IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 18 of 2009
(Indictment No. 74/08)
C#05076/08

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

WILLIAM DAVID MCLAUGHLIN-MARTINEZ

Appellant

Before: **The Rt. Hon. Sir John Chadwick, President**
The Hon. Mr. Justice E. Mottley, JA
The Hon. Dr. A. Conteh

Appearances: Mark Tomassi instructed by Nick Dixey of Mourant for the Appellant
Ms. Cheryll Richards Hon. Solicitor General and Tanya Lobban Crown Counsel for the Respondent.

Date heard and Judgment delivered: 17th August 2010
Reasons released: 3rd September 2010

REASONS FOR JUDGMENT

Sir John Chadwick P

1. This is an appeal by William David McLaughlin-Martinez against his conviction on 20 July 2009 on a charge of murder, following a trial before Justice Henderson and a jury. On conviction the Appellant was sentenced to life imprisonment.

2. The appeal was brought on two grounds: first, that the jury was not properly directed in law by the trial judge when answering a question which they had put to him after retirement to consider their verdict; second, that fresh evidence from tool mark experts, not available at trial, led to the conclusion that a machete found at the residence of the prosecution's principal witness could not be ruled out as the murder weapon. It is

said that, had that evidence been available at the trial, it might have raised a reasonable doubt in the minds of the jury with regard to the guilt of the appellant.

3. We heard argument from both the appellant and the Crown on the first of those grounds. At the conclusion of that argument, we were satisfied that the appeal must be allowed on that first ground. Accordingly, we did not find it necessary to hear argument on the second ground. We indicated that the appeal would be allowed; and that we would put our reasons in writing.

4. The offence with which the appellant was charged arose from the brutal murder of Brian Adrian Rankine (otherwise known as Brian Carter) on 16 May 2008 at McField Lane in Georgetown, Grand Cayman. The case for the Crown may conveniently be taken from the Respondent's Skeleton Argument on this appeal:

(1) The appellant and Jason Hinds worked for the same plumbing company. On the night of Friday, 16 May 2008, Mr. Hinds had driven the appellant and Mr. Carter into town using the company van. At the request of the appellant, the journey took them to McField Lane.

(2) The appellant and Mr Carter got out of the van and had a discussion; after which Mr. Carter left for a short time. On his return, there was a disagreement which led to the appellant demanding the return of "his money".

(3) The disagreement escalated; the appellant grabbed Mr. Carter from behind; pulled him into some bushes; and they both fell to the ground. Mr. Hinds tried to intervene; but he backed off after he realised that the Appellant had a pointed weapon.

(4) The appellant then returned to the van, retrieved a machete and administered several blows to the body of Mr. Carter as he lay on the ground. He stripped Mr. Carter of his clothing, and put the clothing in a bag.

(5) The appellant and Mr Hinds got back in the van. The appellant instructed Mr. Hinds to drive to three different locations on the island; where he disposed of

several items which might have connected him to the scene at McField Lane. Those items included his shoes and a machete.

(6) Mr. Carter was found and pronounced dead at the scene.

(7) On the following day, the police located the van; and found Mr. Hinds and the appellant at a work site. They were questioned as to their whereabouts and that of the van on the previous evening. Both gave an account which omitted any reference to the journey to town.

(8) Shortly thereafter, however, Mr. Hinds gave a full account of his whereabouts to the police. He took them to the various locations where the Appellant had disposed of the items. The appellant's shoes were recovered at one location and items belonging to Mr. Carter at another. Mr. Hinds took the police to his yard where he had buried his own clothing which he had been wearing at the time of the murder. A machete was recovered from the home of Mr. Hinds and was exhibited at trial.

5. Mr. Hinds was the principal witness for the prosecution at the trial. In addition to his evidence, there was some scientific evidence linking the appellant to Mr. Carter. In particular, (i) there was DNA on the appellant's shoes which matched that of the victim, (ii) DNA from a bloodstain on a cap found under Mr Carter's left foot matched that of the victim and (iii) DNA found on the inside of the headband of that cap matched that of the appellant. There was no match with the DNA of Mr. Hinds. Mr. Hinds was charged with being an accessory after the fact to the murder of Mr. Carter.

6. The judge directed the jury, at the commencement of his summing up, that they were to have regard to the whole of the evidence in forming their own judgment about the witnesses and about which evidence was reliable and which was not. He directed them that the sole issue was whether the Crown had made them sure that the appellant was the man who attacked Mr. Carter and inflicted the multiple chop wounds to his head, face and arms. He pointed out that the case for the defence was that it was Mr Hinds, and not the appellant, who had carried out the attack.

7. The judge reminded the jury of the evidence which had been given by Mr. Hinds. He went on to say this:

> "The sole issue in this case is whether the Crown has made you sure that this narrative is true. If you are sure that Mr. Hinds is telling the truth, then you should find Mr. Martinez-McLaughlin guilty as charged. If you believe Mr. Hinds is not telling the truth, you must find Mr. Martinez-McLaughlin not guilty. If you are not sure whether Mr. Hinds is telling the truth about this assault, then you must find Mr. Martinez-McLaughlin not guilty. You may only find the Defendant guilty if you are sure that Jason Hinds is telling the truth in his description of the assault by Mr. Martinez-McLaughlin upon Mr. Carter. Accordingly, you must weigh and assess the credibility of Jason Hinds. In doing so, you must consider all of the evidence you have heard, including the witness statements which have been read to you and including the admissions of fact.

8. On this appeal it was accepted on behalf of the appellant that that direction was beyond criticism. Indeed, it was described by counsel for the appellant as "an exemplar of clear and unequivocal directions that were required and that it identified with precision" the sole issue between the Crown and the Defence which the jury by their verdict was to resolve.

9. The judge went on to direct the jury as to the factors they should take into account in assessing the credibility of Mr. Hinds. He warned them, in particular, of the need to consider the possibility of bias. He said this:

> "Mr. Hinds was arrested by the police on the 17th May 2008 on suspicion of having committed the murder. Subsequently a decision a decision was made to charge Mr. Martinez-McLaughlin alone with the murder and to charge Mr. Hinds with the much less serious crime of being an accessory after the fact.
>
> Any sentence imposed on Mr. Hinds for being an accessory after the fact would be much more lenient than a sentence imposed upon conviction on charge of murder. At the same time the police determined to use Jason Hinds as the principal Crown witness against Mr. Martinez-McLaughlin.

> So, as you can see, ladies and gentlemen, by attributing the murder to Mr. Martinez-McLaughlin, and by saying that he had nothing to do with it himself, Mr. Hinds has avoided being charged with murder, although he has accepted that he is guilty of being an accessory after the fact. He has pleaded guilty to that charge, but has not yet been sentenced. Mr. Hinds may well believe that his sentence for being an accessory after the fact will be lower if he gives evidence which results in the conviction of Mr. Martinez-McLaughlin. In short, he has a bias; that is to say, a good reason to lie.
>
> The presence of this bias does not mean you must reject his evidence, but it does mean this: you must exercise considerable caution when assessing the credibility of Jason Hinds. You should look for other evidence in the case which is independent of Mr. Hinds and which supports or confirms the important aspects of what he has said. If there is no such supporting or confirming evidence which you accept, you are still permitted to accept the evidence of Jason Hinds, but I must tell you that it would be dangerous to do so."

10. The judge then set out, at length and with obvious care, the matters which the jury would need to take into account in deciding whether they accepted the evidence of Jason Hinds. He directed them as to the scientific evidence linking the appellant with the murder, to which I have already referred. He said this:

> "You are entitled to regard this evidence concerning the cap as evidence which does support the credibility of Jason Hinds and of his assertion that it was Mr. Martinez-McLaughlin and not himself who attacked Mr. Carter."

11. His final direction was in these terms:

> "In conclusion, you may only find the Defendant guilty if you are sure that it was he, and not Mr. Hinds, who committed the assault upon Mr. Carter. If you are not sure of that, you must find the Defendant not guilty. You are not permitted to conclude that Mr. Hinds and Mr. Martinez-McLaughlin assaulted Mr. Carter together. The Crown has not presented its case to you in that way. Such a conclusion would not be in accordance with the evidence you have heard."

12. The jury retired to consider their verdict at 12.10 pm. It is clear from the transcript that the summing up had been lengthy. In particular, the judge's clear direction that the jury must find the appellant not guilty "if you are not sure whether Mr. Hinds is telling the truth about this assault" had been given at least an hour (and, probably, about 80 minutes) before the jury retired.

13. Some 10 minutes after the jury had retired, the judge received a note from them. The note raised three questions: of which it is necessary only to refer to the third. That was in these terms:

> "When attempting to reach verdict can we discount Hinds' testimony and reach our verdict based on forensic evidence?"

14. Before recalling the jury to answer that question, the judge invited submissions from Counsel. By way of introduction, he observed "I don't think any part of your submission to date, Miss Richards, has suggested that there could be a conviction if they disbelieve Jason Hinds". The response of the Solicitor-General, Miss Cheryl Richards Q.C., was that it would be possible for the jury to reach a verdict of guilty independent of the evidence of Mr. Hinds. She suggested that the blood found on the appellant's shoes and the blood on the cap could enable the jury to draw the inference that the wearer of the cap was the person who had caused the injuries to Mr. Carter.

15. Counsel for the appellant (Mr Dixey) expressed strong disagreement with that view. He reminded the judge of his directions: pointing out that the jury had been directed that, if they accepted the evidence of Jason Hinds, they might convict the appellant; but that, if they did not, they could not convict.

16. After hearing those submissions, the judge indicated to counsel what he was proposing to say to the jury in answer to their question. He said this:

> "I don't think I'll tell them anything more of substance. I think I have said what I said and I will leave the case with them that way. … I will tell them that they have to consider all of the evidence, including the Hinds testimony and including the forensic evidence, *and decide the case in*

> *accordance with my instructions.* I am not going to, at this stage, focus on a particular that they might approach the case." [emphasis added]

17. It is important to have in mind what the judge thought was troubling the jury. In the course of Mr. Dixey's submissions, the judge had observed:

> "I think what they're asking is this: if you pretend that Mr. Hinds had never testified in this trial just taken him completely out of it … Is there enough evidence to convict Mr. Martinez-McLaughlin based on the fact that his DNA is found on a cap which is lying under the foot of the deceased . . . plus blood on the boots."

Mr. Dixey had submitted that the answer to that question was "Clearly No".

18. The jury returned to Court at 12.26 pm. The judge began by giving them further directions by way of clarification on two points which had not been raised by the jury questions; but on which he had heard further submissions from counsel during the jury's absence. Those further directions both related to the forensic evidence. The judge then turned to the three jury questions. After answering the first two of those questions he set out the third in the terms in which it had been posed. His answer was in these terms:

> "I do not consider it permissible at this stage for me to say very much in answer to that question. You must consider all of the evidence. You must take into account all of the evidence of Jason Hinds, all of the evidence which bears on his credibility one way or the other, and you must take into account the forensic evidence in coming to your ultimate conclusion as to whether the Crown has made you sure that Mr. Martinez-McLaughlin committed this crime. That is all I can say on that subject."

19. There is an important difference between the answer which the judge gave to the jury on their return, and the answer which he had indicated to counsel (in the absence of the jury) that he was intending to give. That difference lies in the omission from the answer actually given of the words "*and decide the case in accordance with my instructions*". There was nothing in the answer actually given to the jury which reminded

them of the clear direction which he had given (by then some 90 minutes or more earlier) that "if you are not sure whether Mr. Hinds is telling the truth about this assault, then you must find Mr. Martinez-McLaughlin not guilty".

20. In our view, it is impossible to escape the conclusion that the jury did not have that earlier direction in mind when they put the jury question in the terms that they did. If the jury had had in mind the judge's direction that they must find the appellant not guilty "if you are not sure whether Mr. Hinds is telling the truth about this assault" - coupled with the direction that "you may only find the Defendant guilty if you are sure that Jason Hinds is telling the truth . . ." - then they could not have put the question in the terms that they did. They could not have put that question - "can we discount Hinds' testimony and reach a verdict based on the forensic evidence?" if they had understood the direction that they had been given; because they would have understood that the answer was plainly "No".

21. The judge's observation in the exchange with counsel in the absence of the jury to which I have referred - and, in particular, his observation that the jury were asking "is there enough evidence to convict Mr. Martinez-McLaughlin, based on the fact that his DNA is found on a cap which is lying under the foot of the deceased . . . plus blood on the boots" - points clearly to his understanding that the jury were enquiring as to the possibility of a guilty verdict in circumstances where they did not feel sure that Mr. Hinds was telling the truth.

22. In those circumstances, unless the judge had changed his mind between the time when he gave that earlier direction and the time when he answered the jury question, he had to remind the jury of the terms on which they had already been directed. Notwithstanding the Crown's attempt, in the absence of the jury, to widen the issues and to suggest that a guilty verdict could be returned independently of any reliance on Mr. Hinds' evidence, there is no indication that the judge had changed his mind. Indeed, the terms in which he indicated to counsel that he would answer the jury question – and, in particular, his reference to deciding the case "in accordance with my instructions" – is a clear indication that he had not done so.

23. A further indication that the judge had not changed his mind as to the need for the jury to accept the evidence of Mr. Hinds if they were to convict the appellant can be found in remarks which he made some two weeks later when he came to sentence Mr. Hinds. Referring to the trial of the appellant, he said this:

> "Hinds testified at the trial. It is impossible to say whether the jury accepted all or part of his evidence. They must have accepted at least part or they could not have convicted."

24. If (contrary to the clear indications to which I have just referred) the judge had changed his mind as to the need for the jury to accept Mr. Hinds' evidence before they could convict the appellant then, in the light of his earlier direction, it was important that he made that clear to the jury. If, on the other hand, he had not changed his mind on that important question, then it was necessary for him to remind the jury of the direction which he had given earlier. It was necessary for him to do so, because the terms of the jury question itself pointed clearly to the conclusion that the jury had forgotten that direction.

25. It is unnecessary to decide whether, as counsel for the appellant suggested, it would have been sufficient for the judge to direct the jury – as, he had indicated he would – that they must "decide the case in accordance with my instructions". It is unnecessary to decide that point because that was not the direction which the judge gave to the jury in answer to the question which they had put to him. But we should not be taken to agree that a direction in those terms would have been sufficient in the circumstances of this case. Given the strong indication, from the jury question itself, that the jury had forgotten (or failed to understand) the thrust of the earlier direction, the better view, we think, is that it was necessary not only to remind them that they had been given directions on the point; but to remind them what those directions were.

26. The possibility that the jury were left without a clear understanding as to their task is aggravated by the terms in which the judge did answer to the jury question. He told them that they must consider all the evidence. But he went on to say this:

> "You must take into account [A] all of the evidence of Jason Hinds, [B] all of the evidence which bears on his credibility one way or the other
>
> and [C] you must also take into account the forensic evidence
>
> in coming to your ultimate conclusion as to whether the Crown has made you sure that Mr. Martinez-McLaughlin committed this crime."

I have broken the sentence into its constituent parts in order to illustrate the danger inherent in an answer in that form. The danger is that the jury may be left with the view that the forensic evidence (to which the judge refers in limb [C]) can be considered independently of, and in isolation from, the evidence of Jason Hinds and the evidence which bears on his credibility (limbs [A] and [B]). The direction that was required was that the jury must take into account the forensic evidence in coming to their conclusion whether they accepted the evidence of Jason Hinds: not that they could reach a conclusion on the basis of the forensic evidence if, after taking it into account, they were left unsure whether they believed Jason Hinds.

27. In those circumstances, we think it impossible to avoid the conclusion that – as a result of the answer given to the jury question – there is a real risk that the jury were left uncertain as to whether they could convict the appellant if they did not accept the evidence of Jason Hinds.

28. The prosecution case had been presented on the basis that it could not succeed unless Jason Hinds were accepted as a witness of truth. The trial had proceeded on that basis. If the jury did not understand that they could not convict unless they accepted the evidence of Jason Hinds, there is a real risk that they approached their task on a different basis. It follows that there is a real risk that the verdict which they reached is unsafe.

29. In those circumstances, we are satisfied that this appeal must be allowed. We were invited by counsel for the appellant to remit the matter to the Grand Court. That is the order we shall make.

30. Before leaving this appeal there are two further matters which we should mention. First, when the judge has decided the answer that he is to give to a jury question (following discussion with counsel), the safe course is to put that answer in writing and read it back to counsel so that they can be in no doubt as to what the judge intends to say. The written text is then available when the judge comes to give his answer to the jury: thereby avoiding the problem – which arose in this case – that the answer which he does give differs from the answer which he had indicated that he would give.

31. Second, the transcript of the proceedings after the jury retired for the first time – and again after they had retired following the judge's answer to the jury questions – reveals a practice which this Court regards as undesirable. That practice is to invite counsel to comment on the direction which the judge has given to the jury after the direction has been given and the jury has been sent out to consider its verdict.

32. An effect of that practice is that – as happened in the present case in relation to the further directions as to forensic evidence which the judge gave to the jury before he came to answer the jury questions – the jury, having been sent out directions which they have been told they must follow, are then recalled in order for the judge to vary those directions. That leads to two possible dangers: first, it tends to undermine the jury's confidence, generally, in the directions which they are being given by the judge; and, second, it tends to lead to confusion as to what the direction actually are, given that they have altered.

33. The practice of inviting submissions from counsel on the directions to be given to the jury on a potentially contentious point – and the practice of informing counsel what the judge intends to do in the light of those submissions - is plainly valuable. These observations are not to be taken to suggest otherwise. But that process should take place (in the absence of the jury) before the jury are directed to retire to consider their verdict.

So that the directions which they have been given do not alter –and, so far as possible (having regard to the need to answer jury questions), are not the subject of elaboration - after the jury have retired to consider their verdict.

_____

Chadwick P

_____

Mottley JA

_____

Conteh JA