JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 131/2000
PRIVY COUNCIL REFERRAL

BEFORE: THE HON. MR. JUSTICE HARRISON, P
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE MCCALLA, J.A.

SHABADINE PEART V R

Miss Nancy Anderson, for the appellant

Mrs. Simone Wolfe-Reece, Assistant Director Public Prosecutions (Acting), Miss Sanchia Burrell Crown Counsel, (Acting), Ms. Tanya Spence, Crown Counsel (Acting), for the Crown.

April 16, 2007 and April 11, 2008

McCALLA, J. A.

This matter has been referred to this Court by the Judicial Committee of the Privy Council. Having heard arguments in the matter on December 14, 2006, the Board concluded as follows:

> "Their Lordships do this day agree humbly to report to Your Majesty as their opinion that the appellants appeal should be allowed, the conviction quashed and the matter remitted to the Court of Appeal of Jamaica to determine whether a retrial should be held."

On April 16, 2007 we heard submissions from both sides in relation to the sole issue as to whether or not a retrial should be ordered. We concluded that in

the interest of justice, a new trial ought to be held and made an order for the appellant to be retried. These are our written reasons, as promised.

The appellant was convicted on July 10, 2000 in the Home Circuit Court of the murder of Delroy Parchment on May 14, 1999 and sentenced to death.

On December 19, 2003 his appeal to this Court was dismissed and his conviction and sentence affirmed and on October 28, 2005, he was re-sentenced to life imprisonment with a stipulation that he should serve 30 years imprisonment before becoming eligible for parole.

This was in accordance with the decision of the Board in the case of ***Lambert Watson v the Queen*** [2005] 1 A.C. 472 which held that the mandatory sentence of death was unconstitutional. In light of our decision to order a re-trial our reference to the evidence which grounded the charge against the appellant will be briefly stated.

The deceased was a security guard who had been issued with a firearm and ammunition to carry out his duties. He was walking home from work on the night of May 14, 1999 when he was shot and killed. At the trial a witness testified that after hearing two gunshots he ran to the scene and observed a motor cycle with the rider and a passenger leaving the scene. As they passed him, he heard one of them say "me bun the boy". His observation of the deceased revealed that his gun was missing. The cause of death was a gunshot wound.

The evidence of the main prosecution witness was that she had seen the appellant and another man in her yard with firearms before and after the deceased was shot. The appellant was arrested and charged with the murder of Mr. Parchment. His defence was alibi. The day after he was charged he was questioned by the investigating officer. Sixty three questions were asked and his answers recorded.

Their Lordships made reference to the requirements of the Judges Rules and concluded that there was a breach of rule iii (b) of those rules. The Board was of the view that the learned trial judge did not indicate, in admitting the questions and answers in evidence, that he took into account factors which would have had an impact on fairness to the appellant. At paragraph 30 of the judgment their Lordships opined that:

> "They cannot be satisfied that the jury would inevitably have reached the same conclusion if the evidence of the questions and answers had not been given. The trial might have taken a very different course and the appellant lost the chance of taking advantage of that and the possibility which it might have afforded of succeeding in his defence. The Board finds it impossible to hold that the result must have been the same if the evidence had been excluded."

Section 4(2) of the Judicature (Appellate Jurisdiction) Act confers on this Court the power to order a new trial. It reads:

> "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."

The case of **Reid *v R*** [1978] 16 JLR 246 sets out the guiding principles which the Court should consider in deciding whether or not to order a new trial. Lord Diplock at page 250 opined as follows:

> "Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public of 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."

The Board stipulated a non-exhaustive list of matters to be taken into account in determining whether or not a new trial should be ordered. They are as follows:

(1) the seriousness or prevalence of the offence;

(2) the length of the trial and the expense which may be involved;

(3) the ordeal which may be suffered by the accused, if there is a second trial, through no fault of his own, unless the interest of justice demands it;

(4) the length of time that has elapsed between the date of the offence and the date of the re-trial and any resultant disadvantage to either side including the availability of witnesses;

(5) the strength of the case of the prosecution presented at the previous trial.

Miss Anderson for the applicant submitted that without the answers to the questions which had been administered to the applicant, there is no

corroboration of the account given by the witness Newell. She said that nearly eight (8) years have elapsed since the incident and the passage of time will inevitably affect the quality of the evidence to be presented. The expense involved in a new trial and the amount of judicial time which would be involved ought to be taken into account and the appellant ought not to be put through the ordeal of a new trial, as he had been on death row for five years and he has been incarcerated for nearly eight years. She cited the case of ***Francis v R*** [2001] 60 W.I.R 143, a case where the appellant had been on death row for four and half years, and the Privy Council was persuaded that a retrial would not be appropriate.

In ***Nicholls v R*** [2000] 57 WI.R.154, Lord Steyn, giving the advice of their Lordships' Board at page 163, in relation to the power of a Court of Appeal to order a retrial said:

> "It is no bar to such an order that more than six years has elapsed since the killing; or that there has already been a retrial; or that about three years have elapsed since the matter was before the Court of Appeal. Cumulatively, these factors do, however, raise the question whether the matter ought to be remitted to the Court of Appeal to consider a retrial."

In ***Nicholls*** the Court did not order a retrial because in the circumstances of that case to do so would have enabled the prosecution to have an unfair advantage by being able to rectify a deficiency which had occurred in the previous trial.

This Court is guided by the above principles in the determination of this matter. There can be no doubt as to the seriousness and prevalence of the offence of murder in Jamaica especially with the use of firearms. This Court in dealing with the question of delay in the case of ***R v Dalton Reynolds*** SCCA No. 41/97 delivered on the 25th January, 2007 at page 15 said:

> "The fundamental safeguard contained and guaranteed by the Constitution is fairness of the trial or the appellate proceedings even after delay, however, inordinate."

We are in agreement with counsel for the Crown that delay without more is not a basis for not ordering a retrial. The appellant went through the trial and the appellate process without any significant delay which could be attributed to the State, and it is our view that the fairness of the trial process would not be compromised. Further, with the exclusion of the question and answer document the trial may be shortened.

There is no legal requirement for corroboration in the case at bar. The questions as to what the witness Newell saw and heard prior to the appellant leaving her yard and subsequent to his return and the conduct of the appellant towards this witness at her house subsequent to the incident are matters which, in the interest of justice, ought in our opinion to be placed before a jury for determination.

We are clearly of the view that in this case it is in the interest of justice that a new trial be held.

It was for the above reasons that we ordered that the appellant be retried at the next session of the Home Circuit Court.