[2006] CCJ 4 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No AL 6 of 2006

BETWEEN

TYRONE DA COSTA CADOGAN **APPLICANT**

AND

THE QUEEN **RESPONDENT**

Before The Rt Honourable Mr Justice de la Bastide, President
And The Honourables Mr Justice Nelson
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Alair Paul Shepherd QC and Mr Muhammed Tariq Uz-Zaman Khan for the Applicant

Mr Charles Leacock QC and Mr Roy Hurley for the Respondent

JUDGMENT

of
The Honourable Mr Justice David Hayton

Delivered on the 4th day of December 2006

JUDGMENT

[1] This is an application for special leave to be granted to the Applicant to appeal against the decision of the Court of Appeal of Barbados, dated 31st May, 2006, dismissing the Applicant's appeal from his conviction for murder, which carries the mandatory death sentence.

[2] The grant of special leave is, of course, a matter of discretion. However, if there is a realistic possibility of a miscarriage of justice if leave is not given for a full hearing, then leave will be given. Counsel thus needs to raise an arguable case for this, highlighting points in his Notice of Application or in his skeleton argument, but not spending time on the lengthy examination of many cases which should be reserved to the substantive hearing, if any. No more than one to two hours should be needed for this.

The trial judge's directions on the intent for murder

[3] Despite forceful, but courteous submissions, Mr Shepherd QC, leading counsel for the Applicant, failed to make out an arguable case against the reasoning of the Court of Appeal for upholding the trial judge's directions on the need for the jury to be satisfied that the accused intended to kill or cause serious bodily harm to the victim. Mr. Shepherd (relying on *R v Nedrick*[1] and *R v Woollin*[2] argued that the trial judge should have gone further to direct the jury that they were not entitled to find the necessary intent for murder unless they felt sure that death or serious bodily harm was a virtual certainty as a result of the Applicant's actions *and* that he appreciated that such was the case.

[4] In our view, however, the Court of Appeal in a well-researched judgment correctly held that there was no need for such a direction. While the Applicant's

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1 [1986] 3 All ER 1

2 [1998] 4 All ER 103

motive was to rob the victim, he armed himself with a 32 cms (14 inches) butcher's knife with a 25 cms (9 inches) blade. Evidence in his statement and in the witness box revealed cunning, coherent actions both just before and just after the robbery. The Applicant, nevertheless, alleged that at the time when he stabbed his female victim sixteen times with his long knife he did not know what happened after the first stab, "I just knew that the body got stab from me and I just froze for a while." The basis for this assertion was that he had drunk a lot of alcohol and smoked two marijuana cigarettes, so that he was not in a position to appreciate that he was doing something where death or serious bodily harm was a virtual certainty.

[5] We agree with the Court of Appeal's view that where there is evidence of a direct violent attack on a victim, as there was in this case, and where the accused has admitted in his sworn evidence that he was aware of what he was doing when he made his first stab with his butcher's knife, and where the trial judge has directed the jury to pay regard to all the relevant circumstances before and after the attack in order to decide if the accused intended to kill or cause serious bodily harm to the victim, there was no need for the direction on virtual certainty argued for by Mr Shepherd.

New grounds of appeal not raised before the Court of Appeal

[6] Counsel who appeared for the Applicant at the trial and in the Court of Appeal was replaced for the purposes of the Application to this Court by Mr Alair Shepherd QC and Mr Tariq Khan, who have pursued new grounds of appeal. Mr Charles Leacock QC on behalf of the Respondent did not object to this.

Diminished responsibility

[7] It was submitted that the trial judge should have put the issue of diminished responsibility to the jury and/or have advised the Applicant's counsel to pursue this defence to a murder charge, but, in the absence of medical evidence of some abnormality of mind substantially impairing the Applicant's mental responsibility,

this submission is baseless. Section 4 of the Offences Against The Person Act (Cap 141) only prevents a killer from being convicted of murder

"if he was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes, or induced by disease or injury, as substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing. On a charge of murder it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder."

[8] It was then submitted that, in order to help establish a plea of diminished responsibility at this late stage, there should be admitted into evidence a preliminary opinion of a Consultant Psychiatrist, Dr George Mahy, dated 27th June, 2006. By section 29(1) of the Criminal Appeal Act (Cap 113A), "the Court may, if it thinks necessary or expedient in the interests of justice … (c) … receive the evidence, if tendered, of any witness."

[9] However, by section 29 (2) it is provided that:

"Without limiting subsection (1), where evidence is tendered to the Court under that subsection, the Court, *unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal*, shall receive the evidence if

(a) it appears to the Court that the evidence is likely to be credible …; and

(b) the Court is satisfied that though it was not adduced at the trial there is a reasonable explanation for the failure to adduce it."

[10] The problem with Dr Mahy's preliminary opinion is that, even if received into evidence, it "would not afford any ground for allowing the appeal." As admitted by Mr Tariq Khan, dealing with this point on behalf of the Applicant, at best it could afford grounds for a stay of this special leave application until a further, definitive, psychiatric report on the Applicant could be obtained, though there is a problem trying to obtain funds for such a report. He submitted that if such a

report could be obtained and if it provides some credible evidence of some abnormality of the mind that could support a plea of diminished responsibility, then special leave should be granted, so that the case could be referred back to the Court of Appeal for cross-examination upon the report; otherwise, leave should not be granted.

[11] This is clutching at straws. Dr Mahy's preliminary opinion is very weak material upon which to hope to establish a basis for a diminished responsibility plea. Dr Mahy saw the Applicant only once when the latter "was well orientated and denied ever having any features of a psychotic illness" as set out in the opinion. His adolescent and adult life style, as there described, is very like the usual aberrant behaviour of thousands of under-privileged young men indulging in some marijuana while over-indulging in alcohol. Thus, the evidence in support of Dr Mahy's "impression" that "from the account [the Applicant] gives of his life style he has a major Personality Disorder with a strong psychopathic element" falls short of the standard required for presenting an arguable case on abnormality of the mind.

[12] Dr Mahy's conclusions were also premised on the Applicant genuinely being unable to recollect stabbing the victim sixteen times. In this connection, the Applicant in his statement to the police admitted that, after he first stabbed her from behind, the victim turned round and recognised him, and he recognised that she recognised him. In the witness box he denied this, though he later admitted it to Dr Mahy. He was thus lucid at the start of the stabbing and his conduct was therefore open to a possible inference that he went on with the stabbing so that his victim could not bear witness against him.

[13] Overall, the new evidence provided by Dr Mahy lacks the "degree of cogency which gives concern as to the safety of the verdict", as neatly put by the Privy Council in *Ramdeen v The State*[3] at [8] when rejecting the admissibility of fresh

[3] [1999] UKPC 50

evidence of two expert psychiatrists. It is thus unnecessary to consider further problems occasioned by the availability, if sought, of evidence like that of Dr Mahy at the trial. One should note that we have been informed that, if counsel had believed there to be reason to obtain psychiatric evidence as to the possible existence of an abnormality of mind of the Applicant, he could have obtained such evidence from one of the psychiatrists employed at the Psychiatric Hospital by the Barbados Government: part of their duties is to provide such services free in a case like the present.

Incompetence of Counsel

[14] Mr Shepherd further alleges that the incompetence of the Applicant's former counsel raises a realistic possibility of a miscarriage of justice if special leave is not granted. However, as stated by Sir David Simmons CJ in *Weekes v The Queen*[4].

> "All attorneys-at-law will do well to take to heart the advice of Judge LJ in *Doherty* and *Mc Gregor*[5]: 'Unless in the particular circumstances it can be demonstrated that, in the light of information available to him at the time, no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal [based on criticisms of former counsel] should not be advanced.' There are difficulties which face counsel under the immediate pressure of the trial process and those difficulties should be carefully analysed. At all times newly instructed counsel should approach the matter with a reasonable degree of objectivity."

[15] It needs also to be noted that we have been informed that the Applicant's former counsel has been in practice longer than either Mr Shepherd QC or Mr Charles Leacock QC who, throughout, has been counsel for the Respondent, and that he has acted as counsel in many criminal trials, including murder trials.

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4 Criminal Appeal No 4 of 2000 (unreported)

5 [1997] 2 Cr App R 218, [1997] EWCA Crim 556

[16] In our view, as intimated in our approach to Dr Mahy's opinion, no question of incompetence arises over counsel not seeking to have a psychiatrist examine the Applicant to try to see if the Applicant might have an abnormality of the mind as a basis for alleging that his mental responsibility was substantially impaired. It could well have been that the Applicant denied having any mental abnormality symptoms, as he did when examined by Dr Mahy. Moreover, as appears from the Applicant's affidavit of 27 September 2006, his former counsel had known the Applicant's family (and presumably the Applicant) since "[he] was a little boy", so the family had contacted counsel after his arrest and counsel had visited him the following day. Counsel would also have the comfort of an evaluation of the Applicant's fitness to instruct counsel and to stand trial, such limited evaluation being provided by Dr Bell of the Psychiatric Hospital within two days of the murder. There is a real problem trying to discover evidence to justify finding incompetence in counsel's failure to run a defence of diminished responsibility. There are some counsel who seek out a faint possibility of running such a defence for want of anything better, but on the available evidence the Applicant's former counsel cannot be faulted for not falling into such a category.

[17] Indeed, it is the lack of reliable evidence, as to what went on between the Applicant and his former counsel and as to why the latter took the courses he did, that substantially undermines Mr. Shepherd's allegations. Mr Shepherd has, indeed, carefully taken us through the trial process (as evidenced in Tab 6 of his Notice of Application) and indicated what he considered to have been grave shortcomings in former counsel's conduct of the case, but he is forced to rely on his own factual assertions from the Bar table, supported only by a last-minute and largely self-serving affidavit of 27 September 2006 sworn by the Applicant, and some speculation to try to explain why such conduct was incompetent. Thus, we have insufficient reliable evidence for finding that former counsel's conduct has led to a realistic possibility of a miscarriage of justice.

Prejudice from lack of better public funding

[18] Lack of public funding for making the services of an independent (non-Government employed) psychiatrist available to the Applicant has no significance, because we have no evidence that the free services provided by the Government-employed psychiatrist at the Psychiatric Hospital would be either biased or incompetent, while we have also found that there was inadequate evidence for alleging that counsel should have had the Applicant examined to see if there was any mental abnormality present.

[19] Whatever the intrinsic merits of Mr Shepherd's submissions that legal aid fees for murder trials should be higher and that for such trials there should be legal aid for leading counsel as well as junior counsel or at least, two counsel, the Applicant did have the benefit of an experienced counsel throughout, a man well-known to the Applicant's family. The Applicant's position at trial was a very weak one. In our view he had a fair trial. There is nothing unsafe in the verdict.

Conclusions

[20] The application filed on 24 July, 2006 for special leave to appeal is dismissed and, by way of corollary, the joined application therein for special leave to appeal as a poor person is also dismissed.

/S/ M.A. de la Bastide
The Rt. Hon. Mr. Justice Michael A. de la Bastide (President)

/S/ R. F. Nelson
The Hon. Mr Justice R. Nelson

/S/ A. Saunders
The Hon. Mr Justice A. Saunders

/S/ J. Wit
The Hon. Mr. Justice J. Wit

/S/ David Hayton
The Hon. Mr. Justice D. Hayton