(19)

DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 3 of 1985
BETWEEN:

HENRY ALEXANDER - Appellant

and

THE STATE - Respondent

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Mee
The Honourable Mr. Justice Williams (Acting)

Appearances: Mr. E. DeFreitas for the Appellant
Mr. D. Christian for the State

1986: Sept. 23,24,25.

JUDGMENT

BISHOP, C.J. (Acting)

On the 3rd June, 1985, Henry Alexander was convicted and sentenced to five years imprisonment for aggravated burglary. The particulars of the offence were that he and Joseph Stevens, between Friday, 11th May, 1984, and Saturday, 12th May, 1984, at Macoucherie, each entered as a trespasser, a building known as the country house of Terrence Laudat, and stole E.C. $2,200.00 cash; and at the time of entry, each of them was armed with a shot gun.

Joseph Stevens was also convicted but he was sentenced to 10 years imprisonment.

Henry Alexander filed a Notice of Appeal on the 12th June, 1985, and then on the 12th September, 1985, he filed an application dated 19th August, 1985, for an order from this Court that witnesses be summoned to attend and be heard on his behalf. The application as filed was almost totally incomplete. Apart from stating his desire that this Court shall order "the witnesses hereinafter specified" to attend the Court and be examined" on his behalf, the form disclosed no other information, as was clearly necessary. The appellant omitted to state the names and addresses of the witnesses, or whether such witnesses had been examined at the trial. He failed to state in paragraphs 3 and 4 the answers to the following questions (a) if not examined, the reason why they were not so examined and (b) on what matters he wished them to be examined.

Before us learned Counsel for the appellant sought leave to amend the original form of Notice of application for further witnesses by filling in the particulars. In Counsel's submission this Court had a

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discretion to grant the application to amend and he urged that since there were two affidavits on record which were filed at the same time as the application for further witnesses, the State could not allege that it was taken by surprise in respect of the facts omitted from the original notice.

This Court refused the application to amend on the ground that as it stood the Notice filed on the 12th September, 1985, was bad in law and not in proper form. Since it was bad then the form was invalid and the Court could not amend it to give it validity. It may be observed that learned Counsel readily conceded that he must have seen the form before it was filed and he must have seen it again after the completion of the Record which was itself filed on 14th August, 1986. Yet, no attempt was made before the Court drew it to his attention, to have the omissions rectified.

As a matter of interest only, and since Counsel for the appellant drew attention to the presence of two affidavits on record, it may be pointed out that if the appellant decided to call as witnesses, Peter Jules and Phillip Lewis, the deponents, then the facts which their affidavits sought to put in the mouth of Joseph Stevens were known by Joseph Stevens after he was released following his arrest; and it may be asked: why did Joseph Stevens remain silent and not say what he knew until a week after his conviction? He went on trial and was afforded ample opportunity to say so, if he wished, in his own defence. He has not even up to date sought to advance them in the interest of his own freedom. In addition, it was hearsay evidence from Peter Jules and Phillip Lewis since each of them, from a witness stand could only have said, at best, "I heard Joseph Stevens say that his brother said that it was not Alexander but Smokey and him (the brother) who did the act for which Alexander (Reds) and he (Stevens) were convicted." The evidence was not well capable of belief and the interests of justice could not have been well served, if served at all, to allow either Jules or Lewis to give such tenuous evidence to the Court. Perhaps the facts which the appellant now seeks to rely on may be more properly put forward for consideration by the Prerogaative of Mercy Committee or such other body as may be empowered to review the whole case unfettered by the procedural and legal constraints of a court trial. Such a body might then, if necessary, indicate its own views.

I turn now to the appeal.

The most important ground concerned the directions of the Judge on the issue of identification. It alleged "that the learned trial Judge

/misdirected.....

misdirected the Jury in relation to the question of identification taking into consideration all of the circumstances of the case by directing them (1) that what happened at the police station does not affect the quality of the identification and (2) view the showing of a photo and decide whether that showing of a photo was important." Immediately it must be observed that (1) and (2) above do not represent quotations from the actual directions contained in the summing up. Rather they are the interpretations given by Counsel to passages in the summing up. This Court is satisfied that when the directions of the Judge on the important issue of identification are carefully considered in their entirety, it cannot be correctly claimed that there was the misdirection alleged in this ground of appeal.

When dealing with the issue of identification learned Counsel relied upon the case R. v TURNBULL (1976) 3 All. E.R. 549. He argued that the trial Judge failed in his summing up to direct the Jury on all of the guidelines laid down in that case. There was only one such guideline that Counsel submitted was not followed, namely, that the Jury should be reminded of any specific weaknesses which have appeared in the identification evidence (see Turnbull's case at p. 551 j to p 552 d). In answer to Moe J.A. Counsel for the appellant conceded that in the summing up in the instant case, the trial Judge dealt with many of the discrepancies contained in the evidence of the prosecution witnesses, and with those to which he referred. Counsel thought they could have been better analysed.

Another ground of appeal that was argued before us was "that the learned trial Judge's direction to the Jury was confusing and tended to confuse the jury in relation to the evidence for and against the appellant and what was the correct approach to be adopted in dealing with the evidence, in particular that of the defence." Clearly this ground as set out was vague since there was no specific passage or passages with which the appellant was dissatisfied nor indeed were any particular aspects of the summing up complained of by the appellant. Both the respondent and this Court were left to wonder or to wait uintil the ground was argued. Learned Counsel for the appellant cited a number of passages from the summing up which he submitted were confusing or were likely to confuse the Jury when analysing the case as a whole.

Only one other ground was strenuously argued by Counsel on behalf of the appellant. It was stated in the Notice of Appeal as follows "that the learned trial Judge misdirected the Jury by directing them that the use of the words if used 'the cheque you would not take I come to put it in your arse today' by No. 2 accused was evidence to be considered against the No. 1 accused."

/The summing.....

The summing up of the learned trial Judge covered some fifty-eight pages in the Record and in support of his submissions on the above grounds of appeal, Counsel drew the Court's attention to a number of passages which he analysed and criticised. We have read and re-read several times not only the passages complained of but also the summing up as a whole.

In our view it was clearly explained to the Jury (which must be regarded as reasonable members of this community, and who were persons carefully chosen by a process which allowed the appellant a right of challenge to any of them) that the defence raised by the appellant was mistaken identity, alibi and weaknesses in the evidence of the vital witnesses for the State. The case before the Court was relatively simple. On the one hand the State was saying, through the Laudat witnesses and others, that the house at Macoucherie was broken and entered around 11.oo p.m. on the 11th May, 1984, by two male trespassers armed with shot guns at the time of entry, who stole E.C. $2,200. Further, that the appellant was saying, in effect, that he was not in a position to argue with the Laudats insofar as the events at the house were described by them, but he was in a position to deny emphatically that he was one of the men involved. Further, the identification by the eyewitnesses was unreliable and mistaken, as at the material time he was at home, in the company of others whom he called by name in an interview with the police. They were watchingtelevision uintil he retired to bed. In our view a jury in Dominica would have had no difficulty whatsoever understanding the real issues and appreciating the directions of the trial Judge. They would not have been so confused by anything told them in the summing-up, as to be unable to consider and properly evaluate the relevant evidence for or against the appellant. Nor would they have failed to understand the correct approach to be used in their analysis of the whole case includig the defence put forward by the appellant. The directions with respect to the alibi were ample, and even if the trial Judge in assisting the Jury with the defence chose to express his own opinions on the extent to which the defence witnesses' testimony was in agreement, he made it cleart that the Jury were the sole judges of fact and that, as such, they did not have to accept his opinions. To mention only two instances; at the commencement of his summing up (in the first two pages) the trial Judge told the Jury this; "You have heard the defence in this case, that it is an alibi; that they were somewhere else and therefore they could not have been the thieves. They do not have to prove it members of the Jury, they just have to raise it and the duty to disprove it..... is on the prosecution....." This was repeated in effect and at greater length at the end (last two pages).

/The trial.....

The trial Judge also reminded the Jury that the defence of the appellant was that he was framed by the Laudats. They got together and fabricated the story on the 1st May and they executed it ten days later.

About half way through the summing up the trial Judge again dealt with the defence of alibi in these words: "The defence in this case is an alibi. That means that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not or was unlikely to have been at the place where the offence is alleged to have been committed at the time of the alleged commission. That means you cannot be two places at the same time, that is alibi, members of the Jury. And involved in the alibi is this issue of identification... Then the Judge repeated his direction on the burden of proof; this for at least the third time.

So far as the issue of identification was concerned there was a significant part of the summing up that assisted the Jury. The trial Judge was clearly aware of the Turnbull case which was intended mainly to deal with the "ghastly risk" run in cases of fleeting encounter (see per Lord Widgery C.J. in Oakwell (1978) 1 All E.R. 1223). He quoted passages and used the words from many sections of the judgment of Lord Widgery C.J. He demonstrated clearly that he was fully aware of the guidelines and we have no doubt at all that the summing up included all of those guidelines in his directions which were easy to follow. It would serve no useful purpose to quote here the many pages of the Record in which this issue was covered. It will suffice to say that there were clear general directions, there were specific directions dealing with the evidence of Enomie Laudat and of Terrence Laudat on this aspect. They were told that it was open to them to prefer the evidence of Enomie to that of Terrence and that if they rejected the latter they were still left with the former. They were told that if they believed Enomie that she saw and spoke with the appellant at her home over a period of half an hour on the 1st May to 11.00 a.m. and if they accepted that in all the prevailing circumstances on the night of 11th May she recognised the appellant, then the occasion when she saw him at the Police Station -if rejected - would not affect the quality of her recognition or identification. In our view the complaint about the photograph being shown to her was without merit since the direction to the Jury on this was that if they felt that caused her to identify the accused then they would use that in favour of the accused. This direction was favourable to the appellant.

The last ground mentioned above is answered simply. The evidence relied on by the State was to the effect that the appellant and Stevens visited the Laudat's home together during the day on the 1st May and

/attempted.....

attempted to pay, by means of a cheque, for an order for provisions and vegetables. The offer was refused. It was Stevens who tendered the cheque in the presence of the appellant. Ten days later when the country house was visited at 11.00 p.m. one of the two trespassers referred to the refusal of the cheque on the earlier visit on the 1st May in the words set out in the ground. It was the State's case that it was Stevens who used the words and he did so in the presence and hearing of Alexander, the appellant. Clearly it was correct to direct the Jury that the statement was evidence in the case against the appellant. The extent to which it would help them with their finding on identification or recognition of the men was a matter for the Jury and the trial Judge directed that that remark was only one bit of evidence that should help them do so. He never told the Jury that it was incumbent upon them to accept or use it in that regard and indeed that was not asserted in the ground of appeal.

In summary, this Court is satisfied that there was no misdirection by the trial Judge along the lines alleged in the grounds of appeal.

As far as concerned the ground that the decision or verdict is unsafe and unsatisfactory having regard to all the circumstances of the case, we have studied carefully the full extent and meaning of the evidence relied on by the State and that relied on by the appellant. By their verdict, a majority of the Jury clearly rejected the defence alibi and was satisfied, after the warning of thetrial Judge about relying upon correctness of identification evidence and after the guidelines given in the directions, that the appellant committed the offence charged. There was no basis on which we could properly say that the verdict was either unsafe or unsatisfactory.

Learned Counsel abandoned the ground that sentence was excessive having regard to all the circumstances of the case. Properly so, we feel.

Each of the grounds of appeal which was argued failed for the reasons given and consequently the appeal stands dismissed.

E.H.A. BISHOP.
Chief Justice (Acting)

/ G.C.R.....

G.C.R. MOE,
Justice of Appeal

L. WILLIAMS,
Justice of Appeal (Acting)