MONTSERRAT

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 of 1993

BETWEEN:

MARY LOUISE MALAKOFF

Appellant

and

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Dr. Nicholas J.O.Liverpool - Justice of Appeal
The Honourable Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. John C. Kelsick & Mr. Jean E.H. Kelsick for the Appellant
Mrs. Gertel U. Thom (Attorney General) and Miss Vera Mendes for the Respondent

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1993: October 15, 16, 17, 25.

JUDGMENT

SIR VINCENT FLOISSAC, C.J

The appellant was charged with the offence of obtaining property by deception contrary to section 218(1) of the Penal Code of Montserrat. The particulars of the offence charged are that:

> "Mary Louise Malakoff on the 13th day of October 1992, dishonestly obtained from the Bank of Montserrat Ltd the sum of EC$1,315.72 with the intention of permanently depriving the Bank of Montserrat Ltd. thereof by deception, namely by falsely representing that she, Mary Louise Malakoff did not sign a cheque made payable to J.Belemjian in the sum of EC$1,315.72 nor did she authorise the payment of that cheque to J. Belemjian and that someone else had signed the cheque without her permission."

On 23rd July 1993, after a trial by jury presided over by Redhead J, the appellant was convicted of the offence charged and was sentenced to imprisonment for a term of 9 months. appellant has appealed against her conviction

It was never disputed that the appellant represented to the bank that she did not sign that cheque. Nor was it ever disputed that the amount of that disavowed cheque was credited to appellant's account on the faith of her representation. The

question in dispute was whether the representation was false with the result that the appellant obtained the amount of the cheque by deceit. The representation was false if the appellant in fact executed the cheque. Accordingly, the authorship of the disavowed cheque was the central issue at the trial

On that issue, the prosecution relied on the testimony of De Rende Durr (the appellant's fellow medical student and estranged former co-tenant or sub-tenant) and on the expert opinion of Superintendent Lionel Belle (a forensic document examiner attached to the Criminal Records Office at the Central Police Station in Bridgetown, Barbados). The appellant relied on her own testimony and on the expert opinion of Janet Masson (a forensic document examiner practising in Houston, Texas in the United States of America).

Durr testified as follows:

> "I went into the kitchen. On the kitchen table was a white envelope. I picked it up, opened it. There was a cheque inside, made out to the Belenjain's account. The amount was for the phone bill for August up to that date the August phone bill was not paid. I did not put that cheque on the table. I did not write that cheque. It had Mary Lou Mailman on there, so I figured it was from Mary. I have seen cheques written by the Accused before that way. I would be able to recognise the cheque if I see it. It was written for I think $1,357.74. I am not absolutely sure."

The appellant testified that she had two bank accounts. She had a local bank account which was opened with the Bank of Montserrat in her maiden name (Mary Louise Malakoff) and which she operated under the signature "Mary L. Malakoff" She also had a foreign joint Bank account in Houston in her maiden name as well as her marital name (Mary Louise Mailman or Mary L. Mailman) and in her son's name (Dennis M Mailman). She stated that she had been married for 23 years and that the foreign bank account was opened in her marital name. She explained that: "The account in Houston, I had for many years. My signature on that account was Mary Louise Mailman. The Court gave me the right to use my maiden name." She stated that "I had signed my name Mary L. Mailman from 1960 to

That was the only signature I had

The appellant's defence was that although recently she had occasionally absentmindedly used her customary marital signature "Mary L. Mailman", she had never signed "Mary Lou Mailman" shown on the disavowed cheque) and would never have so signed even absentmindedly. Her defence is encapsulated in 3 short sentences in her testimony where she said: "I absolutely deny that I wrote that cheque. That's not the form of my cheque even when I sign Mailman absentmindedly. But I will never sign Mary absentmindedly".

The appellant went further than was necessary when suggested that the disavowed cheque was probably written and signed by Durr. The suggestion was based on the facts that (1) Durr had previously used a cheque from the appellant's numbered local cheque book without the appellant's authority (2) the appellant previously drawn cheques in favour of Durr on the appellant's foreign account and under the appellant's marital signature and (3) the appellant believed that Durr was probably the only person in Montserrat who knew the appellant's marital name

The conflict between Durr's and the appellant's testimony was intensified by the inconsistency of the evidence of the experts On the one hand, Belle concluded as follows:

> "The following are my findings that there is a very high probability that the words 1 and 3, the name of J Belemjian and the signature Mary Lou Mailman in the Bank of Montserrat Limited cheque which I marked I for identification were written by the same person who wrote the specimen writing attributed to Mary Lou Mailman a.k.a.Mary L.Malakoff which I marked 2-2.1 for identification."

On the other hand, Masson concluded as follows:

> "In my opinion the handwriting on the cheque made payable to J. Belemjian and signed by Mary Lou Mailman was not written by the same person who wrote the specimen writing of Mary L. Malakoff. L.B.2. It was probably written by the same person who wrote the specimen writing of Miss Durr L.B.3."

Later Masson said:

> "Because of these similarities that I have pointed out, in my opinion the cheque in question was probably written by Miss Durr. It is my very strong opinion that this cheque was not written by this accused."

So far, the evidence for the defence would have equipoised the evidence for the prosecution and but for a curious development, the jury's verdict would have been nothing less than startling. development was by way of evidence (fresh evidence) which adduced by Durr and which amounted to evidence of a virtual confession by the appellant. In examination-in-Chief, Durr said:

> "Kevin, my fiancé and I spoke to the Accused three days after I found the cheque at the house. Kevin asked the Accused why she took the money from his wallet. She said it was for my part of the Bill and she left the cheque on the table."

Under cross-examination, Durr said:

> "I did not say before the Magistrate that the Accused took money from Kevin Thompson's wallet. I was not asked. I never said at the Magistrate's Court that the Accused admitted to me that she left the cheque at the house. I did not say that at the Magistrate's Court because I wanted to leave Kevin out of it. Accused is accusing me of writing the cheque. I did not steal a cheque from the Accused's cheque book and wrote that cheque. Before I gave evidence at the magistrate's Court I had discussed the matter with the police. P.C. Sullivan took a statement from me. I did not know that the Accused had told Bernadette Matthew that I had written that cheque. I went to the Bank. I was shown the cheque. It is true that I did not tell the police or the Magistrate that the Accused admitted to me and my boyfriend that she wrote the cheque. This came up for the first time yesterday. ..... It is my excuse for not giving this vital piece of evidence before is that I did not want to involve my boyfriend. Kevin had done nothing wrong, that is why we approached her about it. Kevin went and spoke to Dr. Cherkok about it. This story is not an invention to protect myself."

The question therefore arises as to whether the circumstances of the admission of that fresh evidence rendered the conduct of the trial unfair and thereby constituted a material irregularity in the course of the trial and a valid statutory ground of appeal against the appellant's conviction. For guidance on that question, invoke the decision in Berry v The Queen (1992) 41 W.I.R.244 There the Privy Council considered the circumstances of the admission at the trial of the fresh evidence of two witnesses for the prosecution. Those circumstances were the facts that (1 the fresh evidence deviated significantly from the witnesses' previous written statements to the police (2) the fresh evidence was not foreshadowed in the witnesses' depositions at the preliminary inquiry (3) the written statements were in the possession of the prosecution at the time of the trial and (4) the written statements

were not disclosed by the prosecution to the defence before or during the trial. The Privy Council held that the circumstances of the admission of the fresh evidence constituted a material irregularity in the course of the trial. Delivering the judgment of the Board, *Lord Lowry* said (at p253):

> *"Since the defence must be given a copy of the statement of a proposed witness who has not made a deposition, it must follow that, if a Crown witness's evidence is intended to depart significantly from his deposition and to be based on his statement to the police, it is the duty of the Crown to give the defence a copy of that statement in advance of the hearing."*

Later, *Lord Lowry* said (at pp 256 & 257):

> *"A comparison of the statements with the evidence of the two important witnesses reveals a small but not insignificant number of discrepancies, only one of which was disclosed by the Crown to the defence. What their Lordships find still more important in this case is that important evidence was adduced which had not been foreshadowed in the depositions. They consider that it was the Crown's clear duty to give advance warning of that evidence by furnishing the three statements to the defence. Failure to do this was in their Lordships' view a material irregularity: R v Maguire (1992) 2 WLR 767 at page 782.*
>
> *The Crown submitted that, even if the appellant's approach be accepted, the defence could not exclude admissible evidence, even if proper notice of it had not been given, and further argued that Zaidie's evidence (confirmed by the appellant) that an accident was not suggested in the telephone call to him was conclusive when taken with the incontrovertible circumstances of the shooting, thereby suggesting that the 'irregularities' were not material in the sense that the defence could have profited if they had not occurred.*
>
> *But, unless the proviso can be invoked, one must adopt the maxim that the more difficult (short of impossibility) is the defending advocate's task, the more vital it is to see that he does not labour under an unfair disadvantage. Had the statements been supplied, the defence could have planned their campaign, prepared a more effective cross-examination, been ready to object, if challenging admissibility, and been prepared to let the judge and jury see the statements if that course appeared to offer prospects of success. It could well be that Matadial was thoroughly discredited, even as the case ran, but with advance information her demolition could have been more clinically achieved, with perhaps a greater effect on the jury and with a better chance of involving Zaidie in the destruction of the Crown case on motive and malice. The joint credibility of Zaidie and Matadial was crucial and was bound to vary inversely to the credibility of the appellant. Taken at face value their evidence was a powerful counterweight to the tenuous defence of accident and the defence needed all the information it could get in order to decide how best to attack the Crown case."*

These passages from the judgment of the Privy Council in **Berry v The Queen** clearly indicate that what constituted the material irregularity in the course of the trial in that case was not the admission of the fresh evidence *per se* but the circumstances of its

admission The fresh evidence was admitted without prior disclosure to the defence of the witnesses' previous written statements from which the fresh evidence significantly departed. Those circumstances rendered the conduct of the trial unfair in that they placed the accused at an unfair disadvantage with no adequate opportunity to prepare to answer the fresh evidence and to destroy the witnesses' credibility

In the present case Durr's fresh evidence of the appellant's alleged confession deviated significantly from Durr's previous written statement to the police and from Durr's deposition at the preliminary inquiry. It was highly incriminating evidence which was not foreshadowed either in Durr's written statement or in her deposition. The defence was not forewarned of the fresh evidence and was not given a copy of Durr's written statement either before or during the trial. The result is that at the trial appellant and her counsel laboured under the unfair disadvantage vividly described in Berry v The Queen. The circumstances of the admission of the fresh evidence therefore rendered the conduct of the trial unfair and thereby constituted a material irregularity in the course of the trial

This material irregularity was aggravated by the trial judge's failure to put the defence fairly and adequately to the jury. trial judge was content with the following statement:

> "The Accused gave evidence on oath. You assess her evidence, the same way you assess the evidence of the witnesses for the Crown. She said categorically, she denied writing that cheque. You have all the evidence before you. Remembering, of course, she does not have to prove anything. But if the evidence you accept from her evidence, that she did not write the cheque, then of course, she would be 'not guilty'. If from the evidence you have any reasonable doubt as to whether she wrote the cheque or not, then equally she would be 'not guilty'. Because it means that the Prosecution failed to prove the case to your satisfaction so that you feel sure about the guilt of the Accused."

In my judgment, this statement does not satisfy the requirement of putting the defence fairly and adequately to the jury. Where, as in this case, an accused denies that the crime was

committed by him and gives reasons for the denial, it is not sufficient merely to put the denial to the jury. The trial judge should also put the reasons for the denial and the facts if any) in support of the reasons

In this case, the appellant did not merely deny that she executed the disavowed cheque. She gave a simple reason for her denial She explained that she had never signed "Mary Lou Mailman" and would never have so signed even absentmindedly. That simple reason and the facts (the numerous cheques) in support of it were never put to the jury

The learned Attorney General properly conceded that if there was a material irregularity in the course of the trial and if the defence was not fairly and adequately put to the jury, the appeal must be allowed because in the circumstances of this case, a substantial miscarriage of justice would have occurred. however invited this Court to exercise ts judicial discretion and to order a new trial in the interests of justice. In considering that application, I am guided by the decision of the Privy Council in Reid v R (1978) 27 WIR 254. There, Lord Diplock (delivering the judgment of the Board) said (at p257;)

> "It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the accused, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the accused to trial has failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under s 14(2) of the Judicature (Appellate Jurisdiction) Act 1962."

In my judgment, having regard to the tendency to surprise displayed by Durr (the sole or principal witness for prosecution), these words of Lord Diplock aptly apply to this case

Accordingly, I would allow the appeal, quash the conviction and set aside the sentence

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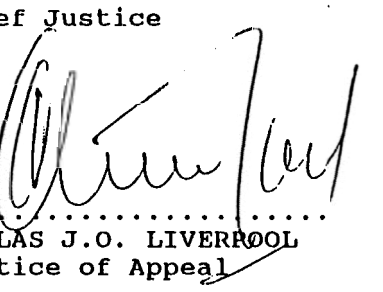
SIR VINCENT FLOISSAC
Chief Justice

I concur.



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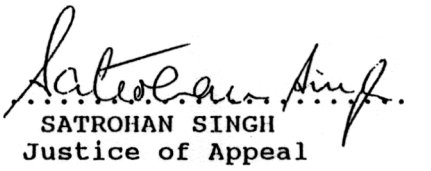
NICHOLAS J.O. LIVERPOOL
Justice of Appeal

I concur.



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SATROHAN SINGH
Justice of Appeal