Privy Council Appeal No. 56 of 1998

Dean Tillett *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 13th May 1999,

Delivered the 28th June 1999

Present at the hearing:-

Lord Browne-Wilkinson
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hobhouse of Woodborough
Lord Millett

*[Delivered by **Lord Hobhouse of Woodborough**]*

On 13th May 1999 their Lordships' Board announced that it would humbly advise Her Majesty that this appeal should be allowed, that the conviction of Dean Tillett of murder should be quashed and that the case should be remitted to the Court of Appeal so that that court could consider whether to order a retrial. The Board said that it would deliver its reasons separately.

This appeal was brought with the special leave of Her Majesty in Council from the dismissal by the Court of Appeal of the appeal of the appellant, Dean Tillett, from his conviction for the murder of Suresh Gidwani in March 1995. The Crown was represented upon the hearing of the petition for special leave but was not represented upon the hearing of the appeal. Their Lordships have however had every assistance from Mr. Fitzgerald Q.C. who appeared on the appeal for the appellant.

The trial took place between 6th and 10th May 1996 before Meerabux J. and a jury. The evidence for the Crown was that on 11th March 1995 the deceased had been shot three times in the back by a dark skinned man who had shortly before been in the clothes shop of Mr. Uandwani in Orange Street Belize. In the shop the dark skinned man had been accompanied by another man, Billy Sanchez. They had selected certain items of clothing and indicated that they wanted to buy them. Billy Sanchez suggested to the other that he should pay for them and walked out of the shop with the bag of clothes. The dark skinned man then pulled out a gun and held up Mr. Uandwani's assistant. Mr. Uandwani allowed the man to leave without paying.

Outside the shop Mr. Gidwani who had presumably seen what was happening came across the road, himself carrying a gun. Billy Sanchez dropped the bag of clothes and rode off on his bicycle. The dark skinned man then came out of the shop and the outcome was that Mr. Gidwani was fatally wounded and died some days later as a result of being shot in the back by, it was accepted, the dark skinned man who then also rode off on a bicycle. The substantial issue at the trial was whether the prosecution had proved that the appellant was the dark skinned man. The appellant denied any involvement in the incident and gave and adduced alibi evidence that he was at home all that day and did not go out. He denied that he knew or was friendly with Billy Sanchez.

The Crown did not rely upon identification evidence from any of those present at the scene of the crime. The Crown called Billy Sanchez as a prosecution witness. He had originally been charged with the offence of murder but this had been dropped. At the time of the appellant's trial Billy Sanchez was still subject to a charge of robbery. But there was no suggestion that he would be tried with the appellant who was charged only with murder. Billy Sanchez gave evidence that he knew the appellant well and often associated with him. On the day in question the appellant had suggested that they both go down to the clothes shop on their bicycles. He and the appellant went into the shop as described by the other witnesses. He expected the appellant to pay and did not know that the appellant had a gun. He was not a party to any plan to rob nor to the use of a gun or any other weapon. The importance of his evidence was that the dark skinned man was the appellant. The other witness

upon which the Crown relied in this connection was a man called Melin Singh who said that he was standing with some friends on a nearby street corner and saw Billy Sanchez and the appellant, both of whom he knew, cycle past.

The jury's verdict was that the appellant was guilty of murder. The death sentence was passed. He appealed to the Court of Appeal. The grounds of appeal were primarily concerned with the evidence of Billy Sanchez. It was argued that he should not have been called because he was still awaiting trial on the robbery charge, that he should have been treated as an accomplice and the jury directed accordingly, and that, in any event, the judge had failed to warn the jury to treat his evidence with caution since he had an interest of his own to serve. The Court of Appeal rejected the first two of these arguments but accepted the third. However they applied the proviso on the basis that there was also the evidence of Melin Singh and that the crown case did not depend upon Billy Sanchez. The appellant's case was very weak. Accordingly, the Court of Appeal dismissed the appeal.

Before their Lordships' Board, the appellant has taken the same three points regarding the evidence of Billy Sanchez and criticises the Court of Appeal's use of the proviso. He additionally submits that the judge's summing up was deficient in that it did not deal with the risk that Melin Singh may have been mistaken in believing that the man he had seen with Billy Sanchez was the appellant; no *Turnbull* direction was given. Further he has, through Mr. Fitzgerald Q.C., drawn our attention to the cross-examination of the appellant by counsel appearing for the Crown at the trial which was by any standard grossly improper but which escaped comment or criticism by the trial judge. The appellant relies upon the cumulative effect of these features of the trial and submits that it is clearly not a case where the proviso can or should be applied.

Billy Sanchez

At the time of the trial and beforehand, the police had no direct evidence against Billy Sanchez that he was a party to a joint enterprise to rob or use violence. The most that they could rely upon was the association, which he admitted, between himself and Dean Tillett and their presence together in the shop choosing items of clothing. There was no evidence to contradict or discredit Billy Sanchez's denial that

he knew anything about the gun. At the trial, it was put to Billy Sanchez in cross-examination that he was a robber but no evidence was adduced by either side to contradict his denial, nor is it suggested that any such evidence was available to the Crown. Under these circumstances, the position at the time of the trial of Dean Tillett was that there were legitimate grounds for suspecting that Billy Sanchez was involved in the robbery to some degree but no clear evidence that he was. There was no evidence at all that he was a party to the murder (or killing) of Suresh Gidwani. That murder was the only count on the indictment.

In relation to his submission that the trial judge should have refused to allow the Crown to call Billy Sanchez as a witness, the appellant relied upon the case of *Reg. v. Pipe* (1966) 51 Cr.App.R. 17. There the witness in question had given evidence at the committal of the defendant. He gave evidence which involved him as an accessory to the offence with which the defendant was charged. The witness was then charged as well but was not put on the same indictment as the defendant. At the trial the defendant objected to the witness being called to give evidence. The Court of Appeal held that the question of the witness's conviction or acquittal has to be resolved before he gives evidence at the trial of his accomplice.

However this rule has been relaxed in later cases (*Reg. v. Turner* (1975) 61 Cr.App.R. 67). The law was reviewed by Lord Mustill delivering the opinion of the Board in *Chan Wai-keung v. Reg.* (1995) 2 Cr.App.R. 194. There is no hard and fast rule. It is desirable that witnesses giving evidence should not have an interest of their own to serve but in certain circumstances the existence of such an interest must be accepted. The simplest example is where one defendant gives evidence in his own defence adverse to his co-defendant. In the present case the judge was fully entitled to allow the Crown to call Billy Sanchez as a witness at the trial. However this does not absolve the judge from warning the jury that the witness does have such an interest and that they should be particularly careful before accepting his evidence.

The first way in which the appellant puts this ground of appeal therefore fails. Billy Sanchez was properly called. The second way is based upon the proposition that Billy Sanchez was an accomplice of the appellant. If he was,

under section 90(4) of the Evidence Ordinance (Chapter 75) which was the statutory provision in force at the time of the trial:-

> "In a trial before any court, a person shall not be convicted solely upon the uncorroborated evidence of an accomplice, and the judge shall direct the jury that the accused is not to be convicted unless there exists confirmation of the accomplice's evidence in a material particular by some fact or circumstance implicating the accused in the commission of the crime."

Therefore, if Billy Sanchez was an accomplice, it was mandatory for the judge to direct the jury in the terms of the subsection. The judge would have to direct the jury upon who was an accomplice, that their power to convict was constrained, upon the meaning of the term "corroboration" and tell them what evidence given in the case was capable of amounting to corroboration. The judge in the present case did none of these things. Therefore if he was wrong not to give the jury an accomplice direction, there can be no question but that this appeal must be allowed; the jury would never have considered the statutory constraint upon their power to convict. Under these circumstances, it is not necessary to consider the direction which would be required by the common law of England. The question is whether the judge was in the present case under an obligation to leave to the jury the question whether Billy Sanchez was an accomplice; this was not a case where it was admitted by the Crown or by the witness that he was an accomplice.

In the present context "accomplice" means a person who was an accomplice of the defendant in the commission of the crime with which the defendant is charged. The relevant crime is the murder of Suresh Gidwani (*Davies v. Director of Public Prosecutions* [1954] A.C. 378, *Reg. v. Farid* (1945) 30 Cr.App.R. 168). If there is evidence that the witness in question was an accomplice the question whether he was or not must be left by the judge to the jury (*Davies supra*). The judge did not leave to the jury the question whether Billy Sanchez was an accomplice to the murder of Suresh Gidwani. He said to them:-

> "I find that there is no evidence before this Court that Billy Sanchez was an accomplice to this charge of murder ...."

Although in passages which preceded and succeeded this direction, the judge used language consistent with his leaving the accomplice question to the jury, the direction was on any view seriously defective if there was evidence upon which the jury could have concluded that he was an accomplice to the murder. But there was no such evidence before the jury. Therefore the judge was right not to leave the accomplice question to them. This was also the view of the Court of Appeal. There was no breach of section 90(4) of the Evidence Act.

However the matter does not stop there because it was the duty of the judge nevertheless to give the jury a warning that Billy Sanchez had an interest to serve in the evidence which he gave. The judge should have warned the jury that they should exercise caution before accepting his evidence (*Reg. v. Beck* (1981) 74 Cr.App.R. 221, *Reg. v. Witts* [1991] Crim.L.R. 562). He gave them no such warning. The Court of Appeal rightly held that the summing up was deficient in this respect. On the hearing of the petition for special leave, counsel for the Crown made a similar concession. There was therefore a material irregularity in the trial. Their Lordships consider that this was not the only irregularity which occurred.

Melin Singh

The court of Appeal attached importance to the fact that the evidence of Billy Sanchez did not stand alone. The appellant was also seen and recognised by Melin Singh. The judge adequately summed up the evidence of Melin Singh and the attack which had been made upon his honesty as a witness. But he did not deal at all with the possibility that he might have been honest but mistaken. On his evidence, his observation of the appellant was casual and fleeting as the appellant and Billy Sanchez cycled rapidly past him whilst he was talking to others. It was a case in which some *Turnbull* type direction should have been given. The fact that it was a recognition case does not preclude the need for a *Turnbull* direction where the circumstances of the observation call for it (*Beckford v. Reg.* (1993) 97 Cr.App.R. 409). The judge gave no such direction. This was a further irregularity in the trial.

Prosecuting Counsel

The appellant's case at the trial was that he was at home all day. His evidence of alibi was contradicted by the evidence of Billy Sanchez and Melin Singh. There was a clear and critical conflict of evidence between the appellant and the prosecution witnesses. The Crown quite rightly challenged the truthfulness of the appellant's evidence. It was central to the case. However during his cross-examination of the appellant, Crown counsel made more than one wholly improper statement. At one point the following questions were asked:-

"Q. You have never been to dance at Pub Amnesia?

A. No.

Q. You see the fat Corporal that sits in court here, Olivera, you know him, noh?

A. I know him and see his face now and then.

Q. Suppose I tell you that man works at Pub Amnesia as security on Thursdays, Fridays and Saturday nights?

A. You di give me news.

Q. All right. I am giving you news then. Well I am going to tell you that that same Corporal sees you and Billy Sanchez at Pub Amnesia together all the time. News again?

A. That's a lie."

Olivera had not given evidence at the trial nor was there any application that he should. It was grossly improper for Crown counsel to tell the jury what Olivera could say about the association of the appellant and Billy Sanchez. The judge should have intervened and at the least told the jury that such statements by Crown counsel were not evidence and pointed out that the Crown had not called Olivera.

In the same vein, a little later, Crown counsel said to the appellant:-

"Q. But that is unusual Mr. Tillett, because you don't normally stay at home all day. You are a man that likes to hang out, isn't that correct Mr.

> Tillett. You don't normally stay home all day. You are a man that likes to ride bicycles around town. I see you all the time. Isn't that unusual for you to stay home all day?"

Here counsel is himself purporting to give evidence as to the appellant's movements. Again, it provoked no reaction from the judge nor did he take any step to correct the impression it must have made on the jury.

Such conduct by Crown counsel (or, for that matter, by any counsel) should not be tolerated, particularly in a capital case. It corrupts the whole of the trial process. In the present case it related to a critical issue in the decision of the case. It was a serious and material irregularity.

The Proviso

The Court of Appeal in respect of the one material irregularity which was drawn to their attention, the failure to warn the jury about the evidence of Billy Sanchez, thought it proper to apply the proviso. The appellant criticises them for doing so. It is not necessary for their Lordships to enter upon these criticisms which were not without force, because their Lordships have to consider the cumulative impact of the three material irregularities which they have held to have occurred. Taken together, these undoubtedly material and substantial irregularities make it clearly wrong to apply the proviso. Notwithstanding the strength of the Crown case and the implausibility of that of the defence, it cannot be said that the jury would certainly have convicted the appellant in the absence of these irregularities.

Their Lordships' opinion is therefore that the appeal should be allowed and the conviction quashed. As previously stated their Lordships consider that the case should be remitted to the Court of Appeal so that that court can consider whether a retrial should be ordered.

[27]