Privy Council Appeal No. 45 of 1977

Charles Ferguson – – – – – – – *Appellant*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF GRENADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH OCTOBER 1978

Present at the Hearing :

VISCOUNT DILHORNE

LORD EDMUND-DAVIES

LORD FRASER OF TULLYBELTON

LORD SCARMAN

SIR ROBIN COOKE

[*Delivered by* LORD SCARMAN]

Shortly after 9.15 p.m. on the 6th April 1974 the late Roy Donald was driving a pick-up lorry towards the River Antoine bridge, La Poterie, Grenada. He was accompanied by his wife Louise, his sister-in-law Linette Rock, Angela Drakes and a small child. Louise Donald had with her a bag containing 200 dollars and some other items of property. They found the bridge blocked by heaps of stones set in three places—at each end and in the middle of the bridge. Roy Donald stopped and, leaving the headlights on, went to the far end of the bridge to remove the stones there. Angela Drakes went to the nearest heap, and Linette Rock to the one in the middle. Louise Donald remained in the vehicle. A man suddenly leaped from behind the bridge and advanced towards Louise Donald, pointing a gun at her. He told her to remain where she was and ordered her to give him " all the money made to-day ". She handed him the bag, saying, " Here it is ". He replied, " This is not all, it has more ". She then said, " Take the money and leave us alone ".

At this moment Linette Rock saw what was going on. She called out, " Roy ". As he came running towards his wife, the man fired a shot, crying out, " Don't come any closer ". But Roy Donald kept on coming, hands in air, and shouting, " Kill me if you want to kill me ". The man fired a second shot, at a range of about six feet. The bullet entered Roy Donald's chest and penetrated the heart, killing him.

The appellant was arrested the next day and charged with the murder of Roy Donald. He was tried and convicted at the October Assizes 1974. His defence, which he supported by himself giving evidence, was an alibi.

The trial judge directed the jury that the burden was on him to disprove the prosecution's case by establishing his alibi to their satisfaction. He appealed. It came on for hearing at the end of May 1975. Faced with this fundamental misdirection, the Court of Appeal quashed the conviction and ordered a new trial.

The new trial was before Nedd J. and a jury in October and November 1975. The appellant was again convicted of murder. His appeal against conviction was dismissed on the 28th May 1976. He was granted special leave to appeal to Her Majesty in Council on the 21st December 1977.

Nothing new emerged at the re-trial. There was really no dispute as to how Roy Donald came to his death. The critical issue was the identity of the killer. He was identified by Louise Donald, but by no other witness upon whom reliance could be put. The defence was, as before, an alibi: but this time the appellant did not give evidence. He did call a witness, and he made a statement from the dock. The summing-up upon the facts was full and fair, as indeed counsel admitted in the Court of Appeal, where in effect only two points were taken. They were:—

1. that the evidence of identity was so unsatisfactory as to render the conviction unsafe:

2. that the judge misdirected the jury as to the intent necessary to establish the crime of murder.

Counsel did not suggest there had been any misdirection on the issue of identity, though Mr. Nigel Murray has submitted before their Lordships' Board that it was inadequate by the standard now set by the English Court of Appeal in *Regina v. Turnbull* [1977] K.B. 224. The Court of Appeal rejected the first ground of appeal, holding

> " that there was sufficient evidence on which a reasonable jury could have come to the conclusion that the man who shot the deceased Donald was the appellant ".

The second ground—misdirection as to the intent necessary to establish the crime of murder—the Court of Appeal held to be a valid criticism of the summing-up. S. 242 of the Criminal Code, Chapter 76, of the Laws of Grenada provides (so far as is material) that:—

> " Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder . . ."

The judge directed the jury that:

> " The prosecution must prove that the accused intentionally did an act which caused harm to the deceased Roy Donald; that that harm was unlawful and resulted in the death of Roy Donald ".

The Crown conceded that this was a misdirection but submitted that no injustice was done and invited the Court of Appeal to apply the proviso to s. 41 (1) of the West Indies Associated States Supreme Court (Grenada) Act, 1971, and to dismiss the appeal. The section, as amended, is in substantially the same terms as s. 2 (1) of the English Criminal Appeal Act 1968. It is as follows:—

> " 41. (1) The Court of Appeal on any such appeal against conviction shall, subject as hereinafter provided, allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the Court before whom the Appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that

there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal:

Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

(2) Subject to the provisions of this Act the Court of Appeal shall, if it allows 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 ".

The Court of Appeal decided to apply the proviso—but not before they had considered the question (not raised in the notice of appeal) as to whether the judge was right in his refusing to leave to the jury the possibility of their returning a verdict of manslaughter. The Court concluded that the judge was right. They held he was abundantly justified when he said to the jury:

" You convict of murder or acquit ".

At the end of the day the Court of Appeal summarised their view of the case in these words:

" In the present case the defence of the appellant was an alibi and the jury by their verdict showed that they were satisfied of his identity. The verdict of guilty of murder was the only proper verdict on the evidence in the case and despite the misdirection in law to the jury the appellant, in our opinion, has suffered no injustice and we find that no miscarriage of justice has actually occurred. This Court will apply the proviso to section 41 (1) of the West Indies Associated States Supreme Court (Grenada) Act, 1971, and dismiss the appeal ".

Mr. Nigel Murray, to whom their Lordships' Board is indebted for a most helpful and cogent argument, has submitted that the Court of Appeal was wrong to apply the proviso in the circumstances of this case. In support of the submission he made the following points:

1. that manslaughter, as a possible alternative verdict, should have been left to the jury,

2. that the direction upon the issue of identity was inadequate,

3. that the evidence of identification was unsafe,

4. that the Court of Appeal, when dealing with the submission that the verdict was unsafe and unsatisfactory, adopted an approach, which was wrong in law, in that they asked themselves not whether the verdict was unsafe and unsatisfactory but whether there was evidence upon which a reasonable jury could convict,

5. that the trial judge's direction as to the standard of proof was incorrect in law.

Mr. Murray went on to submit that the verdict was unsafe and that upon a proper consideration of the points raised in the Court of Appeal and before their Lordships' Board it was not possible to say that no miscarriage of justice had actually occurred.

In their Lordships' view, if the contention that manslaughter ought to have been left to the jury is made good, the conviction must be quashed.

For there could then be no question of applying the proviso. As Lord Tucker said in *Bullard v. The Queen* [1957] A.C. 635 at p. 644:

> " Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached ".

Mr. Murray took us carefully through the evidence in an endeavour to establish the possibility of manslaughter. But their Lordships were totally unconvinced. The circumstances of the shooting were such that, if the jury were satisfied by the evidence of identity, the only proper verdict was one of murder. There was no evidence upon which a verdict of manslaughter could have been returned.

It is convenient, at this stage, to deal with Mr. Murray's final point, that the judge's direction as to standard of proof was incorrect. The direction was ample, (Mr. Murray really says " too ample ") and repeated five times in the course of the summing up—twice at the beginning, once in the middle, and twice at the end. The jury must have known what the judge required of them. One passage from the summing up suffices for a true understanding of Mr. Murray's criticism. The judge said:—

> ". . . it is required to satisfy you beyond reasonable doubt—to satisfy you beyond reasonable doubt that from the evidence before you—all the evidence, whether it be from the Prosecution or from the Defence—that the accused is guilty of murder, as I have explained murder to you. If you entertain the kind of doubt, which might affect the mind of a person in the conduct of important affairs, then you entertain a reasonable doubt which is the kind of doubt which the Prosecution must remove in order to secure a conviction. The burden of thus proving the accused guilty rests on the Prosecution and remains there from the beginning to the end of the case, even when—as in this case—the accused has pleaded an alibi. The Prosecution must satisfy you that the accused's plea of alibi cannot, in the light of the evidence before you, stand the light of day, or hold water, or, if you prefer more dignified language, be entertained. Once you entertain that reasonable doubt, it must be resolved in favour of the accused, and he must be acquitted ".

It is submitted that the judge encouraged " too subjective " an approach by telling the jury that the doubt must be such as " might affect the mind of a person in the conduct of important affairs ".

Their Lordships were told and accepted that in certain Commonwealth jurisdictions some judges avoid this formulation. It is criticised as being unhelpful and possibly dangerous, in that questions arising in the conduct of important affairs often have little resemblance to the issues in a criminal trial and individual jurors may well decide such questions by applying standards lower than satisfaction beyond reasonable doubt and analogous, if to anything, to the civil standard of the balance of probabilities. In *Walters v. The Queen* [1969] 2 A.C. 26 their Lordships had to consider a direction almost identical in part with that in this case. Delivering the judgment in that case (which was not an appeal, but an application for special leave to appeal) Lord Diplock pointed out that a distinction between " objective " and " subjective " tests is not apt in this context. The Board expressed the view in that case that the formula used in summing up does not matter so long as it is made clear to the jury, whatever words are used, that they must not return a verdict against a defendant unless they are sure of his guilt. Their Lordships' Board agree with these comments, with one reservation. Though the law requires no particular formula, judges are wise, as a general rule, to adopt one.

The time-honoured formula is that the jury must be satisfied beyond reasonable doubt. As Dixon C.J. said in *Dawson v. The Queen* (1961) 106 C.L.R. 1, 18, attempts to substitute other expressions have never prospered. It is generally sufficient and safe to direct a jury that they must be satisfied beyond reasonable doubt so that they feel sure of the defendant's guilt. Nevertheless, other words will suffice, so long as the message is clear. In the present case, the jury could have been under no illusion. The importance of being sure was repeatedly emphasised. The judge thrust it home when, abandoning the language of the law for homely metaphors with which the jury would have been well familiar, he said that the prosecution had to satisfy them that the accused's alibi could not " stand the light of day or hold water, or, if you prefer more dignified language, be entertained ". In their Lordships' opinion there is nothing in Mr. Murray's point on standard of proof.

Their Lordships turn next to the point that the Court of Appeal erred in law when they asked themselves not whether the verdict was unsafe and unsatisfactory but whether there was evidence upon which a reasonable jury could convict. In the light of the terms of the amended s. 41 of the Act of 1971 (*supra*), the point is a good one. The Court of Appeal overlooked the new wording which, following upon that of the English Criminal Appeal Act 1968 s. 2(1), has introduced the modern criterion—is the verdict unsafe or unsatisfactory? The use which Mr. Murray seeks to make before their Lordships' Board of this error by the Court of Appeal, is that he submits that this Board has itself to consider whether in all the circumstances the proviso ought to be applied. In the unusual circumstances of this case their Lordships accept the submission, while recognising that only very rarely would they think it appropriate to exercise the discretion which the statute confers upon the Court of Appeal.

The application of the proviso is justified only if the court considers " that no miscarriage of justice has actually occurred ". One is, therefore, driven back to a consideration of the trial and the summing-up. The criticisms that manslaughter should have been left to the jury and that the judge erred in his direction as to standard of proof having been rejected, the fundamental issue arises: was it safe to convict upon the identification evidence? If there be any reasonable doubt as to the identity of the killer, their Lordships could not say that no miscarriage of justice had actually occurred.

Though the judge did not direct the jury in the terms now approved in *Regina v. Turnbull* (*supra*), he left the jury in no doubt as to the state of the evidence and their duty. There was only one witness who recognised the appellant as the killer—Louise Donald. He reminded them of this fact and of the facts which might lead the jury to doubt the reliability of her identification, and concluded: —

> " If you believe Louise Donald, after considering Dr. Gibbs' evidence, and disbelieve the accused and his witness, you must convict ".

In their Lordships' view there is nothing in the way in which the judge dealt with the issue of identity to suggest that the jury were not fully alert to the difficulties in this part of the Crown's case.

But that is not the end of the matter. Before the proviso is applied, the Court (in this exceptional case, the Board) must consider that no miscarriage of justice has actually occurred. It is necessary, therefore, to examine Louise Donald's evidence with care. First, her evidence was uncorroborated by either her sister, Linette Rock, or Angela Drakes. Secondly, according to the evidence, she told no one on the night of the killing that she had recognised the killer. Thirdly, Dr. Gibbs, who

conducted the post mortem, swore an affidavit in May 1975 (i.e. after the first trial and shortly before the first appeal) in which he said that at about 10.30 p.m. on the 6th April 1974 he was at the hospital when he heard Louise Donald, in answer to the question repeatedly put to her as to whether she knew who shot her husband, as repeatedly respond:

> " All I know is that it was a tall man, fair complexion, wearing a coat, and a hat drawn over his face ".

When questioned at the second trial, Dr. Gibbs said he did not hear Mrs. Donald speak these words. He said it had occurred to him that he might have been confusing her with her sister, who was also at the hospital that night.

Louise Donald, under cross-examination, said she saw Dr. Gibbs that night, but did not recall that she told anyone that night it was the accused who shot her husband or that anyone asked her if she recognised the person who shot her husband.

Clearly the jury must have accepted Dr. Gibbs' explanation of his affidavit. The question therefore is as to the inherent strength of Louise Donald's identification. She must also have been accepted as truthful. But was she reliable, or was there the possibility that she was mistaken? She conversed with the killer: he was close enough to take her bag from her: he pushed a gun at her. She recognised him as a man she had known for some five or six years. She described his dress (including, significantly, not a hat but a cap).

Their Lordships have considered anxiously all the evidence as to identification. It was summed up fully and fairly: the evidence of Dr. Gibbs was put to the jury in its correct context—i.e., as capable of throwing doubt upon Louise Donald's reliability. The whole emphasis of the summing-up as to the facts was as favourable to the accused as it could be. Their Lordships are in no doubt that the jury reached a true verdict. No miscarriage of justice has occurred at the end of this protracted and unhappy case, involving as it has done two trials, two appeals, and requiring—a most exceptional feature—their Lordships' Board to consider whether or not to apply the proviso. Accordingly, their Lordships will report to Her Majesty that the appeal should be dismissed.

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In the Privy Council

CHARLES FERGUSON

v.

THE QUEEN

DELIVERED BY
LORD SCARMAN

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