Privy Council Appeal No. 22 of 1994

Nigel Neil *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 6th April 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Mustill
Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Steyn

*[Delivered by **Lord Mustill**]*

On 27th February 1988 in the parish of St. Andrew, Jamaica, Slater Kilburn was shot dead. Between 11th and 15th January 1990 Gladstone Champagnie and Nigel Neil stood trial for the murder of Slater Kilburn. That his death amounted to murder was not in doubt. The issue was whether the two defendants, or one of them (and if so which), were guilty of this offence. At the conclusion of the evidence for the prosecution, counsel for Champagnie submitted in the presence of the jury that his client had no case to answer. The trial judge acceded to this submission, and upon a directed verdict of not guilty Champagnie was discharged. The trial proceeded against Neil alone. After retiring for one and a half hours the jury returned a verdict of guilty, and Neil was sentenced to death. On 29th July 1991 the Court of Appeal of Jamaica dismissed his application for leave to appeal against conviction. Against this decision he now appeals by special leave.

So far as material to this appeal the evidence at the trial was as follows. Keith Williams stated that on the evening of 26th February 1988 he heard Champagnie and the appellant (known

as "Yellow Man") cursing the deceased; they said that he was an informer and "him come a from out, just come from prison and him a go dead because him a informer". Williams recognised the two men because he had known Champagnie by sight for years, and was a friend of the appellant. At 8.30 p.m. the following evening he was walking with Kilburn in Ebony Road, Kingston when he saw three men, about one chain away, walking in the opposite direction. He recognised them as Champagnie, the appellant and a man named Ritchie. After they had walked another five feet one of the men, whom Williams identified as the appellant, pulled a gun from his waist and pointed it towards Williams and Kilburn. Williams did not see Champagnie make any significant movement. There was the sound of an explosion, and Williams ran away. Some minutes later he returned to find Kilburn dead.

One further witness for the prosecution is important. After an unsuccessful objection by counsel for Neil the police officer who arrested Champagnie gave evidence that after caution Champagnie said - "Officer, a nuh me, a Yellow Man".

At the trial the case for the appellant had two elements. First, the appellant, who did not give evidence but made a statement from the dock, said that he was not in Ebony Road at the relevant time, but was with his baby and the baby mother. This account was inconsistent with the evidence of the appellant's father, that the appellant was at the father's house at that time. Secondly, it was asserted that Williams had been coerced by a named person into giving evidence against the appellant, and that through intermediaries he had been asking for money in exchange for going abroad and not appearing as a witness. This case was put to Williams in cross-examination, and the supposed intermediaries gave evidence in support.

Two substantial grounds of appeal have been argued on the appellant's behalf. The first depends on the fact that, as already stated, the successful submission by Champagnie of no case to answer was heard by the trial judge in the presence of the jury. The appellant submits that this was a material irregularity by which his defence was seriously prejudiced. Secondly, the appellant complains that the statement by Champagnie to the police which blamed him for the shooting was wrongly admitted in evidence; alternatively, it is said that after Champagnie had been dismissed, the trial could no longer continue fairly against Neil alone with Champagnie's statement before the jury, and that accordingly the judge should of his own motion have ordered a re-trial.

Their Lordships will concentrate on the first ground which, in the particular circumstances of this case, is the more substantial of the two. As mentioned, the whole of the argument, which occupied some forty-five minutes of court time and extended over the midday break, took place in the presence of the jury. Their Lordships must emphasise that this ground involves no criticism of the trial judge, since he followed a long-established practice of criminal trials in Jamaica, and indeed was not invited to depart from it. Nevertheless, as now pronounced by this Board in the appeal of *Crosdale v. The Queen* and as conceded on behalf of the Crown in the present case, this practice is unsound and should not be followed in the future; for unless the judge is to occupy the unsatisfactory role of what the Court of Appeal in Jamaica has aptly called a "silent umpire" the free discussion between counsel and the judge of the issues and the relevant facts which is an essential feature of such a submission will be overheard by the jury, which in spite of the most careful direction may fail to appreciate that the judge's observations are no more than provisional and that his rejection of the submission in no way forecloses the question of guilt or innocence which is for them alone.

This is not to say that in every instance where the jury has remained in court, whilst a submission of this kind has been made and rejected, an appeal on this ground will be allowed. Far from it. The appellate court may well conclude, after examining a transcript of what passed between the judge and counsel, that there was no harm serious enough to imperil the fairness of the verdict. But some cases may be in a different category, and in the opinion of their Lordships this is one. Indeed, it supplies a clear example of the reasons why the practice which has prevailed in the past could lead to a risk of injustice.

It must be emphasised at once that the events at the trial of Neil and Champagnie had special features which distinguish it from the majority of cases where a similar complaint is made. Here the fact relied on as casting doubt on the verdict is not that an application by the defendant who subsequently appeals was rejected after argument in the presence of the jury. On the contrary, counsel for the appellant neither made nor on the evidence could have made any such application on behalf of his client. Indeed this factor in itself served to exacerbate the feature of which the appellant does complain, namely that the jury was allowed to hear the successful argument of his co-accused. The general shape of the case for the prosecution must be recalled. As regards the appellant it was simple. He had been identified by Williams as one of the three men, and in particular as the one who had drawn the weapon and shot Slater

Kilburn. But Williams had said nothing of this kind as regards Champagnie. The only ground upon which the latter could be convicted of the murder was that he was engaged in a joint venture with the appellant to cause at least serious harm to Kilburn. For this purpose the prosecution, having no direct evidence beyond the quarrel between the men the night before, could only rely on an inference based on the fact (if it was a fact) that Champagnie was walking in the company of the appellant at the time of the shooting. The question therefore to be decided at the stage of the submission was whether a properly directed jury could reasonably make such an inference.

In such circumstances it was inevitable that a discussion of whether Champagnie could reasonably be convicted was bound to take as its starting point the hypotheses - (a) that the appellant shot and killed Kilburn, and (b) Champagnie was with him at the time. The first hypothesis was of course hotly denied by the appellant, but the possibility that the appellant was not only innocent of any shooting but was not even present obviously could not be taken into account when considering whether the jury might legitimately find that the two men were engaged in a joint venture of which the shooting was the outcome. Thus, any useful discussion of the matter between counsel for Champagnie and the judge was bound to start with the proposition that the appellant was guilty. This kind of debate is well understood by lawyers, who are accustomed to it and who appreciate that every apparently damaging statement is tacitly qualified by words such as "assuming for the sake of argument"; but lay people such as jurors may often be confused and misled.

Thus, for example, in the course of the argument prosecuting counsel said:-

> "... what I wish to submit is that in the circumstances of our particular case, Yellow Man draws out a gun, the accused is along with Yellow Man, walking with him together. The common design, from the moment Yellow Man draws the gun from his trousers, the common design so far as intention goes, to kill or to cause serious bodily harm commences ... So I invoke the circumstances of that night to be coupled together with the situation in which we find the accused Champagnie in company of Yellow Man the night after, and Yellow Man has a gun which he pulls and which the other accused, Champagnie does not ... Well, the fact that there is no opposition by the other men to what he is doing in term of brandishing the firearm, there is a common design. There is no expressed repudiation by the other men as to what this man Neil is doing in terms of brandishing the firearm."

Again, by way of example, counsel for Champagnie argued the contrary proposition as follows:-

> "... the evidence is that Slater Kilburn and Keith Williams were walking, and they saw three men walking up to them. All of a sudden, according to Mr. Williams, Mr. Keith Williams, Yellow Man took a gun out, fired a shot and he ran. He saw nothing thereafter. The Crown tried to elicit from him: Well, what did Gladstone Champagnie do? Nothing. Did he say anything? Nothing. Did he have anything in his hand? Nothing. Could you see what he had in his hand? No, his hands were folded. In those circumstances, M'Lord, it is crystal clear that Mr. Champagnie, if he was there, that he was walking with Yellow Man and Yellow Man was on his own, it would have to be said; he pulled a gun and fired. There is absolutely nothing on the evidence, M'Lord, which can go to the jury to say that Champagnie, merely being there walking with another man, could be part of any joint enterprise, or could be part of any common design ... And my submission to your Lordship is, even if Gladstone Champagnie wants Slater Kilburn dead, and has so expressed it, the fact that he is walking and somebody shoots him, and he expresses joy that he died because he wanted him dead too, would not make Gladstone Champagnie a party to that crime ..."

In the course of these submissions the trial judge made a number of interventions, designed to elicit from counsel what they had to say about the existence of a common design before the appellant allegedly drew the gun from his waist. The following was typical:-

> "MR. CLARKE: I am saying, based on the fact, three men walking, three men in extended line, and there is no evidence here that they were some distance from each other. They were walking together coming towards the men one man has gun in hand.
>
> HIS LORDSHIP: No, one man pulled gun from his waist.
>
> MR. CLARKE: Sorry, one man pulled a gun from his waist.
>
> HIS LORDSHIP: And simultaneously pointed it and fired a shot."

Later, the learned judge three times taxed counsel for the prosecution on the lines that no inference could be drawn from the fact of three men walking together at night "prior to the pulling of the gun". The transcript of the argument on this question is too long to quote in full, but these extracts give the

flavour of a debate which was necessarily permeated by an assumption that the appellant had done the shooting. In itself there was nothing improper about this. The trial judge, who conducted the trial very fairly, did not demonstrate any personal inclination to assume that the appellant was guilty. But on careful study of the transcript their Lordships are far from satisfied that the jury could have understood the basis on which the discussions were being conducted, and the very real possibility of a mistake must have been reinforced both by the acceptance of the argument for Champagnie as well-founded and by the fact that, immediately after having ordered Champagnie to be acquitted, the judge asked counsel for the appellant whether he intended to make a similar submission and was inevitably told that he did not.

All this risk of misunderstanding could have been avoided if the practice which their Lordships consider should be the regular course had been followed, and the jury had been asked to retire during the argument. In the special circumstances of the present case a particularly careful explanation would have been required when the jury returned, but it would have been quite practicable, and could have been reinforced by a brief but firm reference during the summing-up. As events transpired, however, the irregularity in the conduct of the trial, understandable as it was in the light of the existing practice, has raised real doubts about whether the verdict of the jury can safely be relied upon. These doubts are reinforced by the presence in the minds of the jurors of the evidence that Champagnie had blamed the shooting on Yellow Man: which chimed with the assumptions on which the argument at the close of the prosecution case had explicitly been based. Their Lordships desire to reserve their opinion on whether there was a further material irregularity in failing to halt the trial after Champagnie had been discharged, so as to begin again with a differently constituted jury which would not have heard this damaging and inadmissible piece of evidence. But this additional consideration heightens the doubts which their Lordships have felt, and which have led them to conclude that in this rather unusual situation the appeal should be allowed and the conviction of the appellant quashed. If circumstances had been different the question would have arisen whether the proper course would be to direct a re-trial, but in a case where the conviction was founded on a single identification made seven years ago this would plainly be out of the question.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed.