

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CRIMINAL CASE NO. SLUCRD 2010/0166

BETWEEN:

THE QUEEN

Claimant

AND

AARON STANISLAUS

Defendant

Appearances:

Mr. L. Mondesir Counsel for the defendant
Mrs. Victoria Charles-Clarke Crown Counsel for the Crown

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2012: December 18
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RULING ON VOIR DIRE

- [1]. **CUMBERBATCH, J. :** On January 10, 2011 the defendant was indicted by the Director of Public Prosecutions for the offence of robbery allegedly committed on one Elizabeth Ludovicque (the virtual complainant) on the 19th day of December, 2009 at Bocage, Castries.
- [2]. At a case management hearing the defendant filed a pre-trial application challenging the admissibility of the identification evidence. It's common ground that no identification parade or any other form of identification procedure was held in this matter and as a result the court ordered a voir dire be held to determine the admissibility of the evidence of identification against the defendant.

[3]. **THE VOIR DIRE**

At the voir dire, the crown relied on two witnesses namely the virtual complainant and Police Constable 561 Stanley Mitchell both of whom provided sworn affidavits which constituted their evidence in chief. Both witnesses at the voir dire were cross examined by defence counsel Mr. Mondesir.

[4]. The virtual complainant testified that she had employed the defendant from around early November 2009 up to the time of this alleged incident. She further testified that she interacted with the defendant almost daily, spoke with him often both face to face and by telephone. In short the virtual complainant's testimony was that she knew the defendant well and had become familiar with his physical features and his voice. The virtual complainant spoke of the lighting conditions at the time of the alleged robbery and that when her attacker first approached her, he was masked. She was however able to unmask him and thereafter recognized the defendant at which time she loudly called out his name. She later made a report to the police at which time she provided them with the name and address of her alleged attacker, the defendant.

[5]. Police Constable Mitchell also testified that he arrested the defendant and told him of the allegation. After he was cautioned, the defendant replied saying "Officer I do not know anything about that, I used to work for the woman". He further testified that in February 2012, the virtual complainant was invited to attend the Criminal Investigations Department, Castries to identify the person she named to the police. On that day, she identified the defendant who was sitting amongst three other persons behind a glass as the person who robbed her on the night of the 19th December 2009. This witness testified that he did not hold an identification parade as he was of

the view that the defendant and virtual complainant were well known to each other and that this was a case of recognition.

- [6]. Under Cross Examination, Police Constable Mitchell admitted that the report made by the virtual complainant to the police in which she stated the name and address of the defendant was not made to him but to another officer.
- [7]. Interestingly enough both witnesses called by the crown at the voir dire testified that upon seeing the virtual complainant the defendant jumped to his feet and made a gesture to the virtual complainant to go away saying 'what she come here for!'

The defence did not lead evidence at the voir dire.

- [8]. At the close of the case for both the crown and defence counsel on both sides provided the court with written submission setting out their submissions on the law and evidence together with written submissions in support thereof.
- [9]. Mr. Mondesir, for the defendant, contends that the evidence of visual identification is tenuous and weak and in breach of section 100 of the Evidence Act ('The Act') and ought not to be admitted. He submits that an identification parade was not conducted in breach of section 100 of the Act and the burden is on the crown to satisfy the statutory requirements of the Act. Counsel also contends that the admission made by the defendant when cautioned by Police Constable Mitchell is inadmissible for non-compliance with the provisions of section 72 of the Act.
- [10]. He further contended that no voice identification procedure was held and in any event no sufficient words were spoken to make the purported voice identification reliable. Hence the evidence of voice identification is weak and unreliable and ought not to be admitted.

[11]. Alternatively, counsel invited the court to consider and apply the provisions of sections 114 and 115 of the Act to reject the impugned evidence of identification in the event that the court finds same to be admissible. Mr. Mondesir relied on several authorities in his written submissions.

[12]. The Director of Public Prosecutions in her written submissions contends that:

1. There was no need to conduct an identification parade in accordance with section 100 of the Evidence Act 2002 because it would not have been reasonable or practicable to conduct an identification parade in the circumstances of this case, for the following reasons: -
 - a. There is evidence from the Virtual Complainant's Statement that she recognized the defendant, by appearance and voice as someone whom she knew and was familiar with.
 - b. The identification was made in circumstances such that the quality of the identification was good. (Evidence Amendment Act No. 46 of 2006, Section 7 (3)).
2. Section 100 of the Evidence Act allows for the admissibility of identification evidence where it is not practicable or appropriate to hold an identification parade, having regard to the relationship if any between the defendant and the person who made the identification (Section 100 (2) (d)).

[13]. The Director of Public Prosecutions addressed the court on the evidence of visual identification adduced at the voir dire and contends that there existed a relationship between the virtual complainant and defendant for a period of some months prior to this incident and that on the 18th December 2009, the day before this alleged incident, the virtual complainant paid the defendant. She further contends that there was no challenge by the defendant to the virtual complainant's prior knowledge of him and that in his statement under caution to the police, the defendant admitted working for the virtual complainant.

[14]. On the question of the purported voice identification, the Director of Public Prosecutions submits that recognition of a familiar voice is an acceptable form of identification by a witness who is familiar with that voice even though a voice identification parade is not held. She submits that there were sufficient occasions when the defendant spoke to the virtual complainant to enable her to become familiar with his voice hence there was no need for a voice identification parade. In closing, the Director of Public Prosecutions submits that the evidence of identification of the defendant is good and ought to be admitted. She relied on several authorities in her written submissions.

[15]. **RULING**

The court has considered and weighed the evidence adduced in the voir dire in its totality. The court has also considered the written submissions of both counsel together with the authorities contained therein.

[16]. I am satisfied on a balance of probabilities that the virtual complainant was able to recognize the defendant's face based on her prior knowledge of him and the nature and extent of their frequent interactions up to the day before the alleged incident. I find that there was more than adequate lighting from which the virtual complainant would have been able to see the defendant's face, having removed the kerchief therefrom. I also find that the defendant's conduct, upon seeing the virtual complainant enter the Criminal Investigations Department Castries, to be compelling circumstantial evidence of their mutual knowledge of each other.

[17]. I do not consider the statement made under caution by the defendant to be an admission of guilt but rather a defence to the allegation made against him. I find that the defendant is saying that his interactions with the virtual complainant were as a result of a master/servant relationship and not

by way of robbery. However for the purposes of this proceeding, the court will not take into consideration what he said to the police under caution.

- [18]. I accept Mr. Mondesir's submissions on the inadequate nature of the evidence adduced at the voir dire in support of the evidence of voice identification. However, the thrust of the crown's case is that the voice identification evidence is not the body and soul of the crown's case against the defendant on the issue of identification but that it is to be considered together with the evidence of visual identification. In the circumstances, I find the evidence of voice identification to be admissible. Matters of weight and reliability of the evidence of voice identification can be addressed by the trial judge by way of the appropriate directions.

I am comforted in this view by the dictum of Sir David Simmons, Chief Justice, in *Holder v R* 2005 67 West Indies Report 60 on appeal from the Court of Appeal of Barbados where he opines:

"Voice identification evidence may, as here, be merely a strand in the total evidential fabric and the cumulative effect of all the evidence is a matter for the jury. If the purported voice identification evidence is tenuous, unconvincing, uncertain, or unreliable, those are matters which go to the weight to be attached to that evidence rather than to its admissibility."

- [19]. Accordingly I find that the evidence of visual identification falls within the exceptions to Section 100 of the Act as provided in section 100(2)(d) and is admissible. I also find that the evidence of voice identification to be admissible. The jury must also be warned of the failure of the crown to hold an Identification parade.

- [20]. The defendant's application is dismissed.


FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE