COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp No. 63 of 2018

BETWEEN

JOSEPH DICKERSON

Intended Appellant

Vs.

REGINA

Intended Respondent

BEFORE: **The Honourable Mr. Justice Jones, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Mrs. Brendalee Rae, Counsel for the Intended Appellant**
Mr. Roger Thompson, Counsel for the Intended Respondent

DATES: **18 November 2020; 14 January 2021; 22 April 2021**

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Criminal Appeal – Appeal against conviction - Attempted Murder – Verdict unsafe and unsatisfactory – Non-disclosure by the crown during the course of a trial - When does the prosecution have a duty to disclose prosecution witnesses' antecedents to the defence – Proviso – Retrial

On Tuesday, 6 October, 2015, Reginald Chase was shot multiple times. He survived the shooting and stated that it was the intended appellant who had shot him. At Dickerson's trial, Reginald Chase's father (Mr. Leonard Chase) gave evidence that he saw Mr. Dickerson shoot his son. Mr. Dickerson defence was that he was not guilty of shooting Reginald Chase and that he was not in the area at the time that Reginald Chase was shot. His case was that Mr. Chase was framing him for the shooting as Chase was a criminal who had been shot previously and that Chase's family were also criminals. Mr. Dickerson was convicted and sentenced. He now appeals his conviction

on the ground inter alia, that **"under all the circumstances of the case, the verdict is unsafe or unsatisfactory"** in that the **"Learned Judge erred when she did not remedy the Prosecution's assertion that the Appellant lied on the witness stand, when he said that the Virtual Complainant's Father had a criminal record, thereby discrediting the Appellant in the eyes of Jury; when it was in fact the Prosecutor who had made a misrepresentation of fact to the jury, because the Witness did in fact have an extensive criminal record"** and that the **"Prosecution's failure to disclose the two key Prosecution Witnesses antecedents to the Defence, greatly affected the fairness of the case."**

Held: application for extension of time within which to appeal granted; appeal allowed, conviction and sentence quashed. The Applicant is to be retried as soon as is practicable before a different Judge of the Supreme Court.

Before the case was put to the jury for their deliberation all parties concerned knew that the Complainant and his father both had antecedents. This was consistent with the evidence of the Applicant which had been challenged by the Crown as a lie. The interest of justice required that the jury be made aware of the true facts and this could have been done by the agreement of the parties.

In not allowing the evidence relative to the antecedent reports before the Court, the learned Judge deprived the Applicant of the central plank of his defence. The way the matter was left, it was open to the jury to believe that the Applicant was lying when he said that Leonard Chase had antecedents and that there was no real evidence that any of the witnesses had a criminal background as alleged by the Applicant.

It is also significant that in the absence of that evidence the jury could possibly find that the Applicant was being dishonest when he asserted that Leonard Chase had antecedents. As such the absence of that evidence was doubly prejudicial to the Applicant in a case which turned on the credibility of the witnesses.

Alexander Williams v. Regina SCCrApp No. 155 of 2016 mentioned
Errol Knowles v Regina SCCrApp. No. 79 of 2017 mentioned
Garvin Adderley v Regina SCCrApp. No. 250 of 2017 mentioned
Attorney General v. Omar Chisholm MCCrApp No. 303 of 2014 followed
Rodriguez Jean Pierre v Regina SCCrApp. No. 110 of 2019 mentioned
Jerome Bethell v Regina SCCrimApp No. 19 of 2013 mentioned
Delancy v The Attorney General SCCrimApp No. 19 of 2012 mentioned
Reid v R (1978) 27 WIR 254 considered
R v. Marr (1989) 90 Cr App R 154 (CA) applied
Ferguson v. Attorney-General of Trinidad and Tobago [2001] UKPC 3
Herbert Ferguson v. Attorney-General (1999) 57 WIR 403 considered

Aritis v. Regina; Flowers v. Regina [2014] 1 BHS J. No. 118 mentioned
Rashad Sullivan & Patrickedo Rose v. Director of Public Prosecutions SCCrApp. Nos. 248 & 272 of 2016 followed
Stinchcombe v. R (1991) 3 S.C.R. 326 considered

JUDGMENT

Delivered by The Honourable Mr. Justice Milton Evans, JA:

1. The Intended Appellant (hereinafter "**the Applicant**") was on the 5 day of July, 2017, convicted of the offence of Attempted Murder contrary to section 292 of the Penal Code, CAP 84 and on the 28 of February, 2018 he was sentenced to twenty-eight (28) years imprisonment.

2. On 23rd March, 2018 the Applicant signed a formal Notice of Appeal that was received into the Registry of the Court of Appeal on 27 March, 2018. The Notice of Appeal was filed out of time a difference of about 7 days since the sentence was passed. In consequence on the 12 November 2020 the Applicant filed a summons seeking an Extension of the time within Which to Appeal his conviction only.

3. On the 12 November, 2020, an Affidavit in support of the above-mentioned application was filed in the Registry outlining the several prospective grounds of appeal as follows:

> **"1. That under all the circumstances of the case, the verdict is unsafe or unsatisfactory;**
>
> > **a. The Learned Judge erred when she did not remedy the Prosecution's assertion that the Appellant lied on the witness stand, when he said that the Virtual Complainant's Father had a criminal record, thereby discrediting the Appellant in the eyes of Jury; when it was in fact the Prosecutor who had made a misrepresentation of fact to the jury, because the Witness did in fact have an extensive criminal record.**
> >
> > **b. The Prosecution's failure to disclose the two key Prosecution Witnesses antecedents to the Defence, greatly affected the fairness of the case.**

2. The Learned Judge erred when she failed to point out to the jury the antithetical and or contradictory nature of the Doctor's evidence."

4. The hearing of the Application for Extension of Time within Which to Appeal came on for hearing before us on the 14th January 2021 and after hearing submissions we reserved our decision and promised to provide a written judgment which we do now.

5. The principles which govern the consideration of applications for extension of time are well settled. In the Case of **Attorney General v. Omar Chisholm** MCCrApp No. 303 of 2014 this Court differently constituted observed that when the court is called upon to consider whether to grant an extension of time in which to appeal, there are four factors which are relevant; namely: (a) Length of delay, (b) The reason for the delay, (c) The prospect of success on appeal, and (d) Prejudice, if any, to the Respondent. See also the cases of See also **Alexander Williams v. Regina** SCCrApp No. 155 of 2016, **Errol Knowles v Regina** SCCrApp. No. 79 of 2017, **Garvin Adderley v Regina** SCCrApp. No. 250 of 2017, and the more recent case of **Rodriguez Jean Pierre v Regina** SCCrApp. No. 110 of 2019.

6. In his Affidavit the Applicant stated that the reason for his delay was that, his Attorney at that time, brought the application for him to sign, after the 21 day expiration date and as he is an incarcerated person, he was constrained to work within that time frame. He asserted that in these circumstances the delay in the court receiving his application for Appeal was not his fault and was due to circumstances beyond his control.

7. The aforesaid affidavit however did not provide an explanation as to why the application for the extension was not made until November 2020. The Applicant had 21 days to file an appeal from the date of sentencing on 28 February, 2018 but did not file a notice until 27 March, 2018. As time continued to run until the filing of the of the application for extension of time within which a notice shall be given the result is that the Applicant is about two (2) years, eight (8) months and fifteen (15) days out of time.

8. In my view the period of delay was inordinate and no satisfactory reason was provided for that delay. However, we also (as is required) considered the prospects of success and the likely hood of prejudice to the Respondent. After considering the matter fully I am satisfied that there is a good prospect of success and that to grant the extension in this case would not in any way prejudice the Respondent. As such, for the reasons which follow I would proceed to consider the appeal and quash the conviction and order that the Applicant be retried before the Supreme Court as soon as is practicable.

The Facts

9. The evidence lead by the Prosecution at trial came primarily from the Virtual Complainant. The Prosecution's case was that the Applicant on Tuesday, 6 October, 2015, approached the Complainant Reginald Chase and shot him multiple times at close range. Mr. Leonard Chase

the Complainant's father also testified that he saw the Applicant shoot the Complainant. The Crown also led evidence from the Complainant's mother that she did not see the actual shooting but that she heard the shots and came out the house and saw the Applicant with her son. She further testified that the Complainant said to the Applicant "Joey you shot me, boy Joey you shot me".

10. The Applicant gave evidence and denied shooting the Complainant he asserted that the Complainant and his family made false accusations against him. He denied being in the area where the shooting took place at all that day.

The Appeal

Ground 2. The Learned Judge erred when she failed to point out to the jury the antithetical and or contradictory nature of the Doctor's evidence."

11. I am satisfied that there is no merit in Ground 2 of the Applicant's Appeal. In that ground the Applicant contended that the Learned Judge erred when she failed to point out to the jury the antithetical and or contradictory nature of the Doctor's evidence. A review of the Doctor's evidence does not reveal any contradictions and cannot be said to be antithetical in any regard.

12. The Doctor confirms finding at least eight wounds to the body of the Complainant as shown on a body map. His evidence was that he could not say conclusively that the injuries were all gunshot wounds as the patient was passed on to other physicians to preform additional medical interventions. He did however specifically state that there were gunshot wounds to both legs.

GROUND 1: That under all the circumstances of the case, the verdict is unsafe or unsatisfactory;

a. The Learned Judge erred when she did not remedy the Prosecution's assertion that the Appellant lied on the witness stand, when he said that the Virtual Complainant's Father had a criminal record, thereby discrediting the Appellant in the eyes of Jury; when it was in fact the Prosecutor who had made a misrepresentation of fact to the jury, because the Witness did in fact have an extensive criminal record.

b. The Prosecution's failure to disclose the two key Prosecution Witnesses antecedents to the Defence, greatly affected the fairness of the case.

13. It is this ground in my view on which the resolution of this appeal turns. It is clear that the case before the Jury had to be decided based on who the jury found to be more credible. There were three prosecution witnesses who testified that the Applicant was the shooter. The Applicant's defence was that he did not do the shooting and that the witnesses were lying. The obvious question was why would these witnesses lie?

14. The case being put forward was that the Complainant was from a family of criminals and that the Complainant himself was a drug dealer who had been previously shot. Counsel for the

Applicant submitted that the Applicant's was hampered in his ability to properly establish that defence due to the Crown's failure to disclose to the defence the antecedents of the Complainant and his father. Counsel further contend that this was exacerbated by the fact that Counsel for the Crown during cross-examination accused the Applicant of lying when he referred to these antecedents.

15. There are a number of authorities which deal with the issue of non-disclosure by the Crown during the course of criminal proceedings. In the decision of the Canadian Supreme Court in **Stinchcombe v. R** (1991) 3 S.C.R. 326 the Court observed as follows:

> **"Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which Counsel became aware. Observance of this rule will enable the judge to remedy any prejudice to the accused if possible and then avoid a new trial. Failure to do so by Counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered."** [Emphasis added]

16. In **Rashad Sullivan & Patrickedo Rose v. Director of Public Prosecutions** SCCrApp. & CAIS Nos. 272 this Court (differently constituted) dealing with the issue of disclosure stated as follows;

> **"The point raised by the appellant is not a small one. It was clearly accepted that the alleged confessions were the only evidence against the appellants. Their defence was that the confessions were not voluntarily obtained and they were entitled to put before the court any and all relevant evidence which could assist their case. It is trite that the Crown had a duty to disclose all relevant information which is in their possession which could assist an accused person charged before the court. Prosecution disclosure is fundamental in an adversarial criminal justice system where the power to investigate lies with the police."** [Emphasis added]

17. In **Aritis v. Regina; Flowers v. Regina [2014] 1 BHS J. No. 118** this Court (differently constituted) although dismissing the appeal discussed how the Prosecution's failure to disclose relevant information to the defence might affect the fairness of the trial and the safety of a conviction. In doing so the Court highlighted the observations of de la Bastide CJ (as he then was) in the Trinidad & Tobago Court of Appeal decision in **Herbert Ferguson v. Attorney-General** (1999) 57 WIR 403 at pp. 421-421 where he observed as follows:

> **"Fairness therefore, which is said to be the key to the rules of disclosure, would seem to require that material which the prosecution is under a duty to disclose in indictable cases at or before the preliminary inquiry (providing of course that it is available to the prosecution at that time)…Breach of that duty, however, does not automatically entitle an accused person to a remedy, whether by way of having a conviction quashed or under s. 14 of the Constitution. In order to justify the granting of such relief the person complaining must prove that he has suffered prejudice. This he may do either by showing that, but for the non-disclosure, he would not have been committed at all…; <u>or that the failure to disclose at that early stage impaired in some significant way his chances of an acquittal at a subsequent trial at which he was convicted</u>."** [Emphasis added]

18. At the Privy Council the Board in **Ferguson v. Attorney-General of Trinidad and Tobago** [2001] UKPC 3 approved the comments of de la Bastide CJ. Writing for their Lordships, Lord Steyn observed as follows:

> **"The common law duty of timeous and fair disclosure as explained by the Chief Justice ensures fairness to the accused. <u>And there are in principle effective remedies for breaches inasmuch as appropriate orders can be sought from trial judges and in the High Court. If despite this safety net, cases of demonstrable unfairness in failure to disclose relevant material appear they can be corrected on appeal or, where appropriate by invoking a remedy under the general guarantee of due process, protection of the law, and fair hearing under the Constitution.</u>"** [Emphasis added]

19. It is to be noted that Counsel for the Applicant first raised the issue at the beginning of the trial before the Judge in chambers and the record reflects the following exchange:-

> **"(Witness stood down)**
>
> **THE COURT: Evidence of his character, why?**
>
> **MR. MCPHEE: My Lady.**
>
> **THE COURT: You want to put his –**
>
> **MR. MCPHEE: Yes, I wish to put character. He has a criminal record –**
>
> **THE COURT: And?**

MR. MCPHEE: And I would wish to put that to him. His whole character, this whole incident, and to show -- well, he's not -- when I raise someone's character I bring the issue of my client's character which I'm prepared to do, and there's another reason why I wanted to put to him that he's not a good character. And then I also want to put to him that he was shot before just to show -- so the jury can see the person we're dealing with. He gave evidence that he was a construction worker employed as a carpenter. We would like to show him, or like to put to him that he sells drugs all day. So, I don't know, but that is why I wish to –

THE COURT: Mr. Thompson?

MR. THOMPSON: My Lady, if he wish to lower his shield, my Lady, he can question him in terms of character. The only issue I would take is matter of relevance. Whether where he slept, is it relevant. Because even though he can ask him anything it still has to be relevant. But in terms of character I have no -- he can attack the character of the prosecution witness.

THE COURT: Yes, and he has rightly said he's -- something will happen almost –

MR. THOMPSON: Yes, my Lady.

THE COURT: Was he convicted?

MR. THOMPSON: Pardon.

THE COURT: With respect to - I just want to know for my own edification. I know where he is now. Is he convicted or is he on remand.

MR. THOMPSON: He's on remand. It is a sexual offence matter.

THE COURT: Mr. –

MR. THOMPSON: He's not up there for any violent matter. You know, physical violent, sexual matter.

MR. MCPHEE: I don't know -- he spoke of one sexual charge.

THE COURT: He's on remand, the prosecutor says to me, for a sexual matter.

MR. MCPHEE: But there's another one, shooting of an officer, police officer. At PMH, disarmed a police officer and shot him at PMH, and he's on remand for that as well.

THE COURT: So two matters?

MR. MCPHEE: Two matters, yes.

MR. THOMPSON: My Lady, I am being advised that he is on bail for a shooting matter, my Lady.

THE COURT: He's on bail for the shooting matter and remanded for the sexual matter.

MR. MCPHEE: So, I want to establish that he has a record as well, criminal record. I cannot speak to –

THE COURT: But does he have a criminal record.

MR. MCPHEE: Yes.

THE COURT: Do you have an antecedents?

MR. THOMPSON: But we only have where he's on remand for the sex matter and he's on bail for the shooting matter. Is correct, he was in possession, he took a gun and he fired at the officer at the hospital.

THE COURT: But he has not been convicted for that –

MR. THOMPSON: He's on bail for that.

THE COURT: Mr. McPhee, are you firm with your instructions?

MR. MCPHEE: Yes, he's not sure that he was convicted.

THE COURT: Prosecutor said that he's not convicted. While he's on remand for the sexual matter, he's on bail for the other matter but neither has he been convicted.

MR. MCPHEE: I would accept that, my Lady.

THE COURT: Okay. So that then changes the course –"

20. The issue was raised again by the Applicant himself while being cross-examined and at pages 120-121 we see the following:-

"Q. And you shot him with your gun in the presence of his father who stood right across the road watching you isn't that true?

A. I was not in the community, Reggie is a criminal, he told his father the things to say. I did nothing, sir. I am a hard working man. I did nothing sir.

Q. I am going to suggest to you that Mr. Chase Reginald Chase father is not a criminal when you said that you were lying on Reginald Chase father?

A. It should be on record.

Q. <u>I have record. I am putting it to you, that you are lying?</u>

A. I am putting it to you he is one." [Emphasis added]

21. The transcript of the trial reveals that after the close of the Crown's case but prior to the Summation it became evident that both the Complainant and his father had criminal records. At page 136 lines 2 to 31 we see that Counsel sought to have the learned Judge deal with the issue.

"THE COURT: Counsels, you want to assist me with respect to the summing up. I deal with the issue of motive and intention.

MR. THOMPSON: Yes. And I believe recognition as well.

THE COURT: Yes.

MR. MCPHEE: I didn't hear that, my Lady.

THE COURT: I said motive, intention and Mr. Prosecutor said recognition as well.

MR. MCPHEE: I'm sorry.

THE COURT: Recognition, a form of identification. Anything else, character? MR. MCPHEE: Character.

THE COURT: I deal with the –

MR. MCPHEE: Yes, good character.

THE COURT: Your client has good character -- of the accused man.

<u>MR. MCPHEE: Yes. And my Lady, I still think you should mention the accused -- the prosecution's witness Mr. Chase, I still think –</u>

THE COURT: I will literally piggyback off Mr. Thompson in his address. That was something that was not put to him by way of cross-examination. I will deal with it generally, in terms of character witnesses and the issue of creditability, but specifically with respect to Mr. Chase senior I will repeat what you said but I will also caution them because Mr. Thompson disputed that that was not an issue that was put to the witness by way of cross-examination.

MR. MCPHEE: Okay, but it was only an allegation by the defendant himself. THE COURT: Yes.

MR. MCPHEE: So –

THE COURT: And that is how you put it just now, sir. That what the defendant said, that's exactly what you said.

MR. MCPHEE: Yes, my Lady. So –

THE COURT: Yes. I'm looking at Archbold 2010 addition and I'm looking at the section which deals with –

MR. MCPHEE: Prosecution witness.

THE COURT: Evidence of bad character of persons other than the defendant, and the Section of 13 16 credit as a matter of an issue. And I think that is the -- that is a vein that I will deal with tomorrow. MR. MCPHEE: I'm sorry. I'm a little -- my problem, my problem. I have -- I didn't hear what you said just now.

THE COURT: I said I'm going to deal with the issue of character of a person other than the defendant, making it very clear that that was not put to him by way of cross-examination but that, you know, you deal with the creditability and how you accept the totality of the package as to how they are to assess the strength and weaknesses of the –

MR. MCPHEE: So my question would be then, how could you elude to -- THE COURT: I can't elude to nothing. I would say what you said, that it was not put to him in cross-examination, but it's always a question of who, as jurors -- judges of the facts, that's a jury question, who they believe and who they don't believe.

MR. MCPHEE: But is there some way, my Lady –

THE COURT: You tell me.

MR. MCPHEE: I'm reading from Archbold. "Where a witness is shown to have a previous conviction it is the duty of the prosecution to inform the defence. The police are not to be expected to examine the record of -- where possible exist any in the country, any matter which might affect the character of a witness. It is their duty to disclose to the defence actually convictions of crime starting on the record of the prosecutor." Okay.

THE COURT: That relates -- start -- read again, where -- take me back to your starting point. Take me where a witness is –

MR. MCPHEE: I, I –

THE COURT: No, no, take me back to the beginning, where a witness is -- MR. MCPHEE: Is known, is that what you're? Where a witness is known to have a previous conviction it is the duty of the prosecution to inform the defence." But they should have informed us.

THE COURT: That is an issue what I think we discussed in chambers. MR. MCPHEE: Right.

<u>THE COURT: And which we discussed at the close of your case on Wednesday, that was an issue that clearly in my mind the prosecutor did not know.</u>

MR. MCPHEE: Okay. What I'm suggesting, my Lady -- I'm just, I'm just -- the fact that you mentioned that I said -- well, it was said that he had a criminal record, that he was a criminal. That's what was said, correct?

THE COURT: That's what the accused man said from the witness box, sir. MR. MCPHEE: I suppose it is kind of difficulty to tell the jury that that is not a fact that -- you see where I'm coming from, my Lady. It is a fact that he has a criminal record. Now, it wasn't put to him so how are you going to raise that to the jury to make sure that the fact of his conviction is a fact. So in other words, it wasn't ideal talk coming from the defendant that this man is a criminal.

THE COURT: Mr. McPhee –

MR. MCPHEE: I'm just –

THE COURT: Mr. McPhee, I accept that.

MR. MCPHEE: Okay.

THE COURT: You showed me a document in chambers, things going back a time in the past.

MR. MCPHEE: Right.

THE COURT: But procedurally what should have happened was when Chase senior took the stand you should have put your client's case to him in the same, I wouldn't say in the laborious manner that Mr. Thompson put his case to your client. It should have been in that self- same fashion, sir. I can't cure that defect but you -- Chase senior was the second prosecution's witness. That was something you should have put to him at that time, sir. And had that been done in that manner then –

MR. MCPHEE: I agree with you, my Lady. It is just that I am concern that you will tell the jury that therefore he could accept what he says because that was unfair. I'm just wondering. I leave it up to you, my Lady. I'm sure you would do –

THE COURT: No, that would be a ground for appeal. I would have cross the line. The only thing that I am duty bound to say is, an assertion was made by the accused man in the witness box is that his neighbour is a criminal. Regrettably that was not put to him by way of cross-examination.

MR. MCPHEE: And that's that. Okay. I suppose –

THE COURT: What else I can do?

MR. MCPHEE: I accept that. I accept that, my Lady. I accept that. My only problem is that I should have been instructed before it came out the witness. He didn't instruct me as to, but that's my case, I accept that. I wish I had knew before he got into the witness box, that's the problem, and I accept that, my Lady.

MR. THOMPSON: My Lady, only because this is being recorded. I just want to mention that he was, Mr. McPhee is referring to something as late as 1976, a spent conviction as late as 1976 which is many years ago. And it was one of not violence, not violence against a person. It was not a matter pertaining to

> **any violence towards no individual, but that's the most I will say".** [Emphasis added]

22. It is interesting to note that the trial judge took the view that the fault lay with Defence Counsel for not raising the issue with Leonard Chase when he was in the witness box. This not-withstanding the fact that at that stage Counsel had no evidence to support such an assertion. The learned judge however was prepared to absolve the Prosecutor on the basis that she did not believe that he was aware of the antecedents.

23. When the learned judge summed up to the jury she dealt with the issue as follows:-

> **"The defendant he elected to give sworn evidence and was crossed examined. The defendant denied that he was the person who inflicted the wound to Reginald Chase. The defendant says that he was at that point and time at a basketball court in the South Beach area. <u>He is a hard- working man with a wife and family he said that he worked at Atlantis and in fact warned by a neighbor of a previous altercation not to bothered by Reggie who he said was a criminal. The difficulty with respect to the virtual complaint father Mr. Leonard Chase regrettably that was never put to Mr. Chase in cross-examination</u>".** [Emphasis added]

24. It is clear that the learned Judge was of the view that there was nothing which she could do to assist the Applicant in the position in which he found himself. It is also evident that the Applicant's then Counsel although dutifully pressing the issue offered no real solution. So what options did the trial judge have? The Privy Council was very clear in **Ferguson** that "**<u>there are in principle effective remedies for breaches inasmuch as appropriate orders can be sought from trial judges and in the High Court. If despite this safety net, cases of demonstrable unfairness in failure to disclose relevant material appear they can be corrected on appeal or, where appropriate by invoking a remedy under the general guarantee of due process, protection of the law, and fair hearing under the Constitution.</u>"**

25. In my view one option was to have Mr. Leonard Chase recalled and the issue of his antecedents put to him. The Defence would by then have had the document in their possession and could put it to him if he denied the convictions.

26. Section 146 of the Evidence Act states:

> **"The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right to further cross examination and re-examination respectively".**

27. Further Section 178 of the Criminal Procedure Code provides-

> **"178. The court shall have power in its discretion <u>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 in the course of the trial or not, and to examine such witness.</u> 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 the leave of the court."** [Emphasis added]

28. A trial Judge may exercise this discretion judicially in the interest of Justice. In this particular case it ought to have been clear to the learned Judge that the case turned on a clash of credibility. The Applicant's position was that yes I am outnumbered three to one but I am a hard working honest man and these witnesses are criminals who cannot be trusted. In **R v. Marr** (1989) 90 Cr App R 154 (CA) Lord Lane CJ said:

> "**It is . . . an inherent principle of our system of trial that however distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury both by counsel and by the judge."**

29. The second option which was available was for the parties to stipulate the evidence relative to the antecedents. Section 19 of the Evidence Act provides that-

> **"19. (1) Subject to the provisions of this section, <u>any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or the accused person, and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.</u>**
>
> **(2) An admission under this section —**
>
> **(a) may be made before or at the proceedings;**
>
> **(b) if made otherwise than in court shall be in writing;**
>
> **(c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager,**

or the secretary or clerk, or some other similar officer of the body corporate;

(d) if made on behalf of an accused person who is an individual, shall be made by his counsel and attorney;

(e) if made at any stage before the trial by an accused person who is an individual, must be approved by his counsel and attorney (whether at the time it was made or subsequently) before or at the proceedings in question.

(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial).

(4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter". [Emphasis added]

30. Before the case was put to the jury for their deliberation all parties concerned knew that the Complainant and his father both had antecedents. This was consistent with the evidence of the Applicant which had been challenged by the Crown as a lie. The interest of justice required that the jury be made aware of the true facts and this could have been done by the agreement of the parties.

31. This was a case where the prosecutor in the face of the Court disputed that Mr. Leonard Chase had a criminal record and went as far as to say that the Applicant was lying when he made that assertion. In my view as a Minister of Justice once he became aware of the antecedents the Prosecutor ought to have tendered those before the Court and corrected his assertion. This he did not do. He instead was content to hold on to the report and take the technical point that the suggestion was not put to Mr. Chase when he gave his evidence.

32. In my view the Judge fell into error in adopting the position taken by the Prosecutor. In not allowing the evidence relative to the antecedent reports before the Court the learned Judge in my view deprived the Applicant of the central plank of his defence. The way the matter was left it was open to the jury to believe that the Applicant was lying when he said that Leonard Chase had antecedents and that there was no real evidence that any of the witnesses had a criminal background as alleged by the Applicant.

33. The final option available to the trial Judge was to declare a mistrial. A mistrial can also occur when there has been a fundamental injury to the rights of a defendant to have a fair trial.

Admittedly this would have been a last resort and would depend on the Crown's willingness to agree to one of the two other options.

34. It appears that the Learned Judge was focused primarily on the issue of whether there was willful non-disclosure by the Crown to the defence. However, at the end of the day that was not the important issue. The fact was that evidence was now available which supported the Applicant's defence. The question to be determined was how that evidence was to be placed before the Jury.

35. It is also significant that in the absence of that evidence the jury could possibly find that the Applicant was being dishonest when he asserted that Leonard Chase had antecedents. As such the absence of that evidence was doubly prejudicial to the Applicant in a case which turned on the credibility of the witnesses. It is for these reasons that I am led to the view that the appeal should be allowed.

36. I had given consideration as to whether this was a proper case for the application of the Proviso to section 13 of the Court of Appeal Act or alternatively to Section 13 (2). Section 13 is in the following terms:-

> "**13. (1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that —**
>
> **(a) under all the circumstances of the case it is unsafe or unsatisfactory; (b) it is unreasonable or cannot be supported having regard to the evidence;**
>
> **(c) there was a wrong decision or misdirection on any question of law or fact;**
>
> **(d) in the course of the trial, there was a material illegality or irregularity substantially affecting the merits of the case; or**
>
> **(e) the appellant did not receive a fair trial, and in any other case shall dismiss the appeal:**
>
> **Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred.**
>
> **(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.

(3) On an appeal against sentence the court shall, if it thinks that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as the court thinks ought to have been passed, and in any other case shall dismiss the appeal."

37. This case is not a proper one for the application of the proviso as I cannot say that there was no miscarriage of justice nor can I say that based on the strength of the evidence a conviction was inevitable. This later point is seen from the fact that even in the absence of the antecedents the jury's verdict was 7 to 2. Clearly with the introduction of the evidence relative to the antecedents of the witnesses there is a chance their evidence may not be believed.

38. I considered whether there was evidence on which the appellant could be retried. Lord Diplock in **Reid v R (1978) 27 WIR 254**, stated the principles to be considered during this exercise. Lord Diplock said:

"The interests of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are, of course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law; it is for the prosecution to prove the case against the accused… It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the accused, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial: the governing reason why the verdict must be set aside is because the prosecution having to bring the accused to trial has failed to adduce sufficient evidence

to justify convicting him of the offence with which he has been charged. To order a re trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third. To do so would, in their Lordship's view, amount to an error of principle in the exercise of the power under s.14 (2) of the Judicature (Appellate Jurisdiction) Act 1961."

The application of these principles is now a well-established in our Courts and were repeated with approval by this Court differently constituted in **Jerome Bethell v Regina** SCCrimApp No. 19 of 2013 and **Delancy v The Attorney General** SCCrimApp No. 19 of 2012.

39. In the circumstances as I have found them I would grant the extension of time within which to appeal; allow that appeal, quash the conviction and sentence and order that the Applicant be retried as soon as is practicable before a different Judge of the Supreme Court.

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The Honourable Mr. Justice Evans, JA

40. I agree.

_____

The Honourable Mr. Justice Jones, JA

41. I agree also.

_____

The Honourable Madam Justice Bethell, JA