THE EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CLAIM NO. SLUCRD2009/2003

BETWEEN:

THE QUEEN

Claimant

and

CURT JAMES

Defendant

Appearances:
Mr. Horace Fraser for the Applicant/Defendant
Mr. Stephen Brette for the Crown

2018 : February 2.

DECISION

[1] BELLE J: On the 2nd day of September, 2010, the Applicant/Defendant Curt James was indicted by the Director of Public Prosecutions for attempted murder and using a firearm with intent to unlawfully cause a wound.

[2] In addition to the amended attempted murder charge, the Applicant was further indicted by the Learned Director of Public Prosecutions for the offence of Murder. This charge was laid based on the principle of transferred malice. The Defendant or Applicant now applies to stay the indictment for Murder on the ground that it is an abuse of process inter alia.

[3] The Crown summarized the case as follows:

That on Sunday 20th September 2009, Prince Richardson was riding his scooter along Park Lane, when he got over the bridge near Marchand Field, he noticed the Defendant standing about five feet away from him to his front. He positively identified the Defendant relying on the light from a nearby street lamp.

This witness gave evidence that the Defendant pulled out a firearm and started shooting at him. He counted five to six shots. The first burst was four (4) shots and the second two (2) shots. He noticed he had been shot in his leg. He later saw that his shoes were covered in blood.

He was later transported to Victoria Hospital. Whilst at the hospital he made a report against the Defendant to the police.

The investigating officer investigating the alleged crime scene three days later on 23rd September 2009, came upon premises which had apparently been pierced by a bullet.

Upon gaining entry to those premises the swollen and decomposing body of Patrick Lewis was discovered lying in the back with hand in the air. At 2:05pm that day, the body was pronounced dead. Dr. Rambally concluded that the deceased had been dead for the past sixty hours. The body was later removed to the Victoria Hospital morgue.

A link was made between the shooting of Prince Richardson and the death of the deceased by way of a projectile found inside of the head of the deceased by Dr. King, the pathologist, who concluded that the death was due to gunshot wound to the head and the ballistic evidence of an expert Station Sergeant Graham Husbands of the Royal Barbados Police who opined that based on the location of the bullet hole on the deceased's house and trajectory of the bullet, the shooter must have been standing by

the gate of the Marchand ground and shooting westwards which was consistent with the version of events given by Prince Richardson. This is a summary of the evidence relied upon in argument.

The trial of Curt James for wounding Prince Richardson went ahead and the murder charge was held back.

The usual warning about identification would have to be given by the trial judge with lighting, distance and the Defendant fleeing being all part of the identification evidence along with the relatively short period of time in which the Defendant could actually be seen by the witness.

Curt James was tried and acquitted of unlawfully using a firearm with intent to cause a wound.

At the trial, the Defendant ran a defence of alibi which was corroborated by his witnesses, Peter Baptist, and Ms. Odessa Darious, a Prosecution witness.

[4] Counsel for the Defendant argued that the central issue of the case was the correct identification of the assailant on the night in question. It is logical to presume that by the not guilty verdict, the jury at least had doubt about the identification of the assailant and counsel submitted that the matter of identification between the Crown and Applicant is res judicata.

[5] This is not a case in which autrefois acquit applies. Since the Defendant could not have been committed on the same indictment for murder because Section 861 of the Criminal Code prohibits the Crown from charging a Defendant in one indictment of the murder and some lesser offence.

[6] Counsel for the Defence submits that the Crown cannot proceed with an indictment based on the evidence produced at a former trial where the jury made a

clear pronouncement by its verdict. Counsel relies on the case Sumbramaniam v. The Public Prosecutor of Federation of Malaya PC Appeal[1] in which the Court observed:

> "The effect of a verdict of acquittal pronounced by a competent Court on a lawful trial is not completely stated by saying that the person cannot be tried again for the same offence. To that it must be added the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."

[7] Counsel argued, the maxim 'res judicata pro-veritate occippitur' is not less applicable to criminal that to civil proceedings. Here the appellant having been acquitted at the first trial on the charge of having ammunition in his possession was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial.

[8] Counsel went on to cite R v. Thomas Sim Beedie[2] Criminal Division the English Court of Appeal which cited the legal principle that bars the prosecution from proceeding on a second charge while relying on the same evidence that was led at the first trial, which is classical autrefois acquit for the Court:

> "Where a person is tried on a lesser offence he is not to be tried again on the same facts for a more serious offence…"

[9] Counsel also relied on Canadian jurisprudence where he argued that for the Canadian Courts, the pleas of autrefois acquit/convict are specific orders while the concept of double jeopardy is of general application. In Manaii Van Rassel v. The Queen[3] the Supreme Court outlined the principle at page 238 paragraph 14 as follows:

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[1]Sumbramaniam v. The Public Prosecutor of Federation of Malaya PC Appeal No. 32 of 1949

[2] R v. Thomas Sim Beedie No. 960329543 CA

[3] Manaii Van Rassel v. The Queen [1990] 1 R.C.S. 225

> "The rule that the Court should not rule on an issue that has already been decided by another Court is a fundamental principle of our system of justice. The fact that a matter has already been the subject of judicial decision may raise an estoppel against the party seeking to re-litigate the matter. This is the principle of issue estoppel and it too is related to the principle of res judicata. Issue estoppel is recognized in Canadian Criminal Law [1980] 1 SCR 798."

[10] Counsel also cites from page 239 where the Court sets out the premise upon which the plea is founded:

> "The principle applies only in circumstances where it is clear from the facts that the question has already been decided. The possibility that the jury found in the accused favour on a particular issue is not enough. The finding on the relevant issue must be the only rational explanation of the verdict of the jury."

[11] Counsel makes the case that the only rational reason for the verdict of not guilty in the shooting/wounding charge is that they had doubt about the identification. How much more likely is a dubious educated guess to be accepted in a murder case based on transferred malice and where no one saw when the deceased was shot, his body being found three days later.

[12] The premise of the entire murder trial would be to encourage a jury to find on a weak identification and other evidence that the Defendant shot the deceased man while trying to shoot Prince Richardson.

[13] It would be clear from the evidence that there was a previous shooting involving Prince Richardson and Curt James and that Curt James had been acquitted in the said matter on a lesser offence.

[14] The evidence in the case would also have to disclose that someone else, namely the deceased, was shot by the Defendant in the same transaction in which Prince Richardson was shot and that the Defendant is charged for causing the death of the deceased person.

[15] Counsel for the Crown argued that there were authorities which approved of the trial of a matter of a more serious nature after the acquittal on an earlier charge. Counsel argued that in such a case, the verdict of a jury did not affect the situation in a different case with a different victim. Counsel argued that the first charge was attempting to kill someone who did not die. The second charge was to the effect that the Defendant had killed someone while attempting to kill another. This was a case of transferred malice.

[16] Counsel cited Hui Chi-Ming v. R[4] where it was held not to be oppressive or an abuse of the process of the Court to prosecute a secondary party for murder when the principal had been convicted of manslaughter and when pleas of guilty of manslaughter had been accepted from other secondary parties. In that case, it was noted that: (a) the acquittal of the principal on the charge of murder appeared perverse; (b) there had been abundant evidence of murder against the appellant; and (c) he had chosen to run a defence which would have resulted in his complete acquittal if it had succeeded rather than accept an offer that had been made to accept a plea of guilty of manslaughter.

[17] I note that it has been established on Connelly v. Director of Public Prosecutions[5] that no man should be punished twice for the an offence arising out of the same or substantially the same set of facts and that to do so would offend the established principle that there should be no sequential trials for offences on an ascending scale of gravity.

[18] In R v. Thomas Beedie cited above, the Court of Appeal held that the charge of manslaughter should have been stayed where the accused had already been dealt with for a summary offence relating to the defective state of a gas installation which had resulted in the relevant death; the public interest in a prosecution for

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[4] Hui Chi-Ming v. R [1992] 1 A.C. 34, PC
[5] Connelly v. Director of Public Prosecutions [1964] A.C. 1254

manslaughter and the understandable concern of the victim's family did not give rise to special circumstances.

[19] Another example cited in Archold Criminal Pleading Evidence and Practice 2001 Edition at page 326 is the case of R v. Forest of Dean J J. ex parte Farley[6] where it was held to be an abuse of process to pursue a charge of driving with excess alcohol before the trial of a charge of causing death by reckless driving based on the allegation of excess alcohol. The purpose of the course proposed by the prosecution, and explained in the judgment, amounted to a misuse of the process of the Court. Reference was also made to the well-established practice of dealing with offences in descending order of gravity.

[20] Counsel for the Crown argued that the principle of res judicata and autrefois convict or acquit did not apply in the case at Bar because the Defendant applicant was being tried for a different offence. Secondly, it could not be argued that in the trial for using a firearm with intent to wound the Defendant /Applicant could have been convicted for murder. This argument cannot be refuted.

[21] However, the Counsel for the Crown went further and argued that there was no abuse of process. He based this argument largely on the decision in Hui Chi-Ming v. The Queen[7] where it was held that it was not an abuse of process where a second indictment was preferred against a secondary party for murder where the principal had been acquitted of murder and found guilty of manslaughter. Counsel argued that the indictments in the case at Bar involved not only two different offences but two different victims. Pleading in support the authority of Connelly v. Director of Public Prosecutions[8] Counsel submitted that the Defendant could not show what is so unfair and wrong with the Defendant having to take the trial on

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[6] R v. Forest of Dean J J. ex parte Farley [1990] R.T.R. 228 D C
[7] Hui Chi-Ming v. The Queen [1992] 1 A.C. 34
[8] Connelly v. Director of Public Prosecutions [1964] 1 A.C. 1254

the murder indictment, related by way of the factual matrix only, to the count for which he was acquitted.

[22] Counsel also argued that the notion of 'unfair and wrong' is for the Court to determine on the individual facts of each case. But the concept of a fair trial involves fairness not only to the Defendant, but to the Prosecution and the Public, as well. Counsel relied in support on the decision in Director of Public Prosecutions v. Meakin.

[23] Counsel focused on the question whether an earlier jury had decided an issue in the trial and argued that the essential issue in the earlier trial (Indictment no. 1781) was the identity of the assailant and that the same essential issue falls for determination by the jury in the upcoming trial. What is not correct is the inference that because the Defendant's defence was alibi and the verdict was not guilty in the first trial, then it is binding on the upcoming trial. Again, on the authority of the dictum of Lord Lowry delivering the judgment of the Court in Hui Chi-Ming v. The Queen, the Crown submitted that "the verdict of a different jury at the earlier trial was irrelevant since it was merely evidence of their opinion."

[24] I quote:

> "Their Lordships have no doubt that he was right to do so, because the verdict reached by the different jury … in the earlier and amounted to no more than evidence of the opinion of that jury."

[25] Counsel submitted that it is not known whether the jury's verdict was one of fear, sympathy for the Defendant or on the issues of the case. Therefore, to say that 'not guilty' verdict was based on the issue of identification only is speculative. By extension, Counsel argued, to make the bald assertion that the jury's verdict was based on the issue of identification only is final and conclusive without more is fallacious.

[26] Counsel invited the Court to reject the abuse of process submission of the Defendant/Applicant and ended his submissions with a quotation from the dictum of the Court in Director of Public Prosecutions v. Meakin to the effect that,

> "Eventually, the defence made an even more bold submission that the continuance of the proceedings was an abuse of the Court. We need not add to the already extensive judicial learning on the subject of abuse of process. The principles are clear. The imposition of a stay is now wholly exceptional. A stay should not be imposed unless the Defendant shows the he will suffer such prejudice that a fair trial is not possible. The defence did not and do not here allege bad faith or serious misconduct."

[27] While it is appropriate for Counsel to remind the Court about the approach to be taken to an allegation of abuse of process, it is clear that when one refers to Beedie and that line of cases the issue is one of serious prejudice to the Defendant, and not mere inconvenience or delay or unfortunate language used in an address to the Court. Counsel at no time addressed the principle laid down in Beedie that being that;

> "Where a person is tried on a lesser offence he is not to be tried again on the same facts for a more serious offence…"

[28] In this case it is obvious that the evidence that the defendant was attempting to wound someone else other than the deceased is going to be led. The legislation seeks to avoid such an eventuality by requiring that a murder indictment should include only the count of murder and no other count so that the incidence of such prejudice is minimized. But a decision was taken to deliberately expose the Defendant to this risk in spite of the legislation. This must be prejudicial to the fairness of the murder trial.

[29] I am also of the view that had the jury accepted that the Defendant/Applicant was properly identified as the shooter, there would have been a guilty verdict in the shooting with intent to wound trial. The issue is therefore 'res judicata', in other words there would have to be a similar view held in a subsequent trial on the same

facts where the consequences for the Defendant are even more serious. But if I am wrong in this conclusion, since it appears to contradict the Court's view in Hui Chi-Men, I nevertheless hold that this is an abuse of the process of the Court and the murder indictment should therefore be stayed and I so order.

FRANCIS H.V. BELLE
HIGH COURT JUDGE

BY THE COURT

REGISTRAR