



JUDGMENT

Taitt (Appellant) v The State (Respondent)

**From the Court of Appeal of the Republic of Trinidad
and Tobago**

before

**Lord Hope
Lord Wilson
Lord Carnwath**

JUDGMENT DELIVERED BY

LORD HOPE

ON

8 November 2012

Heard on 15 October 2012

Appellant
James Guthrie QC
Clara Johnson

(Instructed by Simons
Muirhead & Burton)

Respondent
Tom Poole

(Instructed by Charles
Russell LLP)

LORD HOPE:

1. On 9 May 2008 the appellant Marlon Taitt was found guilty, together with his co-accused Ijah Braithwaite, of the murder by shooting of Anthony McCarthy on 16 May 2006. They were both sentenced to death, as the crime of which they had been convicted attracted the mandatory death sentence.

2. The case for the prosecution had been based substantially on the identification evidence of Sheneka McCarthy, who was the deceased's niece. Prior to the summing up the appellant's counsel asked the judge to give the appellant, who had a prior conviction for larceny in 1999, a good character direction. The judge declined to do so. During the trial counsel for the appellant's co-accused Braithwaite expressed concern as to whether his client's mental state was such as to be able to give him proper instructions. The judge adjourned the trial for an evaluation of Braithwaite's state of mind at the time of the offence and his fitness to instruct counsel and plead at his trial. It does not appear that the grounds for concern were made out, as his trial was permitted to proceed after the adjournment. The appellant's counsel, with whom the matter had been discussed by counsel for Braithwaite, did not make a similar application on the appellant's behalf.

3. Both the appellant and his co-accused appealed against their convictions on a number of grounds. The co-accused's appeal was allowed, on the ground that the trial judge had given inadequate directions on the issue of identification as it affected him. A retrial was ordered in his case. The circumstances of the identification in the appellant's case were not the same, and he did not raise the question of the inadequacy of the trial judge's directions on that issue in his appeal. His appeal was presented on the basis that there had been a number of irregularities during the trial which, when taken collectively, had the effect of rendering the verdict unsafe. On 11 December 2009 the Court of Appeal dismissed the appellant's appeal against his conviction.

4. In April 2010, following the dismissal of his appeal, Simons Muirhead & Burton ("SMB"), who had been instructed by Herbert Smith LLP, agreed to act for the appellant pro bono with a view to a possible appeal to the Judicial Committee of the Privy Council. On 21 April 2010 they notified the State's Privy Council agents, Charles Russell LLP, of their interest and asked for a set of the relevant papers. They are to be commended for having taken this step so promptly. As was noted in *Hamilton v The Queen* [2012] UKPC 31, [2012] 1 WLR 2875, para 14, Charles Russell encourage initiatives of this kind, as it enables them to monitor, as well as assist in, the progress of the appeal, to provide any necessary support with documents for the purpose of the application and to deal with any issues that might arise on their

production. Charles Russell provided SMB with the relevant papers between September 2010 and January 2011.

5. Having studied these papers and consulted counsel, SMB instructed a clinical psychologist, Mr CPA Norman, in February 2011 to assess the appellant's mental state and provide them with a report. Mr Norman interviewed the appellant in the State Prison on 28 March and 1 April 2011. He provided SMB with a report dated 27 August 2011 in which he indicated that in his opinion the appellant had a learning disability which represented a very significant handicap. He said that he had serious doubts as to whether the appellant would have understood the legal process sufficiently well to have offered a reasonably competent defence. On 14 December 2011 SMB lodged with the Board an application on the appellant's behalf for permission to appeal, for an extension of time to allow him to do so and for permission to introduce fresh evidence.

6. Permission was sought on the following grounds:

- (1) that the trial judge ought to have given a modified good character direction;
- (2) that the trial judge failed to give an appropriate warning in respect of Sheneka McCarthy's evidence;
- (3) that the trial judge failed to deal fairly with the key aspects of the defence case;
- (4) that the appellant's conviction ought not to be upheld in view of the successful appeal of his co-accused;
- (5) that the appellant was likely to have been unfit to plead or stand trial; and
- (6) that the imposition of the death sentence on a mentally impaired defendant is cruel and unusual punishment contrary to section 5(2)(b) of the Constitution of Trinidad and Tobago.

7. On 22 December 2011 SMB instructed a consultant forensic psychiatrist, Dr Marc Lyall, to prepare a psychiatric report in the light of Mr Norman's findings and to provide them with his own assessment of the appellant's psychiatric state. Dr Lyall saw the appellant in Trinidad on 10 January 2012 and provided SMB with a report

dated 23 February 2012. He said that the appellant's clinical presentation was in keeping with Mr Norman's findings, that he appeared of borderline low intellectual capacity and that generally a person with his level of impairment would be likely to struggle to participate fully in a criminal trial if attention was not paid to their difficulties. He also said that the appellant required treatment from specialist medical health services as a matter of some urgency.

8. In the meantime steps had been taken to obtain an explanation from the appellant's trial counsel, Mr Selwyn R Mohamed, as to why evidence as to the appellant's mental state had not been adduced earlier. SMB wrote to him on 13 December 2011 enclosing a copy of Mr Norman's report. They did not receive a reply to that letter. They wrote to him again on 30 April 2012 enclosing a copy of Dr Lyall's report. They did not receive a reply to that letter either, or to a further reminder which was sent on 7 August 2012. But, following further efforts by SMB to make contact, Mr Mohamed wrote to them on 1 October 2012 stating that the appellant had been able to give him full instructions. Mr Norman and Dr Lyall then, at SMB's request, provided addenda to their reports in the light of what Mr Mohamed had said.

9. On 30 April 2012 the Board refused permission to appeal on grounds 1 to 4 of the appellant's application. Nothing more need be said about them. But grounds 5 and 6, including the applications for permission to appeal out of time and to adduce fresh evidence, were referred to an oral hearing. Having heard oral submissions from Mr Guthrie QC for the appellant and Mr Poole for the State, the Board is now in a position to give its decision as to whether the appellant should have permission to appeal on these two grounds and on the related issue as to whether he should be permitted to adduce fresh evidence.

10. Very properly, Mr Poole did not resist the application for permission to appeal out of time. It is clear, from the chronology summarised above, that SMB acted promptly and took the steps which the Board was later to say in *Hamilton v The Queen*, para 18, can and should be taken to minimise the risk of unreasonable delay. Nor, in the light of the explanation that had been obtained from Mr Mohamed as to why they had not been obtained earlier, did Mr Poole resist Mr Guthrie's application that the Board should receive and consider the reports that had now been obtained.

The evidence

11. Mr Norman said in his report that, having met and examined the appellant, he did not think that he was in the presence of someone who was suffering from schizophrenia or a similar major mental illness. The tests which he carried out, which included the Wechsler Adult Intelligence Scale ("WAIS"), indicated that the appellant had a significant learning disability. His verbal comprehension index was 68, in the lowest 2% of the population around the world, and he had a reading age of between 6

and 7 years old. His conclusion from the various tests was that he fell in the lowest 2% of the population. Many of the test results fell within the lowest 1%, and in some areas his score was even lower. When he asked the appellant about the issues in his trial he seemed to be unable to show a clear understanding of them, although he was aware of what he had been charged with. In the opinion section of his report Mr Norman set out the following conclusions:

“(1) The standard and most reliable test of general ability (WAIS) suggests that Mr Taitt falls within the least able 1% of the population. This represents a very significant handicap. Any person with this sort of IQ would need very careful help to understand legal issues in a trial. A person with this sort of ability would have a basic capacity to understand right from wrong, especially if they had a stable and law-abiding up-bringing. However, in terms of presenting his best defence and understanding complex points of proof or evidence or law, Mr Taitt has serious handicaps.

...

(6) I would say, in principle, that any person with Mr Taitt’s IQ would have difficulty in following the proceedings of a court of law. My questioning of Mr Taitt about his legal proceedings suggested that the concerns in principle are evidenced by this limited ability, in fact, to explain details about his case.

...

(9) ... I have serious doubts as to whether Mr Taitt would have understood the legal process up to this point sufficiently well to have offered a reasonably competent defence. I saw nothing to suggest that he is fully aware of the issues facing him in any future stages of the legal process.”

12. Dr Lyall said in his report that he could elicit no symptoms of psychosis, apart from some deterioration in the appellant’s mental health that had emerged while he was in custody after his trial. Clinically he appeared of borderline intelligence, but there were no clear cognitive deficits other than that. His conclusions as to the appellant’s capacity to understand legal issues were:

“His clinical presentation was in keeping with Mr Norman’s objective findings: he appears of borderline low intellectual capacity.

Generally, a defendant with this level of impairment is likely to struggle to participate fully in a criminal trial if attention is not paid to their difficulties; for example, such a defendant is likely to find it difficult to follow complex evidence, attend to evidence over a long period of time and give instructions to their legal representatives in response to evidence without the evidence being explained in detail to them and care being taken to ensure that they fully appreciate the possible consequences of the evidence. I am not clear that such an approach was taken with Mr Taitt at the time of his trial; as such, he is likely to have struggled to participate adequately in his trial for the murder of Mr McCarthy.

His difficulties are likely to have increased, if, as his account suggests, he was suffering from symptoms of mild clinical depression at the time of the trial. He is likely to have been less able to concentrate on the evidence given than would otherwise have been the case because of symptoms of depression.”

13. The appellant’s counsel at trial, Mr Mohamed, was sent copies of these reports. In his letter of 1 October 2012 he said that, having represented the appellant at the preliminary enquiry at the Magistrates’ Court, he discussed with him the possibility of his being assessed by a psychiatrist or psychologist. The appellant and his wife both indicated to him that they were not willing to submit to this as he was well and mentally stable. He reminded the appellant of this when the matter came to the High Court for trial, but the appellant insisted that he wanted Mr Mohamed to proceed with the trial without his having any medical examination. As for the appellant’s ability to follow what was going on, Mr Mohamed said:

“He was able to give me full instructions and when examined on these instructions he seemed to be very consistent with those instructions. He seemed to me to be a bit ‘hyper’ however, he appeared to be normal and during the trial at the High Court as well as the Preliminary Enquiry at the Magistrates’ Court Marlon was able to participate fully and pay particular attention to all that went on.”

14. In his comments on Mr Mohamed’s letter Mr Norman said that it is not uncommon for people who have disabilities to find suggestions of a psychological or psychiatric assessment belittling, and that the appellant might not have been the best

judge of whether he was capable of following the trial. A judgement by someone else as to whether a person is able to instruct and follow a trial can be difficult in cases where the handicap is significant but not gross. He insisted that the most objective methods of assessment available suggested that the appellant has significant learning difficulties. Dr Lyall's comments were to the same effect. He added that Mr Mohamed's suggestion that the appellant was able to give him full and consistent instructions and pay attention to the evidence given at the trial was very much at odds with the account that the appellant had given him. The appellant was likely to have been able to demonstrate a superficial understanding of the evidence, so his deficits in understanding were likely not to have been apparent even to an experienced lawyer. They were not likely to have been apparent without a full and focussed assessment.

Ground 5: fitness to stand trial

15. There is no reported case where the fact that a person is simply of low intelligence has been held to operate as a bar to trial. It is, of course, clear that a person who suffers from a severe physical or mental disability which makes it impossible for him to understand what is going on or to give instructions must be held to be unfit to plead. It would be unacceptable for the law to hold that, although a deaf mute such as the defendant in *Pritchard* (1836) 7 C&P 303 was unfit to plead because he was so incapacitated that he could not instruct a defence, a person with a mental disability who was just as incapacitated was not. As Alderson B said in that case, there are three points to be inquired into where a plea in bar is in issue: first, whether the incapacity is, as he put it, "of malice or not" – whether it is genuine; second, whether the defendant can plead to the indictment or not; and third, whether he has sufficient intellect to comprehend the course of the proceedings in the trial so as to make a proper defence. These tests go to the root of the problem. They can be applied generally to all cases where fitness to plead is in issue.

16. The fact that a person suffers from delusions has been held not to deprive him of the right to be tried: *Robertson* (1968) 52 Cr App R 690. In *Berry* (1978) 66 Cr App R 156 Lord Lane CJ said that a high degree of abnormality does not mean that the man is incapable of following a trial or giving evidence or instructing counsel. But what of the man who, to adopt Dr Lyall's description of the appellant, is of borderline low intellectual capacity - whose level of impairment is such that he is likely to struggle to participate fully in a criminal trial if attention is not paid to his difficulties? The questions that must be addressed are essentially for the court, not for the expert witnesses. They can be summarised in this way: see *R v M* [2003] EWCA Crim 3452. Does the defendant understand the charges that have been made against him? Is he able to decide whether to plead guilty or not? Is he able to exercise his right to challenge the jurors? Is he able intelligently to convey to his lawyers the case which he wishes them to advance on his behalf, and the matters which he wishes to put forward in his defence? Is he able to follow the proceedings when they come to court? And is he able, if he wishes, to give evidence on his own behalf? As was pointed out in

Robertson, the quality of his instructions to counsel or of any evidence that he may wish to give is not to the point. The emphasis is on his ability, or his inability, to do those things.

17. As the question is one of fact for the court, the proper time for the issue to be addressed is at the trial. In this case, for the reasons explained by the appellant's counsel Mr Mohamed, that opportunity was not taken. That this was not done is all the more striking as the issue of ability to stand trial was raised by counsel for the co-accused Braithwaite. The trial had been going on for several days before Braithwaite's counsel asked for the adjournment. By that stage Mr Mohamed had had ample opportunity to assess for himself whether the appellant was able to follow what was going on and to give the necessary instructions, as he had when he represented him at the stage of the preliminary enquiry at the Magistrates' Court. His assessment, as he explained in his letter of 1 October 2012, was that the appellant was able to participate fully and pay particular attention to all that went on. Mr Norman said that the appellant seemed to be unable to show a clear understanding of the issues which were discussed at his trial. But the appellant was able to recall a number of significant points in his conversation with Dr Lyall about Sheneka McCarthy's evidence, that no gun powder had been found on his body or his clothes and that his clothes had not been brought to court. He also complained to Dr Lyall that the judge refused to give him a good character direction.

18. In *Nigel Brown v The State* [2012] UKPC 2, para 68 the Board expressed its concern at the fact that reports as to the appellant's ability to instruct counsel were produced ex post facto and without any explanation as to why medical evidence on the issue of fitness had not been produced in the courts below. It wished to make clear that it should not be assumed that even highly persuasive evidence produced for the first time at the final appeal stage would be admitted: para 70. The fresh evidence has been admitted in this case so that it may be scrutinised. But the Board is just as anxious to make it clear that it will only be in an exceptional case that it will entertain the argument that the appellant was not fit to stand trial because he is of low intelligence due to a learning disability when the point was not taken on his behalf by counsel at his trial. It is the responsibility of counsel to assess whether his client is fit to stand trial. He is in the best position to judge at first hand whether his client is able to understand the charge that has been brought against him and to give instructions for his defence. His conclusion that his client is fit to plead will normally be given great weight. The Board will not permit the introduction of the issue for the first time at the final stage unless the evidence points very clearly to the fact that there has been a miscarriage of justice.

19. This is not such a case. Far from being highly persuasive, the evidence when taken as a whole indicates that it is unlikely that the trial court, approaching the matter properly, would have held that the appellant was not fit to plead. The Board has concluded that the appellant should not be given permission to appeal on this ground.

Ground 6: constitutionality of the death sentence

20. Section 5(2)(b) of the Constitution of Trinidad and Tobago provides that Parliament “may not ... impose or authorise the imposition of cruel and unusual treatment or punishment.” As was noted in *Benjamin and Ganga v The State* [2012] UKPC 8, para 60, there is no decided case in any of the appellate jurisdictions of the Caribbean which considers whether a sentence of death, if passed on a mentally impaired person, would constitute cruel and unusual punishment whether as contrary to a constitutional provision or in breach of a common law rule. But the issue has been considered by the US Supreme Court. In *Atkins v Virginia* (2002) 536 US 304 the appellant, who had been found guilty of capital murder and sentenced to death, had an IQ of 59 and was found to be mildly mentally retarded. It was held by the majority that the relationship between mental retardation and the penological purposes served by the death penalty justified the conclusion that to execute the mentally retarded was cruel and unusual punishment which the Eighth Amendment should forbid. The goal of retribution was not served by imposing the death penalty on a group of people who had a significantly lesser capacity to understand why they were being executed.

21. The Board held in *Benjamin and Ganga* that it would be wholly inappropriate for it to embark on a consideration of this question without the opinion of the Court of Appeal in Trinidad and Tobago, and the matter was remitted to the Court of Appeal for further hearing in accordance with the opinion of the Board. The Court of Appeal has not yet delivered its judgment in that case. So the Board finds itself in the same position as it was in *Benjamin and Ganga*. For the reasons given in the judgment in that case at para 61, it would be just as inappropriate in this case for the Board to embark on an examination of this difficult and contentious issue without having the views of the Court of Appeal before it. The question is whether, on the facts of this case, it too should be remitted to the Court of Appeal for its consideration.

22. The facts in *Benjamin and Ganga* were that Benjamin was found to have a learning disability. His performance on the WAIS suggested that fewer than 2% of the population of general adults would score as low as he did. Ganga’s psychiatric disorder too was found to be a mild learning disability – a term which was said to be preferred in current practice, no doubt for good reasons, to the diagnostic category of mental retardation that was used by the US Supreme Court in *Atkins*. The application of the WAIS tests showed him to be in the extremely low category of intellectual functioning. The facts of this case appear to be comparable with those in *Benjamin and Ganga*. It is not possible at this stage to say, one way or the other, whether any ruling that the Court of Appeal will give in that case can be applied to the appellant. The only course open to the Board, in these circumstances, is to remit his case too to the Court of Appeal for a further hearing on this issue.

Conclusion

23. The Board gives the appellant permission to appeal on the question whether the imposition of the death sentence is contrary to section 5(2)(b) of the Constitution. The appeal on this issue is allowed as the point has been fully argued at the permission stage, and the question will be remitted to the Court of Appeal of Trinidad and Tobago for its consideration. The appellant's application for permission to appeal on the question whether he was fit to stand trial is refused.