

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

SAINT LUCIA

CRIMINAL CASES NOS. SLUCRD 2002/1907, 1908

BETWEEN:

THE QUEEN

Claimant

AND

- 1. SYDNEY PRESCOD**
- 2. TERRY CHARLES**
- 3. ULANDA FREDERICK**
- 4. NICKY ISIDORE**

Defendants

Appearances:

Mr. S. Cenac, Crown Counsel, for the Crown
Mr. L. Theophilus, Counsel, for Sydney Prescod
Mr. A. Alcide, Counsel, for Terry Charles
Mr. D. Greene, Counsel, for Ulanda Frederick and Nicky Isidore

.....
2011: June 22 and 28
.....

RULING

[1]. **BENJAMIN, J. :** The defendants are on trial upon an indictment for robbery with violence contrary to Section 365 (1) of the Criminal Code of St. Lucia 1992 and for using a firearm with intent to cause a wound contrary to Section 27 (1) (a) of the Firearms Act No. 11 of 2001. The incident is alleged to have taken place on Monday December 16, 2002 at

about 11:20 a.m. at the RBTT Bank situate on the Vieux-Fort/Laborie Highway near the town of Vieux-Fort.

- [2]. The Crown led evidence of some twelve witnesses in support of its case. There followed an application by the Crown for the evidence of the investigator, Police Constable Garvin Soudatt, to be led by the reading to the Jury of his report dated January 10, 2003 and the tendering of the exhibits including statements made under caution by the defendants. The application was made on the basis that the witness is ill and unable to attend Court.
- [3]. Oral testimony was given in the absence of the Jury by Dr. Christopher Beaubrun who stated that he had seen the witness, Garvin Soudatt, at his medical clinic in Vieux-Fort in February and June 2011. On both occasions, upon examination, the witness was diagnosed with post-traumatic stress disorder having presented with a number of psychological and somatic symptoms. The main psychological symptoms were identified as being anxiety-related involving irritability, poor concentration and feelings of hopelessness. The somatic symptoms were stated as including insomnia, a fast heart-rate and generalized flushing of the body. All symptoms were related to stress. Dr. Beaubrun concluded that in his opinion, given these stated symptoms, the patient would be unable to give evidence. Medication for acute anxiety was prescribed and the patient was referred to a counselor for his traumatic stress and to a psychiatrist to address the possible onset of clinical depression. As a prognosis, the doctor surmised that the medication would relieve the anxiety symptoms quickly but he was unable to provide a time-frame for the abatement of the psychological symptoms.

- [4]. Crown Counsel for the Prosecution and Defence Counsel were all agreed that there was no specific statutory regime for the admissibility in criminal proceedings of a statement made by a potential witness and that no such procedure existed at common law. In this regard, Crown Counsel relied upon a construction of Section 942 (1) of the repealed Criminal Code of Saint Lucia 1992 ("the 1992 Criminal Code") which provides for a deposition taken at a preliminary inquiry to be produced and given in evidence at the trial of an accused person upon proof to the satisfaction of the Judge that certain conditions were proved. It is to be noted that a similar provision is enacted at section 894 of the current Criminal Code of Saint Lucia 2004 ("the 2004 Criminal Code") for the tendering of a deposition taken before a Magistrate in evidence at trial.
- [5]. The extrapolation of treating the deposition as being the equivalent of a witness statement or Police report relied upon by the prosecution at the sufficiency hearing was urged on the basis that the preliminary inquiry which contemplated the taking of depositions has been replaced by the sufficiency hearing at which the prosecution adduced statements of witnesses in support of the committal of a defendant.
- [6]. Not surprisingly, the response of Defence Counsel was that the provision relating to depositions could not be extended to embrace a witness statement far less a police report of an investigating officer.
- [7]. The procedure prescribed for a preliminary inquiry involved the taking of evidence on oath of witnesses. The procedure required an opportunity to be given to the accused or his Counsel to cross-examine the witness. Such evidence had to be recorded in writing in the

form of a deposition (see Section 752 (3), (4) and (5) of the 1992 Criminal Code and Section 798 (1) of the 2004 Criminal Code). At the time the defendants in this case were committed to stand trial, the provisions for the taking of the depositions of witness had been repealed and replaced by a new Section 798. This section now provides for the conduct by a judge of a sufficiency hearing at which the witness statements of the prosecution are reviewed and evaluated. Accordingly, in the face of a new regime and given the manner in which depositions were recorded, section 942 (1) does not apply to witness statements considered at a sufficiency hearing.

[8]. The Crown went to rely on Section 913 of the 1992 Criminal Code which provided:

- (1) Subject to the provisions of this Code and of any other statute, the practice and procedure of the Court shall be the same as the practice and procedure of the Court shall be the same as the practice and procedure for the time being in force in Criminal causes and matters in the High Court of Justice, and the Courts of Assize created by Commission of Oyez and Terminer of Gael Delivery, in England, so far as such practice and procedure are applicable to the circumstances of this state.

- (2) Subject also as herein provided, the law of the evidence administered in the Court shall be the same as the law in evidence in Criminal causes and matters administered for the time being in the said courts in England.”

This section was repealed with the coming into force of the 2004 Criminal Code on the 1st day of January 2005 (see Section 1264).

[9]. Crown Counsel sought to justify the reliance upon section 913 by reference to the alleged date of the offence, that is, the 16th day of December, 2002. However, this provision has been repealed with no identified statutory saving of same. Accordingly, section 913 cannot be rendered applicable to the present case.

[10]. The new 2004 Criminal Code did not re-introduce the provisions of Section 913 aforesaid. Instead, Section 5 states:

"Without prejudice to Section 1083 where no provision is made in this Code with respect to the procedure concerning any criminal proceedings before a Court such procedure at common law as appropriate shall be applied with such modification or adaptation as maybe necessary."

Section 1083 seeks to allow for matters in respect of which no procedure has been provided for in criminal proceedings. The Section enacts:

- "(1) The Chief Justice may make rules of practice for regulating proceedings in criminal causes and matters whether in the High Court or District Court, and in all matters of criminal procedure not provided for by this Code or any other enactment.
- (2) Without prejudice to sub-section (1) in all cases of procedure not provided by this Code or any rules of practice, or otherwise, the procedure or practice or form in matters of criminal proceedings shall be such as may be directed or approved for the purpose and occasion by the Judge in the case of the High Court or by the Magistrate in the case of a District Court."

[11]. It is to be noted that the repealed Section 913 allowed for the application of practice and procedure as well as the law of evidence in force in England where the law was silent in Saint Lucia. However, the effect of the subsisting Sections 5 and 1083 of the 2004 Criminal Code is to embrace the common law on matters of practice and procedure in criminal matters except where the Chief Justice has prescribed rules of practice for the regulation of criminal proceedings. Therefore, there exists no provision for the application of the rules of practice and procedure and the law of evidence as to the admissibility of documentary or other evidence existing in English statute law in force after January 1, 2005 or thereafter.

[12]. The net effect of the present statutory position under the 2004 Criminal Code is that English Statute law cannot be imported and applied as part of the law of Saint Lucia in criminal proceedings.

[13]. It is upon Section 913 that the Crown relied as the platform for applying sections 23 and 26 of the Criminal Justice 1988 (UK). The said Section 23 so far as germane provides:

“...a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if:

(i) The requirements of one of the paragraphs of subsection (2) below are satisfied...”

Subsection (2) includes the case of the person who made the statement being by reason of his bodily condition unfit to attend as a witness. Section 26 governs the exercise of the discretion of the judge in admitting such a statement.

- [14]. In the absence of comparable provisions in the law of Saint Lucia, it is not competent for the Crown to seek the admission of the witness statement of Police Constable Garvin Soudatt into evidence. It is not open to this Court to grant leave to have the report given in evidence as provided for in section 26 of the Criminal Justice Act, 1988. In as much as Sections 23 and 26 have been repealed the position is the same with regard to Section 116 of the Criminal Justice Act 2003.
- [15]. In the course of argument the Crown has turned up the cases of R. v Cole (1990) 90 Cr. App. R. 478 and R. v. Dragic [1996] 2 Cr. App. R. 232 which deal with the admissibility of witness statement of a dead witness and a witness too ill to attend court respectively. These cases addressed the provisions of Sections 23 and 26 of the Criminal Justice Act, 1988 (UK) and the Court of Appeal discussed the exercise of the discretion of the trial judge. Having regard to the position at law in Saint Lucia, the hearing is of no application.
- [16]. For comparison only, the Court averted Counsel's attention to the Privy Counsel decision of Stephen Grant v R. Privy Council Appeal No. 30 of 2005 emanating from Jamaica. In that case, the Board was concerned with the constitutionality of Section 31 D of the Evidence Act which has been amended to allow for the admissibility of a statement made by a person in a document in criminal proceedings. No comparable provision exists in Saint Lucia.

[17]. In the premises, the ruling of the Court is that the report of Police Constable Garvin Soudatt is not admissible in evidence and the Crown's application therefore must be refused.


KENNETH BENJAMIN
HIGH COURT JUDGE