CRIMINAL APPEAL 2004: NO. 21 & 22

BETWEEN:

MAATKARI TAMERRY &
AMENEMHET TAMERRY

Appellant

-and-

THE QUEEN

Respondent

Before: Hon. Justice Edward Zacca, President
Hon. Justice Nazareth, JA
Hon. Justice Murray Stuart-Smith J.A.

Date of Hearing: 19, 20, 21, 22, March 2007
Date of Judgment: 26 June 2007

JUDGMENT

PRESIDENT:

The appellants were charged on an Indictment for the offence of manslaughter of their daughter A-Mya who was born on May 1, 2000. The baby died on March 1, 2001 some ten months later.

It was the Crown's Case that the death of the child was due to gross neglect and a failure to provide it with the necessaries of life. After a long trial both appellants were convicted of manslaughter by a unanimous verdict of the jury on September 27, 2004. Appellant Maatkari Tamerry (Mrs. Tamerry) was sentenced to a term of imprisonment for one year to be followed by three years probation

and appellant Amenembet Tamerry (Dr. Tamerry) was sentenced to a term of imprisonment for five years. Both appellants appealed their conviction in July 2004.

On October 28, 2005, appellant Mrs. Maatkari filed a notice of abandonment of her appeal. On March 12, 2007 she filed an application for leave to withdraw the notice of abandonment and this was granted by the Court.

It is to be observed that a period of six years elapsed between the death of A-Mya and the hearing of the appeal. This was due mainly as a result of the appellants changing attorneys on several occasions prior to trial and several adjournments on behalf of the appellants prior to the hearing of the appeal on the ground that they were unable to get the legal representation they required.

The case for the prosecution was that the baby in the early weeks of its life failed to gain weight. This was of great concern to its doctors who warned the appellants that the baby could die if it continued to lose weight. At birth the baby weighed six pounds, four ounces and was normal. It appears that the mother had difficulty in breast feeding the baby but this was corrected on the advice of a health visitor. The baby was seen by a doctor on May 22, 2000 when the weight of the baby was noted to be five pounds. He was concerned about the loss of weight and so advised the appellants. Dr. Tamerry told the doctor that he disagreed and that he was not concerned about the weight loss.

The matter was reported to the Child and Family Services on May 27, 2000, a nurse visited the home but was not allowed to weigh the baby.

On Monday May 29, 2000 a nurse Jackson visited the home and weighed the baby at four pounds, fourteen ounces. She described the baby as “marasmic” and that marasmus was a level of malnutrition. She recorded that the parents were not unduly concerned about the weight. A report was made to Dr. Baron who called the appellant Dr. Tamerry and told him that if the weight loss continued the baby would die. However the appellant disagreed with the doctor.

The baby was subsequently taken to the hospital on June 7, 2000 after a care order was obtained.

The parents were advised to refrain from feeding the baby sea moss.

The mother accepted that she had been feeding the baby with Irish moss, mixed with quinoa.

The baby appears to have been gaining some weight after seeing a Dr. Hill between June 23, 2000 and August 14, 2000. On this last visit the baby weighed eight pounds. An appointment was made for Dr. Hill to see the baby on September 19, 2000 but the parents failed to bring the baby in.

The last time a doctor saw the baby was on 14th August 2000. The baby was next seen when it was taken to the hospital on February 28, 2001 and the baby died on March 1, 2001.

On February 28, 2001 the baby was ten months old when it was taken to the hospital by ambulance as a result of a 911 call. The baby described as a small baby with sunken, marbly eyes, was not breathing and had no pulse.

The baby was seen by Dr. Spence the head of the ICU Unit. He found the child in full cardio respiratory arrest. The appellants told him that the last meal had been sea moss and some ground up rice derivative and that the child had been sick for some days.

Dr. Spence stated that he had never seen a child like this before. He said that the nutritional state was an obvious, chronic problem and would have been going on for some time.

Dr. Bascombe stated that she knew something about sea moss. In the Caribbean it was used by young men as a performance enhancer but not something you would fill a baby's bottle with.

Dr. Hill was called to the emergency room. She said that the baby was ten months old but looked like three months at the most. She was told that the baby had been unwell for 12 days whilst in England with fever and vomiting. In her considered opinion, if medical assistance had been sought, the child's life would have been saved.

The appellants denied that the child had been unwell in England and had not been ill before the night when it was taken to the hospital.

On August 14, 2000 when the baby was last seen by the doctor, it weighed eight pounds. On March 1, 2001 when it died it weighed approximately eight pounds. Dr. Hill described the baby as being small and scrawny and quite dehydrated.

Dr. Obafumua, the pathologist who performed the post mortem stated the cause of death was bilateral - bronco pneumonia, that is pneumonia in the lungs on both sides with electrolyte imbalance. That the electrolyte imbalance was an excess of potassium in the

blood which was due to protein – calorie malnutrition with hypovitaminosis. He also said that this protein – calorie malnutrition and hypovitaminosis was due to neglect. He found no evidence suggesting any type of congenital abnormality.

At the hearing of the appeal Mrs. Tamerry was represented by Mr. Nigel Romfitt Q.C. and Mr. Craig Attridge, Mr. W. Taylor Q.C. and Mrs. Patricia Harvey for Dr. Tamerry.

The following grounds of appeal were presented on behalf of appellant Dr. Tamerry.

1. Wrongful admission of evidence –

   (1) The Crown's experts' opinions on the following points it is submitted are beyond their areas of expertise.

      (a) the definition of neglect; and

      (b) the appropriateness of sea moss.

   (2) The following evidence where the prejudicial effect outweighs the probative value:

      (a) the baby's condition before September 2000;

      (b) Dr. Obafumua's research;

      (c) The results of Dr. Obafumua's reseach.

2. Joint representation

   In the Supreme Court trial Defence Counsel, Mr. Mark Pettingill represented both Dr. Tamerry and his wife, Mrs. Maatkari Tamerry. It is clear that both appellants should have been separately represented.

3. Defective representation by Counsel

   (1) Mr. Pettingill's handling of the plea bargain;

(2) Mr. Pettingill failed to present evidence to establish the precise extent of Dr. Tamerry's medical knowledge;

(3) Mr. Pettingill failed to challenge assertions made against Dr. Tamerry in defiance of instructions;

(4) Mr. Pettingill failed to instruct an independent medical expert team for the defence;

(5) Mr. Pettingill failed to put to the Crown's witnesses Dr. Tamerry's case;

(6) Mr. Pettingill failed to prepare the case fully;

(7) Mr. Pettingill failed to exhibit highly relevant defence material;

(8) Mr. Pettingill advised Dr. Tamerry incorrectly not to give evidence; and

(9) Mr. Pettingill failed to adduce any evidence of Dr. Tamerry's good character.

4. Incorrect advice given at the Police Station.

5. Fresh evidence

(1) Expert evidence of a nutritionist;

(2) Expert evidence of a pediatrician; and

(3) Evidence of six other mothers, known to the Tamerry's concerning the effects of sea moss on their children.

6. Prejudicial publicity.

7. Improper judicial comment.

(1) Lack of clarity concerning the proper approach the

Jury should take when considering a single count against two defendants;

(2) Summing up fundamentally unbalanced in favour of the Crown;

(3) The Honourable Chief Justice Richard Ground failed to advise the jury fully regarding the prejudicial publicity; and

(4) Improper comment concerning Mr. Pettingill's approach to Dr. Green's evidence.

It is submitted that as a result of the above, the conviction must be rendered unreasonable such that a substantial miscarriage of justice occurred.

For the appellant Mrs. Tamerry, the above grounds of appeal were adopted. In addition it was submitted that there was available by the time of the trial, cogent medical evidence about Mrs. Tamerry's mental health to the effect that she was suffering from post natal depression. In these circumstances it was quite wrong of Mr. Pettingill to continue to represent both spouses.

In view of our decision and reasons we only found it necessary to deal with the submission with respect to the report of Dr. Harlow a consultant in Adult and Forensic Psychiatry.

There were two reports, the first addressed to Ms. Christine Hoskins, Attorney-at-Law, dated June 21, 2003. At the time Ms. Hoskins was on the record as representing both appellants. A second report dated October 23, 2003 was sent to Mr. Julian Hall, Attorney-at-Law. By this time Ms. Hoskins had withdrawn from the case. It was on the basis of these reports that adjournments were

granted. The appellants were subsequently represented by Mr. L. Scott and finally Mr. Pettingill.

When the trial commenced on June 2, 2004, these reports were available. The Court was told that the report was in the Court's file and was before the trial judge when the appellants were sentenced.

On June 20, 2003, Ms. Hoskins wrote to Mr. Juan Wolffe, Crown Counsel informing him that Dr. Harlow's report would be available within a day or two. As observed above the request for an adjournment was made.

The two reports of Dr. Harlow are similar and the report dated June 21, 2003 is set out hereunder:-

> "Ms. Christine Hoskins
> Barrister and Attorney at Law
> 3 Mangrove Bay Road
> Sandys Parish
>
> 21.06.2003
>
> Dear Ms Hoskins,
>
> **Re: Mrs. Maatkai Hutcheput Tamerry**
>
> I attended and examined Mrs. Tamerry in the company of her husband on 19th June 2003 at my clinic City Centre Hamilton. Both parties provided information and an account of Mrs. Tamerry's condition and symptom development.
>
> Currently she is suffering from a severe psychotic depression meeting the criteria according to and ICD 10 F323.(postnatal) DSMIVTR296.3(?POSTNATAL) Mrs. Tamerry is suffering from the characteristic features of depression with psychomotor retardation, somatic syndrome and psychotic features such as paranoia and rare mood congruent auditory hallucinations (hearing her lost child crying).
>
> During interview it was apparent that she was distracted by her inner ruminant depressive

thoughts, she demonstrated and psychomotor retardation in respect of response to questioning and ability to follow the interview.

Such features would impair her capacity to give instructions and follow her trial and as such it is questionable that she is fit to plead but clear that she is not fit to attend trial.

The origin of her problems (from the couple's account is about 1/12 post partum this would need 3rd party validation). The nature of the early phase was typically post partum. The patients condition has been evolving over 2 years.

10% of pregnant women become significantly depressed during pregnancy, usually in the first trimester. Depression in the last trimester can pass unrecognized and often persist as a postnatal depression. It is associated with a previous history of depression, abortion, unwanted pregnancy, marital conflict and anxieties about the foetus, it is characterized by fatigue, irritability, increased neuroticism and possible denial of the pregnancy rather than the usual adult depressive syndrome 10% of women (range 3 – 16%) develop postpartum depression. Onset is usually within one month of deliver often on return home between day 3 and 14. Associated factors are maternal age, childhood separation from father, problems in relationship with mother, relationship difficulties, mixed feelings (ambivalence about the baby, physical problems in the pregnancy and per-natal period, tendency to neuroticism and less extrovert in personality. Also linked are changes in lifestyle and social support/factors. Lack of support from family or partner increase vulnerability to depression. Clinical features are mood change, irritability, tired, despondent, anxious, fears of ability to cope, fear of own or babies health, feeling inadequate. Sleep disorder and concentration difficulties are often complained of as confusion although cognitive testing is often apparently normal. Most cases resolve in one month.

This patient's depressive disorder, in my opinion is likely to have occurred in the first month after the birth of her daughter, the

couple gave their account without any knowledge of the above. Substandation of a post natal syndrome from health records and independent witnesses would be useful.

Furthermore there are other factors which may also be significant namely her previous history of anorexia nervosa (raising the possibility of an unconscious by proxy state) and early childhood experiences may be important. The patient scored 42 on the Becks (severe) although this instrument is not so good for rating postnatal and postnatal and psychotic depressions which have a more specific phenomenology.

The husband suffers from a mild to moderate depressive syndrome, although its severity as measured on Becks (score 17) would not impede his capacity in terms of the medico-legal arena.

TREATMENT PLAN INCLUDING GOALS AND OBJECTIVES:

1. Serial Mental State + Becks (Beck#1-42 (Severe depression))
2. Stop Zolofu(prescribed by GP) and wash out for 3 days
3. Rx tri-cyclic antidepressant Loferpramine (better for retardation and psychotic features)
4. RX-Hypnotio for sleep disorder secondary to depression.
5. Blood Tests (full affective screen U+E,LFT, Cicatinine, IFT, CBC, ESR, TFT, Iron Profile B12, Folate Ca, Amylase
6. As mental state improves be alerted for Increased suicide risk (increased volition and thought/planning)
7. Offer ego supportive therapy initially.
8. <u>Possible psychiatric defence (liaise with legal team and evaluate grounds).</u>
9. As depression improves commence cognitive dynamic therapy.
10. Evaluate organic axis as depressive symptoms resolve.

It would be sensible to request an adjournment of the trial for a period of 3 months so that the depression can be treated.

Yours sincerely

Dr Paul Harlow MA LRCP MRCS MRCPsych".

It was submitted that Mr. Pettingill failed to adduce evidence of the report. It was argued that if this evidence had been tendered on behalf of Mrs. Tamerry, the verdicts need not be the same. It was essential that there be separate representation as the defence of the appellants would have been different. Mr. Taylor also submitted that in the circumstances it would have been vital for Dr. Tamerry to give evidence on his own behalf. The report had suggested a possible psychiatric defence on behalf of Mrs. Tamerry.

In an affidavit dated March 16, 2007 which was before this court, at paragraph 10, Mrs. Tamerry stated:-

> "I saw Dr. Anthony Harlow for approximately seven months; it was he who advised the court that I was unfit to handle a trial without psychological counseling.
>
> Mr. Pettingill was well aware of my meetings with Dr. Harlow and Dr. Harlow's professional opinions regarding my mental health at the time, but the only time this was properly put before the court on my behalf was after I was already convicted by the jury on sentencing by then Counsel Elizabeth Christopher."

In response to this affidavit, Mr. Mark Pettingill in his affidavit dated March 20, 2007 said:-

> (1) That further to my second affidavit in response to a request from the Court of Appeal I have reviewed both the letter from Christine Hopkins dated 20th June 2003 and the letter to Mr. Julian Hall dated 23rd October 2003 and to the best of my knowledge, belief and recollection

> I have never seen either of these documents before nor did I have any knowledge of the matter contained therein and the information was not shared with me by either of the Tamerrys.
>
> (2) That our offices never had contact with either Christine Hoskins or Julian Hall in relation to this matter.
>
> (3) That to the best of my recollection and having discussed with my executive assistant, Mrs. Wendy Percy the Tamerrys brought in their files when they first retained me in January 2004.

We do not think it necessary for the court to come to a decision as to whether Mr. Pettingill was aware of Dr. Harlows' report. The fact is that this report was in existence and available prior to the trial. It would have been in the court's file as it was used in the application for an adjournment. Mr. Tamerry must have shared the information with Ms. Hoskins and Mr. Julian Hall and subsequently with Ms. Christopher at the sentencing stage. The prosecution would have been aware of the report as a result of the letter written to Crown Counsel by Ms. Hoskins.

If Dr. Harlow had been called to give evidence at the trial, this would have presented Mrs. Tamerry with a defence which the jury would have had to consider. It is not for this court to speculate as to whether the verdict of the jury would have been different. It cannot

be said that the evidence of Dr. Harlow could not have resulted in an acquittal of Mrs. Tamerry.

It is clear to us that separate representation would have been required. If such a defence had been put forward, it is reasonable to expect that a different counsel for Dr. Tamerry would have advised him to give evidence on oath in his defence. The defence of each would have been different.

It was conceded by the Crown before us, that if the report of Dr. Harlow had been led in evidence on behalf of Mrs. Tamerry, it could have provided her with a defence.

In our view had Mrs. Tamerry's case been presented differently, using material that was available to the defence, the outcome may well have been different.

The issue as to whether Dr. Tamerry was denied the opportunity to give evidence in his defence at the trial was before this court. In an affidavit of Dr. Tamerry dated March 12, 2007, he stated at paragraph 20:-

> "That Mr. Pettingill similarly ignored and defied my order to put me on the stand as instructed before the beginning of the trial and again during trial when I saw my wife struggling at the beginning of her testimony. He turned to me in open court and mimed me. He subsequently reasoned that would be counter productive and backfire because the crown would seize upon and negatively highlight my very public advocacy for the re-legalization of marijuana. He stated this would undermine and damage our defence, directly playing into the hands of the crown. He articulated the crown and media would have a field day and we could kiss any chance of success and acquittal good-bye, its over."

In response, Mr. Pettingill in his affidavit dated March 16, 2007, stated at paragraph 20:

> "That after careful consideration, review and discussion with both Dr. and Mrs. Tamerry and various colleagues close to the case I did in fact advise that it may be the best course if only Mrs. Tamerry gave evidence at the trial and this was my advice on the basis of a number of statements and instructions made to me by Dr. Tamerry which I thought would be fundamentally detrimental to his defence. I did in fact indicate to him that I was concerned that his community and political views of why he was being prosecuted would probably not sit well with a jury. I must add that contrary to numerous comments made in Dr. Tamerry's affidavit I recall our relationship as being cordial and respectful and at no time did I ever snap at Dr. Tamerry or show him any type of disrespect or put pressure on him or his wife in any way or form. He always seemed to consider my advice carefully and thoughtfully which is the manner in which it was given and at no time did he ever challenge me or demand that I take a particular course contrary to the advice I was giving. I was surprised and frankly

disappointed to read this dialogue in relation to this issue."

In **Kent Fabian Ebanks v The Queen** U.K. P.C. 11 of 2005, their Lordships at paragraph 17 said:-

> "17. It is unfortunate that there should be any room for doubt about the position. The decision whether or not to give evidence is always ultimately one for the defendant himself after receiving appropriate advice from counsel: cf the Bar of England and Wales, *Written standards for the Conduct of Professional Work,* para 11.4. But the decision not to give evidence is one of such potential importance that it has long been recognized that it should be recorded in writing. Watkins LJ explained the position in this way in *R v Bevan* (1993) 98 Cr App R 354, 358:
>
> "One criticism has, however, to be levelled at learned counsel. It is to be hoped that all counsel will heed what we now say. When the decision is taken by a defendant not to go into the witness-box, it should be the invariable practice of counsel to have that decision recorded and to cause the defendant to sign the record, giving a clear indication that (1) he has by his own will decided not to give evidence and (2) that he has so decided bearing in mind the advice, if any, given to him by his counsel. That certainly was the practice in the days when the members of this Court were practicing at the Bar. It should never have been departed from. It is our firm view that if the practice has fallen by the wayside, it should be restored to its former prominence and become invariable once again."

More recently, in *R v Chatroodi* [2001] EWCA Crim 585, at paras 39 – 40 Pitchford J repeated the warning:

> "39. As long ago as 1993 Watkins LJ, giving the judgment of this Court in *R v Bevan* 98 Cr App R 354 said that it should be the invariable practice of counsel to record any decision of a defendant not to give evidence, signed by the defendant himself, indicating, clearly, that the decision has been made of his own free will,

and that in reaching that decision he has borne in mind advice tendered by counsel. We are bound to express some dismay at the knowledge that comparatively senior counsel, advising a client not to give evidence, notwithstanding the provisions of section 35 of the Criminal Justice and Public Order Act 1994, was unaware of this obligation.

40. While we would not expect counsel to record every detail of every conference between himself and his client, we would expect some written record of a conversation relevant to the important question whether it was in the defendant's interests to give evidence at his trial. This court suffers the disadvantage, in the absence of such a record, of being required to evaluate the recollections of counsel, on the one hand, and the appellant on the other."

The reasons which make the practice desirable apply with equal force in the Caribbean jurisdictions, as the Board made clear in *Bethel v The State* (1998) 55 WIR 394, 398. The appellant had alleged that his counsel had acted improperly in several respects, including not permitting him to give evidence. Lord Hoffmann recorded that their Lordships felt bound to say that::

"they are surprised that in a capital case no witness statement was taken from the petitioner or other memorandum made of his instructions. In view of the prevalence of allegations such as those now made, they think that defending counsel should as a matter of course make and preserve a written record of the instructions he receives. If this appeal serves no other purpose, it should remind counsel of the absolute necessity of protecting themselves from such allegations in the future."

Although the Board was there dealing with a capital case, the practice is equally desirable in non-capital cases. Since it appears that even experienced counsel are still failing to follow the practice, their Lordships wish to

> emphasise yet again that, where it is decided that the defendant will not give evidence, this should be recorded in writing, along with a brief summary of the reasons for that decision. Wherever possible, the record should be endorsed by the defendant."

It seems to us that whether the advice of Mr. Pettingill was accepted or not by Dr. Tamerry, the evidence in this case was such, that it was appropriate for Dr. Tamerry to take the witness stand in his defence. His status as a dentist and with some (even little) knowledge of medicine would have required him to rebut the evidence of the Crown.

We wish to recommend that where the accused in a case has decided not to give evidence, whether on the advice of his counsel, or on his own decision, counsel should have it in writing and signed by the accused. In any event it should be the decision of the accused in the final analysis. As observed above if there was to be a new trial, separate representation would be required and one would believe that counsel for Dr. Tamerry would advise him to give evidence in his defence. Instructions from the defence whether by way of a statement or otherwise, should also be in writing and signed by the accused.

It was for these reasons we allowed the appeal of both the appellants. The question then arose as to whether in the interest of justice a new trial should be ordered. It is clear from the evidence presented by the Crown that there was a very strong case against both appellants. In ordinary circumstances a new trial would be ordered.

In deciding whether to order a new trial, the court took the following matters into account:

(1) The date of the offence – March 1, 2001

(2) Trial commenced – June 2, 2004

(3) Notice of appeal filed – July 2004

(4) Appeal heard – March 2007

(5) Mrs. Tamerry has completed serving her sentence of one year and was released, in February 2005.

(6) Dr. Tamerry was due to be released, after serving his sentence of five years, on October 24, 2007

(7) The unavailability of Dr. Obafumua .

We wish to make it clear that the long delays prior to trial and after trial up to the time of the hearing of the appeal, must rest solely with the appellants.

It was urged on us by counsel for the appellants that in view of the circumstances listed above, it would not be in the interest of justice to order to a new trial.

The Director of Public Prosecutions whilst not asking for a retrial in the case of Mrs. Tamerry, submitted that the court should order a retrial in the case of Dr. Tamerry.

Having regards to the circumstances listed above and in particular the fact that Mrs. Tamerry had been released as far back as February 2005, and that Dr. Tamerry was to be released in October 2007, both having served the sentence imposed on each of them, the Court concluded that it would not be in the interest of justice to order a retrial in either case.

In the circumstances the Court ordered that the appeal of each of the appellants be allowed and the conviction and sentences set aside. A verdict of acquittal was ordered in each case.

Before parting with this case we wish to state our dissatisfaction with the way in which this appeal was approached by the defence prior to the hearing of the appeal. Applications were being made even on the day of the hearing of the appeal. These applications could have been made as far back as 2005.

In a case where several different counsel have been retained prior to the trial and a different counsel retained for the actual trial, there should be an obligation upon fresh counsel to communicate with those who previously appeared. If enquiries had been made, in particular with Ms. Hoskins and Mr. Julian Hall, it is very likely that counsel would have been informed of the report of Dr. Harlow.

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Zacca P.

I Agree. _____

Nazareth, J A

I Agree. _____

Sir Murray Stuart-Smith, J A