[2019] JMCA Crim 46

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 30/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

RADCLIFFE LEVY v R

Trevor Ho-Lyn for the appellant

Ms Cadeen Barnett and Ms Kelly-Ann Francis for the Crown

18 and 22 November 2019

PHILLIPS JA

[1] Mr Radcliffe Levy (the appellant) was tried and convicted for the offence of murder on 23 February 2016 in the Manchester Circuit Court before George J. A sentence of life imprisonment at hard labour was imposed with a stipulation that he ought to serve 25 years imprisonment before being eligible for parole. A single judge of this court granted his application for leave to appeal against his conviction, but his application for leave to appeal his sentence was refused. The appeal against his conviction, and his application for leave to appeal against his sentence was therefore renewed before us.

[2] The Crown alleged that on 7 December 2008 at about 9:30 am, whilst the appellant was in a bathroom at a bar located inside a shopping plaza in Mandeville, Manchester, the appellant used a knife to stab Ms Ann-Marie Simpson (the deceased). The deceased and the appellant shared a child and had once resided together. The appellant was identified by two men who had heard the sounds of a female screaming coming from a bar which was located upstairs in a plaza, and went to investigate. They entered the bar. They did not see anybody in the bar. They, however, heard the screams coming from a closed bathroom door inside the bar and they broke the door partially open in order to gain access. Having partially opened the door, the appellant was seen with a knife kneeling over the deceased who was lying on the bathroom floor. One of the men spoke to the appellant, but when the appellant got up, opened the door and went towards both men with the knife, they ran down the stairs and into the main road by the plaza. The appellant ran behind them into the road but pursued a different direction.

[3] One of the men saw the knife fall from the appellant's pocket and it was ultimately retrieved. Both men raised an alarm, and pointed out the appellant to other persons who were present, and those persons began chasing him. The appellant was captured, beaten and eventually turned over to the police. The appellant was identified by both men as the man they saw in the bathroom with the deceased. While in the presence of the police, he was pointed out to the police by Mr Leroy Cole as the man he saw in the bathroom kneeling on the lady with the knife in his hand. The appellant said nothing. He was subsequently arrested and charged for the killing. The knife, items of

clothing, a blood sample and finger nail clippings from the deceased were submitted for forensic testing.

[4] At the trial, the appellant gave an unsworn statement accepting that he had visited the deceased at the bar, but denying that he was the man in the bathroom with the knife. He said that three men had approached him while attempting to rob the bar. He got nervous upon their approach and ran downstairs. After he stopped running, the crowd accosted him and started to beat and stab him all over his body. He was rescued by the police who had also beat and mistreated him, and he was subsequently taken to the Mandeville Hospital. The appellant's sole witness was used to attest to his good character.

[5] The appellant abandoned the initial grounds of appeal that he had filed, and sought and obtained leave to argue one supplemental ground of appeal as follows:

> "The Learned Trial Judge (LTJ) by virtue of her comments concerning the silence of the Appellant after being cautioned by the investigating officer misdirected the jury by effectually inviting them to disregard his defence. By doing so the LTJ therefore failed in her duty to place the defence of the Appellant properly and fairly before the jury and thereby rendered the trial unfair."

[6] Counsel for the Crown conceded that the sole ground of appeal had merit. Both counsel also agreed that in all the circumstances of the instant case, and in the interests of justice, a retrial should be ordered.

[7] The portion of the summation which gave rise to the appellant's complaint is found at pages 659-661 of the transcript. The learned judge told the jurors:

> "He said [Leroy] Mr. Cole spoke to him in the presence and hearing of Mr. Radcliffe Levy. He said Mr. Cole said, 'Officer, mi si dis man in the bathroom kneeling on a lady with a knife in his hand.' And he said he made some observations as to the appearance of Mr. Levy. He said that when [Mr.] Cole said this, he cautioned Mr. Levy that he was not obliged to say anything unless he wishes to, but whatever he said would be taken down in evidence against him, and he said Mr. Levy Made no statement.
>
> Now Mr Levy has the right to silence. It is for the prosecution to prove the case against him. It is not for him to prove that he is innocent. So he didn't have to say anything, but you might want to consider in light of the statement he gave, which was that there were three men in the bar upstairs that at the time when the police held him and these allegations were being made in his presence by Mr. Cole, whether, in fact, you would expect his response to be one of silence or one to indicate or make a report to the police that, in fact, these three men had been in the bar and were robbing persons. It is a matter for you. Because, firstly, you have to decide whether you believe Corporal Parker any at all. Is it that Corporal Parker spoke to Mr. Cole in his presence? Is it that Corporal Parker cautioned him as he said? And is it that he said something as Corporal Parker said it? It is a matter for you.
>
> If you accept what Corporal Parker says, then you might then want to ask yourselves whether it was reasonable in those circumstances, even though he has the right to silence where he is saying there were three men in the bar upstairs robbing or about a robbery taking place, whether, in fact, in those circumstances, you would have expected Mr. Levy to make a report. Corporal Parker is not speaking to you of any report...."

[8] The oft-cited principle with regard to silence is that of Lord Diplock in **Dennis Hall v R** (1970) 16 WIR 276, a case from the Judicial Committee of the Privy Council. At page 279 of that case he said:

> "It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. *A fortiori* he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

[9] Lord Diplock gave further guidance on this principle in **Donald Parkes v R** (1976) 23 WIR 153, where he indicated that a judge may give directions on such inferences where the accusation was not being made by or in the presence of a police officer, or any other person in authority, or charged with the investigation of the crime, but it was spontaneous.

[10] In **R v Derrick Latty and Hernard Smith** (1988) 25 JLR 119, Campbell JA explained **Donald Parkes v R** this way at page 123:

> "It is made abundantly clear in *Donald Parkes v. R.* ... that the only circumstances in which mere silence can give rise to the inference of an admission of the truth of a charge, is where the accuser, and the accused are so circumstanced that no police officer or other person in authority charged

> with the investigation of the crime, is, to the knowledge of either of the parties, present, or within hearing distance and the accusation is spontaneous, that is to say, not made for and on behalf, and on the promptings of a police officer or other person in authority aforesaid."

[11] In **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005, Panton JA (as he then was), in his usual succinct style, stated the principle this way:

> "…There is no room in the law for anyone to attempt to whittle down the right of an accused person to remain silent in circumstances where he is not on equal terms with his accuser. In the instant situation, the silence was in the presence of a person in authority, and the right in such circumstances is inviolable. Where a judge fails to respect the right, and uses the exercise of that right against an accused, the conviction ought not to be allowed to stand."

[12] Our learned brother Brooks JA in **Vince Edwards v R** [2017] JMCA Crim 24, in reliance on **R v Raymond Gilbert** (1978) 66 Crim App R 237, indicated that it amounts to a misdirection if a judge invites a jury to form an adverse opinion of the accused on account of his exercise of his right to silence. The instant case presents a blatant example of this misdirection.

[13] The learned trial judge told the jury that although the appellant was not obliged to say anything unless he wished to, they may nonetheless want to consider why it is that he had not raised the issue of the attempted robbery of the bar when he was accosted by Mr Cole, in the presence of the police. Additionally, she invited the jury to

consider whether one would expect silence in the face of the appellant's statement that there was a robbery, or whether he could have made a report to the police. She then proceeded to direct the jury to ask themselves "whether it was reasonable in the circumstances" not to make a report.

[14] By extending invitations to the jury to make adverse inferences from the appellant's silence, the learned trial judge, in essence, had completely undermined his defence, abusing a right to which the appellant was entitled. When the accusation was made to the appellant, it was done in the presence of a police officer, who is a person in authority, and someone in respect of whom he was not on equal footing. Accordingly, the learned trial judge's directions to the jury in this regard, amounted to a misdirection in law, and warranted the appeal being allowed and the conviction and the sentence being set aside.

[15] The appellant's defence was so undermined by the misdirection on his right to silence that we are not convinced that a jury properly directed would have arrived at the same conclusion upon a review of all the evidence (see **Stafford and Others v The State (Trinidad and Tobago)** [1998] UKPC 35). The proviso pursuant to section 14(1) of the Judicature (Appellate Jurisdiction) Act would therefore not apply.

[16] The principles to be considered when deciding whether to order a retrial are distilled from **Dennis Reid v R** [1980] AC 343 and have been cited in a number of cases in this court (see **Beres Douglas v R** [2015] JMCA Crim 20 and **Morris Cargill**

v R [2016] JMCA Crim 6). Brooks JA in **Nerece Samuels v R** [2017] JMCA Crim 17 summarised the factors to be considered thus:

> "a. the strength of the prosecution's case;
>
> b. the seriousness or otherwise of the offence;
>
> c. the time and expense that a new trial would demand;
>
> d. the effect of a new trial on the accused;
>
> e. the length of time that would have elapsed between the event leading to the charges, and the new trial;
>
> f. the evidence that would be available at the new trial;
>
> g. the public impact that the case could have."

[17] In applying these factors the following matters must be considered. The trial was rather lengthy as it was held for various days between 27 January and 23 February 2016. Almost 12 years had elapsed between the date of the commission of the offence and the date of the hearing of the appeal, and potentially, the date for the order of a retrial of the matter. However, since the appellant was on bail up to trial of the matter which commenced on 27 January 2016, but has been in custody since the date of conviction on 23 February 2016, the substantial prejudice to the accused has been somewhat reduced, as he has only served approximately three years and nine months of his sentence, in respect of which it was ordered that he would only be eligible for parole after he had served 25 years.

[18] The case for the prosecution, on the face of it, appears strong, based on the allegations that the appellant was allegedly, observed, apprehended and identified all

on the same day. The facts are also egregious. It is also of significance that the offence of murder, particularly those arising out of domestic relationships, is serious and especially prevalent in this country. Counsel for the Crown indicated that all the witnesses were still available. The fact that it was alleged that the appellant was accosted by a crowd suggests that there is a heightened public interest in communities generally in cases of this nature.

[19] Accordingly, based on the factors examined, the interests of justice weigh heavily in favour of the grant of a retrial in this matter, and we would so order.

[20] This court therefore makes the following orders:

1. The appeal is allowed.
2. The conviction and sentence is set aside.
3. The matter is remitted to the Manchester Circuit Court for a retrial.
4. The matter is fixed for mention on the next sitting of the Manchester Circuit Court, viz, 13 January 2020.