

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 36 of 2006

BETWEEN

THE STATE

Appellant

AND

GABRIEL DANIEL A/C 'FRIES'

Respondent

PANEL:

**P.M. Weekes, JA
A. Yorke-Soo Hon, JA
R. Narine, JA**

APPEARANCE:

**Mrs. Joan Honoré-Paul for the Appellant
Messrs. R. Rajcoomar and R. Morgan for the Respondent**

DATED: Thursday July 29th 2010

REASONS

Delivered by P. Weekes, JA

1. The appellant appealed the decision of Charles, J to withdraw a case from the jury on the ground that the prosecution failed to establish a *prima facie* case that the acts of the respondent directly caused or substantially contributed to the cause of death of Lincoln Teesdale (the deceased).

2. The State has appealed the judge's decision pursuant to section 65 (e)(1)(a) of the Supreme Court of Judicature Act Chapter 4:01 as amended by the Administration of Justice (Miscellaneous Provision) Act No.28/1996.

We allowed the appeal and now deliver the reasons for our decision.

3. The deceased died of pulmonary thromboembolism (PTE) due to deep vein thrombosis. The learned judge, in her ruling, found that the prosecution could not establish with certainty that a stab wound inflicted by the respondent was the direct or substantial cause of death. In her reasoning, she found that even though two pre-disposing factors for the formation of PTE were present, namely trauma and surgery, there was insufficient evidence to show that the stab wound constituted trauma in this case. Further, no evidence was led to determine whether presence of marijuana in the deceased's blood contributed in any way to the formation of PTE. There was evidence that the wound was no longer life-threatening after the prescribed treatment and the pathologist in her report indicated that there was a healing wound on the upper posterior (back) pole of the left kidney. The judge found that there was a live issue not answered by the prosecution case i.e. whether the original stab wound was the direct or substantial cause of death.

4. According to the judge, the prosecution failed to establish which of the pre-disposing factors for PTE were the substantial cause of death and also whether the failure

to discern the presence of a blood clot was an independent act which relegated the stab wound to background history. The judge found that any finding as to the cause of death would be speculative and upheld the respondent no-case submission.

The Prosecution Case

5. On 23 July 2003, between 8:30 and 9 p.m., the deceased was in the company of Wendell Teesdale and Michael Forbes sitting on a bench in the yard of one Mr. Dulfie on Teesdale Road. The respondent walked up to the bench and asked the deceased “Tappa what is the scene boy?” The deceased responded “What scene boy?” After the respondent repeated his question the deceased ignored him and started walking towards his house which was located a short distance away. The respondent then held the deceased by his neck, from behind, and the ensuing struggle reached onto Teesdale Road.

6. The respondent subsequently lifted the deceased and dropped him on his back on the roadway. He then stood over the deceased and stabbed him in the chest with a knife. The deceased was taken to the San Fernando General Hospital that evening. He was first seen by Dr. Michelle Hydal Kennedy at 9:45pm. She found that he suffered a deep 3cm laceration at the 6th intercostal space of the left chest wall, decreased expansion of the left chest wall and that his chest was dull to percussion and there was significantly decreased air entry. She made a diagnosis of haemopnuemothorax¹, which is a life threatening condition. She inserted a chest tube and after further monitoring found his vital signs to be stable. In her opinion the procedure would not have taken into consideration his blood clotting.

7. He was next seen by Dr. Kelly Sookoo on 24 July 2003 and diagnosed as having haemopnuemothorax and a possible stomach injury. Instructions were given for placement of a nasogastro tube, a urinary catheter and that he be administered antibiotics, oxygen and intravenous fluids. Dr. Sookoo stated in evidence that the procedure to place the chest tube was a surgical procedure that required local anaesthetic.

¹ This refers to free gas and blood in the pleural cavity of the chest.

8. On 25th July 2003, Dr Sookoo again attended to the deceased, found that he was not improving and ordered a CT Scan of the chest and an abdominal X-ray. On 26th July 2003, he noticed no discernible change.

9. On 27th July 2003, he again requested a CT Scan of the chest and abdomen and asked that observation be continued. The CT Scan was not done that day. The deceased died on 28 July 2003 at hospital.

10. Forensic pathologist, Dr. Eastlyn Mc Donald-Burris, testified that the deceased died from PTE due to deep vein thrombosis. She noted a fresh thrombus or blood clot at the bifurcation of the pulmonary trunk, which is the main artery that takes blood to the lungs. She testified that there are four (4) common pre-disposing factors for PTE: trauma, surgery, obesity and immobilization, also that a person can also develop PTE in the absence of these factors.

11. She did not consider the deceased to be obese and found that the stab wound would be trauma. She did not consider the chest wound occasioned by the placement of the tube to be a factor leading to immobilization but advised that the clinician at the hospital would have been in a better position to say if the chest wound would have left the deceased immobilized. The pathologist opined that the insertion of the chest tube was a minor surgical procedure and was not a pre-disposing factor. She stated that the kidney injury could possibly be as a result of the stab wound.

12. At the close of the prosecution case, it was submitted on behalf of the respondent that the prosecution failed to prove the essential element of causation, that after Dr. Kennedy's treatment, the stab wound sustained by the deceased was no longer life threatening. Further, neither the clinical doctors nor the pathologist gave any evidence that the stab wound was the substantial cause of death, and that although the pathologist ruled out obesity and immobilization, the prosecution did not negative hereditary and unknown factors. The onus was on the prosecution to show that trauma and surgery,

either independently or together caused the death of the deceased. As a consequence, the prosecution failed to establish that PTE developed as a result of the stab wound.

13. The prosecution responded that under the “eggshell” principle, one must take the victim as one finds him, ergo, if the condition for PTE was indeed hereditary, then the respondent was still liable. Based on the evidence, the pathologist indicated that a stab wound can constitute trauma (which is one of the pre-disposing factors for PTE) and this led to the formation of the fatal blood clot.

Ground of Appeal

14. *That the decision of the learned trial judge is erroneous in point of law.*

At the hearing of this matter, counsel for the State argued that the judge erred in three ways. Firstly, she was incorrect to assert that the prosecution had to show that an event was the substantial cause of death. What the prosecution had to show was that the event contributed significantly to the cause of death and counsel relied the case of ***R v Pagett (1983) Crim LR 393 (CA)***.

15. Secondly, the judge erred in removing the issue of causation from the jury, as there was evidence from which it could be reasonably inferred. That acts of the respondent were the cause of death. Counsel submitted that if the judge had found that there was evidence to suggest that causation should be left to the jury, she should have given her appropriate directions in law and the jury would be left to establish the factual link between the respondent’s act and the cause of death. Counsel again relied on ***Pagett***.

16. In ***Pagett*** it was held that it was for the judge to direct the jury with respect to the principle of causation and then leave it to the jury to decide whether or not the relevant causal link had been established. It also held that where it was necessary to direct the jury’s mind to causation, it was enough to direct them simply that in law, the accused’s act need not be the sole cause or even the main cause of the victim’s death, it being enough that the act contributed significantly to that result.

17. The third complaint of the State was that there is no onus on the prosecution to adduce evidence of the treatment administered to the victim at the time he was in the hospital. Counsel submitted that the prosecution was under no duty to elicit evidence of treatment and advanced the case of *R v Mellor (1996) 2 Cr. App. R. 245* in support of this argument. In *Mellor*, the appellant was charged with the murder of a 71 year old man who was taken to hospital after being attacked and sustaining bruises to the eyes, a damaged nose, chest pain and a pain in the shoulder. The immediate cause of death was bronchopneumonia brought on directly by the injuries considered but it was asserted by the defence that failure to administer oxygen in time amounted to negligence or incompetence in the care of the victim at the hospital. Schieman L.J., in dismissing the appeal stated:

“The onus on the Crown is to make the jury sure that the injuries inflicted by the defendant were a significant cause of death. However, the Crown have no onus of establishing that any supervening event was not a significant cause of death or that there was no medical negligence in the deceased’s treatment.”

18. Counsel for the respondent submitted that there was insufficient evidence linking the act of the respondent to the cause of death. He argued that due to the intervention of the first doctor, the stab wound was already in the process of healing by the time he was seen by the second doctor. He also advanced that there was insufficient evidence that the stab wound led to the PTE as there was no definitive answer on whether the chest wound caused the deceased to be immobilized.

19. The law in regard to no case submission in this jurisdiction is well-known and often rehearsed. It is to be found in the seminal case of *Sangit Chaitlal v The State (1985) 39 WIR 295*. Of relevance in *Sangit Chaitlal* is that the court held, inter alia, that where the prosecution fails to elicit sufficient evidence to prove an ingredient of an offence it is the duty of the trial judge to withdraw the case from the jury.

20. While the trial judge did not refer to Sangit Chaitlal in her ruling, she clearly must have had it in mind as she deliberated. She did rely on the authority of Mohammed Zamman v The State (1973) 20 WIR 240, quoting from it as follows:

“Evidence of the cause of death is vital, it cannot be overlooked. It is an essential ingredient in the proof of the offence of Murder. In bringing home a case of Murder, how the deceased died has got to be proved. It has to be proved by either direct or circumstantial evidence that it was the accused who caused his death, or the actions of the accused which caused death”.

and also referred to The State v Sam Ghany, Crim. Ap 50/80.

21. We do not find there to be need to delve into the facts or law in these cases as there is agreement between the parties as to their rationale and applicability. What is joined between them is the application of the law to the facts of this case.

22. With the assistance of counsel on both sides we have perused the evidence surrounding the acts of the respondent and the eventual cause of death of the deceased with the intervening medical treatment.

23. We are of the opinion that there was evidence from which a jury properly directed could draw the reasonable inference that it was the original stab wound inflicted by the respondent that was, if not the direct and sole cause of death, at least a significant contributory factor as per Mellor.

24. It was a question for the jury’s decision whether a sufficient casual link had been established on the evidence after being directed on the relevant principles of law on causation by the judge.

25. In the premises we allowed the appeal, set aside the order of the judge below and directed that the respondent undergo a retrial. A warrant was issued for his arrest.

P. Weekes
Justice of Appeal

A. Yorke-Soo Hon
Justice of Appeal

R. Narine
Justice of Appeal