COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp. No. 231 of 2018

B E T W E E N

GIORDANO ROLLE Jr.

Appellant

AND

REGINA

Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Marianne Cadet with Ms. Brendalee Rae for the Appellant**

Ms. Olivia Nixon for the Respondent

DATES: **26 April, 2021; 14 July 2021**

****

Criminal Appeal – Conviction and sentence for murder quashed on appeal – Parties heard subsequently in relation to the retrial issue – Whether re-trial in the interests of justice – Exercise of discretion – Section 13(2) Court of Appeal Act

On 4 March 2021, the Court allowed the appellant's appeal and quashed the appellant's convictions for murder and armed robbery together with the associated sentences.

Thereafter the Court invited the parties to address it on the issue whether this was an appropriate case to order a retrial having regard to the statutory discretion conferred by section 13(2) of the Court of Appeal Act, Ch. 52. The parties filed written submissions with authorities as directed.

After hearing oral arguments, the Court exercised its discretion against ordering a retrial and instead directed Rolle's acquittal and release. The detailed reasons for the Court's decision not to order a retrial are set out in its written decision.

Held: It is not in the interests of justice for a retrial to be ordered. The appellant is acquitted and released in accordance with section 13(2) of the Court of Appeal Act, Ch. 52.

Having weighed these several matters in the balance in the exercise of our discretion and applying the guidance in **Reid**, we were satisfied that in this particular case it was not in the interests of justice for a new trial to be ordered and declined to do so.

Adnan Oliver v. Regina SCCrApp & CAIS No. 129 of 2017; considered
Demetri Rolle v. Regina SCCrApp. & CAIS No. 299 of 2018; considered
Dennis Reid v. The Queen [1980] A.C. 343; *applied*
Dominic Thompson v. Regina SCCrApp & CAIS No. 228 of 2016; considered
Jason Glinton v. Regina SCCrApp & CAIS No. 129 of 2017; considered
R v. Foran (Martin Patrick) [2014] EWCA Crim 2047; mentioned

REASONS FOR DECISION (Re-trial issue)

Delivered by The Honourable Madam Justice Crane-Scott, JA:

Background:

1. On 4 March 2021, we allowed the appellant (Rolle's) appeal and quashed his convictions for murder and armed robbery together with the associated sentences.

2. In our written judgment ("the Judgment") Rolle's appeal was allowed on three bases. Firstly, because the judge erred in law in prematurely ending the *voir dire* and in failing to rule on the admissibility of both the oral admissions in the Record of Interview (ROI) and the Caution Statement (CS) attributed to Rolle in his police interview – *(grounds 1 & 2).* Secondly, we allowed the appeal because we were satisfied that the late disclosure by the

prosecution of the DVD video-recording of Rolle's police interview negatively impacted his ability during the *voir dire* to test the credibility of officers Miller and Evans respectively as to the circumstances in which the ROI and CS were obtained – *(ground 3).* Finally, we found the judge's failure to redress the imbalance and the prejudice to the defence caused by the prosecution's failures rendered the conviction unsafe – *(ground 9*)

3. We invited the parties to address us on the issue as to whether this was an appropriate case to order a retrial. The parties filed written submissions as directed. On 26 April 2021, after hearing oral arguments, we exercised our discretion under section 13(2) of the Court of Appeal Act, Ch. 52 not to order a retrial and instead directed Rolle's acquittal and release. We had promised to provide written reasons for our decision and do so now.

The Contending Submissions:

4. Counsel for Rolle, Ms. Maryann Cadet, relied on her written submissions and contended that the interests of justice in this case would not be served by a retrial. She relied on the principles outlined in Lord Diplock's speech in **Dennis Reid v. The Queen** [1980] A.C. 343; and on the decisions of the Court of Appeal in **Jason Glinton v. Regina** SCCrApp & CAIS No. 129 of 2017; **Adnan Oliver v. Regina** SCCrApp & CAIS No. 129 of 2017; **Dominic Thompson v. Regina** SCCrApp & CAIS No. 228 of 2016 and **Demetri Rolle v. Regina** SCCrApp. & CAIS No. 299 of 2018 where retrials were not ordered. Our attention was also directed to the English Court of Appeal decision on a reference from the Criminal Cases Review Commission in **R. v. Foran (Martin Patrick)** [2014] EWCA (Criminal Division) 2047 where the appellant's convictions for robbery were quashed on the basis of the possibility of the jury's reliance on tainted evidence obtained during the police investigations.

5. For her part, counsel for the Respondent, Ms. Olivia Nixon, submitted that the interests of justice demanded that a retrial be ordered. She similarly relied on the Board's guidance in **Reid** *(above)* and laid-over 2 previous decisions of this Court where a retrial had been ordered on the basis that the appeal was allowed due to a blunder of the judge rather than a failure of the prosecution, namely: **Kadero Munroe v. Regina** SCCrApp. & CAIS No. 98 of 2018; **Zintworn Duncombe and Cordero Saunders v. Regina** SCCrApp & CAIS Nos. 14 & 47 of 2017; and **Rashad Sullivan and Patrickedo Rose v. Director of Public Prosecutions** SCCrApp & CAIS Nos. 272 & 248 of 2016 . Ms. Nixon also sought to distinguish the following decisions of the Court of Appeal, namely; **Demetri Rolle** *(above);* and **Jason Glinton** *(above)* where, for the reasons stated, re-trials had not been ordered.

Section 13(2) and the Court's Power to Order a Retrial:

6. As is well known, the power to order a new trial following the determination of a criminal appeal is a statutory discretion located in subsection (2) of section 13 of the Court of Appeal Act, Ch.52 which provides:

> **"(2) Subject to the provisions of this Part of this Act the court shall, if it allows the appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the court may think fit."** [Emphasis added]

7. In **Reid** *(above)* (a Privy Council appeal from Jamaica) the Board construed and explained section 14(2) of the Judicature (Appellate Jurisdiction) Act, which corresponds in all respects to section 13(2) of the Bahamas Court of Appeal Act.

8. Between pages 349 and 350, Lord Diplock offered the Board's general guidance as to the manner in which the discretion may be exercised:

> **"…the interest of justice that is served by the power to order a new trial is the interest of the public…that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them, it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant. At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso…and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial. In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant**

factor; so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial. The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion…. On the one hand there may well be cases where despite a near certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand, it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, "it is in the interest of the public, the complainant, and the [defendant] himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery." [Emphasis added]

9. As the authorities clearly show, the guidance in **Reid** is routinely applied whenever appeals against conviction are allowed and the Court of Appeal is considering for purposes of section 13(2) how the matter is to be disposed of.

Exercise of the Court's Discretion:

10. With the **Reid** principles firmly in mind, we adverted firstly, to the now notorious fact that the offences of murder and armed robbery for which Rolle stood trial are very serious offences which are, regrettably, much too prevalent in The Bahamas.

11. We further acknowledged the interest of the Bahamian public in the proper functioning of the criminal justice system and the expectation of the public that persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial.

12. We noted that while several judicial errors occurred during the course of the trial, the Crown was responsible for a number of mis-steps which impacted the fairness of the trial. These were the late disclosure to the defence of the DVD video-recording of Rolle's police interview which was in the Crown's possession, together with the failure of the Crown prosecutor to adduce the recording into evidence during the *voir dire*.

13. Despite Ms. Nixon's submission to the contrary, we found that from an evidential standpoint, the Crown's case at trial was not particularly overwhelming. There was, for example, no forensic evidence or identification evidence. As we observed in our Judgment, the only evidence capable of connecting Rolle to the offences came from the police investigators (Miller and Evans) who both attributed to Rolle certain incriminating admissions which they claimed were voluntarily made by him in answer to police questioning during the investigations and which had been taken down in a police record of interview (ROI); together with a written confession statement (CS) which they also claimed had been voluntarily given and signed by Rolle immediately prior to the end of the interview.

14. We accept that a suspect's incriminating admissions and voluntary confessions, (properly obtained in the course of a police investigation) may provide strong evidence of guilt at a criminal trial. However, this was a case where the admissibility into evidence of the ROI and the CS was under challenge by the defence on account of it having been obtained by oppression. Clearly, before the ROI and CS could be admitted into evidence before the jury, the burden rested on the Crown during the *voir dire* to produce evidence before a trial judge capable of establishing beyond reasonable doubt that the incriminating oral statements contained in the ROI and the CS were voluntary and had been obtained in the absence of oppression.

15. We adverted to the Board's guidance in **Reid** that it is not in the interests of justice to give the prosecution another chance to cure evidential deficiencies in its case against the defendant. In this regard, we took account of the fact that when the *voir dire* was held, the the relevant authorities of the Crown had in their possession, evidence in the form of a DVD

recording which, presumably, ought to have contained the crucial video-recording of Rolle's police interview held at the Central Detective Unit (CDU) on 25 February, 2014 when the disputed ROI and CS were obtained.

16. As we found in our Judgment, the DVD recording was not adduced in evidence in the Crown's case on the *voir dire* (as it should have been). Indeed, it was only disclosed by the Crown to defence counsel, Mr. Cash, when his *voir dire* cross-examination of the second investigating officer was well underway!!!

17. In her written submissions, counsel for the Respondent, Ms. Nixon, contended that the prosecution case was not weak and that Rolle's ROI and CS, contained adverse statements regarding the role he had played in the armed robbery as well as in the deceased's shooting death. During her oral submissions before us at the retrial hearing, Ms. Nixon insisted that that the DVD recording had been located by the relevant authorities and was now in the possession of the Crown's prosecution service and would therefore be available for use at a future *voir dire* if a retrial were ordered. She denied any suggestion that if the Crown were to adduce the DVD at a future *voir dire* at a retrial, this would be tantamount to the Crown curing the evidential deficiencies of the first trial and essentially, having two bites at the proverbial cherry.

18. Pressed by the Court, Ms. Nixon eventually agreed that while the DVD had not been handed over to the prosecutor until very late, it was an established fact that the DVD existed and was evidence that had always been in the Crown's possession. To her credit, Ms. Nixon conceded that the proper forum for the DVD recording to have been adduced into evidence was during the *voir dire* itself. However she insisted that if a retrial were ordered, the Crown would not be curing an evidential deficiency, since the DVD evidence had simply been misplaced and had not been made available to the prosecutor in time for it to be adduced at the *voir dire*. We found Ms. Nixon's suggestion completely unacceptable.

19. We recalled that at para 20 of our Judgment we had made the following observation:

> **"20. In this jurisdiction, police interviews with suspects are now routinely video-taped; the obvious rationale being that <u>they serve to provide an independent means of corroborating the assurances by police investigators that adverse admissions and confession statements obtained during a suspect's interview were freely and voluntarily obtained</u>; and that the required police procedures for conducting such interviews conformed with relevant Force Procedures and the Judge's Rules."** [Emphasis added]

20. We took the view that both procedurally and evidentially, the crucial forum for the DVD recording to have been adduced in evidence was before the judge during the *voir dire*, where it mattered most. Had it been adduced in evidence, the judge would have had the opportunity to view it and to assess the credibility of the two police witnesses against the independent record of the police interview captured in the DVD recording itself.

21. As the relevant extracts from the trial transcript which we reproduced in our Judgment clearly show, the prosecutor was unwilling to put the DVD into evidence on the *voir dire* on the basis that it had just come into his possession and he had not yet viewed it. In so doing, he erroneously left the question whether it would be adduced in evidence at the *voir dire* entirely in the hands of Defence counsel, Mr. Cash. This ought not to have occurred. Even if it had been misplaced by the relevant authorities of the Crown and had only just come into his possession during the *voir dire* as he told the judge, it was his duty to formally adduce it in evidence before the judge at the *voir dire*, where it was most relevant.

22. The DVD recording was generated in accordance with the prevailing procedures for the conduct of police interviews with suspects. It was prepared for use at the trial and should have been kept together with the ROI and the CS to which it related. Once a *voir dire* was embarked upon, the relevant recording should have been put into evidence as part of the Crown's case to corroborate the testimony of the police witnesses as to the circumstances in which the ROI and CS were obtained. This was not done. We felt strongly that the Crown ought not be permitted a second opportunity at a new trial to adduce evidence which was in its possession and which ought to have been placed before the judge at the *voir dire* but was not.

23. While the DVD recording of what transpired inside the CDU interview suite during Rolle's interview may not have assisted the judge in determining the voluntariness of the ROI and CS and could not assist in determining whether Rolle had in fact been subjected to police oppression in another room immediately before the start of the interview as he claimed, we take the view that had it been adduced by the Crown (as it should have been) the judge would have been able to observe the demeanour of Rolle as well as the investigating officers during the interview, as well as the manner in which the interview itself had been conducted by officers Miller and Evans. What is more, the issue whether Rolle had in fact initialed the several answers attributed to him in the ROI and signed the CS as the officers claimed would have been obvious from the DVD itself.

24. The trial transcript clearly shows that after the DVD was ultimately put into in evidence by the Crown in the main trial before the jury, police witness, Sgt. Dale Strachan, (who had downloaded the images of the interview onto the DVD) admitted that the DVD recording appeared incomplete in that from his observations it ended prematurely and in particular, did

not record the point in time during the interview when according to officers Miller and Evans, the CS was allegedly taken down and signed by Rolle.

25. As we pointed out in our Judgment, in cross-examination, Defence counsel, Mr. Cash, successfully established a number of material discrepancies between the time-stamps shown in the video recording and the times given by officers Miller and Evans regarding when the ROI and CS had been obtained. Most significantly of all was the witness's evidence that none of the images in the DVD recording which he had viewed, showed the suspect (Rolle) signing any document at all!!!

26. In the face of these material discrepancies, we were satisfied that the DVD recording fell woefully short of its intended purpose. Quite simply, the recording is incomplete and failed to provide the necessary independent support for the testimony given by the two investigating officers as to the circumstances in which the ROI and CS respectively, were obtained. This could possibly explain why it was not kept together with the ROI and CS, and why it was seemingly "misplaced" and not handed over to the Crown prosecutors in advance of the trial. Indeed, it is passing strange that the "missing" DVD recording which had been specifically requested by the defence and said to be unavailable mere weeks before the start of the trial, mysteriously emerged from the custody of the relevant Crown authorities ***only after*** the fact of its existence was established during officer Evans' cross-examination on the *voir dire*.

27. In keeping with **Reid,** we also considered the time that may elapse between the date when the offences were committed and the likely date of a new trial, if one were to be ordered. We noted that the offences were committed on 18 February, 2014. Rolle was convicted on 10 March 2017, and sentenced more than a year later on 22 November 2018. His conviction and sentences were quashed earlier this year following his successful appeal. We are satisfied that if we were to order a new trial, given the ongoing global Covid-19 pandemic which we are aware, has severely hampered the conduct of Supreme Court jury trials in capital matters, a retrial is unlikely to take place in the foreseeable future.

28. Finally, we considered the ordeal which criminal trials and the criminal process in general can evoke in any person accused of a criminal offence, and which a defendant, in Lord Diplock's words: *"ought not be condemned to undergo for a second time through no fault of his own unless the interests of justice so require that he should do so."*

29. Having weighed these several matters in the balance in the exercise of our discretion and applying the guidance in **Reid,** we were satisfied that in this particular case it was not in the interests of justice for a new trial to be ordered and declined to do so.

Disposition and Order:

30. It was for all the foregoing reasons that we found that it was not in the interests of justice to order a retrial and directed his acquittal and release from custody in accordance with section 13(2) of the Court of Appeal Act.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Jones, JA

The Honourable Mr. Justice Evans , JA