Hilary Term
[2017] UKPC 1
Privy Council Appeal No 0035 of 2015

JUDGMENT

McLeod (Appellant) *v* The Queen (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lady Hale
Lord Kerr
Lord Clarke
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

30 January 2017

Heard on 24 October 2016

Appellant	*Respondent*
Christine Agnew QC Charlotte Brewer (Instructed by Dorsey & Whitney (Europe) LLP)	Hafsah Masood (Instructed by Charles Russell Speechlys LLP)

LORD HUGHES:

1. The appellant Leslie McLeod was convicted of murder. Before the Court of Appeal he canvassed a number of grounds of appeal, of which only a single one survives to be argued before the Board. That surviving ground centres upon his assertion, made after conviction, that he had wished to give evidence on his own behalf but had been unable to obtain any opportunity to explain that desire to his counsel.

2. The appellant lived in Duhaney Park, Kingston. He was a haulage contractor and lumber dealer in his mid-fifties with no previous conviction. His two trucks were generally parked on the street outside his house. The deceased, Junior Wilson known as Sam Jeggy, was a local drug addict who frequented Duhaney Drive. In the early hours of the morning of 19 July 2004 Jeggy was fatally wounded by repeated chopping blows with a sharp instrument, principally to the head and arm. The arm was severed and grave cuts to the face were inflicted. He was found still alive in the street, but died of his injuries. The Crown's case largely depended on an eye witness named Reid who said that he had been passing. Reid said that Jeggy had been hanging about on the street dancing to some music being played. He had seen the appellant emerge at speed from between his two parked trucks, carrying a machete and in a rage. He had heard him call to Jeggy that he would not stop lurking around his place. He had then seen the appellant "chop" the deceased repeatedly. Reid said that he was familiar with the appellant, having seen him often tending to his trucks. He had kept out of the way and left without saying anything to the police who arrived at the scene, but he told the police what he had seen some 17 days after the event. In due course he had identified the appellant at an identification parade.

3. The appellant's case was that he had been fast asleep in his house at the time of whatever happened to Jeggy, and had learned of it only the next day. He denied that he knew Reid.

4. The trial at which the appellant was convicted was a re-trial, occasioned because the jury had been unable to agree at the first trial. The second trial began on Monday 18 May 2009, some 15 months after the first had ended in mid-February 2008. The appellant was represented at both trials by counsel, Mr Palmer, who was instructed privately from the outset. Mr Palmer had also attended the identification parade on the appellant's behalf, and his partner had appeared for him at the preliminary enquiry before the magistrate.

5. At both trials, the appellant made an unsworn statement from the dock. It was to the effect that he had been asleep at home on the night of the murder and had no knowledge of it. The next morning he had gone out early, still unaware of the event, but

had heard of it from neighbours on his return in the evening. He had been accused of the killing some days or weeks later when he went to the police station in connection with his report that his truck had been set on fire.

6. After conviction, the appellant alleged that between the two trials he had become convinced in his own mind that the jury had failed to acquit him because he had not given sworn evidence. According to him, he had followed Mr Palmer's advice to make an unsworn statement at the first trial, but he now became determined to give evidence at his re-trial. He asserted that from a time some weeks before the re-trial he attempted to make contact with Mr Palmer in order to discuss the handling of the fresh trial, and to tell him of his decision, but had been unable to do so. Nor, he said, had he had any opportunity to do so during the second trial. His assertion by affidavit made for his appeal was in terms that:

> "Up to the moment when the prosecution closed its case, Mr Palmer and I had at no time ever conferred about my re-trial."

7. The transcript of the re-trial demonstrated that when the Crown closed its case at 10.53 on the fourth morning (Thursday 21 May) Mr Palmer rose to ask the judge to afford him time to consult with the appellant. The judge expressed considerable surprise and limited Mr Palmer to two minutes in court across the dock rail. The appellant accordingly referred in his affidavit to this briefest of exchanges.

8. The reason for the judge's response lay in the timetable which the re-trial had followed. As the judge pointed out, the previous day (Wednesday) had concluded as early as 11.00 when the Crown ran out of witnesses, and the rest of the day had been available for any consultation required. All that had happened on Thursday morning was that Reid had been recalled for a properly certified transcript of his evidence at the first trial, about which he had already been cross examined, to be put formally to him, and that the pathologist had given evidence. The latter's testimony was not in dispute and did not go in any way to the identity of the killer. It is not obvious what necessity for consultation either of those Thursday events could have occasioned. The judge could have added, though she did not, that there had also been a morning out of court with everyone present on Monday 18th, and that the court had adjourned that day at the early hour of about 3 pm. The appellant had been on bail throughout the breaks on Monday and until remanded in custody at the close of proceedings on Tuesday. He had been at court in the cells all day on Wednesday.

9. The appellant's complaint that he had never had the opportunity to discuss with his counsel the giving of evidence was directly contradicted by Mr Palmer by way of affidavit in response. This was presumably served on the basis of either an express or implicit waiver of privilege; at all events no objection was taken to it being before the Court of Appeal. His evidence was that before both trials he had explained to the appellant the difference between giving evidence and making an unsworn statement,

and the appellant had elected the latter course. He said that he had obtained a transcript of the first trial and had reviewed it with the appellant in the interim in order to decide the course which the second trial should take. Further, he said that after the appellant was remanded in custody at the second trial (ie on Tuesday or Wednesday) they had again consulted, in particular because the appellant wished to have a neighbour called as a character witness, which was in due course done.

10. The appellant and Mr Palmer also gave conflicting accounts of the content of the brief conversation in court on Thursday morning after the close of the Crown case. According to the appellant, Mr Palmer told him *sotto voce* not to express any remorse but that he should simply respond to what the witnesses had said against him. He asserted that in the circumstances he felt that he had no choice but to make an unsworn statement in the same way as he had at the first trial. Mr Palmer denied speaking of remorse and said the word made no sense in this context. He said that he told the appellant that the character witness was waiting outside but that the appellant "would have to make his statement or give his evidence" before the witness could be called.

11. These two conflicting affidavits were both before the Court of Appeal. After reviewing the law on the circumstances in which defaults on the part of an advocate may give rise to a miscarriage of justice, the court concluded that it had not been possible for it to resolve the conflict of evidence between the deponents "in the absence of cross examination and the opportunity to observe them giving evidence in person." It went on, however, to conclude that if one made the assumption in the appellant's favour, without deciding, that his account was accurate, it would still not have given rise to any miscarriage of justice in the present case, because (a) Reid's eye witness account had essentially survived searching cross examination and in any event (b) there was nothing in the appellant's unsworn statement to suggest that it might more effectively have been put before the jury in the form of sworn evidence. Lastly it referred to Lord Steyn's endorsement in *Boodram v The State of Trinidad and Tobago* (2001) 59 WIR 493 of de la Bastide CJ's observation in *Bethel v The State of Trinidad and Tobago (No 2)* (2000) 59 WIR 451 that there might be cases in which counsel's misconduct has become so serious as by itself to result in a denial of due process to his client and thus to give rise *ipso facto* to a miscarriage of justice. It concluded, again on the hypothesis that the appellant's account was accurate, that what was alleged could not be said to be in that category. In those circumstances it dismissed the appeal on the ground now under consideration, as well as rejecting the other grounds not now before the Board.

12. The Board is very conscious that the present ground was but one of several before the Court of Appeal, and that it was by no means presented as the principal issue by fresh counsel then appearing for the appellant. The Court had power under section 28 of the Judicature (Appellate Jurisdiction) Act to receive the fresh evidence contained in the two affidavits, and it plainly did so, or at least considered them *de bene esse,* reciting them both more or less in full. It seems not to have been asked to hear the appellant in the witness box, nor to require the Crown to call Mr Palmer.

13. Allegations against advocates are easy to make and all too common. Frequently the question which they raise will be whether there is any more than a complaint about a finely balanced decision upon trial tactics, very often one which had to be made without any opportunity for reflection. In such circumstances, as the English Court of Appeal observed in *R v Clinton* [1993] 1 WLR 1181, 1187, it will no doubt be "wholly exceptional" for it to follow, even if with the benefit of hindsight the decision turns out to have been wrong, that there has been any miscarriage of justice. On the contrary, such decisions, right or wrong, are an inevitable part of the trial process. The decision whether to give evidence or to make an unsworn statement, or to do neither, is one such decision, important as it certainly is in most trials. But in the present case the complaint is not that counsel made the wrong decision or gave the wrong advice. It is not a complaint about his tactics at all. It is an assertion that he wholly failed to discuss the question with his lay client and to give any advice at all about the pros and cons of each possible course. Indeed, it is an assertion that he failed to speak to the appellant at all throughout the period between the first and second trials and all through the second trial; moreover that he failed to do so despite the efforts of the appellant to have discussions with him.

14. This assertion may or may not turn out to be capable of belief, but <u>if</u> it is true, what is alleged is not an erroneous, or even a negligent decision, but a wholesale failure to advise the appellant. There might well be two views about the wisdom of giving evidence. On the one hand the appellant's account was a bare denial of presence, which did not admit of much elaboration so that little would be added in chief, whilst he would have been likely to have to deal with cross examination designed to elicit from his own lips previous (and subsequent) trouble with marauding drug users interfering with his trucks, such as might lead to the kind of rage which was alleged to have occurred. That was indeed the line of cross examination directed to the character witness and no doubt it might have been the more effective directed to the defendant, depending on his response. There might well have been other cross examination also, for example as to his asserted obliviousness of events, or the probability of some other person attacking the deceased whilst complaining of lurking near his trucks. On the other hand, he was a man in his fifties with a respectable business and was of good character. If considered advice not to enter the witness box had been given, it is very difficult to see that such advice could ever be described as negligent, let alone flagrantly incompetent. But the resolution of this appeal does not depend on any attempt to second guess a genuine tactical decision, if it had been made. The complaint here is that the decision was never properly addressed, indeed that all consultation between counsel and client was avoided.

15. The decision of the Court of Appeal was expressly made on the hypothesis that this assertion was true. If this were indeed true, then the appellant would effectively have been deprived of the opportunity of giving evidence in his own defence. He had a right to do so, whether it is common in this jurisdiction for defendants to give evidence or not, and whether or not he would have been wise to enter the witness box.

16. If the appellant's assertions were indeed true, then the question becomes whether it is possible to be sure that it would have made no difference if he had given evidence as he says he wished to do. It is certainly true that his alibi was a simple denial. But the jury was faced with a clear conflict of account between Reid on the one hand and the appellant on the other. The case depended on whom they believed, having due regard for the burden and standard of proof. Some fairly limited progress had been made in the cross examination of Reid, who was himself a drug user. He had volunteered that he had not immediately recognised the deceased, although how far that dented his asserted certainty, by the end of events, that it was the appellant who was the assailant is unclear. He had expressed himself differently at the two trials in relation to part of the assailant's movements and whether he had chased the deceased around the trucks; the jury had to assess the significance, if any, of that discrepancy in his evidence. He appears on paper to have withstood cross examination, including the suggestion that he was not there at all, and the jury must have accepted his evidence. But as against this disputed evidence of Reid, the jury had only an unsworn statement. The judge gave the conventional direction. She made it clear that the conflict had to be resolved, and that the burden lay on the Crown, so that if what the appellant had said in court put the jury in doubt, acquittal must follow. That was correctly to state the test, and to give some value to the unsworn statement for assessment against the evidence of Reid. She correctly directed the jury to take good character into account in the appellant's favour in resolving the conflict. But she also told the jury, equally correctly, that the unsworn statement was of less weight than sworn evidence would have been. She said this:

> "Now, Mr Foreman and members of the jury, the prosecution closed its case and at the close of its case the defendant, accused man … had three choices. He could stay there and say nothing at all, he could say, well, the prosecution has brought me here, let them prove me guilty; or, he could go up in the witness box and give evidence on oath and be cross-examined like any other witness or he could stay where he is and give a statement from the dock which is what he did. That is his right in law. So, he gave you a statement from the dock. But you remember you are going to give it what weight you see fit. It is not evidence that has been tested under cross-examination. So, you can't weigh it in the same scale as the evidence of the witnesses for the prosecution because they all gave evidence on oath."

Unless one is to assume that the jury would disregard this (accurate) judicial direction that the unsworn statement was of less value than a sworn one would have been, it is simply not possible to conclude that the absence of sworn evidence must inevitably have made no difference. It is no more than speculation, and moreover speculation which ignores the direction.

17. If, therefore, the basis on which the Court of Appeal approached the case fell into error, is it possible for the Board to resolve the factual question whether the

appellant's assertion about Mr Palmer was true or not? There are no doubt arguments on each side. For the appellant, Miss Agnew QC points to the sentence in Mr Palmer's affidavit dealing with the brief conversation across the dock rail and which is recorded at para 10 above; she contends that it shows that the question of whether the appellant was to give evidence or to make an unsworn statement remained at that stage unresolved. She relies on the absence of any written record, whether by diary entry, note or otherwise, made by counsel to confirm consultation(s) which he says took place. For the Crown, Ms Masood points to the confirmed presence of a transcript of the first trial in counsel's hands, to the undoubted fact that the character witness was indeed called at the re-trial when he had not been called at the first trial, to the bareness of the appellant's complaint, without any indication of when, where or how he tried but failed to contact Mr Palmer, and to the improbability that no opportunity arose either in the months between the trials or at any time at court.

18. There may or may not be a plain conclusion to be drawn one way or the other on the factual dispute. It would, however, be very unsatisfactory for the Board to attempt to reach such a conclusion on paper, when the Court of Appeal, sitting locally and with daily practical experience of the course of trials in the jurisdiction where the events occurred, did not feel able to do so. The Board is accordingly persuaded that the only proper course is for the appeal to be remitted to the Court of Appeal for determination of the factual issue between the appellant and counsel. How that court goes about its resolution must be for it to decide. The Board is conscious that no request was previously made that oral evidence should be heard, although now the stance of the appellant is that it should be. The Court of Appeal must decide whether it needs to hear the appellant, if he wishes to give evidence, and, if it does, whether it is also necessary to hear Mr Palmer. The latter decision no doubt falls to be made after hearing the appellant, if that is what occurs. It is not the law that merely by making a complaint an appellant can require counsel to be cross examined, but this may in a particular case be the correct course for the court to take. For the present, the opportunity to deal with the case in any way the court thinks fit should be preserved by a direction that both the appellant and Mr Palmer attend the further hearing in the Court of Appeal, unless in the meantime that court makes some different order.

19. For these reasons the Board will humbly advise Her Majesty that the appeal should be remitted to the Court of Appeal for resolution of the factual dispute raised by the appellant's contentions about counsel's failure to confer with him, and consequent determination. Unless and until that court makes some different order, there should be a direction that both the appellant and counsel attend the further hearing in that court.