*Privy Council Appeal No. 12 of 1988*

**Roger France Pardayan De Boucherville** *Appellant*

*v.*

**The State** *Respondent*

FROM

## THE SUPREME COURT OF MAURITIUS

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH APRIL 1994

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*Present at the hearing:-*

LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD SLYNN OF HADLEY
LORD WOOLF
LORD LLOYD OF BERWICK

*[Delivered by **Lord Woolf**]*

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On 21st February 1986 the appellant was convicted of murder by a jury after a trial presided over by Lallah J. at the Supreme Court of Mauritius and was sentenced to death. He appealed to the Court of Criminal Appeal of Mauritius but that appeal was dismissed on 8th July 1986. On 18th August 1986 the appellant was granted conditional leave to appeal to the Privy Council by the Supreme Court but he was unable to apply for final leave to appeal as he lacked the means to have the record printed. Eventually on 1st May 1990 he was granted special leave to appeal as a poor person by the Privy Council and this resulted in his appeal being heard.

The distinctive factual feature of the appeal, upon which the appellant's principal submissions are based, is that he was jointly charged and tried for murder with a man called Serge Laval Lourdes ("Lourdes") who had given evidence as a witness for the prosecution during the appellant's committal proceedings. So far as the researches of counsel have been able to discover, there is no precedent dealing with this situation in the United Kingdom or Commonwealth.

The murder was committed between the evening of 5th January 1984, when the victim was last seen, and 13th

January 1984 when his body was discovered buried on a beach. It is likely that it took place sometime before the early hours of 6th January when the victim's blood stained car was seen abandoned some distance from where the body was discovered.

The evidence relied on by the prosecution at the appellant's trial can be summarised as follows:-

1. His fingerprints were found on the victim's car.

2. During his interviews with the police the appellant stated that he had never travelled in a car belonging to the victim and admitted that there was "bad blood" between himself and the victim because he thought the victim had had an affair with his sister-in-law.

3. The evidence of a witness Jocelyn Marmite ("Marmite") that from 3rd January to 17th January 1984 he was staying with the appellant and Lourdes at the appellant's house. That the appellant and Lourdes had left the house on 5th January 1984 and returned in the early hours of the following morning. That the appellant's arm was then bleeding and he took two blood stained knives from a bag and wiped them clean before burning the cloth which he used for this purpose. (Marmite had a number of previous convictions and during December 1983 and January 1984 was on the run from a prison from which he had escaped).

4. The appellant's statement to the police that while he knew Marmite well he had not seen him during the relevant period.

As against Lourdes the prosecution relied upon statements made by Lourdes in which he claimed that he had been present when the appellant had murdered the victim and the appellant was the instigator and primarily responsible for what happened.

Neither the appellant nor Lourdes gave evidence at the trial but they both made unsworn statements denying that they were responsible. Unlike the appellant, Lourdes was acquitted of murder. He was however convicted of manslaughter which was an understandable verdict having regard to the statements which he had made.

At the commencement of the trial counsel then appearing for the appellant made a submission that the two accused should be tried separately. The ground relied on in support of the application was the common one that if the two accused were jointly tried, the jury would have before them the statements made by Lourdes and this would be highly prejudicial to the appellant. In giving his ruling that the two accused should be jointly tried, the judge indicated that he had considered the relevant authorities, including the practice that obtains in England. He then added that the advantages of the offence being charged jointly against the two accused in the circumstances

outweighed any risk of prejudice. He added that "whatever risk there might be in this regard will, in my view, clearly be avoided by proper directions to the jury. And it is not my assessment that the kind of jury that we have in this country will find it difficult conscientiously to follow my directions".

If it had not been for what happened at the committal proceedings as to the calling of Lourdes, this would be a wholly appropriate and probably the only appropriate conclusion for the judge to come to on the authorities. Experience has shown that in situations of this nature, there can be serious disadvantages in trying separately the two accused in respect of the same charge arising out of a single incident. (See for example *R. v. Lake* [1976] 64 Cr.App.R. 172). It was not suggested to the trial judge that the appellant wanted a separate trial because he was anxious to call his co-accused on his own behalf. The judge therefore did not take that factor into account in exercising his discretion, but even if this argument had then been advanced, the judge would have been entitled to come to the same conclusion. This is the case even though it would mean that, if Lourdes did not give evidence, the appellant would be deprived of any evidence he could give. In his submissions on behalf of the appellant, Mr. Robertson Q.C. accepted that this was the position. In any event Mr. Robertson did not go so far as to say that it would have necessarily been in the appellant's interest to call Lourdes, if he was in a position to do so, but indicated that the decision would be one which was finely balanced, though he indicated factors which he argued meant that the advantages probably outweighed the disadvantages of doing so. It is, however, essential if there is to be a joint trial in these circumstances that the jury are given a very clear warning that the co-accused's statements as to the appellant's involvement, made when the appellant was not present, are not evidence against the appellant. This the trial judge did, as the Court of Appeal correctly held, in the clearest and most ample terms.

After having dealt with the ordinary situation it is now necessary to consider the consequences of the complication that Lourdes was called as a witness on behalf of the prosecution at the committal proceedings. When he was called, the prosecution were obviously expecting him to give evidence in accordance with the statements which he had made to the police under caution prior to the commencement of the committal proceedings. Instead of doing this, Lourdes denied that the contents of the statements were true and he claimed that he had remained at his home with the appellant on the night of 5th January. He said he signed the statements because he was under duress from the police who told him that his wife would be locked up and his child would be taken to a nursery if he did not sign a statement implicating the appellant. As a consequence of his evidence, the committal proceedings were adjourned for the prosecution

to consider whether they wished to continue their examination-in-chief. The prosecution decided not to do this and Lourdes was not recalled and the committal proceedings continued without any evidence from him. It is not suggested that the appellant required him to be recalled for cross-examination. It was after the conclusion of the committal proceedings against the appellant that on 12th June 1985 Lourdes was charged with murder and committed for trial on 21st August 1985.

Mr. Robertson, in these circumstances, made the following submissions:

1. A confessed accomplice (which is an appropriate description of Lourdes) who remains in jeopardy of being charged or convicted cannot be called to give evidence for the prosecution at committal proceedings against a defendant implicated in his confession.

2. It is an abuse of process for the prosecution to join a defendant in a trial with a confessed accomplice with the oblique motive of:

(i) getting the evidence of the accomplice, inadmissible against the defendant, before the jury; or

(ii) rendering the accomplice non-compellable as a witness for his co-defendant.

3. Such an oblique motive will be presumed to exist, at least where the confessed accomplice has been joined as a defendant (i.e. has been prosecuted), where the evidence which he gave at the committal proceedings was not only in breach of the first submission but also unhelpful to the prosecution.

There can be no dispute that what happened in this case was unusual. If by the time of the committal proceedings the prosecution had decided to charge Lourdes, then it would have been inappropriate to call him as a witness for the prosecution in the committal proceedings if it was intended to try him with the appellant. The position would not have been unlike that at a trial where it is clear that one defendant should not be called to give evidence for the Crown against a co-defendant, unless a *nolle prosequi* has been entered, or either the co-defendant has been acquitted or has pleaded guilty or, although jointly indicted, is not in the event tried with the defendant against whom he is called to give evidence (*Archbold*, Reissue (1993) 4-175). However an accomplice who has not been charged remains a compellable witness for the prosecution and the fact that he is called to give evidence against a co-accused without his being made aware of whether or not he is to be charged does not render his evidence inadmissible and in any event does not affect the validity of the committal proceedings in which he gave evidence (*R. v. Norfolk Quarter Sessions ex parte Brunson* [1953] 1 Q.B. 503). There is therefore no substance in the first of the appellant's submissions.

In considering the appellant's second and third submissions it is also important to have in mind what Mr. Robertson described as the appellant's broad proposition, which was:-

> "Where an accomplice has been called as a prosecution witness at proceedings which result in a defendant being committed for trial, it amounts to an abuse of the court's process (at least, in the absence of fresh evidence) for the Crown subsequently to join that accomplice as a co-defendant in the trial. In this event it becomes the duty of the court to rectify the abuse and to avoid the injustice consequent upon it by ordering a separate trial."

There was, as far as the Board is aware, in this case no fresh evidence which became available to the prosecution after the committal proceedings. Therefore, if this proposition is well-founded, the decision of the judge not to order the appellant and his co-accused to be separately tried was wrong. In this respect the proposition has a different impact from Mr. Robertson's second and third submissions which, as their Lordships understand them, apply to the trial itself rather than to the judge's decision as to whether the defendants should be jointly tried. However the practical result will be the same. In either event, if there was an abuse of process this would taint the appellant's conviction.

As to the power to intervene to protect the defendant against abuse of process there is now no doubt. In *R. v. Croydon Justices ex parte Dean* [1993] Q.B. 769 the Divisional Court quashed a committal order (an exceptional exercise of the jurisdiction) where a person had been prosecuted who had received a representation or promise from the police that he would not be prosecuted, notwithstanding the absence of bad faith on the part of the police or any other authority. In *R. v. Horseferry Road Court, ex parte Bennett* [1994] 1 A.C. 42, the House of Lords, in the words of Lord Griffiths (at page 61), took "the concept of abuse of process a stage further" so that it could apply to a case where a defendant had been returned to the United Kingdom unlawfully even though there was no suggestion that the appellant could not have a fair trial or that it would have been unfair to try him if he had been returned to the United Kingdom properly. Their Lordships considered that the courts had the power to interfere because it was part of the judiciary's responsibility for maintaining the rule of law "to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law". In the field of criminal law "if it comes to the attention of the court that there has been a serious abuse of power it should ... express its disapproval by refusing to act upon it" (page 62).

While endorsing this approach to the jurisdiction of the courts in relation to abuse of process, their Lordships do

not consider that any abuse has been established to have occurred in relation to the appellant which would justify interfering with his conviction. Lourdes has not suggested that he was granted an immunity. If he had been granted an immunity and that immunity had subsequently been withdrawn, he would presumably have complained. However even assuming he had been granted an immunity, it is difficult to see why, in the circumstances of this case, that should be a matter which affects the appellant's conviction. The appellant was far from being prejudiced by Lourdes giving evidence in the committal proceedings; indeed the evidence which Lourdes gave was favourable to the appellant. If Lourdes' evidence was correct, it supported a suggestion that the police had been prepared to fabricate evidence against the appellant and confirmed the appellant's alibi that he was at home on the evening of 5th January 1984. Lourdes' evidence was, however, insufficient to prevent the committal of the appellant since there was ample other evidence which meant that it was inevitable that he would be committed. At the trial the defence were able to introduce references to this aspect of the committal proceedings although this may not have been strictly permissible. The appellant's position was therefore certainly no worse than it would have been if Lourdes had been charged with him at the outset as a co-defendant at the committal proceedings.

If it was shown that the prosecution was bringing proceedings against Lourdes for some "oblique motive" or perhaps more accurately some improper ulterior purpose such as is alleged in the second submission made on behalf of the appellant, then this could require the court to intervene probably by ordering separate trials. However their Lordships do not accept that "an oblique motive will be presumed" from what is known to have happened to Lourdes. No doubt it was as a result of Lourdes resiling from his statements in the committal proceedings that his position was reconsidered. However as there was ample evidence to justify his being charged with murder there is no reason to think that the prosecuting authorities did not come to the conclusion that he should stand trial on a perfectly proper reassessment of the evidence against him. In the absence of any complaint or evidence by Lourdes, it would be quite wrong to infer any impropriety.

Mr. Robertson also relies on the fact that, as a result of what happened, the appellant was unable to call Lourdes as a witness at his trial. Their Lordships have reservations as to whether in practice, if he had been available to be called, Lourdes would have been called. While in the normal way it is the duty of the prosecution in the interests of justice and in fairness to the defence to make available witnesses who gave evidence during the committal proceedings whom they do not choose to call at the trial, this is subject to the prosecution being able to do this. However, once the prosecution had decided that the right course was to prosecute Lourdes on a joint charge with the appellant, the prosecution ceased to be under an obligation to make

Lourdes available. By rejecting the appellant's application for separate trials, the judge impliedly (not expressly because the point was not raised with him) perfectly properly approved this being the position for the reasons already referred to. In these circumstances it is not possible for the appellant to make any complaint about the result.

Finally, in relation to Mr. Robertson's arguments, it is necessary to refer to section 10 of the Constitution. This provides:-

> "(1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence ...
>
> (e) shall be afforded facilities to examine, in person or by his legal representative, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before that court on the same conditions as those applying to witnesses called by the prosecution.
>
> (7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

While in some situations section 10 may go beyond the common law, this is not such a situation. As Mr. Robertson has failed, for the reasons already given, to establish any grounds on which it would be appropriate to interfere with the conviction of the appellant, section 10 of the Constitution provides no assistance.

In addition to the arguments advanced by Mr. Robertson, two separate arguments were advanced by Mr. Ollivry Q.C., on behalf of the appellant. He suggested that the judge had failed to give any satisfactory warning to the jury as to the unreliability of Marmite as a witness due to his very bad record. However their Lordships consider that the judge dealt with the matter perfectly properly by telling the jury that he was:-

> "a jail-bird of great experience, who has lied on many occasions on which he was called upon to tell the truth. He has more than 25 previous convictions. I don't need to talk very much about Mr. Marmite. You have seen him. You have heard Counsel. It is for you to decide whether, with regard to the night in question, he is speaking the truth."

The other argument related to the one matter in respect of which the summing-up, which was generally admirably fair, can be faulted. It is with regard to the fingerprint evidence. It would have been preferable, as Mr. Ollivry submitted should have happened, if the judge had made clear that the fingerprint evidence was only of value if the jury were satisfied that there was no innocent explanation for the presence of the appellant's fingerprints on the deceased's vehicle. It was also not correct to suggest that the fingerprints could corroborate Marmite's evidence. However, Marmite's evidence did not in fact strictly require corroboration and, certainly in the context of the summing-up as a whole, these criticisms are not regarded by their Lordships as in any way reflecting upon the safety and satisfactory nature of the appellant's conviction.

Although the appellant's case makes a reference to the delay in the execution of sentence of death which was imposed, this is not an issue on which their Lordships are required to express an opinion. Mr. Guthrie Q.C., on behalf of the State of Mauritius, informed their Lordships that the appropriate authorities in Mauritius were well aware of the recent decisions of the Board as to the propriety of carrying out the death sentence after the expiration of the period of time which has elapsed since sentence was passed in the case of the appellant and their Lordships have no reason to doubt that the appropriate authorities in Mauritius will deal with the situation in accordance with the correct principles.

Accordingly their Lordships dismiss the appeal.