IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 41/79

B E F O R E: The Hon. Mr. Justice Zacca, President (Ag.)
The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Carberry, J.A.

RUDOLPH FRAZER v. REGINA

Mrs. Velma Gayle for the Crown.

30th May, 1980

CARBERRY, J.A.:

This accused was tried at the Gun Court on the 21st February, 1979. He was tried for two offences: (a) illegal possession of a firearm and (b) robbery with aggravation, that on the 17th day of November, 1978, he with another person unknown, being armed with a gun together robbed Beryl Bartley of cash, forty dollars and twenty-eight cents and a chain and pendant.

The evidence was to the effect that the complainant was walking to catch a bus at 7.50 in the morning. While she was waiting to cross at the intersection of West Road and Hagley Park Road a motorcycle ridden by the accused drew up on the other side and the pillion rider jumped off, ran across the road, pointed a gun at her and robbed her. He then jumped back on to the motorcycle and he and the accused rode off. Later in the day she alleges that after she had made a report at the Hunts Bay police station which was near to her workplace and while she was returning to work, she saw the accused and the motorcycle at a Texaco gas station. She quietly returned to the station and informed the police who went with her to the gas station and arrested the accused. Searched at the station the complainant's chain was found in the accused's shoe.

Now, the accused had apparently engaged counsel to represent him at the trial. His counsel did not turn up, and on the face of the record the trial judge was not aware of any reason why he didn't turn up or, indeed, whether he had actually been engaged. Having waited until 12.00 o'clock, still without any counsel or news of him arriving, the judge decided to wait no longer and to proceed to hear the matter, and the accused was, therefore, unrepresented.

It was in essence a simple case. It turned on identification. The judge invited the accused to conduct his own defence and we must say that it does appear that the accused's attempts to cross-examine the witnesses were not conspicuously assisted by the learned trial judge. In view of the fact that he was undefended he he needed the court's assistance but there was, perhaps understandably, a great deal of impatience and it even appears that his cross-examination of the last witness may have been summarily cut off by the judge. At the end of the Crown's case the registrar of the court delivered himself of the following to the accused:

> "You have one of three options; you can sit there and say what you have to say, or you can stand up there without swearing on the Bible and say what you have to say or you can come up here. If you come up here and swear on the Bible, this counsel will ask you questions".

As my brother Melville has pointed out, the accused was not even given the right to remain silent if he chose to do so.

Well, the accused elected to give sworn evidence and he was cross-examined by the Crown counsel and at the end of his evidence he was invited to address the judge and following that judgment was delivered.

Nowhere has the record disclosed that the accused was ever asked by the judge whether he had any witnesses whom he wished to call. (That he has such witness is alleged in the grounds of appeal). In fact, there doesn't seem to have been any clear distinction between

his giving evidence and his being invited to address the court at the end of his evidence.

Now, there are long series of cases which indicate that an unrepresented accused is in a particularly difficult position and that the court ought to give him every assistance possible. One of those things that courts are specifically required to do is to ask such an accused whether he has any witnesses whom he wishes to have called on his behalf. The appropriate reference can be found in Archbold, 38th edition, page 311, paragraph 579 (37th edition, paragraph 551) (where prisoner/defendant is unrepresented) and it is essential that an accused not represented by counsel should be told of his right to call witnesses and be asked whether he wishes to call witnesses. Omission to do so can lead to the quashing of the conviction. See R. v. Carter, (1960) 44 Cr.A.R., 225; Horace George Andrews (1940) 27 Cr.A.R. 12 and more recently, in the West Indies Reports, two cases from the Guyana Court of Appeal: Cleveland Clarke (1976) 22 W.I.R. 249 and Dennis Price (1976) 22 W.I.R. 298. See also Mary Kingston (1948) 32 Cr.A.R. 183.

Further, in a case of this sort when the accused has not in effect had all the opportunities that he ought to have had at his trial and has not in effect had a fair trial, it is usually not possible for the court to apply the proviso, and to say that despite these things there has been no miscarriage of justice because he is obviously guilty. In point of fact, we don't express any opinion on the strength of this case because of the decision to which we have come. But it was, as the learned judge remarked, a simple case and this difficulty ought not to have arisen.

There is one final point that we should like to comment on and it relates to the fact that the accused did not have the benefit of counsel in the court below. We have seen an affidavit that was put in by his counsel with a view to explaining why it was that he did not turn up at the trial. We are not at all happy with the

affidavit nor convinced that it offers any reasonable excuse. We would also note that the grounds of appeal that were canvassed in this case do not include any reference whatever to the grounds on which we are allowing the appeal. We express the hope that the appellant will be better served by his legal advisers when the retrial takes place.

In the circumstances, then, we cannot apply the proviso. The application is treated as an appeal. The appeal is allowed, the conviction and sentence set aside and a new trial ordered in the interests of justice.

It is unfortunate that we are going to have this expensive exercise repeated again, but justice must not only be done, it must appear to have been done.

THE PRESIDENT: I agree.

MELVILLE, J.A.: I agree.

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