[2020] JMCA Crim 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 41/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

CHADWICK BLISSETT v R

Hugh Wilson and Ms Nancy Anderson for the applicant

Miss Sophia Thomas for the Crown

17, 20 December 2019 and 2 December 2020

F WILLIAMS JA

Background

[1] This matter came before us as a renewed application for leave to appeal conviction and sentence which the single judge had refused on 4 April 2018. The application arose from the applicant's conviction on 25 March 2015 in the Home Circuit Court for the offence of murder and his sentencing on 19 June 2015 to life imprisonment, with the stipulation that he serve 15 years' imprisonment before becoming eligible for parole.

[2] The applicant's conviction and sentence relate to the death of Mr Cletus Graham, a quantity surveyor, whose decomposing, nude body was discovered wrapped in a sheet, under a bed in his apartment in the parish of Saint Andrew on 17 May 2012.

[3] This matter came before us on 17 December 2019. After hearing the submissions of counsel on both sides, on 20 December 2019 we made the following order:

> "(i) The application for leave to appeal is refused.
>
> (ii) The conviction and sentence are affirmed.
>
> (iii) The sentence is to be reckoned as having commenced on the date on 19 June 2015."

[4] We had then promised to provide brief written reasons for the making of that order, which promise this judgment is meant to fulfil.

Summary of Crown's case

[5] Mr Graham had last been seen alive on 14 May 2012, driving a Mitsubishi motor vehicle. That motor vehicle was involved in an accident in Old Harbour, Saint Catherine on 15 May 2012. Evidence was given that it was not being driven by Mr Graham at the time of the accident; but by the applicant.

[6] There is no dispute that Mr Graham and the applicant knew each other and that the applicant would from time to time visit Mr Graham at his apartment.

[7] The Crown's case was built on circumstantial evidence, which included the following strands: (i) the applicant admitted that he was in the company of Mr Graham on the evening of 14 May 2012 and stayed at his apartment for some two hours; (ii) Mr

Graham was last seen alive on the 14 May 2012, driving a Mitsubishi motor vehicle; (iii) there was evidence from one Constable Bonner that the applicant was seen driving Mr Graham's motorcar and was involved in a motor vehicle accident on 15 May 2012, when he gave his name as David Chambers; (iv) the morning of the accident the applicant was observed to have scratches to his face and neck; (v) a laptop bag belonging to Mr Graham was found at the applicant's home; (vi) when the applicant was taken into custody on 27 January 2013, the police took two mobile telephones, one of which was stated in evidence to have belonged to Mr Graham; (vii) a telephone that belonged to Mr Graham was bought by one Tevin Linton, who gave evidence that he made contact with the seller of the telephone by calling a particular number. The applicant admitted that that number was his; (viii) the police seized from the applicant a telephone with a personal identification number (PIN) that matched the known PIN used by Mr Graham; (ix) on 16 May 2012, Mr Graham's car was found on Job's Lane, Spanish Town, Saint Catherine, the same road on which the applicant lived; and (x) the DNA profile identified in the applicant's buccal swab was similar to the DNA profile identified in a sample taken from a drop of blood found in Mr Graham's apartment. Evidence was also led at the trial to say that the applicant could not be excluded as the source of blood that was found at Mr Graham's apartment. The evidence was that the probability of someone other than the applicant having those identifying DNA profile was one in many million.

A summary of the defence

[8] In an unsworn statement, the applicant stated that he was a mathematics teacher at the Caribbean Secondary Examination Certificate level and a teacher of pure

mathematics at the Caribbean Advanced Proficiency Examination level, living in Spanish Town, in the parish of Saint Catherine. He admitted knowing Mr Graham (whom he referred to as "Cletus") since 2007 and that they had maintained a good friendship. It was Mr Graham who helped him to get his first job in 2008. He said he last visited him on 14 May 2012 when he had met Mr Graham at his (Mr Graham's request) and travelled in Mr Graham's car to his apartment. He stayed with Mr Graham for two hours after which Mr Graham took him home. He borrowed Mr Graham's laptop bag after Mr Graham told him that he was leaving the island on Wednesday of that week. He subsequently tried calling Mr Graham but could not get him.

[9] The applicant denied being in Old Harbour on the morning of 15 May 2012 or ever driving Mr Graham's car. He also denied having been involved in a motor vehicle accident at any time, or, as a police witness testified, ever having had fresh scratches, scrapes or cuts on his face. In relation to the telephone taken from him that the Crown contended belonged to Mr Graham, the applicant denied that it did, asserting that it had been a gift to him in 2011 from his aunt Annmarie Parkinson who had visited the island from England where she resides. He said that he had nothing to hide, that is why he consented to give a buccal swab for analysis and unlocked all telephones and electronic devices that the police took from him. He said (at page 1056, lines 15-16 of the transcript):

> "I did not kill Cletus Graham, he was my friend."

The grounds of appeal

[10] On behalf of the applicant, Mr Hugh Wilson filed, sought and was granted leave to argue the following grounds of appeal and to abandon those originally filed:

> "1. The verdict of the jury should be set aside on the ground that it was unreasonable or cannot be supported by the evidence.
>
> 2. The learned trial judge erred in failing to provide any sufficient direction to the jury on the inherent limitations of a partial Deoxyribonucleic (DNA) profile in respect to the blood drop on the living room floor.
>
> 3. The learned trial judge erred in permitting the prosecution to adduce into evidence exceptionally high numerical expression of statistical probability of a random match thereby depriving the applicant of a fair trial."

Ground 1: the verdict of the jury should be set aside on the ground that it was unreasonable or cannot be supported by the evidence

Summary of submissions

For the applicant

[11] In relation to ground 1, Mr Wilson argued that the Crown's case was constructed on two planks: (i) DNA evidence and (ii) identification evidence – that is evidence given by witnesses who claimed to have seen the applicant driving Mr Graham's motor vehicle on 15 May 2012 in Old Harbour, Saint Catherine. Both planks were weak, he submitted. For example, there is no evidence of when the passive drop of blood, (which, on the Crown's case, matched the applicant's DNA profile) was deposited – whether before or after the murder. He also argued that, although a theory of the Crown's case was that the scratches to the applicant's face and neck that Constable Bonner had testified to seeing, were indicative of a struggle between the deceased and his killer, it was noteworthy that that theory was not supported by the scientific evidence. Mr Wilson also sought to portray the identification evidence as unreliable, given the fact that it took Constable Bonner some time to identify the applicant at the identification parade; and

that Constable Foster, who was supposed to have been present when the person said to have been the applicant was spoken to, did not identify him.

[12] He acknowledged, however, that the case of **R v Joseph Lao** (1973) 12 JLR 1218, to which both he and Miss Thomas referred, represented "a high test and hurdle" in relation to this case.

For the Crown

[13] On behalf of the Crown, Miss Thomas submitted that the jury was presented with overwhelming circumstantial evidence on which they could be satisfied of the applicant's guilt. In support of this submission, she set out the various strands of the circumstantial evidence on which the Crown relied. She further submitted that the learned trial judge gave proper directions on all the areas of the evidence; but in particular, those in respect of which Mr Wilson expressed concern. She also submitted that the jury, having considered the evidence and the directions, properly returned a guilty verdict.

[14] In particular, she submitted, the learned trial judge highlighted what might be regarded as weaknesses in the prosecution's case – specifically relating to identification and the DNA evidence.

Discussion

[15] The headnote to the case of **R v Joseph Lao** reads as follows:

> "Where an applicant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters

> which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

[16] That is the test or standard that Mr Wilson, quite properly, acknowledged to be a high hurdle. Applying this test, the question that arises on this ground is: can the verdict in this case, having regard to the evidence, be said to be unreasonable and insupportable?

[17] With respect to the identification evidence, a review of the summation discloses that the learned trial judge addressed that issue sufficiently and, more importantly, having regard to the challenge mounted on the applicant's behalf, he highlighted potential weaknesses in the identification evidence that was led. For example, at pages 1257, line 13 to 1258, line 5 of the transcript, the learned judge directed the jury as follows:

> "Constable Bonner identified a photograph which he said was a photograph of this defendant, and that this is the person he had seen at the scene of the accident in 2012, that's on the 15th of May 2012. You would have to examine his evidence, Madam Foreman and Members of the Jury, to see how reliable you find it. You have to examine it bearing in mind the time he took to make this identification, he said about nine to ten minutes having viewed these photographs or these pictures four times. And having after that requested to see two other photographs before he made up his mind. The Prosecution is saying that he wanted to be certain, the Defence is saying it can only have been so because he wasn't sure, and that the identification is poor."

[18] While we quite understand the concern about the time taken to make the identification, it should not diminish the importance of the fact that it was the applicant who was the sole suspect on the parade; and that he was, at the end of the day, identified.

[19] Another example of the learned trial judge's addressing issues raised by Mr Wilson in his quest to overturn the conviction is to be found at page 1262, lines 4 to 15 of the transcript. This is in relation to the finding of the drop of blood on the living room floor of Mr Graham's apartment. The learned trial judge is recorded as saying:

> "Then there is the question of the blood drop in the living room which he said the great probability is that it came from this defendant. You noticed, however, Madam Foreman and members of the jury, that there is no evidence given as to when this blood drop could have been deposited there. They are not able to do that because the blood would have dried up. All the blood that you saw was dry. However, the Prosecution is asking you to say that this drop was deposited during the night of the 14th of May."

[20] These are but two examples of the learned trial judge's bringing directly to the jury's attention matters that might be regarded as potential weaknesses in the Crown's case. The learned trial judge not only brought them to the jury's attention; but also directed them to exercise caution in how they assessed these matters. Looking at the summation as a whole, we took the view that the applicant has failed to scale the high hurdle posed by the test in **R v Joseph Lao** and therefore failed on this ground.

Ground 2: the learned trial judge erred in failing to provide any sufficient direction to the jury on the inherent limitations of a partial Deoxyribonucleic (DNA) profile in respect to the blood drop on the living room floor

Summary of submissions

For the applicant

[21] In relation to this ground, Mr Wilson submitted that the only guidance that the learned trial judge gave to the jury was that they should consider the reliability of the conclusion arrived at by the expert, Mrs Sherron Brydson, in respect of the 10 markers

that constituted the DNA profile match with the applicant. He submitted that the learned trial judge should have gone further to explain the nature of a partial DNA profile and its limitations. Mr Wilson further submitted that proper directions on partial DNA profile were required in this case as "the only evidence linking the applicant to the murder was the passive blood drop found on the living room floor". A partial profile had an exculpatory effect, he submitted. This failure to give proper directions, he submitted, meant that the applicant was deprived of a fair trial.

For the Crown

[22] Miss Thomas submitted that the learned trial judge gave adequate directions to the jury in respect of the DNA evidence. He directed the jury on the possibly-exculpatory part of the evidence relating to the partial profile in respect of the fingernail clipping taken from Mr Graham's left hand. This direction, along with other directions given on, for example, the passive drop of blood and other comments, sufficiently indicated to the jury that there were weaknesses in the DNA evidence. Overall, she submitted, the summation and the treatment of the entire DNA evidence was objective and balanced.

Discussion

[23] At page 1258, line 22 to page 1259, line 12 of the transcript, (as highlighted by Miss Thomas) the learned trial judge is noted as saying the following:

> "[Y]ou will also have to look on the findings in relation to the fingernail clippings which was [sic] taken from Mr. Graham. It is a matter for you, but I will give you my opinion, Madam Foreman and Members of the Jury, that if these scratches, which the Prosecution seems to be saying came during the struggle with Mr. Graham, were in fact made by Mr. Graham,

> would you expect to find skin and other material under Mr. Graham's fingernails? Remember when the analysis was done of Mr. Graham's fingernails all that was found was blood, and the blood when the DNA analysis was done said – it pointed out as having the great probability that this blood was the blood of Mr. Graham, nobody else."

[24] We also noted the judge's directions at page 1264, lines 11 to 19, which read as follows:

> "In relation to Mr. Blissett, the evidence is that normally they use 13 markers and you get results from 13 markers, but in relation to Mr. Blissett, they were only able to have 10 markers. So, you have to look at that also in relation to the reliability of the conclusion made by her or the opinion given by her in relation to the D.N.A. profile matching that took place."

[25] Also, at page 1266, lines 11 to 19, the learned trial judge, just a few minutes before the jury retired, gave them this reminder:

> "Let me reiterate something on behalf of the Defence which he had mentioned in his address to you. He says that you should … not place too much emphasis on the evidence of Miss Brydson as in relation to the drop of blood and the probability of who it might have come from."

[26] So, while the learned trial judge did not conduct something in the nature of a comparative analysis between the strengths and weaknesses of a partial profile as against a full profile, we agree with Miss Thomas, that, with these and other directions that the learned trial judge gave in relation to the fingernail clippings of the left hand (exhibit A1) and the drop of blood, which were the samples from which partial profiles were extracted, it could not have been lost on the jury that they needed to have approached the analysis of the evidence on these exhibits with that much more care.

[27] In relation to Mr Wilson's submission that: "the only evidence linking the applicant to the murder was the passive blood drop found on the living room floor", if that were so, the Crown's case perhaps would have been unsustainable. From a review of the evidence, however, we were unable to agree with the submission. As indicated in the summary of the Crown's case in paragraph [6] of this judgment, there were several strands of circumstantial evidence on which the Crown relied, which together formed a sufficient basis on which the jury could have arrived at a guilty verdict.

[28] For these reasons, the applicant also failed on this ground.

Ground 3: the learned trial judge erred in permitting the prosecution to adduce into evidence exceptionally high numerical expression of statistical probability of a random match thereby depriving the applicant of a fair trial

Summary of submissions

For the applicant

[29] In relation to this ground, Mr Wilson submitted that "there was a real risk that the jury might have been overwhelmed by the exceptionally and inconceivably high probabilities. The jury might have misused the statistical information as evidence of a measure of the probability of the applicant's guilt" (see paragraph 14 of the applicant's written submissions).

[30] He further submitted, at paragraphs 15 and 16, that:

> "15. To say that the applicant is one in 117 quadrillion to have that matching profile was effectively to foreclose any other alternative, but that the applicant was guilty of the offence for which he was charged.

> 16. I submit that the high degree of probability of a match created the mystic of infallibility. The jury would be overwhelmed by figures such as billion, trillion, quadrillion and sextillion. These astronomical quantitative expressions would undoubtedly convey to the jury the perception that DNA evidence has an aura of scientific truth, not an opinion. I submit the prejudicial effect of the quantitative language outweighed its probative value. Qualitative expressions such as rare, exceptionally rare or such other similar expressions would have been preferabl[e]."

For the Crown

[31] Miss Thomas submitted that the learned trial judge was correct in directing the jury on the random occurrence ratio as a factor in determining whether or not the applicant was responsible for the death of Mr Graham. The summing-up was comprehensive and correct, she submitted.

[32] It was further submitted that the learned trial judge faithfully adhered to the guiding principles in **R v Doheny; R v Adams** [1997] 1 Cr App Rep 369; and **Regina v FNC** [2016] 1 WLR 980. She also pointed out that the prosecution had not relied on the scientific evidence alone; but also had other evidence which pointed to the applicant's guilt.

Discussion

[33] In relation to the contention that it might have been better for the learned trial judge, instead of using the figures used in evidence, to have used terms such as "rare" or "exceptionally rare" as submitted by Mr Wilson, at least two issues are raised. In the first place, it would not be surprising to us for directions using such terminology to draw an attack on the basis of vagueness. In the second place, we are not so certain that the

use of such terminology is what the current authorities on the subject require or advise.

The introductory remarks dealing with the summing-up in the judgment of **R v Doheny; R v Adams** read as follows:

> "When the Judge comes to sum up the Jury are likely to need careful directions in respect of any issues of expert evidence and guidance to dispel any obfuscation that may have been engendered in relation to areas of expert evidence where no real issue exists. The Judge should explain to the Jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the Defendant was responsible for the crime stain. Insofar as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case:
>
> 'Members of the Jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The Defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the Defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics'."

[34] As was also stated in that section of the judgment dealing with DNA analysis:

> "Empirical research enables the analyst to predict the statistical likelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups 'the random occurrence ratio'."

[35] The Concise Oxford Dictionary, 10th edition defines "ratio" as:

> "the quantitative relation between two amounts showing the number of times one value contains or is contained within the other."

[36] It was therefore apparent to us that some quantitative relationship is required to be stated in the giving of the random occurrence ratio and that the use of non-quantitative terms such as "rare" would not be appropriate.

[37] Mr Wilson cited to us R **v Bourguignon** [1991] O.J No. 2670, a decision of the Ontario Court of Justice. In that case, the court ruled admissible DNA testing evidence; but ruled inadmissible evidence in relation to statistic probabilities. The judge in that case opined that any such restriction could be easily overcome by evidence that:

> '"such matches are rare" or "extremely rare" or words
> to the same effect…"

[38] However, the very case cited by Mr Wilson contains references to other cases in which other courts declined to take this route, instead allowing evidence of the statistical probabilities. Examples of these are: (i) **Martinez v The State of Florida** 549 So. 2d 694 (Fla. Dist. Ct. App. 1989), in which the probability figure was 1 in 234 billion; and (ii) **Spencer v The Commonwealth of Virginia**, record number 890096, September of 1989 in which the probability was 1 in 705 million. We would decline to follow **R v Bourguignon**, and prefer **Martinez and Spencer**, which we find to be more in line with the requirements of **R v Doheny; R v Adams;** to be relevant and probative and (with appropriate directions) of potential assistance to a jury.

[39] No evidence was called to controvert the statistical evidence given by the expert (DNA) witness called by the Crown; so the evidence that was given was what the learned trial judge was required to address. Even so, how the judge approached the matter seems to disclose a desire to sum up the evidence in as simple and intelligible a manner as possible. To that end, in several instances, the learned trial judge is noted as having referred to the evidence in relation to probability thus (using page 1224, line 25 to page 1225, line 10 as an example):

> "As a result of these similarities, she was able to make what we call a random match or a random occurrence ratio. And what she said in relation to those, in relation to that, that the probability of somebody having, somebody else apart from Mr. Blissett having those characteristics would be one in several million. So those were her findings. The probability of somebody else apart from Mr. Blissett having those characteristics would be one in several million." (Emphasis added)

[40] Similarly, at page 1226, lines 9 to 13, he said:

> "But the possibility of somebody else apart from him having the same characteristics, DNA characteristics, will be one in several million."

[41] At page 1228, lines 5 to 10, he also stated:

> "[S]he still maintains that the probability of somebody else apart from Mr. Blissett having the same DNA characteristics would be rare. And she said one in several million, I think she said one in quadrillion."

[42] Stating the quantities as "one in several million" as the learned trial judge did several times in the summation, could possibly have redounded to the applicant's benefit.

Conclusion

[43] Looking at the summation in its entirety, therefore, we took the view that it was fair and balanced overall and, as a result, that the conviction ought not to have been disturbed.