NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 150/97

MOTION

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

R. V. ROBERT SMALLING

Dennis Daly Q.C., & Miss Nancy Anderson for Applicant

Carrington Mahoney & Miss Rochelle Cameron for Respondent

June 24, and July 31, 2002

FORTE, P:

This is an application to adduce fresh evidence. It comes to us as a result of a reference by Her Majesty's Judicial Committee of the Privy Council. In order to put the matter in perspective, a reference to the 2nd paragraph of the Queen's Order dated 11th April 2001, is appropriate. It reads:

> "**THE LORDS OF THE COMMITTEE** in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to advise Your Majesty that (1) on the issue of provocation the Appeal in respect of all three

> convictions should be dismissed (2) on the issues of (a) diminished responsibility and (b) involuntary intoxication the Appellant ought to be given special leave to appeal (3) the matter ought to be remitted to the Court of Appeal of Jamaica in order that the Court may consider on the exercise of its powers under section 28 of the Judicature (Appellate Jurisdiction) Act 1962 whether it should receive fresh evidence on the issues at 2(a) and (b) above and make such orders as it considers appropriate and (4) effect should not be given to the sentences imposed upon the Appellant until the Court of Appeal of Jamaica has had an opportunity to respond to the Board's invitation and has made a final Order."

In keeping with that Order, Mr. Dennis Daly, Q.C. made before us an application to adduce fresh evidence i.e. the evidence of Dr. P. Gallwey, a psychiatrist who examined and reported on the applicant's mental state sometime subsequent to his conviction. In fact the report formed the basis of new grounds proffered in the Judicial Committee, and resulted in this reference by Her Majesty's Board.

Section 28 of the Judicature (Appellate Jurisdiction) Act 1962, by virtue of which the Court has power to admit fresh evidence states:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice –
>
> (a) ...
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or

> were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; ...".

In our jurisdiction, the test for admitting fresh evidence requires that the evidence must be capable of belief, it must be evidence that was not available at the time of the trial, and must be evidence that if accepted as true might have some adverse effect on the verdict returned by the jury at trial.

In its opinion which resulted in this appeal being referred to us, the Board, per Lord Bingham of Cornhill states at page 10:

> "24. The Board notes that the Court of Appeal may, under section 28 of the 1962 Act, receive fresh evidence if they think it necessary or expedient in the interests of justice to do so. There are various matters to which, by analogy with section 23(2) of the English Criminal Appeal act 1968, the Court of Appeal might think it right to have regard in considering whether to receive fresh evidence from Dr. Gallwey or any other psychiatrist on whom the Crown might wish to rely: whether the evidence appears to be capable of belief; whether it appears to the court that the evidence may afford a good ground for allowing the appeal; whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

> The practice of the Court of Appeal Criminal Division in this difficult field was reviewed in some detail in ***R v Criminal Cases Review Commission Ex p Pearson*** [1999] 3 All ER 498."

The criteria which their Lordships set out in the above dicta is of course the statutory provisions of section 23(2) of the English Criminal Act 1968. In our jurisdiction there is no statutory provision, nor has it even been the approach of our Courts to give consideration to any "reasonable explanation for the failure to adduce the evidence in those proceedings." On the contrary without this statutory provision, the Court's consideration must be directed at whether the evidence was available at the time of trial. If it were, then it is unlikely that such evidence would be allowed as "fresh evidence."

We however, proceed on the basis of the criteria, which we have set out above. Two reports of Dr. Gallwey formed the "evidence" upon which the application is based.

It is not difficult to conclude that the evidence proposed to be tendered, was not available at the time of trial. The appellant had not been examined at that time by a psychiatrist to discover whether he might have been mentally impaired either to the degree of insanity or to the extent of suffering from diminished responsibility. This in our view amounted to a serious omission, having regard to the statements made by the applicant in the various statements he made alluding to

the "ganja" making him commit the offences, as also the very nature and circumstances of the killings. As a result, no psychiatric examination directed at his mental condition at the time of the killings was done until Dr. Gallwey examined him on February 2, 2001 nearly five years after the offences were committed in April 1996. It is to the substance of that report that we are now asked to allow Dr. Gallwey to testify.

In order to do so, we must be satisfied that the evidence is credible and that if believed it would be necessary to quash the conviction for capital murder and substitute therefor, a conviction for manslaughter.

Is Dr. Gallwey's evidence credible?

The Doctor laid great stress on the statements made by the applicant in relation to ganja being the cause of his actions, and the applicant's assertion to him that as a young boy he had had a head injury. Having done what he described as a Stroop Neuropsychological Screening Test, the doctor concluded that there was some brain damage but the test was non-specific and did not indicate the probable part of the brain that is damaged. He however reported that there were no indications in clinical examination of brain damage but asserted that the test was significant in view of the applicant's history of head injury with loss of consciousness as a child, particularly as the

applicant reported a period of irritability and emotional liability for some time following. The doctor took into consideration the applicant's description to him of having suffered a black-out and having had weird visions of "violent kind" on the night of the killings after he had smoked the ganja. He, however expressed a suspicion that the ganja that the applicant smoked may have been adulterated with some other drug. On that background the doctor concluded that the applicant's story was "rather convincing". He felt that the applicant's violence was attributable to unusually high doses of cannabis from concentrated resin or possibly cocaine. This adverse drug reaction, he opined, was increased by the indications of brain damage in the applicant. His conclusion is unfortunately not based on any evidence at all in relation to the concentration of resin in the ganja the applicant might have consumed or indeed whether cocaine was involved. This therefore appears to be speculation based on the account given him by the applicant, and his opinion that there was brain damage. In fact, he reports that he was satisfied that the brain damage was a most significant part of the abnormality of mind at the time of the killings. He concludes that had a psychiatric examination been done at the time of the trial or before, it is more likely than not that a plea of diminished responsibility would have been advanced.

In a supplemental report however, Dr. Gallwey gave the following opinion:

> "I am asked to give a view on the relative causal connection between the drug-induced psychosis and the brain damage in relation to Mr. Smalling's episode of discontrol which formed the background to the offences.
>
> Although they are interrelated, I am of the view that without the brain damage it is more likely than not that Mr. Smalling would not have suffered the discontrol that he did. It is impossible to be certain where the seat of his brain damage lies and the fact that he was never neurologically investigated means that the extent of his brain pathology remains obscure. However, I am satisfied that his brain damage is a most significant part of the abnormality of mind at the time of the killings and would have formed an essential part in the psychiatric evidence in relation to a plea of diminished responsibility." [Emphasis added]

As it turns out, the above underlined words, have become most significant in relation to the assessment of the credible effect of Dr. Gallwey's proposed testimony. Consequent on the referral of the case by Her Majesty's Board, the applicant was examined by Dr. Amza Ali, Consultant Physician and Neurologist at the Kingston Public Hospital. In his report, tendered to us without objection he avers to having the same background information as did Dr. Gallwey. He reported as follows:

> ""Neurological assessment revealed normal higher mental function, a supple neck, equally reactive pupils and normal fundoscopy. All

> cranial nerves were normal and the rest of the peripheral examination revealed no localizing or lateralizing signs.
>
> In the context of the isolated history of remote brain injury, despite the absence of the history of seizures, I requested a CT scan of brain as part of his evaluation. This CT scan was done at Kingston Radiological & Imaging Services Ltd., on the 5th December 2001 and was normal."

The result of the CT scan was also made available to us. It reads:

> "History: Remote history of head injury with loss of consciousness? Relevance to possible behavioral disorder.
>
> Report: The ventricles are normal in size and position.
>
> The basal cisterns and sulci appear normal.
>
> The brain parenchyma appears normal.
>
> No extra-axial lesion is seen.
>
> No fracture or bony abnormality is seen.
>
> Impression: Normal CT of the brain."

This CT was done by Dr. Michelle Foote-Doonquah, Radiologist.

These later reports confirm that in fact there was no brain damage to the applicant. That finding by necessity affects the conclusion of Dr. Gallwey, who placed great significance on brain

damage to the applicant. His assertion that "without the brain damage it is more unlikely than not that Mr. Smalling would not have suffered the discontrol that he did" would certainly affect any attempt to establish diminished responsibility, when faced with the report of the CT scan which showed that there was in fact no brain damage. As a result, we conclude that Dr. Gallwey's evidence would not be credible in the sense that it could not support the defence of diminished responsibility so as to cause a reversal of the conviction for murder. In addition, we found no evidence in the content of Dr. Gallwey's report, to substantiate the finding that the consumption of the drug by the applicant, was involuntary. Apart from the Doctor's speculation, there would be nothing upon which a jury could come to such a conclusion. In the event the application to admit the evidence of Dr. Gallwey is refused.

There is however, one other matter which must be addressed. During the argument before us we enquired whether the learned trial judge, having regard to the statements given by the applicant that the ganja had made him do it, had directed the jury as to the effect a finding that his actions were the result of the consumption of ganja, should have on their conclusions.

An examination of the summing-up revealed the following passage:

> "There is reference made to weed in the statement, and there is reference made in the first oral statement made, according to the prosecution, by the accused to Detective Sergeant Scott in relation to ganja. If you find that these statements were indeed made by the accused and that he was under the influence of ganja, that does not detract from the offence of murder. In other words, Mr. Foreman and members and of the jury, a person may not use an illegal drug and then say that it is the drug that caused him to commit the crime, it is no defence, to deliberately use a drug and then to commit a crime and say you have not committed a crime because you were under this drug.
>
> In this case, there are two verdicts opened to you, guilty of murder or not guilty of murder. There is no question of manslaughter, so don't confuse yourselves."

Those directions are inconsistent with directions approved by the Judicial Committee of Her Majesty's Privy Council in the unreported case of ***Alexander Von Starck v. The Queen*** delivered on the 28th February 2000. In delivering the opinion of the Board Lord Clyde stated at page 4:

> "As a matter of law it is not disputed that the voluntary consumption of drugs, as well as the voluntary consumption of alcohol, may operate so as to reduce the crime of murder to one of manslaughter on the ground that the intoxication was such that the accused would not have been able to form the specific intent to kill or commit grievous bodily harm. In the present case the statements made by the appellant on arrest and in his caution statement point strongly to a conclusion that while he had killed Michelle he was so far

> under the influence of the cocaine that he lacked the *mens rea* required for murder and accordingly should be convicted only of manslaughter."

The instant case has a close resemblance to the ***Von Starck*** case as it relates to the influence that the consumption of ganja would have had on the applicant. The directions given by the learned trial judge, in the circumstances of the case was wrong in law, and as a result he denied the applicant the opportunity of being convicted for the offence of manslaughter.

As the matter before us concerned purely the admission of fresh evidence, we felt unable to interfere with the verdict on grounds which were not before us, and which seemed to have escaped the scrutiny of their Lordships in the Privy Council. As a result we strongly recommend that His Excellency the Governor-General and the Privy Council, be made aware of our comments, and that that august body commute the death penalty to which the applicant has been sentenced and replace it with one of life imprisonment, which we feel would be an appropriate sentence had the applicant been convicted for the offence of manslaughter. Had we had the authority, we would order that he be not considered for parole until he had served a period of twenty-five years.