[2011] UKPC 41
Privy Council Appeal No 0030 of 2010

JUDGMENT

Phillip McKenzie (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Jamaica

before

Lord Phillips
Lord Brown
Lord Kerr
Lord Wilson
Sir Malachy Higgins

JUDGMENT DELIVERED BY LORD BROWN ON

16 November 2011

Heard on 5 October 2011

Appellant	*Respondent*
Ian Lawrie QC Adam Hiddleston (Instructed by Slaughter & May)	Thomas Roe (Instructed by Charles Russell)

LORD BROWN:

1. At about 5 pm on 24 April 2002 a man named Calvin Clarke (the deceased) was shot dead whilst swimming in the Back River near Temple Hall in the parish of St Andrew. He died from three gunshot wounds fired from above. His killing was witnessed by Tiny Chambers, a woman of 21 who had gone down to the river to bathe, as often she did, and who, that sunny afternoon, had taken her six year-old nephew, Rohan Shae (Rohan). The appellant, then aged 29, was also down at the river that afternoon and, indeed, had spoken to Tiny Chambers shortly before the killing. Tiny Chambers said that the appellant was the killer; she saw him fire the shots. The appellant denied it. Tiny Chambers' evidence was supported at trial by unsworn evidence from Rohan (then aged 7). The appellant made an unsworn statement from the dock denying his guilt.

2. On 9 October 2003 the appellant was convicted following a four-day trial before Dukaharan J and a jury (by the jury's unanimous verdict returned after a 25 minute retirement) at the Home Circuit Court in Jamaica. The following day he was sentenced to life imprisonment with a recommendation that he serve 35 years before becoming eligible for parole.

3. On 21 July 2005 (for reasons given on 3 November 2005) the Court of Appeal (Panton and Harrison JJA, Hazel Harris JA (Ag)) dismissed his appeal against conviction and sentence. The sole ground of appeal against conviction argued before the Court of Appeal was that the trial judge had erred in law in admitting Rohan's unsworn evidence without first holding a voir dire to determine whether such evidence should be admitted. This was contrary to section 54 of the Juveniles Act which provides that such evidence is admissible only if a child is found to be of such intelligence as to justify its admission and to understand the duty of speaking the truth. The Court of Appeal held that Rohan's evidence had indeed been inadmissible but concluded that nevertheless "the evidence of [Tiny] Chambers was overwhelming" and that "[a] jury, acting honestly and properly, would inevitably have found that the appellant was guilty of the offence of murder". The Court accordingly held that there had been no miscarriage of justice and applied the proviso to affirm the conviction.

4. By special leave of the Board granted on 10 November 2010 the appellant now appeals against the Court of Appeal's dismissal of his appeal against conviction. The lengthy (over four years) delay between the reasoned dismissal of the appellant's appeal and his petition for leave to appeal (assisted pro bono by Messrs Slaughter & May) in March 2010 is not explained but is presumably due to the appellant being a financially assisted person.

5. In advancing this appeal before the Board Mr Ian Lawrie QC makes no criticism of the Court of Appeal for applying the proviso and dismissing the appeal on the facts and arguments before that Court. He contends, however, that there is now before the Court further material demonstrating such incompetence on the part of defence counsel at trial (Mr Michael Thomas) as to make the appellant's conviction now appear unsafe. He criticises counsel with regard to four particular matters:

(1) The appellant made an unsworn statement from the dock instead of giving sworn evidence.

(2) The jury were not given a good character direction. As will shortly appear, however, this complaint changed radically during the argument to a criticism of counsel for not having led evidence of what was in fact the appellant's bad character.

(3) No evidence was adduced of the contents of the appellant's police interview shortly after his arrest (two weeks after the murder) on 8 May 2002.

(4) Counsel failed to object to Rohan's unsworn evidence being given in violation of the Juveniles Act.

Before turning to consider each of these four matters, it is convenient to sketch in something of the evidence in fact given at trial, albeit unnecessary to do so in any great detail.

6. Tiny Chambers had known the appellant for some eight years or more and would usually see him about once a week. On the afternoon in question she chanced upon him down by the river some 35 to 40 feet from where the deceased was swimming. He said to her: "Every day him come a river and ketch himself naked. Him come in like some rapist." She moved away, undressed, got into the water and began to wash her face. She saw the appellant heading towards where the deceased was swimming. With her head in the water she then heard a big explosion and, looking up, saw the appellant on a rock some 25 feet away, with something in his hand pointing down towards the deceased. She heard another bang and saw a bright light coming from what the appellant had in his hand. She saw the deceased jump backwards. She immediately grabbed her shorts and ran away screaming. First she saw Sister Binns who asked her what was wrong but she was speechless and just kept on running. Then she encountered her brother and sister and, after vomiting, told her sister what she had seen. Finally she spoke to the appellant's brother, Barty-Gienie.

7. It was never suggested to her in cross-examination that she could not see perfectly well who the killer was. Rather it was put to her that there were bad feelings

between her family and the appellant's and that it was for this reason that she had lied about the appellant being the killer. She denied having bad feelings towards the appellant although she agreed that some fifteen years earlier (when she was aged seven or eight) there had been some incident involving Rohan's father, Bernard Shae, being "cut" by the appellant's brother because he (Bernard) had used to beat up the appellant's sister, Sieko, when they had been a couple.

8. As already mentioned, Rohan gave unsworn evidence generally supporting Tiny Chambers' account. It contained little detail.

9. A forensic pathologist gave evidence that the deceased died from three gunshot wounds fired from above.

10. After the killing the appellant had left home and gone to live at a house in Fruitful Vale in the parish of Portland. When cautioned by a police officer following his arrest there on 8 May 2002, the appellant replied: "A di people dem say a mi do it so mi lef." Later that day he was interviewed by the police but, as already stated, the contents of that interview were not put in evidence.

11. In his unsworn statement from the dock the appellant said that on the afternoon in question, as he was going to bathe in the river, after speaking to Tiny Chambers and Rohan he then passed two young men called "Tot" (or perhaps "Todd") and "Richie". Having taken off his shoes and shirt he then heard a number of explosions whereupon he ran off "go[ing] further up the river but com[ing] back round into the village when . . . this lady stop[ped] me." She said she had heard that a man was killed up the river and said that "Tiny sey a mi kill de man up the river, because a mi alone pass her and go up that way, so is must mi kill him." He told the lady that he had not killed the man. A little later he said that he saw a crowd of people going up the river "so mi walk with dem and mi go up the river also, where mi see the man in the water. When mi see him now, mi sey 'A nuh mi kill him. A nuh mi kill the man', and mi walk whey go up a mi yard." He said that he then spoke to his sister and brother who told him to go to the police but he said that he would not because he would have to tell the police the names of the two youths he had seen which he did not want to do being "in fear of mi life and to protect dem life." The following day therefore he went to Fruitful Vale where he had family.

12. So much for the evidence at trial. Their lordships now turn to the four criticisms made by the appellant of defending counsel which, he submits, now show his conviction to be unsafe.

The appellant's unsworn dock statement

(1) In various responses to his new solicitors' investigations into this case between 2009 and 2011 the appellant said that his counsel, Mr Thomas, came to see him before trial and, despite the appellant saying that he wanted to give evidence, Mr Thomas told him he must not do so. "The lawyer told him that the prosecution would mix him up so he got coward." (10 July 2009) "He said I must not take the stand and give evidence. I asked him why, he said the prosecution will cross-question you and tie you up." (7 March 2011).

By phone on 10 November 2010, Mr Thomas told the appellant's solicitors that "he adopts an open approach with his clients. He further stated that before trial he will always discuss with his clients the options available to them. He stated that he will always ask them whether they would like to give a witness statement at trial, provide a written unsworn statement that will be read out of trial or say nothing at all. After he has laid out the options available to his clients, he stated that he would then discuss the pros and cons of each option, explaining to his client the potential implications and consequences (if any) of each option. After discussing the ramifications of each option, he then said that he would leave it up to his clients to decide which option they would like to take."

By letter dated 24 November 2010 Mr Thomas said:

> "Mr McKenzie was fully advised of the consequences of giving sworn evidence as against making an unsworn statement. He was told that if he gave sworn evidence he would be liable to be cross-examined on his evidence, whereas if he gave an unsworn statement no question could be asked of him. Mr McKenzie elected to make an unsworn statement."

This, he later said, was "based on my recollection". Given, however, that the appellant had earlier told his solicitors (on 10 July 2009) that: "There was endorsement to his knowledge to this effect [ie that he would make an unsworn statement]", and given too that some seven years had elapsed between the appellant's trial and the time when Mr Thomas was being asked for his recollection, there is no good reason to doubt that Mr Thomas followed his usual practice and, indeed, consistently with the judgment of the Privy Council in *Bethel v The State* (1998) 55 WIR 394, had made at the time a written record of his instructions.

This does not, however, entirely exhaust the appellant's complaint under this head. Mr Lawrie further submits that in any event the only way that Mr Thomas could properly have discharged his duty to his client was to have advised him to give sworn evidence. Since ultimately everything turned on whether the jury believed Tiny

Chambers' evidence, it was imperative that the appellant gave sworn evidence to the contrary. The Board, however, utterly rejects this argument. Had the appellant been subjected to cross-examination his defence could well have been exposed as yet more unconvincing than it appears to have struck the jury. As it was, the appellant gave a very full account of his defence (stretching over ten pages of transcript) and then had the benefit of the judge's direction to the jury that, although "an unsworn statement is not evidence", "you give it what weight you think it deserves, what he has told you, but you have to consider what he has told you".

(2) *Good character direction*

Although at the time of trial and sentence the appellant was understood to be a man of good character, in March 2009 he told his solicitors that he in fact had a previous conviction for "wounding Aston Shae", there having been "a fight" between them. He had got "a nine months [sentence], suspended for one year". Clearly precluded by this information from persisting in his complaint that Mr Thomas did not obtain for the appellant a good character direction, Mr Lawrie now argues that it would have been helpful to the defence to have had the fact of this conviction elicited before the jury. It would, submits counsel, have lent weight to the appellant's case that Tiny Chambers had falsely accused him of the murder because of bad blood between her family and his. The Board is satisfied that there is nothing in this point. Adducing this evidence would likely have occasioned the appellant more harm than good.

(3) *The Police interview*

The appellant submits that his defence would have been assisted by adducing evidence of his police interview following his arrest on 8 May 2002. Whilst, however, it is true that during the interview the appellant said that, besides seeing the deceased and Tiny Chambers down at the river at the time of the killing, he had "pass[ed] two youth[s]", he said nothing to hint or suggest in any way (as he was later to do in his unsworn statement at trial) that these two youths might have had something to do with the killing. Furthermore, having admitted at interview that he knew the police were looking for him, when asked why then he had "run away to Portland", he answered: "Me leave because me sister say me must leave" – an answer wholly contrary to his unsworn statement at trial that his sister had told him to go to the police and that the reason he didn't was because he was afraid to tell the police the names of the two youths he had seen at the river. Here again the Board is of the clear view that adducing evidence of the interview would have done the appellant altogether more harm than good.

(4) *Rohan's unsworn evidence*

It is a matter of some surprise to the Board that no one, neither Mr Thomas nor prosecuting counsel nor, indeed, the judge himself, appears to have realised the need to ask certain preliminary questions of Rohan before eliciting material evidence from him. That said, however, it is difficult to see how the appellant's position would have been improved over what it is now had the matter been properly dealt with at trial. Rohan may well have been regarded as qualified to give evidence so that the appellant would not now have the benefit of the Court of Appeal's (obviously correct) ruling that Rohan's support for Tiny Chambers' evidence must in fact be disregarded. But in any event, given, as Mr Lawrie accepts, that the Court of Appeal cannot be criticised for applying the proviso notwithstanding their ruling that Rohan's evidence was inadmissible, this argument anyway runs into the sand.

13. Standing back for a moment from the detail of the case, it seems to the Board hardly surprising that the jury were so clear as evidently they were of the appellant's guilt and, indeed, unsurprising that the Court of Appeal applied the proviso. The suggestion that Tiny Chambers, who no one doubts knew perfectly well who the killer was, would on the spur of the moment falsely accuse the appellant of murder merely because of some past ill-feeling between their families is little short of absurd. And the appellant's own explanation for his behaviour throughout could hardly have been less convincing.

14. The Board will humbly advise Her Majesty that this appeal should be dismissed.