COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp & CAIS No. 140 of 2012

Kevano Musgrove

Appellant

vs

Regina

Respondent

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COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp & CAIS No. 22 of 2014

Sherman John Turner

Appellant

vs

The Commissioner of Police

Respondent

(Preliminary Application)

Before: The Hon Mr Justice Conteh, JA
The Hon Mr Justice Adderley, JA
The Hon Mr Justice Isaacs, JA

Mr Stanley Rolle, with Mr Murrio Ducille,
Counsel for Appellant Musgrove
Mr Glendon Rolle, Counsel for Appellant Sherman
Mr Garvin Gaskin, Acting DPP, with
Mr Quintin Percentie, Counsel for Respondent

2 April 2015

The oral judgment of the court was delivered by

Conteh, JA:

The two appellants appealed their convictions by the Supreme Court and Magistrate Court respectively, and they advanced several grounds of appeal. This judgment is concerned only with one aspect, namely, that they were denied a fair trial because, in the course of their trial, their claimed right to make an unsworn statement from the dock without having to give evidence was impacted by the amendment introduced to the Criminal Procedure Code in November 2011.

It is common ground between the parties that the appellants were charged before the amendment came into force but were tried during the currency of the amendment which abolished the right of an accused person on trial at the end of the prosecution's case to make an unsworn statement. Against that amendment they now claim that their right to a fair trial was impacted.

We have given anxious thought to the submissions and arguments urged on their behalf by Mr. Ducille. His principal contention is that the right stated in section 170 of the Criminal Procedure Code is an accrued right and cannot be taken away. This right provides in particular, as follows:

> "When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person, or any one or more of

> several accused persons, committed that offence, shall inform each such accused person of his right to address the court, either personally or by his counsel (if any), to give evidence on his own behalf, and to call witnesses in his defence, and in all cases shall require him or his counsel to state whether it is intended to call any witnesses as to fact other than the accused person himself. Upon being informed thereof, the judge shall record the same."

What is clear to us is that Article 20 of the Constitution, which guarantees the protection of the law, mentions several rights. This article makes provision to secure the protection of the law. Among the rights it guarantees is the right to be presumed innocent until an accused is proved guilty, to be informed as soon as possible in a language that he would understand, and in detail the nature of the offence charged against him.

Paragraph (d) of sub-article (2) provides that an accused shall be permitted to defend himself before the court in person or at his own expense by a legal representative of his own choice or one assigned by the state at public expense.

Mr. Ducille argued, somewhat plausibly, but unsustainably, that the effect of the amendment of 2011 is to impact on this right of an accused person to defend himself.

When that paragraph is read in context, it is clear that the amendment does not in any way affect the right guaranteed under that paragraph. That paragraph provides that a person may defend himself before the court in person or at

his own expense by a legal representative. Defending oneself in person does not, in our view, include the right to make an unsworn statement, but would include necessarily even a defendant pro se to call witnesses and have them examined.

But if a part of the defence of an undefended defendant is he wants to make a statement, he has to make a statement from the witness box which, of course, would open him to consequences of cross-examination, and that is the only evidence the court can harken to because it is on oath.

Part of the defence in person guaranteed by paragraph (d) of sub-article (2) of section 20 does not include the right for a pro se defendant to stand at the dock and make an unsworn statement. He may call witnesses and examine them.

The other point taken by Mr. Ducille is that the amendment of 2011 does not affect the section 170 right because of the operation of section 20 of the Interpretation and General Clauses Act. Again, an attractive argument, because section 20 of Chapter 2 provides as follows:

> "Where a written law repeals in whole or in part any other written law, the repeal shall not -
>
> (c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any written law so repealed ..."

The amendment, in our view, affected a repeal not of a right stricto sensu as understood, although it is so

referred to in the unamended section 170 of the Criminal Procedure Code. Even if it were a right, it is a right that only accrues at the end of the prosecution's case. It is not an inherent right, inalienable in the sense of a constitutional right. It only accrues at the end of the prosecution's case when the accused is put to his choices. Therefore, we do not think it falls properly within the ambit of section 20 of Chapter 2.

Even if it were so, section 2 of Chapter 2 expressly provides:

> "(1) Save where the contrary intention appears either from the context of this Act or any other written law, or instrument, the provisions of this Act shall apply to this Act and to any other written law in force whether such other written law came or comes into operation before or after the commencement of this Act, and to any instrument made or issued under or by virtue law of any such Act."

It is clear from the provisions of the amendment that the legislature intended to express a contrary intention that the so-called right provided in section 170 shall not after the operation of the amendment be anymore available; and to that extent, in our view, it was properly abolished.

Therefore, we are driven to the conclusion that attractive and perhaps plausible as the arguments may be on behalf of the appellants, the succinct submission of Mr. Gaskin for the Crown to the effect that the amendment was proper and that at the time of the trial of the appellants if

they had any such right to make an unsworn statement that right was no longer in being. For these reasons, we must reject the appellant's submissions.

The appellants' appeals will proceed and the date will be fixed for that on the substantive hearing.

Dated this 2nd day of April, 2015

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CONTEH, JA

ADDERLEY, JA:

I agree.

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ADDERLEY, JA

ISAACS, JA:

I also agree.

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ISAACS, JA