COMMONWEALTH OF THE BAHAMAS **Information No**

IN THE SUPREME COURT **150/7/2019**

CRIMINAL DIVISION

BETWEEN

BERNARD KNOWLES

Applicant

V

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mrs. Justice Cheryl Grant-Thompson**

APPEARANCES: **Mr. B'joun Ferguson for the Applicant**

Mr. Terry Archer along with Ms. Destiny Mckinney of the Office of the Director of Public Prosecutions for Respondent

HEARING DATES: **7th December 2020**

****

RULING

SHOULD THE JURY BE DISCHARGED; SHOULD THE INDIVIDUAL JUROR BE DISCHARGED- VOIR DIRE- IS THE PANEL CONTAMINATED- ZINTWORN DUNCOMBE SCCrApp No. 14 of 2017-CORDERO SAUNDERS SccrApp No. 47 of 2017- GIBSON V R [1963] 5 WIR pg. 450- SANGIT CHAITIAL V THE STATE (1985)39 WIR 295.

GRANT-THOMPSON, J

1. Counsel for the Applicant brought to the attention of the Court that one of the jurors was employed with the police which would ultimately result in the juror contaminating the jury panel in its entirety. The comparison Counsel used was as follows: "a disease similar to CORONA VIRUS was threatening to infect the entire panel and accordingly he called for their dismissal." He also submitted that:
    a. To not discharge the juror would cause inherent bias against the accused man;
    b. It was unduly prejudicial;
    c. Having regard to the Voir Dire the court conducted prior to the juror being sworn-that this juror was "a liar" and should be dismissed forthwith.

2. Counsel for the Director of Public Prosecutions countered and submitted that-the results of the Voir Dire-may reveal that the entire jury may not have to be dismissed if they had not been contaminated by the juror; that notwithstanding that the juror worked as a civilian- employed as a secretary- with the RBPF-it was not prohibited by the Jurors Act, Chapter 59; and further that the case law and authorities relied upon caused any apparent defence by discharging the juror in extreme cases having first conducted a voir dire to determine the jurors reliability. He asked me to asked two questions:

    1) If the juror had access to the AS-400 system; and
    2) Is she had disclosed her alleged knowledge of police with the other jurors.

VOIR DIRE OF JUROR

3. The Court determined that a voir dire was appropriate under the circumstances. The juror was called. She responded to questions and revealed that:
    - She is Kim Rhodrigues- employed for ten years at the Criminal Records Office University Drive. She knows the officers who

were prosecution witnesses generally but not well or intimately- so that she cannot be true to her oath;

- I considered her under the oath administered by the court clerk and bailiff when she was sworn as a juror a week ago today;
- She does not have access to the AS-400 systems; and
- She did not discuss the fact that she knew the witness with the other jurors.

4. The Court invited further submissions from Counsel. Mr. Archer submitted that :
   i) The particular juror did not work intimately with the officers;
   ii) She did not discuss the case with the other jurors;
   iii) She did not have access to the AS 400 systems;
   iv) She would not have had any access to any criminal record of the Defendant as he was a man with a clean record and good character (relied on Kofe Goodman).

The Law

5. Section 28 of the Juries Act, Chapter 59 provides that:

> ***"28. (1) The judge may, in his discretion, in case of any emergency or casualty rendering it, in his opinion, expedient for the ends of justice so to do, discharge the jury without their giving a verdict, and direct a new jury to be empanelled during the sitting or may postpone the trial on such terms as justice may require.***
> ***(2) If the judge becomes incapable of trying the case or directing the jury to be discharged, the Registrar shall discharge the jury.***
> ***(3) Without prejudice to the power of the judge to discharge the jury under the provisions of subsection (1), whenever a juror dies or fails to appear at any adjournment of the trial or becomes too ill to continue to serve then in any such case the judge may in his discretion proceed with the trial with the remaining eight jurors, and take their verdict which shall then have the same effect as the verdict of the whole number."***

6. Furthermore, section 35 Juries Act states:

> ***"35. Nothing in this Act contained shall extend or be construed to extend to alter, abridge or affect any power or authority which the court or judge now has, or***

any practice or form in regard to trials by jury, jury process, juries or jurors, except in those cases only where any such power or authority, practice or form is repealed or altered by this Act, or is or shall be inconsistent with any of the provisions thereof."

7. I found the case of ***Sangit Chaitlal v The State*** (1985) 39 WIR 295 (Court of Appeal of Trinidad and Tobago) to also be instructive. Justice of Appeal Bernard commented as follows:

> ***"We do not think the fact that the trial judge did not take the evidence on oath or for that matter by affirmation (if need called for such) the omission operated to vitiate the inquiry. The inquiry did not form part of the trial. If it did, which (as we said) it did not, the trial judge would have been under an obligation so to do in the light of the existing laws of the country. We will return to this aspect of the matter later.***

8. In ***Gibson v R*** (Court of Appeal Trinidad and Tobago West Indian Report-Volume 5- [1963] 5 WIR pg. 450 Chief Justice delivered the decision) at pg. 455:

> ***"We come finally to the fourth, and last, ground on which the appellant relies. Once again, we must refer to the part played by the defence at the trial. Briefly, the relevant facts are as follow. The trial commenced 25 minutes before the court was due to adjourn on 6 December 1962. The case for the Crown was opened within eight minutes; a police officer was sworn but immediately stood down because exhibits which he was to produce were not yet at hand; then a police photographer gave evidence. He produced and explained three photographs taken at approximately 1 am on 1 April, that is to say, within five hours of the tragic events. He was cross-examined about the general topography of the area and the distance between houses appearing in the photographs; he identified two bits of stick, one on either side of the feet of the deceased, which could be seen in one of them; and he said he did not see anywhere tow bits of mango wood about 1 foot long and about 11/2 inches in diameter. That ended the proceedings on that day. Next morning, as soon as the court resumed, appellants's counsel informed the court that one of the jurors was a brother of the deceased. On being questioned, the juror admitted that he was and explained that, not knowing the procedure, he did not mention this when he was "called to be sworn on the book". He was accordingly discharged forthwith. The appellant's counsel was then asked whether he objected to the trial proceeding with the remaining 11 jurors***

and replied that the he did not object, whereupon the learned trial judge forthwith warned them that the case must be decided on the "evidence led in the box, not on matters heard elsewhere". Thereafter, the trial followed a normal course.

Counsel for the appellant admitted that during the 25 minutes while the jury were empanelled in court on the first day of the trial there was no opportunity for the jurior who was afterwards discharged to influence his fellow-jurors in any way whatever. It is not alleged that at any time after the court adjourned on that day he was seen talking to any of the other jurors or that he associated with them in any respect otherwise. Nor is it disputed that his explanation to the court was honest and true. But it was urged that, having been drawn together and sat with the others on the first day, he had the opportunity to bias them thereafter. Accordingly, since justice must not only be done but must be seen to be done, this opportunity for bias incapacitated the 11 from appearing impartial and vitiated the trial and verdict."

9. The Court in ***Gibson v R*** further stated at pg. 455 that:

"***It is manifest, then, that when the relationship of the juror to the deceased became known and objection was taken to his continuing to serve as such, it fell to the learned trial judge to elect to discharge either him alone or the entire array. But it is to be observed that when the objection was taken by the appellant's counsel it was to the particular juror alone and, expressly, he did not object to the trial proceeding as provided by the subsection quoted above. When he was asked by this court why he did not at the appropriate time object to the entire array, his reply was that he did not then think of this "possibility of bias" upon which he now relies to found his fourth ground of appeal. He agreed also that what he said to the learned trial judge at the critical time amounted, in effect, to consent on his part that the trial should proceed in the manner it did. In such circumstances, it seems to us almost unpardonable that he should himself have proposed the present objection. But, since it has been raised, it becomes our duty to determine its validity."***

10. I also relied on the Court of Appeal Bahamas decision of ***Zintworn Duncombe v Regina SCCrApp No. 14 of 2017; Cordero Saunders v Regina SCCrApp No. 47 of 2017*** paragraphs 31-35. The judgement of the Court was delivered by Issacs, JA and paragraphs 31-35 stated:

"31. Ms Fraser submitted that none of the Defence Counsel objected on the record to the trial continuing with the two jurors remaining. This may be so but Mr. Cargill had suggested in Chambers that the jury be discharged; a suggestion rejected by the Judge. Ms. Fraser relied on my judgment in Rashid Dean v Regina SCCrApp. No. 43 of 2014.

32. In Dean the appellant had been convicted of the murder of his ex-girlfriend. During the trial a report appeared in electronic and print media that the Judge had ruled that the Appellant had a case to answer and the caption read "no acquittal for murder accused." We took the view that the publicity of one publication was insufficient to prejudice the case against the appellant and the trial judge had adequately addressed the matter in her directions to the jury.

33. There is a substantial difference between the irregularity in Dean and the irregularity in this appeal, namely, in Dean the problem was external to the jury but in the present appeal, the problem is internal to the jury. Lord Carswell identified the different investigations that are to be carried out by a trial judge depending on the classification; and in respect of an internal matter, the whole jury should be questioned in open court. This procedure was not adopted by the Judge.

34. I am constrained to conclude, therefore, that the investigation by the Judge into the altercation that occurred between the forewoman and the alternate juror constituted a material irregularity in the course of the trial.

35. I note in passing that it is possible that by holding a meeting with Counsel in the absence of their clients the Judge may have fallen afoul of Article 20(2)(g) of the Constitution. According to that Article, a defendant has to be present during his trial unless he has consented to it carrying on in his absence or conducted himself in so disruptive a manner as to warrant his exclusion therefrom:

> ***"(g) shall, when charged on information in the Supreme Court, have the right to trial by jury; and except with his own consent the trial shall not take place in his absence unless he so conduct himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence"."***

Ruling

11. My decision in this matter is as follows:

1) The juror was under the same oath since she was sworn at the commencement of the trial;

2) I found the demeanor of the juror to be truthful-she looked pained at the suggestion that she could have shared the information with her fellow jurors;

3) I am satisfied that the remaining jurors were not contaminated by the 'juror under question'. Indeed because of "COVID-19" restrictions, the congregation of the jury in this trial was severely limited. For the entire trial, we had two (2) points of law when the jury had to be excused-otherwise-they were requested to come when required as our traditional jury room were too small and another Judges courtroom was dedicated for their use; and

4) The Juries Act, Ch. 59 does not expressly prohibit a juror who works at the Criminal Records Office, however, out of an abundance of caution and to avoid the very appearance of bias, I will discharge the juror in question and proceed with the remaining eight (8).

Dated this 10th day of December A.D. 2020

Cheryl Grant-Thompson
Justice