Privy Council Appeal No. 36 of 1996

John Campbell *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.
Delivered the 16th December 1996

Present at the hearing:-

Lord Goff of Chieveley
Lord Keith of Kinkel
Lord Mustill
Lord Hoffmann
Lord Clyde

*[Delivered by **Lord Clyde**]*

The appellant was convicted on 1st June 1983 of the murder of his common law wife. She had died on 12th December 1980 as a result of burns sustained in an incident at their home on 2nd December 1980. A preliminary enquiry was held in May 1981 and a trial took place between 30th May and 1st June 1983. The appellant made an application for leave to appeal but that was refused by the Court of Appeal of Jamaica on 13th June 1985. On 20th June 1988 the appellant communicated with the United Nations Human Rights Committee and on 24th March 1993 that Committee expressed the view that he had not had a fair trial. Subsequent to that he has raised the present appeal.

The allegations against the appellant were that there had been a quarrel between him and his wife in their home on the evening of 2nd December 1980, that he had struck her rendering her temporarily unconscious, and that he had then poured kerosene oil on to her, struck a match and set her alight. She had regained consciousness, had run outside and had endeavoured to extinguish the flames. Although the flames were extinguished she was taken

to hospital and died of the burns ten days later. In the room where the incident occurred were the appellant's two sons Wayne and Ralston. Wayne was awake and Ralston was asleep. The key witness in the trial was Wayne who had seen what had happened. It was on his evidence alone that the prosecution's case depended. The evidence which he gave supported the prosecution case and it must have been entirely on that evidence that the jury convicted the appellant.

The appellant has submitted that the trial judge treated Wayne Campbell in an unsympathetic and inconsiderate manner and subjected him to improper pressure. He submits that this affected the reliability of Wayne's evidence. Wayne was only ten years old at the date of the incident and only twelve years old at the time of the trial. He was a witness of crucial importance in the case. He had the close personal interest in having to give evidence in a case where his father was facing a capital charge. In such circumstances it was obviously necessary to treat him with very particular care, to respect his personal involvement, and to understand and allow for his relatively tender age and the emotional effect which both the incident itself and the process of the trial would be expected to have on him. It should be a matter of concern for any judge in a criminal trial where a young child is required to give evidence to take every care that the process of giving evidence is so managed as to secure both that the least damage is done to the child and that the issue in the case is fairly and adequately explored. Corresponding duties lie on the counsel appearing in such a case to treat such a witness with the care and restraint appropriate to his or her age.

Much of the criticism raised in the present case was directed at what the judge had said to Wayne while he was giving evidence. Read in the cold print of the transcript of the proceedings some of his remarks may appear to have been out of keeping with the proper care and restraint which should be observed when dealing with a child witness. But it is not easy for their Lordships to form a confident view of the impact of words spoken by the judge from the written record. The intent and effect of the words used could be vastly different depending on the tone and manner in which they were spoken. Words which in print may at first sight seem to reflect oppression and coercion may, if spoken in a gentle and kindly tone, in fact turn out to be expressions of support, comfort and encouragement to the witness.

At the very start when the judge was satisfying himself that Wayne had sufficient understanding of the nature of an oath to be sworn, Wayne gave no complete audible answer to one of the early questions and the judge told him to speak up. But it is impossible to ascertain from the record whether this was spoken

sharply so as to alarm him or gently so as to encourage him. Having been sworn the Crown attorney told him that it was important to speak loudly. The judge then intervened:-

"HIS LORDSHIP: You play football at school?

A. Yes, sir.

Q. You have to talk loudly as when you run on the football team, and you want the man to pass ball to you, and you shout to him.

A. Yes, sir.

Q. But that is not loud, Wayne. Is that the loudest that you can talk?

A. No, sir.

HIS LORDSHIP: Let me hear the loudest you can talk?

A. (In a very loud voice) Yes, your honour.

HIS LORDSHIP: You have to talk like that man. All right."

Immediately after that comes a passage on which the appellant founds where the Crown attorney suggested that Wayne might sit but the judge refused, observing that he was a youngster and that sitting was for people who were not feeling well. But he adds that "if he is not feeling well then you can tell him". The Crown attorney explained that she had thought that the jury would hear the witness better if he sat, but the judge took the view that they would hear him if he spoke up. The judge's concern was that the witness should be heard and the requirement for that was that Wayne should keep his voice up.

At an early stage of the evidence Wayne was required to identify his father in court and, while the point was not highlighted in the submissions, it was noted that the identification was achieved not simply by Wayne pointing to the accused in the dock but by going down from the witness stand and touching his father. Precisely why this was necessary remains obscure but the matter was made one of suggestion rather than instruction by the judge. He asked if Wayne wanted to go and touch him and Wayne replied in the affirmative before he did so.

Shortly after that he was being asked about the night of 2nd December 1980 and was giving no answer to the questions. The judge then intervened to ask him about his mother, leading round to the question of how she had appeared when Wayne had seen her in hospital. He remained silent at that stage. The judge then reminded him of the oath which he had taken and after that Wayne described the appearance of his mother's skin. He was then asked what caused the skin to become like that and on his failing to answer the judge said "All right - stand up properly, turn round face us - turn around now - good - and listen now and answer the questions asked. Yes?". The question was repeated and again Wayne failed to answer. The judge then intervened and sought to divert the questions along a different line. It would be surprising if the recollection of the sight of his mother's burnt body in the hospital was not distressing to the witness and his failure to answer may well be wholly explained by such distress. What is significant is that the judge did not force the issue of the cause of her condition but diverted the topic to an area where the distress might be less acute. After further questioning however, evidently aimed at establishing the presence of the accused in the house on the evening in question Wayne again became reticent. The judge again intervened with these word "Wayne, let me tell you something, don't let me speak you again about your attitude. You are a youngster twelve years old and I expect to display the utmost of respect to this Court. Very well; you will stand properly, get your hand from your kimbo and you will not turn your back upon me when you're speaking to me and you will speak so that I can hear you". The questioning then continued until the subject of the cause of his mother going to hospital came up again and Wayne remained silent in response to that question. Thereafter an important passage in the transcript occurs:-

"HIS LORDSHIP: All right - we will take - call in the other witnesses - we will take the adjournment until tomorrow. You are living in Kingston at the moment?

A. Yes, sir.

HIS LORDSHIP: All right; you are to come back tomorrow. This youngster is to be kept at a place of safety and be brought back here tomorrow."

The court then adjourned for the day.

Before considering that passage further, it is convenient to continue with the course of Wayne's evidence. When the court re-convened the next day Wayne continued with his evidence stating that his father had returned to the house and his mother

was sleeping. At that stage he was evidently in tears. The judge said:-

> "Wayne, what is wrong with you? What are you crying about? Something frighten you? There is nobody here who is going to do you anything or going to devour you. Although my name is Wolfe I am not going to do you anything so you stop your stupid crying, you see".

Thereafter Wayne continued to refer to a quarrel between his parents leading up to his mother saying something bad and his father striking her. But he was evidently becoming inaudible and the following exchange then occurred:-

"HIS LORDSHIP: Wayne, if you cry and speak we won't be able to hear you so you have to put aside the crying. Listen to what I am saying. You have to put aside the crying and speak up so that you can be heard. Now, during the quarrel what happened?

WITNESS: My mother told him something bad and he hit her down.

HIS LORDSHIP: Tell him what?

WITNESS: Something bad. During the quarrel my mother told my father something bad.

HIS LORDSHIP: Yes.

Q. You said your mother told ...

HIS LORDSHIP: You heard what she said to your father? Let me tell you something, the longer you stay there and cry the longer you will have to stay up there so if you get rid of the crying and answer the questions you won't have to stay up there that long. We have all the time in the world so you can cry as much as you want. We will wait until you finish crying. If it means until next year, the longer you cry the longer you stay there."

At that point it was indicated by the Crown attorney that another and more comfortable court had just become available and the proceedings were broken off so that everyone could move to the other courtroom. The cause of this adjournment had nothing to do with any failure to answer questions on Wayne's part but was simply a matter of the convenience and comfort of the court proceedings. When the trial continued the judge told Wayne "All right, Wayne you are still on your oath. Now, this is a bigger room so it means you will have to speak even louder than you were speaking downstairs. Very well". The evidence then continued. Wayne however, evidently continued to be tearful. At one stage the judge said "Just leave him let him cry as much as he wants. Just leave him alone". And a little later he again addressed the Crown attorney "Wait a minute. You have to wait until he is finished crying so the jury and the shorthand writer can hear what he is saying". At that stage Wayne was describing how his father had taken a match and set his mother ablaze. Thereafter he appears to have become more confident and forthright in what he says so that at one stage in his cross examination the appellant's counsel was prompted to say "All right. Behave yourself. You don't behave like you are at school here. All your crocodile tears won't help you". At which the judge breaks in "Just a minute. Yes".

In all of this the judge's manner may appear from the printed page to have been somewhat robust and insensitive. But as spoken his words may well in fact have been less harsh and more sympathetic than the text might suggest. Moreover what is significant is that even if the judge was putting pressure on the witness to pull himself together and speak out he was not coercing him to give evidence damaging to the accused. His instructions and words of encouragement even though expressed with brusqueness were aimed at securing that whatever the witness had to say was heard so that the ends of justice could be served, a fair trial conducted and the truth spoken.

Particular attention was paid in the argument to the passage already quoted where at the end of the first day the judge declared "This youngster is to be kept at a place of safety and be brought back here tomorrow". It is said by the appellant with the support of an affidavit from Wayne that Wayne was taken to the police headquarters for the night which was likely to and did frighten him. The respondent was not able to affirm or deny that this was historically accurate. The passage which has been quoted in the record however bears analysis. It may well be, as was suggested by the counsel for the respondent, that the question "Are you living in Kingston at the moment?" was addressed not to Wayne but to the other witnesses who had been called into the courtroom. But in any event the order by the judge regarding

Wayne was not an order of detention nor of custody but simply one of securing that he was safely accommodated overnight. The judge was aware that Wayne had travelled a considerable distance to attend the trial and while the judge could have asked if Wayne had any accommodation for the night no serious complaint can be made at his taking the initiative to have arrangements made for his own safety. At the very least it is impossible to spell out of this a deliberate device to compel Wayne to give evidence against the accused.

The Human Rights Committee was particularly concerned about the matter of Wayne spending the night at the police headquarters. Unfortunately the factual basis for the views which the members of that Committee expressed came from the appellant and Wayne without any contradiction. The Committee regretted that they did not have the assistance of the State party but decided to proceed on the facts which the appellant had put before them. They evidently did not even have a transcript of the proceedings which could have enabled them to check the allegations which had been made. The account put before them was that at the start of the trial Wayne:-

> "allegedly told the court that he did not see his father do anything and had no questions to answer. Since Wayne did not alter this statement after several searching questions from both the prosecutor and the judge, the judge allegedly threatened him with detention if he refused to answer. At the end of the first day of the trial, the author's son was in fact brought to the police headquarters and detained overnight. Upon resumption of the trial the next morning, the judge and prosecutor resumed their questioning of the son; the latter, however, still refused to answer, and as a consequence, the judge adjourned. Upon resumption of the trial, the same scenario repeated itself and Wayne allegedly broke down and testified against his father."

The differences between that account and the account already given by their Lordships derived from the transcript are too clear to require detailed reference. It is understandable that on the basis of those allegations of detention and coercion the Committee formed the view which it expressed. If its members had had the opportunity to study the record of the proceedings they would have readily discovered the differences between the recollection of the events as presented to them and the contemporary account of what actually took place.

Wayne gave a statement in June 1987 in which he explained that he had been frightened when he gave his evidence. He set out a different account of the events of 2nd December 1980 from that which he gave in evidence. The appellant argues that the

conduct of the judge which has already been discussed not only was likely to cause unfairness but did in fact cause unfairness since Wayne was too frightened to tell the story which he now tells. It is suggested that he was too frightened to depart from the account he had given at the preliminary hearing. Alternatively and in any event the submission is made that the new evidence should justify a remission to the Court of Appeal to reconsider the case.

But the substance of the new evidence seems rather to contradict the appellant's account than to support it. The appellant's defences were provocation or accident. The new evidence from Wayne is to the effect that the victim deliberately set fire to herself. Wayne's evidence at the trial after he had got into his stride was clear and positive. In at least one striking detail it was supported by the evidence of his brother Ralston. Wayne said that he had woken Ralston and told him "Look how daddy a do me mother". Ralston in his evidence said that after Wayne had woken him Wayne said to him "Look what John do we mother". Further it is less easy to accept the suggestion that Wayne was frightened to depart from what he had said in the preliminary hearing, since he evidently did differ from it on several points, including one point which the judge regarded as being of very considerable importance in the case, namely whether the room was or was not lit by a candle at the time owing to a failure of the electric power. But it is not for their Lordships to investigate and assess the new evidence and given the content of it they are not persuaded that the circumstances are such as to make it appropriate for them to remit the case to the Court of Appeal in Jamaica for that purpose. It should be added that their attention was drawn to the provisions of section 29 of the Judicature (Appellate Jurisdiction) Act which empowers the Governor General when considering any petition for the exercise of Her Majesty's mercy or of any representation made by any other person to refer the case to the Court of Appeal or refer a point to that Court for their opinion. That course is evidently open in Jamaica even after an appeal has been taken to the Privy Council. Reference in that connection was made to two unreported cases *R. v. Roosevelt Edwards* (3rd December 1982) and *R. v. Housen* (5th July 1985).

The question for their Lordships is whether the conduct of the judge was such as to cause a miscarriage of justice. Having examined the detail of the allegations made against him their Lordships are satisfied that while he might have exercised a greater degree of sensitivity in the delicate task of handling a witness of such tender years, the trial was not unfair nor did any miscarriage of justice occur. The judge gave a full and careful summing up of which no criticism has been made to their Lordships. He

explained that it was for the jury to assess Wayne's evidence and he warned them of the imagination which children have and told them that it was for them to decide whether Wayne's evidence was imagination or fact. Indeed he told them that if they found that there had been a candle burning in the house then they could not accept any of Wayne's evidence. Viewing the whole proceedings their Lordships are satisfied that no miscarriage of justice occurred.

The only other issue raised by the appellant is to the effect that he was not allowed to confer with or instruct any lawyer regarding his appeal before the hearing on 13th June 1985. There is at least a question whether this allegation is soundly based on fact. In the normal case he would have been given written notice of the hearing in advance and that would have included the name of his attorney. The appellant however states that the notice was only read to him and the name of the attorney was not read out. The attorney who did act for him has stated that it was his usual practice to visit clients before an appeal hearing and he can see no reason why he would not have visited the appellant in this case but he has no specific recollection in 1996 of the appellant. Even if the appellant did not confer with his attorney before the hearing there is nothing to show that he was prevented from doing so nor that he was not allowed to do so; yet that is the basis of his complaint. But however all that may be, their Lordships are not persuaded that any conference with the attorney would have made any difference. The allegation of unfair conduct on the part of the judge was not specifically raised in the appeal, but if there was substance in it the attorney or the Court of Appeal would almost certainly have noticed it and in any event the point has in their Lordships' view no substance.

Their Lordships have taken time to examine the detail of the allegations raised in this appeal but on the material presented it is clear that no miscarriage of justice has been made out. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.