Hilary Term
[2020] UKPC 4
Privy Council Appeal No 0045 of 2015

JUDGMENT

Saunders (Appellant) *v* The Queen (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Carnwath
Lord Hodge
Lady Black
Lord Lloyd-Jones
Lady Arden

JUDGMENT GIVEN ON

27 January 2020

Heard on 27 November 2019

Appellant	*Respondent*
James Wood QC Richard Thomas (Instructed by Simons Muirhead & Burton LLP)	Rowan Pennington-Benton (Instructed by Charles Russell Speechlys LLP)

LORD LLOYD-JONES:

1. On 15 October 1996, following a trial before the Supreme Court of the Commonwealth of the Bahamas, the appellant, Melvin Saunders, was convicted by a majority (8-4) of the rape of the complainant on 22 June 1993. The appellant was acquitted of a further count of armed robbery which was alleged to have been committed during the rape. The appellant was sentenced to 14 years' imprisonment to be served consecutively to a term of imprisonment he was already serving.

2. On 16 October 1996 the appellant appealed against his conviction and sentence to the Court of Appeal of the Bahamas. The appeal was dismissed on 7 October 1997.

3. On 20 March 2015 the appellant, who was at that time unrepresented, submitted an application for leave to appeal against conviction dated 20 March 2015 to the Judicial Committee of the Privy Council. On 14 March 2018 permission to appeal was granted on limited grounds.

4. The complainant gave evidence at trial that on the 22 June 1993 she was grabbed in the street by a man who threatened her with a knife and dragged her into woods where he vaginally raped her. She did not look at him as he said he would kill her if she did. During the rape some of his sperm got onto her leg and the rapist used a tissue to wipe sperm from her legs and vagina. She was then bound and blindfolded, put in a car, taken to a beach where he orally and vaginally raped her. She was then driven back to a point close to where she had first been abducted where she was released. At no point did she see her attacker's face. She ran to the lobby of the resort where she was staying. The police were called and she and her husband went to the hospital.

5. The following morning the complainant had gone with police to the location of the first rape. A police officer found a tissue which he preserved as an exhibit. On 23 August 1993 samples were taken from the appellant with his consent.

6. At the trial Keith Howland, a special agent of the FBI, was called as an expert witness in the field of DNA analysis. He gave a detailed explanation of DNA analysis and profiling. He explained that in this particular case he looked at four separate locations out of the DNA in the cell samples. He explained that "These DNA tests that I spoke of to you do not result in an absolute identification". He explained that whilst only identical twins would have the same DNA, other persons closely related such as siblings may have "similar profiles" such that "for one, two, or three of the four genetic

loci tested, two brothers might have the same profile and it wouldn't be until you get to the fourth one that you would see the difference".

7. Mr Howland's evidence was that he was able to identify two different DNA profiles from the tissue; one relating to the complainant and one relating to the appellant. He explained:

> "The DNA match that I declared between … the tissue and the … blood sample from Melvin Saunders, the probability of selecting another individual selected at random in the black population is less than one in 100 million… [and] in the white population is also less than one in 100 million. And in the Hispanic population it is less than one in 18 million".

No statistical result was given in relation to the complainant.

8. In cross examination Mr Howland explained that there was a possibility of the stain not coming from the appellant. In answer to questions by the defendant's counsel, Mr Bradley Cooper, whether he might find another person with the same DNA profile from the black race, he said he would have to sample more than 100 million individuals before he might find a match. In response to questions from the jury Mr Howland explained that only identical twins would have the same DNA and that even if brothers shared the same DNA, after testing four locations he could test further locations and there would be a difference.

9. This appeal comes before the Board in very unsatisfactory circumstances. The appellant was convicted in October 1996. The history is incomplete and, at this late date, it is not surprising that it is often undocumented. In many respects it is not possible to confirm from contemporary records the accuracy of the account which is now provided by the appellant. The solicitors now acting for the appellant have informed the court by letter dated 25 November 2019 that enquiries have been made of counsel previously instructed on behalf of the appellant. However, Mr Wayne Munroe QC has advised that he is no longer in possession of the appellant's file and Mr Bradley Cooper has not responded to the requests. We have, however, been greatly assisted at the hearing of the appeal by the appellant's counsel who have acted pro bono. We are grateful to all counsel for their submissions.

10. The appellant's original proposed grounds of appeal to the Judicial Committee of the Privy Council included a complaint about the constitutionality of the committal proceedings. Permission to appeal was refused on this ground. For convenience we have renumbered the grounds on which permission was granted.

Ground 1: The failure to provide to the defence samples for independent analysis

11. The appellant contends that, despite requests from the defence, there was a failure to provide samples which would have permitted the defence to obtain an independent analysis of the DNA evidence. It is clear that the DNA evidence was critical to the outcome of the trial. It linked both the appellant and the complainant to the tissue which was found at the scene.

12. In the grounds of appeal the appellant states that during the course of the preliminary inquiry he requested samples of the relevant material evidence and, the Magistrate agreeing to his request, the prosecution was instructed to ensure that access to the relevant exhibits was provided to him. The appellant repeats this claim in an affidavit sworn on 30 October 2019. Support for this claim is to be found in an entry in the Magistrate's Court log:

> "27/3/95 … Adj[ourned] to 3/5/95-fpo [for the purpose of] mention samples. D further remanded."

It is not known whether the further hearing in fact took place on 3 May 1995.

13. In his affidavit the appellant states that after his committal Mr Wayne Munroe QC briefly assisted him with the matter. He states:

> "Prior to my arraignment, I understand Mr Munroe made an application to the Attorney General's office in relation to the DNA samples."

This refers to late 1995 or January 1996 when the appellant was arraigned. Thereafter the appellant appeared at the Supreme Court in connection with this charge in February 1996, 1 April 1996, 1 July 1996 and 27 September 1996. It seems that the trial was set for 7 October 1996 on three working days' notice.

14. At the opening of the trial on 7 October 1996 the appellant, who was at that time unrepresented, challenged the legality of his committal. The transcript of this submission by the appellant includes a reference to the Magistrate's Court log:

> "I had also, as seen on page two of the charge sheet, made a request to be provided with certain samples for defensive purposes."

The challenge to the legality of the committal was dismissed. The appellant then explained that he had not taken steps to instruct counsel to represent him at the trial until that issue had been resolved. The judge refused the application for an adjournment of the trial.

15. On 8 October 1996 Mr Munroe appeared on a limited brief to submit on behalf of the appellant that he had not had adequate time or facilities to prepare his defence. He submitted that three working days was inadequate time to prepare the case and engage counsel. However, Mr Munroe did not refer to any failure to produce exhibits for DNA testing by the defence. The judge refused an adjournment. He considered that the appellant had been given ample time to prepare his defence. He had not been deprived of an opportunity to engage counsel and was not taken by surprise.

16. Mr Munroe then withdrew and the trial started with the appellant representing himself. It began with the evidence of the complainant and her husband. Mr Bradley Cooper was then instructed on behalf of the appellant and he took part in the proceedings from 3:20pm on 8 October 1996. On 9 October 1996 Mr Howland, the expert called by the prosecution, gave his evidence. He was cross examined by Mr Cooper who questioned him as to the likelihood of finding another person with the same DNA sample and the possibility of contamination or deterioration of the samples sent for testing. Subsequently, police officers were cross examined by Mr Cooper as to the custody of the tissue with the stains on it.

17. The appellant gave evidence and also called witnesses in support of his alibi defence. On 15 October 1996 the appellant was convicted and sentenced to 14 years imprisonment, that term to be consecutive to a sentence he was already serving.

18. On 16 October 1996 the appellant lodged an appeal against conviction and sentence in the Court of Appeal. The grounds simply stated that under all the circumstances of the case the conviction was unsafe and unsatisfactory and that there were wrong decisions and misdirections on questions of law and fact. The appellant also asked that he be allowed to present additional grounds when he had been provided with a copy of the transcript. No additional grounds are before us on this appeal. On 7 October 1997 the Court of Appeal dismissed the appeals and confirmed the conviction and sentence without giving any reasons.

19. In February 2016 the appellant applied to the Court of Appeal to vary the sentence imposed in 1996 on the ground that his time spent on remand had not been taken into account. The appeal was dismissed and the sentence affirmed.

20. This history shows that it may well be that an application was made for samples to be provided so that DNA testing could be carried out on behalf of the defence. However, it is clear that any such application was not pursued.

(1) It would have been necessary for the defence to instruct an expert and for arrangements to have been made for the transfer of the samples for testing. There is no record of that having taken place, despite the fact that according to the appellant the Magistrate instructed the prosecution to make the samples available.

(2) Between committal for trial on 27 March 1995 and the date fixed for trial 7 October 1996, there was a period of some 18 months during which nothing seems to have been done to obtain samples for testing other than Mr Munroe's application to the Attorney General's office in late 1995 or January 1996. Despite a number of hearings in this matter in January 1996, February 1996, 1 April 1996, 1 July 1996 and 27 September 1996 this matter had still not been pursued.

(3) The brief reference made by the appellant on 7 October 1996 to a request for samples having been made at the preliminary hearing, was merely a passing reference. The appellant was not saying that the matter could not go to trial because he had not yet been provided with the samples. It is incredible that the appellant, who appears from the transcripts to be capable and articulate, would not have done more to draw to the judge's attention on that occasion the fact that the prosecution had failed to provide access to exhibits for DNA testing, if the defence was still pursuing that request.

(4) The failure of Mr Munroe on 8 October 1996 to complain of a failure to produce exhibits for testing by the defence is particularly telling. On the appellant's account, Mr Munroe was aware of an outstanding request for the samples to be provided for testing as he had applied to the Attorney General's office in relation to that matter. Yet, when instructed to seek an adjournment Mr Munroe limited his submissions to the lack of time to enable counsel to prepare the case for trial because of the short notice. If there had been at that date an outstanding application for the provision of samples or if there had been failure to comply with an order for the provision of samples, it would have been a powerful ground on which to apply for an adjournment.

(5) Mr Cooper cross examined Mr Howland on his expert evidence on 9 October 1996. His cross examination of Mr Howland addressed questions of probability and the possibility of contamination or deterioration of the samples. Mr Cooper had, of course, only been instructed in the case the previous day. This was an entirely competent cross examination.

(6) It is incredible that none of his counsel would have pursued this matter had the appellant wished them to do so. If there had been a serious intention to obtain an expert report to rebut the prosecution evidence on DNA, the matter would not have been left in the way it clearly was. We note that no criticism is made of any of the counsel in the case.

(7) In the absence of further information in relation to the original appeal, this cannot cast any light on the present issue. However, it has not been suggested before us that this was a ground of appeal in 1996.

21. In all the circumstances, the Board has come to the clear conclusion that any application for samples for the purposes of obtaining expert DNA evidence was not pursued. This is not a case in which the defendant has been denied the opportunity to obtain expert evidence.

22. It has been submitted on behalf of the respondent that it should not be assumed that it would have assisted the appellant if the request for samples had been made and granted. The Board is not willing to speculate as to whether any deliberate decision was taken not to pursue this matter or the grounds on which such a decision might have been reached. However, the Board is satisfied that, even if a request was made for samples to be made available, that request was not pursued by the appellant or his legal advisors and that, some 23 years after the event, it is far too late now to rely on any resulting lack of evidence.

23. Contrary to the submission of Mr Wood, we are not here concerned with a case of non-disclosure. There was a full hearing at the preliminary inquiry in the Magistrate's Court. The log shows that all of the prosecution witnesses were called and cross examined. In particular, Mr Howland, the prosecution expert, was called and subjected to cross examination. It appears that he produced in court his expert report and the auto-radiographs to which his evidence referred. The appellant was legally represented during at least a part of the preliminary inquiry. (In his submissions to the Supreme Court on 7 October 1996 the appellant referred to "my lawyer's case submission".) As a result, the defence was made well aware 18 months before trial of the expert evidence to be deployed by the prosecution.

24. This is not, therefore, a case in which the prosecution has withheld evidence which might have assisted the defence of which the defence was unaware. On the contrary the existence of the exhibits, the DNA samples, the expert's analysis and the conclusions which he drew were all disclosed to the defence. The question is, rather, whether the defence was prevented from obtaining its own expert report. The Board is satisfied that it was not. The matter was simply not pursued by the defence.

Ground 2: Failure of the trial judge to withdraw the case from the jury

25. This ground has been abandoned.

Ground 3: Misdirection on standard of proof

26. The transcript of the judge's summing up to the jury attributes to him the following statement:

> "As I said earlier, the standard of proof is not beyond a reasonable doubt …"

It seems improbable that this is an accurate record of what was actually said. However, even if it is, when it is considered in its context the statement cannot possibly have misled the jury as to what is the required standard of proof. In other passages, both before and immediately after this statement, the judge directed the jury in the clearest terms that the standard of proof is that they must be satisfied of the defendant's guilt beyond a reasonable doubt.

Ground 4: Defective direction on corroboration

27. The appellant here refers to the centrality of the DNA evidence which was emphasised by the judge when he observed in his summing up that it is "the most important piece of corroborative evidence in this case". The appellant submits that the error concerning the burden of proof will have tended to confuse the approach to be adopted by the jury to the DNA evidence as corroboration and the weight to be given to it.

28. There was no material misdirection on the standard of proof. (See Ground 3 above.) Moreover, there was ample corroboration of this allegation of a sexual offence. So far as the actus reus is concerned, the complainant's own account included reference to the use of a tissue, there was evidence of the complainant's distress and condition following the alleged rape, and there was evidence of the discovery of the tissue and the presence of stains on the tissue. So far as the involvement of the accused is concerned, the complainant's account of the events included reference to the use of a tissue, there was evidence of the discovery of the tissue and there was expert evidence of the presence of the complainant's and the appellant's DNA on the tissue.

Ground 5: Circumstantial evidence

29. This ground was not developed in oral submissions. The Board considers that the judge's direction on circumstantial evidence was appropriate and fair.

Ground 6: Fairness of the summing up

30. On behalf of the appellant Mr Wood submits that the judge deployed the DNA evidence in his summing up in a manner that was "the stuff of advocacy" such as to compel the jury to what was plainly his view and that, accordingly, the appellant was denied the substance of a fair trial. In the Board's view the judge's reference to the DNA evidence as "damning" was unfortunate. Moreover, his repetition of the statistic that the probability of selecting another individual in the black population with the same DNA as the appellant was less than one in 100 million was unnecessary. Mr Wood criticises in particular the judge's statement that the jury should consider whether the DNA evidence "implicates the accused as the person who committed the act of rape remembering that it is one in more than a hundred million people who would have had to be in Nassau at the material time". In the Board's view, this statement could not have misled the jury, not least because it had been clearly accepted by Mr Howland in response to a question from the jury that the one in more than 100 million might be found in the first sample to be checked. The judge had given an entirely appropriate direction that matters of fact were for decision by the jury and that they need not accept any opinion expressed by the judge. In the circumstances, these features of the summing up do not cause the Board to doubt the safety of the conviction.

Conclusion

31. For these reasons the Board will humbly advise Her Majesty that the appellant's appeal should be dismissed.

32. Finally, the Board draws attention to the desirability and importance of the provision of public funding to impecunious defendants who face grave criminal charges in circumstances where complex issues of scientific expert evidence arise.