SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO SLUHCR 2008/0060

BETWEEN:

THE QUEEN

Claimant

And

1. DAVID POLEON
2. KURT MODESTE
3. DANNY DEGAZON
4. MARVIN GABRIEL

Defendants

Appearances:

Mr Al Elliott for the 1st Defendant
Mr Shawn Innocent for the 2nd Defendant
Mr Colin Foster for the 3rd Defendant
Mr Alberton Richelieu for the 4th Defendant
Mrs Victoria Charles-Clarke Director of Public Prosecutions for the Crown

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2011: 11th July
2011: 5th October

DECISION

[1] BELLE J: An indictment against the 4 named defendants was filed on 31st December 2008, on one count of murder which was allegedly committed on Tuesday 25th April 2005.

[2] At the previous trial held on 27th June 2009 it became evident the case against the 4th Defendant was based on identification. In response the 4th Defendant relied on Alibi, and gave the necessary notice of same pursuant to Section 1.3 (2) of the Criminal Procedure Rules of Saint Lucia No.116 of 2008.

[3] During the course of the trial counsel for 1st and the 4th named Defendants raised an objection to the admissibility of the identification evidence being led on the grounds that it ran afoul of Section 100 of the Evidence Act. 2002.

[4] The court ruled that a *voir dire* be conducted with regard to the admissibility of the evidence of a confrontation, in that identification had been raised as an issue at trial.

[5] After hearing the evidence in the voir dire and the submissions of counsel the learned trial judge, Benjamin J, as he was at the time, held that:

> *"The evidence falls woefully short of establishing the basis for recognition even on the balance of probabilities."*

[6] The learned trial judge then upheld the objection and refused to allow the Crown to lead evidence of any confrontation between the witness Angus James and the No. 4 Defendant Marvin Gabriel. The court then advised that the witness would not be permitted to point out the No.4 Defendant in the Dock.

[7] However in spite of the ruling, the learned prosecutor went ahead and insisted that the witness point out the No. 4 Defendant in the Dock. After this the learned trial judge discharged the jury, and ordered a new trial.

[8] There is no evidence that any application was made at the time to dismiss the case against the 4th Defendant. The decision of the learned trial judge appeared to be based on the view that permitting the matter to go the jury after the dock identification contrary to his ruling would render the trial unfair and any guilty verdict following thereafter, liable to be set aside on that ground. Benjamin J did not make any determination of the sufficiency of evidence if the case were to proceed in the absence of a dock identification. What he held was that based on the inadmissible dock identification the jury had to be discharged and a retrial ordered.

[9] Benjamin J's decision would be of particular importance where it was evident that the identification evidence was the only evidence implicating the 4th Defendant in the crime.

[10] In any event pursuant to the order for a retrial two of the Defendants filed pre-trial applications pursuant to the case management powers created by section 6.3 of the Criminal Procedure Rules 2008. These two applicants are the 3rd and 4th Defendants

[11] Both applications ask for the court to order a stay of the proceedings because the retrial would be unjust in the circumstances and wrong because the trial would have to revisit the very issue which has already been ruled upon by Benjamin J. They also claim that the prosecution of the case has taken too long.

[12] Two main issues arise then from this. At a retrial would a trial judge be obliged to come to the same conclusion about the prosecution's evidence, and if so would it be an abuse of process for that retrial to proceed?

[13] The learned DPP argues that there is another possible way in which the evidence could be led and that is if there is an explanation of the basis for recognition of the Defendant. She refers to Section 100 (2) (a) of the Evidence Act Cap 4.15 of the Laws of Saint Lucia. Paragraph 100 (2) (a) states:

> *"Without limiting section (1), the matters to be taken into account in determining whether it was reasonable to hold an identification parade as mentioned in that subsection include-*
> *(a) the kind of offence and the gravity of the offence concerned*

[14] The learned DPP argues that the learned trial judge did not take into consideration that subsequent to the voire dire the witness could have made a statement which satisfied the requirement for a dock identification.

[15] But in my view Section 100 of the Evidence Act is clearly intended to procure an exclusion of identification evidence where the proper foundation is not laid for such evidence to be put before the court.

[16] The intent of the section is to serve as a deterrent to cases being proved based on identification evidence alone because such evidence has been often deemed unreliable. The statute therefore establishes the legal basis for exclusion of such evidence if it could be considered unreliable. The Act also provides for the procedure which should be adopted if the evidence of identification or recognition is to be deemed reliable. This evidence would be led in the voir dire. But in any event there should be full compliance with the procedure laid down by the Act.

[17] One court has held that the explanation for failing to follow the procedure in the case of Defendant No.4 falls below the necessary standard, in my view if the Crown disagreed with this decision the Crown should have appealed.

The Applicants' submissions

[18] Counsel for the 4th Defendant has argued that the DPP should be estopped from leading the same evidence of identification again. However I agree with the DPP that the matter of issue estoppel does not arise and has no application in the criminal law. See Director of Public Prosecutions v Humphrys 1977 A.C. 1 where at page 21 Viscount Dilhorne stated:

> *"I agree with Lord Devlin that to hold that issue estoppel applies in criminal cases would be the importation of new doctrine. I agree with the opinions of Lord Parker and my noble and learned friend Lord Diplock to which I have referred. Though there are dicta to the contrary, in no English case to which we were referred has a conviction been quashed on the ground that evidence was admitted which was inadmissible on account of issue estoppel. In my opinion issue estoppel has not and never has had a place in English Criminal Law and it is very undesirable that it should have. It follows that in my view the ruling given by Lawson J in R v Hogan* 1974 QB 398 *was wrong."*

[19] I also hold that the issues of *autrefois acquit* or *autrefois convict* do not apply in this case for obvious reasons. In my view the application falls to be decided on the basis of fairness and abuse of process.

[20] However learned counsel for the 3rd and 4th Defendants aptly applied the law in terms gleaned from the case *Rogers v R* [1994] HCA 42; (1994) 181 CLR251 when firstly counsel for the 3rd Defendant states his objection in terms that the essence of the Applicant's case is that to litigate anew a case or issue which has already been decided by earlier proceedings would be unjustified, vexatious and oppressive to the said Defendants and that a retrial could bring the administration of justice into disrepute.

In Rogers v R Mason CJ ruled :

> *"Re-litigation in subsequent criminal proceedings of an issue already decided in earlier criminal proceedings is not only inconsistent with the principle that a judicial determination is binding, final and conclusive (subject to fraud and fresh evidence) , but is calculated to erode public confidence in the*

administration of justice by generating conflicting decisions on the same issue. These considerations necessarily prevail over any competing interest in the securing of convictions against the appellant."

[21] The Learned DPP had argued that the Australian case of ***Rogers v R 1994*** provides that the doctrine of issue estoppel as it has developed in civil proceedings is inapplicable to criminal proceedings. The Court further stated "*that the availability of res judicata, the defences of autre fois acquit and autre fois convict and the rule against double jeopardy and the doctrine of abuse of process make it unnecessary to introduce the doctrine of issue estoppel into the criminal law. Moreover the introduction of issue estoppel with all its complexities would only serve to make the criminal law more convoluted. This view accords with the position reached in other common law jurisdictions."*

[22] The learned DPP submitted that the instant case should be distinguished from the cases ***R v Carolll*** 2002 HCA ***and R v Rogers*** cited above, because in those cases final verdicts had been returned by the jury causing the court to hold that to re-litigate issues which had been determined in a prior trial, which became final once a verdict was returned, would constitute an abuse of process.

[23] However in ***Tyrone Kadan et al v The State*** HCRAP 2007/002 (Dominica) Hon Mdme Justice Gerorge- Creque (now Perreira) had this to say:

" I agree that it could not be expected that the same trial judge would come to a different conclusion on a new voir dire based on the same facts. I do not consider however that it was necessary to enter upon a fresh voir dire, (i.e. a trial within a trial) as that aspect of the matter has already been determined. To my mind it is no different to where pre-trial applications may be made as to the determination of confessions and such like before the actual trial gets underway. Indeed this is the new approach rather than conducting a trial within a trial. This obviates the need for further time being spent , as well as reduction of costs , on a trial within a trial, where jurors already empanelled are required to spend hours sitting out of the court room while the issue of admissibility with which they are not involved is thrashed out between counsel and the trial judge."

[24] In ***Tyrone Kadan's*** case the Appellants were jointly charged with the offence of aggravated burglary. Their first trial had been deemed a mistrial and they were re-tried before the same judge. At the second trial the appellants were convicted and sentenced to ten years imprisonment. On the issue whether the learned trial judge was

biased or would have been able to bring a fresh mind to bear on the voir dire at the re-trial, the court made the statement quoted above.

[25] The court of appeal dismissed the said appeals and confirmed the sentence. The implication of the statement therefore is that even if the convictions had been set aside and a new trial ordered there would have been no need for a repeat of the voir dire.

[26] It therefore appears that our Court of Appeal is leaning towards the view that the conduct of another voir dire in the circumstances of a retrial would be an abuse of process even where there was a successful appeal overturning the verdict.

[27] Can such circumstances be logically distinguished from the order of a retrial by a trial judge because of an irregularity in the evidence led by the prosecution? I think not.

[28] It could be argued that the pronouncement of George-Creque JA was made in relation to the possibility of bias affecting a subsequent trial. But George-Creque JA was quite clear and emphatic in saying that this is the modern trend and giving the reasons why it is preferred.

[29] I find that some of the arguments of the DPP would be more properly put before a court of appeal. This is not a matter of a clear irregularity by a trial judge which can be fixed by a court of equal jurisdiction. The DPP submits that the issue of identification has not been finally determined by the judgment of Benjamin J. She argues that the finding that the evidence of the confrontation was inadmissible does not put to rest the issue of identification by means of recognition or on the basis that the defendant was known to the person who made the identification. The finding that the evidence of confrontation was inadmissible and that no identification parade was held does not preclude the witness from giving evidence of recognition of the defendant in accordance with Section 100 (2) (d) of the Evidence Act 2002.

[30] The learned DPP went on to state that Section 100 of the Evidence Act 2002 allows the Crown to establish why an identification parade was not held by leading evidence through a voire dire to satisfy the Court on a balance of probabilities . This allows the court to examine the reasons why an identification parade was not held and whether it

was reasonable to do so. The factors which the court should take into consideration in exercising its discretion and determining whether it was unreasonable to hold an identification parade were outlined by Edwards J in Earl Hunte v R 2006/012 at paras 53 and 54 the DPP argued.

[31] According to the DPP these factors were not fully explored by the learned Trial Judge in deciding to exclude the evidence of recognition of the defendant No.4 by the witness Angus James. The DPP submitted further that the common law rule that evidence of recognition where the defendant is well known to the identification witness can be held admissible in the absence of an identification parade and is preserved by sections 100 (2) (d) of the Evidence Act 2002 and sections 102 (2) (a)

[32] The DPP then referred to section 136 of the Evidence Act 2002 which requires the Trial Judge to give the appropriate warning similar to the Turnbull guidelines. According to the DPP the warning would point out the unreliability of that evidence and the matters which may cause it to be unreliable as well as the need for caution in determining whether to accept the evidence and the weight to be given to it.

[33] The learned DPP also relied on the Barbadian case *Scantlebury v R* (unreported) C.A Barbados Suit No.23/1998 where the court had to interpret Sections 102 (2) (a) and (3) of the Evidence Act which in her opinion are identical to section 102 of the Saint Lucia Evidence Act. In that case the Learned Chief Justice Sir Denys Williams expressed the view that although the judge did not give the caution which was required by section 102 of the Evidence Act he had ample evidence on which he could have so directed the jury such as the witness Alleyne's testimony that he had known the appellant from the time he was a child and that the appellant and his twin brother were not similar in appearance, that evidence constituting special circumstances that tended to support the identification.

[34] The Learned DPP next relied upon the decision in *DPP's Reference No 1 of 2001* in which the Court of Appeal of Barbados had to review the interpretation of section 102 of the Evidence Act of Barbados. The Court of Appeal considered whether section 102 of the Barbados Evidence Act totally excluded the operation of the Turnbull guidelines or whether that section is to be read in conjunction with these guidelines.

[35] The Court held the special circumstances included the accused being known to the identifying witness even in the absence of unusual characteristics that evidence was admissible provided the requisite warning was given in accordance with Section 102 (1) (a) of the Evidence Act.

[36] The DPP submitted finally that the deposition of Angus James that he knows the Defendant No.4 Marvin Gabriel for five years and that knows him by liming, walking about, etc. The circumstances under which he saw Defendant No. 4 in broad daylight around 11.45 a.m. on 26th April 2005 and that he saw the Defendants running after him and the deceased. He also saw the Defendant No.4 push his hand in his waist and pull out something like a gun when he first saw them and they were about 30 feet away when he first saw them. In the DPP's view this was good evidence which could be led.

[37] The DPP concluded that this was evidence of recognition which could be left for a jury to consider with the appropriate warnings under section 102 (2) (b) and 136 of the Evidence Act.

[38] In my view however the issue is not whether the evidence of identification could have been deemed admissible. The point is that after a voir dire it was deemed inadmissible. This court would have to proceed on the basis that Benjamin J not only knew the law but that he also had a command of the facts which were gleaned from the evidence in the voir dire. Even after this evidence was led Benjamin J was clearly of the view that the evidence of confrontation should be deemed inadmissible and there should be no attempt to identify the No.4 Defendant in the dock because there had been enough time for fabrication of the so called "recognition" evidence.

[39] Benjamin J commented in his written Judgment:

> *"The evidence falls woefully short of establishing the basis for recognition even on the balance of probabilities."*

Benjamin J continued:

> *"In the premises, the objection is upheld, and the Crown will not be allowed to lead evidence as to any confrontation between Angus James and the No.4*

Defendant Marvin Gabriel. For the avoidance of doubt, the Crown is advised that the witness will not be permitted to point the No. 4 Defendant in the Dock."

[40] After consideration of the arguments of both sides I am of the view that the court cannot now safely overturn Benjamin J's decision on the grounds submitted by the DPP without usurping the authority of the Court of Appeal. Counsel for the Applicants have expressed other reasons which make it dangerous to overturn Benjamin J's decision with which I agree, and I would therefore follow the approach suggested by George-Creque JA (now George-Perriera JA) and decline to interfere with Benjamin J's ruling on the vor dire and declare the identification evidence inadmissible in any re-trial of the 4th Defendant

[41] The DPP's position that if deemed admissible the evidence could be corroborated by the statement of the Defendant David James Poleon I consider to be misconceived. While the evidence in open court of a co-accused may be corroboration of the identification evidence, the information taken from a caution statement given in the absence of the No. 4 Defendant and without an opportunity to cross examine him could not be corroboration of the identification evidence had it been admitted. What it does say is that there could be the possibility of corroborating evidence being adduced if the David Poleon gave evidence from the witness stand but that is all that can be said in the realm of speculation.

[42] In *Michael Matthew Swayne David et al v The Queen* Appeals Nos. 5 and 6 of 2002 (Grenada) Redhead JA referred to the case of Lobban v R (1995) 2 AER 602 a decision of the Privy Council in which it was held;

"Inevitably, the legal principles as their Lordships have stated them result in a real risk of co-defendants in joint trials where evidence is admitted which is admissible against one defendant but not against the other defendants.
One remedy is for a co accused to apply for a separate trial. The Judge has a discretion to order a separate trial. The practice is generally to order joint trials. But their Lordships observe that ultimately the governing test is always the interests of justice in the particular circumstances of each case. If a separate trial is not ordered, the interest of the implicated co-defendant must be protected by the most explicit directions by the trial Judge to the effect that the statement of one co-defendant is not evidence against the other."

[43] I find that it would be unfair for the prosecution to now be granted the opportunity to prepare the crucial witness of identification for the purpose of avoiding a decision on

admissibility, similar to that of Benjamin J's at a retrial. Such a process would be gravely unfair.

[44] In circumstances where ample pre-trial procedures are available to ensure that accused persons know the case against them and the prosecution is made aware of the tenor of the defence, I can see no reason for providing the prosecution with an opportunity to change the evidence in any way. It would be very strange if in a subsequent trial the quality of the evidence improves so drastically that the identification passes the statutory test.

[45] As I understand the provisions of section 100 of the Evidence Act, if the prosecution fails to hold a identification parade the reasons have to be among those provided by the Act. In all of the cases the prosecution must show that it was not reasonable to hold an identification parade. This reasonableness test is an objective test, not one to be left to the discretion of a police officer.

[46] On the reasonableness test the prosecution has failed to show that the police witness was able to give a reasonable explanation within the scope of Section 100 of the Evidence Act for failing to hold an identification parade.

[47] Furthermore even where the evidence is deemed admissible pursuant to Section 102 of the evidence Act directions to the jury should cover the following, where the court finds

(a) it is not reasonably open to find the Defendant guilty except on the basis of identification evidence
(b) there are no special circumstances of the kind mentioned is subsection 2(a); and
(c) there is no evidence of the kind mentioned in subsection 2 (b)
the judge shall direct that the Defendant be acquitted.

[48] There was no evidence of a refusal by the 4th Defendant to cooperate with the preparation of an ID parade, neither was there evidence of a special relationship between the two parties which would render the ID parade inappropriate. A confrontation thereafter therefore could not remedy the defective approach.

[49] Section 102 of the Evidence Act provides additional safeguards against a conviction on the basis of identification evidence when deemed admissible. It does not provide an escape route for leading such evidence in the absence of an identification parade.

[50] In my view a new trial on the basis of the same evidence would be grossly unfair to the Defendant No 4/Applicant.

[51] However I would decline to make a similar finding on the matter of Defendant No.3 for the simple reason that there was no pronouncement made on the evidence in a voir dire in the case of the 3rd Defendant as was the case with the accused No.4. I am unable to anticipate how the DPP would handle the prosecution of the matter. I also decline to use this opportunity to stand as the authority on the interpretation of Section 100 -102 of the Evidence Act.

[52] But I would say that inevitably evidence cannot be led which does not exist. However it should be stated that if there was going to be additional evidence brought to improve on the identification evidence it should have been foreshadowed during these proceedings otherwise it would be useless trying to adduce such evidence later. The directions which must be give to the jury pursuant to Section 102 of the Act would ensure that a poor identification would not stand even if such evidence were deemed admissible after a voir dire

Delay as abuse of process

[53] The Applicants counsel have also pleaded a lengthy period of time in custody (almost 6 years) as a ground for a stay. In my view the length of remand awaiting trial and indeed re-trial would have an impact on any custodial sentence which may be handed down if the Defendant were found guilty. But a re-trial after five years in custody is not in itself a good ground to declare the retrial unfair and order a stay. There has been only one trial and the retrial was ordered by the trial judge because of a procedural error on the part of the Crown.

[54] Counsel for the 4th Defendant relied on a number of authorities to support his submission that there should be a stay imposed because of the inordinate delay in bringing the matter to trial.

[55] Counsel relied firstly on ***Barker v Winigo*** [1972] 407-514 in which the Supreme Court of Canada considered 4 factors in relation to the matter of undue delay. These factors were:

(i) The length of the delay
(ii) The reasons given by the prosecution to justify the delay
(iii) The responsibility of the accused asserting his rights
(iv) Prejudice to the accused.

[56] Counsel also cited the well known decisions of ***R v Morin*** [1992] 1 S.C.R 771 and ***R v Askov*** [1990] 2 SCR 119 where it was stated:

"Very lengthy delays may be such that they cannot be justified for any reason."

[57] Counsel argued that these cases require the court to weigh four factors:

1. The length of the delay
2. The waiver of time periods
3. The reasons for the delay including
   (a) Inherent time requirements of the case
   (b) Actions of the accused
   (c) The actions of the crown
   (d) Limits on institutional resources and
   (e) Other reasons for delay
4. Prejudice to the accused.

[58] Counsel also relied on the statement of the Supreme Court of Canada in ***R v Godin*** [2009] S.C.R 1 para 31 where it was held;

"The question of prejudice cannot be considered separately from the length if the delay ….even in the absence of specific evidence of prejudice. Prejudice may be inferred from the length of the delay"

[59] While I have great respect for the statements gleaned from these decisions of the Supreme Court of Canada I note that they would not have been made without some kind of evidential and factual foundation. Questions such as who and what caused the delay must arise. What institutional arrangements may have contributed to the delay? Has the accused raised the issue of delay in any prior proceeding?

[60] Indeed the delay on this case came about in order to safeguard the Defendants' rights to a fair trial. What difference does that fact make?

[61] I have heard no evidence adduced that the delay has been as a result of failings on the part of the Crown except the prosecutor's failure to obey the court's order in this latter instance. Neither have I heard that the Crown deliberately delayed the case for some unconscionable tactical reason. Neither has it been alleged that the Crown neglected the prosecution of the case or engaged broadly in prosecutorial misconduct in relation to the case. Such evidence would have assisted in making a case for a stay had it been adduced.

[62] In light of the submissions of both sides and the guidance provided by the authorities cited, including those which I may not have mentioned, the order of this court is that the evidence of identification against the 4th Defendant should be excluded from the retrial of the 4th Defendant.

[63] As far as the 3rd Defendant is concerned although it may be self evident that the evidence of identification cannot succeed, no trial judge has had the opportunity to hear this evidence and rule on it. The 3rd Defendant should therefore be retried on the basis of the evidence which the prosecution has to offer, of course taking into account that if the identification evidence is not capable of passing the section 100 test it will not be admitted at trial.

[64] Bringing the matter to finality on the evidence at trial before judge and jury, is I believe the better course to pursue for the purposes of a just conclusion of the matter, even if justice is procured by the entry of a nolle prosequi by the DPP or on a no case submission from the Defence, and where the Defendants are afforded a fair trial.

[65] Benjamin J's ruling that the case against the 4 defendants be retried is therefore not disturbed in any way.

Francis H V Belle
High Court Judge