Privy Council Appeal No. 61 of 1988

Garth Henriques and Owen Carr *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH FEBRUARY 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Jauncey of Tullichettle**]*

On 3rd December 1986 the appellants, who had been charged with murder, were found guilty of the manslaughter of Clive Gibbons and were each sentenced to fifteen years imprisonment at hard labour. Their appeals against conviction and sentence were heard before the Court of Appeal of Jamaica in May and June 1987 and were dismissed by order of 25th March 1988. On 21st June 1988 the Court of Appeal granted the appellants leave to appeal to this Board certifying a number of points to be of great public importance. On 17th November 1989 the appellants were granted special leave to appeal in respect of certain further points. In the light of the submissions of counsel for the appellants, which substantially embraced the points certified, their Lordships think it more appropriate to deal with these submissions than to answer specifically the points certified.

In summary the circumstances giving rise to the charges were that in April 1984 the appellants and others had been involved in shipping ganja in boats from Greenwich Farm Beach to some nearby hiding place. It appeared that shortly thereafter some or all of the ganja disappeared from the hiding place and suspicion fell upon the deceased. On the night of 18th/19th April the appellants, who were armed, and two other men came to the beach with the deceased and

the other two men beat the deceased for several minutes. At the same time all four men asked where the ganja was. The deceased escaped from his attackers and his body was found floating in the sea on the morning of 19th April. The two critical witnesses for the police were Junior Blackwood and Dr. Venugopal. The former lived in a boat upon the beach and spoke of having seen the attack on the deceased on the night of 18th/19th April and to the presence of the two appellants. The latter was the Government pathologist who expressed the view that death had resulted from the beating and not from drowning. Dr. Venugopal was away from Jamaica at the time of the trial and the Crown were allowed by the judge to produce his deposition sworn before a magistrate on 22nd October 1984.

Against that general background counsel for the appellants made three submissions:-

(1) In granting consent to the reading of Dr. Venugopal's deposition the trial judge failed to exercise his discretion properly;

(2) Having regard to the evidence the trial judge misdirected the jury when he told them to consider the question of manslaughter by flight;

(3) The trial judge failed to give adequate warnings to the jury about the identification evidence of Junior Blackwood.

First submission

The trial judge allowed Dr. Venugopal's deposition to be admitted in evidence in accordance with the provisions of section 34 of the Justices of the Peace Jurisdiction Act which, so far as relevant, provides:-

> "... and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same:

Provided, that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place."

The deposition was in the following terms:-

"Mr. Delisser is Present.
Mr. Manley is holding for Mr. Ramsay.

THIS DEPONENT: Venugopal

ON HIS OATH SAITH AS FOLLOWS: I am a Registered Medical Practitioner and Pathologist attached to the Ministry of National Security and Justice.

On the 5th May, 1984 at about 1 p.m. I performed a Post Mortem examination on a male body at the Kingston Public Hospital Morgue. This body was identified to me by one Mr. Delroy Gibbons to be that of one Clive Gibbons.

On external examination I found the following injuries.

1. A Laceration above the left eyebrow, measuring 2 inches by 1 inch.

2. A contusion below the chin measuring 2 inches by 1 inch and this was reddish in colour.

3. A contusion on the right side of the chest measuring 4 inches by 3 inches.

4. A post-mortem incised wound at the sole of the left foot measuring 6 inches by $\frac{1}{2}$ inch.

On internal examination, I found that the back of the left side of the scalp was contused and it was reddish in colour. The base of the brain and the cerebellum were covered with sub-dual and sub-arachnoid haemorrhage. The skull did not show any fracture. The basal lobe of the right lung was lacerated. The left lung was congested, the heart was also congested. The right side chest cavity contained 1000 millilitres of blood. The Abdominal organs were congested.

In my opinion death was due to shock and haemorrhage as a result of injury to the head and chest caused by blunt external force. I am unable to say with what degree of force were these injuries inflicted.

Congestion of any organ is usually due to loss of blood and lack of oxygen. I would say that death

in this case was immediate upon the sustaining of the injuries.

If I had seen any water in the lungs or the stomach I would have made a note of this. In this case the injuries were obvious and I ruled out drowning as the cause of death.

XXn

I cannot give the exact time of death in this case because of many factors. In my opinion death was with in a range of a few hours to thirty six hours before the discovery of the body. From information I got this body was discovered on the 20th April, 1984 at 10:15 a.m. by Inspector Dyer. Death is usually described as occurring instantaneously, or immediately. By immediate death I mean death within 3 to 7 minutes of the infliction of the injury. If a person goes into the sea and is moving I would expect that that person is alive. If such a person goes under the water and dies I would expect to see water in the stomach and the lungs if that person had swallowed water. If a person who has suffered the injuries which I saw chucks off into the sea and goes under the water and his body is found floating some time after. I may or may not have found water in the stomach. This depends on whether or not this person had inhaled and swallowed water. Because of the nature of the head injuries and injury to the chest and lung this person might not have been in a position to ingest water when he entered the sea. He may have been in a state of semi-consciousness so he may or may not have ingested water. A person is semi-conscious when he is dazed. Such a person would still be breathing. The chances of water entering the stomach depends on how hard the person is struggling in the water. If an unconscious person is immersed in water it is possible that he would ingest water. If a semi-conscious person is immersed in water the only way there could be not water ingested is if the person holds his breath. If a normal person not injured goes under water the person would ingest water only if he was not holding his breath.

I am not able to say whether or not the deceased was conscious or semi-conscious when he chucked off into the sea with the injuries I saw. If a person chucks off and at the same time or in the process he passes out or stop breathing or dies, I would not expect to see any water in the lung or the stomach.

If the person tried to swim after chucking off in the water it would mean that the person did not die as he chucked off. The fact that I found no water in the stomach means that it is possible that the person could have been thrown in the water after he died.

If a person chucks off in the sea with injuries I saw and was trying to swim I would not say that it is more likely that water would be in his stomach and lungs if he dies in the water. I would only say that it is possible.

No. XXn by Mr. Ramsay who is now present.

Venugopal

S.M. Lewis
Resident Magistrate
22.10.84"

In support of the application to have the deposition admitted the Crown led the evidence of the clerk of the court before which it had been made and also the evidence of a detective sergeant who spoke to seeing Dr. Venugopal leave the airport for Miami on 9th May 1986 to do a nine month course in pathology and to his not having returned to the Island by 27th November 1986. The detective sergeant was unable to say where the course was to take place. Counsel for the appellants objected to the admission of the deposition on a number of grounds and argued that the balance of justice required that the doctor should give evidence in person. The trial judge rejected these submissions and dealt with the Crown's application in the following manner:-

"I will deal with that matter now. I was attempted (sic) sorely to go over into an academic explanation on the Laws of Balance of Probability, but it has occurred to me that that was not a part of Mr. Ramsay's - Mr. Ramsay mentioned the question of hardship, whether the jury would be able to appreciate certain technical terms like sub-dural, subarachnoid haemorrhage and contused, and of course, both Mr. Ramsay and Mr. Delisser knows that if we come to that point, I will tell the jury that the evidence of an expert can be rejected like the evidence of any other witness in the case.

I will attempt to do what Lord Atkin suggested to deal with finality and justice. I will allow the document to be read."

The Court of Appeal rejected the argument that the judge had wrongly exercised his discretion.

It was strenuously argued before the judge that the doctor's evidence was of particular importance in that (i) it was desirable that he should be able to explain to the jury the meaning of the technical terms in his report, (ii) there was a conflict between the doctor and Blackwood as to whether a wound on the sole of the deceased's foot had been inflicted ante or post mortem, and (iii) there was evidence that the deceased swam into the sea in which event he might have died from

causes other than those attributable to the beating. No evidence was led by the Crown as to where the doctor was nor whether it would be practicable for him to return to Jamaica to give evidence within a reasonable time. On the other hand it appeared that the witness Blackwood had been held in prison for some time before the trial to ensure his attendance thereat in order to give evidence.

None of these factors appear to have been taken into account by the judge in exercising his discretion to admit the deposition in evidence. Their Lordships have no doubt that they should have been. A judge, faced with an application to admit the deposition of an absent witness, should weigh up all the factors relevant to its grant and refusal before reaching a decision which should seek as far as possible to do justice between the parties and ensure a fair trial. The importance of the evidence to be given and the availability within a reasonable time of the witness to give it are clearly relevant factors as in this case was the continuing incarceration of Blackwood. Indeed as Lord Griffiths observed in relation to section 34 in *Scott v. The Queen* [1989] A.C. 1242 at page 1255 "if absence from the Island is temporary an adjournment may be more just than continuing without the presence of the witness". In his summing up the judge directed the jury that they could disregard the evidence of the doctor if they did not think it sounded right. However, he did not warn the jury that deposition evidence was not necessarily of the same weight as evidence which they had heard tested before them by cross-examination. Their Lordships consider that this was a regrettable omission. When a judge allows deposition evidence to be admitted he should as a matter of course warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination and that they must take this into consideration when evaluating the reliability of his evidence. Furthermore as Lord Griffiths said in *Scott v. The Queen* [1989] A.C. 1242 at page 1259 "in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination".

In his summing up the judge referred to the fact that Mr. Ramsay for Carr had not cross-examined Dr. Venugopal before the magistrate. Their Lordships think it important that, if a judge in such circumstances refers to the lack of cross-examination of a deponent, he shall direct the jury that, in view of the many reasons which may exist for not cross-examining at that stage, no inference adverse to the accused shall be drawn.

Having reached the conclusion that the judge failed to have regard to material factors in exercising his discretion to allow the deposition to be read and failed thereafter to give proper warning to the jury the question arises whether the appellants have suffered prejudice thereby.

It was argued by the appellants that there was evidence from which it could be inferred that the deceased was alive when he escaped into the sea, from which it followed that death could have been caused by means other than the attack on the beach. Furthermore Blackwood spoke of seeing the deceased being cut on the sole of the foot whilst still alive whereas the doctor spoke to finding an incised wound on the sole which was inflicted post mortem. If the doctor had been cross-examined on these matters he might have been persuaded to reconsider his opinion as to the cause of death and in any event to cast doubt upon the credibility of Blackwood. The evidence as to the deceased being alive when he escaped into the sea came from (1) Blackwood in the following two passages in examination-in-chief and cross-examination respectively:-

"Q: After Clive get beating for five minutes, what happen next?

A: He get away from them and chucked off in the sea.

HIS LORDSHIP: He did what?

WITNESS: He get away from them and chucked in the sea."

"Q. Yes. Now, just one other question. When Clive chucked off into the water, a wonder if you could just demonstrate to us how he chucked off. Just demonstrate. Tell me how, when you say he chucked off?

A. He got away from them and stumbled ... fell ... fell off.

Q. What's that?

HIS LORDSHIP: I would like to hear what he answered. He got away and what?

WITNESS: And he dropped off ... fell away from them.

Q. You did something with your hand?

A. Chucked side-ways from them.

Q. Chucked off?

A. Yes, sir.

Q. And his hands were outstretched?

A. Yes."

And (2) the appellant, Henriques, who in his cautioned statement said that the deceased broke away from his assailant, ran into the sea and started swimming towards a boat anchored offshore.

The doctor considered that death was due to shock and haemorrhage as a result of injury to the head and chest and he ruled out drowning as a cause of death having, on internal examination of the body, found water neither in the lungs nor the stomach. He was cross-examined at some length by counsel for Henriques as to the possibility of the deceased having been alive when he entered the water but he was not persuaded to change his opinion as to the cause of death. Given the findings on internal examination both as to the injuries and to the absence of water in the two organs their Lordships consider it highly improbable, if not fanciful, that the doctor in further cross-examination would have been persuaded to say that death was due to drowning or to injuries inflicted upon the deceased after he had taken to the sea. Furthermore the above passages in Blackwood's evidence are not necessarily inconsistent with the deceased having become unconscious or died as he hit the water. So far as the conflict between the doctor and Blackwood as to the time when the wound to the sole of the foot was inflicted, this was already before the jury and it is difficult to see that the oral evidence of the doctor would have added anything to it.

All in all their Lordships do not consider that any injustice was done to the appellants by the judge's failure in the two matters above referred to.

Second submission

In directing the jury that a verdict of manslaughter was open to them the judge referred not only to manslaughter which would arise if the beating of the deceased had been carried out with no intention of killing or causing grievous bodily harm but also to manslaughter by flight. Having directed the jury to consider manslaughter on the above two heads he subsequently gave the following direction:-

> "... I mentioned to you what I conceive the law to be and I tell you if they were beating him up and he escaped and fled and went into the sea and drowned, the offence would be manslaughter by flight."

It was argued for the appellants that this direction was prejudicial to them inasmuch as it enabled the jury to reach a verdict of manslaughter on the basis that the deceased had died from drowning whereas there was no evidence to support such a cause of death. Their Lordships do not consider that there is any substance in this submission. The primary charge faced by the appellants was that of murder and it is clear from the

cross-examination of the doctor before the magistrate and from the account given by the appellant, Henriques, in his cautioned statement that the defence was suggesting that the deceased had died from causes other than those resulting from the beating. By leaving to the jury this very remote possibility as an additional alternative to murder the judge was benefiting rather than prejudicing the appellants. Their Lordships are satisfied that no prejudice resulted to the appellants from the judge's direction and that in the circumstances he cannot be faulted for giving it.

Third submission

The main plank in this submission was that Blackwood having failed to identify Henriques on an identification parade and having proceeded to identify him in the dock the judge should have given an appropriate warning about identification to the jury. Blackwood was, of course, the only witness who saw the appellants at the locus during the assault. The judge warned the jury that a dock identification was not a proper and safe and reliable way and continued:-

> "But then we come back to this point; as Mr. Pantry said, 'Why quarrel about niceties?' Mr. Henriques said he was on the beach, puts himself there. But still, it was my duty to tell you that that identification, that dock identification wasn't proper, not to be encouraged. When I say not to be encouraged I rather put it roundly; not much weight could be placed on it."

The position is not, however, as simple as the above summary might suggest. Blackwood had known Carr for some two years before April 1984. He first saw Henriques whom he described as "the white man", on 13th April on the beach and on several occasions thereafter with Carr. On one occasion Henriques and Carr and the other two men had come to the beach in a car from whose boot they removed the deceased. Later they left in the car having replaced the deceased in the boot. Blackwood said that on some of these occasions Henriques was on the beach for several hours. There was also evidence from the appellants which was relevant to identification. Henriques in his cautioned statement spoke to being on the Greenwich Farm Beach with Carr for some hours after the ganja had been shipped and to going there again and driving away with the deceased in the boot of his car. He further spoke to going to the beach on the night of the assault, to hearing screams from the deceased, to seeing a man Cawley trying to hit him and to the deceased running into the sea. In an unsworn statement from the dock Henriques confirmed the truth of his caution statement and Carr in his unsworn statement confirmed that what Henriques had said was true. It is clear that this was a very different situation to that which obtained in *R. v. Turnbull* [1977] Q.B. 224 and in *Junior Reid v. The Queen* [1990] 1 A.C. 363. Blackwood had had the

opportunity of observing both the appellants over periods of hours during the days preceding the attack on the deceased. He had observed them with the deceased in circumstances which were to say the least curious and hardly indicative of great goodwill on the part of the appellants towards the deceased. The appellants in their unsworn statements confirmed some at least of Blackwood's prior sightings and placed themselves at the locus at the time when the deceased was being beaten. In all these circumstances their Lordships consider that the judge's warning was sufficient.

Sentence

Although the appeal to the Court of Appeal was both against conviction and sentence there appears to be some doubt as to whether counsel for the appellants ever addressed the court on sentence. Before this Board counsel submitted that the sentences were excessive having regard to the fact that the appellants did not strike the deceased. Their Lordships would be very reluctant, other than in the most exceptional circumstances, to interfere with a sentence passed by a local court where they have no knowledge of the level of sentences passed in practice and have no observations of the Court of Appeal for their guidance. The sentences here certainly could not be said to be so exceptionally high as to warrant the interference of this Board unguided by local practice.

However their Lordships understand that it is the practice in Jamaica that sentences run from the date of disposal of any appeal unless an application is made to the Court of Appeal to order that they run from the date of conviction. It appears that no such application was made to the Court of Appeal in the present case. Their Lordships consider that it would be appropriate in this case that the sentences should run from the date of conviction and they accordingly remit the matter to the Court of Appeal to make the appropriate order,

For the foregoing reasons their Lordships will humbly advise Her Majesty that these appeals should be dismissed.