
**Michaelmas Term**
[2015] UKPC 42
**Privy Council Appeal No 0041 of 2014**

# JUDGMENT

# Milton and another (Appellants) *v* The Queen (Respondent) (British Virgin Islands)

## From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

**before**

**Lord Neuberger**
**Lord Mance**
**Lord Kerr**
**Lord Carnwath**
**Lord Toulson**

## JUDGMENT GIVEN ON

## 12 October 2015

**Heard on 14 July 2015**

*Appellants*
Tim Moloney QC
David Rhodes
Amanda Clift-Matthews

(Instructed by Simons Muirhead & Burton)

*Respondent*
Wayne L Rajbansie, Director of Public Prosecutions
Tiffany R Scatliffe, Crown Counsel
(Instructed by Charles Russell Speechlys)

**LORD TOULSON:**

1. On 5 October 2009 Andrew Milton and Dennis Campbell were convicted of the murder of Dorcas Elizabeth Rhule (known as Louise) and of conspiracy to murder Kerrian Ebanks, after a trial in the High Court of the British Virgin Islands before Hariprashad-Charles J. They were each sentenced to life imprisonment for murder, with eligibility for parole after 35 years, and to concurrent sentences of ten years' imprisonment for conspiracy to murder. They appealed against conviction and sentence to the Eastern Caribbean Supreme Court sitting as the Court of Appeal for the British Virgin Islands. Their appeals were dismissed for reasons given by Baptiste JA. Campbell now appeals to the Board against his conviction, and Milton and Campbell both appeal against their sentence.

Outline of the prosecution case

2. Milton and Kerrian are brother and sister. The prosecution's case was that they fell out and he formed a plan to murder her. He enlisted the help of Campbell, Marlon Bailey and Otis McLeod. Bailey died some months later and McLeod gave evidence at the trial for the prosecution. Evidence of the planning of the crime was given by Milton's girlfriend, Shawana Wilson. According to the prosecution's case, on the evening of 3 October, 2006, Milton rang McLeod, who collected the appellants and Bailey from the apartment of a man called Dale Fearon, where Shawana was living. Bailey had a gun. They were also equipped with black gloves and a roll of duct tape. McLeod drove the appellants and Bailey to a place near Kerrian's apartment, which was on the fourth floor of an apartment building. After being dropped, the appellants and Bailey went to the apartment to carry out the killing. Kerrian was not there at first but her room-mate, Louise, was. When Kerrian arrived, she was accosted by Milton with a gun. She fled but Louise was strangled and her body was thrown from the outside balcony. The three men left the apartment and tried unsuccessfully to steal Kerrian's jeep. They then called McLeod. He arrived and the appellants used his phone to make some calls. The appellants made their way back to the apartment where Shawana was staying and then went into hiding in the bush. They were arrested three months later after a struggle with police officers. Campbell was armed with a gun at the time of his arrest. In interview Milton admitted to being present at the scene of Louise's death but denied any plot to murder. He said that she jumped from the balcony, in effect committing suicide. The evidence of the pathologist who carried out the post mortem was that Louise was strangled and was either unconscious or already dead before being thrown over the balcony. There were no injuries to her hands or wrists of the kind she would have sustained if she had been conscious at the time of falling to the ground, because her automatic reflex would have been to put out her hands to brace her fall.

Campbell in interview raised an alibi defence. Neither appellant gave evidence at the trial.

Campbell's appeal against conviction

3. Campbell makes three complaints about the judge's summing-up. First, the judge failed to direct the jury that they needed to approach the evidence of Shawana with caution because she has a history of mental illness which made her evidence potentially unreliable. Secondly, the judge misdirected or failed properly to direct the jury about the DNA profile in a sample of saliva taken from a glove found at the scene, on which the prosecution placed some weight in support of its case against Campbell. Thirdly, she failed to distinguish between Campbell and Milton in her directions about identification evidence. There was eye witness evidence of Milton's but not of Campbell's presence at the crime scene, but the judge's directions could have led the jury to suppose that there was eye witness evidence that both were present. The Court of Appeal accepted that the summing-up was deficient in these three respects, but it held that Campbell's conviction was safe. It is argued on his behalf that the court failed properly to assess the overall effect of the deficiencies. It is therefore necessary to examine the evidence in some detail.

Kerrian Ebanks

4. Kerrian said that Milton ordinarily lived in Jamaica, but he had come to Tortola in August 2006 and he was living temporarily in the apartment which she shared with Louise at Little Dix Hill, East End. They had another brother, known as Kirk, and an uncle, known as Johnny, who were both in prison at the time of Milton's arrival, and Kerrian arranged a visit to them. During the visit Johnny cursed her and accused her of being responsible for their incarceration. She was asked by prison staff to leave. The episode marked a downward turning point in her relationship with Milton, which until then had been good. Milton was unhappy about what had happened to Kirk and Johnny, and relations between Milton and herself deteriorated to the point that she asked him to leave. On the next day he returned with McLeod and she complained that he had taken some cushions from the apartment. This led to a heated argument in which Milton threatened to kill her. She reported the incident at East End Police Station. This happened about three days before the events which resulted in Louise's death.

5. On the morning of 3 October 2006 Kerrian said that while out in her jeep she passed a building site where Milton and Bailey were working. She spotted Bailey and recognised him as a friend of Milton, because Milton had previously brought him to her apartment. Kerrian stopped and told the site foreman that she was going to get the immigration service to send Milton and Bailey home because Milton had threatened to kill her.

6. Kerrian said that at about 8 pm on the same day she returned to her apartment. From the parking lot she saw Louise alone on the balcony. She went up the stairs and entered the apartment. After the incident with her brother she had told Louise to keep the apartment locked and she was surprised to find it unlocked. She opened her handbag and started to search for her keys. She looked up to see Milton pointing a gun at her. At the same time another man rushed past him and she immediately fled. She screamed "murder" and sought refuge in a neighbour's apartment. While in hospital after the incident she identified the second man as Bailey, but she later retracted that identification.

7. Kerrian dropped her handbag when she ran from her apartment. The handbag and her car keys were found by the police on 4 October 2006 beside a road in the Long Look estate, East End. Missing from the bag was a purse.

McLeod

8. McLeod lived in John's Hole, Tortola. He was a friend of Milton and had a car. He testified that on 29 September 2006 Milton called him to say that Kerrian had asked him to move out of her apartment, and at Milton's request McLeod helped him to remove his belongings. Among the things they took away were some cushions. On 30 September 2006 Milton and McLeod returned to Kerrian's apartment because Milton had left behind some shoes. There was a row between Kerrian and Milton about the cushions, during which Milton threatened to kill Kerrian and she said that she was going to get the immigration service to send him home. Later that evening McLeod drove Milton at his request to the airport to pick up Campbell. On the way back Milton told Campbell of his plan to kill Kerrian and the reasons for it. Milton asked Campbell to carry out the killing but Campbell refused, saying that it was a family matter.

9. On the evening of 3 October 2006 McLeod received a call from Milton and drove to Dale's apartment at East End. Present at the apartment were the appellants and Shawana. McLeod drove the appellants to the house of a man called O'Connor, where they collected a pair of black gloves, and to another place where they collected a roll of duct tape. According to McLeod, during the journey Milton said that earlier in the day Kerrian had "brought immigration on them" and that they were going to have to hide in the bush. They returned to East End and picked up Bailey, who was waiting for them and armed with a gun. McLeod, the appellants and Bailey then set off together. Milton said that he planned to kill Kerrian and steal her jeep. McLeod described Milton as being in an angry mood. Campbell's response, according to McLeod, was different from on the previous occasion, when he had refused to be involved in killing Kerrian over what he regarded as a family matter. He was now vexed by the involvement of the immigration authority and the prospect of having to live on the run. McLeod left the appellants and Bailey by a church near to Kerrian's apartment and returned to his home.

10. McLeod said that later the same evening he received another call from Milton asking to be met at East End. As he approached the rendezvous he saw police and ambulance vehicles and people in the street near Kerrian's apartment, but did not stop. He met the appellants but not Bailey, who they said was somewhere up the road in a partially built house. McLeod asked what had happened. Campbell answered that Milton was a fool because he made Kerrian get away. Campbell said that when they arrived at the apartment Kerrian was not there, but they met her room-mate. They went inside, strangled her and waited for Kerrian's return. Campbell said that he had the gun, but Milton grabbed it from him when Kerrian arrived. According to McLeod, Campbell was cross and doubted whether Milton ever meant to kill Kerrian, because he could have shot her in the head when she was running away. He said that they threw the room-mate over the balcony.

11. Before they left the scene McLeod said that he was asked by the appellants to buy some phone cards for them to make some calls. He bought a phone card, put the credit on his phone and Campbell made a call. He then did the same thing again and Milton made a call. McLeod refused to drive the appellants to meet Bailey, because there were too many police on the road, but he said that he would drive home and pick up Bailey later. He left his phone with Campbell. He was not able to pick up Bailey because he was arrested by the police before he could do so.

12. McLeod gave false accounts to the police, but after 13 months in custody he confessed to his role in the affair and agreed to give evidence for the prosecution against the appellants. For his own part he received a sentence on a guilty plea of two years' probation. The judge gave the jury a full and detailed warning about the danger of convicting the appellants on the uncorroborated evidence of McLeod, who was an accomplice on his own confession.

Phone records

13. When Campbell was arrested he was still in possession of McLeod's phone. Reconstruction of the billing records showed that at 20.46 on 3 October 2006 a call was made to McLeod's phone from a number registered to Dale Fearon. The cell site at which the call was received was consistent with McLeod receiving the call at his home. The cell site for the succeeding calls was in East End. At 20.58 and again at 21.13 credit was placed on the phone. After the first top up of credit, the phone was used to make a call to Jamaica to the number of a girlfriend of Milton named Karen, by whom he had a child. After the second top up of credit, the phone was used to make another call to Jamaica, this time to the number of a girlfriend of Campbell named Thelma. All this was consistent with McLeod's account of events, subject to the minor correction that McLeod put the calls made by Milton and Campbell in the opposite order.

Neighbours

14. Two occupants of other apartments in the block where Kerrian lived saw something of the aftermath of the attack. Mr John Shirley heard a scream and saw a woman running from the apartment next door. The time on the clock was 8.20 pm. He saw a man on the opposite balcony whose face was partially obscured. He described him as about the same size as himself and of fair complexion. He saw a second man of similar size but darker complexion. He went back inside his apartment and shortly afterwards he looked down into the parking lot with a flashlight. He saw three men trying to get into Kerrian's jeep, but two walked and the third ran away. He was not asked to attend an identification parade and never purported to identify the man on the balcony. Mrs Symone Syfox-Foster also heard a loud noise and soon afterwards saw three men trying to get into Kerrian's vehicle. She said that they ran off.

Shawana Wilson

15. Shawana was Milton's girlfriend. They had known each other since their school days but their relationship became intimate in the summer of 2006. In September 2006 she followed him from Jamaica to Tortola and went to live at Dale Fearon's apartment. She testified that in the late morning of 3 October 2006 she overheard a conversation between Milton, Campbell and Bailey about killing Kerrian. Milton was complaining that she wanted to send him home to Jamaica but that he could not allow this because he had not yet achieved what he wanted in Tortola. He told the others of his plan to go to her apartment and hold her room-mate until Kerrian came home. He would then take Kerrian into her room, put duct tape on her mouth and call her mother, telling her that Kerrian had become mixed up in certain things and was now dead. Campbell did not like the idea of calling her parents but said that they should just kill her because she had informed on them to the immigration service. Shawana intervened and asked Milton how he could want to hurt his own sister, but in response Milton threatened to kill her too. Shawana left for an interview but she returned later in the day and saw McLeod drive away with the appellants and Bailey. The appellants returned around 9 to 9.30 pm. Milton seemed confused and upset. He said that "nothing went as planned" and that he had to kill the girl. He asked Shawana to wash his shirt. Campbell had a woman's purse. The appellants left the premises together and she did not see either of them again. On 4 October 2006 she went to the police station and gave a statement.

16. In cross-examination it was put to Shawana on behalf of Milton that she had made up her entire narrative of the events on 3 October 2006. It was suggested that she was jealous of Karen, that she wanted Milton to leave Karen and that if she could not have him for herself, no other woman would. It was put to her on behalf of Campbell that he was never at Dale's home on that day and that she never saw him with a woman's purse. It was also suggested on Campbell's behalf that she gave her statement to the police under threats that she would otherwise be treated as an accomplice. She denied

the reasons suggested to her for giving a false account to the police and she maintained that her account was true. She admitted in cross-examination that sometime after the event she went to see a psychiatrist at the Mental Health Services in Tortola. She said that she did not remember whether she told the psychiatrist that she was hearing voices, but she did remember telling the psychiatrist what she had been going through and saying that she was having bad dreams. She said that she had never been to a psychiatrist before the incident. It was not put to her in direct terms that she was experiencing hallucinations at the time of the incident.

17. Milton called the psychiatrist, Dr June Samuel, who saw Shawana in December 2006. She said that Shawana reported that she had previously been the victim of traumatic incidents while in Jamaica and that she was now being held in protective police custody because she was a key witness about an incident which had occurred and because of her relationship with the individuals involved. She had been unable to speak to her daughter. She expressed fears for her daughter's and her own safety. She was suffering low mood, tearfulness, loss of appetite and was hearing a male voice inside her head. Shawana believed that her symptoms were related to the recent incident and to her fears of being returned to Jamaica. Dr Samuel's diagnosis was that she was suffering severe depression with psychosis and a conversion reaction. Dr Samuel saw her more than once. The last occasion was in March 2007. By that time she was well and was discharged. Dr Samuel was not asked whether there was any medical reason to doubt the reliability of her evidence about the events on 3 October 2006.

18. Section 146 of the Evidence Act 2006 provides:

> "(1) This section applies to evidence of the following kinds:
>
> …
>
> (c) evidence the reliability of which may be affected by self interest age or ill health, whether physical or mental,
>
> …
>
> (2) Where there is a jury, the court shall, unless there are good reasons for not doing so,
>
> (a) warn the jury that the evidence may be unreliable;

> (b) inform the jury of matters that may cause the evidence to be unreliable; and
>
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it."

19. It was submitted to the Court of Appeal that the judge should have given the jury a warning under that section that the reliability of Shawana's evidence might be affected by mental ill health, and the court accepted the submission. The Board disagrees. This is the one point of general public importance in this case, which otherwise turns entirely on its facts.

20. Where there are medical grounds for doubting the ability of a witness to give reliable evidence, expert evidence is admissible to enlighten the jury's understanding*:* *R v Toohey* [1965] AC 595, *R v Pinfold* [2004] 2 Cr App R 32. Lord Pearce explained the reason in *R v Toohey*. In that case the issue was whether the defendants had assaulted the complainant. Their case was that the allegation was "the figment of an hysterical imagination" (p 604). Lord Pearce said, at p 608:

> "Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them."

By way of example, Lord Pearce said that if a witness purported to have seen something at a distance of 50 yards, it must be permissible for the defence to call a surgeon who shortly afterwards had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. Lord Pearce continued:

> "So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise."

21. It would be another matter for a judge to direct a jury to regard the evidence of a witness with caution, because they have some history of mental illness, without properly considering whether there is a medical foundation for regarding the particular evidence as unreliable. That would be an invitation to a form of irrationality and stereotypical prejudice, which should have no part in the criminal justice system. In *Regina (B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072, the Divisional Court warned against such an unthinking approach.

22. In this case the defence failed to establish any medical foundation for regarding Shawana's evidence as unreliable. Dr Samuel did not suggest that she had any medical doubt about Shawana's ability to give a true account of the events of 3 October 2006. She was not even asked the question. Nor was it suggested to Shawana herself that she was ill at that time, and that her account was the product of disordered thinking. Neither Dr Samuel nor Shawana therefore had the opportunity to comment on such a suggestion, but the evidence of both of them pointed towards Shawana having had a severe, transient episode of mental illness, brought on by the events of 3 October 2006 and by the pressures which followed her decision to give a statement to the police. These included being kept in protective police custody, unable to communicate with her daughter, fearful for her and her daughter's safety and fearful of having to return to Jamaica. A significant feature of her illness was her self-awareness; she was conscious of the abnormality of her symptoms and that she needed help for them, which she received. She was also clear that their onset post-dated 3 October 2006.

DNA evidence

23. A black glove was found on the balcony of Kerrian's apartment. A forensic scientist, Dr Daniel Beaumont, gave evidence that DNA analysis of saliva staining of the three middle finger tips produced a complex, mixed profile, indicating DNA from at least three people. Dr Beaumont said that all Campbell's 19 DNA components were represented within the mixed profile, in a manner which he might expect if Campbell had contributed a significant amount towards the sample, but that because of the complex nature of the profile he could not give any statistical evaluation of the potential match. The different components could have come from different people. He could not therefore say whether the sample provided a strong or a weak indication that Campbell contributed to it.

24. The judge in her summing up set out Dr Beaumont's evidence accurately and in detail. But she did not attempt to analyse or summarise its effect or to draw the jury's attention to its weaknesses. Towards the end of the summing-up, she said in a resume of the prosecution's case:

> "The second aspect of what the prosecution is saying to you is that Campbell's DNA was found on the outside of the glove, as I have already stated to you."

Dr Beaumont had been at pains to make it clear that he was not saying this.

25. The respondent accepts that the Court of Appeal was rightly critical of the judge's directions on the DNA evidence. She should have made sure that the jury understood the limited nature of the evidence.

Identification

26. In her summing-up the judge said:

> "The prosecution say that a third aspect of their case is the description given by Mr Shirley, who saw a man fitting the description of Campbell …"

Mr Shirley's description was far too general to form any basis for identifying Campbell as one of the men he saw and the judge should have said so.

27. The judge continued by saying that "the case against these defendants, Campbell and Milton depends on identification of them by certain eyewitnesses", and she proceeded to give a *Turnbull* direction, in which she referred specifically to the evidence of Kerrian and Mr Shirley.

28. It was correct that Kerrian's evidence was a significant part of the prosecution's case against Milton, whom she identified as pointing a gun at her, but there was no identification evidence in relation to Campbell. The Board agrees with the Court of Appeal's criticism of the summing-up on identification. The judge ought to have stated clearly that the case against Campbell did not depend on any evidence to identify him as present at the crime.

Safety of Campbell's conviction

29. The evidence against both Milton and Campbell was overwhelming. Against Milton there were the accounts of Kerrian, Shawana and McLeod, all of whom had to be lying if Milton was innocent. There was no reason for Kerrian or Shawana to lie. McLeod was an accomplice, but his evidence was corroborated by Shawana and also

by the cell phone evidence, which connected McLeod with the appellants and showed that McLeod's phone was used shortly after the killing to call Milton's girlfriend in Jamaica. Milton's suggestion in interview that Louise jumped to her death was disproved by the evidence of the pathologist, which established the cause of death as manual strangulation.

30. In the case of Campbell, there was the evidence of Shawana and McLeod. After the incident Campbell and Milton jointly went into hiding in the bush. When they were arrested, after a struggle with the police, Campbell was in possession of a gun. He was also in possession of McLeod's phone, which was used shortly after the killing to call his girlfriend in Jamaica. The suggestion that the murder was carried out by only two people (Milton and Bailey) was belied by the evidence of Mr Shirley and Mrs Syfox-Foster, who saw three men trying to get into Kerrian's jeep. The DNA evidence of itself was very limited, but it was one more piece of circumstantial evidence.

31. The Board is left in no doubt that on the evidence Campbell's conviction was the only proper verdict, and that the deficiencies of the summing-up on the issues of DNA and identification caused no miscarriage of justice.

Sentence

32. In the British Virgin Islands the mandatory sentence for murder is life imprisonment: The Criminal Code 1997, sections 23 and 150. Under section 9(2) of the Parole Act 1997 a judge sentencing a person to life imprisonment is required to state whether that person may be eligible for parole and, if so, to set a minimum period of imprisonment before the person may be considered for parole.

33. There are no statutory guidelines and the courts appear to have developed a practice of using the provisions of Schedule 21 of the UK Criminal Justice Act 2003 for guidance. The courts are entitled to look for guidance to sentencing practices in other countries, but the Board would not recommend that they bind themselves too closely to the regime of a particular country, including the UK. Local judges are in the best position to assess the appropriate tariff in their jurisdiction, subject to their own statutory provisions.

34. In arriving at minimum sentences of 35 years in this case, the judge said that she thought that an English court would take a minimum term of imprisonment of 25 to 30 years as a starting point and that aggravating features would push that figure up. The appellants submit that the judge erred, and that under Schedule 21 of the 2003 Act an English court will impose a minimum sentence of 30 years only in very serious cases where there are a number of aggravating features. They submit that it was wrong, firstly, to regard the seriousness of the case as "particularly high" within the classification of

Schedule 21, so as to merit a starting figure of 30 years; and, secondly, to increase that figure to 35 years.

35. The Court of Appeal rejected those submissions. It considered that the case was sufficiently serious to warrant a 30 year starting point, and that the final sentence reflected the seriousness of the offence, taking into account the severe aggravating features.

36. There is no doubt that this was a callous and ruthless crime, involving two victims, considerable pre-planning and an attack by three men who went armed with a gun. The sentence was carefully reviewed by the Court of Appeal, which is in a better position than the Board to assess the appropriate level of sentence in the British Virgin Islands, and the Board does not consider that it would be right for it to interfere with the Court of Appeal's judgment.

37. The Board will humbly advise Her Majesty that the appeals should be dismissed.