[2012] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 104/2006

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

DWAYNE BADCHKAM v R

Delano Harrison QC for the applicant

Mrs Nadine Atkinson-Flowers for the Crown

27, 28 February and 16 March 2012

HIBBERT JA (Ag)

[1] The applicant, Dwayne Badchkam, was on 2 June 2006 convicted in the Circuit Court for the parish of Saint Ann, presided over by Daye J, for the murder of Anthony Munroe. On 8 June 2006 he was sentenced to be imprisoned and kept at hard labour for life with the stipulation that he should not be eligible for parole before 13 years. The charge against the applicant arose out of the incident on 19 August 2004 at the Brown's Town market, during which Anthony Munroe was set upon, beaten, slashed and stabbed. He subsequently died of the injuries he received.

[2] At the trial, the prosecution adduced evidence from Stanley Watson and William Green, who were purported eyewitnesses to the incident. They gave evidence of seeing persons chasing the deceased into the market where the injuries were inflicted upon him. Stanley Watson initially did not mention the applicant as one of the persons whom he saw taking part in the attack upon the deceased. He eventually claimed that this was as a result of fear which was induced by threats issued to him. During the course of his evidence, he gave several conflicting accounts relating to the participation of the applicant. William Green stated that he saw the applicant and two other persons chase the deceased into the market. During the chase, the applicant and the two others were armed. He later went into the market where he saw the deceased in a pool of blood.

[3] As a result of the absence from the island of Dr Pyne, who conducted the post-mortem examination on the body of the deceased, the prosecution sought and obtained by virtue of section 31D of the Evidence Act the leave of the court to tender into evidence his post-mortem examination report. Evidence was led from Dr Patrick Wheatle, who was attached to the St Ann medical department and the supervisor of Dr Pyne, in support of the application.

[4] Evidence was also led from Miss Carol Dougal, who identified the body of the deceased; Miss Sheron Brydson, a forensic analyst; Mr Compton Beecher, a

DNA analyst; Sgt Leroy Chambers and Cons. Leroy Ledford, who took part in the investigation.

[5] From this conviction and sentence, he has applied for leave to appeal. Before this court, Mr Harrison QC abandoned the original grounds of appeal which were filed by the applicant himself and sought and obtained leave to argue the following supplementary grounds of appeal:

> "1. (a) The learned trial judge erred in law in permitting the admission of Dr. Pyne's postmortem report into evidence in circumstances that breached the provisions of s.31D of the Evidence Act (pages 50-61).
>
> (b) Alternatively to (a) supra, it is submitted that there was no admissible evidence of Dr. Pyne's expertise by which to ground admissibility of his opinion as to the cause of death and, accordingly, the learned trial judge erred in law in having the doctor's postmortem report received into evidence and expressly inviting the jury to act upon it as evidence (pages 51-52; 207-208; **247-253).**
>
> 2. The learned trial judge erred in law in his failure to direct the jury as to the caution with which they should approach the evidence of the cause of death, having regard to the fact that the relevant doctor Dr. Pyne - had not testified before them. That caution was the more imperative, it is submitted, in that his "**reason to believe that death may have been caused or accelerated by poison"** could only have been clarified by Dr. Pyne himself, testifying at trial (**page 56 line 24 to page 57 line 4;** pages 247-253: emphasis supplied).
>
> 3. The learned trial judge erred in his failure to exercise his discretion to discharge the jury after prosecution witness, Stanley Watson, asserted, while testifying, that his exclusion of the Applicant from participation in the

material murder was due to the fact that his "life was in jeopardy" as a result of threats from persons unnamed (pages 77-78; 80-81; 90-91).

4. The learned trial judge's error complained at **3** above was compounded by the fact that:

   (a) he failed to caution the jury to disabuse their collective mind of the prejudicial matter;

   (b) he exhorted [sic] witness Watson to "**talk that everyone can hear**" (the exceptionable matter more audibly) and

   (c) he contributed significantly to Watson's exceptionable 'talk" by his six-page examination of the witness (pages 90-95: emphasis supplied).

5. The verdict is unreasonable having regard to the evidence."

[6] Mr Harrison QC argued that the learned trial judge erred in admitting into evidence, the post-mortem examination report of Dr Claudius Pyne in respect of the death of Anthony Munroe. He submitted that there was not presented to the court sufficient evidence to prove that Dr Pyne, at the time of the trial, was outside of Jamaica and that it was not reasonably practicable to secure his attendance.

[7] Mr Harrison further challenged the admissibility and use of the post-mortem examination report which was prepared by Dr Pyne. He submitted that there was no evidentiary material to ground Dr Pyne's competence as an expert, qualified to express an opinion as to the cause of death of Anthony Munroe. He submitted that Dr Patrick Wheatle's evidence relating to Dr Pyne's qualification as

an expert constituted hearsay upon hearsay. He further submitted that the learned trial judge in leaving the contents of Dr Pyne's report for the consideration of the jury misdirected them.

[8] Relative to ground two, Mr Harrison argued that in order to ensure fairness to the applicant, the learned trial judge ought to have warned the jury that, as they had not had the benefit of seeing Dr Pyne or hearing his evidence tested in cross-examination, they should take that into consideration when evaluating the reliability of his evidence. He submitted that no such warning was given. He also submitted that in the instant case, such a warning became even more imperative as in the report Dr Pyne gave an opinion as to the probable cause of death and the actual cause of death. This failure on the part of the learned trial judge, he submitted, amounted to a serious misdirection.

[9] In addressing the court relative to ground three, Mr Harrison submitted that the learned trial judge erred when he failed to discharge the jury when Stanley Watson, a witness for the prosecution, said that he had refrained from mentioning the name of the applicant because he was threatened. For this proposition, he relied on the dicta in ***R v Weaver*** [1967] 1 All ER 277. Failure to discharge the jury, he submitted, deprived the applicant of a fair trial.

[10] Treating with ground four, Mr Harrison submitted that even if the learned trial judge rightly exercised his discretion not to discharge the jury, he was obliged to direct the jury to disabuse their minds of the prejudicial evidence of

threats purported to have been issued to Mr Stanley Watson. This, he submitted, the learned trial judge failed to do. Mr Harrison further submitted that the prejudice to the applicant emanated substantially from the learned trial judge's questions to the witness at pages 90 to 95 of the transcript.

[11] Learned counsel for the applicant further submitted that the evidence of Stanley Watson and William Green, on which the prosecution relied heavily, was wholly unreliable. He pointed to the inconsistencies contained in the evidence of each of these witnesses, and further submitted that on the basis of the evidence adduced by the prosecution, the verdict of the jury was unreasonable.

Analysis

[12] Ground one brings into question the correctness of the admission into evidence of the post-mortem examination report of Dr Pyne. The challenge is laid on two bases. The first is that the pre-conditions for admission as laid down in section 31D of the Evidence Act were not met and the second is that there was no evidence sufficient to establish the expertise of Dr Pyne.

[13] Section 31D of the Evidence Act, insofar as it is relevant to this case, states:

> "31D. Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person—
>
> (a)...

(b)...
(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
(d)...
(e)..."

[14] In order to satisfy these provisions the prosecution would be obliged to show a) that direct oral evidence of what is contained in the document would be admissible; b) that Dr Pyne was outside of Jamaica; and c) it was not reasonably practicable to secure his attendance.

[15] The purpose for seeking to have the post-mortem examination report admitted into evidence was undoubtedly to have in evidence the number and extent of the wounds received by the deceased and the cause of his death. This would necessitate receiving the opinion of Dr Pyne, which could only be accepted if he was treated as an expert witness. Evidence of his qualifications would, therefore, be required. Dr Wheatle sought to supply this evidence. He having stated his qualifications (which would qualify him as an expert), stated that he was Dr Pyne's supervisor. He further stated that Dr Pyne was attached to the health department in Alexandria, Saint Ann and was regarded as the medical officer for the district of Alexandria. Additionally, based on his qualifications, he extended certain services including performing post-mortem examinations throughout the parish of Saint Ann. We are of the opinion that this evidence was sufficient to establish Dr Pyne as an expert.

[16] Although there was some evidence that Dr Pyne was outside of Jamaica, there was no evidence to show that it was not reasonably practicable to secure his attendance. These two conditions, as was shown in ***R v Case*** [1991] Crim LR 192, had to be satisfied by the prosecution. Mrs Atkinson-Flowers conceded that the conditions were not met. The learned trial judge therefore erred in admitting the report.

[17] Ground two also related to the admission into evidence of the post-mortem examination report of Dr Pyne. ***Henriques and Carr v R*** [1991] 39 WIR 253 concerned the admission into evidence of the deposition of a doctor who performed a post-mortem examination and who was said to be outside of Jamaica at the time of trial. No evidence was led by the Crown as to where the doctor was or whether it would be practicable for him to return to Jamaica to give evidence within a reasonable time. Lord Jauncey of Tullichettle, after examining the factors which the learned trial judge ought to have taken into consideration in the exercise of his discretion to admit the deposition in evidence, said at page 258 paragraphs c-d:

> "None of these factors appears to have been taken into account by the trial judge in exercising his discretion to admit the deposition in evidence. Their Lordships have no doubt that they should have been. A judge, faced with an application to admit the deposition of an absent witness, should weigh up all the factors relevant to its grant and refusal before reaching a decision, which should seek as far as possible to do justice between the parties and ensure a fair trial."

Later, at paragraphs f-k Lord Jauncey stated:

> "In his summing-up the judge directed the jury that they could disregard the evidence of the doctor if they did not think that it sounded right. However, he did not warn the jury that deposition evidence was not necessarily of the same weight as evidence which they had heard tested before them by cross-examination. Their Lordships consider that this was a regrettable omission. When a judge allows deposition evidence to be admitted, he should as a matter of course warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination and that they must take this into consideration when evaluating the reliability of his evidence."

[18] At page 259 paragraphs a-b Lord Jauncey further stated:

> "Having reached the conclusion that the judge failed to have regard to material factors in exercising his discretion to allow the deposition to be read and failed thereafter to give proper warning to the jury the question arises whether the appellants have suffered prejudice thereby."

After examining the evidence relevant to the cause of death, Lord Jauncey at page 260 stated:

> "All in all their Lordships do not consider that any injustice was done to the appellants by the judge's failure in the two matters above referred to."

[19] In ***R v Michael Barrett*** SCCA No 76/1997, in a judgment delivered on 31 July 1998, Rattray P at page 5 stated:

> "The warnings given in relation to deposition evidence need to be stronger in relation to evidence admitted under this amendment of the Evidence Act, since in deposition evidence the witness has come before the examining Resident Magistrate and an opportunity was offered therefore at that stage for cross-examination. That evidence too would have been given under oath.

> The mere police statement received none of these protections."

[20] In the case before us, the learned trial judge properly directed the jury that they could reject the evidence of Dr Pyne, but failed to give the requisite warning as to how they should assess the reliability of the reports. It is, however, clear from the decisions in ***Henriques and Carr v R*** and ***Michael Barrett***, that what is paramount is that no injustice is done to the applicant. The errors made by the learned trial judge, in our view, caused no injustice to the applicant. There was ample evidence from Samuel Green, Stanley Watson and Detective Sgt. Leroy Chambers of the injuries received by the deceased and from which the cause of death could be inferred.

[21] It is of some significance to note what transpired prior to the admission of Dr Pyne's report. Upon Crown Counsel's indication that she intended to seek to have the post-mortem examination report of Dr Pyne admitted into evidence, Mr Ernest Smith, an attorney of considerable experience, stated:

> "M'Lord, let me say that Dr Pyne who is suppose [sic] to have conducted the post-mortem examination in this case was the medical officer in charge [sic] of the Alexandria Hospital. I personally know that Dr Pyne is no longer in the island. I also know that, I personally also know of his departure too, m'Lord. The fact that I have no objection to the post-mortem being admitted in evidence, as a matter of mere formality, because I'm aware of all the facts concerning Dr Pyne and why he had to go back to Nigeria."

This clearly indicates that, in order to save time and expenses, the legislature may wish to revisit the Evidence Act with a view to enabling the admission of

forensic reports and formal statements without the makers being called as witnesses, if this is agreed to by the prosecution and defence.

[22] At the trial, the witness Stanley Watson gave evidence which was in conflict with his statement to the police, and with the permission of the judge was treated as hostile. In explaining his divergence, he said it was as a result of fear. He made various statements such as:

> "True mi neva want dem hurt mi, that's why I have to go to that way... So mi scared to call nuh name, that's why I work it that way. Dem threaten mi life sey anyhow mi call dem name whey dem a guh duh mi."

He later said:

> "The people dem inside the market seh me must not call this youth name."

These and similar utterances form the basis of the complaint in ground three.

[23] In ***R v Weaver*** [1967] 1 All ER 277, Sachs LJ addressed the issue of whether or not a jury should be discharged after evidence prejudicial to the defendant has been divulged. At page 280 paragraphs G-H he said:

> "...the decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion. When that has been said, it follows, as is repeated time and again, that every case depends on its own facts. As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged."

[24] Mrs Atkinson-Flowers also cited the decision in ***Wesley Patterson v R*** [2010] JMCA Crim 69. In the judgment delivered by Harris JA, the learned judge placed reliance on the passage from ***Weaver*** which is cited above and a passage from ***McClymouth v R*** (1995) 51 WIR 178 where Carey JA at page 194 said:

> "The court will be slow to interfere unless it feels that the applicant would be justified in saying that what occurred was devastating. The court must have regard to what was divulged, whether accidentally or deliberately, to appreciate whether it was perhaps a casual remark, as the court found in ***R v Coughlan*** (1976) 63 Cr App Rep 33, or whether it was so prejudicial as to be not capable of curative action by the trial judge."

[25] At the trial, before he was treated as hostile, Stanley Watson refused to implicate the applicant as being a participant in the attack upon the deceased. After he was treated as hostile, he admitted telling the police that the applicant was one of the attackers and that he then spoke the truth. The mention of threats and fear was by way of explaining his earlier refusal to implicate the applicant. At no time, however, did he say that the applicant was in any way involved in the issuing of threats or putting him in fear. The cases of ***Weaver***, ***Patterson*** and ***McClymouth*** are distinguishable from the instant case. In those cases, evidence was given of misdeeds which were totally unconnected and irrelevant to the issues before the court. In the case under consideration,

the credibility of Stanley Watson was in issue and his reasons for making conflicting statements must, therefore, be relevant and accordingly admissible.

[26] No application was made for the jury to be discharged and we do not believe that "the applicant would be justified in saying that what occurred was devastating". Consequently, we do not think that this court should interfere with the exercise of the trial judge's discretion.

[27] During cross-examination by Mr Smith, the witness Stanley Watson reverted to his previous position that he did not see the applicant take part in an attack upon the deceased. In reviewing the evidence of this witness, the learned trial judge said:

> "What I can say to you is that the lawyer, Mr Smith cross-examined him and he went back to the same first position that is, he didn't see this accused, so he contradicted himself in his testimony in court and you will recall how I say you must treat an inconsistency, discrepancy or contradiction."

The learned judge went on to say:

> "I would say that the witness' evidence is of nil value in determining whether he saw this man but it's a matter for you..."

Nothing, in our view, was said by the witness Stanley Watson which was unfairly prejudicial to the applicant. The judge having directed the jury as he did, there was, in our opinion, no need for any further directions about prejudicial matter.

[28] To intimate that the learned judge exhorted the witness Stanley Watson to "talk that everyone can hear" in order to highlight his evidence of threats and his fear is unwarranted. Throughout the testimony of Stanley Watson, Crown Counsel, defence counsel and the judge urged Stanley Watson to speak up as they were having difficulty hearing him.

[29] To address the complaint made by Mr Harrison that the learned trial judge's interventions at pages 90-95 were to highlight prejudicial material, one needs to examine some of the exchanges between the judge and the witness, Stanley Watson. The following exchanges took place:

Page 91 "**HIS LORDSHIP**: Which one is the truth?

THE WITNESS: The truth is, I never see him, your Honor him come in last after the crowd, I see that one. After the crowd I see that man come inside.

HIS LORDSHIP: Which one?

THE WITNESS: The one that sitting over there.

HIS LORDSHIP: I am not hearing.

THE WITNESS: Him say me have to..."

Page 92 "**HIS LORDSHIP:** We ask you which one is the truth?

THE WITNESS: The people dem inside the market seh me must not call this youth name.

HIS LORDSHIP: Why you telling me about people inside the market say you must not call this youth name. All we asking you what is the truth, did he come in after...

THE WITNESS: Yes, your Honor.

HIS LORDSHIP... or with two men. And, you called the name 'Gorilla' and 'Junior'.

THE WITNESS: Him come after, your Honor, after the crowd."

Page 93 "**HIS LORDSHIP:** And, you say he came in after the twelve?

THE WITNESS: Yes.

HIS LORDSHIP: And, he also came in after the two?

THE WITNESS: Them did gone.

HIS LORDSHIP: But the two things not the same. You said he come in after twelve persons, is that the same thing...

THE WITNESS: He include in the twelve.

HIS LORDSHIP: What about the two other persons?

THE WITNESS: They run through the crowd."

Pages 94-5 "**HIS LORDSHIP:** This is the Court that is hearing the evidence, and we want the [sic] know what is the truth, because you said two different things and the Court would like to know what is the truth.

THE WITNESS: What I see I told him, your Honor.

...

HIS LORDSHIP: You keep mentioning your life is in jeopardy, and you talk about being scared and fearful, and therefore, I am asking you the reason you mentioned that because you think it is affecting you?

THE WITNESS: Yes, your Honor.

HIS LORDSHIP: From telling the full story?

THE WITNESS: Because mi life in ah fear true simple things gwaan."

Mrs Atkinson-Flowers in response to the assertion that the intention of the learned judge, by his examination of Mr Watson, further highlighted "prejudicial" evidence, submitted that all the learned judge was doing was to seek clarity in the witness testimony. Having examined the transcript of the evidence, we accept Mrs Atkinson-Flowers' submission and find no fault with the judge's approach.

[30] In making his submissions in relation to ground five, Mr Harrison focused on the evidence of Samuel Green and Stanley Watson. Although there were several inconsistencies between the evidence given by Samuel Green and the statement which he gave to the police and the deposition taken at the preliminary enquiry, they pertained mainly to his vantage point, what he was doing and how many persons he saw chasing the deceased. The learned trial judge duly pointed them out to the jury and gave them proper directions on how they should treat those inconsistencies.

[31] The trial judge's assessment of Stanley Watson's evidence when he stated; "I would say that the witness' evidence is of nil value in determining whether he saw this man [the applicant]…", was adopted by Mr Harrison as being "wholly reasonable". It is to be noted that this comment related only to

the evidence of identification, and there remained unchallenged, his evidence of seeing the deceased being chased by men with weapons and thereafter seeing the injuries on his body.

[32] Even if the evidence contained in the report of Dr Pyne is discounted, there is, in our view, ample evidence on which a jury, properly directed, could arrive at a verdict adverse to the applicant. There was evidence from Detective Sgt Chambers that the applicant admitted that he stabbed the deceased, albeit in self-defence. Detective Sgt Chambers also gave evidence that at the post-mortem examination he was given a sample of blood which was taken from the deceased. This sample of blood was later taken to the Government Forensic Science Laboratory for analysis and comparison, the result of which is dealt with below.

[33] There was also evidence from Detective Cpl Garfield Ledford that during the course of investigation into the death of Anthony Munroe he went to the home of the applicant. On being told of the nature of the investigation the applicant said; "A him fling pon me car sah". When the applicant was asked for the knife and the clothes that he was wearing, his mother, in his presence, handed over a knife and clothing. These had what appeared to be blood on them.

[34] Mr Compton Beecher, the chief DNA analyst at the University of the West Indies, gave evidence that in 2004 while he was employed at the Government

Forensic Science Laboratory, he conducted tests on the sample of blood from the deceased as well as the clothing and knife obtained from the mother of the applicant. These tests revealed that the blood on the knife and clothing had the same DNA profiles as the sample of blood taken from the deceased.

[35] Based on the reasons stated above, we believe that the application for leave to appeal ought to be refused. The conviction and sentence are affirmed, The sentence imposed should commence on 8 September 2006.