The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 7 of 2017

B E T W E E N:

TRAVONE SALTUS

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Richard Horseman, Wakefield Quin Ltd, for the Appellant
Carrington Mahoney and Kenlyn Swan, Office of the Director for Public Prosecutions, for the Respondent

Date of Judgment: **23 March 2018**
Date of Reasons: **12 April 2018**

REASONS

Crucial witness abroad – Practicability of securing attendance – Sections 75-78 PACE – Admissibility of hearsay evidence – Jury pressure – Criteria for retrial.

BAKER, P

1. On 23 March 2018 we allowed the appeal of Travone Saltus ("the Appellant") against his conviction for murder and using a firearm and ordered a retrial. We now give our reasons.

Facts

2. Soon after 10.00pm on the evening of 23 September 2012 Lorenzo Stovell was shot and killed as he sat on a bus in a layby near Woody's Bar in Sandy's. It was a private bus and all the other passengers had got off the bus and gone to the bar except the deceased, who was disabled. Only the deceased, who was sitting immediately behind the driver, and the bus driver, remained on the bus. The deceased was shot through the window. A number of shots were fired. Two other defendants, Zakai Cann and Cordova Marshall were acquitted. A motor cycle, with a passenger, was seen to speed away from the scene. The driver, Menelik Isaac, immediately drove off and made his way to Port Royal Fire Station. The case against the Appellant was dependant upon a confession that he was alleged to have made in about May 2013 to one Troy Harris. Harris made a statement to the police recounting this confession at Hamilton police station on 27 May 2015. He later confirmed this in a further statement to the police made when he was detained at Winson Green prison, Birmingham, United Kingdom on 9 June 2016.

Harris's Evidence

3. The problem for the prosecution was that when the case came to be tried in February 2017 Harris was still in prison in Winson Green and he was a vital witness for the Crown. The prosecution applied to have his evidence admitted in his absence under section 75 of the Police and Criminal Evidence Act 2006. Section 75(1) provides that a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if the requirements of one of the paragraphs of subsection (2) are satisfied. Those relevant to the present case are that the person who made the statements (Harris) is outside Bermuda and it is not reasonably practicable to secure his attendance.

4. Section 77 makes it the duty of the court in deciding whether to admit the evidence to have regard to a number of factors. These are:

> *(a) the nature and source of the document containing the statement and whether, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic*
> *(b) the extent to which the statement appears to supply evidence which would otherwise not be readily available;*
> *(c) the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and*
> *(d) Any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.*

5. Section 78 also applies to this case. It provides that the statement shall not be given in evidence:

> *" ….in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice it shall be the duty of the court to have regard to –*
>
> (i) *the contents of the statement;*
> (ii) *any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and*
> (iii) *any other circumstances that appear to the court to be relevant."*

6. A few days after the start of the trial the prosecution applied under section 75(2)(b) to have Harris's two statements admitted in evidence on the ground that he left Bermuda on 1 December 2015, was in HM prison in Birmingham, and it was impracticable to secure his return. Despite objection on behalf of the Appellant, the learned judge ruled in favour of the prosecution. He found that it was not reasonably practicable to secure the Appellant's attendance

and that reasonable steps had been taken to try to do so. Further, it would be impracticable to delay the trial until he might return to Bermuda. The judge noted that the evidence would be prejudicial to the Appellant in the absence of an opportunity to cross-examine the witness but also noted that there was other evidence that the Appellant was present in the area on the night and also telephone evidence "*that tends to show a person vested with a consciousness of guilt*". A careful warning about the evidence and direction to the jury would suffice.

7. Mr Horseman, who appeared for the Appellant before us, but not in the court below, in the course of a vigorous argument, took a number of points. In the forefront of his submissions he contended that the prosecution had failed to establish it was not reasonably practicable to establish the attendance of Harris. Thus their case to have his statement admitted failed to surmount the first hurdle. The only evidence relied on in support of the application at the trial was an affidavit of Detective Inspector Redfern, the Senior Investigating Officer in the case. His affidavit was sworn on 24 February 2017, which was surprisingly late in the day, bearing in mind that the trial had started on 20 February and that Harris had been interviewed in England and the second statement taken from him the previous June. The thrust of his affidavit was that he had received correspondence from Mr Rob Jones of Central Government Services in Birmingham indicating Harris was sentenced in May 2016 to four years' imprisonment and his release date was 21 June 2018. He would neither be allowed to move establishments nor leave the United Kingdom. He added that he understood that the possibility of Harris giving evidence by video link was not an option. He exhibited the letter from Mr Jones dated 25 January 2017. In the letter Mr Jones said he was aware Harris was a significant witness in a murder trial due to start on 20 February 2017 and continued:

> *"Due to the option of Harris appearing in Bermuda being impracticable and not feasible it has been confirmed that this appearance can be completed by video link.*

A retention marker has been placed on Harris so he will remain at HMP Birmingham and will not be moved establishments or allowed to leave the United Kingdom."

8. Mr Jones had also said in the letter that he had confirmed Harris could appear by video link (meaning at the English end). Appearance by video link would have been the obvious solution to a situation where a key witness is out of the jurisdiction, but unfortunately neither the legislation nor the facilities are available for this in criminal cases in Bermuda despite requests to successive Governments.

9. Harris was keen to cooperate and give evidence but unfortunately the prosecution set about securing his attendance in the wrong way. Mr Jones was employed by an organisation called G4S and was at the material time the security governor of Winson Green prison. His decision was based, so we were told, on the security elements of the prison, the general public and Harris. G4S is an agency that has the management contract for the prison.

10. The correct route was for the Director of Public Prosecutions to make a request for mutual assistance under the Home Office Guidance entitled: **Requests for Mutual Legal Assistance in Criminal Matters Guidelines for Authorities outside of the United Kingdom - 2015** ("the Guidelines"). The introduction to the Guidelines at p.4 makes it clear that all formal requests for assistance **must** be sent to a central authority, the central authority in this instance being the Home Office. The United Kingdom can provide mutual legal assistance to any country or territory whether or not that country is able to assist the United Kingdom and whether or not there is a bilateral or multilateral agreement. In fact Bermuda provides reciprocal assistance – see Criminal Justice (International Co-operation) (Bermuda) Act 1994 and the Amendment Act 2012.

11. Any competent body under the law of the requesting country may issue a request to the United Kingdom, including a court exercising criminal jurisdiction or a prosecuting authority outside the United Kingdom. An

application should have been made by the Director of Public Prosecutions under the Guidelines to the Home Office rather than the inappropriate application by the police to G4S.

12. It is unnecessary to refer to any other provisions of the Guidelines save that at p.15:

> *"In practice the UK accedes to most requests received and in general there is a presumption that MLA will be provided where all the requirements of the investigative measures under UK law have been met. However, the central authorities retain a wide discretion when considering whether to accede to a request."*

13. Mr Horseman submitted that it was inconceivable that the United Kingdom would not have honoured a request for the transport of Harris to Bermuda for the purposes of giving evidence in a murder trial. Since the appropriate request was never made, it cannot be known with certainty whether it would have been met. What is clear, however, is that, having failed to follow the correct procedure and make the appropriate request for mutual legal assistance, the prosecution was unable to discharge the burden under s.75(2)(b) of proving it was not reasonably practicable to secure the attendance of Harris. This was eventually conceded by Mr Mahoney for the Crown.

14. That point alone was sufficient to determine the outcome of the appeal. But the prosecution faced other difficulties with the admissibility of Harris's statements with which it is desirable to deal briefly.

15. If the hurdle of securing the attendance of Harris was crossed, as the learned judge thought that it was, it was his duty to go on and consider the various factors in s.77. S.77 (b) was plainly met because there was no other evidence of the Appellant's confession and likewise s.77 (c) because the evidence was plainly relevant. The problems that arise are with s.77 (a) and (d). The murder was in September 2012, the alleged confession in May 2013 and Harris's first

statement to the police was not until made 27 November 2015. It was made in circumstances where Harris had been arrested in respect of another matter and then decided to give this information to the police. Harris has a criminal record. The judge appears to have had scant information about why Harris was at Hamilton Police Station and the circumstances in which he came to offer the police an interview about the Appellant's confession. All this was relevant to his credibility as was his criminal record.

16. Mr Horseman also argued strongly that there were aspects of the contents of the statement itself that raised doubts about its credibility. For example, Harris said that the Appellant told him he got the gun from Duerr and returned it to Duerr but this conflicted with Duerr's evidence. Later in the interview he said he thought Malachi had taken it to Duerr and finally that it was Romano Mills. Another apparent discrepancy was the number of shots fired. The Appellant said he fired seven. Mr Horseman submitted there was other evidence that it was only four. Then Harris said the Appellant told him he walked up to the bus, hopped onto the wheel, put his hand through the window and shot the deceased. But the bus driver only saw one person by the bus and the co-defendant Cann's palm print was found on the bus just below the window through which the shots were fired. Also, Harris said the Appellant told him that after the shooting he called Malachi, who was across the street at Woody's, to come and get him, that Malachi picked him up on a bike and they rode off towards Somerset. However Malachi was identified by a witness as walking from the bus to the bar.

17. All these are matters that would have been explored in cross-examination at the trial had Harris given evidence in person. Harris might or might not have emerged from cross-examination as a truthful witness. If credible, his evidence would have been very compelling evidence for the prosecution, but there was significant material on which to cross-examine and the Appellant was significantly disadvantaged in being unable to do so. The judge accepted disadvantage to the Appellant but nevertheless felt able to exercise his discretion to admit Harris's statements. One of the matters to which he gave

weight was telephone evidence that he felt implicated the Appellant quite independently of Harris's evidence. This was evidence that came from the phone of a man called Whitehurst. We have not seen this evidence or the judge's subsequent ruling when he decided not to admit it. Mr Horseman made the valid point that if the evidence was subsequently ruled inadmissible it should not have been taken into account by the judge in the exercise of his discretion as showing that there was evidence independent of Harris that implicated the Appellant.

18. The law relating to the admissibility of hearsay evidence was carefully considered by the Court of Appeal in England in *R v Riat & ors* [2013] 1 All E.R. 349. The court was concerned with five appeals and admissibility under Ch 2 of Part 11 of the Criminal Justice Act 2003, but much of what Hughes L.J, as he then was, had to say was equally applicable to the admissibility of Harris's statements in the present case. He said this at paragraph 3:

> "*From the point of view of a defendant, the loss of ability to confront one's accusers is an important disadvantage. Those very real risks of hearsay evidence, which underlay the common law generally excluding it, remain critical to its management. Sometimes it is necessary in the interests of justice for it to be admitted. It may not suffer from the risks of unreliability which often attend such evidence, or its reliability can be realistically assessed. Equally, however, sometimes it is necessary in the interests of justice either that it should not be admitted at all, or that a trial depending on it should not be allowed to proceed to the jury because any conviction would not be safe."*

19. He pointed out that working through the statutory framework in England in a hearsay case the court is concerned at several stages with both (i) the extent of the risk of unreliability and (ii) the extent to which the reliability of the evidence can safely be tested and assessed. He added at paragraph 8:

> *"Although there is no rule to the effect that where the hearsay evidence is the 'sole or decisive' evidence in the case it can never be admitted, the importance of the*

> *evidence to the case against the accused is central to these various decisions."*

He went on at paragraph 18:

> "*In our view, the judge will often not be able to make the decision as to whether the hearsay evidence be admitted unless he first considers, as well as the importance of the evidence and its apparent strengths and weaknesses, what material is available to help test and assess it. If it is the Crown which is seeking to adduce the evidence, and if the evidence is important to the case, the judge is entitled to expect that very full inquiries have been made as to the witness's credibility and all relevant material disclosed; that will not be confined simply to a check of the Police National Computer for convictions."*

20. In the present case there were two stages at which the judge was required to assess the extent of the risk of unreliability of Harris's evidence and how far the reliability of his evidence could be tested and assessed. The first was in conducting the section 77 exercise. The second was in applying section 78 where the ultimate consideration is the interests of justice. It is not clear to us that he did so. Nor were we satisfied that, the evidence having been admitted, the Appellant had a fair trial.

Jury Pressure

21. There was a second ground of appeal that was not fully argued in the light of the Crown's concession that the appeal should be allowed because of the Crown's failure to establish it was not reasonably practicable to secure Harris's attendance. Accordingly, we make no finding upon it. The substance of this ground was that the jury was placed under pressure, delivering their verdict at the end of a long day just before 9.00pm. We should say that the verdict being by 9 to 3 on both counts i.e. one quarter of the jury not in agreement with the verdict, and that it was delivered shortly after a question about the acceptability of Harris's statement in the light of his not having been cross-examined, hardly gives confidence that the conviction was safe.

22. In *Leshore and Simons v The Queen* [2016] Bda LR 115 at paragraph 45 this Court commented on the need for advance planning in a case where the jury might need overnight accommodation and the need for the jurors to be alerted in advance to the possibility so that they can make arrangements to be away from home overnight should the need arise. No such advance warning appears to have been given by the judge in the present case. The danger is that if no advance warning is given the judge is left with a dilemma. If he gives no warning before the jury has retired to consider its verdict, the jurors may feel under pressure to deliver a verdict because they have, for example, child care commitments. If, on the other hand, he only tells them late in the day that if they cannot reach a verdict they will have to go to a hotel overnight and continue their deliberations the next morning, that too is obviously unsatisfactory because they have not been given the opportunity to make the necessary arrangements to be away from home. There needs, in our judgment, to be a standard practice whereby juries are routinely warned at the start of a trial that there is a risk that the problem may arise. They should then be warned more specifically when the time for their retirement approaches, so that they can make any necessary arrangements in case the need arises.

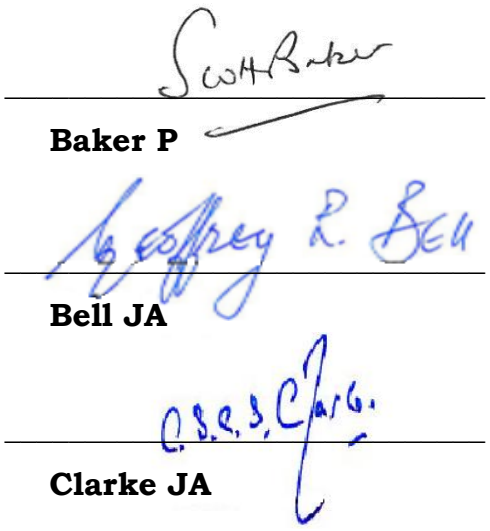
Retrial

23. Having allowed the appeal the question then arose whether we should order a retrial. Mr Horseman argued that we should not. The murder took place nearly six years ago and the only evidence against Saltus was that of Harris. Cann's palm print supports the defence. There were 20 or 30 MOB gang members in the locality at the time and Harris's statement that the Appellant told him he used a 9mm gun takes matters no further as it was common knowledge in Bermuda that a 9mm gun was used in the shooting, a fact published more than once in the Royal Gazette.

24. Mr Mahoney submitted that a retrial was in the public interest. This was a tit for tat gang related killing. Harris will be available following his release in June and the case should not be prevented from proceeding because of what he described as technical blunders. The reliability of Harris's evidence

depended on the whole of the evidence and how it interlocked with other evidence. If Harris's evidence was accepted there was a strong case against the Appellant.

25. We were referred to *Reid v The Queen* [1979] 2 All ER 904 and *R v Maxwell* [2010] UKSC 48. These cases make it plain that the overriding consideration is whether the interests of justice require a retrial having regard to the particular circumstances of the case. The allegation in the present case is murder, a most serious offence. The critical question is whether the evidence of Harris stands up to cross-examination. If it does the Appellant has a case to answer; if it does not, he does not. It is in our judgment in the public interest that his evidence should be heard and tested. Accordingly we ordered that there should be a retrial.



Baker P

Bell JA

Clarke JA