

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 2/94

COR: THE HON MR JUSTICE CAREY P (AG)
THE HON MR JUSTICE GORDON J A
THE HON MR JUSTICE WOLFE J A

R v LEROY GORDON

Lord Gifford Q C for Appellant

Carolyn Reid for Crown

November 7 & 21, 1994

GORDON J A

The hearing of the application for leave to appeal was treated as the hearing of the appeal, the appeal was allowed, the conviction quashed and the sentence of death imposed set aside. In the interests of justice we ordered a new trial, directing that such trial be held in the current session of the Home Circuit Court.

The appellant was convicted in the Circuit Court Division of the Gun Court held in the Home Circuit Court, Kingston on 14th January 1994, at the end of a five day trial, for the capital murder of Norman Patrick Jamieson on 11th July 1990. Having regard to our decision, we do not consider it desirable to deal with the facts. Suffice it to say that identification was a central issue and the defence was an alibi.

Lord Gifford Q C argued by leave of the court one ground of appeal, presented in this form:

"IMPROPER CROSS-EXAMINATION OF
DEFENCE WITNESS

1) Counsel for the prosecution, in cross-examination of one Keith Byles who gave evidence in support of the Appellant's alibi asked the following questions:

- "Q. Mr. Byles, are you presently before the Spanish Town Resident Magistrate's Court and the Half Way Tree Resident Magistrate's Court?
- A. Yes.
- Q. On several charges of car stealing?
- A. How should I answer that?
- Q. Please?
- A. Yes, I am in front of the Court. I bought ...
- Q. We don't want the merits and demerits of it, this lawyer will ask you. Are you before the Half Way Tree Resident Magistrate's Court?
- A. Yes, ma'am.
- Q. For a count of car stealing?
- A. Yes.
- Q. In a matter which is presently pending?
- A. Yes.
- Q. And are you also before the Spanish Town Resident Magistrate's Court also for a count of car stealing?
- A. Yes, ma'am, that case have adjourned sine die.
- Q. Okay.
- HIS LORDSHIP: Which other court was this?
- WITNESS: Spanish Town and we have asked ...
- HIS LORDSHIP: You are before which Court now?
- WITNESS: Half Way Tree. I will tell you about the Spanish Town.
- Q. I don't want to hear it, I just want to know whether you have been charged and you were before that Court for car stealing and you are subsequently before the Half Way Tree Court for car stealing?

"A. Yes.

Q. And Corporal Messam is one of the investigating officers in the matter?

A. Yes.

2. It is submitted that the said cross-examination was improper. It was not relevant to the witness' credibility that he had been charged with offences which were still pending before the court. The witness was entitled to the presumption of innocence in relation to such charges. The Appellant relies upon the speech of Lord Sankey LC in Maxwell vs The Director of Public Prosecutions (1934) 24 Criminal Appeal Reports page 172:

'The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant, it goes neither to show that the prisoner did the act for which he is actually being tried nor does it go to his credibility as a witness.'

3. Further the learned trial Judge made no direction to the jury to disregard the said questions and answers, but drew attention to them in his summing up (page 292), thereby indicating that they were relevant.

4. It is submitted that in the circumstances of this case, where the evidence was finely balanced, the matters aforesaid gave rise to a serious miscarriage of justice."

The witness Byles was called by the appellant and he gave evidence supportive of the alibi raised by the defence. The questions asked in cross-examination as set out above may have raised in the minds of the jurors doubts as to the good character of the witness and so caused them not to give proper consideration to his evidence. The cross-examination was impermissible and the evidence inadmissible, but the evidence having been let in the learned trial judge was under a duty to direct the jury to disabuse

their minds of its effect. Section 18 of the Evidence Act provides:

"18. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies the fact, or refused to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the Clerk of the Court or other officer having the custody of records of the court, where the offender was convicted, or by the deputy of such Clerk or officer shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

A witness is entitled to be shielded by the presumption that he is a person of good character unless the section applies. The questions asked by the prosecuting counsel offended the law as laid down by the House of Lords in Maxwell v. Director of Public Prosecutions [1934] 24 Cr. App. R. 152 in which it was:

"Held, by the House of Lords (reversing the decision of the Court of Criminal Appeal): As a general rule it is not permissible to cross-examine a prisoner, who has put his character in issue, on a previous charge which has resulted in an acquittal. In most cases the fact of such a charge having been made is irrelevant, in that it neither goes to show that the prisoner did the act for which he is being tried nor does it go to his credibility. There may be exceptional cases in which cross-examination on a previous charge which has resulted in an acquittal may be permissible, in order to elicit a statement or evidence given by the prisoner in the

"course of the previous trial which tends to throw doubt on the evidence given by him at the subsequent trial.

Even where the question whether a prisoner has been convicted, charged or acquitted goes to his credibility, it ought not to be admitted if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence with which he is charged."

In D.P.P. v. William Stirland [1943] 30 Cr. App. R 43, the House of Lords set out propositions with regard to cross-examination of a prisoner as to credit. We agree with the submission of Lord Gifford Q C that proposition 5 which we quote is applicable to witnesses generally:

"It is no disproof of good character that a man has been suspected, or accused, of a previous crime. Such questions as 'Were you suspected?' or 'Were you accused?' are inadmissible because they are irrelevant to the issue of character, ..."

Miss Reid conceded that the Crown was in an indefensible position as the submissions of counsel for the appellant were irrefutable. We find the observation of Lord Hewart LCJ in Reginald Arthur Wadey [1935] 25 Cr. App. R. 104 at page 107 worthy of repetition having regard to what transpired in the instant case:

"Counsel entrusted with the public task of prosecuting accused persons should realise that one of their primary duties is to be absolutely fair."

We are of the view that there are issues herein which on a proper presentation are fit for the consideration of the jury hence the future course of these proceedings as indicated in our decision.