

N/M.C.S.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 74/96

COR: THE HON. MR. JUSTICE FORTE, J.A.  
THE HON. MR. JUSTICE PATTERSON, J.A.  
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA  
vs  
JOHN MITCHELL

Dennis Morrison Q.C. for Appellant

Marlene P. Malahoo for Crown

1st December, 1997; January 12, 1998

FORTE J.A.

On the 1st December, 1997, we heard arguments in this application for leave to appeal, at which time we granted leave to appeal, treated the application as the hearing of the appeal, and thereafter dismissed the appeal and confirmed the conviction and sentence. The appeal arose out of the conviction on the 30th May, 1996 in the Home Circuit Court of the appellant for the offence of capital murder of George Taylor on the 14th September, 1992. The appellant was jointly charged and tried with Devon Carty o/c Oliver Johnson who was convicted of manslaughter and who has not appealed.

Before us, Mr. Dennis Morrison, Q.C for the appellant conceded that having carefully examined the transcript of the evidence and of the learned trial

judge's summing -up, he could find no arguable complaint in respect of the conviction and consequently could present no argument in this regard. He, however, strongly complained in respect of the representation, or lack thereof, of the appellant at the trial. He filed and argued the following grounds of appeal:

"That the learned trial judge erred as a matter of law when upon the Applicant's counsel seeking leave to withdraw he failed:-

- (a) To do or say anything to persuade them to remain;
  - (b) To satisfy himself that the Applicant would not suffer significant prejudice by his counsel's withdrawal;
  - (c) To give any or any sufficient consideration to the question whether the trial should have been adjourned to enable the Applicant to try and obtain alternative representation;
  - (d) To inform the Applicant of his right to seek alternative legal representation.
2. That as a result of the learned trial judge's errors of omission aforesaid, the conduct of the Applicant's trial proceeded in breach of his rights under Section 20 (6) (c) of the Constitution of Jamaica and Article 14 (3) (d) of the International Covenant on Civil and Political Rights.
  3. That the Applicant was prejudiced in the conduct of his being unrepresented".

The circumstances out of which these complaints are made, appear in the transcript of the evidence, the relevant section of which are referred to hereunder. Before making reference to those passages, however, it is necessary to give a brief sketch of the evidence.

The appellant, together with Carty and another were alleged to have held up a sales van, and during the course of the robbery, the deceased, who was the driver of the van, got away and ran into the bushes . The appellant leaving his partners with two other victims who had been travelling in the van pursued the deceased. At the trial it was contended by the Crown that the appellant caught up with the deceased, Mr. Taylor, shot and killed him and robbed him of the money he had in his possession. The appellant was seen by two prosecution witnesses, as he came out of the bushes. He was subsequently identified by these two witnesses and one of his victims.

At the commencement of the trial the appellant was represented by two attorneys, Mrs. Harrison -Henry and Ms. Rose Green both of whom had been assigned to him by virtue of the Poor Prisoners' Defence Act.

It appears that on the first day of trial, the only persons giving evidence for the Crown, were one of the victims, who testified that he was not able to identify any of his assailants, and the sister of the deceased who had identified his body at the post mortem examination. As a result, not many questions were asked of these witnesses by the defence attorney. On the second day of the trial, when another witness was to be called, counsel, Mrs Harrison-Henry, informed the Court that the appellant had indicated to her that he wished to cross-examine the witness himself. Having been asked by the learned trial judge if she had advised the appellant, counsel stated as follows:

"No, m'Lord, I haven't advised him, but Mr. Mitchell, as I understand it, m'Lord, is entitled to Counsel of his choice, number one, if he does not

wish Counsel he is also entitled not to have Counsel. That is how I understand the ruling. So I believe, m'Lord, that this is a matter entirely for him as to whether or not he wants to cross-examine the witnesses himself, but I don't see a situation where I am going to cross-examine the witnesses and then he cross-examines the witnesses after or before. I don't know of that being possible, and 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.

HIS LORDSHIP: At this stage?

MRS. HARRISON - HENRY: Yes, m'Lord. He has indicated to me quite vociferously that he would like to do it himself.

The dialogue continued as follows:

HIS LORDSHIP: Stand up, Mr. Mitchell. Do you understand the nature of the charge against you?

ACCUSED: Yes, , 'Lord.

HIS LORDSHIP: It is a very serious charge.

ACCUSED: Yes, m'Lord.

HIS LORDSHIP: You are not trained in law?

ACCUSED: No.

HIS LORDSHIP: Very well. You have an Attorney who represents you. Your attorney , as you have seen, cross-examines the witness as she thinks fit.

ACCUSED: Not to my suit, m'Lord.

HIS LORDSHIP: Why do you say this?

ACCUSED: The question that she should ask the witness to what he says.

HIS LORDSHIP: Nobody has said anything against you up to now.

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.

HIS LORDSHIP: You want to do it on your own?

ACCUSED: Yes, m'Lord.

HIS LORDSHIP: Well, so be it. You don't require the services of Counsel any longer? Is that what you are telling the Court?

ACCUSED: Precisely.

HIS LORDSHIP: And you will do your own cross-examination ?

ACCUSED: Yes, m'Lord.

HIS LORDSHIP: You think you are capable of doing that, Mr. Mitchell?

ACCUSED: Yes , m'Lord.

Thereafter there was a short adjournment, apparently at the invitation of Counsel for the Crown, and when the Court resumed, the jury was asked to retire to the jury room. Then the learned trial judge tried again in the absence of the jury. The dialogue follows:

HIS LORDSHIP: Mr. Mitchell, please stand up. Earlier you had indicated to me that you do not wish

the services of Counsel any longer. Have you had time to think about that?

ACCUSED: Yes, m'Lord.

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.

HIS LORDSHIP: You see, Counsel in her judgment 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.

Then after further dialogue in which the appellant accused his attorney of trying "to push me to say things" i.e advise him to admit that he had signed a statement purportedly given to the police when he had not done so, His Lordship again asked of the appellant:

"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.

ACCUSED: I understand you, m'Lord. I have a little understanding. If I get a pen and some paper I can write down what the witness is saying. I can examine them myself".

The learned trial judge still reluctant to have Mrs. Harrison-Henry withdraw totally from the case, requested her to remain throughout the proceedings in the event that her expertise was needed by the appellant. Mrs. Harrison-Henry, apparently being hurt by the appellant's allegations about her insistence that he admit that he had signed the statement, made a strong plea to the learned trial judge to allow her to withdraw. She said as recorded:

"MRS. HARRISON -HENRY: M'Lord even for me to address on points of law, m'Lord, I am going to have great difficulty. I can tell your Lordship truthfully and honestly I will have grave difficulty representing anybody who makes such an allegation against me. I truly will, m'Lord, and I believe that the Court is asking me to do more than I could possibly bear. I have come here ready to do this case. The matter went through, m'Lord. I have spoken to the accused man yesterday. Today is the first time I get an indication that he is dissatisfied with my services. As far as I know I got what I wanted out of the witness, Donald Peart. M'Lord, truly, truly, m'Lord, honestly, I am going to be in grave difficulty. You know, m'Lord, doing a murder trial always puts Counsel under stress".

Apparently being moved by this plea of Mrs. Harrison-Henry, the learned trial judge, then turned to Ms. Rose-Green, who had also been assigned with Mrs. Harrison-Henry to defend the appellant. Here is what is recorded in the transcript:-

"HIS LORDSHIP: You have two Counsel. Mrs. Harrison -Henry and Ms Rose Green.

ACCUSED; Who is my lawyer, m'Lord? I only see one lawyer speak to me.

HIS LORDSHIP: Well there are two Counsel that appear for you.

Would you be prepared to go along with Ms. 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.

His lordship then asked Ms. Rose Green if she would continue the representation, but counsel, was apparently aggrieved by the appellant's intimation that she had not, as counsel, attended upon him, and having regard to the extensive work she had done with Mrs. Harrison - Henry, and the fact that the appellant was dissatisfied with Mrs. Harrison-Henry, she had no doubt that he would also be dissatisfied with her. She was not sure she would be comfortable continuing in the appellant's defence and was now sure that the appellant could not be comfortable with her.

The learned trial judge then addressed the appellant:-

"Yes Mr. Mitchell".

Mr. Mitchell replied:

"She doesn't want to defend me".

Then the following dialogue took place:-



"HIS LORDSHIP: You are not being very helpful. I am trying to give you all the assistance you need but you don't seem to want it.

ACCUSED: I wish to continue with the case and I will defend myself.

HIS LORDSHIP: Very well, That is absolutely clear?

ACCUSED: Yes

HIS LORDSHIP: I will allow you to defend yourself".

The learned trial judge thereafter allowed Mrs. Harrison-Henry to withdraw and called upon Ms Rose Green to remain in court to assist the appellant if needs be throughout the trial, and to address him on any points of law. The Registrar was then asked to serve on the appellant all the depositions and necessary statements.

The case was adjourned to the following day when Ms Rose Green again addressed the Court on the issue. In order to understand clearly the substance of her address, it is necessary to set out the relevant points. She addressed the learned trial Judge, thus:

"May it please you, m'Lord. M'Lord my application this morning to the court is that I be released from this case and I will give my reasons for the application. Now, m'lord, subsequent to the adjournment yesterday I went and spoke to the accused man, John Mitchell, he told me, m'Lord, in clear and precise terms, he used words to the effect that he no longer wished to have me represent him as Mrs. Henry and myself had worked together and conspired to ensure a conviction in this case. These, your Lordship will admit, are serious allegations. And in my view it would amount to a conflict of interest".

In the end, after further submissions by Ms Rose Green, she was allowed to withdraw by the learned trial judge.

The extensive references we have set out indicate that the appellant, who had been assigned two counsel to undertake his defence was dissatisfied and suspicious of the manner in which they were performing their responsibility. As a result, after many attempts, and clear advice as to the undesirability of proceeding without their assistance, the appellant specifically stated and to some extent, was adamant that he would defend himself. As to his ability to do so, he expressed no doubt when asked by the learned trial judge.

In support of his contentions, Mr. Morrison referred us to the case of *Dunkley v R* (1995) 1 All ER 279. In delivering the opinion of the Board in the Judicial Committee of the Privy Council, Lord Jauncey of Tullichettle at p. 286 stated:

“...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 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”.

Then on p 287:-

“Their Lordships can sympathize 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".

Mr. Morrison also called in aid the provisions of Section 20 (6) (c) of the Constitution of Jamaica which reads:

20 (6) "Every person who is charged with a criminal offence –

(c) shall be permitted to defend himself in person or by a legal representative of his own choice; "...

That section secures to the person charged, the right to conduct his defence by himself and without the assistance of an attorney. If however, he wishes to be represented by an attorney, that is a right which cannot be denied him. The section, however, does not give him the right to be assigned legal representation by the state, nor does it give him an absolute right to legal representation. See *Robinson v The Queen* (1985) 2 All ER 595 where Lord Roskill in delivering the opinion of the Board at p. 599 stated:

"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".

This dicta of Lord Roskill was cited with approval by Lord Slynn of Hadley in delivering the opinion of the Board of Her Majesty's Privy Council in

the recent unreported case of **Delroy Ricketts v The Queen** P.C. Appeal No 10/1996 delivered on the 15th December, 1997.

In the instant case, contrary to the contentions of Mr. Morrison, the learned trial judge did everything that he could to persuade both Attorneys to remain in the case, even though the appellant had in fact on his own volition dismissed them, and expressed a desire to conduct his own defence. In the face of the provisions of Section 20 (6) (c) of the Constitution of Jamaica which gives him the right to represent himself, the learned trial judge could not justifiably be criticized for allowing him to do so, after he (the learned judge) had endeavoured through advice and persuasion not only to secure the continued legal representation of the attorneys, but also to demonstrate to the appellant the dangers of his undertaking his own defence on such a serious charge.

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 this regard the following dicta of Henry J.A. in **R v McGraw** and **Innis** (1979) 30 WIR 220, a judgment of this court is also of relevance:

"As the applicant in **R v Pusey** [(1970) 1 2 JLR 243] had invoked the aid of the Poor Prisoners' Defence Law and had had counsel assigned to him, he could not subsequently be heard to complain that he was deprived of any of the constitutional rights guaranteed him under the Constitution of Jamaica,

s 20(6)(c), following his rejection of the counsel assigned to conduct his defence.

We are of the view, that a similar situation arises where an accused person by his own act deprives himself of the services of counsel assigned to him, particularly where this occurs in the middle of the trial, and that he cannot then be heard to complain that he has been deprived of his constitutional rights".

In respect of the complaint, that the learned trial 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 conclusion we need only state that there was no miscarriage of justice, and accordingly the appeal was dismissed, and the conviction and sentence affirmed.