

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

IN THE HIGH COURT OF JUSTICE

Criminal Case 31 of 2009

BETWEEN:

THE QUEEN

Applicant

And

ANDRE PENN

Respondent

Appearances:

Lord Anthony Gifford QC for the Applicant

Mr. Wayne L. Rajbansie, Director of Public Prosecutions with him Mr. Valston Graham for the Crown

2013: November 19, 20, 22

RULING

[1] **Persad J.:** The Applicant has before the Court of Appeal proceedings which purport to be an Application pursuant to Section 8 of the Criminal Appeal Act 1968 (UK). This provision allows for an Accused person who has had a retrial order made in his favor to have his arraignment within two months of the Retrial Order.

[2] Where no arraignment takes place within two months, the Accused person now accrues an entitlement to apply to the Court of Appeal to have that court direct the High Court to enter a verdict of acquittal on behalf of the Accused. At the same time these provisions allow the Director of Public Prosecutions an entitlement to

apply to the Court of Appeal to have the Accused person arraigned outside of the two month period.

- [3] It is accepted that the provisions found in the UK Criminal Appeal Act 1968 are not on the face of it part of any written law within this jurisdiction. The Applicant accepts that it is disputed whether the provisions of Section 7 and 8 of the UK Criminal Appeal Act 1968 forms part of the law of the British Virgin Islands.
- [4] The Applicant seeks to persuade this Court that if these provisions apply then the Applicant is entitled to press the Court of Appeal to rule on this Application, further in those circumstances this Court should not proceed to hear the retrial and seek to arraign the prisoner since it would be illegal, unjust and oppressive to arraign this prisoner without the leave of the Court of Appeal.
- [5] The critical issue for this Court to determine is whether the provisions of Sections 7 and 8 of UK Criminal Appeal Act 1968 as amended apply to the current law of the British Virgin Islands. If it does then this Court should allow the Applicant an opportunity to have his hearing in the Court of Appeal and have his application determined. If on the other hand this court takes the view that the UK Criminal Appeal Act 1968 as amended does not apply in this jurisdiction then this court should proceed to arraign the prisoner and proceed to trial.

Does Section 7 and 8 UK Criminal Appeal Act 1968 (as amended) apply to this jurisdiction?

- [6] Lord Gifford QC for the Applicant relies on a number of Sections that he submits create gateways that allow UK law to be read in to the law of the British Virgin Islands. He took the Court through a number of provisions that included Section 48 of Criminal Procedure Act ¹and Sections 9, 10 and 28 of the WIAS Supreme Court Act. The question for the Court is whether Sections 7 and 8 can be read in through either of these Sections.

¹ Chapter 18 of the Laws of the Virgin Islands, Revised Edition 1991.

Section 48 of the Criminal Procedure Act

- [7] The Applicant contends that by virtue of this section, the provisions under Sections 7 and 8 of the Criminal Appeal Act 1968 as amended by the 1988 CJA could be read in to supplement the existing law in the BVI. It is submitted by learned Queen's Counsel for Mr Penn that Section 48 is sufficiently broad to allow the reception of Sections 7 and 8 of the Criminal Appeal Act 1968.
- [8] The Director of Public Prosecutions contends that Section 48 is not to be construed as a provision that is capable of receiving these specific provisions and submits that Section 48 is found within Part VI of the Act which deals with "Evidence, Attendance of Witnesses, Amendment Judgment Etc". He submits that in those circumstances the Court cannot invoke this section as a gateway to allow the reception of the provisions relied upon by the Applicant.
- [9] The appropriate starting point for the Court is to examine the section under consideration, one of the first things that is noteworthy as to this provision is the opening words:
- "all other matters of procedure not herein nor in any other act expressly provided for shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Court of criminal law in England".
- [10] What is meant by all "other" matters? Did the legislators intend for Section 48 to be used as a literal gateway to allow all other matters of procedure not provided for in this Act or any other Act to be supplemented by the law of England? Alternatively does the word "other" used in the context of this section of the Criminal Procedure Act limited to all "other" matters contained in Part IV dealing with "Evidence, Attendance of Witnesses, Amendment Judgment Etc"?
- [11] It seems to this Court that to construe "all other matters of procedure" to mean that Section 48 allows all other matters of procedure not included in this or any other Act to be regulated by the law of England would be an absurd interpretation.

- [12] It must be appreciated that the Criminal Procedure Act sets down rules of procedure for the conduct of criminal trials. The act is divided into twelve parts dealing with different areas of criminal procedure. These parts cover areas as diverse as "Proceedings Preliminary to trial"², "Pleas and Arraignment"³ and "Trial Defence and Verdict"⁴. Also of importance is that the Act has a general provisions section at Part XII.
- [13] The court has great difficulty in concluding that the framers of this legislation would seek to insert a clause to allow for the wholesale reception of English law on procedure under Part VI of the Act which deals with "Evidence, Attendance of Witnesses, Amendment Judgment Etc" as opposed to Part XII which deals with general provisions.
- [14] Section 48 in the court's view would allow for the reception of English law on matters of procedure that arise in relation to the provisions dealt with under Sections 34 to 51 of the Criminal Procedure Act. It cannot be a basis to allow the general reception of "all other matters of procedure" much less provisions that deal with the Court of Appeal's jurisdiction to deal with retrials.

Section 28 WIAS Supreme Court (VI) Ordinance

- [15] Lord Gifford QC also relied upon Section 28 WIAS Supreme Court (VI) Ordinance as a potential gateway to allow for the provisions he relies upon in the UK Criminal Appeal Act to be received into local law.
- [16] Section 28 reads as follows:-

"The jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Ordinance and Rules of Court and where no special provisions are contained in this Ordinance or rules of court such jurisdiction so far as concerns practice on procedure in relation

² Part II of the Criminal Procedure Act

³ Part IV

⁴ Part V

to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England.”

- [17] Counsel for the applicant relied on this section of the Ordinance and submits that there are no provisions currently that deal with the question of time limits for retrial. To that extent he submits that there are no special provisions contained in the ordinance on this issue and therefore it is open to this court to read in to the current law of the BVI those provisions in the United Kingdom in order to supplement the local procedures on retrial.
- [18] In particular he submits that sections 7 and 8 of the Criminal Appeal act UK 1968 as amended mandate that any person ordered to be retried by the Court of Appeal has to be arraigned within two months of the Court of Appeal order. When a person has not been arraigned within two months that individual, is entitled to bring an application before the Court of Appeal to have the courts direct the High Court to enter a verdict of acquittal. At the same time it also creates an entitlement for the Director of Public Prosecutions to make an application to the Court of Appeal, to have leave to arraign a prisoner outside of the two months period.
- [19] In support of his argument learned Queen's Counsel for the applicant relied on a number of cases in which the courts have allowed UK law to be received into a particular territory by virtue of provisions in the local law.
- [20] Counsel placed reliance on two cases in particular; the first was the case of **Thompson**⁵, a decision of the Privy Council, in which provisions of the Police and Criminal Evidence Act were successfully received into the law of St Vincent. In this particular case the court outlined a number of considerations to be taken into account when determining the extent to which laws can be received from the UK into the particular territory. In Thompson the provision under consideration was section 3 of the Evidence Act

⁵ 1998 UKPC 6

[21] This section provided as follows:-

"Whenever any question shall arise in any criminal or civil proceedings whatsoever in or before any court, court martial or tribunal, or before any person having by law, or consent of parties, authority to hear, receive and examine evidence, touching the admissibility or sufficiency of any evidence, the competency or obligation of any witness to give evidence, the swearing of any witness, the form of oath or affirmation to be used by any witness, the admissibility of any question put to any witness, the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as provided in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in St. Vincent and the Grenadines."

[22] Similarly in the case of **Forbes**⁶, a decision of the Court of Appeal out of this jurisdiction, the Court approved the use of English law received in the course of a criminal trial. The provision under consideration in that case was Section 12 of the Evidence Act. Section 12 of the local Evidence Act reads as follows:

'Every document, which, by any law now in force, or hereinafter to be in force, is or shall be admissible in evidence in any court of justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any court in the Colony, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence.'

[23] These two provisions under the Evidence Act in the BVI and St Vincent are on the face of it clearly distinguishable from the wording of Section 28.

[24] Counsel for the Applicant also drew the Courts attention to two decisions of the Court of Appeal that brought into consideration the extent to which the Court could read in provisions into local law. In the first case **Panacom International Inc v Sunset Investments Ltd**⁷ the Court in that case had to consider Section 11 of the Eastern Caribbean Supreme Court Act 1970 out of St Vincent and the Grenadines.

[25] Similarly in the case of **Veda Doyle v Agnus Deane HCVAP2011/020** the Court of Appeal once again had to consider whether it was possible to read in English

⁶ 45 WIR 173

⁷ 47 WIR 139

law into the law of Grenada. The sections under consideration in that case was Section 11(1) of the West Indies Associated States Supreme Court (Grenada) Act Cap 336.

- [26] All these cases clearly establish that in appropriate cases it is quite permissible to receive UK provisions into local law. The extent to which this is permissible is dependent upon the specific provision that allows for the UK law to be read into the local law.
- [27] Accordingly one needs to carefully examine the provision under consideration and determine to what extent it is possible to import UK law to supplement the local law. In exercising one's jurisdiction there are a range of considerations that the Court must have regard to.
- [28] Among the considerations that need to be taken into account are to what extent the UK law will be in conflict or potentially offends local law, to what extent the local gateway places limitations on what can be imported.
- [29] The provision in this case that is relied upon as noted earlier is Section 28 WIAS Supreme Court (VI) Ordinance. It is noteworthy that none of the cases that were cited to the court dealt with that specific provision. Indeed the provisions that came closest to the language of Section 28 were the provisions considered in the **Panacom International Case** and the **Veda Doyle Case**.
- [30] It is also interesting that Section 28 appears to only trigger the use of English law not where there is "no provision" but rather where there is "no special provisions contained in this Ordinance or rules of court". In other words the Section is not so broad as to suggest that if there is no provision you can proceed to read in English law.
- [31] Instead it speaks to an absence of special provisions contained in the Ordinance or rules of court. It therefore is ambiguous as to whether Section 28 therefore

allows reception of all law on practice and procedure in the UK where there is no provision or no special provision locally.

- [32] The absence of any definition of what constitutes “special provisions” does not help the Court in trying to determine the limits to this Section.
- [33] There is no doubt that the local Supreme Court Ordinance makes no provision for time limits for the arraignment of an accused person who benefits from an order to be retried. Such an entitlement only arises under the UK law.
- [34] In fact the Director observes that although the UK Act came into force in 1968, it was in 1969 that the local legislators passed this legislation and when they did so they did so in terms of what prevailed in the UK. It was only in 1988 through the Criminal Justice Act that the 1968 Criminal Appeal Act allowed for time limits to be laid down.
- [35] The question that arises is whether Section 28 is capable of importing the provisions relative to the time limits for arraignment. The Court must carry out an exercise whether the imported provisions are in conflict with any other local provisions, the Director seeks to persuade the Court that section 37 of the Ordinance is sufficiently broad to allow for the Court of Appeal to make any order on retrial including the ability to set limits on the time to have a person arraigned. With the greatest respect to the Learned Director, such a construction is too generous when one has regard to sections 37(4) which appears to be very specific.
- [36] The effect of Section 28 appears to relate to practice and procedure as they relate to the jurisdiction of the Court of Appeal, to this extent it does appear based on cases such as Panacom Ltd and Veda Doyle that the provision is not sufficiently broad to incorporate matters of English substantive law, or English procedural law which is adjectival and purely ancillary to English substantive law.

[37] The distinction between substance and procedure is not always easy to draw, it is well recognized nonetheless, relying on **Re Coles and Ravenshear's**, the authors of the 5th edition of Halbury's laws of England (2009), noted as follows:-

"**Substantive law** creates rights and obligations and determines the end of justice embodied in the law, whereas procedural law is an adjunct or an accessory to substantive law."

[38] In **Short & Ors v Ireland HCA 167/ 04** Mr Justice Peart adopted the following definition:-

"... There is the distinction to be drawn between substantive law and procedural law. Substantive law creates rights and obligations and determines the ends of justice embodied in the law, whereas procedural law is an adjunct or an accessory to substantive law. It is by procedure that substantive law is put into motion, and it is procedural law which puts life into substantive law gives it its remedy and effectiveness and brings it into being."

[39] The provisions that the Applicant seeks to import into the local law are on the face of it a mixture of substantive and procedural. There can be no doubt that the provisions in Section 7 and 8 create rights and rights that did not exist before.

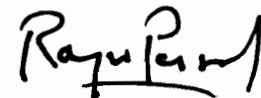
[40] In particular aside from creating an obligation on the Crown to arraign the prisoner within 2 months, it also creates a substantive right to have the Court of Appeal direct that an acquittal be entered where the accused is not arraigned within two months. It also creates a right to the Crown to be able to seek an extension of time to have a person arraigned after two months.

[41] Neither of these rights nor obligations existed under the current law in the British Virgin Islands. The UK law creates procedural mechanisms by which the parties can apply for and enforce these rights and obligations. To this extent these specific provisions are procedural but ancillary to the substantive law.

[42] Based on the reasoning in **Veda Doyle** this court finds that the legislators could not have intended Section 28 to be used to import English substantive law or

English procedural law which is adjectival and purely ancillary to English substantive law.

- [43] Furthermore the court in construing the Section 28 must be mindful that it is to be presumed that it was intended that the law should be certain and predictable and it is also presumed that the law should not be subject to casual change. These principles of construction are well known. It is a well known policy that law should be altered deliberately rather than casually and that Parliament should not change either common law or statute law by a side-wind but only by measured and considered provisions.
- [44] Having regard to the findings of this court, I rule that the provisions of Section 7 and 8 of the Criminal Appeal 1968 Act as amended does not apply to this jurisdiction and in the circumstances the application for the stay of these proceedings are denied.



Rajiv Persad
High Court Judge