TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

NO. 118 0F 2001

THE STATE

V

JUNIOR NICHOLAS A/C AKEE A/C BLACKBOY

FOR

MURDER

BEFORE THE HONOURABLE
MR. JUSTICE M. BAIRD

APPEARANCES:

MISS. A. TEELUCKSINGH AND
MISS A. ALEXIS FOR THE STATE

MISS S. CHOTE INSTRUCTED BY
MISS N. ASHRAPH FOR THE DEFENCE

<u>Ruling</u>

The accused Junior Nicholas otherwise called Akee otherwise called Blackboy is before this Court on an indictment which charges him with murder. A statement of case for the prosecution in summary, is that on 12th February 2001 around 2.00 a.m. the accused, by way of reprisal for what he considered disrespect shown to him on a previous occasion by the deceased Curtis Le Blanc, a homeless person, struck the deceased to the head with a large stone on some two to three occasions as the deceased lay asleep in Tamarind Square. The deceased died on the spot of massive blunt cranio cerebral traumatic injury.

The case for the prosecution relied wholly and completely on the evidence of two witnesses, Ken George and Wayne Selby Peters for buoyancy. Ken George died of natural causes on 25th October 2001, three months to the day after he testified at the preliminary enquiry. Wayne Selby Peters died on 10th July 2003, two weeks before the commencement of this trial, also of natural causes.

In a preliminary application made in the absence of the jury, before the opening of the case for the prosecution, State Attorney Miss Teelucksingh sought under section 39 of the Indictable Offences (Preliminary Enquiry) Act Chap. 12:01 as amended, to have the depositions of the two deceased witnesses admitted into evidence. The application was resisted by Defence Attorney Miss Chote.

Miss Teelucksing relied on her skeleton arguments, which she amplified before the Court, in an endeavour to demonstrate that the depositions of the two witnesses satisfied the criteria laid down by section 39 for admissibility.

Miss Chote in resisting the application, relied on her skeleton arguments. She also submitted before the Court that the defence was conceding that the depositions met the statutory requirements for admissibility in that she accepted that the witnesses were dead and that the State had produced legally acceptable evidence of their death. The question was however, whether it would be safe for the jury to rely on the evidence in those depositions. Defence Attorney then went on to argue that there was several aspects of the case which could only have been evaluated by a "live assessment of the witnesses". And she identified those aspects. The Court will now address those aspects identified, though not necessarily in the order in which they were presented.

Miss Chote contended that the quality of the evidence contained in the depositions was not good as Miss Teelucksingh had maintained. Miss Chote then went on to catalogue what she considered inconsistencies in the evidence of the witnesses.

The Court considered her arguments and was satisfied that these conflicts were of the species contemplated by Lord Griffiths in Barnes, Desquottes, and Johnson v R; Scott and Walters v R (1989) 37 WIR 330, 340:

> *"It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross examination………"*

Accordingly this ground of the submission must fail.

Miss Chote next submitted that although the accused was represented by attorney, his attorney was absent on the day the two witnesses testified and the cross examination by the accused was ineffectual. She contended that the absence of attorney had the effect of curtailing, abridging or constraining the right of the accused to fully cross examine these witnesses.

The Court rejected this line of reasoning. On his return to Court, all defence attorney needed to have done was to apply to the Magistrate to have the two witnesses recalled for further cross examination. This he did not do.

Miss Chote also contended that the instant case could be distinguished from the cases of Barnes (ante) and Boodram v The State (1997) 53 WIR 352 in that the prosecution witnesses in those cases were killed in order that they might not testify at the trial. Their depositions were therefore admitted because of public policy considerations. In the case at hand the two witnesses died of disease, so public policy considerations did not arise; accordingly their depositions should be excluded.

The Court considered section 39 of the Indictable Offences (Preliminary Enquiry) Act Chap. 12:01. Subsection 1 provides that where any person had been committed for trial for

any offence, the deposition of any person taken before a Magistrate might, if the considerations set out below was satisfied, without further proof be read as evidence on the trial of that person, whether for that offence or for any other offence arising out of the same transaction or set of circumstances as that offence. The section then identifies the conditions. And (1) (a) states:

> *"……….the deposition must be the deposition either of a witness whose attendance at the trial is stated to be unnecessary in accordance with the provisions of section 21 (5), or a witness who is proved at the trial by the oath of a credible witness to be dead ………"*

Parliament was silent as to the circumstances which must attend the death of the witness and the Court cannot and will not, read any ancillary words into the section.

This ground of the submission must also fail.

The Court then considered the ground of disclosure argued by Miss Chote. Both sides relied, in the main, on the same legal authorities in support of their respective submissions.

In R v Brown (Winston) (1994) 1 WLR 1579, Steyn L. J. delivering the judgment of the Court of Appeal stated (at p. 1606) that in the adversarial system, in which the police and prosecution controlled the investigatory process, an accused's right to fair disclosure was an inseparable part of his right to a fair trial. The first question was to determine the extent of the Crown's duty of disclosure. He then referred to R v Keane (1994) 1 WLR 746, 752 and to the adoption by Lord Taylor C. J. of the test laid down by Jowitt J. in R v Melvin (Graham), unreported, 20th December 1993. He then stated that Jowitt J. said:

> *"I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence the prosecution proposes to use; (3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) or (2)"*

Steyn L.J. then stated that that was a test which the Court of Appeal would also adopt but he went on to make some additions. The phrase "*an issue in the case*", he said, must not

be construed in the fairly narrow way in which it was used in a civil case; it must be given a broad interpretation. In a civil case a party was not entitled to discovery in respect of the credit of a party or a witness, however in a criminal case, the Crown was under a duty to give disclosure of significant material which might affect the credibility of a prosecution witness. He then gave three illustrations, the third of which he considered to be the most important, namely, the rule that the prosecution was obliged to disclose previous convictions of a prosecution witness, and he quoted with approval the dictum of Cooke, P. in Wilson v Police (1992) 2 N.Z.L.R. 533, 537:

> *"As to the kind of conviction within the scope of the duty, the test must be whether a reasonable jury or other tribunal of fact could regard it as tending to shake confidence in the reliability of the witness"*

Lord Griffiths delivering the opinion of the Board of the Privy Council in Barnes (ante) stated (at p. 340):

> *"Provided that these precautions are taken it is only rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it would be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said: that neither the inability to cross examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence, will of itself be sufficient to justify the exercise of the discretion. It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion."*

Miss Chote submitted that the State had made no disclosure at the preliminary enquiry and disclosure had been recognised in criminal cases, and particularly capital matters, as crucial to a fair trial. She then referred the Court to page 26 of the typewritten proceedings which revealed what transpired before the Magistrate at the preliminary enquiry on 30th July 2001. The Court will reproduce that aspect of the record in its very words:

"Mr. Scotland:

I will like full disclosure

Mr. Ramrekersingh:

I have one statement of Mr. Ken George.

This is the case for the prosecution."

The Court was informed by Miss Teelucksingh that by the time Mr. Ramrekersingh had closed his case, he had already disclosed to Mr. Scotland the following:

(a) the sketch; (b) the post mortem certificate; (c) the post mortem examination report; (d) the conviction record of the accused. This disclosure was made on an attorney to attorney basis on 27th July 2001 – three days before Mr. Scotland asked in open court for full disclosure. At no time before the death of the two witnesses had the prosecution disclosed to the defence material concerning their previous criminal records.

Miss Teelucksingh also stated that as the witnesses had died the prosecution would be unable to provide that information because the criminal records office would not release records without finger print confirmation of identification. The finger prints of the deceased witnesses were never taken.

In a motion filed on 1st April 2003 the accused sought an order that the State disclose material including the criminal records of Wayne Peters and Ken George. Annexed to the notice were letters exchanged by instructing attorney Miss Ashraph and State Attorney Mr. Dubay over a period of time. In a letter to Miss Ashraph dated 10th December 2002, Mr. Dubay stated that the criminal records of Wayne Peters and Ken George could not at that time be properly verified. Ken George was then deceased and a check at the criminal records office revealed that there were several people who carried that name and Ken George's fingerprint impressions would have been the only manner in which his criminal record could have been verified. He also stated that Wayne Selby Peters was at that time a patient at the Port of Spain General Hospital.

In another letter dated 14th February 2003 to Miss Ashraph, Mr. Dubay stated that the State proposed to make an application to have the deposition of Ken George read as evidence. He stated further that the criminal records office was under instructions not to release records without finger print confirmation of identification; he was however,

through the complainant, trying to get his (Ken George's) previous convictions. He would forward it to her as soon as he had received it.

It is clear from this letter that the State was accepting that Ken George did in fact have a criminal record of some sort.

As respects Wayne Peters, Mr. Dubay stated in the said letter that he had asked the complainant to take a further statement from Wayne Peters as to his previous convictions; he had not yet received that statement but would disclose it to her as soon as he had received it.

Miss Teelucksingh informed the Court that a statement had in fact been taken from Wayne Peters by the complainant in which Peters admitted that he had pending charges and two convictions, one for malicious damage and another for unlawful possession of pvc pipes.

It is worthy of note that when the complainant took that statement from Peters he took no steps to have Peters fingerprinted, even though Peters had admitted to having previous convictions. He therefore effectively ruled out any possibility of fingerprint confirmation of identification by the criminal records office.

It is pellucid from the material before the Court that both deceased witnesses had criminal records. Indeed, Miss Teelucksingh frankly admitted that Wayne Peters could not have been regarded as a witness with a clean record. And although there is uncertainty as to the full nature and extent of their criminal records due to the absence of fingerprint confirmation of identification, this in no wise, constitutes retrospective absolution for the prosecution from disclosing the criminal records of those witnesses from the outset of the magisterial proceedings and at a time when those witnesses were still alive. Their duty to disclose remained intact and regrettably, undischarged.

Disclosure of the criminal records of prosecution witnesses to the defence is immeasurably important.

The Court lends countenance to the view that in any criminal matter the State has an inescapable obligation to ascertain from their prospective witnesses, as soon as possible, ideally at the time the witnesses are giving their statements, whether they have criminal records. If the answer is in the affirmative, immediate steps should be taken to have those witnesses fingerprinted in order that the criminal records office could make the

necessary confirmation of identification. The criminal records of those witnesses should then be disclosed to the defence as soon as they are received from the criminal records office.

In the instant case the two deceased witnesses were homeless persons living in Tamarind Square. It is a notorious and well documented fact that Tamarind Square is a haven for roofless and rootless persons of dubious repute. The State should have been alive to the calibre of the witnesses on whom they were seeking to rely in order to prove this charge of murder against the accused, and they should have been proactive in having them fingerprinted, traced and their criminal records disclosed to the defence at the latest, at the threshold of the proceedings before the Magistrate. This they failed to do. Consequently the defence embarked on the preliminary enquiry without vital intelligence as to the character of the two main prosecution witnesses. Even when defence attorney requested full disclosure no responsive chord vibrated in the mind of State Attorney along that line. This calamitous situation is now perpetuated at the trial in that the prosecution is unable to properly disclose the criminal records of the witnesses in order that they might be placed before the jury.

As the Court considered the application it had uppermost in its mind, inter alia, the dictum of Steyn L.J. in Brown (ante) where he stated that, *"an issue in the case"* referred to by Jowitt J. in Melvin (ante) was broad enough in a criminal case to include disclosure of, *"significant material which might affect the credibility of a prosecution witness" (at p. 1606)*

Swayed by this dictum the Court entertained the view that, *"significant material"* which might affect the credibility of prosecution witnesses, would unquestionably impact on the quality of the evidence in the depositions of those witnesses. If therefore, as in the instant case, such material were not available to the defence at the preliminary enquiry with the result that the credibility of the witnesses could not have been adequately challenged, then after the death of those witnesses, it would be a matter of conjecture and hypothesis as to what would have been the true quality of the evidence in those depositions. The test laid down by Cooke P. in Wilson (ante) that is, whether a reasonable jury could regard the criminal records as tending to shake confidence in the reliability of the witnesses, would be pure chimera.

The prosecution having failed to disclose the criminal records of the two witnesses, should not be permitted to capitalise on their non feasance and have the depositions of the witnesses read in evidence. The reading of the depositions in these circumstances would infallibly mean that the witnesses, through their depositions, would be presented to the jury in a wholly incomplete and inaccurate light. A fair trial of the accused would be greatly compromised in such a situation.

The Court then considered a certain aspect of the depositions of Wayne Selby Peters. It noted with some degree of disquiet, the admission by the prosecution that the witness Wayne Selby Peters was himself taken into custody at the Besson Street Police Station as a suspect in this murder on the very 12th February 2001 at 4.45 a.m. This was before the accused was taken into custody as a suspect. This information was not disclosed to the defence until 29th May, 2003, some two years after the conclusion of the preliminary enquiry. And let it not be forgotten that Peters died on 10th July 2003. Mr. Scotland's request for full disclosure at the preliminary enquiry was a cry in the wilderness.

At the end of the day, the Court, having weighed up all the factors relevant to the grant and refusal of the application to have the depositions of Ken George and Wayne Selby Peters admitted in evidence and read at the trial, and having given the matter its best consideration, has come to the conclusion that if justice is to be done then the depositions of those two deceased witnesses must be excluded. It will be unsafe for the jury to rely on their depositions.

Before closing the Court must asseverate that it is fully satisfied that the failure of the prosecution to disclose was no indication of mala fides on their part. The bizarre collocation of circumstances which prompted this application, ironically exposed the shortcomings of the prosecution, imbuing them with a significance that would have been completely neutralized had the witnesses been alive and in court.

The application is refused.

Dated this 28th day of July,2003

Melville Baird
Judge