

ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2001

BETWEEN:

DANIEL MUSSINGTON
GERVIN GUMBS

Appellants

and

THE ATTORNEY GENERAL OF ANGUILLA

Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Satrohan Singh
The Hon. Mr. Albert Redhead

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Thomas Astaphan, Mrs Josephine Gumbs and Mr Elson Gaskin with him
for the Appellants
Mr. Ronald Scipio, Attorney General, Mr. Stanley Reid and Mr. Ivor Greene
with him for the Respondent

June 3, November 11: 2002

JUDGMENT

- [1] Singh JA: Before 1876, a person charged with a criminal offence, was not a competent witness for the defence. The law then, did not permit such a person to testify on oath. He had the option then, either to stay silent or make an unsworn statement which could not be tested by cross-examination.
- [2] In 1876, the Evidence Act, by S6, made a person charged with a criminal offence a competent but not a compellable witness. S 6 [g] preserved such a person's Common Law option to make a statement without being sworn.

- [3] If he made such a statement, whilst the prosecution by S 6 (b) was not permitted to comment on the accused's failure to testify in his own defence, judges were not prohibited from commenting on such failure. English law had always recognized the right of the deciders of fact in a criminal trial to draw inferences from the failure of the defendant to exercise his option to give evidence and thereby submit himself to cross-examination.
- [4] This option of the accused to make a statement without being sworn, remained with Anguilla. In 1967, Anguilla became a Constitutional Society and in 1982 procured its own Constitution.
- [5] In 2000, S 31 (1) of the Criminal Procedure Act, [The Act] abolished the option afforded an accused to make a statement without being sworn. That left such an accused with the right of defence either to stay silent or give evidence on oath which permitted cross-examination by the prosecution, questions from the judge and questions from the jury.

THE CASE:

- [6] The appellants herein, Daniel Mussington and Gervin Gumbs were called upon to stand trial at the June 2001 Assizes of Anguilla for the offences of Causing Death by Dangerous Driving and Assault Occasioning Actual Bodily Harm, respectively.
- [7] Before the trial commenced, the appellants, by motion, activated the jurisdiction of the Constitutional Court of Anguilla pursuant Ss 1, 9 and 16 of the Anguilla Constitution 1982 [The Constitution], for a declaration that the aforementioned statutory provision "violated the appellant's fundamental right to the Protection of the law and to a fair hearing by an independent and impartial court established by law and guaranteed and enshrined by SS1, 9 & 16 of the Constitution and was therefore unconstitutional null and void and of no effect."

[8] The matter came up for hearing before Hariprashad-Charles J, upon a summons to strike filed by the respondent, on the ground that because of the decision of the Privy Council in *HAW TUA TUA –v- Public Prosecutor* [1981] 3 WLR, 395, the appellant’s motion was “doomed to failure and ought to be struck out as an abuse of the process of the Court and/or was otherwise frivolous and vexatious.” *HAW TUA TUA*, was a decision on the identical issue where the Privy Council upheld the Constitutional validity of a similar abolishing legislation in Singapore. S195 (1) of the Criminal Code of Singapore was that legislation and it is similar to S31 (1) of the Act. It reads thus:

“In any criminal proceedings, except an inquiry preliminary to committal for trial, the accused shall not be entitled to make a statement without being sworn or affirmed, and accordingly, if he gives evidence, he shall do so on oath or affirmation and be liable to cross-examination.”

[9] Charles J, on October 10, 2001, determined the substantive motion on the preliminary objection and struck out the reliefs claimed, as being “an abuse of the process of the Court and/or was otherwise frivolous and/or vexatious.” The learned judge was of the view that “the proceedings were doomed to failure.” In coming to that conclusion, whilst the judge felt herself bound by *HAW TUA TUA*, she still investigated the issue as it related to Anguilla.

[10] The appellants are obviously dissatisfied and have appealed. The nub of the appeal is the constitutional validity of S 31 (1) of Act. I now address that issue.

S 31 (1) OF THE ACT: ITS CONSTITUTIONALITY

[11] The submission of the appellants was that the abolition of the option to make an unsworn statement from the dock [1] undermined an accused’s presumption of innocence. (2) imposed a burden of proof on them in circumstances where none existed and (3) compelled them to give evidence at their trial in violation of their fundamental rights as contained in Ss 1 and 9 of the Constitution. To put it more succinctly, it interfered with the appellants’ fundamental right under S9 of the Constitution to a fair hearing.

[12] According to learned Counsel for the appellants, upon the advent of the Constitutional instruments applicable to Anguilla, this Common Law option of an accused as preserved by the 1876 statute “acquired constitutional value and formed part of the provision to secure the protection of law clause embodied in S9 of the Constitution.” Mr. Astaphan referred to this procedure as a “fundamental rule of justice which was imported into the constitution as a fundamental right.”

[13] S9 (1) (5), and [10] of the Constitution respectively provide:

“(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

(10) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

[14] A logical starting point for a consideration of this issue would be the legal position of an accused person in the 19th century. Before 1876, he suffered from the disadvantage of not being a competent witness in his own cause. He had the option to remain silent in his defence, or make an unsworn statement from the dock. If he opted for the former, the jury were deprived of hearing his side of the story. If he opted for the latter, because the truthfulness or otherwise of that statement could not be tested by way of cross examination, a jury was not assisted in their deliberations as to its veracity or otherwise. Additionally, the accused was disadvantaged by the trial judge quite properly directing the jury, that because the statement was not made on oath and not tested by cross-examination, it was not evidence like that of other witnesses in the case, that it

was material which formed part of the overall picture of the case, and therefore they must decide what weight they should put on it, bearing in mind its inquisitorial deficiency. In other words, it was merely persuasive as opposed to being evidential.

[15] It is my view that this pre 1876 position, had the effect of not affording an accused person a fair trial. There was imbalance, and that prompted the legislature by the Evidence Act of 1876, to enhance the status of an accused person to that of a competent witness in his own cause, whilst at the same time preserving his option to make a statement without being sworn.

[16] The next element to be considered in this progression of events, is whether when S9 of the Constitution was crafted, this common law cum statutory procedural option of an accused to make an unsworn statement, was included as one of the elements of “fair hearing” as contemplated therein.

[17] I do not accept the submission of Counsel for the appellant that the abolition of the unsworn statement “may in at least some cases, essentially amount to a shift of the burden of proof of guilt from the prosecution to the accused by making it inexorable that in order to disprove the prosecution’s case, the accused is obliged to take the witness stand and give sworn testimony and be subject to cross-examination.”

[18] In making this submission, learned counsel seemed to be imposing a compulsive burden on an accused to prove the prosecution wrong, when, because of the presumption of innocence, there existed no such burden.

[19] I share the view of the Privy Council in HAW TAU TAU, and hold that S31 (1) of the Act created no genuine compulsion on an accused to give evidence on oath. It might have created a strong inducement for him to do so, particularly if he were innocent. I also accept that the only added inducement, consequent upon the removal of the option, was the withdrawal of the hope that he can get away with a

story, the truth of which could not be tested by cross-examination, a hope which in my view could not have been a consideration in determining the fairness of a trial as contemplated by S9 of the Constitution.

[20] I also agree with this statement of Lord Diplock in HAW TAU TAU at pp 406-407:

“The inferences that the Court may draw from his failure to testify are not enlarged by the amendments to the Criminal Procedure Code; they are limited, as they have always been, to such inferences as appear to the decider of fact to be proper in the particular case having regard to all its circumstances. It was suggested on behalf of the defendants that the fact that the accused is formally “called on” by the court itself to give evidence provides in itself an element of compulsion; but this occurs only after he has been told by the court that he is not compelled to do so and there has been explained to him what the effect of a refusal will be, i.e. that such adverse inferences as are proper may be drawn from his refusal. In their Lordships’ view it is only fair that an accused who is not legally represented should be warned of the risks he runs by failing to give evidence. Where the accused is legally represented the standard allocution ends with a recommendation to the accused to consult with his own Counsel who can advise him (as he would have done even if there had been no formal “calling upon”) whether or not it is in the accused’s own interest to testify on his own behalf. Inducement there is and always has been since the accused first became a competent witness on his own behalf; compulsion there is not.”

[21] In *Bullock –v- The State* [1988] 41 WIR 276 Bernard CJ, in the Court of Appeal of Trinidad and Tobago, made these observations at pp 296 and 297 with which I do not disagree, and which could go to demonstrate the reason in Anguilla and other jurisdictions where the unsworn statement from the dock has been abolished, why this was done:

“This Court desires once more to repeat and endorse these observations. The persons best suited to know and appreciate the concerns and needs of a society and its people and to advise and/or embark upon measures that are considered best for that society in terms of legal innovations are the judges themselves of that particular society. Many are the open violent and gruesome crimes (and this case was one such) that are being committed today in this country, and the occasions on which accused persons remain in the shelter of the dock and make all sorts of accusations against the prosecution’s witnesses are now

commonplace. The criminal element is not only well organized and well schooled but it is virtually in command, and law-abiding citizens are virtually at its mercy. The instant matter was yet another of those occasions where an accused person has made an allegation that police officers had framed a confession against him. But the appellant here went a step further. He made a most damaging accusing against the sole prosecution eye-witness, Morvin Brown. A more damning accusation there could not be. He in fact claimed that Morvin Brown, who (we were told) has since died, was the person who had murdered the deceased that day in his presence. He sought also to shake the credibility of the witness, despite the latter's denial, by attempting to call evidence (which the trial judge ruled, correctly in our view, to have been inadmissible) to show that he (i.e. Morvin Brown) had killed another on a previous occasion. That he would remain in the dock and make this monstrous accusation against Morvin Brown from there was, in our view, cowardly and an abuse of the legal process available to an accused person."

"We have alluded at length to *Henry's case* (1986) 40 WIR 313. We did so principally because the attorney for the appellant had invited the court to review it with particular reference to its observations in regard to a "statement from the dock". We welcome the invitation. It has afforded us an opportunity not only to endorse what the court said in that case, as we did earlier in this judgment, but it has also provided us with the opportunity to go a stage further. We think that as the highest court of the land locally, we would be remiss in our responsibility to the citizenry if, having regard to the numerous past experience, we failed to express the view, which we now do and strongly too, that Parliament should with the greatest urgency, consider the desirability of doing away with the procedure whereby an accused person is allowed to make a statement from the dock. The peace, welfare and safety of the citizenry are too important a price to continue to afford this ancient procedural luxury. We note that the procedure has since been abolished in England; see in this connection the Criminal Justice Act 1982, section 72, and see also *Archbold* (42nd edn) paragraph 4-399, pages 472, 473.

[See also *Henry –v-The State* [1986] 40 WIR 312].

CONCLUSION

- [22] I Share the view expressed in the aforementioned authorities that the unsworn statement from the dock was an "anomalous privilege," an "ancient procedural luxury," which was likely only to have benefited the guilty accused and which could prejudice the defence of an innocent accused person. The luxurious aspect

of the privilege, was the occasion of a guilty accused to get away with a story, the truth of which could not be tested in cross-examination, or to malign the character of a prosecution witness in his statement without question. The prejudicial aspect of it, is the innocent accused not having the truth of his defence fortified by withstanding the cross-examination of prosecuting Counsel.

[23] We see from this procedure, unfairness to the innocent accused and immoral legally clothed benefit to a guilty accused. It may be argued in this context, that the innocent accused may always choose to testify and therefore it would not be unfair to his trial if the unsworn statement from the dock procedure was left in the statute books. That may be so, but, because of its propensity for abuse of the process by a guilty accused, it is my view that, even though that option was preserved in the statute books and was ever present when the Constitution came into being, it could not have been in the contemplation of the framers of S9 of the Constitution, that such a procedure should be an element of the concept of fair trial. I cannot accept that such a privilege with all its unfair attributes could elevate itself to that of fundamental justice.

[24] The principles of fundamental justice must reflect a balance between the interests of society and the interests of an accused person. The first requirement of a sound body of law is that it should correspond with the actual feeling and demands of the community.

[25] I, like Bernard C.J. in *Bullock*, have seen abuse of this optional procedure by guilty accused persons.

[26] The concepts of a fair trial and/or the presumption of innocence, in my view, could never have contemplated giving a shielded lawful avenue to a guilty accused to speak untruths. Here I endorse the words of Bernard CJ in *Henry v The State* (1986) 40 WIR 313 at 337, "the right to (and insist upon) pure and unadulterated justice is not only the hallowed preserve of accused persons; it is also that of the alleged victims of the Criminal acts. The principle of fairness never was, nor was it

ever intended to be a one sided affair, or for that matter the inviolable sanctum of a few”.

[27] No one should be given the inviolable opportunity to be untruthful. That could never properly be a right given to a citizen by a Constitution. In my judgment therefore, the option to make an unsworn statement could never have formed part of the concepts of fair trial and/or the presumption of innocence as contemplated by S9 of the Constitution. The option was merely an anomalous privilege which any good government should abolish and which was abolished in Anguilla by the Act of 2000. This option never became a right under the Constitution of Anguilla. The Common Law rights of an accused person that were preserved by the Constitution are all set out in S9 thereof. This option is not mentioned therein and cannot be read into them, for the reasons aforementioned.

[28] For the above reasons, it is my considered opinion that the making of a statement from the Dock is more detrimental than beneficial to an accused honest defence. It could form no part of the fair trial concept. Its abolishment could in no way affect the hallowed doctrine of the presumption of innocence or shift a burden to an accused to prove anything. It is my view that the purpose of S31 of the Act was to preserve the integrity of the trial of an accused person by eliminating material which had little or no probative force but which could unduly prejudice the trier of fact against a complainant.

[29] Even if it could have been successfully argued that the option was a component part of the fair trial concept of S 9 of the Constitution, then for the reasons aforementioned, it is my view, that it should be removed from the Statutes Books. Because, it would have reflected an imbalance in favour of a guilty accused vis-à-vis the interests of society, that is, the peace, welfare and safety of the Citizenry of Anguilla. It would not have corresponded with the actual feeling and demands of the community. In my judgment therefore, its abolishment would have been reasonably justifiable in the democratic society of Anguilla should the

proportionality test be applied. [R v Oakes]. This ground of appeal is devoid of merit.

- [30] Learned Counsel for the appellants during his argument, expressed the opinion that instead of the trial judge deciding the issue on a preliminary objection, the matter being one involving an alleged fundamental right under the Constitution, that she should have heard the motion substantively where evidence could be had. I now address that issue.

THE NECESSITY FOR A FULL TRIAL:

- [31] Generally speaking, I do not disagree with this submission. It is my view, that where litigation involves the Constitution, it is always the better approach to have a full hearing, unless there were procedural defects which could be dealt with on a preliminary objection.
- [32] At the commencement of Mr. Astaphan's address to this Court, he submitted that he has no evidence to lead in this matter. However, at the close of his address, he made a *volte face* and advised that evidence could be led "to show where it is possible there was no disuse of the right to make the unsworn statement, that the right was not subject to abuse or was not an ineffective right and that it was not an impediment to a fair disposal of the trial." He could not tell us who could be the witnesses whom he felt had the expertise to give such evidence. In this context, I adopt what Bernard CJ said in *Bullock* that judges are best suited to know and appreciate the concerns and needs of society and its people and to advise on legal innovations which they consider best for the particular society.
- [33] I therefore do not see any useful purpose being served in sending the matter back for a substantive hearing. In my opinion, the issue in the substantive matter was fully ventilated before the trial judge.
- [34] However, whilst I will order that the appeal do stand dismissed and that the order of trial judge dismissing the motion be confirmed, I do not consider that the matter

was “an abuse of the process of the Court and/or otherwise was frivolous and/or vexatious.” Charles J seemed to have come to that conclusion because of the binding force she perceived in HAW TAU TAU. Such an order may not have been wrong if HAW TAU TAU was not challenged as to its applicability in this case because of different considerations. In my view, the motion was a legitimate challenge to the impugned legislation that needed ventilation before the Court. Also, it was represented to this Court that it was the trial judge who recommended the institution of the constitutional motion.

[35] The appeal is therefore dismissed. There will be no order as to costs. The respondent had cross-appealed on the Judge’s refusal of his costs in the Court below. The learned trial judge in making that order exercised her discretion for a sound reason stated therein. I do not propose interfering with that order, and for a similar reason, I have refused an order for costs in this Court. The cross-appeal therefore is also dismissed with no order as to costs.

Satrohan Singh
Justice of Appeal

I concur

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Sir Dennis Byron
Chief Justice

I concur

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Albert Redhead
Justice of Appeal