NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HOME CIRCUIT COURT
HCC 89/04 (1)

REGINA vs. HERALD WEBLEY

MURDER

Mrs. Valerie Neita-Robertson and Miss Linda Wright for Accused/Applicant

Mrs. Diahann Gordon-Harrison for the Crown/Respondent

IN OPEN COURT

Application to Stay Proceedings – abuse of process- failure to provide statements – delay in trial – need to show exceptional prejudice

4th, 5th and 7th December 2006

BROOKS, J.

Mr. Clinton Lecky was a security guard. He was deployed by his employer to the campus of the Vocational Training Developmental Institute (VTDI) in Saint Andrew. His dead body was found in a study room on that campus on the morning of 16th August, 1999. There is evidence that he died a violent death. Mr. Herald Webley, also a security guard, and similarly deployed, has been charged with murder arising from that death.

The prosecution has not produced any person who is alleged to have witnessed the event in which Mr. Lecky met his demise. It is relying mainly on a cautioned statement taken from Mr. Webley and on the evidence of another guard, a Mr. Beresford Gray. Mr. Gray alleges that on the previous evening Mr. Lecky and Mr. Webley had an argument on the campus. Mr. Lecky was supervisor to both Mr. Gray and Mr. Webley.

On the 4th December 2006, when this case came on for trial for the twenty-seventh time, the situation was that the case, once again, could not be started. Mrs.

Neita-Robertson appearing for Mr. Webley then made the unusual application that the case against Mr. Webley ought to be stayed on the basis of the continuation of the prosecution being an abuse of the process of the court. Mrs. Gordon-Harrison, for the Crown, submitted that none of the arguments advanced by Mrs. Neita-Robertson described a situation which prevents Mr. Webley from receiving a fair trial.

The question which arises from the submissions is whether Mr. Webley is precluded from receiving a fair trial by any, or any combination, of the following factors:

a. the failure of the Crown to produce a second witness statement said to have been taken from Mr. Gray;

b. the failure of the Crown to produce the original cautioned statement, in circumstances where he denies having given, or signed, any such statement;

c. the failure to bring this case to trial after the lapse of over seven years since Mr. Lecky's death.

I shall address each aspect individually and thereafter assess whether they cumulatively have the effect asserted by Mrs. Neita-Robertson.

The failure of the Crown to produce a second witness statement said to have been taken from Mr. Gray.

Mrs. Neita-Robertson argued that Mr. Gray had testified at the preliminary enquiry held in this case, that he had given two statements to the police with regard to the death. Yet, says Mrs. Neita-Robertson, only one statement has been provided to the defence, despite many requests. In her submission the defence is seriously prejudiced by the failure/refusal of the prosecution to satisfy these requests.

She emphasised that the production of the statement is required by the principle that Mr. Webley is entitled to disclosure of all relevant material, whether the Crown intends to make use of it or not. The missing statement, counsel says, is even more important because it was taken at a time when Mr. Gray was in police custody as a suspect in Mr. Lecky's death. Now that he is the only witness that seeks to link Mr. Webley to the death, the need to ascertain what he did say in that statement is important to the preparation of Mr. Webley's defence.

Mrs. Gordon-Harrison countered that her enquiries of Mr. Gray and of the investigating officer indicate that if there were in fact a second statement, it was a repetition of the statement first taken. She submitted that this was an area that the defence could explore in cross-examination and expose to the jury, any resultant weaknesses, if any, in the Crown's case. Mrs Gordon-Harrison submitted that the issues arising from the absence of the document and Mr. Gray's status would require the trial judge giving guidance and the requisite warning to the jury.

I shall assess these arguments when considering the submissions in respect of the second issue.

The failure of the Crown to produce the original cautioned statement.

Mrs. Neita-Robertson submitted that the defence has been seriously prejudiced by the failure of the prosecution to provide it with sight of the original cautioned statement said to have been taken from Mr. Webley. He denies that he made, or signed, any such statement. The prosecution has, even at the stage of the preliminary enquiry, only been able to produce a photocopy. A handwriting expert retained by Mr. Webley has stated that he is unable to give an opinion concerning the signature on the document, because

firstly, of the fact that it is a copy, and secondly because of the poor quality of the reproduction. Another complication is that the Justice of the Peace who is said to have witnessed the taking of the cautioned statement, has since died.

On Mrs. Neita-Robertson's submissions, this is a crucial plinth of the Crown's case. It is therefore a highly relevant element. She submitted that the inability to have the signature on the document assessed by the handwriting expert places Mr. Webley at a severe disadvantage. It has been caused by serious fault on the part of the prosecution, and is a clear breach of the duty placed on the prosecution to preserve relevant material. Counsel argued that the absence of the document, in these circumstances is unfair to Mr. Webley.

She relied on the case of *R (on the application of Ebrahim) v Feltham Magistrates' Court and another, Mouat v DPP [2001] 1 All E. R. 831.* There the court, in considering a complaint about videotape evidence being no longer available, stated that if it were clear that the prosecution had breached its duty to retain the evidence, then the trial judge should consider whether the breach had been so severe that it would not be fair to try the accused.

Mrs. Gordon-Harrison submitted that this is not a case of bad faith or improper conduct on the part of the prosecution. She argued that the evidence emanating from the preliminary enquiry indicated that the document had been lost, and is not in the possession of the prosecution. In those circumstances, she submitted, the Crown can only produce the evidence which it has. She relied on the reasoning of Lord Denning MR, in *Garton v Hunter* [1969] 2 QB 37, at p. 44 where that learned legend of the law, in

reference to the best evidence rule, opined (as quoted in *Blackstone's Criminal Practice* (2005 Ed.) at para. F1.17):

> "That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in your hands, you must produce it. You cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility."

Counsel for the Crown also relied on the case of *William Guy Alexander Wayte* (1982) 76 C.A.R. 110. In that case the Court ruled that where crucial original documents could not be produced, photocopies thereof were admissible. The court cited with approval the approach set out by Lord Denning M.R. (*supra*) and ruled that "the fact that the documents were merely copies merely went to weight, not admissibility" (p. 110).

In all the issues raised by this application, the onus is on Mr. Webley to satisfy the court on a balance of probabilities that he would suffer serious prejudice to the extent that he would not receive a fair trial. The cases cited by counsel on both sides also make it clear that the jurisdiction to stay criminal proceedings on the basis that it is an abuse of its process is to be exercised with the greatest caution. In the *Feltham Magistrates' Court* case cited above, Brooke LJ, at para. 17 stated that it is a power, "which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it".

The principle behind this stance is that in the vast majority of cases, the trial process is capable of ensuring that all relevant factual issues arising for its consideration, would be placed before the jury and that the trial judge has the power to regulate the admissibility of evidence. (*See Attorney General's Reference (No. 1 of 1990)*[1992] Q.B. 644 A-C)

Without seeking to trespass on the territory of the learned trial judge, I believe it fair to say that, at least in the case of the missing cautioned statement, the defence is not alleging bad faith on the part of the prosecution. At this stage there is nothing to indicate anything deliberate or malicious in the failure to deliver the second statement said to have been taken from Mr. Gray. The cases of *Linton Berry v R.* (1992) 29 J.L.R. 206 and *Richard Hall v R.* (1997) 34 J.L.R. 691 establish that the prosecution should disclose copies of such relevant statements which it has, to the defence. That is not the situation here. The Crown insists that it does not have either the witness statement or the cautioned statement. Subject to the judge's overarching authority concerning admissibility, which I shall mention again shortly, it will be for the jury to decide whether the statements were given or not and in what circumstances.

Mrs. Neita-Robertson relied on paragraph 20 of the *Feltham Magistrates' Court* case where Brooke LJ, said:

> "In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutor's conduct it would be unfair to him if the court were to permit them to proceed at all."

Again however, the learned Law Lord was not referring to cases such as the instant one. He was there treating with cases where a prosecution was, "not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment" (para. 19).

I should point out that although Mr. Webley denies having given or signed the cautioned statement, and so a *voir dire* would not ordinarily be held in those circumstances (*R v Glenroy Watson* (1975) 24 W.I.R. 367 at p. 380 B), it is always open

to a trial judge to consider the question of admissibility of the document on the grounds of fairness of the trial (See *Shabadine Peart v R.* PCA No. 5 of 2005 (delivered 14th February 2006) at paras. 23- 24). That element of protection is still available to Mr. Webley.

The failure to bring this case to trial after the lapse of over seven years since Mr. Lecky's death.

Mrs. Neita-Robertson gave a broad outline of the history of this case since the Preliminary Enquiry was completed in December 2000. She highlighted various failures on the Crown's part to have the case ready for trial, and in particular, that up to 4th December 2006, the Crown still had not provided for the absence from the island of the doctor who had performed the post-mortem examination on Mr. Lecky's body.

Counsel submitted that the undue delay has unduly prejudiced Mr. Webley in securing a fair trial, and in particular that a witness who the defence could have called to challenge Mr. Gray's account of the quarrel between Mr. Lecky and Mr. Webley, was no longer available as her whereabouts were unknown.

Counsel for the Crown demurred. She gave a detailed breakdown of the adjournments of the trial, indicating that the majority were not due to applications by the Crown, but there had been a variety of reasons. Some she said were due to applications by the defence, some because the case was not reached and still others where the reason for the adjournment was inconclusive, according to the Crown's record.

Both counsel adverted to Mr. Webley's constitutional right to a fair hearing within a reasonable time. Mrs. Gordon-Harrison went on to cite the case of *Flowers v R* [2000] 1 W.L.R. 2396 as authority for the principle that the right to be tried within a reasonable time was not an absolute right (see p. 2413 C). In *Flowers,* their Lordships

ruled that the right given by section 20(1) of the Jamaican Constitution "must be balanced against the public interest in the attainment of justice" (p. 2414 H). The Board endorsed its ruling, in *Bell v D.P.P.* [1985] A.C. 937 that, "the right to a trial within a reasonable time is not a separate guarantee but, rather, that the three elements of section 20(1) form part of one embracing form of protection afforded to the individual" (p. 2415A).

The *Attorney General's Reference (No. 1 of 1990)* mentioned above was a case involving delay, albeit of twenty-seven months. The court held that, "no stay was to be imposed unless a defendant established...that, owing to the delay, he would suffer serious prejudice to the extent that no fair trial could be held, in that the continuation of the prosecution amounted to a misuse of the process of the court" (p. 644 A-C).

Another case dealing with delay emanates from the United Kingdom. It is *R v Dutton* [1994] Crim. L.R. 910. In *Dutton* the prosecution was commenced some twenty years after an alleged indecent assault on a young boy. The complaint was made after the alleged victim had become an adult. The court recognized that cases of that nature inherently contained that element of delay, but indicated out that it was the duty of the trial judge "to point out to the jury, what the defence had to say about the possible prejudice as a result of the delay was a matter to which they could and should properly have regard" (p. 911).

In the instant case, it may be appropriate for the judge before whom this case comes on for trial, to say that the Crown should have no more adjournments and that it should proceed with whatever evidence it has. It would also be for the judge, in the event that it is a matter for the decision of the jury, to direct the jury appropriately in respect of the delay, and any prejudice, alleged by the defence, to have been caused by that delay.

Conclusion

In all the issues raised by this application, the onus is on Mr. Webley to satisfy the court on a balance of probabilities that, because of the issues complained of, either individually or collectively, he would suffer exceptional prejudice to the extent that he would not receive a fair trial.

The evidence available at this stage does not indicate any deliberate or improper behaviour on the part of the prosecution. The issues raised in this application may all be dealt with by a judge and jury at a trial. The judge can deal with them by insisting on a timely commencement and by giving careful directions to the jury on any aspect which is alleged by the defence, to cause it prejudice. The jury will for its part, in its wisdom, make its decision after hearing all the evidence.

In these circumstances I find that Mr. Webley has not satisfied me on a balance of probabilities that the trial process will not afford him the opportunity of seeking to prevent the cautioned statement from being admitted into evidence, of exposing the deficiencies to the jury, to bore such 'holes' in the prosecution's case as he can, and ultimately to receive a fair trial.

Before leaving the matter I must express my thanks to counsel on both sides for the industry displayed in the arguments presented.

The application is refused.