IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS **CR-AP 1/2019**

BETWEEN

ALBARO TAVARES **APPELLANT**

AND

REGINA **RESPONDENT**

Before:
Sir Elliott Mottley **President**
The Hon. Mr. Justice N. Adderley **Justice of Appeal**
The Hon. Mr Justice R. Hamel-Smith **Justice of Appeal**

Appearances:
Ms. S. Mair for the Appellant
Ms. s. Hall for the Respondent

Heard: **5th September 2019**
Delivered: **30th January 2020**

REASONS

R Hamel-Smith J.A.

1 The appellant was convicted of Rape in 2017. He appealed against conviction and sentence and filed five grounds of appeal, two of which were pursued at the hearing of the appeal.

2 The first was that the trial judge had exercised his discretion wrongly in not discharging the jury following a complaint to the judge by the officer in charge of the jury. The officer had reported that the victim was sitting in the waiting area of the court downstairs, having completed her evidence some moments before. For some unknown reason, the jury was allowed to enter the room and mingle with members of the public, including the victim. The officer noticed the victim crying as the jurors entered the room. She got up and as she was passing within earshot of the seven jurors, the officer overheard juror # 2 say to juror #3, in a voice loud enough to be heard by the victim, "*she is only crying because she is lying on that man*".

3 Counsel's initial submission was that while the officer had given sworn testimony at the enquiry held by the judge, jurors #2 and 3 had not been sworn. This was short lived when the prosecution pointed out that they had been sworn. This Court however, was concerned that the remark itself, which was obviously within earshot of the victim and the other jurors, could have resulted in a real risk of bias, apparent or otherwise, against either the Crown's case or that of the appellant. First of all, there was serious concern that the jury had been allowed to mingle with the public which included the Crown's main witness. Then, the remark itself was disturbing, having been said in the presence and hearing of the victim and the other jurors. In those circumstances, the Court sought the views of counsel.

4 Counsel for the appellant maintained that the judge should have at least discharged the two jurors at best, or the entire jury for that matter as it was likely that they were all privy to the remark, a remark that reflected potential jury bias. The Crown was of the view that the judge had investigated the issue and was satisfied the trial could continue.

5 The judge did hold an enquiry and the police officer testified that the victim was in the room and when the jury entered she began to cry. As she was leaving the room, the remark was made. At that time, all the jurors were together and as she was passing juror #2, he heard the remark being made to juror #3. An elderly juror told them "*not to say that*", while the juror sitting next to them said nothing. He was certain that the remark was heard by the appellant and made in relation to the ongoing trial of the appellant. Neither counsel made any further enquiry of the officer.

6 The male juror (juror No.2) was called and his evidence is reported here in the sequence in which he gave it. When asked whether he had made any comment to anyone in relation to the trial, he admitted that he did make a remark but it "*was not specifically speaking to the trial"*. He *believed* that the conversation happened as a *collective* with the jury, in speaking of the trial going on next door. He claimed that the conversation took place with another **juror** from the case in the other court.

7 When asked whether he could recall if anything had been said by anyone about the case in his court that afternoon at the end of the day's hearing, he, at first, denied any such remark was made. Then he said that he could recall exactly what happened after collecting his stuff from the room. He said that when the jurors were proceeding to the main room downstairs where the victim was seated, he went outside instead but the security guard ordered him back into the room. While there, he said that his *god sister* came into the room and sat down with him and the other jurors. She was a supporter of the defendant in the other courtroom and he too was a close friend of that defendant. The *god sister* eventually left the waiting room, followed by the jurors who got into a vehicle to go to the hotel. He denied that any discussion took place about the trial while they were in the waiting room. At that stage, no mention was made of any conversation with the *god sister*.

8 The Judge then put the offending remark directly to him. He claimed that it was *"not pertaining to this case.* Unexpectedly, he said that the remark was *from the conversation with my god sister, she spoke about the witness next door".* Apparently, he said, the trial there was also a rape case and the victim had just given evidence and was crying. It was in that context the remark was made by his god sister. Up to that moment the

only conversation he claimed to have had was with a juror from the other court, not with his god sister. Nevertheless, he claimed that such words were not in his vocabulary and in any event said "*how could I make a comment on the victim in this case when the victim in this case is sitting right there. She was in the lobby and I did not even notice her leaving".*

9 Juror #3 was called and from the record it seems that all she could remember was that when they were downstairs somebody said to her "*like she was about to cry, but nobody tell me anything else about cry".* Contrary to what juror #2 had said, she claimed that no discussion took place about the case in the other court while they were in the waiting room. While neither the elderly juror nor any other juror was called, there was no doubt that the elderly juror had heard the remark and, more likely than not, so did the rest of the jurors. Significantly, whether they appreciated that it had to do with the case before them or the case next door was never determined. Without further enquiry, the trial judge concluded that there was nothing in the allegation and decided to proceed with the trial. No further mention or warning was made to the jury of the incident, either after the close of the enquiry or in his summation.

10 When an issue of potential bias is raised in the course of a trial, it is essential that an enquiry be held before any decision is made whether to discharge a juror or the entire jury. It is never an easy matter to resolve and therefore a judge must ensure that the enquiry is adequate in that the juror or jurors are examined to determine their version of the facts and how they were affected by the events. The Court in ***Gregory v United Kingdom*** (1997) 25 E.H.H.R. 577 @ para 44, explained that "*the need for adequate investigation of potential jury bias is vital if the judge is going to be capable of rendering it safe to continue with the trial by providing adequate warning to the jury.* Accordingly, the way in which it is done requires thought and careful attention.

11 When the complaint was made to the judge, he summoned the jury to enquire whether any of them had spoken about the case or heard any juror speaking of the case in the waiting room the day before. He requested that they raise they hand if they did. It is not surprising that no one raised their hand because the question virtually demanded a public admission of having offended a cardinal rule. It was therefore unlikely

anyone would admit to such fault. It was then that he decided to hold the enquiry.

12 The test to be applied in determining bias is whether there was a real possibility or risk that the tribunal was biased. It is an objective test of the circumstances, '*not passing judgment on the likelihood that the particular tribunal was in fact biased' (*see ***Re Medicaments (No. 2*****)** [2001] 1 WLR 700).
If after the enquiry the judge finds that there is *actual* bias then the juror or jurors must be discharged. On the other hand, if there is a *risk* of bias, a strong presumption arises that the juror or jurors should be discharged.

13 ***Re Medicaments*** speaks to a second question arising: whether in the circumstances the risk is sufficient to outweigh the desirability of continuing with the trial unless the judge believes that a warning to the jury is adequate to expel the risk of bias, even in the mind of an objective observer aware of all the facts. If that is his belief, then it is recommended that the judge should ascertain from jurors whether they are able to listen to the rest of the evidence dispassionately and return a fair verdict. This should be done, bearing in mind '*that bias being insidious, a person may unconsciously be affected though he may in good faith believe himself to be impartial*" see Archbold (2009) at 4-257.

14 It is not unusual for there to be a measure of reluctance on the part of the judge, and even on the part of counsel on both sides, to discontinue a trial that is well underway and that is understandable, given the practical difficulties that may be encountered in having a retrial. Lord Hailsham however, in ***Spencer*** [1986] A.C. 128 at132, was quite vocal in his rejection of such a thought. He considered that such factors should be *disregarded* when considering an application to discharge the jury *because the interests of justice should be paramount, and neither the inconvenience of a second trial nor the necessity of which would have been involved in calling again as witnesses the victims…possibly to their detriment, should have outweighed the necessity of the accused receiving, and being seen to receive, a fair trial.* The focus of an enquiry is therefore whether the accused person can have a fair trial on this occasion, not on a resulting one.

15 The judge's enquiry fell short of what was required. He enquired into the factual side of the events by having the officer and the two jurors testify and concluded that the remark was in respect of a similar trial going in another court and therefore not in relation to the trial in his court. That, in his view, was sufficient to direct that the trial continue. Apart from the remarkable coincidence of the factual similarity between the two cases, it may be that he overlooked the clear inconsistencies in the evidence of juror #2 that would have alerted him of the strong likelihood, even if his story were true, that the jurors and the victim may have understood the remark as relating to the case before them and not to the matter in the other court. And, in that event, given the potential bias inherent in the remark, he needed to consider the second limb of the enquiry, namely, the effect it may have had on them.

16 The Court drew that conclusion as it considered that a more in-depth approach in assessing all the evidence would have revealed that, apart from the inconsistencies in juror#2's testimony, Juror #3 was certain that any reference to the case in the other court took place later in the hotel and not in the waiting room as juror #2 suggested. Further, there was no doubt that the officer was familiar with the members of the jury and he identified the offending juror (#2) as having made the remark to juror #3 in the presence of the other jurors and that juror #2 had been rebuked by the elderly juror. Clearly, there was more to the remark and a real risk of bias to warrant further enquiry to determine the effect (if any) it may have had on juror #3 and the elderly juror who obviously appreciated that the remark was in relation to the victim in her trial.

17 In that setting, the remark, coming from within the ranks of the jurors assembled there, could have had a twofold effect. First, it was likely to cause the victim some concern as to the impartiality of the jury. The fact that a conviction may have been secured ultimately is mere hindsight and of no concern at this stage. On the other hand, the jurors having been permitted to mingle with members of the public, including the victim, the possibility could not be ruled out that the victim's crying in their presence may have been orchestrated to play on their sympathy in the hope of a favourable verdict.

18 While the co-mingling, through no fault of the prosecution or defence, should not have been allowed, the officer must be commended

for his vigilance in reporting the incident and the Judge was correct to investigate it. It seems however, that with the focus more on the incident itself, the judge may have overlooked the latent overtones of the remark and the real risk of bias on the part of the juror or jurors, resulting in the omission to enquire into the second limb. The omission was an unfortunate error on his part as it would have determined the effect, if any, the remark may have had on the jurors and whether or not any juror or the jury itself should have been discharged. That omission, in our view, was a fundamental error which deprived the appellant of a fair trial.

19 In the circumstances, the Court adopted a position of caution in the interests of justice and allowed the appeal. The conviction was quashed, the sentence set aside and a retrial ordered. The Court had the assurance from counsel for the Prosecution that appropriate steps had been taken to avoid the recurrence of any co-mingling in the future.

Delivered this 30th day of January, 2020

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Sir Elliott Mottley - President

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Neville Adderley JA

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Roger Hamel-smith JA