

GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No.12 of 1993

BETWEEN:

DEVON CALLISTE

Appellant

and

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice

The Honourable Dr. N.J.O. Liverpool - Justice of Appeal

The Honourable Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. Alban M. John for the Appellant

Mr. Keith Friday, Director of Public Prosecutions

Mr. Christopher Nelson, Senior Crown Counsel with him for the Respondent

1994: July 5;

Sept. 19.

JUDGMENT

SATROHAN SINGH, J.A.

At about 1.30 p.m. on Thursday, August 9, 1990, a masked man, dressed in all black and wearing a pair of white gloves, held an automatic rifle to the chest of Bernadette Morain and attempted to rob the shop of Simon Morain at Ravine, Grenada. Later the said day, the appellant, in an uncautioned oral statement, (the confession), allegedly confessed to the crime to Sergeant Ignatius Mason in these terms:

"Officer I borrowed \$10,000 from the bank. I bought some chickens. When Arthur came the fowl run flood and over one hundred of the fowls dead and I have no food to feed the rest. This morning I take my AKS in a bag and I went up Ravine and I held up Simon shop. I did not get any money."

• on Tuesday, November 16, 1993, a Jury before *Moore J* convicted the appellant of the offences of (1) Attempted Robbery (2)

Possession of 30 rounds of AKS Ammunition and (3) Possession of one AKS rifle. on November 29, 1993, after due deliberation, the learned judge sentenced the appellant to imprisonment for three years, one year and one year respectively to run concurrently. The appellant appeals from these convictions and sentences. The case for the prosecution on the robbery charge rested solely on the confession made by the appellant, the prosecution eye-witnesses Bernadette Morain and Bob Pilgrim not being able to give any evidence on the visual identification of the intruder.

For the other two offences, the prosecution relied on the alleged voluntary act of the appellant in handing over to the police one AKS rifle and 30 rounds of AKS ammunition. In his defence, the appellant denied committing the offences. He denied making the confession. He also denied handing over any gun or ammunition to the police. Those denials therefore effectively made those issues questions of fact for determination by the Jury. However, as a matter of law, learned Counsel for the appellant, before the trial Judge, objected to the admissibility of the confession

on the ground that it was obtained in breach of **Rule 2 of the Judge's Rules** admitted. This objection was overruled and the statement was

From the grounds of appeal filed, the issues raised before this Court were:

1. The admissibility of the Confession.
2. Corroboration of the confession.
3. Whether the trial appellant Judge unfairly questioned the
4. Whether there was imbalance in the Judge's Summing-up.
5. Whether the verdict was unsafe and unsatisfactory.
6. Severity of sentence.

The confession

Learned counsel for the appellant submitted that at the time when the confession was allegedly made, Sergeant Mason had enough material before him upon which he must have had reasonable grounds to suspect the appellant as the robber, and as such, he should have administered the requisite and appropriate caution to the appellant before he questioned him. Counsel contended that the absence of the caution made the confession inadmissible. No challenge was made or is being made as to the voluntary nature of the confession. The appellant's evidence is that he never made that oral statement.

Rule 2 of the Judge's Rules cap. 336 of the **Laws of Grenada**, which is almost identical to Rule 2 of the Judge's Rules of the United Kingdom as stated in Archbold Criminal Pleading and Practice (1982) 41st Ed. p.940 para. 15-46, reads as follows:

"As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution the person or cause him to be cautioned before putting to him any questions, or further questions relating to that offence."

What may amount to "reasonable grounds for suspecting" can be explained by reference to **Archbold Criminal Pleading and Practice (1988)** 43rd Edition Page 1195 where the concept of "reasonable suspicion" is dealt with. There the learned author says:-

"Reasonable suspicion does not require certainty. The officer does not have to be satisfied beyond a reasonable doubt. Reasonable suspicion in contrast to mere suspicion must be founded on fact. There must be some concrete basis for the officer's suspicion related to the individual person concerned, which can be considered and evaluated by an objective third person. Mere suspicion, in contrast, is a hunch or instinct which cannot be explained or justified to an objective

observer. Reasonable suspicion may arise from suspicious behaviour of the person concerned or those with him. Reasonable suspicion cannot be supported on the basis simply of a higher than average chance that the person has committed or is committing an offence".

With these principles in mind, I would now objectively look at the evidence and determine whether Sergeant Mason, immediately before the appellant allegedly made the confession, subjectively could have had reasonable grounds for suspecting that the appellant was the masked intruder. The relevant evidence on this issue is more or less encapsulated in these answers given by Sergeant Mason in cross-examination:-

"No one at the scene of the robbery could identify the robber

After the search we went straight to the home of the accused

The persons at the scene of the robbery gave us certain descriptions of the attempted robber. I went to the home of the accused based upon the description and other information received. The information was that the accused was seen in the area about five minutes prior to the attempted robbery which was unusual. The accused was allegedly seen in the area around lunch time. My informant had never seen the accused in that area. I do not know the habits of the accused or his movements around that area. I think there is a ravine adjacent to the scene of the robbery which is used by members of the public. The unusual features were the description and the fact that the accused was never seen in the area by the informant. The description of the attempted robber was of a man of slim built 5'10" in height dark skinned. These factors together with the information that the accused had been seen in the area about 5 minutes before the attempted robbery, and the fact that he had not been seen there before by the informant led me to go to the home of the accused to make enquiries into the report. I became suspicious because the accused was wet with perspiration when he came out of the house."

From this evidence can this Court, from an objective point of view, say that Sergeant Mason subjectively had some factual concrete basis to reasonably suspect the appellant as the robber. Looking at the evidence as a whole on this issue, while I accept that such suspicion did not require certainty or that the officer had to be satisfied beyond a reasonable doubt, my considered opinion is that until the appellant allegedly made the confession, all Sergeant Mason could have had was mere suspicion or a hunch. The sergeant had information that the appellant, who was seen in the area about 5 minutes before the robbery was almost 6' 1" whereas the height of the robber was about 5'10" and that members of the public use that area. The fact that sergeant Mason's informant told him that he never saw the appellant there before, could not be an unusual circumstance as it cannot mean that the appellant was never before in that area. All that means is that he never saw him there. There was no evidence that the AKS rifle handed over to Mason was the same or a similar rifle to that held by the robber. The appellant was in a red jersey when confronted by the Sergeant at his home and there was no evidence connecting him with the black clothes, mask or white gloves allegedly worn by the robber. And, an objective observer, would not consider being wet with perspiration in the middle of the afternoon in a home at Glean in st. George's as suspicious behaviour. I therefore can see no factual concrete basis upon which reasonable grounds for suspicion could have been founded. For these reasons I would hold that

there was no breach of the Judge's Rules when the confession was made. This ground of appeal accordingly fails. **corroboration of a Confession**

Learned Counsel for the appellant next submitted to this Court that when a case for the prosecution rested solely on the confession of an accused person, and there is no corroboration of that confession, that the Judge should withdraw the case from the Jury or, should give the Jury clear directions on the need for corroboration of such a confession. When put so broadly, I consider this to be a novel proposition of law. counsel relied on **David Stuart McKenzie (1993) 96 Crim Appeal R.98** as authority for this proposition.

I do not agree that McKenzie's case supports this broad principle of law. McKenzie's case is relevant to a situation where a case for the prosecution rests solely on an unconvincing confession, The *Ratio Decidendi* of that case as can be gleaned from the judgment of the *Lord Chief Justice Lord Taylor* who delivered the judgment of the Court of Appeal of England is that where (a) the prosecution's case depended wholly on confessions,

(b) the defendant suffered from a significant degree of mental handicap and (c) the confessions were unconvincing to the point where a jury, properly directed, could not properly convict upon them, then, assuming the judge has not excluded the confessions, unless there was corroboration of the confessions or some evidence from another source pointing towards the appellant, the trial Judge should, in the interest of justice, take the initiative and withdraw the case from the Jury. These three conditions have to be present before the principle is activated.

The learned Lord Chief Justice explained:-

"Confessions may be unconvincing, for example, because they lack the incriminating details to be expected of a guilty and willing confessor, or because they are inconsistent with other evidence, or because they are otherwise inherently improbable. cases depending solely or mainly on confessions like cases depending upon identification evidence, have given rise to miscarriages of justice. We are therefore of opinion that when the three conditions tabulated above apply at any stage of the case the Judge should, in the interest of justice, take the initiative and withdraw the case from the Jury."

In the instant matter, only one of the three criteria set out in the *Lord Chief Justice's* judgment is present and that is that the prosecution's case depended wholly on the appellant's confession. There is no evidence that the appellant at any time suffered from any or a significant degree of mental handicap, and it cannot be truthfully said that the confession in this matter was unconvincing to the point where a Jury properly directed could not properly convict on it if they accepted that the appellant made it. Having made the uncautioned confession, the evidence of the prosecution showed that after having been then cautioned the appellant told Sergeant Mason "*I'll show you where I passed*". He then took the CID officers to the crime scene and said "*Here is where I passed up. The front door was open. I went inside and I did not get any money so I left. The mask and gloves I left in the bushes.*" From his own evidence in Court, the appellant, whilst denying the confession, confirmed that he did borrow \$10,000 from which he bought fowls, that as a result of Storm Arthur the ravine which is about 10 feet away from the back of his fowl-run

over flowed its banks, and that Arthur carried rainfall in the area where the chicken-run was located. However, he says his fowl-run was not flooded..

Without all the three conditions tabulated above being present, and with the confession being as convincing as it is, especially when it is so amply supported by the above further cautioned statement of the appellant - and his evidence in cross examination, I cannot say that the learned Judge erred when he did not withdraw the case from the Jury or when he did not give them clear directions on corroboration. In my view, in the context of this matter, corroboration was not necessary. appeal therefore fails.

This ground of

The Judge's Question

During the evidence in chief of the appellant at the trial, he was asked by his Counsel whether he ever had in his possession the specific firearm of which he was charged. Before he could answer, the learned judge intervened and asked him "*more importantly in the course of your training and service as a soldier did you ever have access to guns like this one?*" The appellant answered in the affirmative to this question and in the negative to his lawyer's question. Learned Counsel for the appellant contends and the learned Director of Public Prosecutions concedes that the prejudicial effect of the Judge's question and appellant's answer thereto far outweighed its probative value. I agree. I see no probative value in this evidence. However, given the circumstances of this case, I consider the prejudicial effect so slight that it was not capable of causing a miscarriage of justice.

The Summing Up

Learned Counsel for the appellant firstly criticized the learned judge's summing up for not being balanced. His main objection related to the use of the expression "*If you believe*" when the Judge was dealing with the appellant's defence. Counsel thought that the use of that expression could have conveyed to the Jury that the appellant was not to be believed. I have perused the Summing up and looking at it as a whole I do not share his view. This expression **per se** in a summing up is not objectionable and the learned Judge used it, not only in relation to the appellant's testimony, but also with Sergeant Mason's testimony when he compared it with the appellant's and also, when he dealt generally with the case. Counsel suggested that the Judge augmented the expression with elaborate gestures. We have no evidence of this. I therefore do not see the imbalance complained of by learned Counsel for the appellant in that regard or regarding any other aspect of the summing up.

Learned Counsel then described as an incorrect statement of fact these words of the Judge in his summing up:-

"But as I said, look at the accused remember his evidence, he is 6' 10 11 , remember the evidence of Bob Pilgrim that he was 5'

6".

I agree with Counsel that this direction sought to convey to the Jury that Bob Pilgrim said the appellant was 5' 6". However, I consider this a slip by the Judge which could have done no damage to the fairness of the appellant's trial especially when regard is had to the context in which that direction was given. Immediately before that direction, the Judge told the Jury this:-

"Bob Pilgrim in his evidence in that aspect said that he did not know who the man was. The man was about 5' 6", but now in evidence the accused testified that he was a man 6' 10". And if you look he is more 6' 10" tall than 5' 6".

Taken in context I am of the view that the slip was so infinitesimal it would not have registered in the minds of the Jury.

Learned Counsel for the appellant as his third criticism of the Judge's summing up then referred to the Ammunition offence and contended that the trial Judge "misdirected or failed to properly direct the Jury when he left them to draw the inference that the appellant was in possession of the ammunition". Counsel submitted that the prosecution had to prove that the appellant knew of the ammunition before possession can be proved and that such knowledge could not have been inferred.

The only evidence against the appellant on this charge is that when he produced the bag with the AKS rifle in it, the police also found the 30 rounds of ammunition in it. When the appellant told Sergeant Mason he had an AKS, he did not mention he also had the ammunition. The prosecution therefore relied on the Jury drawing the inference from the appellant's admitted possession of the gun in the bag that he also possessed the ammunition found in the bag. This is how the learned Judge dealt with the matter. He first of all in the earlier part of his summing up directed the Jury on the drawing of inferences. He told them:

"Both sides have invited you to draw certain inferences on facts which you will find and the rule about that is this, that if from any facts or series of facts two inferences could with equal reasoning be drawn, you will be required **as a** matter of law to draw that inference which is in favour of the accused."

The learned Judge then gave this direction to the Jury:-

"What the prosecution is asking you to believe is that the accused did take the bag and this bag did contain AKS. They are asking you to draw the inference that the accused knowingly was in custody and control of the ammunition as well and intended to exercise custody and control over the ammunition•. ••....•..••. so it is for you whether in these circumstances you can draw the inference that the accused was in possession of the ammunition or whether, assuming that you believe Mason since the accused never said anything about the ammunition you come to the conclusion that he was not in possession of ammunition and of course you disbelieve Mason about the whole thing then you acquit him."

The learned Judge then went on to explain concept of possession to the Jury. He told them:

"Now, the second count is the count of possession of ammunition. Now in order to prove that the accused had possession of the ammunition, the prosecution has to prove that the accused knew about the ammunition, that he intended to possess it and that he had custody and control of that ammunition. If they fail to prove any of those things to your satisfaction or you are in doubt of any of these things you have to acquit."

The Judge then reminded the jury that "at no stage the accused, according to Sergeant Mason said he had ammunition as well."

This direction on the law of possession cannot be faulted and is in keeping with the meaning of possession as confirmed by the House of Lords in **R v Boyeson (1982) 2 ALL E.R. 161** and adopted and used by this court in a Judgment delivered by *Sir Vincent Floissac* Chief Justice on March 8, 1993 in **Ortiz et al v Police**, Magisterial

Criminal Appeal No.27 of 1992 (unreported).

Scarman at p.163 said:

In **Boyeson**, *Lord*

"Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature, but you do not possess it unless you know you have it.¹¹

Looking at the summing up on this issue in this context, I do not see the misdirection or non-direction complained of by learned Counsel for the appellant. The learned Judge fairly and adequately directed the Jury on the drawing of inferences, accurately gave them the law on possession, carefully reminded the Jury of the evidence on the ammunition charge and left it for their consideration. I know of no law which says that the element of "knowledge" in the concept of "possession" cannot be proved by inference. And, in the instant matter, I cannot say that a Jury, on the evidence before them, could not have reasonably inferred the relevant knowledge in the appellant of the ammunition. When Sergeant Mason told the appellant of the report, he would have mentioned that the assailant had a rifle. It is obvious he would not have mentioned ammunition. So I don't place too much store on the fact that when the appellant responded that he had an AKS rifle, he said nothing about ammunition. The conversation would have been about the rifle used in the robbery and not about ammunition. The fact, if accepted, is that he produced the bag to the police in which he said he had the rifle and in that bag was the ammunition. For all these reasons, this ground of appeal challenging the summing up of the learned trial Judge is therefore without merit and fails on all the points taken.

Verdict Unsafe and Unsatisfactory

Learned counsel for the appellant, as his final ground of appeal against conviction, invited the Court to regard the verdict of the Jury on all counts as being unsafe and unsatisfactory. When regard is had to all the circumstances of this matter, the evidence and the general feel of the case have left no subjective lurking doubts in my mind as to the correctness of the verdict of the Jury. I therefore have not been persuaded that the verdict of the Jury was unsafe and unsatisfactory. This ground also fails.

Sentence

Learned counsel finally briefly referred to the sentences imposed. I can find no legal justification to interfere with them. In my view the Judge was extremely lenient.

For all these reasons, I would dismiss this appeal and affirm the convictions and sentences.

SATROHAN SINGH

Justice of Appeal

I concur.

SIR VINCENT FLOISSAC

Chief Justice

I concur.

NICHOLAS LIVERPOOL

Justice of Appeal