Privy Council Appeal No. 21 of 1997

Floyd Howell *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 27th January 1998, Delivered the 11th February 1998

Present at the hearing:-

Lord Browne-Wilkinson
Lord Steyn
Lord Hoffmann
Lord Clyde
Lord Hutton

*[Delivered by **Lord Steyn**]*

At the conclusion of the hearing of this appeal their Lordships announced that, for reasons to be given later, they would humbly advise Her Majesty that all the convictions of murder and the sentence of death in the case of the appellant ought to be quashed. Their Lordships' reasons now follow.

Multiple murders.

On Thursday, 22nd February 1990, gunmen murdered Howard Dennis, the son of Lascelles Dennis Sr. On the night of Saturday, 24th and Sunday, 25th February, the family of the deceased arranged a "nine night", or wake, for the deceased. At about 1.30 a.m. to 2.00 a.m. there were still some 40 people in and about the family home in Seaview Gardens, Kingston, Jamaica. An armed gang of about six or seven arrived and shot seven men. The motive of the gunmen

was to eliminate and scare off witnesses who could testify about the perpetrators of the murder of Howard Dennis.

The Police Investigation.

Not surprisingly, the appalling multiple murders received saturation coverage in the local media. The police were under great pressure to bring the perpetrators to justice. On Tuesday, 6th March 1990, the police took Floyd Howell into custody. The police evidence was that on Thursday, 8th March, Howell made oral admissions, confirmed in a written statement, to the effect that he was present at the scene of the murder but did not shoot anybody. The police charged him with murder. By early May the police suspected that Irving Cox was also involved. On 2nd May 1990 the Jamaica Record carried a photograph of Cox together with a report identifying him as a suspect. Eventually all police witnesses claimed ignorance of the source of this report. On 10th July 1990 the police took Cox into custody. Given his public identification as a suspect Cox refused to stand on an identification parade. On 16th August 1990 two witnesses, Lascelles Dennis Jr. and Howard Johnson attended an "informal" identification parade at a local police station. They allegedly identified Cox as one of the attackers. Cox was also charged with murder.

The accused.

Eventually, five defendants were charged. One was a juvenile and the charges against him were soon abandoned. The Preliminary Examination started in December 1990. At that stage there were four defendants. Two tried to escape and were shot and killed. That left Cox and Howell as the only defendants. They were committed for trial on seven charges of murder.

The trial.

The trial took place during a three week period in October 1993 before Mr. Justice Harrison and a jury. The shape of the case can be stated shortly. The prosecution relied on three eye witnesses who identified Cox as one of the murderous gang. The witnesses were Lascelles Dennis Sr., Lascelles Dennis Jr. and Howard Johnson. The prosecution further relied on an ambiguous statement allegedly made by Cox to the investigating officer after the "informal" identification parade on 16th August 1990. The words

attributed to Cox were "Mi nuh ordinary gunman". Cox made a statement from the dock in which he denied complicity in the murders, presence at the scene, and even knowledge of his accusers. In the case of Howell the judge held a voir dire over two days to determine whether Howell voluntarily made the oral admissions and written statement attributed to him by the police. The judge ruled in favour of the prosecution. The prosecution case against Howell before the jury was based on the written and oral admissions, which he allegedly made on 8th March, as well as evidence from three eye witnesses, who testified as to his participation in the gruesome events. Those witnesses were the same three eye witnesses who testified against Cox. Howell gave oral evidence. He denied making the oral admissions. He testified that he was severely beaten by the police on 6th March and again on 8th March before he signed the written statement. He denied complicity in the murders or presence at the scene. He explained that at the relevant time he was staying with his aunt. She gave evidence in support of his alibi. There was a mass of detailed evidence before the jury. Speeches extended over two days.

The summing up and verdicts.

The judge summed up to the jury for more than three hours. He dealt with the minutiae of the case in great detail. It is necessary to direct attention to one critically important passage in the summing up. The judge told the jury:-

> "You heard also from the police officers who were brought, namely, Inspector Haley, Assistant Commissioner Hibbert and Senior Superintendent Knight in respect of the caution statement that is alleged to have been given by the accused man Howell. Now, the statement was admissible because the court had ruled that in the circumstances in which it was given it was voluntarily given. That is, no violence was used to the accused; he was not induced or promised anything to make the statement; he wasn't put under any situation of oppression; and so the statement was free and voluntary but it is for you to say, still to examine the statement, examine the circumstances under which it was given. Well, you are to decide whether or not it was given by the accused man Howell at all. You will also have to decide if

> given was it free and voluntary and you use those circumstances still to decide what weight and value you would put to the statement."

At the end of his summing up the judge said to the jury:-

> "Please tell me if you wish to go to the jury room to decide on your verdict. You have to discuss and tell me whether you wish to retire."

The jury wished to retire and did so. After a retirement of more than two hours the jury returned verdicts of capital murder on all seven counts against both the defendants. The judge sentenced both the defendants to death.

The proceedings in the Court of Appeal.

Both convicted men appealed to the Court of Appeal. The Court of Appeal allowed the appeal of Cox on all counts. The Court of Appeal described the circumstances under which the "informal" identification parade was held as "far from satisfactory and its probity in great doubt". In dealing with the case against Cox the Court of Appeal further expressed doubt about the police evidence in the light of inconsistencies between the police evidence and lay witnesses who attended the "informal" identification parade. The Court of Appeal allowed the appeal of Howell in part. The context is that the judge had to deal on a submission of no case by Howell's counsel with the argument that there was no proper identification of three of the bodies. The judge rejected this submission. The Court of Appeal held that the judge should have warned the jury that his rejection of the no case submission must not be interpreted to mean that he considered Howell to be guilty. For this reason the Court of Appeal quashed Howell's conviction on three counts. Dealing with the broader issues of the case against Howell the Court of Appeal found two grounds for distinguishing his case from that of Cox, viz. that (1) "Howell unlike Cox lived in the Seaview Gardens community and was well-known to the witnesses over the years" and (2) that the judge "properly admitted" the caution statement. It will be necessary to return to these two distinctions.

An irregularity.

Counsel for Howell relied on the recent decision of the Privy Council in *Mitchell v. The Queen*, delivered on 21st January 1998, for the proposition that a judge, who after a

voir dire found and ruled that a defendant voluntarily made a confession, ought not to inform the jury of his ruling. The reasons for this ruling are fully set out in *Mitchell* and need not be repeated. The procedure adopted in the present case was contrary to the guidance given in *Mitchell*. Counsel for the appellant in the presence of the jury objected to the admission of the oral and written admissions. The judge then told the jury:-

> "... there is a bit of evidence that we need to go in an examination of it to decide whether or not this is evidence you should hear and that decision is to be taken in your absence ..."

The jury were sent out during the voir dire. As explained in *Mitchell* such exchanges ought not to take place in the presence of the jury. But it is on the judge's observations in his summing up that the ground of appeal is principally based. Counsel for the prosecution conceded, as he was bound to do in the circumstances of this case, that the judge's observations constituted a material irregularity. The judge told the jury that he had decided that the statement was voluntarily given and that the defendant was not put under any situation of oppression. He told the jury that he had concluded that "no violence was used to the accused". That meant that he unambiguously conveyed to the jury that he had disbelieved Howell and had accepted the evidence of the police witnesses. In the circumstances of the case against Howell the written statement was of critical importance. If it was voluntarily made there was in reality no escape from the conclusion that Howell was guilty. The jury would therefore probably have understood the position to be that the judge was indicating to them that he was satisfied of Howell's guilt. Their Lordships are however content to summarise the position by saying that the judge's categorical observations would have been likely to undermine Howell's defence in the eyes of the jury, or of some of them. And that damage could not in any way be undone by the formal reminder to the jury "that it is a matter for you". The framework in which the appeal must be considered is therefore the occurrence in the trial of this material irregularity. As in *Mitchell* the test to be applied is whether, if the irregularity had not taken place, the jury would inevitably have come to the same conclusion.

The strength of the case against Howell.

Counsel for the prosecution has argued that the case against Howell was so strong that, even if there had been no irregularity, the jury would inevitably have convicted Howell. First, he described the eye witnesses' evidence as very strong. Secondly he argued that there is no material on which the testimony of the three senior officers, who testified as to the written statement, can be doubted. Thirdly, he argued that, except for the irregularity, the summing up was fair and balanced and that the jury had an adequate opportunity to consider all the defence arguments. Counsel for the prosecution reinforced these submissions with extensive references to the evidence given at trial. Their Lordships will now critically examine the three planks of the prosecution case on the present appeal.

Was the eye witness evidence strong?

The three eye witnesses at trial implicated both Cox and Howell. Cox had a large scar on his cheek. And each of the eye witnesses claimed to have known Cox reasonably well. Nevertheless, it emerged at the trial (1) that each of the eye witnesses made a written statement to the police on 25th February 1990 in which they gave the names and descriptions of members of the murderous gang; and (2) that none of the three eye witnesses mentioned the name of Cox in their statements and none of them provided a description, which could possibly apply to Cox. Making due allowance for the possibility that potential witnesses' fear of reprisals might be an explanation, the failure of the eye witnesses to mention Cox in their initial statements tended to weaken the prosecution case against Cox. That impression is reinforced by the consideration that two of the witnesses (Lascelles Dennis Jr. and Howard Johnson) first identified Cox at an informal identification parade which, as their Lordships will show, raises serious questions about the probity of the police conduct. And one simply does not know when and how Lascelles Sr. first identified Cox. There was therefore some foundation for the argument that the police might have suggested the name of Cox to the eye witnesses. These considerations cannot be ignored when the evidence of the same three eye witnesses against Howell is considered. Lascelles Dennis Sr. gave the most graphic account of the involvement of Howell. He said that Howell shot three of the deceased in his immediate presence. He said he knew Howell well. Nevertheless he did not mention Howell in his

statement given on 25th February. His explanation that he was sleepy when he gave the statement was contradicted by police evidence. Lascelles Dennis Jr. had mentioned Howell in his first statement. But, although he mentioned others in his deposition at the Gun Court, he did not identify Howell in his deposition. He said that he failed to mention Howell because he was nervous. That may be the explanation but at the very least there was a substantial point to be considered by the jury. Howard Johnson expressly said that he recognised Howell and indeed Cox by their voices. Counsel for the prosecution argued that it was implicit in some of his answers that Howard Johnson recognised Howell by his face. That dispute would have been a matter for the jury. But, despite the judge's attempts to clarify the position, Howard Johnson never said that he recognised the face of Howell. His evidence was weak. Ultimately, there was much for the jury to consider in regard to reliability and truthfulness of the evidence of the eye witnesses. Their Lordships are nevertheless satisfied that the judge was right to leave it to the jury to assess the merits and demerits of the eye witness evidence. But, contrary to the submissions on behalf of the prosecution, their Lordships take the view that the eye witness evidence against Howell cannot be described as very strong or even strong. The evidence required critical and anxious consideration by the jury.

Nothing to cast doubt on the confession?

Counsel for the prosecution submitted that there was nothing whatever to raise any doubt about the truthfulness of the three senior police officers who were present when Howell allegedly dictated and signed the statement. The Court of Appeal was worried about aspects of the police evidence. And their Lordships are satisfied that there were matters, revealed by the evidence, which raised troublesome questions about the police evidence. First, the defence were able to argue, given the failure of eye witnesses initially to mention Cox and, in one case, Howell, taken together with the evidence of the "informal" identification parade, that the police may have suggested the names of Cox and Howell to eye witnesses. This point is reinforced by the fact that Lascelles Dennis Sr., who only knew Cox as "Shorty Piece", in his evidence unexpectedly called him "Cox" and when taxed with this curiosity gave an absurd explanation about some other Cox. This suggests that the police may have mentioned the name of Cox to him. This point gave the Court of Appeal some concern. Secondly, there is the

conflict of evidence regarding the "informal" identification parade. The two civilian witnesses, who knew nothing about the proper procedure governing identification parades, said that Inspector Thompson was present. That would have been improper. Inspector Thompson and Sergeant Payne (the latter being involved in arranging the "informal" parade) denied this evidence. Both said that they had lost their diaries. Given the importance of the case this was an odd feature. Like the Court of Appeal their Lordships consider that the veracity of the police evidence on this aspect is in question. If that is so, it tends to undermine the police evidence of events affecting Howell on 6th and 8th March to which Inspector Thompson was an important witness. Thirdly, Inspector Thompson testified that when he took Howell into custody on the morning of 6th March he cautioned him and told him that he had information that Howell was involved in the murders of seven persons in Seaview Gardens. He said that Howell made no statement. Despite the fact that the was the investigating officer Inspector Thompson said that he did not ask Howell any questions. Indeed, the police evidence was that during the next two and a half days no police officers asked Howell any questions. But. on the police evidence, at midday on 8th March Howell volunteered that he wished to make a statement. And this is the context in which he allegedly orally admitted to Inspector Thompson that "I was there but did not fire", a version expanded in the written statement. While volunteered confessions do occur, their Lordships are satisfied that the defence could with some force argue that in the particular circumstances the police evidence, as given, induces an initial sense of incredulity. Taking into account the cumulative effect of these matters their Lordships take the view that there were matters revealed by the evidence which required the jury to give careful consideration to the truthfulness of the police evidence.

Apart from the irregularity was the summing up fair?

Counsel for the prosecution argued, despite the material irregularity, that there was no miscarriage of justice because all the weaknesses in the prosecution were fairly before the jury and, apart from the irregularity, the summing up was fair and balanced. Unfortunately, the position is not so simple. The summing up contained comment which reinforced the impact of the irregularity. First in a long and trenchant passage towards the end of the summing up the judge commented on what he viewed as inherent improbabilities in

Howell's account. Ordinarily, that might have been within the bounds of permissible judicial comment. But here those comments only served to reinforce the judge's irregular observation to the jury that he had ruled "that there was no violence". Secondly, he suggested to the jury, contrary to the evidence, that the credibility of the senior police officer involved was not in issue. The judge said:-

> "Here again is a bit of evidence for you to examine because counsel on both sides were at pain to mention the question of the Assistant Commissioner's integrity and Assistant Commissioner is telling you that no threats or beating were done in his presence; they couldn't do it in his presence. The accused did not complain of being beaten to give any statement and he saw no marks or bruises. He saw none and no complaint was made by the accused man Howell."

The true position is that the counsel for Howell had expressly challenged the veracity of the Assistant Commissioner. The judge's comment struck at the core of the defence case: if the jury accepted the judge's comment it cogently undermined the defence case that he had been beaten. Thirdly, by asking the jury whether they wished to retire the judge conveyed to them the idea that he thought that it was an open and shut case for a conviction of both defendants: *Crosdale v. The Queen* [1995] 1 W.L.R. 864.

The Court of Appeal judgment.

In setting aside Howell's conviction on three counts the Court of Appeal observed that "the specific reference by the trial judge in refusing the no-case submission as to the evidence of what Howell is alleged to have done may have led the jury to believe that the trial judge was accepting the truth of this piece of evidence". If this reasoning is correct, it cannot be restricted to the three counts on which the no-case submission was made. After all, the evidence was relevant to all the charges against Howell. On this basis the Court of Appeal ought to have set aside Howell's convictions on all counts. But their Lordships are not persuaded of the correctness of the stated premise and consider that the case ought to be decided on a broader basis.

The Court of Appeal distinguished the case of Howell from that of Cox on the ground that the eye witnesses knew

Howell well. But each of those witnesses testified that he also knew Cox: Lascelles Dennis Jr. for four or five months; Lascelles Dennis Sr. for five to seven years; and Howard Johnson for about seven years. A detailed perusal of the evidence does not support the distinction which the Court of Appeal made. Moreover, the Court of Appeal was apparently not fully alerted by counsel to all the weaknesses in the eye witness evidence which their Lordships have already described.

Despite voicing concern about parts of the police evidence, the Court of Appeal treated as decisive the alleged written statement of Howell. The Court of Appeal was not aware of the irregularity arising from the trial judge's observation to the jury that he had decided that there was no violence. If the Court of Appeal had been aware of this material irregularity, the Court of Appeal would have had to approach the appeal against Howell quite differently.

The Disposal of the Appeal.

Their Lordships were satisfied that there was a substantial risk that a miscarriage of justice may have occurred.