ARMOGAM and 2 Ors v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

TOMPKINS, HENRY and PENLINGTON JJA

27, 30 May 2003

[2003] FJCA 32

Criminal law — appeals — appeal against conviction and sentence — grounds of appeal — cross-examination of Appellants on previous convictions — whether the judge erred in declaring the witnesses hostile — whether the summing-up of the judge was not clear, intelligible or confusing — Court of Appeal Act (Cap 12) s 22(6).

The three Appellants were charged with two offences. The Appellants were found guilty on both charges. They were convicted and each sentenced to 5 years' imprisonment on count 1 and 2 years' imprisonment on count 2 to be served concurrently. They appealed against the conviction and sentence on the grounds that the judge erred when he allowed or permitted the State counsel to cross-examine two of the Appellants on bad character for their previous convictions and declaring the three State witnesses hostile. Each of these witnesses was called by the State as eyewitnesses to the events. The Appellant also submitted that the judge's direction to the assessors was not clear, intelligible or confusing.

Held — (1) The prosecutor did not apply to the judge in the absence of the assessors for leave to cross-examine each of the Appellants on their previous convictions nor give any notice to counsel for the Appellants of her intention to cross-examine on previous convictions. Despite the judge's direction, the possibility cannot be excluded that the assessors were affected in their judgment of the two Appellants by this evidence of previous convictions. The fault was that of the prosecutor not the judge because the prosecutor failed to ask for leave. The judge had no opportunity to rule on whether the cross-examination was appropriate.

(2) There was no application by the prosecutor to the judge to make submissions in the absence of the assessors in support of her application to have the witness declared hostile. This is the procedure she should have followed or the judge should have required. It enables the judge to consider the application properly and gives the defence the opportunity to make submissions on whether the application should be granted. Also, it appears from the record that the judge made his decision based only on the evidence given by the witness and not some part of his statement to the police.

(3) A witness is considered hostile only when in the opinion of the judge; he bears a hostile animus to the party calling him and does not give his evidence fairly and with a desire to tell the truth. A witness is not hostile when his testimony merely contradicts his proof or because it is unfavourable to the party calling him. The procedure that the judge adopted was inappropriate. It was also inappropriate for him to declare the witnesses hostile only on the basis that some part of the witness's evidence was inconsistent with some part of his prior statement.

(4) The judge when dealing with factual matters is to identify the crucial factual issues that the jury will need to determine refer only to those passages in the evidence that bear directly on those issues, and put clearly the case for the prosecution and the case for the defence on each. The summing-up in this case does not amount to misdirection.

Appeal allowed.

Cases referred to

BRS v R (1997) 191 CLR 275; 148 ALR 101; *R v Gye* (1989) 5 CRNZ 245; *R v Lawrence* [1982] AC 510, considered.

R v Fraser (1956) 40 Cr App R 160; *R v Klassen* (unreported, CA 488 of 1995, 20 February 1996); *R v Manning* [1968] Crim LR 675; *R v O'Brien* [2001] 2 NZLR 145, cited.

A. K. Singh for the Appellants.

G. H. Allan for the Respondent.

Tompkins, Henry and Penlington JJA The three Appellants were charged with two offences. The first was that on 13 April 1997 with intent to do some grievous harm to the complainant Subarmani they unlawfully wounded him. The second was that on the same day they committed the same offence against the complainant Raj Gopal Chetty. After a trial lasting 14 days before Prakash J. and assessors, the assessors reached a verdict of guilty against all three Appellants on both charges. The Judge accepted that verdict. They were accordingly convicted. They were each sentenced to 5 years' imprisonment on count 1 and 2 years' imprisonment on count 2, the sentences to be served concurrently. They have appealed against conviction and sentence, although at the hearing of the appeal, counsel advanced no submissions in support of the appeal against sentence.

Case for the prosecution and the defence

We can state this shortly because although what occurred was substantially disputed at the trial, the facts are not directly relevant to the issues raised on the appeal.

It was the case for the prosecution that the Appellant Singh called the complainant Subarmani to his house. They are neighbours about two or three chains from each other. Master Subarmani (as he was called by most witnesses) went to the Appellant Singh's house with the 2nd Complainant Chetty. Chetty was ahead of him. As he was about to reach Singh's house, he was attacked by Armogam first, then by Singh with a cane knife and then by the Appellant Prasad with a chainsaw. He became unconscious and was taken to hospital. The prosecution further claimed that during this attack on Master Subarmani the complainant Chetty was also attacked with an iron rod.

It was case for the defence that Master Subarmani was injured by Gopal Chetty. If Gopal Chetty had any injuries these were inflicted in the struggle between him and the three Appellants. This was after Gopal Chetty had attacked the Appellant Singh with a bushshaw. The defence version is that the three Appellants were sitting inside Singh's house at the time of the visit by the two complainants.

The grounds of appeal

The notice of appeal and the submissions on behalf of the Appellants set out ten grounds of appeal. However we find it necessary to examine in detail only four.

Cross examination of Appellants on previous convictions

Counsel for the Appellants, when cross-examining some of the witnesses for the State, put to them questions that involved imputations on their characters, The Appellants thereby put character in issue, with the result that, in accordance with s 145 (f) (ii) of the Criminal Procedure Code (Cap 21), the prosecution was entitled to ask the Appellants questions tending to show that they had been convicted of a previous offence, or were of bad character. It is trite law that the trial judge must exercise a discretion whether to allow or refuse such cross-examination.

Counsel for the appellants submits that the judge erred when he allowed or permitted the State counsel to cross-examine two of the Appellants on bad character, in particular on their previous convictions, having regard to the manner in which this was done.

The following are the relevant passages in the transcript.

The Appellant Armogam.

> No, not a violent person. Chintambi my brother. We did not assault a Police officer. Yes charged and found guilty. Police Officer Yakub. Yakub Police Officer investigating a matter – regarding investigations about shooting. Not clear. Long time ago.

The Appellant Singh

> No I did not burn other people's cane farm. I did not harass people in settlement. People not fed up. No they did not tie and beat me up. I did not promise to leave Barotu. In Malau I bought farm No 199 from Nagratnam known as Rinda's farm. Don't drink a lot regularly. Convicted of drunk and disorderly and fined.

It is apparent from these passages that the prosecutor did not, as she ought to have, apply to the judge in the absence of the assessors for leave to cross-examine each of the Appellants on their previous convictions. Nor, as far as we are aware, did she give any notice to counsel for the Appellants (who was not Mr Singh) of her intention to cross-examine on previous convictions. Had she applied to the judge for leave, it is highly likely that the application would have been declined. When sentencing, the judge said that he had considered the history of the Accused and that for the purposes of sentencing, the previous convictions of the Appellants Armogam and Singh were ignored. He said these convictions were for offences committed more than 15 years ago and should be regarded as spent convictions.

The reason why evidence of previous convictions of Accused persons is admitted only in limited circumstances were thus described by Gaudron J in *BRS v R* 148 ALR 101 at 116:

> Leaving aside the situation in which character is in issue, evidence that an accused person has on other occasions committed other offences is admissible in strictly limited circumstance which will be identified shortly. That is because, except in those circumstances, evidence of commission of other offences is highly prejudicial and of limited probative value. As a general rule, evidence that an accused has on other occasions committed offences of the kind charged proves only that he or she is a person capable of committing offences of that kind, not that he or she committed the offence charged. However, a jury might well reason that if offences of that kind were committed by the accused on other occasions, he or she is very likely to have committed the offence in question.

In his summing up the judge directed the jury in these terms:

> Accused 1 and 2 admitted that they had previous convictions: - Accused 1 – for obstructing a Police Officer in due execution of his duty, and Accused 2 for drunk and disorderly. You should be careful about their previous convictions. This evidence on the prior convictions should not suggest to you that they are prone to commit other crimes. These evidence should not be used for any purpose except to assess the general credibility of the accused as witnesses.

This direction to the assessors, although brief, was not itself a misdirection, although we consider it would have been preferable for the judge to have directed the assessors that the two offences, namely obstructing a police officer in the execution of his duty and being drunk and disorderly, were not offences that went to the credibility of the Accused as witnesses.

It is likely that, when summing up, the judge was unaware that both convictions were over 15 years ago. Had he been aware of this, he would have directed the assessors that this evidence should be completely ignored and should not have been the subject of cross examination by the prosecutor.

Despite the judge's direction, the possibility cannot be excluded that the assessors were affected in their judgment of the two appellants by this evidence of previous convictions. The fault was that of the prosecutor, not the judge, because, the prosecutor not asking for leave, the judge had no opportunity to rule on whether the cross examination was appropriate.

Declaring witnesses hostile

Counsel for the Appellant submitted that the judge erred in declaring three State witnesses hostile. Each of these witnesses was called by the State as eye witnesses to the events.

PW6 gave evidence of approaching a house and hearing some yelling. It was raining. The transcript continues:

> Yes, I gave statement to police, I signed it (shown)
>
> Yes, my statement, I signed. Not read to me I said it was correct, I signed. Statement in Hindi. Not read back to me.
>
> Prosecution: Displaying hostile animosity.
>
> Court: Read statement of witness. Quite different. Witness declared hostile.

PW 7 lived nearby in his father's house. The transcript continues:

> Heard people fighting at Rinda's house. Father went to tie cattle. Mother at home when I heard fighting, I came out of house Father told me to bring van.
>
> No I did not go to Rinda's house. When I got out of house, father said bring van I took van before then I saw Ranjit, Rinda, Armogam and my father bringing Master to main road.
>
> Yes, I gave statement to Police on 13/4/97. Yes, I signed statement (shown). Yes, my signature Police did not read to me but I signed it. Prosecution: Seek to declare witness hostile
>
> Court: Witness declared hostile.

PW11 was staying at the house of the 2nd Appellant. He knew the 1st Appellant. He saw Master Subarmani lying on the ground in front of the porch with blood coming out. Before seeing him he did not witness any argument between anyone. The transcript continues:

> Yes, I was issued witness summons in this case for 28/05/02. I did not appear that day. I forgot I moved to Ba – 2 weeks after incident when Master was injured. I don't know who injured Master. I was bathing.
>
> *Prosecution*: Wish to seek to cross examination witness statement to Police different for what he is stating to Court.
>
> *Court*: Statement seen – witness declared hostile.

There are two features of the accounts in these passages. First, there was no application to the judge by the prosecutor to make submissions to the judge in the absence of the assessors in support of her application to have the witness declared hostile. This is the procedure she should have followed or the judge should have required. It enables the judge to consider the application properly, and gives the defence the opportunity to make submissions on whether the application should be granted. Second, it appears from the record that the only ground on which the judge made his decision was that part of the evidence the witness had given did not accord with some part of his statement to the police.

A witness is considered hostile only when in the opinion of the judge, he bears a hostile animus to the party calling him and so does not give his evidence fairly and with a desire to tell the truth: Archbold, *Criminal Pleading Evidence and Practice,* 39th ed s 521. A witness is not hostile when his testimony merely contradicts his proof or because it is unfavourable to the party calling him: Phipson on *Evidence*, 15th ed, 2000, at §52. In R v Klassen, unreported 20/2/96, CA488/95, the Court of Appeal in New Zealand described as "premature" a ruling at trial that a witness was hostile when, at the time, the only indication of hostility was the fact that the witness had made a prior inconsistent statement. If prosecuting counsel has in his possession a statement by a witness for the prosecution which is in direct contradiction to the evidence given by that witness, it is his duty at once to show the statement to the judge and ask leave to cross-examine the witness as a hostile witness: *R v Fraser* (1956) 40 Crim App R 160.

In this situation the correct course for the prosecutor to adopt was to say to the judge before the assessors, that she wishes to make an application. The judge should consider the application in the absence of the assessors but in the presence of the accused, and a record of the ruling kept, together with reasons, which could be given at the time or reduced to writing later: *R v O'Brien* [2001] 2 NZLR 145 CA at 154. On the hearing of the application, the prosecution can advance submissions why any inconsistency is indicative of a hostile animus and counsel for the defence can make submissions to the contrary if appropriate. The judge then decides whether the inconsistency is sufficient to justify the conclusion that the witness is hostile to the prosecution.

While it is unusual to hear evidence on the question of whether a witness should be declared hostile, the procedure to be adopted is essentially for the trial judge. Earlier practice, which tended to discourage voir dire evidence on hostility issues, should no longer be regarded as inhibiting that course if the judge considers it would assist the exercise of the Court's discretion: R v O'Brien (above) at 155.

We accept that the Court of Appeal rarely interferes with the exercise of the discretion of the trial judge who sees the witness and is better able to assess him: *R v Manning* [1968] Crim.L.R. 675, C.A. Thus we are not concerned to consider whether the particular circumstances of each of the three cases justified the Judge exercising his discretion in the way he did. What is of concern is the procedure that was followed in each case, where there was no opportunity for the defence to make submissions before the judge made his ruling, and there is no record of the reasons for that ruling. Not every inconsistency between evidence from the witness box and a prior statement will justify the declaration. For example, a witness who is genuinely forgetful may be unfavourable to the prosecution but cannot be treated as hostile: R v Manning (above). In each case, it is for the judge to decide, after hearing submissions, whether the degree of difference justifies finding the witness to be hostile to the party calling him.

For the reasons we have set out, we conclude that the procedure the judge adopted was inappropriate, and that it was also inappropriate for him to declare the witnesses hostile only on the basis that some part of the witness's evidence was inconsistent with some part of his prior statement.

Lies

In his summing up, the judge gave the following direction:

> In her closing address State Counsel raised the issue of the accused persons lying about the incident to conceal the truth. First it is up to you to decide whether any one accused person or all of them are lying. You should also note that the burden is on the Prosecution to prove its case against each accused beyond reasonable doubt. If you reach a conclusion that any of the accused are lying it is a factor you may take into account in drawing an inference of guilt. What strength such an inference has is a matter for you to decide in considering the totality of consider whether there may be other reasons for heir untruthfulness rather to conceal their guilt.

It was submitted on behalf of the Appellant that this was an improper and insufficient direction.

There are elements in this direction that cause concern. First, the suggestion that the Accused lied is in general terms only. Neither the judge nor (according to the comment in the summing up) the counsel identified what it was that any of the Accused said that were claimed to be lies. Second, in the absence of any specifically identified lies, we do not consider it appropriate for the judge to direct the jury that their lying can be taken into account in drawing an inference of guilt.

In *R v Gye* (1989) 5 CRNZ 245 (CA) at 249, Bisson J in the New Zealand Court of Appeal commented:

> We trust this judgment will sound a cautionary note and suggest that, save in exceptional circumstances, it would be desirable to omit any reference to the strengthening of the Crown case.

There are no exceptional circumstances in the present case.

The summing up

Counsel for the Appellants submitted that the judge's direction to the assessors was not clear and intelligible, or was confusing.

The summing up occupies 64 pages in the case on appeal. For a relatively straightforward case, it is inordinately long. The principal reason for this is that in the summing up, the judge repeated almost verbatim the evidence in chief, cross-examination and re-examination of each witness. Not only is this unnecessary, but the tediousness of this process detracts from the force of the directions on matters of law, and makes it more difficult for the assessors to identify and decide the crucial factual issues. As Lord Hailsham LC said in *R v Lawrence* [1982] AC 510, 519:

> A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a Judge's note book.

What the judge should do when dealing with factual matters is to identify the crucial factual issues that the jury will need to determine, refer only to those passages in the evidence that bear directly on those issues, and put clearly the case for the prosecution and the case for the defence on each. In Lawrence Lord Hailsham put it this way:

> …it must include references to the burden of proof and the respective roles of jury and Judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.

Unsatisfactory though the summing up is, we do not consider that its defects amount to a misdirection.

Conclusion

In view of the conclusions we have reached, it is unnecessary for us to consider the remaining grounds of appeal. The cumulative effect of the defects in this trial we have identified leave us in no doubt that the trial must be regarded as unsatisfactory and unfair. As Mr Allan responsibly acknowledged, this is not case for the exercise of the Court's discretion under s 22 (6) of the Court of Appeal Act (Cap12) to dismiss the appeal.

Result

The appeal is allowed. The conviction of each Accused on both counts is quashed and a re-trial ordered.

Appeal allowed.