[2011] JMCA Crim 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 63/2010

BEFORE: THE HON. MRS JUSTICE HARRIS JA
THE HON. MR JUSTICE DUKHARAN JA
THE HON. MRS JUSTICE MCINTOSH JA

CHRISTOPHER THOMAS v R

Lord Anthony Gifford QC, Cecil J Mitchell and Vernon Daley for the appellant

Gregg Walcolm for the Crown

20, 22 July and 30 September 2011

HARRIS JA

[1] On 5 May 2010, the appellant was convicted in the Home Circuit Court for the murder of Dave Daley. He was sentenced to a term of life imprisonment and it was ordered that he should not become eligible for parole until he had served 30 years.

[2] A single judge of this court granted him leave to appeal against conviction and sentence. On 22 July 2011 we allowed the appeal, set aside the conviction and in the interests of justice ordered a new trial.

[3] The facts on which the Crown relied essentially came from two eyewitnesses, Haroon Smith and Leighton Gallimore. Sometime on the night of 12 February 2007 the deceased alighted from his car on Brook Avenue in the Duhaney Park area in front of a high rise building complex after the car was hit by a stone thrown by a man called Joel. Mr Smith testified that, on the night in question, after the deceased alighted from his car a short exchange took place between them. After the stone was thrown on his car, the deceased walked towards the building complex entering a passage between building O and building P where Joel had run. The deceased fired a shot hitting Joel. Mr Smith went on to say that shortly after, the appellant ran past him (Mr Smith) and began firing shots at the deceased from behind. The deceased fell and while he was on the ground the appellant fired more shots at him. Mr Smith then left the scene.

[4] Mr Gallimore said that sometime in the afternoon on the day of the incident he went to Brook Valley to visit his friend Mr Richard Burke where they played video games for about three to four hours. He then left in order to get something to eat. He said that he passed Joel who appeared to be heading to one of the high rise buildings. He saw the deceased alight from a green Toyota motor car which was hit by a stone. He further related that the deceased proceeded towards the high rise buildings and thereafter he heard explosions. Having heard the explosions, Mr Gallimore went to investigate and saw the deceased being shot by the appellant.

[5] The appellant then went to check on Joel as he lay on the ground and then Harry Dog appeared and assessed him and went towards the deceased and shot him.

Thereafter he went to the rear of the buildings. The appellant, who had run in the direction of the hills behind the community, returned with Jubba, inspected Joel who was still lying on the ground, then went over to the deceased and shot him again.

[6] An unsworn statement was made by the appellant who stated that he was innocent of the charge. He said that at the time of the incident he was at the path way between blocks J and K. He heard loud explosions, was frightened and he ran to a nearby house. He further stated that Mr Smith and Mr Gallimore disliked him. Mr Gallimore, he said, disliked him because he had been involved in a relationship with Mr Gallimore's girlfriend. He also said that the police used intimidation to gather information for investigations which he believed was unfair.

[7] Miss Tamora Willams, who was called as a witness on his behalf, testified that about 8:30 pm on the day of the incident she was seated on her daughter's car in the car park. She saw Joel throw a stone on the back of a car. The deceased alighted from the car and walked towards Joel who was at the corner of building P. Joel ran around the corner when the deceased began shooting at him. By then, she said, she was in the passage between building P and O. Joel fell. Afterwards Harry Dog arrived and said to her "T no mek no funny move" then he went behind the deceased and shot him. The deceased fell. Harry Dog went over to Joel, attempted to move him, at which point Joel spoke to him and he left. She said that she then heard the deceased calling out for help; she turned back and saw Jubba coming from the car park. He went up to the

deceased and shot him, after which, she said, she did not see the appellant on the scene that night.

[8] Mr Richard Burke, who also testified on behalf of the appellant, said that he went to Mr Gallimore's home on the night of the incident at around 7 o'clock. Mr Gallimore and himself and another man played video games and between 10:00 and 10:30 pm, Mr Gallimore left to get something to eat. He went to his aunt's home and while there he heard four shots.

[9] The original grounds of appeal were abandoned. The following supplemental grounds of appeal were argued:

> "1. The fair trial of the Appellant was compromised by the improper conduct of the Prosecution in putting to the defence witness Tamoya Williams an allegation of criminal conduct, namely that she was paid to give evidence, while adducing no evidence to substantiate the allegation, whereby a miscarriage of justice may have occurred.
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> 2. The learned judge erred in (a) permitting the said allegation to be made without any intervention on her part; (b) representing to the jury that the defence had been equally culpable in making unsubstantiated allegations when this was not the case; (c) wrongly stating to the jury that the prosecution had not been irresponsible in making the said allegation;(d) suggesting to the jury that the prosecution may have thought that they were able to put forward evidence in support of the said allegation, but fell short; (e) in the premises permitting the jury to suppose that

the prosecution had good reason to make the said allegation.

3. The learned judge failed to give adequate directions to the jury as to how they should consider evidence adduced that the Appellant was a man of good character."

In light of our decision, it will be unnecessary to consider ground three. Grounds one and two were argued simultaneously.

[10] Lord Gifford QC argued that during the cross examination of Tamora Williams, the defence witness, the conduct of counsel for the prosecution exceeded the permissible boundaries. She questioned the witness extensively and despite denials, she made suggestions on three occasions alleging that the witness was paid to testify on the appellant's behalf, he argued. He contended that these allegations of conspiracy to pervert the course of justice were unbecoming of a prosecutor and she ought not to have done so unless she had evidence which she was able to call in rebuttal, if the allegations were denied. In making the allegations, the impression given to the jury tended to show that they were true, he argued, and the effect of these suggestions could have eradicated any direction given as such directions would have reinforced the allegations. The prosecutor, having had no evidence to show that the witness had been paid to give false testimony, such allegations should never have been made, he submitted.

[11] Mr Walcolm conceded that without an application to call evidence in rebuttal, the suggestions made to the witness were improper. He, however, disagreed that the

conduct of the prosecutor in putting the suggestions to the witness was irresponsible and that the learned judge acted improperly in allowing the suggestions. He argued that although the learned judge's directions were not of a sufficient standard to erase the suggestion from the juror's minds, in the circumstances and on the evidence, there was no substantial miscarriage of justice. The question for consideration, he argued, was whether the suggestion was of substantial importance in establishing the appellant's guilt. Miss Williams, he submitted, knew the appellant was charged, knew Harry Dog had committed the offence, knew of the first trial but never came forward to give evidence and did not do so until after Harry Dog died which suggested a motive on her part for testifying.

[12] The questions for determination are:

1. Whether the conduct of counsel for the prosecution undermined the integrity of the trial so as to amount to injustice to the appellant.

2. Whether the learned judge had failed to exert authority and properly control the proceedings resulting in the trial being unfair.

[13] It is a cardinal rule of law that every accused who is brought before the court is presumed innocent. The presumption of innocence remains throughout until the evidence adduced points to his guilt beyond a reasonable doubt. The law accords him a fair trial. His right to a fair trial is absolute. Persons who are charged with the

responsibility of marshalling evidence for the prosecution as well as a trial judge must at all times ensure that the conduct of the trial is beyond reproach.

[14] Admittedly, the trial process being adversarial cannot always proceed flawlessly. There may be a deviation from good practice as there are times when things are done or said which may not be in keeping with good practice. However, procedural breaches do not always result in harm so serious as to imperil the fairness of a conviction. Despite this, where the occurrences of breaches are substantially prejudicial and an appellate court is of the view that great harm was occasioned to an appellant, a conviction will be quashed as unsafe - see ***Randall v R*** (2002) 60 WIR 103. In that case, Lord Bingham of Cornhill in dealing with the question of fairness of a trial in circumstances where there has been departure from good practice, at paragraph 10 said:

> "There is however, throughout any trial and not least a long fraud trial, one overriding requirement: to ensure that the defendant accused of crime is fairly tried. The adversarial format of the criminal trial is indeed directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence. To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair. These rules are well understood and are not in any way controversial. But it is pertinent to state some of them.
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> (1) The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of Justice: ***R v Puddick*** (1865) 4 F & F 497 at 499, and ***R v Banks*** [1916] 2 KB 621 at 623. The

prosecutor's role was very clearly described by Rand J in the Supreme Court of Canada in ***Boucher v R*** (1954) 110 Can CC 263 at 270 proceedings:

> 'It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.'

(2) The jury's attention must not be distracted from its central task of deciding whether, on all the evidence adduced before it, and on all the submissions made, and on the judge's legal direction and summing-up of the evidence, the guilt of the defendant is or is not established to the required standard. From this imperative several subsidiary but important rules derive. (i) … (iii)

(iii) While the duty of counsel may require a strong and direct challenge to the evidence of a witness, and strong criticism may properly be made of a witness or a defendant so long as that criticism is based on evidence or the absence of evidence before the court, there can never be any justification for bullying, intimidation, personal vilification or insult or for the exchange of insults between counsel. Any disparaging comment on a witness or a defendant should be reserved for a closing speech.

(iv) Reference should never be made to matters which may be prejudicial to a defendant but which are not before the jury…

(3) It is the responsibility of the judge to ensure that the proceedings are conducted in an orderly and proper manner which is fair to both prosecution and defence. He must neither be nor appear to be partisan. If counsel begin to misbehave he must at once exert his authority to require the observance of accepted standards of conduct."

[15] At paragraph 11 he went on to state that:

> "It cannot be too strongly emphasized that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes conviction of which may expose him to serious penal consequences. In a criminal trial (as in other activities) the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse."

[16] It is now necessary to examine the transcript with respect to the breaches of which counsel complains. We will first direct our attention to the complaint as to the conduct of the prosecuting counsel. She embarked on a comprehensive cross-examination of the appellant's witness, Miss Williams, during which Miss Williams stated that she had known the appellant for nine years and would see him pass through one of the buildings in the complex where they all reside. She related that she would see

him with Rema Man, Greasy and Nozzle. Counsel thereafter proceeded to ask her about other persons in the community referring to them by their aliases. She then asked the witness if she met with Buggy Nose the appellant's brother, Sean, Rema Man and Bowla at a shop on the Tuesday prior to the day of her testifying. This she denied. Then on page 501 at lines 8-17 of the transcript, the following emerges:

> "Q. Have you ever received, Miss Williams, any money from 'Buggy Nose'?
>
> A. No.
>
> Q. More specifically, ma'am, isn't it true that you received money to come to court to give evidence in this case, from 'Buggy Nose'?
>
> A. No.
>
> Q. Suggesting to you ma'am that you are paid to come here to give evidence.
>
> A. I was not."

[17] After further cross-examination of the witness the following is observed at lines 6 to 25 on page 506 and lines 1 to 5 on page 507:

> "Q. Suggesting to you, you know, Miss Williams, that the wall is not a recent hangout spot for you.
>
> A. It is.
>
> Q. Suggesting to you ma'am, that you have come here with the intention of trying to have this jury believe that you don't get along well with Chris.
>
> A. No.
>
> Q. Suggesting to you ma'am, that you have, in fact, been paid to give this evidence.

A. No.

Q. You are here, ma'am, solely to deceive this honourable court.

A. (No answer)

Q. That's my suggestion to you.

A. Be more specific.

Q. I am saying to you, ma'am, that when you tell us that the accused was not there, you are lying.

A. No ma'am.

Q. Suggesting, ma'am, that you are here because you have been asked by someone who paid you to give this evidence.

A. No."

[18] It is clear that, prosecuting counsel, in pursuing the line of cross-examination as shown above had surpassed the latitude permissible in cross-examination. The improper cross-examination of a defence witness may result in the quashing of the conviction - see ***R v Leroy Gordon*** (1994) 31 JLR 551. Prosecuting counsel had no evidence that the witness was paid to testify on the appellant's behalf as she had done.

[19] Every prosecutor is under an obligation to discharge his or her duty fairly. In ***R v Wadey*** (1935) 25 Crim App R 104 at page 107 Hewart LCJ said "Counsel entrusted with the public task of prosecuting accused persons should realise that one of their primary duties is to be absolutely fair". Counsel's conduct undeniably undermined the integrity of the trial and is without doubt indefensible.

[20] Sometime after the commencement of the cross-examination, the learned judge said to prosecuting counsel, "Where is this taking us?" It is obvious that the learned judge was aware that counsel might be pursuing a questionable path and should not have permitted her to suggest to the witness that she was paid to testify without being satisfied that counsel had evidence to support the allegations, although the record shows that counsel responded to the learned judge by saying, "M'Lady I am trying to establish something, I will get there in a short while m' lady". It would appear that from this response, counsel would have been making an application to call evidence in rebuttal. Despite this, it would have been prudent for the learned judge to have made the inquiry as to whether counsel had rebuttal evidence to call.

[21] The learned judge seemed to have administered a warning to the jury by instructing them "that the case should be judged on the evidence and not the unsubstantiated suggestion". However, this would not have rectified the damage. The fact that the learned judge permitted counsel to tread along the dangerous path by suggesting on three occasions that the witness had been paid to attend the trial would have been deeply ingrained in the minds of the jury that this was true. As a consequence, the mischief caused thereby could not have been cured by a warning.

[22] For the forgoing reasons, we concluded that the breaches were sufficient to render the trial unfair and that the appeal ought to have been allowed and a new trial ordered.

[23] Before parting with this appeal, we must state that there is a matter which has been of some concern to the court. We have observed that quite frequently trial judges, as in this case, during their summations refer to the defence advanced by an accused as a "Shaggy Defence". We acknowledge that in ***Courtney Samuels v R*** SCCA No 20/2007, delivered 5 December 2008, the court stated that the use of the phrase "Shaggy Defence" by a trial judge in his or her summation was not prejudicial to an accused in the circumstances of that case. We are of the view, however, that there may be situations in which it may be perceived by a jury that the term "Shaggy Defence" means that the accused is guilty. It is therefore desirable that trial judges should take heed and desist from using those words in defining the defence.