Court of Appeal Sitting

Saint Lucia

16th to 20th February 2004.

Coram: **Hon. Adrian Saunders Justice of Appeal**
Hon. Brian Alleyne Justice of Appeal
Hon. Michael Gordon QC Justice of Appeal (Ag)

RESERVED JUDGMENTS DELIVERED

Date: **Monday 16 th February 2004.**

Dion Danny Potter v The Queen Criminal Appeal No. 2 of 2003.
Antigua and Barbuda

Appearances:

Appellant: **Mr. Kenneth Monplasir QC holding for Mr. Sidney Christian QC**
Respondent: **Mr. Leslie Mondesir holding for The Director of Public Prosecutions**

Issue: Criminal Law – murder – safety of the jury's verdict in view of trial judge's directions – application of the statutory proviso.

Failure of Judge to point to evidence in the trial that was capable of constituting self defence - misdirection on the burden and standard of proof relating to self defence – non direction on subjectivity and honest belief as they relate to self defence - non direction on evidence in the trial that was capable of constituting provocation – non direction that an intention to kill is not inconsistent with a plea of provocation – non direction on the ingredients of unlawful act manslaughter - non direction on the defence of accident – adequacy of directions on lies by prosecution witnesses.

Result: Written Judgment: **Alleyne JA:** Appeal allowed. Conviction and sentence set aside. Matter remitted to the High Court for a retrial.

Reason: **Self Defence** – There was some evidence on which the Appellant would have conceivably succeeded on the issue of self-defence. At best the trial judge's directions would have left the jury in considerable doubt as to the onus and standard of proof to be applied. The misdirection was potentially prejudicial to the Appellant.

Provocation – There was just enough evidence (although tenuous) to require a judicial direction to the jury on the defence of provocation (**Shaw v R** (unreported) Privy Council 24th May 2001 applied). The learned trial judge's non direction deprived the Appellant of the opportunity for the jury to consider fully and properly the issue of provocation and that may have resulted in a possible verdict of manslaughter.

Accident - The learned trial judge made no reference to the defence of accident and this is borne out by the record of appeal and is conceded by the learned Director of Public Prosecutions.

The statutory proviso – The mis-directions and non directions in the trial were

extensive and related to all the issues that were favourable to the Appellant, and which may on the evidence have resulted in a conviction for a lesser offence or an acquittal. In the circumstances it would be inappropriate to apply the proviso (**Freeland v R** [1981] 28 WIR 378 at 382-3, **Bullard v R** [1957] AC 635 at 642, **R v Stewart** [1994] AC 999 and **Confessor Franco v R** Criminal Appeal No. 3 of 1997 applied). The events forming the subject matter of the charge are not so remote in point of time as to result in prejudice to the Appellant if there were to be a retrial.

Stephen Trevor Kurt James v The State Criminal Appeal No. 2 of 2003
The Commonwealth of Dominica

Appearances:

Appellant: **No Appearance for the Appellant**
Respondent: **Mr. Leslie Mondesir holding for the Director of Public Prosecutions**

Issue: Criminal Law – Rape – misconduct by jurors – bias by juror – conduct of trial judge in the course of trial - application of the statutory proviso - severity of sentence imposed.

Law of Evidence – handling of physical evidence belonging to the virtual complainant – - trial judge's non direction on appellant's alibi defence - inconsistencies in the prosecution's evidence – learned trial judge's discretion to allow hearsay into evidence.

Result: Written Judgment: **Gordon JA (Ag).** Appeal against conviction dismissed. Sentence imposed varied from twelve to seven years imprisonment.

Reason: **Handling of physical evidence belonging to the virtual complainant –** The investigation of the matter did not meet the standard required of good forensic enquiry. An investigation ought to have two contradictory foci initially, namely; the proof of innocence and the proof of guilt. Any investigation, which focuses on the latter to the exclusion of the former, does violence to the rights and expectations of an accused person.

Misconduct by jurors – The learned trial judge had concluded that the alleged conversation between two jurors and the virtual complainant had not occurred. The appellant was unable to show how the alleged incident might have compromised the fairness of his trial.

Bias by a juror – The assertion that one of the jurors was related to a prosecution witness was unsupported by affidavit or other evidence. In any event, this circumstance by itself alone even if substantiated was insufficient to invalidate the fairness of the proceedings. In small communities it is to be expected that such relationships will occur.

Trial judge's discretion to admit hearsay evidence – Although technically correct, this ground of appeal has no substance, dealing only with form.

Inconsistencies in evidence adduced – The Appellant was able to point out only one inconsistency not dealt with by the trial judge and it related to a very minor point. The trial judge did give general advice on inconsistencies, which was wholly acceptable.

Alibi – The learned trial judge's summation to the jury was perfectly clear in that he placed both the prosecution and defence' s case squarely before the jury.

The statutory proviso – The cumulative effect of the appellant's arguments were ***de minimis***. There was no material misdirection by the trial judge. And even if there were then the statutory proviso would be applied.

Severity of sentence imposed – This rape was not accompanied by any special aggravating factors such as the use of a weapon or acts of violence. However, the Appellant had six previous convictions five of which involved violence. The last conviction related to a crime committed in 1995. Using a starting point of eight years and evaluating the circumstances of the crime and of the victim and the offender, the sentence should be varied. **(Winston Joseph v The Queen**, Civil Appeal No. 4 of 2000 applied)

Lennie Bowens v The owners and persons interested in the motor vessel "Speedy's Delight" and Edwin George and North Sound Express Limited Civil Appeal No. 3 of 2003
British Virgin Islands

Appearances:

Appellant: **Mr. Peter Foster holding for Mr. John Carrington**
Respondent: **Mr. Dexter Theodore holding for Ms. Tana' ania Small- Davis for the Third Respondent**

Issue: Law of Torts – Ferry Service provider's negligence - employer's negligence – failure to adopt a proper system of work

Law of evidence – appellate functions on perception and evaluation of evidence

Law of Remedies – damages for personal injuries

Result: Written Judgment. **Saunders JA:** Appeal dismissed. No order as to Costs.

Reason: **Ferry Service Provider's Negligence –** The captain of the boat had to make an informed decision about the best route for the journey based on his own assessment of the actual weather and marine conditions that he was faced with at the time. Given his many years of experience, his first hand observation of and experience in the actual weather conditions that existed at the time, his testimony that he considered the alternatives open to him before making a choice, and finally his evidence that save for two swells (one of which caused the injury to the appellant) the easier passage was the one that he had taken at the time, he cannot be found to have been negligent.

Employer's Negligence – The Appellant's employers cannot be found negligent because the ferry service provider was not negligent in the provision of its service. (**Mc Dermid v Nash Dredging Limited** (1987) 1 AC 906 and **Smith v Austin Lifts** (1959) 1 WLR 100 applied.

Proper system of work – The employers had adequately discharged their obligations to the appellant. They agreed that it would have been risky to use a small boat to conduct the journey so they hired the services of a reputable and experienced ferry service.

Appellate function - The learned trial judge saw and heard the witnesses and must obviously have preferred the respondent's evidence. The appeal court will not interfere with trial judge's perception of the witnesses. (**Grenada Electricity Services Ltd v Isaac Peters** Civil Appeal No. 10 of 2002 and **Harracksingh v The Attorney General** Privy Council Appeal No. 28 of 2002, (unreported) delivered 15th January 2004 applied)

Trevor Santos v Anis Yazigi Civil Appeal No. 9 of 2003
Antigua and Barbuda

Appearances:

Appellant: **Mr. Anthony Astaphan SC holding for Dr. Errol Cort with Ms. C Cort**
Respondent: **Mr. Peter Foster holding for Mr. Gerald Watt QC with Mr. H Frank**

Issue: Contract Law – agency – entitlement to the payment of a commission

Law of Evidence – trial judge's discretion to admit evidence – weight of evidence adduced.

Result: Written decision**. Saunders JA**: Appeal dismissed. Order of the trial judge affirmed. Appellant to pay the respondent's prescribed costs in the amount of $12 166.30.

Reason: **Weight of the evidence adduced** -The decision of the learned trial judge that the respondent was the effective cause of the sale is fully supported by the evidence. Given the advantage the judge would have had in seeing and hearing the witnesses this court cannot conclude that the judge's decision was against the weight of the evidence.

Trial judge's discretion to admit evidence – The law will admit tape recordings into evidence only if a proper foundation for their authenticity is established. A trial judge will first have to be satisfied that this foundation has been properly laid. The learned trial judge could not have properly made a ruling admitting the tape recording without first permitting counsel for the appellant to cross examine the respondent as to the authenticity of the tape. It could not have been sufficient only to have regard to what was said by the respondent on that matter in his witness statement. The learned trial judge's ruling to admit the tape into evidence was precipitately made.

Maria Hughes v The Attorney General of Antigua and Barbuda Civil Appeal No. 33 of 2003.
Antigua and Barbuda

Appearances:

Appellant: **Mr. Peter Foster holding for Ms. Raquel Walsh – Stilston with Ms Stacy Wilson**
Respondent: **Mrs. V Georges Taylor-Alexander holding for the Attorney General**

Issue: Civil Practice and Procedure – application to strike out a Notice of Appeal – determination of whether an order is interlocutory or final

Result: Written judgment. **Gordon JA (Ag):** The application to strike out the Notice of Appeal is granted. The applicant may proceed in the ways permitted to her to seek to enforce a money order. The respondent to pay the costs of this application in the sum of $1 000.00.

Reason: The trial judge's order for the respondent to make an interim payment to the applicant was not a final order of the court (the 'application test' as opposed to the 'order test' as used in **Sylvester v Singh** Saint Vincent Civil Appeal No. 10 of 1992 and **Pirate Cove Resorts Limited et al v Euphemia Stephens et al** Saint Vincent Civil Appeal No. 11 of 2002 applied). Consequently, any appeal therefrom would be a procedural appeal and would necessitate the leave of the court as stipulated by CPR r 62.5 and s 31(2) of the Eastern Caribbean Supreme Court Act Cap. 143 of the Laws of Antigua and Barbuda.

The respondent's failure to obtain the requisite leave makes the Notice of Appeal a nullity.

APPLICATIONS/MOTIONS

Benoit Leriche v Francis Maurice Civil Appeal No. 15 of 2002.

Appearances:

Appellant: **Mr. Kenneth Foster QC**
Respondent: **Mr. Alvin St. Clair**

Issue: Application for final Leave to appeal to Her Majesty in Council.

Result: Final Leave to appeal to Her Majesty in Council is granted. The parties are to appear before the Chief Registrar for the settling and certifying of the record of appeal within 30 days.

Reason: The application was unopposed and the requisite fee of £500.00 has been paid.

HIGH COURT CIVIL APPEALS

The National Telecommunications Regulatory Commission v Cable and Wireless (West Indies) Limited Civil Appeal No. 23 of 2003.

Appearances:

Appellant: **Mr. Anthony Astaphan SC with Mr. Leslie Mondesir**
Respondent: **Mr. Anthony McNamara QC**

Issue: Administrative Law – judicial review – ultra vires doctrine – legitimate expectations

Contract Law – interpretation of the material terms of an agreement

Result: Matter is adjourned until the next sitting of the Court of Appeal in Saint Lucia.

Reason: Counsel for the Appellant indicated that he was instructed by his client to make a request for an adjournment of the matter. Counsel for the Respondent indicated that the parties were currently attempting to settle the matter. The court although reluctant to grant adjournments will do so on this occasion in the interest of affording the parties an opportunity to attempt to arrive at a settlement of the matter.

Frank Mariette v George Emmanuel Civil Appeal No. 5 of 2003

Appearances:

Appellant: **Mr. Evans Calderon**
Respondent: **Mr. Winston Hinkson**

Issue: Application by Counsel for the Respondent for Leave to withdraw as Counsel in the Appeal

Land Law – proprietary estoppel

Civil Practice and Procedure – exercise of a Master's discretion to strike out a Counterclaim as disclosing no reasonable grounds for bringing a claim (CPR r. 26.3(1)(b))

Result: Application for Leave to withdraw as counsel in the appeal is denied. By consent the appeal is allowed. The matter is remitted to case management for trial of the counterclaim. Costs to the Appellant in the sum of $750.00.

Reason: Counsel for the Respondent indicated to the court that he had received no instructions from his client with regard to the appeal. He stated that his client demonstrates a disinterest in the matter. Counsel has further indicated that he has not informed his client of the hearing date for the appeal. The court ruled that as the Notice of Appeal was served upon Counsel for the Respondent and as Counsel had not informed his client of the hearing date for the appeal, leave to withdraw will not be granted.

The master erred in summarily dismissing the counter claim. On the pleadings there was a case for the claimant to answer. There were triable issues of fact and law. Counsel for the Respondent does not oppose the appeal as he recognizes that there are indeed triable issues in the Counterclaim.

John Bicar v Josephat Bicar and Timothia Bicar Civil Appeal No. 22 of 2003

Appearances:

Appellant: **Mr. Peter Foster**
Respondent: **Mrs. Wauneen Louis-Harris**

Issue: Land Law – title to land – trespass

Civil Practice and Procedure – exercise of a Master's discretion to strike out a defence as disclosing no reasonable grounds for defending the claim (CPR r. 26.3(1)(b) – application to amend the defence

Result: By consent the appeal is allowed. Matter is remitted to the Master for case management. Costs to the Appellant in the sum of $500.00

Reason: It is clear from the pleadings as they stand that there were serious factual and legal issues to be tried and it was not appropriate for the master to strike out the defence. Furthermore, it is not the purpose of the case management conference to try matters on pleadings. This can result in shutting persons out from the court without first affording them an opportunity to be heard.

The Court made reference to the following cases previously decided on similar issues. (**MPG Construction v Dominica Social Security** Civil Appeal No. 3 of 2003, **St. Lucia Furnishings Ltd v St. Lucia Cooperative Bank Ltd and Frank Myers of KPMG** Civil Appeal No. 15 of 2003 and **B Hector et al v N Joseph and C Antoine v B Antoine** Civil Appeal Nos. 6 and 8 of 2003 applied).

The application to amend the defence should be made at the case management conference.

Tuesday 17th February 2004

Coram: **Hon. Adrian Saunders Justice of Appeal**
Hon. Brian Alleyne Justice of Appeal
Hon. Michael Gordon QC Justice of Appeal (Ag)

The Attorney General of Saint Lucia and Francis Dariah v Donovan Isidore civil Appeal No. 20 of 2003

Appearances:

Appellant: **Mrs. Georges Taylor - Alexander with Mr. Deale Lee**
Respondent: **Mr. Michael St. Catherine**

Issue: Law of Torts – assault and battery – Article 985 and 994 of the Civil Code of Saint Lucia – use of reasonable force in the restraint of an escapee from police custody - defence of ex turpi causa non oritur action – apportionment of liability

Law of Evidence – trial judge's findings of fact – weight of evidence adduced

Result: Decision reserved.
Reason:

Malcolm Caplan and Irene Caplan v Michael Du Boulay and Monica Du Boulay Civil appeal No. 30 of 2003.

Appearances:

Appellant: **Mr. Peter I Foster with Mrs. Clair Greene – Malaykan**
Respondent: **Mr. Alberton Richelieu**

Issue: Land Law – entitlement to a right of way

Civil Practice and Procedure – discretion of Master to apply the provisions of Article 503 of The Civil Code of Saint Lucia at a case management conference.

Law of Evidence – burden and standard of proof – expert evidence - findings of law – weight of evidence adduced

Result: The appeal is allowed. The matter is remitted to the Master for further directions for the trial of the dispute. No order as to costs.

Reason: The Master decided the dispute solely upon the basis of conflicting reports submitted by the experts (engineers) for each of the parties. At no time throughout the case management conference were these experts subjected to cross examination in an effort to determine the integrity of the reports submitted by them.

Consequently, the learned Master, without having had the benefit of the testimony elicited from cross-examination of the experts, could not have used a proper basis to decide the dispute.

Furthermore, the court again emphasized that the case management conference should not be used as a forum to try matters. The court referred to and applied the case of **John Bicar v Josephat Bicar and Timothia Bicar Civil Appeal No. 22 of 2003** decided upon almost similar issues the previous day as well as its written judgments in **MPG Construction v Dominica Social Security** Civil Appeal No. 3 of 2003, **St. Lucia Furnishings Ltd v St. Lucia Cooperative Bank Ltd and Frank Myers of KPMG** Civil Appeal No. 15 of 2003 and **B Hector et al v N Joseph and C Antoine v B Antoine** Civil Appeal Nos. 6 and 8 of 2003.

Tuesday 17th February 2004

Coram: **Hon. Brian Alleyne Justice of Appeal**
Hon. Albert Redhead Justice of Appeal
Hon. Hugh Rawlings Justice of Appeal (Ag)

Caribbean General Insurance Company Limited v The Saint Lucia Coconut Growers Association Civil Appeal No. 17 of 2003.

Appearances:

Appellant: **Mr. Peter I Foster with Mrs. Claire Malaykhan**
Respondent: **Mr. Dexter Theodore**

Issue: Civil Practice and Procedure – irregularity in the grant of a final order of the court – waiver of the irregularity in the grant of the final order – trial judge's jurisdiction to set aside a final order – delay in making application to set aside a final order of the court.

Result: Appeal dismissed. No order as to costs.

Reason: The learned trial judge correctly exercised her discretion under CRR r. 26.1(2)(k) to extend the time for the respondent to file its application to set aside an order of 16th April 2002. The learned trial judge also had jurisdiction to set aside the order of 16th April 2002 that was in any event erroneously entered.

The appellant cannot now seek to appeal against the judgment that set aside the order of 16th April 2002 because the appellant's entitlement to the recovery of monies for purchased shares was not premised upon a claim or counter claim against the respondent.

Wednesday 18th February 2004

Coram: **Hon. Albert Redhead Justice of Appeal**
Hon. Adrian Saunders Justice of Appeal
Hon. Hugh Rawlings Justice of Appeal (Ag)

The Attorney General of Saint Lucia v Martinus Francois Civil Appeal No. 37 of 2003

Appearances:

Appellant: **Mr. Anthony Astaphan SC with Ms. Jan Drysdale and Mr. Renee Williams.**
Respondent: **The Respondent in person with Dr. Nicholas Frederick and Mr. Clarence Rambally**
Mr. Anthony Mc Namara QC with Mr. Steven Singh watching brief for the Royal Bank of Trinidad and Tobago.

Issue: Administrative Law – judicial review – whether a guarantee for costs overruns falls within the ambit of capital and recurrent expenditure under the Finance (Administration) Act - statutory powers of a minister – ultra vires doctrine – procedure for parliamentary approval of agreements and guarantees

Contract Law – definition of and obligations under a contract of guarantee – condition(s) precedent to the validity of a contract of guarantee as required by the provisions of the Finance (Administration) Act.

Civil Practice and Procedure – abuse of process - locus standi

Statutory Interpretation – interpretation of the provisions of s. 39 and 41 of the Finance (Administration) Act and s.78 of the Saint Lucia Constitution Order 1978

Result: Decision reserved.

Reason:

Thursday 19th February 2004

Coram: **Hon. Adrian Saunders Justice of Appeal**
Hon. Brian Alleyne Justice of Appeal
Hon. Hugh Rawlings Justice of Appeal (Ag)

Marie Madeleine Egger v Herbert Egger Civil Appeal No. 17 of 2002.

Appearances:

Appellant: **Mr. Peter I Foster with Mrs. Clair Greene - Malaykan**
Respondent: **Mr. Anthony Mc Namara QC with Mr. Bota Mc Namara**

Issue: Land Law – validity of transactions involving purchases of properties – actual and presumed undue influence – duress - positive and negative prescription – community of

property – limitation periods – legal effect of consent orders

Civil Practice and Procedure – res judicata – extra territorial jurisdiction

Law of Evidence – sufficiency and weight of evidence adduced at the trial

Result: Decision reserved

Reason:

Friday 20th February 2004

Coram: **Hon. Adrian Saunders Justice of Appeal**
Hon. Brian Alleyne Justice of Appeal
Hon. Hugh Rawlings Justice of Appeal (Ag)

Toby Fabian Julian v PC Mervyn Clement Magisterial Criminal Appeal No. 2 of 2003

Appearances:

Appellant: **Mr. Sandy John**
Respondent: **Mr. Leslie Mondesir**

Issue: Criminal Law – possession of a firearm and ammunition without a licence – possession of a controlled drug (cannabis resin) – equivocal plea – severity of sentence imposed

Statutory Interpretation – definition of 'a firearm' within the provisions of the Firearms Act

Result: Appeal against conviction is dismissed. The sentences of five and three years consecutively for possession of a firearm and possession of 7 rounds of ammunition respectively are quashed and are substituted by sentences of three years each running concurrently. The sentence of three months imprisonment consecutively for possession of cannabis resin is affirmed but shall instead run concurrently to the other sentences.

Reason: The court does not accept the submission that because the weapon was not working at the time of the Appellant's arrest that it put in issue whether it was a 'firearm' under the provisions of the Firearms Act. The weapon was clearly designed to discharge a projectile and as such it fell within the statutory definition of a firearm. Consequently the guilty plea entered by the learned magistrate was correctly accepted even though the accused had said that the gun was not working.

The learned magistrate applied an erroneous principle in making the sentences consecutive. He was also wrong to take the view that having imposed terms of imprisonment the appellant was incapable of paying a fine(s).

It was parliament's desire that the court should treat firearm offences seriously. The court must be cognizant of this principle when imposing sentences but the court must also be astute to impose fit sentences. Parliament by the provisions of Article 1284 of the Criminal Code of Saint Lucia also appreciates that sentencing is within the purview of the judiciary. The appellant at the time of the offences was 22 years old, was a first time offender, pleaded guilty at the first available opportunity, cooperated with the police fully, was unrepresented at the trial, was gainfully employed as a vendor and was remorseful.

Barbara Radmore and Gillian Radmore v PC Januarius Jn Baptiste Magisterial Criminal Appeal No. 3 of 2003.

Appearances:

Appellant: **Mr. Peter I Foster**
Respondent: **Mrs. Racquel Willie – Trotman**

Issue: Criminal Law – use of insulting language – assault of a police officer with a dangerous weapon

Law of Evidence – weight of the evidence adduced

Result: Appeals allowed.

Reason: The respondent concedes that the appeal should be allowed.

Naila Williams v PC 149 Michel Etienne Criminal Appeal No. 1 of 2004.

Appearances:

Appellant: **Mr. Kenneth Monplaisir QC**
Respondent: **Mrs. Racquel Willie –Trotman**

Issue: Criminal Law – driving without due care and attention

Result: The matter is remitted to the Magistrates Court for the record of appeal to be completed and resubmitted to the Court of Appeal at the end of May 2004. Counsel to monitor the progress of the court for the completion of the record of appeal.

Reason: It shall be unfair to the parties for the Court of Appeal to adjudicate upon an incomplete record of appeal.

MAGISTERIAL CIVIL APPEALS

Lorna Farrel v Nathiel St. Ville Magisterial Civil Appeal No. 3 of 2003.

Appearances:

Appellant: **Mrs. Wauneen Louis – Harris**
Respondent: **Mrs. Kim St. Rose**

Issue: Family Law – paternity – maintenance

Civil Practice and Procedure – functus officio – magistrate's jurisdiction to hear an application that was allegedly filed out of time – two hearings conducted before Magistrate – First hearing aborted by the Magistrate before evidence in chief of first witness completed as magistrate took the view that application had not been made in time - whether second hearing could be held – whether first hearing was a nullity – trial de novo –

Law of Evidence – weight of evidence adduced

Result: The matter is remitted to be heard de novo before the magistrate's court. No order as to costs.

Reason:

Jurisdiction to hear application:

The form that was required to file the application was lodged at the registry within the time limit specified by the provisions of section 3 of the Affiliation Ordinance Chapter 8. The applicant had done what she was required to do. The fact that she was required to return to the court's registry subsequently was an entirely administrative procedure to facilitate the registry's completion of an administrative process. Therefore the court was correct to have entertained the application.

Whether a first hearing is a nullity:

The court can surmise from the record of appeal that at the first hearing there was no trial of the merits of the case. What purported to be a hearing before the magistrate was not a hearing. This case can be distinguished from **R v Essex Justices Ex Parte final Same v Same** (1962) 3 All ER 924 where evidence was adduced and there was a finding of fact. (**R v Marsham, Exp Pethrick Lawrence** (1911-13) All ER 639 applied)

Trial de novo:

It was discovered that the matter was partly heard by one magistrate before the remainder of the case was heard before another magistrate. The second magistrate was in no position to hear the part heard matter because she had no opportunity to see and hear the witnesses' testimony at the part heard matter.

If there is a part hearing of a matter and that matter cannot be completed, it should be vacated and heard de novo before another magistrate.