14/3/03

OPEN COURT

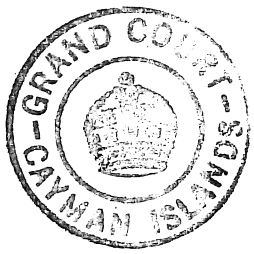
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CRIMINAL SIDE

INDICTMENT NO: 35/00

BEFORE: THE HON. JUSTICE EDWARDS

BETWEEN:



REGINA

vs.

DAMEAN DWAYNE SEYMOUR

APPEARANCES:
Counsel for the Crown: Andre A. Mon Desir & Scott Wilson
Counsel for the Defendant: Charles Miskin, QC & Laurence Aiolfi

Dates of Hearing: March 10-13, 2003.

Ruling on Admission of Evidence of Motive

1. The defendant is charged with the murder of Franklyn Lake. The prosecution case is entirely circumstantial.

2. The deceased was found shot dead in a bedroom of his home at 55 Spice Lane, Bodden Town, on April 14, 2000. He was last seen alive in his home by family members at around 15:00 that day.

3. The defendant was at the door of the deceased's home between 14:00 and 15:00 where he asked for and was given a glass of water.

4. The defendant's finger print was taken from the glass.

5. The occupants of the deceased's house other than the deceased all left around 15:00.

6. A possible gunshot was heard by neighbours around 15:00.

7. The defendant was picked up on a nearby road. While in the car he made or received a cellular telephone call logged at 15:12.

8. The body was discovered around 16:00 that same day.

9. On January 2, 2003, the defendant filed an alibi notice stating he "was not at 55 Spice Drive, Bodden Town at the time of the shooting of Franklyn Lake on Sunday the 14th of April."

10. The Crown evidence of opportunity amounts to evidence that the defendant was in the vicinity of the deceased's home at about the time of the murder.

11. There is no forensic evidence of a scientific nature which links the defendant to that room. A hair found on a towel on the bed in that room

matched the defendant's hair under microscopic analysis, but DNA testing showed it was not his hair. Footprints and finger prints unaccounted for at the scene also potentially point away from the defendant. The fact he presented himself to a member of the defendant's family just before the murder is potentially exculpatory.

12. The theory of the Crown as to motive is that the defendant killed the deceased to prevent him from testifying against Sheldon Brown.

13. The deceased was a jail guard who admitted to police he had attempted to smuggle narcotics into the prison for Brown, a prisoner, and was scheduled to testify against Brown.

14. The Crown theory is that because the defendant had served time in jail in Jamaica where Brown, a fellow inmate there, had acted as his protector, the defendant owed Brown a favour and therefore killed the deceased to spare Brown from a conviction, on the deceased's evidence, for having the deceased smuggle narcotics into the jail.

15. The Crown acknowledges it does not have evidence to support a charge against Brown as a party to the murder, yet it is ultimately Brown's motive for the homicide which it seeks to attribute to the defendant.

16. If the Crown had evidence to prove Brown communicated instructed the defendant to kill the deceased, logically, Brown would also be charged with the murder.

17. The alternative Crown theory is that although Brown did not ask or encourage the defendant to kill the deceased, the defendant, knowing Brown's peril of conviction on the deceased's evidence, decided on his own to kill the deceased to help Brown.

18. Evidence the Crown seeks to introduce to prove motive is set out in the Crown's skeleton of argument as follows:

> " (a) The deceased was a vital witness, and was to give evidence, in the case of R v Sheldon Brown, where it was alleged that Brown was the mastermind behind a relatively large scale distribution of illegal drugs (cocaine and ganja) in Northward prison. (see evidence of DC Gordon, DC Melvin Brown, court records (eg charges etc.)
>
> (b) Sheldon Brown was already serving a sentence in relation to the distribution of cocaine (three years) and would therefore have been at risk of a lengthy custodial sentence had he been convicted.
>
> (c) The sentence Brown was serving was imposed in relation to a charge to which Damean Seymour was a co-accused.
>
> (d) Brown and Seymour fled the jurisdiction to Jamaica and were incarcerated in prison in Jamaica. They were escorted back by DC Gordon who gives evidence as to Seymour's willingness to do "anything" for Sheldon Brown.

(e) There was a large amount of telephone traffic between Sheldon Brown and Damean Seymour on the 14th April 2002. The Court can draw the inference (if indeed it is a matter of inference – the Crown would suggest that there is clear evidence linking telephone no 9178520 to Brown) that Brown and Seymour were talking to each other extensively during that day."

19. The defence seeks to have the court rule inadmissible evidence in categories "c" and "d" on the basis it is evidence of bad character as it relates to the defendant's criminal record.

20. The Crown seeks to lead this evidence as evidence going to the issue of identity. That is, to prove that the defendant, a person in the vicinity of the murder at the relevant time, had a reason to kill the deceased. That reason was to eliminate the deceased as a witness whose testimony could convict Sheldon Brown and result in Sheldon Brown being sentenced to a lengthy prison term.

21. The evidence of the defendant's association in drug-related crime with Sheldon Brown is not what is often called "similar fact" evidence, that is, evidence that the defendant committed other crimes so similar it may be inferred he was the perpetrator of this murder. Nor is it evidence of propensity. Nor is it evidence of enmity of the defendant toward the deceased as reflected in earlier criminal activity directed at or threatened against the deceased.

22. The purpose of the evidence of criminal association between the defendant and Sheldon Brown is to prove their close affinity. The criminal nature of their misdeeds together, while it may go to the depth of their affinity is really incidental.

23. Conceptually, evidence of affinity going to motive could range from benevolent ties such as those of blood and kinship to malevolent ties such as, in an extreme hypothetical case, being involved together in a series of murders strikingly similar to that which is the subject of the charge.

24. For example, if the Crown sought to show the defendant and Brown were lovers so close one had donated a life-saving kidney to the other, such evidence would permit an inference of close affinity, but could not be objected to as showing bad character.

25. On the other extreme, if the defendant had committed a series of ritual Sunday afternoon murders in the same area, because the defendant was in thrall of Brown, the leader of some pseudo-religious cult, there would similarly be no doubt as to the admissibility of such evidence, which would have elelemnts of both affinity and similarity of the crime committed.

26. There is second component of criminality to the evidence in issue here. It is the fact that Brown was in peril because he was under charge (categories "a" and "b" in the Crown's skeleton quoted above). That is not evidence of the defendant's bad character, but it is relevant to the motive alleged by the Crown and is necessary background to understand that allegation.

27. The real issue is whether, where the Crown seeks to prove affinity so close as to motivate the defendant to kill on behalf of his associate, it should be precluded from doing so because that affinity derives from criminal association.

28. Evidence of criminal association could be as probative of close affinity as evidence of benevolent association. The only reason evidence of criminal association, in contrast to benevolent friendship or kinship, might be excluded to prove affinity is on the basis that its prejudicial effect outweighs its probative value.

29. The law is that the probative value of evidence of bad character must outweigh its prejudicial effect if it is to be admitted. Probative value is assessed on the basis of three criteria: cogency, strength of inference and nature and degree of relevance.

30. As to "cogency", it would seem in this case that the evidence of the criminal association of the defendant and Brown is only the underlying support for the inference of close affinity which is directly supported by the anticipated evidence of Detective Constable Clement Gordon. He will say that the defendant told him that after serving time in prison in Jamaica with Brown, that he could not have survived the incarceration without Brown and that he owed his life to Brown, who was his "godfather" for whom he would do anything.

31. The cogency of that direct evidence of affinity to prove motive of course turns on the credibility of DC Gordon. ***Phipson*** at para. 17-31 suggests where that is the case the judge ruling on admissibility should "take the evidence to be 100% cogent", leaving credibility to be assessed by the finder of a fact after hearing the witness.

32. The evidence of the criminal association of the defendant and Brown, that is, their joint charge, flight to Jamaica, incarceration there, etc., which underlies to the statements made to DC Gordon merely serve to potentially corroborate them by setting out the background against which the statements were made. In my view, this evidence of criminal association must also be regarded as cogent.

33. As to the "strength of the inference criterion", it seems to refer to an analysis of the similarity of so-called "similar fact evidence" which has no application here.

34. Here the line of inferential reasoning must be that there is evidence of an affinity so close as to motivate the defendant to kill on behalf of Brown.

35. According the ***Phipson*** at para 17-38 high probative value may be based on "commonsense speculation about probabilities". That being so, it is open to infer that the defendant, if he had a close affinity to Brown, a person who stood to benefit from the deceased's death, was more probably motivated to kill the deceased than someone who had no relationship with or affinity to Brown.

36. Criminals acting together must share potentially incriminating confidences. They need to trust and rely on one another to avoid the consequences of their criminality. The notoriety or probability that criminal association can give rise to close affinity is reflected in the fact that the colloquial expression "as thick as (two) theives" meaning "close in confidence and association: intimate, familiar" has been part of the vernacular since 1756, according to the OED.

37. The degree of probability that affinity could supply a motive to kill depends on the cogency of the evidence of affinity which in turn depends on

credibility to be assessed after hearing the evidence. Here, the evidence of criminal association merely underlies the direct evidence of affinity in statements by the accused to DC Clement. The former could be highly probative, depending on the credibility of DC Clement's evidence and the weight ultimately assigned to it.

38. As to the criterion of nature and degree of relevance, the evidence of affinity arising from criminal association goes to prove motive and the key issue of identity and not to rebut some fanciful defence unlikely to be advanced.

39. In short, the evidence of bad character goes to the key issue of identity. In deciding what probative value it has on that issue I must consider all the other evidence in the case. In this case that is the evidence of opportunity outlined above which puts the defendant in the vicinity of the murder at the relevant time.

40. Defence counsel characterized the evidence of bad character as merely putting a "bad boy" in the vicinity of the murder at the relevant time. With respect, that over-simplifies the effect of the evidence of criminal association the Crown seeks to introduce. If it were merely evidence that the defendant had convictions for drug-related offences with Brown, it

would amount to nothing but evidence of bad character and have no probative value.

41. But the evidence in question seeks to establish a link, through a permissible chain of reasoning, between the defendant and the murder. If the defendant knew Brown who would benefit from the murder then evidence of the origin and degree of the affinity arising from the defendant's criminal association with Brown is probative. It is relevant to the weight to be given to evidence going to motive as a basis for proving the identity of the defendant as the perpetrator.

42. As to prejudicial effect, in my view it is low. The impermissible line of reasoning, that because the defendant committed other different and unrelated offences he is more likely to have committed the murder, does not present the risk here that it would in a more typical case where the Crown, say, was seeking to introduce evidence the defendant had committed similar murders or other offences against the deceased reflecting enmity against the deceased.

43. The defence acceptance of a judge alone trial suggests a degree of confidence that the court will not convict the defendant on the basis he is a "bad person" who should be off the streets, as a jury might.

44. I have already indicated that should the defendant testify I would not permit cross-examination on the irrelevant details of his criminal past aimed at undermining his credibility and the Crown has indicated no intention to pursue such a line.

45. I find that evidence of the defendant's criminal association with Sheldon Brown and of Brown's pending charge set out in categories "a" to "d" quoted in paragraph 17 above is admissible.

46. In order to prove the telephone traffic between the defendant and Brown referred to category "e" quoted at paragraph 17 above, the Crown seeks to introduce computer-generated records of cellular telephone traffic which is the basis for expert opinion evidence setting out the times at which the calls were made, the locale of the calls and the identity of the telephones involved.

47. The defence seeks to have the computer-generated records excluded on the basis there is no basis for their admission in Cayman law.

48. The Crown relies on s. 23 of the ***Evidence Law***, s. 111 of ***the Criminal Procedure Code*** and s. 40 of the ***Interpretation Law*** as the bases for a its submission that the current common law of England is the law of the

Cayman Islands. According to the Crown submission, that law is as stated in ***R. v. Shephard*** [1993] A.C. 380 (H.L.)@ 386-387.

49. The defence submission is that with the simultaneous enactment in the ***Evidence Law*** 1978 of s. 23 relating to admissibility of "certain records in criminal cases" and s. 35 relating to admissibility of documents "produced by computers" in civil cases, the Cayman legislature must be taken to have, by the omission of any parallel provision to s. 35 for criminal cases, implicitly prohibited, by failing to make provision for, the admission of computer-generated records in criminal cases.

50. Further, the defence submits it would be "an absurdity" to conclude the legislature intended to impose the reliability and authenticity safeguards in s. 35 regarding the admission of such records in civil cases while imposing none in criminal cases.

51. As I understand the Crown response to this submission, it is that the Grand Court Rules provided for admission of certain types of records and documents in civil cases at the time of the enactment of s. 35, so it can be taken to be an amendment to those Rules, whereas the legislature was content to leave to common law in place as regards the admission of computer-generated records in criminal cases as part of the wider class of business records embraced by s 23.

52. Section 23 cannot, on my reading of it, encompass automatically generated records from a computer of the type in issue in this case. Section 23 is limited to "a record ... complied ... by persons", not machines. Section 35 by contrast, specifically deals with "a document produced by a computer" whether or not the information reflected in the document is supplied to the computer "with or without human intervention" and whether or not the document itself is produced by the computer with or without such human intervention.

53. If, as I find, s. 23 does not address the admissibility of computer-generated records in criminal cases, then it must be assumed the legislature chose not address the issue at all in 1978. I am not, however, persuaded the legislature omitted reference to admissibility of such records because it regarded their admission as a prospect too horrible to contemplate which it intended, by failing to enact any provision, to prohibit. That would be just as absurd, in my view, as providing safeguards in regards to admission in civil cases but none in criminal cases.

54. Rather, I find that legislative omission of any provision regarding admissibility of computer-generated records in criminal cases does not imply that the legislature intended to prohibit such admission under any circumstances. Such a sweeping prohibition surely would require an

express legislative expression of intent. Rather, I conclude the legislature was content to allow the common law of criminal evidence, as developed by the courts, to impose any necessary safeguards regarding the admissibility of such evidence.

55. What then is the Cayman common law on the admissibility of computer-generated records in criminal cases today? The starting point must be the general adoption of English law, as reflected by s. 40 of the ***Interpretation Law***. There are no Cayman precedents nor any Privy Council authority on the point which counsel have been able to find.

56. Assuming there is no binding authority in Cayman law, then applying the tried and true adage that in the common law nothing ever happens for the first time, the court must reason by analogy from principles reflected in binding precedents or look to non-binding decisions from around the common law world find to persuasive statements of the law. The importation of Lord Atkin's famous "neighbour principle" from the celebrated case of ***Donohue v. Stevenson*** [1932] A.C. 562 (H.L.)(despite the fact it was a Scots law, not common law case) into the tort law of virtually every common law jurisdiction around the world, is an illustration of this process.

57. In the short time available, counsel have not had time to canvas the common law world to assist with persuasive statements of the common law position on the admission of computer-generated records in criminal cases.

58. That being so, I accept the Crown's submission that Cayman practice, in light of the Cayman Islands' status as a dependant territory, is to look to the common law of England.

59. Both Crown and defence counsel referred to the same passages in ***Shephard*** noted above, albeit defence counsel added a caution that this court should be slow to adopt as Cayman common law that which has been extensively modified by statute in England.

60. I decline to adopt as Cayman law English common law which, since it has an overlay of United Kingdom legislation, is unlikely to be clearly stated without that overlay in any judicial decision. Rather, I think it fair to presume that s.35 of the ***Evidence Law*** as re-enacted in 1995 represents the Cayman legislature's current view of what local circumstances require in respect of the admission of computer-generated records in civil cases.

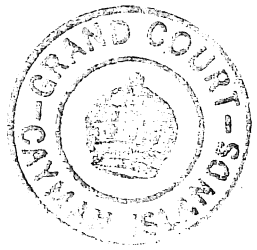
61. Taking the usual incremental approach to the development of the common law, I find that computer-generated records may be admitted in a criminal

case where, at minimum, the provisions of s. 35 are met. It may be that additional safeguards as to reliability and authenticity are appropriate in light of special considerations arising in a criminal case. Any such safeguards may be developed on a case by case basis, including in this case.

62. In short, I find that computer-generated records are admissible, subject to the requirements of s. 35. I am open to submissions that more rigorous requirements are appropriate because of the different burden of proof in a criminal case.

63. I find that, subject to what I have said in paragraph 60, evidence in all categories quoted in paragraph 17 is admissible.

Dated this 14th day of March 2003



Judge of the Grand Court