Easter Term
[2017] UKPC 16
Privy Council Appeals No 0005 of 2015, 0008 of 2015 and 0010 of 2015

JUDGMENT

Sumodhee (No 3) (Appellant) *v* The State of Mauritius (Respondent) (Mauritius)
Sumodhee (No 3) (Appellant) *v* The State of Mauritius (Respondent) (Mauritius)
Keramuth (No 2) (Appellant) *v* The State of Mauritius (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Mance
Lord Kerr
Lord Wilson
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

22 May 2017

Heard on 7 March 2017

Appellant (KS)
Nandkishore Ramburn SC
Shaukatally Oozeer
Rama Valayden
Naushaad K Malleck
(Instructed by Omar I Bahemia)

Respondent
Satyajit Boolell SC, DPP
Sulakshna Beekarry-Sunassee
Medaven Armoogum
(Instructed by Royds Withy King)

Appellant (SIS)
Shameer Hussenbocus
Zaynab Mirasahib
(Instructed by Omar I Bahemia)

Appellant (ANK)
Shameer Hussenbocus
(Instructed by Omar I Bahemia)

LORD HUGHES:

1. The issue in this appeal against conviction is what entitlement an accused person has to the digital record of his trial. Leave to appeal to Her Majesty was granted only on this limited ground. The appellant defendants asserted a very large number of other grounds both before the Court of Criminal Appeal and upon application to the Board for leave. Those grounds were all rejected by the Court of Criminal Appeal and the Board refused leave to appeal them further.

2. The appellants were convicted in 2000 of a serious offence of arson causing death. Mob violence had erupted in Port Louis in May 1999 after a football match had concluded with a result which was disappointing to many supporters. The mob roamed through the streets and launched fire attacks by petrol bombs and other means on a number of target buildings. One of the attacks, on L'Amicale gaming club, resulted in some seven deaths. There was at the trial no dispute that the arson had been committed, and by many. The issue was whether the appellants were or were not proved to have been part of it. Their case was that they were not there at all. They advanced alibis suggesting that they were in different parts of Port Louis at the material time. The first two appellants, though not the third, called evidence in support of those alibis from relatives or friends. None of the appellants elected himself to give evidence.

3. The case against all three appellants was founded substantially on the evidence of an acquaintance, Azad Thupsee. He had at one stage repudiated his initial account of events which had implicated the appellants. He had been treated by the prosecution as a hostile witness at the preliminary enquiry, where he had contended that the earlier statement had been beaten out of him by the police. At the trial, his explanation for his inconsistent accounts was that he had been threatened by or on behalf of the appellants and required to exonerate them by making the complaint about the police which he did. Since he had initially been arrested on suspicion of participating in the attack, and had later been afforded immunity from prosecution either for the arson or for perjury, albeit only after he denounced his retraction, he was treated by the judge as potentially either an accomplice or someone who might have an axe of his own to grind. A second (unconnected) witness, Li Ting, implicated the third appellant and another co-defendant. He had not known them beforehand but gave evidence that he had recognised them as participants when he saw them amongst some nine defendants at the preliminary enquiry, and then at the trial.

4. After their trial, all three appellants lodged appeals against their convictions. Amongst some 34 grounds, the first two appellants complained as follows:

> "25. The learned judge's directions, his language and his inflammatory tone as may be gathered from the digital recording of his summing up to the jury were a clear invitation to them to believe Azad Thupsee's evidence and to convict the appellants. In fact he left them with no other choice."

An equivalent ground appeared in the appeal of the third appellant.

5. About three weeks before the expected date for the hearing of the appeals by the Court of Criminal Appeal, the appellants' solicitors wrote to the court to say that it was proposed to ask the court to listen to the digital recording of the summing up. By the same letter, the solicitors asked for a copy of that recording to be made available to them. The prosecution, when notified of the request, indicated that it would resist the application that the court should be required to listen to the recording. In consequence, the hearing date in October 2004 was given over to a contested application that it should do so. The court determined that there was no right to be supplied with a copy of the digital recording, that the ground for seeking it had not been laid, and that in the absence of any evidence justifying listening to it there was no basis on which the court should do so. It proceeded to hear the substantive grounds of appeal over three days in February 2005 and rejected them all in a substantial reasoned judgment. As indicated above, the attempt to pursue those grounds by way of further appeal to the Board has been refused, leaving only the issue of access to, and use of, the digital recording.

6. It follows that two questions arise. They must be kept distinct.

(i) does a convicted accused who wishes to consider an appeal against his conviction have a right to a copy of the digital recording of the summing up, or of any other part of the trial?

and

(ii) does an appellant have the right to insist that the Court of Criminal Appeal listen to such a recording at the hearing of his appeal?

What right is there to a copy of the digital recording?

7. The appellants found their claim to a copy of the recording on section 10 of the Constitution. Section 10 contains a variety of provisions designed to stipulate for the fair trial of criminal and civil issues. Section 10(1) provides, generally:

> "(1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established."

Section 10(3) goes on to provide:

> "(3) Where a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be specified by or under any law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court."

8. The Constitution was adopted in 1968. No doubt at that time criminal trials were not generally audio-recorded. The Board was told that nowadays they generally are in the Supreme Court, whilst there is usually no audio recording in the summary courts, and may or may not be such in the Intermediate Court.

9. Other legislation in the field demonstrates the development of court records. The Courts Act 1945 originally provided, by section 177(1), for the judge conducting a criminal trial in the Supreme Court to take down in writing the evidence given, and for the Master or Registrar to do so in a civil trial there. It went on to provide that if the judge (etc) became unable to take down the evidence, he could direct another person to do it. Those provisions are still extant. Later, in 1999, a new subsection (3) was added to section 177, which now states as follows:

> "(3) Notwithstanding subsection (1), the evidence and proceedings in any criminal or civil case before the Supreme Court may be recorded by tape or other technological means and the Judge may give such directions with regard to the recording of evidence and proceedings as he deems fit."

Meanwhile, adjacent sections of the Courts Act also deal with court records. By section 23, minutes of proceedings in the Supreme Court must be drawn up and, together with the notes of evidence taken under section 177 are to be preserved as records of the court. Section 24 (as amended in 1992) says as follows:

> "24. Shorthand notes

> In every case, civil or criminal, where the presiding judge so directs, the Master and Registrar or such other officer shall ensure that shorthand notes are taken of any proceedings before the Supreme Court, and a transcript of such notes shall be made if the presiding judge so directs, **and such transcript shall, for all purposes, be deemed prima facie to be the official record of such proceedings**." (Emphasis supplied)

10. There is equivalent provision in the Criminal Appeal Act 1954. Section 18 provides, as from time to time amended, most lately in 1994:

> "18. Shorthand notes of trial
>
> (1)(a) Shorthand notes may, if the judge so orders be taken of the proceedings at the trial of any person before the Supreme Court who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal, a transcript of the notes or any part of it shall be made if the Registrar so directs, and furnished to the Registrar for the use of the Court or any judge.
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> (b) Additionally, a transcript shall be furnished to any interested party upon the payment of such charges as may be fixed under the Court Fees Act."

Meanwhile, rule 18 of the Criminal Appeal Rules 1954 requires the Registrar, when he has received notice of appeal, to obtain from the trial judge a certified copy of the notes of evidence and of the proceedings. And by rule 26(8) "interested party" includes both the prosecution and a convicted person, whilst by rule 26(9) "proceedings at the trial" include the judge's summing up.

11. The contention of the Director of Public Prosecutions in this appeal is that these statutory provisions, and particularly section 24 of the Courts Act, make it clear that it is the transcript of the shorthand note (and/or the judge's notes of evidence) which is "the" official record of the proceedings in the court of trial. It follows, he submits, that that is the record of which an accused is entitled to a copy under section 10(3) of the Constitution. This contention succeeded in the Court of Appeal, which accordingly held that the appellants were not entitled as of right to a copy of the digital recording in addition to the transcript.

12. There is no reason to doubt that when section 24 of the Courts Act and section 18 of the Criminal Appeal Act were most recently amended in the 1990s the normal method of recording a Supreme Court trial was by shorthand note, from which a transcript would ordinarily be prepared for use in any appeal. But it does not follow that the assumption that that would be the method of recording, which underlay those statutory sections, forever limited or controlled the general rule contained in section 10(3) of the Constitution. First, the Constitution must prevail over the statutes, rather than the reverse. Second, the wording of section 10(3) is particularly clear and confers an entitlement to "any" record of the proceedings made by or on behalf of the court. A digital recording is clearly a record of the proceedings within that expression. Third, it is not possible to treat the two sections of the statutes as limiting the entitlement of the accused to a transcript of a shorthand note when, these days, there never has been a shorthand note. For a Supreme Court trial, the modern transcript is prepared from the digital recording, not from a shorthand note. Moreover, fourth, it is the digital recording which is the primary record; the transcript, though the indispensable working tool for any appellate court, is derivative. From this it follows that there is no basis on which section 10(3) can be construed as not applying to the digital recording. An accused is entitled, on payment of the cost of providing it, to a copy of the digital record of the trial.

13. Although the point does not, as a result, arise, the Board should record that it does not accept the subsidiary submission of the appellants that a right to a copy of the digital recording in any event is afforded by section 10(1) of the Constitution without the need for section 10(3). It cannot possibly be said that in every case a fair trial (and in particular a fair hearing of any appeal) requires the provision of a copy of the digital recording. A fair determination of an appeal <u>may</u> require such, but in most cases it will not.

Use of an audio-recording in the Court of Criminal Appeal

14. The mere fact that an accused has paid for a copy of the digital recording does not entitle him to insist that the court must devote time to listening to it. Ordinarily, there will be no occasion whatever to listen to it. What record of the trial is needed in the Court of Appeal depends entirely on the issues which arise in the appeal. Some appeals may need no record of the trial beyond the indictment and the verdict; that might be so, for example, of an appeal where the contention was that the indictment disclosed no known offence in law, or was impermissibly bad for duplicity. An appeal against sentence normally requires only a transcript of the sentencing remarks together with the antecedents of the accused and any reports upon him, but may sometimes call for the summing up (or occasionally for a particular part of the evidence) to see the factual basis for sentence. The majority of appeals challenging the direction to the jury will need a transcript of the summing up but will not normally need any record of the evidence. Some appeals will need transcripts of those parts of the evidence about which an issue arises. The management of appeals is for the court itself. It is perfectly entitled,

by direction communicated through its registrar, or if necessary in open court, to rule what record, if any, is needed.

15. If, unusually, the court is going to be asked to listen to an audio recording, it is fully entitled to insist that that request is justified by counsel on behalf of whichever party makes the request. The potential impact on the court's ability to dispose of the other cases in its busy list must be considered; it is unfair to those concerned in other cases not to do so. Generally, mere assertion that the recording is necessary will not be enough. Nor will a bare assertion that the judge's tone was unfortunate suffice. Particulars must be given. The court is entitled to expect that, unless there is a good reason why he cannot do so, counsel who was present at the trial will vouch by way of signature to the grounds of appeal, or by letter or otherwise, for the proposition that there is a properly arguable basis for complaint. Whether or not still instructed, it is part of his professional duty to the court to do so, and to do so only when the facts justify it. If the request is made, it is for the court to decide whether or not to accede to it. It will of course do so whenever it is genuinely necessary to resolve an issue arising on the appeal.

The present case

16. Given the time which has passed since this trial (albeit the responsibility of neither the court nor the prosecution) and because the recording had only lately been made available to the appellants, the Board took the view that it ought to hear the relevant passages of the recording. It was grateful to Mr Ramburn SC for identifying them and for making clear submissions upon each. It noted that the passages to which he took the Board represented a significantly different selection from those identified in his written case, and omitted most of the latter, but he was plainly correct to discard those he did. On inspection, the complaint that the judge had, in the discarded passages, bestowed approval on the arguments of the prosecution and implicit disapproval on those of the defendants was nothing whatever to do with the tone of the judge's voice. That complaint could be assessed perfectly well, indeed much better, from the transcript. Moreover it turned out that all the judge was doing was, wholly properly, reciting the arguments of each advocate.

17. As to the passages now relied on by Mr Ramburn, the Board was unable to detect any change of tone in the judge as between them and the rest of the summing up. His delivery was, as Mr Ramburn realistically accepted, consistent throughout. It was characteristically staccato, whether or not perhaps in part because he was not speaking in his first language the Board cannot judge, but there was nothing in it to convey improper pressure upon the jury or to remove from them the decisions which needed to be made about where the truth lay. Despite Mr Ramburn's careful submissions, the Board is completely satisfied that listening to the tape in this case added absolutely nothing of significance to reading the transcript. Indeed, such (very limited) argument

as there was for suggesting that the judge might have let slip too much of his own view of the evidence was more apparent from the transcript than it was from the recording. That argument proved, however, on examination, to be ill-founded. Overall, this was a carefully constructed summing up which contained everything which it needed to contain and was well balanced in its treatment of the evidence. The direction in relation to the key witness Thupsee was no exception. The judge correctly treated him as a witness who might have an axe of his own to grind. He correctly warned the jury of the wisdom of looking for corroboration of his evidence, and he was forthright and concise in telling them that there was none. He was, however, also correct in law to tell the jury that it was open to them to accept the evidence if sure, despite the absence of corroboration, that it was true. His summary of the evidence relating to the witness' previous inconsistent accounts was fair and objective. To take seriatim the complaints made in ground 25 of the original grounds of appeal (see para 4 above), there is no warrant whatever for the suggestion that the judge's language was "inflammatory", his summing up was in no sense "a clear indication" to the jury to believe Thupsee, and the assertion that he left the jury with no choice is quite without justification.

18. It follows that this appeal must be dismissed.

Case management and the role of counsel

19. The Board would not wish to leave this appeal without some observations upon some of the case management issues which, it is foreseeable, may ensue from its foregoing conclusion that section 10(3) affords the accused a right to a copy of the digital recording. It does so very conscious that case management is primarily for the local court, no doubt after suitable discussions with practitioners if directions of general application are contemplated. It offers these brief observations only in case, in their absence, it might be thought that it impliedly endorsed a contrary view.

20. It is a matter for the Court of Criminal Appeal how it goes about managing any request that it listen to a recording. It may well be a suitable matter for either a statement of practice or provision in the Rules. What is quite clear is that the court is entitled to insist, if it chooses to do so, on such a request being justified, and to refuse it unless it is justified. The Board would suggest, simply as a temporary measure unless and until the court decides on its practice, that counsel for an appellant who proposes to make such a request must take the responsibility for (1) notifying the court and all other parties in plenty of time before the hearing, say not less than six weeks, (2) identifying precisely the issue to which the recording is said to be relevant, and why that issue cannot be argued in the usual way on the transcript, normally by way of the professionally considered views of trial counsel, (3) specifying by reference to the time-count of the recording, cross-referenced to the page of transcript, the exact parts of the recording which the court is invited to hear and (4) ensuring, through liaison with the court, that

the necessary equipment for playing the recording will be available and a suitably experienced person on hand to operate it without delay or time-wasting.

21. It does not follow from section 10(3) of the Constitution that every accused will have any occasion to apply for such a copy. Indeed, it will only be rarely that he has. Ordinarily, counsel will be perfectly well able to advise upon whether there are properly arguable grounds of appeal, and to settle any notice of appeal, without an audio-recording. Counsel will need in future, as he does now, only a transcript of such parts of the proceedings as call for it. Likewise, the Court of Criminal Appeal will ordinarily expect to determine any appeal on the basis of a transcript, not of course of the whole trial, but of any part of it which the notice of appeal makes necessary. The funding of counsel's consideration of whether there are properly arguable grounds of appeal is a matter either for contractual arrangements between counsel and lay client, or, if legal aid is involved, for local rules as to grant. But the Board should make it clear that it would be perfectly reasonable for funders to insist upon any request for an audio recording, and for fees for time to examine it, being justified. A speculative request does not have to be granted.

22. In advancing notices of appeal, as in the conduct of trials, the professional duty of counsel lies both to his client and to the court. There ought to be no conflict between these duties, but it is axiomatic that the duty to the court is the overriding one. Part of the duty to the court is the duty not to advance grounds of appeal unless the point is properly arguable. There have been many statements of such principle, which is the common currency of criminal appeals although, fortunately, it only rarely needs emphasis. For example, in *R v Morson* (1976) 62 Cr App R 236 the Court of Appeal in London (Scarman and Geoffrey Lane LJJ and Willis J) had occasion to say this in dismissing the appeal against conviction, at pp 238-239:

> "[Counsel's] first point, and it is a very serious allegation indeed which ought not to be lightly made, was that the summing-up read as a whole was unfair, in that it was a direction to the jury to convict this man. This Court deplores the fact that that ground was included in the grounds of appeal and deplores the fact that it was maintained in argument. Of course the appellant is perfectly entitled to take any point that is open to him on appeal, and the mere fact that that argument without any justification at all, in the view of the Court, has been developed is not to be held to the discredit of the appellant. But we are sorry that counsel thought fit to develop it. We have read and re-read the short summing-up. Whatever flaws or blemishes it may or may not contain on such a specific issue as identification, a matter to which I shall come later, it is a travesty to describe the summing-up as a direction to convict. That general ground therefore fails.

> …
>
> Although I have already said what this Court thinks about the first and general ground, I will not leave this case without expressing the hope that the Bar will act responsibly before making in the grounds of appeal or in argument attacks of this general sweeping character upon a summing-up. If they be justified, it is the duty of the Bar to make them; if they be obviously unjustified, it is the duty of the Bar to refrain from making them."

23. The importance of this duty has nothing at all to do with avoiding occasioning irritation to the court. Judges must and do consider on their merits arguments properly advanced whether they turn out to be good, bad or indifferent. The importance of the duty lies in enabling the court to deal efficiently with the very large number of applications made to it, and to concentrate on those which raise properly arguable points. If the court is pre-occupied with hopeless points, possibly meritorious cases where there are properly arguable issues will be delayed at best and may not receive the time which they deserve. An appellate court needs to rely on the professional duty of counsel to avoid this. In a jurisdiction such as Mauritius, where there is no requirement for leave to appeal to the Court of Criminal Appeal, this professional duty is of especial importance if the work of that court is not to be diverted from consideration of possibly meritorious cases into time spent unjustifiably on the unarguable. Happily, the confidence in counsel which courts are able to repose is a major factor in the delivery of justice at all levels.

24. Counsel's responsibility to advance requests to the court to listen to audio recordings only when there is a genuinely arguable ground of appeal to which such recording is relevant, and his duty to abstain from simply speculative applications, is an example of this duty to the court. Indeed, whilst the Board has not had occasion to investigate the more than thirty grounds of appeal which the Court of Criminal Appeal rightly rejected in the present case, it cannot help but observe that some might, doubtless uncharacteristically, have come close to giving too little weight to this obligation. The court itself described as frivolous and vexatious a complaint about jury selection, made after counsel for the appellants had been given at the trial the specific opportunity to raise any matter which troubled them, and had declined to do so, leading counsel expressing himself perfectly content with the procedure adopted. Another example appears to be afforded by the contention that the conviction fell to be quashed because the judge had failed to direct the jury that the police were at fault in not investigating the assertions of alibi which the appellants advanced in interview. Since the alibi witnesses were all known to the appellants, most of them close relatives or friends, and were called at the trial where the appellants wished to call them, there appears never to have been any prospect that any deficiency in investigation by the police of the assertions of alibi, even if such were established, could have damaged the appellants or impacted unfairly upon their trial in any way. A third instance might well be the

assertion that the conviction should be quashed because the jury reached its verdicts after too short a retirement; that was equally consistent with a clear view having been taken on the central issue of the credibility of the two principal prosecution witnesses, whom the jury had had several days of trial to assess.