[2012] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 40/2010

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MISS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

HORACE KIRBY v R

Akin Adaramaja for the applicant

Dirk Harrison and Miss Melony Domville for the Crown

3 February and 16 March 2012

BROOKS JA

[1] On 3 February 2012, we heard Mr Horace Kirby's application for leave to appeal. At that time we made the following orders:

a. application for leave to appeal is treated as the hearing of the appeal;

b. the appeal is allowed;

c. conviction and sentence are set aside and in the interest of justice a new trial is ordered.

Our reasons are set out below.

[2] On 7 October 2006, the applicant stabbed Ms Maureen Duncan once, with a knife, in the region of her clavicle. She succumbed to that injury. The prosecution's case was that he had attacked her because they had had a disagreement the previous evening, during which, she had hit him with a bottle. His defence, at the trial, was that he had acted in self defence. In an unsworn statement, he relied on the contents of a cautioned statement that he had given to the police, on the day of his arrest. In that cautioned statement he said that, on the day of the stabbing, Ms Duncan had attacked him with a bench and in defending himself he pushed the bench out of her hand and stabbed her.

[3] He was convicted of murder and was sentenced to serve 18 years imprisonment at hard labour. The learned trial judge also ordered that he should not be eligible for parole until after he has served 12 years. His application for leave to appeal against his conviction and sentence was refused by a single judge of this court but he has renewed that application before us.

[4] It is a particular aspect of the applicant's unsworn statement that is the basis for the sole ground of appeal, which has been argued on his behalf. The applicant said, therein, "I have no previous conviction". Mr Adaramaja, on his behalf, and with the permission of this court, argued that the "[l]earned Judge [was obliged to, yet] failed to give the Jury any direction on the accused's good character and this led to a miscarriage of Justice".

[5] On learned counsel's submission, the applicant, by stating in his unsworn statement that he had no previous conviction, had placed his good character in issue. This, Mr Adaramaja submitted, placed a duty on the learned trial judge to give directions on the issue, to the jury. In failing to do so, learned counsel submitted, the learned trial judge deprived the applicant of the right to have that issue considered by the jury and, as a result, deprived him of a fair trial. Learned counsel argued that the recent authorities stress that, once the issue of good character has been raised by the accused, a trial judge has no discretion as to whether or not a good character direction should be given. He relied, in support of his submissions, on the authority of **Michael Reid v R** SCCA No 113/2007 (delivered 3 April 2009).

[6] In response, Mr Harrison submitted on behalf of the Crown, that a trial judge does have a discretion, depending on the circumstances of the case, as to whether or not to give directions to the jury concerning the good character of an accused. He submitted that that discretion was triggered when there was no evidence profferred by the accused as to his good character. Learned counsel argued that the applicant, not having given sworn testimony, did not give evidence as to his good character and therefore the learned trial judge was not obliged to give the jury any directions on that issue.

[7] Mr Harrison also submitted that the circumstances of the instant case did not require the learned trial judge to give a good character direction, even with respect to the matter of the lack of propensity of the applicant to have committed the offence.

This is despite the applicant having raised the issue of his good character. Learned counsel argued that "the absence of the direction as to the [lack of] propensity of the applicant [to have committed the offence] did not make the trial unfair; there was no miscarriage of justice".

[8] In support of his submissions, Mr Harrison relied on the cases of **Kevaughn Irving v R** [2010] JMCA Crim 55, **Syreena Taylor v R** SCCA No 95/2004 (delivered 29 July 2005), **Edmund Gilbert v R** PCA No 25/2005 (delivered 27 March 2006), **R v Desmond McKenzie** SCCA No 47/1996 (delivered 13 October 1997) and **Michael Reid**.

Analysis

[9] The law concerning whether or not a trial judge should direct the jury as to the good character of an accused, as well as the nature of those directions, have been modified over the years. In recent times, however, and especially in this jurisdiction, comprehensive guidelines concerning the issue have been settled. These have been set out in **Michael Reid** and were referred to, with approval, in **Kevaughn Irving**.

[10] For the present purposes, it is not necessary to repeat all of those guidelines. It will be sufficient to note three of the principles. Firstly, that a direction concerning the good character of an accused has two limbs, that of credibility and that of propensity. In **R v Aziz** [1995] 3 WLR 53; [1995] 3 All ER 149 their Lordships, in the House of Lords, recognized that fact. Lord Steyn said at page 62:

> "It has long been recognized that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious."

That principle was adopted by this court in **Orville Murray v R** SCCA No 176/2000 (delivered 8 April 2002). Their Lordships Board, in **Teeluck and John v The State of Trinidad and Tobago** [2005] 66 WIR 319, at paragraph [33], gave guidance to trial judges as to the appropriate direction:

> "(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged."

[11] The second principle to be recognized is that where an accused does not give sworn testimony or make any pre-trial statements or answers which raise the issue of his good character, but raises the issue in an unsworn statement, there is no duty placed on the trial judge to give the jury directions in respect of the credibility limb of the good character direction. The accused is still entitled, however, to the benefit of a direction as to the relevance of his good character as it affects the issue of propensity. That was set out by Morrison JA in **Michael Reid** as principle (iii) on pages 26 - 27 of the judgment of this court. He said:

> "(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit

> the offence with which he is charged (**Muirhead v R**, paragraphs 26 and 35)."

[12] The third principle is that where there has been a failure to fulfill a duty to direct the jury in respect of an accused's good character, this court may nonetheless decide that it will not interfere with the verdict of guilty. That decision will be taken if it is of the view that a good character direction would have made no difference to the verdict. In other words, using Mr Harrison's formulation "the jury would have arrived at the same verdict". Morrison JA addressed this as his principle (v) in **Michael Reid**. He said at pages 27 - 28 of the judgment:

> "(v) The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and the verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted (**Whilby v R** [SCCA No 72/1999 (delivered 20 December 2000)] per Cooke JA (Ag) at page 12, **Jagdeo Singh v The State** (2005) 68 WIR 424, per Lord Bingham at pages 435 -436."

[13] Morrison JA applied this third principle in **Patricia Henry v R** [2011] JMCA Crim 16 (delivered 1 April 2011). In that case, after repeating the principles established by the authorities, concerning the failure to give a deserved good character direction, Morrison JA, giving the judgment of the court, ruled that other circumstances outweighed the potential benefit of the good character direction. He said at paragraph [51]:

> "In all the circumstances of the instant case, taking into account in particular the appellant's confession and the other items of circumstantial evidence referred to by the learned Resident Magistrate in her reasons for judgment…it appears to us that this is a case in which the potential benefit of a good character direction to the appellant was wholly outweighed by the nature and coherence of the evidence which she accepted."

[14] Those principles, it seems to us, settle the majority of the issues raised by the arguments before us. After stating those principles, it only remains to address one other point of difference between the submissions of counsel who appeared before us. This is the question of whether there is a discretion given to trial judges as to whether or not to give a good character direction.

[15] There has also been movement in the law in respect of this point. Lord Steyn, in **R v Aziz**, said at page 156 b, that "in recent years there has been a veritable sea-change in judicial thinking in regard to the proper way in which a judge should direct a jury on the good character of a defendant". He went on to say, also at page 156 c:

> "Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance. Leaving it entirely to the discretion of trial judges to decide whether to give directions on good character led to inconsistency and to repeated appeals. **Hence there has been a shift from discretion to rules of practice**." (Emphasis supplied)

[16] It is our view that the authorities have also settled the question as to whether a trial judge has a discretion as to whether or not a good character direction ought to be given. The general position is that an accused, who is of good character, is *prima facie*

entitled to a good character direction. A definitive statement on the point was given by the Board in **Teeluck**. At paragraph [33], their Lordships' second guiding proposition was outlined:

> "(ii) The direction [concerning good character] should be given as a matter of course, **not of discretion**. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: **R v Fulcher** [1995] 2 Cr App R 251, 260. **If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a 'good character' direction could not have affected the outcome of the trial**: **R v Kamar** The Times, 14 May 1999." (Emphasis supplied)

[17] Despite those propositions, the exercise of discretion, as to whether or not to give a good character direction, has not been completely banished. It would not be prudent to attempt to stipulate every circumstance in which a discretion may be exercised, however, two general principles seem to emanate from the authorities. Firstly, a judge is not required to give a good character direction if it would make no sense to do so. Such a situation could arise where the accused has no previous conviction but where the circumstances leading to the charge against him clearly implicated him in other criminal conduct. Lord Steyn, at page 158 c, of **R v Aziz**, said:

> "A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with **R v Vye** [(1993) 97 Cr App R 134, [1993] 1 WLR 471] in a case where the defendant's claim to a good character is spurious. I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without any previous convictions if the judge considers it an insult to common sense to give [such] directions…"

[18] The authorities also suggest that a trial judge may have a discretion, in respect of whether or not to give a good character direction, where an accused's previous character was not absolute. This could occur where, for example, he has a previous conviction. It would then be a matter of discretion whether a good character direction should be given. In such circumstances the trial judge has to decide whether or not the previous conviction is relevant to the case being then tried. In **R v Gray** [2004] EWCA Crim 1074; [2004] 2 Cr App R 30, the Court of Appeal of England and Wales, considered a number of authorities on the point. It set out, what it considered to be, the relevant principles regarding the exercise of the judge's discretion, as to whether or not to give a good character direction in respect of both limbs. It referred to such a direction as a "Vye direction", based on the seminal authority of **R v Vye**. The court in **R v Gray** said, at paragraph [57]:

> "In our judgment the authorities discussed above entitle us to state the following principles as applicable in this context:
>
> (1) The primary rule is that a person of previous good character must be given a full direction covering both credibility and propensity. Where there are no further facts to complicate the position, such a direction is mandatory and should be unqualified (**Vye*,* Aziz**).
>
> (2) If a defendant has a previous conviction which, either because of its age or its nature, may entitle him to be treated as of effective good character, the trial judge has a discretion so to treat him, and if he does so the defendant is entitled to a **Vye** direction (*passim*); but
>
> (3) Where the previous conviction can only be regarded as irrelevant or of no significance in relation to the offence charged, that discretion

ought to be exercised in favour of treating the defendant as of good character ([**R v H** [1994] CLR 833, **R v Durbin** [1995] 2 Cr App R 84]), and, to the extent that it cited **H** with apparent approval, **Aziz**.) In such a case the defendant is again entitled to a **Vye** direction. It would seem to be consistent with principle (4) below that, where there is room for uncertainty as to how a defendant of effective good character should be treated, a judge would be entitled to give an appropriately modified **Vye** direction.

(4) Where a defendant of previous good character, whether absolute or, we would suggest, effective, has been shown at trial, whether by admission or otherwise, to be guilty of criminal conduct, the prima facie rule of practice is to deal with this by qualifying a **Vye** direction rather than by withholding it (**Vye, Durbin, Aziz**); but

(5) In such a case, there remains a narrowly circumscribed residual discretion to withhold a good character direction in whole, or presumably in part, where it would make no sense, or would be meaningless or absurd or an insult to common sense, to do otherwise ([**R v Zoppola-Barrazza** [1994] CLR 833]) and dicta in **Durbin** and **Aziz**).

(6) Approved examples of the exercise of such a residual discretion are not common. **Zoppola-Barrazza** is one. **Shaw** [**v R** [2001] 1 WLR 1519] is another. Lord Steyn in **Aziz** appears to have considered that a person of previous good character who is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged would forfeit his right to any direction (at 53B). On the other hand Lord Taylor's manslaughter/murder example in **Vye** (which was cited again in **Durbin**) shows that even in the context of serious crime it may be crucial that a critical intent separates the admitted criminality from that charged.

> (7) A direction should never be misleading. Where therefore a defendant has withheld something of his record so that otherwise a trial judge is not in a position to refer to it, the defendant may forfeit the more ample, if qualified, direction which the judge might have been able to give ([**R v Martin** [2000] 2 Cr App R 42]).

These principles were applied in **R v Webb** [2011] EWCA Crim 1270 and we respectfully adopt them as correctly summarising the relevant law and as being helpful in our current analysis. We now address the cases cited by Mr Harrison.

[19] **Gilbert v R**, cited by Mr Harrison, endorses the position taken by the House of Lords in **R v Aziz.** In **Gilbert v R**, their Lordships in Privy Council, seemed to further widen the scope for holding that a failure to give a good character direction was not fatal to a conviction. After quoting extensively from **R v Aziz,** Lord Woolf said at paragraph [15] of the judgment:

> "I would only add two comments to this common sense approach, which is particularly relevant on this appeal. The first is that if a judge has a residual discretion **it follows that there can be circumstances where a conviction can be upheld if a judge omits to give a direction due to oversight and secondly the circumstances where this can be the position are not necessarily as rare as was once thought** (see Lord Brown's judgment in **Bhola** [**v. The State** (Trinidad and Tobago) [2006] UKPC 9] paragraph 17)." (Emphasis supplied)

[20] It seems to us that this general principle, that an accused who has no previous conviction, is *prima facie* entitled to a good character direction, may only be bypassed for good reason. Oversight, as mentioned by their Lordships, could never, by itself, we find, justify depriving a deserving accused of the right to a good character direction.

This is because the essence of the issue, as Lord Steyn pointed out, is fairness. There may be cases, such as **Patricia Henry v R**, where the failure would not have affected the outcome of the trial. It seems to us that it is only in such circumstances that oversight would not result in the intervention of an appellate court. Trial judges and counsel (for both prosecution and defence) must, therefore, be alert as to this issue being raised by accused persons. This will avoid situations where an otherwise excellent summation may become fatally flawed.

[21] In applying these principles to the instant case, it seems to us that the applicant was entitled to a good character direction in respect of the propensity limb. The learned trial judge failed to give the jury the relevant directions on the point. Those directions could have assisted the applicant in the thrust of his defence that he would only have made the fatal stroke in self defence. It could also have been of assistance in respect of the issue of provocation, which was also left for the jury's consideration. It does not appear to us that the evidence either allowed the learned trial judge to exercise a discretion not to give the relevant direction, or was such that the jury would have inevitably convicted him even if the direction had been given. Indeed, the jury deliberated for over an hour before it returned its verdict. It must, therefore, have given the matter of the defence some anxious thought. In our view, the conviction must be set aside.

[22] We find that the cases cited by Mr Harrison did not assist him. They all consistently stress the importance of giving the good character direction but are

otherwise distinguishable from the instant case. In **Gilbert v R**, the Privy Council was of the view that the other evidence against the appellant was such as to render, incredible, his unsworn statement. That was also the situation in **R v Desmond McKenzie**, where the good character direction which was given, only addressed the issue of propensity. In that case, this court found that it would have been an insult to common sense to have given a direction in accordance with **Vye**. Gordon JA, who delivered the judgment of the court, said at page 11 of the judgment:

> "The jury had to decide who was the credible witness, [the prosecution's eyewitness] or the appellant. The evidence was overwhelming for the prosecution."

[23] In **Kevaughn Irving v R**, this court was of the view that the conviction ought to have been overturned because of the failure to give the good character direction. The issue of credibility was a live one in that case, as the applicant had given sworn testimony which conflicted that of the victim of the rape. In **R v Syreena Taylor**, this court did not find favour with a submission that there had been a flawed good character direction. This was a case in which the trial judge did give a good character direction, albeit limited to the propensity limb, apparently because Ms Taylor had not given sworn testimony. Harris JA found that the judge at first instance had, also, addressed the credibility of the appellant. She held that this had been done by reference to the applicant's honesty, as attested to by her witnesses. None of these cases have caused us to adjust our view of the flawed direction, in the instant case, and our decision to intervene.

[24] Given the fact that our decision to intervene arose from a non-direction by the learned trial judge, and bearing in mind that the events were not so long ago as to prevent the accused from having a fair trial in the near future, it is our view that a new trial should be ordered. In light of that inclination, we should, for future guidance, observe that the learned trial judge's direction in respect of provocation was not complete. Although he did refer to the question of whether it was reasonable for the applicant to have acted the way he did, the learned trial judge did not specifically point out that a "reasonable person" in this context means an ordinary person of the applicant's age, sex and circumstances, who is not exceptionally excitable but is possessed of such powers of self-control that everyone is entitled to expect that people will exercise in society, as it is today.

Conclusion

[25] It is for those reasons that we ruled in the manner set out at paragraph [1] above.