[2012] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 24 & 31/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

ROHAN McCARTHY v R
RICARDO BRITTON

Ravil Golding for the 1st appellant

Keith Bishop instructed by Bishop and Partners for the 2nd appellant

Miss Natalie Ebanks for the Crown

3, 4 and 12 October 2012

HARRIS JA

[1] On 2 May 2010, the appellants were convicted in the Home Circuit Court for the murders of Tyrique and Tyrone Henry and Moesha Lee. They were sentenced to life imprisonment and it was ordered that they should not become eligible for parole until each had served 14 years.

[2] Miss Ebanks conceded that she could not successfully argue the appeal for the reason that there are several significant non-directions by the learned trial judge. Therefore, the appeal ought to be allowed. She pointed out that the

learned trial judge failed to give to the jury adequate instructions on the issue of visual identification, the good character of the appellants and on the defence of alibi raised by them. Counsel also made reference to the learned trial judge's failure to issue a warning to the jury in light of the fact that the main witness for the prosecution might have had a motive to have named the 1st appellant as one of the perpetrators, he having been previously convicted for injuring her. She, however, argued that despite these defects, on the evidence adduced, a jury properly directed, would have convicted. In these circumstances, she seeks a retrial.

[3] Mr Golding and Mr Bishop strenuously opposed the request for a retrial, contending that the evidence of visual identification was extremely poor and the case ought to have been withdrawn from the jury. Mr Bishop argued that Mrs Henry's evidence is tenuous in that she was looking through a three inch opening in the window, on an extremely dark night yet said that she was able to observe: (a) the faces of the appellants; (b) the 1st appellant throwing the bottle torch which was a big rum bottle; and was also able to describe the clothes each appellant was wearing in those two seconds.

[4] It was also submitted by Mr Bishop that there was no evidence connecting the 2nd appellant to the offence as there is nothing to show that there was any conflict between the 2nd appellant and Mrs Henry apart from his mere presence. There is no dispute that the 2nd appellant did anything wrong, and further, he

submitted, this appellant said he was not there. Counsel also submitted that the length of time which has elapsed since the arrests of the appellants must be taken into account as the charges are still hanging over their heads and it would not be fair and reasonable to expose them to another trial, and further, a retrial would give the prosecution an opportunity to have a second "bite at the cherry". Mr Bishop sought to reinforce his submissions for an acquittal by relying on the cases of **Noel Campbell v R** [2011] JMCA Crim 48; **Douglas Beckford v R** RMCA No 12/2008 delivered 9 October 2009 and **The State v Boyce** PC No 51/2004, delivered on 11 January 2006.

[5] The brief factual circumstances of the case are that at about 1:15 on the morning of 14 September 2004, Mrs Pansy Henry, the main witness for the prosecution, was at her home at Port Henderson Road with her common law husband, her children and step children. Tyrone and Tyrique Henry and Moesha Lee were three of her children. She was awake while the other members of her household were asleep.

[6] On hearing footsteps outside the house and sounds as if water was being thrown around the house, she became suspicious. This prompted her to look through a window. While looking, she related she saw the appellants, who lived in the same community and were well known to her, standing at the side of her house.

[7] The 1st appellant, Mrs Henry said, lit a bottle torch. At this time, she stated, the men were about 14 feet away from her and she was able to observe their faces for two seconds, aided by the light from the torch. Following this, Mrs Henry asserted, the 1st appellant, threw the torch on the house. The men ran. The house became engulfed in flames. Tyrone, Tyrique and Moesha perished in the fire.

[8] Prior to this event, there had been an earlier encounter between the appellants and Mrs Henry. At about 2:00 pm on the previous day, the appellants went to Mrs Henry's home with a man on a tractor who began digging a trench on her property, as a result of which an altercation took place between the 1st appellant and Mrs Henry.

[9] At about 5:30 pm the same day both men returned with the police. Mrs Henry said the 1st appellant said to her, in the presence of the police, "Burn mi a go burn you out before the night done." She responded by saying, "They will – they can find you in a bag too, two of us can dead." The 2nd appellant then said: "Ah dead da gal dey fi dead from bout ya." The police cautioned all parties and left. The men also left.

[10] Both appellants made unsworn statements. The 1st appellant stated that on the morning of the incident he had retired to bed. He was awakened and told about the fire. He looked out and saw the fire. He stated that he loves children and would never have "done it".

[11] The 2nd appellant said that on the night of the event he was at the 1st appellant's house, the 1st appellant having offered him accommodation as his house had been damaged by a recent hurricane. He stated that he was awakened and "they went out and saw what happened". He asserted that he is a good person and had never been in trouble before and had on several occasions given treats to the children.

[12] It cannot be denied, as Miss Ebanks has pointed out, that the non-directions of the learned trial judge warrant the appeal being allowed. Adequate directions on the issue of visual identification had not been given by the learned trial judge. The defence of alibi was raised by both appellants. However, the learned trial judge failed to have given any directions to the jury in respect of that defence. The appellants having spoken of their good character, the learned trial judge was required to have given the requisite instructions to the jury on this issue. This he omitted to do. Further, there was evidence that the 1st appellant, prior to the date of the offence for which he had been charged and convicted, had been convicted for injuring Mrs Henry. This being so, the learned trial judge ought to have brought to the attention of the jury that the report made by her to the police, that he was seen on her premises on the morning of 14 September 2004 and had set her house on fire, could have been born out of malice. In these circumstances, the appeal must be allowed.

[13] The question now arising is whether a new trial should be ordered or the appellants should be acquitted**.** Mr Bishop, in urging us to favourably consider the appellants' acquittal, invited us to consider a number of factors. All these factors save and except the matter of delay and the impact of the learned trial judge's non-directions, are issues of fact which are entirely in the province of the jury. The delay and the non-directions of the learned trial judge will be addressed later.

[14] Reference will first be made to the cases cited by Mr Bishop. These cases do not offer him any assistance. In **Noel Campbell** a new trial was ordered despite a delay of 12 years between the arrest of the appellant and the hearing of the appeal. In **Beckford v R** the court declined to order a new trial because it was of the view that the evidence against the appellant was insufficient to support proof of the prosecution's case beyond reasonable doubt. In **The State v Boyce**, a new trial was not ordered due to the eye witness' confusing and contradictory narrative of the events as well as the existence of certain complicated medical evidence. We cannot say, that in the present case, as in **The State v Boyce**, the evidence was weak and of such poor quality**,** that it could not be left for the jury's consideration.

[15] Section 14(1) of the Judicature (Appellate Jurisdiction) Act empowers this court to allow or dismiss an appeal. Where an appeal is allowed, section 14(2)

grants the court, two options. It may either direct that a judgment and verdict of acquittal be entered or order a new trial. The section reads:

> "14(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[16] The court, after allowing an appeal, in deciding which of the two courses should be adopted, is normally guided by the circumstances of the particular case. If the case is one in which the prosecution's evidence is inherently weak and vague or riddled with inconsistencies and discrepancies and even if on such evidence, taken at its highest, it would be unsafe for a reasonable jury properly directed to convict, then undoubtedly, there must be an acquittal - see **R v Galbraith** (1981) 73 Cr App R 124. However, in circumstances where there is sufficient evidence from the prosecution, which, if properly left to a reasonable jury, a conviction would be justified, then, in the interests of justice a new trial ought to be ordered. The interest of the public is a highly relevant factor in ordering a fresh trial. Where persons are charged with serious offences they ought not to be permitted to evade being made subject to the system of justice due to an error of a trial judge. In **R v Reid** (1978) 16 JLR 246 their Lordships speaking to the question of ordering a new trial, had this to say:

> "The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it

> merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury."

[17] Mr Bishop contended that the non-directions by the learned trial judge are glaring and the cumulative effect of the vast majority of his blunders could not be regarded as technical, requiring a retrial. Although the Board used the words "technical blunder", the phrase cannot be taken to mean that a retrial ought only to be ordered where the error of the trial judge is merely of a technical nature. The rationale in **Reid** is that, in ordering a new trial, the interest of the society is the principal decisive factor. The learned trial judge's errors are not of the nature to justify an acquittal.

[18] It cannot be disputed that there has been a delay between the arrests of the appellants and the hearing of their appeals and that they would be concerned about the charges pending against them. It is acknowledged that there will be a further delay if a new trial is ordered. It could be said that there could be some prejudice occasioned by the delay. This, however, does not mean that although the convictions are quashed, a new trial should not be ordered.

[19] The offences with which the appellants are charged are, indeed, very serious. Significantly, the case against the appellants is relatively straightforward and there was sufficient evidentiary material on which a reasonable jury, properly directed, could have convicted. The appellants' defences are uncomplicated and importantly, a new trial would afford them the benefit of

having their defences being considered by the jury. Any prejudice which they may meet by the delay can be easily discounted. We are of the view that the circumstances of this case would not justify us acceding to the request for an acquittal. In all the circumstances, the interests of justice demand a new trial.

[20] The appeal is allowed. The convictions and sentences are set aside. In the interests of justice, it is ordered that there should be a new trial. It is recommended that retrial takes place before the end of the current term.