[1980–87 Gib LR 304]

DEVANEY v. CHICON

SUPREME COURT (Davis, C.J.): May 3rd, 1985

Evidence—competency and compellability—co-accused—co-accused not competent witness for prosecution unless (i) no evidence offered against him and acquitted; (ii) acquitted in separate trial; or (iii) pleads guilty in separate trial

The appellant and two others were charged in the magistrates' court with assault occasioning actual bodily harm, violent behaviour, causing criminal damage and two counts of common assault.

The appellant was charged together with two others who were involved in the same incident. All three pleaded not guilty to the charges against them and agreed to be tried summarily by the Stipendiary Magistrate. The accused were all called as prosecution witnesses, meaning that they were required to answer questions put to them by the prosecutor in examination-in-chief but were not given the opportunity to answer questions put to them in chief by their own counsel. Five witnesses in total, including one of the accused, were called to give evidence against the appellant and he was found guilty of assault occasioning actual bodily harm contrary to s.51 of the Criminal Offences Ordinance (*cap.* 37). His two co-accused were acquitted of all charges against them.

On appeal against conviction, the appellant submitted that (a) the magistrate had erred in law in holding that one accused could be called as a witness for the prosecution to give evidence against his co-accused in a joint trial; (b) the magistrate's error of law constituted a material irregularity within the meaning of s.156(1)(c) of the Criminal Justice Administration Ordinance (*cap.* 36) which prevented the court from dismissing his appeal; (c) in acting as a prosecution witness, he had been unable to give evidence in his defence as, in answering questions put to him by the prosecutor, he had been unable to give evidence in answer to questions put to him by his own counsel; and (d) similarly, his brother, one of the other accused, had been deprived of the opportunity to give evidence in his support.

The respondent submitted that (a) the appellant and the two co-accused had not been hindered by having to give their evidence as prosecution witnesses as the relevant evidence had been adduced just as it would have been had the accused given evidence as accused persons; and (b) the outcome of the trial had not been affected as the magistrate had convicted the applicant purely on the basis of the evidence given by the police

constable who had witnessed the event, as the two co-accused were found to be unreliable witnesses.

Held, allowing the appeal:

The appellant's conviction of assault occasioning actual bodily harm would be quashed as it had been incorrect for the prosecutor to call the three co-accused as prosecution witnesses. A co-accused could only be called as a witness for the prosecution in specific circumstances—if no evidence was offered against him and he was acquitted; if he was acquitted in a separate trial; or if he pleaded guilty in a joint trial. None of these circumstances, however, had arisen here. To deprive the appellant, in acting as a prosecution witness, of the opportunity to give evidence in his defence, was a material irregularity within the meaning of s.156(1)(c) of the Criminal Justice Administration Ordinance (*cap*. 36). This prevented the court from exercising its discretion to dismiss the appeal under the proviso to s.156 as it was unclear whether the appellant would have been convicted had he and his two co-accused been allowed to give evidence in answer to questions put to them by their own counsel (paras. 8–10; paras. 13–14).

Legislation construed:

Criminal Justice Administration Ordinance (Laws of Gibraltar, *cap*. 36), s.156(1): The relevant terms of this sub-section are set out at para. 11.

I. Marrache for the appellant;
Miss J. McGrowther for the Crown.

1 **DAVIS, C.J.:** This is an appeal against the decision of the learned Stipendiary Magistrate given on March 21st, 1984. On March 20th, 1984, the appellant, a lance corporal in the Duke of Wellington's Regiment, the appellant's brother, Michael Devaney, a private in the same regiment and Francis Gonzalez, a taxi-driver, were each charged in the magistrates' court with a variety of offences arising from an incident that took place at about 2 a.m. on December 20th, 1983.

2 The appellant was charged with five counts of (1) assault occasioning actual bodily harm to a taxi-driver called Philip Cross; (2) violent behaviour; (3) common assault of Francis Gonzalez; (4) causing damage to a taxi; and (5) common assault of Philip Cross. Michael Devaney was charged with (1) assault occasioning actual bodily harm; and (2) violent behaviour. Francis Gonzalez was charged with assault occasioning actual bodily harm to Michael Devaney. The three accused pleaded not guilty to all the charges against them and agreed to be tried together summarily by the Stipendiary Magistrate and to have all the counts against each of them tried together.

3 The learned magistrate found the appellant alone guilty on count 1 of the charge against him, namely, assaulting Philip Cross thereby occasioning actual bodily harm contrary to s.51 of the Criminal Offences Ordinance (*cap.* 37), and sentenced him to pay a fine of £50. He acquitted the appellant of the other four counts against him and he acquitted Michael Devaney and Francis Gonzalez altogether. Francis Devaney now appeals against his conviction on the ground that the learned magistrate erred in law in holding that an accused could be called, as a competent witness for the prosecution to give evidence against his co-accused in a joint trial and that his conviction is therefore unsafe and unsatisfactory.

4 What appears to have happened in the trial before the learned magistrate is as follows. The prosecutor called five witnesses: John Flannigan, Philip Cross, Thomas Vella, P.C. Chichon (the respondent) and Police Sgt. Porro. He then proceeded to call the accused, Gonzalez, as a prosecution witness against the two Devaneys, and each of the Devaneys as prosecution witnesses against the accused Gonzalez. This was done with the approval of the learned magistrate and apparently without the objection of counsel, Mr. Lombard, who was representing Gonzalez, or Mr. Marrache (who now appears for the appellant), who was representing the two Devaneys.

5 Mr. Marrache has explained in his address how he had only recently started practice at the Bar in Gibraltar in March 1984 and that he had been informed that this procedure was the practice in Gibraltar. It was only after the trial, having some doubts about the propriety of the procedure adopted, that he formed the view that it was incorrect and lodged the present appeal. I accept this explanation, particularly as it appears that Mr. Lombard, counsel representing the accused, Gonzalez, who had been in practice for considerably longer than Mr. Marrache at the Gibraltar Bar, apparently made no objection to this procedure. In the event, the evidence-in-chief of each of the accused was led by the prosecutor, and Mr. Lombard and Mr. Marrache were given the opportunity to cross-examine each of the accused. I am informed by counsel that the prosecution then closed its case, though this does not appear from the record. Mr. Lombard, for the accused, Gonzalez, then called a witness in Gonzalez's defence and Mr. Marrache, for the two Devaneys, called a witness in their defence.

6 The learned magistrate, in coming to his decision, appears to have found the evidence of the three accused and their witnesses and the evidence of the prosecution witnesses, Cross and Vella, unsatisfactory. He appears to have been satisfied that the present appellant was acting in self-defence and based his conviction of the appellant on the evidence of P.C. Chichon alone, which he clearly appears to have accepted. This is what the learned magistrate said as it appears in the record:

> "I think the only thing to consider is whether Francis Devaney exceeded his right of self-defence. It is possible that Cross could have broken his little finger in the course of the struggle, but I can't run away from the fact that P.C. Chichon actually saw Francis Devaney hit Cross. I think that exceeded the necessary force required for self-defence and I convict."

7 It is, in my view, well-established that the procedure followed in the lower court, whereby the three accused were called as prosecution witnesses, was quite incorrect. Mr. Marrache has drawn my attention to the following passage in *Cross on Evidence*, 5th ed., at 170 (1979): "The general rule is that the accused is not a competent witness for the prosecution in any criminal case." He has also drawn my attention to 1 *Stone's Justices' Manual*, at 530 (1980), where it is stated: "It is a rule of common law that the defendant may not be called as a witness for the prosecution, nor may one co-defendant be called by the prosecution against another co-defendant."

8 A co-defendant may, however, be called as a witness for the prosecution in the following circumstances: (a) if no evidence is offered against him and he is acquitted; (b) if he is acquitted on a separate trial; or (c) if he pleads guilty on a joint trial (Archbold, *Criminal Pleading, Evidence & Practice*, 41st ed., para. 4–279, at 170 (1982); see also *Phipson on Evidence*, 12th ed., para. 1503, at 1500 (1976)). These passages relate to accused charged jointly in the same indictment, but the principle is exactly the same where, as in the present case, three accused, though charged separately, were tried jointly.

9 Each of the accused in this case—the appellant, Michael Devaney and Francis Gonzalez were co-accused. None of the circumstances set out in the passages cited in *Cross* and *Archbold*, enabling any of the accused to be used as prosecution witnesses, had occurred and none of them could therefore be used as a prosecution witness against the other or others. In fact, all three men were called as prosecution witnesses. Insofar as Gonzalez and Michael Devaney are concerned, this is immaterial, as they were both acquitted on all the counts preferred against them. Insofar as the appellant is concerned, however, it meant that he was not able to give evidence in his own defence, as he would have wished, in answer to questions put to him in examination-in-chief by his own counsel acting on his instructions. Similarly, Michael Devaney, whose evidence would no doubt have tended to support that of his brother, the appellant, was also deprived of the opportunity of giving his evidence in answer to questions put to him in-chief by his and his brother's counsel, Mr. Marrache.

10 In my view, this was a material irregularity falling within the scope of s.156(1)(c) of the Criminal Justice Administration Ordinance (*cap.* 36). This, of course, is not quite the point raised in the appellant's notice of

appeal as the ground of appeal, but Mr. Marrache has raised it in his address to me without objection as being a matter that clearly arose from the wrong procedure followed at the trial. Miss McGrowther for the Crown has also dealt with it in her reply, and in the interests of justice it is clearly a matter that I should consider.

11 Section 156(1) of the Criminal Justice Administration Ordinance (*cap*. 36) reads as follows:

> "The Supreme Court upon the hearing of an appeal against conviction shall allow the appeal if it thinks—
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> (a) that the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
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> (b) that the judgment of the magistrates' court should be set aside on the ground of a wrong decision on any question of law; or
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> (c) that on any ground there was a material irregularity in the course of the trial,
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> and in any other case shall dismiss the appeal.
>
> Provided that the Supreme Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred."

12 In Archbold, *Criminal Pleading, Evidence & Practice*, 41st ed., para. 7–46, at 758 (1982), in commenting on the proviso to s.2(1) of the Criminal Appeal Act 1968, which corresponds to s.156(1) of the Criminal Justice Administration Ordinance (*cap*. 36), it is stated as follows:

> "Where there has been an irregularity, the approach of the Court of Appeal to the application of the proviso was stated by Lord Widgery, C.J. in *R.* v. *Pilcher*. . . 'The same point has been made in different language over and over again . . . the court must not apply the proviso unless it is quite clear that in the absence of the irregularity the consequence of the case would have been the same.'"

13 In the present case, the learned magistrate appears to have based his conviction of the appellant on the evidence of P.C. Chichon alone. I am not satisfied, however, that had the appellant and the two other accused been allowed to give their evidence as defendants as they should have done, and not as prosecution witnesses—that is to say, by giving their evidence-in-chief in answer to questions put by their own counsel, instead of to the questions of the prosecutor—the learned magistrate would necessarily have come to the same decision. Miss McGrowther submits

that the appellant and the other two accused appear to have been in no way inhibited by giving their evidence as prosecution witnesses rather than as defendants, and that all their evidence was adduced just as it would have been had they given their evidence-in-chief in answer to questions put by their own counsel and had the prosecutor merely cross-examined. I am by no means satisfied that this is the case. In the circumstances, I am not satisfied that a miscarriage of justice did not occur in this case, and I do not consider that I should exercise my power to dismiss this appeal under the proviso to s.156(1) of the Criminal Justice Administration Ordinance (*cap*. 36).

14 Accordingly the appellant's appeal is allowed. His conviction and sentence are quashed, and I direct that a judgment and order of acquittal be entered and that the fine of £50, if paid, be refunded to the appellant. Furthermore, I consider that the appellant is entitled to the costs of this appeal and, in the exercise of the powers conferred on me by s. 46(2) of the Criminal Justice Administration Ordinance (*cap*. 36), I order that the appellant's taxed costs of this appeal be paid.

Appeal allowed.
