

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

**CLAIM NO. Criminal Case No. 5 of 2019
BETWEEN:**

THE QUEEN

AND

MAYBE RODRIGUEZ

RAFAEL LORENZO HARRIGAN

VERNON EDELL BERNARD

Appearances: Mrs. Kelli-Gai Smith, Principal Crown Counsel & Mr. Kristian Johnston, Crown Counsel for the Crown/Respondent
Mr. Michael Maduro & Mrs. Isis Potter, Counsel for the Defendant/Applicant - Rafael Harrigan

2022: March 10th

JUDGEMENT ON APPLICATION TO SEVER

- [1] **FLOYD J:** This is an application to sever the indictment, with the applicant, Rafael Harrigan, being tried alone, separate and apart from the other defendants, Maybe Rodriguez and Vernon Bernard. Learned Counsel for the applicant submits that it is impossible to receive a fair trial if he is not separated from the other two defendants. The prejudice against him is too great.
- [2] Notice of Application was filed on 8th March, 2022. Written submissions for the applicant were filed on 9th March, 2022. Oral submissions from both counsel for the applicant and counsel for the respondent were received on 9th March, 2022.

THE FACTS

- [3] On the night of 27th February 2018, Trumayne Daway was shot and killed at Brandywine Bay. His body was discovered inside a parked vehicle in the early morning hours of 28th February, 2018. Two vehicles were discovered on the beach at that time. A post mortem examination revealed multiple gunshot wounds to the body. One wound to the chest caused hemorrhaging and respiratory failure, resulting in death. The wounds were consistent with high velocity projectile injuries and eighteen cartridge cases were found littered about the area near the vehicle.
- [4] Briefly, the Crown's case, as I understand it, is that this was a planned murder, carried out by the defendant, Vernon Bernard, assisted by the applicant, Rafael Harrigan, and the defendant, Maybe Rodriguez. Mr. Bernard asked Ms. Rodriguez to take the deceased, Mr. Daway, to a prearranged location on the beach area at Brandywine Bay, where he was waiting. Mr. Bernard then shot and killed Mr. Daway with a high-powered firearm. The Crown's theory is that the applicant, Mr. Harrigan, was also present, in order to drive the other two defendants away from the scene after the shooting. It was a joint enterprise, with all three defendants involved and having a role to play.

THE POSITIONS OF THE PARTIES

- [5] Learned counsel for the applicant is concerned by a statement given to police by Ms. Rodriguez. It is a confession and is prejudicial to the applicant. Counsel for the applicant refers to and relies upon a number of authorities, in particular, the case of **R v Hayter**¹, which confirms the principle that an out of court confession by one defendant may not be used by the prosecution against a co-defendant. A voluntary out of court confession or admission against interest made by a defendant is an exception to the hearsay rule and is admissible against him or her. See **para 7** of the **Hayter** case, which goes on to confirm that a confession is generally inadmissible against any other person implicated in the confession. That case also confirms the rule of practice requiring a trial judge to direct the jury to ignore a confession made by an accused person in considering the case against a co-defendant. That is well settled.

¹ [2005] UKHL 6

- [6] Counsel for the applicant submits that such a direction would not be sufficient in this case to allay the prejudice to Mr. Harrigan. The trial court must undertake a balancing exercise to determine whether directions would suffice or whether the confession is so prejudicial to the applicant that his right to a fair trial is breached. In this case, a separate trial is the only fair result. Counsel for the applicant submits that there is no other evidence of a joint enterprise involving Mr. Harrigan.
- [7] In oral submissions, counsel for the applicant expanded his grounds of application to include photographs and WhatsApp messages from the phone of Ms. Rodriguez. Counsel also submitted that the trial court had the ability to order the editing of the confession statement of Ms. Rodriguez in the interests of justice, although he maintained the argument that a full severance of the applicant from the indictment was necessary. Counsel for the applicant gave the court no submissions or assistance as to what specific editing might be appropriate or acceptable to the applicant in this case.
- [8] In addition to the case law and precedent supporting applications to sever in the appropriate circumstances, Counsel for the applicant relied upon the **Indictments Act 1927** of the Virgin Islands, which gives the court the authority to order separate trials and to amend indictments, particularly in conjunction with **section 16 of the Virgin Islands Constitution Order 2007**, which enshrines the right to a fair hearing within a reasonable time and the presumption of innocence.
- [9] Learned counsel for the respondent filed no written submissions but submits orally that the case against the applicant involves more than the confession of Ms. Rodriguez. It includes photographs/videos found on the cellphone of Ms. Rodriguez, sent to her by the defendant, Mr. Bernard. The photographs were apparently taken at the residence of the applicant. One photograph is of a firearm. The photographs/videos show flooring and furniture found at the applicant's residence, although counsel for the applicant submits it is the residence of the applicant's grandmother.
- [10] Evidence from a witness near to the scene, confirms hearing a motor vehicle start up and observing three people dressed in black. The vehicle of the witness is then stolen from the same area of the murder. Fingerprint evidence also exists, linking the applicant to a motor vehicle found abandoned

at the scene. Another witness confirms picking up the defendant, Ms. Rodriguez, the day after the incident, from an address adjacent to the residence of the applicant.

- [11] In objecting to the application for severance, counsel for the respondent relied upon a number of authorities. There must be exceptional circumstances to support a case for severance. The general and accepted remedy to any prejudice to a defendant such as the applicant, is thorough and proper instructions from the trial judge to the jury as to the use that can be made of a confession statement. Counsel for the respondent did not support the use of editing, if it was to be ordered. The interests of justice demand that the evidence be viewed in its entirety.

THE LAW

- [12] In cases where the confession statement is the only evidence against a co-defendant, it must be excluded. This was made clear in the case of **Persad v Trinidad and Tobago**², referred to by counsel. In that way, it is distinguishable from the **Hayter** case. But that is not the situation in the case at bar. Here, the confession is not the only evidence against the applicant.
- [13] In the case of **Sheldon Bain v The Queen**³, a decision of the Eastern Caribbean Supreme Court, Court of Appeal, it was held that clear directions were given by the trial judge to consider the evidence of each accused separately. There were no exceptional circumstances to justify separate trials. Prejudice to the defendants was therefore overcome. That is in keeping with the procedure set out in the **Hayter** case.
- [14] The decision in the case of **The Queen and (1) David Poleon, (2) Kurt Modeste, (3) Danny Degazon, (4) Marvin Gabriel**⁴, from the High Court in St. Lucia, referred to the dicta of the learned Justice Redhead in **Michael Matthew Swayne David et al v The Queen**⁵, which in turn referred to the oft cited case of **Lobban v R**⁶, confirming the authority to order separate trials where warranted,

² [2007] UKPC 51

³ GDAHCRAP 2016/007

⁴ Claim No. SLUHCR2008/0060

⁵ Appeals Nos. 5 and 6 of 2002 (Grenada)

⁶ (1995) 2 AER 602

although the general practice was to have joint trials. The ultimate determination is the interests of justice and the particular facts of each case. The interests of the implicated co-defendant must be protected by explicit jury instructions from the trial judge. That is again in keeping with the **Hayter** case principles.

- [15] The **Lobban** case, which went from the Jamaican Court of Appeal to the Privy Council, also confirmed the established practice of, subject to the discretion of the trial judge, generally ordering joint trials for those charged with offences alleging joint criminal enterprise. It is interesting to note the reference in that case to a trial of alleged robbers and a getaway driver often being regarded as a classic case for a joint trial. The parallel to the facts in this case cannot help but be noted. The approach outlined is again in keeping with the **Hayter** case.
- [16] A local case, heard in this court in 2009, **The Queen v Ricky Terrence Powell**⁷, was also referred to by counsel. It mentions the common practice of joint trials, noting that it is only in very exceptional circumstances that separate trials should be ordered. Reference is made to the **Hayter** case and others. The court examined the dicta in the **Hayter** case, and noted at **para 6** and following, that it reaffirmed a long-accepted principle that joint trials are generally favoured.

ANALYSIS

- [17] Although a trial judge has the discretion to sever and order separate trials in the interests of justice, there are powerful public reasons why joint offences should be tried jointly. Those considerations include the avoidance of delay, costs, convenience and the prudent use of resources, including court time. Further, there is the perception that a just outcome is more likely to be reached in a joint trial rather than in separate trials. The maintenance of public confidence in the system of jury trials is important. Joint trials are generally in the public interest and are the norm. When objection is taken to this procedure, the response is usually that the trial judge will give appropriate directions and the matter will continue.

⁷ Claim No. BVIHCV2009/0162

- [18] **Archbold Criminal Pleading, Evidence and Practice 2015 edition at 1-247** and following, states that a severance order may be sought and may be granted where the court is of the opinion that a defendant may be prejudiced or embarrassed in his or her defence by reason of being charged jointly. Such discretion is wide but should be exercised carefully. Is a separate trial necessary in the interests of justice? That is the question. There is also a general desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. Otherwise, all sorts of inconsistencies could arise. Of particular note is **1-257** in **Archbold**, which confirms that it is accepted practice that a joint offence can be properly tried jointly, even though it will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that. The practice requires the trial judge to warn the jury that such evidence is not admissible as against a particular defendant. Of course, there can be exceptions, and each case must be considered on its own facts, but that is the generally accepted practice.
- [19] This does not appear to be an overly complicated case, nor is it expected to be inordinately long, with the Crown expecting to call approximately 20 plus witnesses. I have carefully reviewed the material filed in this application and listened to the submissions of counsel. I am satisfied, as I must be, that the confession of the defendant, Ms. Rodriguez, is admissible only as against her. However, I do not accept the applicant's position that there is no evidence linking the applicant to the incident. The photographs sent by Mr. Bernard to Ms. Rodriguez, apparently taken at the applicant's residence, especially as they depict a firearm, the evidence of the witness seeing three persons at a location near to the incident scene, the fingerprint of the applicant on the abandoned vehicle, and the evidence of Ms. Rodriguez being picked up at a location close to the applicant's residence, the day after the incident, are all relevant pieces of evidence which could potentially connect the applicant to the incident.
- [20] There is clearly a risk of prejudice to the applicant's case if the evidence of the confession of Ms. Rodriguez is placed into evidence but I am satisfied that it can be adequately and properly dealt with by an appropriate direction from the trial judge. I am further satisfied that any prejudice to the applicant is not unusually great nor exceptional, and it can be successfully dealt with in the appropriate direction to the jury, thus ensuring not only that any prejudice is dealt with, but the

multiple advantages of a single trial are maintained. The interests of the applicant and his defence can be protected, while the wider and general interests of having a single trial can also be maintained with strong and appropriate jury directions being given.

[21] As for the editing of the confession, I return to the **Lobban** case, where the Privy Council held that the substitution of letters of the alphabet for the name of Mr. Lobban would probably have set the jury on an irresistible trail of speculation. In my view, the editing of the confession statement of Ms. Rodriguez, with or without the substitution of letters for Mr. Harrigan's name, would leave gaps that would encourage jury speculation. The better and more appropriate approach is to allow the confession statement in and to give the jury a fulsome direction on the use to be made of that statement.

[22] As to the photographs and WhatsApp messages referred to orally by counsel for the applicant, I am not persuaded that they fall into the same category as the confession statement for the purposes of this application. To the extent that they are connected to the confession statement, I am satisfied that they can also be adequately dealt with by appropriate jury directions.

[23] For all of these reasons, the application for severance is hereby dismissed. Before closing, I wish to reiterate what I mentioned yesterday, that the appropriate time for applications such as this is in advance of the scheduled trial date, not to be filed on the day that the jury is to be selected. That is the reason we have extensive pre-trial appearances and case conferences. So that important procedures such as this are prioritized, with adequate time set aside for response, argument, hearing and consideration. I ask counsel to please bear this in mind in future.

Richard G. Floyd
High Court Judge

By the Court

Registrar