Privy Council Appeal No. 37 of 1977

Dennis Reid — 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 4th DECEMBER 1978

Present at the Hearing:

LORD DIPLOCK
LORD HAILSHAM OF SAINT MARYLEVONE
LORD SALMON
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL

/Delivered by LORD DIPLOCK/

In this appeal brought by leave of the Court of Appeal of Jamaica the appellant ("the Accused") seeks to have set aside an order of that court of 11 March 1977, whereby it ordered a new trial of the appellant upon a charge of murder of which he had been convicted by the verdict of a jury upon his trial in the Home Circuit Court on 7 May 1976.

The case against the Accused presented by the prosecution at that previous trial had turned upon his identification by a single eye-witness, Miss Sadie Samuels, as having been present and armed with a revolver on the premises where and at the time when the deceased, a Beach Club proprietor called Fedlan Walsh, was shot. The appeal of the Accused against his conviction was based principally on the quality of this identification evidence. It was contended on his behalf that the verdict of the jury was unreasonable and could not be supported having regard to the evidence; alternatively it was contended that the learned judge in his summing-up had failed to give the jury adequate instructions and warnings upon the issue of identity.

The Court of Appeal unanimously allowed the appeal and quashed the conviction. Their Lordships will examine later the precise grounds on which they did so. They also ordered a new trial; but this was by a majority only. In July 1977 they gave leave to the Accused to appeal to Her Majesty in Council and certified four points of law as arising for

consideration on the appeal, viz:

1. Whether or not the Court of Appeal can properly order a new trial where the only evidence implicating the prisoner (a) has been discredited and/or (b) is palbably or manifestly unreliable.
2. Whether or not a new trial might properly be ordered where the real issue in the case is the reliability of the visual identification of a prisoner previously unknown to the identifying witness and the identifying witness was given a description of the prisoner prior to pointing him out on an identity parade.
3. Whether or not in the instant case it was proper and reasonable to order a new trial.
4. What are the principles which should apply in considering whether or not a new trial should be ordered.

The power to order a new trial is conferred upon the Court of Appeal of Jamaica by s. 14(2) of the Judicature (Appellate Jurisdiction) Act, 1962, which is in the following terms -

> "(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the court may think fit."

Although the verb used is mandatory: "the Court shall ..., if the interest of justice so require, order a new trial", any consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interests of the individual accused and the prosecution in the particular case. The weight to be given to these various factors may differ from case to case and depends very much on local conditions in Jamaica with which the Court of Appeal is much more familar than their Lordships and is better qualified to assess. Their Lordships woulld not think it right to intefere with a decision of the Court of Appeal as to how to exercise their power under s. 14(2) to order a new trial unless their Lordships were satisfied that the Court of Appeal had erred in principle by taking into consideration some matter to which they should not have paid regard or by failing to take into consideration some matter to which they should have paid regard, and in consequence a substantial injustice had been done to one or other of the parties.

In the evidence given by Miss Samuels both at the preliminary examination and at the trial itself there were what the Court of Appeal described as "inconsistencies in her evidence surrounding her ability properly to identify the appellant." Their Lordships agree, but do not find it necessary to go into any detail. After Miss Samuels had completed

her evidence it emerged in the cross-examination of the Detective Inspector in charge of the case that the Accused had been undergoing a sentence of imprisonment at St. Catherine District Prison, that in February 1975, a little less that two months before the murder of Fedlan Walsh on 6 April 1975, he had escaped from prison and had remained at large until he was recaptured at some date in April 1975 after the murder. After his escape his description was published in the press and on the radio and television and a photograph of him was published in at least one daily newspaper. His appearance was distinctive by reason of a conspicious scar across his forehead and his two centre upper teeth were missing. Neither of these disfigurements had featured in the description of Fedlan Walsh's assailant that Miss Samuels had originally given to the police.

In the light of this evidence as to the publication of descriptions and photographs of the Accused during a period before the identity parade at which Miss Samuels had picked out the Accused, application was made by counsel for the prosecution that she should be recalled. The application was granted and on further examination she said that during the relevant period she had seen no photograph of the Accused in the press or on television, but that she had heard a description of him "up by where /she/ was living" at a date which she identified as being between the time of the murder and that of the identity parade. Although she was cross-examined by defence counsel with a view to eliciting an admission that she had also seen a photograph of the Accused no questions were asked either by him or by counsel for the prosecution to throw light upon what characteristics had featured in the description of the Accused that she had heard before the identification parade and what part, if any, the description had played in enabling her to pick out the Accused from the other participants.

In referring to this lacuna in the prosecution's evidence the Court of Appeal said:

> "It was unfortunate that the 'description' evidence was allowed to remain as it was left to the jury".

In that state of the evidence the Court of Appeal found itself unable to say whether Miss Samuels was able to identify the accused wholly by reason of the prior description or wholly from her own powers of observation or from a combination of both. They pointed out that if it was wholly from her own powers of observation then "the matter was one properly to be left for the determination of the jury"; but that if it were not, "serious thought would have had to be given to the 'no case' submission made at the close of the Crown's case". The crucial sentence in the Court of Appeal's judgment is:

> "In the circumstances we are unable to see how the jury could have resolved the question of the identity of the appellant so as to be sure because clarification had not been obtained of the witness's answer regarding the description of the appellant she said she had received".

Their Lordships agree with this; but what it amounts to is a holding that the verdict of the jury was unreasonable and could not be supported having regard to the evidence. The Court of Appeal went on to say that the judge's omission to direct the jury on how that aspect of the evidence on identity should have been resolved was a non-direction amounting to a misdirection; but in the light of what they had already held and of the guidelines as to the way in which evidence as to identification should be treated as laid down by the English Court of Appeal in R. v. Turnbull [1976] 3 All E.R. 549, which is followed by the courts in Jamaica, the only direction that the judge could properly have given to the jury was that on the state of the evidence before them the Accused was entitled to be acquitted.

Having reached, in their Lordships' view quite rightly, the conclusion that the inconsistencies and gaps in the evidence of identity adduced at the first trial were such as to render any verdict of guilty against the Accused unreasonable or, in the words of corresponding provisions in other common law jurisdictions indluding England, "unsafe or unsatisfactory", the court in their Lordships' view ought not to have ordered a new trial in order that the Crown should have another chance to fill the gaps. In doing so they erred in principle.

The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are, or course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the accused. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witnesses it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing-up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witnesses o clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way.

It would conflict with the basic principle that in every crimal trial it is for the prosecution to prove its case against the accused,

if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the accused to trial has failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under s. 14(2) of the Judicature (Appellate Jurisdiction) Act, 1962.

In the U.S.A. where new trials in criminal cases are a commonplace a similar distinction between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence, and cases where the verdict has been set aside on other grounds, had been drawn by the Supreme Court of the United States. In the former class of case a new trial is not to be ordered in either the Federal or the State jurisdiction: Burke v. U.S. 437 U.S.: Greene v. Massey 437 U.S.

That the instant case fell within the category in which a new trial ought not to have been ordered may have been obscured by the circumstance that Miss Samuels' crucial answer that she had heard a description of the Accused "up by where [she] was living" was given in response to a question by the learned judge; and on the hearing of the appeal it was suggested by counsel for the Accused that as the matter was not further probed by counsel for either party the judge ought to have taken it upon himself to pursue the matter. He could quite properly have done so had he thought fit, but, as their Lordships have already pointed out, he was under no duty to make good the deficiencies in the prosecution's case, if the prosecution did not choose to do so. The instant case thus falls into the category of those in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence. The Court of Appeal's error in principle lay in failing to treat this as a conclusive factor against ordering a new trial.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be allowed and that so much of the order of 11 March 1977 as orders a new trial of the appellant on the charge of murdering Fedlan Walsh should be reversed.

Their Lordships have, in what they have already said, sufficiently answered the certified questions (1), (2) and (3). Question (4) is

general in its terms and asks for a statement of the principles which should apply in considering whether or not a new trial should be ordered.

Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by certified question (4) must be read with the following warning in mind.

Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused.

At the other extreme, where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso to s. [illegible]1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely that a conviction, "it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, andnot left as something which must remain undecided by reason of a defect in legal machinery". This was said by the Full Court of Hong Kong when ordering a new trial in Ng Yuk Kin v. Regina (1955) 39 H.K.L.R. 49 at p.60. This was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone.

Their Lordships in answer to the Court of Appeal's request have mentioned some of the factors that are most likely to call for consideration in the common run of cases in Jamaica in which that court is called upon to determine whether or not to exercise its power to order a new

trial. They repeat that the factors that they have referred to do not pretend to constitute an exhaustive list. Save as respects insufficiency of the evidence adduced by the prosecution at the previous trial, their Lordships have deliberately refrained from giving any indication that might suggest that any one factor is necessarily more important than another. The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered to-day. As their Lordships have already said, this makes the task of balancing the various factors one that is more fitly confided to appellate judges residing in the island.