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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 84, 85, 86, 87, 88 OF 1996

MOTION

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

MORRIS BORELAND, DONOVAN MULLINGS,
JUNIOR WRIGHT, CLIFTON SHAW & TITUS HENRY
vs. REGINA

C. Dennis Morrison, Q.C., and Jack Hines
for the applicants

Carrington Mahoney and Dawn Eaton for the Crown

June 21, 22 and September 20, 1999

RATTRAY, P:

On the 21st June, 1999, we dismissed the Notice of Motion for leave to adduce fresh evidence and the Governor General has been notified. We give our reasons for so doing now.

By virtue of a reference by the Governor General under section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act, the application has been made to the Court of Appeal to consider fresh evidence contained in affidavits submitted on behalf of the appellants.

The affidavits relied upon were those of one Elizabeth Jemmett and of various attorneys-at-law who represented the applicants in the trial to the effect that they were not aware at the trial that there was an eyewitness named Neville Johnson (whose statement is exhibited to the affidavit of Elizabeth Jemmett) nor were they informed that a statement had been given to the police by the said Neville Johnson.

Elizabeth Jemmett is a solicitor practising with offices in London, England, and who represented the applicants in the preparation of their appeal to the Judicial Committee of the Privy Council. In the course of this preparation, her firm located one Neville Johnson, an eyewitness to the murders of which the applicants were convicted and sentenced. Mr. Johnson purported to have been in the house on Spanish Town Road where the murders were committed on the night of the 15th May, 1993, and to have witnessed all three murders. Indeed, he himself had been shot.

Miss Jemmett obtained an affidavit from Neville Johnson, who had by then gone to live in England, in which he related the breaking into the house in which the murders took place by men armed with guns. Of the four gunmen three were wearing "black balaclavas" and the fourth a "red balaclava". He described having been shot by a man with a "red balaclava" and of hearing shots fired in the house. He could not identify the men because they were masked.

Indeed that very evening when he was at the Kingston Public Hospital he was visited by Police Inspector Thompson of the Hunts Bay Police Station who

asked him if he could identify any of the men at the house where the killing had taken place, but "I said I couldn't. They were all wearing masks." Attending the police station at Mr. Thompson's request, he gave the same information.

That very day a man came to his house and told him, "They'll kill you. You are an eyewitness. I heard this from down Spanish Town Road." The man told Mr. Thompson what he had heard. Mr. Johnson was taken with his children by the police to Caymanas Park Estate where he remained until he left to join his brother in Birmingham, England. His statement to Miss Jemmett, *inter alia*, reads:

"I don't know if the police put together a statement of what I had told them. I had told them what had happened on the evening 15th May, 1993, at Winston's house. I can't read or write. The police never read out anything to me nor did I sign anything. I was not asked to give evidence at any trial. The police knew that I was leaving for England. I left in June, a month after the incident."

Mr. Johnson, however, did sign his name to the affidavit. In fact, Mr. Johnson had given a statement to the police which he did sign, and it is clear that his signature on that statement is the same as his signature on his statement to Miss Jemmett.

Mr. Dennis Morrison, Q.C., for the applicants, has submitted that the statement of Neville Johnson in the possession of the prosecution should have been disclosed to the defence by the prosecution and the failure to do so was a material irregularity. This non-disclosure, taken together with the fresh evidence which would have come to light in the affidavit of Mr. Johnson that all

the men involved in the murder were wearing masks which would have made them unrecognisable, would establish that there was a miscarriage of justice.

As stated by Glidwell, L.J., in *R. v. Ward* (The Weekly Law Reports 30th April, 1993, page 619 at 641):

"It is now settled law, in this court at least, that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed is 'irregularity in the course of the trial' within the meaning of section 2(1)(c)."

The duty on the Crown to disclose statements in its possession which are relevant to the issues in the trial is directed to achieving fairness and impartiality in the administration of justice. This principle in relation to trials in Jamaica was examined by the Judicial Committee of the Privy Council in *Berry (Linton) v. R.* [1992] 41 W.I.R. 244. It is necessary to examine in this case the statement which the witness Neville Johnson had given to Inspector Thompson. If this statement disclosed that the men were masked, if put before a jury by either prosecution or defence it would cast serious doubt on the ability of any witness to identify the applicants as involved in the commission of the murder.

The sole witness in the case as to the identity of the persons involved in the murder was one Nicola Bowers. Her evidence disclosed that present with her in the room at 82½ Spanish Town Road on the fatal night were several persons, including the individuals who were murdered and Neville Johnson, her father's best friend. She witnessed the murders and identified the perpetrators.

In cross-examination (page 148 of the record), defence counsel, Mr. Walters, asked the witness:

"Q. ... Did you also tell my friend Miss Llewellyn that your father and Neville Johnson, O. C. Wells, were sitting on the hassock?

A. Yes, sir."

It is clear that the defence knew that Neville Johnson was present. The witness stated that Neville Johnson was shot and under cross-examination by defence counsel Mr. Davis (page 166 of the record):

"Q. Now Nicola, Neville, you remember Neville, they call him Wells?

A. Wells.

Q. Wells, do you know if Wells knows any of those accused men?"

Miss Llewellyn, counsel for the Crown, then quite properly objected.

"HIS LORDSHIP: ...You ever see Wells with those men, talking to them or anything like that?

WITNESS: No, sir."

DEFENCE COUNSEL MR. DAVIS: "Now, you say on that night, after everything was finished, Neville called out to you?

A. Sir, he called everyone of us by our name."

The statement given to the police by Neville Johnson and the alleged non-disclosure on which this application to adduce fresh evidence rests, was taken by Inspector of Police Ivanhoe Thompson who at the relevant time was the Detective Inspector in charge of crime in the police division in which the murders were committed. He had in the course of the investigations spoken

with Neville Johnson at the Kingston Public Hospital. Inspector Thompson's affidavit stated:

"He (Johnson) did not indicate whether he knew any of the men who shot him. Mr. Johnson said nothing about any of the men wearing mask..."

Subsequently, Mr. Johnson came to the station and gave a statement.

An examination of Mr. Johnson's statement reveals his presence at the house on the night of the murders, his being shot twice in his left buttocks and a description of the man who shot him as being of clear complexion, slimly built and is about 5 feet tall." As a result of his expressed fear for his life, he was taken to safe premises on Caymanas Park Estate. He later migrated to the United Kingdom.

The prosecution before Reckord, J., was conducted by Miss Paula Vannessa Llewellyn who at the time of her affidavit was acting Director of Public Prosecutions. She deponed that:

- (a) she enquired from Detective Inspector Thompson of the whereabouts of Neville Johnson and received information that he was off the island;
- (b) she saw the police statement in the file as well as the statement of Neville Johnson;
- (c) Johnson's statement "did not carry the Crown's case any further" and he did not purport to identify anyone. The statement did not mention anything about mask;
- (d) as far as she could recollect, she did mention the existence of Johnson's statement to the several attorneys-at-law for the applicants;
- (e) when Inspector Ivanhoe Thompson (pages 347-348 of the record) gave evidence at the trial. In

her examination-in-chief of the Inspector she asked as follows:

"Q: You know one Neville Johnson?

A: Not to speak to.

Q: Did you have occasion to speak to Neville Johnson at all?

A: Yes, ma'am.

Q: When?

A: The night of the incident.

Q: Where you saw him?

A: I saw him at K.P.H.

Q: When you saw him at K.P.H., what was his condition? How did he appear to you?

A: He was suffering from gunshot wounds and he was not well.

Q: Did he make a report to you?

A: Yes, ma'am.

Q: On June 3rd, did you cause anything in particular to be taken from Neville Johnson?

A: I cannot recall.

Q: Since that night that you saw Neville Johnson at K.P.H., have you seen him since then?

A: I think I saw him on another occasion.

Q: When?

A: I cannot recall now, ma'am.

Q: Are you able to say if he ever went to the preliminary enquiry?

A: No, ma'am, he has never been there.

Q: Since 1993, subsequent to this incident, have you ever seen Mr. Johnson?

A: No, ma'am.

MR. WELLESLEY (Defence Counsel): If it pleases you, m'Lord. I am wondering where the prosecution is going with Mr. Neville Johnson.

HIS LORDSHIP: Just one minute. You said you think you saw him somewhere else; about how long...

WITNESS: Just a little bit after the incident, sir.

HIS LORDSHIP: And you have not seen him since?

WITNESS: I have not seen him since.

HIS LORDSHIP: You made effort to try and find him?

WITNESS: No, sir.

MR. WELLESLEY: I hope that puts an end to the existence or non-existence of Mr. Neville Johnson."

and,

(f) paragraph 14 of Miss Llewellyn's affidavit reads:

"That if there had been any statement in existence from any person purporting to 'put masks' on the faces of the assailants, I would have in the interest of justice in the spirit of R. v. Linton Berry and as a matter of fairness certainly served it on Defence Counsel as soon as I had come into the matter and also I would have

enlisted the police's aid to find that person. This is how I have always practiced as a prosecuting attorney."

An examination of the statement of Neville Johnson given to the police on the 3rd June, 1993, at the Hunts Bay Station discloses no claim that the men who perpetrated the murders were masked, nor has he stated an ability to identify the perpetrators of the murders.

The question which this court must ask itself is as follows: Was there material in the statement of Neville Johnson given to Inspector Thompson which, if disclosed to the defence, would have been of assistance to the defence and would have buttressed the right of the accused to a fair trial?

In *Reg. v. Maguire* [1992] 1 Q.B. 936 at page 957 Stuart-Smith, L.J., stated:

"The court has now consistently taken the view that a failure to disclose what is known or possessed and which ought to have been disclosed, is an 'irregularity in the course of the trial.' Why there was no disclosure is an irrelevant question, and if it be asked how the irregularity was 'in the course of trial' it can be answered that the duty of disclosure is a continuing one. If categorisation is necessary we are content to categorise a failure to disclose as a 'procedural' irregularity, and because that which was not disclosed ought to have been disclosed, we would expect the irregularity to be one which usually satisfied the adjective 'material'."

In our jurisdiction, Forte, J.A. stated the position as follows in *R. v. Christopher Brown* (unreported) S.C.C.A. 32/96 delivered December 16, 1996, at page 16 of the judgment:

"The test, however was stated in the case of *Linton Berry v. The Queen* (1992) 2 A.C. 364 at page 373H-374A where Lord Lowry in delivering the opinion of the Board of Her Majesty's Privy Council said:

'In relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused but the practice varies between different jurisdictions in the common law world.'

In Jamaica, it has long been settled that if the prosecution has in its possession, material which could assist the defence in its presentation of its case then as a general rule that material ought to be disclosed to the defence."

Quite apart from whether the defence was aware of the existence of the witness Neville Johnson, and it does appear that the defence was so aware, contrary to the affidavits of counsel who represented the applicants at the trial, the material in the possession of the prosecution must be examined to see whether it could assist the defence in the presentation of its case.

It is clear that since Neville Johnson did not identify the persons who committed the offence and, further, since he gave no evidence in his statement in terms of the persons being masked it would not be possible to conclude that his statement could assist the defence in the presentation of their case.

Furthermore, it is also abundantly clear that the defence was aware that Neville Johnson had been present in the room on the night when the murders took place.

In relation to the fresh evidence itself, in view of the statement given to Miss Jemmett by Neville Johnson, looked at as against the statement given to Inspector Thompson by the same person, it would not be possible to conclude that the statement given to Miss Jemmett was credible.

Faced with these circumstances, we concluded that the application to call fresh evidence must fail and we consequently dismissed the motion before us.