

SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 OF 1989

BETWEEN:

MARTIN SAMPSON ALIAS "RAMBO"

Appellant

and

THE QUEEN

Respondent

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

Appearances: Mr. Marcus Foster for the Appellant  
Mr. Errol D. Walker, D.P.P. for the Respondent

-----  
1993: May 26  
October 25.  
-----

JUDGMENT

SATROHAN SINGH, J.A.

On June 27, 1989, the appellant was convicted by a Jury before Byron J. of the offence of Murder, contrary to Section 178 of the Criminal Code, Cap.250 of the Revised Laws of St.Lucia, 1957. He was sentenced to death. He appeals from this conviction. The case for the Prosecution was that the appellant, with another, on September 23, 1988 at about 7.20 p.m., in his attempt to rob Linmore's supermarket, intentionally caused the death of Arthur Pascal by unlawful harm when he shot Pascal with a .32 revolver in the region of his abdominal aorta. The Prosecution sought to prove its case on the evidence of two accomplices to the alleged crime with other independent witnesses being called for the purpose of corroborating the evidence of these accomplices.

The evidence for the Prosecution shows that the person who fired the fatal shot at Pascal had his face fully covered with a stocking. The accomplices, who were present in the vicinity where the crime was committed and who could have seen when the fatal shot was fired testified that this masked person who fired the shot was the appellant. They testified, inter alia, as to the appellant's plan to rob Linmore's Supermarket, the clothes the appellant wore at the time of and after the commission of the crime, the appellant's possession of the gun "when he left to go on the crime", and of his intention expressed to accomplice Francis George after the commission of the crime, of the desire he had at the scene to shoot his other two accomplices if he had other

bullets in the gun when, after he shot Pascal, they reneged on the plan to take the bag of money, but instead, they ran away. One of the accomplices also testified that he took the police to the spot where he saw the appellant bury the .32 revolver and where it was found by the police. The defence of the appellant was that of an alibi and a denial of the commission of the crime.

Despite discrepancies in the evidence of these two accomplices, they both gave compelling evidence against the appellant. However, because of **S1169 of the Criminal Code of St. Lucia**, as it then was, the appellant, as a matter of law, could not have been convicted on their uncorroborated testimony. It is accepted that because of the defence of alibi raised by the appellant, that the identification of the appellant as the person who fired the fatal bullet was the central and most critical issue at his trial. The corroboration therefore needed by the Prosecution was mainly on this issue of identification. The evidence the Prosecution relied on for this purpose however, was limited to the identification of the coat and the cap the assailant wore at the time of the commission of the crime. There was no corroboration of the evidence of the accomplices on facial identification at the time the fatal shot was fired.

In his arguments before this Court, Counsel for the appellant touched on five issues:

1. Identification: The Turnbull Guidelines
2. Corroboration
3. Accomplices: Interests to serve
4. Statement of co-accused from dock - the warning
5. Intent: The case of **Tench**

#### **Identification: The Turnbull Guidelines:-**

As his first ground of appeal, Counsel for the appellant argued that the trial Judge failed to give the Jury "adequate, proper or sufficient direction on visual identification in accordance with the 'Turnbull Guidelines'". These Guidelines are set out in **R v Turnbull and Others (1976) 3 A.E.R. 549**. We accept that the trial Judge gave no directions to the Jury in accordance with these guidelines. The question then is what miscarriage may have occurred as a result of this omission of the trial Judge. From the line taken by the defence at the trial, the appellant was not contending that the accomplice witnesses were mistaken when they purported to identify him as the killer of Pascal. The thrust of the defence was that they were lying on him and that their evidence was a fabrication. In **R v Courtneil (1990) Crim. L. R. 115** it was held at p.116 that where the sole issue was that of veracity of the evidence of identification, "a Turnbull direction, in those circumstances would only have confused the Jury". In her commentary on this ruling of the Court of Appeal of England, the reporter of this case gave this opinion:-

"The Turnbull rules were principally designed, as **Lord Widgery** so vividly put it in the later case of **Oakwell (1987) 1 A.E.R. 1223**, to deal with the "ghastly risk run in cases of fleeting encounters". Thus the rules are expressed to apply "wherever the case against the accused depends wholly or substantially on the

correctness of one or more identifications of the accused which the defence alleges to be mistaken". If the defence alleges, not mistake, but a frame up, no useful purpose would be served by giving the warning....The Jury have enough to think about without being confused by unnecessary warnings."

I agree with this opinion and applying these principles to the instant matter I find directions to the Jury in accordance with the "Turnbull Guidelines" to be unnecessary with respect to the evidence of the accomplice witnesses. However, regarding the "independent corroborative witnesses" I find such a direction necessary in so far as their evidence purported to identify the coat and cap of the killer. I consider this omission by the trial Judge to be a non-direction amounting to a misdirection.

## 2. Corroboration:

Learned Counsel for the appellant then argued that the trial Judge at no point in his directions indicated to the Jury that if there was no corroboration of the evidence of the accomplices that they must acquit the appellant. There is no merit in this submission. The learned trial Judge in dealing with **S1169 of the Criminal Code** made this abundantly clear to the Jury when he gave them this direction:

"This law which binds us and which both you and I must obey states that the accused person must go home free if his conviction must depend on the uncorroborated testimony of an accomplice. So it is essential to see whether there is corroboration of the testimony of the two accomplices."

Counsel for the appellant also submitted that because of its lack of quality, it was a misdirection to tell the Jury that the evidence of Patrick Christopher, a non-accomplice witness, could be treated as corroborative evidence. Learned Counsel argued that "if a piece of evidence can go either way", it should not be left with the Jury as capable of being corroborative.

On this issue, the accomplices testified that when the appellant left to commit the crime and that when he actually shot Pascal, he was dressed in a black coat and a black "dam dam" cap. Both coat and cap were produced in evidence at the trial and were identified by the accomplices as the same coat and cap they saw on the appellant. The corroboration relied on by the Prosecution was with respect to this coat and cap. 'Prosecution' witness Peter Reynolds testified that about forty-five (45) minutes before the shooting he saw the appellant wearing the said coat and cap. He gave evidence of facial identification. He did not see the shooting. Patrick Christopher testified that the person whom he saw shoot Pascal had on the same coat evidenced at the trial. There was conflict between this evidence and that of another prosecution witness, Adrian Joseph who testified that the person who fired the gun had on a blue or black jersey. The learned trial Judge left that conflict for the jury to deliberate on and resolve. I consider that in doing so, the Judge adopted the correct procedure. I do not agree with the

Submission of Counsel that where evidence is equivocal it should be withdrawn from the Jury. I hold that such evidence should be left with the Jury with proper directions on the method of dealing with discrepancies and contradictions and on the drawing of inferences.

It is patent from the record that the learned trial Judge in a most meticulous manner brought home to the Jury's mind the discrepancies in the evidence led by the Prosecution and gave them adequate guidelines as to how they should deal with those discrepancies. The trial Judge also properly directed the Jury on the law as it related to corroboration and pointed out to them what evidence was capable of amounting to corroboration. He left it for them to say whether such evidence was in fact corroborative. With proper directions, he also left with the Jury for their consideration the issue of the quality of the evidence having regard to the discrepancies. The summing up also discloses proper directions to the Jury on the issue of the drawing of equal inferences. Whilst I agree that the above directions were given at different parts of the summing up, I find no fault with this as a Court of Appeal in deciding an appeal must look at the summing up as whole. This ground fails.

### **3. Accomplices: Interests to Serve:**

I find no merit in the appellant's fourth ground of appeal that the trial Judge failed adequately or properly to explain to the Jury the law in relation to the evidence of the two accomplices particularly on the issue that they had their own interests to serve. The directions of the trial Judge on this issue are clearly set out in his summation to the Jury and I find them impeccable.

### **4. Statement of Co-accused from the Dock: The Warning:**

Counsel for the appellant as his next ground of appeal contended that the trial Judge failed to direct the Jury that what one accused said against the other accused from the dock is not evidence against that other accused. In this matter the appellant was charged and tried together with a co-accused John Butcher. The latter, in a statement to the police and from the dock named the appellant as the killer of Pascal. In support of this ground, Counsel referred the Court to this direction of the Judge which was given to the Jury after the learned trial Judge had dealt with the statement made by John Butcher to the police:

"Now I want to tell you that as a matter of law that any statement made by John Butcher implicating Martin Sampson outside of this Court house and not in the presence of Martin Sampson is not evidence against him."

Counsel contended that this direction limited the warning to what Butcher might have said outside of Court. We do not disagree. However, learned Counsel failed to refer this Court to this other direction of the trial Judge after the Judge had dealt with John Butcher's statement from the dock:

"Now I must impress on you at first that what John Butcher said is not evidence

against Martin Sampson and you must totally disregard it when you consider the case against Sampson."

This ground fails.

#### 5: Intent: The Case of Tench:

As his final ground of appeal, Counsel for the appellant argued that "the Law of Intent, more particularly, in relation to the facts of the case was not adequately and/or properly put to the Jury in the light of the attacks made upon the appellant". In arguing this ground, Counsel for the appellant, assumed the appellant was present at the scene of the crime and, asked the question whether the trial Judge's directions on intent were adequate. Counsel referred to (1) the trajectory of the bullet entering the victim by his navel and angling downwards, (2) the appellant's reaction of "shock" when told by accomplice Francis George that Pascal was dead and (3) the fact that after the fatal bullet was fired, two other bullets were discharged after the shooter was attacked by one of Pascal's co-workers. Counsel then submitted that because of the nature of the injury the Judge should have directed the Jury on "probabilities".

Learned Counsel referred this Court to its own decision in **Hilary Patrick Tench v The Queen (1991) 41 W.I.R. 103** where Sir Vincent Floissac, Chief Justice (delivering the judgment of the Court), faulted the trial Judge for failing to point out to the Jury, in the context of that case, that there were degrees of probability. That was a case where a person who was stupid and mentally retarded had been convicted of the murder of his father. The learned Chief Justice said in that case at page 111 that "this retardation must necessarily have adversely affected the appellant's foresight of a high degree of probability that two blows to his father's head with a stick would result in the father's death" and concluded:-

"I do not know what degree of foresight the Jury would have ascribed to the appellant if they were advised as to the significance of the degree of probability of the father's death and the appellant's foresight thereof."

Since the degree of probability of the consequence of the appellant's act was not and could not have been an issue in this case, there was no need for the trial Judge to say anything on degrees of probability. This is a case where the appellant, presumably a sane and sound person, and another, set out to rob a store. They went masked, the appellant armed with a .32 revolver. In executing the robbery, the appellant, without more, shot the employee Pascal in the region of his navel. Another employee seeing what happened attacked the appellant with a chain. Two other shots went off. This attack with the chain was after the fatal bullet was fired. It boggles the mind to understand what different probabilities Counsel could be referring to when the fatal bullet was fired. Counsel for the appellant thought that directions for the Jury to consider the defence of accident was necessary. I do not agree. On the evidence, when the fatal bullet was fired, the issue of accident never arose. As I see it, the only probability open for the

Jury to find when the fatal bullet was fired in the abdomen of Pascal, was a probability evidencing an intention to cause death to Pascal by unlawful harm, by having regard to the circumstances prevailing when it was fired and to the part of the body of the deceased that received the bullet. These circumstances show a voluntary act by a presumably sane person. An act which such a person in those circumstances must have believed would probably produce or contribute to produce the event it caused, even though he might not have done the act for such a purpose. The learned trial Judge carefully and adequately directed the Jury on the issue of intent in keeping with the provisions of S71, 72 & 75 of the Criminal Code of St. Lucia and advised the Jury as to the importance of that issue.

Challenge was also made to the Judge's directions pertaining to S71. S71 reads as follows:-

"If a person does an act voluntarily believing that it would probably cause or contribute to cause an event, he intends to cause that event within the meaning of this Code although he does not do the act for the purpose of causing or contributing to cause the event."

The learned trial Judge explained S71 thus to the Jury:-

"This could cover all circumstances in a murder case where an accused person voluntarily did an act which he foresaw would probably cause the death of the deceased whether he did the act for the purpose of causing the death or not. So in this case, if the evidence satisfies you so that you are sure that Martin Sampson voluntarily shot the deceased with a point three-two revolver from the distance described by the witnesses in the trial, and that at the time he did so he believed that it would probably cause or contribute to cause the death of Arthur Pascal, then he intended to kill him. **Whether he shot him for the purpose of causing his death or not, or simply to facilitate robbing him of the money belong to Linmore's Supermarket.**

(Emphasis mine)

Counsel for the appellant described these last three lines as "devastating" and "a grave misdirection". Taken in its context, it is obvious that the full-stop at the end of "intended to kill him" should have been a comma. When read with the comma, I find nothing wrong with this direction. I find it to be an adequate explanation of S71. It is a direction to the Jury equating the appellant's subjective intention in regard to a consequence with the appellant's subjective belief in the probability of the consequence.

In *Tench's* case, the learned Chief Justice, referred (inter alia) to S71 of the Code and went into the question whether the belief mentioned therein is required to be subjective or objective and whether the Judge properly directed the Jury on the requisite belief. The learned Chief Justice referred to the dictum of Lord Diplock in *Regina v Hyam (1975) A.C. 55 at p.94* and to the approval of that dictum by the Privy Council in the opinion delivered by Lord Ackner

in *Frankland v The Queen* (1987) A.C. 876 and concluded at p.109.

"The subjective test of intention propounded by Lord Diplock and adopted by the Privy Council in *Frankland v The Queen*, predominates in Sections 71 and 72 of the Criminal Code. S71 equates a person's subjective intention in regard to a consequence with that person's subjective belief in the probability of the consequence."

For these reasons I find no merit in this ground of appeal.

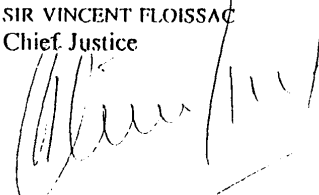
In conclusion, except for the one misdirection on the "Turnbull Guidelines" I find no merit in the other grounds of appeal. Regarding that misdirection, I am of the view that because of the strength of the evidence led by the Prosecution, that had the Jury been properly directed on these guidelines with respect to the corroborative witnesses, they would inevitably still have convicted the appellant of the offence of Murder. There was evidence that there were lights where the shooting took place and that Patrick Christopher could have seen clearly. There was also evidence that both Christopher and Reynolds knew the appellant very well and that when Reynolds saw him with the coat and cap, he had an unobstructed view of him from about 25 yards away. In the result, I would apply the proviso to S35 of the West Indies Associated States Supreme Court (St.Lucia) Act No.17 of 1969 and order that this appeal do stand dismissed. I would confirm the conviction and sentence.

  
SATROHIAN SINGH  
Justice of Appeal

I concur.

  
SIR VINCENT FLOISSAC  
Chief Justice

I concur.

  
NICHOLAS J.O. LIVERPOOL  
Justice of Appeal