BARBADOS:

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 11 & 12 of 1998

BETWEEN:

RICHARD JOHN ANDERSON BARNETT

Appellants

ANDREW CARLISLE FORDE

AND

THE QUEEN

Respondent

Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice George Moe, The Honourable Mr. Justice Colin Williams, Justices of Appeal

2000: February, 3rd, 9th & April 5th.

Mr. R. Worrell in association with Ms. S. Comissiong for Appellants.

Mr. E. Edwards for Respondent.

DECISION

On February 20, 1998 the appellants Richard Barnett and Andrew Forde, together with one Sylvian Horton, were arraigned on a charge of robbery with aggravation contrary to section 30(b) of the Larceny Act Chapter 139. They all pleaded not guilty and on Friday 27 the appellants were found guilty, but Horton not guilty. On the same day Barnett and Forde were each sentenced to ten years imprisonment.

The particulars of the offence charged were that the three accused on February 8, 1992 together robbed Marcia Watson of $500 Barbados Currency. The evidence disclosed that -

(1) on February 8, 1992 about 2.30 p.m. Marcia Watson, cashier at a minimart in Clermont, St. James, opened the cash register at the point of a gun and money was removed from the drawer and taken from the minimart. Watson testified that two men came up to the cash register and one of them, Forde, pointed a gun at her, that they removed money from it and that she “felt” as if one of them was passing the money to someone at the door;

(2) Elson Branch, managing director of the company that managed the minimart, was informed of the incident and visited the minimart about 3.10 p.m. when he made a check and discovered that an amount in excess of $500 was missing; and

(3) Sonja Branch, Elson’s student daughter and Watson’s niece, was behind the counter on an assignment when the incident occurred. She testified that two men came into the minimart, that one of them took out a gun and told her aunt to open the cash register, and that the man with the gun took the change from the dollar section of the till while the other took the paper money from the till. She also testified that at no time did she see a third man.

David Barrow testified that he had known Barnett for most of his life and on February 16, 1992 he and Barnett were talking about the mock gun on the block, Barnett gave him the mock gun to hold and left him with the gun in his hand after one of his friends had shouted him. The next day as a result of something he heard he went to District “A” Police Station and handed the gun over to the police.

Sergeant Bryant testified that on February 18, 1992 he told Forde of his intention to hold an identification parade, that he explained to him what an identification parade is and that he could have an attorney-at-law, a relative or a friend present and that, if he objected to a parade, he would still conduct an exercise with him in order to give a witness, Sonja Branch, an opportunity of seeing him among other persons. According to the Sergeant, Forde said:-

“I done tell the police what happened. Bring the woman let she see. I ain’t want all of that”.

The Sergeant further testified that he conducted an exercise placing Forde among three other man and Branch picked out Forde as one of the men who had robbed Watson at the minimart on February 8, 1992.

Sergeant Bryant went on to testify that later the same day he told Barnett of his intention to hold an identification parade, that he explained to him what an identification parade is and that he could have an attorney-at-law, a friend or a relative present and that, if he objected to a parade, he would conduct an informal exercise with him in order to give a witness, Sonja Branch, an opportunity of seeing him among other persons. According to the Sergeant Barnett said:-

“I ain’t want no parade. Bring the woman”.

The Sergeant further testified that he conducted an exercise placing Barnett among three other men and Branch picked out Barnett as one of the men who had robbed Watson at the minimart on February 8, 1992.

Police officers testified that Barnett, Horton and Forde all made incriminating statements to the police.

According to them on February 18, 1992 Barnett said under caution:

“Sylvian is who carry we up there in he car, but me and Louis is who went in and robbed the woman with the mock gun I had”, and

“It did four of we. Me and Louis and Sylvian and Rayburn was in the car. I gine tell you how it went down”

and he then made the following statement which was recorded in writing and admitted in evidence after a voir dire:

“About two Saturdays ago I was in Waterford pun the block hanging out with Louis, Rayburn and Sylvian. I left and went home and then I see Sylvian come by me in he car with Rayburn and Louis, and he tell me to come and go and look for some money. I went and get in the car and Sylvian drive off. We went down the west coast and then he come up Holder’s Hill and went across the top road. When he was passing by Queen’s College School Sylvian tell me that they got a minimart up through Clermont and that it easy to tek. Sylvian drive up through the road by the minimart and show me it. He drive pass and then turn round and come back down and park in the corner after you pass the minimart. Me and Louis get out the car and walk back to the minimart. Me and he went in, we went down by the cooler and tek out two stouts. Louis had one and I had one. We went by the cash register and Louis ask the woman behind the cash register how much for them and I see she press a button pun the cash register and it open. I then tek out a mock gun I had in my pocket and I point it at the woman and I tell she to look away and she turned she head and move away. Louis hold over the counter and tek out the money out the cash register. I hold over the counter and tek out some silver dollars. The two of we then run out the minimart and went back to the car and then went home. We split up the money. I get about $175.00 That is how it went down”.

They testified that Horton made an oral statement admitting that he was one of the men “who rob the woman”.

Forde, according to their testimony, made the following oral statement:-

“Mingler carried me, Rayburn and Jango out there. Jango point he mock gun at she and I tek out the money from the cash register”.

Barnett, Horton and Forde all elected to give sworn evidence in their defence.

Barnett testified that he was severely beaten by the police and forced to admit to things that he never did. He was forced to sign a statement which he was not allowed to read. He said that the black gun which Barrow gave to the police was the gun which was on the block and with which everybody played. Barrow asked to borrow the gun on February 16, 1992 when it was in his control and he lent it to him.

Horton’s evidence was that he took Barnett and Forde in his car to Clermont Minimart because they wanted to buy a drink. They went into the minimart and came back out with bottles of stout and all of them then left. He knew nothing about it, did not know they were going to rob the minimart and was not a party to any robbery.

Forde’s evidence was that he was beaten by the police. He denied that he had made to them the statements which they alleged he made. He did not direct them to the minimart or say that it was the minimart that they robbed. Horton, he said, was lying on him and so was Branch when she pointed him out as having come into the minimart and taken part in the robbery.

The grounds of appeal filed on behalf of Forde on February 6, 2000 raise important issues applicable not only to the case against him but to the case against Barnett as well, viz:-

1. Whether the appellants were deprived of their constitutional right to adequately prepare for their trials;

2. Whether the trial judge’s directions on accomplices were erroneous;

3. Whether the trial judge’s directions on identification were adequate and whether he should have admitted the evidence of the “informal exercises” conducted by the police;

. 4. Whether the evidence concerning the gun should have been admitted;

5. Whether the jury could have been improperly influenced in their decision whether or not to rely on the written statement tendered against

Barnett; and

6. Whether the convictions are unsafe and/or unsatisfactory.

Adequate time and facilities for preparation of defence

Barnett deposes in his affidavit that in the early morning of Friday March 20, 1998 he was informed by a marshal to attend court by 9.00 a.m.; that he did so and, when the matter was called, informed the court that he had no counsel; that he was asked to plead and pleaded not guilty; and that the case was adjourned and he was asked by the Court to return on Monday March 23. The case continued on March 23 and about 10.20 a.m. the Court put questions to him and he realised that he was supposed to have a copy of the depositions. The case was adjourned for about 1 hour 15 minutes within which period he was required to go to the Magistrates Court District A to obtain the depositions and prepare for trial. This was in respect of an offence which had allegedly been committed in February 1992, the preliminary inquiry having continued until sometime in 1997. To the best of his recollection he informed the Court that he needed the assistance of an attorney-at-law or sufficient time to revise his copy so as to enable him to defend himself adequately but the Court refused to give him that opportunity.

Forde deposed that he was told by police to attend court on February 20, 1998; that he did so and was arraigned and pleaded not guilty; and he was told to attend court on February 23, 1998 and on that occasion he indicated to the Judge that he did not have any depositions in the matter.

The Judge adjourned the case in order that the depositions could be obtained and he returned to the Court at 11.35 a.m. at which time he was informed of his right of challenge. He told the Judge that he needed more time to read his depositions and he wanted a lawyer to represent him. The case was adjourned until the next day at 9.00 a.m. He did not have the opportunity to retain an attorney-at-law within that short period nor was he able to fully prepare himself having received the depositions less than 24 hours before. He was thus deprived of his right to adequately prepare for his trial and this placed him at a disadvantage in conducting his case before the jury.

Forde's affidavit discloses an obvious error as to the month when the trial took place, Forde deposing that it took place in March 1998 whereas the record disclosed that it took place in February of that year.

Accomplices

The learned judge's direction on accomplices began at p.9 of the summing up:-

"Now Mr. Foreman and members of the jury, I must tell you something about accomplices. The term accomplice includes persons who are participes criminis in respect of the actual crime charged, and persons who are in some way concerned or associated in the commission of crime. In that regard, the three accused are accomplices in the crime charged in the indictment. And David Barrow who gave evidence for the prosecution should also be treated as an accomplice with regard to the mock gun or to give it its technical term, the imitation firearm.

At this point, I wish to remind you of that part of the evidence of accused Horton given in cross-examination. Now if an accused goes on the witness stand and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes against his co-accused. So the evidence of Horton must be viewed with suspicion. It is important in assessing that evidence that you exercise special caution, because Horton had an interest to serve and so have Barnett and Forde because they are all accomplices. When you come to consider Horton's evidence you will hear the warning I gave you in mind".

The judge then reminded the jury of Horton's evidence under cross-examination and of Barrow's evidence both in chief and when cross-examined and continued (at p.13):-

"Now I read those two bits of evidence to you and I will remind you that both of the accused are accomplices and Barrow was an accomplice in the use of the mock gun. In the circumstances, since Barrow has given evidence for the prosecution I must warn you that it would be dangerous to act on that evidence unless it is corroborated".

After defining corroboration and telling the jury that there was evidence in the case that was capable of amounting to corroboration provided that they accepted that the witnesses were speaking the truth he continued (at pp.13 and 14):

"In this regard, there is the evidence of the accused Barnett who in cross-examination by Mr. Saddler for the Crown said, 'the black gun which Barrow gave to the police is the gun that was on the block and which everybody played with. I lent the gun to Barrow. That specific day that Barrow asked to borrow the gun I had control of it".

Sergeant Peter Gill in his evidence said that on the 12th February, 1992 at District "A" Police Station, David Barrow handed him a black painted plastic gun with brown handle and red painted cartridges and said, "I hear the police looking for me and that they had Richard, but this is the gun I borrowed from he. And after being cautioned by Sergeant Gill the accused Barnett replied, 'That is the same gun that I had'.

Now Sergeant Gill told you that he said those things; he told Barnett that Barrow handed the gun and he spoke to Barnett and Barnett said, 'that is the same gun that I had'.

You must determine whether you accept the evidence of the accused Barnett and Sergeant Gill on this point. But even if you do not accept that evidence, then there is no corroboration and you will have to bear in mind the warning I have given you. You may have regard to the evidence of David Barrow and act on it once you bear that warning in mind. But as I have told you there is evidence capable of amounting to corroboration once you accept those witnesses as witnesses of the truth."

The main criticism of these directions on accomplices is that the trial judge told the jury that the appellants were accomplices. The common meaning of an accomplice is a partner in crime, a person who helps another or others to commit crime. It was the jury's function to decide

whether the prosecution had proved its case against each of the appellants and it was for the jury to determine whether or not the appellants had taken part in the robbery. For the judge to tell the jury that the appellants were accomplices was to prejudice the very matter which the jury was to decide upon. He in effect told them that the appellants were guilty.

With respect to Barrow, it is difficult to understand the basis on which he could be regarded as an accomplice. No gun was produced in evidence and no gun was identified as having been used in the incident at the minimart. All that Barrow said was that Barnett handed a mock gun to him eight days after the minimart was robbed and on the following day he handed it over to Sergeant Gill after he had heard something. Sergeant Gill testified that Barnett said it was the gun he had. What the evidence originating with Barrow could show was that Barnett had handed a mock gun to Barrow eight days after the incident at the minimart, that Barrow handed the gun over to the police and that Barnett, when shown the gun, admitted that he had had the gun. This evidence was incapable of connecting Barrow with what had taken place at the minimart. The direction that Barrow could be treated as an accomplice to the robbery at the minimart could have caused some prejudice to Barnett as tending to show that the gun of which Barrow spoke could of itself have proved that it was the one allegedly used at the minimart when in fact no gun was identified as having been so used and no gun was produced in evidence.

Identification

Division 7 of the Evidence Act 1994-4 comprises sections 99 to 102 and relates to identification evidence. Section 99 states that the division applies only in criminal proceedings, section 101 relates to evidence of identification by pictures, and section 102 makes provision with respect to the directions to be given to juries.

Section 100 regulates the admission of evidence of visual identification and enacts:-

“100. (1) Identification evidence adduced by the prosecutor is not admissible unless

(a) either

(i) an identification parade that included the accused was held before the identification was made, or

(ii) it would not have been reasonable to have held such a parade, and

(b) the identification was made without the person who made it having been intentionally influenced to make it.

(2) Without limiting subsection (1), the matters to be taken into account in determining whether it was reasonable to hold an identification parade as mentioned in that subsection include:

(a) the kind of offence, and the gravity of the offence concerned;

(b) the importance of the evidence;

(c) the practicality of holding such a parade having regard among other things

(i) to whether the accused refused to co-operate in the conduct of the parade, and to the manner and extent of, and the reason, if any, for the refusal, and

(ii) in any case, to whether the identification was made at or about the time of the commission of the relevant offence; and

(d) the appropriateness of holding such a parade having regard, among other things, to the relationship, if any, between the accused and the other person who made the identification.

(3) Where

(a) the accused refused to co-operate in the conduct of an identification parade unless an attorney-at-law acting for him was present while it was being held; and

(b) there were, at the time when the parade was to have been conducted , reasonable grounds to believe that it was not reasonably practicable for such attorney-at-law to be present,

it shall be presumed that it would not have been reasonable to have held an identification parade at that time

(4) In determining whether it was reasonable to have held an identification parade, the court shall not take into account the availability of pictures that could be used in making identification”.

In this case the witness Sonja Branch picked out the appellants

in what Sergeant Bryant called informal exercises. No identification parade was held for either Barnett or Forde. Sergeant Bryant testified, with respect to each of them, that he told him of his intention to hold an identification parade, that he explained to him what an identification parade is, that he could have an attorney-at-law, a friend or a relative present, and that, if he objected to a parade, he would conduct an informal exercise with him so as to give a witness, Sonja Branch, an opportunity of seeing him among other persons. According to the Sergeant, Forde told him to bring the woman and let her see, he didn’t want all of that and Barnett told him he didn’t want a parade, bring the woman.

It is pertinent to refer to a passage from the judgment of this Court in Wayne Hunte v The Queen, Criminal Appeal No. 25 of 1998, delivered on January 27, 2000:-

“The Sergeant testified that he regarded the appellant as having refused to stand in a parade and that once he declines an Identification parade, the next step is an informal exercise. Unfortunately the Sergeant’s view does not accord with the law as stated in section 100. According to that section the question is not whether the accused has refused an identification parade but whether it would not have been reasonable to have held such a parade: see section 100(1)(a)(ii). There is nothing in the evidence to suggest that it would not have been reasonable to have held an identification parade. It is only if it would not have been reasonable to have held such a parade that the section allows other evidence as to the visual identification to be admitted. So that in this case the evidence of the complainant Franklyn and of Sergeant Ifill of Franklyn having pointed out the appellant at the informal exercise was not admissible.

The assumption underlying section 100 is that the procedure by way of an identification parade is the proper method of testing a witness’s ability to identify a suspect. Evidence of visual identification obtained through a less stringent procedure cannot be admitted unless in the circumstances it was not reasonable to use the proper procedure applicable when an identification parade is held.”

In the present case no attempt was made to show why it would not have been reasonable to carry out what section 100 contemplates as the proper procedure. To refuse to cooperate in the conduct of a parade may make it reasonable not to hold one. But where an accused merely says that he does not want a parade or invites the police to bring the witness to him or her, that cannot of itself justify a departure from the stringent standards set by the statute for testing the witness’s ability to identify the offender. In our view the evidence led did not justify the conduct by the police of the exercises that they carried out and the evidence that Branch pointed out the appellants as the men participating in the robbery should not, in view of section 100, have been admitted.

Counsel for the appellants also relied on section 102 of the said Act for a submission that the judge’s directions on identification were incomplete. That section enacts:-

“102 (1) Where identification evidence has been admitted the Judge shall inform the jury that there is a special need for caution before accepting identification evidence, and of the reasons for the need for caution.

(2) In particular the Judge shall warn the jury that is should not find, on the basis of the identification evidence, that the accused was a person by whom the relevant offence was committed unless

(a) there are, in relation to the identification, special circumstances that tend to support the identification; or

(b) there is substantial evidence, not being identification evidence, that tends to prove the guilt of the accused and the jury accepts that evidence.

(3) Special circumstances include

(a) the accused being known to the person who made the identification; and

(b) the identification having been made on the basis of a characteristic that is unusual .

(4) Where

(a) it is not reasonably open to find the accused guilty except on the basis of identification evidence;

(b) there are no special circumstances of the kind referred to in paragraph (2) (a); and

(c) there is no evidence of the kind mentioned in paragraph (2)(b);

the Judge shall direct that the accused be acquitted”.

The submission is that although the judge satisfied section 102(1) when he gave the jury the Turnbull direction (see pages 14 to 17 of the record) he did not go on to give the warning which he was required by subsection (2) to give.

Exclusion of the evidence concerning the gun

Though no gun was produced or identified, it is impossible to say that the evidence about the gun should have been excluded. Barrow testified that he got the gun from the appellant Barnett and that he handed it over to Sergeant Gill; Sergeant Gill testified that Barnett, under caution, said it was the gun he had; and, in one of the oral statements and in the written statement tendered in evidence against him, Barnett spoke of using the mock gun that he had in the course of robbery. It was for the jury to determine the issues raised on an assessment of all the material evidence.

The written statement admitted in evidence against Barnett

Ground 3 of the amended grounds of appeal filed on behalf of the appellant Barnett is that the trial judge erred in revealing to the jury the outcome of the objection by the appellant to the admissibility of the alleged written statement made by him as a result of proceedings in their absence.

The record does not disclose that the judge did what is alleged in this ground. However it does show that the jury was present when Barnett challenged the statement. He did so in the following terms (p.48 of the record)-

“I object to statement. I was severely interrogated and given a statement to sign which I did not read. I was forced to sign the statement. A policeman had a piece of pipe about 3 inches in circumference and about three feet long and was hitting me in my abdomen with it”.

The learned judge then conducted a voir dire at the conclusion of which he ruled the statement admissible. When the jury were recalled to court, the trial continued without reference to, or explanation of, the outcome of the voir dire.

However the jury, having heard the basis of Barnett’s objection to the admission of the statement and the allegations of beatings by the police, and having then seen the statement admitted, could have inferred that Barnett’s allegations against the police had been rejected.

In Mitchell v R (1998) WIR 25 Lord Steyn who delivered the advice of the Privy Council said (at p.33)-

“It is primarily the responsibility of defence counsel to inform the prosecution and the judge in advance and in the absence of the jury of an intended objection to the admissibility of the statement of an accused. On the other hand, if the position remains unclear, counsel for the prosecution is under a duty to seek clarification of the position in the absence of the jury.

At the appointed time counsel must ask the judge to request the jury to withdraw so that a matter can be raised on which the ruling of the judge is required. No discussion of an intended objection must take place in front of the jury. The judge should simply tell the jury that a matter has arisen on which his ruling is required and that they must please retire for the time being. When the voir dire has been completed and the judge has given his ruling, the judge should give no explanation of the outcome of the voir dire to the jury”.

Lord Steyn did not advert to the case of the undefended accused who wishes to object to the admission of a written statement tendered in evidence against him. But in this jurisdiction where there is limited availability of legal aid, some guidance is required to avoid the possibility of prejudice to an unrepresented accused who wishes to exclude such a statement. In our view at the appropriate time counsel for the prosecution must seek the withdrawal of the jury and the judge, in requesting them to withdraw, need say no more than that a matter has arisen which requires their absence.

Whether the convictions were unsafe or unsatisfactory

In our view the possible effects of the misdirections on accomplices and corroboration and the breaches of sections 100 and 102 of the Evidence Act make the convictions unsafe. On the question whether the appellants were given adequate time and facilities for the preparation of their defences, lack of precise knowledge as to whether an accused was told of his right to have a copy of the depositions in his case and when he was given a copy is causing disruption in the conduct of the trial of criminal cases in the High Court; and it is recommended that provision be made in order to avoid that disruption and to ensure that it can be easily ascertained whether an accused person received a copy of the depositions at a date that gave him or her adequate time for the preparation of the defence. It is also recommended that steps be taken to make those engaged in the investigation, prosecution and trial of criminal offences generally aware of the changes made by sections 100 to 102 of the Evidence Act.

In the result these convictions must be quashed and the sentences set aside and orders are made accordingly.

This offence was committed eight years ago and reached trial six years ago. The record does not disclose the reasons for the delay. The appellants having already served substantial periods of imprisonment, we do not think that retrials should be ordered and the appellants are discharged.

Chief Justice.

Justice of Appeal Justice of Appeal.