[2021] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 45/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

LAMONT RICKETTS v R

Trevor Ho-Lyn for the appellant

Miss Cadeen Barnett and Miss Kelly-Ann Francis for the Crown

20, 22 November 2019 and 19 February 2021

F WILLIAMS JA

[1] On 20 and 22 November 2019, we heard this appeal filed by the appellant against his conviction in the Saint Elizabeth Circuit Court for the offence of murder. At the conclusion of the hearing we ordered that:

> "1. The appeal is allowed.
>
> 2. The conviction is quashed and the sentence is set aside.

3. In the interests of justice, a retrial is ordered.

4. The matter is set for mention at the next sitting of the Circuit Court for the Parish of Saint Elizabeth, viz 9 March 2020."

[2] We also then gave our promise that brief reasons were to follow. With apologies for the delay, this judgment is a fulfilment of that promise.

Background

[3] The appellant was tried in March and April 2017, before a judge and jury, for the murder of Miss Kadian Clarke. On 7 April 2017, at the conclusion of his trial, he was found guilty and on 15 May 2017 he was sentenced to life imprisonment with the stipulation that he should serve 25 years before becoming eligible for parole.

[4] The appellant, on 22 May 2017 and 19 June 2017, filed, respectively, notices of application for permission to appeal against his conviction and sentence. On 6 September 2018, a single judge of appeal granted his application for permission to appeal against his conviction. Accordingly, this matter came before us for hearing.

The case for the prosecution

[5] The case for the prosecution was that some time after 10:30 pm on 17 February 2009, the appellant set fire to the front room of a dwelling house occupied by Miss Clarke and her two children. Miss Clarke sustained burn injuries in her attempt to escape the fire and died at the Black River Hospital on 13 March 2009, as a result of complications arising from those burn injuries.

[6] The prosecution called six witnesses. Among them were Andrew Clarke and Sasha-Gay Parkins, Miss Clarke's brother and daughter, respectively. Additionally, a statement that Miss Clarke had given to the police, while at the hospital, prior to her death, was admitted into evidence and permitted to stand as her evidence-in-chief pursuant to section 31D(a) of the Evidence Act.

[7] Mr Clarke's testimony placed the appellant, on the night in question, about 10:30, in close proximity to Miss Clarke's house. Mr Clarke testified that he resided about two to three chains away from Miss Clarke's house. He further gave evidence that, that night, on his way home, he saw and spoke with the appellant, about a chain from Miss Clarke's house. He further stated that, approximately 10 to 15 minutes after he had arrived home, he heard Miss Clarke's cries. He stated that, when he rushed to Miss Clarke's residence, he saw her outside suffering from burns. He deposed that she said "is Randy do it".

[8] Sasha-Gay Parkins, Miss Clarke's daughter, who was about 9 years old at the time of the incident, gave evidence that, on the night in question, some time before 11:00, she was asleep in a room with her mother and brother. She testified that she was awakened by the sound of the appellant's voice, calling her mother from outside the house. She stated that she had looked through the room window and had seen the appellant standing outside about two and a half to three feet away from the window but that she had returned to bed on the instructions of her mother.

[9] She testified that, about a minute thereafter, she smelled gas and then saw fire coming from the front door of the room, which rapidly spread to the ceiling. She stated that her mother grabbed her younger brother and ran through the front door which was on fire. She testified that her mother fell into the fire before she was able to escape the blaze.

[10] Miss Parkins further testified that she was able to escape the fire only with the assistance of her uncle, who gained access to the room through another door.

[11] Defence counsel for the appellant crossed-examined Miss Parkins and made suggestions to the effect that her statement of the incident, given to the police, was materially different when compared with her evidence given in court. In particular, it was put to her that she had not previously stated that she had seen the appellant on the night in question.

[12] Miss Clarke's statement was to the effect that, on the night in question, shortly before the fire, she had received a call from "Randy" (referring to the appellant), with whom she shared an intimate relationship, asking her to come to him outside. She stated that, after declining his request, she looked through the window and saw the appellant bending over at her front door. She further stated that she saw him flick a lighter and throw it on the front door, which caught fire. She stated that she was able to see the appellant's face and that she had called out to him but that he ran off towards the road.

The defence

[13] The appellant gave sworn testimony. He admitted that Randy was one of several aliases by which he was known. He deposed that, prior to the incident, he had resided in a rented house, which was next to the family home where Miss Clarke had resided. He further testified that he and Miss Clarke had shared an intimate relationship, however his financial struggles caused him to decide to relocate to Spring Mount, in Saint James, which he was in the process of doing on the night of the fire. He stated that on the night in question he had in fact spoken with Mr Clarke (as Mr Clarke had testified) regarding his decision to relocate but that he had left the community for Spring Mount between 9:00 pm and 9:30 pm and, as such, could not have set Miss Clarke's house on fire. He stated that he had arrived in Spring Mount at his cousin's home about 11:30 that night. The appellant further denied that he had called Miss Clarke that night or that he had been outside her home.

Grounds of appeal

[14] Counsel for the appellant sought leave to abandon the original grounds of appeal as filed and to argue in their stead the following supplemental grounds of appeal:

> "1. The Learned Trial Judge (LTJ) denied the appellant a fair trial by failing to adequately instruct the jury as to the issues of alibi and character and by so doing failed to properly place the defence before the jury.
>
> 2. The Learned Trial Judge (LTJ) denied the appellant a fair trial by his excessive interference in the giving of evidence by the appellant effectively becoming a participant at the bar instead of from the bench.

> 3. The Learned Trial Judge (LTJ) denied the appellant a fair trial by his failing to adequately instruct the jury as to the effect of the discrepancies and inconsistencies in the evidence of the prosecution and also the weight to be placed on the police statement of the deceased."

[15] In light of the fact that the appeal was allowed mainly on the basis of the Crown's concession and the court's analysis and decision in respect of supplemental ground of appeal 2, it is best to deal with that ground first.

Ground 2: excessive interference by the trial judge

Summary of submissions for the appellant

[16] Counsel for the appellant submitted that there was excessive interference by the learned trial judge, as of the 549 questions asked of the appellant during his examination-in-chief the learned trial judge had posed 211. In relation to the cross examination of the appellant, it was counsel's submission that of the 420 questions put to the appellant in his cross examination, 130 of those were posed by the learned trial judge. It was argued by counsel that the interventions of the learned trial judge went beyond seeking clarification or clearing up any obscure point that was made and rendered the trial unfair.

Summary of submissions for the Crown

[17] In its written submissions, the Crown initially advanced the following arguments: counsel argued that (i) the appellate court, in determining whether the learned trial judge's interference was excessive, ought to have regard to the quality of the learned trial judge's interventions. It was likewise argued that: (ii) it ought to be considered whether the nature of the interventions resulted in the appellant's being denied a fair

trial, thus resulting in a miscarriage of justice (relying on **Navado Shand v R** [2018] JMCA Crim 45). Counsel also submitted: (iii) that the interference from the learned trial judge did not amount to a miscarriage of justice because it was aimed at: clarifying the evidence elicited from the appellant, assisting the appellant to understand the questions which were asked of him, allowing the appellant to give complete answers; and also allowing for repetition for the purpose of the record. Accordingly, counsel submitted: (iv) that the learned trial judge did not impede the appellant's defence in any way or prevent him from giving his evidence in his own way.

[18] As the hearing of the appeal commenced and progressed, however, the Crown's position evolved, coming ultimately to a concession that the learned trial judge had gone beyond permitted bounds in the nature and extent of his interventions.

[19] The Crown conceded that, having regard to the nature of the learned trial judge's interventions, inferences could be drawn by the jury, which could be adverse to the appellant. A number of those interventions did not go to the issues that arose to be decided in the case, it was submitted. Ultimately, the Crown submitted that: "the interventions were of such a nature having regard to the content of the questions and the context of the case, that the appellant did not receive a fair trial".

Discussion

[20] Before reviewing some of the passages from the transcript to which we were directed or that we reviewed on our own, it may be helpful to briefly set out some of the guidance on interventions by judges, which has been set out in several cases and in

several jurisdictions. One such case is **Jones v National Coal Board** [1957] 2 All ER 155, at page 159, in which Lord Denning, delivering the judgment of the English Court of Appeal in a civil case, made the following observations:

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon LC who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'?: see Ex parte Lloyd (1822), Mont 70, n. And Lord Greene MR who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses,
>
> > 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict.'
>
> See Yuill v Yuill ([1945] 1 All ER 183 at p 189).
>
> ….So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other: see Rex v Cain ((1936), 25 Cr App Rep 204); Rex v Bateman ((1946), 31 Cr App R 106); and Harris v Harris (8 April 1952, The Times, 9 April 1952), by Birkett LJ especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see R v Clewer ((1953), 37 Cr App R 37). The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law;

> to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that:
>
> > 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'." (Emphasis added)

[21] Also, in the case of **Peter Michel v The Queen** [2009] UKPC 41, Lord Brown, delivering the advice of the Board, gave the following guidance at paragraph 34:

> "34. ….Of course he can clear up ambiguities. Of course he can clarify the answers being given. But <u>he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief</u>. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced." (Emphasis added)

[22] Important as well is the case of **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005. In that case Panton JA (as he then was), writing on behalf of the court, made the following observations at paragraph 10 of the judgment:

> "It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in the context of the case. There are questions that are necessary for clarification of

> what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected to remain mute throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena." (Emphasis added).

[23] **Christopher Belnavis v R** was also cited and discussed in the case of **Navado Shand v R**, in which this court (per P Williams JA (Ag), as she then was), observed, in allowing an appeal on grounds which included allegations of excessive and unfair interventions by a trial judge, as follows at paragraph [50]:

> "…when the final issue related to the learned trial judge's appreciation of the defence is considered, the line of questioning the learned trial judge embarked on, may well have contributed to the appellant being denied a fair trial." (Emphasis added)

A summary of the learned trial judge's interventions

[24] We do not, of course, intend to cite every instance of improper intervention on the part of the learned trial judge in this case. A review of just a few of them will suffice to demonstrate our reasoning and conclusion.

[25] At page 298, line 24 to page 301, line 10, during the examination-in-chief of the appellant, this was a part of the interchange, for example:

> "HIS LORDSHIP: Just a minute. Just one question. On your way, as you said, to St. James that night, you had a phone?
>
> THE WITNESS: No, I had a phone, but what I did, I break up the chip because I didn't want any calls from her.
>
> HIS LORDSHIP: So you had a phone but you break the chip?
>
> THE WITNESS: Yes, I break the chip.

HIS LORDSHIP: You break up the chip because you didn't want any calls from her?

THE WITNESS: Yeah, cause I know she was going to pest—

HIS LORDSHIP: Just a minute, any call from who she?

THE WITNESS: Yes, because she said she wanted me to stay and live with her permanent.

HIS LORDSHIP: May I ask when was it that you broke the chip?

THE WITNESS: After ---

HIS LORDSHIP: When did you break the chip?

THE WITNESS: The same night.

HIS LORDSHIP: You broke the chip the same night?

THE WITNESS: Yes.

HIS LORDSHIP: Was it before you go down or when—

THE WITNESS: Before I leave Rocky Hill.

HIS LORDSHIP: Second trip or the first trip?

THE WITNESS: It was from the first trip I broke the chip.

HIS LORDSHIP: From the first trip you say?

THE WITNESS: Yes, sir.

HIS LORDSHIP: Did you communicate with your cousin that you were coming down?

THE WITNESS: Yes, I did that before. Not my cousin that was what – I never contact my cousin, I contacted my wife.

HIS LORDSHIP: You contacted your wife?

THE WITNESS: Yes.

HIS LORDSHIP: And you told your wife to – tell her you were coming?

THE WITNESS: Yes, I'll be coming back home.

HIS LORDSHIP: You say that you got divorced?

THE WITNESS: Yes, we got divorce.

HIS LORDSHIP: When? What year?

THE WITNESS: It was 2009 after I leave up here and go back down the divorce came through.

HIS LORDSHIP: In 2009?

THE WITNESS: Yes.

HIS LORDSHIP: Who file for it, she or you?

THE WITNESS: She was the one which file for it.

Q. The statement is continuing, I am continuing to ask you questions about the statement that is in evidence against you…"

[26] The excerpt that runs from page 302, line 4 to page 304, line 14 is also instructive:

"HIS LORDSHIP: Just one question, did you tell Kadian that you were married?

THE WITNESS: Yes, she know that I was married.

HIS LORDSHIP: Did you tell har?

THE WITNESS: Yes, I did.

HIS LORDSHIP: How much children you have?

THE WITNESS: Two, a boy and a girl.

HIS LORDSHIP: Do you know when in 2009 you get divorce?

THE WITNESS: I can't say specifically, but it was before, it was in the ---

HIS LORDSHIP: Before you leave or after you leave?

THE WITNESS: After I leave Sainty to Mobay.

HIS LORDSHIP: Yes.

THE WITNESS: Yes, that was when I get the divorce after I was down there full, living back.

HIS LORDSHIP: You remember the month?

THE WITNESS: No, I can't specifically say the month, but she was to leave to go on farm work in May, August – in May, not August, April/May in that time. She go on like work programme so she deal wid it before she lef'.

HIS LORDSHIP: Yuh wife used to go on work programme?

THE WITNESS: Yes, she go on work programme and she still do it also now.

HIS LORDSHIP: Your uncle still live in Rocky Hill?

THE WITNESS: Yes, sir.

HIS LORDSHIP: Coffee Lane?

THE WITNESS: Yes, sir.

HIS LORDSHIP: Near Kadian's family?

THE WITNESS: Yes, sir, still the neighbour of Andrew Clarke, as we speak.

HIS LORDSHIP: Since you leave Rocky Hill, you communicate with Kadian?

THE WITNESS: No, I have not, sir.

HIS LORDSHIP: Yes, Madam. Your father is still alive?

THE WITNESS: Yes, sir, my father is still alive.

HIS LORDSHIP: And he is still your uncle's brother?

THE WITNESS: Yes, sir.

HIS LORDSHIP: They live good, your father and uncle live very close?

THE WITNESS: I would say I was the one who bring back dem?

HIS LORDSHIP: They still live good though?

THE WITNESS: I assume they conversate, yes.

HIS LORDSHIP: Yes.

MISS CLARKE: I am just waiting to see when I can proceed, m'Lord.

HIS LORDSHIP: Yes, you can.

MISS CLARKE: Much obliged." (Emphasis added).

[27] Of relevance as well is the excerpt taken from page 324, line 12 to page 326, line 21:

"HIS LORDSHIP: Which route you take to go to your yard that day, back to St. James?

THE WITNESS: It was Maggotty, I drive Maggotty, go back through Elderslie, Garlands, Point.

HIS LORDSHIP: So you meet him going to St. James – going to Sav-la-mar?

THE WITNESS: No, sir, I was just explaining the route.

HIS LORDSHIP: When you deliver the car, where you deliver the car? Where exactly?

THE WITNESS: That's what I don't remember the name, but –

HIS LORDSHIP: Where is the place?

THE WITNESS: On the road going to Haddo. So in other words, if I had come out at the gas station – all right, let me see if I can find a better way to explain it.

HIS LORDSHIP: All right, you say you pass Ramble?

THE WITNESS: Yes.

HIS LORDSHIP: Pass Knockalva?

THE WITNESS: Yes.

HIS LORDSHIP: Ramble?

THE WITNESS: Yes.

HIS LORDSHIP: Ramble is in which parish?

THE WITNESS: Ramble would be in St. James or Hanover, I don't know, or should I say Westmoreland.

HIS LORDSHIP: So you pass Ramble and come up the hill?

THE WITNESS: Yes, I pass Ramble where the police station is and Knockalva.

HIS LORDSHIP: How far away?

THE WITNESS: There is a Texaco gas station down the road, I didn't reach down to the Texaco gas station, I reach the intersection – coming from Mobay you have a road going down the hill like this, and you have a road go down where you can go to the Cool Oasis gas station fi go –

HIS LORDSHIP: The road to the left, that is what you are saying?

THE WITNESS: I am coming on this road from Mobay, when I reach, there is a road, I reach an intersection there is a road go up.

HIS LORDSHIP: Go lef'.

> THE WITNESS: Yes, go lef' go up and one go right, go down.
>
> HIS LORDSHIP: Where, now, you give him the car?
>
> THE WITNESS: It was right there, there was an open spot like wholesale/supermarket over in front of me, across the road.
>
> HIS LORDSHIP: What parish is that?
>
> THE WITNESS: I would say, like, Westmoreland.
>
> HIS LORDSHIP: So how you get back to your yard?
>
> THE WITNESS: I took passenger bus."

[28] Similarly, but this time occurring during the course of the cross-examination of the appellant, there is the following exchange to be found at page 398, line 22 to page 400, line 23:

> "HIS LORDSHIP: Is Matterhorn your friend?
>
> THE WITNESS: No, sir, but we just heng out and we like drink together, and play Bingo together.
>
> HIS LORDSHIP: How long you know Matterhorn?
>
> THE WITNESS: Just since the period of time –
>
> HIS LORDSHIP: How long, one day, two days, three days?
>
> ACCUSED: It was within the year 2008, I was running taxi. It was after the dance yes, after the dance.
>
> HIS LORDSHIP: After the dance what?
>
> ACCUSED: That was after the dance things never went well, so I went for the car, in the shoot-up thing –

HIS LORDSHIP: I don't want to hear about shoot-up, what I want to hear I am asking about, how long you know Matterhorn?

ACCUSED: I can't be specific in months, sir, please.

HIS LORDSHIP: You know where Matterhorn live?

ACCUSED: No, sir. I don't know his house specifically, sir.

HIS LORDSHIP: You keep Matterhorn number?

ACCUSED: It was in the dial log, sir.

HIS LORDSHIP: How long you live with Kadian – how long you have a relationship with Kadian for?

ACCUSED: It was after her baby father left – her baby father left some time in May, April and it got serious.

HIS LORDSHIP: How long?

ACCUSED: July sir, of 2008.

HIS LORDSHIP: So how long, how long, whether ten day, one year, fifteen years, how long you in a relationship with Kadian for?

ACCUSED: Actually seven to six months, sir.

HIS LORDSHIP: And you love har?

ACCUSED: Yes, mi did love har.

HIS LORDSHIP: Who was closer to you, Kadian or Matterhorn?

ACCUSED: Kadian was closer, sir.

MR. DUNCAN: M'Lord, I have a few more areas with the accused, m'Lord.

Q. I want to go back to what I was asking you about the belongings…" (Emphasis added).

[29] These excerpts (and there are several others) show, for example, counsel for the defence and counsel for the prosecution, at different times, making an effort to take their respective cases back from the learned trial judge, who was in the process of eliciting evidence from the witness. As can clearly be seen from the excerpts, that evidence was not always relevant and would have had the effect of turning the witness away from the real issues in the case. However, that was not the only danger arising from the numerous instances of intervention that went beyond the proper function of a trial judge. The interventions, by their frequency, detailed nature and content, also manifest, in our view, a line of questioning that, given the issues in the case, amounted or came close to cross-examination of the witness by the learned trial judge. The very real danger existed that the jury might have perceived the judge to have been viewing the evidence in a particular way and that might have influenced their own approach to the case. We see the interventions as having the cumulative effect of raising the possible perception that the learned trial judge favoured one side and further creating considerable doubt that the appellant received a fair trial. The interventions, regrettably, had the effect of breaching many, if not most, of the guidance set out in the cases reviewed. In these circumstances, the Crown's concession was the correct course of action for it to have taken.

[30] What we have seen in this case marks an unusual departure for the experienced judge who presided. We must say, however, that, although an excess of interventions by trial judges could not fairly be said to be widespread, lest it become so, this may be an opportune time to remind judges generally of the main parameters that circumscribe

their right to intervene in the course of their adjudication. The main points gleaned from the authorities relating to interventions might be summarized as follows: (i) trial judges should, as much as possible, limit their questioning to what is necessary to clear up issues, better understand evidence and bring to the fore points overlooked or not sufficiently addressed; (ii) their questioning should not be of such a nature or go to such an extent as to give the impression that they have taken sides or have descended into the arena and lost their impartiality; (iii) they should try not to interrupt the flow of evidence and, as much as possible, should not take over the elicitation of evidence from counsel (though the temptation is likely to arise when the evidence is being led less than competently); (iv) they should not cross-examine witnesses; (v) they should not display any hostility or adverse attitude or convey any negative view of a particular case or witness whilst hearing arguments and evidence, although they are, of course, entitled to test the soundness of arguments and submissions; and (vi) they are required at all times and so far as is humanly possible to maintain a balanced and umpire-like approach to the task of adjudication.

The other grounds and issues

[31] As previously indicated, the appellant also relied on grounds relating to the treatment of the alibi defence, the effect of discrepancies and inconsistencies and the court's treatment of Miss Clarke's statement. However, having regard to the fact that (i) the resolution of ground 2 was decisive of the outcome of the appeal; and (ii) in the interests of justice, the matter is being sent back for a retrial, it is unnecessary and

would not be in keeping with our current practice to delve into these issues, seeing that they will be explored at the second trial.

Retrial

[32] In cases such as this, where a conviction is quashed, this court is empowered, by section 14(2) of the Judicature (Appellate Jurisdiction) Act, to order a new trial. The subsection states as follows:

> "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."

[33] In the case of **Dennis Reid v R** (1978) 27 WIR 254, the Judicial Committee of the Privy Council discussed several factors that might be considered in an appellate court's decision whether or not to order a retrial. For the purposes of this discussion, the Privy Council's dicta set out in paragraphs (ii) and (v) of the headnote are relevant. They are set out as follows:

> "(ii) The interest of justice that is served by the power to order a new trial is the interest of the public 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.
>
> (v) Among the factors to be considered in determining whether or not to order a new trial are: (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the

> defence on the first trial would be available at the new trial;
> (f) the strength of the case presented by the prosecution,
> but this list is not exhaustive."

[34] We note that the decision to order a retrial is, of course, based on the circumstances of each particular case. This appeal has been allowed on the basis of a procedural irregularity – an error made by the learned trial judge - in the face of what might objectively be regarded as compelling evidence which ought to be fairly and dispassionately heard and tried by a judge and jury to determine the guilt or innocence of the appellant. In coming to our decision to order a retrial, we were assisted by the representatives of the Crown, who, having made checks, informed the court that all the critical witnesses were available and still reside in the same community; and that the investigating officer was also available. Having given careful consideration to all the circumstances of this case and to the guiding factors outlined in **Dennis Reid v R**, it was clear to us that the interests of justice would be best served by the ordering of a retrial.

[35] It was for the foregoing reasons that we made the orders indicated in paragraph [1] of this judgment.