

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 63/02

PRIVY COUNCIL REFERRAL

**BEFORE: THE HON. MR. JUSTICE HARRISON, P.
 THE HON. MR. JUSTICE HARRISON, J.A.
 THE HON. MR. JUSTICE DUKHARAN, J.A. (AG.)**

R V GARNETT EDWARDS

Miss Nancy Anderson for appellant

**Miss Paula Llewellyn, Snr. Deputy Director of Public Prosecutions
and Mrs. Tracey-Ann Johnson for Crown**

19th March & 27th April 2007

HARRISON, P.

This is a referral from the Judicial Committee of the Privy Council to this Court (Privy Council Appeal No. 29/05 dated 25th April 2006) to determine whether or not the appellant whose appeal against his conviction for murder was allowed, should be retried. We heard the arguments on both sides and ordered that the appellant be retried. These are our written reasons.

The appellant was convicted in the Home Circuit Court, on 15th March 2002 of capital murder of Dougal Wright on 13th February 1999, and sentenced

to death. His appeal against his conviction and sentence was dismissed on 25th June 2003 by the Court of Appeal which affirmed his conviction and sentence. On 3rd February 2006 he was re-sentenced to life and ordered to serve a period of fifteen years before being eligible for parole. Special leave to appeal was granted to the appellant by the Privy Council, resulting in the appeal being allowed on the said 25th April 2006.

In view of the determination that we are required to make our comments will be less than in-depth.

The brief facts are that on 13th February 1999 the deceased Dougal Wright and prosecution witness Donovan Bailey, an Inspector of Police met and went to the Mango Tree Bar at 10:0 a.m. and ordered drinks. While both were side by side standing at the counter, a voice said "Big man give me what you have." Bailey turned and saw the appellant with a 9mm pistol pointing at him. Bailey held up his hand, staring at the man and said that he had nothing. Ordered to lift up his shirt, Bailey moved, instead, slightly to his left and grabbed at the firearm. He missed, heard an explosion and was shot in the right side of his stomach. He ran outside holding his side and was taken to the hospital, where he was operated on and spent 31 days. The bullet had exited through his back entered the right side of Wright's chest, through his lungs and heart and lodged in his right chest, causing his death.

The witness Bailey did not know the gunman before, but stated that he focused his gaze on the man's face for about 1 ½ minutes. He described the

man as being about five feet six inches tall, 23 years of age, dark brown complexion, low cut hair, clean oval shaped face, average built with an ordinary, moderate voice.

On 14th April 1999, four weeks after his discharge from hospital, Bailey driving past the Mango Tree Bar at 2:00 p.m., saw the appellant whom he recognized as the man who shot him on 13th February 1999. He drove past him slowly and passed within 10 feet of where the appellant was. Bailey saw a police vehicle at an intersection 100 yards from the appellant. He stopped the police motor vehicle, spoke to the police and pointed out the appellant to the police officers. He left and eventually went home. At about 4:00 p.m. he was summoned to the Cross Roads police station, where he saw the appellant handcuffed and sitting on a bench in the guardroom. He identified the appellant as the man who had shot him on 13th February 1999.

The investigating officer Det. Sgt. Ebanks had gone to the scene on 13th February 1999 and saw the deceased lying face down in a pool of blood.

On 14th April 1999 Det. Ebanks arrested the appellant for the murder of Dougal Wright, on a warrant which he had obtained on 15th February 1999. The warrant had been issued based on "certain information in respect of Garnett Edwards." The appellant said, after caution, "God know me no kill nobody." No identification parade was held.

The main areas of complaint argued by counsel before Their Lordships of the Privy Council were the unsatisfactory evidence of identification along with

various irregularities which should have caused the case to be withdrawn from the jury, the inadequacy of the learned trial judge's direction on those issues and his failure to give directions on a possible verdict of manslaughter.

Their Lordships in their advice said that they were satisfied:

"...that the identification evidence was not so slender that the judge was required on that ground alone to withdraw the case from the jury and direct a verdict of not guilty. Bailey had a close and unimpeded view of the gunman in lighting conditions of which no complaint is made, and his evidence was that he concentrated his gaze upon him. While he undoubtedly appears to have given in his evidence a substantial over-estimate of the time he had him in view, it was nevertheless neither a fleeting glimpse nor a sighting in difficult conditions. Their Lordships accordingly do not consider that the case falls into the category of those which require to be withdrawn on account of the inherent fragility of the identification, ...".

Their Lordships commented on several areas of weaknesses in the prosecution's case, including the confrontation by the witness Bailey at the Cross Roads police station and the arrest of the appellant on a warrant dated 15th February 1999 "on certain information." The latter evidence was inadmissible.

A statement of the barmaid Jennifer Smith given to Det. Ebanks was permitted to be put forward before Their Lordships. She had died on 14th October 2001 and her statement was not introduced at the trial. Discrepancies were adverted to by their Lordships in respect of her statement and the evidence at the trial. She mentioned "four other men in the bar," but Det. Ebanks' investigations did not "unearth" them. She mentioned that the deceased Wright

and Bailey were sitting on the bar stools, but Bailey said they were standing. She said she saw a police officer pick up a spent shell, but Det. Ebanks said that he did not pick up any. In addition, a photograph of the appellant was put before their Lordships, which showed a birthmark below the right eye described as "plain and obvious ... visible from ten feet." Bailey did not include the latter in his description of the appellant.

Their Lordships expressed grave concern in respect of the above matter but were of the view that despite the irregularities and discrepancies, the case for the prosecution was of sufficient strength to be left to the jury, but a careful and thorough direction was required by the learned trial judge. Their Lordships at paragraph 29 said:

"The prosecution case on identification had sufficient strength to be left to the jury, which may well have been entitled to accept it as sufficiently proved, despite its weaknesses. It was incumbent upon the judge, however, to give careful directions to the jury, setting out fully the strengths and weaknesses of the identification, linking the facts to the principles of law rather than merely rehearsing those principles. Their Lordships do not consider that the directions given by the judge were as clear or full as the case required."

Their Lordships concluded that the conviction "cannot be regarded as safe" and must be set aside.

Miss Anderson for the appellant argued that the police investigations were deficient in that no statements were taken from the other four men in the bar, no identification parade was held, the bullet was not received from the laboratory and no spent shell was in evidence. She submitted further that the

expense of a new trial to the appellant and the Crown should be avoided, the ordeal suffered by the appellant and his family should not be endured again, the lapse of eight years will effect the quality of the evidence for the defence and although the Privy Council found that the strength of the prosecution's case was sufficient to go to the jury, the fundamental weaknesses in the prosecution's case could not be cured. No retrial should be ordered.

The power of this Court to order a new trial is contained in section 14 (2) of the Judicature (Appellate Jurisdiction) Act. It reads:

"(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

The factors which should guide the Court in considering whether or not to order a re-trial are set out in the case of **Reid v R** [1978] 16 J.L.R. 246, an appeal from Jamaica to the Privy Council. Lord Diplock, in his advice at page 250 said:

"Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury."

The main factors indicated in the said advice were:

- (1) the seriousness or prevalence of the offence,
- (2) the length of the trial and the expense which may be involved,

- (3) the ordeal that may be suffered by the accused, if there is a second trial, through no fault of his own, unless the interests of justice demand it,
- (4) the length of time that has elapsed between the date of the offence and the date of the retrial and any resultant disadvantage to either side including the availability of witnesses,
- (5) the strength of the case for the prosecution presented at the previous trial.

However, we are mindful of the fact that the prosecution must not be perceived as being given a chance to cure its deficiencies.

We agree with Miss Llewellyn for the Crown that the offence of murder is a serious offence and undoubtedly prevalent in Jamaica.

We have been told that the witness Bailey is now a Deputy Superintendent of Police and is available and there is no prejudice that has been expressed in respect of the availability of witnesses generally. The appellant will of necessity suffer some ordeal due to the passage of time. Up to this moment a period of eight years have passed since the commission of the offence. In ***Nicholls v R*** [2000] 57 WIR 154, Lord Steyn, giving the advice of the Privy Council, at page 163 in respect of the order of retrial by a court of appeal, said:

"It is no bar to such an order that more than six years has elapsed since the killing; or that there has already been a retrial; or that about three years have elapsed since the matter was before the Court of Appeal. Cumulatively, these factors do, however, raise the question whether the matter ought to be remitted to the Court of Appeal to consider a retrial."

No retrial was ordered because of the failure to adduce vital expert evidence of the significance of a bullet wound and the unfairness to afford to the prosecution the opportunity to do so at a retrial. See also ***R v Mitchell*** [unreported] SCCA No. 74/96 dated 31st January 2000.

Despite the said passage of time, in agreement with the view of the Privy Council, and also despite the discrepancies and other weaknesses in the prosecution's case, we maintain that there remains a strong case to go to the jury.

A careful direction by the learned trial judge on the issues of identification the discrepancies, the confrontation and other matters will be required. Furthermore, the learned trial judge may have been gratuitous to the appellant to have left the defence of accident for the consideration of the jury, in view of the deliberate and intentional act of the discharge of the firearm. Their Lordships' observation of the issue of manslaughter that may arise is a consideration at a re-trial.

It is our view that in the interest of justice it is necessary that a new trial be held.

A retrial was therefore ordered to be conducted at the next succeeding session of the Home Circuit Court.