Privy Council Appeal No. 22 of 1992

Byfield Mears *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 9TH MARCH 1993, DELIVERED THE 25TH MARCH 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD LANE
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD WOOLF

*[Delivered by **Lord Lane**]*

This is an appeal from a judgment of the Court of Appeal of Jamaica dismissing for reasons delivered on 14th November 1988 an application for leave to appeal by Byfield Mears. He had on 14th December 1987 been convicted of murder and sentenced to death. Since then, and by virtue of the provisions of the Offences against the Person (Amendment) Act 1992, the case has been reviewed by a judge of the Court of Appeal, who has reduced the offence to one of non-capital murder and has substituted a sentence of life imprisonment for that of death. The judge further directed that the appellant should serve a period of 15 years from 27th November 1992 before becoming eligible for parole.

The case advanced by the prosecution before the jury at trial was as follows. Sonia Jagaroo ("Sonia") had for some time been living with the appellant (a married man) as his wife until 1985 when they separated. They had two children, only one of whom survived. It was about the time of the second child's birth that the separation took place. Thereafter he began to pester her, to the extent on occasions of physical assaults. On 7th August 1986 the appellant waylaid Sonia and the baby and took them by taxi to a guest house where he in effect held them captive. He

locked them in a room while he went out shopping. He brought back food for all 3 and rum for himself.

He then told Sonia that he had something to tell her which she might think was incredible but was nevertheless true. He had, he said, killed the "little boy" who used to come to Sonia's house to look after the goats. That indicated to Sonia that he must have been talking about a youth called Adrian Brown ("Adrian") nicknamed Pension, who was the only person who fitted the description although he was by then some 18 years old.

Sonia said she did not believe him and asked him how it had happened. He said he went to have a bathe and on the way back he saw the boy and called him over, "Hey bwoy, come here", whereupon the boy made to run away but the appellant caught him and "hold him in his throat". Then, according to Sonia, the appellant went on to describe how he shot the boy "in the ears and blood start to run and he shouldn't do it". She described how the appellant started to cry and told her that his head was hurting. Sonia told him that was because he was drinking rum, but she went downstairs to get two Phensic tablets which she gave to him. He went on to tell her how he had "burnt the body two time, because the first time it didn't burn good", repeating that he had killed the boy and if she did not believe him she should go and find out if the boy was missing.

She stayed at the guest house that night and the next day, after the appellant had left, she returned to her home where she told her sisters what had happened at the guest house. One of her sisters went to the police station. Sonia reported the matter to the police.

Adrian was last seen alive by his brother Joseph Nangle on 3rd August 1986: he was on his way to bathe wearing a red ganzie (which, their Lordships were told, is a sort of T-shirt) and khaki shorts and was carrying a rag and a cake of soap.

On 8th August Joseph Nangle was directed to a cane field where he saw in a shallow hole the partially burnt body of his brother Adrian which he identified by a piece of Adrian's ganzie, his rag and soap which were alongside the body.

On post mortem a pathologist found extensive burns. The body was in an advanced state of decomposition. There were fractures of the skull and a piece of red cloth was tied tightly round the remains of the neck. There was no evidence, according to the pathologist, of any gun-shot injury to the skull, whether in the area of the ears or elsewhere. The cause of death was said to be head injury with skull fracture, extensive body burns with a possibility of strangulation.

The appellant gave evidence on oath denying that he had made any confession to Sonia, although he admitted, in

effect, that he had taken her against her will to the guest house. He denied he had killed Adrian. It is perhaps worthy of note that no motive for the murder of Adrian, whether by the appellant or by anyone else, has ever been suggested.

Thus the short question which the jury had to decide was whether they could feel sure that Sonia was telling the truth about the conversations in the guest house, and, if so, whether the confession was true.

The appellant complains primarily that the comments of the judge to the jury in his summing-up were so unfair that they may have produced a miscarriage of justice. Their Lordships therefore turn to the summing-up to see how the judge put the matter to the jury.

At the outset of his directions he asked the jury to consider whether it was mere coincidence that it was after the stay in the guest house that the body was discovered, when Adrian had disappeared five or six days previously. "She is the person who initiated and [was] instrumental, so to speak, in the finding of the body". In fact, although this was an inference which the jury were entitled to draw, it was not established on the evidence that the information given by Sonia was the only possible reason for the discovery of the body. It was Sonia's sister Vannie who had made, so it was said, the report to Adrian's brother Joseph. Vannie, for reasons which were not apparent, did not give evidence. The judge, having set out the case advanced by each side, then made this comment of his own upon the appellant:-

> "He says she is not to be believed, because she has fabricated this whole thing, and this is a comment I make again. I recoil to think that any human being could be so degenerate, so wicked that they would concoct a story like this, especially a woman who has borne from her womb a child for a man. I am not saying, but to me it is inconceivable that a human being could do this, just to settle a score."

Then he went on to say this:-

> "But you are the judges of the facts, it is a comment I am making: and when you think they have been separated for how many months and she never, from what you heard, she never is telling any lie on him to get him into prison, she never make any other report over all these months. In August now, she says he tells her something and following the report she made, this body is recovered."

Mr. Andrade concedes that the judge was perhaps going to the limit of legitimate comment, but submits that any defect was put right by the warning he gave to the jury a little later in the usual terms to the effect that any views expressed by him were not to be considered as binding upon them, the jury.

There were several points which told in favour of the defendant at trial. First there was the unlikelihood of anyone making this sort of confession to a woman who had every reason to dislike him, who, although she was less than frank about it when she gave evidence, eventually admitted hating him. The judge made this comment:-

> "It might very well be that notwithstanding the relationship, the man believed that because she bore him a child ... he could confide in her on the basis that for the sake of the child ... she wouldn't go and tell anybody that her child's father killed a man. He probably thought that. That is a matter for you."

The use of the word "probably" is (it is suggested) significant in the light of the other comments.

Perhaps the strongest point in the appellant's favour was the evidence of the pathologist that there were no signs of any gunshot wounds to the body, in contrast to what Sonia had reported. The appellant complains that the judge so dealt with this particular aspect of the case as to reduce its importance to vanishing point in the eyes of the jury. In fairness to the judge, it should be noted that counsel for the defendant at the trial seems to have started the trouble by suggesting that the pathologist's evidence showed that the body was not that of Adrian Brown at all. The judge as a result was led to direct the jury that, even if that was so and the body was that of an unknown person, they could still convict the appellant of murdering Adrian if they were convinced of the truth of Sonia's evidence. There could have been no real doubt, on the evidence of Adrian's brother, that he had correctly identified the body. The effect of the judge's alternative direction was to dilute or destroy the cogent point that what the appellant had reportedly said to Sonia was in one respect, namely the cause of death, totally inconsistent with what had in reality happened. An added complaint is that the judge did not, so far as their Lordships can ascertain, alert counsel that he was minded to deal with this aspect of the case in the way in which he did, as should always be done. See *Reg. v. Feeny* (1991) 94 Cr.App.R. 1.

Some two hours after the jury had retired they returned to announce that they were not agreed upon a verdict and that they had a problem relating to the evidence. Instead of asking them to retire again and set out their problem in writing so that he could help them with their particular difficulty, the judge immediately embarked on a recapitulation of the evidence, repeating many of the matters which are the subject of complaint in the first direction and in particular the "coincidence" point with which their Lordships have already dealt. Thirteen minutes later the jury returned with a verdict of guilty.

The judge's comments.

The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the appellant's submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words this was to use a test which by present day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd L.J. observed in *Reg. v. Gilbey* (unreported) 26th January 1990:-

> "A judge ... is not entitled to comment in such a way as to make the summing-up as a whole unbalanced ... It cannot be said too often or too strongly that a summing-up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury."

Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views. Whether that is what has happened in any particular case is not likely to be an easy decision. Moreover, the Board is reluctant to differ from the Court of Appeal in assessing the weight of any misdirections. Here their Lordships have to take the summing-up as a whole, as Mr. Andrade submitted, and then ask themselves in the words of Lord Sumner in *Ibrahim v. R.* [1914] A.C. 599 at page 615 whether there was:-

> "Something which ... deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future".

Their Lordships consider that the judge's comments already cited went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he

was plainly suggesting. Their Lordships cannot, taking the summing-up as a whole, overlook the fact that perhaps the most important point in the defence case was effectively neutralised by the way in which the judge dealt with the identification of the body. Finally, the failure to ascertain what it was about the evidence which was puzzling the jury and the reiteration thereafter of some of the questionable parts of the summing-up proper are sufficient to convince their Lordships that this conviction cannot be allowed to stand.

In *Berry v. The Queen* [1992] 2 A.C. 364, 383 Lord Lowry observed:-

> "The judge ... did not find out what was the problem which had brought the jury back into court and it is therefore impossible to tell whether anything said by the judge resolved the problem or not, because no one knows what the problem was. Their Lordships have already met this difficulty in some other recent cases ... The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part."

Mr. Andrade submits that in any event this is a proper case for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act. In *Berry*, already cited, at pages 384/5 Lord Lowry examined the authorities on this aspect of the appeal. The test is whether "if the jury had been properly directed they would inevitably have come to the same conclusion": see *Woolmington v. DPP* [1935] A.C. 462, 482/3 and "a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict". Their Lordships do not consider that these requirements are satisfied in the instant case. This is not a proper case for the application of the proviso. Nor do their Lordships believe that in all the circumstances, including the lapse of time since the happening of the events in question, it would be proper to remit the case to the Court of Appeal to consider whether a new trial should be ordered.

For these reasons, their Lordships have humbly advised Her Majesty that the appeal should be allowed, the conviction set aside and the sentence quashed. The respondent must pay the appellant's costs before their Lordships' Board.