BRITSH VIRGIN ISLANDS

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

Criminal Case No. 31 OF 2009

BETWEEN:

THE QUEEN

Respondent

and

ANDRE PENN

Applicant

Appearances:

Mr. Edward Fitzgerald, Q.C., Mr. Patrick Thompson with him for the Applicant
Mrs. Elizabeth Hinds, Director of Public Prosecution for the Respondent

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2012: July 9

JUDGMENT

[1] **REDHEAD J. (Ag.)** The Applicant was convicted by a jury on 12 counts of a 13 counts indictment on March 2, 2011 and sentenced to 12 years imprisonment by the learned trial Judge. The Applicant filed an appeal against his conviction. The Applicant's primary ground of appeal was that the Learned Trial Judge failed to give the warning mandated by Section 146 of the Evidence Act.

[2] The Court of Appeal allowed the applicant's appeal and ordered a retrial. The Applicant now applies for an order that his retrial be stayed permanently on the basis that it would be an abuse of the process of the Honourable Court for the prosecution to continue in view of the extensive and unremitting publicity that the Applicant's trial has attracted.

[3] The Applicant contends that his previous trial and appeal received extensive coverage in the Territory's media and as such a fair retrial would be impossible. The Applicant seeks a stay on that basis.

[4] In my opinion, extensive publicity by itself cannot be a basis for a Stay. The Applicant must show on a balance of probabilities that potential jurors are aware of these publications and would adversly impact their minds so as to make a fair trial impossible. As **Lawton L. J. opined in R v Kray**[1] "A person summoned for this case would not in my judgment, disqualify himself merely because he had read any of the newspaper containing allegations of the kind I have referred to [discreditable allegation] but the position would be different if, as a result of reading what he had, his mind has become so clogged with prejudice that he was unable to try the case impartially."

[5] Learned Queen's Counsel argued that, that likelihood arises from the following for which the prosecution and the past judicial process are themselves directly responsible:

(1) The fact of the Applicant's wrongful conviction at the first trial and the massive scale of the adverse publicity that surrounded the applicant's preliminary inquiry, trial and appeal. This will inevitably affect the applicant's position at retrial.

In my opinion, I do not think it could ever be fair to say that the prosecution and the judicial process are responsible for the massive scale of adverse publicity.

[6] Learned Queen's Counsel submitted that the prosecution should not be permitted to benefit from its own errors in this way. Nor should the Applicant be further prejudiced by reason of the fact that he was not given a fair trial the first time.

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[1] (1969) 53 Cr. App. R 412 at page 415

[7] I am unable to appreciate, in light of all that went on at the trial, as I understand it, that the judges' failure to direct the jury on section 146 of the Evidence Act could be regarded as an error by the prosecution. It cannot be in my opinion.

[8] Learned Queen's Counsel for the applicant argued that it is common ground that the issue to be determined by this court is whether the applicant can obtain a fair retrial having regard to the publicity that his arrest, trial and appeal in the Territory attracted.

[9] Learned Counsel for the Respondent, Mrs. Hinds contends that this court ought only to consider the media coverage between the appeal stage and the approach to the re-trial.

[10] Mrs. Hinds argues that the earlier publicity ought generally to be considered as faded with the passing of time. In this case, the story broke in February 2009. The trial was completed in March 2011 and the retrial was ordered on 17th January 2012.

[11] Learned Queen's Counsel for the accused argues that the Court of Appeal recognized that in the case of a retrial, a court can take into consideration all publicity before the retrial:- **R v Micheal Stone** [2].

[12] In that case, Barry Thompson who was one of the main witnesses for the crown testified that on two separate occasions the appellant approached him while they were both in custody. The appellant spoke to Thompson and what he told Thompson was regarded as a confession of (Appellant's) guilt.

[13] Upon Thompson's release from prison, he contacted National Newspapers, saying to journalists that he had given false evidence at the trial. This was after the jury had returned their verdict. Lord Justice Kennedy at paragraph 22 opined:

[14] "The publicity to which our attention has been drawn took place for the most part in the months immediately after the verdict was returned. In October 1998 when many matters

[2] (2001) EWCA

were revealed which had not been known to the jury. There was a trickle of publicity thereafter, and erupted again immediately prior to and during this appeal."

At paragraph 27 Lord Justice Kennedy observed:

> "Publicity can impact on a trial at three stages – pre-trial, during a trial or after a trial. If prejudicial material is published either before or during a trial then the publisher will be at risk of proceedings for contempt of court ... for the reason which we have already explained we are not here concerned with publicity prior to the original trial, or with publicity during the trial we are concerned with post-trial publicity after trial."

[15] It is quite clear to me that **Michael Stone** is concerned with publicity after trial. Learned Queen's Counsel for the Applicant invited this Court to have regard to all the publicity which these proceedings attracted in determining whether the applicant can have a fair retrial. He argues that in large part, the coverage of the Applicant's arrest, trial and appeal survives in a permanent form and is readily accessible by potential jurors. I make the observation, that having regard to the evidence, the applicant was arrested on 19th February 2009, 3 years and 5 months ago. The Applicant's trial in the High Court concluded on 2nd March 2011, one year and 4 months ago.

[16] In his certificate of exhibits pages 1 – 5 Learned Counsel exhibited a copy of the BVI Beacon February 26, 2009 in which an article was penned under the headline **Ex Legislator Charged with Sex Crimes.** The article said in part – that "Police arrested former Legislator Andre Penn last Thursday after receiving reports that he allegedly indecently assaulted a – 12 year old girl on multiple occasions over the last 2 years."

[17] On page 2 of the said newspaper it is reported: –

> "Penn case adjourned." On page 3 BVI News Online Coverage, "Unlawful Sexual Intercourse with girl under the age of 13 years. A three line news item "Police arrested and charged Andre Penn of Chapel Hill with four counts of Buggery, three counts of Indecent Assault and four counts of Unlawful Sexual Intercourse with a girl under the age of 13 years."

[18] On page 4 of the BVI News Online which carried a headline ..."Former Legislator charged with sexual intercourse with under aged girl." Page 5 is an article published by BVI News Online which reported: "The Prosecutor said a medical examination was done but they are also awaiting another medical report."

[19] At the bottom of that page a note to "Readers Comments have been removed and discontinued in respect of the victim's case, the sensitive situation of the case. Though the name of the victim was not disclosed, we are not going to publish certain information to protect the identity of the child. We thank you for your cooperation and understanding."

Finally on paper 7 of the BVI News Online May 18th, 2009 under the headline witnesses ready to testify in indecent sexual case against former Legislator; there was a comment:– The Preliminary Inquiry into several counts of Buggery, Indecent Assault and having intercourse with girl under the age of 13 years old. Case against a former Legislator with take place on 13th July.

[20] The articles mentioned above are in relation to the applicant's arrest up to the Preliminary Inquiry. The articles are dated from 21st February 2009 to 18th May 2009, all of them over three years ago. These articles especially the one in the BVI Beacon in my opinion had become "firelighters."

[21] Mr. Fitzgerald Q.C. argues that there is no fade factor. Learned Q.C. referred particularly to the Judge's comments when sentencing. The Learned Judge said: "It is unfortunate that Mr. Penn has labeled the V.C. a chronic liar when he took the stand to testify in his own defence. She was in effect the accused in this case when she was indeed the victim."

[22] Mr. Fitzgerald Q.C. also referred to the Learned Director of Public Prosecutions' remarks when she asked the Court: "take into consideration that the Victim will require therapeutic intervention for the rest of her life ...."

[23] Mr. Fitzgerald Q.C. argues that if you press you will get the sentencing remarks of the judge. This is the damage, it is still there he argues. The fade factor does not apply in this case. He argues that the remarks of the Director Public Prosecutions "scarred for life" will never be forgotten.

[24] The remarks of the Learned Trial Judge and that of the Learned Director Public Prosecutions having being made over a year ago, I am unable to appreciate why one would remember those remarks, except that there are special reasons for so doing. I accept too that those remarks were posted on the internet, but I wonder why one, in particular a potential juror would wish to go on line to look up the remarks made by a trial judge or the Director Public Prosecutions 16 months ago or for that matter 19 months ago. I say 19 months because if a retrial is ordered, it cannot take place before October 2012.

[25] Moreover, I am firmly of the view that measures could be taken to eliminate any chance of potential jurors going on line to visit the offending material.

I turn now to consider the coverage concerning the Preliminary Inquiry, the trial and verdict.

[26] Publications of the Preliminary Inquiry are exhibited in Certificate/Exhibit pages 10 – 26: At page 10 It is written – **"Man accused of sexual acts with Minor will know his fate today"** On page 13 it is written: "Legislator heading to High Court to face charges of sex with minor."

On pages 14 to18 of the BVI Daily News there were comments made by bloggers eg. "Why was his name not released? We need to know about the sexual predators out there. He is a bloody pedophile poor girl barely going through puberty and she had to put up with man crap. So sad."

[27] Another comment:

> "He rape a girl !!! Sorry a child WAH DEH. He got to say that will make it. Even worth listening too!! Lock he !!!! Sorry for a grown man to have sex with a child is a shame. What a shame."

I am of the considered view that these bloggers, though in some instances are inflammatory and prejudicial could never influenced jurors who are sworn to well and truly try and give a true verdict according to the evidence.

[28] The opinions expressed by these bloggers who are faceless creatures could never, in my considered opinion, having regard to my experience in these matters supplant, overcome or cause a jury to disregard the strong directions the trial judge will give.
The trial judge must instruct the jury along these lines, t hat they must ignore any opinions expressed by anyone outside of this court and who have not testified before you. Ignore any gossip which they may have heard outside of this court house. The bloggers fall into the categories of persons advancing opinions and gossip outside of the Court House. In my judgment, I cannot see any sensible jury ignoring these instructions and opt for the views expressed by faceless individuals. In my opinion jurors are sensible people.

[29] As Lord Hope in **MONTGOMMERY v H.M. ADVOCATE,** [3] said:

> "On one hand there is the discipline to which the jury will be subjected, of listening to and thinking about the evidence.
> The actions of seeing and hearing the witnesses maybe expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced. On the other hand by such warnings and directions as the trial judge may think appropriate to give to them as the trial proceeds, in particular when he delivers his charge before they retire to consider their Verdict."

In my view, the articles referred to in the exhibits pages 1 – 26 of Certificate of Exhibits report the facts as emerge during the course of events from arrest of the applicant to the conclusion of his Preliminary Inquiry, I do not see, neither am I directed to any inflammatory sensational or prejudicial matters in relation to the Applicant in relation to these articles.

[30] Learned Queen's Counsel drew attention to the Learned Trial Judge in reminding the jurors against searching the internet for any stories about the defendant and that the jurors should decide the case only on the evidence before them.

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[3] 2003 1 A.C. 641

[31] Learned Queen's Counsel contends that as a result of this warning, the inescapable inference is that pre-trial publicity was a live issue even at the Applicant's initial trial and that in view of his retrial it is even more significant.

[32] I make the observation that it is a case which involved a prominent individual. There must as a result involve a lot of public attention and interest in the case. There were lots of comments in the social media. In my opinion there would therefore have being a justification and prudence on the part of the Learned Trial Judge to warn the jurors that they were not to take into consideration anything on the internet or to search for any stories about the defendant.

[33] In my view, this was commendable of the Trial Judge in an attempt to preserve the integrity of the trial free from extraneous matters and to guide the jury along that path.
I do not agree with Learned Queen's Counsel for the applicant that as a matter of law such a warning is not given. From my experience as a judge for over 27 years as a matter of practice, in our jurisdiction such a warning is always given to jurors to ignore anything which they might have heard from the outside of the court house and to take into consideration only what they have heard from the mouths of the witnesses who testified before them.

[34] Learned Queen's Counsel, Mr. Fitzgerald argues that the strain of giving evidence will be far greater for the defendant as a result of having to relive the ordeal for a second time several years after the original offences.

[35] I make the observation that the victim would not be in a lesser position than the defendant in that she would have to face the same ordeal, if there is a retrial. In any event every accused person who has to go through a retrial faces that ordeal. Once it is legitimate to have a retrial then that is, the judicial process which an accused person has to put up with when a retrial is ordered.

[36] Having said that, I bear in mind Learned Queen's Counsel's submission in his analysis on general principles. He referred to the well known principle that the Trial Judge has a discretionary power to stay the proceedings. I say that this well known principle, must be exercised judiciously and not capriciously.

[37] Learned Queen's Counsel argues that to stay the proceedings ought to be exercised if the defendant proves on a balance of probabilities that he cannot receive a fair trial. He argues that the right to a free trial is part of the common law and is a constitutionally protected right by section 16.

[38] Mr. Fitzgerald Q.C. argues that, that the constitutional right is capable of being frustrated by pre-trial publicity. Learned Queen's Counsel refers to the test as where there is a "substantial" or "serious" risk of prejudice to a defendant to the extent that a fair trial cannot be held or might render a verdict unsafe.

[39] He contends that such prejudice cannot be overcome by the Trial Judge's directions to the jury or other measures such as postponement of the trial or a change of the venue. In my considered opinion the last suggested option is out.

[40] Learned Queen's Counsel, Mr. Fitzgerald, exhibits 3 publications.

(1) Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock jurors journal of Experimental Psychology: by Hope, Memon & Mc George.

(2) Can the jury disregard that information?
The use of Suspicion to Reduce the prejudicial Effects of Pretrial Publicity and Inadmissible Testimony by Fein Mc Closky & Tomlinson.

(3) The effects of Pretrial Publicity on Juror Verdicts: a Meta-Analytical Review Law and Human behavior Vol. 23 by Stelblay Besrivic, Fulero & Jamenez Lorente.

[41] In reference to No. 2 above the authors wrote:-

"In every trial, jurors are instructed to base their verdict exclusively on evidence presented in Court through the sworn testimony of witnesses, exhibits and facts stipulated by the opposing attorneys – and to disregard all facts not formally

admitted into evidence. To help regulate the information to which jurors are exposed. A complete set of rules and procedures has evolved....."

[42] Despite these efforts, the Court, rarely can ensure that juries will not be exposed to information not admissible as evidence. To the extent that extra legal factors increase or decrease perceptions of the defendant's guilt or precipitate a rising or lowering of the standard of proof such as necessary for conviction, they will have a prejudicial effect on jury decision making.

[43] Unfortunately such effects may be all too common. Research has shown that jury verdicts can be influenced by a wide range of non evidentiary factors presented inside and outside the Courtroom, including pretrial publicity concerning the defendant..... disclosure of his prior records, current events in the news, incriminating testimony ruled inadmissible by the judge etc....."

[44] I make the observation that in relation to the above, I am of the view, that there can be no dispute that jury will be exposed to inadmissible evidence. The question is, does that inadmissible evidence impact negatively on or influence jury verdict? I think not, as I am confident that juries are capable, because of directions from the judge, to disregard what is not admissible.

[45] It is not shown by the research how or in what way jury verdicts can be influenced by non evidentiary factors.

[46] In No. 1 above the research as I understand it was done by mock jurors- "Prejudicial Pretrial Publicity (PTP) Constitutes a serious source of juror bias. The current study examined differences in predecisional distortion for mock jurors exposed to negative PTP (NPTP) versus non exposed participants."

[47] I have serious doubt about the practical authenticity of the result of this research. As a theoretical document perhaps it cannot be faulted.

[48] I say this as I am not aware that those mock jurors were subjected to listening to and thinking about "real" evidence. Were they subjected to hearing evidence from real witnesses? I have my doubts about these things which "will have a far greater impact on recollections" that may be put to them in a mock trial.

[49] I would however, suggest that if a retrial is ordered, in order to protect the fairness of the trial more jurors above the ordinary number of jurors, could be summoned for the trial, designed questionnaires, such as did any of you go online and read anything posted concerning the defendant? Did any of you post any of the articles concerning the trial of the defendant? In that way any potential jurors who was involved in any of the above would be eliminated as jurors. A similar method was successfully employed in a criminal trial in Montserrat this year. Montserrat has a population of 5000.

[50] Learned Counsel referred **Attorney General v BBC HAT Trick Production**[4] He contends that Auld J. in an attempt to define "serious prejudice" gave the phrase something which puts the course of justice at risk... by affecting its outcome or necessitating discharge of the jury."

[51] Learned Queen's Counsel for the Applicant makes the point that there is no doubt that there is a real risk of prejudice to the defendant in view of the extensive and unremitting coverage of the defendant at the first trial.

[52] Learned Queen's Counsel also argues that further to the publicity of the first trial, there is a real risk that jurors are likely to prejudged the defendant before trial. I suppose Learned Queen's Counsel was referring to retrial rather than at trial. I shall return to this aspect of that argument later in this judgment.

[4] EMLR 76

[53] In his skeleton arguments, Learned Queen's Counsel contends that Lord Herwicke as long ago as 1742 in **Roach v Carawan** [5] said:

> "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented nor is there anything of more consequence than to prejudice the minds of the public against persons concerned as parties in cases before the cause is finally heard ...there cannot be anything of greater consequence than to keep the streams of justice clear and pure."

[54] In his Skeleton Argument Learned Queen's Counsel refers to **R v Fleet (William)** [6] **Bayley J.** opined:

> "Nothing can be more important to the individuals that their trials should take place without prejudice in the minds of those who ultimately to decide upon the facts in evidence."

[55] Mr. Fitzgerald Q.C argues that a stay is warranted having regard to the nature of the case. In at least two decided cases the courts have specifically adverted to the risk of sexual offences where the risk of prejudice is self-evidently greater: **Attorney General v MGM Ltd.** [7], **Attorney General v ITN News** [8]

[56] In the former case Schiemann LJ. opined at page 461

> "Even in relation to sexual offences where the risk of prejudice is self-evidently greater, Lord Taylor CJ commented on not under-estimating a jury's ability to do justice in such a context **(See R v Cannun R v. Young,**[9]**)**
>
> **In R v. Coughlan** [10]

[57] As Lawton J puts it:

> "Juries are capable of disregarding that which is not properly before them. They are expected to disregard what one accused says about another in his absence. If they can do that, which is far from easy they can disregard what has been said in a newspaper."

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[5] (1742) 26 E.R. 683
[6] (1818) 1B and Aid 379
[7] 1977 1 ALL ER 456
[8] (1995) 1 CR App. R 204
[9] (1990) 92 CAR 16
[10] (1979) 63 CAR 33

[58] **Schiemann L.J. in MGM Ltd (Supra)** said:

> "We are not called upon to rule upon the correctness of Judge Saunders' decision to stay the proceedings in front of him and nothing in this judgment should be taken as doing so. A consequence of the need in contempt proceedings, in which respondents face imprisonment or a fine, to be sure and to look at each publication separately and the need in trial proceedings to look at risk of prejudice created by the totality of publications can be that it is proper to stay proceedings on the ground of prejudice albeit that no individual is guilty of contempt."

[59] Mrs. Hinds, Learned Director of Public Prosecutions in her submissions argues that the fact that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that with his assistance it will be possible to have a fair trial: **R v Abu Hamza.** [11]

[60] At page 684 paragraph 92 Phillips L.J. said:

> "The fact however that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties."

[61] In the Australia Court of Appeal in **R v Glennon** [12] **Mason CJ** quoting from **Mc Pherson v The Queen** [13] opined "unfairness occasioned by circumstances outside of the Court's control does not make the trial a source of unfairness."

Having regard to the state of the authorities on this subject, I am unable to agree with this wide statement as a principle of law. In fact in my considered opinion, unfairness generated by adverse publicity hardly if at all eminates from the Courts.

Continuing Mason C.J. said:-

[62] "When an obstacle to fair trial is encountered the responsibility cast on the trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and

[11] (2007) Q. B. 659
[12] (1992) H. C. 1. A. 10
[13] (46) 1981 147 CLR 512

determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournment or interlocutory orders by rulings on evidence and especially by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer." That I am in agreement with.

[63] As in my considered opinion, any prejudice generated from whatever source which has a likelihood of impacting negatively on the fairness of the trial; it is the duty of the trial judge to take appropriate measures in order to ensure that any potential unfairness occasioned by adverse publicity is eliminated or minimized the effect of any adverse publicity on the minds of the jurors, if, indeed there is adverse publicity.

[64] I make the observation that we live in a real society, not a Utopian society. Adverse publicity has always being with us when someone is accused of serious offence, particularly in a small society, it becomes known to every member of society who would obviously express his views. Some in condemnation of the alleged offender, even if they do not know the details of the alleged offence, so these views expressed reach other members of society. Some of whom may eventually become jurors. I do not think that if they eventually become jurors, it means that we would never have a fair trial in our small societies.

[65] In our technologically advanced age there is an added medium of communication that is the internet. People post comments and opinions on the internet where others can access them. It means therefore that ones personal opinions and views are given a wider dissemination. Do their views become more damaging, more credible than what obtained in the past and therefore must be regarded as adverse publicity to, one who is facing trial? I think not! As I said above the faceless people who blog on the internet cannot be taken seriously by any sensible and intelligent people in our society.

[66] In this regard, I refer to **R v. Kray [14] Lawton J.** opined at paragraph 414:

> "So, the mere fact that at an earlier trial had been reported at length in the Press would not, in my judgment amount to establishing a prima facie case of the

[14] (1969) 53 Cr. App. R. 412

probability of bias or prejudice in anyone summoned to attend as a juror for a later trial."

[67] With respect I adopt all that was said by Lawton J. as referred to above, in the present case, I make the observation that a fundamental principle in any democratic society is the freedom of the press. I agree that this freedom must be balanced against the right of an individual to a fair trial. In this regard that freedom enjoyed by the press to publish comes with the responsibility to publish facts and to be responsible.

[68] Having said that, I do not recall or was shown anything in the newspaper reports or articles which could be regarded as irresponsible publication by way of an attack on the personal character of the applicant. I may say however, some of the bloggers on the online newspaper expresses personnel, prejudicial and inflammatory opinions which I have dealt with in this judgment.

[69] Having regard to all that I have said above, the case at bar so far as adverse publicity is concerned, comes nowhere close to the publications in:

"R v Meade Morris and Woods [15] [The Birmingham Six] and Boodram v Attorney General of Trinidad and Tobago [16]

[70] In Boodram Lord Mustill instructs us at page 855:

"The proper forum for a complaint about complicity is the trial Court where the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury, and decide whether measures such as warnings and directions to the jury peremptory challenges and challenges for cause which enable the jury to reach its verdict with an unclouded mind or whether exceptionally a temporary or even a permanent Stay of the prosecution is the only solution."

[15] (unreported) 15th October 1993
[16] (1996) AC 842

[71] Having regard to that I have said above, I see no exceptional circumstances or any circumstance in this matter in which I should order a permanent or temporary Stay to the applicant to stand his trial.

[72] The Applicant is therefore ordered to stand his trial at the next sitting of the Criminal Assizes commencing in October 2012.

[73] No order as to costs.

Albert Redhead
High Court Judge