



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2016: No. 38

BETWEEN:

THE QUEEN

-and-

ROMANO MILLS

Date of hearing: 14th February 2017

Date of Ruling: 17th February 2017

Mr. C Mahoney for the Crown

Ms. Ms. S Mulligan for Mills

Mr. C Attridge for Bennjamin

Before: Hon. C Greaves PJ.

Criminal law-Murder-Defendants right to counsel of his choice- Barristers Code of Professional Conduct 1981-Sections 24,24 A, 25, 101,126 -Counsels conflict of interest.

RULING

INTRODUCTION

1. On 23rd January 2013 two men were shot to death at the Belvins variety store.

From the onset evidence suggested that these were gang related murders. Evidence pointed to members or associates of the MOB gang as the perpetrators and the victims to be associated with the rival Parkside gang.

2. The evidence shows that Ms Mulligan a counsel in the DPP's office was assigned to the case and that she was involved as a supervisor and or adviser to the police and communicator with some defence counsel in respect thereof up to the period when she recommended charges for three of the defendants and until she demitted office shortly before trial of two of the defendants commenced.
3. The evidence reveals that charges were recommended by Ms Mulligan against Christopher Duer, Leveck Roberts and Gariko Benjamin and but for her retirement she would have been the prosecutor at the trial.
4. Trial proceeded against Duer and Roberts leading to their convictions and Benjamin who was later charged in absentia fled the jurisdiction and remained at large for approximately two years until he was returned to Bermuda.
5. The evidence suggests there was always some evidence tending to implicate Mr Mills but it was insufficient until Mr Duer after his conviction provided the police with a statement implicating Mr Mills. He is expected to be an important witness in the trial whose credibility is expected to be severely taxed.
6. Mr Benjamin and Mr Mills now stand charged together in the second leg of the Belvins variety murder and Ms Mulligan now appears as Counsel for Mr Mills.

THE APPLICATION

7. The Crown has made an application for an order that Ms Mulligan be withdrawn as counsel for Mr Mills on the grounds that as an agent of the Crown who played such a substantial role inter alia in the investigation, counselling, advice and preparation of this murder case, her appearance for Mills as a defence counsel would amount to a conflict of interest of such a degree it would amount to a breach of the provisions of the Bermuda Barristers Code of Professional Conduct 1981-particularly sections 24, 24A, 25, 101, and 126.
8. Ms Mulligan responds that the application should be refused. She asserts that she never advised anyone in respect of Mr Mills; that he is entitled to the counsel of his choice; to the extent of any potential conflict he has granted her a waiver and she an experience counsel is capable of cross examining Mr Duer and other police officers with whom she dealt whilst advising the Crown without raising issues of conflict, or raising issues tending to make her a part of the case or to cause the administration of justice embarrassment in the eyes of the reasonable observer.
9. She asserts that such issues as who instructed the police or recommended the charges against the other defendants but not Mr Mills are irrelevant and inadmissible in the proceeding and the potential of such should not contribute to an order for her withdrawal.

10. Further, to any extent that she may be required to cross examine the co-accused Mr Benjamin his counsel asserts on his instructions that he and the defendant Benjamin have no objections to her continuing as counsel for Mr Mills.

Mr Attridge for Mr Benjamin rose and confirmed this latter assertion.

11. Finally, she asserts that if she is to be removed so too should be Mr Mahoney as he too stands conflicted since his present superior the DPP Mr Mussenden was defence counsel for Mr Duer in the related case.

THE LAW

12. I do not propose to recite the provisions and the learning in the authorities cited as I think a short summary should suffice. It is not contested that the Bermuda Code was patterned after the relevant Canadian Code and that much of the provisions mirror each other. Hence it is not in dispute that the Canadian cases are relevant to the Bermuda provisions.
13. Rule 24, prohibits a barrister from acting for the opponent of a client or former client where his former knowledge may give him an unfair advantage.
14. 24(A), when counsel has joined a new firm, this provision prohibits other members of that new firm from representing a client for the same reasons as are in section 24.

25, prohibits a barrister from acting for a client where he knows the opponent will call a witness who is or was a former client whom he will have to cross examine using knowledge obtained from the former relationship.
15. 101, prohibits a counsel from representing any person or interest in the same or a related matter with whom he had been concerned in an official capacity.
17. 126, provides that a barrister shall observe these rules in the spirit and to the letter.
18. *Martin v Gray*, [1990]S.C.R 1235, per Sopinka J, found the lawyer who actively worked on the very case for her former employer was prohibited from working for the opponent now. See also, *Tiboni et al v Merck Frosst Canada Ltd et al 2008 Can 11 6872(On SC)*.
19. The court should infer that by reason of that previous relationship she possessed confidential information. The burden to disprove that rests upon her.
20. *R v Mandamin 2017, ONSC 418*, the principles may apply to crown prosecutors as they apply to defence counsel where a defence counsel subsequently joins the prosecutions office.

THE EVIDENCE

21. The affidavits of Detective Chief Inspector Pedro and Detective Sergeant Martin, two senior officers much involved in the case, show that very shortly after the murder, all four defendants were suspected. That Ms Mulligan was the Crown Counsel assigned to the murder and that as a

consequence she conducted multiple meetings and contacts with these officers. Pedro supports his assertions with reference to several emails dating from February 1st 2013, Ms Mulligan to Mr Mussenden re Duer and his responses to her. , February 6th Mulligan to him re Benjamin and Roberts, October 8th 2013, likewise, and others referred.

22. The emails reveal that there were ongoing discussions between Ms Mulligan and Mr Duers Counsel Mr Mussenden in relation to helpful information Mr Duer was expected to give. This particularly clearly expressed in an email between Mr Martin and Ms Mulligan dated 22nd September 2014 where she indicated she was meeting Mr Mussenden in that week to get an indication of what his client could offer though his information previously provided was not very helpful as he seemed to think he'll get him a ticket to Sweden.
23. Later on the same date she wrote that she and Duers counsel were in the midst of very sensitive discussions re the use of his client in the Belvin murders and other matters. She expressed her anxiety and caution to the police not to cause the impression Mr Duer was working with the police by their dropping into the prison.
24. From the emails she was also aware that the defendant Mr Benjamin was the subject of extradition proceedings.
25. We know that Mr Duer did provide some information at some time and expanded upon it later , hence his presence at the upcoming trial as a witness.
26. It is also known that documents served on Duer or his counsel were later found at a residence occupied by Mills.
27. An email dated October 8th 2013, Pedro to Mullins, speaks of a document containing intelligence in effect for her eyes only.

THE QUESTIONS ANSWERED

28. Was Ms Mulligan a counsel in the DPPs office who had substantial control of these proceedings or proceedings related to them and may have gained knowledge as a result which may put her at an unfair advantage, per rule 24. On the basis of the above referred evidence and law the answer is a resounding yes.
29. Was that relationship during her public office of such a nature that a representation of Mr Mills in her now private capacity in this related case would amount to a breach of rules 25 and 101 and may lead reasonable observers to a conclusion of unfairness . the answer is a resounding yes.
30. Was the relationship with her former client the DPP and activity in this case or the related case of such a nature that it should exclude other members of her new firm from representing Mr Mills in the instant case.

31. On the face of the law, the answer appears to be yes. On that same basis the same answer would appear applicable to officers of the DPP's department since Mr Mussenden , former counsel for Mr Duer is now the DPP. The DPP is responsible for all prosecutions in this island and may be expected to give directions to his subordinates.

THE DECISION

32. It is evident, in this case based on the evidence referred to above together with the remainder not included for reasons of brevity, that to allow Ms Mulligan to appear for Mr Mills would amount to a blatant breach of all of the provisions of the Code above referred to. Ms Mulligan would by reason of her previous position enjoy an unfair advantage not only against the Crown but against the co-defendant Mr Benjamin.
33. I cannot see how Ms Mulligan can conduct Mr Mills defence without exposing herself to a challenge from Mr Duer or Mr Martin or Pedro if they are called and thus be required to provide answers perhaps as a witness. She cannot expect this court to place its confidence only upon her talents and skill since one never knows what a witness may do.
34. I cannot see how she would not be at an unfair advantage against the co- defendant Mr Benjamin either, if for example he decided to testify and raised a cut throat issue, even if he didn't intend to.
35. How would she explain to a jury that she prosecuted Mr Duer, Benjamin and Roberts and not Mr Mills other than to suggest by her very presence that she was right and that was because they were guilty as was proved by the trial and conviction of Duer and Roberts but Mr Mill is not because she was right or is right, that's why she is defending him.
36. How would a jury not infer from her presence alone that if she was right about the above she must be inferring from her presence that Mr Benjamin must also be guilty because she charged him like she did the others but not Mr Mills.
37. In the circumstances I feel compelled to grant the Crowns application and order that Ms Mulligan must withdraw as counsel for Mr Mills.

RELATED COUNSEL IN A SMALL JUISDICTION: THE WAY FORWARD

38. As for the positions of other counsel in Ms Mulligans new chambers and Mr Mussenden who is now the DPP. These two developments do cause this court serious concern. This is a very small jurisdiction. They are only about half a dozen competent defence attorneys. Outside of the DPPs office there are no known counsel , particularly in government with any competent criminal prosecutorial experience.

39. Because of the small number of competent defence counsel in this jurisdiction and because of the multiple tit for tat gang cases with multiple defendants in this jurisdiction counsel have had to appear for all sides. For these reasons they have no doubt come to gather sensitive information about and from the respective sides. Consequently they have had to thread thin needles. Perhaps in every gang related case and perhaps in many non-gangs related cases in this jurisdiction one will find some level of conflict of interests.
40. I think for these reasons we must adopt a realistic and practical approach to these conflict cases. Should we strictly follow these rules we shall grind our judicial system to a screeching halt when it comes to the trial of criminal cases; particularly when they are multiple defendants. In every criminal case in this jurisdiction involving gang cases there is some level of cross contamination, either by defendants and victims, witnesses , relatives, counsel and or judges.
41. We have all learnt how one or the other is related to the other. Even the selection of juries is an enormous challenge in this jurisdiction due to the close and distant relationships of one to another. Many a case has had to be aborted part-way because of a later discovery that someone is somehow related.
42. It is for these reasons that I consider it necessary to be practical in this jurisdiction not to cause counsel to withdraw for reasons of conflict, particularly when the degree is low to moderate and unless there are substantial or highly compelling reasons to do so. The instant case in respect of Ms Mulligan has met that bar.
43. However, I am not satisfied that I should make an order excluding her experienced senior whose firm she has joined , nor should I bar Mr Mahoney or any of the other DPP's counsel from prosecuting this case because Mr Mussenden is now their superior. Each case is going to have to be judged on its own merit.
44. I must consider that these counsel are all highly respected officers of the court with high integrity and in the absence of compelling evidence to the contrary, I will take it that they will stay as far away as possible from the discussion of this case with their colleagues or from the provision of them with information obtained by reason of their former positions.
46. One way I think this may be handled in this jurisdiction is by early appreciation of the issue by the respective counsel and by undertakings by the respective counsel that they shall not share the advantageous information with the other.
47. I think as officers of the court we may in this jurisdiction in some cases accept that and extend some latitude.
48. I think if we fail to do so , pretty soon no lawyer shall be able to appear in criminal cases in this jurisdiction either for the crown or the defence and we shall dally around unable to conduct trials in breach of defendants' rights to fair trials within a reasonable time. In short we shall be backlogged awaiting overseas counsel.

49. For these reasons I shall not make an order forbidding either Ms Mulligans associate Ms Christopher or Mr Mussenden' s associate, Mr Mahoney from conducting the case.
50. I think these courts in their experience can by astute observation and firm rulings assist during trial to avoid , diminish or eliminate any such advantage when they appear to arise. All counsel both for the crown and the defence should note this and keep their clients informed.
51. In any event to answer Ms Mulligan assertion that there is a conflict on the part of officers of the DPP's office because they have now been joined by Mr Mussenden, I cannot agree with her in the instant case. The reality is, that Mr Mussenden or his staff are not opposing Mr Duer. They are on the same side, albeit that he was Mr Mussenden' s client in the past but now he is their witness. I see no conflict.

Justice Carlisle Greaves, PJ

Dated this 17th February 2017