COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp & CAIS No. 121 of 2020

BETWEEN

ROLIN ALEXIS

Appellant

AND

REGINA

Respondent

BEFORE: **The Hon Mr. Justice Isaacs, JA**
The Hon Madam Justice Crane- Scott, JA
The Hon Mr. Justice Evans, JA

APPEARANCES: **Mr. Stanley Rolle, Counsel for Appellant**
Ms. Darnell Dorsette, Counsel for Respondent

DATES: **31 March 2022; 26 April 2022**

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Criminal Appeal- Armed Robbery- Retrial- Whether retrial is in interest of justice- Section 13(2) of Court of Appeal Act

On the 31 March 2022, the Court delivered a judgment quashing the appellant's conviction and setting aside his sentence. The parties were directed to provide submissions on the issue of retrial by the 14th April 2022. Both parties filed submissions. This is the ruling on the issue of whether a retrial should be ordered.

Held: The appellant is acquitted of the present charges. Unless the appellant is being detained for other matters, he should be released forthwith.

In support of her contention that a new trial should be ordered Ms. Dorsette, Counsel for the respondent. submits that " *the interests of justice pursuant to Section 13(2) of the (sic) demands that a retrial be ordered in this matter as but for the apparent mistake made by the police in showing a photo gallery to Bernard Dorsett and the failure of the learned trial judge to direct the jury on the same; the Crown' case was otherwise cogent, strong, and credible against Rolin Alexis as there was positive identification of Rolin Alexis by the younger brother of Bernard Dorsett, namely, Khiwan Dorsett, on an identification Parade, who was present when his older brother Bernard Dorsett was robbed*…"

Ms. Dorsette has failed to address the issue relative to the Electronic Monitoring Device (EMD). It was this issue which played a significant role in this court's decision to allow the appellant's appeal. The evidence of the agent from the monitoring company was that the device which was functioning properly did not place the appellant on the scene of the crime. This was in stark contrast to the identification evidence from the witnesses which placed him on the scene.

Ms. Dorsette has also failed to address in her submissions the allegation that the appellant has already served 115 of the 120 months sentence which had been imposed by the Court below. This allegation as indicated in not refuted and is consistent with the evidence that the appellant was taken into custody in 2014. It cannot be a source of serious dispute that in the prevailing circumstances of our judicial system today it would be difficult to have the appellant retried within the next five months.In all the circumstances of this case I am not satisfied that the interest of justice would be served by the making of an order for the retrial of the appellant in this matter.

Reid v The Queen (1980) AC 343 applied
Jerome Bethell v Regina SCCrim App No. 19 of 2013 mentioned
Delancy v The Attorney General SCCrim App No. 19 of 2012 mentioned
Dominic Thompson v R. SCCrApp. No. 228 of 2016 mentioned

DECISION ON RETRIAL

Decision delivered by the Honourable Mr. Milton Evans, JA

BACKGROUND

1. The appellant was charged on indictment with two counts of the offences of armed robbery, contrary to Section 339(2) of the Penal Code, Chapter 84 and two counts of attempted armed robbery contrary to Section 83(2) and 339(2) of the Penal Code, allegedly occurring on the 25 of April, 2014 at New Providence.

2. The trial commenced on the 13th May, 2019 and concluded on 20th May, 2019 with guilty verdicts on the two (2) counts of armed robbery. By a directed verdict the appellant was acquitted and discharged of the attempted armed robbery charges as the complainants for those charges did not appear at trial. On the 17th January, 2020, the appellant was sentenced to a term of 10 years imprisonment less the 6 years spent on remand awaiting trial.

3. By way of a Notice of Appeal filed October 23, 2020, the appellant appealed his conviction listing two (2) major grounds of appeal containing numerous secondary grounds. As his original Notice of Appeal was out of time the matter proceeded by way of an application for an extension of time within which to prosecute his appeal. The appellant relied on the following grounds:

> **"Ground 1: Some specific illegality and or irregularity substantially affecting the merits of the case and the fairness of the trial were committed during the course of the trial namely;**
>
> **i. That the learned trial judge failed to adequately analyse and direct the jury on the identification evidence particularly in light of general principles governing the identification parade process.**
>
> **ii. That the learned trial judge misstated a material fact that was subjected to potential adverse finding by the jury;**
>
> **iii. The learned trial judge erred in law by not giving a Lucas Direction;**
>
> **iv. That the learned trial judge did not properly analyse and properly explain and direct the jury on the relevance and significance of the evidence surrounding the electronic monitoring device;**
>
> **Ground 2: That the verdict is unsafe and unsatisfactory having regard to all the circumstances of the case; and**
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> **Ground 3: The sentence as stated disadvantaged the appellant."**

4. After hearing full submissions from the parties we delivered a Judgment on the 31 March 2022 granting the extension prayed for and as we have heard substantive arguments on the prospects of success we also quashed the conviction and set aside the sentence.

5. As we had not had the opportunity to hear submissions from the parties on the issue of a retrial we directed that the parties provide written submissions on that issue.

6. In understanding the reasons for setting aside the conviction the following extract from the Judgment is instructive:

> **"36. The identification evidence lead in this case was of good quality save for the mistake made by the police in showing the photo gallery to Bernard Dorsett and the failure of the trial judge to properly address the same. However, the evidence from the EMD system does not fit with the applicant being present at the scene of the crimes. Ms. Barry's evidence was that the margin for error is only five feet and that the system was in good working order on the day in question. It was therefore incumbent on the trial judge to advise the jury that in the absence of the ability to reconcile the difference they had to choose to reject the identification evidence or that of the EMD System. It is not clear that this direction was ever given and there is a possibility that if given it would have led to an acquittal of the applicant.**
>
> **37. In these circumstances I have a lurking doubt as to the safety of the convictions. I do not see how the application of the proviso would be doing justice in this case as it cannot be said that with proper directions the jury would have convicted in any event. I would therefore grant the extension prayed for and as we have heard substantive arguments on the prospects of success I would also quash the conviction and set aside the sentence."**

THE LEGAL FRAMEWORK

7. The power of this Court to order a retrial is grounded in Section 13 of the Court of Appeal Act which is in the following terms**:**

> **"13. (1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that —**
>
> **(a) under all the circumstances of the case it is unsafe or unsatisfactory;**
>
> **(b) it is unreasonable or cannot be supported having regard to the evidence;**
>
> **(c) there was a wrong decision or misdirection on any question of law or fact;**

(d) in the course of the trial, there was a material illegality or irregularity substantially affecting the merits of the case; or

(e) the appellant did not receive a fair trial, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred.

(2) Subject to the provisions of this Part of this Act the court shall, if it allows the appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the court may think fit.

(3) On an appeal against sentence the court shall, if it thinks that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as the court thinks ought to have been passed, and in any other case shall dismiss the appeal". [Emphasis Added]

8. The operation of this provision is gleaned from assistance provided by the decision of the Privy Council in the case of **Reid v The Queen** (1980) AC 343 where Lord Diplock opined as follows**:**

"The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica 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. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the defendant.

…

It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases 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. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged, To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case—and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under section 14 (2) of the Judicature (Appellate Jurisdiction) Act.

…

Their Lordships have, in what they have already said, sufficiently answered the certified questions (1), (2) and (3). Question (4) is general in its terms and asks for a statement of the principles which should apply in considering whether or not a new trial should be ordered. Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by

certified question (4) must be read with the foregoing warning in mind.

Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant. At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso to section 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial

and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction,

"It is in the interest of the public, the complainant, and the [defendant] himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery."

This was said by the Full Court of Hong Kong when ordering a new trial in *Ng Yuk-kin v. The Crown* (1955) 39 H.K.L.R. 49, 60. That was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone. Their Lordships in answer to the Court of Appeal's request have mentioned some of the factors that are most likely to call for consideration in the common run of cases in Jamaica in which that court is called upon to determine whether or not to exercise its power to order a new trial. They repeat that the factors that they have referred to do not pretend to constitute an exhaustive list. Save as respects insufficiency of the evidence adduced by the prosecution at the previous trial, their Lordships have deliberately refrained from giving any indication that might suggest that any one factor is necessarily more important than another. The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered today. As their Lordships have already said, this makes the task of

balancing the various factors one that is more fitly confided to appellate judges residing in the island". [Emphasis Added]

9. It has been well established that these principles are equally applicable in the Bahamas as they are in Jamaica and they in my view govern the determination of the issues in this appeal. Those principles were repeated with approval by this Court differently constituted in numerous cases including **Jerome Bethell v Regina** SCCrim App No. 19 of 2013 and **Delancy v The Attorney General** SCCrim App No. 19 of 2012, and **Dominic Thompson v R.** SCCrApp. No. 228 of 2016.

SUBMISSIONS BY COUNSEL

10. Counsel for the appellant relies on two points. Firstly, he submits that a new trial should not be ordered unless this Court is satisfied that the prospects of a conviction is good. Secondly, he asserts that the appellant has already served 115 months of the 120 months to which he had been sentenced by the court below.

11. Mr. Rolle further argues that the evidence will not change and that the same deficiencies which existed at the first trial would be present if a new trial is ordered. It follows he contends that the likelihood of an acquittal is higher than that of a conviction. In these circumstances he concludes that it would not be in the interest of justice to order a new trial.

12. Ms. Dorsette, Counsel for the respondent. submits that ' *the interests of justice pursuant to Section 13(2) of the (sic) demands that a retrial be ordered in this matter as but for the apparent mistake made by the police in showing a photo gallery to Bernard Dorsett and the failure of the learned trial judge to direct the jury on the same; the Crown' case was otherwise cogent, strong, and credible against Rolin Alexis as there was positive identification of Rolin Alexis by the younger brother of Bernard Dorsett, namely, Khiwan Dorsett, on an identification Parade, who was present when his older brother Bernard Dorsett was robbed*…"

DISCUSSION AND ANALYSIS

13. It is significant that Ms. Dorsette has failed to address the issue relative to the Electronic Monitoring Device (EMD). It was this issue which played a significant role in this court's decision to allow the appellant's appeal. The evidence of the agent from the monitoring company was that the device which was functioning properly did not place the appellant on the scene of the crime. This was in stark contrast to the identification evidence from the witnesses which placed him on the scene. The fatal error of the trial judge was her failure to draw this to the attention of the jury and to direct them that they had to resolve that conflict to reach a proper verdict. She instead exacerbated matters by misdirecting the jury in advising them that the EMD placed the appellant '**on the scene around that time**" and later "**which placed him right there on the scene that time**".

14. Ms. Dorsette has also failed to address in her submissions the allegation that the appellant has already served 115 of the 120 months sentence which had been imposed by the Court below. This allegation as indicated in not refuted and is consistent with the evidence that the appellant was taken into custody in 2014. It cannot be a source of serious dispute that in the prevailing circumstances of our judicial system today it would be difficult to have the appellant retried within the next five months.

15. It is noted that Ms. Dorsette relies on what she perceives to be the strength of the respondent's case. However, as stated in **Reid "… there may well be cases where despite a near certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course."** The sentence imposed on the appellant by the Court below was not challenged by the respondent on appeal and as such the presumption is that they did not view it as being unduly lenient. Secondly, the appellant having served considerable time in prison relative to this offence it cannot be said that if a retrial is not ordered he will escape being brought to justice merely because of some technical blunder by the judge in the conduct of the trial or her summing up to the jury.

CONCLUSION

16. In all the circumstances of this case I am not satisfied that the interest of justice would be served by the making of an order for the retrial of the appellant in this matter. I would therefore order that an acquittal be entered in respect of the present charges and unless he is being detained for other matters he should be released forthwith.

The Honourable Mr. Justice Evans, JA

17. I agree.

The Honourable Mr. Justice Isaacs, JA

18. I also agree.

The Honourable Madam Justice Crane- Scott, JA