Privy Council Appeal No. 12 of 1994

Norris Taylor *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 26th July 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Slynn of Hadley
Lord Woolf
Lord Nolan
Lord Steyn

*[Delivered by **Lord Nolan**]*

On 10th October 1983 the appellant was arrested and charged with having murdered Ian McMorris on 29th September 1983. One Dermot Harris was charged with him, but was subsequently killed in prison and never brought to trial.

The principal witness for the prosecution was a Special Constable, Othniel Scott. He said that about 9.30 p.m. on the evening of 29th September 1983 he boarded a bus at Kingston and went to sit at the back. One of the passengers seated there with him was the appellant, whom he had known for about five years. The appellant spoke to him about a record which he was holding.

According to Scott, the bus stopped and he saw Harris, whom he also knew, and whom he had always seen in the company of the appellant. Harris was standing by the door with a gun in his hand. Harris said "This is a hold-up, nobody move". There was another man, also armed with a gun, sitting by the driver.

The appellant, holding a long knife in his hand, then began to search one of the passengers and took a bill-fold from him saying "I will stab you boy". Scott heard an explosion and saw Ian McMorris fall to the ground. Scott took cover behind a seat, but was shot by Harris in the right arm. He returned Harris' fire, but Harris, the appellant, and the other man with a gun, escaped. It is not in dispute that, if Scott's evidence was correct, the appellant no less than Harris was guilty of the murder of McMorris.

The appellant was first put on trial on 5th February 1988, some 4½ years after his arrest. His defence was an alibi. In evidence, he denied that he knew Scott, and also denied that he had met Harris before they were both arrested.

The appellant was unrepresented at the trial because the counsel, Mr. C.J. Mitchell, whom he wished to represent him, was not properly retained, and two other counsel who had agreed to represent him were allowed to withdraw from the case after he had decided to decline their services.

In the course of the trial the judge unfortunately asked Scott about the death of Harris. Scott replied that he had heard that Harris had been killed by the appellant. This highly prejudicial evidence led the Court of Appeal to set aside the verdict of guilty which was returned against the appellant on 5th February 1988 and to order a retrial. The retrial was ordered on 27th July 1988, and began on 27th March 1990. The appellant was again convicted of murder, and his application for leave to appeal against his conviction was dismissed by the Court of Appeal of Jamaica on 22nd April 1991. He now appeals to the Board with special leave granted on 16th November 1993. His appeal is based on the proposition that his conviction at his retrial was unlawful in the light of the fact that a delay of 6½ years had occurred between his original arrest and the date of his final conviction.

This proposition does not appear in the grounds of appeal to the Court of Appeal and is not mentioned in the judgment of that court, but Mr. Fitzgerald Q.C., representing the appellant, told their Lordships on instructions which he had received by telephone from Mr. C.J. Mitchell that he, Mr. Mitchell, had argued at the first Court of Appeal hearing that there should be no retrial, because of the delay.

Mr. Fitzgerald, in his able argument on the appellant's behalf, referred their Lordships to the constitutional right of the appellant under section 20(1) of the Constitution of Jamaica to a fair hearing within a reasonable time, but relied more specifically upon the familiar common law principle that an unjustifiable delay in the bringing of proceedings against an accused person may justify the

staying of those proceedings by the court, and if no stay has been granted may result in the quashing of his ultimate conviction. Mr. Fitzgerald accepted that, having regard to the views expressed by their Lordships' Board in *Tan v. Cameron* [1992] 2 A.C. 205 and the authorities there cited, an objection based on delay could only be sustained if the delay was unreasonably long, if it was unjustifiable, and if the accused person has suffered prejudice as a result. He submitted, however, that prejudice can be inferred where the delay is sufficiently long, and that such an inference can more readily be made where the subject matter of the trial is a single fast-moving incident which gives rise to issues of identification and alibi. These, he said, were matters which should be borne in mind particularly strongly where the accused person had already once been in jeopardy, and where a retrial was sought by the prosecution. He referred in this connection to the case of *R. v. Saunders* [1973] 58 C.A.R. 248, in which the English Court of Appeal had held that it was not in the interest of justice to order a retrial $3^1/_2$ years after the offences had taken place, though he had accepted that in a subsequent English case, *R. v. Grafton*, The Times, 6th March 1992, the Court of Appeal had decided that in all the circumstances a retrial should be ordered after just such a delay. Mr. Fitzgerald asserted that the State must bear the responsibility for the original error on the part of the judge which led to the setting aside of the appellant's first conviction, and also for the greater part, if not the whole, of the delays which had preceded both the first trial and the retrial. For example, said Mr. Fitzgerald, it seemed from such correspondence and records of court proceedings as were available that one of the main causes of the delay was the inability of the prosecution to produce the two police officers who were their main witnesses.

Mr. Andrade Q.C., representing the prosecution, accepted that their Lordships' Board had jurisdiction to hear an appeal based on a point not dealt with by the Court of Appeal, particularly if it went to the lawfulness of the conviction, but submitted that it would be wholly inappropriate in the present case for their Lordships to embark upon a consideration of the period of delay upon which the appellant relied. If an objection was to have been put forward by reference to the length of the delay and to the responsibility for it the point should have been taken on three separate occasions by those representing the appellant, that is to say at the outset of the first trial, at the first Court of Appeal hearing at which a retrial was ordered, and at the commencement of the retrial itself. On each of those occasions, including the first trial at which the appellant was initially represented by counsel, although he dispensed with their services, the validity of the objection could have been considered by the courts with the assistance of representations by those on both

sides who were most familiar with the reasons for it. On the basis of his instructions, Mr. Andrade was unable to accept Mr. Fitzgerald's assertions that the greater part or indeed any significant part of the responsibility for the delays which had occurred rested with the prosecution. His instructions were that the prosecution had throughout endeavoured to bring the matter to trial as soon as possible, and that much of the responsibility for the delays which had occurred was attributable to the need to accommodate the different counsel by whom the appellant had been represented at various stages. More generally, he argued that for their Lordships to set aside the decision of the Court of Appeal in the exercise of its discretion to order a retrial at this late stage, and on grounds which that court had not even examined, would be wholly unprecedented and destructive of confidence in the appeal process. If the appellant wished to argue there had been an infringement of his constitutional right under section 20(1) of the Constitution of Jamaica to a fair hearing within a reasonable time (as distinct from the common law right upon which he sought to rely in this appeal) then his appropriate remedy was to bring a separate constitutional motion before the Jamaican courts.

Mr. Andrade added that it would be quite wrong to infer that the length of the delay which had occurred was sufficient to raise a presumption of prejudice, either in general terms or by reference to the particular circumstances of the present case. Owing to the great pressure on the Jamaican courts delay of that length, though regrettable, should not necessarily be regarded as unreasonable, and Mr. Andrade believed that this was not the only case in which a retrial had been ordered after as long a period as $6^1/_2$ years. So far as prejudice on the particular facts of the present case was concerned, the substantial issue was not so much one of identification in a fast-moving sequence of events but of credibility.

Their Lordships have no doubt that the submissions of Mr. Andrade are to be preferred. In *Tan v. Cameron supra* at page 225D their Lordships said, with regard to the inferences that can be made from a long delay:-

> "Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any long to hold the defendant to account."

In the circumstances of the present case, where, virtually the only material offered to their Lordships for determining whether the prosecution has been at fault consists of the conflicting instructions received by counsel it would be wholly improper to infer fault on either side. Still less is it open to their Lordships to consider whether, in all the circumstances, the situation created by the delay was such as to make the retrial of the appellant unfair.

In addition, their Lordships would fully endorse the further submission of Mr. Andrade that it would be improper for their Lordships to embark upon a consideration of the facts of the case, not as a matter of appeal, but as a court of first instance. The question whether, in any particular case, delay from whatever cause in the hearing of a case in Jamaica has led to prejudice is pre-eminently a matter for consideration in the first instance by the Jamaican courts. Their Lordships would refer in this instance to the views expressed by their Lordships' Board in cases such as *Bell v. D.P.P.* [1985] 1 A.C. 937 and *Walker and Others v. The Queen* [1994] 2 A.C. 36. Accordingly, their Lordships wish to make it clear that they are expressing no view whatever about the length of the delay in the present case, or its reasonableness in the circumstances prevailing in Jamaica, or the extent (if any) to which either the prosecution or the defence should be held responsible for it, or the possibility of prejudice to the appellant. All of these are matters which should be addressed in the proper manner by the courts of Jamaica if and when the appellant brings a constitutional motion in reliance upon his rights under section 20(1) of the Constitution.

One further submission was put before their Lordships' Board by Mr. Fitzgerald. It was based on section 14(2) of the Jamaican Judicature (Appellate Jurisdiction) Act which provides that:-

> "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 or 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."

The order for a retrial which was made by the Court of Appeal in the present case did not specify the time or the place at which the trial was to take place. Consequently, submitted Mr. Fitzgerald, the order was invalid.

Their Lordships can find no substance in this submission. In the context of section 14(2) the use of the word "shall" in relation to the fixing of the time and place at which the new trial is to occur appears to their Lordships to be directory rather than

mandatory. But even if it were mandatory, the proper course for the appellant would have been to challenge the order at or before the commencement of the retrial, and no such challenge was in fact made. The retrial, having now taken place, it was too late for the validity of the order to be impugned.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed.