TAYLOR ET AL v. R.

[COURT OF APPEAL - SUIT NOS. 17 & 19 OF 1991

(Husbands, C.J. (Actg.), Smith and Moe, JJ.A.) May 12, 30, 1994]

(1994) 30 Barb. L.R. 258

Criminal law *- Corporal punishment - Sentence to 12 strokes with tamarind rod and 10 years imprisonment - No provision for corporal punishment in law of Barbados - Sentence varied by rescinding order for flogging.*

Practice and procedure *- Directions to jury - Whether trial judge adequately directed jury on treatment of police evidence and on the role of the jury in relation to questions of fact.* **[258]**

Facts: On April 9, 1991 the appellants were convicted of robbery with aggravation. The charge was that on January 6, 1990 they robbed J.R. of a handbag, a purse containing money and other items. The first appellant was sentenced to 15 years imprisonment and the second to 10 years and twelve strokes with the tamarind rod. Both appellants made oral statements which were written down by the police, but which they later stated were made after they were beaten by the police. The stolen handbag was found in the place where the first appellant indicated in his statement that it was hidden. The first appellant appealed against sentence only; the second appellant appealed against conviction on the grounds that there were discrepancies in the evidence presented by the police and in the trial judge's directions to the jury on their role in relation to treatment of facts.

Held: (i) any discrepancies in the evidence of the police were not such as materially affected the issues to be determined;

(ii) when the summation as a whole was taken into account it could not be said that the trial judge's comments in the paragraph complained of made the summation fundamentally unbalanced;

(iii) while the clear intention of the trial judge was that both appellants should share equal responsibility for the offence, the first appellant was not ordered to receive strokes with the tamarind rod because he complained of being asthmatic. However, there was no legislation empowering the inflicting of corporal punishment in prison and the order that the second appellant receive 12 strokes with the tamarind rod would be rescinded. Each appellant would serve 10 years imprisonment.

Mr. D. Saddler for the respondent.

The appellants appearing in person.

HUSBANDS. C.J. (Actg.): On April 9, 1991, the appellants Taylor and Marshall were convicted of robbery with aggravation. The charge was that on January 6, 1990 together they robbed Joan Ross of a handbag, a purse containing money, a driver's licence, a cheque book, an identification card and a comb.

Taylor was sentenced to 15 years imprisonment; Marshall to 10 years and in addition it was ordered that he receive 12 strokes with the tamarind rod. The case for the Crown was based on the evidence of Joan Ross and the oral and written statements of the appellants as given in evidence by three police officers, Sgt. Harewood, Police Constable Jackson and Police Constable Bayne.

Joan Ross testified that in the evening of January 6, 1990 she drove to the home of a friend on the Maxwell Coast Road, Christ Church. She parked her car on a side road. About 9:00 p.m. she ended her visit and returned to the car. As she was about to get in, a man with a long knife in his right hand rushed out of the bushes nearby and held her. She screamed. The man "locked off her neck and pushed her to the ground. The man's knife cut her hand. Another man appeared from the bushes and **[259]** one or other of them took away her handbag containing a purse with Barbados $480.00, her I.D. card, cheque book and driver's licence.

The two men then ran towards Dover Woods. The man with the knife wore a stocking mask and his hair was in little rolls; the other man's face was not covered and his hair was combed down and plaited like that of a rasta. She was unable to identify either of these men except to say that they were both negroid.

The matter was reported to the police and on January 10, 1990, she went to the Police Station and was shown and identified, in the presence of the appellants, her handbag, her I.D. card, driver's licence, cheque book and purse, now without money.

Sergeant Harewood testified that on January 9, 1990, in the course of his investigation into the matter, he informed the appellant Marshall at the Oistins Police Station that he had information that he was involved in the offence reported by Joan Ross. He cautioned the appellant Marshall who replied:

> "Me and Roosevelt Taylor robbed the white woman but we did not get so much money and I hide the bag."

Later that day at the invitation of the police, the appellant Marshall directed Police Constable Jackson and himself to a wooded area at Dover and pointed to a grey metal tank. Under the tank was a handbag containing a cheque book with cheques bearing Joan Ross' name, her I.D. card and driver's licence with her photograph, and a purse without money.

Later at the Oistins Police Station, Joan Ross was shown the handbag and its contents and asked in the presence of the appellants what she could say about them. She said the bag and contents were her property. The appellant Marshall was asked if he heard what Ross had said and

cautioned. Marshall said, yes that he had heard what Joan Ross had said. About 11:00 a.m. that same day in the presence of Police Constable Jackson he (Sergeant Harewood) told the appellant Marshall that it was intended to make a written record of what he had said about the robbery and the part he played in it and he could write it himself or get someone to write it for him. The appellant Marshall instructed him to write the statement. Marshall dictated the statement and he recorded it on an official form. Marshall signed the statement after looking at it and so did he and Police Constable Jackson. Marshall gave the statement freely and voluntarily; he was not induced to do so by the use of violence, threats, force or inducements. The appellant Marshall objected to the production of the written statement on the grounds that he was beaten by the police and forced to give the statement which was not true.

The learned trial judge conducted a *voir dire* at the end of which he admitted the written statement which reads:

> "Last Saturday night me and Roosevelt were down in the Maxwell Coast Road and hide in some bushes waiting for some body to pass that we could rob. When we did there a woman and she friend come and park a white car near this **[260]** said bush and went by a house pon de other side of the road. We did still there when she come out and when she went to open she car door I went out de bush and hold on pon she wid me knife. She start to holler but I pull she round and tek de bag from she but a man come out de house and me and Roosevelt run and went in the woods and search the bag and I tek out the money and hide the bag."

Police Constable Jackson testified that he was present with the appellant Marshall at Dover when Sergeant Harewood removed the handbag from under a metal tank and showed it to the appellant Marshall who said it was the one he had snatched from the lady. Police Constable Jackson also testified that he was present when the appellant gave the written statement to Sergeant Harewood. No promises or inducements were held out to him.

Further, Police Constable Jackson said that at Oistins Police Station on January 10, 1990, in the presence of Police Constable Bayne he told the appellant Taylor that his name was mentioned as being involved in the robbery of Joan Ross and cautioned him; whereupon Taylor said "Ikee Marshall is who tek it, I ent get no money."

Taylor then dictated to him a statement which he recorded on a statement form and read back to Taylor, who looked at it and signed it, and so did he and Police Constable Bayne. No threats, violence, promises or inducements were made to the appellant Taylor.

Taylor objected to the production of the statement on the ground that he was beaten by the police. The learned trial judge held a *voir dire* into this objection and admitted the statement which reads as follows:

> "Last Saturday night me and Ikie Marshall went down by the Coast Road and hide in some bushes when I see a car drive up and stop and two people get out and went in a house. When we did waiting for a time I see a white woman come out the house and Ikie tell me let we rob she and he went and hold on to she bag and when I did going to help I see a man come out of the house and Ikie get way the bag and we run down Dover by the woods and Ikie searched the bag but he aint give me no money."

Later, at the invitation of Police Constable Jackson the appellant Taylor directed him and Police Constable Bayne to the Maxwell Coast Road where he pointed to two separate spots close to each other in some bushes and said " I was there and Ikee was there."

Police Constable Bayne gave supporting evidence of witnessing the written statement of appellant Taylor being voluntarily given.

At the trial each appellant conducted his own case. Neither appellant gave evidence, called witnesses nor addressed the jury. The case against the appellants rested essentially on the evidence of the police officers and the oral and written statements which they said the appellants made voluntarily. **[261]**

If therefore the jury were to entertain any doubt about the authenticity of these statements or were in any way unsure of their free and voluntary nature, the statements had to be rejected with the consequence that both accused must be acquitted. The jury's assessment of the credibility and truthfulness of the police officers was therefore paramount.

The learned trial judge directed the jury's attention to these matters in his summation.

Having directed the jury on the various ingredients of the offence which the prosecution had to prove, on the onus and standard of proof, and how they should deal with discrepancies found in the evidence and that opinions expressed in the case were not binding on them but that they must form their own opinions, the learned judge instructed them how to deal with the two written statements admitted on the *voir dire*. At p. 7 he said:

> "The accused man Marshall objected to the admission of the statement and after carrying out an inquiry, I ruled that the statement was admissible, but you will have, Mr. Foreman and your members, to examine all the circumstances surrounding the making of that statement and seek to determine for yourselves whether the statement was a free and voluntary statement given by the accused man Marshall to Sergeant Trevor Harewood. The fact that I have ruled it admissible and it was read to you is not conclusive. You have got to make your own findings of fact about it. Admissibility is a question for a judge and the weight and the liability (sic) and the voluntariness of the statement are matters for the jury. You have to determine after examining all the circumstances surrounding the taking of the statement by Sergeant Trevor Harewood whether that statement was obtained by him from the accused Marshall freely and voluntarily or whether it was obtained by improper methods used by the police to get the statement. That is the issue you will have to deal with."

Again at p. 19 with regard to the appellant Marshall's written statement the learned judge said:

> "The statement was admitted as I told you by me after hearing a *voir dire* in your absence and it is for you to determine whether it was freely and voluntarily given. You must consider all the circumstances and determine how far the statement represents the truth. If you come to the conclusion Mr. Foreman and your members that the statement from Marshall was not taken properly and that the Judges' Rules were infringed, then you will place no weight on it. The weight and the value to be attached to the written statement is a matter for you to determine. If you come to the conclusion that it was not properly taken, then you will place no weight on it. But the important thing is, you have to determine whether it represents the truth."

With regard to the appellant Taylor's written statement, the learned judge said: **[262]**

> "The accused man Taylor objected to the admission of the statement on the ground that he

was beaten. I held an inquiry and as a matter of law, I ruled that it was admissible and it was read to you, but it is for you to determine whether the statement was given by the accused Taylor freely and voluntarily in accordance with the Judges' Rules. And if you find that it was given as the police alleged, freely and voluntarily, and it represents the truth of what actually took place, if it represents the role that was actually played by the accused Taylor, then you should be able to determine whether the accused man Taylor took part in a robbery or was there ready and willing to assist another person who actually carried out the robbery."

Again, at p. 21 in relation to the appellant Taylor's written statement the learned judge said:

"As I told you earlier, the accused Taylor objected to the admission of the statement and I ruled that it was admissible but it is for you to look at all the circumstances surrounding the statement and it is for you to determine what weight and what value you should place in that statement. The fact that it was admitted by the Judge does not mean that you should accept it as voluntary and valuable and a free and voluntary statement. You have to look at it and make your own determination. You have to look at Peter Jackson and the chap Lisle Bayne and determine whether they were speaking the truth when they gave their evidence. Similarly you will have to look at the evidence of Sergeant Trevor Harewood and Peter Jackson and determine whether they were speaking the truth when they said that the accused Marshall gave them a statement freely and voluntarily.

As far as the case against Marshall is concerned, if you have any doubts about the integrity of the police involved in the case, that is, Sergeant Harewood and Peter Jackson, if you feel that they were speaking and telling lies on Marshall then you will have to acquit Marshall.

If you feel Jackson and Bayne were not speaking the truth when they said that Taylor gave them a written statement freely and voluntarily, if you have any doubts about their integrity, then you will have to acquit Taylor as well. So the case against the two men rests on the integrity of the police as far as the taking of the written statements are concerned."

Before this court the appellants personally conducted their appeals. Because of this we carefully reviewed the evidence and summation to ascertain whether there was any defence or matter, other than those raised, available to them.

The appellant Taylor appeals against sentence only. The appellant Marshall complains that the discrepancies in the police officers' evidence demonstrated **[263**

the unreliability of these witnesses. He urges that the learned judge did not sufficiently draw these discrepancies to the attention of the jury. He contrasts the evidence given by Joan Ross with that given by Sergeant Harewood at p. 33 of the record. At p. 28 Joan Ross, in chief, spoke of identifying and marking her handbag and other property at the police station in the presence of the appellants and when cross-examined by Marshall said:

"You were one of the men in the room at the police station when I was shown my bag and its contents by the police.... I went in front of you and I stood up and I stared at you and you turned your head. I did not say anything to you or to the police.... The policeman and I did not talk whilst we were in that room."

At p. 33 Sergeant Harewood in chief said:

> After she Ross had identified the bag and its contents as her property I asked accused Marshall if he had heard what the woman had said. I cautioned Marshall who said yes that he had heard what Mrs. Ross had said."

In dealing with this aspect of Ross's evidence the learned judge at p. 15 said:

> ".... Sergeant Harewood was there and it was Sergeant Harewood who had shown her the handbag and the contents in the presence of the two accused, but she didn't go there for the purpose of identifying the men. She went there for the purpose of seeking to identify her property which was stolen from her."

In our view any discrepancy in the evidence of Ross and Sergeant Harewood was not such as materially affected the issues to be determined. Another complaint made by appellant Marshall is that Sergeant Harewood's evidence at p. 33 that he "went on duty with Police Constable Jackson to Maxwell Coast Road where the accused Taylor pointed out to us the area where Mrs. Ross had been robbed" is contradicted by Police Constable Jackson and Police Constable Bayne who made no mention that Sergeant Harewood was present. This complaint is unfounded. The appellant Taylor's written statement was recorded by Police Constable Jackson and witnessed by Police Constable Bayne. These two officers gave evidence that they accompanied Taylor to Maxwell Coast Road where he pointed to a spot where he said the robbery was committed. Neither of these officers said that Sergeant Harewood was not present. There was no discrepancy to warrant the learned judge's attention.

Further, the appellant Marshall complains that the pro penultimate paragraph of the judge's summation nullifies the earlier directions given to the jury that it was for them to determine all issues of fact including what credibility was to be given to the evidence of the police witnesses. The paragraph complained of reads:

> "Now you have seen Sergeant Harewood and Police Constable Jackson give evidence in the case against Marshall and as I told you before you will have to **[264]** determine whether they were speaking the truth. I haven't seen anything in their demeanour which would cause me to doubt their integrity or anything like that, but it is not a matter for me to determine, it is a matter for you to determine. I thought they were quite impressive. Similarly, Jackson and Bayne, I haven't seen anything in their demeanour or in their cross examination that would cause me to have any doubts as a judge about it, but that is not my function. Your function is to find facts and if you think that there is anything in the demeanour of Harewood or Jackson or Bayne that would cause you to doubt their integrity, then of course you will acquit both accused."

Taking the summation as a whole it cannot be said that the learned judge's comments in this paragraph amounted to a usurpation of the jury's function or were such as to make the summation fundamentally unbalanced.

Sentence

The record shows that Marshall was put on probation for one previous conviction recorded in 1973 and that Taylor admitted having 32 previous convictions. When the allocutus was put to Taylor he informed the trial judge that he has been asthmatic since birth. The court then sentenced Marshall to 10 years imprisonment and ordered that he receive 12 strokes with the tamarind rod. Taylor was sentenced to 15 years in prison and it was noted "Due to his asthmatic condition there will be no flogging ordered by the Court for accused Taylor."

The clear intention was that Marshall and Taylor should share equal responsibility for the offence, and rightly so. Since however there is no legislation empowering the inflicting of corporal punishment in prison, the order that Marshall receive 12 strikes with the tamarind rod is rescinded. Marshall's sentence of 10 years imprisonment is affirmed; Taylor's sentence is varied to 10 years imprisonment. Each sentence to run from 12th June, 1991. **[266]**