5/12/11

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

IND. NO. 31 of 2011

REGINA

V.

CODIE McLAUGHLIN
TRENT BODDEN
MICHAEL McLAUGHLIN

Appearances: **Ms. Candia James of the Office of the Director of Public Prosecutions for the Crown**

Mr. Ben Tonner of Samson & McGrath for Trent Bodden, the Defendant

Mr. John Furniss Attorney-at-Law for Mr. Michael McLaughlin, the Defendant

Before: **Hon. Justice Henderson**

Heard: **Dec. 5, 2011**

GRAND COURT - CAYMAN ISLANDS

RULING

1. The Crown applies under section 33(1) of the *Evidence Law* for the admission in evidence of the witness statement of Asher McGaw without Mr. McGaw being called to be examined and cross-examined.

2. The alleged offence involves a robbery, best described as a strong arming, which occurred in the area of Barefoot Beach on North Side, Grand Cayman. Initially

three defendants were charged jointly with this robbery. One, Mr. Michael McLaughlin, has now pleaded guilty. The two victims of the robbery are unable to give anything more than the most generalised of identifying details. The Crown proposes to prove the identity of Mssrs. Bodden and Codie McLaughlin through the written witness statement of Mr. McGaw himself.

3. Mr. McGaw was interviewed by a police officer on March 2nd, 2011. In his signed witness statement he said:

> "On the 7th of February 2011 about 1:00 pm, I was along John McLean Drive in the area where we call the ghetto when Trent Bodden, Michael McLaughlin and Codie McLaughlin approached me and Trent told me that 'they' [meaning the three of them] had just robbed a white man on the beach."

The victim and his wife are both white. The alleged offence occurred around noon on February 7th, 2011.

4. Mr. McGaw is not a man unknown to the police. He has had a number of run-ins with them. Mr. McGaw himself was a suspect with respect to this robbery. He was first interviewed on February 26th, 2011 about it. At that point, he answered questions put to him by the officer after having received the standard cautions and signed each page of his statement. The statement of March 2nd is a composite of what he said earlier.

5. The statement of Mr. McGaw is the only evidence which the Crown proposes to lead at present on the question of identity. It will be the only evidence tying

Mssrs. Bodden and McLaughlin to the robbery so its admission is crucial to the Crown's case.

6. Mr. McGaw gave an alibi to the police for the time at which the robbery took place. The Crown intends to lead some evidence corroborating that alibi in an effort to show that Mr. McGaw himself could not have participated in this offence.

7. Mr. McGaw was killed on September 22nd, 2011, some seven weeks before this trial. He died of multiple gunshot wounds at the hand of an unknown assailant or assailants; thus he can never be cross-examined as he was not called as a witness at the preliminary inquiry.

8. Mr. Bodden has given notice to the Crown of an alibi defence. Mr. McLaughlin has said nothing to indicate the nature of his defence.

9. I turn to a consideration of the applicable law.

10. Section 33(1) of the *Evidence Law* reads:

> "A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if-
>
> (a) the requirements of one of the paragraphs of subsection (2) are satisfied; or

(b) the requirements of subsection (3) are satisfied; or

(c) the requirements of subsection (4) are satisfied."

Here the applicable set of requirements is found in subsection (2) which reads in part:

"The requirements mentioned in paragraph (a) of subsection (1) are-

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness..."

11. The three possibilities in subsection (2) are disjunctive.

12. Section 33 is clearly intended to provide a code of procedure for the admission in evidence of witness statements where the person giving the statement is either unavailable or cannot, for some good reason, be called. In addition to the obvious case of a deceased witness, the section provides for the admission in evidence of witness statements from persons who are mentally unfit to attend and give evidence, for persons who are at the time of trial outside the Cayman Islands where it is not reasonably practicable to secure the witness' attendance, and for statements from witnesses who cannot be found after all reasonable steps have been taken to locate the person. In addition, section 33(3) provides for the admission in evidence of statements made to a police officer where the person who gives the statement does not wish to give oral evidence because of fear or cannot give oral evidence because "he is kept out of the way".

13. There are safeguards set out in section 33 dealing with notice to the defence.

14. It is noteworthy that section 33(1) contains the word "shall". On the face of the legislation, it would appear that if one of the many admissibility preconditions has been met the witness statement must be admitted in evidence. That, however, is not so because of other provisions.

Section 33(6) reads:

> "Notwithstanding subsection (1), in criminal proceedings a written statement by any person is admissible as evidence to the like extent as oral evidence to the like effect by that person if the court determines that it is in the interest of justice to admit such written statement."

15. This section appears by its wording to be a limitation upon section 33(1). The presiding judge must be satisfied that it is in the interest of justice to admit the statement. That is the effect of a decision of my brother Quin in *R v Martin.* 1 CILR Note 9.

16. I should also make reference to section 40 of the *Evidence Law* which codifies the common law power an English judge has always had to exclude evidence which would otherwise be admissible if, in the opinion of the court, the admission of the evidence would "operate unfairly against an accused person". That section is an overriding principle which has application to the procedure in section 33 I have outlined.

17. Thus, our *Evidence Law* provides a potentially far-reaching set of provisions permitting the introduction of a witness statement in a criminal trial in circumstances where the witness is unavailable for cross-examination. The fact that the section is not invoked often should not be allowed to obscure its scope, which is very broad. The fact that the witness did not give evidence or undergo cross-examination at the preliminary inquiry is not a bar to the admission of the evidence. Indeed this consideration is not referred to at all in section 33.

18. The leading authority on the topic is the decision of the Privy Council in *Scott v The Queen* 1 A.C. 1242. Lord Griffiths gave the unanimous decision of the Privy Council in a case where at trial in Jamaica sworn depositions of witnesses given at the preliminary inquiry were admitted in evidence over the objection of the defence. This, of course, is not on all fours with the present case because the witnesses in question in *Scott* had been cross-examined at the preliminary inquiry. His Lordship concluded his analysis of the existing case law and legislation in this manner (page 1258):

> "In the light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary

in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case. In an identification case it will in addition be necessary to give the appropriate warning of the danger of identification evidence. The deposition must of course be scrutinised by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury.

Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it will be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it. But this is an extreme case and it is to be hoped that prosecutions will not generally be pursued upon such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition."

19. *R v Blithing f* Cr. App. R. 86 was a decision of the Court of Appeal in which the trial judge had instructed himself that the deposition of a witness should be excluded from evidence if its admission would be grossly unfair to the defendants. The Court of Appeal held that using the adjective "grossly" was an error. It represented the wrong test. The court went on to say that if the judge had applied the correct test, that of simple unfairness, it would have been difficult for him to avoid excluding the statement, the contents of which were highly prejudicial in the view of the Court of Appeal. The court also noted and was troubled by the fact that the defendant could not challenge the credibility of the deponent by cross-examining him at trial. This decision was doubted by the Privy Council in *Scott* (see page 1258).

20. In *Webster v R* CILR 109, our Court of Appeal had before it a case where the deposition of a complainant given at the preliminary inquiry was admitted in evidence at trial over the objections of the defendant. The court referred to the decision in Scott, reiterated that an important consideration was the probative worth of the evidence in the deposition in relation to the essential elements of the offence, and said that an important collateral consideration was whether there was corroborative evidence for the deposition evidence. The court quoted from *Scott* at some length, including the passage I have read, and in the result dismissed the appeal. At page 117, the court said, with reference to the principle arising from

Scott, that unavailability of the witness "does no more than set the stage for the exercise of the judicial discretion."

21. Finally, I make reference to the decision of the United Kingdom Court of Appeal in *R. v. Cole* 1 W.L.R. 866. In Cole an important witness died before trial and his deposition was entered in evidence. A broad challenge to that practice was mounted by counsel in the Court of Appeal unsuccessfully. In the course of its judgment, the court identified not only the usual considerations which I have already mentioned but an additional factor. The court said at page 876:

> "The court is entitled, in our judgment, to have regard to such information as it has at the time that the application is made which shows 'whether it is likely to be possible to controvert the statement' in the absence of the ability to cross-examine the maker. The court cannot require to be told whether the accused intends to give evidence or to call witnesses, but the court is not required, in our judgment, to assess the possibility of controverting the statement upon the basis that the accused will not give evidence or call witnesses known to be available to him. The decision by an accused whether or not to give evidence or to call witnesses is to be made by him by reference to the admissible evidence put before the court; and the accused has no right, as we think, for the purposes of this provision to be treated as having no possibility of controverting the statement because of his right not to give evidence or to call witnesses. If Parliament had intended the question to be considered on that basis express words would, we think, have been used to make the intention clear."

22. I respectfully adopt and apply that passage in the case before me.

23. Thus, I must consider the probative value of the tendered statement, whether there is independent evidence which could support or refute it and, if there is such independent evidence, its cogency. There is a further important consideration: the

possibility, if it exists, that the defendants can contradict the evidence by other evidence available to them. This is not an exhaustive list. All of the circumstances must be considered because the ultimate issue is one of fairness.

24. The evidence of Mr. McGaw, if it is believed, has very considerable probative value in the case of Trent Bodden and somewhat less value in the case of Codie McLaughlin, who made no oral response to Trent Bodden's admission of guilt. The evidence amounts, at least in Mr. Bodden's case, to a full confession of guilt.

25. Is there independent supporting or confirming evidence for what Mr. McGaw has said? McGaw did say the same thing to the police on two separate occasions and was consistent in his brief account of the conversation, but a witness is not, except in very particular circumstances, permitted to bolster his own credibility by showing that he made a prior consistent statement. However, the fact that Michael McLaughlin has now pleaded guilty is a piece of independent circumstantial evidence supporting the truth of Mr. McGaw's assertion. I am confident that I can take Michael McLaughlin's guilty plea into account for this limited purpose although I cannot use it in any broader way as supporting the guilt of these two accused.

26. If the statement is admissible, I would of course remind myself of the danger of accepting the evidence of a witness of unsavoury character who was himself under suspicion for the crime in question. I would then go on to consider whether

there is any reliable and independent evidence which supports his evidence and weigh that, if it exists or if any is found. If the statement is admissible, I would also remind myself of the special danger of accepting it as factual given that it is the written evidence of a witness whose credibility is challenged but who cannot be cross-examined. Much can be learned by observing a witness under cross-examination.

27. Here the possibility referred to in Cole's case of contradicting the witness statement by other evidence available to the defendants does exist. One co-defendant, Michael McLaughlin, has now pleaded guilty but has not yet been sentenced. If this trial is adjourned until after the sentencing, the defendants (or the Crown for that matter) will be able to call Michael McLaughlin without his consent. He will know the identity of the two persons who committed the robbery with him and can testify freely to that once he has received his sentence.

28. In my view, this last consideration removes any realistic danger of unfairness to these defendants. The trial should not end until Michael McLaughlin is available to give evidence. The defendants will have the ability to call Michael McLaughlin as a witness to exonerate themselves if they did not participate in the robbery.

29. For these reasons, I find that the witness statement of Asher McGaw is admissible in evidence.

Dated this 5th day of December, 2011

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS