IN THE COURT OF APPEAL
TURKS & CAICOS ISLANDS
CRIMINAL DIVISION

CR-AP 1/22

BETWEEN:

CLARENCE WILLIAMS

Appellant

AND

REX Respondent

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DATE HEARD: **23rd JANUARY 2023**

DATE DELIVERED: **8th FEBRUARY 2023**

Before:

The Honourable Mr. Justice K. Neville Adderley **- President Ag**

The Honourable Mr. Justice Stanley John **- Justice of Appeal**

The Honourable Mr. Justice Sir Ian Winder **- Justice of Appeal**

Appearances:

Mr. Jerome Lynch KC and Mr. Mark Fulford **For the Appellant**

Mr. Oliver Smith KC and Ms. Tamika Grant **For the Respondent**

JUDGMENT

JOHN JA:

1. On the 24th February 2022, the appellant Clarence Williams was found guilty of Indecent Assault after a trial by jury before Her Ladyship Justice Lobban-Jackson, and was sentenced to 18 months imprisonment suspended for 2 years and made the subject of a Sexual Harm Prevention Order. The indictment had contained two counts but the jury could not agree on count two and were discharged from reaching a verdict in respect of that matter. On the 15th March 2022, the appellant filed a Notice of Appeal against conviction and sentence to the Court of Appeal.

2. On the 23rd January 2023, we heard submissions from attorneys for the appellant and the respondent. At the conclusion of the hearing, we reserved judgment. On the 3rd February 2023 we indicated that our decision and written reasons would be given at a later date. This we now do. The appeal is allowed, the conviction is quashed, the sentence is discharged and a retrial is ordered, for the reasons which follow.

Factual Background

3. Between September and November of 2017, the complainant Jeff Josue Saunders was riding his bicycle in Five Cays. He stopped for a rest near to the entrance that leads to the Church of God Prophecy. There he met the appellant. The appellant was a Bishop of the said church. The appellant was sitting in his car and a conversation ensued during which the appellant invited Saunders to his office to collect $6 for lunch. Saunders accepted and later in the day he rode his bicycle to the appellant's office. There the appellant told Saunders that he was sweaty, smelt badly and invited him to use the bathroom facility at the office. The appellant led Saunders to his sink and took a cloth/flannel from the shower nearby and proceeded to wash Saunders' body eventually making his way to his genitalia, under the pretext that he was teaching Saunders personal hygiene. The only other relevant matter was that Saunders was a Paranoid Schizophrenic. The appellant admitted that the encounter occurred, but alleged that the bathroom incident was a total fabrication.

Grounds of Appeal

4. Messrs. Lynch and Fulford for the appellant filed (5) grounds of appeal in support of his case that the verdict be quashed and the appeal allowed.

> Ground (1): That the learned judge erred in law in not admitting "hearsay evidence".
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> Ground (2) That the learned judge erred in law in allowing improper questions to be put to witnesses.
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> Ground (3) That the learned judge erred in law in refusing a no case to answer submission.
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> Ground (4) That the learned judge erred in law in allowing the mode of trial which was unfair.
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> Ground (5) That in relation to the Sentencing, the Sexual Harm Prevention Order was not necessary and it was excessive.

5. At the hearing grounds 1, 3 and 4 were abandoned and the court did not consider them. This judgment concerns whether the fair trial of the appellant was compromised by improper questions. Having regard to the disposition of the appeal, I did not address the issue of the Sexual Harm Prevention Order.

Improper Questions

6. Counsel for the appellant submitted that two questions which were put to the appellant during cross examination by prosecuting counsel were improper. The first question, prosecuting counsel put to the appellant was that he and his wife had been estranged for 20 years. Counsel submitted that was untrue and not predicated on any disclosure relating to antecedents.

7. In the course of giving his evidence the appellant had spoken of not being aware of any complaints of a similar nature being made against him. The second question prosecuting counsel asked was:

> *"Q. Weren't you thrown out of your house by your wife for allegations of sexual abuse of other male -- men?*
> *A. Definitely not.*

Q. I'm going to put that you ..."

8. At that stage an objection was taken by the appellant's counsel to the question as being scandalous, improper and containing material not previously disclosed on the Defence. The Defence made an application for the jury to be discharged. During the course of the argument prosecuting counsel indicated that he had made a call during the break and had received "instructions" pertaining to the challenged questions. No advanced disclosure of those instructions was made to the Defence. The learned trial judge did not discharge the jury, but instead found that the question was illogical to the Crown's case and directed the jury as follows:

> *"Jury directed thus:*
>
> *Her Ladyship: When we left off on Friday, the final question posed by counsel for the prosecution was: "weren't you thrown out of your house by your wife for allegations of a similar nature?" Hearing the questions and answers leading up to that established that Mr. Williams had been living at his address at Aviation Drive for over twenty years. I, therefore, ask you to disregard that question as it cannot logically follow from the rest of the cross-examination. In due course you will receive further directions as necessary. "*

9. In their written submissions Counsel also averred that another question put to the defence witness Pastor Carol Skippings was improper on the basis that the Defence should have had advance disclosure of it. However, the alleged improper question was not identified in the appellant's submissions.

10. Counsel submits that the learned trial judge erred in failing to safeguard the appellant's right to a fair trial by refusing to sanction the Crown's use of material that was undisclosed and should not have been put in cross-examination, by discharging the jury or at the very least telling the jury to disregard the questions as they should not have been suggested and as there was no evidence to support them. And similarly to warn them again in her summing-up.

11. Counsel for the respondent admitted that prosecuting counsel did not give the defence advance disclosure of the challenged questions, but denied that the non-disclosure amounted to a material irregularity which rendered the conviction unsafe. Counsel

further submitted that the appellant has not demonstrated how he was prejudiced by any question asked during cross examination within the special circumstances of this case. He further submitted that it is well accepted that alleging prejudice is insufficient without more, as it "boils down" to the impact it had on the outcome of the trial. Further, that the learned trial judge in her summation thoroughly examined the evidence and reminded the jurors to only take into consideration relevant evidence. Finally, that the summation taken as a whole was fair to the appellant and therefore there was no miscarriage of justice in all the circumstances.

12. The issue of whether improper questions can undermine the fairness of a trial was central to the appeal and accordingly it is necessary to examine the legal position.

13. In **Christopher Thomas v R (No 1) [2011] JMCA Crim 49** the appellant was convicted of murder and sentenced to a term of life imprisonment. On appeal against his conviction and sentence counsel argued:

> *"1. The fair trial of the appellant was compromised by the improper conduct of the Prosecution in putting to a defence witness an allegation of criminal conduct, while adducing no evidence to substantiate the allegation, whereby a miscarriage of justice may have occurred.*
>
> *2. The learned judge erred in (a) permitting the said allegation to be made without any intervention on her part; (b) representing to the jury that the defence had been equally culpable in making unsubstantiated allegations when this was not the case; (c) wrongly stating to the jury that the prosecution had not been irresponsible in making the said allegation;(d) suggesting to the jury that the prosecution may have thought that they were able to put forward evidence in support of the said allegation, but fell short; (e) in the premises permitting the jury to suppose that the prosecution had good reason to make the said allegation."*

14. The court stated that there were two questions for determination:

(1) whether the conduct of prosecuting counsel undermined the integrity of the trial so as to amount to injustice to the appellant; and

(2) whether the learned judge had failed to exert authority and properly control the proceedings resulting in the trial being unfair. The court allowed the appeal and Harris JA stated:

> *[13] It is a cardinal rule of law that every accused who is brought before the court is presumed innocent. The presumption of innocence remains throughout until the evidence adduced points to his guilt beyond a reasonable doubt. The law accords him a fair trial. His right to a fair trial is absolute. Persons who are charged with the responsibility of marshalling evidence for the prosecution as well as a trial judge must at all times ensure that the conduct of the trial is beyond reproach.*
>
> *[14] Admittedly, the trial process being adversarial cannot always proceed flawlessly. There may be a deviation from good practice as there are times when things are done or said which may not be in keeping with good practice. However, procedural breaches do not always result in harm so serious as to imperil the fairness of a conviction. Despite this, where the occurrences of breaches are substantially prejudicial and an appellate court is of the view that great harm was occasioned to an appellant, a conviction will be quashed as unsafe - see Randall v R (2002) 60 WIR 103.*

15. Commenting on the conduct of prosecuting counsel Harris JA stated:

> *[18] It is clear that, prosecuting counsel, in pursuing the line of cross-examination as shown above had surpassed the latitude permissible in cross-examination. The improper cross-examination of a defence witness may result in the quashing of the conviction - see R v Leroy Gordon (1994) 31 JLR 551. Prosecuting counsel had no evidence that the witness was paid to testify on the appellant's behalf as she had done.*
>
> *[19] Every prosecutor is under an obligation to discharge his or her duty fairly. In R v Wadey (1935) 25 Crim App R 104 at page 107 Hewart LCJ said "Counsel entrusted with the public task of prosecuting accused persons should realise that one of their primary duties is to be absolutely fair". Counsel's conduct*

undeniably undermined the integrity of the trial and is without doubt indefensible.

16. In **Christopher Thomas v R (No 2) [2018] JMCA Crim 31,** an appeal arising after the retrial of the same appellant, the court was again asked to consider the issue of improper questioning. The improper questions concerned identification evidence, and a suggestion that the appellant's wish to obtain legal representation before he turned himself in at a police station was evidence of guilt. On this occasion, the court found that prosecuting counsel had again surpassed the latitude permitted to counsel in cross-examination, and had deliberately flouted the judge's directions to desist. The court was however not satisfied that the appellant was denied the substance of a fair trial, as the trial judge had played an active role in forestalling and mitigating any potential prejudice to the appellant. The court bore in mind *"the judge's plainly disapproving interventions"* during prosecuting counsel's examination-in-chief and cross-examination and, second, *"his clear and unequivocal directions to the jury".* In light of the said two factors the court found it "*fair to conclude that prosecuting counsel's conduct would not have diverted the jury in any way from their duty to return a true verdict in accordance with the evidence".*

17. In **Arthurton (Errol) v R - (2004) 64 WIR 129** the appellant was convicted of two counts of unlawful sexual intercourse with a girl under the age of 13 years. The appellant's good character was a significant part of his defence. The trial giving rise to the appeal was a retrial. The Court of Appeal had set aside the appellant's earlier conviction in part because defence counsel had deprived the appellant of a good character direction from the judge by failing to lead evidence that he had no previous convictions, and because no application to discharge the jury had been made when a prosecution witness had given hearsay evidence that the appellant had said to the police, when interviewed, "I was accused of something like this before and I got away".

18. Given the history of the matter, on the retrial it was critical to ensure that the new trial was not put in jeopardy by inadvertent disclosure of the appellant's acknowledgement during the police interview that he had been arrested before on suspicion of

wrongdoing of a similar character. The fact of arrest for suspected similar offending was of no probative value. If disclosed, it was likely to undermine the good character evidence and risk unfairness through baseless propensity reasoning. In the absence of the jury both counsel indicated to the trial judge that they had agreed that evidence of the question-and-answer interview would not be led.

19. During cross examination by defence counsel of the interviewing officer Sgt Vanderpool, the jury were told albeit inadvertently of a suspicion of similar offending. Defence counsel objected and applied for discharge of the jury. Prosecuting counsel accepted that Sgt Vanderpool's remarks were prejudicial but suggested that the prejudice could be sufficiently overcome by a direction to the jury "in extremely emphatic terms". The judge ruled that the trial should go ahead. In her summation she dealt directly with the issues of prejudice and of good character. On appeal their Lordships examined the judge's decision not to discharge the jury and the adequacy of her direction on the use of the prejudicial information inadvertently disclosed.

20. Their Lordships allowed the appeal. Dame Sian Elias delivering the advice of the Board said:

> *[28] A decision to discharge a jury is a matter of discretion for the trial judge. It falls to be exercised in the context of the trial, the flavour of which may not be readily recaptured on appeal. It will often be a difficult decision. Questions of fairness arise in relation to others, as well as to the accused. The judge in the present case was conscious that the case was a retrial, involving a young complainant. In many cases jury directions will sufficiently meet fears of prejudice through disclosure of irrelevant or insufficiently probative evidence. Whether there is unfairness turns on the context, including in particular the issues at trial. The decision whether or not to discharge a jury is one an appellate court will not interfere with lightly, as cases such as Weaver and Palin emphasise. Where the trial judge has not fallen into any error of principle, it is necessary for the appellate court to form the view whether there has been unfairness which, if not corrected, would amount to a miscarriage of justice.*
>
> *[29] The central issue for the trial was whether the complainant was to be believed. The appellant's good character was critical to that inquiry. It entitled him to a credibility direction in respect of his statement denying intercourse with the child complainant and to a direction that his good character was relevant in assessing the likelihood that he would have offended in the way alleged. Although the judge gave these directions, as she was required by law to do, the evidence that the appellant had been arrested on suspicion of similar offending on another occasion bore directly on the issue of propensity. As such,*

it directly undermined the propensity limb of the good character direction and with it a major plank in the defence case. The disclosure here was far more serious than the unspecific references in Weaver and Palin.

[30] It is to be expected that juries will conscientiously apply the directions given by a trial judge. If good character had not been so critical to the defence, any prejudice in disclosure of previous offending (particularly if of offending unrelated to the charge) might well have been adequately addressed by directions not to reason to guilt from the separate offending and characterisation of the evidence as irrelevant. That is not the case here.

[31] The jury was being asked by the defence to rely on the accused's good character in concluding that he was unlikely to have committed an offence of sexual abuse of a child. It is a type of offending in which propensity reasoning may be significant. It is asking too much to expect that a jury can be expected to give fair consideration to an affirmative good character propensity direction when it is told of suspicion of similar offending, even if it succeeds in putting the disclosure out of mind when considering the question of guilt as established by the other evidence. At best, the accused's character is likely to be treated as irrelevant by the jury. If so, the accused is effectively deprived of the good character direction.

[32] In the context of the issues at trial, it may be doubted whether any directions could have overcome the unfairness. On that basis, the jury should have been discharged. In any event, however, the directions given were insufficient to remove the unfairness to the appellant. The judge's use of Sgt Vanderpool's evidence as an illustration of inconsistencies in evidence was unfortunate. It may well have highlighted the prejudicial evidence. The terms in which the jury was directed to put the evidence out of mind reminded them that it had been 'blurted out', leaving open the impression that the jury may have been inadvertently given credible information which had been suppressed. At the very least it might have been expected that the jury would have been told that the information was not evidence at all as a matter of law. Nor did the judge accept the suggestion of counsel for the Crown that the jury be told that the Crown accepted that the arrest described was 'totally unfounded', which might have made it clear that it had no probative value at all. The instruction to ignore the evidence, with no further explanation, was inadequate.

[33] It is impossible to conclude that there has been no miscarriage of justice as a result. The Crown case depended entirely on the evidence of the complainant. Credibility was critical. The good character of the appellant and the direction it required as to credibility and propensity was the fundamental plank in the defence. It was undermined by disclosure of information which was of no probative value. None of the steps taken at trial to address the prejudice caused were effective. The Board is left with the view that the trial was unfair and the convictions cannot stand. The Crown does not seek a new trial. The Board will humbly advise Her Majesty that the appeal should be allowed and the convictions quashed.

Analysis

21. **Christopher Thomas No 1 and No 2** (supra) and **Arthurton** (supra) establish that the improper cross examination of a defence witness may lead to the quashing of a conviction. In many cases jury directions will sufficiently meet fears of prejudice through disclosure of irrelevant or insufficiently probative evidence. Whether there is unfairness turns on the context, including in particular the issues at trial. In certain cases, such as where a jury is being asked to rely on the good character of a defendant it is doubtful whether any directions can overcome the unfairness of an improperly admitted statement which impugns his character and alleges previous offending or propensity to commit the offence.

22. I am satisfied that the questions were improper and sufficient to warrant the discharge of the jury, especially as in this trial a lot turned on the appellant's credibility. The directions and summation of the learned trial judge did not cure the prejudice suffered by the appellant and in all the circumstances the appellant did not have a fair trial. Having found that the questions were improper and their impact prejudicial, the issue of whether the information leading to those questions should have been disclosed or not bears no weight on the determination of this appeal.

Retrial

23. In the event that this Court found the appellant did not have a fair trial, counsel for the respondent urged the Court to order a retrial in accordance with the provisions of section 7 (2) of the **Court of Appeal Ordinance CAP 2.01** which provides:

> *"Subject to the provisions of this Ordinance, the Court shall, if it allows the appeal against conviction, quash the conviction and direct that a judgment and verdict of acquittal be entered, or, if the interests of justice so require, may order a new trial in accordance with such directions as the Court may give."*

24. Counsel for the appellant strongly summited that having regard to his age, 77, his resignation from all duties within the church, and his possible ill health, that there should be no retrial.

25. In **Reid v R - (1978) 27 WIR 254**, the Privy Council set out the principles to be applied in deciding whether to order a new trial. The Reid principles were applied in **Went v R - (2019) 94 WIR 16**, where the Court of Appeal of Barbados refused to order a retrial. In delivering the judgment Goodridge JA summarized the Reid principles as follows:

> *[59] In determining whether or not to order a new trial, we have had regard to the Privy Council case of Reid v R (1978) 27 WIR 254, [1980] AC 343 (Reid). In Reid (1978) 27 WIR 254 at 257, [1980] AC 343 at 348 the Privy Council observed that the power to order a new trial should not be exercised 'where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed'. At the other extreme, 'where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso ... and dismiss the appeal ...' (see (1978) 27 WIR 254 at 258, [1980] AC 343 at 350). The Privy Council further observed that in cases which fell between these two extremes, like this case, a court would be required to weigh certain factors.*
>
> *[60] These factors are:*
>
> *(i) the seriousness and prevalence of the offence;*
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> *(ii) the expense and length of time involved in a fresh hearing;*
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> *(iii) the length of time between the offence and a new trial;*
>
> *(iv) the availability of evidence to support the defence's case; and*
>
> *(v) the strength of the prosecution's case.*

Of course, this list is not exhaustive, and a court must of necessity give consideration to what the interests of justice would require in any particular case.

[61] We consider that we can usefully apply these factors in our determination of this issue. The appellant was charged with a very serious offence, that is, murder, which is no doubt of grave public concern. This Court must balance the public interest in ensuring that persons who have been charged with serious offences are brought to trial, against the constitutionally protected right of the appellant to a fair hearing within a reasonable time.

[62] In Reid (1978) 27 WIR 254 at 257, [1980] AC 343 at 348 their Lordships stated that—

> *'those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are, of course, countervailing interests of justice which must also be taken into consideration.'*

26. The Reid principles have been applied by this Court in **Jermaine Missick v. Regina [2020] TCACA 16**, **Presil and Others v. Regina [2019] TCACA 3**, **Sadiq Ebanks v. Regina [2018] TCACA 4** and in **Delancy v. Regina [2018] TCACA 21.** Having considered the principles set out therein, including the seriousness and prevalence of this type of offence and bearing in mind the statement of their Lordships in Reid v R (supra) that:

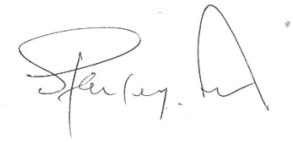
> *'those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury.'*

27. Having given ample consideration to the issue of a retrial and taking into consideration the submission of counsel for the appellant, I am nevertheless of the opinion that the interest of justice is best served by the order for a retrial. It must also be borne in mind

that at trial, counsel for the appellant admitted that the jury should be discharged and a new trial ordered. The appellant's ability to present his defence ought not to be impacted by the passage of time.

Conclusion

28. For all the above reasons the appeal is allowed, the conviction is quashed, the sentence is discharged and a retrial is ordered.



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John, JA

I agree

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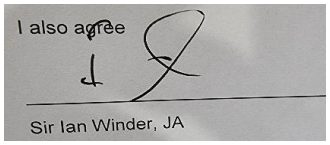
Adderley JA, President (Ag)

I also agree



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Sir Ian Winder, JA