

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 26 OF 2003

BETWEEN:

DANIEL DICK TRIMMINGHAM

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC

Justice of Appeal

The Hon. Mr. Albert Redhead

Justice of Appeal

The Hon. Mr. Michael Gordon, QC

Justice of Appeal

Appearances:

Mrs. Kay Bacchus-Browne for the Appellant

Mr. Colin Williams, Director of Public Prosecutions [Ag.]; Ms. Sandra Robertson
and Ms. Candace Wiley for the Respondent

2004: June 21;
June 22.

JUDGMENT

[1] **ALLEYNE, J.A.:** On the evening of Wednesday 28th January 2003, in the Carriere mountains, Mesopotamia, Albert 'Bertie' Browne was murdered and beheaded, his body was buried in a contour and his head stuffed in a banana root on an adjoining plot of land. The Appellant was convicted of the murder on 10th November 2003, and sentenced to death on 17th November 2003. He has appealed against his conviction and sentence.

- [2] The grounds of appeal were (1) the verdict is unsafe having regard to the evidence; (2) the failure of the prosecution to disclose or acknowledge the Forensic Analyst's report which contained exculpatory evidence re the accused or evidence which tended to contradict the case for the prosecution is fatal to the conviction which must be quashed. The failure to admit the report into evidence was highly prejudicial to the defence and the conviction must be quashed; (3) the learned trial Judge misdirected the jury when he told them that the defence is saying that the absence of the murder weapon alone should create doubt, and that the absence of blood on the murder weapon does not take away anything from the prosecution's case and that the cutlass was lying in the open not hidden and that weather conditions removed the blood, in the absence of or contrary to the evidence; (4) that the sentence is unduly severe.
- [3] Learned Counsel for the Appellant argued ground 2. She drew attention to the evidence of Felix Browne, who may be described as the prosecution's 'star witness' and claimed to be an eye-witness to the crime. He alleged in his evidence that using the cutlass of the deceased the Appellant cut or sliced the throat of the deceased, allowed his blood to run out, cut the flesh around the deceased's neck, and when he reached the bone he hacked the bone, he held the deceased head by the ears and rested it on the bank of the contour. This witness said the Appellant used the cutlass to cut off the deceased's jersey, took off his pants and put the severed head in the pants, put the deceased in the hole in the ground which he had dug with the cutlass, used the cutlass to cut the deceased's belly, and covered the body with sand which he dug. The Appellant then, according to this witness, took the head to a different place and buried it in an old banana hole. This witness gave evidence that about a week later he showed the police the cutlass the Appellant had thrown over a bank into some bush. He said in cross-examination that the cutlass had blood on it. He also showed the police where the body and the head were buried.

[4] Station Sergeant Willis Caesar gave evidence of recovering a cutlass which had what appeared to be blood stains on it. He went to Jamaica with certain exhibits, namely a cutlass, a khaki pants, a pair of brown slacks, one brief, samples of deceased's blood, and five pieces of cloth for forensic testing. He said Corporal Simmons collected the exhibits from Jamaica and handed them to him sealed. He kept them in his possession. He was shown a cutlass which he identified and tendered. Learned Counsel for the Appellant objected. The record shows that the prosecution at that stage stated that there was 'no analyst report in respect to cutlass'. The defence presented an Analyst's report which apparently Counsel had earlier received in a letter from a Crown Counsel in the Department of the Director of Public Prosecutions. The record shows that at that stage the prosecutor said that 'in that regard' he will not put in those items into evidence. The trial continued. In cross-examination this witness reaffirmed that Felix Browne had taken him to where he retrieved the cutlass. He said it appeared to have bloodstains on it. This witness, who claims to have headed the investigation team into this crime, said that no Analyst's report was given to him, he did not inquire about the Analyst's report, and he has never seen an Analyst's report in relation to this matter. All this took place in the presence of the jury. In the event, the trial proceeded to a conclusion without the exhibits of the cutlass and other material matters being in evidence. The learned Director of Public Prosecutions informed us that he had not up to that point in the trial been aware that there was an Analyst's report, and that there was no copy of such a report on his case file.

[5] In his defence the Appellant elected to give evidence on oath. He denied participation in the murder of the deceased and alleged that Felix Browne had confessed to him that he had killed his uncle. He recounted in great detail the story allegedly told him by Felix Browne. At the end of his testimony learned Counsel is recorded as having said to the Court 'That is our case. We are not calling any witnesses. Before I sit down - I apply for the certificate of analysis to be put in through the defence.' Learned Counsel for the prosecution objected on the ground that the defence had closed the case, and that the certificate could not

be properly put in except through a witness. Counsel for the defence responded that it was the duty of the prosecution to produce the report, and that the Court could allow the certificate to be admitted under the Evidence Act section 21 and sections 99 and 200 of the Criminal Procedure Code. The learned trial Judge ordered as follows; 'In exercising its discretion the Court is of the view that the absence of the analyst report is in the favour of the defence. It is left to the Court to direct the jury on the absence of this certificate and for the jury to weigh the effect of its absence in arriving at its verdict.'

[6] On the hearing of the appeal we were shown a copy of the Analyst's report, made by Sherron R. Brydson, Government Analyst, Forensic Laboratory, Jamaica. In reference to a number of items of clothing the report indicated that human blood was found. In relation to a cutlass, the note was 'No blood detected'. Learned Counsel took the position that this was the cutlass allegedly identified by Felix Browne as the murder weapon, and that the absence of blood would cast doubt on the veracity of the evidence of Felix Browne, in relation to this important element of the case, and indeed on the entire case, which hangs substantially on his evidence.

[7] In summing up to the jury on the issue of the cutlass and the Analyst's report the learned trial Judge said this:

"Now the defence is saying because that cutlass is absent it should create a doubt in your minds; because this is supposed to be the murder weapon. Felix Browne says that was the murder weapon; but where is it? What happen to the analyst report? Now let us assume that the analyst report said there was no blood; and I think that is what the analyst report in the possession of the defence counsel says; that there was no blood on the cutlass even though Station Sergeant Caesar says I saw what appeared to be blood. Station Sergeant Caesar is not a Forensic Analyst. He said he saw what appeared to be blood; it could have been blood; it could have been something else; but the fact remains the cutlass was sent away for an analyst. The report let's say it says no blood on it; does that take anything away from the prosecution's case? Is that a material discrepancy to cast doubts in your minds? Bearing in mind the evidence from Felix Browne that that cutlass was used by the accused in digging the soil at the banks of the contour where the deceased body was placed;

he used that same cutlass in digging the soil. Could it be that that action removed all traces of blood from the cutlass? Could it be so?"

The learned trial Judge went on to invite the jury to speculate whether the weather could have 'played havoc on that cutlass, rain, sun, you name it, whatever? Could all those weather conditions have removed all traces of blood from the cutlass?' His Lordship left it to the jury 'to determine whether the absence of that cutlass takes away from the prosecution's case; and whether the absence of the cutlass is very fatal to the prosecution's case'. The learned trial Judge concluded on this issue that if, having considered that the absence of the cutlass is very material to proving the case against the accused because of the nature of Felix Browne's evidence, then it means that they are beginning to have doubts as to his veracity and those doubts must be resolved in favour of the accused.

- [8] Learned Counsel for the Appellant submitted that at common law there is a duty on the prosecution to disclose information not intended to be used as evidence if it
- (a) is relevant or possibly relevant to an issue in the case
 - (b) raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecutor proposes to use or
 - (c) holds out a real as opposed to a fanciful prospect of providing a lead on evidence which goes to (a) or (b).¹

- [9] Counsel contended, and we agree, that the Analyst's report meets all these tests. She concedes that the report was indeed disclosed to her, but complains that it was not acknowledged, indeed its existence or authenticity was denied or questioned by the prosecution at the trial, leading to it being withheld from the jury. The opportunity for the expert to be cross-examined on the report and its implications was not provided, yet the learned trial Judge referred extensively to it and the absent cutlass in his summing up, inviting the jury to speculate on the contents and significance of evidence that was not before the jury.

¹ Reg. v Keane [1994] WLR 746 at 752.

[10] In **Reg. v Keane** *supra* Lord Taylor of Gosforth C.J. makes it clear that disclosure to the accused is not necessarily sufficient. He says at page 752:

“It would be an abdication of that duty (of disclosure) for the prosecution, out of an overabundance of caution, simply to dump all its unused material into the court’s lap and leave it to the judge to sort through it all regardless of its materiality to the issues present or potential. The prosecution must identify the documents and information which are material, according to the criteria set out above. Having identified what is material, the prosecution should disclose it unless they wish to maintain that public interest immunity or other sensitivity justifies withholding some or all of it.”

It is not suggested in this case that the material was the subject of public interest immunity or other sensitivity.

[11] The relevance of the evidence of the analyst in the context of this case is unquestionable. Learned Counsel for the Appellant was entitled, having received a copy of the report from the Director of Public Prosecutions’ office, in the absence of any indication to the contrary, to anticipate that the analyst would be called to give evidence and would be available for cross-examination. Her evidence would potentially be of critical importance to the defence in this case. We do not doubt the assertion of the Director of Public Prosecutions or of Station Sergeant Caesar, who headed the investigation team, that they were not personally aware of the existence of the report. However, they clearly should have been, and their ignorance of the existence of the report does not excuse their failure to do what they ought to have done. The Director of Public Prosecutions is responsible to ensure that all the evidence which comes into the possession of the prosecution and which is ‘necessary to prevent a miscarriage of justice’² is disclosed. What has been referred to in the case of **H AND C**³ as the ‘golden rule’ that full disclosure should be made of any material held by the prosecution but not relied on as part of its formal case, which weakens its case or strengthens that of the defendant, has not, in our view, been fully complied with in this case. To his

² Lord Taylor in *Keane supra* at page 751.

³ [2004] EWHL 3 (The Times, February 6th, 2004).

credit, the learned Director of Public Prosecutions recognised the duty of disclosure, but pleaded ignorance of the existence of the report.

[12] It is our view that the prosecution's act in failing to make the Analyst available for cross-examination and in opposing the production of the report amounts to a serious non-disclosure in the special circumstances of this case. We are further of the view that the learned trial Judge, having ruled the report inadmissible, invited the jury to speculate on the contents and implications of evidence that was not before the Court, and that this potentially caused a miscarriage of justice.

[13] In the circumstances, we feel that we have no option but to allow the appeal on that ground, to quash the conviction and set aside the sentence, and to order that the matter be remitted to the High Court for retrial by another Judge, and we so order.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal [Ag.]