Privy Council Appeal No. 13 of 1994

Rupert Crosdale *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 6th April 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Mustill
Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Steyn

*[Delivered by **Lord Steyn**]*

Introduction.

In the early hours of 20th June 1988, in the Parish of Kingston, Jamaica, John Roberts was killed by a single stab wound, which penetrated his heart. The appellant (Crosdale) was arrested and charged with murder. The trial occupied three working days. On 22nd February 1989 the jury returned a unanimous verdict of guilty of murder. Harrison J. sentenced Crosdale to death. That sentence has since then been commuted to life imprisonment. On 30th April 1991 the Court of Appeal of Jamaica dismissed Crosdale's application for leave to appeal against his conviction for murder. On 16th July 1991 the Court of Appeal granted Crosdale conditional leave to appeal to Her Majesty in Council, and certified points concerning the question whether a jury should be asked to withdraw during a submission of no case as being of general importance. Crosdale failed to comply

with the condition imposed in respect of the leave granted, namely the preparation and despatch of the record within sixty days. On 27th October 1993 special leave to appeal was granted.

The shape of the appeal.

The shape of the appeal can be described quite briefly. Three eye witnesses were called by the prosecution. They testified that Crosdale was well known to them. They said that there had been an altercation involving the deceased's girlfriend. All three testified that Crosdale stabbed the deceased. The defendant gave evidence. He said that the fight had been between the deceased and his girlfriend. He denied that he stabbed the deceased. He said that he did not have a knife. On his case the deceased must have been stabbed by his girlfriend. The thrust of the grounds of appeal before the Board was that the judge did not conduct the trial in a fair and balanced way. Mr. Mansfield Q.C., who appeared for Crosdale before the Board, relied on the cumulative effect of what he described as material irregularities committed by the trial judge. There were three principal features to this case. First, counsel relied on the fact that the judge insisted that a submission that Crosdale should be discharged at the end of the prosecution case should be made in the presence of the jury. Secondly, counsel argued that the judge unfairly commented in his summing up on certain discrepancies between the case as put by defence counsel in cross-examination and the evidence of Crosdale. Thirdly, counsel relied on the fact that after a summing up in which the judge commented at some length on the inherent improbabilities in Crosdale's account the judge twice asked the jury whether they wished to retire. That, said counsel, was tantamount to saying to the jury that there was in reality nothing to discuss.

The course of the trial.

The thrust of the prosecution case can be explained briefly. The crime was committed on 20th June 1988. The scene was a tenement yard at 23 Smith Lane in the Parish of Kingston. A number of individuals occupied rooms around the common yard. There was a standpipe in the yard. At about 6.00 a.m. on the day of the killing Patricia Cooper, one of the tenants, was washing plates at the standpipe. Crosdale, another tenant, approached the pipe. He said that Patricia Cooper had splashed water on him. A heated exchange followed. He threatened to kill her. They went into their respective rooms. Armed with a cutlass Crosdale invited Patricia Cooper to come out so that he could "chop her up". She refused to go out. Crosdale then went into his room, and emerged holding a

knife under his shirt. In the meantime John Roberts, the boyfriend of Patricia Cooper, had arrived on the scene. The enraged Crosdale turned on him and stabbed him. Patricia Cooper ran to her boyfriend and Crosdale then stabbed her. She was hospitalised but recovered. That was how Patricia Cooper described the stabbing. Her evidence was supported by two other eye witnesses, namely Gloria Laxley, another tenant, and Katherine Hudson a 13 year old school girl who was the daughter of a tenant. The accounts of these three eye-witnesses were substantially the same. All three testified to the initial quarrel between Patricia Cooper and Crosdale which culminated in Crosdale stabbing John Roberts. Not surprisingly, in the context of a fast moving scene, there were some discrepancies between the accounts of the three witnesses. Those discrepancies were explored in cross-examination. Counsel unsuccessfully suggested to prosecution witnesses that there had been previous ill-feeling between him and the tenants; that the incident at the pipe happened on a previous occasion; and that the deceased also had a knife.

There was evidence from Detective Sergeant Fullerton that when he arrested Crosdale on the next day, 21st June, and put to him the allegation that he stabbed the deceased, Crosdale replied to the effect that the deceased and his girlfriend had "fussed" with him.

So far Crosdale obviously faced a strong prosecution case. But the defence claimed that there was an irreconcilable conflict between the evidence of the three eye witnesses and the evidence of Dr. Roystan Clifford, a pathologist. It was common ground that the cause of death was a single stab wound to the heart. But all three eye witnesses said that after the deceased had been stabbed and after he fell, Crosdale stabbed him again. The pathologist testified that there was only one stab wound.

Claiming that this feature of the case made the three eye witnesses' accounts suspect and unreliable, counsel submitted at the end of the prosecution case that there was no case against Crosdale. She invited the judge to hear her submissions in the absence of the jury. She explained that the merits of the defence would have to be canvassed. In accordance with the practice then prevailing in Jamaica, the judge declined to ask the jury to withdraw. The judge then heard submissions. The thrust of counsel's submissions was that the eye witness accounts of repeated stabbing by Crosdale could not be reconciled with the medical evidence of a single stab wound. The judge ruled in the

presence of the jury that there was sufficient evidence for the jury to consider.

Crosdale then testified. He said Patricia Cooper and her boyfriend were quarrelling. He said the deceased was trying to hold her. She then stabbed the deceased. Crosdale ran to them and she stabbed at him. He jumped back and was stabbed in the leg. The other tenants attacked him and he ran from the premises. He did not say in evidence that there had been previous ill-feeling between him and the tenant. He did not say the incident at the pipe happened on a previous occasion. Most importantly, he did not say that John Roberts had a knife.

After counsel's speeches the judge proceeded to sum up the case to the jury. It is only necessary to refer to those parts of the summing up which are material to the grounds of appeal. The judge directed the jury to ignore what they had heard when counsel submitted that there was no case against the defendant. He told the jury that "... all the court was saying there is that up to that point, there was sufficient evidence as led by the prosecution for the accused to answer to the charge". He addressed the defence submission that there was an irreconcilable conflict in the prosecution case inasmuch as the eye witnesses testified to the defendant stabbing the deceased several times whereas the pathologist said that there was only one stab wound. He suggested to the jury that the clue was that the eye witnesses merely testified that, after the initial stabbing, they again saw the defendant stabbing at the deceased without necessarily inflicting further wounds.

The judge commented at some length on undoubted discrepancies between the way in which Crosdale's counsel put his case in cross-examination and his evidence. There were three discrepancies. In oral evidence Crosdale denied that there had been (as cross-examination on his behalf had indicated) any ill-feeling between himself and other tenants. He also did not support the suggestion in cross-examination that the initial incident at the standpipe had taken place on a previous occasion. The judge commented as follows:-

> "Now, you use those suggestions made to a witness, where the accused does not support it, to say whether or not you find there is any sincerity in the case for the Defence as it is put to you."

The third discrepancy was more important. Counsel suggested to witnesses that the deceased had a knife. Crosdale said nothing of the kind in giving evidence. The judge commented as follows:

> "Here again is another suggestion, because here is Patricia being told by Counsel for the Defence that John had a knife that morning. Now, the accused never told you that he saw John with any knife that morning. Here again is another suggestion to the witness for the prosecution that John had a knife. Now, there is nothing from the accused to say that John had any knife, so you must ask yourselves the question, why is the Defence so insincere, putting one thing to the prosecution and you don't hear anything about it again in the case? ... So, you use your common sense as members of the jury and say where you find the truth lies. Because here is a suggestion to the witness Patricia Cooper that John had a knife that morning and there is nowhere else in this case that anything has come out that John had a knife that morning."

The judge commented on the merits of the defence case in critical terms. The flavour of the summing up appears from the following passage:-

> "He is asking you to say that is how the knife reach his leg. You believe that is how he would have jumped back? You believe he would jump back and stick out his leg for the knife to reach it? It's a matter for you because you are sensible people, judges. But he has demonstrated to you in the witness box that he jumped back, lifted his right leg, and that's how the knife reached it. You are not obliged to accept any view points or opinions but you use your common sense in the examination of how people behave under circumstances and so come to your final verdict."

After summarising Crosdale's evidence the judge near the end of his summing up commented on what appeared to him to be inherent improbabilities in the defendant's account. This section is too long to quote. But the thrust appears from the following part of the judge's comment:

> "He said, 'I was so upset, I was moving up and down until the next morning.' Now, this is from six a.m. the morning and he said he was so upset, moving up and down until the next morning, and then went to his Aunt's home in Yallahs. Would you wonder why he was so upset? Because here is this man, according to his testimony, he hasn't done anything ..."

The judge then reiterated his directions on burden of proof. The transcript reflects that the judge then addressed the jury as follows:

> "HIS LORDSHIP: Please consult among yourselves if you wish to go to the jury room to consider your verdict and let me know.
>
> MR. FOREMAN: (Nods)
>
> HIS LORDSHIP: You wish to retire? Very well."

The jury retired at 2.30 p.m. and returned at 2.56 p.m. to announce a unanimous verdict of guilty of murder.

The proceedings in the Court of Appeal.

On behalf of Crosdale counsel submitted that the judge committed a material irregularity in refusing to ask the jury to withdraw during submissions after the prosecution case to the effect that there was no case to answer. While expressing reservations about the desirability of the current practice in Jamaica, the Court of Appeal held that there was no prejudice to Crosdale. The judge's comments on the divergence between the case put in cross-examination and Crosdale's evidence was another ground of appeal. Counsel for Crosdale, who appeared at the trial, told the Court of Appeal that her suggestion that John Roberts had a knife was a mistaken inference she drew from Crosdale's instructions. She did not explain the position about the other divergences between her cross-examination and Crosdale's evidence to which the trial judge referred. The Court of Appeal concluded that the trial judge was entitled "to take note of the conduct of the defence and to comment thereon". The final ground of appeal related to the way in which the judge dealt with the defence suggestion of an irreconcilable conflict between the eye witnesses, who testified to a repeated stabbing by Crosdale to the deceased's back, and the medical evidence that there was only one single stab wound. The Court of Appeal emphasised two matters. First, the eye witnesses did not testify to seeing any signs of injury to the deceased's back. Secondly, the judge had the advantage of seeing demonstrations of the incident by the witnesses. Given the context of the witnesses' evidence, the Court of Appeal considered that the judge was entitled to interpret the evidence of the eye-witnesses as being an act of stabbing at the deceased's back without necessarily wounding him. For these reasons the Court of Appeal dismissed the application for leave to appeal.

The grounds of appeal.

Counsel for Crosdale reminded their Lordships of the principles enunciated by the Privy Council in *Mears v. The Queen* [1993] 1 W.L.R. 818. The question is whether the defendant has had the substance of a fair trial. Even if the judge does not usurp the function of the jury by wrongly withdrawing an issue from the jury, a defendant does not receive a fair trial if the judge places an unfair and unbalanced picture of the case (including, in particular, the defence case) before the jury. Turning to the present case counsel argued that by his conduct of the trial and his summing up the judge effectively eroded the defence case. Counsel emphasised the cumulative effect of what he described as unfair treatment of the defendant. And counsel reminded their Lordships that it is no answer, if a defendant has not had a fair trial, that the case against him was strong or even overwhelming. Under a system of trial by jury it is for the jury to judge whether that is so.

The submission of no case.

Counsel for Crosdale submitted that it was a material irregularity for the judge to refuse to ask the jury to withdraw during the proceedings on the application at the end of the prosecution case for a ruling, relying on *R. v. Caibraith* [1981] 1 W.L.R. 1039, at 1042B, that the defendant had no case to answer. It is necessary in the first place to consider the legal position before turning to the facts of the present case.

Their Lordships have already remarked that the prevailing practice in Jamaica was for trial judges to hear such submissions in the presence of the jury. In the present case the Court of Appeal expressed doubts about the desirability of this practice. Those doubts prompted the Court of Appeal to certify four questions for their Lordships' consideration. The first three questions are general and read as follows:-

(i) Whether there are any circumstances in which a no case submission should be made in the presence of the jury.

(ii) Whether where the defence applies to make a no case submission in the absence of the jury it is right for a judge to refuse the application and to hear the submission in the presence of the jury.

(iii) Whether where the defence applies to make a no case submission in the absence of the jury it is right for a judge to inform the jury of his finding that there is a case to answer.

It is to the first two questions that their Lordships must now turn.

A judge and a jury have separate but complementary functions in a jury trial. The judge has a supervisory role. Thus the judge carries out a filtering process to decide what evidence is to be placed before the jury. Pertinent to the present appeal is another aspect of the judge's supervisory role: the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury. Lord Devlin in Trial by Jury, The Hamlyn Lectures, (1956, republished in 1988) aptly illustrated the separate roles of the judge and jury. He said (at page 64):-

> "... there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is *enough* evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is ... The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the pooled experience of twelve men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make the verdict."

The important point is that the jury cannot assist the judge in his decision as to whether there is sufficient evidence for the judge to place the case before the jury. That part of the proceedings is conducted by the judge alone. And the jury has no interest in that part of the proceedings. There is also no sensible reason why the jury should witness that part of the proceedings. On the contrary, there are substantial reasons why in the interests of an effective and fair determination of the issue whether the defendant has a case to answer the jury should be asked to withdraw. If the jury do not

withdraw, there is a risk that they will be influenced by what they hear. In recent times the invariable practice in England has been for the judge to ask the jury to withdraw while such an application is considered by him. The foundation of this practice is to protect the interests of the defendant. It cannot be left to a general discretion of the judge to decide in which cases the jury should be asked to withdraw since it is impossible to predict in advance when a risk of prejudice will arise. In any event, there is no legitimate advantage to be gained by allowing the jury to remain. Moreover, if the jury is asked to withdraw, the submissions of counsel and the testing of the submissions by the judge's questions need not be inhibited. For these reasons their Lordships' response is that irrespective of whether the defence ask for the jury to withdraw or not the judge should invite the jury to withdraw during submissions that a defendant does not have a case to answer. All the jury need to be told is that a legal matter has arisen on which the ruling of the judge is sought. Any contrary practice in Jamaica ought to be discontinued. And their Lordships' ruling applies equally to the trial of a single defendant and joint trial.

It is necessary to refer to one possible qualification which was mentioned in argument. Counsel suggested that the defence may sometimes invite the judge to rule that the jury should remain. If that were to happen, the judge ought to ask the jury to withdraw to hear submissions why he should depart from the ordinary procedure. Their Lordships are sceptical about how realistic the suggestion is that the defence might have a legitimate reason for requesting such a ruling. Certainly, if the defence sought to gain a tactical advantage by making an extra speech before the jury that would not be a legitimate reason for departing from the ordinary practice. Their Lordships are, however, content to assume that in exceptional circumstances the defence might have legitimate reasons for such a request and to leave this point on the basis that the judge in the absence of the jury will hear argument and exercise his discretion on the point. For avoidance of doubt, and since the practice that the jury should withdraw exists for the protection of the defendant, their Lordships make clear that a judge should never entertain a request by the prosecution that the jury should not withdraw.

That brings their Lordships to the third question, namely whether the jury should be present during the judgment on the application that the defendant has no case to answer or whether the jury should subsequently be informed of the judge's reasons for his decision. There is no reason why the jury should be privy to the

judge's reasons for his decision. In order to avoid any risk of prejudice to the defendant the jury should not be present during the course of the judgment or be told what the judge's reasons were. If the judge rejects a submission of no case, the jury need know nothing about his decision. No explanation is required. If the judge rules in favour of such a submission on some charges but not on others, or rules in favour of it in respect of some defendants but not others, the jury inevitably will know about the decision. All the jury need then to be told by the judge is that he took his decision for legal reasons. Any further explanation will risk potential prejudice to a defendant or defendants.

In failing in the present case to ask the jury to withdraw the judge committed an irregularity albeit that in the light of prevailing practice in Jamaica the judge's ruling was an understandable one. Given the fact of an irregularity, the question arises whether there was any significant risk of prejudice resulting from the irregularity in the circumstances of this case. This is the question to which the fourth point certified by the Court of Appeal is directed.

While conceding that this submission was the least cogent of his three submissions, counsel for Crosdale argued that the judge's refusal to ask the jury to withdraw meant that what the defence considered to be their best point was critically exposed in front of the jury by the judge's questions. And counsel emphasised that the judge ruled in the presence of the jury that there was sufficient evidence against Crosdale to hold that a *prima facie* case had been made out. And, counsel said, the judge's refusal to ask the jury to withdraw, compelled him later to remind the jury in his summing up of the discussion on the submission that there was no case to answer and to say that the jury had to ignore what they had heard. The difficulty with this argument is that the submission that there was no case against Crosdale was hopeless. Counsel relied on what she described as the irreconcilable conflict between the accounts of the eye witnesses and the medical evidence. It was always likely that the jury would find the reconciliation in the explanation that the witnesses were merely testifying to the defendant stabbing at the deceased. And the judge was entitled in his summing up to place this possible explanation before the jury. That certainly did not help the defence but it was permissible comment. In these circumstances **it** is unrealistic to say that there was a real risk of prejudice due to the jury being present during the testing of the argument on the application to discharge the defendant. Their Lordships reject this submission.

The judge's comment on the conduct of the defence.

On two occasions the judge explicitly described the defence case as lacking in sincerity. It is upon the likely effect of those observations on the jury that their Lordships must concentrate. In doing so their Lordships accept the submission of counsel that the most striking comment would have been the judge's comment that Crosdale did not testify, as envisaged by his counsel, that John Roberts had a knife. And it seems to their Lordships that the comment would probably have been understood by the jury not as a criticism of counsel but as a criticism of the veracity of Crosdale. *Prima facie* the judge would have been entitled to consider it unlikely that counsel would have misunderstood her instructions on such an important point. Nevertheless, given the forcefulness of the judge's intended criticism, their Lordships consider that the judge should have invited the comments of counsel in the absence of the jury before he summed up the case.

Unfortunately, the record of the proceedings is incomplete. In particular that part of the record which contained the cross-examination of Crosdale is missing. It seems probable, however, that the point concerning the knife was never put to Crosdale by prosecuting counsel or the judge. If the point had been put to Crosdale, one would have expected the Court of Appeal to have been informed accordingly when the matter was raised on appeal. It was an important point. It was an issue which had not been actively canvassed at the trial. In *R. v. Cristini* [1987] Crim.L.R. 504 Watkins L.J. observed that (at page 507):-

> "... judges, if they are to introduce an issue into the summing-up which has not been actively canvassed in the course of the trial, should at least give ample warning of their intention so to do to counsel in the absence of the jury before addresses are begun, so that there can be discussion between the judge and counsel as to the rightness of the course to be adopted by the judge and an opportunity given to counsel to deal with the issue in their addresses to the jury."

This principle of fairness reinforces the view previously expressed by their Lordships that the point ought to have been raised by the judge with counsel in the absence of the jury before his summing up.

That leads their Lordships to an examination of the position that would have arisen if the judge had invited counsel's comments.

Counsel explained to the Court of Appeal that Crosdale had not instructed her that John Roberts had a knife. She shouldered the blame. This was a confession to a surprising lapse on her part. On the other hand, there is no reason to doubt the genuiness of her explanation. What is, however, difficult to understand is that she failed at the end of the summing up to draw the attention of the judge, in the absence of the jury, to her real instructions. If she had done so, the judge would have had an opportunity to inform the jury of the true position.

In the result something went seriously wrong at the trial which caused the defendant's case to be described by the judge in his summing up as lacking in sincerity in an important respect. It is now clear that the judge's comment about the knife was unfair to Crosdale. It was not an irregularity in the trial. On the other hand, even in the absence of an irregularity in the trial, a conviction may be quashed in exceptional circumstances if due to the conduct of counsel a defendant's case was not fairly placed before the jury. That proposition is established by the decision of the Privy Council in *Sankar v. The State of Trinidad and Tobago* [1995] 1 W.L.R. 194. And the same decision established that the correct approach in such a case is not to concentrate on the qualitative nature of counsel's lapse but on its impact on the trial.

Before leaving this part of the case their Lordships would respectfully observe for the assistance of judges in Jamaica that many difficulties which tend to arise on appeal in regard to the way in which trial judges have summed up the case can be avoided if judges routinely adopted the practice of discussing with counsel in the absence of the jury any special directions which they have in mind and inviting counsel's comments on such matters.

The judge's question whether the jury wished to retire.

The judge commented at some length on the inherent improbabilities in Crosdale's account. Those observations did not exceed the bounds of permissible judicial comment. On the other hand, it was the contextual scene against which the concluding question of the judge to the jury must be seen. The judge asked the jury to consult among themselves to see if they wanted to go to the jury room to consider their verdict. It is true that the jury did retire but counsel for Crosdale submitted that they did so on the basis that the judge conveyed to them by the clearest implication that there was really nothing to discuss.

Mr. Guthrie Q.C., who appeared before the Board for the prosecution, said that it may be thought generally unnecessary and perhaps unhelpful to ask a jury if they wish to retire, but that there is no reason to suppose that any prejudice was caused in this case. Their Lordships feel compelled to go further. The judge should not have asked the jury whether they wished to retire. It is a cardinal rule of criminal procedure that a trial judge must avoid any hint of pressure on a jury to reach a verdict: A. *v. Watson* [1988] Q.B. 690, at page 700b. In the context of a summing up, which trenchantly exposed improbabilities in the defence case, the judge's remarks fell foul of this principle. In the nature of things **it** is impossible to prove that the judge's remarks caused prejudice. It is an imponderable factor. But their Lordships cannot exclude the possibility that one or more jurors understood the judge to be conveying to them that there was really nothing to discuss. In these circumstances the conclusion cannot be avoided that the judge's question whether the jury wished to retire was a material irregularity.

Conclusion.

Their Lordships have been greatly troubled by the correct disposal of this case. The prosecution case, based on the recognition evidence of witnesses with no apparent motive to lie, was very strong. And Crosdale's explanation was transparently weak. On the other hand, even a defendant against whom the cards are stacked is entitled to have his case fairly presented to the jury. Taking into account the cumulative effect of the judge's criticism of the sincerity of the defence case, and his question to the jury whether they wished to retire, their Lordships cannot in accordance with the principles enunciated in *Mears* say that the defendant had the substance of a fair trial. The conviction ought therefore to be quashed.

But for the fact that it is almost 7 years since John Roberts was killed, this would have been a classic case for a remission to the Court of Appeal to enable it to decide whether there should be a retrial. In the circumstances that is not a practical course.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed.