JAMAICA

IN THE COURT OF APPEAL

ON REFERRAL FROM HER MAJESTY IN COUNCIL

SUPREME COURT CRIMINAL APPEAL NO 61/2009

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

LESLIE McLEOD v R

Delano Harrison QC for the appellant

Miss Paula Llewellyn QC Director of Public Prosecutions and Mrs Karen Seymour-Johnson for the Crown

22 June , 31 July and 27 October 2017

P WILLIAMS JA

[1] The appellant Leslie McLeod was convicted of murder in 2009. His application for leave to appeal was refused by this court on 20 December 2012. The appellant appealed to the Privy Council. On 30 January 2017, the Board, in its judgment delivered on its behalf by Lord Hughes, remitted the appeal to this court. At paragraph [19] of the judgment, Lord Hughes stated inter alia:

> "19... the Board will humbly advise Her Majesty that the appeal should be remitted to the Court of Appeal for resolution of the factual dispute raised by the appellant's contentions about counsel's failure to confer with him, and consequent determination."

[2] The appeal was accordingly remitted to this court and we held a hearing on 22 June 2017 to deal with the matter as recommended by the Board. On 31 July 2017, we made the following order:

> "The appeal is dismissed. Conviction and sentence are affirmed. Sentence is to be reckoned as having commenced on 28 May 2009."

These are our promised reasons for the decision.

Background

[3] In the application for permission to appeal to this court, Mr Harrison QC canvassed some five grounds of appeal to challenge the appellant's conviction and sentence. Lord Hughes, in the judgment of the Board, observed the following in paragraph [1] :

> "Before the Court of Appeal he canvassed a number of grounds of appeal, of which only a single one survives to be argued before the Board. That surviving ground centres upon his assertion, made after conviction, that he had wished to give evidence on his own behalf but had been unable to obtain any opportunity to explain that desire to his counsel."

[4] The actual ground that survived was canvassed before this court in the following terms:

> "In light of the fact that the Applicant particularly desired to testify in his defence, his counsel's failure to consult with

> him at any time prior to the commencement of the instant trial, so as to receive proper instructions from him in that regard, deprived him of the opportunity to present his defence to the jury adequately and/or in the manner actually desired. In the result a substantial miscarriage of justice occurred (see pages 184-186; applicant's affidavit sworn to on 14 November 2011 and filed herein on 21 November 2011)."

[5] The facts leading to the conviction of the appellant can be briefly stated. The trial that commenced on 18 May 2009 was a re-trial, because the jury had been unable to agree at the first trial, some 15 months earlier. The prosecution relied on the evidence of a single eyewitness, Mr Michael Reid, who testified to having seen the appellant chop Junior Wilson, the deceased, several times in the early morning of 19 July 2004. Mr Reid was a boyhood friend of the deceased and testified that he had known the appellant for over 10 years before the incident. Although the incident had taken place at about 2 o'clock on the morning of 19 July, Mr Reid said he was able to see clearly with the assistance of streetlights that were located on the road on both side of the appellant's house at 41 Duhaney Drive. The incident had occurred near the appellant's home.

[6] The defence was an alibi. In an unsworn statement from the dock, the appellant said he spent the night of 19 July 2004 asleep at his home and had not heard anything. He had left home early the following morning and upon his return in the afternoon he was told that someone had "got chop" in the vicinity of his home. He said it was after his arrest and charge and being placed before the court that he saw Mr Reid, who was previously unknown to him, for the first time. In effect, he denied committing the acts that Mr Reid had testified to seeing him commit.

[7] One witness was called on behalf of the defence. He was a witness who spoke to the appellant's character, having known the appellant for a number of years. He described the appellant to be a "quiet, hard-working person" who was willing to help and was not a violent person.

[8] The jury retired for 22 minutes before returning a verdict of guilty of murder. On 28 May 2009, the appellant was sentenced to 15 years' imprisonment and the learned trial judge stipulated that he should serve a minimum of 10 years before becoming eligible for parole.

[9] At paragraph [18] of the judgment of the Board, Lord Hoffman set out what may well be regarded as the parameters within which this court was to approach this issue:

> "18. There may or may not be a plain conclusion to be drawn one way or the other on the factual dispute. It would, however, be very unsatisfactory for the Board to attempt to reach such a conclusion on paper, when the Court of Appeal, sitting locally and with daily practical experience of the course of trials in the jurisdiction where the events occurred, did not feel able to do so. The Board is accordingly persuaded that the only proper course is for the appeal to be remitted to the Court Appeal for determination of the factual issue between the appellant and counsel. How that court goes about its resolution must be for it to decide. The Board is conscious that no request was previously made that oral evidence should be heard, although now the stance of the appellant is that it should be. The Court of Appeal must decide whether it needs to hear the appellant, if he wishes to give evidence, and, if it does, whether it is also necessary to hear Mr Palmer. The latter decision no doubt falls to be made after hearing the appellant, if that is what occurs. It is not the law that merely by making a complaint an appellant can require counsel to be cross examined, but

> this may in a particular case be the correct course for the court to take. For the present, the opportunity to deal with the case in any way the court thinks fit should be preserved by a direction that both the appellant and Mr Palmer attend the further hearing in the Court of Appeal unless in the meantime that court makes some different order."

[10] In an effort to deal with the single matter of resolving the factual issue, as directed by the Board, the appellant and the attorney-at-law who had appeared for him at trial, Mr Leon Palmer, attended the hearing. The appellant was advised of the reason for the hearing and he was invited to indicate whether he wished to give evidence. The appellant did not wish to do so and indicated that he wished to rely on his affidavit, which he said was "the truth of what had happened". He also indicated that "based on the time span [he] would not be clear on all the questions to remember them clearly".

[11] Hearing from the appellant would have greatly assisted this court in resolving the factual issue between himself and his counsel. With his indicating that he did not wish to give any further evidence than that contained in his affidavit, this court felt it would not be appropriate to hear from Mr Palmer in light of the observations made by the Board.

The submissions

[12] Mr Harrison submitted that this court is not being called upon to determine the truth about the central issue of the complaint. He contended that the Board did not stipulate what this court is required to do in paragraph [18] of their judgment. He, in

his usual eloquence, stated that the paragraph is "rife with discretionary pronouncements". He acknowledged that this court is back to the position of having two affidavits not determined one way or the other as to the truth, with the appellant deciding not to give evidence.

[13] Mr Harrison submitted that the court should resolve the dispute as to fact, by applying the standard of the balance of probabilities in favour of the appellant and accept his version as the truth. He submitted that this standard of proof was appropriate in this circumstance as the appellant is to be viewed in a manner similar to a defendant in a criminal trial who swears to any issue at that trial. This standard is the civil standard and is that which is required when the legal burden lies upon the defence as pronounced by the decision of **R v Carr-Briant** [1943] 2 All ER 156.

[14] Mr Harrison's further submission was that on such an approach to the appellant's affidavit in this matter, the exchange between the trial judge in the matter and Mr Palmer "plainly supports a finding by this court that the appellant might more probably than not, have been swearing the truth on the particular issue in his affidavit". He observed that at the close of the prosecution's case there was a "very long exchange" between the trial judge and Mr Palmer with the latter seeking an adjournment to consult with his client in a private place. Mr Harrison apart from describing this exchange as "very long" also said it was "recorded on several pages of the trial transcript". This, Mr Harrison contended, supported the appellant's position that there had been no proper consultation between him and his attorney-at-law prior to this point in the trial.

[15] Mr Harrison's ultimate submission was that the result of adopting the **Carr-Briant** approach would lead to the conclusion that the appellant might have been deprived of his right to put forward his proper defence due to counsel's failure in his duties to him, as client, to communicate with him at all. He relied on the Privy Council's decision of **Sankar v The State of Trinidad and Tobago** [1955] 1 All ER 236 which he submitted comes close to the circumstances of this case. He highlighted the fact that in that case the Board had held that because the appellant had been deprived of deciding whether he should give evidence or at least make a statement from the dock, there had been a miscarriage of justice. Hence, he submitted, in the instant case, if this court resolved the dispute as to fact, by applying the lower standard in favour of the appellant, this court should accept his version as true and the result would be the conclusion that he was denied a fair trial and his conviction should be quashed.

[16] Mr Harrison further submitted that in the circumstances a new trial would not be appropriate. He relied on **R v Dennis Reid** (1978) 27 WIR 254 as outlining the matters to be borne in mind in making a determination as to whether a re-trial should be ordered.

[17] In her response for the Crown, the Director submitted that the only way this court could properly resolve the factual issues would be by assessing the credibility of the assertions by the questioning of the affiants in circumstances which allowed for the observance of the way both parties responded when questioned. The Director noted that the cases of **R v Clinton** [1993] 2 All E R 998, **Bethel v The State of**

Trinidad and Tobago (No 2) (2000) 59 WIR 451 and this court's decision of **Michael Lawrence v R** [2015] JMCA Crim 24 provide guidance as to how this court should approach the matter.

[18] The Director was concerned with the precedent that may be set if this court were in these circumstances to accept the appellant's allegations as true and rely on it to set aside his conviction. She submitted it would be wrong if all an appellant would have to do is cite this sort of argument, swear it on affidavit and then decline from giving evidence on oath so that his credibility can be tested and have his conviction overturned even in circumstances where the case against him was compelling and credible.

[19] In concluding her submissions, the Director contended that if this court accepts the version of facts given by Mr Palmer, it would be obliged to uphold the conviction and sentence. However, if this court accepts the appellant's evidence that the conduct of Mr Palmer amounted to flagrant dereliction of duty by counsel to his client and thereby denied the appellant the right to due process, then the conviction would be unsafe and ought to be quashed. However, if this court accepts all or part of the appellant's evidence and submissions but finds that there was no miscarriage of justice or abrogation of the appellant's right to a fair trial, the proviso contained in section 14 of the Judicature (Appellate Jurisdiction) Act should be applied and the conviction and sentence affirmed.

Discussion and disposal

[20] The issue before this court is the resolution of the factual issue raised by the appellant's contentions about counsel's failure to confer with him. In the previous decision of this court in this matter, reported at [2012] JMCA Crim 59, the need to resolve the factual dispute was recognised. At paragraph [63] Morrison P stated:

> "In the instant case, although we did have the benefit of affidavits from the applicant and Mr Palmer we have not found it possible to resolve the conflict between them in the absence of cross-examination and the opportunity to observe them giving evidence in person. We consider that the court is therefore in no position to determine where the truth lies as between them on the question of the instructions received as regards the giving by the former of an unsworn statement."

[21] Against that background, the basis on which the Board chose to remit the matter can be well appreciated. This court is indeed best placed in a position to resolve the problem. Although the Board did not expressly state this, a resolution would be best achieved by the method identified by this court in its previous decision. However, with the appellant exercising his right and deciding not to give evidence, this court is once more denied the opportunity to conduct the enquiry and most significantly to make observations of the parties giving evidence to assist in determining their credibility.

[22] The approach suggested by Mr Harrison of applying the standard applicable when the legal burden lies upon the defence, requires a consideration of the decision

he relied on namely **R v Carr-Briant**, which is generally accepted as providing the correct formulation of the principle.

[23] In that case, the appellant was prosecuted under the Prevention Corruption Act with the offence of corruptly making a gift or loan to a person in the employ of the War Department as an inducement to show, or as a reward for showing favour to him. The section under which he was charged provided that "a consideration shall be deemed to be given corruptly unless the contrary is proved". Humphreys J in delivering the judgment of the court had this to say at pages 158-159:

> "In our judgment, in any case where either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved" the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

[24] In the instant case, the applicability of this standard in approaching the issue at hand, whilst attractive, is limited by the fact there is no presumption against the appellant in these circumstances. It is he who is alleging what amounts to improper conduct on the part of his counsel and thus it is for him to prove. He is not entitled to benefit from a lower standard of proof merely because he is the appellant/defendant. The same fair standard, which is to be applied when considering the affidavit of Mr Palmer, made in response to his allegations, must be applicable to the affidavit he relies on outlining those allegations.

[25] The position of this court in approaching assertions of this type made by appellants against their counsel was noted in two of its recent decisions. In **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered on 3 April 2009, Morrison JA (as he then was) writing on behalf of the court stated the following inter alia at paragraph 44 of the judgment:

> "44. In our view, the following principles may be deduced from the authorities to which we have been referred:
>
> (iv) On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be relevance and will ordinarily, in the absence of other factors, be accepted by the court (**Bethel v The State**, page 398; **Muirhead v R** paragraphs 30 and 37)."

[26] In **Michael Lawrence v R** [2015] JMCA Crim 24, F Williams JA (Ag) (as he then was) had this to say at paragraph [15]:

> "While we recognise that it is open to us to decide which account (or, indeed which part of the two accounts), to accept or reject, we approach the matter bearing in mind the words in paragraph [44] (iv) of the summary of the principles set out by Morrison JA in the case of **Michael Reid**. It will be remembered that the general admonition to

> be gleaned from those words is that the assertions of an appellant should be approached with some amount of caution, as they could very well be self-serving. A fortiori, we might observe that where (as here) there exists the likelihood of an appellant spending an extended period (here 20 years) confined in less-than-ideal conditions, that would provide an added or stronger incentive to make every effort to have the appeal succeed."

[27] In the instant case therefore, the assertions of the appellant need be approached with the caution appropriate to the circumstances. The major factor, Mr Harrison has urged as being supportive of the appellant's assertion, is the exchange between the learned trial judge and Mr Palmer. The transcript of what transpired however does not support Mr Harrison's contention that it was very long and suggestive that defence counsel was begging the learned trial judge for an opportunity to consult with his client.

[28] The following exchange took place at the close of the case for the prosecution between Mr Palmer and the learned trial judge:

> " Mr L Palmer: May it please you m' Lady I need to have a brief consultation with my client and I am wondering if the court could afford me - I ask that the accused man be taken to a place I can consult with him?
>
> Her Ladyship: Mr Palmer, you are serious, are you?
>
> Mr L Palmer: Yes m' Lady.
>
> Her Ladyship: You have exactly two minutes and no more and he is not going anywhere but right there.

Mr L Palmer: Can't I have the privilege of consulting with my client in private?

Her Ladyship: At this point, at this point? The only other witness that was brought this morning was the doctor and you were off for all day yesterday, you were off, he was on the building.

Mr L Palmer: M' Lady, I am just asking for time to...

Her Ladyship: No, the answer is no. You asked the question, I shouldn't argue with you I should have just said no. If you want two minutes you can have it and that's it.

Mr L Palmer: Two minutes?

Her Ladyship: Uhm, just not Jamaican two either

Mr L Palmer: But can't I speak with my client in a private place? Very well m' Lady.

(Mr Palmer consulted with client)

Mr Foreman and members of the jury, the accused will give a statement from the dock."

[29] In his affidavit, the appellant described what happened between himself and Mr Palmer during the consultation as follows:

"15. Given that maximum grant of two minutes by the judge, Mr Palmer came up to me in the dock and told me in a soft voice that I should not show any remorse; I should bear in mind whatever the witnesses had said against me and just respond to that. That was all. Mr Palmer then turned from near the dock and left.

16. There was at that time not a single word between us as to my desire relating to my defence. The circumstances (the time limit, the lack of privacy of my deep sense of embarrassment) did not lend

themselves to any such exchange between my counsel and me."

[30] In response, Mr Palmer asserted this explanation of the events in his affidavit:

> "(8) That the trial judge having refused to grant the adjournment, I approached the applicant and informed him that his witness was waiting outside of the court room but that he would have to make his statement of [sic] give his evidence before I called the witness. The applicant agreed that he would proceed to make his statement from the dock.
>
> (9) That which [sic] I spoke softly to the Applicant out of the hearing of the Jury, I did not tell the applicant that he should not show any remorse. I do not understand what is meant by that comment."

[31] It is clear that Mr Palmer was denied an opportunity to consult with the appellant but the exchange that took place between Mr Palmer and the learned trial judge was not as long as Mr Harrison contended. In any event, the length of the exchange is immaterial since the fact is that from the records Mr Palmer did not consult with the appellant in privacy or for any appreciably time at that point in the trial. There is no indication why Mr Palmer was seeking time to consult with his client.

[32] On the one hand, therefore, it may well appear that Mr Palmer was seeking to discuss the options available to the appellant in advancing the defence. It is necessary to bear in mind the fact that there had been a previous trial at which the appellant had also given an unsworn statement. The circumstances of the appellant adopting that course must be considered. The appellant asserted that Mr Palmer had

instructed him, while preparing for the first trial, that he would be giving a statement from the dock. He stated the following:

> "4. At the time I had no idea of the difference between a statement from the dock and evidence from the witness box as I had never before attended at, or participated in, any court proceedings whatever. So, I was totally in my lawyer's hand and relied without hesitation on him and his experience. The difference in the effect of those two options was not then explained to me."

[33] Mr Palmer refuted those allegations and stated:

> "3. That I unequivocally deny and refute the allegations made by the applicant that I singlehandedly took the decision to have him give an unsworn statement at his trial without prior consultation with him.
>
> 4. That leading up to the Applicants first trial and again at his re-trial, I explained to him the difference between making an unsworn statement from the Dock and how such statement or evidence may be treated and giving evidence on oath, and having done so, he elected to make a statement from the Dock."

[34] In light of these contending assertions, it cannot be accepted, without more, that the exchange between Mr Palmer and the learned trial judge must be viewed as supporting the appellant's contention that Mr Palmer had not at any time communicated with him regarding the issue at hand.

[35] The appellant stated further in his affidavit that it was between his first trial and the second that he formed the view that he would have to give evidence from

the witness box at his re-trial. He said that despite several attempts to communicate with Mr Palmer, he failed to have audience with him. The exact nature of these attempts was not specified. The appellant was on bail while awaiting the retrial, which was a period of over a year from 14 February 2008 to 18 May 2009.

[36] Mr Palmer asserted that he did have consultations with the appellant. He stated:

> "5. It is totally false to say that I did not consult with the applicant before the re-trial. Upon receipt of the transcript of the first trial, I had consultations with the Applicant, reviewing the evidence of the main prosecution witness and decided on the way forward for the re-trial.
>
> 6. That after the jury was empanelled and the Applicant [sic] bail revoked, I consulted with him again and he expressed the desire to have one of his neighbours as his witness at the trial. The Applicant gave me the witness name address and telephone number and I eventually found the witness and took a statement from him. At no time did the Applicant express to me any concern which he might have had about giving a statement at the trial as against giving his evidence on oath."

[37] It is significant to note that the Board in its decision appreciated that these assertions gave rise to arguments on each side. At paragraph [17] the following observation was made:

> "There are no doubt arguments on each side. For the appellant, Miss Agnew QC points to the sentence in Mr Palmer's affidavit dealing with the brief conversation across the dock rail and which is recorded at paragraph 10 above; she contends that it shows that the question of whether the appellant was to give evidence or make an unsworn

> statement remained at that stage unresolved. She relies on the absence of any written record whether by diary entry, note or otherwise, made by counsel to confirm consultations which he says took place. For the Crown, Ms Masood points to the confirmed presence of a transcript of the first trial in counsel's hands, to the undoubted fact that the character witness was indeed called at the re-trial when he had not been called at the first trial, to the bareness of the appellants complaint, without any indication of when, where or how he tried but failed to contact Mr Palmer, and to the improbability that no opportunity arose either in the months between the trials or at any time at court."

[38] It is regretted that Mr Palmer had no proof of the consultations and it is unfortunate that he did not see fit to have his client's instructions in writing. This is so especially since this court has found it necessary in previous decisions to encourage counsel to be minded to keep such records. Morrison JA observed in this court's previous decision relative to this matter at paragraph [63] "such a record would surely have served to break the deadlock between counsel and his client on this vital issue of fact". However, the fact there was a witness on the appellant's behalf at the second trial, who had not participated in the first, lends strong support to the contention that some consultation must have taken place.

[39] Mr Harrison is relying mainly on the circumstances leading up to the fact of the brief conversation across the dock rail as a basis on which the appellant's assertions should be preferred. It is not surprising that he chose to urge this court to adopt the approach of the Board in the case of **Sankar v The State of Trinidad and Tobago.** In that case, similar circumstances arose in so far as counsel for the appellant at trial, after a short conference between himself and the appellant,

advised the court that he would not be presenting a defence. Counsel indicated that he was putting the prosecution to proof and in his closing statement he told the jury that no defence had been submitted and if the jury accepted the prosecution's case they should find the appellant guilty.

[40] Before the Board there was only one ground of appeal which was determinative of the outcome of the appeal and which was advanced for the first time at that hearing. Lord Woolf in delivering the judgment of the Board, summed up the substance of the single ground at page 238 as follows:

> "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 further evidence."

[41] Another similarity between that case and the instant case is borne out in the affidavit of that appellant where the complaint there was that he had no proper opportunity to give instructions to his counsel before the trial. The case was adjourned for a day to enable this to be done. Further, the appellant stated that after the trial commenced and without any discussion, the defence counsel advised him that he would be going into the witness box to give evidence. The appellant said that it was while the only witness remaining on behalf of the prosecution was giving evidence; his counsel told him "he was not sending me in the box because of the

way the trial had gone". Despite his objections, defence counsel maintained this stance and the appellant informed the judge and jury that he was advised by his lawyer to stay silent.

[42] Defence counsel provided an affidavit and explained how he had indeed felt duty bound to advise the appellant to remain silent. He described how the appellant had told him 'something' that took him by surprise and ultimately led him to give the appellant the instructions he did. A significant finding by the Board is found at page 241 where Lord Woolf said:

> "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."

[43] The significance of this finding is that there was in effect no factual dispute to be resolved in arriving at the conclusion that the defence counsel had not fulfilled the duties he owed to his client by doing no more than giving whispered advice during the course of a trial. The Board held that because the appellant had been deprived in reality of deciding whether he should give evidence or at least make a statement from the dock, there had been a miscarriage of justice. This was so since it could not be said that if the appellant were given the opportunity of properly considering whether to give evidence or make a statement he would have decided not to do so. Further, if he had given evidence, it was almost certain that the judge would have

been under an obligation to leave the issues of accident, self-defence and provocation to the jury, with the possibility of a different outcome.

[44] In the instant case, the appellant was not deprived of an opportunity of stating his defence. Further, he had a witness testify to his good character and the learned trial judge gave directions to the jury relating to, not only his propensity for committing such an offence, but to the impact of such evidence on his credibility. The learned trial judge had given the following directions:

> "Good character cannot by itself provide a defence to a criminal charge but it is evidence which you should take into account in the accused's favour in the following ways: In the first place, sorry, although the defendant did not give evidence, he gave you what is called an unsworn evidence. He gave you what is called an unsworn statement. In considering what weight you should give to that, if you should give it, you should bear in mind that it was made by a person of good character and to take that into account when deciding whether you can believe what he said to you. In other words, because he's a person of good character, you have to take into account when you decide whether or not you can believe what he gave you in his unsworn statement. In the second place, the fact that he is of good character may mean he is less likely than otherwise might be the case to commit this crime. Now I have said that these are matters to which you should have regard in this defendant's favour."

[45] The defence raised was that of alibi and it was fairly left to the jury. While it cannot be denied that the jury was correctly directed that the unsworn statement was of less weight than sworn evidence, the appellant in this case cannot be viewed as falling into the same category as Mr Sankar who was deprived totally of any

opportunity to put forward his defence and thus had nothing left for the consideration of the jury.

[46] In any event, without the resolution as proposed by Mr Harrison, this court had previously considered the matter on the hypothesis that the appellant's version was the correct one and that he was not or not adequately advised on whether he should make an unsworn statement or give evidence. At paragraph [64] Morrison JA stated:

> "In so doing, we will adopt the approach sanctioned by **Clinton** and subsequently developed and refined in the later authorities, that is, to consider (1) the impact which the alleged faulty conduct of the case has had on the trial and the verdict, and/or (ii) whether the misconduct alleged on the part of counsel was so extreme as the result in a denial of due process to the applicant."

[47] At the penultimate paragraph of the decision, Morrison JA stated:

> "It therefore seems to us that, taking all factors into account, the failure of the applicant to give sworn evidence has not been shown to have had a significant impact on the trial and the verdict, particularly in the light of the fact that there was nothing in the applicant's unsworn statement to suggest that it might more effectively have been put before the jury in the form of sworn evidence. In so far as the second question is concerned, we cannot in these circumstances regard the alleged failure by counsel to afford the applicant an opportunity to consider giving evidence on oath as falling within the category of egregious breaches given as examples by de la Bastide CJ in **Bethel No. 2** (para. [57] above). Given the fact that the applicant was able to put forward his defence of alibi in his unsworn statement, thus obliging the judge to deal with it in the summing up, it seems to us that it cannot be said that

> counsel's alleged misconduct was such as to result in a denial of due process to the applicant."

[48] This court can think of one other way to resolve the factual dispute other than by hearing from the parties. In these circumstances, it seems that any fact that exists independent of the contending assertions that can support any of these assertions should be considered. The fact that the character witness was called on behalf of the defence at the second trial and not at the first strongly suggests that consultation had to have taken place. This leads to the probability that there would have been consultations which would have encompassed the question of whether the appellant would give evidence or not. The appellant's assertion that if he "had the opportunity by which [he] could have advised Mr Palmer that, after serious thought on the matter, [he] strongly desired to give evidence in [his] defence" at the second trial is open to be questioned. This is so in light of the fact that it is apparent that the information about this witness could only have come from him and he would therefore have had such an opportunity. The conclusion to be drawn using this approach means that the factual dispute can be resolved by accepting the version of events given by Mr Palmer in his affidavit.

[49] Thus, with this resolution arrived at, there is no reason to resile from the conclusion previously arrived at. Accordingly, it is for these reasons that we decided in the manner set out at paragraph [2] above.