The Court of Appeal for Bermuda

CRIMINAL APPEAL No 7 of 2013

Between:

JAMAR MALIK DILL

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, JA
Baker, JA

Appearances: Mr. Kamal Worrell, Lions Chambers, for the Appellant
Ms. Nicole Smith, Department of Public Prosecutions, for the Respondent

Date of Hearing: **5 November 2014**

Date of Judgment: **21 November 2014**

JUDGMENT

Baker, JA

1. On 29 February 2012 Jamar Malik Dill was convicted before Greaves J and a jury of one offence of robbery by a majority of 11 to 1. He was sentenced to 8 years imprisonment. He appealed against conviction and sentence but before us his counsel, Mr. Worrell, abandoned his appeal against sentence and all but one of his grounds of appeal against conviction. The one remaining ground is that:

> "His counsel at trial erred in conducting the defence case in such a way as to warrant a successful application by the prosecution to admit evidence of his previous convictions

which resulted in such a risk of prejudice that his conviction is unsafe."

2. This ground was added by late amendment on 21 October 2014 not long after Mr. Worrell had become the appellant's counsel.

The Facts

3. Cleta Burgess, aged 63, went to a friend's house in Pembroke on the evening of Friday 20 May 2011. Others joined them and they played cards until the early hours of the Saturday morning, when she walked to Berkeley Road to wait for a taxi she had called. In her hand was a $100 note with which she intended to pay for the taxi. While she was waiting the appellant appeared on a bike. It was then about 5:00 am. They were acquainted with each other. She knew him as "Smalls" and he used to call her "Aunty". The appellant asked her if she would change a $100 for two $50s. She looked in her purse and said she could not. He then said he wanted the $100 bill she was holding, got off his bike and tried to take it from her. She resisted and a struggle ensued during which he sat on her, hit her in the face and said: "Just give me the money". Then he took off his helmet and hit her with that twice. Having taken the $100 he said he did not mean to hurt her and rode away. Ms. Burgess was left lying in the road until a taxi came and took her home.

4. She suffered multiple injuries including a displaced fracture of the right ankle, a fractured wrist as well as generalised bruising, swelling, and tenderness. She received several stitches. Her daughter took her to the hospital where she remained for two nights. She was on crutches for 4 months.

5. The appellant was arrested a few days later and remained silent in the interview but was positively identified by Ms. Burgess at an identification parade.

6. The appellant's defence, as put in cross-examination by Ms. Subair who represented him at the trial, was that Ms. Burgess was among other things a prostitute, a drug user and a liar. It was suggested she sustained her injuries in the course of her drug-related lifestyle and that she had deliberately fabricated her evidence that the appellant was her assailant. Previous convictions were put to her.

7. In the circumstances, it was inevitable, as proved to be the case, that there would be a successful application by the prosecution to cross-examine the appellant as to his previous convictions so that there would be a level playing field on the issue of credibility.

8. The present appeal is advanced on the basis that before the trial he instructed Ms. Subair about various matters that he thought relevant to his defence but was never advised that if he adduced the convictions of Ms. Burgess the jury might be informed about his past. He says the first he learned of this was during the trial when Ms. Subair, he says, was cross-examining Ms. Burgess and the judge intervened to warn Ms. Subair that he was in danger of "losing his shield". Furthermore, he was never asked to provide any written instructions for his defence; nor was he asked to sign any document.

9. No competent counsel would embark on cross-examination of Ms. Burgess in this way without the clearest instructions from the client and having given advice as to the likely consequences. It is thus apparent that this ground of appeal involves a serious allegation against Ms. Subair who represented the appellant at the trial.

10. When Mr. Worrell took over the appellant's representation he received amongst the papers from Ms. Subair's office an unsigned letter dated 21 February 2012 to the appellant. The trial began two days later. The letter referred to various

matters, saying in its opening paragraph that its purpose was to summarize the scope of advice Mussenden Subair had provided in relation to the case. It referred, among other things, to the appellant's decision not to give evidence. For the purposes of this appeal the critical paragraph runs as follows:

> "We have advised you to instruct us to scrutinize and question the character of the complainant in this matter. You understand and accept that this will permit the Crown to scrutinize and question your own character and allow the Crown to make the jury aware of your record of previous convictions in part and/or in whole."
>
> The letter concludes with the heading "Agreement" and immediately thereafter the words:
>
> "As confirmation of your understanding and agreement with the matters as outlined above, please sign in the space provided."
>
> Below appear the words:
>
> "Agreed to this 23rd day of February 2012"
>
> and a space for the appellant's signature.

11. In cases of this kind where allegations are made on behalf of an appellant by fresh counsel against counsel who previously represented the appellant it is incumbent on fresh counsel to give previous counsel an opportunity to respond. In the present case, Ms. Subair has recently given birth to a child and is unable to deal personally with the issues raised in the amended notice of appeal. However, Mr. Mussenden has sworn an affidavit in which he says Ms. Subair has informed him as follows:

> During a series of meetings with the Appellant he gave verbal instructions to her. As a result, she prepared a written document which stood as his instructions to our firm of his defence. It was on the basis of those instructions as reduced to writing that the defence case was conducted."

12. He went on that she had prepared a written legal opinion dated 21 February 2012 on various trial issues and strategy, an unsigned copy of which he produced. He added that she attended the appellant at Westgate Correctional Facility prior to the trial where she reviewed the document with the appellant, advised him of the contents and the trial strategy. He signed the document which she put in the "Defence Binder" for the trial. Mr Mussenden said that despite a search the Defence Binder, and consequently the signed document, could not be found. A possible reason was that in November 2013 the firm had moved premises.

13. The production of the unsigned document leads, so it seems to me, to the inevitable inference that Ms. Subair was aware of the need to discuss the consequences of running a defence that involved attacking the character of Ms. Burgess. It is but a short step to concluding that she did indeed, as she says, have such a discussion with the appellant.

14. One unexplained matter is why the unsigned document refers to advice to the appellant not to give evidence when in the event he did. This, to my mind, however, does not throw any doubt on the passage referring to the advice of trial strategy. The fact that that passage refers to the possibility of some, rather than all, of the appellant's previous convictions going before the jury not only shows that careful thought was being given to the issue but is also consistent with the argument advanced at the trial.

15. Quite apart from the inherent probability of Ms. Subair's account being correct, there is another pointer in that direction. The appellant says that the first time he heard anything about the rule was during the trial when the judge gave a

warning about being in danger of "losing his shield". The transcript shows that when Ms. Burgess was being cross-examined he told her to "hold on a minute" before answering counsel's questions. Then he said: "Counsel, you realise what line you are going down." Ms. Subair replied in the affirmative and said she was prepared to take it. There was no reference to the appellant "losing his shield". The reference to loss of shield came later in the trial when the Crown sought leave to admit evidence of the appellant's character. Ms. Subair said:

> "My Lord, I accept we've lost our shield. I, obviously from the outset, we were very clear in attacking the character of the complainant. I am not wasting time arguing whether or not the shield' s been lost".

The appellant was plainly wrong in saying the first time he heard reference to losing his shield was in the context of the judge's warning. It is of course possible that he has mistaken the occasion for the reference much later in the transcript but it seems to me much more likely that he understood the judge's intervention in that sense because the expression was used by counsel in the pre-trial discussion of the strategy to be adopted.

16. This is not, in my judgment, a case in which it is necessary to hear evidence from Ms. Subair and the appellant to resolve the conflict of what occurred pre-trial. The evidence seems to me to point sufficiently clearly to the correctness of Ms. Subair's account so as to show that the appellant was appropriately advised.

17. When counsel's conduct at the trial is called into question, general principle requires the Court to focus on the impact of the alleged faulty conduct: see Lord Steyn in *Boodram v The State (Trinidad and Tobago)* [2001] UKPC 20 at para. 39. I am unpersuaded that faulty conduct is established in the present case. There are some inevitability rare cases where the conduct is so extreme that the result is a

denial of due process to the defendant. It is not suggested that this falls into that category. It is however, pertinent to consider what if the conversation of attacking Ms. Burgess' character was never discussed with the appellant? The answer seems to me to be clear. There was no other defence. The appellant and Ms. Burgess were known to each other; so mistaken identity was never an option. Ms. Burgess suffered serious injuries so the only defence that could be run was that Ms. Burgess had, for some reason, fabricated that the appellant was her assailant.

18. In my judgment the conviction is safe and the appeal should be dismissed.

Baker, JA

I agree

Zacca, P

I agree

Evans, JA