

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE NO. ANUHCR 2013/0090

REGINA

V

HEZIKIAH PARKER & KAREEM GARDNER

APPEARANCES

Mr Adlai Smith for the Crown.

Mr Sherfield Bowen for the defendant Parker.

Mr Lawrence Daniels for the defendant Gardner.

2017: FEBRUARY 13

RULING

On prosecution application to amend the indictment

- 1 **Morley J:** The Court is asked to rule on whether the prosecution may have leave to amend an indictment charging a count of 'conspiracy to murder' to a count of 'kidnapping'.
- 2 The reason for the application is the complainant, Titus Rolle, will no longer pursue the allegation, so that the conspiracy to murder will fail. The prosecution still want to pursue these two defendants and are of the view they will succeed on kidnapping if presented as a circumstantial case.

3 The incident took place on 18.08.11, now 5.5 years ago. Four were charged: Kerry Oliver, Hezekiah Parker, Kareem Gardner, and Baah Bastiani. Committal from the Magistrates Court was on 10.05.12. The case was indicted as conspiracy to murder by the ODPP and filed before the High Court for trial on 01.05.15. In October 2016, when due for trial, the complainant, who had by then been deported elsewhere, refused to cooperate. On 20.01.17, the prosecution offered no evidence as against Oliver and Bastiani, and applied to amend to kidnapping as against Parker and Gardner. Argument has been heard during an hour on each of 24.01.17, 25.01.17 and 31.01.17 and 02.02.17.

4 The court has the power to allow amendment in the following terms under s6(1) of the *Indictments Act 1927* [cap213].

Where, before trial...it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice.

5 It follows that the Court will look:

- a. to whether the indictment is defective,
- b. to the merits of the case,
- c. to whether the amendment meets the circumstances of the case,
- d. and to whether amendment cannot be made without injustice.

6 The terms of the section say that, if the indictment is defective, the Court '*shall* order amendment... *unless...*', so that the burden is on the defence to show injustice, which the Court assesses is on a balance of probabilities.

7 The question then is, have the defence shown injustice probably arises.

The allegation in outline

- 8 Titus Rolle made a statement on 18.08.11 that on around 31.07.11 as a local drug dealer he had bought 'weed' from Bastiani, paid EC\$1700 and owed EC\$3500. He was not paid by his customers, continued to owe money, and so on 18.08.11 he was approached by Bastiaini, got in his blue Corolla, and they went to a location where they met the other three defendants in a silver Corolla. There, Parker was driving, Gardner was in the front seat, and Rolle sat between Bastiani and Oliver. They set off for Pares, Parker and Bastiani pulled out guns, and warned Rolle he had to find the money or they would kill him. Near Mountjoy, he was taken out of the car and tied up, and struck across the face by Parker with the gun, causing a wound. He was taken to the basement of a house, his feet were tied, he was gagged, and a plastic bag was placed over his head so that he could not breathe and twice nearly passed out. The four began talking of killing him to avoid him making a police complaint which would mean a return for them to jail. They settled on taking him to Burma quarry, but there were workmen, so they drove elsewhere. Gardner was tasked by Parker to do the killing, and Rolle was allowed to call a friend for the money, who was in Cedar Valley, but he had none. Bastiani and Oliver left on other business in a green Suzuki jeep, while Rolle remained with Parker and Gardner. At Cedar Valley, Parker got out, telling Gardner to continue driving Rolle around. Gardner approached a man in New Winthorpes, asking for 'weed' and he got out of the car to help cut it up. While Gardner was briefly away, Rolle, whose hands were still tied behind his back, used his foot to undo the lock on the door, and escaped.
- 9 Rolle was found by an Adventist Church elder, his hands still tied, police were called, and he went to the police station, where his mother observed him to be frightened with a plaster on his face, and dirty, in a state. In interview, Gardner eventually said they had gone to the quarry with Rolle, he had been with Parker who had told him to kill Rolle, and Bastiani and Parker had had guns (though as a co-defendant interview, it is well established in law that this is not evidence against Parker). Parker said Rolle had asked to be tied up to create a ruse to persuade a friend to give him the money owed to Bastiani, and had run off when the ruse failed.
- 10 At this stage, the Court notes:

- a. The prosecution have said they will not be applying to have Rolle's statement read into evidence, he will not be a witness, and there will be no reference to what he said in his statement – instead, the case which will be offered to prove kidnap will rely on how Rolle appeared on escape, with his hands tied, and to his mother, and what was said by Parker and Gardner in interview.
- b. And, as brought to the Court's attention by the defence, on 14.10.16, which is the timing of the aborted trial, there is a facebook entry by Rolle that says: '*time to release Hezekiah Junior Parker, there was never a case and it will never be a case*'.

Is the indictment defective?

- 11 The first question is, is the indictment defective?
- 12 On its face, there is nothing wrong with it. The count of conspiracy to murder is properly pleaded. The count does not require tinkering as to its statement or particulars.
- 13 It is not the *indictment* which is defective but the *evidence*. What has happened is that the original case to be presented has become defective by reason of losing Rolle, in the sense that the prosecution now cannot succeed on the count. The 'defect' is that the trial on conspiracy to murder cannot be run. On the current indictment, the prosecution have conceded they must offer no evidence. To run anything as a trial from the evidence left over requires a change of count. The case must now be presented differently. The defect on the count is the prosecution will lose.
- 14 Therefore, what is contemplated as amendment is not perfection of the existing count, but substitution of a new count, meaning a new offence and different type of trial. In *Conliffe v Weekes* 1963 5WIR 180, Stoby CJ said on page 183, that 'an amendment at a late stage which substitutes a different offence from the one charged is seldom permissible.'
- 15 It follows the prosecution application here is one which is *seldom permissible*.

The Committal

- 16 In answer, the prosecution point to how the defendants were originally charged with kidnapping, along with conspiracy to murder, so that the proposed count cannot be a surprise, and is therefore not unjust.
- 17 However, two matters arise:
- a. First, the prosecution chose, specifically on settling the indictment to be tried at the High Court, as filed on 01.05.15, not to pursue kidnapping. Instead it set out to prove the more onerous count of conspiracy to murder, in which proof would be needed that there was an agreement to kill Rolle, notwithstanding Parker, Bastiani and Oliver all left his company, as distinct from merely to frighten Rolle by saying in his presence that he would be killed in order to get him to pay up. As such, the approach of the defence in defending the allegation would have meant different trial preparation for the aborted trial of October 2016 than for kidnapping. For kidnapping, if Rolle was giving evidence, then it is plain that different features in the evidence would be emphasized. Moreover, as he is not, other features take on an even greater significance than previously contemplated, like the evidence of the church elder, the officer who helps Rolle, and his mother. This means that the application to try kidnapping means, as contemplated above and here repeated, an altogether different trial. The defence suggest that such a late change of trial issue, 5.5 years from the event, is *ipso facto* unjust.
 - b. Second, in no longer pursuing conspiracy to murder, the prosecution have dropped two defendants out, namely Oliver and Bastiani, against whom no evidence has been offered so that verdicts of 'not guilty' have been recorded against them. This further emphasizes that the contemplated trial on kidnapping will be very different to the originally contemplated trial on conspiracy to murder, as it will involve fewer defendants and less evidence.
- 18 There has been much discussion on whether the four defendants were committed from the Magistrates Court for trial on kidnapping in addition to conspiracy to murder. The original paperwork for 10.05.12 shows a committal only for conspiracy for murder. Adjusted paperwork from the Magistrates Court on 01.02.17 purports to show a committal for kidnapping and an assault with felony intent, as being committed to the High Court on 05.06.14, as against

Parker, Gardner, Bastiani and someone called 'Joseph James'. There has been private oral report to the Court by the Chief Magistrate that the usual procedure is to announce orally in court all the counts which are committed, but that often only the most serious is recorded in the paperwork (which is a practice which will now change).

- 19 However, for the purposes of the argument, it is not necessary to determine whether there was a committal for kidnapping, as a finding either way will not be definitive of whether injustice arises. This is because the present application to amend remains late, after a previous listed trial, 5.5 years after the event, contemplating different emphasis on the evidence, less evidence, against a different number of defendants, on a different count to the one indicted, and which should be 'seldom permitted', none of which is automatically cured by whether kidnapping was committed.

The merits of the proposed case

- 20 Assessment of whether to permit the amendment expressly allows the Court to inquire into 'the merits of the case', which the Court interprets to mean that the Court may look at the available evidence to see whether the proposed case on what is left over has merit.
- a. On the one hand, what was alleged by Rolle was very serious indeed, and there is a public interest in pursuing the defendants. Crown Counsel Mr Smith has reported to the Court that he has received as part of his original trial preparation text messages from Rolle, before he withdrew, persuading him of the truth of his statement, so that the Court observes that for Mr Smith it is partly a matter of personal conviction to bring the defendants to justice.
 - b. On the other hand, the personal conviction of counsel cannot be the yardstick for assessing the public interest, which instead requires a dispassionate analysis of the merits of what is left over, where, though a serious case, it cannot be ignored that Rolle has withdrawn.
 - c. Moreover, in a facebook post, it appears that Rolle says there was 'never a case'. This may be consistent with Parker saying in interview that tying Rolle's hands with a belt was a ruse. The absence of Rolle from the trial now means that the defence are theoretically

prevented from establishing he would agree there was a ruse, as his facebook may suggest (notwithstanding the prosecution may cross-examine him as hostile in the face of his statement).

- d. In addition, the defence of Parker and Gardner no longer have the potential support for a ruse from the now absent co-defendants Bastiani and Oliver. This is because, while they may nevertheless be summonsable and compellable to give evidence, once in the witness box they may be warned against self-incrimination in light of Gardner's interview and what is known to have been said by, but cannot be led from, the absent Rolle, so that they would be right not to give evidence, the effect of which warning occurring in the presence of the jury would be greatly to damage the defendants' case.
- e. Finally, the Court pauses to ask this question: in this case, just who is the accuser to whom the defendants must answer, where there is no complainant?

21 Moreover, the Court is troubled by how the contemplated prosecution must rely heavily on the interviews of the defendants to incriminate themselves. In Parker's case, while he associates himself with Rolle being tied up, as mentioned above the absence of Rolle then undermines his ability to show a ruse, as he states in the very interview being relied upon to incriminate him. In Gardner's case, his interview is impermissibly damaging to Parker, begging the question whether Parker should be tried separately. Gardner claims to have been present but dissociated and frightened, which will be potentially difficult to establish if the jury do not see Oliver and Bastiani, and perhaps Parker (separately tried), to weigh the merits of Gardner's situation.

22 Alternatively, if the prosecution were to edit the interviews and concede admission of the Rolle facebook page as the truth of its content, it is difficult to see how the case will survive a submission of no case to answer.

23 In short, the merits of the proposed case are at best unclear and at worst the proposed case probably creates unfairness.

The circumstances of the case

- 24 Turning to allowing the amendment 'to meet the circumstances of the case', the Court appreciates that it is a circumstance that the original allegation was very serious. However, it is also circumstance that Rolle has withdrawn, his statement will not be relied upon, and he has hinted on facebook that there was never a case. These three new circumstances supersede the original circumstance. The original allegation has 'died'. This case cannot be approached on the basis it ought somehow to 'survive'. Dispassionate assessment of what is left over is needed.
- 25 What is left over is:
- a. Regarding Parker, the height of the case is there was a man found with his hands tied behind his back, in a state, and where Parker says there was a ruse. This is a less fearsome case, and therefore may be more readily discontinued so long after the event.
 - b. Regarding Gardner, the height of the case is there was a man found with his hands tied behind his back, in a state, and where Gardner says he was told to kill him by Parker, who with Bastiani each had guns. This remains a fearsome case.
- 26 The Court has therefore considered whether Gardner could be tried alone on the kidnapping, but is troubled by how the evidence in his interview (ignoring what Rolle said in his statement) suggests Gardner is the least involved, (and arguably merely present but not involved), suggesting an unfairness to the mind of reasonable third party observer that the least involved on what is left over is the only one of four prosecuted.

Conclusion

- 27 Weighing the merits of the proposed case, these are at best unclear and at worst unfairness probably arises, so that merit is probably lacking. Weighing the circumstances, these have changed, so that unfairness probably arises in pursuing Parker on a lesser allegation so long after the event, and then in pursuing Gardner alone. The amendment sought is one which should be 'seldom permissible'. The case is 5.5 years old, two defendants have been discontinued, a different case is contemplated, to try and get someone convicted of something,

where the complainant is not interested, and appears to have said there was never a case. In all these circumstances the Court finds on balance it would be unjust to allow the amendment.

- 28 Notwithstanding sterling efforts by Crown Counsel, the application to amend the indictment from 'conspiracy to murder' to 'kidnapping' is refused. Cases like this one which take so long to come on for trial become vulnerable to failing. Efforts must be redoubled to clear the backlog and to bring cases on in a reasonable timeframe, as justice delayed is justice denied.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

13 February 2017