[2011] UKPC 43
Privy Council Appeal No 0023 of 2010

JUDGMENT

Samuel Robie (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Jamaica

before

Lord Kerr
Lord Clarke
Lord Wilson
Dame Janet Smith
Dame Heather Hallet

JUDGMENT DELIVERED BY LORD CLARKE ON

20 December 2011

Heard on 8 November 2011

Appellant
Richard Onslow
Francisca Da Costa
(Instructed by Dorsey & Whitney (Europe) LLP

Respondent
Tom Poole

(Instructed by Charles Russell LLP)

LORD CLARKE

Introduction

1. On 2 July 2005, after a trial before McIntosh J ("the judge") and a jury in the Home Circuit Court in Kingston, the appellant, Samuel Robie, was convicted of the murder of Roy Bailey (also known as Delroy Bailey) on 24 February 2003. He was sentenced to 15 years imprisonment with hard labour. He applied for leave to appeal against his conviction to the Court of Appeal in Jamaica. On 21 March 2007 the Court of Appeal, comprising Cooke, McCalla and Harris JJA, dismissed his application for leave to appeal against conviction but substituted a sentence of life imprisonment with the stipulation that he was not eligible for parole for 15 years commencing (for some reason) on 22 October 2005. The appellant sought permission to appeal to the Judicial Committee of the Privy Council, which granted permission on 10 November 2010.

Grounds of appeal

2. The safety of the appellant's conviction is challenged on three grounds: (1) that the judge did not direct the jury that he was a man of good character; (2) that she failed to give the jury an adequate direction on the evidence of identification; and (3) that she prevented defence counsel from challenging the credibility of the principal witness for the prosecution, namely Mr Anthony Simms, and made unfairly prejudicial remarks in the course of her summing up.

The facts

3. The underlying facts can be taken from the judgment of the Court of Appeal. At about 0700 on 24 February 2003, Mr Bailey was sitting on a bench at a meeting place for those living in the vicinity. Mr Simms was the sole witness for the prosecution who witnessed the relevant events. His evidence was shortly to this effect. He saw the appellant and another person ride up on a bicycle. He recognised the appellant, who was armed with a meat chopper. The other person was armed with what he called a stabbing weapon. They attacked Mr Bailey while he was sitting, whereupon he got up, ran round some drums and tried to seek refuge in a nearby yard. However, the gate to the yard was kicked over by the assailants and their attack continued. Mr Simms said that after the attack had stopped he heard the appellant say words in a stutter to the effect that "a long time dah bwoy yah fi dead, a him kill my bredda". Mr Simms said that he had known the appellant for some 30 years and that he was in the habit of seeing him very regularly. The Court of Appeal noted that there was evidence that the appellant

had a stutter. Mr Bailey sustained nine serious injuries, which were the cause of his death.

4. The defence was one of alibi. The appellant's case was that he was a tiler, that he had gone to Ocho Rios for a job at the beginning of January and that he did not return until the end of February, which was of course after 24 February when the attack occurred. The appellant gave evidence to that effect.

The Court of Appeal

5. Three proposed grounds of appeal were advanced before the Court of Appeal in support of the submission that the conviction was not safe: (1) that the defence was not permitted to question Mr Simms on aspects of his past that were relevant to his credibility; (2) that the judge showed bias in favour of the prosecution case; and (3) that the jury was not directed that the appellant was a man of good character. The Court of Appeal rejected the first ground on the basis that there was no proper evidential basis for the proposed challenge to Mr Simms' evidence. It rejected the second ground on the basis that it was not made out on the facts. As to the third ground, it appears to the Board that the basis upon which the Court of Appeal rejected it was that, even if a good character direction had been given, it had no difficulty in coming to the conclusion that "the jury would inevitably have convicted him".

This appeal

6. Three grounds of appeal were advanced before the Board. They were (1) a failure to give a good character direction; (2) a failure to give proper directions as to identification; and (3) inappropriate behaviour on the part of the judge both in the course of the trial and during the summing up.

(1) Good character

7. At the time of the trial the appellant was 30 years of age, had no previous convictions and was a man of good character. The judge was not however told that that was the case. She did not discover that he had no previous convictions until evidence was given by Corporal Blair after he had been convicted. As no evidence was given to that effect during the trial, the judge did not give a good character direction.

8. In an affidavit sworn on 21 March 2007, long after the trial, counsel for the appellant said that he took the decision not to introduce character evidence but to reserve such evidence as part and parcel of his submissions on mitigation in the event that the appellant was convicted. He simply added that he was aware of the appellant's good character during the trial but that he judged, based on the evidence that was adduced, that it was not necessary to raise it. The Board is bound to say that it finds this explanation very difficult to understand. Evidence of good character would surely have been at least potentially advantageous to the appellant's defence. It could have been advanced both in support of the appellant's credibility and in support of a submission that he did not have a propensity to commit crimes, let alone a murder. Whether it was advanced before the jury or not, it would still have been available for use in mitigation. The Board is of the opinion that no good reason has been given for counsel's failure to put his good character before the jury and that he should have done so. It is difficult to imagine that, if he had, the judge would not have given a good character direction in the course of her summing up.

9. In *Muirhead v The Queen* [2008] UKPC 40 Lord Carswell and Lord Mance said this, agreeing with Lord Hoffmann, at para 34:

> "… it is important that a defendant who is of good character in the legal sense should be given the benefit of the direction which is now standard in the criminal process in England and Wales, and that, where the defendant is entitled to such a direction and likely to benefit from it, it is the affirmative duty of his counsel to ensure that the court is made aware of his character, through direct evidence given on his behalf or through cross-examination of the prosecution witnesses. The judge's duty to give the direction only arises when such evidence is before the court: *Thompson v The Queen* [1998] AC 811."

10. In these circumstances, although no criticism can properly be directed at the judge, the Board concludes that a good character direction should have been given. Moreover that is so even if, as the Court of Appeal observed, this was the first time that a point on good character had been taken in the Court of Appeal. As stated above, the reason why the Court of Appeal rejected this ground was not that a good character direction should not have been given, but that it had no difficulty in coming to the conclusion that the jury would inevitably have convicted the appellant. In posing the question whether the jury would inevitably have convicted the appellant, the Court of Appeal expressly (and correctly) followed that formulation of the test by the Judicial Committee at para 36 in *Sealey and Headley v The State*, [2002] UKPC 52;61 WIR 491. It is not in dispute that, if the Court of Appeal was properly so satisfied, this was a proper case in which to apply the proviso in section 14(1) of the Judicature (Appellate Jurisdiction) Act.

11. Whether the Court of Appeal was entitled to reach that conclusion depends upon a consideration of all the facts in the case. The Board will therefore return to that question after considering the other two grounds of appeal.

(2) ***Identification***

12. This ground of appeal was raised for the first time before the Board. As stated above, the case against the appellant depended upon the evidence of Mr Simms. Since Mr Simms' evidence was that he had known the appellant for some years, this was a recognition case and not a standard identification case. The Court of Appeal said that the quality of the evidence of identification had not been challenged and no criticism had been advanced of the judge's summing up in relation to identification.

13. Before the Board, it was not submitted that the judge did not give a proper direction as to identification as such. Indeed, it was correctly accepted that she did. The complaint was that, given that the issue was whether Mr Simms recognised the appellant, she should have given a further warning to the jury to the effect that a witness who is convinced in his own mind may be a convincing witness but may nevertheless be mistaken, and that mistakes can be made in the recognition of someone whom the witness knows well, even of a close friend or relative. It was correctly recognised that the jury might conclude that Mr Simms had been present at the scene of the murder because there was obvious support for his account of an attack by two men in the uncontested evidence of Dr Codrington, who was the pathologist who conducted the post mortem examination on the deceased. But it was submitted that, in those circumstances, the real question was whether the identification (that is the recognition) of the appellant by Mr Simms was satisfactory and correct. It was thus submitted that a further specific direction along the above lines was required.

14. In the opinion of the Board, the difficulty with this submission is that, after giving a classic identification direction, the judge said this (at p 225 of the Record):

> "Now, this case of identification involves recognition, because you will recall that the evidence from the accused and from the witness, Mr Simms, was that they had known each other. So this is a case of recognition, but I must point out that mistakes have been made even in a case of recognition. So there is still a need for caution even in the recognition of persons you know."

In the opinion of the Board that was an entirely sufficient direction to the jury. The jury can have been in no doubt that they must be sure that Mr Simms' evidence that he recognised the appellant as one of the assailants was both credible and accurate and that, in judging the accuracy of the recognition, they must have in mind the risk of a mistake in the recognition of someone one knows. She gave them a warning as to that and a reminder that they must have regard to the lighting, the distance between Mr Simms and the assailants, the length of time during which he saw them and any obstructions between them. Moreover, the judge set out Mr Simms' evidence in considerable detail, pointing out potential inconsistencies in it. There are no grounds for criticizing any of those directions. In these circumstances, ground two fails.

(3) Conduct of the judge

15. The principal basis of the defence advanced on behalf of the appellant at the trial was, not that Mr Simms was mistaken in his identification or recognition of the appellant, but that he was lying about it. Counsel wished to assert that Mr Simms was a professional witness, that he had given a statement before in another case and had retracted it, that he had sought on other occasions to give evidence about matters that he had not witnessed and that he had not been present at the scene and was lying when he said that he had. Counsel also wished to cross-examine Mr Simms on various inconsistencies in his accounts. He further wanted to elicit from Mr Simms that on the day of the murder there had been an incident between the deceased and a man named Shoey involving a machete. Finally he wanted to call the appellant to deny knowledge of the murder and establish his alibi.

16. Two main criticisms of the judge were advanced under ground (3). The first was that the judge prevented counsel from cross-examining Mr Simms as to his credibility and the second is what may be called the Shoey point. In dealing with the first point the Court of Appeal said this in para 10 of their judgment:

> "The first observation which is to be made is this, that here counsel is suggesting or putting forward that this Crown witness [Mr Simms], at an unspecified date in the year 1993, in an unspecified court house and in an unspecified trial, is supposed to have retracted his evidence. Perhaps to use the word sketchy in these circumstances is euphemistic. Counsel did not put forward with any precision, what it was that he wanted to challenge the witness on. In this Court, we asked Mr Equiano [counsel for the appellant on appeal] to put forward the material which the applicant [the appellant] is saying was material (sic) relevant to the question of the witness's credibility. That has not been forthcoming and, therefore,

> this Court has been provided with no basis for this complaint. Perhaps it may well have been nothing more than a fishing expedition."

In this regard the Board accepts the submission made on behalf of the respondent that the position remains as it was in the Court of Appeal, namely that no material has been produced to support these suggestions. The judge was entitled to approach the matter as she did and so was the Court of Appeal.

17. As to Shoey, it is correct that the judge stopped counsel for the appellant from asking Mr Simms about a previous incident between the deceased and Shoey on the ground that she could not see its relevance. She invited counsel to address her subsequently on the point in the absence of the jury but he chose not to pursue the issue. In these circumstances the Board sees no basis for any valid criticism of the judge with regard to Shoey. As to more general complaints about the judge's approach to the cross-examination of Mr Simms, the Board accepts the submission made on behalf of the respondent that the judge was right to stop potentially irrelevant matters being put to him. In short, the defence was given every reasonable latitude in cross-examination of Mr Simms.

18. It was correctly accepted on behalf of the appellant that the judge summed up the evidence fully and that she told the jury, both that they must assess the evidence of the appellant in the same fair way that they assessed the other evidence, and that they should not accept any views that she might express unless they agreed with them. However, it was submitted that she overstepped the mark in three particular respects. First, towards the end of her summing up she said:

> "As I said before, he just kept repeating after all aspects of the prosecution's case was put to him. I don't know nothing about that."

Secondly, the judge concluded her summary of the appellant's evidence in this way:

> "He doesn't know any of the other relatives and that, Mr Foreman and members of the jury, was the defence put up by the accused, that was his attempt to answer. You remember I told you he is entitled to do so, if he so choose, although he is not obliged to do so, that is what he had to say in his defence in this matter."

It was submitted that, given that the appellant's case was that he was not there and knew nothing about what happened, the first comment was a derogatory way of

putting it. As to the second quote, it was submitted that the judge plainly thought little of the appellant's defence and that the reference to his "attempt to answer" was a comment too far and was not consistent with the appellant having a fair trial.

19. The Board is unable to accept those submissions. The judge is entitled to make comments to the jury. She had directed the jury to reject her comments unless she agreed with them. In any event her comments did not cross the line into the unacceptable. The summing up has to be read as a whole. So read, the case (including the case for the defence) was fairly put before the jury, who knew that it was for them to decide whether, on all the evidence, they were sure of the appellant's guilt. Thus the judge expressly told the jury that it was their judgment that counted, that no-one told them what facts they were to find and that it was their verdict that was required. Having told them that, if they believed the appellant, their verdict must be not guilty, the judge properly directed them in this way:

> "However even if you don't believe him and you reject his defence of alibi, that does not entitle you to say he is guilty. Remember he has nothing to prove. You must go back to the prosecution case, consider it along with what the accused man has told you and see if you are satisfied until you feel sure that the prosecution has proved its case against him."

Viewed as a whole, the complaints that the judge acted unfairly, either in the course of the trial or in anything she said in the course of the summing up, cannot be accepted. It follows that ground 3 fails.

The proviso

20. The question remains whether the Court of Appeal was entitled to conclude that the jury would inevitably have convicted even if a good character direction had been given. There was a strong case against the appellant. It depended upon the evidence of Mr Simms. However, that evidence was tested at length in the course of cross-examination. Moreover, as counsel for the appellant properly and realistically accepted in the course of the argument, Mr Simms' evidence as to the nature of the attack was corroborated by Dr Codrington's evidence about the injuries. In these circumstances, the Board has reached the conclusion that the Court of Appeal was entitled to reach the conclusion it did. Indeed the Board would reach the same conclusion for itself.

21. It follows that the Board will humbly advise Her Majesty that the appeal against conviction should be dismissed.