GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO: GDAHCR2008/0125

BETWEEN:

REGINA

AND

KEVON BISHOP
NEOLON CHARLES

Appearances:

Mr. H. Pinnock for the crown
Mr. A. Clouden and Mr. D. Horsford for the No.1 Accused
Mr. C. Hood for the No. 2 Accused

2009: November 6

RULING

[1] **CUMBERBATCH, J.**: The two accused were indicted for the offence of murder of Jimson Charles allegedly committed on the 14th February 2008. On Monday, November 2, 2009 a jury was selected to hear the matter. At the completion of the selection of the jury panel Counsel for the accused made the following submissions:

(a) Section 8 of the Constitution gives the accused the right to a fair hearing,

(b) Section 22 (b) of the Jury Act abrogates and infringes or is likely to infringe the guaranteed right to a fair trial,

(c) The provisions of section 22 (b) are repugnant, void and ultra vires the Constitution.

[2] Counsel went on to submit that the provisions of section 22 (b) more particularly the right of Crown Counsel to cause any number of jurors to stand by without cause is a right which is exclusive to the Crown and in the circumstances there is no equality of arms in the jury selection process. It was further submitted that the arbitrary manner in which the stand-by procedure is used makes the likelihood of abuse that much greater.

Section 8(1) of the Constitution provides thus:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Section 22 of the Jury Act provides:

> "22. Whenever a jury is or alternate jurors are being empanelled for the trial of a person charged with a criminal offence –
>
> a. the person charged may peremptorily and without cause challenge any number of jurors not exceeding four;
>
> b. the prosecutor is entitled to ask that any number of jurors "stand by" until the panel has been gone through or perused, and thereafter the prosecutor may peremptorily and without cause challenge any number of jurors not exceeding four in respect of each accused person:
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> Provided that the prosecutor may not peremptorily and without cause challenge more than eight jurors in all."

[3] It is common ground that the stand-by procedure is for the exclusive use of the Crown and its application is unlimited until the entire panel has been gone through or perused. Thereafter the Crown is entitled to use four peremptory challenges. The accused on the other hand is just restricted to four peremptory challenges.

[4] The judgment of Lord Parker, C.J. in **R v Chandler** (No. 2) [1964] 2 QB 322 at pages 333-334 provides the historical background in the use of the stand-by

procedure. In that case an accused who had exhausted all of his peremptory challenges sought the right to use the stand by procedure hitherto exclusively reserved for the Crown. Lord Parker, C.J. said:

> "The history of the matter, so far as the Crown itself is concerned, is that before 1305 the Crown had an unlimited right of peremptory challenge. It is interesting that as early as 1305 it was felt that this was unfair to the subject, and that it might be abused by the Crown of the day, who might instruct the attorney to challenge everybody, thus in effect keeping a prisoner in prison without trial
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> Accordingly by the Ordinance for Inquest, 1305, 33 Edw. 1 Stat. 4, peremptory challenges by the Crown were abolished, and the Crown could thereafter only challenge for cause. But then, either as a matter of construction of that statute or as a matter of practice, it was found convenient that, before the Crown should show cause, they should be entitled to go through the panel, "stand by", as it was called, the jurors in order to see whether an acceptable jury could be sworn without having to challenge for cause. If, the panel, having been gone through, the Crown had not allowed 12 jurors to be sworn but had stood them by, then it became necessary to recall the prospective jurors and challenge them for cause. That as it is clear from the old cases, was or became not merely a rule of practice by a right in law.
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> One need only refer in this connection to two or three of the old cases. In **Rex v Jonn Horne Tooke,** a trial for high treason, Eyre C.J said "Your counsel advised you very properly not to resist the challenges for the Crown, in the course in which those challenges have been taken. As far as our legal history affords us any information upon the subject, the course is a clear one, the Crown has no peremptory challenge, but the course is, that the Crown may challenge as the names are called over, and is not bound to show the cause of the challenge until the panel is gone through; that is the course of proceeding, which is now so established that we must take it to be the law of the land.
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> In **Regina v Frost,** Parke B said, "Mr. Kelly says that it is a matter of practice only; but this it not strictly speaking a matter of practice. It is a matter which has been regularly adopted, and could not be adopted by the judges except upon their view of the construction of the statute of Edward I.
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> Again in **Mansell v The Queen** this right of the Crown is looked upon as a matter of law. That is the position in regard to the Crown."(**Emphasis added)**

[5] This common law procedure was introduced into the criminal justice system of Grenada by the Jury Amendment Act No. 13 of 1986. The Act provides:

> "4. Section 23 of the principal Ordinance is repealed and the following section is substituted:
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> 23. Whenever a jury, including alternate jurors, is being empanelled for the trial of any person or persons charged with any treason, felony or misdemeanour:
>
> (a) every person charged may peremptorily and without assigning cause challenge any number of jurors but not exceeding four; and
>
> (b) The prosecutor shall have the right to ask that any number of jurors "standby" until the panel has been "gone through" or perused and thereafter the prosecutor may peremptorily and without assigning cause challenge not more than four jurors for each accused person."
>
> Provided that the prosecutor may not peremptorily and without assigning cause challenge more than a total of eight jurors.

[6] Crown Counsel submitted that the use of the stand by procedure does not militate against the right of the accused to a fair trial by an independent and impartial tribunal. He submitted that section 22 (b) of the Jury Act is not inconsistent with the provisions of section 8 of the Constitution. He relied on the decision of the English Court of Appeal in **R v Vincent Mason** 1980 71 Cr App Rep 157 to persuade the Court that notwithstanding the fact that the use of this procedure is exclusively for the Crown there are certain advantages therefrom which would benefit both the Crown and the Defence and are in aid of ensuring that the accused receives a fair trial. He further submitted that what is paramount is that the accused receive a fair trial by an impartial and independent tribunal and the impartiality and independence of the jury would not be compromised by the use of the stand by procedure. The Court was also referred to the provisions of the Jury Acts of Dominica, St Vincent and the Grenadines and the BVI. In those territories the stand-by procedure is provided for in their Jury Acts. However, unlike

Grenada, the Crown does not have a right to make peremptory challenges in addition to the stand-by procedure.

[7] In **R v Vincent Mason** Lawton, L.J. stated thus:

> "To this extent the random selection of jurors has always been subject to qualification. Defendants have long had rights or peremptory challenges and to challenges for cause; prosecuting counsel for centuries have had the right to ask that a member of the panel should stand by for the Crown and to show cause why someone should not serve on a jury; and trial judges, as an aspect of their duty to see that there is a fair trial, have had a right to intervene to ensure that a competent jury is empanelled. The most common form of judicial intervention is when a judge notices that a member of the panel is infirm or has difficulty in reading or hearing; and nowadays jurors for whom taking part in a long trial would be unusually burdensome are often excluded from the jury by the judge. In our judgment, the practice of the past is founded on common sense. A juror may be qualified to sit on juries generally, but not be suitable to try a particular case.

[8] Crown Counsel conceded that there is indeed the possibility that the stand by procedure could be abused, but directed the court's attention to the Attorney General's guidelines in **Practice Note** [1988] 3 ALL ER 1086. Counsel cited paragraph 5 of the guidelines which states:

> '"The circumstances in which it would be proper for the Crown to stand by a member of the jury panel are (a) where a jury check authorised in accordance with the attorney general's guidelines on jury checks reveals information justifying the exercise of the right to stand by in accordance with para 9 of the guidelines and the Attorney General personally authorises the exercise of the right to stand by or (b) where a person who is about to be sworn as a juror who is manifestly unsuitable and the Defence agree that accordingly the exercise of the right to stand by the prosecution would be appropriate. An example of the sort of exceptional circumstances which might justify stand by is where it becomes apparent that despite the provisions mentioned in para 4 above, a juror selected for service to try a complex case is in fact illiterate."

[9] Crown Counsel also submitted that in an unusual or high profile case the use of the stand-by procedure would be necessary. Counsel was however unable to provide the Court with reasons as to how or why this would be so, and examples of its use on previous occasions in a manner consistent with the rights in section 8 of the Constitution.

[10] As stated aforesaid, it's common ground that the stand-by procedure is and has at all times been a right exclusively for the Crown. However the right of the Crown to have persons removed from the panel without showing cause does not, unlike in the UK, end there. The Crown is also clothed with the right to make four peremptory challenges. Crown Counsel has sought valiantly to persuade the court that asking a juror to stand by is only a temporary measure unlike a peremptory challenge which effectively prevents a juror so challenged from serving. In this regard I find the dictum of Lawson LJ in **R v Vincent Mason** to be quite instructive on the effect of requesting a juror to stand by. In citing a passage from **Mansell v R** (1857) 8 E & B 54 Lawson, L.J. stated:

> "It is clear from this passage that Lord Campbell regarded prosecuting counsel's request that a member of the panel should stand by for the crown as being the equivalent of a peremptory challenge which could be exercised until the whole panel had been called. It was then and only then that prosecuting counsel had to show cause if he still wanted to exclude form the jury any of those ordered to stand by."**(Emphasis added)**

[11] The current position in my view places prosecuting counsel in a more advantageous position than before. Crown Counsel having gone through the entire panel still retains in his armoury four peremptory challenges to be used as he desires. I find that the current state of affairs enables Crown Counsel to use the stand by procedure in the form and manner and with the same effect of a peremptory challenge. No case has been cited to me where the Crown stood by the entire panel and those stood by were thereafter recalled. It follows therefore that before reaching the stage of going through the entire panel the crown could have any number of jurors stood by until the Crown is content with those selected. Those persons stood by are therefore effectively prevented from serving on the panel. The defence on the other hand having exhausted its peremptory challenges could only challenge for cause. Indeed as has occurred in the instant case crown counsel caused eight jurors to be stood by whilst the No. 1 accused, Bishop, had already exhausted his peremptory challenges.

Section 23 of the Jury Act provides:

"The prosecutor and every accused person shall be entitled to any number of challenges on any of the following grounds, that is to say –

a. that a juror's name does not appear in the Juror's Book: Provided that no misnomer or misdescription in the Jurors Book shall be a ground of challenge, if it appears to the Court that the description given in the Juror's Book sufficiently designates the person referred to; or

b. that a juror is not indifferent between the Queen and the accused; or

c. that a juror has been convicted of any offence for which he was sentenced to death or to a term of imprisonment exceeding one year; or

d. that a juror is disqualified as an alien under the law in force for the time being; or

e. that a juror cannot, speak, read, and write English; or

f. that a juror was returned to serve as a juryman contrary to the provisions for the time being in force for the returning of jurors in rotation.

No other ground of challenge than those above mentioned shall be allowed."

[12] The effect of the aforesaid provisions is that unlike in the guidelines relied on by Crown Counsel aforesaid the court is empowered to remove jurors for reasons which in the opinion of the legislature make them unsuitable for jury service. Hence in this regard the stand by procedure is wholly unnecessary. In any event the Court as the guardian of the fundamental rights and privileges in the Constitution is entitled to have removed any person whose presence would compromise the right of the accused to a fair hearing before an impartial and independent tribunal.

[13] Defence Counsel has submitted that the Court should view the whole process of jury selection with its attendant disadvantages as being unfair and discriminatory. Counsel submits that the issue to be determined is not whether or not at the end of

the day the selected panel is impartial and independent but whether the process of selection is fair.

[14] In **De Haes v Belgium** (1997) 25 EHRR 1 at paragraph 53 it was stated thus:

> "The court reiterates that the principle of equality of arms, a component of the broader concept of a fair trial, requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent"

[15] In **Brown v Stott** (2001) 2 WLR 817, at 827, Lord Bingham observed:

> "Equality of arms between the prosecutor and defendant has been recognised by the court as lying at the heart of the right to a fair trial. The scope and implications of this principle have been considered in many cases, and recently in **Fitt v United Kingdom** Application No. 29777/96 (unreported) 16 February 2000 where the court said:
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> 44. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party."

[16] It is accepted that the right to a fair trial in section 8 of the Constitution is an absolute right. Lord Bingham made it clear, however, that the right to equality of arms was not absolute but subject to limitations. Lord Bingham put it thus at page 836.

> "The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by the national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for."

[17] No reasons have been provided by the Crown to persuade the Court that the right to equality of arms must be qualified to allow the stand-by procedure, nor has the

Court been addressed that the stand by procedure in its present format satisfied the conditions for acceptability as a limited qualification of that right as enunciated by Lord Bingham aforesaid.

[18] In **Pilar Rojas v Berllaque and the Attorney General for Gibralter** the Board was called upon to decide whether the appellant's Constitutional rights were infringed. In that case the appellant, a woman, objected to being tried by an all male jury and contended that her Constitutional rights to a fair hearing within a reasonable time by an independent and impartial court were infringed. Section 8 of the Constitution is in **pari material** similar to Section 8 of the Grenada Constitution and Section 6 (1) of the ECHR.

[19] The Attorney General in that case submitted **inter alia** that the focus of impartiality is on the actual jury, not in its process of selection. There is no basis for believing that a jury of nine men is incapable of affording a fair trial to Ms Rojas. The majority of the Board in response to the submissions of the Attorney General stated thus:

> "9. Where their Lordships part company with the Attorney General's submissions is that they cannot accept that Section 8 is powerless to assist in a case where the method of selection of members of the jury is blatantly, indefensibly discriminatory, Section 8 contains an open-ended constitutional guarantee of a fair trial. This is one of the most important guarantees in the Constitution. Section 8 is to be interpreted so as to ensure citizens of Gibraltar receive the full measure of protection this guarantee is intended to provide."
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> 11. Trial by jury is not a constitutional right in Gibraltar. But that difference is immaterial for present purposes. The constitutional guarantee of a fair trial in Gibraltar applies to whatever form of trial is adopted in a particular case. If the form is jury trial, the method by which the jury is selected must be a method which will accord citizens a fair trial."

[20] Their Lordships went on to state at paragraph 14 that since juries are chosen at random from jury lists, a non-discriminatory method of compilation of the jury list is an essential ingredient of a fair trial by jury. This is inherent in the concept of a fair trial by an impartial jury. Fairness is achieved in the composition of a jury by random selection from a list which is itself fairly constituted.

[21] I find that the whole process of jury selection in Grenada to be in the words of the Board in the **Rojas** case, blatant and indefensibly discriminatory. I accept that at the end of the day the jury selected is not incapable of being impartial and independent. However, during the process of selection the Crown is seised of an embarrassment of riches whilst the Defence are saddled with the burden of using their four peremptory challenges prudently and perhaps sparingly so as not to exhaust them even before the entire panel is selected. For reasons aforesaid the Crown is not similarly burdened.

[22] I am reminded that Crown Counsel quite correctly, in the Court's opinion, conceded that there exists the possibility of abuse in the use of the stand by procedure. Indeed, jurors who participated in a previous trial and either returned no verdict or one unfavourable to the Crown could be effectively prevented from further jury service by the excessive use of the stand-by procedure.

[23] I find this wholly lopsided approach to jury selection to be unfair and an infringement of the accused's absolute right to a fair trial. I find that the unfettered and exclusive right of the Crown to the stand by procedure in circumstances not dissimilar to a peremptory challenge in jury selection to infringe the provisions of Section 8 of the Constitution.

[24] Defence Counsel invited the Court to apply the provisions of section 1(2) of Schedule 2 of the Constitution, the transitional provisions to remedy the invalid part of section 22(b) of the Jury Act. That section provides:

> b. "the prosecutor is entitled to ask that any number of jurors "stand by" until the panel has been gone through or perused, and thereafter the prosecutor may peremptorily and without cause challenge any number of jurors not exceeding four in respect of each accused person."

[25] The legislation which introduced the stand by procedure to Grenada was enacted in 1986, hence this clearly was not an existing law within the meaning of transitional provisions.

Section 106 of the Constitution provides that:

> "This Constitution is the supreme law of Grenada, and subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency be void."

DPP v Hutchinson 1994 1 AC 283 the House of Lords approved the use of the procedure of severance of that part of legislation which was ultra vires. Lord Bridge at page 811 stated thus:

> The test of textual severability has the great merit of simplicity and certainty. When it is satisfied the court can readily see whether the omission of the legislative text of so much as exceeds the lawmaker's power leaves in place of a valid text which is capable of operating, and was evidently intended to operate independently of the invalid text."

[25] The case of **Commissioner of Police v Davis** 1994 1 AC 283 dealt with the question of severance of the offending statutory provisions. In that case the Board found that certain provisions which were not existing laws infringed the Constitution of the Bahamas. The Board applied the substantial severability test as enunciated in the House of Lords decision of **D.P.P. v Hutchinson** aforesaid.

[26] I will therefore apply the substantial severability test aforesaid. I find that in so doing section 22(b) of the Jury Act should be read to the exclusion of the reference to the standby procedure. The Crown will in the circumstances be entitled to 4 peremptory challenges in respect of each accused person.

F.M. Cumberbatch

Francis Cumberbatch
HIGH COURT JUDGE