IN THE SEYCHELLES COURT OF APPEAL

1. DAVE BENOITON

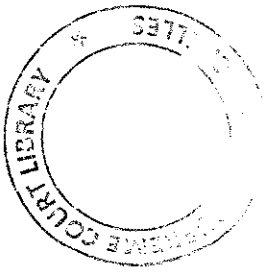
2. PASCAL TIRANT

v.

THE REPUBLIC

Cr. App. No.5 of 1996

(Before: H. Goburdhun, P.
A. M. Silungwe;
E. O. Ayoola, JJ.A.)



A. Juliette for the Appellant
A. J. Derjacques for the 2nd Appellant;
Miss L. Pool for the Respondent

Reasons for Judgment of the Court

In this case Dave Benoiton ("the 1st Appellant") was convicted at the Supreme Court with Pascal Tirant ("the 2nd Appellant") of Possession of firearms, charged in the 1st count, and possession of ammunition, charged in the 2nd count, contrary, respectively, to section 84(1) read with section 23 of the Penal Code. They were each sentenced to three years imprisonment on the 1st count and two years imprisonment on the 2nd count. Both sentences were to run concurrently. They have appealed from their conviction. On 5th July 1996 their appeals were allowed and their convictions set aside. We now give reasons for our decision.

The prosecution's case as summarised by the trial Judge was that on the 14th July 1993, in the evening, Police

....2/

Officers at Cascade Police Station had erected a road block by placing a police vehicle GS 5914 on one side of the road. Two Police Officers, namely, Inspector Desire Esparon and Corporal Bibi manned the said road block. Inspector Desire Esparon stood some feet from the entrace of Cascade Police Station, whilst Corporal Bibi was in the said Police car behind the driving wheel. Apprivate car registration No. S6226 travelling from North and proceeding towards the South avoided the road block and continued on its way without stopping. Immediately thereafter PMU officers who were in a PMU jeep pursued the said car. The said jeep was driven by S. I. Bonifac . Corporal Bibi and Inspector Esparon followed in police car registration No. GS 5914. When they reached the entrance of a lane past the Golden Eggs, the blue car registration No. S6226 had stopped at the said entrarce leading to the low cost Housing Estate. P. C. Victor who sat astride on the door of the Police vehicle driven by Corporal Bibi saw the first accused leave car S6226 through the window of the driver's door. He had with him "something which resembled a rifle." Whilst running away the first accused (2nd appellant) turned back and PC Victor recognised him. PC Victor also saw the second accused (1st Appellant) running towards the left side of the lane. He pursued the 2nd Appellant up to the junction of the said lane. After he lost that appellant, he retraced his steps towards the Police vehicles. Upon a search of the area, the police found the 1st Appellant sitting in a marshy and bushy area. A search of the vicinity of the Housing Estate was then undertaken whereupon an AK 47 with its magazine containing 40 bullets were found lying near a rock 150 - 200 feet from the place where the 1st Appellant had been hiding. The AK 47, its magazine and bullets

...3/

were produced in evidence at the trial. The 2nd Appellant was arrested by ASP Guy Roucou at his home at Brillant between 8 and 10 km from the scene of the crime at about 11.15 p.m.

The 1st appellant who pleaded Not Guilty to the charge elected not to give evidence. The 2nd appellant gave evidence denying the charge. His defence was an alibi. In summary, his evidence was that on the night in question, he was at home with his wife and three children. According to him, during the day he was working on a Spanish ship and he went home at about 5 p.m. Arriving home, according to him, he helped his wife to cook, washed his clothes, had his supper, watched the seven o'clock news on television and thereafter went to bed and fell asleep. He said that he was sleeping at home at the time when the alleged incident happened.

After directing himself on the law as regards identification and the standard of proof, the learned trial Judge found that the evidence of identification of the 2nd appellant (1st accused) was correct. He considered the lighting condition under which the identification of the 2nd Appellant was made and held that it was good. Turning to the fact that this appellant was arrested at his home sleeping when he was arrested, he said:

> "A period of time of at least 30 to 40 minutes had elapsed from the time he had escaped at Cascade up to the time he was arrested at his home. The Police officers who drove the jeep took between 8 to 9 minutes to reach the house of the first accused from Cascade. It is therefore not impossible for someone to run that distance in the space of 30 minutes. The accused is a young man and if he was able to run faster

> than PC Victor who is younger than him then it is not impossible for the first accused to have covered that distance within thirty minutes."

In regard to the 1st appellant (2nd accused), he was of the view that his identification was by recognition and that his identification was reinforced by the fact that he was found hiding in the midst of a marshy and bushy land.

The learned trial Judge after noting the discrepancies in the prosecution's case and holding that those discrepancies did not detract from the fact that the two appellants were infact in car registration No. S6226 or in any way lend support to the view that the witnesses were lying or mistaken summed up his conclusion in regard to the case against the two appellants in the following words.

> " I am satisfied that the two accused each having an AK 47 and travelling in the car of Guilner Mangroo were seen travelling towards the South of Mahe, passed a road block without stopping and the first accused managed to lose his pursuer and escaped with his SMG rifle. The second accused discarded his own with the magazine and bullets and went to hide in the bush. It goes without saying that people who arm themselves with such weapons and with so many bullets do not do so if they do not intend to use them in the pursuit of unlawful actions. I am sure that had the police not successfully stopped the two accused, they would have certainly used these weapons in the perpetration of serious crimes."

On these appeals the appellants by their counsel, have criticised these conclusions. Each contended that his conviction was unsafe and unsatisfactory given the

material discrepancies which existed in the case and that the learned trial Judge erred in his evaluation of the evidence relating to identification of each of the appellants. Counsel for the 2nd appellant challenged, as regards this appellant, the conclusion which in effect accepted that this appellant who was found in bed 30 minutes after his alleged flight from the site of the incident could have covered the 8 - 10 km distance to his home in 30 minutes on foot.

In the final analysis this appeal must turn on the facts. The main question at the trial having regard to the charge was whether the appellants were at the material time and place in possession or arms and ammunition as charged. In particular regard to the 1st appellant, the question can be further narrowed down to whether he was in possession of the gun found several feet from the spot where the appellant was found there being no direct evidence that he was seen in possession of any gun. In the result, the fact of his possession of arms and ammunition must turn on circumstantial evidence. The question on this appeal therefore was whether there was such circumstantial evidence. In regard to the 2nd appellant about whom there was oral and direct evidence of identification and possession of a gun, the question was whether it was safe to convict him on such evidence as there was of identification when considered alongside the evidence which tended to show that it was improbable that he would have been on the scene and yet found 30 minutes later sleeping in his home about 8 - 10 km away.

The evidence of the circumstances in which a gun and ammunition were recovered was this:
The 1st appellant having been seen getting down from the

...6/

vehicle which the Police were chasing and running into the bush, the Police searched for and found him in the bush. Upon a search of the locality a rifle (AK 47) and ammunitions (said to be 40 bullets) were found 150 - 200 ft. away from where the 1st appellant was found. The rifle and ammunitions were found on the steps or terrace of a house. There was no evidence as to who placed them on the steps or terrace. The prosecution witness who gave evidence of the finding of the rifle and bullets asked if he knew to whom they belonged or who placed them on the steps answered No.

The record shows questions put to him when cross-examined and answers to them as follows:

Q : Do you know who is the occupier?

A : The occupance of the house closest to the place where the items was(sic) picked, yes, the occupier is known to me;

Q : Do you know how many adults live in that house?

A : I know two ladies that live there;

Q : Did you interview them;

A : No

Q : It could belong to them also, it was on their property;

A : I do not know;

Q : In fact you do not know at all to whom it belongs, who placed it there;

A : No

Q : You do not know;

....7/

A : I do not know;

Q : It could even belong to the PMU, because your post is CID you do not know what belongs to them, so it is a possibility;

A : There is a possibility, but perhaps they could have claimed first, I don't know.

Finally, he was asked:

> "So you would agree with me the entire question is open, the ownership, possession, who placed it there, to whom it belongs, it is entirely open.

and he answered

> "Yes, and I do not know for who it is."

A further remarkable fact was, as disclosed by the evidence, that the spot where the 1st appellant was found was never searched but the Police chose to search a place 200 ft. to 400 ft. away. There was no evidence that finger prints on the gun were taken and matched with those of the 1st appellant.

From the totality of the evidence in this case, there was no evidence of facts that point to an inference that the arm and ammunition found was ever in possession of the 1st appellant. For circumstantial evidence to be proof of guilt, it must point irresistibly and beyond reasonable doubt to the guilt of the accused. Evidence that merely shows circumstance of suspicion will not do. There was no shred of evidence to support the conclusion of the learned trial Judge that - "The second accused discarded his own (SMG rifle) with the magazine and bullets and went to hide in the bush." There was no evidence that he was ever in possession of an SMG rifle etc. let alone that he discarded them.

...8/

All these put at the highest were mere speculation based on suspicion. In the circumstances, we were satisfied that on the evidence before him the learned trial Judge should have found the case not proved beyond reasonable doubt against the 1st appellant and acquitted him.

In regard to the 2nd appellant, the prosecution relied solely on the evidence of identification of him at the scene by Unas Victor (6th p.w.), a Police Constable. His evidence as regards the identification of the 2nd appellant was that this appellant came out of the car S 6226 and ran towards the river holding an "AK 47". The time according to him was between 8.30 and 9 p.m. He first saw the appellant at a distance of 30 ft. to 35 ft. and ran after him but the appellant got away from him. Cross-examined, he said that he saw the appellant in the glare of light when the appellant turned and looked back at the vehicle and he saw the appellant, whom he had seen about 3 times prior to the incident, for only 2 seconds. The witness Unas Victor said that he was certain the appellant whose house was about 3 km away from the scene was brought back to the scene about half an hour later after he had seen the appellant running away. He said he did not know how he could have got to his house.

Another prosecution witness, Inspector Esparon gave evidence which contradicted the evidence of Constable Victor in regard to the time when they gave chase to the car in which the 2nd appellant was alleged to be. He said that if Victor stated that the car passed by 8.30 p.m., that is three hours before the witness, Esparon, said the car went by, Victor must have been in error. Also he and another prosecution witness Elvis Lue did not see Victor sitting astride the

....9/

door of the vehicle. Victor was riding in as Victor had claimed he was doing. Sub-Inspector Boniface (P.W. 11) also contradicted Victor in regard to the time the vehicle S 6226 drove past the road block. He gave the time as 11.20 or 11.25 p.m. The evidence of P.W.7, A.S.P. Roucou who led the arrest of the 1st appellant was that the whole incident before the arrest of the 1st appellant took place before 11 p.m. He said that he went to the appellants home at 11.15 p.m. None of the witnesses has been able to explain how the 2nd appellant could have been seen at the scene of the alleged crime and lie in bed sleeping 8 to 10 km away thirty minutes later and how he could have surfaced in his house without being seen by the Police along the route he would have had to take whereas the evidence was that there were Police vehicles on the main road. The conclusion by the learned trial Judge that it was not impossible for someone to run the distance in question in the space of 30 minutes was not supported by evidence.

The facts that the 2nd appellant was seen in his bed 30 minutes after he was allegedly last seen on the scene in circumstances which required explanation from the prosecution as to how he could be in his home in bed and that no explanation came from the prosecution, by themselves ought to have raised reasonable doubts as to the identification of the 2nd appellant by Victor. These facts taken together with the rest of the evidence showed that it was unsafe to have convicted the 2nd appellant. There were unresolved discrepancies in the evidence of the prosecution witnesses and Victor as to when the car S 6226 was sighted driving by by the Police. There was no evidence in rebuttal of the alibi of the 2nd appellant or even of an investigation of his alibi.

...10/

The materiality of discrepancies in a case must depend on the circumstances of each case. In this case, the time when the 2nd appellant was said to be identified at the scene by Constable Victor was material to the defence of alibi of the 2nd appellant. Yet Victor who was the only witness who gave any direct evidence against the 2nd appellant had been described by one or two prosecution witnesses as being in error in respect of some other matters over which those other witnesses were in position to testify. In these circumstances where the case depended mainly on the accuracy and quality of evidence of the witness Victor, on the totality of the evidence, the learned trial Judge should have entertained grave doubt as to whether the person the prosecution witness Constable Victor saw was the 2nd appellant. It was worth mentioning that the 2nd appellant's house was not searched for arms and ammunition and that the Police did not seem to have looked for any evidence to connect the 2nd appellant with the crime other than the unsafe evidence of Constable Victor. In the result, we were of the view that the learned trial Judge on the evidence before him ought not to have convicted the first appellant.

It was for these reasons that we allowed the appeal, quashed the convictions and acquitted and discharged them.

Dated this day of 1996

H. GOBURDHUN (PRESIDENT)

A. M. SILUNGWE
(JUSTICE OF APPEAL)

E. O. AYOOLA
(JUSTICE OF APPEAL)

12/12/96 Reasons read in the presence of Mr L. Poole, Chief Counsel.