REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 301 OF 1993

SIMON SARUNI PASHA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No 12563 of 1991 of the Resident Magistrate's Court at Kibera: R N Kimingi Esq)

JUDGMENT

The appellant, Simon Saruni Pasha, was charged before the learned Resident Magistrate, Kibera, with the offence of being in possession of a firearm without a firearm certificate contrary to section 4(1) of the Firearms Act (cap 114, Laws of Kenya). The particulars of the offence were that on the 6th day of Dec 1991 at Ngong township, Kajiado district of the Rift Valley province, was found being in possession of a firearm S/No AY 3324 made Makarov of 9mm without a firearm certificate. He denied the offence but after trial, the Court found him guilty, convicted him and sentenced him to serve 3 years imprisonment. His appeal to this Court is against conviction and sentence.

Briefly the prosecution case was that on the evening of 6th of Dec 1991, the appellant was drinking in company of his wife together with Rahel Sebhu (PW1) at Embassy Bar, Ngong town. Rahel and the appellant's wife are cousins and she (PW1) testified that she had known the appellant for a period of 1 year and 2 months. As the couple and PW1 were drinking, they decided at around 8.30 pm to go for a disco dance at Riverside Bar at Kiserian which was being operated by one Lawrence Semieto Mukoso (PW2) who is the husband of Rahel. Before they left Embassy Bar for the dance, Rahel testified that she first proceeded to her room upstairs, and, while there, the appellant followed her. He took out a pistol wrapped in a piece of paper and asked Rahel to keep it for him in her room saying that he would collect it on the following day because his residence is quite far from town and probably he felt that he could not take it back before they proceed to the disco dance. Rahel then took the said pistol (Ex 1) and kept it in her wardrobe drawer in her hotel room. Together with her cousin, appellant's wife, they all left for the disco. She did not come back till around 5 am on the following morning. While still sleeping in her room, Rahel testified that her husband, Lawrence (PW2), came back during the day. He opened the wardrobe and saw the pistol wrapped with a piece of paper and asked his wife what she was doing with it. She told him that it had been left with her by the appellant who was to collect it that same day. Lawrence felt disturbed and took out his wife (PW1) to go and report the matter to the police. They duly reported the matter to the police officers and PC Isaac Mosa of Ngong Police Station who recorded the report went to the hotel room of PW2 and his wife and collected the pistol. The same was handed over to the investigating officer, Ag IP Wilson Alusa (PW3). They commenced investigations.

In the course of the investigations, PW3 testified that he was accompanied by Lawrence (PW2) together with PC Mosa to Riverside night club at Kiserian where PW2 pointed out to them the appellant. He

arrested him and took him to the police station. He then took a statement from the appellant under inquiry regarding the said firearm. The appellant duly recorded such a statement which was admitted in evidence after a trial within trial was held since the same was repudiated by the appellant on the grounds that it had been obtained by coercion and inducement. The learned trial magistrate however ruled that the said statement was properly obtained and was admissible in evidence (Ex 6). In that statement, the appellant gave a detailed account as to how he had acquired the said pistol in Isiolo which was intended to be sold to someone else whom he did not name, but, who had been persistently asking him for a firearm.

The said pistol was taken by PW3 to a ballistic expert for examination. It was duly examined by Mr Mbogo Donald Mugu of the CID Hqrs, Central Firearms Bureau and was found to be a firearm within the meaning of Firearms Act. The same was found to be in good working condition and was complete with all its component parts. It was successfully testified by the said firearm examiner. His report was admitted in evidence (Ex 2). The said firearm was also produced in evidence by PW3 (Ex 1). He was then charged with the offence.

In his defence, the appellant denied any knowledge of the said firearm. He stated that he had been simply arrested by the police following a report by Lawrence (PW2) who was his long time friend but they never found anything in his possession at the time of his arrest. His house was duly searched and again nothing was found therein. After his arrest, he was later called from the cells and shown the pistol but he denied any knowledge

about it stating that he had never even touched a gun in his lifetime. He alleged that PW2 had his debt.

That is a summary of the entire evidence that was adduced before the court below. It was urged on appeal by Mr Sane, learned counsel for the appellant, that his conviction was not safe as the said firearm was never found in actual possession of the appellant and he had no control over PW1 in whose custody it was actually found. He submitted that the particulars of the offence as laid before the Court were not therefore proved and he cited the case of *Gakuu Macharia – v – R* [1979] KLR 264 in support of his contention. It was further submitted that the inquiry statement (Ex 6) was irregularly taken from the appellant by PW3 who was himself the investigating officer as well as the arresting officer. He relied on the Court of Appeal decision in the case of *Joseph Njaramba Karura – v – R* [1982 – 88] 1 KAR 1165 and submitted that such statement ought not to have been admitted in evidence.

Learned state counsel, Miss Waithaka, was of the contrary view and submitted that the appellant was in constructive possession of the said firearm and as such, the charge as laid was proper and was proved since PW1's evidence was well corroborated.

There is no dispute that a firearm was found with PW1 in her hotel room by her husband (PW2). The same was duly handed over to the police (PW3). It was subsequently examined and tested and found to be a firearm within the meaning of the Firearms Act (cap 114, Laws of Kenya). The issue for consideration is whether the evidence of Rahel (PW1) as to how she came by that pistol is to be believed. According to her testimony, it was the appellant who had left it with her, in her hotel room, to keep it for him as they were then leaving for a disco dance at Riverside Bar at Kiserian and he told her that he could collect it on the following day, but before he came, her husband (PW2) found the pistol. He became furious with her and he reported the matter to the police. According to the testimony of Rahel, she was alone with the appellant when he handed over to her the said pistol for safe keeping. Although the appellant claims that he had left that pistol with Rahel as stated, he does not dispute the fact that on the same night, he and his wife were drinking with Rahel at Embassy Bar in Ngong and that they thereafter left together for a disco dance at Embassy Bar. PW2 saw the appellant at Riverside Bar during the disco and he is bitter with him that he never told him that he had left a pistol with his wife at their hotel room. The appellant himself describes Lawrence (PW2) as his long time friend. Rahel says that he has married her own cousin who was with him on that particular night. Why should Rahel now testify falsely

against the appellant to put him in trouble with the law? Why should Lawrence (PW2), whom the appellant acknowledges was his long time friend, manufacture such a story against him? Although the appellant says that Lawrence has his debt, he has nothing against Rahel (PW1) who is the important

witness for the prosecution in this case.

I find that the evidence of Rahel is well corroborated by the appellant's statement under inquiry (Ex 6). This statement amounted to a complete confession of his handling of the said firearm and sets out in detail how he had acquired it in Isiolo and carried it with him to Ngong intending to hand it over to a buyer who never came for it on that day. It was submitted that this statement was obtained from the appellant by inducement and coercion but the learned trial magistrate found nothing of the sort during the trial within trial and ruled that it was admissible. It is nevertheless a repudiated statement which therefore requires corroboration by independent evidence before it could be safely acted upon (See *Tuwamoi –v- Uganda* [1967] EA 84). I find such corroboration in the evidence of Rahel (PW1) whom I regard as an independent and reliable witness.

It was submitted that Ag IP Alusa (PW3) ought not to have taken this statement (Ex 6) from the appellant as he was the arresting officer as well as the investigating officer. I accept the observation made by the Court of Appeal in the case of *Karura –v- R* [1982-88] 1 KAR 1165 that it is understandable for an investigating officer to take a confession statement from a suspect as he runs to risk of being accused as in the present case, to have tailored such statement to suit what he wants. However, in my view, an investigating officer can properly take a statement under inquiry from a suspect but not a statement under charge and caution. I wish in this case to draw a distinction between these two types of statements ie inquiry statement and a charge and caution statement. Whereas as investigating officer who has made up his mind to charge a suspect cannot lawfully take a charge and cautionary statement from him, I see no harm, with respect, in his taking a statement under inquiry from such a suspect in the course of his investigation, provided that the suspect is properly cautioned before such a statement is taken. If such statement, properly taken, turns out to be incriminating, I see no danger in its being admitted in evidence during the trial. In some instances, such statement gives a lead to the investigating officer in the course of his investigations. I see no prejudice having been caused to the appellant herein by the statement which the investigating officer took from him during inquiry.

It was voluntary contrary to what the appellant would want us to believe.

In my own evaluation and assessment of the recorded evidence, I hold that the evidence of Rahel (PW1) taken together with the appellant's confession in his statement under inquiry (Ex 6) clearly shows that he was in constructive possession of the said firearm when he left it with Rahel for safe keeping in her hotel room when they were leaving for a disco dance. I am satisfied, therefore, that the charge as laid, was proved beyond all reasonable doubts on good and reliable evidence. I dismiss the appeal against conviction.

The sentence that was imposed of 3 years imprisonment was on the lenient side and I see no basis to interfere.

In the result and for reasons given, the appeal against conviction and sentence is dismissed.

Dated and Delivered at Nairobi this 10th day of February 1994.

S.O.OGUK

<u>JUDGE</u>