HAREWOOD v. R.

[COURT OF APPEAL - CRIMINAL APPEAL NO. 5 of 1993

(Williams, P., Smith and Moe, JJ.A.) January 31, 1994]

(1994) 30 Barb. L.R. 40

Practice and procedure - Summing up in a murder case - Allegations that the trial judge misdirected the jury on theconsideration which they should give to an unsworn statement, failed to put the defence fairly to them and gaveinsufficient direction as to the verdicts which they should return - Whether conviction unsafe - Whether proviso could beapplied.

Facts: The appellant was convicted of two offences, viz. wounding with intent to do grievous bodily harm and maliciouswounding. He was sentenced to ten years and three years respectively. The appellant allegedly attacked the mother of hisfive children and her brother with a collins, wounding them both. It was alleged, inter alia, that the trial judge failed togive sufficient direction to the jury as to the verdicts which they should return, leaving them in doubt. It was also arguedthat the judge misdirected the jury as to the approach which they should take in considering the appellant's unswornstatement. It was further argued that the judge failed to put the defence fairly to the jury in that he consistently gave hisopinion on aspects of the evidence.

Held: In the circumstances of the case, there was no inadequacy in the way in which the judge dealt with the burden orstandard of proof. Failure to repeat the initial direction on the burden or standard of proof or to give a concluding directionon the possible verdict did not in the circumstances nullify the verdict. In examining the summing up, the trial judge didnot go beyond the proper bounds of judicial comment. If the jury had been properly directed on the issue of the accused'sunsworn statement, they would inevitably have come to the same conclusion and accordingly, the proviso could be and wasapplied.

Application dismissed and convictions affirmed.

Cases referred to:

Mears v. The Queen [1993] 1 W.L.R. 818.

R. v. Ensor [1989] 1 W.L.R. 497.

R. v. Gautam (1988) Crim. L.Rev. 109.

R. v. Gilbey (1990) 12 Cr. App.(S) 49.

R. v. Swain (1988) Crim. L.Rev. 109.

R. v. Turnbull (1977) 65 Cr. App. R. 242.

R. v. Young and Fergusson. Barbados. Court of Appeal. Crim. Appeals Nos. 1 and 2 of 1983. Judgment delivered March22, 1985.

Mr. Alair Shepherd for the applicant.

Mr. Olton Springer for the respondent. [40]

WILLIAMS, P.: On January 19, 1993 the applicant Vincent Harewood was convicted before a judge and jury of twooffenses: wounding Eulanda Hinds with intent to do her grievous bodily harm or to maim, disfigure or disable her andmaliciously wounding Fitzgerald Hinds. He was sentenced to ten years imprisonment for wounding with intent and threeyears imprisonment for the lesser offences.

The charges arose out of an incident that took place on Kendal Road, St. John on September 30, 1990. The case for theprosecution was that the applicant made a fierce attack on Eulanda, the mother of his five children, with a collins causingher serious injury and then wounded her brother Fitzgerald.

The applicant's version of the incident was given in the latter part of his statement from the dock. Having spoken ofEulanda's requesting him to meet her at Kendal "by the woods corner", of his agreeing to do so and on his arrival findingEulanda, Muriel (known as "Poopsy") and Fitzgerald there, of Eulanda's raising the matter of the dispute that they had overthe house and support for the children, and of his telling her that he was not coming back there since her mother had takenover the house and was the dictator in it, he continued-

"At this point an argument started and Fitzgerald attacked and throw two stones at me, then we held on and startedto struggle, all three of us fell, Fitz, Eulanda and I. Whilst on the ground we struggled, I received some kicks,thumps and butts. While the struggle going on Fitz manage to get away and he got to his feet, me and Eulanda alsogot to our feet and Fitz went to the side of the grass and bend down and when he got back up I noticed he had acollins in his hand. He came at me with the collins. I got behind Eulanda and held her and Fitz start lashing at mewith the collins and I use Eulanda as a shield, holding and thrusting her to and fro, around and around andsuddenly I push Eulanda away from me. She and Fitz went and butt up on one another and they fell and I movedaway from the site."

So that the defence was that Fitzgerald Hinds was the aggressor and it was he who inflicted the injuries.

The testimony of all the others who saw what happened, Eulanda herself, Fitzgerald, Muriel and Lemuel Parris is that itwas the applicant who had the collins and wounded Eulanda and Fizgerald.

Muriel's story was that she was talking with Eulanda in the road by Kendal Woods, saw the applicant emerge from thecanes with a collins in his right hand and shouted to Eulanda to run for her life. Eulanda kicked off her right shoe and ranoff but the applicant ran behind her, lashed her across her leg with the collins and she fell. He then chopped her up with thecollins while she, Muriel, rode off on her bicycle shouting for help. FitzGerald came to the scene, tried to get the collinsfrom the applicant and got two lashes with it.

Eulanda's testimony is that she was on her way from church and was on the [41] road speaking to Muriel who had herbicycle with her. Muriel said something to her and she ran back towards the church shouting for murder. She fell and theapplicant was over her cutting her with a collins. He told her he had long been waiting on her.

FitzGerald's evidence is that he was walking on the road going towards the woods to look for his stock. Eulanda wasstanding by the road with Muriel and the applicant came out of the woods. Eulanda shouted for help, he ran to hold her, shefell and the applicant cut her up and then gave him three cuts.

Parris said he was at his home below the woods and heard a noise. He went out to investigate and saw the applicant in theroad about 100 yards away waving a cutlass up and down in a criss-cross motion. He went closer and saw Eulanda lyingon the ground with cuts all over her.

Self defence was the first ground argued by Mr. Shepherd. His submission is that such a defence arose out of the applicant'sunsworn statement and the trial judge should have directed the jury on that defence and gone on to give the standarddirection that it was for the Crown to rule out self defence and if they believed that the applicant was acting in self defenceor were left in reasonable doubt, they should acquit. He was unable to point to any authority for the proposition that a mancan use the body of another as a shield to prevent injury to himself and then claim that, in so doing, he was acting in selfdefence. We find no merit in this ground.

He then argued identification and that the trial judge should have given a Turnbull direction to the jury. Here again we donot think that any merit exists. Apart from it being morning time and the applicant being well known to all the witnesses,he admits that he was on the scene. The issue that the jury had to decide was not whether or not the applicant was there butwhat really happened. Mr. Shepherd went on to argue that there was not sufficient direction to the jury as to the verdictsthat they should return if they were left in doubt. He referred to the following passage (page 3 of the summing up):

"The standard of proof which is required is that the Crown leads evidence of such a nature, quality and kind as tosatisfy you and make you feel sure that the accused is guilty of the offence or offenses for which he has beencharged. That is traditionally referred to as proof beyond reasonable doubt, but a simple explanation for it is the onel gave you that the evidence must make you feel sure that the accused is guilty. If per chance you have any doubt asto whether the prosecution has adduced enough evidence or adequate evidence as to make you feel sure, that doubtmust be exercised in favour of the accused."

The submission is that the jury were not told what verdicts they should return if they are left in doubt. Tied to this is afurther submission that, the summing up having gone on for over two hours, the jury should have been reminded at itsconclusion of the burden and standard of proof and the possible verdicts.[42]

We do not think that there was in the circumstances of this case any inadequacy in the way in which the judge dealt withthe burden or standard of proof. The duration of the summing up may have exceeded two hours but the case was neitherdifficult nor complicated. It was a simple issue of which side was telling the truth as to what really happened and the juryhad been made award that the verdict of guilty is not appropriate to a charge on which they did not feel sure of the guilt ofthe accused. Failure to repeat the initial direction on the burden or standard of proof or to give a concluding direction on thepossible verdicts does not in the circumstances of this case nullify the verdict.

Another ground argued is that the judge misdirected the jury as to the approach they should take in considering theapplicant's unsworn statement in that -

(a) the judge directed the jury that it was open to them to disbelieve the applicant on the ground that his defence hadnot been put to the witnesses for the Crown; and

(b) he directed the jury that they should approach his evidence in the same way that they should approach theevidence given by the other witnesses in the case.

As to (a), the argument is that, in discussing the failure to put the particulars of the defence story to the prosecutionwitnesses, he did not refer to the possibility that any such failure was due to the incompetence of his attorney-at-law andallowed it to reflect solely on the applicant's credibility. This would have been prejudicial to the applicant by affecting theway in which the jury viewed his account of the incident.

In our view no reason has been shown why the judge should have adverted to counsel error. We all know that there arecases in which accused persons when giving evidence or making unsworn statements, depart from instructions originallygiven to their attorneys-at-law. In this case, the position of FitzGerald Hinds in the encounter as put to the prosecutionwitnesses differs so fundamentally from his position as given by the applicant in his unsworn statement as to suggeststrongly that there was such a departure. It was put to Eulanda in cross-examination, and she denied, that while she was onthe ground FitzGerald was also on the ground swinging the cutlass. It was suggested to Muriel, and she denied, that at onepoint three people were on the ground. It was suggested to Fitzgerald that three people were on the ground scuffling. Hedenied this and said that he was not on the ground at any point. After these questions, on would have expected theapplicant to say that FitzGerald's attack with the collins took place when the three of them were on the ground but in thepart of his statement reproduced earlier, he said that FitzGerald's attack with the collins took place when they were bothstanding.

As to (b), reference is made to the following direction (at page 5 of the summing up) -[43]

"Now when you encounter these discrepancies, you must deal with them in this way. You must try to determinewhether you feel that the witness is deliberately lying. If you find that he is deliberately lying, you will thereforehave to reject not only that part of his evidence that you feel that he is lying about, but the entirety of his evidence.The reason for this, being that, if a person lies on oath about one particular matter, it is fairly likely that he wouldalso be lying on oath about another matter or most other matters. And it is not your function to try to determine, tosift and analyse and to determine what he is lying about and what he is truthful about. In the circumstancestherefore, you must reject the entirety of his evidence."

The judge (at page 3) had told the jury that the witnesses in the case would "include the accused and the statement that hegave from the dock" and counsel's submission is that the applicant would have been prejudiced by the direction. In supportof the submission, he relies on the following passage from R. v. Young and Fergusson, Criminal Appeals Nos. 1 and 2 of1983, judgment delivered on March 22, 1985 -

"The other observation relates to the inferences which may be drawn from contradictory statements made by anaccused. A prosecution or defence witness is sworn or under affirmation to tell the truth and a deliberate lie on thepart of such a witness is sufficient to destroy his credibility. It is proper to direct a jury on these lines where theoccasion arises. But such a direction in relation to the evidence or unsworn statement of an accused is inappropriatebecause in the case of an accused the jury are concerned not only with his credibility but also with his innocence orguilt. A jury can only properly convict on the strength of the prosecution's case and where the defence of an accusedis contained in his evidence or unsworn statement, a direction to the jury that rejection of the whole of his evidenceor unsworn statement follows from a finding that he lied in one respect is akin to a direction to accept the evidencefor the prosecution and convict on the basis that the accused told a lie. Just as a conviction cannot automaticallyfollow a lie told by an accused, so in my view rejection of his evidence or unsworn statement should notautomatically follow a lie told by him and a jury should not be directed on those lines."

We will refer further to this matter at the conclusion of our judgment.

Another ground argued is that the judge failed to put the defence fairly to the jury in that he consistently gave his opinionon aspects of the evidence, including the credibility of the witnesses and the applicant, which opinion was capable of beinghighly prejudicial to the applicant.

Here the test to be applied is stated by the Privy Council in Mears v. The Queen [1993] 1 W.L.R. 818 where Lord Lane,delivering the judgment of their Lordships said (at page 822) -[44]

"The Court of Appeal (of Jamaica) took the view that the trial judge was not putting forward an unfair orunbalanced picture of the facts as he saw them. In rejecting the defendant's submission that the comments of thejudge were unfairly weighed against him, the court asked themselves whether the comments amounted to anusurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury'sfunction short of withdrawing in terms an issue from the jury's consideration. In other words, this was to use a testwhich by present day standards is too favourable to the prosecution. Comments which fall short of such anusurpation may nevertheless be so weighed against the defendant at trial as to leave the jury with little real choiceother than to comply with what are obviously the judge's views or wishes. As Lloyd L.J. observed in R. v. Gilbey(1990) 12 Cr. App. R.(S) 49:

`A judge is not entitled to comment in such a way as to make the summing up as a whole unbalanced. It cannot besaid too often or too strongly that a summing up which is fundamentally unbalanced is not saved by the continuedrepetition of the phrase that is a matter for the jury.'

Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course, remain impartial,but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has tosupplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between thetwo sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen intoerror for this reason. However, if the system is trial by jury, then the decision must be that of the jury and not of the judgeusing the jury as something akin to a vehicle for his own views. Whether that is what has happened in any particular caseis not likely to be an easy decision. Moreover, the Board is reluctant to differ from the Court of Appeal in assessing theweight of any mis-directions. Here their Lordships have to take the summing up as a whole and then ask themselves in thewords of Lord Sumner in Ibrahim v. The King [1914] A.C. 599, 615 whether there was:

`Something which deprives the accused of the substance of a fair trial and the protection of the law, or which ingeneral, tends to divert the due or orderly administration of the law into a new course, which may be drawn into anevil precedent in future.'"

We have examined the summing up with care, considered the different occasions on which the trial judge expressed hisopinion and the language and terms in which he did so, and are satisfied that he did not go beyond the proper bounds ofjudicial comment as stated by the Privy Council.[45]

The final ground argued by Mr. Shepherd is that the judge erred in law in admitting the evidence of Eulanda Hinds that theaccused had on a previous occasion acted strangely and had previously assaulted and threatened her and maliciouslydamaged her property.

It is unnecessary to reproduce this evidence. It was admitted without objection and R. v. Ensor [1989] 1 W.L.R. 497provides guidance on how the court should approach such a question. Reference is made at page 502 to the words ofTaylor, J. as he then was, in R. v. Gautam (1988) Crim. L. Rev. 109:

"It should be clearly understood that if defending counsel in the course of his conduct of the case makes a decisionor takes a course which later appears to have been mistaken or unwise, that generally speaking has never beenregarded as the proper ground for an appeal."

The Court of Appeal in R. v. Ensor said that generally speaking that court will always proceed upon the basis that whatcounsel does is done with the authority of the client who has instructed counsel to conduct his case and that the correctapproach to complaints arising out of counsel's

conduct of a case is that indicated in R. v. Gautam, subject to thequalification referred to by O'Connor, L.J. in R. v. Swain (1988) Crim. L.Rev. 109, heard by that court on March 12, 1987,that if the court had any lurking doubt that the applicant might have suffered some injustice as a result of some flagrantlyincompetent advocacy by his advocate, then it would quash the conviction. This is not such a case.

Returning to the argument based on R. v. Young and Fergusson, we are of the view that if the jury had been properlydirected they would inevitably have come to the same conclusion and accordingly the proviso can be, and is,

applied. The evidence against the applicant was overwhelming. The application is dismissed, the convictions are affirmed.

As to sentence, we see no reason for alteration. This was a savage attack on the complainant Eulanda who testified that shereceived 16 wounds or more and spent almost 5 months in hospital. At the time of the trial she could not use her left had,could not do anything properly for herself and had to get help.

The violence was as unnecessary as it was excessive and violence like that must be dealt with severely. The sentences areconfirmed to run concurrently as to commence on January 19, 1993.