COMMONWEALTH OF THE BAHAMAS **CRI/VBI/52/3/2015**

IN THE SUPREME COURT

CRIMINAL DIVISION

BETWEEN

THE KING **APPLICANT**

AND

RICLAUDE TASSY **RESPONDENT**

Before: The Honourable Mr. Justice Gregory Hilton

Appearances: Rasheed Edgecombe along with Tabitha Frazier and Cashena Thompson for the Applicant

Ms. Cassie Bethel for the Respondent

D E C I S I O N

[Criminal Law – Prosecution application to close its case without calling two witnesses listed on back of Indictment – Defence opposes application – Material witness – Crown's Discretion to call witness – Guidelines on whether prosecution should call witness – Section 177 and 178 of Criminal Procedure Code.]

1. The Accused Riclaude Tassy is charged with Murder alleged to have occurred between 13th October 2014 and 5th January 2015.

2. On the 13th January 2025 a jury was empaneled in the trial and the Crown commenced its case. The Crown after calling eleven (11) witnesses in the trial sought leave of the court to close its case without calling two (2) witnesses whose names were listed on the back of the Indictment and whose witness statements had been disclosed to the Defence.

3. The Defence objected to the application on the basis that one of the witnesses, Inspector Michael Johnson, was a material witness whom they wished to cross-examine. That this witness alone can testify to the fact regarding the proper conduct and preparation of the identification parade.

4. The Prosecution submitted that it was in the discretion of the Prosecution whether to call the witness or not and that in this trial the witness evidence was not necessary for their case as other witnesses had testified regarding the substance of what evidence the witness could give. Additionally the Prosecution submitted that calling the witness (who had recently resigned from the Police Force and is the subject of a criminal charge – unrelated to the present case) would be an unnecessary distraction in the trial and "muddy the waters" and that the Accused would not be prejudiced if the witness was not called.

5. The evidence, in brief, led in the trial is that on the night of 13th October 2014 Pedro Moss was shot in the left eye while under the Potter's Cay Dock at close range while standing next to two of his

close friends. That Pedro Moss was taken to the hospital and was unable to respond or give a statement to the Police (as he was in a "vegetative state") and eventually succumbed to his injury on 5th January 2015. The two close friends, eyewitnesses gave evidence in the trial of seeing the incident and attending an Identification Parade and selecting the Accused as the person who shot the deceased.

The witness, the subject of this application, (then) Inspector Michael Johnson was the officer who set up and conducted the identification parade with the Accused. Two other Police Officers testified in the trial that by way of notices of additional evidence that they escorted the two eye-witnesses, respectively, into the identification parade room and were present when the eye witnesses called out the number which the witnesses said was around the neck of the person responsible for the murder and they identified the Accused in the trial as the person the eye-witnesses picked out. The evidence of these two Police Officers was challenged in cross-examination by the Defence.

The Accused was charged for the murder by the investigator Inspector Brian Coakley, after reviewing the statement of the various witnesses and receiving the identification parade results from Inspector Johnson.

6. In considering this application the court has been referred to several decided cases by Prosecuting Counsel and has considered its powers under Section 177 and 178 of the Criminal Procedure Code.

7. Sections 177 and 178 are set out here.

Section 177 reads:

> "If the court is of the opinion that any witness who is not called for the prosecution ought to be so called, it may require the Crown to call him and, if the witness is not in attendance, may make an order that his attendance be procured and adjourn to further hearing of the case until the witness attends, or may on the application of the accused discharge the jury and postpone the trial."

Section 178 reads:

> "The court shall have power in its discretion at any stage of the trial, prior to the conclusion of the summing up, to call any witness, whether or not such witness has been called before the court or not, and to examine such witness. If a witness for the Crown is recalled by the court or by leave of the court, the Accused or his counsel shall be allowed to cross-examine him on the new evidence given. In any other case a witness called under the provisions of this section may only be cross-examined by either party with leave of the court."

8. In **R. v Russell-Jones** [1995] 3 ALL England Reports the 239 the English Court of Appeal set out the guidelines of when the prosecution should call witnesses. In Garvin Pratt V. R. SCCr. App No 41 of 2016 the Bahamas Court of Appeal referred to these guidelines and principles in an appeal of a conviction where during the trial the prosecution decided not to call a witness who was listed on the back of the Indictment. Paragraphs 18, 19, 20 and 21 are instructive and set out here.

> ***Paragraph 18 reads:***
>
> "The facts are that the Crown did not call Ms. Alexionetter Pratt as a witness because it formed the view that she was not

a credible witness having given the police a false name when she was first seen by them. It is not the law that the Crown must call all witnesses listed on an indictment in circumstances where the Crown is not satisfied that the witness is credible or will be truthful in her evidence."

Paragraph 19 reads:

"In **R v Russell-Jones** [1995] 1 Cr. App. R. 538 the English Court of Appeal set out the principles to be applied where the prosecution elects not to call a person as a witness. They have been helpfully set out in Archbold 2015 at paragraph 4-437 as follows:

> **"i. Generally speaking the prosecution must have at court all the witnesses whose statements have been served as witnesses on whom the prosecution intend to rely, if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution have an unfettered discretion, but must normally disclose material statements not served.**
>
> **ii. The prosecution enjoy a discretion whether to call, or tender, any witness they require to attend, but the discretion is not unfettered.**
>
> **iii. The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial. The dictum of Lord Thankerton in Adel Muhammed El Dabbah v. Att.-Gen. for Palestine [1944] A.C. 156, PC (court will only interfere if the prosecutor has been influenced by some oblique motive), does not mean that the court will only interfere if the prosecutor has acted out of malice; it means that the prosecutor must direct his**

mind to his overall duty of fairness, as a minister of justice. Were he not to do so, he would have been moved by a consideration not relevant to his proper task—in that sense, an oblique motive.

iv. The prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, they regard the witness' evidence as unworthy of belief. In most cases, the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution have discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say "incredible", then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called. This limitation of the prosecution's discretion, which requires witnesses of the central facts to be called, is supported by what was said by Lord Roche in Seneviratne. This is also the sense in which, as it seems to us, Lord Hewart

CJ's observation in R v Harris [1927] 2 KB 587 at 590 should be read.

v. It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a witness has to say is at best marginal.

vi. The prosecutor is also the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one that is less favourable to the prosecution case than that of the others.

vii. A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the prosecution rely. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in their endeavor to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken."

The court added that these principles should not be regarded as a lexicon or rule book to cover all cases. There may be special situations that have not been adverted to, and in every case, it is important to emphasize, the judgement to be made is primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle.

Paragraph 20 reads:

"In **Grant (Steven) v R** [2006] 88 WIR 354, the Privy Council endorsed the principles set out in **R v Russell-Jones**. The Board said:

[25] The extent of the duty on a prosecutor to call witnesses named on the back of an indictment was fully reviewed in R v Russell-Jones [1995] 3 All ER 239. The principles there summarized were not criticized in argument, and provide authoritative guidance. That summary need not be repeated. Plainly the prosecutor has a discretion. It is a discretion to be exercised by the prosecutor acting as a minister of justice, in the interests of fairness. Thus the prosecutor need not call witnesses who are incapable of belief, or whose evidence is pure repetition (R v Haringey Justices, ex parte Director of Public Prosecutions [1995] QB 351 at 356), or whose evidence is not material (R v Harris [1927] 2 KB 587 at 590, and Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279 at 307 and 308). The general rule, however, was that stated in R v Russell-Jones (at p 245):

'The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instances, the prosecutor regards the witness' evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves

witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say "incredible", then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.'

Paragraph 21 reads:

"In **R v Mahmood** [2013] EWCA Crim 742 the English Court of Appeal said:

"It is clear from those principles that the prosecution are obliged to call only witnesses whose statements have been served as part of their case. Of those, they are obliged only to call those who give evidence as to the primary facts, and they are obliged only to call those whom they regard as witnesses of truth" [Emphasis added]

9. When applying these guidelines and principles to the present case the court accepts that the prosecution has a discretion whether or not to call a witness whose name is listed on the back of the Indictment and in this case the court is not of the view that the prosecution is influenced by any oblique motive in choosing not to call Inspector Johnson.

10. The court is also of the view however that the evidence that Inspector Johnson is expected to give (if called) is material evidence of primary facts (he alone can testify to the preparation of and make-up of the identification parade and whether the proper procedures

were followed prior to the identifying witnesses viewing the parade).

11. There has been no indication that the witness is incapable of belief or that his evidence is incredible or uncredible and the fact that he is no longer a Police Officer and subject to a criminal charge in and of itself is not disqualifying.

12. The court is of the view that the evidence of Inspector Johnson relates to an important and material issue the jury will have to consider in determining the issue of identification which is the primary contested issue in the trial.

13. In the interest of fairness and justice the court does not consider it appropriate in this case to have the witness called by the Accused or Defence as part of their case.

14. The court will exercise it discretion to have the witness called, in the interest of justice, and to allow the witness to be cross-examined by the Defence and questioned or cross-examined by the prosecution. A Summons/ Subpoena will be issued for the witness.

Dated this 23rd day of January 2025.