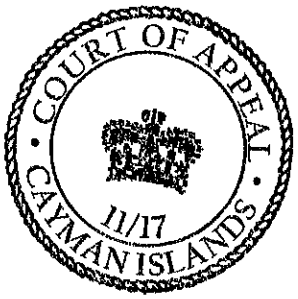
IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 21/2017
IND.0020/2011 &
SC#0357/2011

BETWEEN:

DEVON JERMAINE ANGLIN

Appellant



- and –

HER MAJESTY THE QUEEN

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
The Hon Sir Richard Field, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal

Date of Hearing: **6 September 2018**

Appearances: Appellant in Person
Mr. David Perry QC instructed by Ms. Elizabeth Lees for the Respondent

---

JUDGMENT

Transcript of oral judgment 6 September 2018
Approved and Released – 22 October 2018

GOLDRING, Pres:

1. This Applicant seeks leave to appeal his conviction for murder. He encapsulates his argument in the following way in a letter written to the Court of Appeal on the 9th of May 2017:

"*I am writing to you in an attempt to have Leave to Appeal granted in relation to Indictment 20/11, the murder of Carlo Webster .... I have been convicted and sentenced to life imprisonment and my first appeal into the matter has been dismissed by the [Cayman Islands Court of Appeal] on December 7th, 2012.*

Since being incarcerated, I have studied this case from beginning to end, the relevant evidence and laws that apply to this particular case, and have come to certain conclusions or opinions about both my conviction and sentence. I am firmly of the view that:

1. *A conviction for manslaughter and a sentence which would reflect these circumstances would have been appropriate, whereas the conviction for murder and the mandatory life sentence was not. [In] my respectful submission that the failure by the Chief Justice, Mr Anthony Smellie, who presided over the matter, to identify and therefore consider evidence of provocation by the deceased and others directed toward[s] me and members of my party amounts to a material non/misdirection.*

2. *I also wish to highlight the fact that this defence was not put forward by my then attorney, Mr Dorian Lovell-Pank QC, and was not pointed out by the Crown prosecutor, Ms Cheryll Richards DPP. I would like to elaborate on this further, if granted the opportunity, to the [Cayman Islands Court of Appeal] through written and oral argument, which I feel has merit for the reasons I will briefly describe."*

2. Mr Anglin briefly set out those reasons. He has since submitted various documents elaborating upon them. He enlarged upon them in brief submissions to this court. We take all that he says very carefully into account.

3. Mr Anglin also seeks to appeal the Court's decision setting the minimum term of imprisonment of 30 years under the Conditional Release Law of 2014. That is a topic with which we shall deal briefly at the end of this judgment.

The Background

4. It is necessary to set out the background to the conviction for murder.

5. The trial took place from the 1st to the 15th December 2011 before the learned Chief Justice sitting alone. As well as being convicted of murder, the Applicant was convicted of attempted murder and possession of an unlicensed firearm.

6. The facts are helpfully summarised by Mr. Perry QC in his skeleton argument on behalf of the Respondent.

7. The offences were committed on the 10th of September 2009 in the Next Level nightclub on West Bay Road in Grand Cayman. Carlo Webster and Christopher Solomon, the victims of the shooting, arrived at the club on the evening of Wednesday, the 9th of September. During the early hours of the Thursday morning, violence broke out in the nightclub on a number of occasions. At around 1:30 am, Carlo Webster was shot three times at close range and died instantly. He was shot once in the head at point-blank range, once in the body when falling to the ground, and once to the body when on the ground. He died almost instantaneously. One of the bullets passed through the body of Carlo Webster and struck Christopher Solomon, who suffered a non-fatal wound to the abdomen.

8. At the time of the shooting, there were approximately 300 people in the club. Two witnesses to the incident, who identified the Applicant as the offender, agreed to give evidence and subsequently were granted orders for the protection of their identities. They were known during the course of the proceedings as "witness B" and "witness E".

9. The Applicant was arrested on the 11th of September 2009. Over a year later, on the 23rd of September 2010, he was interviewed under caution and exercised his right not to answer questions. He was charged with the murder of Carlo Webster on the 12th of

January 2011. The trial commenced on the 1st of December 2011. It concluded on the 15th of December. The Applicant elected not to give evidence.

10. The essential issue arising for determination was whether the prosecution had proved the identity of the gunman. In short, the Applicant's case was a complete denial that he was gunman.

11. On the 9th of February 2018, the learned Chief Justice had to set the minimum period of imprisonment under the Conditional Release Law of 2014 before the Applicant could be considered for release on license. In the course of his judgment setting that term at 30 years, the learned Chief Justice, under the heading "Conclusion", said, and we quote:

> *"In the present case, the cold and calculated manner of his killing of Carlo Webster was not the consequence of Mr Anglin's loss of self-control. It was, as found at trial, 'a cold-blooded act of retribution for the earlier hostile exchange' between Devon Anglin and Carlo Webster. Webster had been removed from the restroom and restrained from any further attempt at approaching Anglin even while Anglin was seen washing his face in the restroom. Some 29 seconds later, armed by this time if not before with a gun, Anglin then calmly and deliberately walked out of the restroom directly to where Webster was standing and shot him at near point-blank range. Mr Anglin then concealed the gun in the waist of his pants, calmly made his way through the crowd and exited the nightclub before running away from the scene. Consistent with that deliberate attitude, he steadfastly denied being the gunman, a further troubling consequence of which is that the gun was never recovered.*
>
> *This was not a shooting in the heat of rage, but retribution by way of a 'gangland style' execution, aimed not only at Webster but also at intimidation of his associates and reckless as to whether or not anyone else was hurt."* (see paras. 116 and 118)

12. The learned Chief Justice went on to say:

> "*While there may well have been a degree of provocation, neither Carlo Webster nor his fellow protagonist Chadwick Bodden can be said to have clearly prevailed in their exchanges with Anglin. There is no evidence that Anglin was humiliated. Instead, the evidence is that he had clearly prevailed against Chadwick Bodden who was drunk and had retaliated blow for blow in an exchange of punches with Carlo Webster before the security officers intervened.*" (See para. 121)

The Applicant's first appeal

13. The Applicant's first and unsuccessful appeal in respect of the conviction for murder was based on three grounds: first, the poor quality of the identification evidence; second, that the Witness Anonymity Orders should not have been made at all; and, third, that in any event they should have been discharged at the close of the prosecution's case.

The present grounds of the Applicant's proposed appeal

14. It follows from what we have said that the Applicant has now completely changed his stance regarding his responsibility for the shooting. He accepts he was responsible for killing Carlo Webster. He submits that this court should permit him to reopen his appeal in order to argue that his conviction for murder should be quashed and a conviction for manslaughter substituted on the ground either of provocation or because when he shot Carlo Webster his responsibility was substantially diminished by an abnormality of mind.

Ground 1: Provocation

15. The relevant Cayman Islands law on provocation is set out in s.186 of the ***Penal Code (2007 Revision):***

> "*Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be*

left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which in their opinion it would have on a reasonable man."

The Applicant's Submissions

16. The Applicant submits, and we summarise, that the learned Chief Justice should have given a provocation direction. His counsel too should have raised it. His case is that there was an altercation between him and, among others, Carlo Webster. As well as striking the Applicant, he submits the violence was directed at his girlfriend. The Applicant's argument was encapsulated by the submissions of Mr. Ryder QC made to the learned Chief Justice during the setting of the appropriate minimum term.

17. In the course of arguing that the provocation was such as to amount to exceptional provocation justifying a reduction in the minimum term from 30 years, Mr. Ryder said:

> "*We base that submission on the fact that the threats and violence against the defendant were sustained. They were committed by two people and, importantly, they were directed not only towards the defendant himself but also towards his girlfriend. These matters ... took place in the presence of many other people, a large number of whom were all known ... to all parties.*"

18. Mr. Ryder amplified that submission and spoke of the others in terms of aggressors. He emphasised the abuse directed towards the Applicant's girlfriend.

19. The learned Chief Justice, as we have indicated, rejected Mr. Ryder's submission in the terms that we previously set out.

Our conclusion

Provocation

20. In our judgment, there was no call at all for the learned Chief Justice to leave provocation to the jury. It was never raised by highly experienced counsel representing the Applicant. That is hardly surprising. It was not the Applicant's case. Moreover, on the evidence, it would have been a submission wholly without merit. The Applicant went to the nightclub and armed himself with both a firearm and ammunition. We have set out how the learned Chief Justice described the Applicant's conduct on the night of the killing; it was the very antithesis of someone who had lost self-control, as is required by the law of provocation. This was, as the learned Chief Justice said, a cold-blooded shooting, no doubt because the Applicant was annoyed with Carlo Webster.

21. Not only was there no evidence of a loss of self-control, but, also, it seems to us inconceivable that any jury could conclude that a reasonable man, with or without the characteristics of the Applicant, facing the provocation alleged, would in response, shoot the primary provocateur three times, once from point-blank range through the head.

22. Ground 1 is wholly without merit.

Diminished Responsibility

23. Section 185(1) of the ***Penal Code (2007 Revision)*** provides:

> "*Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he is suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for acts in doing or being party to the killing.*"

24. By subsection (2):

> "*On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.*"

25. By subsection (3):

"*A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.*"

26. Section 16(c) of the ***Court of Appeal Law (2011 Revision)*** provides that:

> "*... the Court may, if it appears to the Court to be necessary or expedient in the interests of justice-*
>
> *(c) receive the evidence, if tendered, of any witness (including the appellant) ....*"

27. Ground 2 is said to arise in this way. On the 16th of November 2016, Ms. Nina Welsh, an experienced forensic psychologist, prepared a short psychological report for the hearing of the Chief Justice's setting of the minimum term. On the basis of answers the Applicant himself had given in response to a series of questions (the "*checklist*"), Ms. Welsh said, "*It is possible that his behaviour during the index offence of murder was influenced by such factors [of which he complains].*" She went on to say that management strategies could be offered to the Applicant in prison. She did not at any time in her report say anything about whether the Applicant at the time of the killing was suffering from diminished responsibility. That report provides no basis at all for such a finding. It therefore does not seem to us to be necessary or expedient in the interests of justice to admit it under s.16 of the ***Court of Appeal Law (2011 Revision)***, as the Applicant requests. That alone would be sufficient to dispose of this ground. However, it goes further.

28. Before the learned Chief Justice was a detailed report from Dr. Wade Myers, the professor of psychiatry at the Warren Alpert Medical School at Brown University.

29. Dr. Myers saw the Applicant on the 12th of December 2017. He does not accept the diagnosis of Post-traumatic Stress Disorder at the time of the shooting. Among other things, he observed that the diagnosis substantially depended on self-reporting. Dr. Myers rejected that diagnosis, as he put it, with "*reasonable medical certainty*". In his view, the

primary diagnosis was of an Anti-social Personality Disorder. (see p.14 of Dr. Myers' report).

30. Although it was not necessary for him to do so, Dr. Myers did in terms consider diminished responsibility. He rejected it. (see p.50 of Dr. Myers' report).

31. Not surprisingly, the learned Chief Justice rejected the explanation of Post-traumatic Stress Disorder. In the result, there is nothing in Ground 2.

32. It follows that if this Court has the jurisdiction to re-open the Applicant's appeal, and decided to do so, it would be bound to refuse leave.

Does the law of the Cayman Islands permit the Applicant to re-open his appeal?

33. The jurisdiction of the Court of Appeal is statutory. It is set out in ***Part III of the Court of Appeal Law (2011 Revision)***. By Section 7:

> *"Subject to this Law, the Court shall have jurisdiction to hear and determine appeals from the Grand Court by a convicted person-*
>
> *(a) against the conviction on any ground of appeal which involves a question of law alone;*
>
> *(b) with the leave of the Court... against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or upon any other ground which appears to the Court or Judge aforesaid to be a sufficient ground of appeal".*

34. There is nothing, therefore, on the face of the legislation which states that a concluded appeal may not be re-opened. But, as Lord Lane CJ said in the English case of ***R v Pinfold*** [1988] QB 462 at 464D, when considering the provisions of the equivalent Court of Appeal Act of 1968 of England and Wales:

"... one must read those provisions against the background of the fact that it is in the interests of the public in general that there should be a limit of finality to legal proceedings ...."

35. The same observations may be made in respect of the statutory scheme of the Cayman Islands. We should add this: the scheme in the Cayman Islands provides for an appeal to the Privy Council. It also provides for the Governor to pardon a person convicted of an offence (see s.39 of the ***Cayman Islands Constitution Order 2009***). In deciding whether to grant a pardon, the Governor is advised by the Committee for the Prerogative of Mercy (see s.50 of the Order). Unlike in England and Wales, there is no body, such as the Criminal Cases Review Commission, which may bring a case back to the Court of Appeal.

36. In short, therefore, the legislation of the Cayman Islands does not provide for the reopening of a concluded appeal.

The position in Jamaica and England and Wales

37. Section 36 of the ***Court of Appeal Law 2011*** provides:

"Where, in any case, no special provision is contained in this or any other law, or in rules of court, with reference thereto, any jurisdiction in relation to appeals in criminal and civil matters shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being observed in Jamaica, and where such law and practice has no application, then to the law and practice for the time being observed by the Court of Appeal having equivalent jurisdiction in England."

38. Rather oddly, given that provision, it states in the margin, "*English rules to apply where no other provision made*".

39. We have not, in this case, heard full *inter partes* argument. Moreover, this is a proposed appeal, as we have said, wholly without merit. What follows, however, are our

preliminary views on the assumption that s.36 applies and requires us to consider the law of Jamaica and, if necessary, the law of England regarding the possible opening of a concluded appeal.

The law of Jamaica

40. In his most helpful submissions, Mr. Perry drew to our attention to the case of ***Steven Grant*** [2018] JMCA App 13, a decision of the Supreme Court of Criminal Appeal in Jamaica. That case considered whether the Court had a residual jurisdiction to reopen a concluded appeal. The Court concluded that it had. At para. 59, having considered various authorities, including the seminal English Court of Appeal decision of ***Yasain*** [2016] QB 146, the Court stated (para. 59):

> "*The general principles to be gleaned from the cases are that:*
>
> *(a) Generally, there is no power to relist or reopen an appeal which has been determined and orders made outside of any relevant statutory provisions and the slip rule.*
>
> *(b) There is limited jurisdiction in the Court of Appeal, based on its inherent jurisdiction to control its process, to relist or reopen an appeal and alter the order of the court before the order is perfected on the record.*
>
> *(c) Where the appeal has been determined and the order of the Court of Appeal has been perfected, there is generally no power to reopen an appeal.*
>
> *(d) An appeal, which has been determined and the order perfected, will not be relisted or reopened unless there has been a defect in procedure or an irregularity amounting to fraud or mistake which had caused the previous hearing to be a nullity.*"

41. And, we add, particularly materially:

> *"(e) The court has the jurisdiction, only in exceptional cases, to reopen a determined appeal where it considers that there is a likelihood of substantial injustice to the appellant if it does not*

intervene. Those exceptional cases include, but are not limited to, circumstances where:

(i) the appeal was decided on a point on which the applicant was not heard;

(ii) *there were grounds of appeal which were argued but were not determined by the court so as to raise the issue of whether the appeal was finally determined or not;*

(iii) the appeal was a procedural nullity.

(f) neither a change in the law or fresh evidence by themselves will be sufficient for the appellate court to reopen the case".

42. At para. 60, the court went on to say:

> "*The general principle, therefore, subject to the exceptional circumstances, is that an appellate court has no authority to review its own decision pronounced after a hearing inter partes where the decision has passed into a judgment which is formally drawn up. This principle is one that is strictly enforced and is deviated from in limited exceptional circumstances only. The applicant must not only place himself in one of the limited exceptional circumstances, but the injustice which would be meted out to him if his appeal is not reopened must be so substantial as to ... outweigh the public interest in the finality of litigation".*

43. We apprehend that the law in Jamaica is a developing jurisdiction. It does in those circumstances seem to us pertinent to refer to the law and practice in England in the light of several decisions subsequent to the case of ***Yasain***.

44. We return, first of all, and briefly, to the case of ***Pinfold***. The Court held that subject to two possible exceptions, there was permitted only one appeal against conviction. As Lord Lane CJ put it, (464D):

> *"... one must read those provisions [in the Criminal Appeal Act 1968] against the background of the fact that it is in the interests of the public in general that there should be a limit or finality to legal proceedings. We have been unable to discover, nor have counsel been able to discover any situation in which a right of appeal couched in similar terms to that, has been construed as a right to pursue more than one appeal in one case."*

45. The two possible exceptions to which the Lord Chief Justice referred were: first, where the decision on the original appeal amounted to a nullity; and, second, where there was some defect of procedure resulting in an injustice where, for example, the appellant had not been informed of a hearing, or his counsel been unable to attend.

46. The question of the English courts' residual jurisdiction was considered, as we have observed, more recently in ***Yasain***. The Court there considered, as a matter of principle, the circumstances in which it could revise an order previously made where there had been real injustice. It held that the Criminal Division of the Court of Appeal was vested, like the Civil Division, with the residual jurisdiction to avoid real injustice in exceptional circumstances. It had an implicit power to reopen a concluded appeal where it was necessary to do so to correct a wrong decision and ensure public confidence in the administration of justice.

47. As Mr. Perry put it in his skeleton argument, the foundation for the court's conclusion was the decision of the Court of Appeal in the Civil Division in ***Taylor v Lawrence*** [2003] Queens Bench Reports 528. Lord Woolf CJ, (paras. 54-55), said:

> " *Earlier judgments referring to limits on the jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of the court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised.*

There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.

55. ... What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave."

48. In ***Yasain***, Lord Thomas CJ, giving he judgment of the Court, pointed out the distinction between the exercise of the jurisdiction in the criminal, as opposed to the civil, sphere. He said (para. 40):

"*The fact that both have the same implicit jurisdiction does not mean that the jurisdiction has necessarily to be exercised in the same way by the Criminal Division as it would be by the Civil Division. For example, in a criminal case there will often be three interests that have to be considered — that of the state, that of the defendant and that of the victim or alleged victim of the crime, even though the victim is not a party to the proceedings under the common law approach .... There is the strongest public interest in finality. The jurisdiction is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission."*

49. The exceptional nature of the jurisdiction in criminal cases has recently been emphasised in a number of cases in the English Court of Appeal. In ***Gohil*** [2018] 1 WLR 3697, Gross LJ, when giving the judgment of the court, said (para. 129):

> "*We venture to pull the threads together as follows:*
>
> *(i) the [Court of Appeal Criminal Division] has jurisdiction to reopen concluded proceedings in two situations. First, in cases of nullity, strictly so-called and distinguished from 'mere' irregularities. Secondly, where the principles of Taylor v Lawrence ... as adopted in R v Yasain ... are applicable; thus, where the necessary conditions are satisfied. For ease of reference, though not to be interpreted as a statute, the necessary conditions are: the necessity to avoid real injustice; exceptional circumstances which make it appropriate to reopen the appeal, and the absence of any alternative effective remedy. It is to be emphasised that these are almost invariably cumulative requirements — though not necessarily sufficient for the exercise of the jurisdiction, in that the court retains a residual discretion to decline to reopen concluded proceedings even where the necessary conditions are satisfied."*

50. The court, on more than one occasion when giving its judgment in ***Gohil***, emphasised the very limited nature of the exercise of this jurisdiction. At para. 112 it referred to the case of ***Melius*** [2016] EWCA Crim 1538, in which the Vice President of the Court of Appeal, Hallett LJ, emphasised the very limited nature of this residual jurisdiction.

51. The court also referred to ***Hockey***, [2018] 1 WLR 343, a case presided over by the President of the Queen's Bench Division. Gross LJ said of it (para. 119):

> " *Sir Brian Leveson P emphasised (at para. 14) the 'very limited jurisdiction identified by **R v Yasain**'. Moreover (at para. 17), before the Yasain jurisdiction was triggered, it was a 'critical requirement' that there was no*

other remedy available. Sir Brian concluded (at para. 23) with these observations:

> *There has been a real increase in the number of applications seeking to apply **R v Yasain** which are almost invariably, without merit and are liable to be rejected summarily. Given the pressure on the Court of Appeal (Criminal Division) to deal with outstanding appeals and applications, it is therefore appropriate to underline the truly exceptional nature of this type of application and the strict need to justify attempts to bring cases within its remit."*

52. It is worth underlining what the learned Lord Justice said at para. 129 (vi):

> "*Throughout any consideration of a Yasain application in a conviction case, it is necessary to keep in mind the 'end game': What, if any, bearing does the application have on the safety of the conviction?"*

53. Finally, the practice in England and Wales of the Court dealing with such applications wholly in writing, exceptional circumstances apart, was referred to.

Our Conclusion

54. Assuming, by reason of s.36 of the ***Court of Appeal Law (2011 Revision)***, this court is obliged to follow the current practice in Jamaica, we would observe that it is there a developing jurisdiction. It is likely, as it seems to us, the Jamaican approach will reflect that in England as exemplified by the several cases after ***Yasain*** to which we have referred. What is clear is that this case does not fulfil the very demanding criteria for re-opening a concluded appeal, whether in Jamaica or in England.

55. First, the defect was not procedural, plainly a requirement in England and, as we read ***Grant***, probably so in Jamaica.

56. Second, there does not begin to be an arguable case of injustice. The grounds of appeal advanced by the Applicant are wholly without merit. There is no arguable injustice in not permitting him to rely upon them.

57. Third, there are not any arguable circumstances which are exceptional and make it appropriate to permit this appeal to be re-opened. This is merely the Applicant seeking to have a second bite at the cherry, his first choice of grounds having failed. That cannot begin to amount to an exceptional circumstance.

58. Fourth, nothing which the Applicant now seeks to advance can affect the safety of his conviction for murder. As Mr. Perry put it, the public interest lies overwhelmingly in favour of finality as far as this Applicant is concerned.

59. If about which in light of our view of this case it is unnecessarily finally to decide, this court does have the residual jurisdiction to re-open a concluded appeal, we should make it quite clear that it is a jurisdiction the exercise of which is bound to be extremely rare. All the elements identified by Lord Justice Gross, would have to be present. Even then, its exercise may well not be appropriate.

60. Finally, it does seem to us that any application should, as in England, normally be dealt with by the Court in writing.

61. In the result, therefore, for the reasons we have given, Mr. Anglin's proposed re-opening of his appeal against conviction is rejected.

62. As far as Mr. Anglin's appeal in respect of the minimum term is concerned, that that should be dealt with separately. It would be appropriate for him to have legal advice and representation before we do so. That application is therefore adjourned.