

REPUBLIC OF TRINIDAD AND TOBAGO

POS MAG. APP. No. 133 of 2007

IN THE COURT OF APPEAL

BETWEEN

MAURICE KOON KOON

APPELLANT

AND

MARLON LINTON, P.C. #14070

RESPONDENT

PANEL:

**M. Warner, J.A.
W. Kangaloo, J.A.**

APPEARANCES:

Mr. E. Welch for the Appellant

Mr. W. Rajbansie for the Respondent

DATE DELIVERED: 10th March 2008

Delivered by M. Warner, J.A.

J U D G M E N T

1. This is an appeal against the conviction of the appellant by a Magistrate sitting at a Magistrates' Court in Port of Spain, for the offence of possession of ammunition contrary to section 6(1) of the Firearms Act Chap 16:01, he not being a person exempted under section 7 of the Act, and not being the holder of Firearms User's Licence. The appellant was charged jointly with another person against whom the case was dismissed.

2. The appellant was fined the sum of two thousand five hundred dollars (\$2,500.) and in default he was ordered to serve a term of imprisonment of one year with hard labour. The case against the appellant was that on the 6th April 2005, at about 2a.m., the complainant, dressed in 'plain clothes' was on mobile patrol in the company of other police officers at Buccaneer Drive, Westmoorings, when he observed a vehicle approaching from the opposite direction. The vehicle's headlamps were off. It suddenly turned and sped away. The driver of the patrol car gave chase and intercepted the vehicle. When the complainant approached the vehicle, he found that the appellant was the driver and another person was seated in the front passenger seat. He asked the occupants to alight from the vehicle and searched it.

3. The complainant found a plastic bag in the open "console" area of the vehicle, containing four cylindrical objects which were later analysed at the Forensic Sciences Centre and certified to be ammunition. The appellant and his companion, who is hereinafter referred to as the "co-defendant," were taken to the Four Roads Police Station where they were charged with the offence. The appellant and the co-defendant both denied that the vehicle was searched, or that they were in possession of ammunition, or that ammunition, was found in the vehicle.

4. The appellant, who lived at Trincity, testified that before the incident, he was at Crobar, a restaurant on Ariapita Avenue Woodbrook in the company of the Manager of that business, one Anthony Chow. He had arranged to meet with Mr. Chow at his home in Westmoorings after he had closed the business that morning, in order to get some information about accommodation in Tobago. On his way there, in the company of the co-defendant, he saw a police vehicle at some distance behind his vehicle. He “pulled his vehicle to the side” and stopped. The Officers came to the vehicle and asked them what they were doing in Westmoorings. He explained that they were going to visit his friend Anthony Chow. They (the Police Officers) told them that they were lying. The police officers did not search the vehicle, but instead took the appellant and the co-defendant to the Four Roads Police Station. They were not brought to court until the day following, despite the fact that they were apprehended in the early hours of the previous morning.

5. The appellant’s defence was that the case against him had been totally fabricated. His evidence was that he had been beaten at the Police Station, by the complainant; ridiculed by other police officers and that no attempt was made to verify his explanation that they were in the area to visit his friend Anthony Chow. The complainant did agree in cross-examination that the appellant had told him about the reason for their presence in the area. He (the complainant) stated however that he was so informed at the Police Station, but had not seen the need to verify the story.

6. Mr. Chow testified on the appellant’s behalf. He confirmed that the appellant and the co-defendant left in a separate vehicle to meet him at his home. He (Chow) however stopped to get petrol on the way. The appellant never came to his home that morning, and calls to his cell phone remained unanswered.

7. The Magistrate in her Reasons assessed the case as, “not complex.” She said that the evidence of the appellant’s witness (Chow) was not helpful to the court in finding the facts. She found that the degree of control exercised by the appellant and where the ammunition was located in vehicle meant that the appellant had both possession and knowledge of the ammunition. She was not satisfied however, to the extent that she felt sure that the co-defendant was in possession of the ammunition and so she dismissed the charge against him. She made no reference to his evidence and its impact, if any on the case against the appellant.

8. A factor in the Magistrate’s decision was, that having accepted the complainant’s evidence that the appellant was driving with the headlights of the vehicle off, she concluded that a person in possession of an illegal item might not exhibit reasonable and rational behaviour.

9. The first ground of appeal was directed towards the Magistrate’s reasoning process, which, it was contended, amounted to a denial of due process. Mr. Welch argued that the Magistrate did not say that she found the appellant ‘unworthy of credit,’ nor did she comment on his demeanour, yet she concluded that he was in possession of the ammunition because he was driving his vehicle without headlights. This, Counsel continued, was an issue which the appellant and co-defendant “vehemently” denied.

10. The second ground of appeal was that the Magistrate erred in law when, by implication, she cast upon the appellant “the obligation to create a reasonable doubt” in the case for the prosecution. To support this ground, the appellant relied on the following passage extracted from the Memorandum of Reasons:

“the Court considered carefully the case presented by the appellant, had there been any reasonable doubt of the case for the appellant, the court would have given him the benefit of that

doubt. Of course, if the court accepted the evidence of the Appellant then the respondent would necessarily not have proven his case against the Appellant.”

11. Mr. Welch argued both these grounds together on the basis of his contention that the Magistrate operated on the premise that the prosecution’s evidence was true.

12. The Magistrate in her Reasons, evaluated the back ground facts presented by the prosecution in order to assist her in determining where the truth lay. In that regard, she, stated that she looked at the circumstances under which it was said that the appellant “came to stop the vehicle.” She, having accepted the complainant’s evidence that the headlamps of the car were turned off, proceeded to draw certain inferences from that fact, and examined the inherent probabilities and improbabilities of the respective accounts.

13. Once the Magistrate in her Reasons demonstrated that she had focused on the important aspects the evidence and the points of law which arose, it was not necessary that she rehearse the ‘formula type’ incantation based on demeanour. We therefore defer to the Magistrate on matters of credibility.

14. As to the burden of proof, we think that quite early in her memorandum of Reasons, the Magistrate indicated that she had directed her mind towards whether the police led evidence to satisfy the court beyond a reasonable doubt that the appellant was in possession of the ammunition. It is not fair therefore, to extract a paragraph from her Reasons in which she said that she had considered carefully ” the case presented by the appellant” and proffer that statement in support of the contention that she was not cognisant of the fact that it was for the prosecution to prove its case. We are of the view that the paragraph merely demonstrates that the Magistrate considered the case of the appellant and was unmoved by it. We do not think that the paragraph reflects a burden

cast on the appellant to raise a reasonable doubt. We find the criticisms to be misconceived. These grounds of appeal are therefore unsustainable.

15. The third and fourth grounds of appeal were, respectively, that the Magistrate failed to consider relevant and admissible evidence and rejected relevant evidence.

16. Counsel for the appellant argued that the Magistrate in arriving at her decision totally failed to consider and or consider relevant evidence, that is to say, the evidence of the co-defendant and that she erred in her finding that the evidence of Anthony Chow was irrelevant.

17. Evidence is relevant if either taken by itself or in conjunction with other evidence, it tends to make the existence of one fact more probable than the other. Although Mr. Chow's evidence was relevant as to the true purpose of the appellant's presence in Westmoorings at the material time, it did not assist in determining the fact in issue, that is, whether he had the ammunition in his possession. It simply does not follow that because the appellant was on his way to visit Mr. Chow he was not in possession of the ammunition. As regards the evidence of the co-defendant, he had made very serious allegations of physical abuse against the complainant. The appellant's testimony in this regard was not as detailed. He merely said that he was beaten. It is a fundamental, though not inflexible rule of cross-examination that it is necessary to put to an opponent's witness the nature of the case on which reliance is placed. This was particularly so in a case such as this where the witnesses' accounts were so fundamentally different. However, none of these allegations was put to the complainant (P.C. Linton) when he testified. There was simply no explanation for the failure to attempt to discredit him. We do not think that the Magistrate can be faulted on this basis. These grounds of appeal cannot therefore be supported.

18. During the course of the appeal we granted the appellant leave to argue the following ground of appeal:

“The verdict of guilty against the appellant was so inconsistent with the acquittal of the appellant’s co-defendant as to render the appellant’s conviction unsafe, as no reasonable tribunal of fact applying its mind properly to the facts of the case and the relevant law could have arrived at the conclusion which was reached by the learned Magistrate to the effect that the co-defendant was not guilty but the appellant was.”

19. A point of considerable significance in the complainant’s evidence was that he found the ammunition in the “console” of the vehicle. On two separate occasions in cross-examination, he explained that the “console” was an open area of the vehicle between the two front seats of the vehicle. This ground of appeal raises the proper test for possession and the degree of knowledge required. It is to be borne in mind though, that there has been no appeal against the Magistrate’s refusal to convict the co-defendant.

20. The relevant provisions of the Fire Arms Act, Chapter 16:01 (the Act) are the following:

Section 5(2) which provides:

“In any prosecution for an offence under this Part or Part IV a person who is proved to have had in his possession or under his control any thing whatsoever in or on which is found any firearm or ammunition shall, until the contrary is proved, be deemed to have been in possession of such firearm or ammunition.

Emphasis added

Section 6(1), which provides:

Subject to section 7, a person may purchase, acquire or have in his possession a firearm or ammunition only if he holds a Firearm’s User’s Licence with respect to such firearm or ammunition.”

21. The focus of the Magistrate's enquiry therefore, was whether the appellant, who was the owner and the driver and in charge of the vehicle, had in his possession or under his control anything in or on which ammunition was found. If therefore the ammunition was found in an open area of the vehicle, next to the appellant, it is inconceivable that he, who had physical custody or control of the vehicle, would not have been aware of its presence. This was the line of reasoning which the Privy Council adopted in the case of **DPP v Brooks [1974] 2 All ER 840 at 842-843, followed in Belgrave v Commissioner of Police (1975) 27 WIR 15.**

22 Would the same reasoning however apply to the co-defendant who was seated in the front passenger seat and in respect of whose guilt the magistrate had doubts? Mr. Rajbansee for the State argued that there was nothing in the evidence to connect the co-defendant with the ammunition. Further, he contended, even if the co-defendant was erroneously discharged, that did not in any way weaken the case against the appellant. He cited dicta of Fox, J.A. in the case of **Haye v Hamilton (1972) 18 WIR 360 at 363** to that effect. This was a case involving possession of dangerous drugs where the case against all the occupants of a vehicle, save the owner/ driver was dismissed at the close of the prosecution case.

23. In order to incriminate the co-defendant, passenger, there had to be an additional factor to link him with the ammunition. For example, if the ammunition were found with his personal belongings, or if the appellant had entrusted him with custody or control. This concept is reviewed in several authorities (See **Warner v Metropolitan Police Commissioner [1968] 2 All E. R. 356**); in this jurisdiction see **Magisterial Appeal 24 of 1973 Mills v Heller; and 274 of 1973 Magisterial Appeal; James v Wong**, both unreported.) Applying these principles, the evidence opened up the possibility to the co-defendant of a defence based on lack of knowledge of the presence of the ammunition in

the vehicle. Whereas the appellant as owner and driver of the vehicle in the circumstances of the case, could not conceivably have had recourse to that defence, there was a sufficient basis upon which the Magistrate could have acquitted the co-defendant but convicted the appellant. The co-defendant was not in control or possession of the motor vehicle in which the ammunition was found, so as to be deemed by virtue of Section 5(2) of the Act to be in possession of the ammunition. The same cannot be said of the appellant.

24. We view, with circumspection, the findings of the Magistrate who has had the advantage of seeing and hearing the witnesses. Overall, despite the brevity of her Reasons, the Magistrate did demonstrate that she appreciated the relevant law and the factual content of the evidence. This ground of appeal must also fail.

25. Finally, we granted leave to the appellant to argue that counsel's failure to elicit evidence of good character rendered the conviction unsafe. We note that the issue of good character was raised at the sentencing stage only.

26. The approach to evidence of good character in jury trials has been considered in several judgments of the Privy Council recently, more notably, in the case of Teeluck and John v The State, Privy Council Appeal 36 of 2004 in which their Lordships set out a series of basic propositions which they considered to be relevant when a defendant is of good character, that is to say, he has no convictions of any relevance or significance. In the more recent case of Bhola v the State, Privy Council Appeal 26 of 2005, their Lordships advised caution in respect at least one of the criteria set out in Teeluck. They had this to say:

“The appellant relies heavily on the series of propositions set out in paragraph 33 of the Board’s judgment in Teeluck v The State of Trinidad and Tobago [2005] 1 WLR 2421 and certainly it is right to say, as paragraph 33(iv) of Teeluck’s case does, that “where

credibility is in issue, a good character direction is always relevant". But the trilogy of cases examined above suggests that the statement in paragraph 33(ii) of Teeluck's case that the direction "will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial" needs to be applied with some caution. ...The cases where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so "rare".

Emphasis added

27. I understand the import of the dicta to be that while the importance of a good character direction is not to be minimized, their Lordships have recognised and emphasised that in many instances, its omission will not have been fatal to the fairness of the trial or the safety of the conviction.

28. In this jurisdiction, this court has set out guidelines for Magistrates. Where there is evidence of good character, they must consider it. (See judgment of **Archie J.A.** (as he then was) in **Magisterial Appeal 308 of 2003, Rodriguez v Nimblett** (unreported); **Mendonca J.A. in Magisterial Appeal 55 of 2005, Nelson v Singh** (unreported) and **John J.A. in Magisterial Appeal 75 of 2005 Raymond v Ragoonanan in Magisterial Appeal** (unreported))

29. Earlier, in **Magisterial Appeal 100 of 2003 Lewis v Virgil** (unreported) and in, **Magisterial Appeal 37 of 2003 Ramcharan v Archie** (unreported) much the same observations were made.

In the **Lewis** case, Jones, J.A. observed that the evidence might be so strong that its omission might not be fatal. In each of these cases, good character was raised in some form and it was consistently recognised that the question of good character must be

distinctly raised. In the instant case it was not so raised. It follows therefore, from what we have said that the challenge would not have been available to the appellant.

30. There is a further point which we should mention. We have not had the benefit of an explanation from counsel who appeared at the trial about his reason for not raising good character. We do not think therefore, that it would be fair to make any adverse comment about his conduct of the matter.

We therefore dismiss this appeal and affirm the conviction and sentence.

Margot Warner
Justice of Appeal

Wendell Kangaloo
Justice of Appeal