



[2011] UKPC 12
Privy Council Appeal No 39 of 2010

JUDGMENT

**Rohan Vidal and Kevin Thompson (Appellants) v
The Queen (Respondent)**

From the Court of Appeal of Jamaica

before

**Lord Hope
Lady Hale
Lord Brown
Lord Kerr
Lord Dyson**

**JUDGMENT DELIVERED BY
Lord Dyson
ON**

18 MAY 2011

Heard on 29 March 2011

Appellant
Michael Egan QC
Alex Ward

(Instructed by S.J. Berwin
LLP)

Respondent
Tom Poole

(Instructed by Charles
Russell LLP)

LORD DYSON:

1. At about 6 pm on 9 May 1997, Dexter Taylor was shot dead at the A3 building in Majestic Gardens in the Parish of St Andrew. The appellants were arrested for the murder on 13 June 1997. They were first tried between 7 and 17 July 1999 and unanimously convicted. On 27 March 2001, their appeals were allowed by the Court of Appeal of Jamaica and a retrial was ordered. At the retrial, both were unanimously convicted at the Home Circuit Court (McCalla J and a jury) and on 28 November sentenced to life imprisonment with hard labour and no possibility of parole for 21 years. On 7 December 2004, their appeals against conviction were dismissed by the Court of Appeal of Jamaica (Forte P, Smith JA and Harrison JA). They now appeal against their convictions by special leave of the Board.

2. The principal prosecution witness was the deceased's cousin Miss Sylvia Notice. At the time of the murder, she had been living in Majestic Gardens for 35 years. She had known the appellant Vidal for about 10 years and Thompson for about 5 years. She knew Vidal's mother, brother, sisters and extended family. Her sister, Anne-Marie James, was in a relationship with Vidal's uncle Clinton. In the period before the murder, Miss Notice said that she saw both Thompson and Vidal every day. At the time of the murder, Thompson was living with his mother on the first floor of the A3 building.

3. At about 6 pm on 9 May 1997, Miss Notice was at the foot of a staircase beneath the ground floor veranda at the A3 building. She said that she was in a group which included the deceased and her cousin Sandra Wright. She heard a male voice say "don't move" and saw three men (one of whom was masked) coming towards her group from the road. They were all pointing guns in their direction. She then saw Thompson and Vidal coming from a different direction. They too were carrying guns. The masked man said "Oono deal with him". She next saw Thompson step forward and point his gun at the deceased. She heard shots coming from the direction of Vidal. The deceased fell to the ground. He died as a result of the gunshot injuries that he sustained.

4. Miss Notice and Miss Wright went to the Hunts Bay Police Station where they reported the incident and gave statements to DC Neville Faulkner. On the evening of 13 June 1997, Miss Notice went to Hunts Bay Police Station with Miss Wright. Both women saw several men in the corner of the CIB office. They recognised two of the men as Vidal and Thompson and pointed them out to DC Faulkner as having been involved in the shooting. The appellants were arrested and charged with the murder. They did not give statements to the police.

5. At the trial, Miss Notice was the sole Crown eye-witness. As will be explained, Miss Wright did not give evidence. The defence case was in part that this was a case of mistaken identity and in part that Miss Notice was lying and had not witnessed the murder at all. She roundly rejected the suggestion made on behalf of Thompson that at the time of the murder she had been at the shop of her sister Anne-Marie James in Majestic Gardens watching a fight between Miss James and Dada and that she had only found out about the murder when she was told by the deceased's sister.

6. DC Faulkner also gave evidence for the Crown. He said that he had spoken to Miss Notice and Miss Wright on the evening of 9 May 1997. Having recorded the names of the five individuals (including the appellants) whose names had been given to him by the two women, he prepared warrants for the arrest of all of them. He said that on 13 June 1997 there was a large-scale police operation in Majestic Gardens which resulted in many arrests. Thompson and Vidal were among the men who were arrested. He said that both Miss Notice and Miss Wright identified Thompson and Vidal at Hunts Bay Police Station as having been involved in the killing of the deceased. As will become clear, this evidence about what Miss Wright said to DC Faulkner on 13 June has assumed some significance in these appeals.

7. Thompson did not give evidence. He made an unsworn statement from the dock. He denied that he had shot the deceased. He said that at the time of the murder he had been standing in Majestic Gardens watching a fight between Miss James and Dada in Miss James's shop. Three witnesses were called on behalf of Thompson. Sylvia Barrett said that she was with Thompson at the time of the murder watching the fight between Miss James and Dada. The fight had started at 6.00 or 6.30 pm and ended when she heard the first explosion. Miss James said that Miss Notice and Miss Wright were in her shop at the time of the fight. Rudolph Willoughby gave evidence in support of Thompson's good character.

8. Vidal gave evidence. He said that at the time of the murder he was at his mother's back yard. He heard about the murder the following day. He said that only Miss Notice had identified him at the police station on 13 June.

9. The name of Miss Wright was endorsed on the back of the indictment and the Crown intended to call her to give evidence. DC Faulkner started to give his evidence at 2.24 pm on 23 October and completed it during the afternoon of 24 October. It was only on 23 October that Mr Mahoney, counsel for the Crown, was told that Miss Wright was abroad and had not been told of the trial date. He informed Mrs Gayle (counsel for Thompson) of this during the morning of 24 October. He hoped that Miss Wright would be able to attend court before the end of the trial. At the end of DC Faulkner's evidence, Mr Mahoney informed the judge of the position. He told her that, in the interests of saving time, he proposed to close his case and that if Miss

Wright returned in time, she would be made available to the defence. The judge said that no efforts should be spared to secure the presence of Miss Wright at court. In the event, she did not attend court before the conclusion of the trial.

The first ground of appeal

10. Mr Egan QC submits that the judge failed to direct the jury adequately as to how they should approach DC Faulkner's evidence that Miss Wright had identified Thompson and Vidal on 13 June as having been involved in the murder. He submits that an important strand of the defence case was that Miss Notice had fabricated her evidence and that she had not witnessed the killing. In the absence of an appropriate warning, there was a real danger that the jury would accept the hearsay evidence given by DC Faulkner of what Miss Wright had said to him as true and rely on it as support for the account given by Miss Notice.

11. During her summing up, the judge made several references to DC Faulkner's evidence of what Miss Wright had said to him. It should be made clear that no complaint is made about the fairness or accuracy of her summary of this evidence. The first reference (p 820) was to the evidence of DC Faulkner that on 13 June 1997 Miss Notice and Miss Wright had identified both appellants as having been involved in the killing. This was during the course of his evidence in chief when answering the question whether anything happened when the two women came into the CIB office on that date.

12. The second reference (p 827) was to evidence given by the officer when he was cross-examined by Mrs Gayle about the accuracy of the statement that he took from Miss Wright on 9 May.

13. The third reference (p 829-830) was to evidence that he gave when he was being cross-examined about procedural matters including the endorsement on the arrest warrants. In particular, he was asked why he had endorsed the warrants with the words "[the arrested person] was pointed out to me by the complainant" rather than "[the arrested person] was known to me before". This was part of a detailed cross-examination in which counsel attempted to damage DC Faulkner's credibility and portray him as an incompetent officer. The judge said:

“...he was shown both warrants and asked whether since he had known the persons before, why it is that that was not put on the warrant itself, and according to him, he says both witnesses had pointed out the accused men, they were complainants in the case, and he did not see it necessary to put that he knew them. Well that was the explanation he

gave, it was not necessary as the accused men were pointed out to him by the complainants.....

But [Vidal] says that it was only one person who pointed him out to the police, but when Miss Notice gave evidence, it was not suggested to her that he was not pointed out by both; but it is a matter for you. The police officer said that both Sandra and Sylvia were the complainants in the case.”

14. The next reference is in a similar passage at p 834 about the endorsement on the warrants. The final reference is at p 869 where the judge referred to the cross-examination by Mr Mahoney of Vidal and Vidal’s denial of the suggestion that he had been pointed out on 13 June by both Miss Notice and Miss Wright. He said that it was Miss Notice alone.

15. The judge was clearly right to remind the jury of these parts of DC Faulkner’s evidence. In so far as this evidence was adduced by the Crown, it was done so without objection from the defence. Otherwise, it was elicited in cross-examination. It was part of the appellants’ case to seek to discredit the officer. It is also possible that, as suggested by Mr Poole, the eliciting of this evidence was the result of a deliberate decision by counsel to further the defence that there was a conspiracy between Miss Notice and Miss Wright falsely to identify the appellants.

16. But the real thrust of Mr Egan’s submissions is not that the judge was wrong to remind the jury of the parts of the evidence to which reference has been made. Rather, it is that the judge failed to give appropriate warnings to the jury. Mr Egan submits that each time the judge reminded the jury about what DC Faulkner said Miss Wright had said to him, he should have warned the jury to disregard that evidence in terms along the following lines:

“There has been much reference in this case to a woman called Sandra Wright who has not given evidence before you. There has been reference to what she may have said to police officers and indeed Miss Notice. You remember I told you that you try this case on the evidence you have heard in the witness box and that has been read to you. Sandra Wright has given no evidence and therefore she cannot support in any way the one witness that says that these two defendants committed the crime you are trying. Sandra has given no evidence at all; you should disregard what you have heard about what she might have said to police officers or Miss Notice. It is Miss Notice you must focus on. Her evidence that it was the defendants is unsupported by any other evidence”.

17. It is, therefore, necessary to examine the directions that the judge did give. Mr Poole relies on seven passages in the summing up which he submits adequately directed the jury that they could not rely on the evidence of what DC Faulkner said Miss Wright had said as evidence of the appellants' guilt of the murder. At p 758 of the record, the judge said:

“...it is the evidence that you have heard in this court room, the evidence that you have heard in this court from the witnesses called in this court, which must determine the conclusion to which you arrive in respect of the guilt or innocence of these two accused men.”

18. It is, however, fair to say that the passage which follows on p 759 indicates that this direction was primarily concerned to ensure that the jury were not swayed by sympathies and prejudices or anything that they had read or heard about the case.

19. The next passage is at pp 778-779 where the judge was dealing with the jury's assessment of the evidence. She said:

“Miss Notice is the *sole eye-witness* in the case. So you have to assess that evidence....” (emphasis added).

20. At p 780, the judge said:

“The question which arises is whether he met his death *in the manner stated by Miss Notice in her evidence*, and in that regard the Crown is relying on *her* evidence to prove that these two accused men were present and also that they committed the offence” (emphasis added).

21. At p 789, the judge referred to Miss Notice as:

“the *only* witness as to fact in the case, the eye-witness on whom the Crown relies. There is *no other evidence* in the case which links these two accused men *other than the evidence of Sylvia Notice* and you will have to recall and recapture her demeanour as she gave evidence in the witness box” (emphasis added).

22. At p 818, the judge referred to the fact that Miss Wright had not been called to give evidence. She mentioned the fact that comments had been made by counsel in their addresses about that and continued:

“but I remind you that you are *not* trying the case *on evidence of witnesses that you don’t have*. What you are trying the case on is in respect of the witnesses that you do have and you cannot speculate in respect of evidence of witnesses not before you.

In the final analysis what you are required to do is *consider the evidence before you* and see whether on *that* evidence you can feel satisfied to the extent that you feel sure of the guilt of those accused” (emphasis added).

23. At p 877, the judge reminded the jury that Mrs Gayle referred to the absence of Miss Wright and repeated that the jury were to “try the case on the evidence that is before you and that you cannot speculate”. Finally, at the very end of her summation, the judge said:

“It is *only if*, Mr Foreman and members of the jury, you were to feel sure that Miss Notice was in fact, after you have considered the question of identification and the caution that I gave you, after you have considered that and you *feel sure that Miss Notice is to be believed* when she said she was at the A3 building, and if you feel sure that she is not mistaken it’s only in those circumstances that it *would be open to you to convict the accused in each case of the offence of murder*. If you are in doubt, then you acquit them” (emphasis added).

24. The Board considers that there can be no doubt that the cumulative effect of the passages that it has emphasised must have brought home to the jury that they could only rely on the evidence of Miss Notice to convict the appellants. They were bound to have understood that they were not permitted to rely on what Miss Wright had said to DC Faulkner on 13 June as evidence of the appellants’ guilt. It was quite unnecessary for the judge to give a repeated warning after each reference to DC Faulkner’s evidence of what Miss Wright had said to him.

25. As regards the substance of the direction suggested by Mr Egan (para 16 above), it seems to the Board that such a direction was not appropriate in so far as it would have required the jury to disregard the evidence of what Miss Wright had said to DC Faulkner altogether, and not to take it into account even for the limited (and legitimate) purpose of their considering the points that were put on behalf of the defence in the cross-examination of the officer.

26. The Board rejects the first ground of appeal.

The second ground of appeal (Thompson alone)

27. The second ground of appeal is that, having decided (correctly) that Thompson should have the benefit of a good character direction, the judge failed to direct the jury that good character was relevant to propensity as well as to credibility. The relevant passage is at p 852-3. It is not necessary to set it out, since it is common ground that the judge should have given the propensity limb of the good character direction and failed to do so: see, for example, *Teeluck and John v The State (Trinidad and Tobago)* [2005] UKPC 14, [2005]–1 WLR 2421 at para 33 (iii) and *Maye v The Queen (Jamaica)* [2008] UKPC 35 at para 19. It was also made clear in *R v Vye, R v Wise and R v Stephenson* [1993] 1 WLR 471, 477D-G by the Court of Appeal of England and Wales (Criminal Division) that the propensity limb of the good character direction should always be given where a defendant is of good character, even in cases where he or she does not give evidence. Where the propensity limb is not given, the court stated at p 482E that, if it is impossible to say that the jury would necessarily have reached the same verdict if they had been given the full character direction, then the conviction should be quashed. On the other hand, in a case where the evidence against the defendant was overwhelming, the appeal would be dismissed despite the irregularity: see p 484B.

28. As the judge told the jury immediately before they retired to consider their verdicts, the Crown case depended entirely on the evidence of Miss Notice. She gave the clearest evidence that she knew both appellants very well and had a good view of the incident which led to the death of the deceased. In short, this was a recognition case. Although the defence raised the issue of mistaken identity (even in the Court of Appeal), Mr Egan accepts that the real defence was that Miss Notice was lying and had fabricated the whole story. The credibility of Miss Notice was tested at length during the trial during almost the whole of 19 October 2001 and for a further 20 minutes on 22 October. The jury were able to assess her credibility and to measure it against that of Vidal and Thompson's alibi witnesses. They reached their verdict within 62 minutes of their retiring. They clearly had no difficulty in being sure that Miss Notice was a truthful witness and in rejecting the contrary evidence of Vidal and Thompson's alibi witnesses as untrue. In these circumstances, the Board is in no doubt that, if the propensity limb of the good character direction had been given, the jury would have reached the same verdicts.

29. In the result, the Board agrees with the Court of Appeal that no substantial miscarriage of justice has occurred as a result of the judge's failure to give a full good character direction and that this is a proper case to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

Conclusion

30. For these reasons, therefore, the Board will humbly advise her Majesty that these appeals should be dismissed.