[2013] UKPC 32
Privy Council Appeal No 0021 of 2010

JUDGMENT

Dominique Moss (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Mance
Lord Wilson
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT DELIVERED BY

Lord Hughes

ON

13 November 2013

Heard on 22 October 2013

Appellant	*Respondent*
Francis FitzGibbon QC Sarah Elliott (Instructed by Simons Muirhead & Burton)	Thomas Roe (Instructed by Charles Russell LLP)

LORD HUGHES:

1. The appellant Dominique Moss was convicted by the jury after trial of the murder of a woman by cutting her throat. He was sentenced to death. On appeal, the Court of Appeal of the Bahamas quashed the conviction for murder and substituted a conviction for manslaughter. The Court of Appeal went on to re-sentence the defendant for the manslaughter and imposed a sentence of 25 years. It did so, however, without giving the defendant any opportunity to make submissions as to the length of sentence. It is that omission which forms the principal ground of the present further appeal to the Board against sentence. An application for leave to appeal further against the substituted conviction for manslaughter was refused by the Board.

2. In the small hours of the morning the defendant and his co-accused Lotmore had taken the woman victim from a bar and onto a golf course with the object of having sexual intercourse with her. There was evidence that she was reluctant to go. Her body was found the next morning in standing water on the course. Her throat had been cut to the extent that her head was almost severed from her body. There were signs of sexual assault. In police interviews Moss and Lotmore each asserted that the other had killed her. At trial Moss altered his account. He admitted that he had intended to have intercourse with the deceased but said that he had been unable to do so, whereupon Lotmore had taken her away and returned alone. Subsequently, he said, he had gone back to the golf course and found the body. That, he said, explained blood found on his clothes. He purported, however, to exonerate Lotmore, in sharp contrast to what he had said to the police. For his part, Lotmore gave, both to the police and at trial, an account of Moss killing the deceased in front of him. He asserted that he had tried to stop him. The jury convicted Moss of murder. It acquitted Lotmore of murder but convicted him of manslaughter. Given the way the case was argued and left to the jury, it must have found that it had been Moss who cut the throat of the deceased and it cannot have been sure that Lotmore was either a principal or secondary party to murder. It must have rejected that part of Lotmore's evidence in which he asserted that he had tried to stop the killing, and have found that he was a party to, at least, an assault on the deceased, with foresight that she might be done some harm.

3. There had been some evidence that Moss was drunk. This might possibly have been relevant to the question whether Moss had formed the specific intent required for murder, which, in the Bahamas, is an intention to kill and nothing less. However, the trial judge had altogether omitted to deal with the possible relevance of drink in his summing up. It was on the ground of this misdirection that the Court of Appeal quashed Moss's conviction for murder, together with the death sentence which had been imposed in consequence, and substituted a conviction for manslaughter.

4. The principal submission of Mr FitzGibbon QC for Moss is that it is a fundamental breach of natural justice to pass sentence without giving a defendant the opportunity to be heard. He makes subsidiary submissions that the sentence of 25 years is, on the facts of this case, manifestly excessive both generally and in particular because the sentence imposed by the trial judge on Lotmore was one of six years. For the Crown, Mr Roe accepts that it should ordinarily be the practice of a criminal court to receive submissions as to sentence on behalf of a defendant before fixing his punishment, and that the Court of Appeal ought to have done so in this case. He contends, however, that in this case such submissions could not have achieved any shorter a sentence, and invites the Board to dismiss the appeal for that reason.

5. The Crown's concession on the point of principle is clearly realistic. It is elementary that, at least where the sentence is not fixed by law, a criminal court has a duty to give a defendant the opportunity to be heard, through counsel or otherwise, before sentence upon him is passed. That is so however little there may appear to be available to be said on his behalf. As Megarry J memorably put it in *John v Rees* [1970] Ch 345, 402:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

An omission to hear a defendant before passing sentence is a serious breach of procedural fairness. That simple proposition does not need the citation of authority.

6. Cases cited to the Board suggest that in other instances the Court of Appeal in the Bahamas has indeed sought submissions upon sentence when substituting a conviction for a lesser offence; an example is *R v Robinson* [1997] BHS J No 38. For completeness mention should be made of *Farrington v The Queen* SCCrApp No 30 of 2006, decided after the Court of Appeal's decision in the present case. There, as here, the judgment of the court appears to proceed directly from quashing the conviction for murder and replacing it with a conviction for manslaughter (on grounds of diminished responsibility) to substituting a sentence of life imprisonment. One cannot tell whether in that case there was opportunity for submissions to be made on the subject of sentence. It may well be that it was there accepted on behalf of the defendant, who was characterised by potentially very dangerous personality disorders, that a life sentence for manslaughter was inevitable, but if there was no discussion at all of sentence, that procedure was as wrong in that case as it was in the present one. The same question arises in respect of the Board's decision in *Rose v The Queen* [1961] AC 496, where the Board substituted a conviction for manslaughter on grounds of

diminished responsibility together with a sentence of life imprisonment; again, in a diminished responsibility case involving a potentially dangerous defendant, the life sentence may have been canvassed at the hearing of the appeal. The issue of hearing counsel on the question of sentence did, however, directly arise before the Court of Appeal in *Francis v The Queen* SCCrApp No 133 of 2009, again decided after the present case. There the court quashed the conviction for murder and substituted one for manslaughter on grounds of misdirection as to intent. The trial judge had imposed a sentence of 25 years. The majority of the court found that this represented an appropriate sentence on conviction for manslaughter and re-sentenced accordingly. Newman JA, concurring in the result as to conviction, dissented explicitly from the decision to pass sentence without hearing counsel on behalf of the defendant. It is not clear what if any alteration of practice may have ensued as a result of the point being thus formally brought to the court's attention. In the Board's view, Newman JA was entirely correct to say that the court was obliged to afford counsel the opportunity to address it on sentence for the newly substituted conviction in order to avoid a denial of justice and a breach of the obligation to hear both parties.

7. The procedure which may be adopted in order to satisfy this duty will no doubt vary from case to case, but need not involve delay or further expense. If judgment on the conviction appeal is given orally at the conclusion of the hearing, and in the presence of counsel, then no doubt submissions on sentence can immediately be taken. If judgment is to be reserved, then either the court can invite submissions at the oral hearing on the provisional basis that they will be operative if the appeal succeeds or, if necessary, submissions can be invited, either orally or in writing, after the reserved judgment is handed down. In all cases, counsel mounting an appeal against conviction should be prepared to deal with the point at the oral hearing. In the event that the court overlooks the need to deal with it, counsel ought to raise it, either at the oral hearing or immediately on receipt of a reserved judgment.

8. The Board accepts the submission of Mr Roe for the Crown that there may be cases in which, despite a breach of this duty by the court, a reviewing court can be confident that no injury can have been done to the defendant because no submissions that might have been made on his behalf could have reduced the sentence below that passed. There might also be cases in which the question is academic, for example because the sentence has been served. In such cases a further appeal to the Board would be unlikely to succeed. But in a serious case of homicide, such as the present, and especially where a long sentence has been passed which has some time to run, the Board would need to consider long before reaching such a conclusion.

9. The Board is satisfied that the present is not a case in which this can be said. The defendant was, and is, entitled to address the proper factual basis for sentence now that the conviction for murder has been quashed. He is entitled to address the relative roles of the two accused. He is entitled to address the proper tariff for manslaughter in the Bahamas, the proper place within that tariff for the present

offence and the effect of his lack of previous convictions. All these are properly matters for the Bahamas court, and not for the Board; sentencing practice may properly vary from state to state and the Board is not in touch with local conditions in the same way as the Court of Appeal is. In order to investigate whether the submissions on behalf of Moss might affect the length of sentence it would be necessary for the Board to discharge what are properly the functions of that court.

10. For this reason, in reaching its conclusion, the Board has deliberately abstained from offering any view as to whether the sentence of 25 years was or was not appropriate to the manslaughter conviction which the Court of Appeal substituted. It cannot know whether that will turn out to be the right sentence notwithstanding such representations as counsel can make for Moss, as Mr FitzGibbon realistically accepted might be the case. Nor does the Board offer any view as to whether the differing roles and personal circumstances of the two co-accused are properly reflected in the difference between sentences of 25 years and six years. If they should be held not to be duly reflected, then the Board also offers no view as to whether the consequence ought in justice to be an adjustment to Moss's sentence or a refusal to adjust it on the grounds that a correct sentence on A ought not to be altered even if a separate sentence on B is in error. All those are matters which ought to be addressed by the court charged with supervision of sentencing practice in the Bahamas.

11. For these reasons the Board will humbly advise Her Majesty that the appeal against sentence ought to be allowed and the presently imposed sentence of 25 years must be quashed. Although Newman JA adverted in passing in *Francis* to possible remission to the trial judge, there appears to be no power in the Court of Appeal, and therefore in the Board, to do so. The case must be remitted to the Court of Appeal of the Bahamas to hear counsel on both sides as to sentence and to determine what that sentence should be. In the meantime, the appellant must be remanded in custody. The Board's decision in *Ali v State of Trinidad and Tobago* [2005] UKPC 41; [2006] 1 WLR 269 applies; subject only to any question of loss of time in the case of a frivolous appeal, ordinarily time in custody spent awaiting re-sentence will be taken into account either by directing the new sentence to run from the date of the original one, or in fixing its length. Any submission which the appellant has to make about time spent in custody pending conviction should be addressed to the Court of Appeal of the Bahamas.