LICORISH v. R.

[COURT OF APPEAL - CRIMINAL APPEAL NO. 38 OF 1991

(Williams, C.J., Husbands and Smith, JJ.A.) February 21, March 31, 1994]

(1994) 30 Barb. L.R. 135

Evidence *- Fresh evidence - Application to adduce fresh evidence - Medical report which may have provided appellant with an arguable defence was available, but not put forward at trial - Whether court should receive the fresh evidence.*

Facts: On October 17, 1991 the appellant was convicted and sentenced to death for murder. Prior to his trial, at his counsel's request, the applicant was examined by a medical practitioner who was Senior Consultant at the Psychiatric Hospital and who held a diploma in Psychological Medicine and. She opined that the appellant **[135]** had an abnormality of the mind which significantly impaired his comprehension, reasoning and actions and that the crime proceeded from the illness. When the doctor contacted counsel to inform him of her findings, the appellant had already been convicted of murder and sentenced to death. On an application for leave to adduce the fresh evidence -

Held: There was evidence at the trial of the appellant's strange behaviour at the material time and also of a mental state that seemed troubled and unsettled. In the circumstances, it is expedient to admit the fresh evidence in the interest of justice and to hold that it rendered the conviction unsafe and unsatisfactory.

Conviction quashed, sentence set aside and new trial ordered.

Cases referred to:

Kiranjit Ahluwalia (1990) 96 Crim. App. R. 133.

R. v. Clinton [1993] 1 W.L.R. 1181.

Statute referred to:

Criminal Appeal Act, Cap. 113A, s. 29.

Miss M. Mottley for the appellant.

Mr. C. Leacock, Deputy Director of Public Prosecutions, for the Crown.

JUDGMENT OF THE COURT: On October 17, 1991, the appellant, Carlos Licorish, was convicted and sentenced to death for the murder on November 9, 1990 of Violet Elsie Clarke. He seeks leave to call additional evidence in support of an appeal to this Court, one of the grounds of which is that his right to a fair hearing, guaranteed under section 18(1) of the Constitution, was prejudiced by the failure of his counsel at the trial to advance the defences of diminished responsibility and/or insanity on the basis of potentially available psychiatric evidence concerning him.

On Monday, February 21, 1994 we heard the application, allowed the fresh evidence to be received, quashed the conviction on the ground that it was unsafe and unsatisfactory, set aside the sentence of death and ordered a new trial. We stated that we would give our reasons at a later date and we now do so.

The incident that gave rise to the charge against the appellant took place in the early morning hours of November 9, 1990. The appellant had been living with his wife Joyce and their four children at the home of her grandfather, Mr. James White, at Reece Road, Brittons Hill, St. Michael, but had ceased to live there and on November 9 was living at Paddock Road, St. Michael. Joyce's cousin, Sandra Clarke, lived with her mother Violet, the deceased, in a house next to Mr. White's.

About 3 o clock on the morning of Wednesday, November 7, Sandra saw the appellant lurking around Mr. White's house and called the police. They went to the scene and P.C. 748 Lorde spoke to the appellant. According to Lorde, the appellant **[136]** told him that "my wife live there and that man (Mr. White) living with she." Lorde testified that he spoke to the appellant in the presence of Mr. White and he appeared to be disturbed and angry.

Sandra again saw the appellant in the vicinity on the morning of the 8th at about 4 o'clock and again called the police. P.C. 490 Gittens and P.C. 986 Scantlebury went to Reece Road and Gittens testified that Scantlebury spoke to the appellant about a complaint from Mr. White that he had trespassed on his premises after he had been forbidden to do so. The appellant replied that he wanted to speak to his wife to find out what had been happening for the past 7 years while he was living in the United States. Gittens' evidence was that the appellant seemed quiet and as if he was disturbed and upset about something. He appeared emotional in his responses when they spoke to him. Scantlebury's testimony was that the appellant appeared to be disturbed when he spoke to him.

Violet Clarke's life came to an abrupt end on the following morning. Sandra testified that she got up at about 3 o'clock to go to the bathroom and saw her mother at a window. Her mother spoke to her and she looked through the window. She heard a tumbling noise coming from the house of her grandfather, Mr. White. She and her mother went over to investigate and it was then that her mother met her death which was caused by a subdural haemorrhage to the brain as a result of contact with some blunt object. Police Sergeant 190 Bishop who assisted in the investigations into her death testified that when he saw the appellant at Hastings Police Station later in the morning,

he seemed to be concerned. He looked worried and spoke to him about reading the Bible.

The appellant in his written statement, which was recorded by Sergeant Bishop on the same morning and admitted into evidence without objection, gave his account of what had happened. He had entered the house and shortly thereafter locked himself in the front bedroom awaiting his wife whom he felt would come to that bedroom. He fell asleep and was awakened in the morning when someone tried to put a key in the door. In his words -

> "I got up and stood by the door. I heard Aunt Elsie outside saying come we got he. I hear he inside there every since. The grandfather say yes he in here. I hear he too. He open the door and we stood face to face. He ask what I was doing in the house and I show him the bible and asked him if this is your burden. He told Aunt Elise to call the police and I said yes, call the police. I ain't carrying this burden any longer. Aunt Elsie came into the house and she started to talk with me and grandfather left and went into the back. I stop talking to Aunt Elsie and I walk and went to the back of the house shouting for my wife. When I reach the kids bedroom I saw grandfather with a piece of pipe in his hand. He raised it and said he would hit me."

The appellant went on to tell of a struggle with Mr. White with Aunt Elsie pulling him from behind.

The evidence in respect of which leave is sought is that of Dr. Patricia Bannister, a registered medical practitioner with a diploma in Psychological Medicine and at present Senior Consultant at the Psychiatric Hospital. At the request of Mr. Nelson who represented the appellant at his trial on October 15 - 17, 1991 she examined him on or about September 24, 1991 with a view to determining his mental condition. She took a full history, did a mental status examination and concluded that he was suffering from schizophrenia of the paranoid type and had been suffering from this disease of the mind at the time of the crime with which he was charged. It was her opinion that he had an abnormality of the mind which significantly impaired his comprehension, reasoning and actions and that the crime proceeded out of the illness. She called Mr. Nelson on or about October 22, 1991 to report orally on her diagnosis of schizophrenia only to discover that the appellant had already been convicted of murder and sentenced to death.

The statutory provisions that regulate the admission in this Court of additional evidence are contained in section 29 of the *Criminal Appeal Act,* Cap. 113A. Those relevant to the application are:

> "29 (1) For the purposes of this Part, the Court may, if it thinks necessary or expedient in the interests of justice
>
> (a) .....
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> (b) order any witness who would have been a compellable witness at the trial to attend and be examined before the Court, whether or not he was called at the trial: and
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> (c) ....receive the evidence, if tendered, of any witness.
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> (2) 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 would have been admissible at the trial on an issue that is the subject of the appeal; 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."

It is clear that Miss Bannister's evidence cannot be admitted under subsection (2). Though it is credible and would have been admissible at the trial on issues of insanity and diminished responsibility which are issues raised on the appeal, the court has been given no explanation for the failure to adduce it at the trial. **[138]** The appellant's attorney-at-law had requested Miss Bannister to examine the applicant, she had done so about 3 weeks before the trial began and had reached a conclusion which would have supported at least one defence based on his mental condition. But there is nothing to show why counsel had not got back to her to see if she had formed any opinions that could assist the defence at the trial. In these circumstances the court cannot be, and is not, satisfied that there is a reasonable explanation for the failure to adduce Miss Bannister's evidence at the trial.

The court turns to consider its general discretionary power under section 29(1) to receive further evidence where it is plainly made out that this is necessary or expedient in the interests of justice. The appellant relies on counsel's error and a passage from the judgment of the English Court of Appeal in *R. v. Clinton* [1993] 1 W.L.R. 1181 shows the approach that should be taken when such a ground is put forward and the Court has to decide whether the appellant's conviction has been rendered unsafe or unsatisfactory -

"During the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions not the least of which is whether or not to call his client to give evidence. Some of these decisions turn out well, others less happily. In *R. v. Gautam* [1988] Crim. L.Rev. 109 this court concisely explained why such decision could not generally afford valid grounds of appeal. They held that provided counsel had properly discussed the case with his client the court would not permit the defendant to have another opportunity to run an alternative defence which had not been run at his trial. In *R. v. Ensor* [1989] 2 All E.R. 586; [1989] 1 W.L.R. 497 the Court considered both *R. v. Irwin* [1987] 2 All E.R. 1085 and *R. v. Gautam* [1988] Crim. L.Rev. 109 and expressly approved the approach in the latter case subject only to the qualification which had been inserted in an intervening case called *R. v. Swain* [1988] Crim. L.Rev. 109 that if the Court had any lurking doubt that the defendant might have suffered some injustice as a result of flagrantly incompetent advocacy by his counsel, then it would quash the conviction...We think that the proper interpretation of the cases to which we have referred is that the Court was doing no more than providing general guidelines as to the correct approach. The court was rightly concerned to emphasise that where counsel had made decisions in good faith after proper consideration of the competing arguments and, where appropriate after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory. Particularly, does this apply to the decision as to whether or not to call the defendant. Conversely and, we stress, exceptionally, where it is shown that the decision was taken either in defiance of or without proper instructions, or order all the promptings of reason and good sense pointed the other way, it may be open to an appellate court to set aside the verdict by reason of the terms of S.2 (1) (a) of the 1968 Act (that the conviction was unsafe or unsatisfactory). It is probably less helpful to approach the problem via the somewhat semantic **[139]** exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but seek to assess its effect on the trial and the verdict according to the terms of the subsection."

Is this an exceptional case? It is in our view strikingly similar to the case of *Kiranjit Ahluwalia* (1990) 96 Crim. App. R. 133, a decision of the English Court of Appeal on which Miss Mottley relied. In that case, diminished responsibility was not raised at the trial, but evidence was given as to the appellant's strange behaviour after lighting the fire that caused the death of her husband. A report was available before the trial from a medical practitioner, recognised for the purposes of the Mental Health Act, in which the doctor expressed the opinion that the appellant was suffering

from endogenous depression at the time of her act, a condition which, in the opinion of some experts, would be termed a "a major depressive disorder."

It was unclear how this material came to be overlooked or why it was not further pursued at the time of the trial but the Court was told that the appellant herself was not consulted about the report or about the possibility of investigating it further. The Court concluded that without, it would seem, any fault of the appellant, there may well have been an arguable defence which, for reasons unexplained, was not put forward at the trial and in those circumstances considered that the verdict must be regarded as unsafe and unsatisfactory. A retrial was ordered.

In this case, there was evidence at the trial not only of the appellant's strange behaviour at the material time but also of a mental state that seemed troubled and

unsettled. It is unclear why the appellant's attorney-at-law at the trial did not follow up his reference of the appellant to Miss Bannister for determination as to his mental condition, but her evidence, if she had been called at the trial, would have given the appellant an arguable defence. Though Miss Mottley did not say that the appellant was not consulted about any decision not to pursue the reference of the appellant to Miss Bannister for examination, her submission proceeded on the assumption that he was not a party to any such decision. In all the circumstances we thought it was expedient to admit the fresh evidence in the interests of justice, and to hold that it rendered the conviction unsafe and unsatisfactory. Accordingly, we quashed the conviction, set aside the sentence and ordered a new trial.

The cases show that it will only be in exceptional circumstances that the Court will be minded to hold that a conviction is unsafe or unsatisfactory on the ground of counsel error. Both this case and the case of *Kiranjit Ahluwalia*, point to the desirability, when an application is made to admit fresh evidence for the purpose of having a conviction quashed on such a ground, for evidence to be put forward showing, as far as possible, the full circumstances in which the decision as to the action or course of conduct complained of was made.**[140]**