**[2015] JMCA Crim 24**

**JAMAICA**

**IN THE COURT OF APPEAL**

**MISCELLANEOUS APPEAL NO 2/2013**

**ON REFERRAL FROM THE GOVERNOR-GENERAL**

**BEFORE:** **THE HON MR JUSTICE DUKHARAN JA**
**THE HON MR JUSTICE BROOKS JA**
**THE HON MR JUSTICE WILLIAMS JA (AG)**

**MICHAEL LAWRENCE v R**

**Vernon Daley for the appellant**

**Mrs Suzette Sahai Whittingham-Maxwell for the Crown**

**22 September and 16 October 2015**

**F WILLIAMS JA (AG)**

[1] This matter came before us by way of a referral from His Excellency the Governor-General pursuant to section 29(1) (a) of the Judicature (Appellate Jurisdiction) Act. The appellant was convicted of the offence of murder on 24 January 2008 after a three-day trial before a judge and jury in the Circuit Court Division of the Gun Court holden in the parish of Kingston. On 4 April 2008, he was sentenced to life imprisonment with the stipulation that he should serve a minimum of 20 years

imprisonment before becoming eligible for parole. His application for leave to appeal was refused by a single judge of this court on 18 June 2009. The renewal of his application before the full court was also refused, with the direction that the sentence should commence on 4 July 2008. The appellant was at the time of the hearing of the application, unrepresented.

[2] In those previous applications the focus of the grounds of appeal related to the adequacy or otherwise of the summation and the sustainability or otherwise of the verdict, having regard to the evidence that had been adduced. The basis on which the referral was made, however, was that there was a failure to adduce evidence of his good character during the trial. In fact, the contention was that the possibility or importance of adducing such evidence during the course of the trial (rather than after conviction and with a view to mitigation), was not appreciated by counsel who had represented him at his trial; and that the appellant had thereby lost the possible benefit of a good-character direction, rendering his conviction unsafe. In fact, this was the way in which the ground on which the matter was referred (and the initial sole ground of appeal before us) was stated:

> "Defence counsel failed to adduce evidence of the Petitioner's good character, so denying the Petitioner the benefit during the summing-up of a good character direction both as to credibility and propensity to which he would otherwise have been entitled. The effect of counsel's failure to lead such evidence was to deny the Petitioner a fair trial, thereby rendering his conviction a miscarriage of justice."

[3] At the hearing of this matter, counsel sought and was granted leave to argue the following supplemental ground:

> "Defence counsel failed to advise the Appellant of the implications for a character direction of giving an unsworn statement and/or not giving sworn evidence. The effect of this failure was to deny the Appellant a fair trial, thereby rendering the conviction a miscarriage of justice."

**The evidence on behalf of the appellant**

[4] The evidence-in-chief from the appellant came in the form of his affidavit which was sworn and filed on 19 March 2015. We have summarized the main matters which he alleged in that affidavit. They are as follows:

(i) That the attorney-at-law who represented him did not raise his good character as an issue in the trial; and that at no time before his conviction did the attorney-at-law ask him whether there was anyone who could give character evidence on his behalf. The attorney-at-law first asked him about a character witness after he had been convicted and awaited his fate in the dock.

(ii) The attorney-at-law, while explaining to him his options on the close of the Crown's case, did not tell him that if he gave an unsworn statement, it would weaken the impact of any character direction that the judge might have given insofar as it related to his credibility. The attorney-at-law told him that the case looked good for him and told him that he could stay where he was and speak - that is, to make an unsworn statement.

(iii) He was shocked to have learnt from English solicitors assisting him that if his attorney-at-law had raised the matter of what he considers to be his

good character during the trial, that could have assisted his defence – especially if he had also given evidence instead of making an unsworn statement.

(iv) He exhibited letters which passed between the said English solicitors (the first dated 24 May 2011), and his attorney-at-law in which the solicitors posed this question:

> "…I am aware he was a man of previous good character and note a good character direction was not provided by the trial judge. I wonder why this was not raised?"

(v) That the attorney-at-law responded by letter dated 16 March 2012 indicating, inter alia, that:

> "The undersigned represented Mr. Lawrence at his trial and can confirm that a "good character direction" was not given by the learned trial judge. Based on my understanding of the Jamaican law, this is not usually done.
>
> Indeed, the fact that an accused has no previous convictions is normally not raised unless it is being dealt with as part of a plea in mitigation."

(vi) That he had presented his sister to the said attorney-at-law as a possible alibi witness; but, for no apparent reason, she was not called as a witness.

[5] In cross-examination the appellant agreed that the attorney-at-law otherwise conducted the trial in a professional manner and had asked the witnesses the questions

that he (the appellant) wanted to be asked. He also agreed that on some three visits or so to his said attorney-at-law's office, trial preparation was done, which included the attorney-at-law pretending to be prosecutor and simulating his cross-examination.

**The other evidence in the matter**

[6] The other evidence in the matter came from the attorney-at-law who had conduct of the appellant's trial. He is senior counsel of, then, some 19 years' standing, having been called to the bar on 26 October 1989. These are the main points of his affidavit evidence and his viva voce testimony on cross-examination:

(i) That from as early as 25 January 2007 he met with the appellant and discussed his case with him in detail, requesting the appellant to give him instructions with details of any witnesses that he intended to call, including character witnesses – especially as he had no previous convictions.

(ii) The appellant was reminded on more than one occasion of this need, but to no avail.

(iii) In trial preparation, he encouraged the appellant to give sworn testimony and to speak firmly of his alibi. He prepared the appellant for sworn testimony by conducting a simulation of a cross-examination.

(iv) At the trial, at the close of the Crown's case, the appellant appeared nervous, and to the surprise of his said attorney-at-law, opted to make an

unsworn statement. This the appellant did despite the fact that the said attorney-at-law had informed him before the close of the Crown's case that the case against him was strong, and that it was better for him to give sworn testimony.

(v) That he, the attorney-at-law, in fact tried to change the mind of the appellant, to have him give evidence, but he refused to do so, making a very brief unsworn statement.

(vi) Even after conviction there was difficulty in getting someone to come forward to give character evidence for the appellant – the person who eventually did so (Sergeant Joseph Bryan), first coming forward some six weeks after the appellant had been convicted.

(vii) In explaining his response to the English solicitors he meant that raising the matter of previous convictions is "normally" not done; but that was not intended to convey the meaning that it could not or should not be done.

(viii) He admitted, however, that he did not explain to the appellant that giving sworn testimony would have required the judge to give the jury a full good-character direction.

**Summary of the submissions**

[7] The above summary of the evidence would no doubt indicate the essence of the submissions that were made by both counsel in the matter. For his part, Mr Daley, on behalf of the appellant, asked the court to accept the appellant's evidence and to find that he was not asked by his attorney-at-law to provide character witnesses and, in fact, that the whole issue of character evidence was not raised until after he, the appellant, was convicted. The appellant was in fact directed by his said attorney-at-law to make the unsworn statement; and that he lost the benefit of a good-character direction – both as to credibility and as to propensity.

[8] For her part, Mrs Whittingham-Maxwell for the Crown sought to persuade the court to accept the evidence of the attorney-at-law who appeared for the appellant at his trial. She pointed, *inter alia*, to the considerable time devoted to the preparation of the case (which the appellant himself accepted as true); and asked that, in all other material respects, the appellant's evidence be rejected. She submitted that, even though the appellant's indication in his unsworn statement that he was not a violent person might have earned him a good-character direction as to propensity, the omission from the summation of such a direction was not fatal, given the strength of the Crown's case against him. In these circumstances, no injustice was done, and the appeal should be dismissed.

**The law**

[9] The principles governing the circumstances in which a judge is required to give a good-character direction have been rehearsed and discussed in a number of cases. Among the most helpful of these (helpful, *inter alia*, because they review several cases on the matter and summarize the principles to be extracted therefrom), are (i) **Michael Reid v R** SCCA No 113/2007, judgment delivered 3 April 2009; (ii) the more recent case of **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28; and the case of **Nigel Brown v The State** [2012] UKPC 2.

[10] In **Michael Reid v R**, Morrison JA (as he then was) writing on behalf of this court, canvassed and reviewed many of the more-significant cases on this area of the law, beginning with what is perhaps the seminal case of **R v Vye & Ors** [1993] 3 All ER 241, which spoke primarily to the two limbs of the good-character direction and the circumstances in which either or both ought to be given. The review also considered the case that was chronologically last of those cases reviewed – that of **Vijai Bhola v The State** [2006] UKPC 9.

[11] After the several authorities were reviewed, the following five principles were deduced from them as stated at paragraph [44] of the judgment:

> "44. In our view, the following principles may be deduced from the authorities to which we have been referred:
>
> (i) While it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of counsel to

discharge a duty, such as the duty to raise the issue of good character, which lies on counsel, can lead to the conclusion that there may have been a miscarriage of justice (**Sealy and Headley v The State**, paragraph 30 and the Judicature (Appellate Jurisdiction) Act, section 14(1)).

(ii) Such a breach of duty may also include a failure to advise, in an appropriate case, if necessary in strong terms, on whether the accused person should make an unsworn statement from the dock, give sworn evidence, or say anything at all in his defence (**R v Clinton**).

(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).

(iv) On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be of relevance and will ordinarily, in the absence of other factors, be accepted by the court (**Bethel v The State**, page 398; **Muirhead v R**, paragraphs 30 and 37).

(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 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**, per Cooke JA (Ag) at page 12, **Jagdeo Singh v The State** (2005) 68 WIR 424, per Lord Bingham at pages 435-436)."

[12] In **Mark France and Rupert Vassell v R**, the Privy Council also usefully reviewed a number of authorities in its statement of the principles governing the giving of a good-character direction at paragraphs 42 to 49 of its judgment. It is helpful to set out one of these paragraphs in full, specifically paragraph 42:

> "42. Mr. Vassell had not been convicted of a criminal offence before he stood trial for the murder of Glenroy Sutherland. It does not follow, however, that he is inevitably of good character: see *Gilbert v The Queen* (Practice Note) [2006] UKPC 15, [2006] 1 WLR 2108 at paras 18-20. In *Teeluck v State of Trinidad and Tobago* [2005] 1 WLR 2421 at para 33 (v) Lord Carswell, delivering the judgment of the Board, said this:
>
> > 'The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen,* at p 844…'"

[13] To similar effect is the case of **Nigel Brown v The State**, in which the Board, at paragraph 33 of the judgment, made an observation that will be referred to and discussed later in this judgment.

**Discussion**

[14] We have given very careful consideration to the two contending accounts given by the appellant and his former attorney-at-law as to when the matter of the appellant's good character was first raised; as to why the appellant made an unsworn statement, as opposed to giving sworn testimony and as to why no character witnesses were called during the course of the trial.

[15] While we recognize that it is open to us to decide which account (or, indeed, which parts of the two accounts), to accept or reject, we approach the matter bearing in mind the words in paragraph [44] (iv) of the summary of the principles set out by Morrison JA in the case of **Michael Reid**. It will be remembered that the general admonition to be gleaned from those words is that the assertions of an appellant should be approached with some amount of caution, as they could very well be self-serving. *A fortiori*, we might observe that where (as here) there exists the likelihood of an appellant spending an extended period (here 20 years) confined in less-than-ideal conditions, that could provide an added or stronger incentive to make every effort to have the appeal succeed. At the end of the day, considering the fact that this is not one of those cases in which all that is before the court is a bare allegation made by an appellant, on the one hand; and a written response from counsel, on the other; but that

sworn testimony has been given by both parties, we have approached the matter on the basis of whose version of events to accept.

[16] In all the circumstances, although we have some concern about the written response given by the appellant's former attorney-at-law, which appears (at least in part) to stand in contrast to and in conflict with his *viva voce* testimony, the weight of the evidence in resolving this issue seems to point to careful preparation of the case. In fact, it would have been strange for the anticipated cross-examination to have been rehearsed (and rehearsed on more than one occasion), for all the appellant's options on the close of the Crown's case to have been explained to him (more than once), and then for him to have been directed (as he contended) by his attorney-at-law to make an unsworn statement.

[17] It is also somewhat difficult to accept (as the appellant apparently would have us believe), that his then attorney-at-law, when given an opportunity of strengthening the case by calling, at the very least, one credible alibi witness, would have turned that witness away for no apparent reason. Another consideration is that, if, as the appellant contended, the reason for his attorney-at-law directing him to give the unsworn statement was his (the attorney-at-law's) confidence in the weakness of the prosecution's case, is it not likely that that confidence would have manifested itself in the making of a no-case submission? We should observe that no no-case submission was made in this case. (We do not, however regard this point as being conclusive, as we recognize that there may be cases in which a no-case submission might not be

made; but counsel may be of the view that it might be best for a defendant not to testify. It is but one of several considerations). The appellant's testimony also agrees in large measure with the account given by his former attorney-at-law, except as to the circumstances of a bail application and, of course, the matter of the character evidence.

[18] In all the circumstances, we are minded to accept the evidence of the appellant's former attorney-at-law and find that the matter of character evidence was raised with the appellant before the trial, but that he did not give his said attorney-at-law the "tools" with which properly to do the job.

[19] One candid admission made by the appellant's former attorney-at-law, however, was that, although he would have preferred for the appellant to have given sworn evidence, he did not explain to him the full implications thereof: that is, that the trial judge would then have been under a duty (had he given sworn testimony) to give an unqualified good-character direction if the issue of his previously-unblemished record had been raised.

[20] In any event, however, it may not be necessary to decide to accept one account over the other, as the fact of the matter is that, even in making his unsworn statement, the appellant might be regarded as having introduced what might be construed as an issue concerning his good character by uttering a few words.

[21] In the instant case, the following were the words used by the appellant (as recorded at page 155, lines 10-11 of the transcript):

> "I am not a violent person. I don't own a gun, I don't wish to own a gun."

[22] In **Denjah Blake v R** [2014] JMCA Crim 19, this court found that a good-character direction ought to have been given in a case in which words used by that appellant were considerably similar to the words used by this appellant, Lawrence, in his unsworn statement. These were the words used by Blake in that case:

> "I did not had [sic] no weapon on mi, not even a pin…"
>
> "Anyone know mi would tell yuh that I am not a violent person and I don't walk with weapon."

[23] It is accepted that no good-character direction was given by the learned trial judge. But does this now mean that the appeal must therefore automatically be allowed? The answer to this is to be found in, *inter alia*, the case of **Nigel Brown v The State**, at paragraph 33, where it was observed that:

> "33. It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction – *Jagdeo Singh's* case [2006] 1 WLR 146 para 25 and *Bhola v The State* [2006] UKPC 9, paras 14-17. As Lord Bingham of Cornhill said in *Jagdeo Singh's* case, "Much may turn on the nature of and issues in a case, and on the other available evidence." (para 25) Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the

> significance of the other evidence in the case. Thus, in *Balson v The State* [2005] UKPC 2, a case which turned on the circumstantial evidence against the appellant, the Board considered that such was the strength and cogency of that evidence the question of a good character direction was of no significance."

[24] There are dicta in the later case of **France and Vassell** to similar effect: at paragraph 46 Lord Kerr stated that:

> "46. The Board… observed that there would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. *Jagdeo Singh* and *Teeluck* were obvious examples. But it recognized that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."

[25] With these words in mind, it is, therefore, to a consideration of the evidence in the case that we must now turn.

**The evidence at the trial**

[26] In summary, the appellant stood his trial for the offence of murder- it having been alleged that on 7 July 2012, in the parish of St Andrew, he murdered Mr Uriel Williams, otherwise called "Rooster". The incident, from the evidence, is said to have occurred around 10:00 am in the vicinity of Davidson Drive in the Drewsland community.

[27] Evidence was led from two eyewitnesses: (i) Mr Christopher Stephenson; and (ii) Ms Aldine Powell, who had borne a child for Mr Williams, the deceased.

[28] In a nutshell, Mr Stephenson testified to having known the appellant from he (the appellant) was a baby. They lived in the same community. He would see the appellant on a regular basis. He knew members of the appellant's family. He observed the appellant take a gun from his waistband and fire shots in the direction of Mr Williams. When the shooting took place, he was some 18-19 feet away from the appellant; and was also close enough to Mr Williams that he had to duck when the shots were being fired. The incident happened some 20 feet from the appellant's yard. He was able to see the appellant's face for at least five seconds.

[29] Miss Powell's evidence was to similar effect: she had known the appellant for over 15 years, during the course of which she would see him actually every day. She testified that she was about 15 feet away from the appellant when the shooting took place; (but pointed out a distance that placed her even closer: of some 10 feet). She lived across the road from the appellant. She had seen him shortly before the shooting when he emerged from his yard to request two persons to discontinue a dispute; and later saw him again when he fired shots at Mr Williams. She was able to see his face for some six seconds in all at the material time.

[30] In his unsworn statement, the appellant attempted to set up an alibi. This was done by his saying twice in his unsworn statement: "I was not there…" (see page 155,

lines 6 and 16 of the transcript). He sought to portray himself as a non-violent person and sought to convince the jury that he and Mr Williams did not have a dispute; and that they were, in fact, friends, so that he would have had no motive for killing him. In respect of the eyewitnesses' testimony, he did not seek to challenge their evidence that they knew him well. His focus in that regard was to say that he believed that they, in identifying him as the shooter that day, were making an "honest mistake" (see page 155, lines 13 to 14 of the transcript).

**The summation**

[31] In what we consider to have been a detailed and careful summation, the learned trial judge, in our view, correctly identified the main issue in the case as concerning the correctness or otherwise of the identification (or recognition) evidence. At page 187, lines 6 to 9 of the transcript, for example, the learned trial judge highlighted the need for the correct resolution of the identification evidence as being "crucial".

[32] The learned trial judge considered and highlighted to the jury the issue of credibility, as well, pointed to inconsistencies and discrepancies and gave the standard guidance as to how the jury should treat with them. The learned trial judge also highlighted for the jury the evidence that would assist them in determining whether the witnesses were mistaken or not – such as distances, the time period for observing Mr Williams' assailant and all other matters that would fall for consideration under the guidelines in **R v Turnbull and others** [1976] 3 All ER 549, giving them the required **Turnbull** warnings.

[33] The sole omission by the learned trial judge in her summation of the case was that she did not expressly state the limb of the standard alibi direction, that a false alibi might sometimes be used to bolster an otherwise genuine defence (see, for example, **Fabian Donaldson v R** [2010] JMCA Crim 52, paragraph 15). However, the learned trial judge stated and repeated to the jury in her summation that even if they were to find that the appellant was lying about his alibi, that would not be the end of the matter; but that they would have to return to the Crown's case to see whether they could feel sure of the appellant's guilt. So that, the summation, looked at as a whole, must have conveyed to the jury the most important matters for them to consider in relation to the defence advanced.

[34] It will be seen, therefore, that the case against the appellant was a strong one. The jury were obviously impressed with the cogency of the evidence that came from not just one, but two eyewitnesses who (the jury must have believed) knew the appellant well. They obviously took the view that, contrary to what the appellant had contended in his unsworn statement, the witnesses had not made a mistake in identifying him as the person who murdered Mr Williams on the day in question. There was no issue as to the truthfulness and honesty of the eyewitnesses (which might ordinarily have necessitated the need for a direction on good character). It was either that the jury believed that the witnesses were correct in their recognition of the appellant; or that they were not. The guilty verdict delivered by the jury reflected the fact that they believed the witnesses. So that, after a trial lasting over three days (22 to

24 January 2008), a unanimous verdict of guilty was returned within one hour and four minutes of the jury retiring, without any request for further directions.

**Disposition**

[35] In the light of these considerations, we take the view (accepting the submissions of Mrs Whittingham-Maxwell for the Crown), that, owing to the strength and cogency of the Crown's case, a good-character direction (whether in terms of a propensity direction alone – seeing that the appellant had made an unsworn statement – or a direction with both a credibility and propensity element); would not have availed the appellant.

[36] We are, therefore, unable to take the view proffered by Mr Daley that what unfolded at the trial amounted to a miscarriage of justice.

[37] In the circumstances, we are minded to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, which reads as follows:

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

[38] We are of the view that, not only has no substantial miscarriage of justice occurred; but, indeed, that there has been no miscarriage of justice at all.

[39] In the result, the appeal is dismissed; the conviction and sentence are affirmed. The sentence shall be reckoned as having commenced on 4 April 2008.