[2013] UKPC 14
Privy Council Appeal No 0057 of 2012

JUDGMENT

Andrew Laing (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Bermuda

before

Lord Hope
Lord Kerr
Lord Reed

JUDGMENT DELIVERED BY LORD HOPE ON

14 MAY 2013

Heard on 23 April 2013

Appellant
Edward Fitzgerald QC
Ruth Brander

(Instructed by Simons Muirhead & Burton)

Respondent
Howard Stevens QC
Rory Field
Cindy Clarke
(Instructed by Charles Russell LLP)

LORD HOPE:

1. The appellant, Andrew Laing, was convicted after trial before the Hon Justice Wade-Miller in the Supreme Court of Bermuda on 21 June 2007 on five counts. There were three counts of conspiring to import cannabis and one count of conspiring to import diamorphine, contrary to the Misuse of Drugs Act 1972. There was also one count of assaulting a special constable with intent to prevent lawful arrest, contrary to the Criminal Code Act 1907. On 6 July 2007 the appellant was sentenced to 17 years imprisonment on the drugs charges and one year on the assault charge, those sentences to be served consecutively. He appealed against his conviction and sentence.

2. The appellant's grounds of appeal against conviction related to the directions of the trial judge, which were said on various grounds to have been inadequate. Evidence had been given at the trial by the appellant's former co-defendant Ms Teeteta Iereria. She had pleaded guilty on her first appearance before the Supreme Court to charges of importing the same controlled drugs with which the appellant was said to have been concerned. She was sentenced to five years imprisonment, but her sentence was later reduced on appeal to two years under section 27E of the Misuse of Drugs Act 1972 in recognition of her testimony against the appellant.

3. On 9 March 2009 the Court of Appeal for Bermuda (Zacca P, Stuart-Smith and Ward JJA) dismissed the appellant's appeal against conviction. His application for leave to appeal against sentence was refused. The Court of Appeal did not give any reasons in writing for its decision. But the Deputy Director of Public Prosecutions, Ms Cindy Clarke, prepared a note of the proceedings which contains this entry:

> "Appeal sentence abandoned. No merit warranting call on the Crown. Satisfied direction adequate. Appeal dismissed. Conviction affirmed. Application for leave to appeal sentence refused. Sentence affirmed."

There is no other record of what could be said to have been the court's reasons. We do not know what further explanation, if any, was given.

4. The appellant has now applied for permission to appeal to the Board against the decision of the Court of Appeal. The application was made on the

ground that the appellant had been deprived of the protection of the law and of a fair hearing, as in the absence of reasons he had no way of knowing why his appeal and application had been dismissed or even if they had been properly considered. The application for permission was made on 24 July 2012. It was out of time, but an explanation was given as to why it had been delayed. On 22 August 2012 the solicitors for the respondent provided the appellant's solicitors with a copy of a transcript of the summing up and the sentencing process, of the Crown's case and of its supplemental skeleton submissions in the Court of Appeal. A note was then lodged in which the respondent submitted that the application for permission to appeal should be dismissed. On 4 February 2013 those representing the appellant submitted a note in reply in which they stated that, having had the opportunity of considering those documents, they were not seeking permission to pursue any additional substantive grounds of appeal against either conviction or sentence arising out of the summing up or the sentencing remarks.

5. On 4 March 2013, having considered these papers, the Board was satisfied that sufficient reasons had been given for the time for making the application to be extended. But it directed that there should be an oral hearing as to whether permission to appeal should be given on the ground stated in the application. On 16 April 2013 the respondent submitted a further note supplementing its objection to the application for permission. The point was made that, as the appellant had confirmed that he was not seeking to pursue any substantive ground of appeal either against conviction or sentence, no purpose would be served in granting the application. On 19 April 2013, in a letter to the solicitors for the respondent, the appellant's solicitors said:

> "We have considered your response carefully with counsel. We accept that the judge's directions are not so defective as to warrant an appeal to the Privy Council. However, we do consider that there was a serious breach of the appellant's constitutional rights by the denial of reasons, in relation to a difficult issue of law as to the appropriate warning in an accomplice case, especially in the new statutory regime after the abrogation of the requirements of a formal corroboration ruling in accomplice cases."

6. When the application came before the Board for an oral hearing on 23 April 2013 Mr Fitzgerald QC for the appellant indicated that he wished to argue that permission should be given for the appeal to be argued on substantive grounds as well as on the issue about the absence of reasons. Mr Stevens QC for the respondent, for perfectly understandable reasons, objected to this change of position in view of the assurance only a few days before that the application was to be confined to the procedural issue. The Board decided,

with some reluctance, to hear Mr Fitzgerald on the question whether permission should be given on the substantive issue. But, having heard argument on the point and considered the careful directions by the trial judge, it was satisfied that permission to appeal on this ground should not be given.

7. The directions to which Mr Fitzgerald's argument was addressed appear in a passage in the trial judge's summation in which she was dealing with the evidence of Ms Iereria. She and the appellant had both been working on a cruise ship. Her evidence was that the appellant had enlisted her to join him in importing drugs from New York into Bermuda. She also said that she was quite jealous of the appellant before she agreed to do this, and that she had ended up sleeping with another man in order to get back at him. But they made up their differences, and it was then that the appellant had approached her. The trial judge warned the jury that Ms Iereria might have had a motive for not telling the truth to get her sentence reduced, and that if that was the case they must treat her evidence with the utmost caution. She also told them that it was a matter for their judgment to determine whether she had a grudge and had concocted the story to implicate the appellant. She added that her evidence, which the appellant disputed, was that of an accomplice and there was a special need for caution. It would be wise therefore to look for some supporting material. One such piece of supporting material was provided by the cruise log which showed them embarking and disembarking together, as the trial judge put it, all over the place.

8. Mr Fitzgerald pointed out that, when the rule that required corroboration of evidence was abolished in Bermuda in 1994, it was stated in section 32(3) of the Evidence Act that nothing in subsection (2) which abolished the rule precludes a judge from advising a jury to consider, in their discretion, whether evidence ought to be corroborated by other evidence where the interests of justice so warrant. He said that, so far as he was aware, this was the first case in which such a warning had been given in Bermuda. But that provision, although not in the same terms, serves the same purpose as section 32(1) of the Criminal Justice and Public Order Act 1994 which abolished the corroboration rule in England and Wales, and in *R v Makanjuola* [1995] 1 WLR 1348, 1351-1352, Lord Taylor of Gosforth CJ, with reference to the evidence of an alleged accomplice, said:

> "It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence."

Mr Fitzgerald said that the real point he wanted to make was that Ms Iereria's evidence was inherently dangerous, and that the warning that was needed was not given. Mr Stevens said in reply that there was no evidence that section 32(3) had caused any difficulty in Bermuda, that Lord Taylor's observation was plainly applicable there too, that the situation in this case was very similar to that with which he was dealing in that case and that the trial judge's direction was both appropriate and adequate.

9. The Board was not persuaded that there is any substance in the criticism of the directions by the trial judge. She dealt with the two grounds on which Ms Iereria's evidence had to be treated with caution: grudge and motive. She warned the jury that they must treat her evidence with the utmost caution. And she told them that, as there was a special need for caution where her evidence was disputed by the appellant, they would be wise to look for some supporting material. It is not arguable that her directions were inadequate or that the conviction is unsafe. Mr Fitzgerald did not seek to argue that the sentence was so plainly excessive that permission should be given to appeal on that ground. The Board will humbly advise Her Majesty that permission to appeal on these substantive issues should be refused.

10. There remains the question whether permission to appeal should be given on the ground that, as the Court of Appeal gave no reasons for its decision, the appellant was deprived of his right to a fair hearing of his appeal. Three points may be made by way of background to a consideration of this argument which will help to put Mr Fitzgerald's submissions into their proper context.

11. The first is that there is at least a hint in the words "satisfied direction adequate" that were noted down by Ms Cindy Clarke that brief oral reasons were in fact given for the Court's decision that there was no merit in the appeal that warranted calling on the Crown. The argument was all about the directions by the trial judge, so these few words do appear to have been directed by the Court to the very point at issue. The second is to be found in the information as to the practice in Bermuda provided by the respondent, which Mr Fitzgerald did not dispute. If there is no new or novel point of law, it appears to be the Court's practice not to provide written reasons unless it is requested to do so at the end of the hearing and then generally only to provide a transcript of whatever reasons were given by the Court orally. It has not been suggested that any such request was made in this case. The third is to be found in the judgment of the European Court of Human Rights in *Ruiz Torija v Spain* (1995) 19 EHRR 553, para 29, where the Court said that article 6(1) of the European Convention on Human Rights obliges courts to give reasons for their judgments, but that this cannot be understood as requiring a detailed answer to

every argument and that the question whether a court has failed to fulfil the obligation can only be determined in the light of the circumstances of the case.

12. The appellant had nevertheless been, as Mr Fitzgerald pointed out, convicted of very serious offences and was facing a very long period of imprisonment. He was entitled to a fair hearing of his appeal. The giving of reasons was an important part of that process. It was one of the elements of his constitutional right to a fair hearing. In *Maharaj v The State* [2008] UKPC 28 the hearing before the Board was conducted on the assumption that, despite requests that it should do so, the Court of Appeal had not produced any reasons for refusing the petitioner's appeal. As it happened, written reasons were subsequently produced. But Lord Rodger of Earlsferry took the opportunity in para 4 of his judgment to stress how seriously the Board took a failure to give reasons and to express the hope that nothing similar would occur again. He also said that, if it considered that there was merit in the appeal, the giving of reasons by the Board would in substance remedy the failure by the Court of Appeal to do so.

13. Had there been merit in the appeal on the issues of substance, the Board would have been inclined to give permission on this procedural issue too so that a remedy for the failure could be given. But, as Lord Rodger said in *Maharaj*, para 4, it cannot be the case that, if a conviction is otherwise sound, it would have to be quashed simply because of the failure by the Court of Appeal to give their reasons for dismissing an appeal against that conviction. That is the position in this case. The Board was not persuaded that there are grounds for regarding the conviction as unsafe. It has given its reasons for taking that view. That is enough to make good any inadequacy in the reasons that the Court of Appeal gave for its decision in this case. The Board will humbly advise Her Majesty that permission to appeal on this ground also should be refused.

14. The situation revealed by this case cannot, however, be regarded as entirely satisfactory. All three members of the Board are well aware, from their own experience, of the pressures that are endemic to the criminal appeal courts. But the interests of justice must come first. Once again it must be stressed that an appellant has a constitutional right to be given the reasons for the court's decision if his appeal is dismissed. The more serious the offence of which he has been convicted and the more severe the sentence that has resulted from it, the more important it is that this right should be given effect. This should be done by giving written reasons for the decision or, where they have been given orally, for them to be recorded so that they can be transcribed into written form as soon as possible. Only then can one be certain that the constitutional right has been satisfied.

15. It will always be a matter at the court's discretion how much need be said, and whether it should deal with every point that has been raised in the course of the argument. But the guiding principle is one of fairness. The appellant is entitled to be assured that his case has been properly considered and to know why his appeal did not succeed. The few words that were noted down by Ms Cindy Clarke, while directed to the point at issue, did not begin to measure up to that standard.