[2016] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 16/2011

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

DWAYNE GREEN v R

Gladstone Wilson for the appellant

Mrs Sharon Milwood-Moore for the Crown

6 October 2016

ORAL JUDGMENT

MORRISON P

[1] On the 17 February 2011, after a trial before Beckford J and a jury in the Circuit Court for the parish of Clarendon, the appellant was found guilty of the offences of burglary and larceny (count 1) and wounding with intent (count 2). On that same day, he was sentenced to 12 years' imprisonment on count 1 and 15 years' imprisonment on count 2, both sentences to run concurrently.

[2] The appellant now appeals, pursuant to leave granted by a learned single judge of this court on 26 February 2015, against his conviction and sentence. When the

matter came on for hearing before us this morning, Mr Gladstone Wilson for the appellant sought and was granted leave to argue three supplemental grounds of appeal in substitution for the grounds of appeal originally filed by the appellant himself. The supplemental grounds are as follows:

> "(1) That the treatment by the learned trial judge of the process of the jury's verdict was irregular and therefore amounted to a misdirection in law.
>
> (2) That, although the identification of the appellant occurred in less than ideal circumstances, the learned trial judge failed to assess the jury in how to treat inherent weaknesses given in the testimony of the main eyewitness. The circumstances which attended the identification parade only added to the unsatisfactory treatment in the judge's direction to the jury.
>
> (3) That crucial parts of the trial were conducted unfairly, and taken together, those specific areas rendered the verdict inconsistent having regard to the evidence."

[3] In our view, ground one, which is the basis on which the learned single judge gave leave to appeal, is dispositive of this appeal. In order to understand how the matter arises, it is necessary to set out the sequence of events which followed the judge's invitation to the jury, at the end of the summing up, to retire to consider their verdict:

> "HER LADYSHIP: Please go with the officer. As soon as you reach a verdict, please knock on the door and they will bring you back in.
>
> **Jury leaves at 11 o'clock a.m.**
>
> Jury returns at 12 o'clock p.m.

REGISTRAR: Members of the jury, please listen for your names.

Jury roll call -- all present.

REGISTRAR: Mr. Foreman, please stand. Members of the jury, have you arrived at a verdict?

FOREMAN: Yes, miss.

REGISTRAR Is your verdict unanimous, that is, are you all agreed?

FOREMAN: No, miss.

HER LADYSHIP: They have been out for an hour. Would it assist you, Mr. Foreman and members of the jury, is there something in law that you need some help with, do you think if you were to go back you will be able to come to a decision?

FOREMAN: Yes, miss.

HER LADYSHIP: What is the question in law?

FOREMAN: Some of the evidence is not coming forth to us, ma'am.

HER LADYSHIP: No, I am not understanding, just to talk to me in simple language.

FOREMAN: Some of the witness, how they talk about the accused man, some of them that not coming forth to us.

HER LADYSHIP: I am not understanding you when you say not coming forth to you. I don't know what you mean. I don't know what you mean when you say not coming forth to you. I ask you if you had a problem in law and if you would tell me what it is in relation to the law I could assist you. You could go back and talk about it if you wish, and if you find you cannot come to an agreement then you tell me what it is. Do you think if you talk some more you would come to some agreement?

FOREMAN: Yes, ma'am.

Jury retires at 12:08 p.m.

Jury returns at 1:00 p.m.

REGISTRAR: Jury roll call -- all present.

Mr. Foreman, please stand. Members of the jury have you arrived at a verdict?

FOREMAN: Yes, ma'am.

REGISTRAR: Is your verdict unanimous, that is, are you all agreed?

FOREMAN: Yes, ma'am.

REGISTRAR: Do you find the accused Dwayne Green guilty or not guilty of Count One of this indictment, which charges him of Burglary?

FOREMAN: Guilty.

REGISTRAR: Do you say he is guilty of Count One of this indictment?

FOREMAN: Yes, sir.

REGISTRAR: That is your verdict?

FOREMAN: Yes, ma'am.

REGISTRAR: So say all of you?

FOREMAN: Yes, ma'am.

REGISTRAR: Do you find the accused, Dwayne Green, guilty or not guilty of Count Two over [sic] this indictment which charges him with Wounding with Intent?

FOREMAN: Guilty.

REGISTRAR: You say he is guilty of Count Two of this indictment?

FOREMAN: Yes, ma'am.

REGISTRAR: That is your verdict, so say all of you?

FOREMAN: Yes, ma'am.

REGISTRAR: Thank you, you may sit."

[5] Mr Wilson referred us to section 44(3) of the Jury Act ('the Act') which provides as follows:

> "On trials on indictment before the Circuit Court for offences other than murder or treason, the verdict of the jury may be unanimous, or a verdict of a majority of not less than five to two may, after the lapse of one hour from the retirement of jury, be received by the Court as the verdict of the jury."

[6] On the basis of this provision, Mr Wilson submitted, the foreman of the jury not having informed the court that they were unable to reach a verdict, but only that they were divided, the judge should have taken the verdict thus arrived at. Instead, having implicitly rejected the decision of the jury on a divided verdict, the judge then failed to assist the jury by giving them the assistance which they had asked for.

[7] In response to these submissions, Mrs Milwood-Moore for the Crown pointed out, firstly, that the use of the word "may" in section 44(3) of the Act suggests that the judge was not mandated to accept a majority verdict after the lapse of one hour. So in the instant case, the judge merely inquired of the foreman whether it was felt that further time to deliberate might allow the jury to arrive at the unanimous verdict, but in no way suggested that they were obliged to do so.

[8] However, in our view quite properly, Mrs Milwood-Moore went on to concede that, by declining to offer any assistance to the jury save on a question of law, the judge had flown in the face of the authorities, some of them emanating from this court, which made it clear that the jury were entitled to assistance from the judge at any stage of the proceedings on any area, whether of law or of fact. In **R v Linton Edwards** (SCCA No 250/2001, judgment delivered 21 May 2003, page 8), for example, to which Mr Wilson referred us, Bingham JA observed that "there can never be any stage of a trial with a jury that the jury may not need some assistance from the learned trial judge". This observation was explicitly based on the decision of the Privy Council on appeal from this court in **Berry v The Queen** [1992] 3 All ER 881, in which Lord Lowry explained (at page 894) that:

> "The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending upon the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part."

[9] In the subsequent decision of this court in **Machel Gouldbourne v R** [2010] JMCA Crim 42, the trial judge's failure to offer any assistance to the jury in circumstances not dissimilar to those of the instant case was treated as "a material irregularity that might have affected the fairness of the … trial".

[8] On this basis, it therefore appears to us that the appellant's complaint in ground one has plainly been made good on the record of the proceedings which we have set

out. But we will not go so far as Mr Wilson invites us to, which is to say that, at the point when the jury returned to indicate that they had reached a decision, but that it was not unanimous, the judge ought then and there, without more, to have accepted the verdict. We say this because the law permits the entering of a majority verdict in these circumstances only if the jury is divided in a certain proportion, that is, five to two. So that the next step for the judge to have taken, in our view, ought to have been to make an enquiry of the jury as to how they were divided. It is only upon being told that the jury were divided in a manner which permitted the court to accept a majority verdict according to law, that the judge would then have been obliged to consider the question of accepting the majority verdict.

[9] However, as has been seen, the foreman did go on to indicate an area of the evidence in respect of which the jury required some assistance from the judge. It is true that, as Mrs Milwood-Moore pointed out, the actual language used by the foreman was not particularly helpful. But it nevertheless seems to us that a simple enquiry by the judge as to the precise nature of the concern would have sufficed to elucidate the matter and would have enabled her to give such assistance to them as might have been required. Instead, contrary to what the authorities call for, the judge took the view that she had no power to do so. As in **Machel Gouldbourne v R**, we consider that this was a material irregularity sufficiently serious to make it impossible for us to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

[10] As regards the option of a retrial, Mr Wilson makes the point that the appellant has been in custody for five years and that in those circumstances, some prejudice will inevitably result to him if he is required to stand trial again. But Mrs Milwood-Moore helpfully indicated that her information is that it will be possible for the prosecution to remount the case against the appellant notwithstanding the loss of time and she also points out the seriousness of the offences, in particular, the wounding with intent, which has left the complainant without the use of one eye. Taking all the relevant factors into account, and in keeping with the considerations set out in the decision of the Privy Council in **Dennis Reid v R** [1980] AC 343, we have come to the conclusion that the case for a retrial has been made out. In the event of his conviction at that trial, the time already spent by the appellant in custody will clearly be a factor to be taken into account in his favour in fixing the appropriate sentence which he is to serve.

[11] This conclusion suffices to dispose of the appeal and it is therefore not necessary to consider the other supplemental grounds of appeal. However, we will say that, as Mrs Milwood-Moore again quite candidly conceded, the judge could have dwelt in some greater details on some of the clear weaknesses in the identification evidence. While it was for the jury to resolve those weaknesses, the jury were entitled to full guidance from the trial judge and we therefore point this out in the hope that on the retrial that is to take place, that lapse is not repeated.

[12] So, in the result, our decision is that the appeal must be allowed and the conviction and sentence set aside. In the interests of justice, the court orders that a retrial should take place at the earliest possible date in the Clarendon Circuit Court.