Privy Council Appeal No. 74 of 1995

Linton Berry *Appellant*

v.

(1) The Director of Public Prosecutions and
(2) The Attorney General for Jamaica *Respondents*

(No. 2)

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 26th June 1996 Delivered the 17th October 1996

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Lloyd of Berwick
Lord Hoffmann
Lord Cooke of Thorndon

*[Delivered by **Lord Goff of Chieveley**]*

This appeal from the Court of Appeal of Jamaica was heard by their Lordships on 26th June 1996. At the conclusion of the argument advanced on behalf of the appellant, their Lordships indicated that they did not require to hear the respondents, and that they would humbly advise Her Majesty that the appeal should be dismissed, for reasons which they would deliver later. Their Lordships now set out the reasons for which they reached their decision.

The matter arose as follows. On 22nd March 1988, following a trial before Wolfe J. (as he then was) and a jury, the appellant, Linton Berry, was convicted of the murder of Paulette Zaidie and was sentenced to death. Paulette had been killed by a bullet in the head fired from a revolver at point blank range. There was

no doubt that the revolver belonged to the appellant, and that it was he who had pulled the trigger when she was killed. The case for the prosecution was that the appellant had deliberately killed her. The defence case was that the revolver went off accidentally in the course of a struggle. By their verdict the jury must have rejected the appellant's defence, and concluded that he acted deliberately in killing Paulette.

On 10th November 1989 the Court of Appeal (Carey P. (Ag.), Campbell and Wright JJ.A.) dismissed the appellant's appeal against his conviction, for reasons which were set out in a written judgment delivered on 12th March 1990. However on 15th June 1992 the Privy Council [1992] 2 A.C. 364 allowed the appellant's appeal from that decision, and remitted the case to the Court of Appeal with a direction that the Court should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course they considered proper in the interests of justice.

The matter then came back before the Court of Appeal (Rowe P., Carey and Wright JJ.A.). After hearing argument between 27th and 30th July 1992, the Court announced their decision that there should be a new trial. They gave the reasons for their decision on 21st September 1992.

The appellant then commenced constitutional proceedings, pursuant to section 25(1) of the Constitution of Jamaica, claiming that his rights under sections 13 and 20(1) of the Constitution had been infringed. The essential basis of his complaint was that two of the three judges who comprised the Court of Appeal which decided that there should be a new trial had also sat in the Court of Appeal which dismissed the appellant's appeal against his conviction, and that by reason of their participation in the earlier judgment of the Court there was a reasonable suspicion that the appellant did not receive a fair hearing when the Court of Appeal later decided that there should be a new trial. The gravamen of the complaint was derived from a passage at the end of the judgment delivered by the court when dismissing the appellant's appeal against his conviction, when the Court expressed the opinion that the jury had come to a correct decision on the facts, and that the appellant's version of the shooting was incredible. They concluded the passage by saying that the case against the appellant was a powerful one. In addition it was alleged that the published pronouncement of the Court of Appeal on that occasion prejudiced the appellant's constitutional right to a fair trial. A further issue arose from the submission by the respondents that, by participating in the hearing by the Court of Appeal on the question of retrial without objecting to the composition of the court the appellant waived his right to seek constitutional redress

on that basis. The matter was heard by a Constitutional Court consisting of Theobalds, Harrison and Langrin JJ. and was dismissed by them on 23rd April 1993. An appeal from that decision was dismissed by the Court of Appeal on 20th March 1995. It was from that decision that the appellant appealed to the Privy Council.

Their Lordships turn first to the reasons for which the Board allowed the appellant's appeal from the decision of the Court of Appeal dismissing his appeal against his conviction. The first main reason was that certain written statements made to the police by Paulette's husband, Jimmy Zaidie, and her sister, Daphne Matadial, were not disclosed before or during the trial and were wrongly withheld from the appellant and his advisers. The statements did not come to light until 20th July 1990, and so were not available to the Court of Appeal at the time when they dismissed the appellant's appeal on 10th November 1989, nor when they gave their reasons for so doing on 12th March 1990. A comparison of these statements with the evidence of the two witnesses revealed what Lord Lowry (delivering the judgment of the Board) described as a small but not insignificant number of discrepancies. The second main reason was that important evidence was adduced by the prosecution which had not been foreshadowed in the depositions. The Board held that it was the Crown's clear duty to give warning of that evidence by furnishing the statements in question to the defence, and that the failure to do so was a material irregularity. In addition, the Board held that the trial judge had erred in failing to direct the jury adequately with regard to the appellant's previous good character, and criticised the manner in which he dealt with a problem raised by the jury after they had been deliberating on their verdict for about an hour. These two latter points of criticism were however very much subsidiary to the failure of the prosecution to disclose the statements of Jimmy Zaidie and Daphne Matadial, and their leading evidence which was not foreshadowed in the depositions, which led the Board to conclude that *prima facie* the appellant's conviction ought to be quashed. The Board considered whether the proviso to section 14(1) of the Judicature (Appellate Procedure) Act ought to be applied to uphold the conviction, but decided not to do so although, as Lord Lowry said, "The case against the appellant was indeed a strong one and for that reason their Lordships would not be prepared simply to recommend that an acquittal be ordered". It was on that basis that the Board remitted the case to the Court of Appeal to decide whether to enter a verdict of acquittal or to order a new trial. In so doing, the Board expressly stated it was relying for this purpose on the judicial discretion and experience of the Court of Appeal in Jamaica.

In making that order, the Board no doubt had in mind the principles stated by Lord Diplock in *Reid v. The Queen* [1980] A.C. 343, 349-350 as applicable when an appellate court has to decide whether to order a new trial. In his judgment in that case, Lord Diplock stressed that the interests of justice that are served by the power to order a new trial are the interests of the public in Jamaica that persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technicality. He also stated that the strength of the case presented by the prosecution is always one of the factors to be taken into consideration, but the weight to be attached to it may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of opinion in Jamaica. He provided examples of other factors deserving of consideration, including the seriousness of the offence, and its prevalence; the likely length of the retrial; the ordeal which would be undergone by the accused in having to face a second trial; and the possibility that material evidence tending to support the defence might not be available.

From this it appears that the task which faced the Court of Appeal on remission was to consider a case in which the case against the appellant was recognised as being indeed strong, and on that basis to balance the various considerations in order to decide whether or not, in the interests of justice, a new trial should be ordered. It was because the Court of Appeal of Jamaica was best equipped to perform that balancing operation that the matter was remitted to them to make the decision. Study of the judgment of the Court of Appeal delivered when the court decided to order a new trial shows that this was precisely the duty which they performed, with express reference to the judgment of Lord Diplock in *Reid v. The Queen*.

It is against this background that their Lordships considered the allegation of bias which was advanced against two members of the Court of Appeal by Lord Gifford Q.C. on behalf of the appellant. Their Lordships were grateful to him for his helpful and lucid submission; but they nevertheless concluded that there was no substance in his argument. The test to be applied is whether there was, in the circumstances, a real danger of bias: see *Reg. v. Gough* [1993] A.C. 646. Their Lordships have no doubt that the courts below were right to conclude that there was no such danger. The fact that two members of the court were previously party to a judgment in which strong views were expressed as to the guilt of the appellant in the light of the evidence then before them does not suggest that there was any danger of bias on their part when they came to perform the balancing operation involved in deciding whether or not to order a new trial. It is not to be forgotten that, in jurisdictions in which the Court of Appeal has power to order

a new trial, the court will ordinarily decide whether or not to make such an order at the conclusion of a hearing during which the appellate judges have reviewed the whole course of the trial and may well have formed a view as to the guilt of the defendant; but that does not mean that the court's capacity to exercise an independent and impartial judgment when performing the necessary balancing operation is in any way impaired. Indeed there must be many cases in which appellate courts have ordered a new trial, although not doubting that the defendant was guilty of the crime with which he was charged. The fact that the same court has just heard the appeal against conviction is regarded as advantageous for the purpose of deciding the issue of a new trial if it should arise for decision, rather than disqualifying the court from doing so. Certainly, when the Privy Council remitted the matter to the Court of Appeal in the present case, there was no hint that the same judges should not deal with the issue of a new trial. As to the performance of that function by the Court of Appeal, there is not the slightest reason to believe that the judges of the Court of Appeal were not wholly impartial, as is indeed confirmed by their judgment on the issue of a new trial, in which they can be seen to be weighing the relevant considerations with scrupulous care.

Their Lordships wish to add that, in their opinion, there was no substance in the suggestion that the publication of the opinion expressed at the conclusion of the Court of Appeal's earlier judgment might have prejudiced the fair retrial of the appellant. In any event, the judge at the retrial will no doubt stress to the jury that their duty is to decide the issue of the guilt or innocence of the appellant on the evidence called before them at the retrial. Finally, in view of their Lordships' conclusion that there was no substance in the allegation of bias against the members of the Court of Appeal, it followed that the issue of waiver did not arise for consideration.