IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 33/08

THE QUEEN

V

KEITH BRIAN ORRETT
BRIAN EMMANUEL BORDEN
BJORN CONNERY EBANKS
KEITH ROHAN MONTAQUE

Appearances:

Crown –
Ms Trisha Hutchinson and Ms Candia James

Defence Counsel –
Mr. John Fox and Mr. James Stenning of Stenning & Associates for Keith Brian Orrett;

Mr. Nick Hoffman instructed by Priestleys for Brian Emmanuel Borden;

Mr. Nicholas Dixey of Mourant for Bjorn Connery Ebanks;

Mr. Ben Tonner of Samson & McGrath for Keith Rohan Montaque

Before: **The Hon. Mr. Justice Charles Quin**

Heard: **18th February 2010**

RULING ON SEVERANCE

1. Mr. Hoffman on behalf of Brian Borden makes an application pursuant to Section 118(3) of the Criminal Procedure Code whereby his client, Defendant, Brian Borden, invites the Court to exercise its discretion and order a separate trial for Mr. Keith Orrett.

2. The Defendants are jointly charged with possession of unlicensed firearms, contrary to Section 15(1) and 15(5) of the Firearms Law.

3. Mr. Borden is charged under Count II and the particulars of the offence on that count are that Keith Orrett, Brian Borden and Keith Montaque, between the 4th and 7th day of April 2008, at 4 Town Hall Courts, West Bay, Grand Cayman, had in their possession a firearm, namely a Remington Model H70 12-gauge shotgun, serial number A52367 not under, and in accordance with the terms of a Firearms Users Licence.

4. Mr. Borden's counsel argues that for Mr. Orrett, unlike for the other Defendants, the Crown will place a reliance on matters alleged to have been said by him to the police on his arrest and interview. Mr. Hoffman argues that this evidence cannot have any probative value against any other Defendant and is not admissible against Mr. Borden. Mr. Hoffman argues that such evidence, if adduced, is highly prejudicial to Mr. Borden, as it implicates him in the offence.

5. Furthermore, Mr. Hoffman argues that Mr. Orrett should be tried separately because his defence implicates Mr. Borden by the anticipated introduction of the bad character of Mr. Borden which, again, is inadmissible.

6. S. 118 (3) of the Criminal Procedure Code states:

> "*Where, before a trial upon indictment or at any stage of such trial, the court is of the opinion that the accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any reason it is desirable to direct that where there are two or more accused persons they should be tried separately, the court may order the separate trial of any count or counts in such indictment or the separate trial of any accused persons charged in the same indictment.*"

7. I note that Mr Borden's counsel is not submitting that there is a misjoinder, but for the sake of completeness, and for the record, Section 162 of the Criminal Procedure Code states:

> *"The following may be joined in one indictment and tried together (a) persons accused of the same offence committed in the course of the same transaction; (b) persons accused of an offence and persons accused of abetement or of an attempt to commit such offence; (c) persons accused of different offences committed in the course of the same transaction; and (d) persons accused of different offences all of which are founded on the same facts or form, or are part of, a series of offences of the same or a similar character."*

8. Mr. Hoffman submits that the evidence against Borden "primarily rests", or, to put it another way, "effectively exclusively rests", on the probity of the DNA evidence against Mr. Borden.

9. Mr. Borden's counsel argues that the evidence against Mr. Orrett is very prejudicial to Mr. Borden and it is inadmissible against Mr. Borden. This is an "it is not me it is him" defence.

10. Furthermore, Mr. Hoffman submits that Orrett's defence will likely to include an attack on Mr. Borden's character, which is inadmissible evidence against Mr. Borden.

11. Mr. Borden's counsel cites the well-known dicta of Justice Darling in ***R v. Gibbons and Proctor*** (1919) 13 Cr. App. R. 134 which states:

> *"The discretion of a judge at the trial, whether the defendants jointly indicted should be tried separately must be judicially exercised."*

12. Mr. Hoffman submits that the combined effect of Mr. Orrett's likely evidence, i.e. duress, it's-not-me-it's-him, and the likely introduction of Mr. Borden's bad character, means that the reality is, that any direction, however robustly given, must run the risk of not having the desired effect, or to put it another way, would fall on deaf ears.

13. Mr Hoffman submits that they are separate circumstances which bring this case into the ***R v. O'Boyle*** (1991) 92 Cr. App. R 202 category and the effect of the totality of the inadmissible evidence will be that Mr. Borden cannot have a fair trial.

1 14. In summary Mr. Hoffman says that these are exceptional circumstances which
2 allow this Court to depart from the general rule that it is in the public interest to try
3 co-defendants jointly charged on one offence, together.
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5 15. Mr. Dixey adopts submissions in favour of Mr. Bjorn Ebanks for the same reasons,
6 and likewise Mr. Tonner for Mr. Keith Montaque.
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8 **Crown Case**
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10 16. The Crown opposes Mr Hoffman's application. The Crown submits that the
11 discretion to allow joint trial is codified in Section 162 and in particular Section
12 162(d) which allows for a joint trial in matters founded on the same facts or form,
13 or in matters which are part of a series of offences of the same or similar character.
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15 17. The Crown submits that:
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17 a. The charge is one of joint possession;
18 b. The accused Borden was present in number 4 Town Hall Courts at the
19 time the offence was committed;
20 c. The firearms which are the subject of the charges against the accused
21 are the same;
22 d. The police witnesses who would be required to give evidence against
23 all the accused are the same;
24 e. The ballistic expert evidence against the accused is the same;
25 f. All documentary evidence, save and except for the statement and
26 interview of Orrett, is the same.

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28 18. Accordingly by implication the Crown submits that its case does not "rest
29 exclusively" on DNA evidence.
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31 19. The Crown also submits that there are adequate safeguards such as:
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a. Mr. Borden's counsel can cross examine the witnesses and put his client's case which the jury will hear;

b. Mr. Borden's counsel will have the opportunity to address the jury on his client's case;

c. There can be clear directions from the judge to ensure that the jury disregards any inadmissible evidence against Borden to ensure that he has a fair trial.

20. The Crown also cites from the same well known authorities. In particular they rely on the case of ***R v. Assim*** [1966] 2 Q.B. 247 and the judgment of the Court of Appeal as read by Sachs L.J. which was summarized by the Crown as follows:

a. Whether the matters which constitute the individual offences of the several offenders are, upon the available evidence, so related;

b. Whether in time or by other factors, that the interests of justice are best served by them being tried together;

c. If the answer to b. is yes then they can properly be the subject of counts in one indictment and can, subject to the discretion of the court, be tried together.

21. The Crown submits that, bearing in mind the factors earlier outlined, it is submitted that there are sufficient factors to justify a single trial of all the accused, as they are all being tried for joint possession of the firearms recovered and the evidence against all is virtually the same.

22. The Crown further submits that the overriding test is what would be in the interests of justice, and this will involve taking into consideration the issue of having the prosecution evidence given twice before different juries, and the added potential increase of inconsistent verdicts.

23. The Crown relies on the often cited dicta of the former Chief Justice Lord Goddard in ***R v. Grondkowski, R v. Malinowski*** [1946] K.B. 369:

> "*Prima facie it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be.*"

24. Lord Goddard also considers the issue of one prisoner's defence amounting to an attack upon the other prisoner and states:

> "*The discretion, no doubt, must be exercised judicially, that is, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interest of justice means only the interests of the prisoners. If once it was taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate must be trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. There is no case in which this has ever been laid down, and in the opinion of the Court it would be most unfortunate and contrary to the true interests of justice if it were.*"

25. The Crown submits that there are many cases where we have cut throat defences, which inevitably mean that the jury hears admissible evidence against one defendant, but the same evidence is inadmissible against another defendant and cites ***R v. Joseph and Christie*** [1997]165 Cr. App. R. 253 and ***R v. Cairns, Zaidi and Chaudhary*** [2003] 1 Cr. App. R. 662.

26. The Crown also relies on the classic dicta of the former Chief Justice Lord Widgery in ***R v. Lake*** [1977] 64 Cr. App. R. 172 in which he stated:

> "*The judge declined to order separate trials and we think that he was right. It has been accepted for a very long time in English practice that there are powerful reasons why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise. Accordingly, it is accepted practice from which we certainly should not depart in this Court today, that a joint offence can properly be tried jointly, even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that. Of course the practice requires that the trial judge in such a case should warn the court that the evidence is not admissible, and this trial judge was certainly not lacking in his duty in that regard because he on no less than eleven occasions pointed out to the jury that the evidence in question was not admissible.*"

27. The Crown submits that the facts in this case are not of the exceptional character that was found in ***R v. O'Boyle***. The Crown submits this case is different from ***R v. O'Boyle*** on the facts. In this regard the Crown relies heavily on the case of ***R v. Eriemo*** [1995] 2 Cr. App. R. 206.

28. Indeed the English Court of Appeal stated that ***R v. O'Boyle*** was wholly exceptional, if not unique. Furthermore the Eriemo decision is some four years after ***O'Boyle***, and, it is quite clear that the Court in ***Eriemo*** reviewed the ***O'Boyle*** judgment.

29. In Eriemo the co-defendant's defence involved an attack on the character of the appellant and also the co-defendant put forward a defence of duress. I quote Justice Glidewell at page 211:

> "*When Carrington came to be tried, he duly put forward his defence of duress and it succeeded and he was acquitted. His defence involved an attack on the character of this applicant. Carrington gave evidence and was allowed to put in evidence the previous convictions of this applicant, but he was not allowed to go further than that. Quite properly the judge ruled that general evidence, such as was suggested in Carrington's solicitor's notice, that this applicant was terrorizing the people on the estate generally, that he had a propensity to commit offences of violence in matters of that sort, the judge ruled was not admissible, and not properly part of Carrington's defence.*
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> *Of course we appreciate that for the jury to hear this applicant's previous convictions would make it much more likely that they would not believe any protestations he had made, that he had not taken part in the particular burglary with which he was charged together with Carrington, and it would make it much more likely that they would believe Carrington. That of itself does not make it so unfair that he should be tried together with Carrington that the judge should have severed their trial. The normal rule, and this has frequently been reiterated, is that where it is alleged that defendants are jointly guilty of the same offence they should be tried together; (see the matter set out in paras 1-167 and 1-168 of the current edition of Archbold 1994).*
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> *The fact that one defendant is intending to say that he has acted under duress by the other defendant is not of itself a valid reason for severing the trial of the individual defendants. Indeed, the interests of justice may well dictate that they should be tried together so that the whole truth can be put before the jury. The interests of justice of course demand that a particular defendant has a fair trial, but they also demand that all material matters which can properly be admitted in the circumstances of a particular case are elicited. For those reasons, had we come to it, we would concluded in any case that the judge was certainly acting well within his discretion, in coming to the conclusion to which he did come, and we should have refused leave to appeal on that ground, if indeed we thought there was any valid right to appeal.*"

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30. What is interesting is that the English Court of Appeal in the ***O'Boyle*** case stated,

"*The instant case was wholly exceptional, if not unique.*"

This Court notes that the English Court of Appeal decision in ***Eriemo*** and Lord Justice Glidewell's ruling was four years after ***O'Boyle*** and the Court of Appeal clearly reviewed the ***O'Boyle*** decision and cited it.

31. Accordingly, it is only in truly exceptional cases in which the Court should order separate trials when two or more accused are jointly charged with participation in one criminal offence.

32. The question of the likelihood of a cut-throat defence, Orrett claiming that he acted under duress and also raising possible inadmissible evidence regarding Mr. Borden's character does not, in my view, mean that Mr. Borden cannot have a fair trial.

33. Mr. Borden is represented by an experienced criminal junior counsel who can present his case and with strong and clear directions from the judge, can ensure that he receives a fair trial. In that regard I should state that I am happy to welcome suggestions from counsel as to directions when the time comes to address the jury.

34. I have listened to the well-presented arguments of both Mr. Borden's counsel and Mr. Ebanks' counsel, but on the facts as we know it, and on the submissions before me, I cannot identify any features of this case which bring it into the high O'Boyle threshold of truly exceptional circumstances.

1 35. The facts appear to be that the Defendants were found in the same house as the
2 guns were found and at the same time, and accordingly, in all the circumstances of
3 this case I reject Mr. Borden's application for severance.
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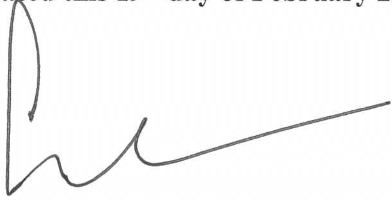
8 **Dated this 19th day of February 2010**



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12 **The Hon. Mr. Justice Charles Quin**
13 **Judge of the Grand Court**