

Evanson Mitcham

Appellant

v.

The Queen

Respondent

FROM
**THE COURT OF APPEAL OF
SAINT CHRISTOPHER AND NEVIS**

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE

11th December 2008, Delivered the 16th March 2009

Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Carswell

[Delivered by Lord Carswell]

1. On 10 June 2002 the appellant and his co-defendants, Vincent Fahie and Patrice Matthew, were convicted of the murder of Vernal Nisbett after a trial before Baptiste J and a jury in the High Court of Saint Christopher and Nevis. On 26 June 2002 the appellant was sentenced to death and the other defendants were sentenced to imprisonment for life. On 3 November 2003 the Court of Appeal of Saint Christopher and Nevis dismissed the appeal of all three defendants against conviction, but allowed the appeal against sentence and remitted the case to the trial

judge for sentencing. On 2 June 2004 the appellant was again sentenced to death and his co-defendants to life imprisonment.

2. On 7 July 2004 the appellant gave notice of his intention to appeal to the Privy Council against the Court of Appeal's decision of 3 November 2003 and his London solicitors informed the London agents of the Attorney General of Saint Christopher and Nevis that they were instructed to present a petition for leave to appeal. No further step took place for some time and on or about 15 June 2007 the appellant was informed that he would be executed four days later. An immediate petition was presented to the Privy Council and heard on 28 June 2007, when the Board granted leave to appeal and ordered that the carrying out of the appellant's sentence of execution be stayed pending the hearing of the appeal.

3. Before the appeal came on for hearing, the Eastern Caribbean Court of Appeal granted the appellant leave to appeal against sentence out of time. That appeal, against the sentence imposed on 2 June 2004, is still pending. The Board heard the appeal against conviction on 11 December 2008 and announced at the close of the hearing that they would advise Her Majesty that the appeal should be dismissed, for reasons which would be given later. This judgment now contains those reasons.

4. The charge against the appellant arises out of an event which took place in Basseterre on 3 February 2001. In the light of the view which the Board has taken of the sole issue in the appeal, a relatively brief résumé of the material facts will suffice.

5. On 3 February 2001 about 12.30 am three masked men approached Arlene Fleming at her barbecued chicken stall in Basseterre. One of the men, armed with a gun, held on to her apron and demanded money. Vernal Nesbitt came to her assistance, also grabbed hold of the apron and told the gunman to desist. A struggle took place, then the gunman stood back and shot Nesbitt, inflicting a fatal wound.

6. Neither Arlene Fleming nor the other eye-witness was able to identify the assailants, who were all masked. The case against them depended largely on the evidence of Dayane Lake, who stated that he saw the appellant some time before the shooting, and Jacqueline Hendrickson, who saw him immediately after it.

7. Lake said that he had been in the company of all three defendants from 4 pm until some time later on the day of the shooting. He saw Fahie give Matthew a gun, wrapped in a red cloth. The appellant distributed clothing to the other two and fashioned a mask by cutting eyeholes out of

a black “tam”. Lake stated that when the three men were walking away the appellant turned around, pointed his finger at him and said “ah you ain’t seen me”.

8. Ms Hendrickson said that when she was sitting in a bus at Shadwell she saw three men running along the road, in a direction taking them away from the scene of the shooting and some hundreds of yards from that place. She claimed to have recognised the appellant, but not the other two, who she said were running too fast for her to identify them. Her evidence was challenged in a number of respects, especially her assessment of time and distance. It was put to her in cross-examination that there was a feud between her family and that of the appellant and that she had threatened to have him sent to prison.

9. The incident which gave rise to the arguments presented on behalf of the appellant in the appeal to the Board took place on the second day of the trial, 22 May 2002, immediately after the lunch adjournment. The record reads that when the sitting recommenced at 2.20 pm the following exchange took place:

“MR. MERCHANT, DPP rises to state that certain destructing developments have occurred which threaten the orderly conduct of the matter. It relates to threats.

COURT: Inquires whether it is something the jury should hear.

DEFENCE COUNSEL DR BROWNE AND MR

BENJAMIN: States they do not object to the jury being excused for the purpose of Mr Merchant’s observation. Jury excused at 2.23 pm.

MR. MERCHANT: States that has been advised that threats have been made to witnesses. I am instructed that the threat have been made by No. 1 accused [the Appellant].

DR. BROWNE: States that whoever is receiving threats should go to the police.

MR. BENJAMIN: States that he is confused about the word threat.

COURT: States that the parties to [the] proceedings should not issue threats against any witnesses.

Jury returns at 2.31 p.m.”

The trial continued without any further reference to the matter discussed in the jury’s absence and no mention was made at any time to it, nor did the trial judge refer to it in his summing-up. No request was made by any of the counsel to have the jury discharged. The only reference to threats

of any kind was, as related above, in the evidence of Dayane Lake and the suggestion put to Jacqueline Hendrickson.

10. A statement made by the appellant to the police was put in evidence, in which he claimed to have been at home at the material time. The other defendants in their statements admitted being present at the scene of the shooting, but each denied that he had done the shooting and claimed that he had sought to withdraw from the enterprise. None of the defendants gave evidence or called any witnesses.

11. In their appeal to the Court of Appeal the three defendants unsuccessfully argued that the judge should have allowed the submission of no case at the close of the prosecution evidence and that the jury's verdict could not be sustained on the evidence given at trial. None of them raised the question of prejudice arising from the interchange on 22 May 2002, nor did the judgments of the Court of Appeal advert to it.

12. Mr Nicol QC submitted on behalf of the appellant that the reference before the jury to "destructing developments" and "threats" was capable of prejudicing the appellant. If there were two or more possible meanings which could be taken out of the remark, it should be assumed that the jury may have taken that which was most damaging to the defendants. There was therefore a real risk that it could be construed as a reference to threats from one or more defendants. The jury might, he argued, have attributed the issue of threats to the appellant, particularly since his co-defendants sought in their statements to exculpate themselves and throw the blame for the shooting on to the appellant as the third man present. Although the defendants' counsel did not ask for the jury to be discharged, it was the judge's duty to advert to the possible need to take that course, as part of his function to ensure a fair trial. The necessity for discharge was reinforced by the mention of threats in the subsequent evidence, when Lake said that he was warned by the appellant "ah you ain't seen me" and Ms Hendrickson was cross-examined about threats alleged to have been made by her to get the appellant sent to prison. Accordingly, even if, contrary to his submission, the judge was right not to discharge the jury immediately after the reference by the Director of Public Prosecutions to threats on 22 May 2002, he should have reviewed the necessity in the light of the later evidence and then discharged them.

13. When an issue arises such as that which occurred in the present case, where a matter has to be mentioned to the judge which the jury should not hear, the preferable course is for a procedure to be followed analogous to that described by the Board for initiating a voir dire relating to the admissibility of a contested confession statement. This was set out by Lord Steyn in *Mitchell v The Queen* [1998] AC 695, 704:

“At the appropriate time counsel must ask the judge to request the jury to withdraw so that a matter can be raised on which the ruling of the judge is required. No discussion of an intended objection must take place in front of the jury. The judge should simply tell the jury that a matter has arisen on which his ruling is required and that they must please retire for the time being. When the *voire dire* has been completed, and the judge has given his ruling, the judge should give no explanation of the outcome of the *voire dire* to the jury.”

If counsel had taken this course, no question could have arisen. The judge did, however, follow an appropriate procedure once the matter was mentioned in open court.

14. Once a matter has been referred to in the presence of the jury which could give rise to possible prejudice, the trial judge has a choice of courses open to him. He could elect to take no action, on the basis that the matter was insufficient to create a degree of prejudice which would make the trial unfair and that to refer to it again would only draw attention to it. He could at the appropriate stage or stages give the jury a warning to disregard what was said, if he considers that that would be sufficient to minimise the prejudice and prevent the trial from being unfair. Finally, he could decide to discharge the jury, if he considers that there is prejudice which would make the trial potentially unfair and that warnings would not diminish it to a sufficient extent. He should give consideration to the course which he should take, even if counsel have, for whatever reason, not asked for the jury to be discharged or even submitted that he should not do so: cf *R v Azam* [2006] EWCA Crim 161, [2006] Crim LR 776; *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615. It is a decision which lies within the discretion of the trial judge, and an appellate court will not interfere with a decision made by him about the proper conduct of the case, unless satisfied that it was wrong and that the trial was unfair to the defendant, in consequence of which the conviction would be unsafe and in contravention of article 10(1) of the Constitution of Saint Christopher and Nevis. It is always relevant for an appeal court to bear in mind that the trial judge had the advantage of knowing the atmosphere of the case and the way in which the matter later complained of appeared in court at the time.

15. The principles to be applied were set out by Auld LJ in *R v Lawson* [2005] EWCA Crim 84, [2007] 1 Cr App R 20, a case concerning the improper admission of potentially prejudicial evidence, at para 65:

“Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and

circumstances of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including: 1) the important issue or issues in the case; 2) the nature and impact of improperly admitted material on that issue or issues, having regard, inter alia to the respective strengths of the prosecution and defence cases; 3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant; 4) the extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed. We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence. Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction.”

As Auld LJ pointed out, this does not purport to be an exhaustive list of factors, and their relative importance will vary from case to case: for example, the strength of the respective cases will be more relevant in an appeal concerning the improper admission of evidence. The issue in a case such as the present will always come back to the question whether a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility or danger that the jury would have been prejudiced against the appellant: cf *Porter v Magill* [2001] UKHL 67, [2002] AC 357.

16. Mr Nicol submitted that the words of the Director of Public Prosecutions should be given the most unfavourable interpretation which the jury might take from them, which could be that they took them as referring to threats made by the appellant against a witness or witnesses. In so submitting he relied on *R v Docherty* [1999] 1 Cr App R 274, a case of indecent assault in which a witness had made a reference to the defendant’s having been in prison. The trial judge refused to discharge the jury, stating that the remark could well have been taken to mean that that the defendant was a dishonest person whose word could not be believed, rather than that he had been convicted of a sexual offence, which was not the inevitable inference to be drawn from the remark. The

Court of Appeal stated in the course of their judgment that the judge had been wrong to apply the test which he adopted. Roch LJ stated at page 280:

“In weighing up the danger of bias on the part of this jury arising from these answers, the judge should, in our judgment, have approached the issue on the basis of the more prejudicial meaning that could reasonably be placed on these answers rather than some lesser prejudicial interpretation.”

In *Docherty* it was quite possible to place a prejudicial interpretation on the words spoken, which would have been a reasonable conclusion for the jury to draw from them. In the present case it is rather less clear that threats had been made by any of the defendants, rather than some other person, and it was submitted in the respondent's printed case that it was not a reasonable interpretation to attribute to the appellant, rather than a co-defendant, any threat that might have been made. In their Lordships' view such an interpretation of the remark might be regarded as possible, although other meanings might readily be taken from it, and they approach the matter on that basis.

17. The trial judge did not overtly refer to an exercise of his discretion, although he may have given the matter consideration without discussing it. In these circumstances it is for the Board to determine whether it considers that the risk of prejudice to the appellant was sufficient to make the trial unfair, applying the test set out in paragraph 15 above.

18. Their Lordships do not consider that the risk of prejudice was more than minimal. The reference to threats by the Director of Public Prosecutions was fleeting and oblique, very far from being a specific reference to any action of the appellant. The jury were sent out for a short time, then there was no more reference to the matter during the rest of the trial, which continued until 10 June 2002, some 19 days later. In their Lordships' view it was best that the matter be left in that way, rather than that the judge should highlight it by giving the jury directions about disregarding it. No request was made to him to discharge the jury, and if one had been made he would have been justified in refusing it. Nor was any point taken about the incident when the case went to the Court of Appeal. Their Lordships are satisfied that the trial was fair and the appellant's conviction safe.

19. For these reasons the Board will humbly advise Her Majesty that the appeal should be dismissed.