

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2013/0007

BETWEEN:

ANDRE PENN

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Chief Justice [Ag.]

Appearances:

Mr. Courtenay Griffiths QC and Mr. Michael Fay QC for the applicant

Mr. Wayne L. Rajbansie with him Angel Flax-Solomon for the Director of Public Prosecutions

2013: July 22; 23.

DECISION

[1] **BAPTISTE, CJ [AG.]:** On 17th January 2012, the Court of Appeal ordered the retrial of Andre Penn in respect of Criminal Case No. 31 of 2009 (The Queen v Andre Penn). By notice of application filed 9th July 2013, Mr. Penn applied for a stay of the retrial until the hearing and determination of:

- (a) an application filed on 5th July 2013 in which he seeks the quashing of the order of retrial and the entry of a verdict of acquittal on the grounds of the failure of the prosecution to comply

with the applicable law, practice and procedure in the Virgin Islands in respect of retrials in criminal cases and;

- (b) an Originating Motion filed on 14th July 2013 seeking redress under the **Virgin Islands Constitution Order 2007**¹ for contravention of section 18 and article 8 of the European Convention of Human Rights.

Mr. Penn also seeks an injunction restraining any further proceedings in the retrial until the hearing and determination of the application filed on 5th July and the Originating Motion.

- [2] The grounds of the application for the stay are that the Mr. Penn has not been served with an indictment for a retrial nor has he been arraigned, in contravention of the law, practice and procedure for retrials ordered by the Court of Appeal in the Virgin Islands. Secondly, he has not been provided with a record of any kind of the proceedings of the Court of Appeal on the hearing of his appeal on the 17th January 2012, including a transcript of the proceedings, the Court of Appeal's decision or the Certificate of Result of Appeal, in contravention of the relevant law and procedures. Thirdly, the failure of the Prosecution to observe and follow the law, practice and procedure for retrials ordered by the Court of Appeal has rendered the Prosecution incapable of proceeding with the retrial without further order of the Court of Appeal and has engaged the Applicant's constitutional rights. Fifthly, the July 5th Notice of Application and the Originating Motion should be heard and determined before the High Court can proceed with the criminal trial.
- [3] It is well established that a court has power to stay proceedings in two categories of cases, namely (i) where it will be impossible to give the accused a fair trial and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category, if the court concludes that the accused cannot receive a fair trial, it will stay the proceedings without more. No question of balancing competing interests arises.

¹ S.I. No. 1678 of 2007.

See Lord Dyson in **R v Maxwell**². The law in relation to the second category is well settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed. See Lord Steyn in **R v Latiff**³ [1996].

[4] The background facts show that the Court of Appeal ordered Mr. Penn to be retried on the 17th January 2012. A fresh indictment was filed on the 27th January 2012; ten days after the Court of Appeal ordered a retrial and the matter was listed for the February Assize. (The Director of Public Prosecutions has indicated that the counts in the indictment reflected the original twelve counts as the previous indictment but omitting count 13 that was withdrawn at the trial. Further, no new evidence is to be led against Mr. Penn.) Mr. Penn filed an application for an abuse of process and a stay contending adverse pre trial publicity. Redhead J heard the applications on 9th July 2012 and in his decision given on 25th July, dismissed the application and ordered Mr. Penn to stand trial at the Criminal Assizes in October 2012. In October 2012 Mr. Penn applied for the matter to be traversed as he had no counsel. In February 2013 Mr. Penn was again unrepresented but indicated that he had retained United Kingdom counsel but counsel would not have been available until 2nd of July. Mr. Penn was arraigned on 8th July 2013 and indicated that he did not wish to take part in the proceedings. A plea of not guilty was therefore entered on the record.

[5] In the oral argument in support of the stay in this court, Mr. Penn's counsel contended that there are no provisions in the law of the Virgin Islands for the conduct of a retrial and submitted that the law, practice and procedure in the Superior Courts of England and Wales apply. This is so by reason of section 48 of the **Criminal Procedure Act**⁴ which provides that:

² [2010] UKSC 48.

³ [1996] 1 WLR 104.

⁴ Chapter 18 of the Laws of the Virgin Islands, Revised Edition 1991.

“All other matters of Procedure, not herein or in any other Act expressly provided for, shall be regulated, as to the admission thereof, by the laws of England and the practice of the Superior Courts of Criminal Law in England.”

Counsel argued that the law in England and Wales regarding retrials is set out in sections 7 and 8 of the **Criminal Appeal Act 1968** (UK). Section 8 provides that a person who is to be retried pursuant to an order made under section 7 shall be tried on a fresh indictment preferred by direction of the Court of Appeal but after the end of two months from the date of the order for his trial he may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal gives leave. Where a person has been ordered to be retried but may not be arraigned without leave, he may apply to the Court of Appeal to set aside the order for retrial and to direct the court of trial to enter a judgment and verdict of acquittal of the offence for which he was ordered to be retried.

[6] Counsel argued that the retrial order of the Court of Appeal was made on 17th January 2012; therefore the two month period expired on 17th March 2012. Any further steps to retry Mr. Penn had to be on the further direction of the Court of Appeal on application by the prosecution. There being no such application, the High Court has no jurisdiction to commence and or continue the retrial of Mr. Penn. The Director of Public Prosecutions contends that the 1968 Act does not apply to the Virgin Islands.

[7] I am mindful that the application before me is for a stay of the retrial and I do not have to determine, on this application, whether the **1968 Criminal Appeal Act** (UK) applies to the Virgin Islands by virtue of section 48 of the **Criminal Procedure Act**. I note however that the Full Court has pronounced upon the question as to which laws are intended to be imported by section 11 of the **Supreme Court Act of the Virgin Islands**⁵. Thus in **Panacom Int v Sunset Investments**⁶, Sir Vincent Floissac C J stated that section 11 relates solely to the exercise of the jurisdiction of the High Court and is therefore an intrinsically

⁵ Cap. 80, Laws of the Virgin Islands, Revised Edition 1991.

⁶ (1994) 47 WIR 139.

procedural provision and the words “provisions”, “law” and “law and practice” appearing in the section are clearly intended to be references to procedural as distinct from substantive law. The Court held that the English Law intended to be imported by section 11 is the procedural law administered in the High Court of Justice in England and not English substantive law nor English procedural law which is adjectival and purely ancillary to English substantive law. It appears to me that in construing section 48 of the **Criminal Procedure Act** of the Virgin Islands, by parity of reasoning, a court is likely to come to the same conclusion. It is instructive to note that *Panacom* was followed recently by the Court of Appeal in *Veda Doyle v Agnes Deane*⁷.

- [8] Viewing the matter generally and paying regard to the grounds of the application, it appears to me that the issues raised can properly be dealt with in the criminal proceedings. The trial judge would be well placed to manage the issues which may arise. The complaints could be properly resolved within the criminal process itself. In the circumstances, the threshold for a grant of a stay has not been met. In so far as reliance is placed on the reception provision in the **Criminal Procedure Act** Cap 18 of the Virgin Islands, in view of the pronouncements of the Court of Appeal in the cases of *Panacom*; and *Veda Doyle v Agnes Deane*, the prospect of success on this point appears to be bleak. In the circumstances the application for a stay of the criminal trial is dismissed and the injunction sought is also refused.

Davidson Kelvin Baptiste
Chief Justice [Ag.]

⁷ HCVAP 2011/020, delivered 16th April 2012.