JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 74/96

COR. THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

REGINA vs JOHN MITCHELL

Jack Hines for the Appellant

Kenty Pantry, Q.C. Director of Public Prosecutions and Marjorie Moyston for the Crown

November 23, 1999 and January 31, 2000

WALKER, J.A.

On May 30, 1996 John Mitchell was convicted in the Home Circuit Court, Kingston for the capital murder of George Taylor and sentenced to death. Subsequently he appealed to this court and on December 1, 1997 his appeal was dismissed.

On a further appeal to the Judicial Committee of the Privy Council, John Mitchell succeeded to the extent that his appeal was allowed, the conviction and sentence of death quashed and his case remitted to this court to determine whether there ought to be a retrial of the case. The case so referred now comes before us in the form of an application for the release of Mr. Mitchell.

On November 23, 1999 having considered the matter we ordered that there should be a retrial of this case to take place at the earliest possible time.

We promised then to put our reasons for that decision in writing and we now do so.

Before us this application was presented on the three grounds which were stated as follows:

> "1. That balancing the variety of factors the interest of justice does not require that a new trial be ordered.
>
> 2. It is now seven years and six months since the deceased was killed and over seven years that the applicant has been in custody for the murder (see in particular the ***State v Nasrat Ali*** 26 W.I.R. page 115).
>
> 3. The evidence of the applicant's daughter Claudia Mitchell who gave evidence that tended to support the applicant's defence of an alibi in the first trial will not be available to him in a retrial."

It is always a difficult question for determination whether there should be a retrial of a criminal case after the lapse of an inordinately long period of time since the date of the offence. We do not hesitate to say that a retrial in such circumstances is undesirable and ought not to be ordered lightly. However, whether or not a retrial should be ordered must be determined after taking into account all relevant factors. In ***Reid v R*** (1978) 27 W.I.R. 254, in a list which their Lordships' Board was careful to point out was by no means exhaustive, some of those factors were enumerated as:

> "(a) the seriousness and prevalence of the offence;
>
> (b) the expense and length of time involved in a fresh hearing;

(c) the ordeal suffered by an accused person on trial;

(d) the length of time that will have elapsed between the offence and the new trial;

(e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial;

(f) the strength of the case presented by the prosecution."

With regard to the instant case the first observation that we would make concerns the strength of the prosecution's case against this applicant. As the evidence emerged on the occasion of the first trial of the applicant it revealed a powerful case to be answered. Such a case, we were told by Mr. Pantry Q.C., the prosecution is still in a position to present. He advised that all the prosecution witnesses, with one exception, had been located and were available to testify. He assured the court that were a retrial to be ordered, if by the time of that retrial the Crown had failed to locate the missing witness, consideration would be given to invoking the provisions of section 34 of the Justices of the Peace Jurisdiction Act with a view to making the evidence of that witness available to the court. In addition to Mr. Pantry's assurances in this regard we were also convinced by reference to the chronology of events of this case that the prosecution is altogether blameless for the lapse of time that has occurred.

Finally, we gave the most anxious consideration to Mr. Hines' submission as to the unavailability of the applicant's witness, Claudia Mitchell, in the event of a retrial. The submission, be it noted, was advanced on the basis of a bald

assertion and not by way of affidavit evidence. In the circumstances, and also in the light of the fact that Claudia Mitchell's evidence given at the first trial of the applicant may, if required, be adduced in evidence at a retrial (see section 31D of the Evidence Act) we determined that no prejudice would accrue to the applicant in the event of a retrial of his case. There being no other relevant factor which dictated otherwise, in the interests of justice we ordered such a retrial as hereinbefore stated.