JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 37/05

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.(Ag.)

CHRISTOPHER McDONALD v REGINA

Delano Harrison, Q.C., for the appellant

Miss Kathy-Ann Pyke and Nigel Parke for the Crown

9th June, 2nd & 31st July 2008

PANTON, P.

1. On July 2, 2008, we allowed the appeal herein, quashed the conviction and set aside the sentence. In the interests of justice, however, we ordered a new trial to take place at the next session of the Westmoreland Circuit Court. The appellant was remanded in custody to await that trial. These are our reasons for allowing the appeal.

2. The appellant was convicted of murder on March 4, 2005, before Donald McIntosh, J. and a jury in the Westmoreland Circuit Court, and sentenced to life imprisonment, with the specification that he should serve twenty-five years before becoming eligible for parole. A single judge of this Court granted him leave to appeal.

3. At the hearing before us, the appellant did not pursue the appeal along the lines suggested by the ruling of the single judge. Instead, he sought and was granted leave to argue the following grounds of appeal:

> (1) "That refusing 'to stop the case' to permit the Appellant 'to get another lawyer', the learned trial judge unfairly denied him the right to have a lawyer of his own choice ('a proper representative') to continue the conduct of his defence (pages 148-157).
>
> (2) That the nature and extent of the learned trial judge's exchanges with the Appellant, in which (in the presence of the jury) the Appellant strongly importuned the learned trial judge to permit him to substitute counsel, then representing him, with counsel of his own choice to continue his representation, could only have prejudiced the jury, incalculably, against the Appellant's cause. Further, or alternatively, in such circumstances, the occurrence of those exchanges constituted a material irregularity in the course of the trial (pages 149-157)".

4. The evidence on which the conviction was based was circumstantial in that, on the night of June 15, 2003, the appellant was seen in Westmoreland driving a car owned by the deceased. With him in the car were the deceased and four other persons. The appellant was the last known person with whom the deceased was seen alive. Early the following morning, the appellant was seen sleeping on the verandah of his aunt's house in Portmore, St. Catherine. On the road outside this house was the car, without its registration plates. The deceased was reported missing, and his mutilated body was found on June 19, 2003, in Westmoreland.

5. During the cross-examination of the final witness for the prosecution, the appellant interrupted the proceedings by indicating that he wished to speak with his attorney-at-law as he was cross-examining the witness against his (the appellant's) will. The appellant added that he did not wish the attorney to continue to represent him. The judge advised the appellant that the jurors were listening to what he was saying so he should be careful. In further exchanges with the appellant, the learned judge advised him that he was not a lawyer, whereupon the appellant asked the judge: "you are asking me or you are telling me?" The judge then inquired of the appellant whether he wished to defend himself. To this, the appellant replied that he was not going to defend himself as he would be getting another lawyer. The judge told the appellant that he could not get another lawyer as the case had already started.

6. The appellant opined that he was not getting justice, adding that he knew that he was entitled to stop his lawyer if he was not representing him in the way he wished. The learned judge then delivered himself thus: "Let's get something clear, will you please shut up" (p.152 lines 15 & 16). There followed a discussion as to whether the representation was by private retainer or legal aid. The learned judge then stated that he was sorry but he was not going to stop the trial to allow for the appellant to retain another attorney-at-law. The appellant insisted that it was his right and, in answer to the judge, said that he had no wish to cross-examine the witness on his own. The learned judge then

instructed the appellant to "sit down and shut up" (p.154 lines 12 & 13). The exchanges ended with the appellant saying that he needed justice, and requested permission to go to the bathroom. That exchange between the judge and the appellant went thus (p.154 line 23 to p.155 line 5):

> "ACCUSED: Can I use the bathroom, please?
>
> HIS LORDSHIP: No
>
> ACCUSED: Why?
>
> HIS LORDSHIP: Please continue, Mr. Frater.
>
> ACCUSED: Mr. Frater, I am talking for my right. My Lord, Father Jesus, Almighty Father, God, I need my justice m'Lord. I am not going down like this. I need my justice.

Thereupon, His Lordship relented. He instructed an inspector of police to escort the appellant to the bathroom, but the judge added a rider that the inspector should gag the appellant on his return.

7. The record does not indicate that the appellant was actually gagged on his return. Indeed, the cross-examination by the appellant's attorney-at-law continued, and the appellant is recorded at one stage as "making a lot of noise" (p.160 line 18). Prior to this, and apparently while the appellant was absent from the courtroom, there was an exchange between the judge and the appellant's aunt as to the family's ability to afford an attorney-at-law. The aunt advised the

judge that the appellant's father had said that he would have secured the services of an attorney-at-law for the appellant.

8. During these exchanges, there was no contribution from the attorney-at-law representing the appellant, nor was there any assistance sought of him by the learned judge. Hence, we have no information as to what, if anything, may have transpired between the appellant and the attorney-at-law in respect of the question of representation.

9. It is clear from the foregoing that there was discomfort and unease on the part of the appellant in respect of the question of his representation on this serious charge. He wished to dispense with the services of his Court-appointed attorney-at-law, and to retain an attorney of his own choice. The fact that he had the services of an attorney-at-law appointed by the Court suggests that at an earlier period during the life of the case, there was an indication that he did not have the resources to privately retain one. It must have been rather awkward for the judge to have been receiving a request of this nature at such a late stage in the trial. A change in representation would have had to be at the appellant's expense as an accused person receiving the benefit of legal aid does not have a right to chose his attorney. The appellant made it clear that he neither wished, nor intended, to defend himself, and there is nothing on the record to indicate whether it would have been practicable for a new attorney-at-

law to continue the trial after a brief adjournment. In the end, the learned judge did not grant the request.

10. In the instant case, Mr. Delano Harrison, Q.C., referred us to the following exchange which took place between the learned judge and the appellant, shortly after the appellant had requested to be allowed to have a change in representation.

> HIS LORDSHIP: "Mr. McDonald, there are jurors over there, you need to be careful about what you are saying".
>
> ACCUSED: " Yes, sir"
>
> HIS LORDSHIP: "Mr. McDonald, you need to be careful what you are saying." (p.150 lines 16-21)

Notwithstanding this caution uttered by himself, the learned judge, in the presence of the jury, indulged in a discourse with the appellant in relation to the request for a change in representation. In the latter stage of the discourse, the appellant's aunt was invited into the courtroom and was questioned on the issue by the judge. During all this, the jury remained in situ. They would have heard the judge telling the appellant on more than one occasion to sit down and shut up. This, while the appellant protested what he regarded as a non-recognition or an erosion of his rights. The jury would also have heard the judge threaten the appellant with gagging.

11. Mr. Harrison, Q.C., submitted that from the very moment it was plain that the appellant had something he wished to air, the learned trial judge ought immediately to have directed the withdrawal of the jury until the matter was ventilated to the satisfaction of all – especially since the judge had recognized that there might have been something which was not for the jury's ears. Mr. Harrison, Q.C., listed the issues raised thus:

> (a) the appellant's rejection of his counsel, and concomitant desire to have some other lawyer replace him;
>
> (b) the appellant's expression of a desire for his "justice" and his "right";
>
> (c) whether the appellant had actually paid the lawyer up to then representing him or whether the lawyer had been acting on legal aid assignment;

He further submitted that the tenor of the exchanges and their extent "were so potentially prejudicial that the jury ought to have been absent during the verbal 'toing and froing' between the appellant and the learned trial judge".

12. Mr. Harrison, Q.C., submitted further that there was every possibility that the jury or any number of them, might well have been troubled by the ominous-sounding assertion by the appellant that he was not going down like this. Some, he submitted, might have felt that it was a dangerous threat, and if so they might have been wondering against whom. The jury, he said, should never have been placed in such a situation as might give rise to any such possible questions in their minds.

13. The Crown relied on skeleton arguments crafted by Mr. Donald Bryan, who was counsel in the case at an earlier stage, and oral submissions by Ms. Pyke. The sum of those arguments and submissions was that the appellant suffered no injustice as a result of the exchanges complained of. In the skeleton arguments, reference was made to the case of ***Mitchell v The Queen*** [P.C. Appeal No. 62 of 1998 – delivered on 28th June, 1999]. The Crown noted that the exchanges which took place in the presence of the jury in Mitchell's case "were not dissimilar to those complained of in the instant case", and submitted that "the content of the verbal exchange between counsel and the judge might have left a lingering adverse perception of the accused in the minds of the jury as he continued unrepresented". The argument continued that in the instant case, there being no withdrawal of counsel from the proceedings, there was no prejudice to the appellant.

14. Ms. Pyke submitted that the effect of the exchanges was not as the appellant wished it to be construed. This, notwithstanding her concession that the exchanges were unusual and somewhat outside the norm. She added, in answer to the Court, that the appellant would have come across as being very strong and assertive. There was nothing negative to be cured, she felt, and there was no necessity for the jury to have been given any instruction as to how they should have dealt with the exchanges between the judge and the appellant. In

her view, the reaction of the jury to all that had transpired would have been one of sympathy for the appellant.

15. The Constitution of Jamaica provides that every person who is charged with a criminal offence "shall be permitted to defend himself in person or by a legal representative of his own choice" [section 20(6)(c)]. Notwithstanding this provision, it is a matter in the discretion of a judge whether or not to grant the request for a change of legal representation in the middle of a trial. In this case, the learned judge decided not to grant the request and stated as his reason the fact that the trial had already started. No judgment is being passed on whether the reason given was sufficient in the circumstances for the discretion to be exercised against the appellant. It is important to say, however, that an accused person who waits until the last witness is being cross-examined to make the request here made is taking a great risk as the inevitable question would be: why has he waited so long? Of course, the situation will be readily understood if the reason for the request for a change of representation is something that has recently manifested itself. It is noteworthy that the challenge to the conviction in this case is not so much in relation to the refusal to allow a change of attorney, but rather it is as to the nature and extent of the exchanges between the judge and the appellant in the presence of the jury.

16. It has for some time been recognized that discussions and exchanges of the kind that took place in this case ought not to be in the presence of the jury.

In ***Lyons*** (1979) 68 Cr. App. R 104, the appellant who had been on trial for perjury, applied to the judge at the close of the prosecution's case for permission to dispense with the services of his counsel and to conduct the rest of the case personally. The judge refused the request after ascertaining from counsel that he "was not forensically embarrassed in continuing to act" for the appellant. In delivering the judgment of the English Court of Appeal, Waller, L.J. said in a matter-of-fact way, at page 108:

"Of course, all this happened in the absence of the jury".

He was there referring to the discussion that had taken place involving the judge, the appellant, and counsel on whether the application should be granted.

17. In ***Mitchell v. The Queen*** (supra), a case from this jurisdiction, the appellant faced a charge of capital murder. On the second day of the trial, the senior of two counsel who had been assigned to defend him, advised the judge that the appellant wished to cross-examine the witnesses himself. There followed discussions involving the judge, the appellant, and both counsel for the appellant. In the end, counsel withdrew from the case and the trial proceeded with the appellant conducting his defence. In quashing the subsequent conviction, and remitting the matter to the Court of Appeal for it to determine whether there should be a retrial, the Board said:

> "Moreover it cannot be certain that the discussion in the presence of the jury between counsel and the judge as to the future conduct of the case did not affect their attitude to [the] accused...".

18. In the instant case, the appellant was told on more than one occasion to shut up, and sit down. He was asked, obviously in a derisive way, if he was a lawyer. He was threatened with gagging. The impression of the appellant being deliberately disruptive was unavoidable in the minds of the jury in the circumstances. Why else would the learned judge have threatened him with gagging? The jury was no doubt left with the impression that the appellant was seeking to dispense with the services of his attorney-at-law, in order to abort the trial. All told, this was clearly not the appropriate atmosphere for the conduct of a murder trial. The learned judge, having warned the appellant to be careful as to what he said in the presence of the jury, failed to have heeded the warning himself. That which occurred thereafter should never have taken place in the presence of the jury. The "discussion" that took place in ***Mitchell v The Queen*** (supra) was mild when compared with what transpired in the instant case. In our view, the interests of justice were not served in this case; hence, our decision as earlier stated.