R. v. SANTOS and FIELD

SUPREME COURT (Pizzarello, Ag. C.J.): November 7th, 1997

Evidence—witnesses—late availability—evidence of witness formerly unwilling to attend may be admitted before close of prosecution case if statement disclosed to defence as soon as available and corroborates other witnesses—court may exclude otherwise admissible evidence to ensure fair trial

On the trial of the accused in the Supreme Court, the Crown requested leave to adduce additional evidence contained in a witness statement recently taken from a person present at the scene of the alleged offences. The offences had occurred 18 months before the case came to trial, but the witness had been unwilling to make a statement before, since he was completing military service in Spain and should not, under military law, have been present in Gibraltar at all.

The accused objected to the production of the evidence at this stage and submitted that it should not be admitted since (a) it had not been obtained during the investigation into the offences; (b) it could have been obtained earlier and disclosed to them, allowing them time to investigate the witness; (c) they had been advised on the basis of the evidence and would be prejudiced by the introduction of new evidence; and (d) the witness's recollection of events 18 months earlier was unsupported by a contemporaneous note and would be so defective as to be more prejudicial than probative.

The Crown submitted in reply that (a) it had produced the evidence at the first opportunity, *i.e.* once the witness had completed his service and was willing to attend; (b) the evidence was of particular relevance as it corroborated the evidence of other witnesses; and (c) it was at liberty to give notice of additional evidence at any time before the close of its case and the quality of the evidence was a matter for the court to direct the jury upon.

Held, allowing the evidence to be adduced:

The evidence was *prima facie* admissible and had been produced as soon as was practicable and useful. The absence of a contemporaneous note and the lapse of time since the relevant events was common to many witnesses, and the accused would have the opportunity to cross-examine him as to the accuracy of his recollection. Furthermore, since the witness statement appeared to do no more than corroborate the evidence in other statements, the advice given to the accused should be unaffected by it. Accordingly, the Crown would be permitted to call the witness. However,

it would be undesirable for any further charges to be laid against the accused on the strength of his evidence (page 212, lines 14–38).

Case cited:
(1) *R.* v. *Sang*, [1980] A.C. 402; [1979] 2 All E.R. 1222, considered.

A.A. Trinidad, *Acting Senior Crown Counsel*, and *Ms. S. Davidson* for the Crown;
S.P. Triay for the first defendant;
Ms. M.P.C. Grech for the second defendant.

PIZZARELLO, Ag. C.J.: The prosecution called Mr. Carlos Gil to the stand after having served on the defence notice of additional evidence. The notice was served on the defence at 10 a.m. on the morning of November 6th, 1997. The witness statement had come into the hands of prosecuting counsel 10 minutes earlier, so there was no delay on the part of the prosecution.

The existence of this witness had been known to the police immediately after the incident took place. He was a Spanish national, a relative of Mrs. Howson, and quickly removed himself from the scene because he was doing his military service in Spain and he would have been in trouble with the military authorities were they to find out that he was in Gibraltar, which was out of bounds to him as a serviceman. He has been reluctant to be helpful throughout his military service and the Crown has not endeavoured to obtain a statement from him. Indeed, as recently as November 4th, Mrs. Howson told this court that he was doing his military service and could not come. It appears she was wrong, for Mr. Gil has recently been demobbed and is now willing to make a statement and come to Gibraltar to give evidence, as he is now a civilian and no longer subject to military law. Constable Wood went to Spain on November 5th, 1997 and obtained the statement.

Mr. Triay and Miss Grech submit that the court should not allow him to give evidence on three main grounds: (a) that additional evidence cannot be given except when that evidence was collated during the investigation; (b) that the prosecution had it within their power to obtain the evidence well before now, in which case, therefore (i) the prosecution should have disclosed it and they would have had time to investigate the witness; (ii) the necessary corollary was that since the advice the defendants have received is based on the statements already extant (which does not include Mr. Gil) they will be ill-served as a result, and to allow his evidence would be unfair and prejudicial to them; and (c) that the prejudicial effect outweighs the probative value.

They refer to a couple of passages in *R.* v. *Sang* (1) which are quoted in Archbold, 1 *Criminal Pleading, Evidence & Practice*, 1995 ed., para. 15–416 – 15–417, at 1893. Lord Scarman said there ([1980] A.C. at 451): "The second, and merciful, face of the law is the criminal judge's

discretion to exclude admissible evidence if the strict application of the law would operate unfairly against the accused." The effect of allowing in this evidence is that it is $1\frac{1}{2}$ years old, and has no contemporaneous note to back it up. The witness accepts that he remembers parts and not others and in these circumstances he will give evidence which will be misleading and worse, because it will be given by a witness who could be mistaken when thinking he is not.

In reply Mr. Trinidad submitted that the Crown was always at liberty to give notice of additional evidence at any time before its case is closed and that this evidence is particularly probative because it corroborates the CEPSA witnesses. Of course, the Crown concedes, this may damage the defendants' defence, but that is not what is envisaged in the case of *R.* v. *Sang* as being prejudicial.

In my view, since the prosecution did not have the statement available until November 6th, 1997, the defence cannot complain that they have received it at this late stage, nor do I think their complaint that the prosecution could have done anything about it is justified. I think Mr. Trinidad is quite right to suggest that in this case, until he knew that the witness was willing to come, there was no merit in pursuing the witness in Spain to obtain a statement by way of letters of request or by obtaining a statement, even if it were given voluntarily, which was not the case anyway.

Whether, the evidence being admissible, I should in the exercise of my discretion stop it is somewhat more difficult. "'. . . [T]he discretion is now a general one in the sense that it is to be exercised whenever a judge considers it necessary in order to ensure the accused a fair trial.'" (see Archbold (*op. cit.*, para. 15–417, at 1894), quoting Lord Scarman in *Sang* (1) ([1980] A.C. at 453)). It is not the law that a witness should have made a contemporaneous note of matters before he gives evidence, and the length of time between incident and trial will always make recall difficult, but that is what cross-examination is for. As for the submission relating to advice to clients, that has some force, but when I come to examine the statement it seems to me that it only corroborates the evidence given by the CEPSA ladies and does not materially add to it, so I cannot understand why the advice should be different when taking this witness's statement into account.

May I say that I would be unhappy if further charges in relation to this witness were presented against the defendants at this stage.

Ruling accordingly.
