[2015] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 1/2014

ON REFERRAL FROM THE GOVERNOR GENERAL

APPLICATION NO 112/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

OMAR NEIL v R

Lord Anthony Gifford QC and Ms Sue-Ann Lowe for the applicant

Mrs Sharon Milwood Moore for the Crown

18 May, 15 June and 31 July 2015

BROOKS JA

[1] There are two aspects to this case. The first is an appeal by Mr Omar Neil from his conviction for murder on 29 December 1999. It is his second appeal to this court from that conviction. His first appeal was dismissed on 20 December 2002. This second appeal is by way of a referral from His Excellency the Governor-General pursuant to section 29(1) of the Judicature (Appellate Jurisdiction) Act. The second aspect is closely linked to the first. It is an application by Mr Neil for the court to

consider fresh evidence in relation to this second appeal. It was Mr Neil's petition to His Excellency for the consideration of this fresh evidence, which led to the referral. In recognition of the close link between the two aspects, Lord Gifford QC, on behalf of Mr Neil, candidly conceded that if the application for the admission of the fresh evidence were to fail, there would be no grounds upon which this second appeal could be argued.

[2] The fresh evidence was not from a new witness. It was, instead, from the main witness for the prosecution at the trial, Miss Dionne Larmond. What made the evidence fresh was Miss Larmond's statement that her testimony at the trial was untrue and that she wished to retract it.

[3] Miss Larmond's fresh evidence was initially contained in two statements that she gave at the Office of the Public Defender in 2009 and 2010, respectively. On 18 May 2015, we read the documents in relation to the application, including the two statements. We also heard submissions from counsel in respect of the application. We concluded at that time that it was necessary to hear Miss Larmond "*de bene esse*", that is, to hear her testimony in order to determine whether her fresh evidence was capable of belief.

[4] The hearing took place on 15 June 2015. Having heard Miss Larmond being examined by Lord Gifford and cross-examined by Mrs Millwood Moore, for the Crown, we concluded that Miss Larmond's fresh evidence was plainly not capable of belief. There was, as a result, nothing to suggest that the verdict of the jury was

unreasonable. We concluded at that time, and so ordered, that the application to adduce fresh evidence be refused, the appeal, based on the referral, be refused and the sentence of 20 years imprisonment at hard labour, which had been previously affirmed, should be deemed to have commenced on 29 March 2000, as had been ordered at the end of the first appeal. We then promised to put our reasons in writing. We now fulfil that promise.

[5] Mr Neil was convicted at the trial along with two other men, namely, Mr Carletto Linton and Mr Roger Reynolds. They were convicted of the shooting death of Miss Larmond's mother, Veronica Nation, at about 5:00 am on 14 September 1997. Mr Reynolds was acquitted on appeal but Messrs Neil and Linton were unsuccessful in their respective appeals.

[6] Miss Larmond testified at the trial that she was an eye witness to the shooting. She said she saw all three men, whom she knew before, together with a fourth, at the time of the killing. Her testimony was aggressively attacked in cross-examination and at the first appeal. She was accused of changing her account of the shooting between her statements to the police, her testimony at the preliminary examination and at the trial. The various versions were placed before the jury by the learned trial judge and they concluded that Messrs Neil and Linton were present and participating in the killing. This court held, on the first appeal, that the jury had been properly directed in this regard and were entitled to have convicted Messrs Neil and Linton.

The fresh evidence

[7] In her testimony in support of this application, Miss Larmond said that the truth is that she did not see who killed her mother. She said that she heard gunshots, but by the time she came out of her house she saw her mother lying face down on the roadway. She said that she saw no gun and she did not see who had fired the shots that killed her mother.

[8] Her explanation for giving contrary evidence at the trial was that on the same day that her mother was killed, a man named Dave, who is from the area where Miss Larmond was living, told her who was involved in the killing and told her that she had to send them to prison. He was particularly insistent, however, that Omar Neil should be convicted for the killing and sent to prison for a long time. She said that he threatened that if she did not give that evidence she and her children would be killed.

[9] Her reason for coming forward with her retraction of her testimony at trial was, she said, that Dave had since died and she was tired of being in fear. She said that she has spent the last 18 years living in fear and stress and that she was tired of the situation. She just wanted it to end. She also wanted to clear her conscience.

[10] Miss Larmond made a poor witness in testifying to this fresh evidence. Her credibility became unravelled during examination in chief. The situation led Lord Gifford to make an application to treat her as a hostile witness. In her testimony, she said, as was mentioned above, that she saw none of her mother's attackers. That testimony was in stark contrast to the portion of her statement at the Public Defender's Office on

7 July 2010 in which she said that she saw the attackers but that Mr Neil was not one of them. She said:

> "**I did in fact see 3 men shoot my mother**. I recognized 2 and pointed them out to the police without anybody forcing me to, but the third person was not Omar Neil though DAVE had warned me to point out Neil. Omar Neil was definitely not there! The third gunman was definitely taller and slimmer than Omar Neil who I have grown up with. I just don't know that third gunman, though I could recognize the other two from the area.
> I want to take back the lie I was forced by Dave to tell on Omar Neil – I NEED PEACE OF MIND." (Emphasis supplied)

[11] Miss Larmond's credibility further deteriorated during cross-examination. It was an important part of both her statements to the Office of the Public Defender that her reason for coming forward was that Dave had died. In her first statement, made on 23 September 2009, Miss Larmond said in that regard:

> "**I come forward with the information because the person who had threatened me died**. I've never tried to recant the statement as I was fearful. Even though I am still fearful I just want him [Omar Neil] to be released." (Emphasis supplied)

[12] In her second statement, made on 7 July 2010, she said:

> "On 23/9/2009 I gave a statement to Ms. Eavean Hylton of the Office of the Public Defender about correcting a statement given to the police identifying OMAR NEIL as one of 3 gunmen that I saw kill my mother in 1997 – because of threats from someone, **a known gunman of the area SAMAKAN in Waterhouse, named DAVE who is now dead and so I can now talk the truth**." (Emphasis supplied)

[13] Despite that important aspect of her motivation for coming forward with her retraction, Miss Larmond testified in this court that Dave died about two years ago. She then said he had died in 2011. When pressed about the inconsistency, she said that she did not know in 2009 that Dave had died but she did not know where he was. She then said that she heard two years ago that Dave had died. She then said, "maybe I told them he had died because I just wanted to get it over with and done".

The relevant law

[14] The law in relation to fresh evidence in circumstances such as those in this case, has been assessed in some fairly recent cases in this court. In **Clifton Shaw and Others v R** [2002] UKPC 53; (2002) 61 WIR 368, the Privy Council confirmed that the guiding principles for the proper approach to considering applications for fresh evidence is contained in **R v Sales** [2002] 2 Crim App R 431 where Rose LJ stated:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for [the] court to hear the witness "*de bene esse*" in order to determine whether the evidence is capable of belief."

[15] In **Sales**, the appellant initially pleaded guilty to a killing. He gave a detailed account of the killing to his solicitors. Although his plea was not accepted, he was later convicted after a trial. Some years later, after the death of one of the persons who were also convicted for that killing, the appellant sought to give, as fresh evidence, a

different account of the killing. This was proffered in written form. In it he stated that it was that co-convict who had committed the offence. The appellant was, on that basis, granted leave to appeal. The court heard the fresh evidence "de bene esse" but found that it was incapable of belief. It held that the new version of evidence was totally different and inconsistent from the detailed, largely coherent account that he had made after the killing. The appeal was therefore dismissed.

[16] In **Patrick Taylor v R** SCCA No 85/1994 (delivered 24 October 2008) this court accepted the guidance set out in **R v Pendleton** [2002] 1 All ER 524 as to the proper approach to be taken when the proffered fresh evidence is rejected. Panton P stated that there were two tasks which this court should undertake in those circumstances. The first is to decide whether or not to accept the fresh evidence. The second step is to decide whether or not to allow the appeal. In doing this second task the court has to decide whether the fresh evidence raised any reasonable doubt as to the guilt of the appellant. If it does not, the court should dismiss the appeal. A similar approach was used by this court in **Orville Murray v R** SCCA No 176/2000 (delivered 19 December 2008). In both those cases the fresh evidence was rejected and this court found that the verdict of the jury was not unreasonable. There was therefore, no miscarriage of justice.

Application to the instant case

[17] As has been said above, the issue of Miss Larmond's credibility was the main issue at the trial and at the first appeal. The jury saw and heard her and heard the

various attacks against her credibility. They accepted her evidence that she was present and saw when her mother was shot and killed. The new evidence that she now adduced to attempt to contradict that testimony is plainly incapable of belief. Following the guidance of the authorities set out above, it is our duty to reject this fresh evidence and to dismiss the appeal. It is for those reasons that we made the orders set out at paragraph [4] above.

[18] We thank counsel on both sides for their assistance in providing the authorities and insightful submissions.