[2021] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 1/2013

APPLICATION NO 235/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

OSWALD JAMES v R

Michael Williams for the applicant

Leighton Morris and Miss Kerri-Ann Gillies for the Crown

23, 24, 25 October, 10 November 2017 and 30 April 2021

PHILLIPS JA

[1] Having lodged an unsuccessful appeal against his conviction and sentence for the offence of fraudulent conversion, Mr Oswald James (the applicant) filed a notice of application, seeking to reopen his appeal to adduce fresh evidence indicating alleged bias on the part of the Resident Magistrate (now called Judge of the Parish Court) before whom he was tried. After hearing the application and reviewing the affidavits and other documents filed in relation thereto, on 10 November 2017, we made the following orders:

> "1. The application by the applicant Oswald James for permission to re-open the appeal no 1/2013 to adduce fresh evidence is hereby refused.

> 2. The applicant has not demonstrated that the integrity of the earlier litigation process had been critically undermined by bias and/or corruption of the process in any way in the court below.
>
> 3. The conviction and sentence of the applicant by the learned [Judge of the Parish Court] on 19 March and [20] April 2012, respectively, and affirmed by this court on 9 May 2014 stands."

[2] The reasons for our decision were promised and are stated below. We recognise that there has been considerable delay in delivery of these reasons. We wish to convey our sincere apologies and deep regret for the same.

Background

[3] The applicant (who was then an attorney-at-law) was retained by Mr Carl Lewis, a financial advisor who resides in Toronto, Canada, to facilitate the purchase of property. The sum of US$337,500.00 was given to the applicant as a deposit on the purchase price. The purchase failed to materialise. Despite numerous efforts and requests made by Mr Lewis for the return of his money, only US$100,000.00 was paid. Mr Lewis did not give the applicant any permission to use his money or to invest it, and yet the applicant had used it to engage in many expensive undertakings. The applicant acknowledged his failure to return the money in a letter dated 13 May 2008, where he gave a written undertaking to return the balance owed by 30 July 2008. That promise was never kept. A report was subsequently made to the police.

[4] The applicant was charged with fraudulent conversion, in that, he fraudulently converted US$237,500.00 that had been entrusted to him by Mr Lewis, for his own use and benefit, or the use and benefit of some other person. The trial occurred on various

dates between 14 March 2011 and 20 April 2012, before Her Hon Mrs Lorna Shelly-Williams (as she then was), Judge of the Parish Court for the Corporate Area. The applicant was subsequently convicted and sentenced to two years' imprisonment.

[5] The applicant lodged an appeal against his conviction. This court found that his grounds of appeal relating to non-disclosure; the credibility of the witnesses; and whether the offence of fraudulent conversion had been proved were without merit. On 9 May 2014, the appeal was dismissed, and the applicant's sentence was affirmed.

The application to re-open the appeal

[6] Two years and seven months later, on 19 December 2016, the applicant filed a notice of application, which was amended on 10 March 2017, in which he sought the following orders:

> "That he be granted leave to reopen the appeal to adduce 'fresh evidence' to demonstrate that the integrity of the earlier litigation process has been critically undermined by bias and/or corruption of the process at the Court below or in the alternative that the Court finds that the integrity of the earlier litigation process has been critically undermined by bias and/or corruption of the process at the Court below and set aside his conviction as being unsafe in the circumstance." (Underlined as in original)

[7] The application was filed on grounds that there was fresh evidence that revealed bias, which had not been placed before this court when it heard the appeal, and which had not been known to the applicant during or after his trial. It was the applicant's contention that the evidence of this alleged bias, once established, exposed the risk that he would have been subjected to substantial injustice during his trial.

[8] The applicant deponed to five affidavits in support of his application. They were filed on 19 December 2016, 2 March 2017, 6 March 2017, 20 June 2017, and 1 September 2017. He deponed that prior to his release from prison he had received information not known to him at the time of his trial and appeal. Based on that information, he conducted investigations which revealed that the learned Judge of the Parish Court, before whom he was tried, and her husband, were passengers on American Airlines flight 331 which crash-landed at the Norman Manley International Airport on 22 December 2009. He also learned that the learned Judge of the Parish Court and her husband were among the 20 plaintiffs in a claim for damages, in respect of personal injury, filed against American Airlines dated 14 September 2011.

[9] The applicant deponed, citing articles from the Jamaica Gleaner and the Jamaica Observer, that the firm of attorneys-at-law, Wilson Franklyn Barnes, practising in Jamaica, had partnered with Slack & Davis LLP, a firm of lawyers based in Texas, United States of America, to represent the passengers involved in the plane crash. Mr Delano Franklyn, a senior partner in the firm Wilson Franklyn Barnes, had conduct of that matter. The applicant deponed that in or about January 2010, he was informed by Mr Hugh Wilson, a partner in Wilson Franklyn Barnes, that the learned Judge of the Parish Court had visited the offices of Wilson Franklyn Barnes in relation to her personal injury claim and had discussions with Mr Franklyn.

[10] The applicant stated that based on his investigations, the learned Judge of the Parish Court would have had some degree of familiarity with Mr Franklyn and his firm, as they were both 1995 graduates of the Norman Manley Law School. Of significance too,

he deponed that Mr Franklyn had received no remuneration from the learned Judge of the Parish Court or her husband, in respect of their personal injury claim against American Airlines.

[11] During the applicant's trial before the learned Judge of the Parish Court, he was represented by Mr Brian Barnes of the same firm, Wilson Franklyn Barnes. The firm also represented him in a number of other related matters before the Disciplinary Committee of the General Legal Council and the Court of Appeal. The applicant indicated that aside from representation, the firm was possessed of his instructions and other confidential information. The applicant further deponed that he had a cordial relationship with Mr Franklyn over the years, and when he had cause to attend the firm's offices and saw Mr Franklyn, they would extend pleasantries, and on occasion, he gave Mr Franklyn a "status update" of his on-going trial before the learned Judge of the Parish Court.

[12] It was the applicant's contention that the learned Judge of the Parish Court "knew or ought to have known that the firm of attorneys that represented her also represented [him]; the party before her". He indicated that the name "Wilson Franklyn Barnes" appeared on all the written applications, submissions, documents, and written correspondence from Mr Barnes to the court relating to the case before the learned Judge of the Parish Court. He deponed that there "was a clear and unambiguous statement" to the learned Judge of the Parish Court that the firm was acting on his behalf, as the appearance of the firm was stated on the record in the judicial review and appeal proceedings. In accounting for the absence of the firm's name on the notes of evidence, the applicant stated in his affidavit filed 20 June 2017, that the firm's name was somehow

excluded, as he "verily recall[s]" that on 11 July 2010, when the learned Judge of the Parish Court had fixed his trial date, Mr Barnes had introduced himself as "Brian J. Barnes, instructed by Wilson Franklyn Barnes".

[13] The applicant said that there had been no disclosure to him by the learned Judge of the Parish Court, at any time before, during or after his trial, that she and her husband had also been represented by Slack & Davis, which had partnered with Wilson Franklyn Barnes, the same firm that had conduct of his defence. He further emphasized that this association had not even been disclosed to him during his subsequent appeal to this court, or his application for special leave to appeal to the Judicial Committee of the Privy Council. He deponed that that association ought to have been disclosed to him and his counsel, so that an application could have been made for the learned Judge of the Parish Court to recuse herself on the basis of a potential "conflict of interest, lack of impartiality and or bias".

[14] The applicant deponed that his counsel, Mr Barnes, had never brought to his attention the connection between the firm and the learned Judge of the Parish Court, which (the applicant) assumed was because Mr Barnes "had no actual knowledge" of that connection. He further deponed that before and during his trial, there was "acrimony" between Mr Barnes and Mr Franklyn. The acrimony, he deponed, developed into a lack of communication between the parties, and which ultimately resulted in Mr Barnes' physical relocation from the firm and the establishment of two separate firms, "Barnes & Associates" and "Wilson Franklyn". The applicant stated that this acrimony was further evidenced by his perceived lack of invite of Mr Barnes to Mr Franklyn's wedding, on 17

December 2011, a conclusion he deduced from certain photographs of Mr Franklyn's wedding, exhibited to the applicant's affidavit, which do not depict Mr Barnes in any of them. It is the applicant's conclusion, that this acrimony caused Mr Barnes' lack of awareness and communication to him of the association between the firm and the learned Judge of the Parish Court.

[15] In response to the applicant's application and the allegations therein, a single judge of this court made an order at a case management conference on 4 April 2017, for the learned Judge of the Parish Court to file a statement providing answers to four questions. Those questions and answers are stated below:

> "A. Question: Whether the learned trial judge was aware that both the applicant and herself had retained the same firm of attorneys namely, Wilson, Franklyn, Barnes, with regard to the learned trial judge in respect of her claims for personal injuries against American Airlines and in respect of the applicant in [his] matter before her in the Parish Court for the Corporate Area relating to the offence of fraudulent conversion.
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> Answer: The trial of the Applicant in the Parish Court before me on charges of fraudulent conversion was held between March 2011 and April 2012.
>
> Throughout the Applicant's trial he was represented by Mr. Brian Barnes. At the time that Mr. Barnes announced his representation of the Applicant, my recollection is that he stated his name and did not give any affiliation to any law firm. I did not know that Mr. Barnes was a member of the law firm Wilson, Franklyn, Barnes.
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> B. Question: Whether in or about January 2010 or on a date prior to the commencement of the hearing of the above matter before the learned trial judge, she had visited the offices of Wilson, Franklyn, Barnes to have

discussions with Mr. Delano Franklyn, one of the partners in respect of representation relating to her personal injury mater.

Answer: I did not visit the office of Wilson, Franklyn, Barnes.

C. Question: Whether the learned trial judge had knowledge of any acrimony existing between the partners in the law firm Wilson, Franklyn, Barnes before the commencement and/or during the hearing of the trial of the applicant Oswald James before her.

Answer: At no time did I have any knowledge of any acrimony between the partners in the law firm Wilson, Franklyn, Barnes. In addition, as stated above, I did not even know that Mr. Brian Barnes was associated with Mr. Delano Franklyn.

D. Question: What is the extent of the relationship between the representation of the firm of attorneys Wilson, Franklyn, Barnes in the said personal injury matter on behalf of the learned trial judge against American Airlines and the representation of the attorneys in Texas with regard to the said matter.

Answer: I, along with other persons who had been passengers on the crashed American Airlines flight, were invited by Mr. Delano Franklyn to attend a meeting in January 2010. The purpose of the meeting was to introduce us to the USA law firm of Slack & Davis. It was proposed that Slack & Davis would have primary conduct of the claim, that the lawsuit would be filed in the state of Texas, and that all matters concerning the case would be handled there by Slack & Davis. Mr. Franklyn, (sic) would serve as local liaison and, on the directions of Slack & Davis, file a suit in the Supreme Court of Jamaica to preserve the cause of action, but that no further steps would be taken in the local lawsuit. I agreed.

Thereafter, I communicated directly with the attorneys at Slack & Davis about my case in the USA.

> The claim was settled at mediation in Texas, which I attended and was represented by Mr. Michael Slack and his associates. Following the settlement, Slack & Davis informed Mr. Franklyn and instructed him to discontinue the lawsuit filed in the Supreme Court." (Underlined as in original)

[16] At the case management conference on 4 April 2017, additional affidavits were permitted, and on 28 September 2017, the Crown filed an affidavit sworn to by Mr Franklyn on the same date. He deponed that Wilson Franklyn Barnes was retained by Slack & Davis in relation to the personal injury claims arising from the American Airlines plane crash in December 2009. He confirmed that the learned Judge of the Parish Court was a passenger on that flight who was represented in the negotiation of her claim by Slack & Davis. Her claim was settled at mediation in Texas.

[17] Mr Franklyn indicated that he had informed counsel for the applicant in this application, Mr Michael Williams, when he had visited his office in or about July 2017, that at no time did the learned Judge of the Parish Court visit his office. He further deponed that the learned Judge of the Parish Court had paid no fees to him or his firm as the engagement was between the learned Judge of the Parish Court and Slack & Davis. He denied participating in any negotiations on the part of the learned Judge of the Parish Court. He also denied the presence of acrimony between himself and Mr Barnes and further denied that he had ever discussed his relationship with Mr Barnes, any aspect of the firm's partnership, or the applicant's case, with the learned Judge of the Parish Court.

Discussion and analysis

[18] At the hearing of this application, we were urged to re-open the applicant's appeal, after final judgment had been given, to adduce fresh evidence of alleged bias on the part of the learned Judge of the Parish Court. Although both counsel for the applicant and the Crown agreed that an appeal could be re-opened after final judgment had been given, and also the basis upon which that could be done, they diverged in opinions relating to whether the threshold for so doing had been met in this case.

[19] Indeed, rule 1.7(7) of the Court of Appeal Rules allows this court to vary or revoke any of its orders. However, in keeping with the fundamental common law principle that the outcome of litigation should be final, an appeal will only be re-opened in rare and exceptional cases where it has been "clearly established that a significant injustice has probably occurred and that there is no effective alternative remedy" (see **Taylor and another v Lawrence and another** [2002] EWCA Civ 90, at paragraph 55). We should also note that the existence of an error or a challenge to the merits of the decision will not suffice as a valid basis for the exercise of that power. There must be strict compliance with the established criteria in order to succeed (see **Taylor v Lawrence** and **Fiesta Jamaica Limited v National Water Commission** [2014] JMCA App 32).

[20] Lord Woolf CJ in **Taylor v Lawrence** acknowledged that one situation which may give rise to significant injustice is where bias has been established, as this may lead to a breach of the principles of natural justice. In the instant case, the applicant sought to adduce fresh evidence of alleged bias on the part of the learned Judge of the Parish Court, in that, she had failed to disclose that she had been represented by Wilson Franklyn

Barnes, the same firm of attorneys that had represented the applicant. The alleged fresh evidence also claimed that the acrimony existing between Mr Barnes and Mr Franklyn, and the close association between Mr Franklyn and the learned Judge of the Parish Court, may have precluded the learned Judge of the Parish Court from accepting the position being advanced by Mr Barnes, on behalf of the applicant, bearing in mind the conflict between counsel. Before deciding whether there was a significant risk of injustice on account of the alleged bias, we first had to determine whether to allow fresh evidence in support of those allegations to be adduced.

[21] Section 28 of the Judicature (Appellate Jurisdiction) Act (JAJA) empowers this court to order the production of documents or the examination of witnesses, necessary for the determination of an appeal. It reads, in part, as follows:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; …"

[22] The power conferred on this court under section 28 of JAJA is exercised in keeping with the principles stated by Lord Denning in **Ladd v Marshall** [1954] 3 All ER 745 where, at page 748, he said:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first**, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: **second**, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: **third**, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible." (Emphasis supplied)

[23] Provisions similar to section 28 of JAJA were construed by Lord Parker CJ in **R v Parkes** [1961] 3 All ER 633, at page 634, as follows:

> "… **First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial." (Emphasis supplied)

[24] The guidance given in these cases has been applied by this court in cases such as **Darrion Brown v The Attorney General of Jamaica and others** [2013] JMCA App 17 and **Seian Forbes and Tamoy Meggie v R** [2014] JMCA App 12. For the applicant's fresh evidence application to be successful, the criteria listed in those cases must be satisfied cumulatively (see **Seian Forbes and Tamoy Meggie v R**).

[25] As indicated, the applicant is first required to show that the evidence he wishes to adduce was not available at the trial, nor could it have been obtained with reasonable due diligence. The applicant, by his own admission, seemed to have been aware of some form of interaction or association existing between the firm, Wilson Franklyn Barnes, and the learned Judge of the Parish Court before his trial had commenced (from as early as 2010). He deponed in an affidavit filed 2 March 2017, at paragraph 14, that in or about January 2010 (after a mention date but before his trial had commenced), Mr Wilson informed him during a discussion, that the learned Judge of the Parish Court had "recently returned to Jamaica and that she had recently visited the offices of the firm of defence counsel and had discussions with Mr. Delano Franklyn". At paragraph 15, he further deponed, that Mr Wilson had informed him that Mr Franklyn had conduct of all claims in relation to those injured on the American Airlines flight that crashed landed in December 2009, at the Norman Manley International Airport.

[26] The fact that the information was available at trial or could have been easily obtained with due diligence is illuminated also by paragraph 18 of the affidavit filed 2 March 17. In that paragraph, the applicant stated that he had a "cordial relationship" with Mr Franklyn and would exchange pleasantries and have discussions with him upon his visit to the firm's office. The applicant also indicated that "[o]n a number of occasions [he] gave a status update on the on-going trial before the learned Judge of the Parish Court".

[27] In those aforementioned circumstances, the applicant was unable to satisfy the first criteria as, by his own admission, the information was available before his trial, and

based on his relationship with Mr Franklyn, that information could have been obtained with due diligence. His application to re-open the appeal therefore failed at the outset. However, we think it is also prudent to indicate that the evidence which the appellant sought to adduce would have also failed to comply with the remaining criteria that it was relevant; credible in the sense that it is "well capable of belief"; and sufficient to create reasonable doubt in the minds of the jury as to his guilt.

[28] Counsel for the applicant, Mr Williams, made it clear that he had pursued allegations of apparent bias, as the relationship between the learned Judge of the Parish Court and her spouse with Wilson Franklyn Barnes, raised a possibility that she may have departed from impartial decision-making in four ways:

> "1) ex parte communication between the members of the firm (not just the attorneys) and the [learned Judge of the Parish Court] and/or her spouse.
>
> ii) a feeling by the [learned Judge of the Parish Court] that she is beholden to Mr. Franklyn one side of the split and unconsciously choose one side in the split in the sense that she might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of the [applicant] to the issue under consideration by her;
>
> iii) the [learned Judge of the Parish Court] may be influenced by her long term friendship with Mr Franklyn; and
>
> iv) the [learned Judge of the Parish Court] may be influenced by her spouse to choose one side in the split."

[29] The current test for apparent bias, as stated by Lord Hope of Craighead in **Porter v Magill** [2001] UKHL 67, was "whether the fair-minded and informed observer, having

considered the facts, would conclude that there was a real possibility that the tribunal was biased". Lord Woolf CJ in **Taylor v Lawrence** reminds us at paragraph [64] that:

> "... judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair minded and informed observer as raising a possibility of bias. If such a relationship is disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship. On the other hand, if the situation is one where a fair minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant's confidence in the judge."

[30] In giving clarity to the concept of the fair-minded and informed observer, Lord Hope of Craighead in **Helow v Secretary of State for the Home Department and another** [2008] UKHL 62; [2008] 1 WLR 2416 reminded us that although the fair-minded observer is a "creature of fiction", the observer is "the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument". The observer knows that the judge must also be objective and unbiased. The fair-minded observer, he said, also knows that a judge must take a "balanced approach to any information she is given" and "will take the trouble to inform herself on all matters that are relevant".

[31] In the instant case, the learned Judge of the Parish Court made it clear in her statement that when Mr Barnes had announced his representation of the applicant, he did not state any affiliation to any firm. Indeed, the transcript is devoid of Mr Barnes'

affiliation with the firm, Wilson Franklyn Barnes, although the applicant deponed that it was announced in court and somehow excluded. The learned Judge of the Parish Court and Mr Franklyn both denied that the learned Judge of the Parish Court had ever attended the firm's office, and so any allegation that she would have interfaced with any member of staff and obtained confidential information from them, relative to the applicant's case, is entirely speculative and without basis. Mr Franklyn denied that fees were paid to him by the learned Judge of the Parish Court. It is clear that the firm's participation in the claim against American Airlines was limited, as the engagement was between the learned Judge of the Parish Court and Slack & Davis, who negotiated and settled the claim, on her behalf, in mediation, in the United States. As a consequence, we could not say that there was the existence of any relationship between the firm and the learned Judge of the Parish Court that could have or did raise any real possibility of bias.

[32] The applicant's allegation that there was acrimony between Mr Franklyn and Mr Barnes was denied by Mr Franklyn. The learned Judge of the Parish Court indicated that "at no time" was she aware of any acrimony existing between the partners of that firm. There was no affidavit from Mr Barnes. In our view, the existence of this acrimony had not been established merely because Mr Barnes relocated to a separate office and also that he did not appear in certain photographs of Mr Franklyn's wedding exhibited to the applicant's affidavit. There was no evidence of this alleged notoriety of the alleged acrimony between Mr Franklyn and Mr Barnes. Indeed, the applicant averred that the firm ceased to exist in 2014, two years after he was convicted (19 March 2012) and sentenced by the learned Judge of the Parish Court (on 20 April 2012).

[33] Additionally, there was no indication that the fact that Mr Franklyn and the learned Judge of the Parish Court pursued their studies in law at the same institutions, at the same time, would have, or in these circumstances, could have any impact at all on the fairness of the trial. Indeed, Mr Franklyn did not conduct the applicant's defence and he denied discussing his relationship with Mr Barnes and any aspects of their partnership or the applicant's case with the learned Judge of the Parish Court. In our view, no fair-minded or informed observer, cognizant of those facts, could conclude that there was a real possibility of bias stemming from an alleged relationship between Mr Franklyn and the learned Judge of the Parish Court.

[34] The foregoing analysis precluded any satisfaction of the criteria for the consideration of fresh evidence. This meant that the fresh evidence which the appellant had sought to adduce, alleging basis, did not show that a fair-minded and informed observer, with knowledge of these facts, would conclude that there was a real possibility that the learned Judge of the Parish Court was biased. He had also failed to demonstrate that the integrity of the earlier litigation process had been critically undermined by bias and/or the corruption of the process, in any way, in the court below. As a consequence, the fresh evidence which the applicant had sought to adduce did not display the possibility that any significant injustice or any injustice, at all, had occurred that would warrant the appeal being re-opened. Those findings made it unnecessary to explore the issue of whether there had been an alternative remedy to re-opening the appeal.

[35] For all those reasons, in our view, the grounds listed in the applicant's application were devoid of merit. We therefore made the orders stated at paragraph [1] herein.