Neutral Citation Number: [2020] CA (Bda) 18 Crim

Case No: Crim/2020/4
Case No. Crim 2020/8
Case No. Crim 2020/9

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR. JUSTICE GREAVES
CASE NUMBERS 2014: No. 025; 2010: No. 013; 2018: No. 004

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 20/11/2020

Before:

JUSTICE OF APPEAL SIR MAURICE KAY (PRESIDING)
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

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Between:

LEVECK ROBERTS

Applicant

- v -

HER MAJESTY THE QUEEN

Respondent

QUINCY BRANGMAN

Applicant

- v -

HER MAJESTY THE QUEEN

Respondent

KHYRI SMITH-WILLIAMS

Applicant

- v -

HER MAJESTY THE QUEEN

Respondent

Ms. Victoria Greening of Resolution Chambers for Applicant Roberts

Mr. Jerome Lynch, QC and Ms. Sara-Ann Tucker of Trott & Duncan Ltd. and Mr. Mark Pettingill of Chancery Legal Ltd. for Applicants Brangman and Smith-Williams

Ms. Maria Sofianos, Office of the Director for Public Prosecutions for the Respondent

Hearing date(s): 17 November 2020

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APPROVED RULING

KAY JA *(Presiding)*:

1. We have three applications to reopen previously determined appeals against conviction. Their common features are that the Applicants were convicted of very serious offences a considerable time ago; they each pursued conventional appeals to this Court but their convictions were upheld; and they are now effectively seeking to reopen their appeals as a result of recent legal developments. The circumstances are therefore highly unusual.

2. This is part of the fallout from the recent case of *Jahmico Trott* in the Supreme Court, [2020] SC(Bda) 35 Civ, a judicial review case in which the Chief Justice decided that the provisions in section 519 of the Criminal Code, which effectively accorded to the Prosecution more extensive rights of challenge without cause to potential jurors than were accorded to the Defence, were unconstitutional by reason of section 6(1) of the Constitution. It is an equality of arms point.

3. There was no appeal against the Chief Justice's decision. The response was legislative. The Criminal Code Amendment Act (No 2) 2020 almost immediately amended section 519 so as to put Prosecution and Defence on an equal footing in respect of peremptory challenges. However, it also sought to prevent appeals in past cases based in reliance on *Trott*. Section 5 provides:

> *"(1) The method of the challenge of jurors under section 519 of the principal Act before the coming into operation of this Act is not invalidated by reason only of the amendment to section 519 of the principal Act.*
>
> *(2) Accordingly, no conviction shall be quashed solely on the ground that it resulted from a trial in which the Crown stood by more potential jurors than a defendant, or defendants together, were able to challenge without cause."*

4. The judgment of the Chief Justice sets out the unamended provisions of section 519, including the right of the Defence to challenge up to three jurors without cause, the right of the Prosecution to stand by up to 36 jurors and the right of either party to challenge any number of jurors for cause. In the trial transcripts we have considered, the language used by counsel and the trial judges does not always use the correct terms for these different concepts. Strictly, the Defence right is one of peremptory challenge. "Stand by" should be used only in relation to the Prosecution's right which, when exercised, does not remove the juror from the pool. He or she may be reached again. When a potential juror is removed for cause, the correct term is "excused" or "stood down" but not "stood by".

5. The applications before us seek to challenge the constitutionality of the 2020 amendment. They seek to argue that it is just as much an infraction of the applicants' constitutional rights as the unamended section 519 was. The written submissions make clear that a number of important legal issues are involved. We do not propose to address these legal issues at this stage.

6. When the parties first came before us last week, we identified a potential threshold issue in relation to which we had insufficient information. It seemed to us that that it could be said that if, in a particular case, the Crown had not exercised its right to stand by more than three jurors, a defendant could not complain about an inequality of arms. At the adjourned hearing, we were able to receive submissions based on transcripts of the jury selection processes. We are now better informed. The position seems to be as follows.

7. In the case of Smith-Williams, at least five potential jurors were stood by at the behest of the Prosecution. Although they remained in the pool, they were not called a second time.

8. In the case of Brangman, there were certainly three who fell into that category but there were several others who, having been stood by at the first stage, were later recalled. When they proffered reasons why they should not serve, rather than those reasons being investigated and evaluated by the judge, they were again stood by, either by the judge or the Prosecution, or effectively excused. Sometimes the words "stand down" were used, either by the judge or the Prosecution. On some but not all of these occasions, it was clear that the prospective jurors were not being asked to stand by but were being excused. On other occasions, the words "stand down" were used when it was clear that "stand by" was intended. Mr Mahoney says that this is just a convenient way of saving time, but it does give the appearance of the Prosecution playing a privileged part in the selection of the jury. In our view, they should be taken into account when considering the numbers threshold.

9. The case of Roberts is less clear. Initially the Prosecution stood by 33 potential jurors who went back into the pool. Of those, three were empanelled on the second time round and as many as 28 were excused by the judge when they proffered reasons why they should not serve. This leads Mr Mahoney to submit that only 2 of the original 33 stand bys are relevant, the remainder having been later empanelled or properly excused for cause. Miss Greening submits that, nevertheless, the picture is one of the Prosecution gaming or manipulating the composition of the jury and that it is redolent with real or at least apparent unfairness. We have come to the conclusion that, notwithstanding the difficulties, Roberts should not now be treated differently simply on the basis of the numbers threshold.

10. Although that gets the Applicants over the numbers threshold, there remain the difficult legal arguments set out in the written submissions from both sides. They are not fanciful on either side. They seem to us to be worthy of consideration by this Court at a substantive hearing. It is inevitable that one or more of us will be part of that Court. In the circumstances, we do not propose to say anything about the respective arguments at this stage. We add that, quite apart from whatever potential force the respective arguments may or may not have, we consider that there is a public interest in their being considered by the Court at a full hearing. At that hearing, everything will be at large – all legal arguments and factual issues.

11. Accordingly, we grant leave for the three appeals to be reopened.