3/12/08

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CRIMINAL DIVISION
CICA NO. 33 OF 2006
(Ind 10/04 C#5626/2003)

BETWEEN:

KIM IONIE MONCRIEFFE Appellant

AND

HER MAJESTY THE QUEEN Respondent

Before:

The Hon. Mr. Justice Forte, President (Acting)
The Hon. Mr. Justice Mottley, Justice of Appeal
The Hon. Mr. Justice Vos, Justice of Appeal

Heard and Judgment delivered on 3rd December, 2008
Reasons released: 25th March 2009

Appearances: Edward Renvoize of Sampson & McGrath for the Appellant and John Masters, Crown Counsel for the Respondent.

MOTTLEY, J.A.

Reasons for Judgment

[1] The appellant Kim Ionie Moncrieffe was convicted after a trial by judge and jury on fourteen counts of theft and one count of false accounting. She was sentenced to a term of imprisonment for 2 years and 6 months on 10 counts and discharged on 5 counts. The offences which occurred between 7

July 1998 and 2 July 2002 involved money belonging to British Caymanian Insurance Company Limited. She now seeks to appeal against her convictions and sentence.

[2] The application for leave to appeal is based on an allegation relating to the selection and empanelling of the jury. It is alleged that at the trial the judge failed "to hold any investigation into the manner by (sic) which juror Judson Christian knew the appellant". It is further alleged that this failure constituted a material irregularity as a result of which the conviction of the appellant should be set aside. Complaint was further made that, in the circumstance, the presence of the juror Judson Christian on the jury raised the possibility of apparent bias on the part of the jurors. As regards to her sentence, the appellant alleges that the sentence was manifestly excessive.

[3] At the beginning of the trial on 18 September 2006, before the jury was empanelled, the judge addressed the panel of jurors thus:-

> ".....we are about to begin selection of a jury in this case. Before we do that I need to tell you this; if you have any close personal relationship with the defendant Kim Moncrieffe, or with defence counsel Mr. Howard Hamilton or with Miss Facey-Clarke, or with Crown Counsel Miss Gail Johnson, or with myself or with any of

the witnesses, you should bring that to my attention before you are sworn as a juror."

The judge went on to point out that Crown Counsel would read out a list of the witnesses she intended to call on behalf of the prosecution. He also asked them to bring to his attention if they had any personal knowledge relating to the case. He explained that the appellant was charged with theft of money belonging to British Caymanian Insurance Company Ltd. He requested them to bring to his attention if they were customers or employees of the insurance company.

[4] The clerk of the court then informed the appellant of her right to challenge the persons who were being called to try her case. She was told that if she wished to challenge or object to any person called as a juror she had to do so as they were about to be sworn. The Record of Appeal does not indicate whether any objection was taken to any of the persons who were called and before being empanelled. The trial was then adjourned until the following day.

[5] On the morning of 19 September 2006, Crown Counsel informed the judge that she wished to be heard on a matter in the absence of the jury. Crown Counsel informed the judge that she was not aware before he was empanelled that the juror Judson Christian had convictions for dishonestly.

These convictions occurred between 1986 to 1996. She then sought to challenge the juror for cause but was told by the judge that her application was too late as the jury had already been empanelled.

[6] A discussion then ensued as to whether the convictions had disqualified Christian from sitting on the jury. It was later discovered that his convictions related to summary matters and that he was never convicted on indictment. By section 8 of the Judicature Law a conviction on a trial on indictment would have disqualified Christian from sitting as a juror.

[7] During the discussion, the judge informed counsel that Christian had sent a letter dated 19 September 2006 to the clerk of the Court. The judge then read aloud the letter in its entirety. Christian sought to be excused from the jury inter alia on the ground that he knew "the individual". That aspect of the letter stated:

> "I would like to be excused from duty because I know the said individual....."

The judge rejected Christian's application to be discharged from the jury stating that "none of those reasons provide a basis for excusing him".

[8] Counsel for the appellant submitted that, having been told by Christian that he knew the appellant, it was incumbent on the judge to make an inquiry of the juror as to whom he referred as "the said individual" and the circumstances under which he came to know "the said individual". He contended that it was part of the duty of the trial judge to ensure that the defendant received a fair trial by an impartial tribunal. Consequently, he asserted that, if a potential source of bias is raised, the judge has a duty to make an investigation and exercise his discretion whether to discharge the particular juror. The judge ought to have conducted an investigation to ascertain what the juror meant when he stated that he knew "the said individual". Counsel argues that the failure to do so might very well have lead to an appearance of bias which would have prevented the appellant from obtaining a fair trial.

[9] This Court was invited to say that where a juror declared that he had an association with someone involved in the trial, justice required that an investigation into the alleged connection ought to be conducted. He relied on the often quoted statement of Lord Hewart, Chief Justice **in Regina v. Sussex Justice Ex parte McCarthy [1924] 1 KB 256** where at p. 259 he said:

"...it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

[10] Counsel for the appellant conceded that he did not find any authority which dealt with this matter. However, by analogy he relied on **Regina v. Tyrell and Fisher [2005] EWCA Crim. 3678 and Regina v Box (1962) 47 Cr. App. R. 284.**

[11] In **Regina v. Tyrell and Fisher** (supra), both Tyrell and Fisher had been convicted of possessing heroin with intent to supply. After conviction it was discovered that one of the jurors was a neighbour of Fisher and the issue of a real possibility of bias by the juror towards Fisher was raised. The juror, whose husband was a plain clothes police officer, lived two doors away from Fisher. An affidavit sworn by Fisher's mother stated inter alia that the juror's attitude "toward her daughter might have been adversely affected during the trial by knowledge of the family including remarks made by neighbours about the family's wealth and speculations to how the family had come by it". In his judgment, Richards LJ said that as a result of accepting into evidence the affidavit of Fisher's mother, the issue of possibility of bias arose. The Lord Justice states at paragraph 22 of his judgment:

"....The relevant test is set out in **Porter v McGill (sic) [2002] 2 AC 537**. The question is whether a fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the jury was biased. The question is not whether there was actual bias but whether from an informed, objective stand point, there might be bias."

[12] In applying that test to the facts of that case, Richards L.J stated at paragraph 24:

"24. We have asked ourselves, nonetheless, what the position would have been if Mrs. Fisher had recognized the juror and had been sure of her recognition at the outset of the trial and had raised the matter with the trial judge. We think it inconceivable that the trial judge would have allowed Mrs. Dobinson to sit on the jury for this trial even if he had been satisfied, after hearing from her that she did not recognize either of the defendants or anybody else in court. It seemed to us that to allow a next door neighbour on the jury in circumstances where there is evidence that the attitude of neighbours might be adverse to a defendant would be unthinkable."

[13] In **Regina v. Box (1963) 47 Cr. App. R. 284** the Court of Criminal Appeal in England, sitting en banc, stated at p. 287:-

> "This Court knows of no case, and none has been referred to us, in which knowledge of a prisoner's previous convictions or character by a member of the jury has been held to be, as it were, an automatic disqualification or prevent him from hearkening to the evidence, observing the oath which he taken and affording the prisoner a fair trial".

The Court of Appeal indicated that nothing they had said must be taken to approve the conduct of the foreman of the jury. The Court went on to point out that:

> "A foreman, or indeed any juror, who knew a prisoner or knows from hearsay of the prisoner's bad character, ought not to sit on the jury."

[14] We do not consider either of these cases to be of any assistance to the appellant. The juror in his letter had asked to be excused because "I know the said individual".

[15] In **Pullar v. United Kingdom [1996] ECHR 23** the European Court of Human Rights at paragraph 36 stated:

"It is natural that a presiding judge should strive to ensure that the composition of the jury is beyond reproach whatsoever at a time when this is possible, before or during the course of the trial."

The judge did not seek to ascertain the identity of the individual. Whilst it would have been prudent for him to have asked the juror to whom he was referring, this failure by itself does not amount to bias. The statement has to be looked at in the context in which the letter was written. The previous day the judge had addressed the entire panel before the jury selection had commenced. He pointed out that the appellant had been charged with theft of money belonging to British Caymanian Insurance Company Limited. It is reasonable to assume that had the juror been referring to the company he would have used the word "company" rather than "individual". Equally, had he been referring to any of the witnesses he most likely would have referred to the witness by name. In the circumstances the use of the word "the individual" would indicate that he meant the defendant. A common sense approach must be adopted. Even though the Defendant's counsel's participation was limited to stating what the law in Jamaica was in relation to the disqualification of a juror who had a conviction, it would be reasonable to think in these circumstances that he was satisfied that the reference in the letter to knowing the individual was not intended to bear any bias to his client. It should not be over looked that the defendant was represented by a senior and very experienced counsel

and who had taken part in the discussion, when Crown counsel raised the issue of whether the juror was disqualified by reason of his previous convictions.

[16] In **R v. Tyrell and Fisher** (supra) it was necessary to have regard to the evidence that Fisher was a member of one of the few Afro-Caribbean families in the area and whose family was the subject of speculation concerning the source of their apparent wealth. It was not merely that the juror would have known Fisher. But that knowledge had to be viewed against the background of the facts disclosed in the mother's affidavit. As Richards LJ pointed out, it was not necessary to decide whether those facts were correct for the test of apparent bias as laid down in **Porter v. McGill** (supra).

[17] In **Regina v. Box** the knowledge of the defendant's conviction did not in itself automatically disqualified the foreman from sitting on the case. The Court nonetheless indicated that he ought not to have sat. In **Pullar v. United Kingdom** (supra) the European Court of Human Rights stated at para 3:

> "However, it dose not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case that he will be prejudicial in favour of that person's testimony."

In **Regina v. Abdroiko [2007] 1 WLR 2679** Lord Bingham of Cornhill accepted the view expressed in Pullar's case:

"that knowledge of a person did not necessarily lead to prejudice in his favour, and that it had to be decided whether the familiarity in question was of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal."

[18] Assuming that the individual about whom the juror was speaking was the defendant, that in itself was not sufficient to disqualifying the juror. This leads to the second part of the ground relating to bias. In this ground, it is alleged that, given the presence of a juror who knew "the said person" ("the said individual"), this without more would have led the fair minded and informed observer to conclude that there was a real possibility of bias. In other words, counsel for the appellant said that, once you applied the test of apparent bias as stated by Lord Hope of Craighead in **Porter v. Magill** (supra) and applied by Richards LJ in **R v. Tyrell and Fisher**, the Court must come to the conclusion that fair minded observer would conclude that there was an appearance of bias. Counsel maintained that this conclusion is fortified by the fact that the instant appeal is analogues to the case of **R v. Tyrell and Fisher**.

[20] The question, which this Court must ask, is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal (jury) was biased (see Lord Hope of

Craighead paragraph 103 of **Porter v Magill** (supra)). In order to do this it is necessary to examine the facts which that person would know. Those facts are set out at paragraphs 1 to 7 above. The fair-minded observer would have been aware that after the letter was read stating that the juror knew "the individual", and the judge at the conclusion of his discussion with Crown counsel intimated that he was not going to discharge the juror. The observer would know that this took place in the presence of the very experienced counsel for the defendant. If there was any doubt in the mind of the appellant or her counsel as to whom the reference in the letter of knowing "the said individual" related, objection would have been taken and a request made to the judge to have the juror discharged. In the absence of any objections by the appellant or her counsel to the juror continuing to sit, the informed observer would be entitled to conclude that the appellant was satisfied with the juror continuing on the jury. Room for doubt as to what the juror meant or the identity of the individual would have been removed. That person would also be aware that the judge in his direction to the jury would have informed them that they had to decide the case against the appellant "only on the evidence which has been placed before" them.

[20] We are, therefore, of the view that the fair minded and informed observer would have concluded that in the circumstance of this case there was

no appearance of bias, and the appeal against conviction must therefore be dismissed.

[21] The appeal against sentence was abandoned.

Forte, P. (Acting)

Mottley, JA

Vos, JA