JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 97/2000

PRIVY COUNCIL REFERRAL

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

GERALD MUIRHEAD v R

Miss Nancy Anderson for the Appellant.

Jeremy Taylor, Deputy Director of Public Prosecutions, for the Crown.

April 20 and July 30, 2009

DUKHARAN, J.A.:

1. This is a referral from the Judicial Committee of the Privy Council (Privy Council Appeal No. 103 of 2006 delivered on the 28th July, 2008) for this Court to determine whether or not the appellant whose appeal against his conviction for murder was allowed, should be retried. Having heard arguments on both sides we ordered that in the interest of justice the appellant should be retried. We promised to put our reasons in writing and this we now do.

2. The appellant was tried and convicted in the Home Circuit Court on the 8th May, 2000 for the murder of Carlos Gunn on the 27th August, 1997. He was sentenced to

imprisonment for life and to serve 25 years before being eligible for parole. His appeal to the Court of Appeal was dismissed on the 3rd July, 2001 and written reasons were delivered on the 20th December, 2001. He appealed with special leave to the Privy Council which resulted in the appeal being allowed on the 28th July, 2008.

3. The brief facts are that in 1997, the deceased Carlos Gunn was living on McKoy Lane, Kingston, in a single room. He lived with his common law wife Nuncia Webb, their three (3) children and her daughter by another man. On the afternoon of the 27th August, 1997 the deceased was in his room along with the children and two (2) little cousins. A man opened the door, drew a gun from his pocket and shot the deceased. The eldest of the deceased's children was seven (7) years old Orando Gunn. Shortly after the shooting, Detective Cpl. Ceston Nelson from the Hunts Bay C.I.B. went to the house and saw the body of the deceased. He spoke to Orando Gunn who told him that the killer was a young man known in the community as Zaza. There was no other identifying witness. The police was unable to find Zaza. Zaza's correct name is Gerald Muirhead and he is the appellant.

4. Almost a year later on the 4th August, 1998 police brought the appellant and a number of men to the Hunts Bay Police Station in connection with an unrelated matter. The appellant was pointed out to Det. Cpl. Nelson who told him that he had been looking for him in connection with the murder of Carlos Gunn. He denied that he was called Zaza and that he had nothing to do with the murder. He was placed on an identification parade and identified by Orando Gunn. He was then charged for murder.

5. At the time of the murder the appellant was about seventeen (17) years old and lived with his parents at the end of McKoy Lane. The appellant and his parents were known to Nuncia Webb's mother, Gloria Grey, who lived some distance away and to whom the children of the deceased fled after the murder. Orando Gunn said that he had never spoken to the appellant but had seen him regularly on his way from school and knew him by sight.

6. The appellant was tried on the 17th November, 1999 but the jury were unable to agree. He was retried on the 4th May, 2000, and this time he was convicted. At both trials the appellant was represented by Mr. Eric Frater and Miss Althea McBean. At the first trial Mr. Frater adduced evidence that the appellant had no convictions and led evidence as to his good character. At the second trial no character evidence was adduced. The appellant gave an unsworn statement and no witnesses were called on his behalf.

7. There were thirteen (13) grounds of appeal argued by counsel on behalf of the appellant before their Lordships at the Privy Council. However, on nine (9) of those grounds the Board did not find it necessary to ask for submissions from the Crown.

8. On the question of identification it was their Lordships view that from start to finish, from the time the police came from the scene of the crime until the end of his evidence at the second trial, Orando Gunn maintained that the appellant had shot his father. The chances of his having been mistaken must have been very small. Their Lordships felt that the judge left this possibility to the jury with appropriate warnings

about the fallibility of identification evidence. The real question was whether Orando was telling the truth.

9. There were two (2) matters which gave their Lordships some concern. They both relate to the conduct of the case by defence counsel. The first was that the appellant was not called as a witness. He gave evidence at the first trial but says that after the close of the prosecution's case at the second trial, Miss McBean told him that leading counsel had advised that he should rather make a statement from the dock. The appellant was surprised and disconcerted by this advice but did as he was told. He made a fairly lengthy statement but immediately after the verdict, when asked whether he had anything to say, regretted his decision. He said:

> "I was so nervous when I was standing I was standing a while ago, I would rather to be in the box where to the lady I could have explain certain thing and bring across certain things that I could answer in the right way".

10. The second area of their Lordships concern was that counsel did not call evidence of the appellant's good character although this was done at the first trial. At para. 28 their Lordships had this to say:

> "It may well be that Mr. Frater considered, after observing the impression the appellant made in the witness box at his first trial, that he would be wiser not to give evidence at the second. The fact that the appellant did better at the first trial in the sense of securing a disagreement among the jury is not necessarily inconsistent with the view. And it may be that, contrary to what the appellant now says, he freely accepted this advice. It is more difficult to imagine why it was decided not to call any character evidence, but Mr. Frater may have learned something before or at the second

> trial which made it seem to him inadvisable to put the appellant's character in issue".

11. The Board had some difficulty in that neither Mr. Frater nor Miss McBean have been willing to answer any questions about the case; nor have they produced any written instructions from the appellant. Their Lordships said at para 38:

> "In a case which depended so heavily on the reliability of a very young identifying witness, whose testimony was controverted by the strong denial of the appellant, it would be difficult to be sufficiently satisfied that the jury would have been bound to reach the same conclusion if he had given evidence and had received the benefit of a good character direction. That degree of doubt is increased by the fact that the jury in the first trial failed to agree".

12. Their Lordships concluded that it was too great a risk that the appellant did not have a fair trial and had no option but to allow the appeal.

13. Miss Anderson for the appellant submitted that the prosecution's case against the appellant has never been strong and depended solely on a very young eyewitness. Although there were others who witnessed the shooting, they were not questioned nor called as witnesses. No gun was recovered, no forensic evidence was adduced and there was no confession or statement made to link the appellant to the offence. Counsel further submitted that the prosecution's case was weak and unlikely to stand the sworn evidence of the appellant and the direction on his good character after evidence of his character is led. The passage of nearly twelve (12) years between the incident and date of retrial is also a factor to be taken into account. No retrial should be ordered.

14. The Judicature (Appellate Jurisdiction) Act gives this Court the power to order a new trial. Section 14 (2) 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".

15. The statutory provision to order a retrial is to ensure that justice is done. The power is to exercise with considerations of fairness and of what is just and appropriate. The examination of factors and the balancing of these factors in the interest of justice was analysed in the case of **Reid v R** (1978) 16 JLR 246, an appeal from Jamaica to the Privy Council. Lord Diplock said at page 250:

> "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 in 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".

16. The main factors for consideration as outlined by Lord Diplock 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.

17. Mr. Taylor for the Crown submitted that the instant case up to 2001, moved fairly quickly up to the second trial, and that the delay was not the fault of the prosecution. We have observed that between 2001-2006 the delay has been at the instance of the appellant. He took over five (5) years to petition the Privy Council. Mr. Taylor has indicated that the witnesses are available if a retrial is ordered.

18. We are cognisant of the fact that to face a third trial for murder can be an ordeal for any accused person. However the prevalence of murder in this country is of great concern to all of us. In respect of the order of retrial by a Court of Appeal, Lord Steyn said in **Nicholls v R** (2000) 57 WIR 154 at page 154;

> "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".

19. Despite the passage of time in this case, which in a large part is due to the tardiness of the appellant, we are in agreement with the view of the Privy Council that there was plainly evidence upon which a jury could reasonably convict. The real question was whether Orando Gunn was telling the truth.

20. We are of the view that in the interest of justice it is necessary that a new trial be held.

21. Based on the advice of the Privy Council that character evidence could have been in the appellant's favour, if it is raised at a retrial, a careful direction will be required by the trial judge to give a good character direction.

22. A retrial was therefore ordered to take place at the next succeeding session of the Home Circuit Court.

23. The foregoing are our reasons for ordering the retrial.