IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 64/78

BEFORE: THE HON. PRESIDENT
THE HON. MR. JUSTICE MELVILLE, J.A.
THE HON. MR. JUSTICE ROWE, J.A. (Ag.)

REGINA

vs.

ERIC MESQUITA

Mr. Frank Phipps Q.C., and Miss Kay Bennett for the applicant.

Mr. Gayle Nelson for the Crown.

November 9, 1979.

ROWE, J.A. (Ag.)

This is an application for leave to appeal from convictions in the High Court Division of the Gun Court, presided over by Theobalds, J. sitting without a jury, whereby the applicant was found guilty on two counts of illegal possession of a firearm and sentenced to mandatory life imprisonment, on one count for robbery with aggravation and sentenced to seven years imprisonment with hard labour and on one count for wounding with intent to do grevious bodily harm and sentenced to four years imprisonment at hard labour.

At the trial two men were indicted, the applicant and another by the name of Anthony Mesquita. No admissible evidence was led by the Crown to indicate whether the two accused were blood relatives and they denied knowing each other before the day of the robbery. The issues as to whether there was a robbery, as to whether a shot gun was produced and as to whether Mr. Chin was wounded were

never disputed. Indeed the two accused men admitted their presence at the scene of the crimes but denied taking any part in the criminal activities.

It was the Crown's case that Mr. Chin with his wife had journeyed from Kingston to Ocho Rios taking with them $28,000 in a paper bag for the purpose of purchasing land in the Ocho Rios to St. Ann's Bay area which was to be shown to them by Anthony Mesquita whom they had met before and who was acting as their agent in Ocho Rios. On the direction of Anthony Mesquita, Mr. Chin drove to the Hilton Hotel and there Mr. Chin was introduced to one "Johnnie" who joined them. Anthony Mesquita as well as Johnnie directed Mr. Chin to drive into a subsidiary road then up a hill and at a lonely spot the car was brought to a stop. Mr. Chin alighted from the car and was inspecting the area when a black Corsair motor car drove up and the occupant who turned out to be the applicant, was introduced by Anthony Mesquita to Mr. Chin in the terms,"Meet a friend of mine". Johnnie went to the trunk of the Corsair, flung it open, confronted Mr. Chin with a double barrel shot gun, and issued the command, "Stick them up". Mr. Chin drew his revolver, whereupon Johnnie threw down the shot gun and grappled with Mr. Chin. These two men were wrestling for the revolver when the applicant took up the shot gun and said,"Mek a shoot him, mek a shoot him." He then proceeded to hit Mr. Chin several blows in his head with the stock of the shot gun. Mr. Chin released his hold on his revolver but not before Johnnie had bitten him in his chest. The applicant pointed the shot gun at Mr. Chin while Johnnie had the revolver and they both demanded his car keys.

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Mr. Chin was ordered to open the trunk of his car and Johnnie removed the bag with the $28,000. He then deflated the car tyres and both he and the applicant ran to the Corsair, threw the shot gun and the bag of money therein and the applicant drove the Corsair away. Anthony Mesquita took no physical part in the robbery and when he was asked by Mrs. Chin to help her husband he said he was fearful that the robbers would shoot him.

It was suggested to Mr. and Mrs. Chin during cross-examination that their real mission to the North Coast on October 12, 1977, was to purchase United States dollars on the black-market. The Chins stoutly denied the suggestions. Suffice it to say that their evidence on this aspect of the case did not carry the ring of truth.

At the end of the Crown's case Counsel for both accused made submissions that there was no case for either accused to answer. In ruling on these submissions, Theobalds, J. said:-

> "A no case submission having been made it is for the party making the submission to satisfy me that the Crown witnesses have been so discredited or are so manifestly unreliable as to make it unsafe for this tribunal to call upon them to answer. One has to consider the evidence of Insp. Campbell as to what was told him by the accused man, Anthony Mesquita. That in my view, is one of the factors which put Anthony so much into the picture as to require that the no case submission be rejected. There is also an abundance of evidence in relation to Eric Mesquita and the part that he is alleged to have played on the scene. It is my view that a no case submission at this stage cannot be upheld. I call upon the accused to answer the charges against them."

The applicant made an unsworn statement in his defence to the effect that he is a "robot operator" and on that day he was driving the car of his friend when a person whom he did not know before (but whom he referred to in his statement as Johnnie) offered

him a lucrative fare of $10.00 to take him from St. Ann's Bay to the Hilton Hotel. He did this and in continuation of the same journey he drove this man to the place on the "dirt road" where Mr. Chin's car was parked. Johnnie had a discussion with Mr. Chin and soon he saw Mr. Chin with a revolver in his hand wrestling with Johnnie. Mr. Chin was disarmed and then Johnnie took a paper bag from the trunk of Mr. Chin's car. The applicant said that he could not leave the scene during the course of the struggle as Johnnie had removed the ignition key for the Corsair. He was just standing there dumbfounded not knowing what to do. It was Johnnie, who armed with the revolver, ordered him to drive away from the scene and at one stage threatened to shoot him. The applicant denied taking any part in the robbery of Mr. Chin and denied having unlicensed fire-arms in his possession.

Anthony Mesquita gave an unsworn statement denying any complicity in the robbery. He was acquitted. In his reasons for the acquittal the learned trial judge said:-

> "At the time that I over-ruled the no-case submission I was mindful of this statement and I bore it in mind. It seems to me that that statement provided evidence of suspicious circumstances which entitled the Court to over-rule the no-case submission at the time, I felt that coupled with the other evidence given by Egbert Chin and Beverly Chin it was in my view that there was a case for Anthony Mesquita to answer.
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> ..... Examining the evidence adduced in this Court in great detail, I come to a conclusion that where there is evidence of suspicious circumstances and it does not go beyond that, it would be unsafe to convict Anthony Mesquita on any of the remaining four counts that I outlined earlier on: possession of firearm, robbery with aggravation, wounding with intent and illegal possession of a Harrington and Richardson revolver. There is not one iota of evidence adduced in the Court to satisfy any of those four remaining counts. As I said earlier on, there was an abundance of evidence of suspicious circumstances but the Crown's case in my view does not go beyond that....."

Mr. Phipps argued two grounds of appeal. The first ground was to this effect:-

> "The Learned Trial Judge misdirected himself on the onus of proof when at the end of the Crown's case he ruled that a no case submission had failed because the Defendant had not discharged the onus of establishing that "the Crown witnesses had been so discredited or are so manifestly unreliable as to make it unsafe for this tribunal to call upon them to answer."

He submitted that the learned trial judge applied the wrong test as to the onus of proof in relation to both accused when he came to consider whether the Crown had made out a prima facie case on which to call upon the applicant to answer. The wrong test he said was used as the learned trial judge thought it was for the accused person making the submission to satisfy him that the witnesses were so discredited or were so manifestly unreliable as to make it unsafe for the tribunal to call upon him to answer.

Up to the end of the case for the prosecution an accused person has no opportunity whatever to adduce evidence on his own behalf to contradict the evidence called for the prosecution. All Counsel for the defence would have had opportunity to have done up to that stage, would have been to cross-examine the prosecution witnesses and to make suggestions to them. Any submission in law which defence Counsel made to the trial judge at the close of the prosecution's case, could only be intended to assist the judge to make a proper determination as to whether the Crown had discharged the burden of placing before the Court a prima facie case. When such a no case submission was being made to a trial judge there could be no question of an onus or burden on the defence to satisfy the trial judge on any aspect of the case. Therefore if this first sentence of the learned trial judge's ruling had stood alone it would

be a clear misdirection on the onus of proof. But it did not stand alone. Three sentences later the learned trial judge said:-

> "There is also an abundance of evidence in relation to Eric Mesquita and the part he is alleged to have played on the scene."

It seems clear that what the learned trial judge had in mind was that there being this abundance of evidence against the applicant, for the defence to succeed on a no case submission, defence counsel would have to persuade him by argument that the prosecution witnesses were not credible. He found the evidence abundant and credible and the valiant efforts of defence counsel on the no case submission ineffective and non-persuasive.

At the end of the case, in his final summation, the learned trial judge correctly stated the burden of proof and reminded himself that "the burden of proof rests at all times on the crown and never shifts." It is our view that when the passage giving the learned trial judge's reasons for rejecting the no case submission in relation to the applicant is read as a whole there was no misdirection as to the burden of proof.

In essence, a no case submission is an invitation to the trial judge to make a provisional evaluation of the evidence adduced by the prosecution and to rule in favour of the defence if on that evaluation, the prosecution has not made out a prima facie case. A ruling at that stage that there is a case to answer does not lead inexorably to conviction should the accused decline to give any evidential explanation. As Lord Parker said in the oft cited Practice Note of 1962, 1 All E.R. 448:-

> "If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict."

Therefore whether the trial is by judge alone or by judge and jury if the judge proposes to rule that there is a case to answer it is undesirable that he should make any comment whatever on the evidence or on the credibility of witnesses when for all he knows the defence may tender evidence which compels him to form a different opinion of the evidence for the prosecution. This was the point being made by Roskill, L.J. in R. v. Falconer-Atlee (1974) 58 Cr. App. R. 348 at 356 when he said:-

> "At the end of Counsel's submission, the learned judge turned to the jury who were still there, having listened to all this. He told them in an address extending over four pages of transcript why it was that he was leaving the case against the appellant to them. With great respect, that was unwise, to say the least, in the circumstances, because it involved expressing, however tentatively, a view on the facts which it would have been much better not to do. If he was going to leave the case to the jury, he should have left it saying no more than that there was evidence to go to the jury and it was for them to say whether or not the appellant should be convicted."

The second ground of appeal argued by Mr. Phipps was that the learned trial judge misdirected himself when he rejected a no case submission made on behalf of the applicant and he submitted that at the end of the Crown's case the learned trial judge made his ruling based upon suspicion rather than on cogent evidence. Mr. Phipps argued that it is apparent from what the trial judge said when he was discharging Anthony Mesquita, that at the time when the trial judge called upon that accused to answer there was not an iota of evidence against him but only a mountain

of suspicious circumstances and if the judge could apply a completely wrong test as to what amounted to a prima facie case in respect of one accused, he must have had precisely the same state of mind in relation to the other accused. Attractive as this argument is, it lacks substance having regard to the evidence in this particular case. On the Crown's case it was the applicant who drove the Corsair motor car to the lonely place where Mr. Chin was parked. The applicant was the only occupant of the Corsair and it was from the trunk of the Corsair that the shot gun was produced. It was the applicant who threatened to shoot; it was the applicant who delivered the blows to the head of Mr. Chin while that gentleman wrestled with Johnnie and it was the applicant who drove away the Corsair taking along Mr. Chin's bag of money, the shot gun and the revolver. On this evidence the applicant was a principal participant. The trial judge did warn himself to treat the cases against each applicant separately, and there is nothing in his ruling in relation to Anthony Mesquita which having regard to the array of facts implicating Eric Mesquita necessarily taints his approach to the case against this applicant.

At the very end of his summation the trial judge did say that the effect of the unsworn statement of the applicant was to strengthen the case for the prosecution. Mr. Phipps urged us to say that the state of the judge's mind at the close of the prosecution in relation to the applicant, could be, that the applicant could be called upon although only suspicious circumstances were shown to exist in relation to him and that the applicant's conviction followed only because the judge concluded that the

applicant's statement had strengthened the Crown's case. It is patent from the judge's summation that he did not approach the applicant's conviction in that manner. At page 166 of the record, the trial judge enumerated the several specific acts alleged by the prosecution witnesses to have been perpetrated by the applicant and found as a fact that those witnesses spoke truthfully as to those events. We are of the view that the trial judge was fully justified in making the comments which he uttered as to the effect of the applicant's defence.

The application is refused. The convictions and sentences are affirmed.