

17-Dec-2009
(DJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE
HOLDEN AT GEORGE TOWN

Indictment No: 27/09

REGINA

V.

RANDY MARTIN

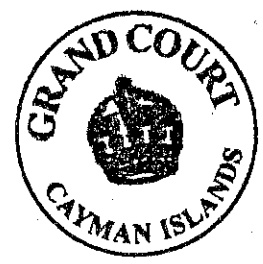
Appearances:

Defence/Applicants: David Evans Q.C. and Adam King of Samson and McGrath

Crown/Respondent: Cheryll Richards Q.C., Solicitor General, and Kirsty Gunn
Crown Counsel

Before: Hon. Justice Quin

Heard: 25th November to 16th December 2009



RULING

Introduction

1. I asked both the Solicitor General and Defence Counsel whether Mr. Akiwumi had an opportunity to discuss this matter before speaking to the witness and they both concurred that he had.
2. I am grateful to both counsel for the research and helpful arguments, both yesterday afternoon and this morning.

3. This is not an easy matter and, forgive me, if on dealing with the question of fear under Section 45 of the Criminal Procedure Code, and Section 33(3) of the Evidence Law, there is some overlap in what amounts to two rulings.

Reasons

4. On the morning of the 16th of December 2009 the Crown called Juliet Ebanks as a witness for the Prosecution pursuant to Ms Ebanks having provided a witness statement to the Royal Cayman Islands Police Service (RCIPS) on the 21st of April 2009.
5. Ms. Ebanks was then called and sworn.
6. Before Ms Richards was able to have any questions put or answered, Ms Ebanks said that she had "nothing to say to, or about, the Defendant, Randy Martin." She said that she felt that "her life was in danger." She stressed that she had "a child to live for" and that was why she was refusing to give evidence.
7. She told the Court that she had spoken to the Solicitor General before coming into Court and also to the Police, and she had explained her situation to them. She told the Court under oath that she was seriously concerned about her safety and that of her three-month old child.
8. On hearing Ms Ebanks' evidence about her concern for her safety and that of her baby, I decided to appoint an *amicus curiae* to assist the witness, and indeed, the Court.

9. The Court is grateful to Mr. Anthony Akiwumi, of Stuarts Walker Hersant, who came at very short notice and discussed the case with both the Solicitor General and leading Defence Counsel. Mr. Akiwumi then read the witness' statement dated the 21st of April 2009 and, I understand, had and took the opportunity to advise the witness as to her position pursuant to Section 45 of the Criminal Procedure Code.
10. The Court adjourned to Chambers and Mr Akiwumi, acting as *amicus curiae*, confirmed that the witness was in fact adamant and in fear. He confirmed that she had been warned of the consequences of the position she was taking, however, he reported that her position remained unchanged. Mr Akiwumi also confirmed that, in his view, allowing the witness more time to consider her position would not make any difference.
11. The witness had made a further statement on 16th of December 2009, which followed on from her first statement which was dated the 21st of April 2009.
12. In that second statement she stated that "I have however made the decision not to give any evidence in this case against Randy Martin because of the following reasons:
- i. I am afraid that if Randy is set free he will come after me
 - ii. Or that he will send somebody after me
 - iii. I have my child to live for
 - iv. I just do not want anything to do with this matter anymore because I had a situation with Randy in the past. This was 2008, a burglary matter, when Randy sent his cousin, alias "Hubba" to give me a punch in my face in the ShirReynolds car park.

- v. As a result of this previous incident and the knowledge that I have in relation to how dangerous Randy Martin can be, I do not want to give any evidence against him.

Defence's Submissions

13. Mr. Evans, leading counsel on behalf of the defence, argues that the witness has not made out "sufficient fear." Mr. Evans submits that the witness' statement of yesterday's date does not reveal sufficient fear to allow the legislation to bite.
14. Mr. Evans points out that the witness is very capable of expressing herself and her feelings. He says further, that the incident in her statement, dated the 16th of April 2009, is no more than an unpleasant incident.
15. In conclusion, Mr. Evans submits that sufficient fear has not been illustrated in her statement or in any other way.
16. I have listened to the witness explain her reasons for refusing to answer the questions put to her by the Solicitor General. The witness has told the Court after being sworn that she informed both the Police and the Solicitor General about her concern. Mr Akiwumi, as *amicus curiae*, has confirmed the witness' fear and concern. I have read the witness' statement dated the 16th of December 2009. I have listened to the witness and watched her give her evidence regarding her fear. She has answered her Summons, attended Court and has been sworn. The witness understands that she can be committed to prison, but her fear for her safety and that of her baby, seem greater than her fear of prison. I find that the witness is in genuine fear for the safety of herself and her baby, and this constitutes "sufficient cause" for refusing to answer the questions put to her by

the Solicitor General. Accordingly, in light of these very regrettable and unfortunate circumstances, I will not commit the witness to prison, nor impose any other punishment. The witness is free to go.

17. The Solicitor General has made an application pursuant to Section 33 (1)(b) as read with Section 33 (3), and also under Section 33 (6) of the Evidence Law to admit the statement of the witness, dated the 21st April 2009.

18. Section 33 (1) states:

"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 or her would be admissible if...

(b) the requirements of subsection (3) are satisfied and subsection (3) states "the requirements mentioned in paragraph (b) of subsection (1) are (a) that the statement was made to a Constable or some other officer charged with the duty of investigating offences or charging offenders; and (b) that the person who made it does not give oral evidence through fear."

19. In addition, the Solicitor General relies upon Section 33 (6) of the Evidence Law which states:

"Notwithstanding subsection (1), in criminal proceedings a written statement by any person is admissible as evidence to the like extent as oral evidence to the like effect by that person, if the court determines that it is in the interest of justice to admit such written statement."

20. The Solicitor General submits that the statutory requirement of Subsection (3) of Section 33 is satisfied, in that the witness who made the statement does not give oral evidence through fear.
21. The Solicitor General citing from Archbold 2001 19-142 submits that once the statutory requirement is met, the Court has a balancing act regarding "the weight to be attached to the inability to cross examine the witness, and the magnitude of any consequential risk that admission of the statement will result in unfairness to the accused (which) must depend in part on the Court's assessment of the quality of the evidence shown by the contents of the statement."
22. The Defence highlights the fact that Section 33(1)(b) of the Evidence Law was similar to the provisions of Section 23(3)(b) of the United Kingdom Criminal Justice Act 1988. Furthermore Section 26(b) of the UK Criminal Justice Act is similar to Section 33(6) of our Evidence Law.
23. There is helpful guidance in Section 26 of the UK Criminal Justice Act relating to statements and documents that appear to have been prepared for purposes of criminal proceedings or investigations. And where it states at 26(b):
- "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 interest of justice; and in considering whether its admission would be in the interest of justice, it shall be the duty of the court to have regard:
- i. to the contents of the statement;
 - ii. to 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, then its admission or exclusion will result in unfairness to the accused or, if there is more than any one, to any of them; and
 - iii. to any other circumstances that appear to the court to be relevant

24. The Defence submits that there are no other witnesses so the Defendant cannot cross examine the only witness or test that evidence. Furthermore the Defence distinguishes the case of *R v. Cole [1990]* W.L.R 866, because in the Cole case the witness had died and there were other witnesses to give the relevant evidence.

25. Finally, the Defence complains that the statement of the 26th April 2009 is of poor quality and, indeed, there is on the face of it a mistake between 2007 and 2006.

26. Archbold 2001 deals with Sections 25 and 26 of the UK Criminal Justice Act. Section 25 begins in favour of admitting a statement, whilst Section 26 begins in favour against admitting it.

27. The learned editors of Archbold state in the second paragraph of 9-142:

“It is inappropriate for the judge in deciding how to exercise his discretion under Section 26 to speculate as to the possible outcome of cross examination had the witness attended, or as to the jury’s likely comparative reaction to one lot of evidence as compared with another; where the Defence are not in position to controvert the evidence of the missing witness, and the witness is central to the prosecution case, the potential unfairness of lack of opportunity to cross examination is compounded.”

28. The Solicitor General relies on the English Court of Appeal decision of *R v. Cole [1990]* W.L.R 866 and the judgment of Lord Justice Gibson. In dealing with Sections 25 and 26 of the Criminal Justice Act 1988 Lord Justice Gibson stated at page 875 letter E:

“The overall purpose of the provisions was to widen the power of the Court to admit documentary hearsay evidence while ensuring that the accused receives a fair trial.

In judging how to achieve the fairness of the trial a balance must on occasions be struck between the interests of the public in enabling the prosecution case to be properly presented and the interest of a particular defendant in not being put in a disadvantageous position, for example by the death or illness of a witness. The public of course also has a direct interest in the proper protection of the individual accused. The point of balance, as directed by parliament, is set out in the sections.”

29. As Lord Justice Gibson points out at letter F:

“It is not of course the case that these provisions are available only to enable the prosecution to put evidence before the Court. A defendant also may wish to make use of the provisions, in order to get before the jury documentary evidence which would not otherwise be admissible.”

30. Lord Justice Gibson goes on to state at page 876 G:

“The Court must consider the contents of the statement, as explained in *R v. Blithing*, 77 Cr. App. R. 86, where the court was concerned with Section 13(3) of the Act of 1925; the statement may leave relevant questions unanswered and appear to provide evidence of greater certainty than is warranted having regard to the absence of those answers.”

31. Lord Justice Gibson cites the dicta of Lord Griffiths in ***Scott v. Regina*** [1989] A.C. 1259, after reference to a need for proper warnings when a statement is admitted:

“It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion ...”

32. Carrying on, on page 877 at letter B Lord Justice Gibson states:

"Thus the weight to be attached to the inability to cross examine and the magnitude of any consequential risk that admission of the statement will result in unfairness to the accused, will depend in part upon the court's assessment of the quality of the evidence shown by the contents of the statement. Each case, as is obvious, must turn upon its own facts..."

33. Lord Justice Gibson went on to state at letter C:

"In considering a submission to that effect the court is entitled, and in our view required, to consider how far any potential unfairness, arising from the inability to cross-examine on the particular statement, may be effectively counter-balanced by the sort of warning and explanation in the summing up described by Lord Griffiths and in fact given by the judge in this case (*R v. Cole*). The court will also, for example, consider whether, having regard to other evidence available to the prosecution, the interests of justice will be properly served by excluding the statement."

34. The learned editors of Archbold cite the case of *R v. Batt and Batt* [1995] Crim. L. R. 240, where the evidence is of considerable significance as implicating the defendants, and therefore the judge is entitled to take this into account in support of admitting the statement.

35. I find that the test of fear as set out in Section 33(3) of the Evidence Law has been satisfied by the Crown.

36. Ms. Juliet Ebanks is the only witness who could give this evidence and that causes me to lean in favour of ruling it admissible rather than inadmissible.

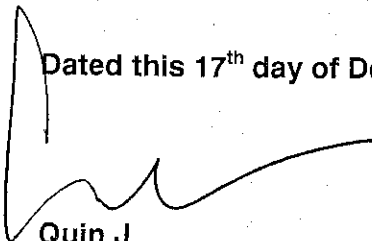
37. This case is not unlike **R v. Batt and Batt** [1995] Crim. L. R. 240, in that the evidence of what the Defendant said and what he did are of considerable significance. It is detailed and clearly memorable, and the two pieces of evidence make it of considerable significance.

38. Clearly the Legislative Assembly recognized, when drafting this Section 33(3), that if such a witness statement is admitted, there would be no opportunity for the Defendant to test it in cross examination.

39. Therefore I am guided by the cases of **R v. Cole** [1990] W.L.R 866 and **R v. Batt and Batt** [1995] Crim. L. R. 240, and when I consider the contents of the statement dated the 26th April 2009, and examine the significance of the evidence, I do admit it under Section 33(3) and Section 33(6) of the Evidence Law.

40. However it will be extremely important that I give myself a direction to examine this evidence with care, and I also stress that it loses weight because it has not been tested by cross examination.

Dated this 17th day of December 2009



Quin J
Judge of the Grand Court

