

RULING 26 JUNE 2003

**ANTIGUA AND BARBUDA****IN THE HIGH COURT OF JUSTICE  
(CRIMINAL)****CASE NO 44/2002****THE QUEEN****v****TIMOTHY HENRY  
DAYNE SAMUEL  
JAMAL BROWNE****Appearances:**

Mr Cosbert Cumberbatch, DPP Mr Wendell Robinson  
and Mr Peyton Knight for the Crown

Mr Dane Hamilton Snr Mr Dane Hamilton Jr for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants  
Mr Harold Lovell and Mr Jason Martin for the 2<sup>nd</sup> Defendants

**RULING ON THE INQUIRY**

- [1] At the conclusion of the Preliminary Inquiry (PI) the accused Timothy Henry, Dayne Samuel and Jamal Browne were committed, on 5<sup>th</sup> April 2002, to stand trial in the month of May 2002 next.
- [2] The committal for trial recites the names of witnesses including Collinford Jarvis and Vaughan Christian.
- [3] The trial of the accused commenced on 16<sup>th</sup> June 2003 in High Court with Messers Dane Hamilton Snr and Jr appearing for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and Mr Harold Lovell and Mr Jason Martin for the 2<sup>nd</sup> Defendant.

- [4] On the second day of the trial, Mr Cosbert Cumberbatch, Director of Public Prosecutions made certain allegations concerning the corruption of witnesses by defence counsel. There was an immediate objection to the remarks by Messers Hamilton and Lovell. The entire matter included a number of serious allegations between the attorneys. When matters were brought to order the court directed that all attorneys should meet in chambers at 9.00am on the following day.
- [5] At the meeting, which was attended by all the attorneys, certain aspects of the allegations were aired by the DPP and there were responses. In the end in the face of the allegations and the presiding Judge determined that a judicial inquiry was warranted in order to determine whether the trial had been prejudiced, whether there was any improper conduct on the part of any defence counsel.
- [6] **The Inquiry:**
- The inquiry was held in open court on 20<sup>th</sup> June and commenced at 12.05 pm in accordance with the procedure previously outlined in open court. The inquiry centered on the allegations by the DPP that defence counsel had entertained witnesses in the case who had given evidence at the FI. This was done in private chambers and involved a statement that was signed by one such witness. It was further alleged that another witness was approached by defence counsel and asked if he could be depended on to say what he had said on the previous Sunday.

[7] At the inquiry four witnesses gave evidence - Lois Allen, Collinford Jarvis, Vaughn Christian and McKenzie Joseph.

[8] The detailed testimony of all the witnesses is contained in the attached APPENDIX from which the following relevant facts emerge.

1. Ms Lois Allen, the mother of the second defendant, Dayne Samuel, after a meeting with Mr Martin, her son's attorney, told Collinford Jarvis (aka Meat Head) that Mr Martin wanted to see him.
2. Jarvis was not at that meeting between Mr Allen and Mr Martin.
3. According to Ms Allen she did not tell Jarvis to go to Mr Martin Chambers.
4. Jarvis either went to Mr Martin Chambers or was driven there by Mr Martin after he was picked up in Cashew Hill.
5. Mr Martin and Jarvis were alone in his Chambers.
6. Mr Martin told Jarvis that he wanted to hear the truth and "I told him that I had made up my mind to tell the truth."
7. Jarvis agreed to give Mr Martin a statement which Jarvis signed.
8. Jarvis identified his signature on the copy of the statement shown to him in court.
9. Jarvis did not speak to Mr Martin at the High Court on Monday 16<sup>th</sup> June or Tuesday 17<sup>th</sup> June.
10. Jarvis was not paid and Ms Allen did not make any promise to him.
11. Mr Martin took Jarvis home after the completion of the statement.
12. Mr Martin did not tell Jarvis what to say.
13. According to Jarvis he went to Mr Martin's office to tell him the truth.
14. Mr Martin met Vaughn Christian on Wednesday, June 18<sup>th</sup> on the stairway at the High Court.

15. Mr Martin asked then Christian if he can depend on him to tell the truth. Christian said "yes."
16. Christian was not promised anything by Mr Martin
17. Jarvis told Inspector McKenzie that Mr Martin drove a green Honda car.

[9] Having regard to the facts, the questions are:-

1. Was the trial compromised to the extent that its continuance would be unfair to the accused.?
2. Are the actions of Mr Martin proper or improper.?

[10] **The Submissions:**

The essence of the submissions made to the Court by Messers Lovell and Hamilton is that, Mr Martin's actions speak no evil. They do not offend the due administration of justice.

[11] According to learned counsel Mr Harold Lovell, there is no property in any witness. For this proposition he cited **Harmony Shipping v Davis (1979) 3 ALL ER 177, 180j and 181a**. In the circumstances counsel submitted that the allegation that could be made is that of impropriety which in any event are baseless and totally unfounded. It was further submitted by counsel that Mr Martin had a duty and a right to pursue his duties in a fearless and forthright manner and that this duty was discharged by wholly ethical and proper methods.

[12] The proposition that there is no property in a witness which was enunciated in the **Harmony Shipping Case** is in turn based on the Law Society Guide to the

Professional Conduct of Solicitors 1944. It was affirmed and approved in 1963 by Lord Parker CJ and the judges and published in the Law Society's Gazette for February 1963.

[13] While the validity of the rule cannot be questioned in relation to Britain, the question is whether the Law Society Guide to the Professional Conduct of Solicitors has any legal effect in Antigua and Barbuda where for one thing the legal profession is fused.

[14] In Antigua and Barbuda the legal profession is governed by the **Legal Profession Act 1995 No 9**. This Act of Parliament contains a Code of Ethics of which paragraphs 21, 25 of Part A and 2(2) and 27 of Part B are relevant. They provide as follows:

"21 An attorney-at-law shall always act in the best interest of his client to represent him honestly, competently and zealously and endeavour by all fair and honourable means to obtain for him the benefit of any and every remedy and defence which is authorized by law, steadfastly bearing in mind that the duties and responsibilities of the attorney-at-law are to be carried out within and not without the bounds of law.

25 It is the right of an attorney-at-law to undertake the defence of a person accused of a crime regardless of his own personal opinion is to do the guilt of the accused and having undertaken such defence he is bound by all fair and honourable means to present every defence that the law permits so that no person maybe deprived of life or liberty except by due process of law.

2(2) An attorney-at-law shall not withhold facts or secrets witnesses in order to establish the guilt or innocence of the accused.

27 An attorney-at-law shall not knowingly use perjured testimony or false evidence or participate in the creation of or use of evidence which he knows to be false."

[15] What these provisions do is to prescribe a context within which attorneys must act in the defence of their client. And, to use the language of paragraph 21, "within the bounds of the law." More importantly, however, in the present context is the effect of the Legal Profession Act on the rule in the **Harmony Shipping Case**. Quite simply the matter cannot prevail so long as the Parliament of Antigua and Barbuda has covered the field.

[16] The phrase "*fair and honourable*" is used both in paragraphs 21 and 25 of the Fourth Schedule to the Act. These are two plain words with a multitude of implications. At a very basic level it can be said that what is not fair and honourable may be unfair and improper.

[17] Mr Hamilton, who concurred with Mr Lovell in every respect, submitted that the sole question before the Court was whether there was an improper contact between Mr Martin and Mr Jarvis. And on that basis he advanced a number of factors which must be considered. These are:

1. Is a short form PI a trial of a cause?
2. The fact that the concern of Mr Martin was the conduct of the police during the investigation of the death.
3. The witness statement of Collinford Jarvis pertains to the conduct of the police.

4. It is immaterial whether Mr Martin or Ms Lois Allen asked the witness to speak the truth.
5. The witness was not induced or rewarded for making the statement.

[18] It is considered that while the matter of a trial should be part of the wider equation its absence therefrom is not conclusive. The fact which remains is that a judicial process had started with the committal of the accused in April 2002 and the names of the witnesses endorsed on the ~~on the~~ Committal For Trial included Collinford Jarvis and Vaughan Christian. Further still, the same names appeared at the back of the indictment dated and filed on 12<sup>th</sup> September, 2002. These are all part of a continuing judicial process, A dictum of Lord Diplock in case of *R v. Sang* (1979) <sup>the</sup> 2 ALL ER 1221, 1229 is relevant to the debate. He said this:

"Outside the limited field in which, for historical reasons the functions of a trial judge extend to imposing sanctions for improper conduct on the part of the prosecution before the commencement of the proceedings in inducing the accused by threats favour or trickery to provide evidence against himself."

[19] By implication the dictum makes the point quite clearly that the absence of a trial is not a bar to the imposition of sanctions on counsel for improper conduct in relation to accused persons. Naturally, this extends to defence counsel. And while there can be no issue with the concerns of Mr Martin regarding the conduct of the police there is a legal context in which it can and must be addressed.

[20] A similar comment may be made on the matter of Mr Jason Martin asking Vaughan Christian whether he can be depended on to speak the truth. On the

surface this may appear to be quite innocent but the fact is that Mr Martin is defence counsel and Christian is a Crown witness who tendered evidence at the PI. When this is juxtaposed with the concern with the conduct of the police different inferences may be drawn.

[21] In so far as the DPP is concerned the whole episode of the contact involving Mr Martin, the mother of one of the accused and two Crown witnesses is unethical, improper and outside the bounds of proper conduct. The DPP also pointed to the fact that there was cross examination at the PI and that there is a procedure for testing the voluntariness of a statement, namely the *voire dire*. Anything outside of this would be improper. Therefore, according to the DPP, the taking of a statement from a Crown witness statement having him sign it and then keeping it a secret is an aspect of improper conduct.

[22] In support of his submissions the DPP referred the Court to paragraphs 25 of the Code of Ethics of the OECS Bar and section 615 of the written standards of the Bar of England and Wales which states:

"Unless otherwise directed by the Court or with the representative of the opposing side or his counsel, a barrister should not communicate directly or indirectly with any witness whether or not the witness is his client once that witness has started to give evidence which it has been contended."

[23] While the foregoing has no application in Antigua and Barbuda, it, however, serves to give some indication as to strictures placed on contact with witnesses in

another jurisdiction. But while the Code of Ethics does not address the matter in such strict and direct terms, however, being bound by all fair and reasonable means undoubtedly has a similar objective.

**[24] Conclusion:**

The questions whether:-

- (a) the trial had been prejudiced; or
- (b) the conduct of Mr Martin in all the circumstances was proper or improper, must now be determined.

[25] As indicated before, the matter of the commencement of a trial cannot be used as a mask to hide the issue. Even if the trial had not commenced on Sunday 15<sup>th</sup> June it did commence on the following day. But before that the judicial process was well in train by virtue of the committal for trial, the names of the witnesses mentioned in the committal, the drawing and filing of the indictment on 12<sup>th</sup> September 2002 with the names of the witnesses at the back thereof, notice of the commencement of the trial a few days prior to 16<sup>th</sup> June 2003 and the actual commencement on that date.

[26] In the general scheme of things, a person who for example threatens a witness prior to the commencement of the particular trial cannot escape conviction for a criminal offence by saying that the trial had not commenced. There can hardly be a debate about that.

[27] Improper conduct is a term commonly used in the various professions to categorize conduct in the context of disciplinary proceedings. In this regard it was observed by Smith JA in **Arthur Williams v Douglas Manley and H.A Young (1973) 20 WIR 333, 336** Act that wrong or improper conduct is misconduct. Such conduct embraces a wide range of actions. It may be minor or it may be serious.

[28] In the case of **Casimir v Shillingford (1967) 10 WIR 269, 270** A.M Lewis, CJ had this to say:

"During the course of the argument, I made reference to the fact that it was not proper (I put it no higher than that) for a barrister who is going to appear in the cause to swear an affidavit in the same cause, even if he swear it in his capacity as solicitor. It puts the court in an embarrassing position."

In other words, one cannot give evidence in a matter and argue the same case before the court. Such action does not involve anything of which the court or the parties will not be aware at some point.

[29] To pre-empt the jurisdiction of the Court was considered improper conduct on the part of the attorneys for the appellants so held Hamel Smith, JA in the case of **Wallen and Another v. Baptiste and others (No. 2) (1994) 45 WIR 405, 445**. Likewise in **Re Brown (1992) 19 WIR** a failure to account for and pay over clients money was held to be improper conduct.

[30] In **Re T (a barrister) (1981) 2 ALL ER 1104**, it was held that in relation to conduct which was plainly dishonest, it was improper for a barrister to make inquiries of the

prosecuting authorities to discover where they drew the line between conduct which would lead to criminal proceedings and conduct which would not.

- [31] A comment in open Court by counsel that the Court had "set the seal on dishonesty" after there was a refusal to re-open an appeal was held to be improper conduct. Speaking for the Board in **Hilbourne v Law Society of Singapore** (1978) 2 ALL E.R 756, 759 Lord Russell of Killowan said:

~~The~~ lordships would observe that in their opinion the remark at that juncture was offensively critical of judges, was intended to be so and by ordinary standards of the ~~profession~~ constituted improper conduct."

- [32] Having regard to the evidence the Code of Ethics and the jurisprudence on improper conduct it is <sup>an</sup> inescapable conclusion that Mr Martin's conduct was improper and tends towards the perversion of justice. This is a strong statement but it is well grounded. For one thing the institutional legal framework obviated the need for such action. For even if the statement was ruled to have been made voluntarily that is not the end of the matter - far from that. They had to be put through the full rigours of the trial and in the end the jury has the final say. If indeed the conduct of the police was a concern there are other persons who had been detained and who could also assist. The whole episode involving Collinford Jarvis was deliberate, serious and improper which does not augur well for the administration of justice in Antigua and Barbuda. By any standard it must be highly improper for defence counsel to take a Crown witness to his Chambers to

give a statement unknown officially to the other side and keep it as ammunition for some other appropriate occasion.

- [33] Perhaps a reminder of the ancient judicial attitude to the matter of crown witnesses may help to put the matter in its proper context. In the case of **R v. Kellett (1975) 3 ALL E.R 468, 478 the Bishop of Lincoln's Case (1637) 3 State Tr**, in which one of the charges was tampering with the King's witnesses, is quoted extensively. The case was heard in the Court<sup>1</sup> Star Chamber where the Archbishop of Canterbury said.

"The matter is ill and howsoever it be not subornation of perjury, yet to tamper with witnesses, to threaten, deter, affright, corrupt or to silence or abate those that are to witness a truth and to give evidence in a court of justice are ejusdem naturae a very fowl crime and a most odious detestable fault, in any man of what condition soever he be."

Lord Coventry in the same case said:

"Now it may be said, said he, may not a man meddle nor question a witness? Yes but with certain limitations, for else, if the witness be made and corrupted, the jurors and judges both of them may be abused, and if that witness may be led and instructed by questions or the like, it comes all to me as subornation."

- [34] To return to the matter of the conduct of counsel, that on Wednesday 18<sup>th</sup> June 2003 is even more to the point. On this date although the jury was not present, the accused had been placed in their charge and the court was sitting. In the circumstances it is simply inconceivable that a witness could be approached on the stairway of the court and asked for assurances that he would speak the truth.

What is even more astonishing is that this was done after all the tumult of the previous day in open court and after the meeting in Chambers which lasted for more than one hour and which was attended by counsel. In fact he sought then to explain his actions except that the evidence at the inquiry posted a slightly different picture.

- [35] To ask a witness, or more particularly a Crown witness, to speak the truth may on the surface be quite innocent but there may be a host of serious implications depending on the factual substratum. But beyond that the old adage that justice must not only be done but must necessarily be seen to be done comes to the

*fore.*  
fore.

- [36] At this juncture it is of some importance to note that although this rule in **Harmony Shipping Case** was held not to be applicable to Antigua and Barbuda, a subsequent variation of that rule must be noted. In **R v. Kelly (1988) The Times, 27 July 1995** it was held that once a witness had given evidence for the Crown in a criminal case, it would always be a matter for the Judge's discretion whether that witness might be interviewed by either side and whether any statement taken from him might be produced in evidence.

- [37] While the content of the statement taken from Collinford Jarvis, is not the concern of the inquiry, it is worth considering having regard to the station of the maker, the correctness of the grammar and in particular this sentence:

"After Rage had finished with me, he carried McKenzie, Bad News and Mohan individually into the room."

[38] Mr Martin's conduct apart from being improper shows very scant regard for the judicial process of which he is part. This is heavily emphasized by his conduct especially on Wednesday last coupled with the statement made in Chambers earlier that day. It was also neither fair or reasonable.

[39] The legal system and in particular the criminal process cannot service if it is to be assaulted by conduct of this nature. <sup>not</sup> It is therefore necessary this type of conduct cease immediately. Such conduct may in the appropriate case amount to contempt of court.

[40] It is considered that the trial has been prejudiced and hence cannot be fair if continued.. For this reason it was aborted and the case will be traversed to the next assizes. And it is very strongly urged that counsel, Mr Martin, out of consideration for the accused, consider not appearing at that trial.

[41] It is hoped and also expected that this inquiry and the ruling thereon will serve as a warning to all concerned. Winning at all cost is not and never will be a constituent of our legal ethics. Likewise justice at all cost has its legal and constitutional limitations.

[42] The Director of Public Prosecution is of course empowered to take whatever action, if any, he considered appropriate in the circumstances.

[43] Finally, there is agreement with senior counsel Mr Lovell when he said that this episode could damage the reputation of counsel. The simple answer is that this is |||  
of his own making.



Errol L Thomas  
High Court Judge.

26/6/03