Trinidad and Tobago

In the Court of Appeal

Cr. App. No. 72 of 2000

Between

DENNIS CHADEE Appellant

And

THE STATE Respondent

CORAM
R. Hamel-Smith, J.A.
R. Nelson, J.A.
A. Lucky, J.A.

APPEARANCES:

Ms. Margaret Rose
holding for Mrs. P. Elder for the Appellant

Mr. Rangee Dolsingh S.C.
and Ms. Angelica Teelucksingh for the State.

Delivery date: 10th July, 2002

RULING

Nelson, J.A.

The applicant for leave to appeal was convicted on October 5, 2000 of wounding Grace Seetal on September, 18, 1994 with intent to do her grievous bodily harm. He was sentenced to eight years' imprisonment with hard labour. An order for compensation was also made. As a result of the incident Grace Seetal lost sight in her left eye.

Ms. Seetal had gone to her mother's house to obtain a vegetable, dasheen bush, for cooking. On her way home she used a track through the applicant's premises. She soon realized that the track had been blocked with galvanized iron sheets. The applicant approached her menacingly with a stone in one hand and a bottle in the other. He protested that he did want anyone to pass through his property.

For present purposes it is sufficient to say that the applicant struck the victim with the stone and the bottle. Ms. Seetal was wounded and became unconscious as a result. She was hospitalized; she suffered cerebral concussion and multiple jagged lacerations to the left upper and lower eyelids, damage to the globe of the left eye, hyphaema and a lacerated iris. There were conjunctiva lacerations, and Ms. Seetal no longer had any perception of light.

The defence was one of accident, the result of a collision between an umbrella that Ms. Seetal was carrying and the bottle in the applicant's

hand. The learned judge also left to the jury the issue of self-defence, which appeared to arise from the allegations made by the defence.

The learned judge did not clearly leave to the jury the option of convicting the accused of unlawful wounding, but we nonetheless considered that in the face of the gravity of the injuries inflicted on the victim a reasonable jury, properly directed as to the alternative verdict of unlawful wounding, would inevitably have arrived at the same verdict of wounding with intent. There was accordingly no miscarriage of justice, and we applied the proviso.

When the application for leave to appeal came up the applicant sought to rely on two grounds, but with leave added a third ground – that the learned judge erred in law in not putting to the jury the alternative verdict of unlawful wounding. The second ground was that the judge's directions on self defence either "neutralized" or "undermined" the real defence of accident. The first ground was that the learned judge erred in law in refusing to allow counsel for the applicant at the trial, Mr. Merritt, to cross-examine Ms. Seetal on civil proceedings in negligence brought by her against the applicant. The applicant sought at the outset of the hearing leave to use an affidavit of counsel at the trial, Mr. Merritt, to make good this ground of appeal. We refused to admit the affidavit of Mr. Merritt, as a result of which counsel for the applicant withdrew the first ground of appeal.

We dismissed the application for leave on the second and third grounds of appeal and gave brief reasons for doing so. We indicated that we would later give reasons for our ruling rejecting the evidence of Mr. Merritt, since the ruling resulted in the withdrawal of the first ground of appeal. We do so now.

The affidavit of Mr. Merritt

The relevant paragraphs of the affidavit are as follows:

> "5. During the course of the trial I sought and obtained certified copies of H.C.A. 281 of 1998 Grace Seetal v Dennis Chadee, wherein the virtual complainant, Grace Seetal, alleged that the said injuries were inflicted by the Appellant negligently.
>
> 6. I formed the view that this version of the events wholly corroborated the Appellant's defence and as such I attempted during cross-examination of the virtual complainant to introduce this material.
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> 7. At no time at all did I wish to put the documents into evidence, I only wanted to cross-examine the Appellant on its contents.
>
> 8. However the Learned Trial Judge prevented me from undertaking this line of cross- examination.

> 9. As such none of the contents of the aforementioned documents was put before the jury."

The substance of the proposed evidence was that counsel wished to cross-examine Ms. Seetal on the contents of certain documents (identified in the affidavit as the writ and statement of claim in High Court Action No. 281 of 1998) without putting them in evidence. The purpose of the cross-examination would have been to attack the credibility of Ms. Seetal by suggesting that the claim of negligence in the civil proceedings was not consistent with the charge of wounding with intent in the indictment.

We have no transcript of the judge's reasons for not permitting the proposed line of cross-examination. Nor do we have the judge's notes of evidence. Counsel have not provided us with an agreed note of the relevant proceedings. However, it seems that the learned judge regarded the civil proceedings as irrelevant and inadmissible. He may also have treated the writ and statement of claim as hearsay documents and so inadmissible.

Counsel for the applicant further contended that it was always open to a cross-examiner to put documents in the hands of a witness and cross-examine on them without reference to their admissibility and without showing them to opposing counsel. Accordingly the learned judge should have allowed the cross-examination. Counsel relied on Regina v Peter Blake (1977) 16 JLR 61, a decision of the Court of Appeal of Jamaica.

The law

We do not think that the judge's ruling that the civil proceedings were irrelevant is assailable. There is no necessary inconsistency between civil proceedings for negligence and a contention in criminal proceedings that a party intentionally inflicted personal injuries or foresaw such injuries with virtual certainty. Injuries may be negligently inflicted if a person inflicts them because he or she fails to conform to the standard of the reasonable man or woman. A person who throws a bottle at a woman intending to hit her but in fact hits and wounds Y may be negligent in the sense that such conduct or behaviour is below the standard of the reasonable man, or in the sense that he or she adverted to the consequences of his or her actions but nonetheless decided to take the risk or to ignore the risk. This latter conduct is normally described as gross negligence: see Clerk and Lindsell on Torts (15th ed.) para 10-02.

We would therefore agree with the trial judge that cross-examination on the writ and statement of claim was irrelevant to the issue of intent. Cross-examination on them would not test the credibility of the witness, and might mislead the jury.

Again, cross-examination on the writ and statement of claim would raise the issue of lawyer-client privilege as to the nature of the instructions given to the attorneys-at-law in the civil action. The judge was therefore entitled to disallow this line of cross-examination, unless privilege was being waived.

Further, the writ and statement of claim, although prima facie based on the instructions of the applicant, are for present purposes the documents of Ms. Seetal's attorneys-at-law, and are therefore hearsay in the present proceedings. However, it is clear from Mr. Merritt's affidavit that he wished to place the contents of these inadmissible documents before the jury. This line of cross-examination was therefore not permissible.

Of course, cross-examination is at large, and counsel may cross-examine on any allegations that are relevant. He or she may cross-examine from a document without identifying it or showing it to the witness.

However, in our view, if counsel wishes to place documents in the hands of a witness and to cross-examine on them, counsel must either obtain an admission that the witness was the author of the documents, or if the documents were written by another person, the witness must accept the contents of the documents as true, before counsel cross-examines on such documents: see Gillespie and Simpson [1967] 51 Cr. App. R 172. If the documents are accepted as true they are admissible at the option of the cross-examiner; if they are not accepted by the witness they are hearsay and inadmissible. If not accepted, they cannot be made evidence by being put to the witness: Treacy [1944] 30 Cr. App. R 93 or by requiring a witness to read them aloud: see Gillespie and Simpson (supra).

Where a witness is asked to refresh his memory from a document, the document may be put in the hands of the witness without the document being shown to opposing counsel. However, once leave is given to refresh memory, opposing counsel has a right to inspect the document even though it is not at that stage evidence: see Beech v Jones [1848] 5 CB 696.

In Regina v Peter Blake (supra) defence counsel placed a newspaper clipping in the hands of a police witness and sought to cross-examine him to test his credibility. Counsel indicated that he did not wish to tender the clipping as evidence. The trial judge disallowed this line of cross-examination. The Court of Appeal of Jamaica held that counsel was entitled in cross-examination to confront a witness with a document regardless of its admissibility and without disclosing its contents to opposing counsel for the purpose of testing the credit of the witness.

We would respectfully treat the proposition in the headnote to Regina v Peter Blake (supra) as being too widely stated and as not applicable to the instant case. We think that cross-examination is at large and one may cross-examine out of any document. However one may only put the contents of a document put to a witness if the witness accepts it or is the author of it. If the document is inadmissible it may not be put in the hands of the witness at all. The admissibility of the document is therefore important. Further, once the document is identified or accepted as true, counsel has a right to inspect it.

In our judgment the rule applicable to the right to inspect a document handed to a witness by cross-examining counsel is correctly stated in Taylor's Treatise on the Law of Evidence (12th edn. 1931) para. 1452:

> "The cases on this subject are somewhat conflicting, but the practice seems to be that, if cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but, if the paper be used to refresh the memory of the witness, or if any questions be put respecting its contents, or as to the handwriting in which it is written, a sight of the document may then be demanded by the opposite counsel. Opposing counsel has no right to read such a document through, or to comment upon its contents till so used or put in by the cross-examining counsel. If it be not put in, its absence may be remarked upon by the counsel on the other side. The counsel on the other side will, moreover, have a right (even where it is not put in) to ask questions upon it in re-examination, without himself putting it in."

Thus, until the document or the nature of it is identified or the witness being cross-examined acknowledges or accepts the document as being true there is no right to inspect the document handed to the witness.

In the case before us it is manifest from the affidavit of Mr. Merritt that he wished to cross-examine on the contents of the writ and statement of claim. He could not do so unless the witness was the author or accepted them as true, in which case opposing counsel was entitled to inspect the documents and to have the opportunity to re-examine on them. Counsel could not therefore cross-examine without showing the documents to counsel for the state or without reference to the admissibility of the documents.

We think the judge correctly disallowed cross-examination on the writ and statement of claim because they were irrelevant to the issue before him and so not admissible. Since the writ and statement of claim were inadmissible, they could not be introduced into evidence by way of cross-examination

For these reasons we ruled that the affidavit of Mr. Merritt and the exhibits thereto would not be received in evidence on this application.

R. Hamel-Smith,
Justice of Appeal.

R. Nelson,
Justice of Appeal.

A. Lucky.
Justice of Appeal.