[2012] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 103/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

CHRISTOPHER MURRAY v R

Gladstone Wilson for the applicant

Jeremy Taylor and Mrs Lori-Anne Cole-Montaque for the Crown

15 and 18 May 2012

PANTON P

[1] The applicant was convicted on 28 October 2010 of the offences of indecent assault on a male, and buggery, and sentenced to concurrent terms of imprisonment of six years and seven years respectively. He had been charged on an indictment containing four counts; three of these charged him with indecent assault on a male, and the other charged him with buggery. He was acquitted on two of the counts that charged indecent assault on a male.

[2] The offences allegedly took place in 2008 and 2009, and the complainant in each count was the same, a boy born in 2001.

[3] A single judge of this court on 3 February 2012 refused the applicant's application for leave to appeal and ordered that his sentences were to commence on 9 December 2010. The application has been renewed before us. As part of that application, the applicant is desirous of putting before this court expert evidence that he claims was not available at the time of the trial before the judge and jury.

[4] It should be noted that at the trial the applicant had called the Government Analyst, Miss Sheron Brydson, to give evidence on his behalf. She said that she had received anal and buccal swabs from the complainant and the applicant, and she did DNA analysis on them. The results were such that she could neither include nor exclude the applicant as to whether there had been any sexual contact between the parties. It is in respect of this area of the evidence that the applicant is seeking to place new evidence before the court.

[5] The applicant has filed a forensic report signed by Professor Wayne McLaughlin of the University of the West Indies which purports to exclude the applicant from involvement in the events complained of by the child. The report purports to go further than Miss Brydson's report does. There is an indication that Professor McLaughlin performed a test that was not done by Miss Brydson and so he was able to achieve a definitive result.

[6] This court is wary as far as the reception of new evidence after trial is concerned. However, in circumstances of this nature, careful examination of the situation is required as the court must always seek to avoid an injustice being done to an innocent individual.

[7] The rules are quite clear in this regard. In ***Shawn Allen v R*** (SCCA No. 7/2001 delivered on 22 March 2002) we restated the principles, following ***R v Parks*** [1961] 3 All E.R. 633 and ***Bernal v The Queen*** (RMCA Nos 30 & 31/1995, Motion No. 1/1996- delivered on 6 November 1997). Firstly, the proposed evidence from Professor McLaughlin was not available at the time of the trial. Secondly, it is clearly relevant to the issues as it bears on the identification of the perpetrator of the offences. Thirdly, given the standing and training of the potential witness, the evidence is capable of belief and acceptance. Finally, the court has to consider the effect such evidence might have had on the jury.

[8] We have noted the observation of the Deputy Director of Public Prosecutions, Mr Jeremy Taylor, that an affidavit was necessary from counsel in respect of the unavailability of the evidence at the time of trial. The point is of importance, and there ought to have been such an affidavit. However, there are documents before the court that indicate that there may have been a failure on the part of the Government Analyst to disclose certain information as to the possibility of a further test which would have alerted counsel. That not having been done, and given the seriousness of the offences, we do not think that this should be held against the applicant.

[9] In the circumstances, we grant the application and we propose to hear the evidence of Professor McLaughlin on 9 July 2012, and the submissions on the other grounds for the application for leave to appeal, if necessary.