

BARBADOS:

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Criminal Appeal No. 22 of 1997

BETWEEN:

VICTOR SYLVESTER BOWEN

Appellant

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: January, 20th & March, 31st.

Mr. N.K. Simmons in association with Mr. M. Lashley and Mr. A. Sealy for Appellant.

Mr. E. Edwards for Respondent.

DECISION

On April 21, 1997 the appellant Victor Bowen and Wesley Quashie were arraigned before a judge and jury charged with the following three offences (1) importation of a controlled drug contrary to section 4(3) of the Drug Abuse (Prevention and Control) Act, Chapter 131, (2) possession of a controlled drug contrary to section 6 (2) of the said Act and (3) drug trafficking contrary to section 18(4) of the said Act. On the following day the jury found the appellant guilty, but Quashie not guilty, of each of the three offences. Quashie was discharged and the appellant was convicted, reprimanded and discharged on the importation and possession counts but was sentenced to 15 years imprisonment for drug trafficking.

Gordon Husbands testified that on the morning of Saturday November 18, 1995 he and his fishing partner Graham Webster set out on a moses from Stroude Bay, St. Lucy, to go fishing off Archer's Bay. On their way they came upon some garbage bags, a tank and a five gallon can floating in the rough seas and they picked up three men near to the flotsam, first Quashie, then the appellant whom he had known for 8 to 10 years and who was calling to him for help, and later a third man who was hugging two bags which appeared to be full and who insisted on bringing the bags on to the moses with him. While they were coming through the breakers on their way to land a breaker sank the moses and the three men whom they had rescued left him and Webster in the water and went towards the rocks, the man with the bags still carrying them.

Graham Webster in his testimony confirmed what Husbands said. Some of the garbage bags were black and others were white and they all seemed to be full of something. He saw in the distance a large object in the breakers and they moved in the direction of the object. Before they got to it he heard a voice calling for help. It was Quashie who was floating on a red fuel tank. They went to him and pulled him on board the moses. He noticed a large white object in the breakers and heard the appellant call for his partner. The distance between Quashie and the appellant was about 75 to 100 yards. The appellant swam from the breakers towards the moses, and was helped aboard and said that he wanted them to work him out, to help him to get to shore or words to that effect and he would give him \$5,000.00. Webster told the appellant that he would help him but he was not interested in any illegal activity. He saw a third man a little distance away floating on two garbage bags that were much larger than those he had seen before. He too was taken on the moses with the garbage bags. On their way towards the shore in the moses they passed through another set of breakers, the moses got filled with water and he told the men to get off his boat. At this point they were about 100 yards from shore and the men swam towards the rocks, the man with the packages taking them with him. He himself went towards the rocks about half an hour later and as he got into the rocks and climbed on to the shoal he heard someone ask for a hand. He looked into the water, saw that it was the appellant and that he did not look too strong and helped him on to the shoal.

According to this witness there were about 3 or more black bags and two or three white bags apart from the bags that the man had brought aboard the moses.

Police Constable Emmerson Sobers testified that on November, 18, 1995 he was driving his car along Harrison's Road, St. Lucy, about 1000

yards from the beach at Archer's Bay, in the direction of Content Road when he saw three men walking on the road in the same direction. He became suspicious of the men and their actions and immediately drove to Crab Hill Police station where he had a conversation with Police Constable Went and Police Constable Evelyn. The three constables then drove, Sobers in his car and Went and Evelyn in a police van, to the area where he had earlier seen the men and when they reached Content Road the officers stopped their vehicles. On their approach to the men, two of them started to run away and Went held the man that remained. Sobers identified the appellant as the man who had remained and Quashie as one of the two men who had run away but who had soon been caught.

Police Constable Went confirmed what Sobers said. He testified that he asked the two men for their names and addresses and the reason for their being in the area. The man who had remained standing gave his name as Victor Bowen of Block D, Beach Path, Deacons Farm, St. Michael and the other man gave his name as Wesley Quashie of Baywoods, St. James. They both said that they had gone fishing with a friend Marcus Sealy in his boat and it had capsized off Archer's Bay earlier that day. This witness testified that both men agreed to accompany him to Crab Hill Police Station for an investigation into the matter. He further testified that Content Road runs into Husbands Road and vice versa.

Martin Greaves testified that on November 18, 1995 he went to Archer's Bay, St. Lucy by boat accompanied by seven divers. They located an area and began diving. About 15 minutes after the divers were in the water he observed a white fishing boat in the breakers in Archer's Bay floating in about 20 to 25 feet of water. Sometime between 8 and 9 a.m. he saw the boat rise in the waves and it went "down up" in another wave. The wave broke on it and he did not see it again. He observed the area for a little while and saw nothing. After the divers came up, he spoke to them and they all headed towards the area where he last saw the boat. On reaching the area he saw on the water a variety of flotsam and a long trail of green substance. He went further into the area and saw some black garbage bags. He also saw a light blue moses in the breakers behind the cliff. Two men were on the moses, it was heading towards Archer's Bay and the men on it were taking men and stuff out of the water. After the men were taken aboard the boat there were four or five men on it. Hours later he spoke to the police and assisted them in taking two black garbage bags from the water. They were strapped with waterproof tape and one was burst with some green stuff coming out of it.

Vernon Hoyte testified that he is with the Defence Force and employed at the Coast Guard Station at Willoughby Fort. On November 18, 1995 he was the duty officer at the Fort and about 8.45 a.m. he received a report and detailed the small boat "Flotella", the Boston Whaler, with leading seaman Pierce and seamen Rock and Mapp to investigate an incident off Archer's Bay. On the return of the men about 11.22 a.m. Pierce handed over to him three black garbage bags containing vegetable matter and some other items. He placed them in the outboard shop for safe keeping. Later in the evening he handed over all the items to Sergeant Boyce.

Neville Pierce, testified that on November 18, 1995 about 9.00 a.m. he went on duty on a Boston Whaler to Archer's Bay, St. Lucy. Martin Greaves was on a diving boat and directed him to an area 100 metres off Archer's Bay where he saw floating in the sea three black garbage bags with a greenish substance coming out of them and other articles floating in the same area. He put the three bags and the other articles on the Whaler and returned to the Fort where they were stored for safe keeping. Jefferson Rock and Anthony Mapp, ordinary seaman with the Coast Guard, confirmed Pierce's testimony.

Sergeant Boyce of the Criminal Investigation Department gave evidence of statements made by the appellant in the course of the police investigations. According to her he said:-

"Man, me, Marcus and Vincie Man bring up the boat from St. Vincent with a lot of drugs pon it but it ketch in water and start to sink and we jump off with de drugs and ask two men in a boat for help and we get in. Then the two men boat start to sink also so we get off and one of the men show me how to swim shore with four bags of drugs and hide dem by the rocks. Then we climb the rock".

According to Boyce the appellant directed the police to a cliff overlooking the beach at Archer's Bay, St. Lucy and pointed out an area in the sea as the area where the boat caught water and started to sink. The Sergeant testified that she told the appellant that she would like him to point out to her the area where he said they swam ashore and hid the drugs and cautioned him. She testified that the appellant pointed to an area in the sea near three rocks as the place where they swam ashore and hid the drugs.

The Sergeant further testified that later in the day she gave instructions to Police Constables Thomas and Norville and Island Constable Carrington and they went down the cliff and swam into the sea near the area of the three rocks pointed out by the appellant. They later returned to the top of the cliff with four nylon bags, Thomas with two, and Norville and Carrington each with one. She examined the contents of each bag, saw that they all contained vegetable matter which she suspected to be cannabis, asked the appellant what he could say about it and cautioned him. According to her the appellant said "Dem is the same four bags of drugs that we swim shore with and hide by the rocks".

The Sergeant testified that about 7.40 p.m. at Oistins Police Station she asked the appellant if he wanted to give a written statement in connection with the matter under investigation and cautioned him. According to her the appellant replied:-

"I am not giving no written statement. I gine tell you what happened. I left Barbados last Friday with Marcus on a fishing boat M51 to carry some foodstuff to St. Vincent for a friend. Me and Marcus arrange to bring up some weed to Barbados and sell and Marcus would give me a piece of money for my assistance. We get in St. Vincent Friday evening about five o'clock. Me and Marcus and Vincie Man collect the bags of weed and load them on de boat. We left St. Vincent about ten minutes to ten. We got back about eight o'clock this morning and when we did coming in to land de weed down Archer's Bay, de boat turn over and we had to jump off. I swim shore with four bags that I had tied together and I hide them under some rocks in the sea. At first I was thinking about telling wunnah lies but I decided to tell wunnah the truth and dat is how I come to show wunnah".

Sergeant Boyce testified that on November 23, 1995 she handed over the four nylon bags that had been recovered by Thomas and his team and three black garbage bags and a yellow bucket that she had received from Petty Officer Hoyte at the Coast Guard base at Fort Willoughby on November 18, to Angela O'Neale, the Director of Analytical Services, for her examination and findings; and O'Neale testified that she took samples from each package of vegetable matter and also from the bucket and analysed these samples at the laboratory. She came to the conclusion that the vegetable matter consisted of seeds, crushed leaves and stalks of the plant of the genus cannabis from which the resin had not been extracted. She found the total weight of the vegetable matter to be 75.15 kilograms or approximately 158.7 pounds.

The appellant made an unsworn statement in his defence and called witnesses. He said that on November 18 he was walking in St. Lucy exercising when a police van pulled up at his side. Three or four people who were walking in front of him ran but he stood up. The police held him and took him to Crab Hill Police Station. A number of policemen started to beat him, telling him that they had found bags of vegetable matter floating in the sea and that he knew about these things. He told the police that he knew nothing about them. Sergeant Boyce told him that she was investigating him about drugs, guns and robberies which he had no idea about. He told Sergeant Boyce that he was walking along St. Lucy road exercising. He did not know about the items she asked him about. The first time he saw Quashie that day was at the police station. Later that day at the police station Sergeant Boyce told him that his co-accused name was Quashie. At no time was he in the sea that Saturday.

Quashie gave evidence in his defence and testified among other things, that he was travelling on a boat from St. Vincent to Barbados bringing foodstuff on behalf of a man called Pinero and he was going to buy sugar in Barbados to take back to St. Vincent where it was scarce. When the boat was off Barbados the sea was rough and a big wave hit the boat. He started to swim and saw two men on a boat who took him on their boat.

According to him the appellant was with him on the boat that came from St. Vincent and after it capsized and they came ashore, he was walking with the appellant.

In the appellant's first ground of appeal complaint is made of misdirection by the trial judge on the burden of proof. The passage that is the centre of criticism appears shortly before the conclusion of the summing up (p.88 of the record):-

"Madam Foreman and your Members, if you believe the defence, if you believe the two accused, you will find them not guilty of anything".

It is said that this direction shifts the burden of proof from the prosecution to the defence.

The appellant was saying that he was not involved in the importation, possession or trafficking of the drugs. He was not in the sea at any time on that Saturday. He was walking alone for exercise and the police picked him up, took him to the police station and beat him. He did not make any oral statement to Sergeant Boyce or any other police officer. The evidence given against him was fabricated.

In the passage from the summing up referred to above all that the learned judge was telling the jury was that if they believed what the appellant was saying, they would find him not guilty on each of the three counts. The judge had earlier given the appropriate direction on the burden and standard of proof. (at p.4):-

"In this case, as in every criminal case, the burden or responsibility of proving that the accused committed the offence rests on the prosecution. This burden of proof never shifts to an accused person. The accused are presumed to be innocent until proven guilty.

The standard of proof which the prosecution must reach is proof beyond reasonable doubt, in other words, the evidence must make you feel sure of the prisoner's guilt. This is a high standard but no less a standard will do. If you are left in any reasonable doubt then you must return a verdict of not guilty".

The judge returned to these issues (at p.78 of the record):-

"Madam Foreman and Your Members, at the beginning of my summation I told you that the accused Bowen, and Quashie as well, are presumed to be innocent and therefore do not have to prove their innocence. The burden of proof remains on the prosecution and it is for the prosecution to make you feel sure of the guilt of the two accused by the evidence which the prosecution has placed before you. There is no burden cast on the accused Bowen to prove to your satisfaction that he was indeed not in the sea but elsewhere, that he was not in possession of the drugs, that he did not import drugs, and that he was not trafficking. It is the duty of the prosecution to prove that he Bowen imported the drugs, that he was in possession of the drugs and that he was guilty of drug trafficking.

There is no merit in this ground.

Another ground of appeal is that the trial judge did not adequately put the defence to the jury.

The judge read the appellant's unsworn statement to the jury (p.53 of the record) and he dealt with his defence in this way (pp.76, 77):

"Now Mr. Bowen said that at no time was he in the sea that Saturday. Accused Bowen called witnesses but you may well feel that they do not help you in determining his guilt or innocence on these charges. These witnesses you may very well feel were to help to prove that, the doctor to prove that he was beaten. I don't know what you will make of that and the others witnesses show that he was in and out of the station.....

Now the accused Bowen, Madam Foreman and your Members, is saying that he was not in the sea at all in a boat. He is saying that he was elsewhere. He is saying that he was not in the sea at Archer's Bay, that he was not in the sea at all, that he was elsewhere even though he did not say where he was. Accused Bowen is therefore saying to you that you should reject the evidence given on behalf of the prosecution when you come to deliberate on his guilt. He is saying that he knows nothing about the items found in the sea at Archer's Bay and that he was not in the sea there. He never made any oral statements. He never made any oral statements and he did not point out anywhere. The accused Bowen is therefore asking you, Madam Foreman and your Members, to accept the evidence given on his behalf and to reject the prosecution's evidence and return a verdict of not guilty on all counts in his favour".

The judge returned to the appellant's defence (at p.86) and reminded the jury of what he had told them in his address. In doing so he reminded them of the substance of his defence: that he never made any statements to the police or any of the witnesses, that the case against him was fabricated, that he was never on any boat with Quashie. Then shortly before the jury retired, the judge told them that Bowen was saying that he wasn't near the sea at Archer's Bay that morning, that he was exercising in St. Lucy as was his right, that the police came and held him and that is all he knows. The judge went on to tell the jury that if they believed the accused, they will find them not guilty of anything.

There is likewise no merit in this ground.

Another ground is that the verdicts are unsafe and unsatisfactory. This ground must likewise fail. The case against the appellant was overwhelming, comprising the evidence of

- (1) Gordon Husbands that he had known the appellant for eight to ten years and had rescued him from the rough seas and the flotsam around him;
- (2) Graham Webster who said that the appellant, when taken aboard the moses, offered him \$5000 to work him out and help him get to shore;
- (3) Sergeant Boyce as to the appellant's oral confessions, as to the appellant's pointing out an area where he had hidden the bags and as to the recovery from the area of four bags containing cannabis; and
- (4) his co-accused Quashie who gave evidence on oath and testified that the appellant was on the boat from St. Vincent that capsized.

Before dismissing this appeal, it only remains to note that Dr. Watson, who was called by the appellant as a witness, testified that the injury which he found on the appellant could have been caused if the appellant had been thrown twice from an overturned boat and was swimming about in breakers. It was for the jury to decide whether to believe the appellant's story that he was beaten by the police or that his injuries were caused by his being buffeted about in rough seas and in the breakers on the morning of the 18th.

Drug traffickers who are caught bringing or helping to bring such large quantities of drugs into Barbados by sea or by air must expect severe sentences of imprisonment when they are caught. The courts must continue to demonstrate their strong disapproval of these illegal drug importations that are wreaking havoc in the society.

The appeal is dismissed and the conviction and sentence are affirmed.

In our view the sentence of 15 years imprisonment is not excessive and it is to run from June 3, 1997.

Chief Justice.

Justice of Appeal Justice of Appeal.