TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. S.104 of 1997

BETWEEN

THE STATE

v.

RAJHNATH RAMDHAN, AMOY CHIN SHUE,

SUNIL RAMDHAN and RABINDRANATH DHANPAUL

Before the Honourable Justice P. Moosai

Appearances:
Mr. S. Persad and Mr. Sookraj for Sunil Ramdhan and Rabindranath Dhanpaul
Ms. G. Lucky and Ms. I. Ramkissoon for the State

JUDGMENT

This is a Notice of motion dated 1st July, 1998 to quash an indictment on behalf of the Accused Sunil Ramdhan and Rabindranath Dhanpaul for non-compliance with s.18 of the Indictable Offences (Preliminary Enquiry) Act Chapter 12:01 ("the Act"). An affidavit was filed on the 1st day of July 1998 by Sunil Ramdhan on behalf of himself and the other Accused, Rabindranath Dhanpaul disputing what was contained in the record. In effect the Accused were both saying that they indicated to the Magistrate that they wished to remain silent. No affidavits were filed by the State. Leave was granted to both sides to cross-examine but there was no cross-examination.

The record reveals that after the Accused were both cautioned pursuant to s.17 of the Act, they said that they reserved their defence. They signed the respective forms confirming same. Their Attorneys were present. The State relies on the record as revealing what truly transpired**.**

In Fazal Mohammed v. The State (1990) 91 Cr App R 256, the judge's note was the only record of the proceedings. Lord Griffith in delivering the judgment of the Privy Council stated :

> "Their Lordships have felt some doubt about this matter and it may be, than the judge's questions went further than he recorded, but the fact remains that no questions or answers are recorded in the judge's note that bear upon the child's understanding of the nature of the oath. In these circumstances their Lordships are not prepared to depart from the view of the Court of Appeal that the judge did not make the enquiry that good practice demands. The lesson to be learned is that in future the judge should record in his note the whole enquiry he makes of a child under 14 before allowing the oath to be taken…"

Further in Cadogan v. R.(1963) 6 W I R 292 Phillips J. A. stated at page 297:

> "In our judgment, this is a situation in which the maxim omnia praesumuntur rite esse acta applies, and in the absence of clear evidence to the contrary, it is not competent for this court to hold that there was such an irregularity in the conduct of the inquiry as would vitiate the entire proceedings."

It must be remembered that magistrates deal with approximately 100 matters a day. They are required to comply with statutory provisions that are not contained in a detailed and comprehensive code. What we have in this instance is a contemporaneous note signed by the Accused. A Magistrate cannot reasonably be expected to remember every single detail of what transpired in court. I am not surprised that the State filed no Affidavits as, having regard to what I have just stated, it would have been of no assistance to this Court to merely state what was the Magistrate's normal practice.

I am of the view that the record accurately reflects what transpired on that date. Both Accused were represented by Counsel on that day and said they reserved their defence. They signed the respective forms confirming same. They seek to complain some 6 years after the completion of the preliminary enquiry. In addition, their Affidavit seeks to highlight so many technical errors that I have great difficulty in accepting the Accused as credible witnesses. Cadogan's case suggests that there must be clear evidence to the contrary to rebut the presumption of regularity. The Accused have not satisfied that standard.

Based on the authority of the State v. Guniss Seecharan H.C.A No. S.423 of 1997, I am of the view that there was no need for the Magistrate to comply with s.18 of the Act. Having reserved their defence, they were in fact saying that they were not disclosing their defence at the stage of the preliminary enquiry. It amounted to a pre-emptive strike thereby precluding the Magistrate from moving on to the s.18 stage.

Even if I were to accept the evidence of both Accused to the effect that they indicated to the Magistrate that they wished to remain silent, based on the authority of

The State v. Guniss Seecharan (supra), the provisions of s.18 are directory. The Accused must show prejudice. Both these Accused are contending that they are prejudiced.

SUMMARY OF RELEVANT FACTS

On Wednesday 17th May, 1989 around 5.45 p.m., the complainant, then Cpl. Ruthven Paul in company with Cpl. Hillaire and other police officers, executed a search warrant at the home of Rajnath Ramdhan (a co-accused who has since absconded and for whom there is an outstanding warrant), located at Alice Street, La Romain. They were dressed in plain clothes. On arrival at those premises, Cpl. Paul and Cpl. Hillaire went to the back of those premises, while the other officer went to the front. They ascended a step leading to the back door, where they saw a man, who was about to close that door. The officers prevented him from closing that door. Cpl. Paul then showed and read the search warrant to this man.

Both officers then entered that house, and on reaching the kitchen area, they saw a tray with a spoon containing a whitish substance resembling cocaine. There were also several parcels on the counter, also containing a whitish substance resembling cocaine. Cpl. Paul spoke to the man, who had accompanied them to the kitchen area. One of the other officers in the party took up a position in the kitchen area with that man, and Cpl. Paul and Hillaire proceeded to the toilet area. On entering the

toilet, the two accused persons together with another man were seen hiding in the bathroom behind a shower curtain.

> The two accused together with the other man were then taken to the living room where they were made to sit on a mattress. Cpl. Paul then asked the two accused persons along with the two other men what they knew about the cocaine that he had found in the kitchen. The two accused persons did not answer. One of the other men then said in the presence and hearing of the accused persons 'ah get that shipment last night and the three of them only helping me'. Cpl. Paul then drew the Accused's attention to what the other men had said and he cautioned them. They responded by saying that 'officer is true, we only helping him parcel the cocaine.'

The Magistrate then overruled no-case submissions. It means that the Magistrate would have found at that stage that there was a prima facie case made out. As a result he committed both these Accused. Both these Accused now say that they had two witnesses, a photographer and the caretaker of the house at Alice Street, La Romain, but they were unable to call them because they had not been given the opportunity. The caretaker would have given evidence that they both went there after he (the caretaker) called them and told them that the house had been broken into.

The photographer would have tendered the photographs (which had been marked X, Y and Z for identification at the preliminary enquiry) to support their case that the said house was in fact broken into.

Pausing here, I am of the view that this is an irregularity which would not have substantial adverse consequences for the Accused nor does it amount to a really substantial error leading to a demonstrable injustice as set out in The State v. Guniss Seecharan No. S.423 of 1997 at page 21. What the Magistrate had before him was an oral confession by both these Accused to the effect they were only helping one of the Accused parcel the cocaine. The evidence of the Accused's witnesses namely, the photographer and the caretaker, would have amounted to more than a joinder of issue.

As was stated by Lord Woolf in Brooks v. D.P.P [1994] 1 A.C. 568 at 581:

> "Questions of credibility, except in the clearest of cases do not normally result in a finding that there is no prima facie case. They are usually left to be determined at the trial."

In Sanjit Chaitlal v. The State (1985) 39 W. I. R. 295, the Practice Note [1962] 1 All E R 448 by Lord Parker CJ was referred to. At page 448 Lord Parker CJ stated:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
>
> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal

(if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

By overruling the no-case submission it is clear that the evidence was such that there was a prima facie case against the Accused. In R v. Barker (1975) 65 Cr App Rep 287 at 288 Lord Widgery CJ stated:

"It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is primarily concerned with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case."

Faced with the oral confession and the evidence of the Accused's witnesses the Magistrate, on being satisfied that the Sangit Chaitlal's principles were not applicable, would have committed both Accused.

Both Accused are also contending that at the preliminary enquiry, the Accused Rajhnath Ramdhan was handling the conduct of the defence of both these Accused. They are now unaware of his whereabouts or even if he is alive and as such they are unable to locate or identify either of the witnesses.

The record reveals that at the Magistrate's Court Rajhnath Ramdhan and Sunil Ramdhan were represented by Mr. F. Hosein and Amoy Chin Shue and Rabindranath Dhanpaul were represented by Mr. S. Persad.

Surely in this case where photographs had already been tendered by the Defence and marked X, Y and Z for identification, it is presumed that Defence Attorney for Rajnath Ramdhan and Sunil Ramdhan would have had the photographs in his possession, the name and address of the photographer and a statement from the photographer. Similarly the name and address of the caretaker and his statement should have been in the possession of defence Attorney for Rajhnath Ramdhan and Sunil Ramdhan. I am therefore of the view that the contention of Sunil Ramdhan is without merit.

A fortiori for the Accused Rabindranath Dhanpaul to contend that he was represented by a different Attorney, but that the conduct of **his** defence was being handled by a co-accused who is represented by another Attorney is absolutely without merit.

A Defence Attorney is ultimately responsible and accountable for the conduct of his client's defence. Where there are co-Accused and an Attorney perceives that there is a conflict, it is the duty of Counsel to represent his client fairly and impartially and fearlessly. Defence Counsel cannot delegate the conduct of his client's defence to another Attorney. If there were witnesses known to the Defence and available at that time, then statements ought to have at least been recorded from them.

I have attempted to compartmentalize the issues and deal with them as they arose, but I am of the view that when one looks at the facts in its entirety, the Accused seem to

be relying on technicalities. As was stated by Lord Mustill in Neill v North Antrim Magistrates' Court [1992] 4 All E.R 846 at page 857:

> "I wholly share the sentiments of those who, over the years, have exclaimed in dismay at the vision of the streams of applications by persons committed for trial seeking to put off the evil day by drawing attention to supposed errors in the application at the committal stage of the highly technical rules of criminal evidence."

For the foregoing reasons the Motion fails.

The trial of this matter is adjourned to the next Assizes.

Dated this 17th day of September, 1998.

Prakash Moosai

Judge