EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Criminal Case 9 of 2016

BETWEEN:

THE QUEEN

Applicant

And

PAMPHILL PREVOST
SIMON POWER
SHAWN HENRY

Respondent

Appearances:

Patrick Thompson for the 1st Applicant
Israel Bruce for the 2nd Applicant
Ian Wilkinson QC for the 3rd Applicant
John Black QC, Tiffany Scatliffe Esprit and Tamara Foster for the Crown

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2019: February 6th , 11th

JUDGEMENT ON CROWN'S APPLICATION TO LEAD RECONSTRUCTION EVIDENCE

[1] **Persad J:** The accused in this matter are tried principally with a count of conspiracy to steal. The Crown in putting forward its case seeks to rely on an incident at Cane Garden Bay, wherein on the 12th December 2012 an exercise involving Police, Customs and Immigration took place based on intelligence that have been gathered by the police. A number of persons were detained and cash seized.

[2] The case for the Crown is that some of the accused were part of the exercise at Cane Garden Bay, and in the course of that exercise, while a search was being carried out on the premises, a pillow case containing cash monies in US dollars was discovered.

[3] It is the Crown's case that on the night of the incident in which the exercise was done four witnesses had seen the pillowcase at the Elms Suite at Cane Garden Bay. These witnesses included Customs Officers, Dean Fahie, Annete Moses and Police Officers Royston Da Silva and Ivor Fraser.

[4] These witnesses have already given evidence of having seen the pillowcase on the scene on that evening and their recollections differ as to the extent to which the pillowcase was stuffed that night.

[5] One witness speaks of the pillowcase being full and standing like a man, another witness speaks of the pillowcase being three quarters full whereas another witness speaks of the pillowcase being not exactly empty but not exactly full.

[6] On the Crown's case there is no evidence that any pictures were taken of the pillowcase with the cash on the night of the joint operation raid. The Crown's evidence is that the pillowcase having been taken from the location at Cane Garden Bay it was then given to the Deputy Commissioner of Police that night who was present when the monies were put for safe keeping in a vault until the next day when officers from the Financial Intelligence Unit were able to count the monies seized the night before.

[7] It should be noted that when the monies was given to the Deputy Commissioner of Police Mr. James, there was no pillowcase included with the monies.

[8] When the Financial Intelligence Unit counted the money manually, the next day, they came up with a figure of 133,000 USD. This money was returned for safekeeping in the vault. In May of 2013 the monies are recounted at the bank and the count reveals that the seized monies were in the sum of 117,000 USD and not 133,000 USD as originally counted by the FIU Team.

[9] It is against this background that the Crown seeks to tender evidence of pictures taken with the pillowcase which was kept as an exhibit in relation to the Cane Garden Bay incident where three persons were charged and prosecuted in relation to matters that occurred on that night in December 2012.

[10] The pictures were taken some three years after the incident in 2015 and were taken by having the pillowcase stuffed with monies to depict how the pillowcase would look if it was stuffed at different levels example a quarter, half, three quarters and full.

[11] The Crown also initially sought to have permission to lead evidence as to how much money would have been contained in the case at each of the four levels mentioned above.

[12] The first picture depicted pillow a quarter full containing 134,000 USD. The second picture depicted pillowcase half full containing 270,000 USD. The third picture depicted the pillowcase three quarters full 400,000 USD and the fourth and final picture depicted the pillowcase completely full come containing 620,000 USD.

[13] The defence had indicated that it would be objecting to this evidence when the Crown indicated it would be relying on these photographs as well as amounts of money that was contained in the pillowcases at the different levels.

[14] The defence were invited to file their objections in writing to which the Crown was afforded an opportunity to respond and the court had the benefit of oral submissions by all parties in an effort to narrow the issues.

[15] The defence essentially took objection on a number of grounds including (1) relevance, (2) the fact that the evidence invited the jury to speculate, (3) that the evidence was strictly inadmissible as reconstructive evidence was generally not admissible in the circumstances of this case and finally (4) that court should exercise its discretion to exclude such evidence as its prejudicial effect outweighed its probative value.

[16] The Crown in their submissions responded to the concerns of the defendants in the matter and while it was accepted that at least four witnesses had given evidence that they had seen the pillowcase on the night in question at Cane Garden Bay the issue that arose was (1) whether the prosecution should be allowed to have these witnesses shown the reconstructive photos as well as

(2) whether the Crown should be allowed to adduce evidence of the amount of monies in each reconstructed picture of the pillowcase at the varying levels.

[17] The Crown in their submissions stated as follows:-

> "The purpose of the pillowcase reconstruction exercise is not to determine how much money was in fact stolen. The sole purpose for the witnesses at the scene who described the pillowcase is to enable them to say which images taken by DS Crimmins resemble what they say they observed on 20th December 2012."

[18] In addition to the above the evidence of DS Crimmins also enables the jury to visualize what the pillowcase would look like with 133,000 USD or so in it.

[19] It should be pointed out that in the course of oral submissions before the court, the Crown took a position that it would no longer seek to rely on the evidence of how much money was contained in each reconstructed photograph but rather would ask the court to allow the jury to see the first photograph depicting how the pillowcase looked with 133,000 USD being stuffed into it.

[20] In short the Crown's application was as follows:

a. for the court to allow evidence to be led of the taking of the four photographs in the reconstruction exercise with a view to having evidence led by of the four witnesses who had seen the pillowcase on the night and having them look at the reconstructed photographs and point out which one of the reconstructed photographs was closest to their recollection of what they saw on 20 December 2012.

b. For the court to put into evidence the first reconstructed picture that depicted the pillowcase with 133000 USD so that the jury could see or visualize what the pillowcase would look like with 133,000 USD in it.

[21] In order to consider the issues on these two applications, the court needed to examine what principles apply to reconstruction evidence in order to determine whether such evidence is admissible. Having determined the applicable principles, the court would apply them to the facts in this case.

Principles relating to Reconstruction Evidence and Admissibility

[22] An appropriate starting point is the English case of **R v Quinn and Bloom**[1]. The Court at 617 noted as follows:

> "Before we deal with the summing-up in either case, we should dispose of the second question raised in Quinn's certificate of appeal, which relates to the admissibility in evidence of a film taken three months after the events complained of. There were no doubt cogent reasons why the film could not be taken at an earlier date, but they do not in the least affect the question of admissibility.
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> Mr. Clarke's first application at the trial was that the jury should be allowed to see the film at the appellant's premises, but the chairman rightly rejected this suggestion, and Mr. Clarke then applied that the film should be exhibited within the precincts of the court.
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> The film was intended to portray what three of the performers actually did in the course of their acts, and evidence was apparently available to the effect that the performances shown in the film were identical with the performances on the occasions complained of. The chairman rejected the evidence on the ground that it was inadmissible, and we agree with this. The film was in essence a reconstruction of the alleged crime and, quite apart from the interval of three months, we think that evidence of this type is inadmissible.
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> It is, of course, true that demonstrations are frequently given by witnesses in the witness box to show what was done at the material time. For example, the way in which a blow was struck is often demonstrated, however, such demonstrations usually take place in the witness box, in the presence of the jury, and are intended to illustrate one act.
> In our view, such demonstrations are altogether different in character from a reconstruction of an entire scene, a reconstruction which has been brought into existence in private for the purpose of constituting evidence at a trial.
>
> It is obvious that to allow such a reconstruction would be introducing a method of proof which would be most unsatisfactory for the reason that it would be almost impossible to analyse motion by motion those slight differences which may in the totality result in a scene of quite a different character than that performed on the night in question.
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> Indeed, in this case, it was admitted that some of the movements in the film (for instance, that of a snake used in one scene) could not be said with any certainty to be the same movements that were made at the material time. In our judgment, this objection goes not only to weight, as was argued, but to admissibility: it is not the best evidence."

[1] 1961 3 WLR 611 CCA

[23] In that case the Court of Criminal Appeals held as follows:-

> "That the film was in essence a reconstruction of the alleged crime, and quite apart from the interval of three months, evidence of that type was inadmissible as it was not the best evidence."

[24] In the case of **Collins**[2] cited by the Crown, the Ontario Court of Appeal looked at the issue of reconstruction evidence. In the Canadian jurisdiction such evidence is known as experiment evidence. The Ontario Court of Appeal noted as follows:-

> "[16] Despite the fact that experiment evidence is often, and at times routinely, admitted at trials, there is a paucity of Canadian jurisprudence relating to this kind of evidence. Perhaps this is explained by the fact that experiment evidence often goes unrecognized for what it is: in some cases, it consists of mere factual evidence, much like any other sworn testimony; in other cases, it is a combination of factual and opinion evidence. In either situation, its admissibility is governed by well-established rules of evidence. Indeed, in my view, the key to determining the admissibility of experiment evidence is to keep in mind this distinction between fact and opinion as it is understood in the law of evidence. I will briefly review the applicable principles of law.
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> [17] In the law of evidence, an opinion means an "*inference from observed fact*": see *R. v. Abbey* (1982), 1982 CanLII 25 (SCC), 68 C.C.C. (2d) 394 at 409. As stated in *Abbey*, as a general rule, witnesses testify only as to observed facts and it is then up to the trier of fact to draw inferences from those facts. A lay witness will be permitted to give an opinion only with respect to matters that do not require special knowledge and in circumstances where it is virtually impossible to separate the facts from the inferences based on those facts. A witness testifying that "a person was drunk" is a common example of an opinion that can be provided by a lay witness. See *R. v. Graat* (1982), 1982 CanLII 33 (SCC), 2 C.C.C. (3d) 365 (S.C.C.) for a review of the law on non-expert opinion. Otherwise, opinion evidence will only be received with respect to matters calling for special knowledge beyond that of the trier of fact. In those cases, an expert in the field may be permitted to provide the judge and jury with an opinion, that is "a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate" (*Abbey* at 409). The law as to expert opinion evidence was authoritatively restated in *Mohan, supra*. Before expert opinion evidence can be admitted, the evidence: (a) must be relevant to an issue in the case; (b) it must be necessary to assist the trier of fact; (c) it must not be subject to any other exclusionary rule; and (d) it must be given by a properly qualified expert.

[2] **2010 160 CCC 85**

[18] A witness' testimony as to observed facts is, of course, subject to the general principles governing the admissibility of any evidence: relevance and materiality. *Relevance* is established at law if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced. The evidence is *material* if it is directed at a matter in issue in the case. [1] Hence, evidence that is relevant to an issue in the case will generally be admitted. Indeed, it is a fundamental principle of our law of evidence that any information that has any tendency to prove a fact in issue should be admitted in evidence unless its exclusion is justified on some other grounds: see *R. v. Corbett*, 1988 CanLII 80 (SCC), [1988] 1 S.C.R. 670 at 715; *Morris v. R.*, 1983 CanLII 28 (SCC), [1983] 2 S.C.R. 190 at 201; and *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577 at 609.

[19] The grounds that justify the exclusion of evidence that is otherwise relevant and material form the basis of many of our more specific rules of evidence. The rule against hearsay, the opinion rule and the similar fact rule are a few examples. Quite apart from these specific rules, evidence that is otherwise relevant and material may also be excluded by the exercise of the trial judge's general power to safeguard the fairness of the proceedings. Our law of evidence recognizes the general power of a judge to exclude relevant and material evidence where its probative value is outweighed by the prejudice caused by its admission, provided that where the evidence is tendered by the defence, it should not be excluded on that basis unless the prejudice *substantially* outweighs the value of the evidence: see *Seaboyer*, *supra*, at 390; and *R. v. S.C.B.* (1997), 1997 CanLII 6319 (ON CA), 119 C.C.C. (3d) 530 at 541 (Ont. C.A.). Prejudice in this context does not mean, of course, that the evidence will be detrimental to the other party's position. Rather, it is related to the detrimental effect that the evidence may have on the fairness and the integrity of the proceedings. For example, the evidence may not be worth receiving if its reliability is clearly outweighed by its potential to mislead or confuse the trier of fact. The evidence could also be excluded where its admission would involve an inordinate amount of time that is not commensurate with its value. See *Mohan*, *supra*, at 411.

[20] These general principles apply to experiment evidence. A pre-trial experiment can be as simple as driving from one location to another to determine the time it takes to cover the distance in order to substantiate or disprove an alibi, or driving along a particular stretch of road to determine at what point a stop sign becomes visible. The evidence in such cases, provided that it is relevant to an issue in the case, will usually be admitted without argument. It is entirely factual, and its admissibility is only subject to the general principles of relevance, materiality and discretion as discussed earlier. In other cases, the pre-trial experiment may be more complex, requiring particular technical or scientific knowledge to perform, and it may also form the basis of expert opinion evidence in the interpretation of the results. In such cases, the experiment evidence, in so far as the observed facts are concerned, will be subject to the usual principles of relevance, materiality and discretion but, in addition, to the extent that it includes inferences from observed facts, the opinion rule will come into play. In order to be admissible, that part of the experiment evidence that constitutes opinion evidence will have to meet the criteria in *Mohan*.

[21] In a nutshell, experiment evidence, if it is relevant to an issue in the case, should generally be admitted, subject to the trial judge's residuary discretion to exclude the evidence where the prejudice that would flow from its admission clearly outweighs its value. Beyond this, when the evidence requires the making of inferences from observed facts that require special knowledge, the test in *Mohan* will have to be met before the evidence can be admitted as expert opinion evidence.

[22] In most cases, the relevance of the experiment evidence will depend on the degree of similarity between the replication and the original event. Consider the example given earlier where the experiment consists of the driving along a particular stretch of road to determine at what point a stop sign becomes visible. If the distance at which the stop sign becomes visible is in issue at trial, the experiment evidence will be material, but will only be relevant if the replication bears some similarity to the original event."

[25] In the Trinidad and Tobago case of **Andy Brown & Ors v The State HCA**[3] Mohammed J as he then was, was called upon to admit reconstruction evidence relating to a night-time video.

[26] The court at page 5 of the judgment noted as follows:-

"I turn now to the night-time video: it is useful to set out what needs to be considered, when the court looks at reconstruction evidence. Firstly, is it relevant to an issue in the case? This point can be dealt with readily, plainly it is, given the basis explained for the admission of Daniel White's evidence. Secondly, the degree of similarity between the replication and the original event; and thirdly whether the prejudicial value outweighs the probative value."

[27] The court in the course of its judgment cited the Australian case of **R v Holmes**[4] at paragraph 25 and noted:-

"it is clear that the conditions need not be identical to those existing at the time of the occurrence but it is sufficient if there is substantial similarity of conditions. Minor variations in the essential conditions go to weight rather than the admissibility of the evidence."

[28] Finally it is necessary to complete this review of the cases on reconstruction evidence by citing a passage from **Phipson on Evidence**, in its 19th edition at paragraphs 7–32 under the rubric "reconstruction of events" the editors had this to say:-

"In R v Quinn and Bloom, the Court of Appeal considered the admissibility, for the defendants, on a charge of keeping a disorderly house of a film made of a striptease act after the date of the charge court. The court held that the film was inadmissible, because of the danger that the performances on the film would not accurately portray the

[3] 112 of 2003
[4] 2008 VS COA 128

performances which were the subject of the charge. The court drew a distinction between such a film on the common practice of a witness demonstrating a particular movement such as a blow in the witness box. The decision has been described by the Privy Council as readily understandable. **However it is submitted that the ambit of the decision should not be extended to situations in which the particular dangers of unreliability are not present.** It is clear for example that the film or photograph of a test carried out by an expert could be admitted to illustrate his or her evidence of whether a particular set of events was likely or possible. It is submitted that in an appropriate case, where there is evidence that a reconstruction is identical to what was seen by the witness on a particular occasion, the admissibility of such reconstruction may have to be considered further. A film of two reconstruction of a crime by two defendants has been admitted as a confession."

[29] From these authorities the following principles can be extracted:-

a. As a general rule it seems that experiment evidence or reconstruction evidence, if it is relevant to an issue in the case, should generally be admitted, subject to the trial judge's residuary discretion to exclude the evidence where the prejudice that would flow from its admission clearly outweighs its value.

b. Much will depend on whether the experiment evidence or reconstruction evidence is factual in nature or opinion based. The key to determining the admissibility of experiment evidence is to keep in mind this distinction between fact and opinion as it is understood in the law of evidence:

c. A witness' testimony as to observed facts is, of course, subject to the general principles governing the admissibility of any evidence: relevance and materiality whereas before expert opinion evidence can be admitted, the evidence: (a) must be relevant to an issue in the case; (b) it must be necessary to assist the trier of fact; (c) it must not be subject to any other exclusionary rule; and (d) it must be given by a properly qualified expert.

d. Finally, the Canadian case suggests that relevance of experiment evidence will depend on the degree of similarity between the replication and the original event. The greater the similarity between the replica and the reconstructed evidence and the original evidence the more likely the reconstructed evidence would be considered relevant and admissible.

e. In other Commonwealth countries there is a clear overlap in relation to whether the reconstructed evidence is relevant and or similar to the original evidence and the cases tend to suggests that once say is no question of unreliability, then the courts should proceed to consider the admissibility of such reconstructed evidence.

f. The Australian cases appear to suggest that the reconstructed evidence does not necessarily have to be identical to the original evidence and where there are minor variations such differences will go to weight of such evidence as opposed to admissibility.

g. At the end of the day the modern approach seems to suggest where no issues of unreliability arise, the court should move on to consider the admissibility of such evidence.

Application of Legal Principles to the facts of this case.

[30] Having regard to the legal principles outlined above, the court must now proceed to consider the evidence adduced by the Crown in relation to the finding of the pillowcase at Cane Garden Bay and to consider to what extent the reconstructed photographs that the Crown wishes to admit into evidence are identical and or similar to the pillowcase containing what is described as cash on the 12th December 2012.

[31] Firstly the question arises, are there any issues of concern for the court as it relates to the reliability of the reconstructed photos. The Court is of the view that there a number of matters which raise reliability issues in relation to the reconstructed photos, these concerns may be outlined as follows:

a. It is the case for the Crown that at the time of the incident on 12 December 2012 there were no pictures of the pillowcase containing the cash. The only pictures taken are of the bundles of cash that was counted by the FIU the next day. Those pictures cannot therefore help us to depict how the pillow case appeared at Elms Suites in Cane Garden Bay on the 12th December 2012.

b. Accordingly the purpose of the reconstruction evidence is to represent what the pillowcase would have looked like if a quarter filled, half filled, three quarter filled and completely filled.

c. There is little evidence as to the denominations of the bundles that made up the 133,000 that was counted by the FIU when they did the count on the next day. There is evidence from Richards from the FIU that the stacks of money were "predominantly 5's 10's and 20's in the middle" and that they were in bundles.

d. The only other witness who speaks to the denomination of the bundles of money is Royston Da Silva who in his evidence speaks to seeing into the pillow case at Elms Suites and he testifies that he saw bundles of "50's 100's and 20's in the bundles.

e. In other words when the reconstruction of the pillowcase takes place in 2015 and monies are taken from the government treasury to fill the pillowcase with 133,000, there is no way of verifying whether the denominations of the bills used at the time of the reconstruction was the similar or identical to what the original pillowcase contained on the 12th of December 2012. There being a material disparity between the two witnesses who had sight of the cash from the12th of December 2012.

f. It would seem to the court that if the reconstructed 133,000USD in the pillowcase was made up of hundred dollar bills fifties and twenties, the appearance of the pillowcase would looks significantly different from a situation where it was stuffed with the same 133,000 USD where the bundles used to stuff the pillowcase was made up of smaller five's ten and twenty dollar bills.

g. The situation is further aggravated by the fact that the Crown leads evidence that even though the Financial Crimes Unit counted the money the day after it was seized and came up with a figure of 133,000USD. When the seized money is taking to the government treasury some months later in May 2013 and monies are counted using a cash counting machine, the figure of the seized monies comes up to 117,000 USD.

h. From the material before, the court reconstructed evidence is done on the basis of pillowcase having 133,000 USD and not 117,000 USD. It would seem to the court that this is a material discrepancy since the purpose of the reconstruction is to re-create what the exhibited pillowcase would have looked like with the monies seized on 12 December 2012 in the pillowcase.

i. Finally, the evidence coming out on the crown's case raises some concern as to the reliability as to when the various witnesses see the pillowcase and the degree to which it is stuffed at the point at which they saw it.

j. The witness Gumbs, sees it in the bedroom behind the dresser, another witness on the bed in the bedroom, witness Da Silva sees the pillowcase when it is on the counter in the kitchen area and the witness Moses also sees it when it is on the counter in the kitchen area. Fraser sees it in the bedroom on the bed. It is clear that the various witnesses see the pillowcase at different places and times. In principle there is nothing wrong with this.

k. What is of concern to the court is evidence that comes from other witnesses who were present at the apartment where the pillowcase was found who in their evidence speak of seeing bundles of cash on the counter.

l. These witnesses include Gurvin Stoute who does not make any reference to any pillowcase but the clear suggestion is that sometime during the exercise cash monies from somewhere appears to have been placed on the counter of the kitchen. Where did this cash come from? The only evidence of any cash being found is in relation to the pillowcase.

m. It is unclear why two witnesses speak to this and is also unclear at what stage exactly this occurred. Was it before the witnesses da Silva and Moses saw the pillow case that bundles of cash were on the counter? Was the cash taken from the pillow case and put on the counter? Was it put back in the pillow case later on? There is no evidence that explains this.

n. In other words can we say for sure, that when the Crown witnesses saw the pillow case in the kitchen that they saw the pillow case with all the money in it. What do we make of the testimony of Gurvin Stoute who does not speak of pillow case but bundles on the counter and Ivor Fraser who sees both the bundles on the counter and also later sees the pillow case.

Conclusion

[32] The above-mentioned matters gives rise to a number of concerns for the Court as to whether or not the reconstruction evidence is sufficiently reliable to be considered relevant in this matter. I am of the view that because of the legal principles that apply to the admissibility of reconstruction evidence as well as the concerns of the Court as to the reliability of the reconstructed photographs in terms of whether they are able to truly representative of how the pillow case actually appeared on the 12th December 2012, the Court is not minded to allow the Crown to show the Jury the reconstructed photograph of the pillow case with 133,000 USD in it.

[33] The Court in making this finding is well aware that in those cases where there are minor discrepancies between the reconstruction and the original, such discrepancies will go to weight and not admissibility.

[34] However in this case the Court takes the view that the matters of concern to the Court cannot be described as minor, in fact the Court is of the view that the concerns are material and fundamental and go the issue of the overall reliability of the reconstructed evidence.

[35] Nor is the Court prepared to allow the Crown to show the Jury the reconstructed pictures to assist them on what the pillow case would have looked like with it being stuffed at different levels.

[36] It seems to the Court that the Crown is free to recall the witnesses who saw the pillow case on the 12th December 2012 and have them point out to the jury what they recall in relation to the pillow case which can be put in their hands for them to speak to.

[37] In the circumstances the Court is not minded to grant the application by the Crown and will therefore dismiss their applications.

Rajiv Persad
High Court Judge (Ag)

By the Court

Registrar