[2018] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 32/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

JASON COLLINS v R

Bert Samuels, Michael Hemmings and Andrew Dixon instructed by Knight Junor and Samuels for the appellant

Jeremy Taylor and Janek Forbes for the Crown

20 June 2018

F WILLIAMS JA

Background

[1] This appeal arose out of the appellant's trial, conviction and sentence for the offence of murder in relation to an incident which occurred on 16 November 2011, in the parish of Saint James. In that incident, the deceased, Derrick Smith, was shot and killed, allegedly by the appellant, Jason Collins, who was a passenger in the taxi being driven at the time by Mr Smith. On 8 May 2015, the applicant was sentenced to imprisonment for life, with the stipulation that he should serve 18 years in prison at

hard labour before becoming eligible for parole, following a trial by a judge and jury in the Circuit Court Division of the Gun Court for the parish of Saint James.

The main ground of appeal

[2] Several grounds of appeal were filed in the matter. The Crown has conceded in respect of ground four, in light of what it admits is the merit in that ground. We believe that, in light of the law, that concession was properly made. The essence of that ground is that the learned trial judge, by accepting a majority verdict of nine to three in favour of conviction, when the time that had elapsed since the jury retired was only one hour and 12 minutes, rather than two hours, had fallen into error. By that error, it is contended, the jury were deprived of the full opportunity, as required by section 44(1A) of the Jury Act, of giving due consideration to the evidence in the trial.

[3] Although several other grounds have been filed, and we know that Mr Samuels was quite prepared to argue all of those grounds, we felt that, especially in relation to ground four, the main issue in this case took the matter outside of the usual course of criminal appeals that tend to come before us. This is because what the authorities indicate is that where the jury, in breach of the Jury Act, is not allowed the stipulated minimum time in which to consider its verdict, then the conviction, sentence and indeed the trial itself, amount to a nullity (see, for example, the cases of **R v Raymond Failey** (1975) 13 JLR 39; **R v Shaw** (1963) 5 WIR 212; and **R v Winston McDonald and Clover Haye** (1969) 11 JLR 201).

[4] The question therefore arises: with the trial being a nullity, ought a retrial to be ordered?

Should a re-trial be ordered?

[5] We have looked at the relevant statutory provision, that is, section 44 of the Jury Act. That section reads as follows:

> "44.-(1) On trials on indictment for -
>
> (a) murder committed in any of the circumstances specified in section 2(1)(a) to (f) of the Offences Against the Person Act, or murder upon the conviction of which section 3(1A) of that Act would apply; or
>
> (b) treason,
>
> the unanimous verdict of the jury shall be necessary for the conviction or acquittal of any person for such murder or treason.
>
> (1A) On trials on indictment for murder not falling within subsection (1)(a), **after the lapse of two hours** from the retirement of the jury a verdict of a majority of not less than nine to three, of conviction or acquittal of any person for such murder, may be received by the Court as the verdict of the jury." (Emphasis added)

[6] Suffice it to say that section 2(1)(a) to (f) of the Offences against the Person Act generally treats with murders committed against certain categories of persons acting in the course of their duties, such as members of the security forces, correctional officers; and judicial officers, for example, and with murders committed in the course of the commission of certain named offences.

[7] The murder in question did not fall under section 2(1)(a) to (f) of the Offences against the Person Act; and so, for a verdict of nine to three to have been accepted at the trial, at least two hours needed to have elapsed since the retirement of the jury.

[8] We have looked at the cases, cited by counsel on both sides on what, in the result, turned out to be the narrow point in this appeal. The case of **Reid v The Queen** [1979] 2 All ER 904, cited on behalf of the Crown by Mr Taylor is generally accepted as outlining the main considerations of an appellate court in deciding whether to order a new trial in a criminal case. In that case, the Privy Council expressed itself as being "very loath to embark on a catalogue of factors" (page 908 d) to be taken as fitting every case, for fear that any such catalogue might be taken as being exhaustive. The Board stressed, in outlining several factors, that: "the factors that they have referred to do not pretend to constitute an exhaustive list" (page 909 g). The first consideration that their Lordships outlined was 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 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." (Page 907 h).

[9] Their Lordships also stated other factors for consideration, such as: (i) the power to order a retrial ought not to be exercised where the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury - even if properly directed; (ii) on the other hand, the power to order a retrial would be expected to be exercised where the evidence at trial was so strong that any reasonable jury, properly directed,

would have convicted; (iii) the seriousness of the offence and its prevalence; (iv) the expense and length of time which a fresh hearing would involve; (v) the effect on the defendant; (vi) the length of time that has elapsed between the commission of the offence and the likely date of the new trial, etc.

Summary of submissions

[10] On behalf of the appellant, Mr Samuels sought to advert us to what he submitted were the evidential deficiencies and general weakness of the prosecution's case. In light of these considerations, no useful purpose would be served, he argued, in ordering a retrial. To order a retrial, he argued, would not be in keeping with the interests of justice.

[11] On the other hand, Mr Taylor for the Crown, sought to have us give emphasis to the Board's view in **Reid v The Queen**, that a retrial ought to be ordered in cases where, as here, he submitted, the reason for the appeal being allowed was a technical blunder on the part of the judge.

Discussion

[12] In relation to Mr Samuel's concern about what he considered to be the weakness of the case, it appears to us (while not expressing a view on the strength or weakness of the instant case) that that consideration is addressed in the authority of **Reid v The Queen**, in which, at page 909 e, the Board observed as follows:

> "...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 on a fresh trial an acquittal is on balance more likely than 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, and not 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 Kim v The Crown** (1955) 39 HKLR 49 at 60."

[13] Similarly, in the case of **R v Raymond Failey**, a new trial was ordered although the judgment reveals that this court clearly had concerns about the quality of the evidence that had been given at first instance. But perhaps the essence of the reason for the ordering of a new trial in these circumstances might be seen in the case of **R v Winston McDonald and Clover Haye**, in which, at page 206 I, this court (per Henriques P), observed as follows:

> "The trial having been declared by this court to be a nullity, there has in fact been no trial. The court therefore, in the interest of justice orders a new trial..." (Emphasis added)

[14] It is unfortunate that the proceedings have ended in the way that they have and for the simple yet far-reaching reason of taking a verdict in less than the statutory mandatory minimum period. One would have expected that, even if the presiding judge, being fallible, might have lapsed in ensuring that the minimum time limit had been met, then the error would have been brought to his attention before the verdict was taken, either by the prosecution, defence or registrar, all of whom have a role to play in ensuring a just outcome in every trial. Hopefully we will see very few, if any, recurrences of this.

[15] As previously observed, this case is somewhat unusual in that, unlike the position in the helpful authority of **Reid v The Queen**, the discussion of whether to order a retrial in this case is "complicated" by the fact of the trial, verdict and sentence being a nullity. Despite this not-insignificant difference, we nonetheless hold to the view that the discussion in **Reid v The Queen** and similar cases offer useful guidance and so we have considered the factors set out in those cases. Having done so, we are of the view that in light of all the circumstances and the fact that the proceedings being declared a nullity arose from judicial error, that the following orders are appropriate:

1. The appeal is allowed.

2. The conviction is quashed and the sentence is set aside.

3. In the interests of justice, a retrial is ordered.

4. The matter is set for mention on 9 July 2018 in the Circuit Court for the parish of Saint James.