JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 72/99

COR. THE HON. MR. JUSTICE FORTE,P.
THE HON. MR. JUSTICE WALKER J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag)

RICARDO WHILBY
vs
R

Frank Phipps, Q.C. for the appellant

Brian Sykes, Acting Senior Deputy Director of Public Prosecutions
and **Tricia Hutchinson** for the Crown.

7th 8th November and 20th December, 2000

COOKE, J.A. (Ag):

Ricardo Whilby was convicted in the Western Division of the Gun Court in Montego Bay on the 23rd March, 1999 on two counts of illegal possession of firearm and illegal possession of ammunition, respectively. He was sentenced to ten years imprisonment on the first count and six years on the second court. Both sentences were to run concurrently. It is from these convictions and sentences that he applied for leave to appeal. The court heard his application on the 7th and 8th of November, 2000, granted the application for leave to appeal, treated the application as the hearing of the appeal. At the conclusion of which, the conviction was

affirmed. However, the sentences were set aside and five years imprisonment on each count, to run concurrently, imposed, to commence on June 23, 1999.

At the trial, the evidence was uncomplicated. Whilby, a Jamaican citizen arrived in Jamaica at the Sangster International Airport in Montego Bay on the 28th November, 1998. On the 2nd December, 1998 he went to check in prior to his return to the United States. He enquired about luggage which had been sent to him. He wished to take this luggage with him. The luggage was subsequently located. A key was obtained (not from Whilby) and the luggage opened. There was revealed the presence of a Glock 9mm pistol and a magazine containing five rounds, a Smith and Wesson 9mm pistol with two magazines and a further three rounds. There was also a bullet poof vest. The luggage also contained women's clothing. Whilby acknowledged ownership of the firearms and ammunition. In his unsworn statement he said that he and his girlfriend (Lorna) were to come to Jamaica together to sort out a problem which involved his 'babies mom'. However, because of her working schedule she (Lorna) was unable to travel with him. She was to follow but in the meantime she had sent her luggage. This was the same luggage which was addressed to him in which the prohibited items were found. There will be a return to this unsworn statement, but this aspect is now adverted to, in order to put the following questions and answers in perspective. These questions and answers were recorded shortly after the discovery of the firearms and ammunition:

> "**Ques. 11:** Do you have a girlfriend by the name of Lorna Andral?

Ans. Yes

Ques. 12: Where does she work?

Ans. Milwaukee International Airport

Ques. 13: Did you ask Lorna to bring this Smith and Wesson pistol for you?

Ans. Yes.

Ques. 14: Did she come to Jamaica?

Ans. No.

Ques. 15: Did you communicate with her this morning?

Ans. Yes.

Ques. 16: Did she tell you that her suitcase was in Jamaica?

Ans. Yes, she told me that North West had it, and it is [in]my name.

Ques. 17: Did you go to North West at the airport to collect the suitcase?

Ans. Yes.

Ques. 18: Was the suitcase checked in your presence?

Ans. Yes by Customs.

Ques. 19: Did customs officer find these two guns in your suitcase with the rounds and magazine?

Ans. Yes.

Ques. 20: Did you claim these two firearms and ammunition as your property?

Ans. Yes.

Ques. 21: Was your name on the baggage tag?

Ans. Yes.

Ques. 22: What is the purpose of getting these two firearms into the island?

Ans. I was robbed twice in Kingston.

At the trial there was no challenge to the accuracy of the responses of the applicant. Nor was there any challenge as to admissibility of this aspect of the evidence being presented by the prosecution. A reading of the transcript indicates that the approach of the defence led by Mr. Roy Fairclough was to contest the case on the basis that in the circumstances Whilby could not be said to be guilty of possession in law. This approach is quite understandable given the overwhelming factual evidence which confronted Whilby. Excerpts from the no case submission made by Mr. Fairclough demonstrates the thrust of the defence.

> "My submission, m'Lady, is that the evidence adduced so far is not sufficient to entitle the prosecution to have the defence called upon to state a defence, that is, there has been no evidence adduced to show that the defendant intended to posses the firearms in Jamaica contrary to Law.
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> My submission is that, the following anaylsis of the evidence is that one, the defendant had originally been scheduled to leave Jamaica on the 8th of December, secondly the defendant was attempting to leave Jamaica.
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> **HER LADYSHIP**: Sorry.
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> **MR. FAIRCLOUGH**:The defendant was attempting to leave Jamaica on December 2, and in the course of that attempt, wanted for the suitcase.
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> **HER LADYSHIP**: Wanted for the suitcase
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> **MR. FAIRCLOUGH**: Wanted For the suitcase to be

> allowed with outgoing luggage at Northwest Airline without him taking physical possession of it at all, it being already in the possession of the carrier, and it having remained in the possession of the carrier from the time it had arrived in the island. All this is uncontroverted evidence on the Crown's case".

The applicant complained that he was denied a fair trial. The particulars of this complaint is contained in his affidavit of which paragraphs 5,6,7 and 8 are reproduced hereunder:

> "5. I had instructed my lawyer, Mr.Fairclough to call as defence witnesses the two customer service agents at Northwest Airlines who had dealt with me on December 2, 1998 when I was leaving Jamaica, and who had taken me to the customs area of the airport where the travel bag in which the firearm and ammunition were; this my Attorney failed to do saying he had everything under control.
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> 6. I had also instructed my lawyer to challenge the police-interview document with questions and answers dated December 2, 1998, on the basis that the document was not true and had been prepared after I signed, during the questioning by the police when I told them the guns were mine but I had not authorised anyone to send them to Jamaica neither did I know they were to be sent to Jamaica, the police officer made notes and later told me to sign the blank sheets of paper indicating where on the paper I should put my signature; this my Attorney failed to do, saying he had everything under control
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> 7. I had told my Attorney I wish to give evidence on oath as I was innocent of the charges made against me, and to call witnesses but he told me all this was not necessary as he had everything under control.
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> 8. In preparation of my case it was impossible to get a full meeting with my lawyers who were

never available to me and took no written instructions from me".

To the assertions of Whilby, Mr. Roy Fairclough by affidavit, responded. His response was contained in paragraphs 6-13:

6. My assessment of the matters which were in issue at the trial did not include the evidence which could have come from the Customer Service Agents. The police officer Anderson admitted at trial the facts which paragraph 5 of the Affidavit speaks to i.e. that Ricardo Whilby was seeking to leave Jamaica that day and that he had been escorted to the Customs area by airline staff.

7. Paragraphs 6 of the Affidavit is untrue as expressed. It is true however that the instructions challenged the accuracy of a particularly damaging answer recorded on the documents bearing the signature of Ricardo Whilby.

8. It has never been said to me in my presence by Ricardo Whilby that the questions and answers were not recorded as asked and answered and signed at completion.

9. The factual history of the case prior to the appearance of Ricardo Whilby in the Gun Court includes the following witnessed personally by me:

   Before R.M. His Honour Mr. Glen Brown Ricardo Whilby represented by Mr. Michael Erskine and Mr. George Thomas, who was not in the Courtroom at the precise moment, had adopted by his plea, a non-controversial course with the added oticesity (sic), 'with explanation' appended by the overhead entreaty of his legal representative then present. This plea in mitigation and the matter committed to the Gun Court, the Circuit Court either being in session or soon to sit.

Paragraphs 7 and 8 contain truth though not as expressed. I did advise against giving evidence in the following circumstances: having outlined the three options open to Defendant following as closely as I was able to, the formula used by Judges in advising the unrepresented, I asked for Ricardo Whilby's choice and was met by the query of which I thought was best for him. I considered, in all the circumstances, the unsworn statement to be the best choice and so informed Ricardo Whilby.

10. I foolishly failed to record with attestation this decision by Ricardo Whilby.

11. There were two (2) major evidential difficulties which encouraged against exposure to cross-examination namely the question and answer already mentioned herein, and the document referred to in paragraph of the affidavit of Ricardo Whilby

12. The question and answer was never repudiated to me as being what was asked, answered, recorded in writing and attested in a single continuous process. I heard for the first time after 3:00 p.m. of Tuesday, May 9th 2000 that Ricardo Whilby had signed blank paper and had told me so.

13. The document with all its difficulties, was what Mr. Thomas and myself had used as written instructions after it's contents had been confirmed by Ricardo Wilby as what was said to the police by him. It is true therefore that I did not take any separate written and signed statement from Ricardo Whilby but I made notes of our several interviews.

It has been conceded by Mr. Phipps, Q.C. that if the questions and answers were unchallenged then the convictions would be unassailable. Therefore, the complaint that potential witnesses were not called would have had no effect on the outcome of the trial. The court agrees with the opinion

stated in paragraph 6 (supra) of Mr. Fairclough's affidavit. In respect of the complaint as contained in paragraph 8 of Whilby's affidavit about there being "no full meeting with my lawyers" and " no written instructions from me", this also would have had no effect on the outcome of the case since essentially the unfairness of the trial centered on two issues which were (a) failure of Mr. Fairclough to challenge "the police –interview document" which according to him had been prepared before he signed and (b) contrary to his wishes Mr. Fairclough advised him not to give sworn evidence.

In respect of issue (a) above, Mr. Fairclough said that Whilby never instructed him that the "questions and answers were not recorded as asked and answered and signed at completion" (para.8). The conduct of the defence in totally refraining from any challenge as to the authenticity of the questions and answers does give credence to this assertion. These questions and answers were vital evidence in the presentation of the prosecution of Whilby. It does seem inconceivable that any counsel, moreso an experienced one, could have so flagrantly flouted the instructions of his client. In his unsworn statement Whilby never denied the correctness of the questions and answers. As regards this aspect this is what he said:

> "I sat there for about half an hour, then they escorted me to Barnett Street Police Station, where I was asked a series of questions about the incident, then was arrested".

There is no indication in Whilby's affidavit that Mr. Fairclough advised or influenced him in any way not to say, as he now asserts, that "the document (questions and answers) was not true and had been prepared after I signed" (para. 6). The circumstances are such, as to cast grave doubt

on the sincerity of Whilby's allegation that he instructed his Counsel that the questions and answers were not genuine. His present stance appears to be all an afterthought. Mr. Fairclough admits he had instructions to challenge a particularly damaging answer. This he did not do. He has not given any reason for not so doing. Whether this omission resulted in the denial of a fair trial to the applicant will be subsequently discussed.

In respect of issue (b), the advice of Mr. Fairclough, contrary to his wishes, to give unsworn evidence, Mr. Phipps, Q.C. placed reliance on two cases. (I) ***R v Clinton*** [1993] 1 WLR 1181 and (2) ***Lawrence Pat Sankar v The State of Trinidad and Tobago*** [1995] 1WLR 195 a judgment of the Privy Council.

In ***Clinton*** the headnote is an accurate summary of the judgment of the Court of Appeal and this is now reproduced:

> "Following her kidnap and the indecent assault the complainant made a statement to the police describing her attacker. Fourteen months later she saw the appellant in a market place and identified him as her assailant. The appellant was arrested and charged. The case against him depended on the correctness of the complainant's identification and two incriminating comments alleged to have been made by him after his arrest. The appellant did not give evidence and was not advised by his counsel to do so and no evidence was called on his behalf. As a result important discrepancies between the appellant's actual appearance and the complainant's description of her attacker were not put before the jury and no explanation was given for the appellant's comments in interview. The appellant was convicted.
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> On appeal against conviction:-
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> **Held**, allowing the appeal, that the nature of the prosecution evidence had made it essential to advise the appellant in the strongest possible terms to give evidence, and the failure of his counsel to

> do so, in combination with the absence of any supporting evidence, had been a grave error; and that the appellant had a strong positive defence which had never been presented to the jury; that, although the cases where the conduct of counsel could afford a basis, for appeal were wholly exceptional, where a decision was taken either in defiance of or without proper instructions or contrary to the promptings of reason and good sense, it was open to an appellate court to set aside the verdict on the grounds that it was unsafe and unsatisfactory; and that, accordingly, in the circumstances the conviction was unsafe and unsatisfactory and should be quashed".

In this case as the judgment pointed out at pg. 1183 (c)

> "In point of fact the reality of the appellant's appearance and physical characteristics differed from the descriptions given (by the complainant) in a number of important respects".

The court then listed six such differences. In considering this aspect of the case the learned judge said at pg. 1183 (h):

> "There is an unfortunate dispute between the appellant and counsel who represented him at the trial as to whether a conference on this subject took place during the trial and if so whether the appellant expressed a strong wish not to give evidence. In our judgment, however, it is not necessary to resolve that issue. We are firmly of the view that the appellant should have been advised in the strongest possible terms that it was highly desirable that he should give evidence in order to underline the discrepancies outlined above".

In seeking to provide guidance, the court said at p.1187 E-H, p.1188 A:

> "Most recently ***Reg. V. Wellings*** (unreported), 20 December, 1991, heard in another division of this court, repeated the principle. Giving the judgment of the court, Lord Lane C.J. said:
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> > 'The fact that counsel may appear to have made at trial a mistaken decision or has made a decision which in retrospect is shown to have

> been mistaken, is seldom a proper ground of appeal. Generally speaking, it is only when counsel's conduct of the case can be described as flagrantly incompetent advocacy that this court will be minded to intervene'.
>
> We would, however, draw attention to the fact that in both ***Reg. V. Gautam,*** The Times, 4 March, 1987 and ***Reg. V Wellings,*** 20 December, 1991 the principle was stated in general rather than restrictive, inflexible terms. In our judgment the court was not thereby intending to derogate from the plain wording of section 2(1)(a) of the Criminal Appeal Act 1968. Mr. Maxwell has, rightly we think, urged upon us that it is basically to the wording of the subsection itself that the court must look. We think that the proper interpretation of the cases to which we have referred is that the court was doing no more than providing general guidelines as to the correct approach. The court was rightly concerned to emphasize that where counsel had made decisions in good faith after proper consideration of the competing arguments, and , where appropriate, after due discussion with client, such decision could not possibly be said to render subsequent verdict unsafe or unsatisfactory. Particularly does this apply to the decision as to whether or not to call the defendant. Conversely, and, we stress, exceptionally, where it is shown that the decision was taken either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way, it may be open to an appellate court to set aside the verdict by reason of the terms of section 2(1)(a) of the Act. It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection".

From ***Clinton*** the following points may be extracted:

(1) a successful challenge based on the criticism of counsel's conduct "must of necessity be extremely rare".

This is how the court put it at p. 1186:

> "At the same time we are acutely aware that the circumstances in which a court is entitled to overset a jury's verdict when the grounds advanced consist wholly or substantially of criticisms of defence counsel's conduct of the trial, or of matters preparatory thereto, must of necessity be extremely rare".

(2) In making a determination the court has to assess counsel's conduct on its effect on the trial and verdict.

In this case it was the view of the court at p. 1186 E:

> "That the appellant had a far from feeble case which, for a variety of reasons, was never presented to the jury".

(3) It has to be shown that counsel's decision was "taken either in defiance of or without proper instructions or when all the promptings of reason and good sense pointed the other way" (supra).

In ***Sankar*** the headnote as far as it is relevant states:

> "The defendant was charged with murder. The prosecution relied on the evidence of three eyewitnesses who testified that the defendant had made an unprovoked attack on the deceased with a knife, fatally injuring him. When cross-examined by the defendant's advocate those witnesses denied that the deceased had a knife or had caused the defendant to act in self-defence. The defendant did not give evidence but said that he had been advised by his advocate to stay silent. In his closing speech the defendant's advocate merely put the prosecution, to proof and the judge did not leave issues of provocation, self-defence or accident to the jury. The defendant was convicted of murder and the Court of Appeal of Trinidad and Tobago dismissed his appeal against conviction. After being granted special leave to appeal to the Judicial Committee of the

Privy Council the defendant swore in affidavit in which he stated that he had wanted to give evidence that he and the deceased had been struggling when the deceased had been wounded with a knife which the deceased had drawn, but that during the testimony of the last prosecution witness his advocate had gone over to the dock and had told him that he was not sending him into the witness box, and being so near to the jury had not wished to argue about that with his advocate. In his affidavit the defendant's advocate said that the defendant had decided to make an unsworn statement but before the hearing on the last day of the trial had commenced the defendant had told him something which had taken him by surprise and he had eventually advised the defendant to remain silent.

...

On the defendant's appeal to the Judicial Committee:--

Held, (1)...

But (2) allowing the appeal, that although such a course was very unusual, in the exceptional circumstances of the case the Judicial Committee would consider the additional ground of appeal and the further evidence; that the defendant had not given evidence or made an unsworn statement because of his advocate's failure to give him adequate advice or explanation of the alternative course available to him, or to tell him that if he did not give evidence he had in practice no defence; that if an advocate was embarrassed in the conduct of the defence by what his client told him he had a duty to explain the situation and inform his client of the options which arose, including the advocate's withdrawal from the trial if the course chosen was inconsistent with the advocate's duty to the court; that the defendant's advocate had failed to so advise him; and that, accordingly, the defendant had been deprived of the opportunity to present his defence to the jury and a substantial miscarriage of justice had occurred, and since it would be inappropriate to apply the proviso to section 44(1) of the Supreme Court of Judicature Act the conviction would be quashed".

In this case the Board recognised the importance of the defendant giving evidence. On p. 198. G. Lord Woolf who delivered the Opinion of the Board said:

> "The decision of the defendant as to this was of the greatest importance since if he was to have any prospect of avoiding conviction, this would have been dependant upon his giving evidence which conflicted with that of the three eye witnesses called on behalf of the prosecution".

After reviewing the evidence by way of an affidavit as to what transpired between the defendant and his counsel Mr. Khan pertaining to the giving of evidence by the former, the Board said at p. 199 F-H:

> "Nonetheless the fact remains that the defendant 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 an explanation as to what were the alternative courses which were open to him.

Sankar as in ***Clinton*** focussed on the effect of the conduct of counsel as it affected the defence of the defendant being properly and fully advocated. In commenting on ***Clinton*** the Board said at p.200 G-H:

> "In ***Reg v Clinton*** [1993] 1 W.L.R. 1181 the English authorities were reviewed in a judgment of the Court of Appeal given by Rougier J. Having done so the court made it clear that it was only in wholly exceptional circumstances that the conduct of counsel could form the basis for an appeal, but in that case the appeal was allowed because of the failure of counsel, in a case where the defendant's evidence was essential to advise the defendant in strong terms to give evidence. Rougier J. pointed out, at p.1188, that it is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial".

Mr. Sykes adverted the court's attention to ***Suresh v the Queen*** [1998] H.C.A. 23 (3 April 1998). In this decision of the High Court of Australia two passages of the judgment of Kirby J on the conduct of Counsel are relevant. They are found in paragraphs 55 and 56:

> "**55**. I agree that the fundamental question remains whether a conviction 'involves or has brought about a miscarriage of justice' ***(R v Sarek*** [1982] VR 971 AT 983; ***Jukov v The Queen*** (1994) 76 A Crim R 353 at 361; ***Maric v The Queen*** (1978) 52 ALJR 631 at 635; 20 ALR at 520 per Gibbs J. Neither the proof that the accused was represented by competent legal representatives nor that a conscious forensic choice was made relieve the appellate court from considering the claim that mistake has occurred which has produced a miscarriage of justice. But that conclusion will rarely be reached where the defence has been conducted competently. It will be even more rare when the conduct complained of involved a forensic choice, consciously elected with the prospect of perceived advantage, but [and] the peril of risks to the accused.
>
> <u>The accused exercised his right to a fair trial</u>
>
> **56**. The object of the foregoing approach is not to punish an accused for an erroneous tactical decision made by that person's legal representative. It is to put an end to what would otherwise be an infinite regression of argument which would be destructive of finality of trials and of certainty in the administration of justice. It is not to hold the accused rigidly to rules of a game which ordinarily must be played by others over whom, as courts recognise, effective control by the accused is often more theoretical than real. It is to accept the realities within which a criminal trial takes place, reserving complaints about alleged miscarriages of justice arising from the conduct of the trial by a party's legal representatives to really serious

> cases of incompetence, ignorance and inexperience".

In ***Suresh*** as in ***Clinton*** and ***Sankar*** the determinative factor in appeals questioning the conduct of counsel in any particular case, is the effect of the role of counsel within the context of that particular case. This court agrees that this is the proper approach. With this in mind the question arises whether or not Whilby was denied a fair trial resulting in a miscarriage of justice within the meaning of Section 14(1) of the Judicature (Appellate Jurisdiction) Act.

In this particular case, the defence was faced with meeting the following factors:

(i) The firearms and ammunition belonged to Whilby.

(ii) By the questions and answers Whilby admitted that:

(a) He had asked his girlfriend "to bring" firearm and ammunition for him (Ques. 13) (supra).

(b) He had gone to collect the suitcase which was addressed to him (Ques. 17) (supra).

(c) His purpose for having the firearm in Jamaica was that he had been robbed twice in Kingston

It has already been established that Whilby never instructed Mr. Fairclough to challenge the authenticity of the questions and answers. It is in these circumstances that Mr. Fairclough, it would seem, made a forensic choice, consciously elected with the prospect of perceived advantage and the peril of risks to Whilby (See ***Suresh***). The choice was to contend that despite the factual situation, which appeared unchallengeable, the

prosecution had not established possession in law. The effect of this choice cannot be said to be inimical to the prospect of Whilby's acquittal. This choice, it would seem, was the only escape route from the clutches of prosecution. In his affidavit Mr. Fairclough, as already noted, was instructed to challenge the accuracy of a particularly damaging answer. This answer has not been disclosed. Certainly there was more than one damaging answer (see questions and answers supra). Here counsel was being placed in the invidious position of being requested by his client to challenge an answer given by him which he (the client) did not deny to be true. In any event it was not part of the strategy of the defence to join combat with the factual circumstances as presented by the prosecution.

Whilby also complains that he wished to give evidence on oath. (para 7). Although he did not say so, presumably, he is complaining that Mr. Fairclough persuaded him not to so do. Mr. Fairclough's reply in para. 9 (1) is in effect that Whilby placed that decision in the hands of his counsel. It is unnecessary to resolve these contrary assertions. Firstly, it is to be noted that unlike ***Clinton*** and ***Sankar*** where the respective defendants remained silent Whilby made an unsworn statement. Therefore he had an unfettered opportunity to say whatever he wished. Is he now wishing that this court should believe that, had he given evidence an oath, that sworn evidence would have been so remarkably different as to have had an impact on the verdict? This is entirely far fetched. Unlike in ***Clinton*** and ***Sankar***, where the giving of evidence on oath was essential to the conduct of the defence here this is not so. The defence was founded on a strictly technical

legal issue which was whether or not Whilby could be said to be in possession in law. Therefore, his giving evidence on oath would have had no effect on the ultimate verdict.

It is for these reasons that Whilby's application for leave to appeal against conviction was refused.