[2011] UKPC 21
Privy Council Appeal No 0012 of 2010

JUDGMENT

Phillip Tillett (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Belize

before

Lord Walker
Lord Mance
Lord Dyson
Sir Christopher Rose
Sir Stephen Sedley

JUDGMENT DELIVERED BY
Lord Dyson
ON

18 July 2011

Heard on 9 June 2011

Appellant	*Respondent*
Michael Grieve QC Richard Thomas (Instructed by Simons Muirhead & Burton)	(Not represented)

LORD DYSON:

1. In 2003, the appellant was an inmate at the Correctional Department in Hattiville, Belize ("the prison") where he was serving a 20 year sentence for manslaughter. It was the prosecution case that on 17 June 2003, he murdered a fellow inmate, Kirk Lee Gentle.

2. Prison Officer Jacinto Pop was a crucial prosecution witness at the trial. He said that he was working on perimeter guard duty on the roof of the medium security section of the prison when he saw two inmates outside cell 12 on the lower floor. He saw one push the other (subsequently identified as the deceased) up against the door to cell 12 and make a single punching movement towards his chest. The deceased fell to the floor.

3. PO Pop was unable to provide any identification of the inmate who made the punching movement and he did not see a knife. But he did say that no other inmates were involved in the struggle. He said that he saw the first inmate walk from cell 12 towards cell 1 and the stairs where Prison Officer Ernesto De Leon was standing. It was at this point that he saw that the first inmate was holding a knife which he dropped when he was confronted by PO De Leon. He also saw another inmate run up the stairs, but said that this inmate had not been involved in the incident outside cell 12.

4. PO De Leon also gave evidence. He said that he had received a radio message from PO Pop and was descending the stairs near cell 1. An inmate ran towards him from the direction of cells 1 and 12 and then past him up the stairs. On reaching the bottom of the stairs, he saw the appellant running from the direction of cell 12 towards him. He asked him to stop, but he did not do so. So he pointed his gun at the appellant who then dropped the knife.

5. The appellant accepted when giving evidence that he was the person stopped by PO De Leon and that he dropped the knife. The knife, which had a blade seven inches long, was handed to PO De Leon by another inmate, Anthony Morris. The appellant's case was that he was in the vicinity of cell 12 when he saw two inmates struggling. He saw one push the other and then run away towards cell 1. He noticed a knife on the floor outside cell 12 which he picked up to prevent other inmates in cell 2 getting hold of it. His intention was to give the knife to PO De Leon. He admitted that he was stopped by PO De Leon and dropped the knife when the gun was pointed at him.

6. PO De Leon and PO Kevin Gladden then accompanied the appellant to the Control Tower at gun point. An exchange took place between the appellant and PO Gladden which forms the basis of the second ground of appeal. The Board will deal with this in detail when addressing that ground of appeal.

7. There are two grounds of appeal (neither of which was advanced before the Court of Appeal). The first is that counsel then acting for the appellant (Mr Twist) failed to challenge the critical evidence of PO Pop. The second is that the judge erred in admitting evidence of a confession made by the appellant to PO Gladden while he was being taken to the Control Tower and that, having admitted it, the judge failed to take steps to ensure that the jury disregarded it once its effect had been undermined during the cross-examination of PO Gladden.

The first ground of appeal: counsel's failure to challenge the evidence of PO Pop.

8. Mr Grieve QC submits that Mr Twist acted incompetently in failing to challenge the critical evidence of PO Pop. The central issue in the case was the reliability of PO Pop's evidence that the inmate he saw making the punching motion (which was assumed to be the knife stabbing that killed the deceased) was the same inmate who dropped the knife in front of PO De Leon. It is said that counsel should have challenged PO Pop's evidence that he had held the same person in his sight for the whole time (said to be five minutes) before that person approached PO De Leon. There was no such challenge and at no point was it put to PO Pop that the person he saw outside cell 12 was not the person who was stopped by PO De Leon. It is submitted that the defence case had to be that PO Pop had failed to keep the assailant continuously in his sight and that the assailant was not the person who was stopped by PO De Leon. The person seen to run up the stairs was an obvious alternative candidate.

9. Mr Twist did, however, in his final speech to the jury raise the issue of whether PO Pop's attention may have been distracted during the period between the stabbing and the time when the appellant was stopped by PO De Leon. He suggested to the jury that PO Pop would have been distracted during part of the vital period of five minutes because (i) he received a radio call and must have been distracted in answering the call (in fact his evidence was that he *made* a call to the control tower when he saw the fighting); (ii) he walked down from the roof and must have been looking at his feet when so doing (in fact, PO Pop's evidence was that he remained at roof level throughout the five minute period); (iii) he saw the victim and must have been distracted by him; (iv) he would have been distracted by seeing PO De Leon on the steps pointing a gun; and (v) he would have been distracted by the person running up the stairs.

10. Mr Twist was sent a copy of the appellant's draft petition in September 2008 and asked to consider in particular this ground of appeal. His response by return was simply that he had no comments to make. In early May 2011, he was sent a copy of the appellant's written case and the précis of facts and asked for his comments on the documents. Once again he replied by return that he had no comments to make. It might have been better if Mr Twist had been asked specific questions including why he had not challenged the crucial parts of PO Pop's evidence and only dealt with the points in his final speech. But on any view, these unhelpful responses are to be regretted.

11. Nevertheless, the Board is not persuaded that Mr Twist's conduct of the defence was such as to cause it to have doubts about the safety of the conviction or give rise to a risk that a grave and substantial miscarriage of justice has occurred in this case. PO Pop gave clear and unequivocal evidence which suggests that, if it had been put to him that he was distracted for a material part of the five minute period, he would have denied it. He said in evidence that he saw the inmate who had punched the deceased "walked away to where officer De Leon was" (p 18 of the record). And when he was asked whether he had been able to see the inmate who did the punching motion for the entire five minutes, he replied: "Yes Ma'am. I had him under my observation for about five minutes" (p 20 of the record).

12. There is no doubt that Mr Twist should have challenged PO Pop in the way suggested by Mr Grieve and that it was improper to suggest to the jury that the officer had been distracted without first putting this to the witness for his comment. But, if anything, it is likely that the appellant was advantaged by this course of events. It is unlikely that PO Pop would have conceded that he did not have the inmate who did the punching under his constant observation throughout the five minute period. In the event, Mr Twist made suggestions to the jury about the possibility of distraction which he was able to do without any danger of contradiction by the witness.

13. Mr Twist may have had tactical reasons for not challenging this part of the evidence of PO Pop. Or his failure to challenge the evidence, although not seriously incompetent, may have been an oversight on his part. Either way, it did not affect the safety of the conviction.

The second ground of appeal

14. As already stated, the appellant was escorted by PO De Leon and PO Gladden to the Control Tower. In his evidence in chief, PO Gladden said that he asked the appellant "*why he gaan through dat fa*". According to PO Gladden's oral evidence, the appellant replied "*dat young bwai punk fu he ma and he noh deh pahn dat fu mek nobody fu he ma*". The officer explained that "punk" meant "to disrespect". Mr

Grieve submits that this was a confession which should not have been admitted in evidence because it had been obtained in breach of the Judges' Rules. Rule 15 of the Judges' Rules provides that: "persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules". Rule 1.2 provides that "a person whom there are grounds to suspect of an offence must be cautioned before any questions about it….are put to him for the purpose of obtaining evidence which may be given to a court in a prosecution". Rule 3 provides that "whenever a police officer has arrested or detained a person, he must immediately inform that person that he is entitled to speak privately with an (sic) instruct a lawyer". Mr Grieve submits that PO Gladden had a reasonable suspicion that the appellant had committed an offence and must have asked the question that he asked in order to establish why the appellant had committed the offence he believed that he had committed. PO Gladden was investigating the offence in pursuance of his duties as a prison officer and he should have complied with Rules 1.2 and 3.

15. The judge ruled that PO Gladden was not a person charged with the duty of investigating offences, or offences or charging offenders so that he was not obliged to comply with the Judges' Rules. Mr Grieve, who has conducted this appeal with great skill and frankness, realistically conceded that it would be difficult to persuade the Board to overturn this finding of the judge. Whether a person is charged with the duty of investigating offences or charging offenders is a question of fact, although it may involve a question of law if the duty involves the construction of a statute or some other document: see *R v Bayliss* (1993) 98 Cr App R 235, 238. No material has been placed before the Board which suggests that the judge's finding was not one that was reasonably open to him.

16. The main thrust of the second ground of appeal as developed by Mr Grieve was altogether different. After PO Gladden had given evidence of the alleged confession, he was cross-examined by Mr Twist that his oral evidence was "something different" from what he had told the police in his witness statement on 18 June 2003. After the witness had been shown the statement, the judge asked: "did you tell the police something different having seen the statement?" to which he replied: "Yes, sir". The judge asked a number of supplementary questions and then the following exchange took place:

The Court. You told that to the police what is in the statement?

A. Yes, Sir"

The Court. Now the follow up question was: whether that is true, what's in the statement or what you say here in court. Which one is true? You have to choose because two of them are different.

Q. Which is correct?

The Court. You don't know which one is correct?

A. The statement is correct.

The Court. The statement is correct?

A. Yes, Sir"

17. Although the witness was asked to look at his statement, its contents were not put in evidence. At the close of the prosecution case, Mr Twist made a submission of no case to answer. In the course of his submissions, he identified the planks of the prosecution case and included among them the confession to PO Gladden. During the course of argument, the judge said that PO Gladden had disowned his oral evidence about the confession (the judge said "that is out") and that the true account given in the witness statement was not in evidence. In other words, the judge's assessment of the effect of PO Gladden's evidence was that he had given no evidence about what the appellant said to him.

18. The judge rejected the submission of no case to answer. Thereafter and until the end of the trial, there was no further mention of the confession evidence. The judge gave the jury no directions in respect of it. He gave them no direction in his summation or at all to disregard it or as to its evidential status in the light of the cross-examination or the judge's own questioning. As Mr Grieve puts it, it was simply left hanging in the air. He submits that, having ruled that the confession evidence was admissible, the judge ought to have discharged the jury or at least given them a strong direction not to take it into account. He ought to have invited counsel to make submissions as to the appropriate course to follow. Mr Grieve submits that, since the judge had said nothing at all about the evidence, there was a real risk that the jury would take it into account against the appellant to his great prejudice.

19. Despite the attractive way in which Mr Grieve made these submissions, the Board is unable to accept them. PO Gladden gave the evidence about the confession on 16 February 2005. There was evidence from other witnesses on 17 and 18 February (including a visit to the prison). The submission of no case to answer was

dealt with on 20 to 22 February. The appellant gave his evidence on 22 February. Final speeches were made on 23 February and the summation and verdict on 24 February. As already stated, there was no reference to the confession evidence after it had been given. It was not relied on by the prosecution and not mentioned by the judge in his summation. Indeed, far from mentioning it, the judge told the jury (perhaps incorrectly) that the prosecution case was based entirely on circumstantial evidence and said that circumstantial evidence was to be contrasted with direct evidence, such as a confession by the accused. He said: "if the accused had made a confession to the police, admitting in evidence saying, yes, I did the act, then, Members of the jury, that is said to be direct evidence". In other words, he was telling the jury that there was no confession evidence in this case.

20. The judge was placed in a difficult position by the fact that the witness statement of 18 June 2003 was not put in evidence. But it was clear from the evidence given by PO Gladden that it was materially different from the account that he had given orally. The effect of his evidence, therefore, was that his oral evidence about the confession could not stand. That is how the judge saw it ("that is out") and there was no other interpretation reasonably to put on PO Gladden's evidence. And it was treated by everybody thereafter as having no part to play in the case. Of particular significance is the fact that it was not one of the building blocks on which the prosecution based its case. All of these facts, together with the fact that the jury was considering its verdict on 24 February (some 8 days after the evidence had been given), lead the Board to conclude that the judge was entitled to take the view that it was not necessary to give the jury a warning to disregard to evidence. Indeed, to have done so might have made things worse from the appellant's point of view: the jury might have wondered why the judge had seen fit to raise a point which had been disowned by PO Gladden himself. The Board also rejects the suggestion that the judge should have discharged the jury of his own motion (no application to discharge having been made). For the reasons already given, it was far from obvious that the jury would have remembered, still less attached significance to, the confession evidence.

21. For these reasons, the second ground of appeal is rejected.

Conclusion

22. The Board will, therefore, humbly advise Her Majesty that this appeal should be dismissed.