

Newton Spence

Appellant

v.

The Queen

Respondent

FROM

**THE COURT OF APPEAL OF ST. VINCENT
AND THE GRENADINES**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 16th July 2001

Present at the hearing:-

Lord Hoffmann
Sir Patrick Russell
Sir Christopher Staughton
Sir Andrew Leggatt
Sir Philip Otton

[Delivered by Sir Patrick Russell]

1. The appellant, Newton Spence, was first convicted of the murder of John Edwards in the High Court of St Vincent and the Grenadines on 26th October 1995. The conviction was quashed on appeal but, after a retrial, the appellant was again convicted of the murder on 11th November 1998. An appeal against that conviction was dismissed on 13th September 1999 by the Eastern Caribbean Court of Appeal (St Vincent and the Grenadines). Special leave to appeal to the Privy Council against both conviction and sentence was granted on 19th April 2000. The matter of sentence was remitted for consideration by the Eastern Caribbean Court of Appeal. The present appeal is concerned only with conviction.

2. Three grounds of appeal were argued before their Lordships namely: (a) the alleged invalidity of the jury's verdict after the trial judge had discharged one of their number during the course of the hearing; (b) the alleged failure of the judge properly to investigate a

communication which had been made to another juror during the hearing; and (c) misdirections in the summing up relating to the issue of causation of the death of the victim.

3. The facts, in summary form, can be shortly stated. On 15th January 1995 the appellant was operating a taxi service, using his van. The victim was picked up at Langley Park in Georgetown. The taxi stopped at Georgetown Police Station where, after the appellant had been engaged in conversation with a police officer, the victim alighted from the taxi and walked away without paying his fare. The appellant told the police officer that he was going to get the fare from John Edwards and followed him. Witnesses spoke of hearing a gun shot, and one witness saw the appellant shoot the victim with a short handgun. Another police officer, who had been a passenger in the taxi, stayed with the appellant before he was taken to the police station. The victim was taken to the Georgetown Health Centre and later to the Kingstown General Hospital. There he was treated and underwent an operation in the form of a tracheostomy, but he died, it being common ground that he had suffered a gun shot wound when a bullet had penetrated and passed through the neck. The surgeon who carried out the tracheostomy was strongly criticised by another surgeon called by the defence. More of that later.

4. The appellant made two statements to the police to which no objection was taken. He alleged that the victim had struck him with a stone and attempted to strike him again with another stone. The appellant had then pulled his gun from its holster and fired a shot. In his evidence at trial the appellant swore that the gun had gone off accidentally and that he had not deliberately aimed or discharged the gun. He had pulled out the gun in an effort to defend himself and frighten the deceased.

5. It will be convenient if their Lordships dispose first of the attack upon the summing up. As earlier observed the defence called a consultant surgeon who had had access to the hospital notes. *Inter alia* he expressed the view that the vertical tracheal incision had been too large and that a transverse skin incision should have been employed. He expressed serious reservations as to the desirability of a tracheostomy or its necessity and in response to the judge he said that the medical treatment had contributed to the death. He conceded however that the original wound in terms of causation expressed as a percentage was 35% to 40%.

6. The attention of their Lordships was drawn to the provisions of the Criminal Code (Chapter 124 Laws of St Vincent and the Grenadines 1990 Revision). Section 168 provides that:

“A person shall be deemed to have caused the death of another person, although his act is not the immediate or not the sole cause of death, in any of the following cases –

- (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes his death. In this case it is immaterial whether the treatment is mistaken if it was employed in good faith with common knowledge and skill, but the person inflicting the injury shall not be deemed to have caused the death if the treatment which was the immediate cause of the death was not employed in good faith or was so employed without common knowledge or skill.”

There are other sub-paragraphs of section 168 which have no bearing on the instant case.

7. The judge was not referred to section 168 and in the view of their Lordships with good reason. No one suggested in evidence that the immediate cause of death was the medical treatment, negligent or otherwise. The high-water mark of the defence medical evidence was that the medical treatment was the substantial cause of death. But at all times up to the moment of death the original infliction of the serious neck wound remained what the jury were entitled to regard as an immediate cause of death.

8. The judge’s summing up on the issue of causation was, in their Lordships’ view, impeccable. It is unnecessary to rehearse every relevant passage. Two will suffice. The judge said:

“As I said to you the prosecution must convince you, make you feel sure, that the wound was operating up to the time of death as a substantial cause of such death. No matter that something else, for example medical bad treatment or abnormally bad treatment may be operating. The wound or injury does not have to be the only cause of death.”

Having reviewed the evidence the judge said later:

“Members of the jury, if having considered the evidence you are sure that the wounds in terms of percentage did contribute in terms of 35 to 40 per cent, you may quite

properly conclude that was a cause of death. But you must be sure if the wounds were operating up to the time of death as a cause and remain up to the time of such death a substantial cause. It is a matter for you. It remains a matter of fact for you to decide.”

9. The direction cited followed long-standing common law principles and in their Lordships’ view were not contrary to the terms of section 168. Accordingly their Lordships reject this ground of appeal.

10. The validity of the appellant’s conviction in this case, however, does not rest with the summing up. It depends upon the verdict having been reached by a jury properly constituted in accordance with the laws of St Vincent. So far as relevant they are to be found in The Jury Act (Chapter 21 Laws of St Vincent and the Grenadines 1990 Revision). Section 14 provides:

“A jury in a criminal trial for a capital offence shall consist of twelve persons to be selected by ballot whose verdict shall be unanimous:

Provided that in trials for murder, after two hours of its consideration, a verdict of ten jurors convicting the accused of any offence less than murder of which they are entitled by law to convict him, shall be received as the verdict in the cause.”

Section 15 provides:

“If, during the course of any criminal proceeding, one of the jury dies, or becomes incapable of serving, or absents himself, it shall not be necessary to discharge the jury or to add thereto another juror, but the trial shall be proceeded with by the remaining jurors notwithstanding such death, incapacity or absence.”

11. The Court of Appeal correctly in their Lordships’ view found that there was no inconsistency in the two sections, and went on to consider their effect upon a situation which arose at a comparatively late stage of the trial. One of the jurors, Miss Ronelle Payne sent a message to the judge asking to be excused from further service. The Record of the proceedings is not as full and detailed as it might be, but their Lordships have been helped greatly by an affidavit sworn by junior counsel for the defence, Miss Nicole Sylvester. The reason for the request was that the juror had arranged her vacation and it seemed inevitable that the

trial would continue into the period when Miss Payne had anticipated being on holiday in Europe. The judge consulted with counsel and initially indicated that he had no power to discharge the juror.

12. After that ruling a Mr John West, with whom Miss Payne had intended to go on holiday, wrote to the judge. He signed the letter but Miss Payne did not do so. It reads as follows:

“Your Lordship,

Miss Payne and myself sat before you yesterday afternoon together with counsel for both prosecution and defense, Miss Young and Miss Leigertwood. At that time you were presented with a communication from Miss Payne addressed to you for which a response is awaited.

At the meeting you expressed your concern with the dilemma before you and intimated that your hands were effectively tied by the laws of this state. If these are in fact true statements then we have no choice but to accept them. Please be very certain however that Miss Payne is in no way shape or form responsible for the circumstances brought to your attention and no amount of lawyerly huffing and puffing will properly remedy matters. It seems that as a citizen of this state Miss Payne has no rights whatsoever when it comes down to your lordship weighing these on the one hand against the gross incompetence of the Courts officers on the other hand. For this we will be grateful for a clear and cogent explanation either from you or the Courts Officers if indeed they are capable of providing same.

We are attempting to rearrange our travel plans to precisely one week later and will advise you if we are successful in doing so. We already know that we shall incur the minimum additional cost of some \$663.40 United States Dollars (\$1791.18 Eastern Caribbean Dollars) as a result of cancellation fees and such like as a direct result of the erroneous, irresponsible and imbecilic behaviour of at least one of the Courts officers. As yet we are uncertain of the additional fax and telephone charges to ground operators, hotels and family to advise them of the new schedule and will be better able to provide material documents in support thereof by early December.

Our question to you is a simple, but compound one - who will you order to pay the above sum and any other relevant additional sums, when, in what currency and to whom?

We respectfully expect a forthright response to both to the original communication and the foregoing today.

Sincerely

John West & Ronelle Payne
cc I. E. Leigertwood (Miss)”

The letter was followed by another letter from Mr. West. It reads:-

“Your Lordship,

I have shown a copy of my letter to you of yesterday’s date to a lawyer who has given me advice. In these particular circumstances I write to you to clarify my feelings on the entire affair.

First of all I hope that you will appreciate that this communication is prepared in a reflective conciliatory mood. This I assure you is vastly different from the frustration and anger felt after our meeting on Wednesday that rolled over into Thursday morning. Nothing happened that morning that would change the events of the previous day except of course the spiraling costs of rearranging our vacation. Whilst frustration and anger are powerful emotions by themselves they are further tempered in this case by all that I feel for my fiance Miss Payne. She found herself equally frustrated and pure instinct determined the content of the letter. I hope that you may be able to understand the helplessness we felt at that time.

Without doubt the tenor of the letter was inappropriate, but more importantly perhaps certain words, I now clearly understand, could offend the sensibilities of others. For this in particular I am most apologetic. At no time was any ill intent meant toward any person in particular especially your Lordship.

I hope your Lordship will be able to consider my unreserved apology should either your Lordship or any of the Courts officers have been offended in any way.

Sincerely

John West
cc I.E. Leigertwood (Miss)”

13. The juror was not asked whether she felt able to continue in accordance with the terms of her oath, but the judge decided that the trial should proceed with only eleven jurors and Miss Payne was discharged. The remaining jurors were so informed by the judge.

14. The terms of section 15 are to be contrasted with section 16 of the Juries Act 1974 which deals with the discharge of a juror in an English trial. Section 16(1) of the 1974 Act provides:

“Where in the course of a trial of any person for an offence on indictment any member of the jury dies or is discharged by the court whether as being through illness incapable of continuing to act or for any other reason, but the number of its members is not reduced below nine, the jury shall nevertheless (subject to subsections (2) and (3) below) be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.”

15. Thus it can be seen that the judge in a trial taking place in England or Wales has a wide discretion as evidenced by the words “or for any other reason”. He is not restricted by the words of section 15 applicable in St Vincent.

16. The question for determination by the judge in the instant case was whether there was evidence that Miss Payne had become “incapable of serving”. She was plainly a reluctant juror and she plainly was upset and irritated by the fact that her holiday might be ruined or not take place. She also thought that the administrative staff at the court was to blame for her predicament. That said, however, she displayed no open hostility to the trial process nor to anyone actively or directly concerned with it. She did not assert at any stage that she felt unable to continue as a juror and there was nothing to suggest that she had become in any way incapable of fulfilling her function and doing justice to both the prosecution and the defendant in accordance with her oath.

17. The reduction in numbers of a jury is always a very serious matter for it may deprive one side or the other or both sides of valuable contributions in discussions leading to the return of a verdict. Their Lordships, looking at what happened in this case,

are unable to agree with the judge that Miss Payne had become “incapable of serving”. There was, in their Lordships’ view, no evidence to support that finding and there being no evidence the Board is entitled and feels bound to interfere. The decision to discharge Miss Payne was an irregularity which necessitates the quashing of the conviction.

18. There remains for consideration the third ground of appeal which can be disposed of briefly. It was not strenuously argued before their Lordships and does not appear to have been raised at all before the Court of Appeal.

19. The notes of evidence at the trial, as set out in the Record of Proceedings, reads for 21st October 1998:

“9.10 a.m. Counsel see judge in chambers
Mr. Cottle draws to Court’s attention that juror Esther Horne has informed him that she received telephone call from one purporting to be the brother of the Accused.

The person said ‘Esther how you doing.’ I said, ‘I am fine’. He said ‘You know this case is a hard case you’

He said ‘you know the Privy Council throw out the case already?’

I said ‘Mr Daniel, you know I should not be discussing this case with anyone and the person I know the voice of Mr Daniel very well. We work in different branches of the National Bank. I have no doubt in my mind that it was voice of ...

Court asks Juror whether she can fairly participate in performance of jury duty.

Juror informs Court that incident took place last Friday 16th October. I was not comfortable since then. I got call at my work place. I reported to foreman the very Friday morning.

Defence counsel asks if they have any reservation about continuing notwithstanding incident.

Counsel for defence says that they had thought (as indeed had the Court) that incident had occurred this morning.

In view of fact that incident was last Friday

Counsel expresses reservation as to the fairness of going on.

Court is of the view that in all the circumstances and in particular the juror's statement as to her willingness to carry on and do her duty.

That the case should proceed.

Whereupon the question as to whether the other jurors may have been told is raised.

Court sends for Juror and juror asked whether she had discussed this with other colleagues. Juror answers 'yes'. She was discussing with them for purpose of determining what should be done.

Court continues in open court.”

20. From this Record, which is all that their Lordships have in relation to the episode, the Board is satisfied the judge was entitled to conclude that the wholly improper approach of Mr Daniel had no impact upon the juror or any of her fellow jurors. In the view of the Board the judge, having made an appropriate enquiry of the juror was right to continue and this ground of appeal therefore fails.

21. For the reasons set out in this judgment the Board will humbly advise Her Majesty that the appeal should be allowed, the conviction quashed, and the case remitted to the Court of Appeal to consider whether there should be an order for a retrial.

22. Before parting with this appeal the Board would respectfully suggest that consideration might be given to amending section 15 of the Jury Act, *supra*, so as to give judges in St. Vincent and the Grenadines a wider discretion along the lines of that provided for by section 16 of the Juries Act 1974 (England and Wales). This must, however, be a matter for the St. Vincent legislature and not for their Lordships.