Privy Council Appeal No. 62 of 1998

John Mitchell *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 28th June 1999

Present at the hearing:-

Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Clyde
Lord Hutton

*[Delivered by **Lord Slynn of Hadley**]*

On 30th May 1996 the appellant was convicted of the capital murder of George Taylor on 14th April 1992 by shooting him and was sentenced to death. His co-accused, who has not appealed, was convicted of manslaughter and sentenced to five years' hard labour. The appellant appealed to the Court of Appeal which on 1st December 1997 dismissed his appeal, giving their reasons on 12th January 1998.

The ground raised on that appeal is in essence the first ground raised before their Lordships and arose out of matters which occurred at an early stage of the trial as a result of which the appellant was unrepresented. Accordingly he contends that he was thereby deprived of a fair trial.

To appreciate the arguments put forward on both sides it is necessary to recount what happened. On the first day of the hearing Mrs. Harrison-Henry, his senior counsel for whom a legal aid assignment had been granted, cross-examined the first witness who described events shortly before the shooting but did not say anything to link the accused with them. She did not ask any questions of the second witness, the deceased's sister, who identified the deceased. On the second day in the presence of the jury Mrs. Harrison-Henry told the judge that the appellant wished to cross-examine the witnesses himself. The judge asked if she had advised him; she said that she had not but that "if it is that he does not wish me to cross-examine the witnesses, then I will ask Your Lordship to allow me to terminate my assignment in the matter". The judge asked "At this stage?" which counsel confirmed. The appellant said that he would like to do the cross-examination himself. The judge told him that this was a very serious charge, that he was not trained in the law and that his attorney "as you have seen, cross-examines the witness as she thinks fit". The appellant said in effect that he was not satisfied with the cross-examination. Mrs. Harrison-Henry then said "This is a legal-aid assignment, M'Lord. I believe that the accused man has said more than enough. He does not want me in the matter". The judge then spoke to the accused:-

> "HIS LORDSHIP: Counsel is assigned to you. If you do not want Counsel then you are on your own. The case has already started. It's in progress. As far as I have seen Counsel has done nothing wrong."
>
> ACCUSED: I haven't said she has done anything wrong.
>
> HIS LORDSHIP: I do not know what you want Counsel to ask because nobody has said anything against you up to now, and you are clearly to understand this. If you are going to reject Counsel at this stage I am not going to provide you with another Counsel.
>
> ACCUSED: I can do it on my own, m'Lord.
>
> HIS LORDSHIP: This is what you want?
>
> ACCUSED: Yes, m'Lord."

Then after a short adjournment and in the absence of the jury the following exchanges took place:-

"HIS LORDSHIP: As I told you earlier the charge is a very serious charge. It's a charge that involves a lot of law. Now, your Counsel is trained in law. You are not so trained, and I think it would be a wise thing to do if you reconsider your position. Nobody is forcing you to do anything, but I think you should abide by the advice of your Counsel.

ACCUSED: M'Lord ...

HIS LORDSHIP: There are matters that you are not going to be able to handle, matters of law.

ACCUSED: Might I explain something to you, m'Lord?

HIS LORDSHIP: No, no, I don't want any explanation. I am telling you the situation as it is.

ACCUSED: I heard.

HIS LORDSHIP: You see, Counsel in her judgement knows what questions to ask and when to ask these questions. Now, without Counsel you would be on your own and I can only assist in certain areas. You understand that? Now, do you want to reconsider what you have said earlier?

ACCUSED: Yes, m'Lord, I am going to take it into consideration.

HIS LORDSHIP: What do you wish me to do?

ACCUSED: The point is, m'Lord , I do not really understand the full procedure.

HIS LORDSHIP: You don't understand the full procedure? This is what you are saying?

ACCUSED: You can outline certain things to me. I thought that after the witness finish speak I could have the opportunity to speak to the witness to ask questions."

Having been told that counsel would know what questions to ask the appellant said:-

"ACCUSED: M'Lord, at the first place, m'Lord my Attorney she tried to push me to say things which I haven't said.

HIS LORDSHIP: But you are not saying anything. Nobody has asked you to say anything.

ACCUSED: M'Lord, she speak to me over and over and all she trying to tell me is that if I accept that I give a statement to the police or I signed a statement which I told her I did not do, then she would able to help me, but unless I accept that, she can't help me. Now, I don't think that is right. I can't accept things that I haven't done.

HIS LORDSHIP: Just a minute. Have you reached the stage where you think it's best to go it alone, or do you wish to continue with the services of your Counsel?

ACCUSED: I think it is best for me to defend myself.

HIS LORDSHIP: Very well, if that is your wish. I have explained to you all the difficulties it might encounter, so I will allow you to conduct the trial yourself. I can only help you in certain areas. I can't act as Counsel on your behalf. You are clearly to understand that."

The judge asked counsel to stay so as to be able to address him on a point of law if that arose. He said that he would not allow Mrs. Harrison-Henry to withdraw. She said that she could do nothing to help the accused, that she had never told him to accept a police statement and that she would be in great difficulty. The judge commented:-

"HIS LORDSHIP: Well, there are two Counsel that appears for you. Would you be prepared to go along with Miss Rose-Green or you still want to go on your own?

ACCUSED: M'Lord, I leave everything to your opinion. Anything you wish, m'Lord.

HIS LORDSHIP: What you want?

> ACCUSED: I already made up my mind that I see where people seem to be displeased of my idea. Might as well I just let it continue."

Miss Rose-Green, the junior counsel assigned to him said that she had done a lot of work with Mrs. Henry and that:-

> "If he is dissatisfied with Mrs. Henry I am sure he is going to be equally dissatisfied with myself, and I am not sure I would be comfortable to continue with this matter."

The appellant said "She doesn't want to defend me" and that he would continue with the case and defend himself. The judge then asked Miss Rose-Green, despite her evident reluctance to do so, to stay to help him on a point of law but "I wouldn't be asking you to take part in the trial". Prosecution counsel then submitted that one of the two ought to stay in accordance with the rules.

The jury came back and the judge told the appellant that he would be provided with all the relevant documents and he adjourned the hearing until the next day, 22nd May. At the resumed hearing on 22nd May in the absence of the jury Miss Rose-Green applied to be released from the case; since the appellant had told her that she and Mrs. Henry had worked on the case and "conspired to ensure a conviction in this case", she ought not to be required to continue. She stressed that under section 20(6)(c) of the Constitution the accused "shall be permitted to defend himself in person or by a legal representative of his choice" and that he could not be obliged to take counsel he did not want. The judge agreed to release her. The accused was asked whether he had any witnesses and he gave the name of his daughter and her mother. The first prosecution witness was then called. He was a man who had been with the deceased in his commercial van shortly before the shooting and he identified the accused as being there. At the conclusion of his evidence-in-chief the appellant was asked if he had any questions. The following exchange then took place:-

> "ACCUSED: I would prefer him to come back a next day.

HIS LORDSHIP: No, No, any question you have to ask you ask him now.

ACCUSED: But, m'lord, I have to look at both files to ask the questions.

HIS LORDSHIP: You had those from last night. Please start asking him those questions.

ACCUSED: M'Lord, I didn't have much time to read because no light is not in the cell, so I just get a little time to read.

HIS LORDSHIP: You got the depositions from yesterday afternoon, in the day.

ACCUSED: In the evening, sir.

HIS LORDSHIP: Yes? You got them from yesterday.

ACCUSED: Yes, sir I get them in the evening yesterday, sir.

HIS LORDSHIP: And you read them?

ACCUSED: I read a part when I went down.

HIS LORDSHIP: Now, what is it you want time to do?

ACCUSED: I want to look at the first statement he gave and the second one.

HIS LORDSHIP: Well, you have to start questioning him now, I cannot stretch out this matter.

ACCUSED: I am not prepared, I am not prepared to ask him questions now, m'lord."

The judge then agreed that cross-examination of this witness could take place on 24th May. The same course was taken with the second witness who also identified the appellant, the judge saying "please understand that you will do your cross-examination on Friday [24th May]. In other words you are not going to get any more time".

The trial proceeded on 24th, 27th, 28th, 29th and 30th May.

The appellant contends that the judge should have done more to persuade counsel to remain in the case and/or discharge the jury and adjourn the case to enable the accused to seek alternative representation. He was in the result deprived of his constitutional right under section 20(6) of the Constitution which provides that:-

> "Every person who is charged with a criminal offence -
> ...
>
> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;"

The Court of Appeal took the view that the trial judge did everything that he could to persuade the attorneys to remain in the case, even though the appellant had in fact of his own volition dismissed them. The court referred to the judgment of the Board in *Robinson v. The Queen* [1985] A.C. 956 at page 966 as cited in *Ricketts v. The Queen* [1998] 1 W.L.R. 1020:-

> "In their Lordships' view the important word used in section 20(6)(c) is 'permitted'. He must not be prevented by the state in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection. He must be *permitted* to exercise those rights."

The Court of Appeal continued:-

> "The appellant, having taken that decision, cannot now complain that he was unrepresented 'through no fault of his own' and that his rights have been breached. ...
>
> In respect of the complaint, that the learned judge should have considered an adjournment to give the appellant an opportunity to retain other counsel, this must be considered against the background that the appellant had already been assessed as not being able to retain representation and had accordingly been

> assigned, not one, but two attorneys to represent him. In addition, the question of an adjournment did not arise, as the appellant made no such application but instead insisted that he wanted to defend himself.
>
> In our view the action of the learned trial judge, in allowing counsel to withdraw, and to continue with the trial in the absence of any legal representation of the appellant, arose out of the appellant's own desires, and there was no obligation on the part of the learned trial judge to grant an adjournment. In any event, the fact that the appellant would not be able to retain counsel privately would make any adjournment to secure the services of other counsel, pointless, as he had already been assigned two counsel under the Poor Prisoners' Defence Act, whom as we have seen, he dismissed from the case."

In their Lordships' view it is not correct to say, as the Court of Appeal do without qualification, that the appellant had in fact of his own volition dismissed counsel. The appellant was not content with the way the cross-examination had been conducted. This complaint may well have been unjustified but it was linked with a more serious matter. Whether rightly or wrongly he had clearly formed the view that his counsel wished him to admit to a statement which he said that he had not made and that they were not prepared to put forward his case.

He was entitled to have his case put forward but counsel obviously took offence at his suggestion that they had tried to make him say things he had not said. It is neither possible nor necessary to resolve whether he was right or wrong or whether there had been a misunderstanding. One thing is plain. His counsel in all the circumstances did not wish to act for him; he was not content to continue with them. The judge recognised this and did no more than to ask counsel to stay to help the judge if a question of law arose. They were not willing to do that. Their Lordships do not accept the suggestion put forward on behalf of the prosecution that this criticism of counsel was all an attempt to manipulate the proceedings so as to get rid of Mrs. Harrison-Henry. Moreover to attribute all the responsibility for what happened to the appellant as having "of his own volition dismissed counsel" seems to their

Lordships to be putting it too heavily against the appellant. His comment after Miss Rose-Green had spoken (page 45 of the Record) "She doesn't want to defend me" seems accurate.

The Court of Appeal also said that an adjournment to secure other counsel would have been "pointless as he had already been assigned two counsel under the Poor Prisoners' Defence Act, whom as we have seen, he dismissed from the case".

It is to be noted that rule 13 in the Third Schedule to that Act provides that if counsel assigned is unable to appear he must give at least eight days' notice to the Registrar who "shall thereupon assign other counsel under the legal aid certificate". That rule thus recognises some flexibility. Moreover by rule 14:-

> "14. A person who refuses to accept the services of counsel or a solicitor assigned to him under a legal aid certificate in respect of any proceedings shall not be entitled to have another counsel or solicitor assigned in respect of those proceedings."

The latter rule seems to be aimed principally at preventing an accused from changing his counsel at will. It does not on the face of it prevent a further certificate being issued by the authorities if counsel withdraw, or indeed of counsel being changed under the same certificate by the authorities, as appears to have been done twice in the present case. It is not necessary to decide whether this Act, read with section 20(6)(c) of the Constitution means that the appellant would have been entitled to new counsel once his counsel had withdrawn or ceased to act at his request. There was it seems to their Lordships clearly at least a discretion for the authorities to change counsel, not least in a situation where counsel and client have lost confidence in each other or where counsel is professionally embarrassed as appears to have been suggested here. If a judge indicated that in his view different counsel should be assigned for such a reason in a capital case their Lordships cannot think that his view would not have been followed. In the present case they consider that the Court of Appeal erred in directing themselves that an adjournment would have been pointless.

That leads to the wider question as to whether in all the circumstances an adjournment should have been granted for the question of other counsel to be investigated. In *Robinson v. The Queen* [1985] A.C. 956, which was relied on by the Court of Appeal, the situation was different since there had already been many adjournments, the defendant who had not applied for legal aid had not paid his counsel and when an assignment for legal aid was offered the accused declined it. Moreover the judge said that witnesses might not be available if there was an adjournment. In *Ricketts v. The Queen* [1998] 1 W.L.R. 1016 the defendant had been found by a jury to be mute of malice and had chosen not to instruct his counsel. It was thus his own fault that he was unrepresented, and there was no breach of any constitutional right or fairness on the facts of the case.

In *Reg. v. Pusey* (1970) 12 J.L.R. 243 the applicant had rejected one counsel assigned to him. Friends of his sought to obtain the services of another counsel. The prosecution having referred to the difficulty of getting together the witnesses, the accused was given an adjournment of 43 minutes to contact the second counsel but he was engaged in another case. Luckhoo J.A. giving the judgment of the Court of Appeal said at page 247:-

> "While we fully appreciate that the Constitution of Jamaica enjoins that every person who is charged with a criminal offence must be permitted to defend himself by a legal representative of his own choice if he so desires, yet the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future money sufficient to retain the services of counsel."

The facts of that case are very different from the present.

In addition their Lordships have been referred to a number of decisions of the United States courts where it is said that the right to representation "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused" (*Johnson v. Zerbst* (1938) 304

U.S. 458 at page 465; *Von Moltke v. Gillies* (1948) 332 U.S. 708 at 723).

Their Lordships are of the view that in a situation like the present under consideration the approach to be followed is to be found in the judgment of the Board in *Dunkley v. The Queen* [1995] 1 A.C. 419 at page 428:-

> "In the first place where counsel appearing for a defendant on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. If the proposed withdrawal arises out of an altercation with the trial judge he should consider whether it would be appropriate to adjourn the trial for a cooling-off period. The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If notwithstanding his efforts counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation. In this case although the judge did not exactly encourage Mr. Frater to withdraw he made no attempt to dissuade him and it does not appear that he considered the possibility of the first defendant trying to obtain alternative representation. Indeed he allowed the trial to proceed as though nothing had happened without even so much as an adjournment until the following morning. Their Lordships can sympathise with the anxiety of the judge to proceed with a trial whose start had already had to be postponed on many occasions but where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there be a reasonable adjournment to enable him to try and secure alternative representation."

The Board attached importance to two other factors, one of which is not present here, but the other was that the withdrawal of counsel deprived the first defendant of skilled cross-examination on his behalf of a witness. The Board, however gave a warning at page 429:-

> "The cumulative effect of these three matters is such as to lead their Lordships to the conclusion that the

> conviction of the first defendant was unsafe and cannot be sustained. Their Lordships would, however, wish to make it clear that while the facts of this case warrant the foregoing conclusion it by no means follows that the same consequences would flow when the appellant's only complaint was that he had been left unrepresented at some stage in a trial."

In the present case it is true that the appellant did not ask for an adjournment and moreover stated that he would conduct his own case whereas in *Dunkley* the accused wanted another counsel. But when regard is had to the fact that he was told firmly by the judge that he would not provide another counsel, the appellant was left with no choice other than to continue with existing counsel or to do it himself. It seems to their Lordships that it is not right to distinguish the general principle stated in *Dunkley* from the present case on the basis that here the defendant wished to go on his own.

The present was a case in which the sentence of death would follow conviction. The appellant clearly did not understand all the procedures of the court and was at times confused not least as to the role of counsel in cross-examining. He was not advised by counsel as to the course he might take before the hearing (Record page 38). Nor, though he was told by the judge that it would be a wise thing to reconsider his position, was he given positive advice that he should ask for an adjournment to consider his position and to investigate whether other counsel could act for him. Indeed at an early stage (page 39) the judge said:-

> "If you are going to reject Counsel at this stage I am not going to provide you with another Counsel."

This must have indicated to the appellant that there was no possibility of getting alternative counsel.

It is true that the judge sought to persuade counsel to stay to help him on the law (though not to defend the accused), that he granted an adjournment from midday on 22nd May to 10.00 a.m. on 24th May to enable the accused to study the depositions and other papers which he had been given on the evening of 21st May and that the

appellant was able to cross-examine in more detail and at greater length than might have been expected. The learned trial judge also gave the accused assistance in putting questions and he took a leading part on the voir dire as to the voluntariness of the appellant's statements. As the judge himself stressed, however, there are limits to what the judge can do by way of cross-examination and on the voir dire the task of the judge both in cross-examining, and giving a ruling is a particularly difficult and sensitive one.

Moreover it seems to their Lordships that in a number of areas skilled cross-examination by counsel might have affected the outcome of the case - the identification evidence and the voluntariness of his statement are only two examples. In addition he really had little or no opportunity to obtain proofs and witnesses in support of his defence of alibi and it is clear that the evidence of his daughter and her mother was confused and not adequately clarified. He did not point out to the judge two apparent errors of law in the summing up in that he had not accused one of the witnesses of lying and his daughter had not said that he had a hut on his land. 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 an accused who thereafter continued unrepresented when his co-accused was represented.

All these circumstances are to be taken into account in considering whether justice required on a capital charge that more should have been done to seek to ensure that the accused was represented. Their Lordships conclude here that the judge could not have been satisfied that the defendant would not, or at any rate might not, suffer prejudice by the withdrawal of counsel. Nor is there anything to indicate that the judge considered "whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation". They do not consider that it can be said that the lack of representation see *Dunkley v. The Queen* [1995] 1 A.C. 419, 428 was due to his "fault" nor that this was the "most exceptional case" where "a reasonable adjournment to enable him to try and secure alternative representation" was not required. Despite the submissions of Mr. Pantry who has put forward every argument in

favour of dismissing the appeal their Lordships are satisfied that here there should have been an adjournment to see whether other counsel were able and willing to represent him or at least to advise him as to the courses open to him. It was only after such advice that he could properly reflect on what he should do in the situation in which he found himself. It was not suggested that witnesses would be unavailable if there was a short delay.

In the circumstances it is not necessary for their Lordships to consider in detail the appellant's alternative ground that the delay of four years between his arrest and trial deprived him of the substance of a fair trial, though they are not satisfied that this ground is made out.

The difficult question arises however as to whether there should be a retrial. It is now seven years since Taylor was killed and the appellant has been in prison for seven years and on death row for more than three years. The case depends on oral testimony which may be affected by the delay. Retrials after such a long period, even in Jamaica, where longer periods are customary than in England, are not desirable. On the other hand as the evidence came out on the occasion of this trial there was a strong case to be answered. Their Lordships consider that the appropriate course is for the conviction to be quashed and further consider on balance, though only on balance, that the case should be remitted to the Court of Appeal in Jamaica for that court to consider in the light of the availability of the witnesses, the state of the lists and any other relevant factors whether it is appropriate that there should be a retrial. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed to that extent.