

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 32-34 of 1999

BETWEEN

**CURTIS BARKER
GREGORY GRIFFITH
JASON TITUS**

APPELLANTS

AND

THE STATE

RESPONDENT

PANEL:

**M.A. de la Bastide, C.J
J. Permanand, J.A
M. Warner, J.A.**

APPEARANCES:

MR. K. WRIGHT, MR. W. CAMPBELL and MR. D. ALLUM, S.C.
appeared on behalf of the **APPELLANTS**

MR. R. DOLSINGH, S.C. appeared on behalf of the **RESPONDENT**

DATE DELIVERED:

Friday October 5th , 2001.

JUDGMENT

Judgment Delivered by M.A. de la Bastide, C.J.

CHIEF JUSTICE M. A. de la BASTIDE: These are three applications for leave to appeal against conviction. The indictment on which the applicants were convicted contained 6 counts: The first count was for receiving a motor car knowing the same to have been stolen. The second count was for shooting at Sergeant Kennedy with intent to do grievous bodily harm. The third count was for possession of a firearm, and the fourth was for possession of ammunition, in both cases without being the holder of the relevant licence. The fifth was for possession of a firearm with intent to endanger life. The sixth was for possession of ammunition with intent to endanger life.

The jury brought in the following verdicts: they found the applicant Barker guilty on all six counts. They found the applicant Griffith guilty on only the first count, that is, the count for receiving. They found the applicant Titus guilty on the first count, that is, for receiving, and on both the third and fifth counts, that is, the charges of being in possession of a firearm without a licence, and being in possession of a firearm with intent to endanger life.

I should point out that no verdict was returned on the other counts against Griffith and Titus, but the trial Judge did not call on them to answer those charges. We give the applicants leave to appeal and treat the hearing of their applications for leave as the hearing of the substantive appeal.

The case for the prosecution may be summarised as follows: at about 4 o'clock on the morning of the 8th May, 1994, Ejaz Mohammed returned in his father's motor car to their home on the Eastern Main Road, San Juan. On his arrival there, he was robbed of the car by three men. His father was awakened by his son's screams in time to see the car being driven away. It was a white Toyota Royal Saloon with the licence number PAS 2371. At about 9:30 that same morning, PC Richards saw the same car, that is, a white Royal Saloon bearing the same number-plates, being driven near the market in Siparia. There were three men in the car. He recognised the driver as the appellant Titus. Richards knew Titus well. There was another man in the passenger seat in front, whom Richards did not recognise, but in the back-seat the officer recognised the appellant Barker, who was known as 'Trinity'. The next day between midday and 1:00 p.m. Sergeant Kennedy went with other policemen to a trace in Oropouche. There he came upon a shed which had two sides, and in that shed there was a white Royal Saloon Toyota motor-car bearing a number plate PAS 2371. Beside that car were the three appellants. The appellant Barker, according to Sergeant Kennedy, had what appeared to be a revolver in one hand. When Sergeant Kennedy accosted the men and asked what they were

doing, Barker fired a shot in Kennedy's direction. Kennedy took cover and fired a shot back in the direction of the men. The men then ran off and in the course of doing so another shot was fired in Kennedy's direction.

The men jumped down what was described as a 'precipice', not far from the shed, in an area where there was a lot of bush. Two of them escaped capture but Kennedy managed to apprehend the appellant Barker. Before doing so he saw Barker hand what appeared to be a revolver to the appellant Titus. Titus and Griffith made good their escape in a rented car PAR 4460 which was parked nearby. It transpired that that car had been rented by Titus some two days before. The owner of the Royal Saloon, Mr. Shazrudeen Mohammed, subsequently identified the car found in the shed as his car which had been stolen. The car was not available at the trial because it had been sold by Mr. Mohammed.

The appellant Barker gave a written statement to the police which was challenged at the trial but was admitted by the trial Judge after a voir-dire. In that statement Barker admitted that he was apprehended in the vicinity of the shed in which the car was, but claimed that he had been engaged by some men to 'watch' the car. He gave an explanation which would have exculpated him from any involvement in the offences with which he was charged. Indeed, he took a similar line when he gave evidence at the trial. There he gave a rather involved account of his movements on the 8th and 9th May, 1994 which included his going to the location where he was caught initially, for the purpose of 'washing' the car and returning to get the balance of the money which was due to him for having washed it.

He claimed in his evidence that he was in a tall mango tree which was near the shed, at the time when the police arrived and held him. There was evidence that he had made an oral admission to the police after his arrest that he and the two other appellants had robbed the owner of the car.

At the trial the two other appellants also gave evidence. They relied on alibis; in the case of Titus supported by a witness. Titus claimed that at the time he was attending a festival in Point Fortin and Griffith claimed that he was looking after some house property of his in La Brea. They denied having any involvement in the stealing of the car or having ever been in possession of it or having been anywhere near the spot in which the car was found and Barker arrested.

There were several grounds of appeal argued on behalf of each of the appellants. It is not my intention to go through these grounds as they were not all of equal merit. I will concentrate on those which we find to have most substance.

The first ground with which I will deal, was advanced on behalf of all the appellants. It is a complaint that the evidence led by the prosecution was

capable, to put it at its lowest, of leading to the conclusion that the appellants, more especially the appellants Barker and Titus, were not receivers of the stolen car but were in fact the men who had robbed Ejaz Mohammed of it. There was, however, no count in the indictment which charged robbery against any of the appellants. We agree that the evidence, particularly that against Barker and Titus, was at least as consistent with their having taken the car themselves from Ejaz Mohammed as with their having received it from someone else who had done so. The evidence was that within some five hours or so of the robbery at San Juan, these two appellants were seen; one driving, and the other riding in, the stolen vehicle at Siparia. In conditions which are free of traffic, Siparia is about an hour and a half by car, we were told, from San Juan. Moreover, the same two men were within a further day or so found in apparent possession of the same vehicle, standing beside it in a secluded spot. Further, there was the evidence already mentioned of an oral confession by Barker that he had indeed been involved in the robbery.

Such evidence as there was against Griffith (which I will examine more closely shortly) did not point so strongly to his having participated in the robbery, but to the extent that it justified the inference that he was in joint possession of the car with the other two appellants on the 9th May, 1994, it did at least leave it open as a reasonable possibility that he too may have been a participant in the robbery, more so in light of the evidence of PC Richards that there was a third unidentified occupant of the car at 9:30 a.m. on the 8th May.

The learned trial Judge did not at any stage in his summing-up advert to the possibility that the jury might conclude on the evidence that the appellants were guilty of having robbed Ejaz Mohammed of the car, rather than of the offence of receiving with which they were charged. If the jury had reached that conclusion, then they would inevitably have had to acquit the appellants of the offence of receiving. The appellants could not properly be denied the opportunity of having the jury consider the robbery option as opposed to the receiving option based on the prosecution's case. As it turned out, the jury were never given that opportunity and therefore, their verdict of guilty of receiving cannot be allowed to stand.

This is a matter which was dealt with by the Court of Appeal in England in the case of **R v Seymour [1954], 1 AER 1006**. In that case Lord Chief Justice Goddard gave the judgment of the Court of Appeal. That Court was faced with a situation similar to ours, in that an indictment charged the accused with receiving stolen property but did not contain a count charging larceny. The evidence which the prosecution led was consistent with the prisoner either having stolen the property or having received it from another. The Court of Appeal held in those circumstances that as there was no alternative count of larceny available, the accused was entitled to an acquittal. Lord Goddard confirmed that the proper practice in such circumstances was for charges of both larceny and receiving to be included in the indictment. He also made it

clear that when that was done, the jury should not be required or allowed to return a verdict on both charges unless of course they found the accused not guilty of both. If they found him guilty of one, then they should be discharged from giving a verdict on the other. In this way the option would be preserved to the Court of Appeal of substituting a verdict of guilty on that other charge if the Court of Appeal came to the conclusion that that was justified on the evidence. I should mention that in his judgment Lord Goddard referred to a case of **R v Loughlin**, [1995] 46 WIR 256 in which the evidence disclosed that the goods in question had been stolen as a result of a breaking and entering of the premises in which they were kept. In such circumstances it was held that the indictment should have charged the offence of breaking and entering as well as the offence of receiving. Relating that to the facts of the instant case, the circumstances in which the motor-car was taken from Mr. Mohammed's home amounted not to larceny but to robbery and accordingly, the appellants in this case ought to have been charged also with having robbed Ejaz Mohammed of the motor-car. We do not know why the Director of Public Prosecution did not adopt that course but he was, with respect, misguided in not doing so. The fact that Ejaz Mohammed was unable to identify the men who robbed him, did not preclude the possibility of the appellants being convicted of robbery. Clearly, it is always possible to found a conviction on circumstantial evidence and/or a confession.

The doctrine of recent possession is not some esoteric legal theory which is confined to cases in which receiving or larceny is charged. It is really an application of common sense and if the possession of a stolen article is so recent as to support the inference that the article was removed from the owner's possession by the same person or persons in whose possession it was subsequently found, then that person or those persons should be charged with the appropriate offence given the circumstances in which the property was taken.

As Lord Goddard commented in the **Seymour** case, it is unfortunate that guilty persons should go free because of the failure to charge them with the right offence, but there is no alternative. Not only is it necessary to ensure that a person has been convicted of the right offence, but it is necessary to provide against the possibility of his having been convicted of the wrong one, What I mean is that whenever the evidence may lead either to a conviction for receiving or to a conviction for some other offence, then both offences, receiving and the other offence, should be charged. It should then be left to the jury to decide which of these offences, if either, the accused is guilty of. In our jurisdiction it is particularly important that this alternative be offered, as peculiarly the penalty for receiving under our law is heavier than the penalty for simple larceny.

In these circumstances, we have no option but to allow the appeal against the convictions of all three appellants for receiving. In relation, however, to the

appellant Griffith, there is another reason why the conviction for receiving cannot stand.

It is obvious that Griffith's case was on the evidence different from that of the other two appellants in that he, unlike them, was not identified as an occupant of the car on the morning of the 8th May. The only evidence against him was that he was present with the other two beside the car when the police arrived at the shed on the 9th May, and that he ran away after the arrival of the police and the exchange of gun-fire. It was submitted by Counsel on his behalf both in the Court below and in the Court of Appeal, that that evidence was insufficient to support a conviction. Complaint was made on appeal that the learned trial Judge was wrong to have rejected the no-case submission made on his behalf. Reliance was placed on the judgment of this Court in **Ramesar v The State Cr. App. No 55 of 1993**, in which it was held that in the particular circumstances of that case a man who was held in the course of stripping a stolen motor-car, was wrongly convicted of having received it knowing it to be stolen. One of the facts which led the Court to that conclusion was that sometime between that incident and the earlier theft of the motor-car, another person had been seen driving the car and therefore, this opened the possibility that the appellant in that case had not received the motor car but was simply taking advantage of its presence not too far from his home, to profit from the dishonesty of someone else.

There is something of a parallel in this case arising out of the evidence that Barker and Titus were seen in the car a few hours after it was stolen. This would serve to weaken the inference which might otherwise have been drawn from Griffith's presence in the shed near to the car and his flight after the arrival of the police.

One cannot, however, ignore the fact that although he was unidentified, there was a third person in the motor-car at the time when it was spotted by PC Richards. Of course, a jury would have had to be warned that they could not make any assumption that that person was Griffith. But nevertheless the fact that there was a third person who might have been Griffith, would tend to weaken the negative impact of the evidence of PC Richards on the inference that might otherwise be drawn from Griffith's presence at, and flight from, the scene on the 9th May. In all the circumstances, we do not consider that the Judge was wrong to reject the no-case submission as we think that the evidence against Griffith was capable of supporting the inference that he was a participant either in the robbery of the motor-car or in the subsequent receiving of it from those who committed the robbery.

It was necessary however, in the circumstances of this case for the Judge to give a very careful direction to the jury with regard to the evidence against Griffith. It was important for him to emphasize that he was in quite a different position to the other two accused, since the evidence of PC Richards did not touch him. His first association with the car, on the evidence, was when

Sergeant Kennedy arrived at the shed on the 9th May. That was the first time that there was any evidence linking him with the stolen motor-car. The Judge ought then to have explained to the jury the different inferences that might be drawn from Kennedy's evidence so far as it related to Griffith, and indicated how those inferences would impact on their verdict. This, however, the Judge totally failed to do. In fact, he would have given the impression to the jury that there was no distinction to be made between the cases of the three men, at least, insofar as the strength of the prosecution's case against them was concerned. I do not lose sight of the fact that the Judge on more than one occasion emphasised the need for the jury to compartmentalize the cases against the three appellants, but what he failed to do was to highlight the important differences between the prosecution's case against Griffith as compared with its case against the other two. The result is that even apart from the failure of the prosecution to include in the indictment a charge of robbery against Griffith, his conviction for receiving could not have stood in the light of the inadequate direction which the jury was given in relation to the evidence against him.

There remain the charges relating to the firearm and ammunition. So far as the charge of shooting with intent against Barker is concerned, the ground of appeal that was advanced, focused on the failure of the learned trial Judge to give proper directions with regard to the element of intention in that offence. Early on in his summing-up the learned trial Judge said this:

"The State will also have to lead evidence to satisfy you beyond a reasonable doubt as in the first count that Curtis Barker shot at Kelvin Kennedy with the intent to do him grievous bodily harm and I shall explain to you the meaning of intent. Suffice it to say at this stage, no one can tell what a man is thinking. We can only decide what he is thinking by his action or words."

The Judge did not in fact return thereafter to offer any explanation about the 'meaning of intent.' The point has been made in many judgments by this Court as well as by others, that where a specific intent is alleged as an element of an offence, it is important for the trial Judge to explain to the jury what is the nature of the intention required to be established and to direct the jury's attention to the evidence which bears on the question whether or not that intent was present.

Well, the learned trial Judge in this case did not do that. Now it may be that in some cases the facts once found point so conclusively to the existence of the relevant intention that the omission to give this direction may not be fatal, but this is not one of those cases. The evidence in-chief of Sergeant Kennedy was that Barker shot 'in his direction'. Again, in relation to the second shot that was fired, he used the same expression - there was a shot 'in his direction'. It is true that later on in his evidence he talked about a shot having been fired 'at him'. On the evidence in this case it should have been left to the jury to decide whether the evidence satisfied them that Barker had the intention of hitting

Kennedy when he fired 'in his direction' as opposed to the intention of deterring him from pursuing them or simply frightening him.

We were referred to a Jamaican case of **R v Moore (1972) 19 WIR 72** in which a question arose whether a verdict of not guilty of shooting with intent was inconsistent with a verdict of being in possession of the gun with which the shooting was allegedly done. The Court of Appeal in Jamaica in that case was of the view that while the evidence was that the accused had shot in the direction of or at the virtual complainant, the jury were entitled to find that the gun had indeed been fired by the accused and that he was in possession of it, without being satisfied that he had shot with the intention of causing grievous bodily harm. In that case the trial Judge had given the jury a very careful direction as to what possible inferences might be drawn from the evidence. That as I have said was totally lacking from this summing-up and in those circumstances the conviction is flawed. We cannot say that if proper directions had been given and the jury's attention had been directed to the evidence and the possible inferences that might have been drawn from it, with regard to intention, they would have inevitably come to the same conclusion, namely that Barker was guilty of shooting with intent. On that ground the appeal succeeds and the conviction on that count is quashed.

That now leaves the convictions of Barker for possession of a firearm with intent to endanger life and possession of a firearm without a licence and the convictions of Barker for possession of ammunition with intent to endanger life and simple possession of ammunition. There are also as against Titus convictions for possession of a firearm with intent to endanger life and simple possession of the firearm

The ground of appeal which impacts on all of these convictions is the failure of the trial Judge to give the jury a proper direction as to the use which they might make of previous inconsistent statements by witnesses, and more particularly of a conflict or contradiction between the evidence given by Sergeant Kennedy at the trial and that given by him before the Magistrate at the preliminary inquiry.

The evidence of Sergeant Kennedy to which I refer is that which had to do with the passing of the gun by Barker to one of his companions in the course of their attempt to escape. In his evidence at the trial Kennedy testified that Barker passed the gun to Titus. In the course of his cross-examination, however, it was put to him that he had said something quite different in his deposition. The following is an excerpt from the Judge's note of the answers which Kennedy gave during the relevant portion of his cross-examination:

"I know each accused reasonably well. I saw Accused No. 1 Barker hand the revolver to Jason Titus, I am not making a riddle, the events of the day would have been fresh in my mind, fresher than now. I am certain he handed the revolver to Titus. I did not say that he handed the revolver to Gregory

Griffith in my evidence in the Magistrate's Court. Before I give evidence here, I read over my deposition. In the Magistrate's Court, my evidence was read back to me. I was told I could correct it. I did not correct—it did not occur to me that I had made an error with the name. I see the correction on it now, I did not make that up. I did not fabricate any of my evidence.”

Now, it is fairly obvious from this note of his evidence that his deposition was shown to Sergeant Kennedy and that the discrepancy which it contained, was pointed out to, and was accepted by, him. This, however, is not expressly recorded by the Judge. We have looked at the relevant part of the deposition and we have noted that in it Sergeant Kennedy said quite categorically that he saw Barker hand the gun to Gregory Griffith.

It is unfortunate that Counsel for Griffith did not ensure either that the witness explicitly acknowledged what he had said about this in the Court below in so many words, or else if he failed to do so, that the relevant part of the deposition was put into evidence. This he did not do. But this is a matter which was so important that, in our view, the Judge himself ought to have ensured that the fact of the contradiction was sufficiently brought out and recorded in the evidence. We do not suggest that it is part of a Judge's duty to assist defence Counsel, but when it is a question of ensuring that a miscarriage of justice does not occur, or there is a risk of it occurring, then the Judge ought to intervene, if necessary, to prevent that happening. It could hardly be considered fair for the jury to have assessed Sergeant Kennedy's credibility in this case without being aware of, and taking into account, the contradiction to which I have just been referring.

In the summing-up there is no hint of this contradiction. In fact, as it happens, the Judge did deal with previous inconsistent statements but he did so in the context of what might be regarded as one or two quite inconsequential discrepancies. One of these had to do with a prosecution witness who at one stage in the Magistrate's Court estimated a distance at a hundred yards and at the trial corrected it to a hundred feet. In relation to this the learned trial Judge gave the jury the following direction:

“And I must tell you that in law, as to variations between a witness's deposition and his evidence at the trial, that too much importance ought not to be attached to any such variations if there is a substantial agreement between the evidence at the preliminary inquiry and that given at the trial—I will leave it as it is—that is, sufficient. So he was tested. He said he was speaking the truth when questioned by learned attorney for Mr. Barker.”

That comment on the significance of variations in evidence would have been most inappropriate if applied by the jury to the contradiction in Sergeant Kennedy's evidence as to the person whom he handed the gun. One does not know what view the jury might have taken of that contradiction if it had been

brought to their attention and an appropriate direction given in relation to it. All that we can say is that it is by no means inevitable that Sergeant Kennedy's credibility would not have been shaken by it. As to the extent to which it might have undermined his credibility; that is a matter of speculation. It was certainly capable of causing the jury some concern over Sergeant Kennedy's evidence whenever it was not supported by other evidence. We do not think that it was fair to the accused to fail to bring this inconsistency in the policeman's evidence to the jury's attention, and to attribute some significance to it. That piece of evidence, of course, impacts most directly on the charges against Titus of being in possession of the firearm. The failure of the Judge to deal adequately with this discrepancy clearly renders unsafe the conviction of Titus on the two charges relating to possession of the firearm, and they cannot stand.

We would mention in passing that in any event there was no evidence whatever to support the allegation that Titus was in possession of the firearm with intent to endanger life, since there was no suggestion that he ever attempted to use the gun.

With regard to the charges against Barker relating to his possession of a firearm and possession of ammunition, the question is whether, given the failure of the Judge to deal appropriately with the discrepancy in Kennedy's evidence, those convictions can stand.

It is true that there was some support for Sergeant Kennedy's evidence from the other police officer who accompanied him to the shed and who spoke of having heard three explosions which presumably were the gun-shots two fired by Barker and one by Kennedy. There was also the evidence of the police officer who found three spent shells and that of the Armourer who examined the shells and testified that two were from the same gun. But none of this supporting evidence incriminated Barker specifically. Moreover, there was some criticism, not altogether unjustified, of the evidence of the finding of the three shells some three days after the shooting incident. Kennedy's evidence was that immediately after the shooting he and other officers had searched the area and found nothing. Moreover there was no attempt to pinpoint exactly where the shells were found in relation to where the various persons involved in the incident were at the time when the shooting occurred.

At any rate, the issue whether Barker had the gun and fired it, was one which could only be resolved against him by reliance on the evidence of Sergeant Kennedy, and for the reasons which I have given, the jury were not put in a position fairly to assess Kennedy's credibility. Therefore, Barker convictions on those charges are in our view also unsafe and must be quashed.

There were a number of other grounds argued on behalf of the three Appellants but there is no merit in any of them, and I do not propose to deal with them individually. I may say that some of the other criticisms made of the learned

Judge's summing-up do have some substance, but they do not impact in any way on the outcome of the case, so that their significance is academic rather than practical. I would like to say, however, that we do not agree with the submission that the summing-up was fundamentally unbalanced. We do not think that that criticism is justified.

For these reasons, therefore, we allow the appeals of all three appellants and quash all the convictions recorded against them. They are very fortunate men. The outcome is not by any means an indication of their innocence, but rather an indication that they have had the good fortune of being tried on an indictment which did not contain a count charging the offence of which they would probably have been convicted.

In the circumstances the convictions as well as the sentences must be quashed.