TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 54 OF 2001

THE STATE

V

FRANCIS JOHN

FOR

(1) INCEST
(2) SERIOUS INDECENCY

BEFORE THE HONOURABLE
MR. JUSTICE M. BAIRD

APPEARANCES:

MR. L. FORTE FOR THE APPLICANT
MR. G. HENDERSON FOR RESPONDENT

RULING

The applicant Francis John is before this Court on an indictment which charges him with two offences: incest and serious indecency alleged to have been committed on 1st September, 1999. A preliminary enquiry into the charges was held by the Magistrate sitting at the Princes Town Magistrates' Court and on the 15th June 2001 the applicant was committed to stand trial at the San Fernando Assizes. On 30th August 2001 the indictment was preferred by the Director of Public Prosecutions and it was filed in the Sub Registry San Fernando on 7th September, 2001.

The Court pauses here to say how very impressed it was at the commendable expedition in which the indictment was filed by the Director of Public Prosecutions after committal. The need for expedition both in the holding of the committal proceedings and in the preferment of the indictment in sexual matters involving children of tender years is axiomatic and the Court applauds the department of the Director of Public Prosecutions for appreciating this need and acting with laudable dispatch.

In a motion filed on 27th March 2002, the applicant is seeking an order to quash the indictment on the ground that it was preferred on the basis of a committal order that was made in contravention of section 23 of the Indictable Offences (Preliminary Enquiry) Act Chap. 12:01 in that no prima facie case of any indictable offence had been made out against the applicant. And/or in the alternative an order to quash the committal order on the ground that the Magistrate failed to comply with the provisions of the said section 23 of the said Chap. 12:01 in that there was an insufficiency of evidence to establish a prima facie case against the applicant.

The Court will deal with both branches of the application together due to the strong common denominator that pervades them.

The submission of Mr. Forte for the applicant, compendiously put, was that section 19 (5) and (6) of the Children Act Chap. 46:01 as amended by the Administration of

Justice (Miscellaneous Provisions) Act No. 28 of 1996 was unconstitutional null and void and of no effect because:

(1) it violated a rule of law existing prior to the coming into being of the constitution which was now entrenched, that a person was entitled to a fair trial in accordance with the law of the land to wit, due process of law and in this case that due process allowed for a conviction to be sustained only on the unsworn evidence of a child;

(2) an accused person was presumed innocent until he was convicted; the amended section had now made provisions for an accused person to be convicted on less than a prima facie case, thereby interfering with the presumption of innocence. The law prior to the amendment made absence of corroboration fatal because Parliament recongised that the absence of corroboration meant that there was no prima facie case to go to the jury. A variation in the law arising from the amendment would affect the entrenched rights of the applicant to due process. Any alteration of due process would require passage in Parliament of a special three fifths majority. The amended provision was passed by a simple majority and was null and void as being inconsistent with sections 4 and 5 of the constitution.

State attorney Mr. Henderson in a submission that was remarkable for its force and clarity stated, inter alia, that the challenged amendment to the Children Act did not affect the substantive rights of the accused; it was a procedural change by which the prosecution could establish the offence, accordingly there was no infringement of the rights of the applicant to a hearing in accordance with due process. He argued that the trust of the applicant's complaint was not aimed at the substantive law creating the offence or even the fairness of the trial, his complaint was directed at the change in procedure authorised by the amending Act which now allowed proof of the substantive offence by the unsworn and uncorroborated evidence of a child. He also demonstrated that Mr. Forte in his submission had equated the reliability of the unsworn evidence of a child with the sufficiency of such evidence and urged that the confusion of these two concepts by Mr. Forte occasioned flaws in his submission.

The Court will now consider the Children Act Chap. 46:01. Before it was repealed and replaced by the Administration of Justice (Miscellaneous Provisions) Act, section 19 (1) of the Children Act provided for the reception of unsworn evidence of a child of

tender years in proceedings for specified offences where the child did not understand the nature of the oath, if in the opinion of the Court the child was possessed of sufficient intelligent to justify the reception of the evidence and understood the duty of speaking the truth.

Section 19 (2) provided that no person should be liable to be convicted of the offence unless the testimony admitted by virtue of sub section (1) and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.

By section 16 of the Administration of Justice (Miscellaneous Provisions) Act 1996, section 19 of the Children Act was repealed and replaced. Section 19 (1) provides:

> *"A child's evidence in criminal proceedings shall be given unsworn"*

Section 19 (5) provides:

> *"Subject to subsection (6) a person may not be convicted of an offence unless the evidence admitted under this section and given on behalf of the prosecution is corroborated by some other material particular implicating the accused and such corroboration may consist of evidence other than oral evidence."*

Section 19 (6) provides:

> *"Notwithstanding subsection (5) an accused person may be convicted on the uncorroborated evidence of a child provided that the Court warns the jury of the danger of convicting the accused person on the uncorroborated evidence of a child."*

As the Court sees it the Rosetta stone that would unravel this entire question would be the determination of "due process." So soon as "due process" is ascertained then the various points dependant thereon will fall into their proper place. In *Lasalle v A.G. (1971) 18 WIR 379* Phillips J.A. defined "due process of law", and Lord Millet delivering the reasons of the majority of the Board in *Thomas and Another v Baptiste and Others (1999) 54 WIR 387* cited his judgment with approval. Phillips J.A. stated (ibid.) at p. 391:

> *"The concept of 'due process of law' is the antithesis of arbitrary infringement of the individuals right to personal liberty; it asserts his ' right to a fair trial, to a*

pure and unbought measure of justice'. While it is not desirable and, indeed, may not be possible to formulate an exhaustive definition of the expression, it seems to me that, as applied to the criminal law (in which category I include offences against military law) it connotes adherence, inter alia, to the following fundamental principles;

(1) reasonableness and certainty in the definition of criminal offences;
(2) *trial by an independent and impartial tribunal;*
(3) observance of the rules of natural justice."

The Court will now look at the proceedings before the Magistrate to see whether one or more of these principles had been violated.

There has been no complaint from the applicant that there was any unreasonableness or uncertainty in the definition of the offences with which he was charged. He was charged that on 1st September, 1999 at Basseterre, Moruga he had sexual intercourse with Nikesha Mollino who is and was to his knowledge his daughter, contrary to section 9 (1) of the Sexual Offences Act No. 27 of 1986. The essential ingredients of the offence for the purposes of this charge of incest are: (a) the sexual intercourse and (b) knowledge on the part of the accused that the person with whom he had the sexual intercourse was his child by blood relationship.

A prima facie case is established before the Magistrate where there is some evidence which taken at face value, establishes each essential element. The mandatory requirement for corroboration made by the previous section 19 (2) of the Children Act in respect of the unsworn evidence of a child, was not and could not have been an essential ingredient of the offence of incest. The lapse which in the opinion of the Court diverted Mr. Forte's line of reasoning was his apparent lack of appreciation of the difference between substantive law and adjectival law. Adjectival law is the aggregate of rules of procedure or practice. Substantive law is the basic law of rights and duties; it is that part of the law which creates duties, rights and obligations. Adjectival law constitutes the rules according to which substantive law is administered. The law of evidence is a branch of adjectival law and corroboration fall squarely within the law of evidence.

Corroboration whether required as a matter of law or as a matter of practice, can in no way be a requirement for the establishment of a prima facie case at the preliminary

enquiry. And I must add, at the trial. Indeed, were the Court to accept Mr. Forte's reasoning, ironically enough, it would then be denying the applicant due process in that it would be purporting to alter the structure and definition of the offence of incest, occasioning thereby unreasonableness and uncertainty in that definition.

At the preliminary enquiry the Magistrate is not concerned about the presence or absence of corroboration, whether required by law or as a matter of practice. He is concerned with the question whether on the whole of the evidence there is material which if believed would support the basic elements of the charge. The question of corroboration, in all its ramifications is exclusively a matter for the Judge at the trial. The requirement of corroboration by the old section 19 merely constituted the means or the procedure by which the prosecution could obtain a conviction. The repeal and replacement of that provision by a provision which abolished the requirement of corroboration and introduced a warning by the Judge to the jury about the danger of acting on the uncorroborated evidence of a child, still constitutes the means or the procedure by which the prosecution can secure a conviction. There was no need therefore for a special majority to pass the amendment into law. This is unlike the situation where there was legislation creating a right of appeal by the prosecution and providing for a new trial where a person had been acquitted of a charge that had been laid against him. Here the right to personal liberty had been affected and a special majority was needed in those circumstances for the passage of that piece of legislation. See *Brad Boyce* Cr. App. No. 88 of 1988.

It cannot be gainsaid that there was reasonableness and certainty in the definition of the offence with which the applicant was charged before the Magistrate.

Mr. Henderson expressed the view that the second and third principles enunciated in *Lasalle (ante)* were inapplicable to the preliminary enquiry and they would have had relevance only to the trial. The Court does not agree. Clearly, the proceedings before the Magistrate were an enquiry and not the actual trial, but the independence and impartiality of the Magistrate and the conduct of the proceedings by the Magistrate in accordance with the rules of natural justice are principles that must be adhered to. There has been no complaint from the applicant that the Magistrate was partial or was anything other than independent, and there was no complaint from him that the

proceedings before the Magistrate were conducted in breach of the rules of natural justice in any of its facets.

The Court considers the words of Phillips J.A. in *Lasalle (ante)* most apposite:

> *"The effect of the due process clause is to entrench, not the particular form of legal procedure existing at the date of commencement of the constitution for adjudication of the rights of the individual, but rather his fundamental right to such adjudication by a fair, independent and impartial tribunal, in accordance with legal principles that have come to be well understood in our democratic society – in a word, his right to justice as we know it………"*

What Lord Millet had to say in *Thomas v Baptiste (ante) at p 442 is also instructive:*

> *"A constitution embodies fundamental rights and freedom, not their particular expression at the time of its enactment. The ' due process' clause must therefore be broadly interpreted. It does not guarantee the particular form of legal procedure existing when the constitution came into force; the content of the clause is not immutably fixed at that date"*

The Court is of opinion that this change in procedure by which the mandatory requirement for corroboration of the evidence of a child was abolished, was long overdue. The rationale behind this principle was the unreliability of witnesses of tender years, even if the child had a sufficient understanding of the nature of an oath to enable its evidence to be sworn. One must not lose sight however, that a child of this modern era is a completely different entity from his counterpart of thirty years or more, ago. What was considered precocity in the latter is now considered normalcy in the former. It seems to the Court that Parliament, in enacting the new legislation, was indicating a change of attitude reflecting in its turn a change of attitude by the public in general to the acceptability of the evidence of young children. The concept that evidence was inherently unreliable because its author was a child can now be considered a shibboleth. Having given the matter its best consideration the Court holds the view that there was ample evidence from the child to satisfy the establishment of a prima facie case before the Magistrate. The committal of the applicant to stand trial at the assizes was therefore good. The indictment preferred by

the Director of Public Prosecutions is therefore soundly and legally based and accordingly, valid.

The motion is dismissed and the trial will proceed.

Dated this 21st May, 2002.

Melville Baird
Judge