BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 35 of 2001

BETWEEN:

SHURLAND BOYCE

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Hon. Sir DavidSimmons K.A., B.C.H., Chief Justice, the Hon. Colin Williams, Justice of Appealand the Hon. Elliott F. Belgrave, C.H.B., Justice ofAppeal (Acting)

2002: September 30 and November11

2003: March 25

Mr. Andrew Pilgrim and Ms. Alicia Archer for the Appellant.

Mr. Trevor Gibbs for the Respondent.

DECISION

SIMMONS CJ: This is a case about a large quantity ofliquor dishonestly obtained 3 days before Christmas, 1998. The appellant, ShurlandBoyce, appeals against his conviction for criminal deception, contrary tosection 10(1) of the Theft Act, Cap. 155. He had been indicted for dishonestlyobtaining $4 147 worth of liquor from C.F. Harrison Limited (Harrison's) [1] by falsely representing that he wasBenjamin O'Neill on December 22, 1998.

[2] Although 6 groundsof appeal were filed, only ground 3 which deals withidentification evidence is of any real substance.

[3] The factsmaterial to this appeal are these: On December 22, 1998, RodneyBradshaw, Assistant Manager of "Harrison's LiquorDen", received an order by telephone for a supply of liquor. The caller purported to be Benjamin O'Neillof Diavilla Apartments (the apartments), Hastings. He requested that the liquor be delivered tothe apartments. Bradshaw arranged forAlvin King, the van driver, to deliver the liquor on December 23, 1998.

[4] When King gotto the apartments about 8.30 a.m. he saw "awhite gentleman" who told him that O'Neill lived "upstairs". He went upstairs. There he met another man (black) who told himthat he was the caretaker/guard of the apartments; that Mr. O'Neill was "notup" but he would go and get the cheque signed andcome back. He said that King could leavethe goods and return for the cheque but Kingdeclined.

[5] However, hedid return about 10.30 a.m. This time hesaw the caretaker/guard (whom he identified in court as the appellant) sittingon a wall. The appellant handed him anenvelope containing a [2] cheque and King satisfied himselfthat the amount written on the cheque correspondedwith the amount on the delivery documents which he had. He got the appellant tosign an invoice for the liquor and then delivered it to him.

[6] On receipt bythe accounts department of Harrison's, theaccountant, Sonia Griffith, noticed that the chequewas very "tattered". It appeared asthough it had been tampered with. Therewere a number of erasures on it. MalcolmNiles, an officer of the Barbados National Bank, to whom the cheque had been presented by Harrison's,described the cheque as having "several alterationswith liquid paper and ink". Hissuspicions were also raised because the account number against which the cheque was drawn was invalid. It was an old account number, no longer onthe Bank's files. Of course, the cheque was dishonoured.

[7] Policeinvestigations led them to the appellant. P.C. Heather Pinder interviewed him and toldhim of his rights. He made a number oforal statements during the course of the interview but none of them was signedor otherwise acknowledged by the appellant in the officer's notebook. At the trial he did not object to theadmission of the orals in evidence. Noneof them was an admission of the offence. However, the police took 4 specimens of his handwriting [3] and 5 from Alvin King. The appellant wrote certain words andfigures, dictated to him by P.C. Pinder, on a blank

cheque. Thespecimens of handwriting attributed to King and the appellant were latersubmitted to Sgt. Nola Sobers, a handwriting expert, for analysis. She gave itas her opinion that the author of the writing on the specimens was the sameperson who had written on the "untidy" cheque givento King on December 23, 1998.

[8] The appellantwas duly arrested and charged. He gavesworn evidence at the trial and flatly denied any knowledge of or connectionwith the circumstances of the dishonoured cheque. He set up analibi as the core of his defence. At the trial the appellant representedhimself.

The Grounds of Appeal

[9] We shall dealfirst with those grounds of appeal in which we find no merit.

Ground 2

[10] It wassubmitted on this ground that the trial judge caused prejudice to the appellantby not directing him that he should put his case to the prosecutionwitnesses. The rule in Brownev. Dunn (1894) 6 The Reports 67, lays down that fairness in the conductof a trial requires that each side should put the essentials of its case to the[4] witnesses on the other side –(see the explanation of this rule and the comments of this Court in FranklynYarde v. R., Criminal Appeal No.22 of 2000, judgmentgiven on October 16, 2002 paras [29] to [32]).

[11] Sometimes itmay be that strict compliance with the rule is unnecessary as where, forexample, there is searching cross-examination which, by its very nature andcontent, exposes the weaknesses in an opponent's case or destroys it. In every case it is a matter for the trialjudge to make his/her own determination as to whether a case should be strictlyput in order to ensure fairness in the conduct of a trial or whether the substanceof the case can be discerned from the cross-examination.

[12] In this casewe felt obliged to observe during the argument that the record of appeal showedthe appellant to be highly knowledgeable in court craft and to have displayedthe skills of a seasoned cross-examiner. The quality of his cross-examination was quite exceptional.

[13] Nevertheless,we are also bound to say that the trial judge gave him every assistance duringthe trial. For example, the trial judgeassisted the appellant in putting the depositions to Alvin King when thereappeared to be an inconsistency between that witness's [5] evidence at the preliminary inquiry and the trial –(p.17). He was helpful to the appellanton the issue of identification – (p.18 lines 25-35). In point of fact, we have counted at least 11instances where the trial judge assisted the appellant.

[14] Upon a carefulreview of the record, we are of opinion that the trial judge went out of hisway to protect the rights and interests of this appellant and to assisthim.

Ground 4

[15] Here it wasargued that the trial judge erred in law in failing to warn the jury that theevidence of his oral statements to P.C. Pinder, notsigned or otherwise acknowledged by the appellant, may be unreliable. It is said that there was a breach of section136 of the Evidence Act, Cap. 121.

[16] That sectionprovides that where oral statements made in response to official questioningare recorded in writing but have not been signed or otherwise acknowledged by adefendant, "the Judge shall, unless there are good reasons for not doing so,(a) warn the jury that the evidence may be unreliable…" – section 136 (2).

[17] So far as thisCourt is concerned, the position in Barbados is nowsettled by the decisions in Roann Bovell v. R., Criminal Appeal No.38 of 2001 and IanGill v. R., Criminal Appeal No.18 of 1998. [6] In the latter case, the Court of Appeal traced the historicaldevelopment of section 136 from its birth in the Report of the Australian LawCommission to its adoption in the legislation of Barbados. We held and reiterate that the requirementfor a warning under section 136(2) is directory and not mandatory.

[18] In this appealthe trial judge would have had "good reasons" for not giving a warning. None of the orals was an admission of guilt;in fact, they were entirely neutral or amusing. These were the orals: (a) "My lawyer tell me not to say anything. My lawyer is in court; go ahead with yourinterview." (b) "I don't know nothingabout this; my lawyer tell me not to say anything." (c), (d), (e) "No Comment."(f) "Alright; let me write." (g) "I done with that. I ain't gettingtrapped. I am too old a cat to betricked by a kitten."

[19] There was noerror on the part of the trial judge; no prejudice to the appellant and,consequently, no miscarriage of justice. Moreover, the trial judge's directions on oral statements, the burdenand standard of proof were so impeccable that the jury could not have been indoubt as to how they should evaluate and weigh the evidence. Accordingly, this ground is rejected. [7]

Ground 1

[20] This ground ofappeal is pleaded thus: "The learnedtrial judge failed in his duty to ascertain the problem experienced by the juryand to properly direct them before allowing them to return a majority verdict." We reproduce the relevant part of the recordof appeal at p.123:

"THE CLERK: Madam foreman, please answer yes or no. Have you reached a verdict upon which you areall agreed?

MADAM FOREMAN: No.

THE COURT: Madam Foreman and members of the jury, in thecircumstances I must ask you to retire again and try - - continue to try toreach a verdict upon which you are all agreed. In the event that you cannot reach such a verdict I can accept amajority verdict upon which at least 7 of you are agreed whether that verdictbe guilty or not guilty. Do you require any further directions?(emphasis supplied)

MADAM FOREMAN: No."

[21] It is clearthat the trial judge specifically asked the jury if they required furtherdirections. They said "No." It may be that they only required furthertime to reach a decision. We find noerror in the trial judge's handling of this part of the case. [8]

Ground 5

[22] On this groundit was submitted that the defence was not adequatelyput to the jury. It is undoubted that adefendant has the right to have his defencefaithfully left to the jury. It is partof the judicial duty to fairly state and analyse thecases for the prosecution and defencerespectively. That is the essence ofimpartiality. In order to determinewhether the judicial duty was properly discharged, we are required to examineand analyse the entire summation. We have done so. At pages 118-121 of the record the trialjudge faithfully reminded the jury of the entire evidence of the appellant onoath. Then he summarized his case andexplained to the jury that the appellant's case was that he knew nothing of theoffence; he never saw Alvin King in December 1998; he never saw the cheque and he never touched it.

[23] The jury musthave retired with the case for the appellant ringing in their ears. For minutes before they retired, the trialjudge again put the appellant's case in these terms:

"On the other hand, theaccused man says and he has said from the outset when the police questioned himon this matter that he knows nothing about this case. He told you that he was with Emmanuel atChristmas time in Greenwich Village making Christmas trees and other craftitems from rope and wire. He denies all knowledge of the offence. He said that Alvin King did not identify [9] him at the time of theidentification parade at the police station, and that therefore anything thatKing has said after that about the accused being the man to whom he deliveredthe liquor and from whom he received the cheque hasto be a lie. He is telling you that Kingis lying on him. That King ismistaken. The accused said that whenKing went to the identification parade in March of 1999, he was not a hundredper cent sure, yet he said subsequently that when he saw the accused and heardhim he then realized that that was the man and yet at a later date on the 2ndof July 1999, King told you that there was still some element of doubt in hismind as to the identity of the person to whom he delivered the liquor and fromwhom he received the cheque. The accused man is telling you that King'sevidence is unreliable and that you must disregard that evidence and find himnot guilty. He said he knows nothingabout this case and that he is innocent."

[24] Consideringthe summation as a whole, it is impossible to argue successfully that the defence case was not fairly and adequately left to thejury. There is no merit whatsoever inthis ground.

Ground 3

[25] This ground ofappeal was baldly pleaded to allege that the trial judge did not "properly putthe identification evidence into perspective for the jury."

However,during the argument it transpired that there were really two complaints. First, that the trial judge did not giveadequate directions in respect of dock identification evidence. Secondly, [10] counsel questioned the procedure by which Sgt. Nola Sobersidentified the handwriting of the appellant.

Dock Identification Evidence

[26] This Court hasdealt with the matter of dock identification evidence at length in WayneSpringer v. R. (Criminal Appeal No.30 of 2001). We do not propose to repeat that exhaustivetreatment of the matter in this appeal – see, instead, paragraphs [11] to [25]of WayneSpringer v. R.

[27] It will beenough to say that a dock identification may be permitted even though there wasno prior out-of-court identification. And the admission of such evidence does not necessarily constitute amiscarriage of justice. Of course, it ispreferable that there be an earlier out-of-court identification before evidenceis led of a dock identification – see R. v. Britten(1988) 51 SASR 567 and Jamal v. R. [2000] FCA 1195.

[28] In the instantappeal, there was some evidence of an out-of-court identification of theappellant by Alvin King. This evidencewas elicited during his cross-examination by the appellant at pages 18 and 19of the record. In our view no prejudicewas occasioned to the appellant when there was subsequent dock identificationat the trial.[11]

The Handwriting Evidence ofIdentification

[29] In regard tothe second aspect of this ground of appeal, it appears that when the dishonoured cheque and thespecimens of the appellant's handwriting were submitted to Sgt. Sobers, theywere accompanied by an official document of the Royal Barbados Police Force. This document (the Form), admitted inevidence as exhibit SB1, is headed:

"Forensic ExaminationSection

Scenes of Crime Unit

Central Police Station

Bridgetown

Request for Examination ofPhysical Evidence"

[30] On this Formthe name and address of the appellant were entered under the column"Accused/Suspect Name and Address" –"Shurland

BoyceSt. Paul's Ave, Bayville, St. Michael". There follows a column headed "Summary of Case" and the following wordsare written:

"The accused stole a cheque, wrote it up and presented it to Harrison's LiquorDen as payment for liquor. The cheque was later discovered to be forged."

[31] The Form wassubmitted by P.C. Pinder, requesting an examinationof the handwriting specimen and it shows on its face that it was received bySgt. Sobers at 14.30 hrs on August 4, 1999. [12]

[32] Mr. Pilgrimsubmitted that Sgt. Sobers could have been prejudiced by the informationentered on the document in so far as it suggested that the appellant had stolenthe cheque and forged it. He submitted that the Form should not havebeen admitted in evidence.

[33] There areimportant points of law, evidence and police practice that are raised on thisground of appeal and, in order to determine whether there is merit in counsel'ssubmission, we think that 3 questions must be answered.

(A) How did the Form come to be admitted inevidence? The record of appeal (pages 47to 49, 56 to 59 and 67 to 70) shows that, during his cross-examination of Sgt.Sobers, the appellant referred to the Form and said that the information on it"can only be prejudicial". At this pointthe jury were asked to withdraw and dialogue ensued between the appellant andthe trial judge concerning the admissibility of the Form in evidence.

[34] Theappellant's argument at the trial was that the information given in the sectionof the Form headed "Summary of Case" was prejudicial and untruthful and must have created bias in the mind of Sgt. Sobers who wasrequired to make an independent comparison of the handwriting on the specimenand the dishonoured cheque. The trial judge, on the other hand, whilesaying that he [13] wished to avoidprejudice to the appellant's case, thought that it was "for the jury to listento the evidence and come to a conclusion" (p.59). After trying to persuade the appellantagainst putting the document in evidence, the trial judge eventually admittedit. So that the Form was admitted at theinsistence of the appellant.

[35] (B) The second question that has to be asked iswhether the appellant's case could have been prejudiced by the admission of theForm? Sgt. Sobers' expert opinion wasreceivable in evidence for the purpose of assisting in a determination of theidentity of the person who wrote the dishonoured cheque.

[36] An expert isexpected to be non-partisan and to provide independent assistance to the courtby way of an objective and unbiased opinion. That opinion should be founded upon rational and demonstrable criteria;similarly, the process or procedure by which an expert reaches a conclusion oropinion should be fair, transparent and unprompted by extraneous prejudicialinformation.

[37] We believethat, in principle, the rule against non-pecuniary bias can be made to apply tothe peculiar circumstances of this case. Traditionally, that rule has developed to bolster impartiality indecision-making. Thus, it applies tojudicial officers as well as jurors and extends to administrativedecision-makers.[14]

[38] An issue whicharises on this ground is whether the rule has applicability to a police witnesscalled to give expert evidence. As anexpert in handwriting, Sgt. Sobers' opinion should have been expressed purelyon the basis of a comparison of the handwriting on the chequeand that on the specimens. She wasrequired to give a decision as towhether, in her expert, independent and unbiased opinion, and having regard toher training and experience, the author of the handwritings was one and thesame person.

[39] It is clearthat there was no evidence of actualbias on the part of Sgt. Sobers but, as Lord Goff said in R. v. Gough [1993] 2 All E.R.724 at 728:

"Bias is such an insidiousthing that, even though a person may in good faith believe that he was actingimpartially, his mind may unconsciously be affected by bias."

[40] Thecorrect test to be applied, on the basis of R. v. Gough (supra) is whether there was a real danger that Sgt. Sobers' opinionmight have been contaminated by the information on the Form which identifiedthe appellant, as the perpetrator of the crime. Since the only evidence to connect the appellant to the forged cheque was the handwriting evidence, it is our view thatsuch evidence ought to have been pure and unadulterated both in appearance andin fact.[15] Whatever may be the training, experience andreputation of Sgt. Sobers, it cannot be said with certainty that the opinionsexpressed by her in her evidence were not unconsciously tainted by the contentsof the Form. On the particular facts of this case, wethink that the test in Gough has been satisfied.

[41] (C) Should the evidence have been excluded? The only evidence connecting the appellant tothe crime was the handwriting evidence; the probative worth of that evidencewas devalued by the prejudicial information on the Form. In our opinion the trial judge had asupervisory role to refuse to admit the evidence especially since the appellantwas unrepresented.

[42] It is ourjudgment that this was a classic case to which section 114 of the EvidenceAct, Cap. 121 applied and the trial judge ought to have exercised hisdiscretion to refuse to admit the evidence because the probative value of theevidence was substantially outweighed by the danger of prejudice to theappellant.

[43] With a view tothe elimination of accusations of bias, prejudice or prompting in future cases,we suggest that the Royal Barbados Police Force should re-design the Form toprovide for coded information or numbers rather than names. In any event, the Form should contain nomaterial from which the guilt of the person [16] supplying the specimen handwriting could be inferred. Public confidence in the administration ofjustice must not be shaken by dubious police practices and procedures.

Disposal

[44] It followsfrom our decision on ground 3 that this appeal must be allowed. The conviction is quashed and the sentence isset aside. [17]

Chief Justice

Justice ofAppeal Justiceof Appeal