Privy Council Appeal No. 22 of 1993

Lawrence Pat Sankar *Appellant*

v.

The State of Trinidad and Tobago *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 4TH OCTOBER 1994, DELIVERED THE 16TH DECEMBER 1994

Present at the hearing:-

LORD BROWNE-WILKINSON
LORD BRIDGE OF HARWICH
LORD SLYNN OF HADLEY
LORD WOOLF
LORD NICHOLLS OF BIRKENHEAD

*[Delivered by **Lord Woolf**]*

On 25th April 1988 Lawrence Pat Sankar was convicted of murder at the Port of Spain Assizes and sentenced to death. That sentence was subsequently commuted to life imprisonment. The murder was alleged to have been committed on 28th January 1987 and the victim was a Mr. Carlton Baptiste who was also known as "Boggeyman". There was an appeal against the conviction which was dismissed on 12th October 1990 by the Court of Appeal of the Republic of Trinidad and Tobago. The appellant was granted special leave to appeal to the Privy Council on 5th May 1992. The appeal was heard on 4th October 1994. At the conclusion of the appeal their Lordships announced that the appeal would be allowed and the conviction quashed for reasons to be given later. This judgment contains those reasons.

Central to the appellant's appeal was the conduct of his advocate, Mr. Israel B. Khan, at the trial. Due to his behaviour at the trial, Mr. Khan was subsequently the subject of contempt proceedings to which he pleaded guilty.

The ground of appeal which is determinative of the outcome of this appeal was advanced for the first time before their Lordships. It was alleged that the behaviour of his advocate deprived the appellant of the opportunity to give evidence in a case where his evidence was essential if he was to have any opportunity to avoid being convicted. This allegation depended upon further affidavit evidence. Although this is a highly unusual course for their Lordships to adopt, in the exceptional circumstances of this case, they thought it right to consider the additional ground and the further evidence.

The other grounds which were relied on by Mr. Fitzgerald, who appeared on this appeal on behalf of the appellant, were that:-

1. A fair trial was not possible because of the hostile exchanges which took place between the appellant's advocate and the trial judge.

2. The trial judge erred in failing to leave the issue of self-defence and provocation to the jury for their consideration.

The case for the prosecution was based on the evidence of three eye witnesses. They claimed that on the morning of 28th January 1987, between approximately 8.00 a.m. and 8.30 a.m., the appellant had a conversation with the deceased at a place called Never Dirty. The appellant had previously paid the deceased for some tyres and he was demanding either to be repaid or to be provided with the tyres for which he had paid. The deceased was either not in the position or unwilling to comply with this request so he put the appellant off with some remark to the effect that he would "check" the appellant later. The appellant was alleged to have then drawn a knife, taken a hold of the deceased's shirt and stabbed him in the chest. At about 9.15 a.m. the appellant arrived at a nearby police station. He reported that around 8.15 a.m. that day Boggeyman had molested him and then threatened him with a knife. A quarrel and a scuffle had then ensued and the appellant said that he would like the deceased to be warned.

The appellant's conduct in attending the police station is not as surprising as it would first appear. This is because it is possible on his case that he may not have appreciated that the deceased was fatally or even seriously injured in the struggle. Although there is evidence that after the stabbing the deceased did drop on his knees and fall on his back, it is not clear what precisely caused this to happen. It was also suggested that the appellant went to stab the deceased a second time, but it was accepted that he desisted from doing so in response to a shout. Furthermore the witness who was responsible for taking the deceased to hospital indicated that after the incident the deceased was still able to walk.

While the appellant may not have appreciated how badly the deceased was injured, three witnesses gave an account of the incident which was only consistent with the appellant having made an unprovoked attack upon the deceased with a knife. Their evidence was not contradicted by any other witnesses. Although suggestions were made in cross-examination that the deceased had a knife this was denied by the witnesses. It was also denied that there was any other conduct on the part of the deceased which would afford any support for a contention that the appellant was acting in self-defence.

The appellant did not give evidence. According to the trial judge's notes (there is no transcript) in his closing address the appellant's advocate made it clear that he was doing no more than putting the prosecution to proof. The judge's notes state that counsel said:-

> "We have not presented a defence. If you accept the State's case then find him guilty of murder."

The appellant's notice of appeal to the Court of Appeal in addition to relying on the hostile exchanges between his advocate and the trial judge alleged misdirections by the trial judge in his summing up, including a failure to leave provocation, self-defence and accident to the jury.

In dealing with the allegation of a hostility between the advocate and the trial judge, Bernard C.J. in his judgment in the Court of Appeal accepted there could be situations where the conduct of the judge presiding at a trial resulted in the proceedings being flawed. Bernard C.J. cited the judgment of Goddard L.C.J. in *R. v. Clewer* (1953) 37 C.A.R. 37, at page 40. In that case there was an allegation of misconduct on the part of the trial judge and in the context of that case Lord Goddard emphasised that:-

> "the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury. If counsel is constantly interrupted both in cross-examination and examination-in-chief, and, more especially, as in this case, during his speech to the jury, his task becomes almost impossible."

This was not such a situation. The Chief Justice considered that the judge had "acted throughout the trial with complete aplomb and restraint". He indicated, however, that where what has happened is attributable to the conduct of the defendant's attorney the court would also interfere, but only when it could be established that an accused had been seriously prejudiced by what had occurred. This case was not regarded as amounting to such a situation. The Chief Justice pointed out the danger

that could result from too readily assuming that an attorney by resorting to "undignified and unbecoming practice" during a trial could ensure that the trial would be set aside on appeal.

On the evidence which is available to their Lordships of what occurred before the trial judge, their Lordships agree with the conclusions of the Court of Appeal as to this aspect of this appeal. The difficulties were brought about by the refusal of the defence advocate to accept the rulings of the trial judge. This obviously created very real difficulties for the trial judge which no doubt he dealt with as well as he could. In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice. However if there was no more to this case than the exchanges between counsel and the trial judge this would certainly not be a case in which it would be appropriate for an appellate court to intervene.

So far as the other ground is still relied on by the appellant, which was raised before the Court of Appeal, the overriding difficulty with which the appellant is faced is that, even taking into account the statement which the appellant made when he went to the police station about there being a scuffle, there was no direct or inferential evidence which raised the issues of provocation, self-defence or accident so as to require the judge to leave them to the jury. If there had been any doubt as to this, then the approach of the defendant's advocate indicated in the passage of the trial judge's notes to which reference has already been made, as to not presenting a defence, would put the matter beyond any doubt. Furthermore, as the Chief Justice said, with justification, at the end of his judgment, if "there was any serious defect in the summing up, we would not have hesitated to apply the proviso to section 44 of the Supreme Court of Judicature Act".

Their Lordships turn to the remaining ground which was raised as a result of the exchanges between counsel and the Board on the application for leave. As a result of those exchanges, evidence was obtained both from the appellant and Mr. Khan as to what occurred which resulted in the appellant not giving evidence. The decision of the appellant as to this was of the greatest importance since if he was to have any prospect of avoiding conviction, this would have been dependent upon his giving evidence which conflicted with that of the three eye witnesses called on behalf of the prosecution.

In his affidavit the appellant describes how he had no proper opportunity to give instructions to Mr. Khan before the trial started, although the case was adjourned from 20th to 21st April 1988 to enable this to be done because, as Mr. Khan explained to the trial judge in an unsuccessful attempt

to obtain a further adjournment, he had been too busy to visit the appellant in prison. He said that Mr. Khan told him, when the trial was adjourned on Friday, 22nd April 1988, that he would visit him in prison over the weekend, but Mr. Khan did not do so. The following Monday, Mr. Khan informed him that he would be going into the witness box to give evidence. However after the trial had restarted, while the only witness who remained to give evidence on behalf of the prosecution was giving that evidence, Mr. Khan went over to the dock and told the appellant that "he was not sending me in the box because of the way the trial had gone". The appellant said that he then told Mr. Khan that he still wanted to give evidence but that Mr. Khan then informed him "because of the way the trial went I was sure to be convicted. He said he was sure from the way the trial was going that I would get a retrial". The appellant added that he wanted to give evidence that "the deceased and I were in a struggle when he was wounded with the knife he had drawn". However he thought that, as he was only a few yards away from the jury, it would make him 'look bad' if he were to argue with his own lawyer. However he did, and this is confirmed by the judge's notes, inform the judge and the jury that he "was advised by my lawyer to stay silent".

Mr. Khan also provided an affidavit in which he said that he conducted the case in accordance with his instructions from the appellant along the lines of self-defence, provocation and accident; that on Friday, 22nd April 1988 he indicated to the appellant the pros and cons of giving his evidence from the witness stand or making an unsworn statement from the dock and that the appellant had opted to make an unsworn statement; that he promised to visit him in prison over the weekend to give him some pointers and guidelines on the statement but he did not do so; however on Monday morning he did see the appellant; that he appeared very nervous, he had told him not to worry, that all he had to do was speak the truth; that the appellant then "told me something and I questioned him about the 'something' he told me and he elaborated. I was taken by surprise". Very shortly after, the learned trial judge came into Court and the trial continued. He said that while the last witness was being called he was pondering what the appellant had told him and eventually, based on what the appellant had told him, he expressed the opinion that he was duty bound to advise him to remain silent and he so advised.

Independent evidence of what happened at the trial provides some support for Mr. Khan's account. If the appellant was intending to give evidence or make a statement, Mr. Khan's advice which, it was common ground, was given, that the appellant should remain silent was difficult to understand unless it was provoked by something occurring on the lines Mr. Khan described. Furthermore the approach which Mr. Khan adopted in his closing speech suggests that he felt inhibited from doing more than to put the prosecution to proof.

Nonetheless the fact remains that the appellant was, even on Mr. Khan's account, placed in a position as a result of which he did not give evidence or make a statement from the dock without his having received advice and without his being given any explanation as to what were the alternative courses which were open to him.

Their Lordships do not know what it was that the appellant told Mr. Khan. However, whatever Mr. Khan was told, as Mr. Fitzgerald argued, Mr. Khan was under a duty to investigate the matter fully with the appellant and explain the options which were open to him. He should, if necessary, have sought an adjournment for this purpose. He certainly did not fulfil the duties he owed to his client by doing no more than giving what must have been whispered advice during the course of a trial.

Faced with this evidence, Mr. Knox, on behalf of the State, in the course of his submissions, felt compelled to accept that there had been in the event a miscarriage of justice. The appellant had been deprived in reality of deciding whether or not he should give evidence or at least make a statement from the dock. It had never been explained to him how important his evidence would be to the outcome of the trial and that, without that evidence, in practice there was no defence. These were things he should most certainly have been told.

The fact that the appellant apparently said something to Mr. Khan which embarrassed him in his further conduct of the defence did not mean that he was discharged from fulfilling these minimum obligations which any advocate owes to his client. Mr. Khan, if what he was told made this necessary, could have withdrawn from the trial. Even then he would have been under a duty to explain the position to the appellant and place before the appellant the options which arose in consequence of the embarrassing position in which Mr. Khan found himself. One of those options would have been for Mr. Khan to withdraw from the case, if the course that the appellant selected was inconsistent with Mr. Khan's duty to the court.

In *R. v. McLoughlin* [1985] 1 N.Z.L.R. 106 the Court of Appeal of New Zealand was not faced with the same situation. In that case counsel and the defendant differed as to how the case should be conducted and counsel, contrary to his instructions, conducted it in the way he thought was appropriate rather than in the way his client wished. In giving the judgment of the court Hardie Boys J. said at page 107:-

> "It does happen from time to time that a barrister will find himself unable or unwilling to act in accordance with his client's wishes. They may, for example, be incompatible with his duty to the Court or with his professional obligations; or he may consider that compliance would be prejudicial to his client's best interests. Should such a circumstance arise, then he

> must inform the client that unless the instructions are changed he will be unable to act further. ... But certainly counsel may not take it upon himself to disregard his instructions and to then conduct the case as he himself thinks best.
>
> It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury. ... The present appellant has been deprived of that opportunity and justice has therefore been denied to him."

Although the facts of the present appeal are different from those in that case, the principle to which Hardie Boys J. referred applies equally here. In *R. v. Clinton* [1993] 1 W.L.R. 1181 the English authorities were reviewed in a judgment of the Court of Appeal given by Rougier J. Having done so the court made it clear that it was only in wholly exceptional circumstances that the conduct of counsel could form the basis for an appeal, but in that case the appeal was allowed because of the failure of counsel, in a case where the appellant's evidence was essential, to advise the appellant in strong terms to give evidence. Rougier J. pointed out that it is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial (at page 1188). When this is done it is clear the outcome can differ as is apparent from *R. v. Noel and De Fabrizio* (unreported): Court of Appeal (Criminal Division) 2nd December 1994.

Mr. Knox very properly drew the Board's attention to all the material which could justify the Board dismissing the appellant's appeal notwithstanding what happened at the trial. However having carefully considered Mr. Knox's argument, the Board were satisfied that this was not a case where it would be appropriate to apply the proviso. It cannot be said that, if the appellant had not been deprived of the opportunity of properly considering whether to give evidence or make a statement, he would have decided not to do so. At least if he had given evidence, it is almost certain that the judge would have been under an obligation to leave issues of accident, self-defence and possibly provocation to the jury. What would have been the outcome, if this had happened, is pure speculation.

It is for these reasons that the appeal had to be allowed.