IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

IND #0030/2019

REGINA

V

BR
DM
JM
NS

Appearances:	**Mr. Scott Wainwright for the Crown**
	Mr. Keith Myers for Defendant #1
	Ms. Lee Halliday-Davis for Defendant #2
	Mr. Jonathon Hughes of Samson Law for Defendant #3
	Mr. Oliver Grimwood of Barton Attorneys for Defendant #4
Before:	**Justice Marlene I. Carter (Actg.)**
Hearing Date:	**24th July 2020**
Ruling Date:	**27th July 2020**

HEADNOTE

Criminal Law – Conspiracy to import ganja – Criminal Records (Spent Convictions) Law *– Imputations against character of prosecution witnesses – Expungement - Bad Character – Directions to Jury.*

RULING ON EXPUNGEMENT AND BAD CHARACTER

THE APPLICATION

1. Counsel for the Third (3rd) Defendant has made an application to the court that his client is entitled, by virtue of the provisions of the ***Criminal Records (Spent Convictions) Law*** (hereinafter "the Law"), to be treated as a man of good character, as his previous convictions have been expunged by virtue of s.15 of the Law.

2. The defendant has nine (9) historic criminal convictions ranging in date from 1998 to 2002. All of these offences were dealt with by way of non-custodial penalties. It is not in issue that they are not relevant as far as showing any propensity on the part of the defendant.

3. Counsel for the 3rd Defendant also contends that the effect of such expungement is that the Crown should not be permitted to raise these previous convictions during the course of cross examination of the 3rd Defendant. The Crown has indicated that they will seek to raise these previous convictions because the Defendant has, in the course of the cross-examination of the prosecution witnesses, made imputations of collusion, fabrication of evidence and tampering with witness statements on the part of those witnesses.

THE RELEVANT LEGISLATION

4. The ***Criminal Records (Spent Convictions) Law*** 2018 repealed the ***Rehabilitation of Offenders Law*** (1998 Revision). Section 4 of the Law sets out the object of the Law as follows:

> *"The primary object of this Law is to implement a scheme to limit the effect of a person's conviction for a range of offences if the person, having served that person's sentence, subsequently completes a period of crime-free behaviour and on completion of that period, the conviction shall be regarded as spent and, subject to some exceptions, a person is eligible to apply for the expungement of that criminal record."*

5. The Law created an Expungement Board to which applications could be made to have spent convictions expunged from one's criminal record. Section 15 of the Law allows for certain records to be automatically treated as expunged. Section 15 states as follows:

> *"Procedures for expunging criminal records*
>
> *15. Where a person has been convicted of an offence and has been sentenced for a period not exceeding five years, upon the expiration of the prescribed crime-free period, that person's criminal record shall be treated as expunged.*
>
> *15A. (1) Where a person has been convicted of an offence and has been sentenced for a period exceeding five years, upon the expiration of the prescribed crime-free period, that person may apply to the Board for that person's criminal record to be expunged.*
>
> *(2) An application for expungement shall be made in the prescribed manner and accompanied by the prescribed fee."*

6. All of the 3rd defendant's previous convictions fall within the ambit of s.15 and are to be treated as spent and expunged.

7. Specifically, as regards the instant application, the s.26 and s.27 of the Law are relevant:

> *"PART 4 - EFFECT OF EXPUNGEMENT*
>
> *Effect of Expungement of a Criminal Record in General*
>
> *26. A person shall, where the criminal record of that person has been expunged, be treated, for all purposes in law, as a person who has not*
>
> *(a) committed;*
> *(b) been charged with;*
> *(c) been prosecuted for;*
> *(d) been convicted of; or*
> *(e) been sentenced for,*
>
> *the offence which was the subject of that criminal record.*
>
> *27. (1) Notwithstanding any other written or unwritten law –*

(a) no evidence shall be admissible in proceedings before a judicial authority to prove that a person has –

(i) committed;

(ii) been charged with;

(iii) been prosecuted for;

(iv) been convicted of; or

(v) been sentenced for, the offence which was the subject of an expunged criminal record; and

(b) a person shall not, in any proceedings, be asked and, if asked, may answer in the negative any question relating to the person's criminal record which cannot be answered without acknowledging or referring to a conviction which forms the basis of an expunged criminal record or any ancillary circumstances.

(2) If, in judicial proceedings the judicial authority is satisfied that justice cannot be done except by requiring or admitting evidence relating to a person's expunged criminal record or to ancillary circumstances to it, that authority may –

(a) require or admit the evidence in question, but a court before which such evidence is admitted shall, in appropriate circumstances, take reasonable steps to prevent or minimise publication of that evidence; and

(b) determine any issue to which the evidence relates.

(3) In the performance of its functions, the Department of Community Rehabilitation shall be entitled to have access to the criminal record."

DEFENCE SUBMISSIONS

8. Counsel for the third defendant has submitted that the effect of the legislation is that in this case, the 3rd defendant is entitled to be treated as a person who has not been convicted of any offences. He submitted that, were the Court to do otherwise, that would serve to defeat the purpose of the Law and the clear provisions of s.26 of the Law.

GRAND COURT · CAYMAN

9. In relation to the Crown's request to rely on the third defendant's supposed bad character, Counsel emphasized that as far as the Law is concerned, the only exception to the general rule that such evidence is not admissible occurs if, as per s.27 (2), a judicial authority is satisfied that *'justice cannot be done except by requiring or admitting evidence relating to a person's criminal record.'*

10. Counsel for the 3rd defendant submitted that this is plainly not the case here because the Crown could not seek to argue that '*justice cannot be done'* if the court were to rule that they would not be permitted to adduce the evidence of the defendant's previous bad character. Counsel argued that:

> *"The defendant's character is not central to their [the prosecution] case. It is not a material issue. If allowed it would simply be used to attack his credibility."*

11. Counsel submitted that the questions asked of the Crown witnesses were valid questions, that they were not wildly speculative and that they were questions that the 3rd defendant was entitled to ask. Counsel asked the court to carefully consider the nature of the 3rd defendant's previous convictions.

12. Counsel submitted that the 3rd defendant is entitled to deny the existence of his criminal record without challenge should he choose to give evidence at trial, which is the purpose of s.27 (1).

13. Counsel for the 3rd defendant emphasized that the Court could not ignore the intention of the law and went further to state that the exception in s.18(d)(ii) of the ***Evidence Law*** which permitted reference to a defendant's previous convictions or bad character was only a narrow exception to the principle that the defendant's previous convictions

should not be before the jury, and he disagreed with the Crown's submission that the defendant had lost his right to be shielded in the manner suggested by the Crown.

14. Finally, he stated: *"The prejudicial effect that incorrectly admitting this evidence could have (should the Crown make such an application) is significant."*

15. Counsel for the 4th defendant joined in the application because, he submitted, the effect of the court's ruling had the potential to affect all of the defendants, whether directly or indirectly. He submitted that the course that the prosecution may seek to take with regard to the questioning of the 3rd defendant was not a permitted line of attack given the provisions of the Law. He submitted that the stringent and rigid test that is envisaged by the interpretation of s.27(2) was restricted in its application to issues of propensity, niche sexual proclivity or, where there is inherent dishonesty, and to correct a false impression. He argued that the Crown's application based, as it was, on s.18 of the ***Evidence Law*** should not be considered because the Law excluded its application in the circumstances of this case where what the Crown was attempting was simply a "levelling up exercise" between the imputations against the character of the Crown witnesses and these now expunged convictions of the 3rd defendant.

CROWN'S REPLY

16. Crown Counsel submitted that the discretion that the Court was to be asked to exercise in allowing the 3rd defendant to be cross-examined about his previous convictions was outwit the remit of the Law. Crown Counsel referred to s.4 of the Law and submitted that the Law envisioned that the expungement would only limit the effects of a person's previous convictions within certain parameters. He emphasized that the Law itself provided for exceptions to the effect of expungement.

17. Crown counsel argued that what was being submitted on behalf of the 3rd defendant was "blanket immunity" which has a far wider interpretation than s.27 was capable of bearing. Counsel argued further that in the instant case where there has been a significant attack on the credibility of the prosecution witnesses[1] if the Court were to exercise its discretion to allow the cross-examination to encompass the 3rd defendant's previous convictions that this would be in essence a levelling up as between the prosecution and the defendant. He submitted that the jury in these circumstances should not be held in ignorance of his character and emphasized that the court had to be careful that the jury would not be misled.

AUTHORITIES

18. Counsel for the 3rd defendant referred the court to the case of ***Thomas v Commissioner of Police of the Metropolis***[2] - a case from the Civil Division of the Court of Appeal in the United Kingdom. That case dealt with the application of the provisions of s.4 of the ***Rehabilitation of Offenders Act*** 1974 in the context of a civil trial. Section 4(1) is in similar terms to the provisions of the ***Rehabilitation of Offenders Law*** in the Cayman Islands, now superseded by the ***Criminal Records (Spent Convictions) Law*** with regard to no evidence being admissible in any proceedings, including judicial proceedings, to prove that a person with spent convictions had committed, been charged with, prosecuted for, convicted of, or, sentenced for, the offence which is the subject of the spent conviction. The UK legislation excluded criminal cases from the effect of s.4(1).

[1] It was submitted that the imputations would be viewed as perjury or perverting the course of justice.
[2] [1997] QB 813

19. The main issue on the appeal was whether the trial judge was correct to allow two previous convictions of the plaintiff which were spent for the purposes of s.4, to be put to him in cross-examination. The Plaintiff had brought an action against two police officers for damages for assault, false imprisonment and malicious prosecution after he had been acquitted in a criminal trial for threatening behaviour.

20. Section 7(3) of the ***Rehabilitation Law*** is in similar terms to s.27(2) of the Law and provides that the prohibition set out in s.4(1) was inapplicable if the authority were satisfied "*in light of any considerations which appear to it to be relevant...that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions...*"

21. While these provisions in ***Thomas*** are similar to those under discussion in the present case, the decision is of limited application in this case given the difference in the civil and criminal jurisdictions - a fact recognized by Counsel for the 3rd defendant in his submissions before this court. In the dissenting judgment of Sir Richard Scott, the Learned judge suggested that the trial judge may have had the criminal aspect very much in mind. He emphasized however that "*the approach established in criminal cases is not, in my judgment, an appropriate approach in civil cases*[3]" where there have been imputations on the character of the opposite party.

COURT'S ANALYSIS

22. By dint of s.15 of the Law the 3rd defendant's conviction is to be treated as expunged. The effect of this expungement is set out at Part 4 of the Law at s.26 in general and at s.27 in judicial proceedings

[3] Per Sir Richard Scott, at pages 825-826 of the judgment.

23. Within the object of the Law[4] it is made clear that there are limitations or exceptions to the expungement scheme that the Law prescribes. In the case of the ***Supervisor of Elections v Candidate X***[5], the only local authority that this Court has found that has considered the provisions of the Law, the Learned Chief Justice stated as follows:

> *"59 Indeed, the legislative policies of both the 1998 Law and the CR(SC) Law are based on a philosophy that recognizes that while rehabilitated persons must be allowed to overcome past delinquencies for which they have atoned, there are competing public interests of such importance that those interests will continue to require the disclosure and citation of otherwise spent convictions or expunged records.*
>
> *60 Among such public interests identified, for example, in passing above is the protection of vulnerable children against abuse where a person who seeks to be put in charge of their care and protection has a criminal history, especially, it may be assumed, a history of child abuse. Another is the public interest in ensuring that only persons of trustworthy character are appointed to certain important public offices or admitted to certain professions of trust. Yet another important public interest is that in ensuring the due administration of justice and which is recognized in the limitation that requires that a spent conviction or expunged record may be disclosed in evidence on the direction of the court, "if the interests of justice so require."*

24. Section 33(1) of the Law is concerned with "*Circumstances where persons shall disclose expunged criminal record*"

25. Section 33 (1) states as follows:

> *"PART 5 - DISCLOSURE OF EXPUNGED RECORDS*
>
> *33 (1) A person shall, if requested to do so, disclose particulars of an expunged criminal record when seeking to –*
>
> *(a) be made a member of a professional body or any of the professions specified in Part 1 of Schedule 4;*
>
> *(b) be appointed to an office of employment specified in Part 2 of Schedule 4;*
>
> *(c) become engaged in a business of the type specified in Part 3 of Schedule 4; or*
>
> *(d) be elected as a member of the Legislative Assembly."*

[4] See paragraph 4 above
[5] 2017 1 CILR 307

26. That the effect of expungement is not absolute with regard to the disclosure of a person's criminal record is also apparent from the provisions of s.27(2) of the Law which empowers a judicial authority to require or admit the evidence in question relating to a person's expunged criminal record or to ancillary circumstances to it if the judicial authority is satisfied that justice cannot be done except by requiring or admitting such evidence.

27. In the context of the instant application where the 3rd defendant's record of criminal convictions is to be treated as expunged, the court must consider within the exercise of its discretion whether it *is satisfied that justice cannot be done except by requiring or admitting such evidence.*

28. This court does not agree that the effect of expungement of the record of the 3rd defendant's criminal convictions leads to the conclusion that the court is fettered by the proviso to s.27(2) from requiring or admitting such evidence except where it goes to the issue credibility.

29. Counsel for the 3rd defendant is correct that, even in judicial proceedings, a defendant is entitled to act and be regarded in the manner contemplated by s.27(1). However, to this Court's mind, if it were intended that the court's discretion were to be curtailed in the manner that Counsel submits, the Law would have been clear of its intention in this regard. Instead, the Law maintains the discretion in the Court, in the context of ensuring fairness in judicial proceedings, to allow a defendant's expunged record to be required or admitted.

30. There is nothing in s.27(2) which limits the application of the proviso and the Court's discretion only to "issues of propensity, niche sexual proclivity or, where there is inherent dishonesty, to correct a false impression" as has been submitted by Counsel for the 4th defendant. The Court's obligation to ensure fairness in its proceedings extends beyond these. Expungement does not trump fairness.

31. The fact that the ***Evidence Law*** (2019 Revision) at s.18 preserves the rule that allows the record of a defendant's previous convictions to be put, in the circumstance where imputations against the character of prosecution witness have been made on the defence case, cannot be ignored.

32. Within the course of criminal proceedings, the determination whether to allow questions to be put to a defendant is governed by s.18 of the ***Evidence Law*** (2019 Revision) which states, as far as is relevant:

> *"Every person charged with an offence is a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:*
>
> *Provided that —*
>
> *a) ... ...*
>
> *b) .....*
>
> *c) ....*
>
> *d) A person charged and called as a witness under this Law shall not be asked, or required to answer, any question tending to show that he has committed or been convicted or been charged with any offence other than that wherewith he is charged or is of bad character unless —*
>
> *i. the proof that he has been charged with or committed or been convicted of such other offence is admissible evidence to show that he has committed the offence wherewith he is charged;*

ii. *he has personally or by his advocate asked questions of the witnesses for the prosecution to establish his own good character or has given evidence of such good character, or the nature of the conduct of the defence is such as to involve imputations on the character of any other person, in which case evidence tending to show that he has committed, been convicted, or been charged with any offence other than that with which he is charged, or is of bad character, may be adduced whether or not he has given evidence in his own defence; or..."*

33. In considering a s.18 (d)(ii) application as in this case, a court still exercises a discretion whether to allow such questions to be led. That this is so is consistent with the authorities. ***Archbold*** 2018 at 13-80 refers to the case of ***Jenkins***[6], in which it was stated:

> *"[The judge] may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible. On the other hand, in the ordinary and normal case he may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed that those he has attacked."*

34. The application of s.18 is not at odds with the provisions of s.27(1). Instead, s.27(2) preserves the rule's relevance by maintaining the discretion of the Court to ensure fairness by requiring that expungement by operation of law is preserved, except where to maintain it would mean that justice could not be done. The issue for this Court is whether it would be fair to allow the 3rd Defendant's previous convictions to be put in this case keeping these principles firmly in mind.

[6] 31 Cr. App. R. 1 at page 15

35. The Court has considered the submissions made by defence counsel and also by the Crown on this issue. I agree that serious imputations have been made against the prosecution witnesses' characters, police officers, in this case. I also consider that the defendant's previous convictions are of some vintage, to the extent that were it not for this application, the court in this case would treat them as expunged and not inquire further into them.

36. Counsel for the 3rd defendant submits that the questions asked of the officers were questions that the defence were entitled to ask. However, even in instances where the questions asked of the prosecution witnesses are necessary to enable a defendant to establish his defence, cross-examination of the defendant with regard to his previous convictions may be permissible and in the interests of justice.

37. The Crown will be permitted to ask questions in cross examination regarding the 3rd defendant's previous convictions.

38. On the matter of whether the court will then give a direction to the jury on the defendant's good character, I consider that a modified good character direction should be put before the jury to reflect the particular circumstances as they apply to the 3rd Defendant. It would be useful at the end of the presentation of the evidence to have a short hearing with Counsel to discuss how best to put that direction before the jury.

Dated this the 27th day of July 2020

Carter J.

Mme. Justice Marlene Carter
Acting Judge of the Grand Court