[2013] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 212/2006

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

RALSTON BAKER v R

Gladstone Wilson for the applicant

Mrs Natalie Ebanks-Miller for the Crown

15, 16 and 19 July 2013

BROOKS JA

[1] Ms Lydia Dennis and her tenant, Miss Carol Blair, shared a relationship whereby Miss Blair never left the premises, which they shared, although in separate sections, without telling Ms Dennis where she was going. It therefore caused Ms Dennis concern when, on Tuesday, 26 August 2003, Miss Blair's live-in paramour, the applicant, Mr Ralston Baker, informed Ms Dennis that Miss Blair had gone "to town to get her sister to go to the country because their mother is sick". Ms Dennis had last seen Miss Blair on the afternoon of 25 August 2003. The premises are at Mountain View Avenue in the parish of Saint Andrew.

[2] Two other unusual developments occurred between 26 and 27 August 2003. Firstly, Ms Dennis noticed that a woman, whom Mr Baker identified as his mother, came to the house during the morning of 26 August. Ms Dennis saw when he gave the mother a number of parcels from inside the section of the house that he shared with Miss Blair. The mother put them in a motor vehicle and went away in that vehicle. Ms Dennis did not see Miss Blair all of that day.

[3] The second thing is that, on 27 August, Ms Dennis smelled a foul odour in the house. She attempted to get rid of the odour by using air freshener. When the odour returned within 20 minutes, Ms Dennis sought the assistance of the police. She went to a police vehicle that was stationed in her community and got the officers to come to her house. Mr Baker, who was leaving the house when the police arrived, ran away when one of the police officers called to him. The officer chased him but he made good his escape.

[4] The police eventually got into the house and found Miss Blair's dead, decomposing body stuffed into a cardboard barrel. Wires were wrapped around her neck. A subsequent post-mortem examination revealed that she had died from asphixia secondary to ligature strangulation.

[5] The police scenes of crime unit was summoned to the premises and the persons attached to that unit processed the scene. Checks revealed that there was no sign of

any forced entry to the premises and the room "was neatly put together" (page 70 of the transcript). The processing involved dusting the barrel for fingerprints.

[6] Mr Baker was eventually taken into custody on 26 September 2003 after, once again, attempting to elude the police. He also gave a false name and particulars when he was apprehended by the police.

[7] Those, among other circumstances, comprised part of the evidence led by the prosecution at Mr Baker's trial for the offence of murder. His defence was that he had nothing to do with Miss Blair's demise. On his account, there were persons who were in the Mountain View area who were threatening to harm both Miss Blair and himself, referring to them as "informers". He said that he had resolved to leave the area and that he pleaded with Miss Blair to leave with him, but she refused.

[8] The jury who heard the evidence, convicted Mr Baker on 21 November 2006. On 24 November 2006, he was sentenced to imprisonment for life at hard labour, with the condition that he should not be eligible for parole until he had served 20 years imprisonment.

[9] Mr Baker applied for permission to appeal against his conviction but a single judge of this court considered his application and refused permission. Mr Baker has renewed his application before us. His counsel, Mr Wilson, although he filed two supplemental grounds of appeal, in substitution for those originally filed by Mr Baker, argued only one of those grounds. The other ground, it seems, was based on a

misconception, due to a defect in the copy of the transcript with which Mr Wilson was provided. The ground of appeal argued was:

> "That the non-disclosure of the fingerprint report by the Crown had the effect of excluding a vital piece of information from the Defence and thus contributed to an unfair trial of the Applicant."

It is that ground of appeal that will now be assessed.

Ground of appeal

[10] Mr Wilson, in addressing the ground of appeal, pointed out that the prosecution had failed to produce any information concerning the results of the fingerprinting exercise which was conducted at Miss Blair's house. The relevant portion of the evidence was adduced during the cross-examination of the investigating officer, Detective Sergeant Richard Hylton. It is recorded at pages 166-167 of the transcript:

> "Q. And did you get back reports on all those checking for latent fingerprints, signs of breaking in, you had got reports from all of the personnel that you instructed to do those tasks?
>
> A. I got reports from the person who did the physical search of the building and the latent impressions.
>
> HIS LORDSHIP: That was the person who did what?
>
> THE WITNESS: The physical checking of the scene to see whether or not there was any break-in and the person who did the dusting for latent fingerprints impressions.
>
> Q. And you got reports from these persons?

HIS LORDSHIP: Just one minute.

MISS JOBSON: I am sorry.

HIS LORDSHIP: Yes?

Q. So you are saying you got a report from the person who did the fingerprinting?

A. Yes, ma'am.

Q. You submitted a written report?

A. No, ma'am.

Q. Were you there when they were dusting the place for fingerprints?

A. No, ma'am."

The other relevant portions of Detective Sergeant Hylton's evidence are at pages 171, 172 and 173 of the transcript. At page 171 the evidence is as follows:

"Q. Did you ever submit, or have submitted a report on the, ahm, results of your, ahm fingerprinting.

A. No, ma'am."

At pages 172-173 the transcript states:

Q. ...[sic] when you had prepared a warrant for this accused man had you gotten the results from the fingerprint dusting?

A. From the very day I was informed of the findings by the person.

Q. You have no records of this, no written record of this result, the findings?

HIS LORDSHIP: That is what he told you, Miss Jobson, that he never submitted any written records.

MISS JOBSON: So he never received a written record?

HIS LORDSHIP: Did you receive any written report?

THE WITNESS: **No, I did not receive a written report**." (Emphasis supplied)

[11] The thrust of Mr Wilson's written submissions was that the failure of the prosecution to adhere to the requirement of full disclosure of all relevant material in its possession, resulted in unfair prejudice to Mr Baker's defence. According to Mr Wilson:

> "The non-disclosure of a very important forensic test did not afford [Mr Baker the opportunity] to utilise the results to his advantage."

That situation, Mr Wilson submitted, "would have [had] the effect of impeaching the Crown's case as to the circumstances of death and [Mr Baker's] possible involvement within close contact of the victim as alleged by the Prosecution". On his submission, neither "the Prosecution nor the learned trial judge sought to preserve the fairness properly due to [Mr Baker] at his trial". He cited a number of cases in support of his submissions, including the recent ones of **Harry Daley v R** [2013] JMCA Crim 14 and **Mardio McKoy v R** [2010] JMCA Crim 27.

[12] The cases cited by learned counsel are helpful in ascertaining the principles guiding the assessment of this ground. In **Mardio McKoy v R**, the failure by the police to pursue and secure the results of a test for fingerprints, was highlighted by this court. In addition to the failure to produce the results of the fingerprinting exercise, the

prosecution also failed to provide a statement that had been taken from a police officer during the investigation. The court placed the failure to produce the report in context. Phillips JA said, in part, at paragraph [32] of the judgment:

> "It was prudent and incumbent on the prosecution to have made every effort to ensure that the results were provided and disclosed to the defence and produced to the court. In this case, there has been no explanation for the absence of the results. In fact, the evidence discloses that the police showed no interest in even seeking to obtain the results.**The absence of the results in light of the very vague description of the assailants given to the police, under very difficult circumstances with no information as to how the applicant was taken into custody, all together provide reasonable grounds for concluding that the applicant was not given a fair trial and the convictions and sentences must be quashed**.We have also observed that the learned trial judge made no finding whatsoever with regard to the failure to disclose the statement of Detective Corporal Blake and or the failure to obtain and disclose the results of the fingerprinting exercise." (Emphasis supplied)

[13] Earlier in paragraph [32], Phillips JA emphasised the duty placed on the prosecution:

> "With regard to the results of the fingerprinting exercise, it is this court's view that the failure to pursue these results had the possible effect of serious prejudice to the defence. The results of the exercise could have had the effect of entirely exonerating the applicant. **It was the duty of the prosecution to have secured the evidence, bearing in mind that it was the evidence of the complainant that the applicant was driving the motor vehicle as it left the scene and the vehicle was discovered very soon after the incident**. The police in participating in the investigation were obviously of the view that obtaining and producing the fingerprint results could have proven useful…." (Emphasis supplied)

[14] The learned judge of appeal was applying principles that are well established. She cited some of the cases which set out the stringency with which the requirement to provide relevant material should be enforced. In the case of **R v Hennessey** (1978) 68 Cr App R 419 Lawton LJ said at page 426:

> "...[Courts] must also keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action.The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution."

[15] Glidewell LJ in **R v Ward** [1993] [1993] 2 All ER 577 reinforced the point. He said at page 602:

> "We would emphasize that 'all relevant evidence of help to an accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led."

Both those excerpts were cited with approval by Lord Hutton at paragraph 58 of the opinion of the Privy Council in **R v Richard Hall** [1997] UKPC 63.

[16] In **Harry Daley v R**, the police deliberately removed certain portions of an audio recording that had formed part of the prosecution's case. In addition, an application by the defence for access to certain material was denied. Panton P, in stressing the need

for a fair trial, pointed out the status of the police in the preparation of a case for trial. He said, at paragraph [49]:

> "In this country, whenever a person is charged with a criminal offence, he is entitled to receive a fair trial. Fairness involves, among other things, the prosecution not putting obstacles in the path of the conduct of the defence of the person charged, or withholding material relevant to the case. For example, where there are matters that are likely to be of importance to the defence and they are under the control of the prosecution, such matters ought to be disclosed. '**The prosecution' means not just the prosecutors who appear in court but includes persons such as police officers and other state officials connected with the investigation and conduct of the case against the accused person.**" (Emphasis supplied)

[17] It is important, however, to examine the nature of the material withheld and the value of the evidence that was actually adduced. This principle is demonstrated in both **Mardio McKoy v R** and **Harry Daley v R**. In **Mardio McKoy v R**, the issues of the identification of the robbers who took the complainant's motor vehicle and the short time thereafter that the stolen motor vehicle was recovered, made the results of the fingerprinting exercise very important. The absence of the report was material to the conduct of the case. In addition, as mentioned above, there was a police statement that had been withheld. Those defaults were in the face of Mr McKoy's defence of alibi. His alibi was supported by a defence witness.

[18] In **Harry Daley v R**, the withholding of portions of the recording was only one of a number of aspects of the case that were criticised by this court. The prosecution's case turned on the credibility of its main witness. Certain difficulties with his testimony

made other independent evidence critical. The withholding of some of that evidence and the unsatisfactory state of some other portions of the evidence that was adduced, led to the reversal of the conviction.

[19] We find that, in the instant case, the default by the prosecution was not an egregious one. There is no indication of any attempt at concealment, or wilful default, as in the cases of **Mardio McKoy v R** and **Harry Daley v R**. The jury, in the instant case, would have gleaned from the evidence of Detective Sergeant Hylton, cited above, that he had received an oral report on the very day of the testing for fingerprints. That report indicated that no information whatsoever had been secured from that exercise. He received that report before he had prepared any warrant for the arrest of Mr Baker. No written report had been provided.Not only did he, therefore, not conceal, or fail to secure, an existing written report, but the indications are that the provision of a written report would have confirmed there was no information available from the fingerprint testing exercise,to assist either the defence or the jury. The absence of a formal report was, therefore, not prejudicial to the defence.

[20] There was also sufficient circumstantial evidence that minimised the impact of the absence of the report on the test for latent fingerprints. The learned trial judge gave accurate and fulsome directions to the jury about all the relevant issues, including the burden and standard of proof and circumstantial evidence. In respect of the fingerprint report, he said, at pages 307-308 of the transcript:

> "[Detective Sergeant Richard Hylton] said personnel from Scene of Crime came there and he asked them to check signs of break in. He said he got reports from the Scene of Crime personnel that they could not assist in his investigation. Remember counsel for the defence says how come they couldn't assist. If no other fingerprints were found, then you would have expected the police to come and say so, but remember I told you, you can only go from the evidence that is before you. You can't speculate as to what might have come. You look at what has come. If you find that it is deficient, then you might well find that the Crown has not made out its case, but you would have to look at it to see if on the basis of what has been presented to you, whether or not you are satisfied to the extent that you feel sure that this accused man committed the offence for which he is charged. He said he had never submitted a report in relation to fingerprint."

[21] Whereas we do not condone the failure to produce a formal report on the results of the test for fingerprints, we agree with Mrs Ebanks-Miller for the Crown, that the evidence was such that the issues were squarely placed before the jury and it accepted that the circumstancial evidence led to one conclusion only, namely the guilt of Mr Baker. We find that no substantial miscarriage of justice has occurred. In the circumstances we shall apply the *proviso* to section 14 of the Judicature (Appellate Jurisdiction) Act, and will not disturb this conviction.

Order

[22] The application for leave to appeal is refused and the sentence shall be reckoned as having commenced on 24 November 2006.