Neutral Citation Number: [2024] CA (Bda) 29 Civ

Criminal Appeal No. 3 of 2023

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION**
**BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS**
**CASE NUMBER 2022: No. 001**

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 22/11/2024

**Before:**

**THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE**
**JUSTICE OF APPEAL, THE HON GEOFFREY BELL**
**and**
**JUSTICE OF APPEAL, THE RT HON DAME ELIZABETH GLOSTER DBE**

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**Between:**

**A**

**Appellant**

**- and -**

**THE KING**

**Respondent**

**Appearances by:**
Ms. Elizabeth Christopher of Christopher's, counsel for the Appellant
Ms. Cindy Clarke, Director of the Department of Public Prosecutions, counsel for the Respondent

**Hearing date(s)**: 19 November 2024
**Date of Judgment:** 22 November 2024

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*Prejudicial comment made by witness in presence of jury - new jury empanelled containing five members of original jury - whether second jury contaminated by presence of five original jurors - whether possible to overcome effect of prejudicial comment by means of direction to jury*

**JUDGMENT**

**BELL, JA:**

## Introduction

1. When the hearing of this appeal began, the court asked counsel to address the first of the grounds of appeal taken by the appellant ("A"), namely the manner in which the court had dealt with the fallout from what was described as an utterance made during the course of her evidence by the mother ("the Mother") of the victims in the case. At the conclusion of the argument on that first ground, we indicated that A's appeal should be allowed on his first ground of appeal, and that we would give our reasons in due course, which we now do.

2. To put matters into context, it is necessary to explain the nature of the Mother's comment, and to give details of the charges which A faced. The indictment comprised three charges of sexual exploitation of a young person when in a position of trust or authority, two charges of incest, and charges of buggery and unlawful anal intercourse; these were all very serious charges. The Mother had been in a relationship with A, and was the mother of the two victims, one of whom was also A's daughter.

3. The trial started on 3 February 2023. Unfortunately, two juror conflicts arose after the trial had started. First, one of the jurors sent a note to the judge to indicate that she had only just appreciated that her son had been in a relationship with the older victim. Counsel and the judge agreed that this juror should be discharged. Then the Mother began giving her evidence, and had reached the point where she was being asked by counsel for A in cross-examination whether there had come a time when she and A had fallen out. No doubt the question was put only with a view to ascertaining the timing of the falling out. But the Mother's answer was "Yes, when I noticed that he was trying to have sex with his 16-year old daughter. In Jamaica." (See page 112 of the Record.) That led to an immediate application for a mistrial, which the judge refused (page 116 of the Record). The judge indicated that she would tell the jury to disregard what was said and indicated that she would tell them that again in her summation.

4. No sooner had the jury returned to the courtroom after this refusal than the judge received another note from a juror, saying that as he was walking to the jury room, he had recognised

one of the victims, a friend from high school. This again led to the immediate discharge of the juror in question. There then followed a lengthy discussion between counsel and the judge as to how best to deal with the problem which arose from the Mother's comment, in the context of having to re-start the trial. Counsel for A (not Ms Christopher) at one stage suggested starting the following day with a new jury, and discussion then moved to the logistics of how to deal with the evidence given by the Mother up to that point, with one possible solution being that the court recording of the Mother's evidence should be played up to, but omitting, the Mother's answer as to the timing of the breakdown of her relationship with A, which went beyond answering the question as to timing which she had been asked. During these discussions counsel for the Crown had referred to there not being a problem if one of the original jurors was again selected to be on the second jury and saw no objection to such a course.

5. On 7 February 2023, another jury pool was summonsed. Twelve jurors were selected, five of whom had been on the first jury, and who had therefore heard the Mother's answer to counsel's question about the timing of the breakdown of their relationship, the answer to which went to the reason for the breakdown rather than its timing. The presence of five jurors from the first jury pool on the second jury selected led counsel for A to make a renewed application for a mistrial. The judge's preliminary response was that the objection should have been made prior to, or during, the jury selection process. There then followed extensive discussion between counsel and the judge, during the course of which the judge recognised the difficulty of raising the issue with a jury of which five members had heard the Mother's comment, and seven had not, noting that to raise it would highlight something which had not been heard by those seven members. The discussion included consideration as to how the matter could be dealt with by a strong warning to the jury to consider only the evidence in the trial, to which defence counsel seemed at one point to accede. In the end, the judge refused the application for a mistrial (page 191 of the Record), and the trial continued. The judge indicated that there would be before the jury the fact that A had not been subject to any previous allegation, charge or conviction related to sexual activity and that the jury would be given a strong warning that the only evidence to be taken into account was that in the second trial.

6. The above sets out the background, which Ms Christopher took this court through in some detail. The only other comment to be made at this stage is that Ms Christopher submitted that the strong warning to the jury to consider only the evidence before it in the second trial, which the judge had canvassed with counsel, had not occurred when the judge came to her summing up. In fact, the judge did remind the jury that they must reach their verdict on the basis of the evidence led in the courtroom, and not anything that they had heard elsewhere – whether in the media, press, rumour or otherwise; however Ms Christopher submitted that this was simply a standard form direction. It did not refer to the Mother's utterance, no doubt for the reason which the judge had recognised; to do so would be to draw attention to something which five of the jurors had heard and seven had not, quite apart from the fact that any reference to the utterance would serve to remind the jury (or at least five members thereof) of the evidence in question. And the interest of the seven who had not heard the utterance would no doubt be piqued.

7. Ms Christopher then turned to the relevant law, starting with the case of *R v Lawson* [2005] EWCA Crim 84. That case involved a conspiracy to import drugs, and the inadvertent disclosure of inadmissible evidence prejudicial to the defendant made by the judge in the course of his summing up. Paragraph 65 of the judgment sets out the factors to be considered when

considering the discharge of a jury by the trial judge. Included in these were the manner and circumstances of the admission (by contrast, in the case before us, in the Mother's evidence) and the extent to which it was potentially unfairly prejudicial to the defendant and the extent to which, and the manner in which, it was remedial by judicial direction or otherwise so as to permit the trial to proceed . The appellate court took the view that despite the strength of the prosecution case against each of the appellants, the judge's slip was of such importance to the central issue in the case that it could not be remedied by judicial direction, however strong.

8. I pause to note that in the case before us, the accused was charged with a number of sexual offences alleged to have been committed by him against two of his daughters. The Mother's statement that he had tried to have sex with his 16 year old daughter in Jamaica could hardly have been more prejudicial in the context of his trial.

9. Next Ms Christopher referred as to the case of *Arthurton (Errol) v The Queen* [2004] WL 1074500, a judgment of the Privy Council on appeal from the BVI Court of Appeal. That case was one where the appellant had been charged with unlawful sexual intercourse with a girl under the age of 13. The accused was said to have told the police when he was interviewed that he had been accused of something like this before and had "got away". When the officer in the case was being questioned as to the defendant's good character, and was asked about his antecedent history, she said that she had checked with another officer and knew that he had been arrested and charged for a similar offence. Counsel for the Crown had accepted the prejudice to the defence caused by this piece of evidence.

10. The Board held at paragraph 26 of the judgment that the Court of Appeal had been in error in thinking that the relevant question was whether the evidence in question was inadmissible hearsay, and that, accordingly, it was necessary for the Board to consider the appeal afresh. The central issue for the trial was whether the complainant was to be believed. The appellant's good character was critical to that enquiry. The Board held that in the context of the issues at trial it was doubtful whether any direction from the judge could have overcome the unfairness to the defendant, and on that basis the jury should have been discharged. As the Board put it at paragraph 30:

> "It is asking too much to expect that a jury can be expected to give fair consideration to an affirmative good character propensity direction when it is told of suspicion of similar offending, even if it succeeds in putting the disclosure out of mind when considering the question of guilt as established by the other evidence. At best, the accused's character is likely to be treated as irrelevant by the jury. If so, the accused is effectively deprived of the good character direction".

The position is a fortiori when the jury is told of an actual criminal act of the same type as that with which the defendant is charged.

11. The Board also commented that the terms in which the jury had been directed to put the officer's evidence out of mind reminded them that it had been "blurted out", much as the Mother's evidence had been in the case before us. And the Board commented that the instruction to ignore the evidence, with no further explanation, was inadequate. Credibility was critical, where the appellant's good character was the fundamental plank in his defence. None of the steps taken

at trial to address the prejudice caused were effective. Hence the trial was unfair and the conviction could not stand.

12. Again, I would comment with reference to the case before us, that there were no effective steps taken to address and minimise the prejudice caused – no doubt because any attempt to do so would have exacerbated the problem by drawing attention to the prejudicial evidence of the Mother.

13. Lastly, Ms Christopher drew our attention to the case of *R v Barraclough* [2000] Crim LR 324. That case also involved the discharge of a jury because of a prejudicial issue, where the retrial had started the following day, and questions arose as to the possibility of the second jury being contaminated by contact with the first jury, where the defendant had been prejudiced. On the facts, there was no real opportunity for contamination. But the case does demonstrate that where, as in the case before us, five members of a jury had heard a prejudicial comment made about the defendant the day before the second trial had started, the question is not whether there was an opportunity for contamination; in our case the five members of the jury clearly had been contaminated, and as per *Arthurton*, it was doubtful whether any directions from the judge could overcome the unfairness to the defendant.

14. Ms Clarke in her address to the court emphasised the warnings which the judge had given. She also submitted that the utterance went to the Mother's credibility, and that a full good character direction had been given. But in my view those matters were not and could not be enough.

15. To summarise, I have no doubt that the Mother's response was highly prejudicial to A, such that there could not, in my view, be any direction which the judge could have given so as to overcome the unfairness to A which the prejudicial answer by the Mother had caused. To make any direct reference to the utterance would only serve to emphasise the prejudicial comment so far as the five jurors were concerned and no doubt raise questions in the minds of the seven. In short, the only course open to the judge was to declare a mistrial and start afresh with an uncontaminated jury. And that could have been achieved if the judge had granted the application made by counsel to declare a mistrial at an early stage.

16. Finally, I should record that, having advised counsel that the appeal would be allowed, for reasons which would be given in due course, we raised the question of whether there should be a retrial, as to which Ms Clarke advised that she did not seek a retrial.

**GLOSTER JA:**

I agree

**CLARKE P:**
I, also, agree.