SAINT LUCIA

IN THE COURT OF APPEAL

HCRAP 2008/002

BETWEEN:

JESSIE ST. CYR AKA 'DOLLAR'

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Gertel U. Thom — Justice of Appeal [Ag.]

Appearances:

Mr. Shawn Innocent for the Appellant
Mrs. Victoria Charles-Clarke, Director of Public Prosecutions, for the Respondent

2011: December 12, 14.

Criminal Appeal – Whether verdict unsafe and unsatisfactory – Evidence Act, Chapter 4.15 – Application of sections 55, 114, 115 and 136 of the Evidence Act – Whether there was need for an identification parade –Section 102 direction – Whether the probative value of the evidence outweighed the unfair prejudice to the defendant – Admission of previous representation of the deceased – Section 136 warning – Admission of evidence to establish motive

ORAL JUDGMENT

[1] BAPTISTE, J.A.: This is a judgment of the court. This is an appeal by Jessie St Cyr, alias Dollar, (''the appellant") against his conviction and sentence of 10 years imprisonment for the murder of Dave George ("Soliel"), after a trial before Benjamin J. and a jury.

[2] Soliel was shot sometime after 11:00 p.m. on Monday, 19th September 2005 and died at about 12:35 a.m. the following day. There was no eye witness to the murder or forensic evidence linking the appellant to the crime. The appellant did not give evidence at his trial and called no witness. On the Crown's case, the incident was precipitated by a quarrel between the appellant and Soliel wherein the appellant was alleged to have made certain threats to Soliel. The Crown contended that there was a motive for the killing and also led evidence of the appellant being seen near the vicinity of the shooting about two hours before the incident.

[3] The Crown's case depended substantially on the evidence of the deceased's common law wife, Martha St. Brice ("Lilyn") who testified that about 9:00 p.m. on 19th September 2005 she was sitting on the steps at the front of her house (part of her house contained a shop) when she saw the appellant enter a yard opposite to where she was seated. She knew the appellant before and also described the lighting in the area. She retired at about 11:00 p.m., leaving Soliel in the shop. While asleep, she heard a gunshot coming from the area of the shop and about a minute later, Soliel ran into the shop and said to her, "Lilyn, look Dollar shoot me there…" pointing to the area of his chest and asked her to call an ambulance. She saw a hole in his chest and it was bleeding. She asked him whether he was sure that it was Dollar and he replied, "Look, Dollar running in the yard there''.

[4] The Crown also relied on the evidence of Angella Samuel, relating to a quarrel that had taken place between the appellant and Soliel, in which they traded insults at each other. From that evidence, the Crown sought to establish a motive for the killing. According to Angella Samuel, who was treated as a hostile witness by the Crown, the appellant told Soliel that he was a "pussy", to which Soliel retorted that the appellant was a "boula" and stole his father's gold and his little girlfriend was wearing that gold. The appellant told Soliel that he was disrespecting him. Soliel told the appellant that the reason that he was getting on so was "because his father gold [was] haunting him" and that he would have to kill people. The

appellant also told Soliel that he hopes when he comes back he will not be able to call him a "boula" again.

[5] The main thrust of the appeal concerns the application of sections 55, 114, 115 and 136 of the Evidence Act[1] ("the Act") and their applicability to the case in so far as (1) the trial judge's ruling on the voir dire, (2) the directions to the jury in the summing up and (3) the trial judge's failure to exclude prejudicial evidence are concerned. Mr. Innocent contends that the trial judge erred when he admitted the evidence of the previous representation of the deceased without considering the provisions of sections 114 and 115 of the Act. The complaint here is that the trial judge failed to exercise his discretion or failed to exercise it properly in relation to the evidence. Alternatively, the appellant contends that even if the evidence of the previous representation were rightly admitted, he suffered severe prejudice which was not cured by the failure of the trial judge to properly or at all direct the jury in the manner dictated by section 136 of the Act. Mr. Innocent submits that there was ample evidence before the trial judge for him to find that the previous representation of the deceased was made in circumstances that made it unreliable, thus triggering the exercise of his discretion under sections 114 and 115 of the Act. It was therefore incumbent on the learned judge to inform the jury that the evidence was unreliable and as to the matters which made it unreliable; that he failed to do.

[6] Mr. Innocent also complains that the trial judge failed to warn the jury in relation to section 136 of the Act in relation to identification evidence admitted during the trial. Alternatively, the identification evidence was wrongly admitted.

[7] Mr. Innocent contends that the trial judge failed to give the jury proper or adequate directions on how to treat the evidence of the relationship between the appellant and the deceased in relation to the evidence given of the quarrel that occurred before the shooting. Mr. Innocent also complains that the previous representation

[1] Cap. 4.15, Revised Laws of Saint Lucia 2008.

of the prosecution witness Angella Samuel, deemed hostile by the court having been led by the prosecution in cross-examination of the witness, appeared to have been used by the prosecution for the collateral purpose of establishing the truth of the statements made by the appellant in the course of the quarrel with the deceased. The learned trial judge failed to give the jury sufficient guidance on how to deal with this aspect of the case.

[8] Section 114 of the Act deals with the discretion to exclude evidence. The section provides that where the probative value of evidence is substantially outweighed by the danger of unfair prejudice or confusion, the court may refuse to admit the evidence. Section 115 ordains that in criminal proceedings, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, the court may refuse to admit the evidence.

[9] Section 52 of the Act applies in criminal proceedings where the person who made a previous representation is not available to give evidence about an asserted fact. Section 52(2)(b) provides that the hearsay rule does not apply in relation to evidence of a previous representation that is given by a witness who saw, heard or otherwise perceived the making of the representation, being a representation that was made at or shortly after the time when the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication. Section 6(1)(a) enacts that for the purposes of this Act, a person shall be taken not to be available to give evidence about a fact if the person is dead.

[10] Section 136 of the Act applies, inter alia, to hearsay evidence and identification evidence. Subsection (2) provides that where there is a jury the judge shall, unless there are good reasons for not doing so (a) warn the jury that the evidence may be unreliable; (b) inform the jury of matters that may cause it to be unreliable; and (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

[11] The respondent submits, and I agree, that the learned judge properly exercised his discretion under sections 114 and 115 of the Act to admit the evidence of the previous representation in accordance with section 52(1) and (2)(b) and section 6 of the Act. The prosecution sought to adduce the out of court statement as evidence of the truth of the asserted fact as it was made contemporaneously shortly after the time when the asserted fact occurred. Martha St. Brice said that Soliel spoke to her about one minute after she heard the gunshots. He ran into the room and stated "Lilyn, look Dollar shoot me there…" pointing towards the area of his chest. He was bleeding from the chest and asked her to call an ambulance for him. Shortly after, an ambulance took him to the hospital. He was pronounced dead soon after. The statement was spontaneous and given in circumstances that made it unlikely that the representation was a fabrication, concoction or a distortion.

[12] I turn to the learned judge's direction with respect to the evidence of Martha St. Brice. The learned judge directed the jury that if they found that no words were spoken by the deceased or were unsure about it, they must acquit as there was no other evidence that linked the appellant to the offence. The learned judge told the jury that they must be satisfied that Martha St. Brice was not mistaken as to what she heard. The learned judge warned the jury that they must approach their task with extreme caution. It was the body and soul of the case because the deceased was not before the court and the Crown was presenting them with a representation that he allegedly made. The learned trial judge reminded the jury that the representation was not made on oath and there was no opportunity for the deceased to be cross-examined upon what he may have said. The learned trial judge told the jury that they must be satisfied that there was no opportunity for concoction by the deceased or to distort what really happened either to the disadvantage of the accused or to the advantage of the deceased. Further, the learned judge warned the jury that they must be satisfied that the deceased did not say what he said out of spite or malice against the accused, and asked the jury to bear in mind the nature of the argument described by Angella Samuel. The learned judge told the jury that they must determine whether the deceased was

mistaken or guessing as to the person who may have shot him. The learned judge emphasized to the jury the fundamental importance of the evidence of Martha St. Brice to the Crown's case and that they had to decide whether her evidence was reliable to the extent that they could accept it to be true.

[13] The learned Director of Public Prosecutions contended that, and I agree, the learned trial judge gave extensive directions to the jury as to how to treat the evidence of Martha St. Brice and the need to exercise extreme caution when considering that evidence. The learned judge pointed to the various aspects of her evidence that could make it unreliable including the circumstances in which the statement was made. Looking at the directions as a whole, the complaints against the learned judge are not made out and there was no unfairness or prejudice to the appellant.

[14] The appellant contends that the learned judge wrongly admitted identification evidence contrary to section 100 of the Act and having admitted the evidence, failed to direct the jury in accordance with section 136. Such a warning was necessary as it related to the issue of the admissibility and weight to be attached to the evidence of the previous representation of the deceased. The learned Director of Public Prosecutions contended that the identification by Martha St. Brice of the person she saw go into the yard two hours before she heard the gunshots cannot translate into an identification of the appellant by Martha St. Brice as the person who shot the deceased. The evidence was not adduced by the Crown to identify the appellant as the one who shot the deceased. In the circumstances there was no need for an identification parade involving Martha St. Brice and the appellant.

[15] The Director of Public Prosecutions submitted that the lighting conditions rendered it possible for Martha St. Brice to recognize the defendant earlier that night. Martha St. Brice stated that she knew the appellant and used to see him in Gros-Islet. At about 9:00 p.m. she saw the appellant enter the yard which was about 12 feet from where she was sitting. There were two light bulbs where she was sitting

and they only lit the area immediately in front of her shop. The yard across the road was very dark. While Martha St. Brice could see someone enter the yard, it is reasonable to infer from her evidence that she may not be able to see someone in the yard. The Director of Public Prosecutions submitted that the lighting conditions would have been sufficient for the deceased to identify his attacker before the attacker went into the yard. It is recalled that when Martha St. Brice asked the deceased if he was sure that it was the appellant who shot him, he replied "look Dollar running in the yard". From that evidence there is a compelling inference that the appellant shot the deceased and ran into the yard. Given the lighting conditions described, there is also a compelling inference that the deceased would have seen his attacker. He named the appellant as his attacker.

[16] It is clear that apart from the evidence of the deceased who identified the appellant as the person who shot him there was no other person identifying the appellant as the shooter. In the circumstances, I agree that there was no need for an identification procedure in accordance with section 100 of the Act. Martha St. Brice and Angella Samuel identified the appellant as the person known as "Dollar" who had a quarrel with the deceased on a previous occasion. Martha St. Brice's evidence that she saw the appellant enter the yard about 9:00 p.m. the night of the shooting, does not incriminate the appellant or link him to the shooting of the deceased some two hours later that night. In the circumstances, I agree that there was no prejudice to the appellant and no need for a warning under section 102 of the Act.

[17] Another ground of appeal was that the trial judge erred in allowing the prosecution to lead evidence of the relationship between the appellant and the deceased and the evidence having been received failed to adequately direct the jury as to how that evidence could be used. Mr. Innocent pointed out that the prosecution invited the jury to view the evidence of the quarrel between the appellant and the deceased as evidence of motive. Mr. Innocent argued that the learned judge ought to have excluded the evidence under sections 114 and 115 of the Act to the extent that its prejudicial effect outweighed its probative value and having admitted

the evidence ought to have warned the jury in terms of section 136 of the Act. Mr. Innocent contended that the admission of the evidence created unfair prejudice to the appellant to the extent that the prosecution sought to adduce the evidence not only as probative of a quarrel having occurred but also as showing that the precise words spoken by the appellant was probative of his guilt or intention in having murdered the deceased.

[18] The Director of Public Prosecutions submitted that the evidence of motive was not admitted as proof of the appellant's guilt but rather as evidence which the jury could take into account along with all the other evidence in determining whether he was the one who shot the deceased. The evidence in question came from Angella Samuel who testified to a quarrel between the appellant and the deceased in which the appellant called the deceased a "pussy" and the deceased called him a "boula". During the quarrel the appellant also told the deceased that he hopes when he comes back the deceased will not be able to call him a "boula" again. The Director of Public Prosecutions argued that it could be inferred that this was an open or veiled threat to silence the deceased and it was open for the learned judge to direct the jury that they could use that evidence when deciding the issue of motive or intention to kill along with the other evidence adduced.

[19] It was further submitted that the evidence was relevant to the Crown's case and the learned judge properly directed the jury on how to use it in helping them to decide that the appellant had a motive and an intention. Further, the learned judge's direction was consistent with the propositions laid down in Lewis v The Queen.[2]

[20] The learned judge charged the jury that if the evidence of Angella Samuel as to the quarrel was true then they could use it as a basis for deciding that the accused had a motive for doing what he did as well as to determine whether there was the intent to kill. The learned judge also told the jury that they had to decide whether perhaps that's a real threat of some kind.

[2] [1979] 2 S.C.R. 821.

[21] The Crown does not have to prove that an accused had a motive for committing an offence. Evidence of motive is always admissible to show that it is more probable than not that that accused committed the offence charged.[3] The question is whether the evidence should have been excluded pursuant to section 115 of the Act on the ground that its probative value was outweighed by the danger of unfair prejudice to the defendant. I do not find any proper basis to hold that the learned judge erred in not excluding the evidence of the quarrel. The evidence was relevant to establish a motive for the offence charged in the indictment and could not be said to constitute unfair prejudice to the appellant. This ground of appeal accordingly fails.

[22] Mr. Innocent complains that the trial judge having granted leave to the prosecution to treat a witness as hostile under section 35 of the Act and permitting cross-examination of that witness by the prosecution erred when he:

(i) failed, having admitted evidence contained in the out of court statement that was itself a report of what someone else (the appellant) said that was capable of being used as proof of the truth of what was said, to exclude parts of the evidence or to properly or adequately direct the jury by clear directions to the jury about the very limited use to which they could put the previous out of court statement. Essentially, that, the previous inconsistent statement could only be used for the limited purpose of determining the credibility of the witness;

(ii) failed to warn the jury that the previous inconsistent statement was admitted only as evidence of the fact that the witness had made an inconsistent statement and that it was not evidence of the truth of the contents of that earlier statement;

(iii) for all intents and purposes the learned trial judge erred when he permitted the prosecution to tender the previous inconsistent statement made out of court as evidence of the truth of what was contained in it.

[3] See R v Ball [1911] A.C. 47 at 68 (H.L.).

The situation mentioned was further compounded by what may be described as a material irregularity in the course of the trial where the learned trial judge failed to hold a voir dire both in relation to section 35 and section 53 of the Act. The application for leave under both provisions of the Act having been made and heard in the presence of the witness and the jury, the prosecution's purpose of calling the witness to get the content of her statement to the police before the jury was achieved.

[23] The respondent submits that the proper procedure was employed in seeking leave of the court to treat the witness as hostile in accordance with section 35 of the Act. The fact that this was done in the presence of the jury did not render the evidence inadmissible nor did it result in a miscarriage of justice.

[24] Section 35(1) of the Evidence Act states:

> "Where a witness gives evidence that is hostile to the party who called the witness, that party may, with the leave of the court, question the witness about that evidence as though the party were cross-examining the witness."

Section 35(2) states:

> "Where, in examination-in-chief, a witness appears to the court not to be making a genuine attempt to give evidence about a matter of which the witness may reasonably be supposed to have knowledge, the party who called the witness may, with the leave of the court, question the witness about that matter as though the party was cross-examining the witness."

[25] The respondent concedes that the learned judge failed to direct the jury on how to treat the evidence of Angella Samuel, the hostile witness. The respondent contends that the failure was not fatal as her evidence only established that there was a quarrel between the appellant and the deceased earlier in the day and that evidence was already before the jury from the testimony of Martha St. Brice. I agree.

[26] The Director of Public Prosecutions applied for leave to tender in evidence the written statement Angella Samuel gave to Sergeant Alcee on the ground that it was a previous representation made by a witness about an asserted fact and that

witness heard. The learned judge heard arguments about its admissibility in the presence of the jury and the witness and refused leave to tender the document. Mr. Innocent complained that this was a material irregularity as submissions were made by both counsel on the admissibility of evidence under sections 35 and 53 of the Act, in the presence of the jury. Mr. Innocent argued that the result was that evidence likely to be prejudicial to the appellant was disclosed to the jury and the defect in procedure was not cured by any direction by the learned judge in the summation. The Director of Public Prosecutions conceded that the application should not have been made before the jury. I agree with the contentions of the Director of Public Prosecutions that there was no prejudice to the appellant because Angella Samuel denied that she said in her written statement to Sergeant Alcee that she heard the appellant threaten to shoot the deceased earlier that morning. Moreover, the learned judge refused to allow the written statement to be tendered into evidence. In the circumstances, it cannot be successfully argued that the statement was tendered as proof of the truth of what was reportedly said by the appellant to the deceased.

[27] Mr. Innocent submits that the various breaches of the Act coupled with the failure of the learned judge to give the required warnings leaves a lurking doubt as to whether justice was done and whether there was a miscarriage of justice. Mr. Innocent also complains that the verdict was unsafe and unsatisfactory and is unreasonable having regard to the evidence.

[28] In my judgment looking at the case as a whole, it cannot be said that the verdict is unsafe or unsatisfactory or unreasonable having regard to the evidence; neither is there a lurking doubt about whether justice was done. In the circumstances, the appeal against conviction is dismissed and the conviction is affirmed. There is no basis for disturbing the sentence of 18 years imposed by the learned judge on the ground that it is excessive. The appeal against sentence is likewise dismissed and the sentence is affirmed.