EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2013/0006

BETWEEN:

ANDRE PENN

Applicant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal

Appearances:

Mr. Jerome Lynch, QC, with him Ms. Lauren Sadler Best and Mr. Jack Husbands for the Applicant
Mr. Wayne L. Rajbansie for the Respondent

2014: June 4;
September 29.

Application to set aside order – Whether the Criminal Appeal Act 1968 (UK) forms part of the law of the Virgin Islands – Whether order for retrial ought to be set aside – Unlawful sexual intercourse – Indecent assault

The applicant was convicted in March 2011 after a jury found him guilty of having committed various sexual offences against a female minor. On 17th January 2012, the applicant's appeal against conviction was allowed by the appeal court; the conviction was quashed, the sentence was set aside and a retrial was ordered. A fresh indictment was filed ten days after the order for retrial. At the February 2012 assize, the applicant, who was unrepresented, sought an adjournment for counsel to file an application for a stay of proceedings on the ground of pre-trial publicity. That application was filed in March 2012 and was heard and dismissed in July 2012. The applicant was arraigned on 8th July 2013.

The applicant, on 5th July 2013, filed a "notice of appeal" which was later amended on 23rd December 2013 and titled "amended notice of application". In both documents, the applicant sought to have the Court of Appeal's retrial order set aside and an order that a verdict of acquittal be entered in respect of him on the basis that the prosecution failed to

indict and arraign him within two months of the Court of Appeal's order for a retrial. The applicant grounded his application on section 8 of the Criminal Appeal Act 1968 (UK) which he alleged is applicable in the Virgin Islands by virtue of section 48 of the Criminal Procedure Act.

Held: dismissing the application, that:

1. In the Virgin Islands, the procedure following a retrial ordered by the Court of Appeal is provided for in the Supreme Court Act and the Criminal Procedure Act. The Court of Appeal having ordered a retrial, the jurisdiction of the High Court is engaged. The High Court's jurisdiction is to be exercised in accordance with the Criminal Procedure Act and any other law in force in the Territory. Therefore, it would be impermissible to import into the laws of the Virgin Islands, the Criminal Appeal Act 1968 (UK) with its provision for a two month period of arraignment after the order for a retrial, and the consequences which flow from non-compliance. Such an importation is not sanctioned by section 48 of the Criminal Procedure Act. The Court therefore lacks jurisdiction to entertain the application.

2. Where there is a local statute or statutory regulation relating to a particular subject matter and there is an English statute or statutory regulation made pursuant to statute relating to the same subject matter, the English statute would be inapplicable to that particular subject matter.

   Eversley Thompson v The Queen [1998] UKPC 6 followed.

JUDGMENT

[1] BAPTISTE JA: This is an unusual matter. It is not an appeal. It is an application made pursuant to an English statute - the Criminal Appeal Act 1968 (UK) as amended by the Criminal Justice Act 1988 (UK). The applicant, Andre Penn, invites this Court to make an order to set aside its order of retrial and enter a verdict of acquittal. The applicant complains that the prosecution failed to indict and arraign him within two months of the Court of Appeal's order for a retrial. He is thus entitled to apply to the Court of Appeal for the orders he seeks, pursuant to section 8 of the Criminal Appeal Act 1968 (UK). The applicant, however, faces a hurdle. He has to show that the Criminal Appeal Act 1968 (UK), forms part of the

law of the Virgin Islands. He says that it does. In that regard he prays in aid section 48 of the Criminal Procedure Act.[1]

[2] The Director of Public Prosecutions urges the Court to dismiss the application for want of jurisdiction. He argues that the Court of Appeal derives jurisdiction from the West Indies Associated States Supreme Court (Virgin Islands) Act ("Supreme Court Act")[2] and attempts to move the Court must be made pursuant to that Act. The applicant has not alluded to any provision of the Supreme Court Act that allows his approach to the Court. The Director of Public Prosecutions also dismisses the application as frivolous, vexatious and an abuse of process. He also contends that the context of section 48 is important. It is not a global section. It is restrictive. It has to be looked at in the context of Part VI of the Criminal Procedure Act.

[3] Before examining the relevant statutory regime and the submissions in more detail, I pause to synopsise the background facts. The applicant was convicted on 2nd March 2011 on a twelve count indictment concerning various sexual offences committed against a female minor. The applicant appealed his conviction and sentence. The appeal found favour with the Court of Appeal to the extent that on 17th January 2012 the Court quashed the conviction, set aside the sentence and ordered a retrial. A fresh indictment, containing twelve counts was filed on 27th January 2012, ten days after the order of retrial. The case was first relisted for hearing before the Assize of February 2012. The assize opened on 7th February. The applicant, who was unrepresented, sought an adjournment for counsel to file an application for a stay of proceedings on the ground of pre-trial publicity. The application was filed on 30th March 2012. The submissions were heard and the application was dismissed in July 2012. The trial is yet to get off the ground, largely due to a multiplicity of challenges the applicant has mounted before the High Court and the Court of Appeal in respect of his retrial. The applicant was arraigned on 8th July 2013.

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[1] Cap. 18, Revised Laws of the Virgin Islands 1991.
[2] Cap. 80, Revised Laws of the Virgin Islands 1991.

[4] By "Notice of Appeal" filed on 5th July 2013, the applicant appealed to this Court for the following orders: (1) an order to set aside its order of retrial; and (2) an order that a verdict of acquittal be entered in respect of him. No doubt recognising that he could not properly appeal to the Court of Appeal, the applicant filed an "amended notice of application" dated 23rd December 2013, inviting this Court to set aside its order of retrial made on 17th January 2012 and enter a verdict of acquittal.

[5] Mr. Lynch, QC, the applicant's counsel, articulates the position that the Criminal Procedure Act is silent on the practice and procedure in cases where the Court of Appeal has ordered a retrial and no rules of practice and procedure are prescribed under any other law in the Virgin Islands. Queens Counsel points to section 37(4)(iii)(a) and (b) of the Supreme Court Act (which deals with reading of depositions, and transcripts of witnesses who are not available) and contends that the legislature considered and prescribed what is to happen with respect to the reading of depositions at a retrial, but did not address the question of arraignment or other matters in a retrial.

[6] Mr. Lynch, QC posits that the current law and practice in England is that a defendant must be arraigned within two months of the Court of Appeal's order for a retrial. There being no published guidance in the Virgin Islands for retrials and in accordance with section 48 of the Criminal Procedure Act, the law and practice of the Superior Courts of England applies. This, in Queen Counsel's view, paves the way for the engagement and application of the Criminal Appeal Act 1968 (UK) (as amended), section 8 of which grants an applicant the right to apply to the Court of Appeal to set aside the order for retrial and for a direction that the Court of Appeal enter a verdict of acquittal once a retrial has been ordered by the Court of Appeal and the accused has not been arraigned within the period of two months after the order of retrial.

[7] Mr. Lynch, QC argues that once the prescribed period for arraignment had passed, the High Court has no jurisdiction to commence and or continue a retrial

of the applicant, in the absence of further directions from the Court of Appeal on the application of the prosecution. Noting that no such application has been made by the prosecution, Mr. Lynch, QC submits that the retrial which commenced on 8th July 2013, without the leave of the Court of Appeal, contravenes the law, practice and procedure; and is unjust, oppressive and a nullity.

[8] In the submissions filed on behalf of the applicant, several cases were referred to as to the approach of the Court regarding the applicability of United Kingdom law in the Virgin Islands. For example in Forbes (Gregory) v R[3] - a case involving drug trafficking and possession of cocaine - an issue arising before the Court of Appeal was whether the documentary evidence was admissible under the Criminal Justice Act 1988 (UK). The Court held that a copy of the flight manifest, the ticket voucher with baggage tag attached and the baggage tag from the suitcase were admissible under sections 24 and 27 of the Criminal Justice Act 1998 (UK) having been duly incorporated into the law of the Virgin Islands by section 12 of the Evidence Act. Section 48 was not mentioned. In William Penn v R[4] Edwards JA referred to section 48 of the Criminal Procedure Act and affirmed the rectitude of the trial judge's decision to follow the English common law guidelines declared by the English court in R v Buckley[5] in the absence of any known case law in England demonstrating any implementation of a new non-numerical standard in England.

[9] The Privy Council decision in Eversley Thompson v The Queen[6] was also relied on. The main issue in Thompson was whether sections 76 and 78 of the Police and Criminal Evidence Act 1984 ("PACE") applied to St. Vincent and the Grenadines and if they did whether Code C of PACE, issued by the Home Secretary under section 66 of PACE, also applied. The Board concluded that because of the absence of a local statutory provision, sections 76 and 78 of PACE

[3] (1993) 45 WIR 173.
[4] Territory of the Virgin Islands High Court Criminal Appeal BVIHCRAP2006/0001 (delivered 28th September 2009, unreported).
[5] [1999] EWCA Crim 1191.
[6] [1998] UKPC 6.

applied to the admissibility of confessions in St. Vincent and the Grenadines. Code C did not. The Board stated at paragraph 34 that where there is a statute or statutory regulation of St. Vincent and the Grenadines relating to a particular subject matter and there is a an English statute or statutory regulation or code made pursuant to statute relating to the same subject matter, a difficult question can arise as to whether there is a conflict between the law in St. Vincent and the Grenadines and the law and practice in England, so that the English Provision does not apply, or whether the English provision can be regarded as supplementing, but not conflicting with, the local provision so that the English provision applies in St. Vincent and the Grenadines. The Board opined that where the police regulations lay down a code for the questioning of prisoners, it is not permissible to regard the more detailed provisions of Code C as merely supplementing the local code. For the reason appearing later in the judgment, I am not of the view that Thompson or the other cases cited, assist the applicant's case.

[10] I now examine the statutory framework. Section 27 of the Supreme Court Act vests in the Court of Appeal the jurisdiction and powers which at the prescribed dates were vested in the former Court of Appeal and the British Caribbean Court of Appeal; and such other jurisdiction and powers as may be conferred upon it by this Ordinance or any other law. Section 28 deals with the jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court. This jurisdiction shall be exercised in accordance with the provisions "of this Ordinance and rules of court". Where no special provisions are contained in this Ordinance or rules of court such jurisdiction, so far as concerns practice and procedure in relation to appeals from the High Court in criminal matters, shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England, in the Criminal Division of the Court of Appeal.

[11] Section 37(2) of the Supreme Court Act provides that if the Court of Appeal allows an appeal against conviction, it may order a new trial, if the interests of

justice so requires. An appellant who is to be retried for an offence in pursuance of such an order shall be tried upon a fresh indictment preferred by the direction of the Court of Appeal.[7]

[12] The jurisdiction of the High Court in all criminal proceedings is dealt with in section 10 of the Supreme Court Act. Section 10 states that the jurisdiction shall be exercised in accordance with the Criminal Procedure Act and any other law in force in the Territory.

[13] Section 16(1) of the Criminal Procedure Act states that "subject to the provisions hereinafter in this section contained, every indictment shall be filed in the Registry of the High Court five days at least before the… trial of the accused person charged in the indictment". Section 16(5) provides for the filing of an indictment at any time before the day of the sitting of the Court. In that event, the accused is entitled to apply to the Court for a postponement of the trial to another sitting of the Court on the ground that he has not had sufficient time to prepare his defence. Part 1V (sections 19, 20 and 21) deal with dilatory pleas and arraignment. I will examine section 19 later in the judgment.

[14] Section 48 of the Criminal Procedure Act states:

> "All other matters of procedure, not herein nor in any other Act expressly provided for, shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England."

Section 48 of the Criminal Procedure Act is found in Part VI. The sections in Part VI preceding section 48 (sections 34 to 47) deal respectively with the reading of depositions in evidence for offences other than that for which they were taken; attendance of witnesses bound by recognizance to attend; writs of subpoena; duty to prepare subpoenas; service of subpoenas; warrant for the apprehension of witnesses not attending on recognizance; warrant for the apprehension of witness disobeying writ of subpoena; fine for non-attendance of witness; warrant in the first

[7] Section 37(4)(i) of the Supreme Court Act.

instance for the apprehension of a witness; mode of dealing with witnesses refusing to be sworn; non-attendance of witness at adjourned trial; conveyance of a prisoner to court; non-incapacity of a witness by reason of crime or interest; and compellability of such a witness.

[15] Section 7 of the Criminal Appeal Act 1968 (UK) states that where the Court of Appeal allows an appeal against conviction and it appears to the court that the interests of justice so require, they may order the appellant to be retried. Section 8(1) provides that a person who is to be retried for an offence in pursuance of an order made under section 7 thereof, shall be tried on a fresh indictment preferred by direction of the Court of Appeal but after the end of two months from the date of the order for his retrial he may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal gives leave.

[16] Section 8(1A) ordains that where a person has been ordered to be retried but may not be arraigned without leave he may apply to the Court of Appeal to set aside the order for retrial and to direct the court of trial to enter a judgment and verdict of acquittal for the offence for which he was ordered to be retried. Section 8(1B) states that on an application under subsection (1) or (1A), the Court of Appeal is empowered to grant leave to arraign, or to set aside the order for retrial and direct the entry of a judgment and verdict of acquittal. The court shall not give leave to arraign unless it is satisfied that the prosecution has acted with all due expedition and that there is good and sufficient cause for a retrial in spite of the lapse of time since the order for retrial was made. The implication here seems to be that the accused was not arraigned due to some fault of the prosecution.

[17] Having established the relevant statutory framework in the Virgin Islands, the position can be stated as follows. The procedure following a retrial ordered by the Court of Appeal is provided for in the Supreme Court Act and the Criminal Procedure Act. The Court of Appeal having ordered a retrial, the jurisdiction of the High Court is engaged. The High Court's jurisdiction is to be exercised in accordance with the Criminal Procedure Act and any other law in force in the

Territory. In keeping with the Supreme Court Act, the Director of Public Prosecutions preferred a fresh indictment. Subject to the provisions of section 16 of the Criminal Procedure Act, the indictment has to be filed in the High Court Registry five days at least before the trial of the accused. The fresh indictment was filed on 27th January 2012. The applicant's case was relisted for hearing before the February Assize of 2012. The assize commenced on 7th February 2012. The applicant attended.

[18] Section 19 of the Criminal Procedure Act is a critical section. It provides the requisite framework for arraignment. It states that no person prosecuted shall be entitled, as of right, to traverse, or postpone, the trial of any indictment presented against him in any court, or to have time allowed him to plead, or demur, to any such indictment. There follows an important proviso:

> "Provided that, if the Court before whom any person is so indicted, upon the application of such person, or otherwise, is of opinion that he ought to be allowed a further time to plead or demur, or to prepare for his defence or otherwise, such Court may grant such further time to plead or demur, or may adjourn the receiving or taking of the plea or demurrer, and the trial (as the case may be) of such person, to some future time of the sitting of the Court, or to the next, or any subsequent, sitting of the Court, and upon such terms as to bail, or otherwise, as to the Court seems [fit] and may, in the case of adjournment to another session or sitting, respite the recognisances of the prosecutor and witnesses accordingly;…"

[19] Arraignment is concerned with the reading of the indictment to the accused; after which the accused is formally asked how he or she pleads. In so far as a defendant does not have a right to traverse or postpone the trial of the indictment presented against him or to be allowed time to plead or demur to the indictment, it follows that, absent an application by an accused or otherwise, arraignment is at the first sitting of the Court after an indictment has been preferred. In the applicant's case, the arraignment would have been 7th February 2012. However, the proviso to section 19 of the Criminal Procedure Act envisages that an arraignment might not take place at the first sitting of the Court after an indictment has been preferred. Essentially, the section contemplates or envisions the adjournment or postponement of an arraignment on the application of the

defendant in the circumstances postulated in the section, to a later time in the sitting or to the next or subsequent sitting.

[20] A further point to be made about section 19 is that the proviso to the section is for the benefit of a defendant. The facts show that the applicant utilised its provision. When the matter was first relisted before the assize in February 2012, the applicant (who was unrepresented) sought an adjournment for counsel to file an application to stay the proceedings on the ground of pre-trial publicity. The application was filed on 30th March 2012 - well outside the period of two months for arraignment contended for by the applicant, and dismissed in July 2012.

[21] Given the above, it is rather incongruous for the applicant to complain that he was not arraigned within two months, having utilised the provision of section 19 of the Criminal Procedure Act which contemplates or envisages a deferral of arraignment. The logical conclusion of the argument would be that the prosecution would have had to apply to the Court of Appeal (pursuant to section 8 of the Criminal Appeal Act 1968 (UK)) for leave to arraign the applicant on the ground that he had not been arraigned within two months of the order for retrial. Under the Criminal Appeal Act 1968 (UK), one of the two factors the Court of Appeal must be satisfied of before granting leave is that the prosecution has acted with all due expedition in making its application; when in fact it is the applicant who invoked the beneficence of section 19 of the Criminal Procedure Act, with the resulting delay.

[22] The process of arraignment of an accused, following the order of retrial after a successful appeal, is a matter of procedure which is provided for within the Criminal Procedure Act. In the circumstances, it would be impermissible to import into the laws of the Virgin Islands, the Criminal Appeal Act 1968 (UK) with its provision for a two month period of arraignment after the order for a retrial, and the consequences which flow from non-compliance. Such an importation is not sanctioned by section 48. It would also be inconsistent with the provisions of section 19 and would give rise to conflict and confusion. Such a concern was

highlighted by the Board in Thompson at paragraph 34. There is accordingly, no basis for invoking section 48. The Court therefore lacks jurisdiction to entertain the application, predicated as it is, on the reception provision of section 48. Further, the application is not sanctioned by any provision of the Supreme Court Act. Section 28 deals with the jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court. This section is of no moment as the present application is not an appeal from the High Court.

[23] The applicant's complaint that he was not indicted nor served with the indictment by the Director of Public Prosecutions will be examined in light of the statutory regime. I note, however, that the applicant's claim that he was not indicted lacks merit. The fact is that a fresh indictment was filed on 27th January 2012. Section 16(1) of the Criminal Procedure Act provides that every indictment shall be filed in the Registry of the High Court five days at least before the trial of the accused. Importantly, and in the context of the complaint, section 16(2) provides for an accused person who is on bail (the applicant was bailed on 12th January 2012) to apply to the Prison Keeper, for a certified copy of the indictment.

Section 16(2) states:

> "The Registrar shall, four days at least before the day of trial, deliver or cause to be delivered to the keeper of the prison to which the accused person has been committed to await his trial, or to which he would in due course have been so committed if he had not been admitted to bail, a certified copy of the indictment, and the copy shall be given by the keeper to the accused person forthwith, if he is in custody, or when he applies for it, if he is on bail."

[24] Notwithstanding, the foregoing provisions, section 16(5) provides that an indictment may be filed at any time before the first day of the sitting of the Court. In that event the accused shall be entitled to apply to the Court for a postponement of the trial on the ground of insufficiency of time to prepare his defence. Section 13 of the Indictments Act[8] states that it shall be the duty of the

[8] Cap. 32, Revised Laws of the Virgin Islands 1991.

Registrar to supply to the accused person, on request, a copy of the indictment free of charge.

[25] The provisions of law referred to are fairly straight forward. They do not place an obligation on the Director of Public Prosecutions to serve an indictment on an accused. I do not consider there to be much in the applicant's complaint. There is no indication by the applicant that he made any application to the Prison Keeper or requested a copy of the indictment from the Registrar. Be that as it may, the indictment was filed on 27th January 2012; the case was first relisted before the Assize in February 2012. The applicant attended the opening of the assizes on 7th February 2012. The matter was adjourned to 27th February 2012. The applicant was granted an adjournment for counsel to file an application to stay the proceedings on the ground of pre-trial publicity. On 21st June 2013, the Crown sought to amend the indictment. It was served on the applicant. I do not see any prejudice having been occasioned to the applicant.

[26] Another aspect of the applicant's case as articulated in Mr. Lynch, QC's oral submissions is that the arraignment ought to be in a reasonable time and that an arraignment on 8th July 2013, eighteen months after the order for a retrial, is too long and therefore unreasonable. Mr. Lynch, QC referred to the period for arraignment provided for in the Criminal Appeal Act 1968 (UK) as a reasonable period. Of course, what is reasonable depends on the facts and circumstances of a particular case. It is a fact sensitive inquiry. Though not circumscribed by a period of two months, the period for arraignment would be necessarily subject to the principle of reasonableness and the court's obligation to control its processes to avoid abuse and to ensure a fair trial. However, in light of the statutory provision relied on by the applicant - the Criminal Appeal Act 1968 (UK), and taking into account the fact that the prosecution is not seeking leave to arraign, I am of the view that this complaint is not properly before this Court.

[27] In passing, I note that since the order for a retrial, the applicant has filed a multiplicity of proceedings throughout the court hierarchy, some of which are still

pending. On 30th March 2012, the applicant filed an abuse of process application on the ground of adverse publicity. It was heard in July 2012 and dismissed. On 25th July, it was ordered that the retrial take place in October 2012. In October, the Director of Public Prosecutions applied to traverse the retrial to the next assize in February 2013. On 14th June 2013, the applicant filed an originating motion under section 31 of the Virgin Islands Constitution Order 2007 seeking redress for breaches of section 16 which deals with the protection of the law. The motion was heard on 23rd July and dismissed on the 25th July. The criminal trial was set to begin on 8th July 2013; the applicant was arraigned and a jury selected. The trial was aborted before evidence was taken. On 5th July 2013, the applicant filed a notice of appeal, three days before the commencement of the criminal trial. On 9th July 2013, the day after the jury was selected, the applicant also filed a notice of application for a stay of the retrial pending the hearing of his appeal and originating motion filed on 14th June 2013. The application was heard on 23rd July 2013. On the following day, the 24th, the application for the stay was dismissed and the injunction sought refused.

[28] The period of delay in arraignment has to be viewed in the context of the legal challenges being launched by the applicant.

[29] For all the reasons advanced the application for orders to set aside the order of retrial made by the Court of Appeal on 17th January 2012 and that a verdict of acquittal be entered in respect of the applicant is dismissed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal