[2021] JMCA Crim 31

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

SUPREME COURT CRIMINAL APPEAL NO 74/2013

EVON JACK v R

Terrence Williams instructed by John Clarke for the appellant

Mrs Tracy-Ann Robinson and Dwayne Green for the Crown

Written submissions by counsel for the Attorney General

29, 30 July and 4 October 2021

BROOKS P

[1] On 30 July 2021, at the conclusion of the hearing of Mr Evon Jack's application for leave to appeal against his conviction, and appeal against sentence, the court, decided that it was not possible to have a fair review of Mr Jack's conviction. It, therefore, ruled as follows:

> "1. It is declared that the right of the applicant under section 16(7) of the Constitution of Jamaica, to be given a copy of the record of the proceedings made by or on behalf of the court, has been breached.
>
> 2. It is declared that the right of the applicant under section 16(8) of the Constitution of Jamaica, to have his conviction and sentence reviewed by a superior court within a reasonable time has been breached by the excessive delay between his conviction and the hearing of his appeal.

3. a. the application for leave to appeal against conviction is granted and the hearing of the application is treated as the hearing of the appeal;

b. the appeal is allowed;

c. As redress for those breaches of his constitutional rights in these circumstances the convictions are quashed, the sentences are set aside and a judgment and verdict of acquittal is ordered for each count on the indictment."

[2] At that time the court promised to provide reasons for its decision and this is in fulfilment of that promise.

Introduction and grounds of appeal

[3] Mr Jack was convicted on 17 May 2013 for sexual offences against a child. As a result of the convictions, he was sentenced on 14 June 2013 to serve concurrent terms of imprisonment at hard labour, as follows:

a. 15 years for carnal abuse;
b. five years for buggery; and
c. two years for indecent assault.

The offences were said to have been committed on 6 May 2011.

[4] Mr Jack applied for leave to appeal against his convictions and sentences. A transcript of the trial judge's summation to the jury was delivered to this court in November 2019. A single judge of appeal reviewed the transcript and refused Mr Jack's application for leave to appeal against convictions. The learned single judge of appeal, however, granted him leave to appeal against his sentences.

[5] As was his right, Mr Jack renewed his application for leave to appeal against his conviction. His originally proposed grounds of appeal against his conviction were:

"(1) **Misidentity by the Witness**: - That the prosecution witnesses wrongfully identified me as the person or amoung [sic] any persons who committed the alleged crime.
(2) **Unfair Trial**: - That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me lack facts and credibility thus rendering the verdict unsafe in the circumstances.
(3) **Lack of Evidence**: - That the prosecution failed to present to the [jury] any 'concrete' piece of evidence material, forensic, DNA or scientific evidence to link me to the alleged crime.
(4) **Miscarriage of Justice**: - That the Court wrongfully convict [sic] me for a crime I knew nothing about." (Emphasis and underlining as in original)

[6] Over eight years after his conviction, the transcript of the evidence, which was adduced at his trial, has not been produced. All that has been produced to this court, as emanating from the trial, is the transcript of the trial judge's summation to the jury.

[7] As a result of the failure to produce that transcript, Mr Jack, in his renewed application, has supplemented his original proposed grounds of appeal with other grounds, which he sought leave to argue. Those supplemental grounds complain about the fairness of the appellate process, and breaches of his constitutional right to a review of his conviction within a reasonable time.

[8] During the course of the application for leave to appeal, Mr Jack also sought leave for permission to adduce his affidavit, filed on 30 April 2021, as fresh evidence, before the court. The court granted the application and considered the affidavit, except for certain portions, which, for various reasons, were ruled inappropriate for these purposes.

The prosecution's case

[9] In light of the decision that the court has made in this case, it is unnecessary to provide more than a broad outline of the prosecution's case against Mr Jack.

[10] The child's evidence, as gleaned from the summation, is that on 6 May 2011, at about 10:00 pm, she went to the bathroom of the house, in which she lived with her mother, to use the toilet. While there, Mr Jack, who lives in the same yard, approached her and spoke to her. She walked out of the bathroom but he pulled her back in, turned off the light and assaulted her. When he was finished, he told her not to tell anyone, for if she did, he would go to prison and she would have to go to "Council". The following day he spoke to her in the yard outside the house and asked her if she wanted to do it again. He also asked her if she had told anyone.

[11] On 11 May 2011, she spoke to her guidance counsellor at school. As a result of that discussion the child's mother was called into the school. Both the mother and the guidance counsellor gave evidence as to what the child said to each of them, although there is some uncertainty as to whether the reports were made on separate occasions. The evidence was admitted on the basis that the child's statements to them constituted a recent complaint.

[12] There were some discrepancies and inconsistencies in the prosecution's case that would have had to have been carefully assessed by the jury.

The case for the defence

[13] Mr Jack gave an unsworn statement in which he denied interfering with the child. He said that he went home that evening, gave a hot dog to the child, and two to her mother, cooked dog food, and left the premises. He said that he did not return home until 11:00 pm. He called a witness to testify as to his good character. The child's mother also said, in evidence, that Mr Jack was kind.

The delay in the hearing of the appeal

[14] The delay in having the appeal heard was not restricted to issues with the record of the evidence. The transcript of the summation also had difficulties. The summation that was produced is said to be a combination of the court reporter's notes as well as

some notes from the trial judge's notebook, because of deficiencies in the former. The transcript of the evidence at the trial has not been delivered because the court reporter who took those notes left the service without producing them. There were also technical difficulties in recovering the material from the recording media. The full transcript will never be available.

The submissions

[15] Mr Williams, appearing in this court for Mr Jack, supplemented those proposed grounds of appeal with the complaints that the delay in having Mr Jack's appeal heard, and the failure to produce the transcript of the evidence adduced at the trial, amounts to an abuse of the process of this court. That abuse, Mr Williams submitted also resulted in a breach of Mr Jack's constitutional right to a review of his conviction within a reasonable time. Learned counsel submitted that the absence of the transcript of the evidence prevents this court from conducting a fair assessment of Mr Jack's conviction. The only appropriate remedy for the constitutional breaches and the abuse of process, Mr Williams urged, is to quash the convictions and sentences and to enter a judgment and verdict of acquittal.

[16] Mrs Robinson, for the Crown, argued that the transcript of the trial judge's summation provides a sufficient record to enable this court to deliberate and decide on the validity of Mr Jack's conviction. The transcript, learned counsel submitted, shows a careful summation, which accurately identified the relevant issues for the jury, and correctly communicated to the jury the relevant law relating to each of those issues. Those issues included, learned counsel submitted, identification, credibility, recent complaint, discrepancies, inconsistencies, alibi and good character. Mrs Robinson contended that the sentence for carnal abuse was longer than it should properly have been, but argued that the conviction should not be disturbed.

[17] The court had the benefit of written submissions from the Attorney General, who was not able to have counsel appear at the hearing of the application for leave to appeal. The Attorney General argued that this court is not the correct forum for treating

with the issue of redress for breaches of constitutional rights. The appropriate procedure, the submissions assert, is an application to the Supreme Court, pursuant to section 19(1) of the Constitution. Additionally, the submissions continued, in the event that the court found that there was inordinate delay, quashing the conviction is not the appropriate remedy.

The analysis

[18] The essential backdrop to the analysis of Mr Jack's complaints is a reference to the subsections (1), (7) and (8) of section 16 of the Constitution of Jamaica. Section 16 is part of the chapter of the Constitution called, "the Charter of Fundamental Rights and Freedoms" ('the Charter').

[19] Section 16(1) of the Charter speaks to the right to a hearing within a reasonable time. It states:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The term "hearing" has been accepted as incorporating, not only trials, but also post-conviction proceedings. That interpretation was established even before the promulgation of the Charter. The Privy Council, in **Tapper v Director of Public Prosecutions of Jamaica** [2012] UKPC 26; [2012] 1 WLR 2712 ('**Tapper v DPP'**), endorsed that position, saying at paragraph 9 of its judgment:

> "…the Court of Appeal [of Jamaica] accepted, and there is no dispute, that [the right to a fair hearing within a reasonable time by an independent and impartial court established by law] extends to post-conviction delay."

The subsequent promulgation of the Charter does not affect that principle. There is no doubt, therefore, that Mr Jack was, and is, constitutionally entitled to have his appeal heard within a reasonable time.

[20] Subsection (7) addresses an appellant's right to have, within a reasonable time, a copy of the record of his trial. The subsection states:

> "An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court."

There is, similarly, no doubt that Mr Jack's entitlement to this constitutional right has also been breached. The six-year delay in the production of the record of the summation, as well as the failure to provide the transcript of the evidence, are ample testimony of that breach.

[21] The next provision is subsection (8). It addresses the right to the hearing of an appeal from a conviction. It states:

> "Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

The provision does not specifically include a reference to a time period, but it would be unarguable, considering the requirement of a "reasonable time" in subsection (1), quoted above, and its applications to appeals, that subsection (8) does not incorporate the element of a reasonable time for the hearing of an appeal. The inherent interrelationship between subsections (1) and (8), given the length of the delay in this case, necessarily means that the "reasonable time" aspect of the right conferred by subsection (8), has not been afforded to Mr Jack.

[22] An issue in this case is whether the failures which have led to the breaches of Mr Jack's constitutional rights, mentioned above, also prevent his appeal from being properly considered. The determination of that issue will require an analysis of the grounds of appeal.

[23] Allied to the issue of the breach of Mr Jack's constitutional rights, mentioned above, is Mr Jack's complaint that there has been an abuse of the process of this court in respect of his case. Rules 3.7, 3.8 and 3.9 of the Court of Appeal Rules ('the CAR') speak to the material to be placed before this court in criminal cases.

[24] Rule 3.7 of the CAR requires, among other things, the "notes of any particular part of evidence relied on as a ground of appeal" (rule 3.7(1)(c)), "any further notes of evidence which the registrar may direct to be included" (rule 3.7(1)(d)), and "the summing up or directions of the judge in the court below" (rule 3.7(1)(e)), to be provided to the court. Rule 3.7(6) stipulates that:

> "Either party may apply to the court or a single judge for a direction that all the notes of evidence be supplied to the court and to the Director [of] Public Prosecutions except for appeals from the Resident Magistrate's Court in which event the Judicature (Resident Magistrates) Act applies."

[25] Rule 3.8(2) of the CAR requires the registrar of the court below to supply "a typewritten transcript of the whole, or such part as the registrar [of this court] may direct, of the shorthand note taken of the trial proceedings appealed".

[26] Rule 3.9(1) of the CAR requires for the use of the court, the following documents from the judge of the court below:

> "(a) a written report giving his opinion upon the case either generally or upon any point arising in the appeal; and/or
>
> (b) a certified copy of the whole or any part of his or her notes of the trial."

[27] Whereas, in this case, the registrar of this court requested the transcript of the summation and of the evidence taken at the trial, it has not been the practice of the registrar, in any case, to request the documents referred to in rule 3.9, and neither of those items were provided, for the purposes of this appeal.

[28] As in the case of the breaches of Mr Jack's constitutional rights, it must be determined whether the failure to comply with these rules resulted in a miscarriage of justice.

[29] Before assessing the details of this case, however, it would be helpful to determine how this situation has been previously handled. Unfortunately, the partial absence of a transcript has occurred before.

[30] In **R v Parker** (1966) 9 JLR 498, (1966) 10 WIR 85, Mr Parker was convicted on 10 March 1966. On 14 June 1966, this court was informed that a portion of the notes of the summation was also unavailable. Later it was informed that a portion of the notes of the evidence was unavailable; both sets of notes having been lost by the shorthand writer. The court, on 4 October 1966, taking the approach of the Federal Supreme Court of the West Indies in **Police Commissioner v Springer** (1962) 4 WIR 286, quashed Mr Parker's conviction and entered a verdict of acquittal. The court said, as part of its concise judgment (page 499 of the former report):

> "[Mr Parker] is entitled to have his application [for leave to appeal] considered by the court on the basis of the full transcript of the evidence, if the court requires it, and of the full summing-up by the trial judge. Since this is not available, the court has no alternative but to allow the appeal and set aside the conviction and quash the sentence."

The court refused to order a retrial, partly because Mr Parker had "been in prison awaiting the determination of his application for leave to appeal for over six months", and partly because it had "no way of determining whether the evidence against him was so convincing that the interests of justice require a new trial".

[31] The absence of a portion of the transcript will not always result in the conviction being overturned. In **R v Cecil Stewart** (1967) 10 JLR 222, Mr Stewart was convicted on 1 February 1967. The shorthand writer in the case "had failed to complete the typewritten transcript of the summing-up and of the evidence too". On 24 July 1967,

this court adjourned the case and requested the trial judge "to furnish a report giving his opinion on the case and his notes of the trial". Those were provided, and on 27 October 1967, the appeal was heard. The court found that the situation was "entirely different" from that in **R v Parker**. It decided that it had sufficient information to hear and consider an appeal. It dismissed the appeal, affirmed the convictions and sentences, but, in light of the "considerable" delay in hearing the appeal, it ordered that Stewart's sentence should be reckoned to run from 1 April 1967.

[32] **Sylvester Stewart v R** [2017] JMCA Crim 4 was an appeal from the decision of a resident magistrate (as the judicial officer was then called). When Mr Sylvester Stewart's case first came on for hearing, this court adjourned it in order to allow an opportunity to secure the notes of evidence. The attempts were futile, and the court found that it would "have been hard pressed had it been required to give any decision based on the merits of the case" (paragraph [5]). Although it found that there was no proper appeal before it, the court noted that the "the absence of the notes, where no fault for their non-production could be laid at the feet of the appellant or applicant, could possibly result in a different outcome, depending on the circumstances" (paragraph [16]).

[33] Finally, in **Delevan Smith and others v R** [2018] JMCA Crim 3, a portion of the transcript of the evidence was unavailable because of the absence of the court reporters, when that evidence was taken. The trial judge's notes of the relevant evidence were also not available. They were not located, despite searches having been made for them. This court used the transcript of the rest of the evidence and that of the summation in order to hear and determine the appeal. It considered, that bearing in mind the circumstances of that case, which was a judge-alone trial, in which:

a. the main issue was the identification of the perpetrators of a robbery;

b. the alleged robbers were caught a very short time after the commission of the offence; and

c. the directions of the trial judge to himself being unimpeachable,

it could dismiss the appeal and affirm the convictions and sentences.

[34] This review of the previously decided cases, on this point, in this jurisdiction, shows that each case will be decided on its own facts. The procedural circumstances of this case will now be considered. It must first be noted that this case was first before this court on 7 June 2021, when it could not be heard. It was set for hearing as quickly as possible because of the length of time that Mr Jack has been in prison, awaiting the hearing of his application for leave to appeal against his conviction. The court at that time directed the registrar of this court to request the judge's notes of evidence of the proceedings at the trial. They were not produced.

[35] The difference in the period between conviction and hearing, in the cases of **R v Parker** and **R v Cecil Stewart**, on the one hand, and this case, on the other, is striking. The delay in the older cases is a matter of several months while the delay in this case is one of eight years.

[36] The issues involved in this case required sight of the transcript of the evidence to determine if the learned trial judge was:

a. accurate in recounting the evidence generally and particularly in respect of the issue of penetration;
b. correct in permitting the recent complaint into evidence; and
c. accurate in identifying the various instances of discrepancy and inconsistency.

[37] Mr Williams sought to argue that the issue of identification should also be included in the list of items that required sight of the transcript. That submission may have some merit in that the learned trial judge's directions to the jury (the **Turnbull** directions, based on **R v Turnbull and others** [1976] 3 All ER 549), on the issue of

identification of the person carrying out the illegal acts, were deficient. The learned trial judge did not inform the jury of the necessity to analyse the circumstances (lighting, distance, length of time etc) of the opportunity to observe the features of the perpetrator. She did, however, recount, for the jury, the evidence of the child's knowledge of Mr Jack for her entire life; the fact that she would see and speak to him daily; and the interaction between Mr Jack and the child, on the day following the incident. Depending of the strength of the evidence, a reasonable jury, despite the flaw in the direction, would have had no difficulty with agreeing on who the child's attacker was. The point need not be decided.

[38] The evidence of penetration, as recounted by the learned trial judge, was such, however, that it was necessary to have reference to the transcript of the evidence given by the child. The learned trial judge's summation in respect of this evidence is set out at page 24 of the transcript of the summation:

> "…He pulled down her pants, pulled his zipper, told her to bend over and she did and he inserted his penis in her bottom. He then pushed his penis in her vagina and it was not going in…."

Although it was for the jury to decide if there was penetration, this summation of the evidence does not provide the detail on which, a reasonable jury, properly directed could be sure that there was penile penetration of either the child's anus, or her vagina.

[39] The issue of the recent complaint is another area that required sight of the transcript of the evidence in order to determine whether that complaint was properly admitted into evidence, or at least by both the child's mother and her school's guidance counsellor. There is, as mentioned above, uncertainty as to whether the child made a complaint to the guidance counsellor before the mother was called to the school. If a relevant complaint was made, that would have been the complaint that qualified as a recent complaint since it would have been the one made on the "first opportunity". The report made to the mother, thereafter, would not have been properly admissible.

[40] In the absence of the transcript no proper review can be made of this aspect of Mr Jack's complaint of an unfair trial.

[41] There were several areas of discrepancy and inconsistency, which the learned trial judge brought to the attention of the jury. Among them were:

a. the absence from the child's statement to the police of the various complaints of indecent assault, on which the prosecution relied for that count of the indictment;
b. the fact that the doctor, who examined the child, pursuant to the complaint, only examined her in relation to a case of rape;
c. the child's mother's testimony denying that Mr Jack came home with hot dogs on the evening of the incident, when she had said, in her witness statement to the police that he had done so;
d. the absence from the guidance counsellor's witness statement to the police that she went to the child's house; and
e. differences between the child's evidence and her mother's as to whether the bathroom door was defective.

[42] The accuracy, or not, of the directions on these important areas of the evidence cannot be tested in the absence of the transcript. The fact that this case depended heavily on the credibility of the witnesses, it is important that a review of the trial should allow examination of the evidence of the witnesses.

[43] Those deficiencies, combined with the facts that:

a. the transcript of the evidence will never be available; and
b. Mr Jack has already spent eight years in prison,

result in a situation that calls into consideration the issue of redress for a breach of the constitutional right to an appeal within a reasonable time.

Redress for breaches of constitutional rights

[44] Redress for breaches of constitutional rights may take a number of forms, ranging from a public acknowledgment of the breach to a quashing of the conviction. Public acknowledgment of the breach, reduction of the sentences and quashing of the convictions are remedies that this court can grant, in appropriate circumstances, without the appellants having to apply to the Supreme Court, pursuant to section 19 of the Constitution. This court has previously granted redress for delays in the hearing of appeals. It reduced the respective sentences in **Tapper v DPP**, in **Techla Simpson v R** [2019] JMCA Crim 37 and in **Alistair McDonald v R** [2020] JMCA Crim 38. In all those cases, however, it was possible to hear the respective appeals.

[45] In **Tapper v DPP**, Lord Carnwath of Notting Hill JSC, made it clear that quashing a conviction would not be a normal remedy for a long, even extreme, case of delay in the hearing of an appeal. In delivering the judgment of the Privy Council, he explained when it would be appropriate to take the extreme step of quashing a conviction for a breach of the constitutional right to have an appeal heard within a reasonable time. Their Lordships, at paragraph 26, approved a statement from the judgment of the House of Lords in **Attorney General's reference (No 2 of 2001)** [2004] 2 AC 72. The relevant portion of **Attorney General's reference**, states:

> "24 If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's [Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 of England] right under Article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established....**If the**

> **breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction**. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.
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> 25 The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. **There may well be cases (of which *Darmalingum v The State* [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Tauranga District Court* [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue.** It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right." (Italics as in original, emphasis supplied)

[46] In applying the requirement of fairness, which is highlighted in that extract, it must be said that the deficiencies in this case make it impossible to afford Mr Jack a fair review of his trial. Further, without the full transcript, the court cannot determine whether the evidence against Mr Jack demands that, in the interests of justice, there should be a retrial. The length of time that has elapsed would also militate against ordering a retrial. Accordingly, a retrial was not considered to be appropriate. The

appropriate remedy to adequately provide redress to Mr Jack for the breach of his constitutional rights was to have quashed his conviction.

Summary and conclusion

[47] This case, as Mr Williams continuously stressed, is not just a case of delay, but that delay is combined with the absence of the transcript and the fact that the transcript will never be produced. The transcript of the summation suggests that without the transcript of the evidence, this court would be unable to undertake a fair review of Mr Jack's conviction for these offences.

[48] It is for those reasons that the court made the orders that have been set out at paragraph [1].