

COURT OF APPEAL SITTING

ANGUILLA
22nd – 26th April 2013

JUDGMENTS

Case Name: **Betty Lou Bailey (Nee Chalwell)**
v
Mark Bailey

[BVIHCVAP2009/0003]
(Territory of the Virgin Islands)

Date: **Monday, 22nd April 2013**

Coram: **The Hon. Mde. Janice M. Pereira, Chief Justice**
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: **Mr. Thomas Astaphan holding papers for counsel for the appellant**

Respondent: **Ms. Jean Dyer holding papers for counsel for the respondent**

Issues: **Civil appeal – Divorce – Matrimonial Proceedings and Property Act, 1995 – Ancillary relief – Sale of matrimonial home – Exercise of judicial discretion – Lump sum payment – Jurisdiction of appellate court – Circumstances in which appellate court can interfere with first instance decision – Whether appellate jurisdiction different in cases dealing with welfare of children**

Result and Reason: **Held: allowing the appeal in part in relation to the educational loan and ordering that the respondent do pay one half of the balance of the educational loan (shorn of any additional loans taken out by the appellant) as existed at the date of the trial; and dismissing the appeal on the other grounds, that:**

1. The learned trial judge in reaching her decision correctly directed herself that one of the major considerations on a divorce settlement is that both the parties and, most importantly, the children of the marriage, have homes. In the exercise of her discretion, and based on the affidavit evidence and the oral evidence led before her at the hearing the trial judge arrived at her conclusion that the house should be sold. There was no error in law and or in fact in the learned trial judge's decision.

Section 26 of the Matrimonial Proceedings and Property Act, 1995 applied.

2. The principles applicable to the Court of Appeal's jurisdiction when reviewing a judge's exercise of discretion in cases involving the welfare of children are the same as those which apply to the Court of Appeal's general appellate jurisdiction. That being said, an appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. Where therefore there is an appeal against the finding of facts, the burden upon the appellant is a very heavy one. Having regard to the fact that in cases such as the one at bar there are often no right answers and the judge at first instance is faced with choosing the best of two or more imperfect solutions, the Court of Appeal should only intervene when it considered that the judge at first instance had exceeded the generous ambit within which judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the Court of Appeal preferred a solution which the judge has not chosen. In this instance, the learned trial judge properly exercised her discretion and did not exceed the generous ambit within which reasonable disagreement is possible. Accordingly, the Court of Appeal will not interfere with her decision.

G v G [1985] 2 All ER 225 applied; *Jada Construction Caribbean Limited v The Landing Limited* (Saint Lucia High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported)) followed.

3. The learned trial judge was wrong in principle in holding the parties to any sort of agreement as to how they would manage their finances during marriage after the break-up of the marriage. Excluding the paramount interests of the welfare of any children of the union, the Court must be guided only by the principles of fairness. People come to arrangements of all kinds for different reasons. It is not for the Court to cast those arrangements in stone in circumstances which, by definition, have fundamentally changed.

Case Name:

**A, B, C, D
v
E**

**[AXAHCVAP2011/0001]
(Anguilla)**

Date:

Monday, 22nd April 2013

Coram:

**The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]**

Appearances:

Appellants:

Mr. Gerhard Wallbank instructed by Webster

Respondent:

**Mr. J. Alex Richardson instructed by Alex
Richardson & Associates**

Issues:

Result / Order:

(Judgment under seal) A copy of the judgment was given to the parties.

APPLICATIONS AND APPEALS

Case Name:

Sheldon Brooks

v

Regina

[AXAHCRA2008/0002]

Date:

Monday, 22nd April 2013

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

**Ms. Keesha Carty and Ms. Katrina Yearwood
instructed by KCW et al**

Respondent:

**Mr. Thomas Astaphan and Ms. Erica Edwards of the
Attorney General's Chambers**

Issues:

Appeal against conviction – Murder – Whether learned trial judge erred in finding that appellant had case to answer – Whether learned judge erred in not making determination on the satisfaction of actus reus which was essential element of offence – Whether learned trial judge failed to adequately direct jury on nature of appellant's defence and his explanation that both he and the deceased were fired upon at his premises – Whether learned trial judge failed to adequately direct jury on importance of existence of multiple shots when prosecution's case was that there were two shots fired, not four or more – Whether learned judge failed to give jury proper explanation of inconsistencies in evidence in

relation to number of shots fired

Result / Order:

[Oral delivery]
The appeal is dismissed.

Reason:

The Court, having reviewed the grounds of appeal that were filed on behalf of the appellant as well as the written submissions filed by counsel for the parties, and having heard the oral arguments of counsel, took the view that the evidence before the lower court was cogent and compelling circumstantial evidence.

Having looked at the evidence that was before the learned trial judge (in its totality), the Court held that the judge did not err in dismissing the appellant's no case submission; there was overwhelming evidence of a circumstantial nature before the judge on which she could have properly concluded that a jury, properly directed, could have found the appellant guilty, on one interpretation of the facts. The evidence was not tenuous and in those circumstances the learned trial judge quite properly overruled the no case submission.

Additionally, the learned trial judge properly addressed her mind to the essential elements of the offence and impressed on the jury that the onus of proof was on the prosecution and the standard of proof was "beyond a reasonable doubt" or, that they must feel "sure" that the person who committed the offence was the appellant. The learned trial judge gave a careful and balanced summation in assisting the jury with the matter.

In relation to the issue of whether the learned trial judge failed to adequately direct jury on the nature of the appellant's defence, the Court found that learned counsel for the appellant, Ms. Carty, had properly indicated that the learned trial judge did put before the jury several important aspects of the appellant's defence. Further, the judge ensured that the jury fully understood the defence of the appellant, both in relation to the number of shots

fired and the issues joined by the parties. The learned trial judge did not err in relation to appellant's defence.

In relation to the issue concerning the number of shots fired and the alleged failure of the trial judge to explain the inconsistencies in the evidence relating to that, the Court took the view that the judge had analysed those aspects of the evidence and indicated to the jury in a fair and balanced way the inconsistencies in the Crown's case, if any, and left it for the jury to determine whether in the particular circumstances of the matter the Crown had made them feel sure that it was the appellant who had committed the offence.

The Court held that the appellant's conviction was not in any way unfair or unsafe. On the contrary, in view of the overwhelming circumstantial evidence, there was no basis on which to criticise the careful summation of the learned trial judge and the conviction of the jury.

Case Name:	Whentworth Connor (alias Wrenford Connor) v [1] Mitchell Connor [2] Gustav Company Limited [AXAHCVAP2011/0007]
Date:	Monday, 22 nd April 2013
Coram:	The Hon. Mde. Louise E. Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Thomas Astaphan and Ms. Nakishma Rogers (instructed by Astaphan's Chambers)

Respondents: Ms. Josephine Gumbs-Connor and Ms. Yanique Stewart (instructed by J.A.G. Gumbs & Co.)

Issues: First respondent permitted by order of learned judge to accept offer for sale of boats (which were the property of partnership) to third party – Consideration for sale of boats was value of debt owed by the partnership to said third party

Result / Order: **Consent Order**

1. The first (1st) respondent shall pay the sum of US\$115,000.00 to the appellant in full and final settlement of any and all claims, interest and rights in Cheers I and II arising out of their partnership which was the subject of the judgment of Her Ladyship, The Hon. Justice Janice George-Creque of 2006 as she then was and all subsequent matters.
2. The said sum shall be paid by the respondent as follows:
 - a) US\$40,000.00 within one month of the date of this order and;
 - b) The balance of US\$75,000.00 shall be paid within six (6) months of the date aforesaid payment;
3. The boats which were the property of the partnership shall be the property of the 1st respondent who shall be solely responsible for all debts related thereto;
4. Upon completion of the total payment Mrs. Marjorie Connor shall transfer title to the boats to the 1st respondent, Mr. Mitchell Connor;
5. It is further ordered by consent that Mrs. Marjorie Connor shall not transfer, lease or in any way part with possession or encumber the title to the said boats;
6. Each party to bear its own costs.

(Consent order dated 15th May 2013)

Reason: The parties consented to the above order.

Case Name: **Brilla Capital Investment Master Fund SPC
Limited (for and on behalf of Brilla Cap
Juluca Segregated Portfolio M, a segregated
portfolio thereof)**
v
[1] Registrar of Companies
**[2] Leeward Isles Resorts Limited (in
liquidation)**
**[3] Maundays Bay Management Limited (in
liquidation)**
[4] William Tacon & Stuart Mackellar
**[5] Charles Hickox, Linda Hickox & Cap
Juluca L&C Limited**
[AXAHCVAP2012/0002]

Date: **Tuesday, 23rd April 2013**

Coram: **The Hon. Mde. Janice M. Pereira, Chief Justice**
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant / **Mr. Robert Levy, QC, with him, Mr. Edward Knight**
Applicant: **and Mr. Ravi Bahadursingh (instructed by Alex**
Richardson & Associates)

Respondents: **Ms. Mary Clare Haskins (instructed by the Attorney**
General's Chambers) for the 1st respondent
Ms. Dahlia Joseph (instructed by Daniel, Brantley &
Associates) for the 2nd & 3rd respondents
Ms. Joyce Kentish-Egan, with her, Ms. Tana'ania
Small-Davis and Mr. Kerith Kentish (instructed by
Joyce Kentish & Associates) for the 5th respondents

Issues: **Late filing of skeleton arguments – Breach of order**
of Court – Failure of 5th respondents to file skeleton
arguments on time as had been directed by
previous order of Court – Prejudice to

appellant/applicant caused by delay – Whether 5th respondents should be debarred from being heard on appeal as a result – Whether extension of time to file skeleton arguments should be granted to 5th respondents

Result / Order:

[Oral delivery]

- 1. The application to debar the fifth respondents from being heard on the appeal is dismissed.**
- 2. The application for extension of time to file submissions made by the fifth respondents is granted. The skeleton arguments filed on 26th March 2013 by the fifth respondents are duly filed and time is thereby extended.**
- 3. The fifth respondents shall bear the costs of the application to debar and the costs of the application for extension of time.**
- 4. Costs on those applications to be assessed if not agreed in twenty-one (21) days.**

Reason:

The order of the Court which had specified a deadline for the respondents to file further skeleton arguments did not state any sanction for non-compliance with its terms. The Court, in the general exercise of its discretion, held that notwithstanding that the explanation provided by the 5th respondents for the delay did not fully excuse them, they should not be debarred from being heard on the appeal, having regard to the following facts: the skeleton arguments were eventually filed and served (albeit late) and the appellant/applicant was able to reply to them; the appeal was able to proceed on the scheduled date; and prejudice to the appellant/applicant could have been met by an order against 5th respondents to pay costs to the appellant/applicant.

Case Name:

**Brilla Capital Investment Master Fund SPC
Limited (for and on behalf of Brilla Cap
Juluca Segregated Portfolio M, a segregated**

portfolio thereof)
v
[1] Registrar of Companies
[2] Leeward Isles Resorts Limited (in
liquidation)
[3] Maundays Bay Management Limited (in
liquidation)
[4] William Tacon & Stuart Mackellar
[5] Charles Hickox, Linda Hickox & Cap
Juluca L&C Limited

[AXAHCVAP2012/0002]

Date: Tuesday, 23rd April 2013 – Thursday, 25th April 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Robert Levy, QC, with him, Mr. Edward Knight
and Mr. Ravi Bahadursingh (instructed by Alex
Richardson & Associates)

Respondents: Ms. Mary Clare Haskins (instructed by the Attorney
General's Chambers) for the 1st respondent
Ms. Dahlia Joseph (instructed by Daniel, Brantley &
Associates) for the 2nd & 3rd respondents
Ms. Joyce Kentish-Egan, with her, Ms. Tana'ania
Small-Davis and Mr. Kerith Kentish (instructed by
Joyce Kentish & Associates) for the 5th respondents

Issues: Sale of assets by private treaty – Joint liquidators
obliged to obtain best price for assets for benefit of
unsecured creditors – Failure of judge to give
reasons for granting joint liquidators permission to
sell real property to fifth respondents and thereby
accept lower bid in face of higher bid being on the
table at time of acceptance of lower bid –
Procedural irregularity – Whether bidding process
unclear, arbitrary, unreasonable and misunderstood
by parties

Result / Order:

[Oral delivery]

- 1. The appeal is allowed and the orders of the trial judge made on 30th April 2012 are set aside. No order is made on the subsequent sale transaction.**
- 2. No order as to costs.**
- 3. By consent this order is stayed for a period of twenty-one (21) days.**

Reason:

The Court opined that it was clear from the transcript of the proceedings that the judge was very dissatisfied with the manner in which the joint liquidators had acted in going about the process of the sale of the assets. It was clear too that on the morning of 30th April 2012, the joint liquidators had engaged the parties in a bidding process which was not on equal terms; the terms imposed on the fifth respondents were considerably more onerous than the terms imposed on the appellant.

Having examined the exchanges between the learned judge and those who were involved in the bidding process, the Court held that the entire process was mired in controversy and uncertainty and an order made by the learned judge in those circumstances to accept a lower bid from one party on the basis that it came in at a particular time, which time had not been clearly set in advance and had not been clearly understood by the parties as the cut-off time for the acceptance of bids, cannot be upheld because it was irrational and the judge in the process acted in a manner in which no reasonable judge would have acted. Moreover, he failed to give reasons for his decision which, in the circumstances of this case, was fatal.

In the circumstances, the process employed by the learned judge in arriving at his order was flawed.

Case Name:

Lynwood Bell

v
[1] Malcolm Hope Ross
[2] Donald Curtis

[AXAHCVAP2012/0005]

Date: Thursday, 25th April 2013

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Ravi Bahadursingh instructed by Chancery Lane Chambers

Respondents: Mr. Gerhard Wallbank instructed by Webster

Issues: Determination of true value of shares of company –
Jurisdiction of judge to appoint valuer – Obligation
of judge to give directions for conduct of valuation

Result / Order: **Consent Order**

1. This order substitutes and supersedes the order of His Lordship, the Honourable Justice Sir Clare Roberts [Ag.] of the 29th June 2012.
2. The parties hereby agree that Mr. Claudel Romney of KPMG (Anguilla) (“Valuer”) shall be appointed as Valuer for the purposes of conducting a forensic examination of the books, records and documents (including but not limited to electronic ledgers with audit trails) for the purpose of determining the true value of the shares of Counsel Limited (“Counsel”) as of 19th March 2004 (“Valuation Date”), and having regard to the findings made in the judgment of the Honourable Justice Janice George-Creque dated 26th January 2011 (“Valuation”).
3. Valuer shall interview the parties to gain an understanding of the background of the litigation and operations of Counsel.

4. Messrs. Hope Ross and Curtis shall disclose and make available to the Valuer complete and accurate books, records, documents (including but not limited to the electronic ledgers) (“Material”) necessary to assist the Valuer in reaching the Valuation. Without limitation to the foregoing, Messrs. Hope Ross and Curtis shall deliver to the Valuer all Material – whether prepared or adjusted prior to or subsequent to the Valuation date – which contains any information which is or is capable of affecting the value of the shares at the Valuation Date. Mr. Bell shall be entitled to inspect all Material disclosed and made available to the Valuer. In the event of any inspection by Mr. Bell, the beneficial owners of any client companies of Counsel shall be redacted and kept confidential.
5. All parties shall be at liberty to examine and comment to the Valuer with regard to the Material and may request for any further or other Material or information be furnished to the Valuer, which the requesting party *bona fide* believes may impact the Valuation.
6. Valuer shall interview the Financial Advisor of each party and may take account of such advisors’ working files, to gain an understanding of the background of the litigation and forensic accounting work undertaken in relation to the financial affairs of Counsel.
7. Valuer shall review, *inter alia*, the following documents (and the parties shall provide such documents to the Valuer):
 - a) Judgment of Her Ladyship, the Honourable Justice Janice George Creque dated 26th January 2011;
 - b) Financial Statements for Counsel for the years ended 31st December 2003-2004 as prepared by management of Counsel;
 - c) Adjusted Accounts for the period ending 19th March 2004 of Counsel as prepared by Youngman Tax Services Ltd;

- d) List of Counsel accounts receivables for 2004 and bad debt write offs in 2005 and 2006;
 - e) All Stock Option Agreements between Arawak Energy Corporation and Messrs. Hope Ross and Curtis.
 - f) All email communications between Messrs. Hope Ross and Curtis and any other party dealing with any write offs, deferrals or other adjustments of the Material which or which is capable of affecting the Valuation of the Shares at the Valuation Date.
8. Parties agree to assist the Valuer with such further or other Material that the Valuer may require and as the Parties are able to provide.
9. Upon completion of items 3 through 8 above, the Valuer shall prepare and produce to the parties (a) the full details of his proposed Valuation (including reference to the Material which he intends to rely upon and intended treatment thereof) ("Valuation Procedure") and (b) his estimate of his costs for the remainder of the Valuation exercise. For the avoidance of doubt, the parties agree that all costs and expenses of the Valuer shall arising out of or related to the matters referred to in items 3 through 8 shall be paid equally by the parties, to wit, Messrs. Hope Ross and Curtis paying 50% therefor and Mr. Bell paying 50% therefor.
10. Upon review of the Valuation Procedure – which shall be limited to seven (7) days – the Parties shall have the following options:
- a) To approve the Valuation Procedure, or
 - b) To make further submissions to the Valuer – with reasons and copying the other parties – as to any proposed adjustments to the Valuation Procedure, which submissions the Valuer shall consider and inform the parties of his decision in relation to such proposed adjustment. The decision of the Valuer shall be final.
11. Upon completion of the Valuation Procedure, the

Valuer shall inform the parties of his Valuation and such Valuation shall be final.

12. Once the Valuation has been furnished to all the Parties, Messrs. Hope Ross and Curtis shall purchase, with full payment of purchase price to Mr. Bell within thirty (30) days, the shares of Mr. Bell's 50% on the basis of the Valuation and on a pro rata basis.

13.

- a) The parties shall pay all fees and expenses of the Valuer in equal shares, to wit, Messrs. Hope Ross and Curtis paying 50% thereof and Mr. Bell paying 50% thereof.**
- b) In the event that a party fails to pay its share of the fees and expenses of the Valuer within fourteen (14) days of presentation of the invoice of the Valuer then the other party shall be at liberty to make said payment to the Valuer and the amount so paid shall be adjusted to the credit of the Party so paying on the payment of the purchase price of the shares.**

14. The appeal is discontinued and each party bears its own costs.

(Consent order dated 15th May 2013)

Case Name:

Lynwood Bell

v

[1] Malcolm Hope Ross

[2] Donald Curtis

[AXAHCVAP2012/0005]

Date:

Thursday, 25th April 2013

Coram:

The Hon. Mde. Janice M. Pereira, Chief Justice

The Hon. Mde. Louise E. Blenman, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

**Appellant /
Applicant:**

**Mr. Ravi Bahadursingh instructed by Chancery Lane
Chambers**

Respondents:

Mr. Gerhard Wallbank instructed by Webster

Issues:

Application for permission to adduce fresh evidence

Result / Order:

[Oral delivery]

- 1. The application to adduce fresh evidence is discontinued.**
- 2. Each party to bear its own costs.**