JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 116 & 150/84

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

R. v. HOWARD MCDONALD &
TERRENCE CHUNG

R. Small & H. Murray for McDonald

Howard Hamilton, Q.C., & R. Fletcher for Chung

K. Pantry & Miss V. Grant for Crown

NOVEMBER 5, 6, & DECEMBER 9, 1985

CAREY, J.A.:

On 30th November, 1984 in the Home Circuit Court before Wolfe, J., and a jury, both these applicants were convicted on two counts of an indictment which charged Conspiracy and Robbery with Aggravation. As to the first count, the particulars of offence were stated thus:-

> "Howard McDonald, Terrence Chung and Hopeton Blair, on divers days between the 1st day of October, 1983 and the 15th day of December, 1983 in the parish of St. Mary, conspired together and with other persons unknown to steal money from the Highgate Branch of the Bank of Nova Scotia Jamaica Limited".

The second count alleged that the three persons named in the first count -

> "on the 15th day of December, 1983 in the parish of St. Mary, being together and with other persons unknown and armed with offensive weapons, robbed Verna Gurdon of One Million, One Hundred & Two Thousand, Five Hundred Dollars in cash ($1,102,500)".

The accused Blair was acquitted on both counts. The other two, the present applicants, were thereafter each sentenced to concurrent terms of two (2) years imprisonment at hard labour and fifteen (15) years imprisonment at hard labour respectively.

In so far as Terrence Chung was concerned, Mr. Fletcher intimated that he had carefully considered the record of the summing-up and was quite unable to find any matter on which legitimate complaint could be made to enable him to put forward submissions of any merit. We shared learned counsel's view and accordingly, refused the application for leave to appeal by Chung and directed that his sentence should begin to run from 28th February, 1985. As regards the other applicant, we granted leave to Mr. Small to to argue three supplementary grounds which we set out hereunder:

> "1. The Learned Trial Judge wrongly directed the jury that the evidence of Mrs. Verna Gurdon that she received a glass of Kool-Aid and cup of fever grass tea from a person who she could not identify was capable of amounting to corroboration of the witness Allan Gordon. (See pages 85-86 of the record). Similarly, the Learned Trial Judge misdirected the jury at page 87 by telling them that the police officers' evidence of finding tapes at Gordon's premises was capable of amounting to corroboration of Gordon's testimony.
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> 2. (a) The joining of the count of conspiracy to rob with a count alleging the completion of the substantive offence in the same indictment was unfairly prejudicial to the applicant.
> (b) Further, the Learned Trial Judge erred in leaving for the jury's consideration the testimony of the witness Warren Lyn in relation to a conspiracy formulated on the 1st October 1983, where it was clear on the evidence that that conspiracy did not include the applicant McDonald and where that conspiracy was brought to an end by the only two participants to the conspiracy namely: Lyn and Chung. Alternatively, the Learned Trial Judge failed to leave to the jury, with the appropriate directions in law, the issue of fact as to whether that conspiracy had come to an end or was capable of forming part of the conspiracy alleged in Count 1.

"3. The Learned Trial Judge failed to direct the jury that the caution statement admitted into evidence against Terrence Chung and oral statements made by Chung could not be relied on as evidence against the applicant McDonald. In particular, the Learned Trial Judge failed to give a specific warning to the jury that nothing contained in these statements could be relied on to establish either:

a. corroboration of Allan Gordon's evidence in relation to the applicant McDonald, or

b. proof of the conspiracy in which the applicant McDonald was alleged to be a part of".

Before considering these grounds, however, we propose to relate shortly the circumstances which brought about the trial and eventual conviction of the applicants.

The applicant Chung was a teller at the Highgate branch of the Bank of Nova Scotia, and in October 1983 intimated to one Warren Lyn that he was in dire financial straits which could only be resolved by planning a robbery of his bank. Lyn, who gave evidence on behalf of the prosecution, testified that Chung enquired if he knew of any persons in Kingston who could be enlisted. During that very month, they went to Waterhouse where Lyn had friends, one of whom, one "Kenneth" was introduced to Chung. In the course of a conversation between them, Lyn was asked to fetch an envelope from Chung's car. In that envelope were two photographs, one of which Chung identified as being that of the Manager of the branch, and the other a lady described as of 'dark complexion', was a teller there. Chung also briefed this recruit on aspects of his bank's security equipment. The interview ended with Chung inviting this gentleman to contact him at the bank.

In a subsequent conversation between the witness Lyn and Chung, Lyn tried to dissuade Chung from continuing his scheme. Indeed, Chung, although promising that he

would refrain from any further action, nevertheless, expressed himself as being quite desperate.

The female teller whose photograph had been shown by Chung to Lyn's friend Kenneth at Waterhouse, was Mrs. Verna Gurdon. She was in fact the Senior Accountant at that branch, and an important witness for the prosecution. She said that about 8:00 p.m. on the 14th December, 1983 she was abducted from her home by three men who came there in a white Lada motor car, in respect of which, there was other evidence which showed that this car though not known to be owned by the applicant McDonald, who owns a white Toyota car - was from December 12, 1983 in his possession. After she had been taken in this car and driven out of Port Maria, she was blindfolded with strips of tape. She was eventually taken into what seemed to be the basement of a house. At some point on the journey thither, she was aware she was joined by the other applicant Chung, whom she recognized by his voice when he greeted her. Sometime after their arrival she complained of hunger, and was given some drink which she was told, was Kool-Aid. She declined to have it. She, however, was offered a hot drink and in the event did have some fever grass tea. Chung was questioned by her abductors and provided information as to the timing device for opening the vault and the amount of money which was lodged therein. Subsequently, she was taken from that building and placed in a car with Chung. Some distance out of Port Maria on the road to Highgate, her blindfold was removed. Eventually they reached the bank which was robbed of the amount stated in the indictment. Both Chung and herself were required to dial the combination to allow access to the vault from which the money was removed.

After the robbery, Chung suggested that Mrs. Gurdon and himself should be locked up downstairs in the bank. The robbers acceded to this request. Some twenty minutes after the robbers had made their escape, she began flicking the light switch in order to attract attention but Chung counselled her against such foolhardy conduct. She, however, found a bucket and climbing on it, opened a window from where she called for help. Chung's contribution was to persist in asking her if anyone was coming. They were ultimately delivered from their ordeal. So far as the identity of her abductors was concerned, she was entirely ignorant and of course she was not able to identify those persons who actually participated in robbing the bank.

Another witness for the prosecution whom the learned trial judge correctly described as 'a very important witness in the case', was Allan Gordon. He lived at Gibraltar Heights, Oracabessa, St. Mary, in a house which had a basement from which there was no internal communication with the rest of the house. At the request of McDonald with whom he was on very friendly terms for a number of years, Gordon granted the use of this basement. McDonald told him that he would be engaged with some other persons on a project for the Workers Party over a two (2) day period. This request was made on 11th December, 1983. He said he would require the place from the 12th December and sometime between 9:00 and 10:00 o'clock in the morning, did arrive in a white Lada motor car with two men. He provided the applicant with a blanket, linen and the keys for the basement. McDonald handed over thirty Dollars ($30.00) to defray the cost of an evening's meal. That afternoon McDonald and his colleagues left but returned later.

On the 13th December, Gordon said he served tea. McDonald who intimated that he would be going to Kingston, set off without the others. In the evening, he returned with another man. On the 14th December he gave McDonald a cup of tea and once more McDonald advised he was going to Kingston. The learned trial judge did suggest to the jury that they might well regard all these alleged trips to Kingston as a ploy to enable these men to reconnoitre the bank and its environs. On McDonald's return from this supposed trip to Kingston, both McDonald and Gordon went to the Americana Hotel in Ocho Rios where Gordon was asked by McDonald to put through a call to a number which he recognized as a Highgate telephone number. This number was that of the Nova Scotia branch there. McDonald then spoke for about ten minutes, and when he was asked by Gordon whether he had gotten through, replied, "Yes, I got my man". On the way back to Gordon's home, McDonald advised that two more men would be joining his party and at this, Gordon registered his strong objections. At 6:00 p.m. McDonald left in the Lada motor car with two men and returned some two hours later.

Subsequently, while McDonald was making a request of him for iced water, he heard a voice say - "Lug (being the applicant) she want something to drink". As he was unaware that a woman was in the basement, he enquired of McDonald who she was. But the reply he got was - "cho man, is just a girl we have with us". At this point, McDonald requested a drink which he supplied in the form of 'Kool-Aid'. McDonald went off with the drink and returned empty handed. The same voice which had made the earlier request, then demanded a hot drink - "Lug she don't want anything cold, she want something hot".

McDonald again called on him to supply a cup of tea. He provided fever grass tea. Next morning when Gordon awoke, it was to find that all had taken their leave. Later that very morning the police arrived, and, from the basement retrieved some rolls of masking tapes and the blanket he had loaned McDonald.

Later, the police took Gordon into custody, and indeed he was committed for trial with these two applicants and another man Blair, but the Director of Public Prosecutions entered a 'nolle prosequi' and so terminated the proceedings against him. Thereafter he gave evidence on behalf of the prosecution, and the learned trial judge left the question of accomplice vel non for the jury's consideration. With respect to this witness, we must confess that we have not been able to discover a scintilla of evidence to suggest that Gordon could properly be regarded as an accomplice. This is not said in criticism of the learned trial judge's directions in this regard because we have not the least doubt, that his directions were given ex abundante cautela. We note as well that he rightly suggested to the jury that they should consider whether this witness was not a person with an interest to serve. At page 88, he said this:

> "I have already told you, if you say he is not an accomplice then you have to consider whether he is a person with an interest to serve, and the question of the interest to serve would arise because he was a person who was charged and he was a person who knew these men - if you believe what he is telling you - who were at his house, and because of that he might have well been protecting his own interest. So I have told you how to deal with it in either case, but you will have to decide that, not me".

It only remains to rehearse shortly the evidence of one of the police officers, viz., Detective Superintendent Albert Richards of the C.I.B. Headquarters. On 15th December he went to premises at 32 Pantropant Avenue, Pembroke Hall in St. Andrew where he saw the applicant

McDonald whom he advised of the purpose of his visit. After a search of the house, he recovered some $155,380.00 in cash, two firearms and a substantial quantity of ammunition for these weapons. McDonald was cautioned and then questioned on a number of matters, to which he responded by remaining mute. However, when he was asked 'who has the rest of the money?', he did reply - 'What's your name again?' Detective Superintendent Richards gave his name and then the applicant said - 'Well you know that if I was to tell you that tonight, I would be a dead man and wouldn't even reach the police station. Take me in first and I will tell you'.

At the police station when the question was repeated after caution, his reply on this occasion was: 'Mr. Richards any man can back down on his words. You have Howard McDonald already. Well, let it remain at that'.

In his defence, the applicant explained that Gordon was a 'bandooloo' man, i.e., an underworld character capable of obtaining scarce items including foreign currency, and from whom he had obtained on a number of occasions in the past, U.S. currency. The large sum he had in his possession, he explained, represented collection from one 'Dimples', a higgler who required U.S. dollars for Christmas purchases for herself and colleagues. He had been to see Gordon to discuss such a transaction on Saturday 10th December, 1983, but had not seen him since. On the 15th December the police raided his home and seized $166,000.00 which he admitted having there. He denied any complicity in the bank robbery.

We can now turn to consider seriatim the grounds of appeal which have been set out earlier in this judgment.

With respect to the first ground, Mr. Small submitted that although the learned trial judge gave correct directions as to the nature and quality of the evidence which was capable of constituting corroboration, the evidence which he identified as such, lacked that nature and quality because the items isolated were neither capable of proving the commission of an offence of Robbery with Aggravation nor could they implicate McDonald in the circumstance of being in Gordon's basement. He cited authorities such as R. v. Sailsman (No. 2) 8 J.L.R. 296 and R. v. Brathwaite 11 W.I.R. 458 to illustrate his point that where evidence pointed out as corroboration does not possess that quality, that this may well be a ground for quashing a conviction.

In the instant case the learned trial judge gave the following directions with respect to corroboration. He said at page 80:

> "What is corroboration? Corroboration is independent testimony that is testimony from a source other than the person giving the evidence - good - which tends to support or confirm in some material particular the testimony of the person who is the accomplice and it must confirm and support it to show that the accused who that evidence affects is the person who has committed the crime. In other words, it must connect the accused man to the crime".

We think it might not be amiss then to revisit R. v. Baskerville [1916] 12 Cr. App. R. 81. There a strong Court of Criminal Appeal comprising Reading, L.C.J., Scrutton, Avory, Rowlatt & Atkin, JJ., reviewed and considered the previous authorities dealing with corroboration and declared what the law was, which should be applied in future cases. At page 91 Lord Reading, C.J., propounded the law thus:

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. [In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute, 'implicating the accused', compendiously incorporates the test applicable at common law in the rule of practice.] The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime".

This quotation is helpful for its valuable examination of the nature of corroborative evidence. We would highlight the aspect of the dictum which we think pertinent to the circumstances of the present case and it is that the corroborative evidence must show or tend to show that the story of the accomplice is true, i.e., that the accused was circumstantially implicated in the commission of the offence. In other words, the test will be met if the corroboration consists of circumstantial evidence with the necessary nexus of the accused's complicity.

In the present case, the evidence of Allan Gordon, we think, clearly falls into that category of persons

with an interest to serve, where the warning as to corroboration was not obligatory. The significance of his evidence was to place the applicant at the home of Gordon at the material time. His presence there, from the point of view of the Crown's case, was a link in the chain of circumstantial evidence going to prove that he was one of the persons involved in the robbery of the bank. The evidence of this witness it will be remembered, was that he had been requested by the applicant to provide, and had provided first Kool-Aid and then fever grass tea for a female. "That female", Mrs. Gurdon, swore that she had been provided with refreshments of that nature by persons who abducted her from her home, took her to the basement, and were themselves involved in robbing the bank. The receipt of refreshments by Mrs. Gurdon thus constituted the circumstantial evidence which was admissible and relevant in corroborating Gordon's evidence that he provided refreshments to the applicant. If Gurdon's evidence was believed, it confirmed Gordon's evidence in a material particular, viz., that the applicant was present in the basement. His presence in the basement tends to implicate him in the commission of the crime charged.

Thus in R. v. Birkett [1839] 8 C & P. 732 the charge which was for Receiving stolen sheep, was proved by evidence of an accomplice. The corroboration was constituted by proof that a quantity of mutton corresponding with the stolen sheep in size, was found in the accused's house.

What we have said in relation to the refreshments provided by the applicant, applies equally, in our opinion, to the tapes found in the basement of Gordon by the police.

Gordon had sworn that he had allowed the applicant the use of his basement for an innocent purpose. Mrs. Gurdon gave evidence that she had been blindfolded by her abductors, the bank robbers, with tape. The presence of the tapes was thus circumstantial evidence which linked the persons in the basement with the crime. It confirmed a material particular, viz., the presence of the applicant in that basement for a purpose which was far from innocent.

We cannot, therefore, agree with Mr. Small's submission that the corroborative evidence indicated by the learned trial judge lacked that quality because Mrs. Gurdon was unable to identify the applicant as either one of the persons who had abducted her and robbed the bank, or as the person who had given her refreshments. Had she been able to identify the applicant, as the person who gave her refreshments, then Gordon's evidence could well have been unnecessary. As we have endeavoured to show, the evidence which is required is some independent evidence rendering it probable that the story of the accomplice is true and of course connecting the applicant with the crime. If the corroborative evidence, albeit circumstantial, is a link in the chain connecting the accused with the crime, then, in our judgment, the test is satisfied. We are therefore of opinion that this ground fails.

With respect to ground 2, learned counsel complained that the joinder of the count for conspiracy with a count alleging the achievement of the purpose of the conspiracy, viz., the robbery, was unfairly prejudicial.

As to this ground, it is perfectly true that dicta abound to show that the charging of conspiracy where there is evidence of the completed crime, is an undesirable

procedure. For example, see R. v. Boulton [1871] 12 Cox C.C. 87 at page 97: R. v. Dawson 44 Cr. App. R. 87. In the latter case, Finnemore, J., indicated three reasons for the court's disapproval of the practice. At page 93 he said this:

> "First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen trials by adding a charge of conspiracy. Secondly, that course can work injustice, because it means that evidence, which otherwise would be inadmissible on the substantive charges against certain people, becomes admissible. Thirdly, it adds to the length and complexity of the case, so that the trial may easily be well-nigh unworkable and impose a quite intolerable strain both on the court and on the jury".

The objection taken to the joinder in the instant case, is presumably based on the second reason identified by the learned judge, that of injustice. In so far as the applicant was concerned, it was urged in the first place that the evidence of Lyn regarding his discussion with the other applicant did not attain the character of an agreement to steal. The jury ought to have placed before them, for their decision, the issue whether the discussion, proposal or negotiation between Chung and Kenneth resulted in a concluded agreement. Further, on the state of the evidence, assuming it was perhaps possible to say that there was an agreement, it would have been between Lyn and Chung, and since they had aborted it, that evidence would be inadmissible in the trial against the applicant McDonald.

Learned counsel did concede that the only piece of evidence linking this applicant with the conspiracy was the evidence of Gordon regarding McDonald's telephone call to the Highgate Bank and his statement - "I have got my man". But as to this, he said that the learned trial judge had

given a fundamental misdirection with respect to corroboration of the evidence of this witness, which tainted the rest of his evidence. A number of cases were cited to us to illustrate these points made by counsel. We mention some, viz., R. v. Meyrick 21 Cr. App. R. 94 where it was held that to prove conspiracy it was not necessary that there should be direct communication between each conspirator and every other, but the criminal design alleged must be common to all. Their Lordships approved of dicta of Willes, J., in Mulcahy's case 3 English and Irish Appeals 306 at page 317 - "A conspiracy consists not merely in the intention of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable". We pause to note that the learned trial judge in his directions at page 103 used the very words of that distinguished Victorian judge.

R. v. Walker [1962] Crim. L.R. 458 where Lord Parker, C.J., pointed out the necessity for the discussion to have passed from the sphere of negotiation or intention and had become a matter of agreement.

We have set out counsel's arguments in some detail out of deference to his care and skill in presentation, but at the end of the day, we are constrained to say that we do not agree with them.

We think it right to say that in general it is undesirable to join a count for conspiracy with substantive counts charging the completed offence. The reason which we think should urge prosecutors against such a joinder is the likelihood of creating complexity especially for a jury, a factor which might well result in unduly prolonging a trial.

We can see no unfairness or prejudice in such joinder if the entire scheme of criminality will not emerge in a prosecution of the substantive offence alone. We are supported in this by the opinion of James, L.J., in R. v. Jones & Ors. 59 Cr. App. R. 120 at page 124 where he observed:

> "In our view, the judge was right in his refusal to quash this count. The question whether a conspiracy charge is properly included in an indictment cannot be answered by the application of any rigid rules. Each case must be considered on its own facts. There are, however, certain guiding principles. The offences charged on the indictment should not only be supported by the evidence on the depositions or witness statements but they should also represent the criminality disclosed by that evidence. It is not desirable to include a charge of conspiracy which adds nothing to an effective charge of a substantive offence. But where charges of substantive offences do not adequately represent the overall criminality, it may be appropriate and right to include a charge of conspiracy".

The prejudice often cited in discouragement of joinder is that it allows acts and declarations of any of the conspirators in furtherance of the common design to be given in evidence against any other conspirator.

In the present case, there was no prejudice because no declarations of any conspirator in furtherance of the common design was given in evidence against the applicant. Moreover, it seems unreal to assert in the face of evidence of the completed crime, that the evidence of Lyn about Chung's discussion with Kenneth at Binns Road, Waterhouse, amounted to no more than negotiation. Further, the evidence that the conspiracy would no longer be pursued, came from Lyn who swore that Chung said that he was not going to worry with it. This question of abandonment was essentially a question for the jury to decide and having returned a

verdict of guilty of conspiracy, they must, therefore, have determined that the conspiracy was neither aborted nor terminated, and that the applicant subsequently joined therein.

In our considered opinion, the learned trial judge acted correctly when he left to the jury, Lyn's evidence of the conspiracy in October, although there was no direct evidence that the applicant was involved at that time. It is seldom that direct evidence of the agreement is available and the only way to prove an agreement, is to show that the parties were involved in a common pursuit, in this case, to rob the Highgate branch of the Bank of Nova Scotia, and that their actions must have been coordinated by arrangement before hand. See R. v. Cooper & Compton [1947] 32 Cr. App. R. 102. Discouragement of the practice of joinder should not be confused with the legal validity of adducing relevant and admissible evidence. It was not necessary to show that this applicant was in direct communication with the other conspirators, provided there was evidence that they had a common design, and in the instant case, there was evidence that the common design was to rob the bank. R. v. Meyrick (supra).

Finally, we would add that there was no unfairness in the joinder in the present case because that count allowed the evidence of the totality of the criminality to be adduced in evidence. There will always be borderline cases, but in our view, the facts in this case fall well within this side of propriety and fairness. This was no ordinary 'run of the mill' bank robbery. It was a well planned and organized scheme involving persons with no apparent connections. [One of the applicants was a teller at the bank, and the other who lived in Kingston, and

worked for a non-governmental body called Project for the People , had some underworld connections]. It was essential in the proper administration of criminal justice that the overall scheme be laid bare before the Court.

From what we have said, it must be clear that we see no merit in this ground as well.

We now come to the third ground. We have looked at the caution statement of Chung and we are clear that nothing therein contained, called for any direction as is suggested in that ground. Chung's statement consisted of a detailed account of his actions and made no mention whatever of this applicant. We are quite unable to appreciate what purpose could be served by giving to a document which served to implicate solely the maker thereof, a significance which, so far as this applicant was concerned, it neither had nor was capable of having. It was much fairer to the applicant to accord it no significance as the learned trial judge did. This Court has carefully considered what Mr. Small has said on this point, but we do not think that this point deserves further comment.

In the result, seeing that the grounds argued, raised questions of law, we treat the hearing of this application for leave to appeal as the hearing of the appeal itself, which we now dismiss. The convictions and sentences are affirmed and we direct that the sentences will begin to run from 28th February, 1985.