[2017] JMSC Crim1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIRCUIT COURT FOR THE PARISH OF MANCHESTERHOLDEN AT MANDEVILLE, IN THE PARISH OF MANCHESTER

BETWEEN	**JERMAINE GIBSON**	**1ST RESPONDENT**
AND	**PAUL GARDENER**	**2ND RESPONDENT**

In Open Court

Mr. Joel Brown and Ms. Sheryl Lee Bolton for the Applicant.

Mr. Pierre Rogers for Jermaine Gibson.

Mr. Peter Champagne for Mr. Paul Gardener

Heard: June 1 and 5, 2017

Criminal Law - Trial – Fair Trial - Application for Change of Venue

L. SHELLY-WILLIAMS, J.

Background

[1] The two applicants Mr. Jermaine Gibson and Mr. Paul Gardener were charged for the offences of indecent assault and carnal abuse.

The Crown filed a Notice for Court Order for Change of Venue. This Notice was made pursuant to Section 34 of the Judicature (Supreme Court) Act.

[2] The Crown relied on three grounds for their application namely:

(i) That there is a reasonable likelihood that there will not be a fair trial in the parish of Manchester having regard to the status of the Respondents and the nature of the incident.

(ii) That there is a reasonable likelihood that any potential jury pool in the parish of Manchester and those parishes indigenous to it, would have been contaminated already or will be contaminated due to the influential status of the Respondents' in light of the pre-trial publicity.

(iii) That there is a reasonable likelihood that the witnesses for the crown may be intimidated if the matter remains in the parish of Manchester.

[3] In support of their application the Crown filed two affidavits from Detective Sergeant Patricia Butler.

[4] The respondents filed affidavits in response to the application along with submissions opposing the application.

Applicant's submissions

[5] Mr. Joel Brown on behalf of the Applicant relied heavily on the affidavits of Detective Sergeant Patricia Butler that was filed in support of the application. The affidavit of the officer alleges four main issues which are:-

a. That the respondents Mr. Paul Gardener and Mr. Jermaine Gibson are Moravian ministers and public figures who held influential positions in the said church namely president and vice president of the Moravian church of Jamaica. Mr. Gardener was born, raised and resided for a period of time in the parish of Manchester. Mr. Gardener no longer has pastoral duties but he is alleged to have considerable influence in the communities surrounding the four churches that he had been affiliated with in Manchester. Mr. Gibson was also born, raised and resided for a period of time in the parish of Manchester. Due to this fact Mr. Gibson is also alleged to have considerable influence in the parish.

b. Detective Sergeant Butler in her affidavit speaks to a friend of the complainant withdrawing her offer to provide a statement in the case because her uncle who is a Moravian minister instructed her not to assist in the investigations.

c. She also gave evidence about what took place on the first two days that the matter was mentioned before the court. She spoke to the size of the crowd that was present outside of courthouse, that there was a lot of media coverage and as she described it 'fanfare.' She averred that she was concerned about the space the jurors would have for deliberations.

d. Detective Sergeant Butler also stated that a protest took place in a neighbouring community where persons came out in support of one of the complainants. During that gathering the respondent Mr. Paul Gardener was hit in the head by a tambourine by a friend of the complainant.

[6] Mr.Brown argued that the venue should be changed to the Corporate Area because the jury pool there would be wider and more varied. This, he argued, would be essential for all parties to be able to choose a jury to try the respondents.

[7] Mr. Brown submitted that the facilities at the Manchester court are less than ideal as there is just one entrance in and one out of the court. He also pointed to the first two days the matter was placed before the court and the crowd that it attracted. He argued that although there was no evidence of a large crowd following the case since the first two days, however, it was important for all parties to be assured that there would not be a repeat of this which could possibly intimidate the jury pool and as such the case should be transferred.

[8] He pointed to the effects that the case was already having not only on the witnesses before the court but also on potential witnesses. He highlighted the witness that had agreed to give a statement then withdrew the offer after she

spoke to her uncle who is a Moravian minister. He argued that the change of venue was the only option in all the circumstances.

Submissions on behalf of Mr. Jermaine Gibson

[9] Mr. Rogers on behalf of Mr. Gibson argued that the Crown from its affidavits has not provided the court with any evidence that would support an order for the change of venue. He argued that it is the Crown who has made the application and it is the Crown who has to satisfy the court that such an order should be made. In relation to grounds one and two of the application he argued that the case law has established a very high standard. He submitted that the standard as established by case law is that the applicant must show:

a. Not that there is perceived prejudice but that there is actual prejudice in retaining the case at a particular venue.

b. That the evidence to ground the application must be based on empirical rather that anecdotal evidence.

c. That the affidavit evidence submitted on behalf of the Crown does not rise to the standard required.

[10] He argued that pre-trial publicity that was alluded to by the Crown was not centralised to the parish of Manchester but was island wide. He argued that the issue of publicity had been argued in the Jamaican case of ***R v Greg Tingling, Odel Buckley and Arnold Henry delivered January 25, 2013.*** In that case, the Defence argued that there should be a change of venue because of the publicity. The application was refused. He further argued that it was the Crown who had created most of the publicity in the first place and then is seeking to capitalise on the publicity to make this application.

[11] He further argued that Crown's application was predicated on the fact that the jurors in Manchester fell below normal standards for jurors which was not the case.

[12] In relation to the third ground preferred by the applicant he submitted that the Crown has provided no evidence that would support this ground.

[13] In contrast he argued that Ms. Harriott had filed an affidavit in opposition of the application on behalf of Mr. Gibson. He highlighted the evidence in the affidavit of Ms. Harriott which spoke to:

a. The adverse articles and comments on social media in relation to his client in this matter. He argued that the social media activity was concentrated in the Corporate Area.

b. That there was a march which started at the church that is presided over by Mr. Gibson. That church is located in the Corporate Area. The march started at the church when there was a service in progress and it continued along the road on which the church is located.

c. He argued that the affidavit of the investigating officer which spoke to an incident where Mr Gardener was injured showed that it is the respondents who are at risk. Based on this he submitted that the application should be dismissed.

[14] He argued that the affidavit of the investigating officer which spoke to an incident where Mr Gardener was injured showed that it is the respondents who are at risk. Based on this he submitted that the application should be dismissed.

Submission on behalf of Mr. Paul Gardener

[15] Mr. Champaigne who represents Mr. Paul Gardener argued that the threshold for the granting of an application for change of venue is not based on supposition and maybes. He pointed to the case of **Dennis Jenkins and Leroy Walker v The Director of Public Prosecution and The Attorney General (1985) 22 JLR 175**. In that authority there was actual hostility to the accused. However, the court refused to grant the order for the change of venue.

[16] He pointed out that there are different options that are open to the parties when choosing a jury to try the matter. He highlighted that these included:-

a. Warnings to the jury before and after it has been empanelled.

b. Polling of the jury pool.

c. The parties have the option of engaging in a judge alone trial if it is made clear that an unbiased jury cannot be empanelled.

[17] He argued that in the affidavit filed by Mr. Paul Gardener in opposition to the application it showed that Mr Gardener had not been assigned to any church in the parish of Manchester for the past fourteen (14) years.

[18] He submitted that the application is devoid of any remedies and the law is replete with such remedies that can be utilized by the court.

The Law

[19] The starting point in this type of application is Section 16 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 which states that:-

> *Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*

[20] This case originated in Manchester as it is the place where the offence is alleged to have been committed.

[21] Section 29 of the Judicature (Supreme Court) Act Jamaica states that:

> *"The Judges of the Supreme Court shall act within the Circuits in all respects as the Judges of Assize, Oyer and Terminer and Gaol Delivery have heretofore done, and it shall be the duty of each, within the*

jurisdiction of the Courts respectively over which he shall preside, and at the times at which such Courts are respectively required to be held, to enquire by the oaths of good and lawful men of the parish in and for which such Courts shall be held, of all treasons, misprision of treason, felonies and misdemeanours whatsoever, and of the accessories to the same; and to hear and determine the same, and each of them according to law; and it shall be their duty, each within his Circuit, and at the several times at which the Courts of the said Circuit are held, to deliver the gaol and gaols within his said Circuit, doing therein what justice shall require; and at the times respectively aforesaid shall take verdicts upon issues and assessments of damages within such Circuit."

[22] Section 34 of the Judicature (Supreme Court) Act states that:

"It shall be lawful in any cases of criminal prosecutions for a Judge of the Supreme Court, on application either on behalf of the Crown or the accused, and on good cause shown, to change the venue and remove the trial from any one Court to any other, and such last mentioned Court shall thereupon have jurisdiction in such case."

[23] It was stated in the case of ***R v Larman, R v Bowen, R v Jarrett*** 6 WIR 550 at 558 that:-

"The decision whether or not a change of venue will be ordered is one for the Judge to whom the application is made acting in his discretion, a discretion which he must exercise judicially."

[24] Whether the judge should exercise his/her decision to grant an application for change of venue was argued in the case of ***R v Greg Tingling, Odel Buckley and Arnold Henry*** (supra)**.**

[25] In that case the defendants applied to a Supreme Court judge to have their trial transferred from Kingston to another parish. They claimed that they could not get a fair trial in Kingston. Their applications were supported by affidavits that swore to hearing persons who could be in the jury pool making uncomplimentary remarks to them as they were attending court and the notoriety of the case. The application was dismissed. The learned judge held that:-

(i) as it is normally fitting for a trial to be held in the area where a crime was committed, the applicant must show, on the balance of probabilities, good cause for the venue to be changed;

(ii) nevertheless, a trial may be transferred to another venue to ensure that there is a fair trial;

(iii) there was insufficient evidence that the alleged remarks were uttered by persons who were potential jurors; and

(iv) there were other measures that could be taken in the jury selection and trial proceedings to ensure that the defendants had a fair trial.

[26] In that case Frank Williams J opined that there was a dearth of authorities in relation to change of venue. He then went to consider s number of Canadian cases that he found to be of assistance to him.

[27] Having traced the history relating to change of venue in the Canadian cases, he stated at paragraph 19 of his decision that:-

> *All these various dicta show that the general rule is for the trial to take place where the act giving rise to the criminal charge is said to have occurred. It is for the applicant in each case to satisfy the court that good reason exists for a change of venue to be ordered or that to do so would be expedient to the interests of justice. It is therefore important to look carefully at the reasons and grounds that are proffered by an applicant to*

see whether they are sufficient to make a change of venue necessary or desirable.

Analysis and Disposal

[28] The applicant in this case has to fulfil the threshold for a change of venue. That threshold is whether the respondents will receive a fair trial. The applicant has to provide the court with good reasons for the court to exercise its discretion to change the venue. The application before the court is based on three grounds the first of which is that:-

(i) That there is a reasonable likelihood that there will not be a fair trial in the parish of Manchester having regard to the status of the respondents and the nature of the incident.

[29] In this case the influence that was sought to be argued was that the respondents were vice president and president of the Moravian church respectively. Those submissions were supported by the fact that the respondents were born and resided in the parish of Manchester for a number of years. In reviewing the evidence submitted by the applicant in relation to this ground I note that the positions of the respondents concerned the Moravian Church of Jamaica and as such their influence, for want of a better word, would not necessarily be centred in the parish of Manchester. I have also considered the uncontroverted evidence from the respondent Mr. Gardener himself that he has not presided over any church in the parish of Manchester for over 14 years.

[30] Due to the length of time that has passed since the respondent Mr Gardener presided over a church in Manchester then the argument of the applicant is not very convincing. In light of this evidence, I find that except for mere conjecture, there is no evidence placed before the court to support this ground.

[31] This submission about the respondents' influence could be made about any jury not only in Manchester, but in the entire island. One should, however, remember the different safeguards in the jury system which includes not only warnings to

the jury but also pre-emptory challenges, challenges for cause and the fact that the jury can be polled. In the event that the jury cannot be successfully empanelled with all those safe-guards then counsel for the respondents have indicated that they are willing to explore a Judge alone trial.

[32] Ground two of the application states:-

(i) That there is a reasonable likelihood that any potential jury pool in the parish of Manchester and those parishes indigenous to it, would have been contaminated already or will be contaminated due to the influential status of the respondents in light of the pre-trial publicity.

[33] However, it is my observation that the publicity that is referred to by the applicant appears to be island wide as opposed to being centred in the parish of Manchester. The other incidents alluded to regarding the crowds that were present on the first two appearances of the respondents in court is something that should be controlled by the security forces with proper planning and execution.

[34] The fact that there is only one entrance and one exit for all parties to the court would not be unique to this particular case in Manchester. This could not support an application for the change of venue.

[35] In relation to the third ground of the application which states;-

(i) That there is a reasonable likelihood that the witnesses for the Crown may be intimidated if the matter remains in the parish of Manchester.

(ii) I note that the applicant did not provide any evidence to support this ground. The investigating officer spoke of a witness who was persuaded not to give a statement in the matter. However, there is no evidence of the actual witnesses being contacted or intimidated in any manner. The potential witness in question was persuaded by her uncle who is a

Moravian minister. This is not an issue relating to Manchester, but could have related to any parish in Jamaica.

[36] There is, therefore, no evidence that was presented to the court that would support the application for a change of venue and as such this application is dismissed.