BARBADOS:

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No: 45 of 1998

BETWEEN:

EMMERSON ROBERTS

Appellant

AND

THE QUEEN

Respondent

Before: The Honourable Sir Denys Williams, ChiefJustice, The Honourable Mr. Justice George Moe, and the Honourable Mr. JusticeErrol Chase, Justices of Appeal.

2000: March,31st & May 10th.

Mr. R. Worrell for Appellant.

Ms. D. Babb for Respondent.

DECISION

On November 23, 1998 the appellant Emmerson Fitzgerald Roberts wasconvicted of aggravated burglary contrary to section 25(1) of the Theft Act,Cap. 155 and sentenced to imprisonment for eight years. The charge against him was that on August 14, 1995 he entered as a trespasser the dwellinghouse ofRachel Wilkie with intent to steal therein and at the time of entry had withhim a weapon of offence, namely, a .32 revolver.

The evidencedisclosed that High T is a house at Sandy Lane, St. James which is ownedby an Italian resident and rented to short term visitors to Barbados. Rachel Wilkie looked after the rentals and onAugust 14, 1995 it was rented to aFrenchman. [1]

Henderson Maynard testified that on that night he wasemployed as a security guard at the house and between 11 p.m. and minutes after midnight he saw a man inside the house. He went over to the man and asked him what he was doing there. The intruder had socks on his hands and a gunin one hand and said that he was going to shoot. He jumped into the jacuzzi and tried to getaway. They had a scuffle and the gundropped. Then two guests in the housecame and they all had a scuffle. Thesocks dropped off his hands in the course of the scuffle. He held the intruder and left the guestsholding him while he went to call the police. He got away from the guests.

The police visited the scene and took away the gun, a .32revolver, and the socks and an officer with specialist training in the scienceof firearms identification and examination testified that the gun was in verypoor condition but was capable of discharging cartridges.

The case against the appellant rested on (1) Maynard'sidentification of him as the intruder and (2) statements which the policetestified the appellant made to them in the course of investigations. The appellant's defence was that he was athome. He knew nothing about the incidentand was innocent.

As to identification, Maynard testified that the lightingaround the house was reasonably good and he saw the man's face for quite awhile. There was no mask on it and hecould see his face clearly. He had neverseen the appellant before. SergeantDawson testified that the appellant told him that he was not going [2] onany parade and to do what he had to do. He then held what he called an exercise in which he placed the appellantwith three other persons of similar appearance and Maynard picked out theappellant as the man who pointed the gun at him.

As to the statements which the police testified theappellant made, Sergeant Ellis testified that on September 28, 1995 he told theappellant that he suspected that he was the man who, armed with a gun, enteredHigh T at Sandy Lane, St. James on August 14, 1995, that it was a criminal matter and he had the rightto speak to an attorney-at-law or have one present. He cautioned the appellant who said:

"My lawyer know I here already, I ain't know about that Ellis".

The Sergeant further testified that later that day hetold the appellant that he was in receipt of information that he was identifiedas the man who entered High T and cautioned him. The appellant said:

“All right, I gine tell you the truth. I went dey, me and he fight, he hold me and Igot away from the white man, but I ain’t point no gun at he”.

He then asked the appellant if he wanted to give awritten statement and cautioned him. Thereply was

“Ellis, I co-operating with you, but I ain’tgiving no statement cause this is a big one”.

He went on to show the appellant a pair of socks, a .32revolver, two rounds of ammunition, asked him what he could say about them and cautioned him. The appellant, he said, replied: [3]

“That is a old piece of thingthat I find, I don’t even think that it working. I had them socks pun myhands”.

Sergeant Ellis testified that the appellant, undercaution, told him that he would point out High T to him and that the appellantdirected him to Sandy Lane where he pointed out High T and said:-

“Itis dey I went when the watchman and the white man hold me”.

The appellant gave sworn evidence in his defence. He said:-

“I do not know anything aboutthe incident. I was home ... That night in question I was home with mybrother. Also, the girl that he and Mr.Maynard had the talk over, but she gone away to the States. This is just a case against me ofhearsay. Nothing was found leading me tothe crime. All I can say is I wasinnocent.

I don’t know High T. Never saw it. Know the Sandy Lane area. Was a caddie there as alittle fellow. The guard is telling lieson me. Also, the police. It was a lie that I refused to go on aparade. I never said anything to SergeantEllis. Ellis fabricated that. I did not even see the gun at the station. He never asked me to point out the house tohim. I don’t know the house High T. I never entered the premises ... “.

The appellant’s brother, Mclvor Roberts, testified thatif his memory served him well, the appellant was home on that night at 11 p.m. He went on to testify that he checks on hisbrother every night. He wascross-examined by the prosecutor.

The Grounds of Appeal

The grounds of appeal are that the learned trial judgefailed to properly direct the jury. [4]

1. on the standard of proof by stipulating “If you are left with any reasonable doubtthen you must return a verdict of not guilty”;

2. on the issue ofidentification evidence as it related to the requirements of the Evidence Act.Cap. 121;

3. on the defence of theappellant and thereby failed to deal adequately with the defence.

The fourth ground is that the appellant was not allowed adequate time toprepare for the trial, having been given his depositions on the morning of thetrial.

The fifth ground is that the conviction is unsafe and/or unsatisfactory.

Ground 1

There is no merit in this ground. Proof beyond reasonable doubt is the proper standard of proof in acriminal case and it was not erroneous for the judge to tell the jury that averdict of not guilty should be returned if they were left with any reasonabledoubt.

Ground 2

Counsel relies on section 102 of the Evidence Act Cap. 121 for asubmission of inadequacy in the summing up with respect to identificationevidence. That section enacts:

“102(1). Where identification evidence hasbeen admitted, the Judge shall inform the jury that there is a special need forcaution before accepting identification evidence and the reasons for the needfor caution, both generally and in the circumstances of the case. [5]

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

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

(b) There is substantial evidence, not being identificationevidence, that tends to prove the guilt of the accused and the jury acceptsthat evidence.

(3) Specialcircumstances include

(a) the accused being known to the person who made theidentification, and

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

(4) Where

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

(b) there are no special circumstances of the kind mentioned inparagraph (2)(a); and

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

theJudge shall direct that the accused be acquitted".

In the present case the jury was given a Turnbulldirection but no warning was given pursuant to this section. There was substantial evidence, that is, theevidence of Sergeant Ellis as to the oral statements made by the appellant tohim that tended to [6] prove theappellant's guilt and the jury should have been told that if they acceptedSergeant Ellis's evidence that the appellant made those statements, they couldfind on the basis of Maynard's evidence that the appellant was the person whohad committed the offence. No suchwarning was given and consequently there is merit in this ground.

Ground 3

This ground rests on a criticism of the following passage in the summing up (p.8):-

"So I suppose you could call his defence analibi because he doesn't have to prove anything, he doesn't have to. But he said he was home and he called hisbrother to say that he was home. I musttell you that he doesn't have to prove where he was, he doesn't have to provethat he was home. The prosecution has toprove that he committed the offence. Sothat even it you reject this alibi completely you can't find him guilty simplybecause you disbelieve his alibi. Evenif you reject the alibi completely you still have to consider the Crown's case,because you can only find him guilty on the strength of the prosecution'scase. But of course you must considerthe alibi. Obviously if the alibi leaves you in doubt well then of course youhave to find him not guilty. Even if youreject the alibi you still have to consider the Crown's case and ask yourselveswhether you are satisfied beyond reasonable doubt on the prosecution's case".

The criticism of this direction lay in the opening words"So I suppose you could call his defence an alibi". It was, it is said, an alibi and the judge waswrong to suggest that there could be uncertainty as to whether or not thedefence was an alibi.

The Judge was clearly unimpressed with the testimony ofthe appellant's brother as indeed the jury must have been and anyone readingthe record of his evidence would be. Buthe went [7] on to give an alibi direction to which no objection has beenor can be taken.

Ground 4

The following is a record of the opening of the trial:

"Accused says he does not havedepositions.

Matter adjourned.

9.35 a.m.

Mr. Saddler: Matter came before (Court) No. 3 on at least two occasions. Accused said Mr. R. Worrell was his attorney. Mr. Worrell saidno. I checked the depositions and saw herepresented himself at preliminary. Matter was set for another date. Depositions were photocopied and the Marshal present handed thedepositions to the accused. Since then,the panel of seven Marshals have changed. But he was handed the depositions mid October;

Matter adjourned. Depositions to be photocopied and given tothe accused".

The case was adjourned, the depositions were photocopied,a copy was given to the accused and hearings resumed at 9.53 a.m.when the appellant pleaded not guilty and the trial commenced.

There was no contradiction of what Mr. Saddler told theJudge. The trial of the appellant tookplace on November 20, 1998. He had been given a copy of the depositionsin mid [8] October, that is, about a month before. The trial of cases in the High Court mustproceed with due expedition and this Court is not going to encourage or condonethe attempts by accused persons to manipulate the hearing of cases. The Judge with knowledge that the appellanthad been given a copy of the depositions a month before adjourned the trial sothat he could be given another copy and to enable the trial to proceed. We are not prepared to say that the Judge wasin error. As it turned out, the trialproceeded, the appellant cross examined the prosecution witnesses, and gavesworn evidence and he called his brother to support his alibi. We are not persuaded that there is merit inthis ground.

The learned Judge failed to direct the jury in terms ofsection 102 (2)(b) of the Evidence Act but in our judgment this is a case inwhich the proviso can be applied. Thereis nothing unsafe or unsatisfactory about the conviction. The jury would inevitably have convicted theappellant. The proviso is applied, the appeal is dismissedand the conviction and sentence are affirmed, the sentence to run from January 5, 1999. [9]

Chief Justice.

Justice of Appeal. Justice of Appeal.