

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

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

CRIMINAL CASE No. BVIHCR 2019/16

BETWEEN:

THE QUEEN

and

SEAN MARTIN

Appearances: Mrs. Tiffany R. Scatliffe Esprit & Mr. Kristian Johnson for the Crown
Mrs. Valerie R. Gordon & Mr. Michael Maduro for the Defendant

2021: May 28th & 31st

RULING ON JURY IRREGULARITY HEARING

[1] **FLOYD J:** This is an inquiry into potential jury irregularity in the course of this trial. The Defendant is charged with murder contrary to section 148 of the Criminal Code 1997. The trial began on May 18, 2021. A jury of nine members was selected. This Juror Irregularity Hearing follows immediately after and relates to an earlier Juror Irregularity Hearing in this case.

THE FACTS

[2] This incident began on 27th May, 2021 when the court dealt with a Juror Irregularity Hearing involving Juror No. 4. That juror had been heard making disparaging remarks about police officers in the presence of other members of the jury. That led to a hearing with witnesses being called and Juror No. 4 being subjected to judicial questioning. For that questioning to be done properly and without alarming the remaining jurors, Juror No. 4 was carefully and discreetly isolated from the other jurors,

when the jury was dismissed for the day. Following that questioning, Juror No. 4 was released as well. It was necessary for Juror No. 4 to remain isolated from the other jury members until a ruling was made and I so directed.

- [3] On 28th May, 2021 the court reconvened and I commenced to give my ruling on the Jury Irregularity issue involving Juror No. 4. In the course of reading the decision, I became aware of some unrest in the courtroom and upon the conclusion of my decision, I was advised by the learned DPP that Juror No. 4 had in fact not been isolated from the jury that morning. She had been allowed to join the other jurors when they arrived. This was a most unfortunate turn of events. The issue should have been obvious to all concerned that, since Juror No. 4 had been isolated from the other jurors and subjected to questioning, she could not be allowed to rejoin them until a decision had been made as to whether she should be discharged. The risk of jury contamination was clear. The issue became even more problematic when the decision was made that Juror No. 4 should, in fact, be discharged.
- [4] Following my decision on the jury irregularity question and the subsequent discovery of Juror No. 4 being in the jury room with the other jurors, discussion and consultation took place between myself and counsel for the Crown and counsel for the defence, in open court. It was determined that another hearing should take place, so that the facts could be obtained and a determination made of what, if anything, had occurred in the jury room. Had Juror No. 4 discussed the questions she was asked and the concerns that were raised when she had been examined the day before? It was decided that each juror would be questioned under oath by me as to what, if anything, was said by juror No. 4 regarding the proceedings when she was questioned about the jury irregularity issue. As before, both Crown and Defence Counsel would be free to hand up written questions for my consideration and, if deemed appropriate, would be asked by myself.
- [5] Case law, references to Blackstone's and Archbold's, and a direction from Sir John Thomas, dated November, 2012 entitled Jury Irregularities in the Crown Court: Protocol Issued by the President of the Queen's Bench Division, were all considered again and were fresh in everyone's minds from the day before.

- [6] The court then proceeded to question each of the remaining jurors. As before, I conducted the questioning. I also received written questions from counsel, and upon review, if considered appropriate, they were posed by me.
- [7] In the end, little or no evidence of any significance was obtained. Each juror spoke about being present in the jury room with Juror No. 4 that morning.
- [8] Juror No. 18 testified that Juror No. 4 said to be quiet and speak in a low voice in the jury room. Be mindful of what you say inside the jury room and elsewhere.
- [9] Juror No. 20 testified that Juror No. 4 said to speak in low tones and not to be loud in the jury room. Juror No. 4 said that something had happened when they were all together in the presence of the police officers. Juror No. 20 knew what she was talking about. Juror No. 4 said that she had been asked some questions about that.
- [10] Juror No. 21 testified that juror No. 4 said that she had been called as a witness yesterday. It was in relation to when the jury was on the safari bus and she gave a general statement regarding police officers. Juror No. 4 was upset and did not want to talk about it.
- [11] Juror No. 31 said that Juror No. 4 had talked about something happening on the bus on the way to view the scene. Juror No. 31 often wears earphones and therefore was not aware of anything else said by Juror No. 4.
- [12] Juror No. 11 testified that Juror No. 4 said something about an incident on the bus. However, Juror No. 11 was not feeling well and was therefore asleep for much of the morning.
- [13] Juror No. 2 said that Juror No. 4 spoke about a need to be quiet and be careful about what they said. After that, Juror No. 2 had her headphones on and heard nothing more.
- [14] Juror No. 25 said that Juror No. 4 had spoken about being held back yesterday. She had been asked some questions about something that happened on the bus. No further details were given.

- [15] Juror No. 9 testified that Juror No. 4 said that when they all left yesterday, she was held back. Juror No. 4 had been asked questions about what was said on the bus. One of the officers had reported her. Juror No. 4 was not pleased. She was upset. However, no more details were given and the topic of conversation was changed.

The Position of the Parties

- [16] The learned DPP referred to **Blackstone's Criminal Practice 2021, Part D, Ch. D13.57** and the considerations regarding the discharge of an entire jury. There must be a high degree of evident necessity based upon some form of misconduct. What happened in this case was unfortunate but there is no evidence of contamination of the remaining jurors. None appear to have knowledge of the questions asked of Juror No. 4. If the incident on the bus was discussed, it does not create a problem or raise a concern because all of the jurors were present on the bus when that happened, in any event.
- [17] The DPP also made reference to **Archbold's Criminal Pleading Evidence and Practice 2021 Ed., Ch. 4, Part VII, s. 4-313**. The test for bias must be applied to the circumstances as they are known. Further, when considering exercising the discretion to discharge the jury, the judge may also have regard to background factors such as convenience and cost. Overall, is there a real risk of impartiality justifying the discharge of the jury? The submission of the Crown was that there was not.
- [18] In her submissions, learned counsel for the Defendant agreed with the DPP. There has been no contamination of the remaining eight jurors. Nothing untoward took place. There is no cause for the jury to be discharged.

THE LAW

- [19] The procedure to be followed in dealing with jury irregularities is set out in the Privy Council case of **Bonnett Taylor v The Queen, [2013] UKPC 8** and the direction document dated November, 2012 entitled **Jury Irregularities in the Crown Court: A Protocol Issued by the President of the**

Queen's Bench Division. When an irregularity is brought to the attention of the trial judge, the following is a distillation of the steps to be followed in open court:

- (1) Consult with the lawyers and invite submissions.
- (2) Establish the facts.
- (3) Question witnesses, especially the juror(s) concerned.
- (4) Invite further submissions.
- (5) Determine what to do with the juror, the jury and the trial itself.

[20] Just as in the first Jury Irregularity Hearing in this case, I am again satisfied that the correct procedure has been followed. I am further satisfied that the proceedings have been fair. There has been no prejudice to either party and in particular, to the Defendant. It is essential that he receives a fair trial and that his rights are preserved.

[21] Trial by jury is the very heart and soul of our criminal justice system. The process must be upheld and enshrined. It is for that reason that the utmost care and attention must be given to any allegations of irregularity in the process. Jurors must remain scrupulously unbiased, independent and unaffected by any outside or inappropriate contact, interest, view or belief. The system demands nothing less. It is only when the juror in question or the entire jury has presented sufficient reason to interfere with the course of the trial, that the court will take action. Such action may take different forms. A stern reminder of the juror's affirmation and her obligations according to that affirmation may be given. The juror may be discharged and the trial continued with a reduced number, according to statute and precedent. At the extreme end of action to be taken, the jury may be discharged as a whole and the trial re-listed.

[22] The nature and seriousness of the irregularity must be considered. Jurors are expected to abide by their oath or affirmation to try the case according to the evidence. When considering this, the court must bear in mind whether a fair minded, reasonable person would conclude there was a real possibility or a real danger that the juror(s) would be biased (see **Archbold's Criminal Pleading Evidence and Practice 2021 Ed. Ch. 4, Part VII, Section J**).

- [23] Jury irregularities are dealt with in generally similar fashions in other jurisdictions. Australian authorities indicate that the test is one of reasonable apprehension of bias or reasonable suspicion of impartiality. Notwithstanding a warning from the judge, does the situation raise a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public, that the juror(s) will not act impartially?
- [24] Canadian authorities raise the question of whether the irregularity taints the administration of justice. Is there actual prejudice to the defendant? Can the juror(s) remain manifestly impartial and true to their oath or affirmation?
- [25] British authorities have directed the judge to consider whether there is a real danger of bias on the part of the jurors. Would they unfairly regard with favour or disfavour the case of one of the parties?

ANALYSIS

- [26] After reviewing all of the material filed, receiving the evidence of the witnesses called, and upon hearing the submissions of counsel, what follows is my decision in this Application.
- [27] In reviewing the evidence of the eight jurors concerning their interaction with Juror No. 4 in the jury room on 28th May, 2021 I can find no cause for concern. Taken at its highest, Juror No. 4 spoke about being held back at the end of the day and then being asked questions about something that had happened on the bus on the way to the scene view. No details regarding the nature or specifics of the questions were given. The incident that she was questioned about took place in the presence of all of the jury members. It was known to all of the jury members. The lack of detail about the questions asked and the entire proceeding reassures me. I can find nothing upon which to ground any finding of bias on the part of any of the remaining jurors. None of those jurors have misconducted themselves and nothing provides an indication of an inability to act impartially. I can see nothing in what happened here that could deprive this defendant of a fair trial and a fair jury deliberation as set out in the case of **S [2009] EWCA Crim 104**, which is referred to in **Blackstone's Criminal Practice 2021, Part D, Ch. D13 at D13.54**.

- [28] The discharge of a jury is an extreme step and not to be taken lightly. It is a matter of discretion and I am guided by **Blackstone's Criminal Practice 2021, Part D, Ch. D13, s. D13.57** wherein it is noted that "a jury should not be discharged unless an evident necessity for it has arisen." The passage goes further and indicates that a jury should not be discharged "unless a high degree of need for it arises." In this case, the evidence falls well short of that.
- [29] I am reminded that when considering reasonable suspicion of bias, I must bear in mind that justice must not only be done but be seen to be done. Therefore, I must further consider what an outside observer, a reasonable, fair-minded person, would make of this situation and background. In doing so, I find that a reasonable apprehension of bias or impartiality does not arise in this case.
- [30] For all of those reasons, I am satisfied that no irregularity has been made out on the part of any of the remaining eight jurors. I am further satisfied that no action need be taken. The appropriate course of action is to continue this trial with a reduced jury, consisting of eight members. A new foreperson will have to be selected by the remaining jury members.
- [31] I note that **s. 33** of the **Jury Act, CAP 36**, refers to juries of eight in situations where a juror becomes unable to continue serving, although that is in reference to so called non-capital charges (that is a reflection on the age of this legislation). Therefore, it appears that the Act allows for a trial to be conducted with less than nine jurors. I am also informed by counsel for both the Crown and Defence, with reference to local cases that confirm it, that trials in the High Court have indeed carried on with eight jurors in this Territory. All of that gives me comfort in proceeding with this trial, albeit with a jury composed of eight members.
- [32] For all of these reasons this trial shall continue with a jury composed of eight members.

Richard G. Floyd
High Court Judge

By the Court

Registrar