[2011] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 84/2002

BEFORE: THE HON. MRS JUSTICE HARRIS JA
THE HON. MR JUSTICE DUKHARAN JA
THE HON. MRS JUSTICE MCINTOSH JA

NOEL CAMPBELL v R

Lord Anthony Gifford QC for the appellant

Miss Melissa Simms for the Crown

28 July and 30 September 2011

MCINTOSH JA

[1] This matter was heard on a referral from the Privy Council where, on 21 July 2010 the appellant was granted special leave to appeal his conviction and sentence in the Home Circuit Court, on 10 April 2002, for the offence of murder. His appeal was successful and the case was remitted to the Court of Appeal on 3 November 2010 with directions to quash the conviction and to determine whether or not a retrial should be ordered. At the conclusion of arguments from the attorneys for the appellant and the respondent we reserved our decision with

an undertaking to deliver same on a date early in the ensuing term. We now seek to fulfill that undertaking.

A Brief History

[2] The appellant was first tried in January of 2001 for the murder of Leroy Burnett on 12 September 1999 but the jury failed to reach a verdict and a retrial was ordered. His second trial was in 2002 when on 10 April he was convicted and sentenced to imprisonment for life with a stipulation that he should serve 40 years before he would become eligible for parole. He then applied to the Court of Appeal for leave to appeal his conviction and sentence but he was denied leave both by a single judge of appeal and the full court. Undaunted by these denials, he pursued the path which led to this referral. The single basis upon which their Lordships' Board made the determination in his favour was the absence of a good character direction to the jury by the learned trial judge, a failing which, in the opinion of the Board, was due to the incompetence of defence counsel who had led no evidence to require the learned trial judge to give such a direction. The Board decided that this was sufficient to warrant quashing the appellant's conviction and setting aside the sentence and to require this court to determine whether or not he should stand trial for a third time. A factor for consideration in coming to that determination is the strength of the case against the appellant and with this in mind, we summarize below the case for the prosecution and for the defence.

The Prosecution's Case

[3] The evidence from the prosecution's sole eye witness, Clifford Anglin, was that at about 7:30 am on 12 September 1999, he was in a bar called Coral Reef in the parish of St Catherine where he saw Leroy Burnett sitting on a stool. The appellant (who was known to him as Brem Brem for about 12 years) and three other men were at the front section of the bar while the owner, Jennifer, was behind the counter. Mr Anglin said he heard explosions sounding like gunshots and saw the appellant with a gun in his hand which he pointed at his face. As Mr Anglin backed away from the appellant, he said he heard a sound then noticed that the glass he was holding in his hand had splintered and that he had been shot below his right eye. He heard more explosions and went down on the floor at which time he said he saw that Mr Burnett was lying on the floor. He then saw the appellant go over to Mr Burnett and take something from his person. Mr Anglin said the appellant lived in his community and he knew him well and knew several members of his family.

The Defence

[4] The appellant gave sworn evidence and called four witnesses. He gave his age as 21 years and confirmed that he knew the witness Clifford Anglin from he (the appellant) was a little boy, he said. Mr Anglin was a person whom he respected but he was always drunk and on more than one occasion he assisted him while he was in a state of drunkenness. There was, however, a problem between them in that he knew Mr Anglin's granddaughter apparently more than

Mr Anglin was prepared to tolerate and there had been arguments between them about this. He was not at the Coral Reef bar on Sunday 12 September 1999 and did not shoot and kill Leroy Burnett. Nor did he shoot Mr Anglin. He was at his "sewing shop" he said, from Saturday, (the day before the murder), slept there and was still there on the Sunday. In cross examination he admitted to knowing the bar in question and to going there on more than one occasion to make purchase but maintained that he was not there on the date in question. Of his four witnesses, two were made available to the defence by the prosecution but they were not of assistance to him in his alibi defence. However, the other two witnesses, Herman Lewis and Josephine Campbell, tended to support his defence, Lewis testifying that after hearing sounds akin to a carpenter's hammering he saw a man emerging from the bar with two guns and then made good his escape. Mr Lewis said he knew the appellant well before that morning and that the man with the two guns was not the appellant. Mrs Josephine Campbell, the mother of the appellant testified that he was at his tailoring shop from Saturday to Sunday at about 8:00 am (after the murder) and that she had seen him there on Saturday night when she went to his shop.

Submissions

[5] Lord Gifford commenced his written submissions with an outline highlighting the passage of time from the murder on 12 September 1999 and the subsequent arrest of the appellant in February 2000, to the two trials which took place in January 2001 and April 2002. Then followed the hearing of his application in the

Court of Appeal in October 2003, his application to the Privy Council in November 2009 with leave being granted in July 2010 and the hearing of his appeal before the Board where judgment was delivered in November 2010.

[6] Pursuant to the decision of the Board, he said, the matter was listed before the Court of Appeal, prior to the date of this hearing, first on 14 February, then on 21 and 23 March 2011, all in an effort to determine whether the witnesses were available for a retrial. The witness Clifford Anglin was located, but, up to the date of this hearing, no word had been received regarding the availability of the defence witness, Herman Lewis, Lord Gifford said, in spite of the prosecution's efforts to enlist the assistance of the Commissioner of Police. It was therefore Lord Gifford's submission that the court should proceed with the matter on the footing that Mr Lewis cannot be found. This witness is crucial to the defence, he argued, because of the four witnesses called by the appellant, Mr Lewis was the only one whose evidence tended to support his alibi defence, inasmuch as it was his testimony that the man he saw emerging from the Coral Reef Bar that fateful morning and made good his escape was not the appellant whom he knew well. According to Mr Lewis's evidence, that man was armed with two guns and this, Lord Gifford said, was of significance bearing in mind the evidence of Clifford Anglin that the shooter had removed something from Mr Burnett. This was evidence for the jury's evaluation, counsel said, as it could be inferred that it was a weapon that the shooter had removed from Mr Burnett's

body. At this time, Lord Gifford said, the defence has no means of securing Mr Lewis' attendance.

[7] Lord Gifford referred us to the case of ***Gerald Muirhead v R*** SCCA No. 97/2000, a judgment delivered by this court on 30 July 2009. There were similarities between ***Gerald Muirhead*** and the instant case, he said, in that the prosecution's case had depended on evidence of a sole eye-witness and a retrial had been ordered for similar reasons, namely the conduct of defence counsel and the lack of good character evidence. He submitted that while the court cited the factors outlined by Lord Diplock in ***Reid v R***, (1978) 16 JLR 246, including the length of the delay between the date of the incident and the date of the retrial and any resulting disadvantage to either side as well as the availability of witnesses, the court had ordered a retrial on the prosecution's indication that the witnesses were available. Counsel submitted that in the instant case, the availability of witnesses is a vital consideration and, because this is a defence witness, his unavailability shifts the interests of justice decisively against a retrial.

[8] He sought support from the case of ***Kakis v Republic of Cyprus*** [1978] 2 All ER 634 for his submission that a retrial should not be ordered. In that case it was held that it would be unjust and oppressive to return the appellant to Cyprus "because the witness A on whom the appellant relied on (sic) for his alibi defence was no longer an available and compellable witness in Cyprus and it would detract significantly from the fairness of his trial if he were deprived of his

ability to adduce the evidence of the only independent witness who could speak to it".

[9] Counsel for the Crown submitted that the statutory provision to order a retrial is designed to safeguard the interests of justice "to satisfy a long established and universal thread that underpins all systems, the need for justice to be done and (to) manifestly (be) seen to be done". Miss Simms also referred us to ***Reid v R*** setting out the main factors for consideration in the Board's opinion as:

> "A. The seriousness and prevalence of the offence;
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> B. The expense and length of time involved in a fresh hearing;
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> C. The ordeal suffered by an accused person on trial;
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> D. The length of time that will have elapsed between the offence and the new trial;
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> E. The fact, if it is so, that the evidence which tended to support the defence on the first trial would be available at the new trial;
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> D. The strength of the case presented by the prosecution …"

The Board was careful, she said, to add that this list was not exhaustive.

[10] She accorded separate treatment to each of these factors submitting that in seriousness, murder is perhaps only matched by treason and that the court could take judicial notice of the prevalence of murder in the Jamaican society; that the cost to administer justice, having regard to the expense and length of

time involved in a fresh hearing is "a tightrope which has to be crossed in ensuring that justice is dispensed to all parties"; and that the court should consider the ordeal suffered by an accused on trial along with the loss of the pleasures of life by the victim and the anguish of family and friends left behind and seek to balance the scales of justice.

[11] On the question of the delay between the commission of the offence and the likely fresh hearing of the matter she invited the court to consider the following:

a. **Gerald Muirhead** where the court ordered a retrial, notwithstanding the passage of 12 years between the offence and the order for retrial;

b. **R v Garnett Edwards** SCCA No 63/ 2002, judgment delivered 27 April 2007 where a new trial was ordered after eight years;

c. **R v Dalton Reynolds** SCCA No 41/1997, judgment delivered 25 January 2007 where the court said:

> "The fundamental safeguard contained and guaranteed by the Constitution is fairness of the trial or the appellate proceedings even after delay, however inordinate."

Miss Simms then quite correctly observed that in the instant case a retrial would not be affording the prosecution a second bite of the proverbial cherry but it is the appellant who would benefit from the opportunity to put before the court and jury all relevant aspects of his case including his good character which may assist him to secure a verdict of acquittal.

[12] In response to **Kakis** cited by Lord Gifford, Miss Simms referred us *to* ***R v Mitchell*** SCCA No 74/1996, a judgment of this court delivered on 31 January 2000 where Walker JA stated that a bald assertion that the absence of an alibi witness will result in prejudice to the appellant is not sufficient to result in a retrial not being ordered as there is adequate remedy under the Evidence Act particularly section 31 D. Miss Simms further pointed out that in its judgment the Board had in no way impeached the strength of the prosecution's case. Their Lordships' main concern was the absence of character evidence which the appellant had sworn, in an affidavit, was available at the time of trial. Counsel said that in **Reid v R**, the Board had expressed the view that the interests of justice that is served by the power to order a retrial is "the interest of the public of Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing up to the jury" and this, Miss Simms submitted, is even more keenly applicable, in the instant case, where the blunder was on the part of defence counsel.

The Court's Decision

[13] The power of the court to order a retrial is derived from the provision of section 14(2) of the Judicature (Appellate Jurisdiction) Act which states that:

> "Subject to the provisions of this Act the court shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice

> so require, order a new trial at such time and place as the Court may think fit."

This court has followed with approval the guidelines of the Board in **Reid v R** when seeking to determine whether or not the interests of justice require that a new trial be ordered and we have sought to apply those guidelines to the circumstances of the instant case. We must state at the outset that we consider the seriousness and prevalence of the offence of murder in Jamaica to be beyond argument. The case for the prosecution is strong and as Miss Simms observed, correctly in our view, the judgment of the Privy Council did not suggest otherwise.

[14] The complaints before the Board were that the learned trial judge's direction to the jury on the issue of identification had been inadequate; that there was misrepresentation of the evidence in its recounting in summary form by the learned trial judge; and that there was no direction on good character. The Board reviewed the transcript of the evidence and the summation of the learned trial judge and expressed the opinion that such criticisms as could be made did not lend any real support to a conclusion that the trial was unfair or the verdict unsafe. With regard to the complaint that he failed to address key weaknesses in the identification evidence, for instance, the evidence relating to Mr Anglin's drunkenness at the relevant time and a failure to direct on the possibility of mistakes being made even in recognition cases, in light of Mr Anglin's inability to describe the height of the appellant and a further complaint

about the absence of any identification parade (which the Board was not prepared to entertain), Lord Mance who delivered the opinion of the Board, had this to say at paragraph 31 of the judgment:

> "31. Despite the criticisms that can be made in this area, the Board considers that, after a six-day trial, the jury cannot have been in any doubt that the fundamental issues between the prosecution related to (a) Mr Anglin's truthfulness, bearing in mind such motive as had been canvassed for him to pin the murder on the appellant, and (b) if he was truthful, his reliability, bearing in mind his account of events, the nature of the incident and the possibility of mistake. The judge covered both subjects in his summing up, albeit he did not treat them separately in the manner which would have been desirable. Nonetheless, the Board does not think that such criticisms as can be made lend any real support to a conclusion that the trial was unfair or the verdict unsafe."

Further, at paragraph 34 Lord Mance said "It is not easy on the facts of this case to identify features throwing real doubt on the clarity of Mr Anglin's identification of the appellant in the Coral [Reef] Bar at the critical time, in a context where the appellants' (sic) case was that he was nowhere near the bar that morning".

[15] The Board did not find the criticism that the learned trial judge might have misled the jury on certain aspects of the evidence relating, for instance, to his reference to whether or not there was 'bad blood' between the appellant and the witness Anglin and Mrs Campbell's evidence as to whether there were arguments between them, these being crucial to the question of credibility, to be of such substance as could lead to a conclusion that the trial was unfair or that

the conviction was unsafe. Their Lordships took a different view, however, of the complaint concerning the absence of a good character direction, noting that such a direction would have been relevant on the facts of this case. No complaint was leveled against the learned trial judge in this regard but it was submitted before the Board that this was entirely due to the incompetence of defence counsel.

[16] At paragraph 39 Lord Mance said:

> "Ordinarily, the Board will not entertain a ground of appeal based upon allegations of incompetence of counsel raised for the first time before the Board."

He pointed out that their Lordships were only too aware of how easy it would be for a convicted defendant to invent after the event allegations of incompetence and the practical difficulties of investigating these allegations which really should have been raised in the domestic Court of Appeal.

After reviewing all of the circumstances on this issue Lord Mance said at paragraph 42:

> "42. In these circumstances, the Board feels compelled to conclude that the only plausible explanation of the failure to adduce evidence of good character is defence counsel's incompetence. That being so, the focus moves to the impact of such failure on the trial, rather than an attempt further to rate the incompetence according to some scale of ineptitude: *Teeluck,* para 39. The absence of a good character direction is by no means necessarily fatal. In *Balson* v *The Queen* [2005] UKPC 2, 'the nature and coherence of the circumstantial evidence' 'wholly outweighed' any assistance that such a direction might have given (para 38). In *Brown (Uriah)* v *The Queen* [2005] UKPC 18; [2006] 1 AC 1, the nature of the

> offence charged (motor manslaughter) made such a direction of less significance than with other offences. In *Jagdeo Singh* v *State of Trinidad and Tobago* [2005] UKPC 35; [2006] 1 WLR 146, para 25 the Board said:
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> > 'Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated.'"

And, in the concluding paragraph of the judgment, Lord Mance had this to say:

> "45. There is force in these submissions, but nevertheless on the facts of this case the credibility and reliability of Mr Anglin's identification stood effectively alone against the credibility of the appellant's denial of any involvement. This is a case where the appellant gave sworn evidence. The absence of a good character direction accordingly deprived him of a benefit in precisely the kind of case where such direction must be regarded as being of greatest potential significance. The Board also notes in this connection that at the appellant's first trial, the members of the jury were unable to agree, and that it would appear, on the appellant's evidence, that his good character was at least before them (paras 3 and 37 above). In the result, the Board does not feel able to treat the absence of a good character direction in this case as irrelevant to the safety of the verdict…"

These extracts sufficiently demonstrate the reasoning of the Board in arriving at its decision and they clearly show that the strength of the prosecution's case was not impeached and that the Board's only concern was the absence of evidence of the appellant's good character which was the responsibility of defence counsel.

[17] We considered the submission of Lord Gifford that there was seemingly a disadvantage to the appellant where, on the one hand, the prosecution's sole eyewitness would be available to give viva voce evidence and be cross-examined, affording the jurors the opportunity to assess his demeanour while, on the other hand, the testimony of the witness upon whom the appellant would be relying in support of his alibi defence, may have to be presented on paper if he is not located, but we do not find this to be of sufficient force to militate against an order being made for a retrial and we approve and adopt the words of Walker JA in **Mitchell** (quoted above) as being equally applicable in the circumstances of the instant case.

[18] In our view, the delay between the commission of the offence and the likely fresh hearing of the matter could not be considered inordinate in all the circumstances of this case, so as to preclude an order being made for a new trial. It was clear from the record that the conduct of this matter from its inception up to the refusal of leave in the Court of Appeal took place in a timely manner and that the only real delay was in the filing of the appellant's application to the Privy Council for special leave. Thereafter, things again moved apace and we do not view the passage of time in these circumstances to be oppressive. In our opinion, the interests of justice require that a retrial be ordered bearing in mind particularly the seriousness of the offence and the strength of the prosecution's case. The words of their Lordships' Board in **Reid**

v R bear repeating and we adopt them as entirely applicable to this case especially where the error was on the part of defence counsel:

> "the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury."

The ultimate goal should be sufficient to assuage any ordeal which the appellant may otherwise suffer as, in fact, this retrial is designed to afford him an opportunity to have his case put fully and fairly before a jury of his peers, particularly the opportunity to adduce evidence of his good character which the Privy Council found to have been denied him at his second trial.

[19] Undoubtedly, the availability of witnesses is an important factor for the court's consideration. There was no report on the results of the efforts to locate Mr Herman Lewis, so that it cannot be said with any degree of certainty that he will not be located and available for a retrial. The last word received was that the Commissioner of Police had requested more information concerning Mr Lewis to assist in locating him and Miss Simms was unable to advise the court on the results of those efforts. If, unhappily, he is not located by the scheduled date for a retrial, resort may be had to the provisions of the Evidence Act which were designed to accommodate situations where a witness is unavailable to give viva voce evidence. This will allow full use to be made not only of Mr Lewis' statement to the police but his evidence at the trial both in chief and in cross-

examination. It will thereafter be for the trial judge to give appropriate and full directions to the jurors on how to assess this evidence in arriving at their verdict.

[20] We therefore make the following order, in accordance with the decision of the Privy Council handed down on 3 November 2010:

> The conviction is quashed and the sentence set aside.
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> In the interests of justice a new trial is ordered to take place in the shortest possible time.