

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 89/2013

MOTION NO 2/2018

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA**

LESCENE EDWARDS v R

Patrick Atkinson QC and Miss Deborah Martin instructed by Usim Williams & Co for the applicant

Miss Donnette Henriques and Miss Channa Ormsby for the Crown

17 and 19 December 2018

PHILLIPS JA

[1] Mr Lescene Edwards (the applicant) has applied by motion for leave to appeal to Her Majesty in Council as of right pursuant to sections 110(1)(c) and (2) of the Constitution of Jamaica (the Constitution).

[2] He has sought leave to appeal against the dismissal of his appeal by the Court of Appeal in respect of his conviction by a jury for the offence of murder of Mrs Aldonna Harris-Vasquez, whom he fatally shot in the bathroom of her home on 5 September 2003. On 5 November 2013 he was sentenced to life imprisonment and ordered to serve 35 years imprisonment before being eligible for parole. He was granted leave to

appeal his conviction and sentence. On 19 January 2018, the Court of Appeal dismissed his appeal against conviction, and confirmed the conviction. However, the appeal against sentence was allowed, the sentence set aside, and a sentence of life imprisonment with eligibility for parole after serving 20 years imprisonment at hard labour was imposed in its stead. The sentence was deemed to have commenced on 5 November 2013.

[3] On 1 February 2018, the applicant filed a motion for conditional leave to appeal to Her Majesty in Council. The applicant claimed that his constitutional rights under section 16(1) of the Charter of Fundamental Rights and Freedoms (the Charter) had been breached, in that, he had not been granted a fair trial within a reasonable time. He therefore appealed as of right pursuant to section 110(1)(c) of the Constitution which reads:

"110(1) An appeal shall lie from decision of the Court of Appeal to Her Majesty in Council as of right in the following cases-

- (a) ...
- (b) ...
- (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution;..."

[4] He also applied for leave to appeal to Her Majesty in Council pursuant to section 110(2) of the Constitution. Section 110(2) reads as follows:

"110(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-

- (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
- (b) such other cases as may be prescribed by Parliament."

[5] This prescription by Parliament is grounded in section 35 of the Judicature (Appellate Jurisdiction) Act (JAJA) which provides that:

"35. The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of provision of Part IV, V or VI, where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

[6] The applicant submitted that there were certain questions that he was desirous of placing before Her Majesty in Council involving points of law of exceptional public importance, and deserving of the consideration of the Privy Council. They were:

- "(1) Whether a delay of ten (10) years, during which time evidence and witnesses which could support the [applicant's] case were lost; was a reasonable time within which to grant the [applicant] a fair trial.
- (2) Whether the [applicant's] case was fairly placed before the jury by the Learned Trial Judge, in particular evidence concerning photographs which

together with the circumstantial evidence demonstrated that the [applicant] could not have fired the fatal shot and was therefore innocent.

- (3) Whether the expert witness' testimony was fairly put to the jury.
- (4) Whether the delay between the hearing in the Honourable Court of Appeal and delivery of judgment was violative of the [applicant's] right under section 16(1) of the Constitution of Jamaica and impacted the Honourable Court of Appeal's recall of submissions presented, in particular the submissions concerning the photographs mentioned in (2) above, as well as the unchallenged narrative of events occurring after the shot was heard.
- (5) Whether in directing the jury on circumstantial evidence, the Learned Trial Judge misdirected them and failed to deal specifically with each item, thereby denying the [applicant] a fair trial.
- (6) Whether the Learned Trial Judge's non-direction as to how to treat the rest of the evidence if they accepted or rejected it or had a doubt as to the opinion of either handwriting expert amounted to a misdirection thereby denying the [applicant] a fair trial

Submissions

[7] We do not intend to set out the submissions of the parties in detail. We assure you that we have read the written submissions and considered them along with the oral submissions made in court.

[8] We understand the applicant to be saying that the question of delay has always been a constitutional issue and has been submitted to the Privy Council for deliberation in the past. Additionally, all issues of delay in any particular case must be considered on their own peculiar facts. In the instant case, the circumstances involve a delay of 10

years between the applicant's arrest and the commencement of the trial, during which period the applicant claims that witnesses who could assist the defence were no longer available, and critical evidence was inadvertently destroyed. So, the question is, would the period of delay (10 years) be in breach of the applicant's constitutional rights as set out in the Charter which guarantees the protection of the right to due process. Section 16(1) of the Charter reads as follows:

"16-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[9] So, the real substantive issue in this application before us is, whether that 10 year period would have impacted so adversely the applicants' right to a fair trial within a reasonable time to vitiate the conviction.

[10] Counsel for the Crown contended that in the circumstances of this case, section 110(1)(c) of the Constitution was inapplicable. She argued that many authorities have already recognised and stated that an unreasonable delay can result in an abuse of process, making the trial unfair, such that it cannot be remedied on appeal. In the instant case, Brooks JA on behalf of the court stated in paragraph [49] that "[i]t cannot be denied that the 10 years it took for this case to come on for trial was unacceptable". He stated, however, that the length of the delay was only one of the factors to be considered with respect to the effect of the delay on the fair trial of the applicant. There were other considerations such as the reasons advanced by the prosecution for the

delay; the accused's responsibility to assert his rights; any prejudice experienced by the accused; the strength of the prosecution's case; the absence of the witnesses and physical evidence; the general assessment of the conduct of the prosecution; and the directions given by the learned trial judge.

[11] Counsel submitted that the Court of Appeal had dealt with these matters in detail appropriately, and all matters had been taken into account by the court in arriving at the reduced sentence imposed. Counsel also referred to **Eric Frater v R** [1981] 1 WLR 1468 to remind the court of the vigilance that the Law Lords in the Privy Council had stated that the court should observe, in order to ensure that applications for leave to appeal to Her Majesty in Council are not made allegedly under section 110(1)(c) of the Constitution, but which are not genuinely disputable questions of interpretation of the Constitution, and have merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right.

[12] Counsel submitted that there was no genuinely disputable question of the interpretation of the Constitution, the issue was really the application of the particular provision namely section 16(1), and that made the matter not one which could be appealed as of right.

Discussion and analysis

[13] There have been many cases which have dealt with the issue as to how the phrase "of great general or public importance or otherwise" should be viewed by this court in relation to questions which the applicant may wish to submit to Her Majesty in

Council. Section 35 of the JAJA similarly speaks to whether, in the opinion of the court, the decision involves a point of law of exceptional public importance. As indicated, the particular phrase set out in section 110(2) of the Constitution has been dealt with by many cases and particularly more recently by this court in **Norton Hinds and Other v The Director of Public Prosecutions** [2018] JMCA App 10, at paragraph [32]. It is of significance that Brooks JA, on behalf of the court, had canvassed all the issues raised by the applicants, particularly relating to the issue of delay, and had pointed out that the directions of the learned trial judge were more than adequate. Crown Counsel had nonetheless indicated that she would not submit to this court that it ought not to grant leave on that particular aspect pursuant to section 110(2) of the Constitution.

[14] Counsel for the applicant of course had however submitted, which we have referred to earlier, that the questions posited as set out above all fell within the description of the particular phrase in section 35 of JAJA. Counsel also emphasised that this court should examine whether the questions numbered 2, 3, 5 and 6 which refer to the applicant's case relating to the issue of: (i) expert evidence with particular reference to certain photographs; and (ii) whether circumstantial evidence had been placed fairly before the jury, requires determination by Her Majesty in Council.

[15] We wish to state that we have considered all the submissions of counsel on both limbs of section 110 of the Constitution and have arrived at the conclusion that the main issue in the matter of concern to us relates to one of delay, that is, the 10 year period between the applicant's arrest and the commencement of the trial, and the two year period between the hearing of the appeal and the delivery of the judgment of the

court. Inordinate delay, as occurred in this case, could be presumed to be prejudicial. The real question is the extent of the impact of that delay on the fair trial of the applicant. Has the applicant's constitutional right guaranteed under section 16(1) of the Charter, namely, the right to have a fair trial within a reasonable time been infringed? Any court, in deliberating on this must take into consideration all the relevant factors as set out previously, that is, the length of the delay; the justification put forward by the prosecution; the responsibility of the accused for asserting his rights; and any prejudice to the accused. However, the weight to be attributed to each factor must depend on the particular circumstances of each case.

[16] As a consequence, it appears to us, that the circumstances of this case may fall for consideration under section 110(1)(c) and (2) of the Constitution. In whichever case (for it may be that with regard to section 110(1)(c), this matter is a borderline one, it not being a specific interpretation of the Constitutional provision), such delay in the conduct of the matter, during which period several other events have taken place, may have been to the detriment of the applicant in the conduct of his case. In our view, the questions numbered 1 and 4 stated in paragraph [6] herein, raise matters of exceptional public importance that warrant consideration by Her Majesty in Council. This consideration, however, in our view, does not arise with regard to the questions referred to earlier numbered 2, 3, 5 and 6.

[17] As a consequence, we therefore make the following orders:

1. The applicant is granted conditional leave to appeal to Her Majesty in Council, the decision of the Court of

Appeal delivered 19 January 2018, pursuant to section 110(1)(c) and (2) of the Constitution of Jamaica for consideration of the questions numbered 1 and 4 in the notice of motion for leave to appeal to Her Majesty in Council dated 1 February 2018 as follows:

- “(1) Whether a delay of ten (10) years, during which time evidence and witnesses which could support the [applicant's] case were lost; was a reasonable time within which to grant the [applicant] a fair trial.”
- “(4) Whether the delay between the hearing in the Honourable Court of Appeal and delivery of judgment was violative of the [applicant's] right under section 16(1) of the Constitution of Jamaica and impacted the Honourable Court of Appeal's recall of submissions presented, in particular the submissions concerning the photographs mentioned in [paragraph 6(2)] above, as well as the unchallenged narrative of events occurring after the shot was heard.”

on the following conditions:

- (a) that the applicant will pay the sum of \$1,000.00 within 30 days of the date hereof for the due prosecution of the appeal; and
- (b) that within 90 days of the date hereof the applicant should take the necessary steps for the purposes of procuring the preparation of the record and its dispatch thereof to England.

2. The costs of and incidental to this application shall be costs in the appeal to Her Majesty in Council.