

14/85

IN THE PRIVY COUNCIL

No. 3 of 1984

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N

FRANK ROBINSON

Appellant

and

THE QUEEN

Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from the Judgment of the Court of Appeal (Zacca, P, Carey and White JJ.A.) delivered on the 18th March, 1983, refusing the Appellant's application for leave to appeal against his conviction and sentence for Murder in the Circuit Court Division of the Gun Court on the 2nd April, 1981, before Parnell J. No written reasons were given for refusing the application.

2. In order to appreciate the issues involved your Respondent must refer to the history of this case and the relevant practice of the Court.

3. The Appellant was arrested and charged for murder on the 31st day of August, 1978, and after a preliminary enquiry was committed to stand his trial in camera in the Circuit Court Division of the Gun Court commencing on the 18th April, 1979, with a Judge and jury.

4. The matter was set for trial to be commenced on the 3rd October, 1979. On that date Crown Counsel's brief was endorsed "Prosecution witness threatened - can't be found, matter taken out list." Subsequently there were at least nineteen adjournments before the police were able to locate the main prosecution witness.

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5. It is the invariable practice that whenever an accused is brought before the Supreme Court, if the matter is one which attracts the provisions of the Poor Prisoners Defence Act and the accused is without representation, a social enquiry is carried out by a Probation Officer to enable the Court to determine whether a legal aid certificate ought to be issued. Because of this a trial date is never set until the question of representation is settled.

6. On numerous occasions when the case was mentioned the accused was represented by Mr. Churchill Neita and Mr. George Soutar. At no time before the date on which the trial started was the Court given any indication that "instructions" to Counsel were incomplete - a euphemism in Jamaica to indicate that Counsel's fees were in part still outstanding.

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7. The relevant statutory provisions governing legal aid is the Poor Prisoners Defence Act, Section 3(1) and (2) reads:

1. "Where it appears to a certifying authority that the means of a person charged with or as the case may be convicted of a scheduled offence are insufficient to enable that person to obtain legal aid, the certifying authority shall grant in respect of that person a legal aid certificate which shall entitle him to free legal aid in the preparation and conduct of his defence in the appropriate proceedings or in such of the appropriate proceedings as may be specified in the legal aid certificate and to have counsel or solicitor assigned to him for that purpose in the prescribed manner.
2. For the purpose of determining whether a legal aid certificate ought to be granted a certifying authority -
 - a) Shall
 - i) upon application made by or on behalf of the person charged; or
 - ii) where the person charged appears to be a person of unsound mind,

make such enquiries as he considers necessary into the means of the person charged; and
 - b) may direct any probation officer to

enquire into and report to him on the means of the person charged."

Section 2(1) provides that a "certifying officer" means:

- a) The Resident Magistrate before whom a person is charged with a scheduled offence; or
- b) a Judge of the Supreme Court.

8. Your Respondent will contend that the Poor Prisoners Defence Act envisages that a Superior Court of record would indicate to an accused person that an application could be made for legal aid where there is no representation at the outset. Where counsel appears and withdraws, depending on the circumstances, different considerations may arise.

9. The principle applicable when an accused is represented and counsel withdraws in the face of the Court without prior notice to the Registrar and without leave of the Court must be determined when the history of the proceedings are delineated against the background of the Court of Appeal's decision to dismiss the application and affirm the conviction in an instance where knowledge of the local situation is of exceptional importance.

10. The Appellant was jointly indicted with one Anthony Gibson. Sometime in January 1981, the case was "fixed definitely for the 30th March, 1981." The trial commenced at 11:55 a.m. on that date. Counsel for Gibson was present. Counsel for the accused Robinson were absent. The vital witness for the Crown was present. The Court was informed by Counsel for the Crown that "if this case should be taken out of the list we might not be fortunate enough to see this witness again" - a statement to be understood against the prevailing atmosphere in Jamaica where vital Crown witnesses have been murdered especially in proceedings pursuant to the Gun Court Act. No satisfactory reason was given why the trial should not proceed. Counsel having withdrawn from the case, without leave of the Court the accused Robinson was told of his rights and the trial proceeded.

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11. On the following day during the course of the evidence of the main witness for the Crown, Mr. Soutar, counsel for the accused Robinson, appeared and sought leave of the Court for the withdrawal of Senior Counsel Mr. Neita and himself. For the first time the Court was asked to allow the accused Robinson "time in order that an assignment may be made" and counsel intimated that he felt "inhibited" making himself "available in that respect."

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12. Counsel's application to withdraw was refused and the Court granted an adjournment for

counsel to sort out the representation with senior counsel in view of the Court's ruling. On resumption, Mr. Soutar told the Court that senior counsel "was unable to give me any directive". Whereupon the learned trial Judge directed Mr. Soutar to inform Mr. Neita that the trial would proceed.

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13. The records disclose that, in spite of the Petition before your Lordships' Board, no ground of appeal was filed before the Court of Appeal. However, that Court permitted the Appellant to argue the following ground:

'The Appellant was deprived of his right to representation by Counsel through no fault of his own.'

This was elaborated before Your Lordships in paragraph 22(a), (b) and (c) of the Petition as follows:

22. That in regard to the matter of representation of Your Petitioner by Counsel, it is respectfully submitted that Your Petitioner was denied the substance of a fair hearing in the following respects:-

(a) the learned trial Judge erred in empanelling the jury and commencing the trial in the morning of the 30th March, 1981, despite Your Petitioner's objections that he did not understand what was going on and that he wanted to see his barristers.

(b) the learned trial Judge erred in allowing the trial to proceed in the afternoon of the same day and erred in particular to allow the evidence of the principal witness for the prosecution to be given in the absence of Counsel for Your Petitioner when he knew that the question of Your Petitioner's representation by Counsel had not been resolved.

(c) the learned trial Judge erred when both Mr. Neita and Mr. Soutar applied to withdraw, to accede (sic) to the application of Mr. Soutar for an adjournment to allow a legal aid assignment to be made for another counsel.

14. The considerations which impelled the trial Judge to exercise his discretion as he did were that the accused was present in the dock and that there was no sufficient explanation as to the absence of counsel on the date fixed for trial. Further consideration was the presence of counsel on the second day of trial when an

adjournment was granted so that consultation could take place with the accused and communications could be made with senior counsel. Moreover the experienced trial Judge Mr. Justice Parnell, Senior Puisne Judge, must have been aware of the constitutional provision which enables an accused to defend himself in person - See Section 20(6) of the Jamaican Constitution which envisages a situation when a counsel abandons a client after ample time had been given for accused and counsel to prepare their defence.

15. As for the Judge's decision to proceed with the trial without granting a legal aid certificate as requested by counsel, Mr. Soutar, on the second day of the trial, the following circumstances must have been taken into account by the learned trial Judge. Firstly, from 1980, the year before the trial, counsel made no attempt to inform the Registrar of the Supreme Court that an application would be made for a legal aid certificate. Secondly, Judges take judicial notice of those counsel who resort to delaying tactics especially when there is only one vital witness for the Crown. Had an adjournment for a legal aid assignment been made it would have necessitated securing other counsel on the legal aid panel which would probably have taken some weeks. Further, there is no certainty that the accused would have accepted an assigned counsel as his plea to the Court was that he wished to get in touch with his barristers.

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16. It is submitted that the trial Judge in taking into account the interests of the accused and the interests of justice exercised his discretion correctly in refusing to grant an adjournment which was a colourable device to delay the trial. Both counsel were retained and the one present, a counsel of upwards of ten years experience, refused to accept a legal aid certificate to defend the accused without giving any adequate reasons for his refusal. It was in these circumstances that the Court of Appeal dismissed the application for leave to appeal and affirmed the conviction which it is submitted should be affirmed by Your Lordship's Board. See also R.v. Glenford Pusey (1970) 12 JLR 243.

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17. The next question was whether during the course of the trial the trial judge gave the requisite assistance to the accused so that he was not deprived of the substance of a fair trial. To determine the nature of the assistance required one must take into account the Crown's evidence and the nature of the alibi defence. A summary of the Crown's case which was based entirely on the evidence of the witness Wilbert Irving is as follows:-

He testified that both accused whom he had known for at least eight months brought a motor bike to his room at 4:30 a.m. on the 21st August, 1978. The

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deceased lived in an adjoining room. The accused Gibson told him they were coming from the Stadium and the motor bike ran out of gas. On their request he allowed them to leave the bike in his room. Later that same day when returning from work he passed by the home of Gibson and the accused Robinson. He knew where they lived. He saw Gibson who asked him if he knew that the police had gone to his room, broken the door and taken the bike away. Irving went home and discovered that the door was broken and the motor bike was not there. He went to the Police Station and made a report. Early next morning just before daylight he heard a knowcking on his door. The caller identified himself as the accused Robinson. He opened the door and saw the accused Robinson. The accused invited him into the deceased's house and asked him to sit on a chair therein. The deceased was in bed. Witness saw accused Gibson inside deceased's room behind the door. The accused Robinson then asked them which of the two of them (Irving or deceased) informed the police about the motor bike. The deceased said that he did not "business with nobody business". The accused Robinson said "shot the boy dem inna dem bumbo cloth". Accused Gibson pointed a gun at Irving and fired at him but missed. The deceased attempted to get up and was shot dead by the accused Gibson. The accused Gibson again pointed the gun at Irving and shot him in the neck, the bullet going through. With the gun still levelled at Irving he heard it "click" twice. Gibson then threw a knife to Robinson saying "bring the boy come". Robinson stabbed at the witness' head; he took evasive action and was cut on the wrist. The knife fell from Robinson's hand. Robinson held onto the witness and tried to pull him outside. There ensued a struggle between them. The witness tried to grab onto a cutlass whereupon Robinson released him and both accused left. The witness, Irving, then went to the Police Station.

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18. The Judge specifically asked the accused if he had any questions of the principal crown witness. For reasons best known to himself he asked no questions despite the testimony that the accused stabbed at the witness after he was shot through the neck by the co-accused. There was therefore no need to invite the accused to embark on a prolonged questioning of the witness when it emerged that his defence was an

alibi and further his mother gave supporting evidence. This matter was never raised in the Court of Appeal but Your Respondent does not shirk from defending the trial Judge's conduct of the trial.

19. Your Respondent contends that the learned Judge would have assisted the accused in formulating questions for cross-examining the witness if there was any response from the accused and that in the light of the accused's failure to ask any questions, any further intervention by the Judge at that stage might well have prejudiced the alibi defence which was later resorted to.

20. No criticism was made of the learned trial Judge's summing-up before the Court of Appeal and such a course ought not now to be pursued, but Your Respondent is content to say that the summing-up was fair and impeccable and there was no miscarriage of justice.

21. Your Respondent would point out that the co-accused, despite representation by Counsel was also convicted and his conviction and sentence affirmed. In light of this the Appellant seeks in substance to be granted a new trial in the interest of justice. On the basis that counsel of his choice abandoned him even though he was offered a legal aid certificate and that he the accused failed to ask any questions of the crown's witness even when invited to do so by the trial judge. It is respectfully submitted that Section 14(2) of the Judicature (Appellate Jurisdiction) Act which empowers the Court of Appeal to order a new trial in the interest of justice was never meant to be exercised in the circumstances of this case.

22. Your Respondent contends that the appeal should be dismissed and the order of the Court of Appeal affirmed for the following among other REASONS:

1. Because the trial judge was right in proceeding with the trial after counsel refused to conduct the trial despite the Judge's offer of a legal aid certificate.
2. Because the trial Judge gave the requisite assistance to the accused during the course of the the trial in view of the supported defence of alibi.
3. Because the fair and impeccable summing-up which was unchallenged in the Court of Appeal leaves no room for a complaint that there was a miscarriage of justice.

4. Because there was no basis in the proceedings below on which the Appellant could properly urge Your Lordships' Board to grant a new trial in the interests of justice.

IAN X. FORTE, Q.C.

F. ALGERNON SMITH

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CHARLES RUSSELL & CO.
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