IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR 2017/0055

REGINA

V

MERYL CHIDDICK

APPEARANCES

Mr Adlai Smith for the Crown.

Mr Andrew Okola for the defendant

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2018: JUNE 21

JULY 30

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RULING

On the admissibility of ballistics evidence

1 Morley J: I am asked to consider as a preliminary ruling the fairness of future trial proceedings where in a murder allegation important Crown evidence will come from a ballistics expert, but there is no legal aid available to an indigent defendant to seek a second expert opinion.

2 I set out the Crown's case as below, from editing the helpful opening note by Crown Counsel Smith.

a. The Crown alleges that on the afternoon of 10.11.14, the defendant Meryl Chiddick aka "Tula" along with another Audrey Joseph aka "Brodda", went to a farm belonging to the

deceased Conroy Andrew situated in Liberta, where Chiddick shot and killed Andrew using a 0.25 calibre handgun with a single bullet to the left side of the head.

b. A pathologist, Dr Lester Simon, conducted a post-mortem examination on the body of the deceased on 24.11.14. There were no other medical problems identified with Andrew, and it is unchallenged evidence from the pathologist that the cause of his death was the single gunshot injury to the left side of his head.

c. The main evidence comes from Joseph who on the date in question was about 18 years old. He was someone who was easily led, and that Chiddick, who is in late middle-age, was a father figure of sorts to Joseph who had actually lost his biological father at a tender age. Joseph has pleaded guilty to the offence of manslaughter in relation to this matter.

d. On 10.11.14, Chiddick asked Joseph to follow him. Joseph was under the impression that they were going to do some sort of work. There was no arrangement to rob or kill anyone. Joseph then followed Chiddick to the West Bus station, where they took a bus to Swetes village and disembarked by the Wesleyan Holiness Church. They followed a dirt road into a nearby bushy area. At some point along the way, Chiddick stood up for a little while and then he took out a gun and put some bullets in the clip and he put back the gun in his pocket. Notwithstanding this, Joseph continued to follow Chiddick and they eventually went up a hill and ended up in Andrew's yard, who was a tall black Rastaman. Chiddick shot Andrew who then fell on the ground and start to roll. Chiddick ran to Joseph, and told him that he had just killed the man and beckoned him to come. Both men made their escape.

e. There were no witnesses to the actual killing apart from Joseph. A search was conducted at Chiddick's home and nothing illegal was found.

f. Chiddick was subsequently interviewed by the police in order to obtain his whereabouts on 10.11.14. He denied being in Swetes or Liberta or having anything at all to do with the killing.

g. However there were persons who will be called who will be able to verify that both Chiddick and Joseph were seen in the Swetes area on the morning of the day of the murder. One such person is Vaun John, the operator of a bus transporting people from the West Bus Station to Swetes village who says that at 10:30 on 10.11.14, Chiddick and Joseph boarded. He did not know Joseph at the time but described him as a little boy accompanying Chiddick,

who he knew as Tula. He dropped them off in the vicinity of the Swetes Wesleyan Holiness Church.

h. Tevin Willock is also a key witness in the case. Willock was a friend of the teenage sons of Chiddick. Willock has a poor police history. He did not have much of a relationship with Chiddick apart from "hello and hi". In November 2015, Willock was charged with possession of a 0.25 handgun to which he subsequently pleaded guilty. Ballistics testing was done by an expert named Graham Husbands on the 0.25 handgun as well as the spent bullet which was recovered from the head of the deceased Andrew. As a result of the analysis it was found that the said bullet was fired from the said 0.25 handgun. Sometime after February 2015 but before November 2015, Willock says he came by the gun while he was chasing a cock one day, and he ended up having to go under a house belonging to Chiddick which was short distance away from the Chiddick's main residence. While crawling under the house he saw something that appeared to be wrapped in a black plastic bag stuck under the ledge. He removed the package, opened it and found it to be a gun. He will give evidence how Chiddick heard that Willock had his gun and confronted him about getting it back. Willock can be completely ruled out as a suspect in the murder of Conroy Andrew because between May 2013 and Feb 2015, he was remanded in custody at Her Majesty's Prison.

3 For the purposes of this ruling I am concerned primarily with para 2h.

4 From the point of view of the Crown, there is a ballistic link to a gun said by Willock to belong to Chiddick, supported by an eyewitness to the murder, namely Joseph, with corroboration as to movement from Vaun, making this a strong case.

5 From the point of view of the defence, Willock is an inherently unreliable witness given his police history and who may be protecting someone other than Chiddick who is the true owner of the firearm, Joseph has his own motives to blame Chiddick to lessen his own sentence, and without either, the evidence of movement is inconclusive. If the ballistic evidence linking the handgun to the killing is wrong, then any support given to the case by Willock, if truthful, is greatly weakened,

to the point where it might arguably be inadmissible as more prejudicial than probative to allow the jury to hear of an association of Chiddick with a firearm unconnected to the case.

6 Without the ballistics link, the case therefore relies almost entirely on Joseph, who the defence may persuasively argue cannot be trusted alone and unsupported. It follows the ballistics link is highly significant and is not a mere detail in the case.

7 Moreover, Joseph was originally charged jointly with the murder, and was on the same indictment as Chiddick as filed at the High Court on 26.01.18. He only pleaded guilty to manslaughter on 23.02.18, and was then bailed after being in custody from 12.02.16, as an arrangement with the prosecution in exchange for testimony against Chiddick, feasible in light of admissions by Joseph in police interview. This feature of the case serves to emphasise how pivotal the ballistics link has been, as without it there would probably have been no case against Chiddick to commit for trial from the Magistrates Court.

8 I would expect that defence counsel in preparing in a murder case would rightly advise any defendant, solvent or not, to get a ballistics expert to review the work of Graham Husbands, particularly having seen the disclosure of Husband's notes where there is surprisingly not much material to analyse.

9 I have been assisted by well-prepared argument from both counsel, presented on 21.06.18, for which the court is indebted. This ruling is dated 30.07.18 only because I have been off-island, with duties on Montserrat and St Lucia since 22.06.18.

10 Defence Counsel Okola argues the inability of indigent Chiddick to have public funds made available to investigate the ballistics means his trial will be in breach of the Constitution.

11 However, as I understand it, Counsel Okola has not filed a specific and separate motion to this effect, preferring to take the point as part of the trial on indictment as a preliminary ruling, reviewable by the Court of Appeal after trial if convicted. This approach is to be encouraged, or else a constitutional point in criminal proceedings may create parallel litigation, staying the trial, causing interlocutory appeals, perhaps all the way to the Privy Council (or where applicable to the Caribbean Court of Justice), all too easily leading to delays of a criminal trial of several years,

which would be unconscionable here where the defendant is in custody, and in general whether or not in custody, because as a matter of public policy justice delayed is justice denied. *Obiter*, where there is a separate constitutional motion filed in the High Court in parallel with a criminal indictment, it might usually be right to adjourn the motion *sine die*, to deal with the point instead as part of the criminal trial process, with preliminary or trial rulings as needed, then to await the outcome of the trial and any rulings on appeal, which should always have the effect of resolving the constitutional point raised.

12 Turning to the Constitution, under s15, citizens of Antigua and Barbuda are guaranteed certain minimum rights concerning trial,

> (1) If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
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> (2) Every person who is charged with a criminal offence
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> a. shall be presumed to be innocent until he is proved or has pleaded guilty;
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> b. shall be informed orally and in writing as soon as reasonably practicable, in language that he understands, of the nature of the offence with which he is charged;
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> c. shall be given adequate time and facilities for the preparation of his defence;
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> d. shall be permitted to defend himself before the court in person or by a legal practitioner of his own choice;
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> e. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
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> f. shall be presumed to be innocent until he is proved or has pleaded guilty;
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> g. shall be informed orally and in writing as soon as reasonably practicable, in language that he understands, of the nature of the offence with which he is charged;
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> h. shall be given adequate time and facilities for the preparation of his defence;
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> i. shall be permitted to defend himself before the court in person or by a legal practitioner of his own choice;
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> j. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and shall be permitted to have without payment

> the assistance of an interpreter if he cannot understand the language used at the trial of the charge…"
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> [Bold and underlining added for emphasis]

13 Counsel Okola's first argument is that Chiddick should have the 'facility' of public funds to get a second expert opinion.

14 The meaning of 'facilities' was considered in various cases previously, and it may be said has now been settled in the leading case of Gibson v AG 2010 CCJ 3, President de la Bastide presiding. The case concerned a murder, where a bite mark on the defendant, according to an expert odontologist, linked him to the deceased. The defendant was indigent and sought to argue a like point as here, seeking a second opinion, under the constitution of Barbados, where at s18 there is a like provision. Relying on para 31, it says:

> Having reviewed all the authorities we are not persuaded that s18(2) gives to an accused a right to the services of an expert funded by the State. It seems to us that it would be straining the meaning of the term to include within it any such obligation on the part of the State. Interpreting the provision in his way would necessarily mean that this 'right' could properly be claimed on any occasion and under any circumstance by 'every person who is charged with a criminal offence'. But the Constitution does not envisage that on each occasion an accused, indigent or otherwise, would like to have the assistance of an expert, the State must pay for him to acquire those services.

15 However the court went on to consider whether the hearing had been unfair, under s18(1) on Barbados, (mirrored here by s15(1) on Antigua), and in particular made the following observations, in part leading to the quashing of *Gibson*'s conviction.

> [At para 36,] The solicitor general seemed to believe that making an order that *Gibson* be provided with the services of a state funded expert would open up the floodgates and result in the State being overwhelmed with such requests. We do not share similar anxieties. A court may only make such an order if after a careful examination of the facts of the particular case the court considered that a fair trial required it.
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> [At para 37,] The starting point is the presumption of innocence.

[At para 38,] …As far as it is possible to do so, we must ensure that at his trial the truth is established…At base a fair trial is a trial that appears fair, both from the perspective of the accused and perspective of the community…A fair trial is one that satisfies the public interest in getting at the truth.

[At para 39, quoting the famous Justice Thurgood Marshall of the US Supreme Court,] …without the assistance of an [expert] to conduct a professional examination on issues relevant to the defence, to help determine whether the defence is viable, to present testimony, and to assist in preparing the cross-examination of the State's [expert], the risk of an inaccurate resolution of the issues is extremely high. With such assistance the defendant is fairly able to present at least enough information to the jury in a meaningful manner, as to permit it to make a sensible determination.

[At para 40,] When one considers the sum total of the specific circumstances of this case, it was our view that there could not be a fair trial in this case if the defence through lack of means were deprived of access to the services of a forensic odontologist…

[At para 41,] Since there was uncertainty as to the choice of expert and the quantum of his fees and expenses, it was impossible for the court to determine what sum of money was reasonably required by the appellant in order to obtain the expert assistance which he required for his defence. We considered that the proper course to follow was to give the parties an opportunity to hold discussion and exchange information with regard to those matters. It could reasonably be expected there would emerge an answer to the question of how much money was reasonably required for the purpose….We hoped [the negotiations] would culminate in the State paying or undertaking to pay an agreed sum for the funding of an expert. We were quite clear in our own minds that the trial ought not to be allowed to proceed unless that funding was provided. We were prepared however to leave it to the state to decide whether to provide that funding or to abandon in effect the prosecution.

[At para 42,] …we do not subscribe to the notion the separation of powers principle can preclude the court from making an order against the Executive in exercise of the court's power to redress or prevent breaches of constitutionally protected rights merely because the order requires the Executive to expend public funds. The Constitution is supreme…The court must be ready to

> exercise power to grant effective relief for a contravention of a protected constitutional right. If the appropriate way to remedy a breach is to make a mandatory order of the payment of money by the State, then that is what the court is empowered and obliged to do.

16 The *Gibson* case encourages the court to look carefully at the specific facts, and in this way floodgates should not open to endless requests for experts.

17 Concerning the specific facts of this case, which cannot be more serious, as it alleges murder, which in theory can be a capital offence, given the significance of the ballistics link I am of the view it is unfair, in the sense as explored in the *Gibson* case, for the indigent Chiddick to be unable to get a second expert opinion. He is innocent until proven guilty, and it is plausible for the defence to be concerned that maybe the expert is wrong, in particular as there is little disclosed laboratory material to analyse.

18 Another way of looking at the conundrum is to review s78 Police and Criminal Evidence Act 1984, from the UK, well-known in the Commonwealth, which though not directly applicable on Antigua, is instructive, being from a sister jurisdiction, and says:

> (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

19 In my judgement, following the language of the section carefully, having regard to all the circumstances, including how the expert evidence has been obtained, (namely without Chiddick being able to explore its correctness with a separate expert, as he is indigent, making it 'unfair' under the Constitution for there to be no funds available from the State in this particular case), the admission of the ballistics link, in its present form, untested and not fully testable, would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

20 I sum, in this specific case, applying the Constitution, the dicta in the *Gibson* case, and in addition guided by s78, the court rules the ballistics link will not be admitted in evidence, unless there is a second, separate expert opinion available exclusively to Chiddick. I do not order the State to provide funding, though this is contemplated in the *Gibson* case, but instead I will rule out the evidence if no funding is available.

21 If funding is made available prior to trial, whether or not Chiddick uses it, and whether or not any second opinion is relied upon, then I would revisit this ruling and in all probability reverse it. In this way, assuming the evidence of Graham Husbands is reliable, I would then likely admit it.

The Hon. Mr Justice Iain Morley QC

High Court Judge

30 July 2018