JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 69/88

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

REGINA VS. LINTON BERRY

Richard Small & Gayle Nelson for appellant

Kent Pantry Deputy Director of Public Prosecutions for the Crown

27th, 28th, 29th, 30th July &
21st September, 1992

CAREY, J.A.

In their judgment in this case delivered on June 15, 1992 allowing the appeal from the decision of this Court which had dismissed the appeal against conviction and sentence of death for the murder of Paulette Zaidie on 11th January, 1987, the Lords of the Judicial Committee of the Privy Council concluded as follows:

> "... their Lordships will humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal with the direction that that court should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course it considers proper in the interests of justice."

[(1992) 3 W.L.R. 153 at pp. 169 - 170]. The Order in Council which is dated 15th July, 1992 contains the following directions:

> " **HER MAJESTY** having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.
>
> **WHEREOF** the Governor-General or Officer administering the Government of Jamaica for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

We now act in obedience to that order.

The principles which are to be applied in deciding whether or not a new trial should be ordered are to be found in several cases, a number of which were referred to us by Mr. Small. Those to which counsel called attention were **Ahmedi Sumar v. Republic** [1964] E.A. 481; **Nirmal v. R.** [1972] Crim. L.R. 226; **The State v. Harris** [1974] 22 W.I.R. 41; **R. v. Saunders** [1974] 58 Cr. App. R. 248; **The State v. Adbool Azim Sattaur & Anor.** [1976] 24 W.I.R. 157; **The State v. Nasrat Ali** [1976] 26 W.I.R. 99; **R. v. Bourget** 41 D.L.R. (4th) 756 and **Reid v. R.** [1978] 27 W.I.R. 254. The last mentioned is of particular relevance not only because it is a Jamaican case, but among the questions certified as arising for consideration on the appeal to the Privy Council, was one requesting a statement of the principles applicable to a consideration whether or not a new trial should be ordered. In that regard, Lord Diplock one of the great jurists of our time, stated as follows at pp. 258 - 259:

> " Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as

"their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by certified question must be read with the foregoing warning in mind.

Their Lordships have already indicated in disposing of the instant appeal that the interests 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. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused.

At the other extreme, where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso to s. 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own

"unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of this crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from the course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery'. This was said by the Full Court of Hong Kong when ordering a new trial in **Ng Yuk Kin v. Regina** [1955] 39 HKLR 49. This was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone."

We are thus engaged in a delicate task of balancing a number of factors, some of which were enumerated by the learned Law Lord. We must bear in mind as was stated in **Au Pui-Kuen v. A.G. of Hong Kong** [1980] A.C. at p. 356:

> "... The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it."...

We must first recognize the factors relevant to the circumstances of the instant case and assess their relative importance in the light of our sense of justice and commonsense. One of the factors is the interest of the public in this country. The appellant was charged with a serious and brutal crime. The high incidence of crimes of violence involving very often the use of firearms, is a factor which we recognize as a relevant consideration.

The strength or weakness of the Crown's case is but one of the factors which we must consider as relevant in our determination. Their Lordships expressed the opinion that the Crown's case "was indeed a strong one," and they did so in the penultimate paragraph of their judgment. We feel justified in observing first, that the irregularities which they found did not constrain them to direct an outright acquittal which it was in their power to do. Secondly, it is because they themselves could not say that a jury would inevitably have convicted that they were loath to invoke the proviso to section 14 (1) of the Judicature (Appellate Jurisdiction) Act. The case thus falls somewhere between those boundaries.

The case, in our view, cannot be described as complex: the fact that inconsistent statements or discrepancies emerge at a trial is not an uncommon feature of most trials. The concept of the Crown's case was essentially simple: it was jealousy. The defence of accident which the Privy Council described as "tenuous" suggests nothing remotely complex and can readily be understood by any twelve reasonable Jamaican jurors.

The question of the complexity of the case is very much related to the facts to be adduced. The vexed and difficult question of identification evidence does not arise for consideration. The Crown's case depended on circumstantial evidence. Evidence of conversations and/or statements of threats allegedly made by the appellant will once more have to be adduced. It is true that five years have elapsed since the events occurred of which the witnesses will speak. In our view, however, there is little to forget.

We have not been made aware by Mr. Small that any witnesses he may wish to call will be unavailable. The unavailability of witnesses has not played any part in his submissions.

We have mentioned the fact that it will inevitably be an ordeal for the appellant to endure a second trial. But in our judgment, it is in the interests of the Jamaican public that so serious and brutal a crime should be resolved in a Court of Law. It is in the interest of the public and the appellant himself that the question of his guilt be not left as something which must remain undecided because the prosecuting authority was held guilty of some irregularities.

Mr. Small argued that a new trial would be different from the first and urged that as a factor militating against ordering a retrial. In our view, how the second trial will proceed is a matter of the merest speculation. Every trial is, in some way different from the first but that is largely due to the fact that the defence makes it so. There is always the possibility of fresh discrepancies and inconsistencies emerging thus providing the defence with further material for cross-examination. In our view, the issue which will fall to be determined by the jury will remain what it was at the first trial viz, in what circumstances did the late Mrs. Paulette Zaidie meet her death.

In our opinion, no factors have been shown which would incline us to enter a verdict and judgment of acquittal. It was for these reasons that we ordered a new trial to take place at the next session of the Home Circuit Court.