

**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 26th, 27th & 28th

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 18th May, 2021. A jury of nine members was selected. Juror No. 4, A.H., became the foreperson.

THE FACTS

[2] This incident began on 25th May, 2021 when the court attended upon a view of a location relevant to the case. On 26th May, 2021, when the court resumed sitting after the lunch recess, the Director of Public Prosecutions (DPP), Mrs. Scatliffe Esprit, advised the court, in the presence of the Defendant and his counsel but in the absence of the jury, that she had been approached by a Police Officer, APO Etienne, over the recess. APO Etienne was one of two court officers assigned to the jury.

The DPP indicated that an incident involving the jury had been reported to her. Juror No. 4 had been heard making disparaging remarks about police officers in the presence of other members of the jury. A second court officer, P/C Joseph, had also been present and heard the comments.

- [3] Discussion and consultation then took place between myself and counsel for the Crown and counsel for the defence, again in open court. It was determined that a hearing should take place so that the facts could be obtained and a determination made of what exactly had taken place. Written statements were to be provided to the court and to the defence from the two police witnesses. Those officers would be questioned under oath by myself in the presence of counsel. Following that, Juror No. 4 would be questioned by me under oath. 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.
- [4] 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 submitted by the Learned DPP to the Court and to Defence Counsel later that day. Two printed statements from APO Ettienne and P/C Joseph were submitted electronically that evening by the DPP to the court and Defence Counsel.
- [5] On the morning of 27th May, 2021, the court reconvened. The jury was brought in but almost immediately dismissed for the day, being advised that there were matters that needed to be determined by counsel and the court in their absence, and this would take some time. The Bailiff was tasked with discreetly contacting Juror No. 4 and isolating her from the other jurors, so as not to alarm the jury nor raise any concerns or suspicions on their part.
- [6] P/C Joseph testified that on 25th May, 2021 at 14:10, while in the bus awaiting transport to the scene of the view, Juror No. 4 looked at another police officer nearby, who was in uniform and was dealing with his police vehicle, and said, "That's all them good for." He then heard APO Ettienne ask Juror No. 4 if she was "anti-police?" He heard Juror No. 4 reply that "It is not all, only some" and it was "(her) opinion." The comments of Juror No. 4 were made in the presence of the entire jury and the two escorting officers. The bus was small and everyone was in close quarters. The comments elicited some laughter from other jurors. P/C Joseph said the comments were made "with a little bit

of attitude.” He explained that it was as though the officer referred to in the comments was being looked down upon.

[7] APO Ettienne testified that on 25th May, 2021 between 2:00 p.m. and 2:30 p.m., all of the jurors were in the bus awaiting transport to the view location. She and P/C Joseph were present. She saw another officer, P/C Ramprashad, dealing with his vehicle trunk area and heard another juror comment about the small size of the rear area of the vehicle. She then heard Juror No. 4 say “That is all they are good for. No use.” Another juror directed the attention of Juror No. 4 to APO Ettienne, whereupon Juror No. 4 looked towards APO Ettienne and began to laugh. APO Ettienne then said to Juror No. 4 “I expect better from you. You are anti-police.” Juror No. 4 replied, “I didn’t say all police officers. Is some.” Juror No. 4 went on to say, “It’s my opinion.” All of the jurors and the two officers were present on the bus in close quarters. According to APO Ettienne, the words were spoken, not in a mild tone, but “with passion.” APO Ettienne consulted with P/C Joseph when they arrived at the view location to confirm what he had heard. APO Ettienne reported the incident to the DPP on 26th May, 2021. The comments caused her to be concerned that Juror No. 4 would not act fairly in the case, especially considering that she held the position of foreperson.

[8] Juror No. 4 was questioned by me, just as the two police officers were earlier. I received written questions from Counsel for both the Crown and Defence for each witness, and upon review, if considered appropriate, they were posed by me. Juror No. 4 recalled being in the bus awaiting transport to the view location. All jurors were present, along with two officers. Juror No. 4 became aware that the female officer (APO Ettienne) was offended by something she had said. Juror No. 4 indicated that she had said that “Some officers liked to show off.” She heard the officer mumbling and becoming upset, so she said “Not you officer, we are all good.” Juror No. 4 said she was speaking based upon her own experiences with police officers in the past. She attempted to clarify her words by saying that she had said “Some officers like to show off themselves or like attention. Something along those lines. It was not directed at any specific officer.” She said she has been in situations where officers have used too much authority. Juror No. 4 said no one discussed her comments with her. Other than a brief statement from the female officer, “Yourself madam foreperson”, that officer did not speak to her about what she said. That prompted a response from Juror No. 4 of “Not you officer” or “I am not referring to you officer.” And then “We are all good.” She

had no recollection of the officer asking if she was anti-police. She went on to say that she was not anti-police. She had family members who were police officers in other jurisdictions and she had friends who were police officers in this Territory. She admitted that she did say that it was “her opinion”, referring to what she said about police showing off. Juror No. 4 went on to say that she held no bias nor malice towards police. She respected the police and the jobs they do. She said that what happened would not hinder her from doing her job as a juror and upholding her affirmation. She had no intention of offending anyone.

[9] Juror No. 4 described an incident where she saw police being aggressive towards a person. They used too much force and could have handled the situation better. This occurred in this Territory sometime between 2017 and 2019. In her attempt to deal with concerns about her attitude towards police, she named a specific officer who is a friend of hers, Brad Remy. She said she has other police friends in this Territory. She also has family members who are police officers in other jurisdictions. In attempting to confirm her understanding of the seriousness of this case and the importance of her juror’s oath, she referred to having lost someone close to her by way of murder. It appeared to be a family member or a loved one that had been murdered.

[10] Juror No. 4 offered an apology. If her comments had offended anyone. That was not her intention.

THE POSITION OF THE PARTIES

[11] To her credit, the learned DPP indicated in submissions following the witness testimony, that Brad Remy was actually a member of the Major Crime Unit and had previously been a member of the Special Investigations Unit (SIU). Although he was not involved in this case, the Major Crime Unit was the investigating police section in this case. That was a concern. The DPP went on to say that she had further concerns with this juror’s ability to continue, given her candid indication that someone close to her had been a murder victim. Finally, the DPP also indicated that, based upon case law, including **Sander v UK [2000] Crim LR 767**, an apology may not be sufficient to dispel concerns about comments or actions of a juror directed towards a particular group of people. It displays a lack of empathy and understanding that could impair the ability of a juror to uphold her oath or affirmation.

Learned Defence Counsel concurred with the submissions of the DPP. She shared the concerns of the DPP.

- [12] Written submissions from the DPP were provided to the court later on 27th May, 2021, although regrettably, they did not reach me until the morning of 28th May, 2021. It is the Crown's position that, based upon the words spoken by Juror No. 4 and her evidence, a perception of bias or prejudice on the part of Juror No. 4 exists. The learned DPP submits that it may be best to discharge Juror No. 4 and continue the trial with a jury of eight. She relies upon s. 33 of the **Jury Act, CAP 36** for that procedure.

THE LAW

- [13] 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.
- [14] In this case, I am 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.
- [15] 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 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.

- [16] 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 would be biased (see **Archbold's Criminal Pleading Evidence and Practice 2021**¹).
- [17] 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 will not act impartially?
- [18] Canadian authorities raise the question of whether the irregularity taints the administration of justice. Is there actual prejudice to the defendant? Can the juror remain manifestly impartial and true to her oath or affirmation?
- [19] British authorities have directed the judge to consider whether there is a real danger of bias on the part of the juror. Would she unfairly regard with favour or disfavour the case of one of the parties?

¹ 2021 Ed. Ch. 4, Part VII, Section J

ANALYSIS

- [20] After reviewing all of the material filed, receiving the evidence of the witnesses called, especially juror No. 4 herself, and upon hearing the submissions of counsel, what follows is my decision in this Application.
- [21] In dealing with the irregularity that precipitated this inquiry, that being the comments made in the transport vehicle regarding police, I have concerns. Both police witnesses were clear in what they heard Juror No. 4 say. The comments were described as being said with passion and attitude. That tone, combined with the words themselves, indicated juror No. 4 held police in disfavour. Both officers confirmed the words spoken, however, Juror No. 4 recalled her comments differently. Her description of the words she used was far less severe. That difference causes me concern. I accept the evidence of the officers as to what they heard said by Juror No. 4. There is nothing to be gained by either officer raising the issue to begin with, nor in presenting anything other than what they heard. The upset the words caused to APO Ettienne was confirmed by Juror No. 4 herself. She knew that officer was upset by her words. That accords with the evidence of APO Ettienne. That upset caused the officer to raise the issue with the DPP. Juror No. 4 was unable to articulate why she would have been discussing police officers showing off or seeking attention, if that is what she said. The two officers were, however, able to relate the words they heard to the observations made by Juror No. 4 of nearby Officer Ramprashad. I accept the words spoken by Juror No. 4 were those described by APO Ettienne and P/C Joseph.
- [22] The words spoken by Juror No. 4 give me pause. I find that those words indicate a bias towards a particular group, that being police officers. That is a concern as, obviously in a criminal trial, police witnesses will be testifying. I question, therefore, whether Juror No. 4 would be able to coldly and dispassionately receive and consider the evidence of police witnesses, as she has sworn or affirmed to do. By speaking those words, I find that Juror No. 4 has misconducted herself and that misconduct indicates an inability to act impartially. I am concerned, therefore, that the presence of Juror No. 4 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**².

² Part D, Ch. D13 at D13.54

- [23] To go further and beyond the irregularity referred to in this hearing, I am also concerned by the information that Juror No. 4 was candid enough to share in her testimony. Her friendships with police officers stationed in this Territory, in particular, Brad Remy who, although not connected to this case, serves in the unit that investigated this case, could impact her ability to carry out her sworn oath or juror affirmation. I also note her comments about the tragic murder of someone close to her. That could also impact her ability to carry out her juror oath or affirmation. Obviously, acting as a jury foreperson in a murder case when someone close to you has been a murder victim, raises potentially serious issues and concerns. The potential for bias and a lack of impartiality is clear. That would significantly impair the Defendant's right to a fair trial.
- [24] 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 would inevitably flow from all of the concerns raised. That includes the comments attributed to Juror No. 4, her friendships with police officers in this Territory and her unfortunate loss of a loved one by way of murder. Even if there was no actual bias, the perception that it exists is clear. That cannot be allowed if the fairness of this trial is to be upheld.
- [25] For all of those reasons, I am satisfied that an irregularity has been made out on the part of Juror No. 4. I am further satisfied that action must be taken. A stern reminder of the oath or affirmation of Juror No. 4 would be insufficient. The appropriate course of action is to discharge Juror No. 4 and continue the trial with a reduced jury, consisting of eight members. A new foreperson will have to be selected by the remaining jury members. I also find that given the roles played by APO Etienne and P/C Joseph in this incident, they should be replaced as Court Officers in this case. That is not due to any fault on their part. There is no cause to think those officers did anything but conduct themselves properly and in the best traditions of the police service. However, as I referred to earlier, the proper perception and appearance of proceedings in this case must be maintained. Justice must not only be done but be seen to be done.

[26] 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.

[27] For all of these reasons, Juror No. 4 is hereby discharged. This trial shall continue with a jury composed of eight members.

Richard G. Floyd
High Court Judge

By the Court

Registrar