Privy Council Appeal No. 10 of 1996

Delroy Ricketts *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 15th December 1997

Present at the hearing:-

Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hutton
Mr. Justice Gault

*[Delivered by **Lord Slynn of Hadley**]*

On 23rd March 1988 the appellant was convicted in the St. James Circuit Court in Montego Bay of the murder on 19th February 1986 of Alvin Wong and sentenced to death. On 12th April 1989 the Court of Appeal of Jamaica gave their reasons for having on 13th March 1989 dismissed the appellant's application for leave to appeal against conviction and sentence. Special leave to appeal as a poor person against that order was granted on 28th June 1995.

The murder took place one evening in the deceased's home where the deceased, his wife and son were present. It was said that three men came, two with guns and one with a knife, looking for money. Evidence was given by the deceased's son that his father had been shot by the accused. The son was the only witness called by the prosecution as to what happened that evening.

Counsel contended that the conviction should be set aside because of defects in the conduct of the trial and the appeal, in the judge's summing up and in the conduct of the identification parade at which the deceased's son, also called Alvin Wong, identified the accused as the man who killed his father.

The starting point for the criticism of the conduct of the trial is the Constitution of Jamaica in schedule 2 of the Jamaica (Constitution) Order in Council 1962 S.I. 1962 No. 1550 which by section 13 declares that every person has a right, *inter alia*, to the protection of the law and by section 20(6)(c) provides that every person who is charged with a criminal offence shall be permitted to defend himself in person or by a legal representative of his choice. To that is added a claim that by the common law a defendant is entitled to a fair trial which in itself includes representation by counsel.

When the case came on before the court in the morning of 21st March 1988 counsel who had been assigned to the defendant was not present but the court was told that he would be present at 2.00 p.m. The judge decided to empanel the jury and thereafter to adjourn until counsel arrived. When asked if he heard and was listening to what the judge had said the accused replied "Yes, sir". When asked if he pleaded guilty or not guilty he did not answer and a plea of not guilty was entered. When told that he could object to jurors called and when asked, as the jurors' names were read out, whether he objected to them individually he did not answer. The court adjourned at 11.27 a.m. In the afternoon when the court resumed the appellant's counsel was not present and the prosecution suggested that it would be necessary to empanel a jury to decide whether he was mute of malice. The judge said that he would not wish to do that without counsel being present. Counsel arrived a few minutes later and the judge adjourned so that the appellant could have the opportunity of talking to him. On the hearing being resumed counsel told the court that he had not got any further with instructions from the defendant save that the defendant said that he could hear but could not understand what the judge had been saying. Counsel thought that the defendant might have a mental problem. A discussion took place as to whether the accused should be seen by a psychiatrist but the court was told that the Government's psychiatrist was not available nor were funds

available to engage a doctor in private practice. Without objection from counsel the court then proceeded to try the issue whether the accused was mute of malice.

Evidence was given by a police sergeant that he had been in contact with the accused for over two years since the murder and had noticed no sign of mental disorder and that on being taken from the police lock-up to the court that morning he had spoken normally to the police sergeant. The accused asked to speak to his father for five minutes. That request was refused. The accused also had called out to his girlfriend "and told her that he is not taking any plea". He asked for a change of clothes. It was said that he had spoken normally during the adjournment though not with the police sergeant. Counsel for the accused cross-examined the witness and addressed the jury which in the result unanimously found that the accused was mute of malice.

New jurors were empanelled without objection. Counsel then said that he could get no instructions from the accused and that he felt that he should withdraw. The judge, from his comments, was obviously reluctant that this should happen. He said "Even at this stage Mr. Frater?"; "You could still use your experience in challenging the jurors"; "There might be a change of attitude, so I wouldn't ask you to abandon him at this stage".

After discussion with the judge counsel made it clear that in his view he should not continue. The judge replied:-

> "I regret that you feel that way, but as you have quite rightly said, if he continues to display this course of conduct there is very little that you will be able to do for him. We will just proceed without you then."

New jurors were called and when asked if he challenged them the accused made comments which were at times incoherent about a man who had no shirt who was watching him. When the trial began the next morning the accused did not reply to questions but made noisy outbursts so that a piece of cloth was tied round his mouth. During the prosecution evidence the accused again made a lot of noise at times referring to the man watching him and from time to time a gag was taken off or replaced.

He was asked if he wished to put questions to the witnesses, give evidence or make an address or, as he was entitled to do, to remain silent.

It is obviously disturbing that in a capital murder case the accused should not be represented by counsel. On the facts of the present case, however, it is impossible to say that he was not "*permitted* to defend himself in person or by a legal representative of his own choice" in violation of his constitutional rights. He had counsel and there was no suggestion that he objected to this particular counsel. He chose not to instruct counsel to put forward his defence and to challenge the prosecution case. Counsel thought that he could not properly go on.

As was stressed in *Robinson v. The Queen* [1985] A.C. 956 at page 966D:-

> "... 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 <u>permitted</u> to exercise those rights."

This is not a case where counsel wished to leave and the defendant wished to go on with counsel. In such a case clearly the judge should usually seek to persuade counsel to stay or to grant an adjournment for other counsel to be instructed. In *Dunkley v. The Queen* [1995] 1 A.C. 419 it was said at page 428 that:-

> "... where a defendant faces a capital charge and is left unrepresented through no fault of his own the interest 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."

On the finding of the jury it cannot be said that the accused was unrepresented "through no fault of his own". If a defendant refuses to take part in his trial, as if he absconds, in order to prevent trial he may not rely on silence or absence to avoid or postpone trial. (*Reg. v. Sharp (Note)* [1960] 1 Q.B. 357 and *Reg. v. Jones (Robert) No. 2* [1972] 1 W.L.R. 887).

The judge was in a difficult position. He obviously realised the importance of having counsel present at the trial and was reluctant to go on without the accused having

counsel. Looked at after the event it can be said that the judge could have insisted more on counsel staying. Yet he had to proceed on the verdict of the jury that the defendant was mute of malice, a verdict arrived at when counsel was taking part in the proceedings, and on the basis of evidence as to the accused's behaviour both in previous months and on the very day when he refused to speak and in particular evidence that he had told his girlfriend in effect that he would not plead. The judge gave counsel the opportunity he sought to get instructions.

This case had a long history. It had been mentioned to the court on some fifteen occasions. There had been, it seems, difficulties in obtaining counsel; there had been a number of adjournments of the date fixed for trial even though some of these may have been due to difficulties in getting the crucial prosecution witness to come to Jamaica on a convenient date. On this particular day the witness was in Jamaica and available to give evidence.

It was of course always possible that the accused might change his mind overnight, or as the trial went on and as he heard the evidence. Yet the appellant's contention before their Lordships was that there should have been a further short adjournment on the opening day. That does not seem in itself likely to have produced a result. It was not in any event asked for by counsel or by the accused. The judge was entitled in his discretion to proceed.

During the evidence the judge asked questions on matters which he thought required clarification after the witnesses had given their evidence-in-chief. Having considered them it seems to their Lordships that he asked the questions in a neutral inquisitorial way and that it cannot be said that his questions were biased in favour of the prosecution even if the answer sometimes came out in favour of the prosecution.

Many of the criticisms made relate to the issue of identification and can more conveniently be dealt with in connection with the summing up and the identification parade. It is, however, said in particular, that the judge permitted counsel to refer, and did himself refer, to the defendant in the dock as "the accused". This, it is said, led the jury to think, and to assume, that the judge thought that the accused was the murderer. Thus, by way of example,

witness was an honest witness; he did not give an adequate warning in accordance with *Reg. v. Turnbull* [1977] Q.B. 224, *Reid (Junior) v. The Queen* [1990] 1 A.C. 363, and *Scott v. The Queen* [1989] A.C. 1242. In particular he did not point out that an honest witness can be a mistaken witness so that identification evidence should be treated with special care.

It is true that the judge did not recite the actual words used in *Turnbull* but that is not necessary. It is the substance of the warning which matters. Here the judge stressed at the beginning that "the crucial issue is going to be the question of identity"; he repeated it later and he stressed it at the end of his summing up. Thus:-

> "The crucial question - and I can't stress it too much - is really the question of identification."

It is correct that on a number of occasions the judge raised the question as to whether the witness was a witness of truth. Having told them that the Crown relied on the identification of a single eye-witness he also told them, however, "it is known to be a fact that a single or several witnesses can be mistaken and a mistake is no less a mistake even if it is made honestly". He went on:-

> "I could also go on to add that the question of mistake arises in identification evidence usually when the identification takes place in difficult circumstances. But, it's also my duty to tell you that people have been known to mistake one person for another because in the Jamaican population, to a large extent, most of the persons are of the same complexion and persons' features can be known to have been known to resemble. People resemble people in short. And when you are considering identification evidence therefore, what that means is, and this is important, you need to view, look at what the witness has said, view his demeanour, bearing in mind the appearance of the accused, in determining whether based on the circumstances and the witness had available to him, there is any question of a mistake. Or, whether, on the other hand, based on the witness' testimony, you accept that he is a witness of truth when he says that he is sure about the fact that the accused was a man."

The judge referred more than once to the fact that the parade took place three months later. For example he asked: "Are you satisfied that he was positive about it? Because, months had passed. The incident happened on the 19th of February and three months had now passed, so it's the 22nd of May that the parade is being held". Such a reminder of the delay, which clearly refers to the possibility of memory being less reliable because of the passage of time, is not vitiated by the comment which followed even though that sentence is clearly favourable to the witness rather than to the accused:-

> "So you might well regard the witness's cautious approach on the parade as something which does not detract or take away in any way from his identification of the accused after a period of two months."

The judge gave a clear warning to the jury to consider the quality of the identification evidence and the circumstances in which it was made including the length of time, the distance of the witness from the accused and the lighting available when the witness saw the gunmen. That the evidence of these matters lent credence to the identification rather than cast doubt on its reliability cannot be complained of by the appellant.

The appellant further complains that the judge did not comment to the jury on the fact that the witness had not mentioned the accused's facial scars which he must have noticed if he had been so long with the accused. It is not surprising that the witness did not mention that he recognised the accused by the scars at the identification parade or that the accused was different from the others on the parade because he had scars, since at the accused's request all those taking part in the parade wore a plaster covering the site of the accused's two scars, one under the left eye and one on the forehead. The witness said that on the day of the murder the accused wore a cap though that did not cover any part of his face. It is still possible that the cap might have obscured the scar on the forehead. Although the presence of the scars and the witness's failure to mention them should have been referred to in the summing up, their Lordships consider that in view of the circumstances in which a firm and clear identification was made by the witness this does not justify setting aside the conviction.

In this case, where the trial was very short, and the jury would well remember the evidence, the evidence of identification was clear. The witness, a pre-medical student, was the son of the deceased who saw his father shot in his own house. The men involved had been in the house for something like forty five minutes. The witness was with the gunman in his father's room for ten minutes, his brother's room for fifteen minutes and then again in his father's room for fifteen minutes. He was only a few feet away from the gunman: the lighting was good.

Then the appellant contends that the judge gave a wrong or inadequate direction on the accused's right to silence. The judge said in summing up that when the witness pointed out the accused at the identification parade the witness said nothing; that was in accordance with the witness's own evidence but the evidence of the police officer who conducted the parade was that the accused said: "Yes, but me no know him still". Both should have been mentioned for completeness.

Just before he began his summing up the judge indicated to the accused three times his right to remain silent. Early in his summing up the judge referred to what he had said and continued:-

> "... I told the accused of his rights at that stage and that he had one of three courses. The last of those courses is that he could just stay where he was and say nothing at all.
>
> Now, the fact that he hasn't said anything at all, you can't on that alone infer guilt from his silence. The burden which is on the prosecution still has to be discharged by the prosecution. You see, the law presumes that the accused man is innocent even though he hasn't said one word throughout this trial and that presumption of innocence remains with him until the prosecution can bring evidence which satisfies you to this standard so that you feel sure about it and it is only when that stage is reached, that you feel sure about the evidence brought by the prosecution, that this presumption of innocence is displaced, removed and you can go on to say that the accused is guilty as charged."

Their Lordships consider that the statement of the right to silence was itself clear and sufficient; they do not read the

phrase "you can't on that alone infer guilt" in its context as implying that silence can contribute to an inference of guilt.

When the matter came before the Court of Appeal counsel was again assigned to the appellant. He took the view that there was no merit in the application for leave to appeal and so informed the court. The question of the appellant's mental state was considered by his new counsel who was at first minded to request a psychiatric examination of the applicant. However he received a long and coherent letter from the appellant which satisfied him that such a course was unnecessary.

It is right to say, as the appellant says, that the Court of Appeal did not have the benefit of counsel's argument along the lines followed in the present appeal. It is however clear that the Court of Appeal referred both to the evidence of Mr. Wong and the police officer as to whether the applicant had said anything after he had been identified. The Court of Appeal, however, analysed the rest of the facts and reviewed the summing up carefully, if briefly, and were satisfied that there was no merit in the appeal.

The fact that counsel could not find any argument to advance on behalf of the appellant does not mean that the decision of the Court of Appeal can be set aside in this case on the grounds of unfairness. Moreover all the points which could possibly have been advanced on behalf of the appellant have been advanced by Mr. Sapsford and Mr. Hackett. Despite their arguments their Lordships consider that the criticisms made of the trial taken separately and together do not justify their setting aside the conviction and that this conviction was safe. They will accordingly humbly advise Her Majesty that the appeal should be dismissed.