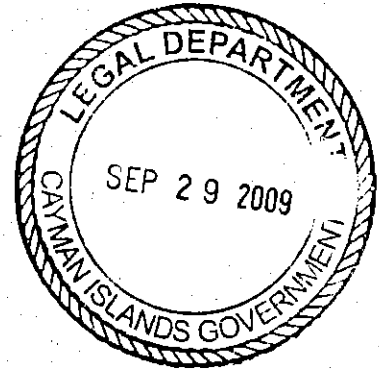


IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION

IND. NO. 90/08



REGINA
V
FABIAN POWELL



IN OPEN COURT
THE 13TH JULY 2009
BEFORE THE HON. CHIEF JUSTICE

Appearances:

**Ms. Nicola Moore Crown Counsel for the Crown
Mr. Philip McGhee of Walkers for the Defence**

RULING

1. I have to decide two issues of admissibility of evidence.
2. The first is as to the admissibility of photographs taken of the defendant at the time of arrest and which show a series of tattoos on his arms and torso.
3. A tattoo to one arm depicts what has been described as a ganja leaf with the word "death" written through it. A tattoo to the other arm is of the word "OUTLAW" in bold letters.
4. A third, on the defendant's back, depicts what appears to be a bullet of rifle calibre and the word "OUTLAW" again written above.

5. The fourth and final tattoo is of letters written "BACDAFUCUP" in bold and forming an arch over the abdomen of the defendant.
6. Miss Moore for the Crown argues for the admissibility of those photographs because "as a matter of common sense", as she puts it, all the tattoos are evidence of the defendant's gang affiliation and because the one on his arm depicting a ganja leaf, has been specifically mentioned by the Crown witness as an identifying mark.
7. In support of her arguments, my attention has been brought to the law dealing with the admissibility of similar fact evidence. I note immediately though, that viewed merely as evidence of a predisposition to unlawful conduct or bad character, the photographs of these tattoos are plainly inadmissible. Viewed in that way, the photographs would be nothing more than prejudicial evidence of other circumstances "which merely tend to deepen suspicion and would not be probative of the offence" of unlawful possession of a firearm which is charged on this indictment (per Lord Cross in DPP v Boardman [1995] AC 421, at 457).
8. This photographic evidence must therefore be excluded unless it can be shown to have a really cogent and material bearing on the issues to be decided.
9. Admissible similar fact evidence need not be confined only to evidence of previous similar criminal conduct. It may include evidence of the defendant's involvement in other activities indicative of the likelihood of his involvement in the activities alleged; provided that that is relevant to and probative of the indictment. The relevance and probative force may be demonstrated when the earlier activity discloses a motive for commission of the alleged offence.

R v Sidhu 98 Cr. App. R 59 C.A. is apposite: the appellant Sidhu had been charged with two others with conspiracy to possess explosives in such circumstances as to give rise to a reasonable suspicion that they were not in their possession or under their control for a lawful purpose (see S. 4(1) of the Explosive Substances Act 1883 U.K.). Sidhu denied all knowledge of the explosives although he had been present at the house at which the explosives, supplied by undercover police officers, were recovered and his finger prints found on some of the notes with which the undercover officers had been paid.

10. A video recording adduced in evidence and apparently made in Pakistan, showed the appellant as one of a group of heavily armed people practising using various weapons, and singing in support of the Khalistan Liberation Force. The Court of Appeal upheld the decision to admit the video into evidence, holding that it was clearly relevant to the reasonableness of the suspicion that the explosives were possessed for an unlawful purpose. It was evidence of a continual background relevant to the appellant's part in the conspiracy, without the totality of which, the account placed before the jury by the defendant (who claimed to be a law abiding citizen who did not believe in violence as it was against his religious principles), would have been incomplete.
11. The case is discussed at Archbold 2002 Edition paragraph 13-17 page 1300. It provides a clear precedent for the admission of evidence of previous activity or involvement (whether or not itself proven to be unlawful) being of cogent relevance to the case at bar.

12. The primary issue to be decided in this case is identification. There can be no doubt that someone shot at the car in which the witness Dave Rockett was seated with what has been described and shown to be a .45 calibre firearm.
13. The question for the jury will be whether that person was the defendant.
14. The answer to that question will depend entirely on whether or not the accuracy of Dave Rockett's evidence is accepted and in that respect the photographic evidence of the tattoo depicting the ganja leaf may be relevant. This is in the sense of going to show how well Dave Rockett knew the defendant before the incident. Rockett says that he knew him very well and to support this mentions that he had described to the police this particular tattoo which he knew to be borne by the defendant.
15. The photographic evidence of it is therefore relevant to the question whether Dave Rockett would have been able in the short time available during the assault, and in the angst of the moment, to recognise the defendant as the assailant with the firearm, as Rockett says he was.
16. The photograph of that tattoo is therefore ruled to be admissible.
17. As to the other photographs of the other tattoos, there is nonetheless shown to be a further cogent and potentially probative basis on which they might be admitted.
18. This is in the context of the motive which has been ascribed by Rockett to the defendant for wanting to do him harm. Rockett stated that the defendant's motive has to do with him having refused to become a member of the defendant's gang. It is the Crown's intention to argue in support of Rockett's allegation in this

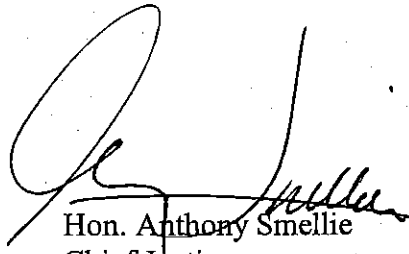
regard, that the tattoos as depicted in the photograph are generally indicative of the defendant's involvement in gang activity.

19. As yet, however, the probative value of this evidence is only potential. Further evidential foundation is required. It will not suffice for Ms. Moore to merely assert – as she has so far sought to do – that these tattoos are as a matter of common sense in and of themselves indicative of gang involvement.
20. If further evidence can properly be adduced, either from Dave Rockett himself or from some other source as to the meaning or significance of the photograph being indicative of gang involvement, the evidence will be capable of being relied upon by the jury as supportive of Dave Rockett's allegation of motive ascribable to the defendant.
21. Although the prosecution does not have to prove motive, evidence of motive is always admissible in order to show that it is more probable that the accused committed the offence charged: see *R v Ball* [1911] A.C. 47 H.L.
22. As the full evidential foundation for the admission of the photographs of the 2nd, 3rd and 4th tattoos has not yet been laid, the direction I give is that they may not be opened to by the Crown and may not be adduced at all during the trial unless and until the evidential foundation is fully laid. Without that foundation, I would regard the prejudicial effect of these photographs as likely to outweigh their probative value.
23. Miss Moore expressed a lack of understanding of what is meant by “evidential foundation”; a concept which she says is unfamiliar in her experience of practice in England.

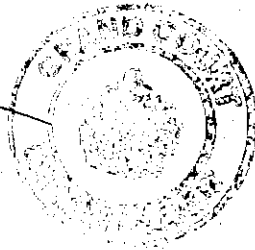
24. I find that to be surprising. The concept is germane. In this present context as the foregoing discussion reveals, it is a matter of common sense: unless there is evidence to explain the tattoos as being indicative of gang involvement, they can have no bearing on the question of motive and so no relevance to the case. The marshalling of that evidence of symbolic value (if it is available) is thus the necessary foundation for admissibility.
25. This is so in this case notwithstanding that the unlikelihood of coincidence remains the rationale justifying the reception of all similar fact evidence. See Archbold 2002 Ed. Para 13-6, page 1287, discussing DPP v P [1991] 2 A.C. 447, DPP v Boardman (above) A.C. 421 and Makin v Attorney General for New South Wales [1894] A.C. 57.
26. Here the "similar fact" evidence arises from the unlikely coincidence of Rockett's evidence about the defendant's motive being supported by the presence of the tattoos on the defendant depicting gang involvement (if that turns out to be the case from further evidence). It is thus that predicative further evidence that remains to be adduced by the Crown.
27. The second issue relates to the admissibility of further evidence from the police officers about the circumstances surrounding their arrest of the defendant. They say that his conduct while under surveillance and shortly thereafter when he and his girlfriend were accosted, suggests that the defendant, with the help of his girlfriend, was seeking to avoid detection by the police. The circumstances involved the girlfriend of the defendant as the driver of the car in which the defendant was hiding when they were accosted. The defence has indicated that the

girlfriend may be called to support the defendant's alibi as being with her at home at the time of the shooting.

28. The evidence of the police officers about the arrest is likely to be relevant to her credibility as a witness. It is thus likely to be relevant to the issues to be considered by the jury and is therefore admissible.



Hon. Anthony Smellie
Chief Justice



July 14 2009