[2023] UKPC 18
Privy Council Appeal No 0010 of 2019

JUDGMENT

Vinson Ariste (Appellant) *v* The King (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Lloyd-Jones
Lord Kitchin
Lord Hamblen
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON
31 May 2023

Heard on 28 March 2023

Appellant
Paul Bowen KC
Emma Mockford
Jagoda Klimowicz
Krysta A Mason Smith
(Instructed by Simons Muirhead Burton LLP)

Respondent
Rowan Pennington-Benton
(Instructed by Charles Russell Speechlys LLP (London))

LORD KITCHIN AND LORD BURROWS:

1. Introduction and factual background

1. On 16 July 2010, Andrea Donaldson was robbed at gunpoint by a number of men. The appellant, Vinson Ariste, who was aged 20 at the time, was arrested by the police at his home on 21 July 2010. It appears that the police were looking for his brother but, on finding that the brother was not at home and that his whereabouts were unknown, arrested the appellant instead. The appellant was detained in police custody between 21 and 27 July 2010. Between 22 and 25 July 2010, he confessed, during police interviews, to a number of offences including the robbery of Ms Donaldson. His confessions covered at least six offences or sets of offences, apart from the robbery of Ms Donaldson, including murder. At the time, he had no previous convictions and, apart from his confession, there was no other evidence linking him to the robbery of Ms Donaldson (or, it would appear, to any of the other offences which he admitted).

2. No audio or video recording was made of the interviews conducted by the police. But if the record of the interview in which the appellant confessed to the robbery of Ms Donaldson read out at his trial is to be believed, he volunteered a full account of his participation in this offence purely of his own accord without any encouragement and without being confronted with any evidence implicating him in the robbery. The respondent has not suggested any motive for this unusual act of self-sacrifice.

3. The appellant alleges that the confession was untrue and was not made voluntarily but was made by him as a result of being beaten and suffocated with a bag and water by the police (and impliedly he makes the same allegation about the other confessions). When he arrived in police custody, the detention record stated that the appellant appeared well and in good health. When he was transferred to prison on 27 July 2010, the prison doctor recorded that he had a number of injuries including a temporal abrasion, multiple handcuff abrasions, a skin avulsion on the left wrist, bruising of the buttocks, and a 6cm abrasion or ulcer on his right buttock. The doctor also records that the appellant told him that he had been beaten by the police on his arrest on 21 July 2010.

4. The appellant had no legal representation at the time of his detention. He alleges that he had asked for a lawyer and the police officers had beaten him and told him that he did not need a lawyer. At the trial in March 2012, the appellant again had no legal representation. He alleges that he asked for the court to appoint a lawyer for him but that that request was refused by the judge.

5. The judge, after a voir dire but without giving any reasons, decided that the confession was admissible. On the basis of the confession the appellant was found guilty by the jury of the armed robbery and, on 5 June 2012, he was sentenced to 15 years imprisonment. In a very short judgment, his appeal against conviction was dismissed by the Court of Appeal on 18 February 2013. Permission to appeal was granted by the Board on 31 March 2021.

6. The appellant contends that, on the grounds of appeal set out below, his appeal against conviction should be allowed, applying section 13(1) of the Court of Appeal Act 2006 (see para 8 below), because his conviction is unsafe or unsatisfactory; or because there has here been a wrong decision or misdirection by the judge on a question of law or fact; or that he did not receive a fair trial. He also contends that the proviso under section 13(1) does not apply because there has been a serious miscarriage of justice. His grounds of appeal are:

(i) Ground 1: the lack of legal representation at the time of his original detention and questioning was a breach of his rights under Articles 19(2), 20(1) and 20(2)(d) of the Constitution of the Commonwealth of the Bahamas.

(ii) Ground 2: his lack of legal representation at the time of the trial breached his right to a fair trial.

(iii) Ground 3: the judge with conduct of the trial erred in finding, beyond reasonable doubt, that the appellant's confession had not been obtained by oppression and could therefore be admitted.

(iv) Ground 4: inadequate directions were given to the jury by the trial judge in relation to the confession and evidence going to the appellant's character.

7. It is convenient to deal initially with the grounds of appeal relating to the confession (that is to say, grounds 3 and 4). It is only if those grounds fail that it will be necessary to go on to consider grounds 1 and 2.

2. The statutory test to be applied in deciding whether to allow an appeal against a criminal conviction

8. Section 13(1) of the Court of Appeal Act 2006 lays down the alternative tests that are to be applied by the Court of Appeal (and, at one stage removed, by the

Board) in deciding whether to allow an appeal against conviction. That section reads as follows:

> "**13. Determination of criminal appeals**
>
> (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."

9. The appellant here invokes section 13(1)(a), (c) and (e) and submits that there has been a serious miscarriage of justice so that the proviso does not apply.

3. The statutory provision on the admissibility of confession evidence

10. The relevant statutory provision in respect of the admissibility of confession evidence is section 20 of the Evidence Act 1996. This reads, so far as relevant:

> "**20. Admissibility of confessions**
>
> (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any fact in issue in the proceedings and is not excluded by the court in pursuance of this section.
>
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession —
>
> (a) was or may have been obtained by oppression of the person who made it; or
>
> (b) is rendered unreliable by reason of anything said or done or omitted to be said or done in the circumstances existing at the time,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.
>
> (3) …
>
> (4) …
>
> (5) In this Act —
>
> 'confession' includes any statement wholly or partly adverse to the person who made it, whether made to a

person in authority or not and whether made in words or otherwise;

'oppression' includes torture, inhuman or degrading treatment, and the use of threat of violence (whether or not amounting to torture)."

4. The evidence and decision on the voir dire (trial within a trial) as to the admissibility of the confession

11. In relation to ground 3, the crucial decision to admit the appellant's confession in evidence against him was taken after a voir dire. That voir dire was heard by the trial judge, Turner J, at the start of the trial in the absence of the jury on 6-7 March 2012. The appellant was not legally represented. Four police officers, namely Constable Benson Miller, Constable Kimeo Patrico Smith, Constable Dion Marcus Ranger and Detective Sergeant Michael Anthony Johnson gave evidence. All of the police officers denied that the appellant had been subjected to any ill-treatment. Detective Sergeant Johnson's evidence was that the appellant had told him that the bruise to the right side of his face had been caused by a rock that was thrown at him. He said he did not observe any injuries to the appellant's wrists. Officer Ranger's evidence was that he observed the appellant to have a scratch on the side of his face and that the appellant had told him that this was caused as a result of being struck to the face with a rock prior to him being arrested. He also gave evidence that the appellant had been in a car accident following a police pursuit. It was accepted at the voir dire by the doctor, Dr Johnson, who examined the appellant on 28 July 2010, that the appellant's injuries could have been caused by this alleged accident.

12. The appellant in cross-examination raised with two of the officers (Miller and Ranger), and they did not dispute this, that, although they claimed that he had injuries including to his face when he came into the police station, there was no record of any injuries in the police detention record.

13. The appellant gave evidence that the police had beaten him with a cutlass and a baseball bat and had also suffocated him with a bag and water. It was as a result of this violence that he gave his confession telling them what they required him to say.

14. Dr Johnson, the prison doctor, gave evidence that he examined the appellant on 28 July 2010 following his transfer to prison on 27 July 2010. Dr Johnson noted that the appellant told him he had been beaten by the police on his arrest on 21 July

2010. He had a temporal abrasion, multiple handcuff abrasions, a large 6cm abrasion or ulcer on his right buttock, an avulsion (skin tear) on his left wrist and pain in his left knee. Although not mentioned in his evidence at trial, the doctor's contemporaneous notes also mentioned bruising to his buttocks. Dr Johnson estimated that the temporal abrasion and injury to the right buttock were "from two week or three weeks old" or "about two to three weeks old", but could only give an estimate to "within two or three days". The wrist injury was most likely caused by handcuffs, including plausibly that it happened while the appellant was "trying to stop something".

15. On 8 March 2012, Turner J gave his decision on the voir dire. In ruling that the confession was admissible, he said:

> "For the reasons provided in the written decision which will be provided later on today, I find the alleged statements contained in the record of interview to be voluntarily given and admissible in evidence."

16. However, there is no record of any written reasons having been handed down by Turner J later that day or ever. A request was made by the appellant's lawyers for those reasons but they have not been forthcoming. The Board therefore does not know, and the Court of Appeal did not know, on what grounds Turner J decided that the confession was admissible.

5. The trial judge's legal direction to the jury on confession evidence

17. In relation to Ground 4, although the trial judge, Turner J, gave no legal direction to the jury as to the appellant's good character, he did make clear to the jury (more than once) that the only evidence linking the appellant to the offence was the confession and he did give the standard legal directions on confession evidence. So he said the following:

> "Now, in respect of admissions or confessions, it is your job to decide two issues in relation to these matters. First, you must decide whether the confessions or admissions were actually made by the accused. Second, and only if you find that he made them, you must then consider whether they are true or not. Now, in determining that, you should take into account all of the circumstances in which you find that the confessions may have been made, having regard to the

> allegations by the accused that he was beaten and threatened to make the statement, and also the denials by the police officers that they used any such force or any force at all in respect of the record of interview and the things which were recorded in the record. If you are not sure for whatever reason that the admission was made and that it is true, then you must disregard it. … As I have said, if you have any doubt, any reasonable doubt as to whether the admission was made and that it is true, then you must disregard it.
>
> Further, if you think that the admission was or may have been obtained by oppression, that is to say, by the use of force or threats of harm in the manner suggested to the police officers by the accused person in his cross-examination of them, or in the manner as he described in his own evidence before you, then you should put the admission aside and place no reliance on it. And if you do that, you will then be obliged to acquit the accused, because as I have indicated, the case for the prosecution stands and falls on the record of interview."

6. The judgment of the Court of Appeal

18. The Court of Appeal dealt in very short measure with the appeal which, it would appear, was solely on what is now Ground 3. It is helpful to set out the full judgment of the Court of Appeal, dated 18 February 2013, which was given orally by the President, Allen P, with whom John and Adderley JJA agreed:

> "Having looked at the transcript and having heard counsel for the appellant this morning, we are satisfied that the learned judge was correct in admitting the record of interview.
>
> In our view, having accepted the evidence [of] the witnesses for the prosecution and, after hearing the incredible story of beating, and the evidence of the doctor that the injury to the head and buttocks were two to three weeks old (which would mean that they were inflicted prior to his coming into police custody); and his evidence that the injuries could possibly have been caused by a car

> accident (of which there was evidence); that it was reasonable for the judge to determine in all the circumstances that the prosecution had proven beyond a reasonable doubt that the record of interview was not obtained by oppression and that there was nothing done or omitted to be done to make it unreliable.
>
> On the evidence, in our view, it was properly admitted and we dismiss the appeal and affirm the conviction and sentence."

7. Difficulties with the trial judge's ruling on the voir dire

19. It is a very serious problem that, despite having stated that he would be doing so (see para 15 above), Turner J did not provide any reasons for his ruling on the voir dire to admit the confession evidence.

20. There are three matters in particular that should have been obvious to the trial judge at the time of the voir dire and that should have been troubling him about the voluntariness of the confession.

21. The first is that the appellant was not legally represented at the police station. Although the evidence of Officer Ranger at the voir dire was that he was advised of his rights to a lawyer and responded "I straight. Y'all done get me", the appellant's evidence at the voir dire was that he had asked for a lawyer and the officers had beaten him and told him that he did not need a lawyer. This is consistent with the fact that he had not signed the relevant section of the detention record informing him of his right to have a lawyer.

22. Secondly, there was no record of any injuries in the police detention record on his arrival at the police station even though at least the temporal abrasion to his face must, on the account given by the police officers, have been visible. On the contrary, the detention record records that on arrival at the police station, "he appeared well" and was in "good health". Further statements that the appellant "appeared well" occur frequently in the detention record without a single reference at any point to any mark or injury on his body.

23. Thirdly, and most importantly, there is the inherent improbability that during a period of detention (between 22 July 2010 and 25 July 2010) the appellant would

voluntarily confess, without a lawyer, to at least six offences or groups of offences, including murder, for which there was no independent evidence.

24. The Board is conscious of the advantage that Turner J had over both the Court of Appeal and the Board in seeing and hearing the witnesses at the voir dire. But without any reasons for his decision, the Board is unable to conclude that Turner J took into account the three troubling matters that we have referred to. Had he done so, it is difficult to see how he could rationally have concluded that the prosecution had proved beyond reasonable doubt that the confession was not obtained by beating. It is well-established that a failure to consider relevant evidence in making a finding of fact constitutes an error which justifies an appellate court setting aside the finding of fact: see, eg, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, at para 67. Similarly in its short and, with respect, cursory judgment, the Court of Appeal did not refer to any of those three matters so that its decision to uphold Turner J was also a wrong decision on a question of law or fact.

25. The conclusion that the confession evidence should not have been admitted at the voir dire stage is sufficient in itself for the Board to allow this appeal applying section 13(1)(c) of the Court of Appeal Act 2006 (see para 8 above). The proviso is inapplicable because the Board does not consider that "no miscarriage of justice has actually occurred". But there are other matters to which the Board will now turn that are relevant to grounds 3 and 4 and which further support allowing this appeal on the basis that the verdict is unsafe and unsatisfactory applying section 13(1)(a) of the Court of Appeal Act 2006.

8. Four additional significant factors

26. There are four additional significant factors that support a decision that the conviction must be regarded as, in all the circumstances of the case, unsafe and unsatisfactory.

(1) Dr Johnson's evidence at trial

27. A very important point emerged from the evidence given at the trial which meant that, even if, contrary to the Board's view, the judge was correct to have admitted the confession after the voir dire, he should have directed the jury more clearly to be extremely cautious before placing any weight on it. This was that, in his oral evidence to the jury at trial, Dr Johnson said the temporal injury had occurred "in a week or two weeks prior to me seeing him". This contradicted what he had said at the voir dire (see para 14 above) and crucially meant that the appellant's evidence

that he received the facial injury at the hands of the police in detention was consistent with the doctor's evidence. Although Turner J correctly drew the jury's attention to this apparent discrepancy in the doctor's evidence at two stages of his summing up, this change of evidence from the voir dire did not lead him to modify, by bolstering, the standard direction to the jury in respect of confession evidence. Indeed, it is arguable that, given the importance of the timing aspect of the doctor's evidence on the voir dire, he should have discharged the jury. In this respect, it is also significant that the trial judge did not expressly draw to the jury's attention, in the context of considering the voluntariness of the confession, the three troubling matters referred to in paras 20 – 23 above (although there was a brief mention of the detention record point; and the judge would need to have been careful to avoid referring the jury to other potential crimes). Even if one might hesitate to describe the giving of the standard direction on confession evidence as a misdirection, the trial judge's failure to make clear the need for extreme caution before placing weight on the confession evidence can be taken into account as a significant factor in assessing the safety of the conviction.

28. It is also important that, although the inconsistency of Dr Johnson's evidence was referred to during the appeal to the Court of Appeal, it was not mentioned in the judgment of Allen P. In considering the overall safety of the conviction, it should have been adverted to, and carefully considered, by the Court of Appeal - not least because the prosecution had offered no alternative explanation for how the appellant might have suffered multiple handcuff abrasions and bruising on his buttocks.

(2) No legal representation at trial

29. The appellant was not legally represented at the trial (including the voir dire). There is a dispute between the parties as to how this came about. Affidavits from the appellant and, in reply, from prosecuting counsel at the trial, have been put before the Board. The appellant says that his counsel withdrew shortly before the trial and that, although he asked for the court to appoint a lawyer for him, that was refused by the judge. This is contradicted by an affidavit from prosecuting counsel at the trial, who recalls that it was the appellant who insisted that he wanted to proceed, without counsel, so as to avoid an adjournment. The Board cannot at this stage resolve this factual dispute: there may or may not have been a valid waiver of the right to legal representation by the appellant. But whether there was a waiver or not, the Board is entitled to take into account as a significant factor in assessing the safety of the conviction, the undisputed fact that the appellant was not legally represented at trial.

(3) No good character direction

30. The trial judge omitted to give a good character direction to the jury. As the appellant had no previous convictions, this was a serious omission not least as the only evidence against him was the confession. Indeed, it is strongly arguable that in this case that omission in itself would have been a good reason for allowing the appeal. At the very least, it is a significant factor for the Board to take into account in assessing the safety of the conviction.

(4) The subsequent decision of Isaacs J

31. In August 2016, a further prosecution for a different robbery was brought against the appellant on the basis of another alleged confession made by him during the same period from 22-25 July 2010. As in the trial with which we are concerned, the appellant's case was that he had been beaten and tortured and a voir dire was conducted by the judge, Isaacs J. On this occasion, the appellant was legally represented. Having heard the evidence, Isaacs J rejected the prosecution's case that the confession had been voluntary. The judge's view was that the Crown had not established beyond a reasonable doubt that the record of interview and confession statement were given voluntarily. The judge accordingly ruled the confession inadmissible and directed the appellant's acquittal, there being no other evidence linking him to the crime. It is instructive to set out Isaacs J's oral ruling and reasoning on the voir dire. He said:

> "The prosecution has offered what it terms as a confession case. The meaning of which, that there is no other evidence save for the words of the defendant, during the recording of the record of interview and caution statement.
>
> The defendant was brought into the police station and appeared in good health on the date, 21 July 2010. By the time he arrived at the prison, he had an ulcerated wrist and bruised buttocks, which required antibiotics. Both of his injuries, the defendant said, was while in custody.
>
> The Crown offered a theory to say that these were caused during an altercation. The Crown suggests that an injury to the side of the defendant's face, occurred as he said, when he was hit by a rock during an altercation. The defendant claims that he said whatever the police wanted him to say.

> The Crown offered by way of explanation that there is no mention of the bruise to the defendant's face on the detention record, because Officer Miller would only record a fresh injury, and this one was healing. That, however, does not explain the other injuries of the evidence of Dr Johnson. Relative to that, the other injuries have not been explained adequately by the Crown.
>
> I do not accept that the wrist injury was self-inflicted, and there was no evidence that the defendant was hit on his bottom because of a fight. As described by him, with a bat to his buttocks while stretched out on a table.
>
> In the circumstances, the Crown has not established beyond a reasonable doubt, that the record of interview and confession statement was given voluntarily. Both documents are inadmissible and will not be presented to the jury as evidence."

32. Without knowing the full background to Isaacs J's decision and given that one is here dealing with two different courts rather than two decisions being given by the same court, the Board does not accede to counsel for the appellant's submission that this was an example of an inconsistent verdict. Nevertheless, the ruling of Isaacs J casts further doubt on the decision of Turner J on the voir dire in this case. Even allowing for the possibility of some differences in the evidence presented, it would appear merely from examining Isaacs J's decision set out above that the essence of the evidence and the cases put by the appellant and the prosecution were very similar. The contrast in the decisions reached is stark. At the very least, the Board is entitled to take this contrasting decision into account as a factor undermining the safety of the conviction.

33. The Board also notes that, following on Isaacs J's decision, the Director of Public Prosecutions has entered a *nolle prosequi* in all the other (six) cases bar one (which is the murder charge).

(5) Conclusion on the four additional significant factors

34. The Board concludes that these four additional significant factors support the view that in all the circumstances of this case the verdict is unsafe and unsatisfactory.

9. Overall conclusions

35. In relation to Grounds 3 and 4, the Board's conclusions are as follows:

(i) The trial judge made an incorrect decision on a question of law or fact in admitting the confession after the voir dire. This is sufficient in itself for the Board to allow this appeal applying section 13(1)(c) of the Court of Appeal Act 2006 (see para 8 above). The proviso is inapplicable because the Board does not consider that "no miscarriage of justice has actually occurred".

(ii) In any event, there are four additional significant factors which mean that, in all the circumstances of the case, the verdict is unsafe and unsatisfactory so that the appeal should be allowed applying section 13(1)(a) of the Court of Appeal Act 2006 (and the proviso is here inapplicable).

(iii) The Court of Appeal was therefore incorrect to have dismissed the appeal and the appeal to the Board should be allowed. The conviction should therefore be quashed.

36. It follows that the Board does not need to consider Grounds 1 and 2 and prefers to say nothing about them.

37. We cannot conclude this judgment without expressing the Board's deep concern about what has happened in this case. A young man has been languishing in prison for over 12 years on the basis of a confession that should never have been admitted in evidence against him.

38. For all these reasons, the Board will humbly advise His Majesty that the appeal should be allowed and the conviction quashed.