[2014] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 55/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

IAN MCKAY v R

Robert Fletcher for the applicant

Mrs Karen Seymour-Johnson and Ms Melony Domville for the Crown

5 May and 20 June 2014

MANGATAL JA (Ag)

[1] The applicant was on 6 March 2009, convicted in the Home Circuit Court, after a trial before P Williams J and a jury for the murder of Tomoya Bailey which occurred on 6 November 2005. The trial took place between February and March 2009 and on 24 April 2009, the applicant was sentenced to life imprisonment. The court directed that he should serve 25 years in prison before becoming eligible for parole. A single judge refused the applicant permission to appeal against his conviction and sentence but he has renewed his application before the court.

The prosecution's evidence at trial

[2] The case for the prosecution was based to a large extent upon circumstantial evidence. However, reliance was also placed upon inferences to be drawn from the statements of the applicant. Twelve witnesses gave evidence for the prosecution. Evidence was led that Tamoya Bailey, a security guard, went missing on the night of 6 November 2005. She was last heard from by her mother during a telephone conversation in which the deceased told her mother, in a low voice, that she was in a taxi. She also instructed her mother that if anything happened to her, her mother must call the police.

[3] The nude body of the deceased was discovered by the police at Fort Rocky, an old fort along Port Royal main road in the parish of Kingston sometime in the morning of 7 November 2005. The body was seen approximately 315 feet away from where a white Toyota Corolla station wagon registration number CE 6199 had earlier been discovered abandoned, with the keys still in the ignition. The car had been found by the police at Fort Rocky on the night of 6 November 2005. Inside the car there was subsequently found to be a black bag with, amongst other items, a security guard uniform and textbooks with the name "Tomoya Bailey" written on them.

[4] Detective Sergeant Frank Buchanan, who was then stationed at Elletson Road Police Station, was one of the witnesses' whose evidence was integral to the case for the prosecution. He gave evidence as to that aspect of the case involving statements by the accused. Detective Sergeant Buchanan met with Corporal Granville Ellis, who

was the first officer on the scene at Fort Rocky on the night of 6 November 2005. Detective Sergeant Buchanan also caused the abandoned station wagon to be towed to the Elletson Road Police Station.

[5] At about 11:30 to 11:45 that night, Detective Sergeant Buchanan received further information which caused him to go to the Norman Manley International Airport Police Station where he spoke to police personnel there. He saw the applicant sitting on a bench, bare-footed, wearing just short pants, and not wearing any shirt. He appeared nervous and had a scratch to his forehead. Detective Sergeant Buchanan spoke to the applicant, and, based upon what the applicant said to him, he took him to Elletson Road Police Station. At the station, the applicant identified the Toyota Corolla station wagon registration number CE 6199 as belonging to his common law wife. The applicant related to the officer an account of what he said had happened that night, including that two men had kidnapped him, and that he had escaped by jumping out of the vehicle while it was moving at 50-60 m.p.h.

[6] Detective Sergeant Buchanan interviewed the applicant at Vineyard Town Police Station, and at a certain point, he asked the applicant where is the girl that was in the car. Detective Sergeant Buchanan stated that the applicant immediately fell to the ground, and started kicking and bawling out "whoy, whoy, mi a goh dead, mi billias, mi a goh faint". He then placed the applicant in custody.

[7] Detective Sergeant Buchanan took the applicant from his cell and again asked him where is the girl that was in the car. The applicant said "mi nuh know 'bout nuh girl". Detective Sergeant Buchanan then took the applicant to Fort Rocky along with other police personnel. There the officer saw a nude body, lying face down on the beach, with the head partially in the water. He testified that at that time he was some distance away from the body and could not discern whether the nude body was that of a male or female. The applicant was right beside him at the time that the officer saw the body.

[8] This is the evidence-in-chief of Detective Sergeant Buchanan as recounted at the top of page 219 of the transcript of the evidence:

> "Q. Did you ever go closer to this body?
>
> A. Yes, when I first saw the body I cannot recall who said see the body there. The accused man shouted out 'Mi neva touch har'."

[9] It was the prosecution's case that the applicant made certain statements that contained lies. Further, the prosecution at the trial argued and suggested to the applicant that he and at least one other man committed the offence. It was also argued that in saying that he never touched "har" at a time when the sex of the nude body could not have been made out, this was a clear indication of the applicant's knowledge of, and presence at the killing and of his awareness that the victim was a female.

The case for the defence

[10] The applicant gave sworn evidence at his trial and was vigorously cross-examined. His defence was one of complete denial of any culpability in, or knowledge of the murder of the deceased. He stated that the motor vehicle in question belonged to his common law wife, and that he had three children, aged 13, 10, and 6 years. He was a higgler who took mostly fruits for sale to the Export Market at Heywood Street and the AMC and Princess Street markets. The applicant had a stall at Heywood Street from which he would sell produce. On 6 November 2005, he was driving back to Kingston from Christiana. He had taken someone called Sean, who also sells produce from a cart in the market at Heywood Street, to Christiana to buy bananas and plantains. He collected a fee from Sean for driving him there. At about 6:30 to 7:00 p.m. the applicant was heading for home in Rollington Town, having dropped Sean back home in Portmore. He reached the traffic lights near Palace Theatre, at South Camp Road, and the light turned red. He stopped, and was pounced upon by two men, one of whom was armed with a firearm. He was ordered out of the driver's seat and into the front passenger seat. One of the men drove the vehicle in the direction of Port Royal. In the vicinity of the lighthouse, the applicant jumped out of the moving vehicle, sustaining injuries as a result, and made good his escape. He went to the Norman Manley International Airport Police Station where he made a report to the police. He said he knew nothing about any girl being in his car or about her being strangled or murdered.

The grounds of appeal

[11] When the application came on for hearing before us on 5 May 2014, Mr Robert Fletcher, who did not appear at the trial, sought and was granted permission for the original grounds of appeal filed by the applicant himself on 4 May 2009, to be abandoned, and to argue the following three supplemental grounds of appeal:

> 1. The directions by the learned trial judge fell short of the standard required of this particular case in that it did not leave for the jury's consideration inferences from the evidence consistent with the applicant's innocence or assist them in evaluating such evidence. By virtue of this, the applicant was denied a fair consideration of the whole evidence and a real chance of acquittal.
>
> 2. The sentence is manifestly excessive.
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> 3. The learned trial judge erred in not giving a good character direction on behalf of the applicant there being (a) no evidential basis impeding the appropriateness of such a direction; and (b) there being some evidence raised by the applicant, in his sworn evidence to which the learned judge was alerted. This failure denied the jury the opportunity to isolate and consider the issue of character and how it might have affected both the applicant's propensity to commit the act for which he had been charged, or credibility, especially where the Crown based some of its evidence on the fact that he lied.

The submissions

[12] In light of the decision which we have reached in relation to ground one, it will not be necessary to examine the facts and arguments advanced in relation to the other grounds. In relation to ground one, counsel submitted that the inference that the prosecution asked the jury to draw from the evidence was that the applicant was one of at least two men who killed the deceased. Further, that despite the prosecution's

assertion that it was not relying on the statement of the applicant for the truth of its contents, that his account of the fact that he was present in the car was important to the Crown's case. Thus, the prosecution was saying that the applicant was present along with the deceased, and that there was at least one other man there. The prosecution asserted that because of his lies, the applicant's account as to what happened ought not to be believed, and therefore the jury should draw the inference that he was a participant in the killing.

[13] Counsel referred to the evidence of the prosecution's witness Detective Sergeant Buchanan and his account of his interaction with the applicant. The Detective Sergeant spoke of carrying the applicant to the scene where the body of the deceased was seen. Reference was made to the evidence in examination-in-chief, quoted at paragraph [8] above, viz:

> "Q. Did you ever get closer to this body?
>
> A. Yes, when I first saw the body, I cannot say who said see the body there. The accused man shouted out 'mi neva touch har'."

[14] Mr Fletcher submitted that this evidence, which the prosecution treated as raising the level of suspicion against the applicant, also raised the inferential question whether he was admitting that he was there but he did not participate in the acts which caused the deceased to die and had no culpability in respect of the killing.

[15] Counsel argued that, in this case of circumstantial evidence, certain other questions arise flowing from this alleged statement of the accused. If the applicant was

pointing to knowledge but not participation, counsel posed the question whether the following inferences would not also be reasonable inferences to draw:

> That he was in fact hijacked and present when the deceased was killed but did not plan or agree with what was happening.
>
> That he in fact escaped.
>
> That his account to the police was an attempt to cover himself.
>
> That the evidence that the prosecution itself led about a man looking for something at the side of the road were those very other men searching for him right after his escape.

[16] It was submitted that the learned trial judge explained the basic elements of common design, dealt with the issue of lies, the burden and standard of proof and inconsistencies. However, it was argued that the summation did not spell out the possible inferences that were in favour of the applicant, and consequently the jury, in a case which required careful guidance, was not assisted in how they should approach the applicant's complicity in the offence. Reliance was placed upon the decision of the Judicial Committee of the Privy Council in ***Taylor v R*** [2006] UKPC 12, (2006) 68 WIR 401 and the decisions of this court in ***Melody Baugh-Pellinen v R*** [2011] JMCA Crim 26, and ***Sheldon Palmer v R*** [2011] JMCA Crim 60.

[17] In relation to the remedy which the applicant seeks, it was Mr Fletcher's contention that a retrial would be the appropriate order for the court to make in the circumstances.

[18] Counsel for the Crown Mrs Seymour-Johnson submitted that there is no merit in ground one. She argued that the learned trial judge's summation was not only fair but balanced, and gave a careful consideration to all of the evidence. It was submitted that for the learned trial judge to leave for the jury's consideration the inference of mere presence without being a participant would not be in keeping with the gravamen of the applicant's defence. The applicant had maintained that his car was robbed, he had no knowledge of how his car ended up where it did, and he had not been in the presence of the deceased nor had any knowledge of her murder. Counsel went so far as to submit that if the trial judge had left to the jury an inference that the applicant was in fact present at the time of the killing of the deceased, when in fact his defence was that he was not involved or present at all, that would have amounted to a misdirection.

[19] Counsel further submitted that the case of ***Taylor v R*** is distinguishable from the instant case because the only evidence linking the appellant in that case to the murder was his police statement, in which he had admitted being present when the deceased was killed. It was also submitted that it was because of the peculiar circumstances of that case, where the Crown's case was riddled with ambiguity as to the part played by each of two accused, that it was essential for the judge to spell out the possible inferences to be drawn from the statement and instruct them that they must rule out all inferences consistent with innocence before they could be satisfied beyond a reasonable doubt that an inference of guilt had been established.

[20] Mrs Seymour-Johnson additionally asserted that the learned trial judge had adequately dealt with inferences in the matter and indeed, had even (favourably to the accused), directed the jury not to draw any inference from the applicant's refusal to answer the question and answer conducted.

[21] Counsel rounded off her submission by arguing that, even where an inference could be drawn as to the applicant's mere presence and non - participation in the commission of the offence, the court should apply the proviso and hold that there was no substantial miscarriage of justice, as the jury properly directed would inevitably have reached the same conclusion. Reference was made to the decision in ***Albert Edward Haddy*** [1944] Cr App R 182, 190 where it was held by the English Court of Appeal, following ***Cohen and Bateman*** (1909) 2 Cr App R 72, that if the court comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso.

[22] It was further submitted that the circumstantial evidence upon which the prosecution relied was overwhelming, and included the numerous matters set out at page 6 of the Crown's written skeleton arguments.

Discussion

[23] A useful starting point is to examine the case of ***Taylor v R***. The facts of that case were quite complicated and there were two accused persons who were alleged to have acted together. In their decision, the Board of the Privy Council did not discuss the

legal parameters of circumstantial evidence at all. One important point in the case was that the primary evidence against the appellant was a lengthy statement which he made to the police after his arrest. The decision was therefore concerned with inferences to be drawn from statements by the accused. At the trial the appellant had insisted that the statement was written by the police and that he signed it after he had been hit and his glasses broken. The statement had blamed the co-accused for the murder. Following a voir dire, the trial judge admitted the statement into evidence. In his testimony, the appellant gave an account of the events that was essentially an absolute denial of the contents of his statement. The only evidence linking the appellant with the murder was his police statement in which he had admitted being present when the taxi driver was killed and in which he had claimed that the co-accused had shot him. In allowing the appeal, Lord Carswell, who delivered the judgment of the Board, at paragraphs [13], [16], [18] and [19], discussed the matter as follows:

> "[13] It is imperative that the judge should keep the case against each defendant carefully distinct and that the jury should receive sufficient direction on the drawing of inferences from the contents of the statement and on the liability of participants in a joint enterprise...
>
> ....
>
> [16] It is possible, as counsel for the appellant and the Crown both acknowledged, to draw different inferences from the appellant's police statement. Mr Knox contended on behalf of the Crown that the facts contained in the statement, allied to the surrounding facts, pointed irresistibly to a conspiracy to lure the deceased to Spring Farm and there hijack his taxi, either marooning or killing him. He emphasized the deserted nature of the destination chosen, the lies told by the appellant to the witnesses Wellington and Willie and the appellant's attempt to flee to New York as indicia of his guilt. He suggested that the summons to

the deceased to pick up Claudine Tenfa was a pretext to get hold of the deceased and his taxi, that picking up Solomon was not adventitious and that the plan had all along been to pick him up and for the pair to take the taxi to Spring Farm. He pointed out that the appellant made no expression of surprise in his statement at the sudden shooting of the deceased and that his main pre-occupation appeared to be to drive off the car. As against that, Mr Owen, while accepting that it was open to the jury to draw an inference of guilt from the statement and other facts, submitted cogently that it was far from being the only inference which could be drawn. The statement at no point contains any admission of prior knowledge or foresight that the taxi driver might be shot or knowledge of any fact, such as that the other passenger was carrying a gun, which might have fixed him with knowledge from which such foresight might be inferred. All of the averments in it are capable of an interpretation consistent with the appellant's innocence. In these circumstances it was vital that the judge should give the jury careful directions about the possible inferences which could be drawn and firm instructions that they must rule out all possible inferences consistent with innocence before they could be satisfied beyond reasonable doubt that the inference of guilt had been established.

...

[18] ...Their lordships agree with the submission made on behalf of the appellant that in the circumstances of this case it was essential that the judge (a) give the jury sufficiently clear and accurate directions on the law relating to joint enterprise, and (b) in addition, spell out the possible inferences to be drawn from the statement and instruct them that they must rule out all inferences consistent with innocence before they could be satisfied that the inference of guilt has been proved correct.

[19] The judge's directions on common design were correct as far as they went, but he did not explain how intention might be proved and the relevance of a participant's foresight that in the course of the enterprise another actor in it might kill or inflict grievous bodily harm on the victim; see *R v Powell* [1999] 1 AC 1, and the authorities there

> discussed. More particularly, he did not in his summing-up enter into any discussion of the possible inferences which might be drawn from the appellant's statement and the need for the jury to be satisfied beyond reasonable doubt that they should draw the inference of his guilt, ruling out any others in the process. While this may not always be necessary in cases of joint enterprise, their lordships consider that it was essential in the present case. Failing that, the jury did not have sufficient guidance on how they should approach the assessment of the appellant's complicity in the offence. Moreover, the contradictory nature of the case made by the Crown, with its ambiguity about the part played by each defendant in the offence, was a potential source of confusion for the jury. The judge rightly warned the jury that they must not take into account against one accused the contents of a statement made outside the courtroom by another accused. The warning could have borne repetition at the point when the judge was directing the jury on the elements of a joint enterprise, as there was a risk that they might have regard to the contents of Solomon's statement when assessing Taylor's state of knowledge and intention. Taking these matters together, their lordships are compelled to conclude that the appellant's conviction was unsafe and cannot be upheld. Although they were invited by Mr Knox to apply the proviso and hold that there was no substantial miscarriage of justice, they do not find it possible to do so, as they do not consider that a jury properly directed would inevitably have reached the same conclusion."(underlining emphasis provided)

[24] We now turn to a consideration of how the learned trial judge dealt with the statement of the accused in respect of which complaint is made in ground one. At pages 585 to 587, the learned trial judge provided directions to the jury as follows:

> " ... At that time he took Mr. McKay again from the cell and asked him for the girl and Mr. McKay told him, "Mi nuh know nuh ting 'bout nuh girl". At this time, Mr. McKay was taken to the Fort Rocky area with the police, where Mr. Buchanan said

> they saw a nude body lying face down on the beach with head partially in the water, face down. At that time, he said the body was about one hundred and sixty five feet from where he had found the panties. And at that time he said that the accused was right beside him and the accused shouted out, "Mi neva touch har".
>
> You heard the comment of Crown counsel as to how you are being asked to view these words, suggesting the Crown says that Mr. McKay knew that it was a female out there. Although, the person was lying face down and he think [sic] he also suggested that when he said "Mi neva touch har," that can be used to infer that it was not him alone who have [sic] been involved in whatever happened, he was with someone else. So, the Crown is asking you to consider these words and introduce into your consideration the theory that it was not Mr. McKay alone at work with Miss Bailey.
>
> So, the Crown, then, would be relying on what is known in law as common design and that principle is no more than where two or more persons participate in committing an offence, then each would be responsible ultimately for the outcome. Once they are in an agreement to commit an offence, they may play different parts, but if they are in it together, as part of a joint plan or agreement to commit it, they are each guilty. So the words 'plan' and 'agreement' do not mean anything formal. An agreement to commit an offence may arise on the spur of the moment. Your approach, therefore, based on what the Crown is presenting to you, is to decide whether Mr. McKay was one of possibly one or more persons, who participated in what took place that led ultimately to the death of Miss Bailey."

[25] Detective Sergeant Buchanan was cross-examined extensively but nowhere in that cross-examination was it suggested to the officer that the applicant had not said the words "mi neva touch har", nor for that matter that the applicant had not fallen to the ground and bawled out "mi billias" on an earlier occasion. However, in giving his sworn evidence, the accused man seems to be denying that he did say these words (at

the very least, inferentially) since, he states that what was said was this (pages 395-396 of the transcript):

> [after giving his statement] (page 395)
>
> " ....him [Detective Sergeant Buchanan] just tell me sey him don't believe mi, whey di girl dey inna di car. And I said to him, ah don't know noh girl, because it is me alone and two man jook mi and rob mi. Then he call di other officer and tell him fi lock mi up. About 7:30 di following morning him come fah mi and tek mi back to Port Royal. Afta ah was going ova Port Royal, they were driving their car to a speed and ask mi if ah so fast di car ah was driving going and ah said yes.
>
> Q Where at Port Royal did they take you?
>
> A Back to where they found the car and the body.
>
> Q Was the car still there?
>
> A No, ma'am.
>
> [page 396]
>
> Q When you went there what happened?
>
> A I walk - they drove pon di beach. Afta they drove on to di beach they step out of the vehicle, Mr. Buchanan sey, " Si di woman whey yuh murder deh last night."
>
> Q What was your response to that?
>
> A The honest truth on to God, I have three child, mi pickney life....
>
> HER LADYSHIP: What you said to him?
>
> THE WITNESS: I said to him, mi noh kill nobaddy, you know, and mi no know bout' no baddy, you know that is what I said to him."

[26] The applicant was cross-examined extensively also. Nowhere in that evidence did counsel for the Crown suggest to the applicant that he had in fact uttered the words "Mi neva touch har" or "Mi billias" in the circumstances as outlined by Detective Sergeant Buchanan. Indeed, in fairness to the applicant, it was the prosecutor's duty to have made the suggestions in order to give the applicant a chance to respond to these assertions. This is particularly so in light of the importance and considerable weight that the prosecution intended to ask the jury to attach to those words.

[27] As Mr Fletcher commented during the course of his submissions, this case, which was largely based upon circumstantial evidence (but also on inferences from statements of the applicant), was not the simplest of cases, and as it turned out, it required detailed guidance. In our judgment, the learned trial judge, did provide quite detailed guidance to the jury in relation to what the prosecution's case was in relation to the alleged statement of the applicant. She also appears to have given the jury clear and correct directions as far as they went in relation to the law relating to common design. Further, she dealt with the issue of how intention might be proved when she gave her directions as to the ingredients of the crime of murder. However, she did not explain the relevance of a participant's foresight that in the course of the enterprise another actor in it might kill or inflict grievous bodily harm. Also, it seems that the learned trial judge could have indicated in clearer language what the applicant's version of the conversation and sequence of events was. This is particularly so since, on his case, it was Detective Sergeant Buchanan who first raised the matter of there being a missing

person who was female and who first mentioned that the body in question seen in the water was that of the "woman" whom the applicant had murdered. Additionally, as Mr Fletcher argued, the judge did not spell out the possible inferences to be drawn from the applicant's statement. Whilst it was perhaps open to the jury to draw an inference of guilt from the statement and other facts and circumstantial evidence, this was far from being the only inference that could be drawn. Nor did the learned trial judge instruct the jury that they must rule out all inferences consistent with innocence before they could be satisfied that the inference of guilt had been proven correct. As in ***Taylor v R***, the alleged statement of the accused at no point contains any admission of prior knowledge or foresight that the deceased might be killed or knowledge of any fact which might have fixed him with knowledge from which such foresight might be inferred. We do not share counsel for the prosecution's view that the facts in ***Taylor v R*** are readily distinguishable from those in the instant case; indeed the guidance provided in that case has proven invaluable.

[28] Counsel for the prosecution, indeed both counsel, are quite correct that there is no rule requiring a special direction in cases in which the prosecution relies either wholly or in part on circumstantial evidence - see paragraph [40] of ***Baugh-Pellin v R***, per Morrison JA and paragraphs [32] – [35] of ***Sheldon Palmer v R*** per Phillips JA, and the cases therein referred to. Further, the learned trial judge also gave very clear directions about the standard of proof and inferences generally. However, in the circumstances of this case, it appears that the summation was inadequate in that the inferences that could be drawn from the applicant's statement were not spelt out, and

the jury were not told that they had to rule out all inferences consistent with innocence before they could be satisfied so that they felt sure of the applicant's guilt.

[29] Mrs Seymour-Johnson did invite the court to apply the proviso. However, we are of the view that it would be inappropriate to do so as we do not take the view that a jury properly directed would inevitably have reached the same conclusion. Albeit that this trial took place quite some time ago, in the circumstances, we agree with Mr Fletcher that the appropriate and just course is to order a retrial.

[30] In light of these conclusions, it is unnecessary to consider the other grounds advanced in support of the appeal.

Conclusion

[31] In conclusion, therefore, the orders of the court are as follows:

a. The application for leave to appeal is granted.

b. The hearing of the application is treated as the hearing of the appeal.

c. The appeal is allowed.

d. The conviction is quashed and the sentence is set aside.

e. A new trial is ordered, to take place as soon as possible.