GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS.19 AND 20 OF 2003

BETWEEN:

[1] KASHIF MUSTAPHAKHAN
[2] DEREK PARKE

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Mr. Albert N.J. Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. Cajeton Hood for the Appellants
Mr. Christopher Nelson, Director of Public Prosecutions, with him Mr. Darshan Ramdhanni for the Crown

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2006: December 6;
2007: January 29.

JUDGMENT

[1] MATTHEW J.A. [AG.]: The appellants and three others were jointly charged in three counts of an indictment presented by the learned Director of Public Prosecutions. The counts were:

(a) Possession of a controlled drug, to wit, cocaine contrary to Section 6(2) of the Drug Abuse (Prevention and Control) Act Cap 3 of the 1994 Edition of the Continuous Revised Laws of Grenada.

(b) Trafficking in a controlled drug, to wit, cocaine contrary to Section 18(2)(a) and 18 (4) of the above mentioned Act.

(c) Conspiracy to export a controlled drug, to wit, cocaine contrary to Section 38(1) of the said Act.

[2] The indictment stated that the offences in the first and second counts were committed on November 7, 2002; and the offence in the third count was committed between October 24 and November 7, 2002. The Prosecution led evidence at the trial through three police witnesses. The appellants and the three others were tried before Benjamin J and a jury and were all sentenced to varying terms of imprisonment.

Facts

[3] The Prosecution's case was based on alleged events between Tuesday November 5, 2002 and Thursday November 7, 2002 as recounted through the eye-witness accounts of Woman Detective Corporal Portia Nicholas, Sgt. Simon Dixon and Det. Sgt. Kenny Smart, all members of the Drug Squad of the Royal Grenada Police Force. Reliance was also placed upon written question and answer interviews recorded from the appellants.

[4] In brief, the Crown's case was that the two female accused came to Grenada from the United Kingdom and developed intimate relationships with the appellants. The appellants spent late evenings in the hotel room of the two female accused. On November 6, 2002 a black suitcase was handed over by one or both of the female accused at their hotel, the Blue Horizon, and taken by the appellants to a garage at Queens Park owned by the Second appellant.

[5] Later that day, the No. 3 accused, John Cecil Francis who incidentally pleaded guilty and who was employed at the airport, came to the garage and the appellants handed over to him a black suitcase which was placed in the trunk of his vehicle after which he left for his residence. The events thus far took place on November 6, 2002.

[6] Sgt. Smart testified that he took up a position at the hotel from the morning of Tuesday November 5, 2002 acting upon information. On that day he observed the female accused leave Room 8 in beach attire and return during the morning hours. That night the appellants entered Room 8 where they remained until the early hours of Wednesday, November 6, 2002.

[7] Sgt. Smart said that during the morning hours of November 6, 2002, the female accused were again seen leaving their room in beach attire. Later they came back in a car with the appellants. They all went into the room. Soon after, the Second appellant came out of the room and went to the car where he was seen speaking on a mobile phone. After that he went back to the room 8.

[8] Early that afternoon, the appellants were observed leaving the room with the First appellant carrying a black suitcase with wheels which he placed in the trunk of the car, P 627. Both appellants got into the car and the Second appellant drove to his garage at Queen's Park. Sgt. Smart said he followed at a discrete distance and took up a surveillance position opposite the garage. He spoke of seeing the appellants greeting John Cecil Francis outside the garage before all three of them went inside. They all emerged five minutes later with the Second appellant carrying a black suitcase which he placed in the trunk of the car driven by John Cecil Francis.

[9] The appellants also left in the other car P 627. Sgt. Smart said he elected to follow John Cecil Francis' car to Independence Avenue, St. Georges. He continued the surveillance there until 7:30 a.m. on Thursday November 7, 2002 when he saw John Cecil Francis come out of his house, get into his car and drive off. Sgt. Smart narrated that he followed the car up to the Maurice Bishop Highway, at which point he called Cpl. Nicholas who was stationed at the airport and spoke to her.

[10] The Prosecution's narrative of events was taken up by Cpl. Nicholas who recounted how she accosted John Cecil Francis at the ASG Cargo Building with a black suitcase taken from the trunk of his car. When opened the suitcase contained female clothing and female shoes of different sizes. Cpl. Smart arrived and assisted in removing a piece of plywood from the suitcase. Below the plyboard, packages were found. The contents were later tested, analyzed and certified to be cocaine; certificates to this effect were tendered without challenge.

[11] Cpl. Nicholas said she observed attached to the suitcase a tag marked PREMIUM with the name "A. Shepherd" and "Flight No. 306" written on it. One of the female associates of the appellants who had been charged and convicted along with them goes by the name Annette Shepherd.

[12] The two officers took the suitcase and John Cecil Francis to CID in St. Georges. Cpl. Nicholas then left with another officer for the Blue Horizon Hotel. She spoke to the receptionist then proceeded to Room 8 where she met the two female accused and executed a search warrant. She observed two suitcases, one of which had a "Premium" tag on the handle and on the inside there was a "Golden Caribbean" tag with the name "A. Shepherd" and "Flight No. 306". The search also turned up airline tickets in the names of the female accused reflecting Monarch Flights 307 and 306 for arriving at and departing from Grenada.

[13] The female accused were detained and taken to the front desk to check out. The No. 4 accused, Annette Shepherd, told the clerk that her boyfriend, Leslie, would be paying the bill for them. The female accused were kept at South St. George Police Station.

[14] Sgt. Dixon was on duty at the Blue Horizon Hotel in the lobby at about 11:00 a.m. on the morning of November 7, 2002. He said he observed the Second appellant drive onto the hotel premises. Both appellants were in the car P 627. The car was driven to the apartment No. 8, where the First appellant came out and knocked on the door. No one opened the door.

[15] The First appellant then walked to the lobby leaving the Second appellant at the apartment. The First appellant inquired of the occupants of Room 8 from the receptionist. She made inquiries and asked him if he had come to pay the bill. He acknowledged this and handed her a cheque signed by the Second appellant. Upon him receiving documents from the receptionist, Sgt. Dixon intervened and detained the First appellant. Sergeant Dixon later detained the Second appellant.

[16] The First appellant was interviewed by Sgt. Smart during the evening of November 7, 2002. He admitted knowing both the nos. 4 and 5 accused, Annette Shepherd and Sharon Burrows and visiting them at their hotel. He accepted that he paid for their accommodation with a cheque written by the Second appellant and said he did not expect to be repaid. He however denied being at Queen's Park on the previous evening as testified to by Sgt. Smart. He described Annette Shepherd as his "woman" with whom he had slept over at the hotel.

[17] The First appellant denied that he, along with the Second appellant took a suitcase from the hotel room occupied by Annette Shepherd and Sharon Burrows and handed it over to John Cecil Francis at Queen's Park.

[18] During a search of the First appellant's premises at St. Paul's, a piece of paper bearing the name "Annette Shepherd" was found on his bill stock. He accepted this but could not recall when she gave it to him.

[19] The Second appellant was interviewed on November 8, 2002. He admitted visiting a lady friend at the Blue Horizon Hotel along with the First appellant on Wednesday 6th and Thursday 7th November 2002. However, he denied being there at 1:42 p.m. on the Wednesday as was testified to by Sgt. Smart. He did admit paying the Hotel bill for Annette Shepherd and Sharon Burrows with his cheque as John Cecil Francis told him they had run short of money. The Second appellant denied any knowledge of the suitcase.

[20] John Cecil Francis pleaded guilty and is presently serving his 4-year term of imprisonment. Annette Shepherd and Sharon Burrows were each sentenced to a 2-year term of imprisonment. They have served their sentences and are back home in England. The First appellant was sentenced to 7-year terms of imprisonment and the Second appellant to 5-year terms of imprisonment. The First and Second appellants have appealed their convictions and sentences. The appeals were heard together.

The Appeals

[21] Learned Counsel for both appellants submitted eight grounds of appeal as follows:

1. The learned Judge erred in finding that there was a case to answer by the appellants.
2. The learned Judge erred in failing to give proper directions on the law regarding joint possession.
3. The learned Judge erred in failing to give any proper direction on the law regarding circumstantial evidence.
4. The learned Judge erred in failing to give any direction on the question of identification of the black suitcase.
5. The learned Judge erred in failing to order disclosure of the identity of the alleged informant.
6. The learned Judge erred in failing to give any proper direction on the good character of the Second appellant.
7. The sentences handed down were disparate and there should only be one term of imprisonment handed down and not three terms to run concurrently.
8. The conduct of the trial was not fair in all the circumstances.

The learned Judge erred in finding that there was a case to answer by the appellants

Case to Answer

[22] Counsel for the appellants sought to invoke the authority of R v Galbraith which is addressed in Blackstone Criminal Practice 2000 D 13.27 at pages 1402-1403. Counsel was of the view that the evidence against the appellants was inherently weak or tenuous and this was fortified by the lies of Sgt. Kenny Smart, the main prosecution witness. Counsel further submitted that there was no direct evidence that each appellant had possession of the suitcase with the drugs. Counsel also submitted that the trial Judge did not address conspiracy in any serious manner when he dealt with the no-case submissions and that the directions on burden of proof were not satisfactory.

[23] We are of the view that the Prosecution built a strong case against the appellants and there was sufficient cogent evidence to prove the essential elements of the offences in the indictment and the evidence was far from being inherently weak or tenuous. We agree that the evidence of Sgt. Smart was punctuated with inconsistencies but they were generally as regards time and other issues which could not disturb his direct evidence of seeing the appellants moving a black suitcase from the Blue Horizon to the garage of the Second appellant.

[24] More particularly he gave evidence of seeing the appellants remove a similar black suitcase from the garage and give it to John Cecil Francis who placed it in the trunk of his car, and eventually drove to the airport where he was apprehended.

[25] In our view it made no difference whether there were other suitcases in that car before or after the black suitcase was placed in car PF 987, driven by John Cecil Francis. The suitcase remained overnight in that car and it was driven to the airport the next morning where Corporal Nicholas intercepted and prevented its shipment.

[26] The evidence of Corporal Nicholas that there was a tag on the black suitcase in the name of A. Shepherd with flight number 306 written on it together with similar tags found on one of the suitcases at the Blue Horizon Hotel, is very strong evidence linking the suitcase taken from the trunk of the car at the airport with the suitcase taken from Blue Horizon Hotel by the appellants.

So the evidence is palpably clear that the two appellants gave the suitcase with the cocaine to John Cecil Francis after which they exchanged "high fives". The learned Director of Public Prosecutions submitted that it was not necessary for the Prosecution to invoke Section 42 of the Drug Abuse (Prevention and Control) Act[1] to prove that the appellants had knowledge of the controlled drug.

[27] Section 42 addresses presumptions of possession and knowledge of controlled drugs. According to Section 42 (1) (b)

> "where it is proved that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such a person was in possession of such drug."

By virtue of this section possession of the drug is proved presumptively against John Cecil Francis and the appellants who were in joint possession with him.

[28] There was no proof to the contrary to rebut the presumption since the defence of the appellants was that they did not remove any suitcase from the Blue Horizon Hotel and they were not on the premises of the garage at Queen's Park when a suitcase was placed in the trunk of the vehicle belonging to John Cecil Francis

[29] Learned Counsel submitted that the learned trial judge did not address himself to conspiracy in any serious manner in dealing with the no-case submission. He referred to paragraph 26 of the ruling which did not say with whom agreement was made. In his ruling the judge was not speaking to the jury. When he addressed the jury later in his summing up on conspiracy he gave fairly long and adequate

[1] CAP 3 of the Laws of Grenada, 1994 Continuous Revised Edition

directions beginning from line 9 of page 69 of the record to line 4 of page 71. Earlier at the beginning of the summing up he directed rightly that there was no need for a formal agreement. We are of the view that the learned trial judge was right to overrule the no-case submission and allow the case to go to the jury.

[30] We agree with the learned judge when he ruled on the no-case submission that it would be left to the jury to resolve the question of the credibility of Sgt. Kenny Smart[2] This ground of appeal fails.

The learned trial judge erred in failing to give any proper direction on the law regarding joint possession

[31] Under this head complaint was made that the judge equated "aiding and abetting" with joint possession. In his summing up the learned trial judge stated that the essence of joint responsibility for a criminal offence is that each accused shares the intention to commit the offence and did take some part in it so as to achieve the aim of the plan or agreement.

[32] He told them to consider the case against each accused and he kept emphasizing that as being very important; and then told them if they are sure that he or she was in the custody or in control of the suitcase and its contents of cocaine, or if they find that he or she assisted by aiding or abetting John Cecil Francis in any way, he or she is guilty if they are satisfied to the extent that they feel sure of it.

[33] The case against the appellants rested on a joint enterprise, an enterprise including the appellants and accused Nos. 3, 4 and 5. According to the learned Director of Public Prosecutions the Crown was relying on the elasticity in the concept of possession in accordance with the decisions in Romero and Macrado v R[3] ; and The State v Gomes and Gomez [4].

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[2] In accordance with Taibo v R 1996 48 WIR 74 at page 83; The State v Gomes and Gomez 2000 59 WIR 479 at page 485; Patrick Lovelace v R C/A No. 33 of 2004.
[3] 1994 46 WIR 151
[4] 2000 59 WIR 479

[34] In the former case, Chief Justice Sir Vincent Floissac stated:

> "Where a crime (e.g. unlawful possession of a controlled drug…) is committed by a principal offender and either before or during the commission of the crime a secondary party renders assistance either by way of aid, abetting, counsel, procurement or encouragement to the principal offender in the commission of the crime, the secondary party will be guilty of the crime as a party to it if he rendered assistance with the mens rea necessary for guilt of that crime or with knowledge, contemplation or foresight of a substantial degree of probability (as distinct from a bare or remote possibility) that the crime was being committed … by the principal offender."

[35] In his summing up the trial judge was right to equate "aiding and abetting" with "joint possession" in the circumstances and his directions on the burden of proof on the Prosecution were pellucid. This ground of appeal fails.

The learned trial judge erred in failing to give any proper direction on the law regarding circumstantial evidence.

[36] Learned Counsel submitted that the trial judge failed to give sufficient directions on the law with regard to circumstantial evidence. He drew attention to line 9 of page 9 of the record where the judge described circumstantial evidence. After doing so His Lordship told the jury: "The question you have to ask yourself is, are you sure that the conclusion which the Prosecution is asking you to draw is the only conclusion open to you and no other conclusion can be drawn. That is what is required of you in dealing with the circumstantial evidence that has been presented at the trial."

[37] In the next paragraph he speaks of the jury's requirement to draw inferences and he proceeds to point them out to the jury,[5] on all occasions leaving it to them to draw their own inferences.

[5] for example at page 21, lines 1 – 9; page 26, lines 9 – 14; page 32, lines 10 – 16; page 33, lines 2 – 8; page 40, lines 15 – 24; and page 43 lines 1 – 7;

[38] Under this head learned Counsel suggested that the appellants might have been innocent parties to a transaction between the other accused. The learned Director of Public Prosecutions however submitted that the jury were entitled to conclude that the drugs belonged to the appellants who used John Cecil Francis because of his employment with the airlines to bypass the security check and then to give to their "mules", Annette Shepherd and Sharon Burrows.

[39] We are of the view that the directions on the law regarding circumstantial evidence and its application to the facts of the case cannot be faulted. This ground of appeal also fails.

The learned Judge erred in failing to give any direction on the question of identification of the black suitcase

[40] Counsel submitted that the jury convicted on the premise that the black suitcase found with the drugs was the same one that left the Blue Horizon Hotel. Under his first ground of appeal learned Counsel for the appellant raised issues as to the vagueness of the identity of the black suitcase and the failure to apply the fact that the suitcase as found was locked.

[41] The learned Director of Public Prosecutions replied that the identification of the suitcase was not critical to the Prosecution's case. In our view the case against the appellants need not relate back to the time when the suitcase was removed from Room 8 of the Blue Horizon Hotel.

[42] The appellants were seen on the early evening of Wednesday November 6, 2002, around 6:30 when they were about to meet with John Cecil Francis. The appellants came out from the garage to greet him. They spoke and all three went into the garage. They emerged soon after about 6:35 p.m. and it was appellant No. 2, this time, who was carrying a black suitcase. John Cecil Francis opened the trunk of his car PF 987 and the second appellant put the suitcase in the trunk of the car. That suitcase was found to contain the cocaine.

[43] The case is simply more weighted in that when events start from the Blue Horizon it is the First appellant that emerges from Room No. 8 of the Hotel with a black suitcase which he placed in car P 627 driven by the Second appellant. It was a matter for the jury to infer that the same black suitcase that emerged from the hotel was the same one used throughout especially as it contained the tag with the name of the Fourth accused, Annette Shepherd. This ground of appeal also fails.

The learned judge erred in failing to order disclosure of the identity of the alleged informant/friend of Officer Smart

[44] As he began to address this issue learned counsel soon realized that the Court would not be finding favour with his arguments on the issue and he rightly abandoned that ground of appeal.

The learned judge erred in failing to give any proper direction on the good character of the second appellant

[45] The complaint made under this head is that he left the determination of good character to the jury. The learned trial judge specifically referred to the evidence of Frances Joseph[6] where she put forward Derek Parke as a man of good character and then gave the classical character directions that the good character of the accused is relevant in two ways.[7]

[46] The learned judge said: "Have regard to what has been put before you as evidence about the accused Derek Parke, and you may think that he is entitled to ask you to give some weight to his good character when deciding whether the Prosecution has satisfied you as to his guilt."

[6] at page 54 of the record

[7] R. v Aziz 1995 3 All E.R. 149; R v Vye & Others 1993 3 All E.R. 244.

[47] In his reply the learned Director of Public Prosecutions submitted that in every case findings of facts are for the jury and they would need to decide if they accept the evidence of the Second appellant's character. The learned D.P.P. pointed out that the evidence showed that the Second appellant had been married to his wife Leelawattie Parke for six years and was living with her at the time of the trial; that Frances Joseph had been employed at the garage for 10 years as the appellant's secretary and she described herself as his fiancé as well; that Carlyle Clunis gave evidence that she is mother of Parke's four year old daughter and he normally takes her to Clunis' home after school; and that the Second appellant had an open relationship with a British blonde.

[48] The Director of Public Prosecutions submitted that the good character directions were unduly favourable to the Second appellant.[8] We agree. This ground of appeal also fails.

The sentences handed down were disparate

[49] The First appellant was sentenced to 7 years while the Second Appellant was sentenced to 5 years. The disparity can be justified in that the First appellant had a previous conviction in 1997 for possession of controlled drugs.

[50] There was another submission with respect to sentence which the Director of Public Prosecutions promptly conceded. That related to the fact that the appellants were given terms of imprisonment on each of the three counts even though they were to run concurrently. The Director of Public Prosecutions said only one sentence should have been imposed by virtue of section 80 of the Criminal Code. We so order.

[8] See Edmund Gilbert v The Queen [2006] UKPC 15 ; Privy Council Appeal from Grenada, No. 25 of 2005.

The conduct of the trial was not fair in all the circumstances of the case.

[51] Under this head we considered the defences of alibi put up by the appellants. They both denied being at the Blue Horizon Hotel on the afternoon of Wednesday 6th November 2002, removing a black suitcase from Room 8 or that they were on or near the garage later with a black suitcase which they gave to John Cecil Francis.

[52] The defences of alibi of each appellant were properly put to the Jury with the requisite burden of proof.[9] We do not agree that the conduct of the trial was not fair in all the circumstances of the case.

Conclusion

[53] For all these reasons we dismiss the appeal of each of the appellants and confirm their convictions. We substitute one sentence of 7 years for the First appellant and one sentence of 5 years for the Second appellant for the three sentences given on the three counts to run concurrently handed down by the learned trial Judge.

Albert N.J. Matthew
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal

[9] See pages 27, 35, 46 and 47 of the record.