[1988–90 Gib LR 141]

FERRARY v. R.

COURT OF APPEAL (Spry, P., Briggs and Fieldsend, JJ.A.):
February 23rd, 1989

Evidence—witnesses—accused as witness—failure of accused to give evidence—prosecution not to comment on accused's failure to give evidence in own defence—judge not to endorse any such remarks made in breach of Criminal Procedure Ordinance, s.67(b)

The appellant was charged in the Supreme Court of having with him in a public place an offensive weapon without lawful authority or reasonable excuse.

The appellant was observed by the police walking towards a car carrying a sawn-off shotgun. The appellant submitted at the trial that he had a reasonable excuse, as he had been returning the gun to the car, although he had made no prior mention of this. The three police witnesses gave inconsistent accounts of the appellant's actions that evening. The appellant did not give evidence at the trial; prosecution counsel referred to this fact several times, as did the trial judge in his summing-up. The appellant was convicted and appealed.

He submitted that (a) the conviction was unsafe, as there had been a procedural irregularity at the trial: prosecuting counsel had referred to his failure to give evidence in derogatory terms, suggesting that this was a significant ground for the jury to consider, and remarks of the judge had served to reinforce this impression; and (b) the police evidence on which his conviction had been based was unclear and inconsistent.

The Crown submitted in reply that (a) when read in conjunction with remarks made by the judge earlier in his summing-up, his comments on the mention of the appellant's failure to give evidence were not misleading; and (b) even if the trial judge's remarks had left the jury with a mistaken impression, no miscarriage of justice had in fact occurred, as the jury would still have convicted the appellant and the court should therefore apply the proviso to the Court of Appeal Ordinance, s.14.

Held, allowing the appeal:

(1) There had been a clear irregularity at the trial, constituting a misdirection to the jury. Counsel for the prosecution should not have referred to the defendant's choice not to give evidence, and the judge should certainly not have referred to his remarks in this regard with apparent approval; unconnected remarks made by the judge earlier in his

summing-up did not correct the impression made on the jury that the appellant's failure to give evidence was an important factor for their consideration (paras. 11–13; para. 15).

(2) It was not possible to discount the prospect that a jury, properly directed, might have acquitted the appellant, on the basis of the inconsistent police evidence presented at the trial. There had therefore been a miscarriage of justice and the proviso to the Court of Appeal Ordinance, s.14 could not therefore be applied (para. 16).

Cases cited:
(1) *R.* v. *Bathurst*, [1968] 2 Q.B. 99; [1968] 2 W.L.R. 1092; [1968] 1 All E.R. 1175; (1968), 52 Cr. App. R. 251; 112 Sol. Jo. 272, *dictum* of Lord Parker, C.J. applied.
(2) *R.* v. *Naudeer*, [1984] 3 All E.R. 1036; (1984), 80 Cr. App. R. 9; [1984] Crim LR 501, applied.
(3) *Stirland* v. *D.P.P.*, [1944] A.C. 315; [1944] 2 All E.R. 13; (1944), 42 L.G.R. 263; 30 Cr. App. R. 40; 109 J.P. 1; 113 L.J.K.B. 394; 88 Sol. Jo. 255; 171 L.T. 78; 60 T.L.R. 461, observations of Viscount Simon, L.C. applied.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.67(b):
> "[T]he failure of any person charged with an offence . . . to give evidence shall not be made the subject of any comment by the prosecution."

C. Finch for the appellant;
J.M.P. Nuñez, *Crown Counsel*, for the Crown.

1 **FIELDSEND, J.A.**, delivering the judgment of the court: The appellant was originally charged on four counts but at the close of the Crown case only two remained: one of being in possession of a firearm with intent to endanger life, the other of having with him in a public place an offensive weapon without lawful authority or reasonable excuse. He was acquitted by the jury on the first of these charges and convicted by a majority on the second. It is against this conviction that he now appeals.

2 It is common cause that the appellant had with him an offensive weapon—a sawn-off shotgun with two cartridges in the chambers—in a public place and that he had no lawful authority. The sole issue on this count was whether he had a reasonable excuse.

3 The facts fall within a very narrow compass. There was confused evidence about events that evening, but none of it directly implicated the appellant. So far as he is concerned, only the police evidence is material.

4 At about 11.30 p.m. on the evening in question, the police arrived on the scene and observed the appellant walk across the road towards a

Mercedes car carrying a sawn-off shotgun. The police witnesses, Sgt. Cruz, P.C. Olivera and P.C. De Los Santos, gave not entirely consistent evidence. Olivera said that he saw the appellant walking towards the car with the gun broken open, carrying it at his side; that he saw him pass the gun barrel forwards and no longer broken open through the front window of the Mercedes; that someone called out "Here are the police," and the appellant looked round and placed the gun in the car.

5 De Los Santos said that he saw the appellant walking towards the car with the gun closed and reaching the car raising the gun to the level of the window speaking to a person in the car; someone called "Here's the police," whereupon the appellant looked round and threw the gun into the car.

6 Sergeant Cruz said initially that he saw the appellant crossing to the car with the gun at his side; that he raised the gun and pointed it through the right front window of the car; that someone shouted "Here's the police" as he caught the appellant by the arm and caused him to drop the gun into the vehicle. In cross-examination he said that the appellant threw the gun into the car after the words "Here's the police" had been said and finally agreed that this may have been correct and that earlier in his evidence he may have been mistaken.

7 The evidence and the discrepancies are important, as the appellant's case was that he was merely returning the gun to the car from which it had come and in doing so had a reasonable excuse for having it with him in a public place. He seems to have said nothing of this at the time, saying only to Sgt. Cruz "There's no justice" and "This is all a lie." According to Sgt. Cruz he was at first dazed and later seemed excited.

8 He was seen by Insp. Payas some time after 12.30 a.m. and said that he knew nothing about a shotgun, but that earlier in the evening he had been threatened with a gun by four people, including Duo, the owner of the Mercedes, and Cardona and Nuñez, the two people in the Mercedes when he had put the gun through the window. He did not say that he was returning the gun to the people from whose car it had come. Nor did he give evidence at his trial that that is what he was doing.

9 It is from this that the central point of this appeal arises. When dealing with the defence of lawful excuse—where, of course, the onus was on the appellant to establish the excuse—the learned judge said:

> "Now it has been put to these witnesses that what the defendant was doing was merely returning that shotgun to people in that vehicle, the Mercedes. He has not said it himself. Mr. Nuñez, would like you to take great note of that, he has not said it himself."

and, at a later stage:

> "He says that it was reasonable and that it was excusable since he was only handing back what belonged to that other group . . . 'Here is your shotgun.' Mr. Nuñez, the Crown Counsel, says 'Well, we have not heard that from the defendant and that has not been proved on a balance of probabilities.'"

10 Mr. Nuñez told us with the utmost frankness that he did not recall what he said in his address to the jury, but that he did recall being told after his address that on three occasions he had referred to the fact that the appellant had not given evidence, and that he replied: "Yes, perhaps I should not have said that."

11 As Mr. Finch has submitted, the Criminal Procedure Ordinance, s.67(b) expressly forbids any mention by the prosecution of the fact that a defendant has not given evidence. There was therefore a clear irregularity at the trial. It is unfortunate that at the time neither Mr. Finch nor the learned judge immediately stopped Mr. Nuñez when he first said this. It is even more unfortunate that the learned judge in his summing-up twice referred to these remarks of Mr. Nuñez apparently with approval.

12 Where there is an onus on the accused, as there was in this case, the decision in *R.* v. *Bathurst* (1) sets out the way that a trial judge might comment on the question of an accused not having given evidence to support his excuse ([1968] 2 Q.B. at 108, *per* Lord Parker, C.J.). It is in these terms: ". . . [H]e is not bound to go into the witness box, nobody can force him to go into the witness box, but the burden is upon him, and if he does not, he runs the risk of not being able to prove his case."

13 It is our view that in dealing with the matter as he did, he must have left the jury with the impression that the appellant's failure to give evidence was an important factor for them to consider. Nor do we think that this can be said to have been corrected by the earlier and disconnected passage in which he said:

> "I must say quite firmly to you that the defendant elected not to give evidence at all and that is his right, he does not have to give evidence and in some trials the defendant says he is not going to give evidence and there is really no more that can be said about it. He is exercising what he is given as a right by the law here."

14 The question at issue bears a close resemblance to that in *R.* v. *Naudeer* (2). There, prosecuting counsel had commented "in an adverse manner and aggressive tone" ([1984] 3 All E.R. at 1038, *per* Purchas, L.J.) on the fact that an appellant's wife had not been called in his defence. The trial judge made no comment on this in his summing-up, nor any reference to the fact that the wife had not been called, despite defence counsel having commented on what he considered prosecuting counsel's improper

submissions. The Court of Appeal considered that the position was wholly unsatisfactory and allowed the appeal.

15 In the present appeal the position is even more unsatisfactory, as the summing-up gives fairly clear support to the irregular submissions of prosecuting counsel. It is perhaps unfortunate that defence counsel did not intervene to minimize the effect of the prosecution's irregular submissions when he persisted on that course, or invite the learned trial judge to correct any possible damage. But counsel's failure must not be allowed to prejudice his client in this case at any rate: see *Stirland* v. *D.P.P.* (3) ([1944] A.C. at 327–328, *per* Viscount Simon, L.C.)

16 Mr. Nuñez contended that this was a proper case for the Court of Appeal to apply the proviso to the Court of Appeal Ordinance, s.14, and dismiss the appeal despite the irregularity. In view of the conflicting nature of the police evidence and the confused evidence of what occurred before the police arrived on the scene we do not think that it would be safe to do this. We cannot exclude the possibility that a jury properly directed might have acquitted.

17 The appeal is allowed and the conviction and sentence are set aside.

Appeal allowed.