[2010] JMCA Crim 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 123 OF 2007

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS. JUSTICE Mc INTOSH, J.A. (Ag.)

DAVID SERGEANT
v
REGINA

Robert Fletcher, Gladstone Wilson and Miss Tamika Harris for the Applicant

Miss Dahlia Findlay, Crown Counsel for the Crown

February 22, 23 and March 12, 2010

HARRISON, J.A.

[1] The applicant was tried and convicted of murder before Hibbert, J. and a jury in the Home Circuit Court, on 28 September 2007. He was sentenced on 1 October 2007 to 15 years of hard labour with a specification that he should serve a period of 10 years before he becomes eligible for parole.

[2] On 5 March 2009 a single judge of this court refused him leave to appeal so he has renewed his application to the court. In the light of how we propose to dispose of this application, a brief outline of the facts of the case is all that is necessary.

Outline of the Facts

[3] This is a case in which there were eye no witnesses to the murder of the deceased and the prosecution depended on a dying declaration made by the deceased. The deceased stated that on 7 August 2004, the applicant and another man came up suddenly on him and shot him. Detective Corporal Harris, who was then stationed at the Elletson Road Police Station, testified that at about 6:40 pm, on 7 August, 2004 he had visited the scene of the shooting and made certain observations. He later went to the Kingston Public Hospital where he saw the deceased in the casualty department with what appeared to be gunshot wounds to the abdomen, left leg, left arm and left thigh. The deceased was being treated by a Dr. Gafoor, and just before he was taken to the operating theatre he told Corporal Harris, "Mi know seh yuh a pastar. Mi naaw goh mek it. A 'Ruggu' an' 'Ritchie' shat mi up". The applicant was subsequently charged with murder of the deceased but he denied the shooting and contended that he was not in the area at the material time.

[4] The prosecution had also relied on the applicant's denial that he was known as 'Ruggu'. This alias was however confirmed by witnesses called on his behalf.

The Law

[5] It is widely recognized that evidence of the deceased's statement is admissible at common law as a dying declaration if it were shown that the deceased had died; that there followed a trial for his murder or manslaughter; that the statement related to the

cause of his death; and that when making the statement he was shown to have had a settled hopeless expectation of death.

[6] It is the latter of these conditions which has provoked legal argument in several cases in which the dying declaration is raised. It is plain that this exception to the hearsay rule owes much to a pragmatic recognition that the deceased, had he survived, would have been better placed than anyone to identify his assailant and describe the circumstances of the fatal assault. It also owes much to a belief, now perhaps somewhat anachronistic, that a person knowingly facing the awful prospect of divine judgment would not dare to dissemble: See **R v Woodcock** (1789) 1 Leach 500, 502; 168 ER 352; **R v Osman** (1881) 15 Cox CC 1; **Nembhard v R** (1981) 74 Cr App R 144, 146; [1981] 1 WLR 1515, 1518.

The Directions

[7] The learned trial judge, in the instant case, began his treatment of the issue of the dying declaration at page 253 of the transcript, whereby he explained the hearsay rule and directed the jury quite properly on the rationale for the exception of the declaration to the hearsay rule. He stated inter alia, at pages 253-254:

> "Now in this case, Mr. Foreman and members of the jury, the Prosecution relies primarily on the dying declaration given by Mr. Omar Powell. In the normal course of things, a witness is not entitled or not permitted to give evidence about what somebody else says outside of the court. That is hearsay evidence. That is what happens in the normal course of things, but there are exceptions which was (sic) adopted to this hearsay rule and certain things which have

> been said outside of court are admitted as evidence in this case. What we call the dying declarations (sic) would be one of these exceptions and this has been recognized for centuries as an exception to the hearsay rule. This is what one judge had to say in relation to why this ought to be. (sic) Says, **"The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at the point of death, and when every hope of this world has gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."**
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> So, what is being said here, Mr. Foreman and members of the jury, about a person who is expecting to die and is speaking about what causes his death - because it confines (sic) to the cause of his death - such a person expecting to die, expecting to meet his maker would not, in those circumstances, be expected to lie..."

[8] The learned judge returned later in the summing-up to the dying declaration and at page 275 (lines 6-8) he said:

> "Now, remember what I said about the hearsay rule. **If you find there is a settled hopeless expectation of death, you have to believe him**, bearing in mind he was never seen by you, never came to the witness box and took an oath. You have heard nothing of him for yourselves to form an impression as to how reliable he might be. Then, you balance that against this settled hopeless expectation of death, if he would be telling a lie..."

[9] After the jury had retired, they returned to the court room and sought further directions on the dying declaration. The learned judge repeated his directions on the rationale for the rule. He then continued at pages 313 (lines 20 -25); 314 (lines 1-25) and 315 (lines 1-5):

"...So, what that means is this, it makes exception to the hearsay rule because it is the belief that somebody who is about to die or thinks he is about to die, would therefore not be telling a lie. That would forward, (sic) I think, making reconciliation with God, therefore they would not be seeking to lie in those circumstances. So, that is the reason for the exception and it is said also that such a person wouldn't want to die telling a lie. This is why it is considered solemn because it tantamounts (sic) to somebody taking an oath. However, you need to look at what was said. Is there a reason for its acceptance? But, remember in this particular case, he said this person was one of those persons and remember when I gave you directions in relation to identification, you need to be satisfied on the Crown's case, that he could properly and did properly identify this person. So, that is the direction in relation to the dying declaration. So, that is the reason for it. You need to look at it and see how you will treat it. When you come to look at the declaration, you look to see whether or not in relation to the words that was (sic) actually used, whether or not it shows a settled hopeless expectation of death. Remember, he said, "Look how di man dem kill mi aaf. Mi naaw go mek it." So, you look to see if there is a settled hopeless expectation of death and whether or not, in the circumstances, he would be telling a lie, but look to see, in light of all the circumstances if he had been mistaken, whether or not he was in a position to and properly identified his attacker."

[10] The following dialogue then took place between the judge and foreman:

HIS LORDSHIP: Is there anything else in relation to that or it is clear enough?

FOREMAN: It would seem so, m'Lord.

HIS LORDSHIP: Anything else?

FOREMAN: No, m'Lord.

The Grounds of Appeal, Submissions and Analysis of the Arguments

[11] In advancing this application on behalf of the applicant, Mr. Fletcher sought and was granted leave to argue three (3) supplemental grounds. The original ground of appeal was abandoned. We now turn our attention to the respective grounds.

Ground 1

- **The learned trial judge erred in his treatment of the central issue of the dying declaration. This error denied the applicant a fair and balanced consideration of his case.**

[12] Mr. Fletcher submitted that the issues concerning admissibility of the dying declaration, and identification of the applicant, were crucial and required careful directions by the learned judge. He took issue with the directions given at page 275 (supra) which state: "... **If you find there is a settled hopeless expectation of death, you have to believe him**...". He submitted that this was a definitive direction as to credibility, thereby settling the issue as to whom to believe. He further submitted that at no time did the learned judge correct the direction.

[13] In the circumstances, Mr. Fletcher submitted that the judge's presentation of the evidence did not meet the required standard in the following respects:

(a) The learned trial judge used language which had the effect of withdrawing from the jury their consideration of the weight to be attached to the declaration;

(b) He placed such emphasis on the rationale for admitting the declaration that it amounted to an

invitation to the jury to transpose the reasons for admissibility to the credibility of the declaration; and

(c) The learned trial judge had failed to adequately advise the jury of the special care required when assessing evidence which has not been the subject of either examination or cross-examination.

[14] Mr. Fletcher finally submitted that for the above reasons the applicant would be denied a fair and balanced trial.

[15] Miss Findlay, for the Crown, submitted that the learned trial judge had done all that was required of him in relation to the directions on the dying declaration. She nevertheless conceded that the direction given at page 275 (supra), that the jury should believe the deceased, was most unfortunate.

[16] We have given serious consideration to the directions and are of the view that the decision by the learned trial judge to admit the alleged statement by the deceased as a dying declaration had been adequately established on the evidence adduced by the prosecution.

[17] We are nevertheless concerned with the judge's directions as to how the jury should approach what was contained in the declaration itself and whether he had provided the required assistance to the jury. It is our view that the learned judge ought to have made it sufficiently plain that it was for them to decide as a question of fact, whether they were satisfied that the deceased had, when making the observations in question, a settled hopeless expectation of death. It was a patent misdirection to have

told the jury that, "If you find there is a settled hopeless expectation of death, **you have to believe him.** (emphasis supplied)." The learned judge having adjudged the declaration to be admissible in principle, ought to have directed the jury that the reliability, meaning, effect and probative value of the statement were matters for them to consider. We therefore agree with Mr. Fletcher when he submitted that the learned judge had failed to sum up to the jury on the issue of the dying declaration in a fair and balanced way. There is therefore merit in ground 1 and it succeeds.

Ground 2

- **The learned trial judge erred in failing to give a Lucas direction in circumstances where the jury was being called upon to place great emphasis on a lie told by the applicant in arriving at their verdict.**

[18] We will deal with this ground briefly. In a question and answer, produced as part of the case for the prosecution, the applicant had denied that he was called "Ruggu" so this became an important factor in the consideration of guilt. The evidence revealed that the defence witnesses had confirmed that he was called by that name. At page 280 of the transcript, the learned trial judge raised the issue of his denial and at the end of the page he underscored the importance of the denial to the prosecution's case. He said:

> "Counsel for the prosecution has asked you to treat the answer to question number two as very important evidence..."

[19] Mr. Fletcher submitted that in the circumstances, fairness demanded that the jury should have been assisted in evaluating the reliance placed on the denial, according to the law.

[20] Miss Findlay conceded that the trial judge ought to have given the **Lucas** direction. However, she asked the court to apply the proviso since the judge's failure to give the required direction could not have caused a miscarriage of justice.

[21] In our view, **R. v. Goodway**, 1994 98 Cr. App. R. 11, is quite instructive. That case held that whenever lies are relied on by the prosecution, or might be used by the jury to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a judge should give a full direction in accordance with **R. v. Lucas** [1981] Q.B. 720, 73 Cr. App. R. 159, CA, to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury are satisfied that (a) the lie was deliberate, (b) it relates to a material issue, and (c) there is no innocent explanation for it.

[22] In the instant case, a **Lucas** direction was required in view of the reliance placed on the lie by the Crown. The learned trial judge was therefore in error when he failed to direct the jury accordingly. There is therefore merit in the submission made by Mr. Fletcher.

Ground 3

- **The learned trial judge failed to appropriately isolate the weaknesses in the identification evidence for the**

consideration of the jury. These weaknesses brought about by the absence of the opportunity for appropriate questioning were critical matters.

[23] It has been widely accepted that where the dying declaration is a feature of the case, it is necessary for the trial judge to give a full **Turnbull** direction. See **Regina v Dalton Reid** SCCA 65 of 2006 delivered 21 November 2008 where our brother Morrison, J.A. stated inter alia, at paragraph 6 of the judgment:

> "6 ....So on the issue of identification, a full Turnbull direction was required as to the circumstances in which the deceased purported to be able to identify the applicant..."

And at paragraph 7 he continued:

> "7. In this case, we came to the view (and counsel for the Crown, to his credit, did not contend otherwise) that the directions of the learned trial judge, though adequate in general terms were not sufficiently focused on the wholly unusual circumstances and features of the identification evidence. In this regard the approach of Smith C.J as trial judge in **Nembhard v R** [1982] 1 All ER 183, which attracted the specific approval of the Privy Council, still merits careful attention."

[24] In the instant case, Mr. Fletcher argued that the learned judge should have appropriately isolated the weaknesses in the identification evidence bearing in mind the absence of the opportunity for appropriate questioning on such a critical matter. We entirely agree with him. The learned judge appreciated the importance of directions on visual identification and had given directions on this issue. We are of the view however,

that although he gave directions in general terms, they were not sufficiently focused on the circumstances of the case. He needed to have been more explicit in his directions on the absence of cross-examination of the deceased.

[25] In **Nembhard v R** [1982] 1 All ER 183, Sir Owen Woodhouse in delivering the decision of the Board had this to say at page 186 on the question of absence of cross-examination and identification by the deceased:

> "At that point the Chief Justice expressly drew the attention of the jury to the fact that the dying declaration had not been tested by cross-examination. He said:
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> > 'Another thing which you bear in mind when you consider evidence of this sort is that you have not had the advantage of the witness coming here and having what he said tested by cross-examination. The statement is there, it is not tested, so it suffers or it is at a disadvantage in so far as you are concerned as against evidence given from the witness box where the witness states a fact and counsel can test him or her on it whether it is true or not.'
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> There follows a lengthy and entirely accurate warning concerning the various problems that can and do arise in the area of identification evidence and the circumstances that were relevant in assessing the deceased's identification of the appellant as his assailant. Then he summarised what he had been saying in the following way:
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> > 'If you feel sure the statement was made to her you have to examine the circumstances which must have existed at the time when Mr. Campbell was shot; you have to take into account his state of mind when he made the statement; was he in a state of mind where you would feel that you could safely rely on

> what he was saying, as being the truth? You have to take into account the caution that I have given about mistaken identity and whether the circumstances were such, having regard to distance, light and so forth, that you can feel that a mistake was not made in the identity of the accused. And if you are not sure whether a mistake was made or not, or if you do not think that you can safely rely at all on what the deceased is alleged to have said, then you must acquit the accused.' "

[26] We are of the view, that the above passages make it abundantly clear how the trial judge should approach the issue of identification and absence of cross-examination where dying declarations are relied upon by the Crown. We once more, commend the above passages to trial judges.

[27] In this case, the learned trial judge did warn the jury of the need to be cautious when they are asked to rely on identification evidence because there is the likelihood that an honest witness can still make a mistake even where the case is based on recognition. He had also directed the jury that they should look at the circumstances of the identification such as the distance separating the deceased and assailant, lighting conditions and whether the suspect was known to the deceased before. The learned judge had also directed the jury that there was no evidence of how long the deceased was able to identify his assailant but they could draw the necessary inference from the statement made by the deceased when he said, "They run down on me."

[28] Regrettably, however, the learned judge did not point out to the jury that they should bear in mind when they came to consider the evidence of the statement made

by the deceased, that they did not have the advantage of the witness coming before the court and having what he said tested by cross-examination. Furthermore, in our view, he should have told the jury of the disadvantage they faced by not having the witness in the witness box to determine whether what he said was true or not. It was essential for the learned judge to have highlighted these weaknesses and his failure to do so was a non-direction which amounted to misdirection. We therefore conclude that there is merit in the submissions made by Mr. Fletcher in respect of ground 3.

The Outcome

[29] It is always a difficult question for determination whether there should be a retrial of a criminal case but we do believe that the interest of justice would be better served if such an order were to be made in the instant case. We have borne in mind the principles enunciated in **Reid v R** (1978) 27 W.I.R. 254, and are firmly of the view that 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.

[30] We have treated the application seeking leave to appeal as the hearing of the appeal. The appeal is therefore allowed; the conviction quashed and the sentence set aside. It is further ordered that a re-trial should take place as early as possible.