[2016] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 1/2012

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

TINO JACKSON V R

Oswest Senior-Smith for the applicant

Ms Keisha Prince for the Crown

6 and 22 April 2016

BROOKS JA

[1] Mr Tino Jackson was convicted on 20 December 2011 in the Circuit Court for the parish of Saint Ann, for the offence of rape. He was sentenced to serve 12 years imprisonment at hard labour. Being dissatisfied with that result, he applied for permission to appeal against the conviction and sentence. His application was considered by a single judge of this court, but was refused. He has renewed it before the court.

[2] In his originally proposed grounds of appeal, Mr Jackson asserted that the trial was unfair. He also complained that his counsel at the trial failed to interview witnesses who could have supported his alibi that he was not in the parish of Saint Ann when the offence complained of was committed. During the hearing of this application, Mr Senior-Smith, appearing for Mr Jackson, sought and obtained the permission of the court to abandon those grounds, and to argue instead, a supplemental ground of appeal, namely:

> "The Applicant lost the protection of the law when the Jury received no Good Character directions from the Learned Trial Judge."

The prosecution's case

[3] The events about which the prosecution's case is concerned, took place at a house in the parish of Saint Ann. Sometime during May 2010, an 11 year old girl and her mother were staying at that house. The evidence led by the prosecution was that sometime during the night, on a day unknown during that month, the girl was lying on a bed in a room of the house. She was watching television.

[4] While she was there so engaged, Mr Jackson, who was at the time in an intimate relationship with the child's mother, entered the room. The child said that Mr Jackson commenced having forced sexual intercourse with her on the bed. He was, however, interrupted by a sound at the front grille of the house. She says that he got up and ran out of the house by way of the back grille of the house, having told her not to tell anyone of the incident.

[5] The child's evidence was, to an extent, supported by her mother's evidence. The mother said that she entered the house that night and heard as if someone was rushing to the rear door. She found the child in the bathroom crying. When asked what was wrong, the child, however, replied saying "nothing".

[6] Mr Jackson's entry to the house, shortly thereafter, convinced the mother that it was he who had previously exited through the rear door of the house. She accused him of having interfered with the child. She says that he denied having had sex with the child but admitted that he had had oral sex with her, that is, he had "sucked it".

[7] The mother testified that she did not report the matter to the police until the following week. This is because the child would not say what had happened. It was when the child eventually told her that Mr Jackson had interfered with her that the mother took her to the police and laid a complaint.

[8] There were a number of discrepancies and inconsistencies in the prosecution's case. One of the troubling inconsistencies was that the child, in examination in chief, stated that Mr Jackson did nothing to her, except putting his penis into her vagina. In cross-examination, she admitted, however, that she had told the police that he had put his mouth on her vagina. She accepted, in cross-examination, that she was not being truthful in her testimony-in-chief, when she had said that he did nothing else to her except put his penis in her vagina. She also accepted that she had not spoken the truth at the preliminary enquiry when she had said that Mr Jackson, "did not get to put his

mouth on [her] vagina" (page 60 of the transcript). Her explanation in re-examination, for these inconsistencies, was that she was embarrassed to say that Mr Jackson had used his mouth on her in that way.

[9] Another inconsistency arose in the child's evidence as to the number of times Mr Jackson had had sexual intercourse with her. In her examination in chief, she said Mr Jackson had sex with her once, lasting for about three to four minutes. During cross-examination, however, when asked if Mr Jackson had sex with her after putting his "mouth on her vagina", she told the court that "he had sex with me again" for a further "two to three minutes" (page 63 and 84 of the transcript). Again, she accepted she had not spoken the truth when she said earlier in her examination-in-chief that he had sex with her just once. When asked during re-examination as to the reason why she did not tell the court about the second occasion, she said she thought she had told the court.

The defence

[10] Mr Jackson's defence at the trial was that he was not in the parish of Saint Ann at the time that the offence was said to have occurred. He testified that he was in the parish of Portland at that time. He called no witness to support his case.

[11] Another important part of Mr Jackson's case was that the allegations were a deliberate fabrication engineered against him by the child's mother. He asserted that the mother harboured ill will against him because of a disagreement between them over her accommodation at the house at which the incident was said to have occurred.

[12] That house was said to have been occupied by a half-sister of Mr Jackson. He testified that it was he who had arranged for the mother and child to stay there. The child's mother, however, said that it was the sister (who is also her half-sister through a different father from Mr Jackson's), who had asked her to stay with her after the sister's father had died. Mr Jackson asserted that the sister wanted the child's mother to leave the house and when Mr Jackson sought to have the mother do so, the mother threatened to "f... him up" and "make his life a living hell". Those assertions were denied by the mother. Neither the prosecution nor Mr Jackson called the sister as a witness. This is despite the fact that she was said to have been in the house at all material times on the night of the alleged assault.

[13] Mr Jackson testified that he would never do an act such as that of which he had been accused. He said that he had two daughters of his own and was protective of the virtual complainant. He said at page 278 of the transcript:

> "Mi feel very upset [about] the accusation, me myself did a look out fi her daughter own sake you understand and me have two daughter. Mi have a daughter in America and mi daughter a Portland and mi have a son a Portland. Mi have three kids and two a dem a daughters and mi nuh see why mi fi fool round people pickney – people little pickney – ..."

He testified to similar effect during cross-examination. The following exchange is recorded at page 293 of the transcript:

> "Q. I am going to suggest to you, sir, that [the mother broke off the relationship with you] because you had sexual intercourse with her daughter.
>
> A. No, ma'am.

Q. Her 11 year old daughter.

A. No, ma'am. Mi nuh have sex with nobody pickney. Mi have mi own ah daughter…fi me fi think 'bout."

The summation

[14] The learned trial judge placed the majority of the issues, raised by the defence, squarely before the jury. She gave full directions on the issues of identification and alibi. She also gave full directions on the issue of discrepancies and pointed out the many discrepancies in the prosecution's case.

[15] The learned trial judge did not, however, give a "good character" direction. She did tell the jury that Mr Jackson had said that he "is a working man, had been a working man" and that he "used to look out for [the virtual complainant] and he himself had two daughters" (page 51 of the transcript of the summation). She did not, however, expand on the significance of these statements.

The submissions on behalf of Mr Jackson

[16] The main evidence, which is relevant to the ground sought to be argued on behalf of Mr Jackson, concerns the child's mother's response, when she was asked, in cross-examination, if she had viewed Mr Jackson to be a good person. The exchange, in which her answer is contained, is recorded at pages 165-166 of the transcript:

"Q. Did you view [Mr Jackson] as a good person?

A. I view him as a good person when we just met, but after I use to hear a lot of things.

HER LADYSHIP: Please say that again.

> THE WITNESS: Yes. I view him as a good person when we met, but in the relationship, people used to tell me a lot of things about him but I never listen. I used to love him and he said he love me, so I didn't have anything against him."

[17] The second area of evidence, directly concerned with the proposed ground of appeal, concerns the aspects of Mr Jackson's testimony that have been quoted above. Mr Senior-Smith also relied upon these aspects in his submissions concerning the proposed ground.

[18] Learned counsel submitted that those areas of the evidence made it obligatory for the learned trial judge to have given a good character direction to the jury. Those areas, learned counsel submitted, coupled with the fact that Mr Jackson gave sworn evidence, entitled him to a good character direction, on both the credibility limb and the propensity limb. Learned counsel even submitted that the mere fact that Mr Jackson gave sworn testimony entitled him to a good character direction on the credibility limb.

[19] The learned trial judge's failure to give a good character direction, learned counsel submitted, is fatal to the conviction. He argued that the failure cannot be overlooked in light of the many serious discrepancies in the prosecution's case, and the fact that the jury had acquitted Mr Jackson on the charge of indecent assault, with which he had also been charged on the indictment.

[20] He cited the cases of **Kevaughn Irving v R** [2010] JMCA Crim 55 and **Horace Kirby v R** [2012] JMCA Crim 10 in support of his submissions.

The Crown's response

[21] Miss Prince, on behalf of the Crown, stressed that a trial judge is under no obligation to give a good character direction unless there is evidence to warrant it. Learned counsel argued that there was no such evidence in this case. She submitted that the areas of the evidence, cited by Mr Senior-Smith, did not amount to an assertion of good character.

[22] Miss Prince, as part of her submissions, accepted the principle that an assertion of good character could be elicited from a prosecution witness. Learned counsel argued, however, that the evidence, which has been quoted above, elicited from the child's mother, was a qualified statement, while the evidence from Mr Jackson was equivocal or at least a mere statement of the fact of Mr Jackson's parental status.

[23] These bits of evidence, learned counsel submitted, at best gave rise to a situation where the learned trial judge had a discretion whether she would have given a good character direction. There was no obligation to give such a direction, Miss Prince argued, and the omission to do so should not be held to be fatal to the conviction. She argued that the basis for such a direction was so slim that it would have been more appropriate not to give it.

The analysis

[24] Mr Senior-Smith's submission concerning the effect of Mr Jackson's giving sworn testimony should be addressed first. It is correct to say that there are two possible

limbs to a good character direction. The first is the propensity limb and the second is the credibility limb. The propensity limb speaks to the likelihood, or more accurately, unlikelihood, of the person accused having committed such an offence. The credibility limb speaks to the likelihood of his being truthful in his assertions of innocence to the court. If an accused raises the issue of his good character in an unsworn statement only, the cases suggest that whereas he is entitled to a good character direction on the propensity limb, a direction on the credibility limb may be of limited effect. A full discussion on this point is unnecessary in this case, because Mr Jackson gave sworn testimony, but it was considered at paras [128]-[130] of **Leslie Moodie** [2015] JMCA Crim 16. If, however, the accused gives sworn evidence, in which he distinctly raises his good character, he is entitled to a full direction on both limbs.

[25] In addressing the issue raised by Mr Senior-Smith, it must be borne in mind that the English cases on the point must be viewed in context. In England, there is no right, since 1983, to make an unsworn statement (see section 72 of the Criminal Justice Act 1982). An accused must either give sworn testimony or remain silent. It must also be remembered that, in this jurisdiction, as well as in England, the prosecution is not entitled to adduce any evidence of bad character unless the accused had put his character in issue.

[26] Those facts should be borne in mind in considering the following statement in Blackstone's Criminal Practice 2010, where the learned editors state at paragraph F13.3:

> "There is, however, no obligation for the trial judge to deal with good character unless the issue has been raised by the defence (*Thompson v R* [1998] AC 811; *Brown v The Queen* [2006] 1 AC 1, where it was noted that a judge would be 'ill-advised' to mention good character unless he had been given information from which he could properly and safely do so). It follows that defence counsel is under an obligation to raise the issue in an appropriate case, so that the accused does not lose the benefit that the direction is designed to confer (*Teeluck v The State of Trinidad and Tobago* [2005] 1 WLR 2421)...."

In the context of the environment mentioned above, it is implicit in that extract that even if the accused does give sworn testimony, the issue of good character must be specifically raised.

[27] Curiously, however, all of the cases cited by the learned editors, in support of their statement, were from the Caribbean. They are, nonetheless, very helpful in the analysis of Mr Senior-Smith's argument on this first point.

[28] **Thompson v R** [1998] UKPC 6 was an appeal to Her Majesty in Council, originating from the Court of Appeal of the Eastern Caribbean Supreme Court. Mr Thompson had been convicted of murder. It is important to note that at his trial, he gave sworn testimony in his defence. On his appeal to the Privy Council, it was submitted to their Lordships that the trial judge had erred when he failed to enquire whether or not Mr Thompson had a good character and failed to direct the jury as to the import of a person having a good character.

[29] In assessing these submissions their Lordships stated, at paragraph 73 of their judgment, that the issue must be specifically raised:

> "...However, if it is intended to rely on the good character of the accused, **that issue must be raised by calling evidence or putting questions on that issue to witnesses for the prosecution**: see per Lord Goddard C.J. in *Rex v. Butterwasser* [1948] 1 K.B. 4, 6. Their Lordships are of opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise the issue himself: this is a duty to be discharged by the defence and not by the judge...." (Emphasis supplied)

[30] The second case cited by the learned editors of Blackstone's, is **Brown v R** [2005] UKPC 18; [2006] 1AC 1. It is a judgment of the Privy Council on an appeal from this court. The appellant in **Brown** was a police officer who had been convicted for manslaughter arising from a motor vehicle collision. He gave sworn testimony at his trial. No evidence was, however, led in his defence concerning his character. Their Lordships addressed the issue of whether an obligation had been placed on the trial judge to give a "good character" direction. They did so at paragraph 36 of their judgment:

> "[Counsel for Mr Brown] did not lay the blame [for the omission to give a good character direction] upon **the judge, who not only had no duty to raise the issue of good character but would have been ill advised to mention the appellant's character unless he was given information from which he could properly and safely do so**. Rather, he contended that it was a default on the part of defending counsel, which must lead to the conclusion that the conviction is unsafe and that there has been a miscarriage of justice: see the discussion in *Sealey v The State* [2002] UKPC 52 [(2002) 61 WIR 491], paras 26 et seq. The basis of the contention is that since the resolution of the central conflict of fact in this case depended on accepting one or other version as truthful and correct, that is to say, it was an issue of credibility, the good character direction was of especial importance." (Emphasis supplied)

[31] Finally, on this point, **Teeluck and John v The State** [2005] UKPC 14 is a decision of the Privy Council from a decision of the Court of Appeal of Trinidad and Tobago. Both appellants gave sworn evidence in the trial which culminated in their conviction for the offence of murder. They argued before their Lordships that the trial judge ought to have given a "good character" direction. This was based on testimony to the effect that neither had been previously been arrested.

[32] Their Lordships gave a number of guidelines concerning the management of cases in which the issue of the accused's good character is said to be important. Among those guidelines, set out at paragraph 33 of their judgment, is subparagraph (v), which stipulates where the obligation lies on raising the issue and how it is to be discharged. They said:

> "**The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses**: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844. . It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. **The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself**: *Thompson v The Queen, ibid.*" (Emphasis supplied)

[33] These three cases demonstrate the flaw in Mr Senior-Smith's submission, that the mere giving of sworn testimony by an accused person is sufficient to entitle him to

a "good character" direction. Learned counsel had relied on the following extract from **Horace Kirby v R** [2012] JMCA Crim 10 to support his submissions on that point:

> "[11] The second principle to be recognized is that where an accused **does not give sworn testimony** or make any pre-trial statements or answers **which raise the issue of his good character**, but raises the issue in an unsworn statement, there is no duty placed on the trial judge to give the jury directions in respect of the credibility limb of the good character direction...." (Emphasis supplied)

Mr Senior-Smith submitted that one interpretation of that extract is that if the accused merely gives sworn testimony, the issue of good character is raised. The analysis which has been set out above would, however, show that the extract should be interpreted to mean that if the accused gives sworn testimony, without more, the issue of good character should be raised during that testimony, before an obligation to give a good character direction would be imposed on the trial judge. In the absence of any other factor concerning good character, it is only if he does so that the obligation arises. If he does so during such testimony, he is entitled to a good character direction on both the propensity, as well as the credibility limb.

[34] The issue was explained in another scenario in **Norman Holmes v R** [2010] JMCA Crim 19. In that case, Morrison JA said at paragraph [47]:

> "There is no question that both the applicant, who gave sworn evidence, and his witnesses testified to his good character. Neither can there now be any question that in these circumstances the applicant was entitled to a credibility direction, that is, that a person of good character is more likely to be truthful than one of bad character, and a propensity direction, that is, that he is less likely to commit a crime, especially one of the nature with which he is charged…"

[35] This aspect of Mr Senior-Smith's submissions must, necessarily, fail.

[36] The second aspect of his submissions is the issue of whether the evidence in this case does raise the issue of good character.

[37] The question of whether a statement is made as an assertion of good character will sometimes depend upon context in which it is made. Whereas in **Bruce Golding and Damion Lowe v R** SCCA Nos 4 and 7/2004 (delivered on 18 December 2009), the accused's assertion that he was not a gunman but a "working youth", was held to be an assertion of good character, it cannot be said in every context that that statement would be an assertion of good character. The context in that case was that those accused had been charged with the gun-slaying of a man. The accused's statement was therefore, viewed as meaning that he was "less likely to be involved in incidents such" as the one leading to the charges against him (paragraph 88 of the judgment).

[38] As was the case in **Teeluck**, **Golding's** case also emphasises that the issue of an accused's good character must be "distinctly raised by him" (paragraph 90).

[39] In the instant case, the two aspects of the evidence, on which Mr Senior-Smith relied, must therefore be considered in the context of the charges on which Mr Jackson had been indicted and whether they distinctly raise the issue of his character. In respect of the context, the question was directly asked of the child's mother whether Mr Jackson was a "good person". That question, it seems, distinctly sought to raise the

issue of good character and would have done so regardless of the context. Similarly, although the mere assertion of the fact of fatherhood could be said to be a neutral statement in the context of this case, the assertion did not just rest with that bare assertion. It went further. Whether the child's mother's answer and the rest of Mr Jackson's statements, concerning his status as a father, were sufficient to create an entitlement to a good character direction will be examined below.

[40] The first aspect was the evidence adduced from the child's mother, a prosecution witness. She testified that she thought that Mr Jackson was a good person, "when [they] just met" and despite things said to her about him "[she] didn't have anything against him".

[41] Despite the fact that the mother sought to inject hearsay into her answer, the result of her testimony was that she viewed him as a good person when they met, she used to love him and she did not have anything against him. It was at least a borderline case for the purpose of raising the issue of good character. It was certainly not a negative statement.

[42] The second aspect comprised of his assertions, under oath, that he was a father of daughters and would not interfere with other people's little children. Despite Miss Prince's submission to the contrary, that assertion is, in this context, an assertion of good character. This is especially so when it is considered that he distinctly sought to raise the issue of good character with the child's mother and that her answer was, at least, not in the negative.

[43] There being an assertion of good character, which was made under oath, Mr Jackson was, therefore, entitled to a good character direction, on both limbs of that issue, namely the credibility and the propensity issues. That is the requirement set out in the various authorities set out above and is pointedly repeated in the extract from **Norman Holmes v R**, which is quoted above.

[44] The learned trial judge, did not, however, give such a direction.

[45] The failure to give the good character direction, when it is required, does not automatically amount to a miscarriage of justice. It was said in **Michael Reid v R** SCCA No 113/2007 (delivered on 3 April 2009), at pages 27-28, that the focus in each case should be the impact that the omission had on the trial and the verdict. The question to be decided in such circumstances is whether the jury, given the case as a whole, would inevitably have convicted the accused, even if the proper direction had been given.

[46] In the present case, the many instances of discrepancies and inconsistencies in the prosecution's case were such that credibility was a major issue. Their Lordships stated in paragraph 33(iv) of **Teeluck**, that "[where] credibility is in issue, a good character direction is always relevant...". In this court, in **R v Newton Clacher** SCCA No 50/2002 (delivered on 29 September 2003), Cooke JA (Ag), as he then was, endorsed the principle that "evidence of good character is part of the totality of the evidence which is for the tribunal of fact" (page 19). At page 22 he stated, as being a

guiding principle, the fact that "[e]vidence of good character is of probative significance".

[47] This was a backdrop against which it cannot be said that a good character direction, especially on the issue of credibility would, nonetheless, have resulted in a conviction. It cannot be said that the "sheer force of the evidence against the defendant was so overwhelming" (paragraph [130] of Moodie) that the case would inevitably have concluded in a conviction. In the circumstances, although the learned trial judge did place all the major discrepancies before the jury for its consideration, her failure to give a good character direction should be held to be fatal to the conviction. The conviction should, therefore, be set aside.

[48] The next issue to be considered is whether there should be a new trial ordered. Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, "if the interests of justice so require". The Privy Council in **Dennis Reid v R** (1978) 16 JLR 246, ruled that a "distinction must be made between cases in which the verdict of the jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder" (see the headnote).

[49] Their Lordships, in that case provided useful guidelines in assessing whether a new trial should be ordered in cases which fell between the extremes of those in which

a conviction on a new trial was almost inevitable and those where acquittal was the most likely result. They said in part, at page 251:

> "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."

Their Lordships also made it clear that a new trial should not be ordered if the result would be to allow the prosecution to make good any deficiencies, which were present in its case at the first trial.

[50] In the present case, the conviction would not be set aside, on the above reasoning, because of a deficiency in the prosecution's case. It would have been impugned because of an error on the part of the learned trial judge. There are, however, three aspects of the case that particularly assist in determining whether to order a new trial.

[51] The first is that almost six years have elapsed since the time of the incident. This is especially important in the context of the age of the virtual complainant. The second factor, which is not unrelated to the first, is that a number of the discrepancies in the trial stemmed from differences between what had been said by the child and her mother in their respective police statements and depositions, and what was said in their testimony at the trial. With the passage of further time, bearing in mind the age of the child, there are likely to be even further difficulties of that nature in the prosecution's case. The third factor is that Mr Jackson has served over four years imprisonment since his conviction.

[52] Bearing all these factors in mind, it is in the interests of justice that no new trial be ordered. Based on the above, the application for permission to appeal against conviction and sentence should be granted and the hearing of the application should be treated as the hearing of the appeal. The conviction should be quashed, the sentence set aside and a judgment and verdict of acquittal should be substituted for the conviction. It is ordered accordingly.