CA Criminal Law — Gun Court — Burden of proof: failure of judge sitting alone to state ... in summation. Evidence: whether judge failed to consider ingredients of offence — whether failed to consider proof beyond reasonable doubt — whether failed to consider sworn evidence of appellant. Identification: whether judge failed to consider identification evidence and to apply proper principles — whether impropriety in identification parade. Appeal dismissed

Cases

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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 127/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

Evidence

Criminal Practice

R. v. PHILLIP GILLIES

Carlton Williams for the Appellant

Miss Diana Harrison, Deputy Director of Public Prosecutions for the Crown

May 4 & June 2, 1992

WOLFE, J.A. (AG.)

The appellant a police constable, was on the 8th August, 1990, in the High Court Division of the Gun Court convicted by Mr. Justice Courtenay Orr on an indictment which contained two counts. Count I charged him with illegal possession of firearm and count II with robbery with aggravation. He was sentenced to twelve years imprisonment at hard labour on each count.

Leave to appeal against conviction and sentence was granted on the 2nd March, 1992 and before us counsel for the appellant sought and was granted leave to argue the undermentioned supplementary grounds of appeal:

1. "The learned trial judge failed to apply the proper burden and standard of proof in arriving at his verdict for the following reasons:

   (a) He at no time in his summation adverted to the burden and/or standard of proof.

"(b) He failed to consider all the ingredients of the offence for which the appellant was charged and so failed to determine whether the Crown had proven the case against the appellant beyond reasonable doubt.

(c) He failed to give any consideration whatsoever to the sworn testimony of the appellant in arriving at the verdict of guilty.

2. (a) The learned trial judge fell into error in not recognizing and so carefully considering the inconsistencies in the testimony of the witnesses.

(b) That the learned trial judge's finding that a specific inconsistency was a correction to wit -

Page 56: 'At first he did say that he was looking at the man for about 10 minutes but later he corrected that when I asked him quite clearly ..."

was in error and deprived the appellant of a reasonable chance of acquittal.

3. That the evidence of identification was extremely poor particularly in light of the witnesses failure to take any action whatsoever after they alledgedly (sic) saw appellant subsequent to the alledged (sic) incident.

4. That the learned trial judge failed to have carefully or at all considered the implications of the police officer, Coombs involvement in the parade."

The evidence revealed that three men, one of whom was identified as the appellant, invaded the Sunflower Beach Resorts Villas, Runaway Bay, St. Ann, in the early morning of the 3rd March, 1990. At gunpoint they relieved Sheldon Ashman, the cashier/receptionist, of cash and goods valued at over $12,000. The appellant was a principal actor in the drama.

Sheldon Ashman testified that the security guard summoned him to the front office. On arrival there, he saw three men one of whom was the appellant, who enquired of him if he had any rooms or villas to rent. Before he was able to reply, the appellant entered behind the counter, pulled a gun and ordered him not to move. Another of the men, who was also armed with a gun, ordered the security guard Richard Smith into the office. The appellant asked for money and was told that the money was kept in the cashier's room. He ordered Ashman to take him to the cashier's room. This Ashman did at gunpoint. The appellant removed from the cash box travellers' cheques amounting to US $1000 and Canadian notes amounting to $200. He then left the room leaving the cashier inside. Ashman heard a vehicle drive from the premises and concluded that the man had left, whereupon he emerged from his office and saw the security guard and another worker in a back room. He discovered that the telephone lines were cut and that a television and video recorder were missing from the Manager's office.

The evidence showed that the office was lighted with electric bulbs and that the entire incident lasted for approximately twenty minutes. The appellant was always in close proximity to the identifying witness. Mr. Ashman testified that he observed the face of the appellant aided by the light.

At about 3.00 p.m. on a day some one month after the robbery Ashman saw one of his assailants, the appellant, in St. Anns Bay. He again saw him on or about the 17th March, 1990 leaving the St. Ann's Bay Police Station at about 5.00 p.m. Within fifteen minutes he saw the appellant escorting a man into the station. This alerted him that the appellant could possibly have been a policeman. On the first occasion that he saw the appellant, he did nothing as he was more concerned with concealing himself from the appellant. On the second occasion he waited until some two days had elapsed before he spoke to Det. Sergeant Hamilton.

On the 11th April 1990 Ashman pointed out the appellant on an identification parade held at the Constant Spring Police Station in St. Andrew. No attempt was made to discredit the propriety of the identification parade. As a matter of completeness it must be mentioned that Richard Smith, the security guard, made a dock identification of the appellant. He stated that prior to the morning of the robbery, he had seen the appellant on occasions in St. Ann's Bay dressed in police uniform. The learned trial judge in his summation made it abundantly clear that he would not rely upon the identification evidence of the witness Smith.

The appellant gave sworn evidence and denied that he was involved in the robbery at Sunflower Beach Resorts Villas on the early morning of the 30th January 1990. He said he was unable to say where he was at the time in question. He further swore that himself and Detective Inspector Coombs, the sub-officer in charge of crime for the parish of St. Ann, did not have a good relationship. The significance of this bit of evidence will emerge when ground four is being discussed.

This summary of the evidence makes it patently clear that the only issue which arose on the evidence was the question of visual identification.

GROUND I

(a) Mr. Williams complained that nowhere in his summation did the learned trial judge indicate upon whom the burden of proof rested and what was the standard of proof required to discharge that burden. Consequently the judgment was not a reasoned one. Counsel was fortified in this brave submission by reliance upon the dictum of Carey, J.A. in R. v. Clifford Donaldson et al S.C.C.A. Nos: 70, 72 & 73/86 July 1988, (unreported). At page 10 of the judgment Carey, J.A. said:

> "It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the court to categorize the summation as a reasoned one."

This dicta is oft cited to support the proposition that a judge engaged in a summary trial is obliged to sum up as if sitting with a jury. The injunction by Carey, J.A. must be seen in the light of the peculiar situation of that case.

The learned trial judge in **Donaldson's** case was concerned with the failure by the trial judge to warn himself expressly or by the use of language which did not have to be construed, of the dangers of acting on the uncorroborated evidence of the victim in a sexual offence case. The uncorroborated evidence of a complainant in a sexual offence case or the uncorroborated evidence of an accomplice or the evidence of visual identification have been categorised as special category evidence requiring a warning as to how to approach such evidence. If authorities are needed for such a well established principle then, see **Junior Reid and Others v. The Queen** [1989] 3 W.L.R. 771. Because of the special nature of this type of evidence the trial judge is required to demonstrate in his summation that he appreciates the principles which govern such evidence and further that those principles have been applied by him in arriving at his verdict. The judge must make it abundantly clear whether he sits with or without a jury that the required warning has been administered. It is in this context that Carey, J.A. must be understood when he speaks of a reasoned summation. This injunction was never meant to be of general application.

In **R. v. Edwards** 77 Cr. App. R. 5 C.A. the trial judge failed to direct the jury upon the standard of proof. On appeal, the Court held that on the evidence a reasonable jury properly directed on the standard of proof would have undoubtedly convicted. The proviso was applied. Where the burden of proof lies, and what is the standard of proof which must be attained before the burden is discharged are such elementary principles of law that a judge of the Supreme Court must be presumed to know, unless he expressly states the contrary, and to have these fundamental principles of law in the forefront of his mind when adjudicating in a criminal trial. We bear in mind the dicta in **R. v. Cameron** S.C.C.A. 77/86 delivered 30th November 1989 (unreported) where the Court speaking per Wright, J.A. said:

> "What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is not as to the latter."

Edward's case (supra) clearly indicates that the failure to expressly state where the burden of proof lies and what is the standard of proof required, before guilt is established is not necessarily fatal.

We conclude that a judge presiding at the Gun Court is not required to "expressly or by language which does not have to be construed" state where the burden of proof lies and what is the standard of proof required to discharge that burden.

If it were at all necessary then this would be an appropriate case in which to apply the proviso to section 14 (1) of the Judicature (Appellate Jurisdiction) Act, as we are of the view that no miscarriage of justice has been occasioned by the omission. To hold otherwise would make it incumbent upon a judge in a summary trial to address himself as if he were summing-up to a jury. He would be obliged to remind himself of his functions as well as how to approach rumours, inferences, discrepancies etc.

(b) The appellant complained that the judge failed to consider all the ingredients of the offence, consequently he failed to determine whether the Crown had proven the case against the appellant beyond reasonable doubt.

A lack of conviction in this ground was evident, as counsel attempted to urge his arguments in support of this ground. Nevertheless we have seriously considered the matter. In his summation the judge said:

> "In this case the Defence is not disputing that a robbery took place and I accept the evidence particularly that of Mr. Ashman's. He says he was at this Resort and three man came, one asked about a room then stuck him up then forced him to go to another section where the boxes were and took money, travellers cheques but when he came out back from the back section where he had been, the television and video were taken by these three men."

The evidence of Mr. Ashman amply supported the proof of the ingredients of the offences charged.

(c) In this ground, the appellant has complained that the judge failed to give any consideration whatsoever to his sworn evidence in arriving at the verdict.

It is a fact that no where in the summing-up did the judge specifically make reference to the evidence of the accused. Can it be said that this omission indicates a failure to consider the evidence? This issue cannot be resolved merely by looking at the transcript and saying the evidence of the appellant has not been rehearsed, hence it has not been taken into consideration. The proper approach must be to look at the summing-up as a whole and determine its effect.

The appellant's defence was a straight denial of the charges. He did not know where he was at the time the crime was alleged to have been committed. The issue to be resolved was that of identification. The judge analysed the evidence of visual identification, giving himself the required warning and found it reliable.

This acceptance of the identification evidence by implication resulted in the rejection of the appellant's denial of having committed the crime. The trial judge in respect of Ashman's evidence said:

> "I basically find him to be a witness of truth, I find nothing sinister. I find that he is not in the least mistaken."

It is clear from the manner in which the trial judge approached the evidence that he addressed his mind to the appellant's defence, that this was a case of mistaken identity. This ground of appeal therefore fails as being without merit.

Notwithstanding our conclusion, we would however wish to advocate that it is desirable that every summing up should specifically refer to the salient features of the defence with an analysis thereof.

GROUNDS 2 and 3

Both these grounds were argued together. We find both grounds to be without merit. The learned trial judge considered at length the identification evidence and applied the proper approach advocated in **Scott and Others v. The Queen** (supra) and **Junior Reid and Others v. The Queen** (supra). We do not agree with counsel that the quality of the identification evidence was poor. If the testimony of Sheldon Ashman was believed as to the lighting, the proximity of his assailant to him during the robbery and the duration of the incident, then there was ample evidence on which it could properly be concluded that the identification of the accused had been established beyond reasonable doubt.

GROUND 4

This ground complains that the presence of Detective Inspector Coombs in the room where the witness Ashman waited prior to attending the identification parade was an impropriety, which vitiated the fairness of the parade.

Detective Inspector Coombs, it must be observed, played no part in the investigation of this case. However, the appellant averred that the relationship between himself and Coombs was strained. The narrative of his evidence in this regard is interesting:

> "Q. How did you get along with him?
>
> A. We didn't have a good relationship.
>
> Q. Any particular thing Mr. Gillies that you can recall.
>
> A. Not to my knowledge but Inspector Coombs seem to have an immense dislike for me.
>
> Q. Any particular incident happened why you said that?
>
> A. I remember once when I was involved in a shoot out with some criminal element in Priory, sir, with some gunmen, it happened on the Thursday night, the Saturday following he summoned all of us that were involved in the shoot out at St. Ann's Bay, he was questioning us about the incident. I remember that I am the one that he interrogated mostly. It is not that I played any active part in it, all of us were armed and I recall that I fired less shots than the others and yet he was applying a lot of pressure to me."

It is against this background that the presence of Det. Inspector Coombs in the room with the witnesses is attacked. The transcript of the evidence shows the following as taking place in the room:

> "Q. I dont want it to appear to you that I am not being straight, let me put it to you straightforward, that in the room Inspector Coombs spoke to you about the identification parade?
>
> A. Yes, sir.
>
> Q. What did he tell you about the Identification Parade?

"A. He told us that they are going to put the person with other men and we must only choose one person out of the men. It cant be two or three persons.

Q. Anything else he told you?

A. Yes that I must not be nervous.

Q. Let me ask you something, you said that you were the last to see the accused man, Did Mr. Coombs tell you that none of the other persons identified him?

A. No sir.

Q. I just asked you the question ...

HIS LORDSHIP: One moment.

Mr. Smith: Other persons from Sunflower Villa were in the room before you went to identify the person?

A. No, sir, I was the only person.

Q. Yes, sir, I am going to suggest Mr. Ashman, that you have not told this court the whole truth.

A. Why you said that, sir?

Q. I know why, if you agree with me say, I agree with you if you dont say no.

A. I told the Court the truth.

Q. I am going to suggest that Inspector Coombs come into the room and told you to identify this man.

HIS LORDSHIP: What is that?

MR. SMITH: I am suggesting to him that Inspector Coombs come into the room at Constant Spring and told him to identify this man.

Mr. Ashman: No, sir."

The learned trial judge in considering the identification evidence and the propriety of the identification parade considered this episode and found that Inspector Coombs did nothing improper. In our view what transpired between Detective Inspector Coombs and the witness Ashman, in the waiting room, did not in any way breach the provisions of the Jamaica Constabulary Force; Rules dealing with identification parades. We find this ground to be without merit.

For these reasons we dismissed the appeal and affirmed the conviction and sentences and ordered that the sentences commence from 8th November, 1991.