

Daniel Dick Trimmingham

Appellant

v.

The Queen

Respondent

FROM

**THE COURT OF APPEAL OF
ST VINCENT AND THE GRENADINES**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 22nd June 2009

Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell
Lord Mance

[Delivered by Lord Carswell]

1. The appellant Daniel Dick Trimmingham was on 23 November 2004 convicted after a trial before Blenham J and a jury in the High Court of St Vincent and the Grenadines of the murder of Albert Browne and on 8 December 2004 was sentenced to death by hanging. His appeal against conviction and sentence was on 13 October 2005 dismissed by the Eastern Caribbean Court of Appeal (Alleyne CJ Ag, Gordon and Barrow JJA). On 12 December 2007 the appellant was granted special leave to appeal to the Privy Council against conviction and sentence, it being provided that reliance on the evidence relating to mental capacity which he has sought to adduce be limited to the issue of sentence.

2. The appellant had been earlier tried on the same charge and convicted on 10 November 2003, but his appeal against conviction was on 22 June 2004 allowed by the Eastern Caribbean Court of Appeal on a ground not material to the present appeal and a retrial was ordered.

3. The Crown case against the appellant rested to a very large extent on the evidence of one Felix Browne, known as “Ding”. The trial judge correctly directed the jury that he could be regarded as an accomplice. The following account is based exclusively on his evidence. Ding stated that on 8 January 2003 he and the appellant went to land at Carriere where the victim Albert Browne (“the deceased”), a man of 68 years, kept his goats. The appellant was carrying a firearm. He resolved to rob the deceased, but it is not clear from the evidence at what stage he formed that intention. When the deceased drew near the appellant told Ding to hide. When Ding looked out he saw that the appellant had the deceased on the ground and had held him up with the gun. The appellant demanded money, but the deceased said that he had given it away to his daughter and told the appellant that he could take his goats if he left him alone. When Ding told the appellant to leave the deceased alone, he asked Ding if he wanted him to leave the deceased for him to lock him up. He then took the deceased some little distance away and struck him in the stomach, causing him to fall on the bank of a “contour” or rain water ditch. He threw the deceased down into the contour and cut his throat with a cutlass which he had taken from the deceased, then cut off his head with the same implement. He removed the trousers from the body and wrapped the head in them. He handled the penis of the deceased and made a ribald remark about it. He positioned the body in the contour and slit the belly, explaining to Ding that he did so to stop the body from swelling. He covered up the body and stuffed the trousers containing the head into a hole under a plant in a nearby banana field.

4. The appellant picked out six goats belonging to the deceased and he and Ding took them away. They later attempted to sell the stolen goats. Some evidence was given on behalf of the Crown to the effect that witnesses had seen the appellant and Ding together on 8 January 2003, that he had not been at home on that date until he returned about midnight along with Ding and that he had offered on 13 January to sell goats to one Clement John.

5. The appellant made a statement to the police on 20 January 2003, in which he claimed that he had been at home all day and all night on 8 January, suffering from a bad back. He stated that Ding had been out that day and on his return had confessed to him that he had killed Albert Browne over a land dispute. He claimed that early on the next day, 9

January, he and Ding had set out to move the goats, but his back had begun to hurt him and he returned home, leaving Ding to complete the move. This statement was admitted in evidence and formed the basis of the defence adduced on behalf of the appellant, who did not give evidence at the trial.

6. Meanwhile Ding had co-operated with the police, showing them the place where the cutlass had been thrown by the appellant and identifying to them a number of goats which he said belonged to the deceased. Ding was not charged with any offence arising out of the attack on and death of the deceased.

7. On the appeal to the Board against conviction Mr Fitzgerald QC did not attempt to reopen any of the grounds argued before the Court of Appeal and dismissed by them. Instead he advanced two grounds of appeal, neither of which had been previously put forward, that the trial judge's directions in relation to accomplice evidence and to the appellant's lies as evidence of guilt were deficient. The two issues are to a degree interdependent, as counsel demonstrated in his written and oral argument.

8. Having directed the jury that they might regard Ding as an accomplice, the judge continued:

“I need, therefore, to tell you how to treat the evidence of an accomplice ‘cause there are all sorts of reasons for an accomplice to tell lies, and to implicate other people, and for that reason it is dangerous for any jury to act on the evidence of an accomplice unless that evidence is corroborated in some material way. Corroboration means independent evidence. It can either take the form of direct, or circumstantial, independent evidence, which does not come from the accomplice, but which in some ways confirm or corroborate the evidence that the crime has been committed, and also that it was the defendant who committed the crime.

I will just briefly tell you a little bit of circumstantial evidence. Circumstantial evidence is evidence of circumstances which can be relied upon, not as proving a fact directly, but as pointing to a fact. The Prosecution suggests that facts from which different witnesses have provided you where you take all of them together, there are strong circumstantial evidence pointing to Daniel Trimmingham as the person who murdered Albert Browne on Wednesday the 8th of January. You have to examine all

of this evidence in the case, and look for evidence that corroborates Felix Browne's testimony. What you should look for is evidence that agrees with the important parts of Felix Browne's testimony, and make you confident in your mind so that you be sure that it corroborates what Felix Browne has told you."

She pointed to some evidence which might be capable of constituting corroboration of Ding's testimony, stating:

"Note that the witnesses don't necessarily have to be able to say that they saw the entire murder. What the evidence should be of such a nature that when you put it together it should be capable of corroborating that it was the accused who murdered Albert Browne, and it is for you to determine, whether it does indeed so corroborate ..."

The evidence to which the judge pointed was that of the several witnesses which tended to contradict the account of the appellant, by putting him in company with Ding on the day of the murder and not, as he claimed, at home all that day. None of them purported to have seen the murder committed or to be able to say who killed the deceased.

9. The judge then directed the jury:

"Note, however, Mr Foreman, if you are of the opinion, and you are sure in your mind, even if you were to find that Felix Browne was an accomplice; if you are sure in your mind that when Felix Browne gave evidence in this matter, he told you the truth, want to exercise the necessary caution and you are still convinced that he was speaking the truth, there is no need for corroboration. You are entitled to accept his evidence even if you find he is an accomplice, once you are convinced and sure that when he said to you the things in this box, and he said to you that the person who murdered Albert Browne on 8th January was Daniel Trimmingham, if you are sure that you can believe him even though he is an accomplice, you don't have to look for any other corroborative evidence. But I must warn you once the person is an accomplice you have to exercise caution in dealing with his evidence."

10. Mr Fitzgerald QC for the appellant submitted that these directions were defective, in that the judge did not spell out why it was dangerous to convict on an accomplice's evidence and failed to make it sufficiently

clear that the evidence relied on by way of corroboration only went so far as to contradict the appellant's alibi and fell short of pointing to him as the one who killed the deceased, rather than Ding. It has to be borne in mind, however, that at the time of trial the appellant was advancing an alibi and was not making the case upon which he subsequently relied, that although both he and Ding were present at the scene it was Ding who carried out the killing, contrary to the appellant's wishes. In negating his alibi, the Crown evidence tended to show that he was making a false case. The judge in such a situation had to make it sufficiently clear to the jury that advancing a false alibi or lying in other respects did not of itself suffice to establish guilt of the crime and that they had to consider possible reasons why the appellant might have done so other than trying to cover up guilt. The issues of corroboration and a *Lucas* direction are in this respect interdependent.

11. On the issue of the falsity of his alibi the judge directed the jury as follows:

“However, if you reject Daniel Trimmingham's alibi, you do not automatically convict him. Even if the Crown has disproved that he wasn't at home; even if the Crown has proved that he misled you when he said he was at home, you are still required to go back and examine the Crown's case, and to determine for yourself whether the Crown has proven to you so that you feel sure in your mind that the person who committed the crime was Daniel Trimmingham. Even if you say, 'look, this alibi thing, I don't believe what he is saying', you still have to come back to the Prosecution's case, go through every witness' evidence, and determine whether the Prosecution has made you feel sure that the person who committed the crime was Daniel Trimmingham.”

When she was dealing with the evidence of the several witnesses whose testimony might be accepted as corroborative of the Crown case as contained in Ding's evidence, she made it sufficiently clear that the effect of each was to corroborate part of Ding's evidence, and her directions did not give rise to any inference that those pieces of evidence tended to suggest on their own that the appellant was the person who killed the deceased.

12. There are few cases in which the judge's summing up could not be criticised in some respects and submissions advanced that the content or wording could have been improved upon. The present case is no exception. It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an

appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention. Their Lordships are fully satisfied that the trial judge's careful summing up stated the law adequately and put the issues properly and fairly before the jury. They consider that any deficiencies to which exception might be taken were minor and that they fall well short of a miscarriage of justice which should cause them to set aside the verdict.

13. The judge held a sentencing hearing on 8 December 2004. Notice had been given on behalf of the prosecution of its intention to seek the death penalty. The appellant's criminal record was put before the court. It included seven convictions for assault, dating back to 1980, and two of unlawful and malicious wounding. Five of the assaults involved the use of a cutlass. The appellant was not given a custodial sentence for any of these offences. The last conviction was in 1993, almost ten years before the instant offence.

14. A probation report on the appellant was given by Mr Camie Matthews, deputy director of the Family Services Division. The report was highly prejudicial to the appellant, retailing a great deal of hearsay evidence about his past deeds and the fear which he was said to instil among other people in his area. It concluded with two paragraphs of conclusion and recommendation which were wholly inappropriate for a probation report presented to the court and which the judge quite correctly deleted from it. Their Lordships must express the hope that probation reports in future cases will be expressed in more objective and temperate terms.

15. Evidence was given for the Crown by a psychiatrist Dr Mrinaleamti Debnath, to the effect that on examination the mental status of the appellant revealed no signs or symptoms of any kind of mental illness or personality disorder and that he was completely fit mentally and of sound mind. The appellant's sister Mrs Hermina Job gave character evidence on his behalf.

16. After receiving the evidence and submissions from counsel, the judge gave an extended ruling on sentence. She referred to the evidence given, including the psychiatric report, and concluded that the appellant was a man who "should be kept out of society entirely by the imposition of the ultimate sanction." She expressed the view that the circumstances

of the case brought it into the category of “the rarest of rare”. She summed up her view by saying:

“... I have no doubt that no useful purpose would be served by the continued presence of the prisoner in the community in Saint Vincent and the Grenadines. And I am fortified in my view, having examined the nature of the offence, his antecedents, his character, the circumstances, and also I have to look at the interest of the community and the safety of the community [and] the sanctity of life also. It is my view that a case like this justifies a retention of the death penalty as the ultimate sanction. There is nothing before me to persuade me that Mr Trimmingham is deserving of my leniency. I am not convinced that any lesser penalty would do justice to this matter despite the able submission of his lawyer. I am convinced that the prisoner dehumanised Mr Albert Browne in the manner in which he executed his murder”.

She accordingly sentenced the appellant to death by hanging.

17. In the Court of Appeal Barrow JA, in a judgment with which the other members concurred, reviewed the principles applicable to a determination whether a death sentence should be imposed. He summarised this in paragraph 22 of his judgment:

“The unqualified right to life that the cases affirm means that there is no mandatory death penalty. It means as well that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death.”

That meant, as he stated in succeeding paragraphs, that it will be only in the worst and most extreme cases that the death penalty should be imposed, and it has to be shown that there is no other penalty that may suffice to do justice to the case.

18. The court concluded that the trial judge had wrongly placed strong reliance on the appellant’s bad character, since his character and record should only work in a defendant’s favour. She had therefore erred in the exercise of her discretion and it became the duty of the Court of Appeal to consider it afresh and exercise their own judgment on the sentence. Barrow JA set out the determination of the court in the final portion of his judgment in paragraphs 35 and 36:

“(35) Beyond falling into the category of particularly reprehensible killings, because it was committed in furtherance of a robbery, the murder that the appellant committed was heinous because it was cold blooded and inhuman. It is the criminal culpability, the degree of moral guilt, present in this specific murder that made it appropriate to consider it as one of the ‘rarest of rare’ cases in which the death penalty may be appropriate. The character and record of the appellant were not capable of significantly mitigating the punishment that this murder deserved. The most that his counsel was able to urge by way of mitigation was that the appellant had had no convictions for ten years and this showed that he was capable of reform. It was a valid argument and we weighed it in the balance. There were no mitigating factors in the motive and circumstances that led to the murder. Apart from the fact that the last decade of his life has been conviction-free there was no evidence that showed any possibility of reform and social re-adaptation of the appellant. The appellant neither expressed nor showed remorse; he continued to insist on his innocence. The individual circumstances of the appellant provided no assistance in determining whether the death penalty can and should be imposed.

(36) When the aggravating and the mitigating factors were weighed afresh in the balance we were satisfied, beyond reasonable doubt that this particular murder required consideration of the imposition of the death penalty. After due consideration we were further satisfied, beyond reasonable doubt, that there was no basis upon which we could say that the object of punishment could be achieved by a sentence other than death. It is on that basis that we dismissed the appeal against the death penalty”.

19. Mr Fitzgerald attacked the validity of the sentence on a number of grounds:

- (a) It was imposed without a fully and fairly informed sentencing process. Counsel sought to adduce additional evidence in the form of a psychiatric report from Professor Nigel Eastman and neuropsychology reports from Dr Alastair Gray. Such evidence was not been adduced on behalf of the appellant at the time of trial because of the lack of funding available to an indigent defendant to obtain it. These reports, if admitted in evidence, would tend to cast

doubt on the appellant's mental state and to establish that he has a very low level of intelligence.

- (b) Prosecuting counsel displayed personal animus towards the appellant and exceeded his duties as an officer of the court.
- (c) The case did not fall into the category of "the worst of the worst" which would justify a sentence of death.
- (d) When they set aside the judge's exercise of her discretion, the Court of Appeal should have sent the case for a further sentencing hearing.
- (e) The imposition of the death penalty on a mentally retarded defendant is inhuman and degrading punishment.
- (f) There has been unconstitutional delay in the execution of the sentence, such that it is no longer lawful for the sentence of death to be carried out.

20. Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary. This approach received the approval of the Board in *Pipersburgh v The Queen* [2008] UKPC 11, and should be regarded as established law.

21. It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, "the worst of the worst" or "the rarest of the rare". In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled.

22. Mr Fitzgerald readily accepted that the appellant's crime was a brutal and disgusting murder, involving the cold-blooded killing of an elderly man in the course of a robbery. He contended, however, that it fell short of being in the category of the rarest of the rare. He submitted that the killing did not appear to have been planned or premeditated and although the manner of the killing was gruesome and violent, there was no torture of the deceased, nor prolonged trauma or humiliation of him prior to death.

23. Their Lordships accept the correctness of this contention. It was undeniably a bad case, even a very bad case, of murder committed for gain. But in their judgment it falls short of being among the worst of the worst, such as to call for the ultimate penalty of capital punishment. The appellant behaved in a revolting fashion, but this case is not comparable with the worst cases of sadistic killings. Their Lordships would also point out that the object of keeping the appellant out of society entirely, which the judge considered necessary, can be achieved without executing him.

24. This conclusion makes it unnecessary for the Board to consider the factors relating to the character and personality of the appellant, to which the content of the medical reports, if admitted, would be material. Nor do they propose to express an opinion on the other grounds of appeal against sentence advanced on behalf of the appellant, save that they feel obliged to draw to the attention of prosecutors once again the principles set out in paragraphs 10 and 11 of the judgment of the Board in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 regarding the standard of conduct to be expected of them as ministers of justice.

25. The death sentence accordingly cannot stand. Their Lordships consider that the only appropriate disposition of this case is that the appellant should be sentenced to life imprisonment and that should be substituted for the sentence of death pronounced by the judge and affirmed by the Court of Appeal.

26. Their Lordships will humbly advise Her Majesty that the appeal against conviction should be dismissed, the appeal against sentence should be allowed, that the sentence of death by hanging be set aside and a sentence of imprisonment for life should be substituted.