JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 23 of 1971

BEFORE: The Hon. President.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Hercules, J.A.(Ag.).

WILFORD CARTER v. R.

C. Leiba for the applicant.

S. Panton for the Crown.

1971 - October 13, November 26

SMITH, J.A.

The following are the reasons for the judgment of the Court given in this appeal on October 13.

The appellant was convicted on February 23, 1971 in the Saint Ann Circuit Court on the first and third counts of an indictment on which he was tried. The first count charged him with larceny in the dwelling and the third with burglary. The second count charged him with receiving stolen goods as an alternative to the first count. He was sentenced to imprisonment at hard labour for two years and seven years, respectively. In addition, he was ordered on the third count to receive six lashes.

It was a simple case. Mr. and Mrs. Marcel Thiffault lived with their children at Upton in Saint Ann in October and November, 1970. In October they lived in a house called "Tree Tops." In November they lived in another house, on the same compound, called "Valley View." On October 12 their house "Tree Tops" was entered in their absence and Mr. Thiffault's watch and his money, $160.00, stolen. During the night of November 16, at "Valley View", Mrs. Thiffault was awakened at 2 o'clock and, on going to investigate a noise she had heard, saw a man in the house. He ran from the house through a window from which it was later discovered that two louvres had been removed. On November 29 the appellant was seen by detective constable Stanley Scott wearing a watch, which Mr. Thiffault later claimed to be his stolen watch. The first and second counts of the indictment were in respect of Mr. Thiffault's loss from "Tree Tops" and the charge in the third count related to the incident at "Valley View" on the night of November 16.

The substantial complaint on appeal was that the jury must have been confused by the way in which the learned trial judge reviewed the evidence relating to the three counts in his summing-up.

In support of the first and second counts, the prosecution relied on the doctrine of recent possession as well as on a confession which the appellant allegedly made to detective constable Scott after he was charged with stealing the watch and money. The appellant is alleged to have admitted taking them. He denied the confession on oath at the trial. He admitted being in possession of the watch but claimed that he had bought it early in 1970. The only evidence in proof of the charge in the third count, which implicated the appellant, was that of Mrs. Thiffault. She said that she recognized the appellant as the man she saw in the kitchen of her house. She said she saw his face sideways by the light of a lamp on the wall outside the house which shone into the kitchen. She did not know him before. The appellant denied on oath that he was ever in the house.

No rule regarding the scheme of a summing-up can be laid down. This is a matter for the trial judge depending on the issues which arise for decision in each case. But the case under consideration was ideal for dealing with all the law and the evidence relating to the first two counts and then doing the same with respect to the third count. There would have been no difficulty in doing this as the evidence relating to the two incidents giving rise to the charges were quite distinct. We think this method would have been most helpful to the jury and would obviate any risk of the jury supplementing the evidence relating to one incident by evidence which related solely to the other.

The learned trial judge did not adopt this method. Instead, in dealing with the evidence, the summing-up roamed from one count to the other and back again, often without any indication as to what count the evidence then being reviewed related. The jury were never told, as they should have been, that the evidence relating to counts one and two should be considered separately from that relating to count three and vice versa. Nor were they told not to supplement the evidence on the one by evidence from the other. On the contrary, in the way in which the evidence was reviewed in parts, the jury must have got the impression that they could legitimately do this. This is amply demonstrated by reference to the following passages in the summing-up.

The learned trial judge (at p. 15 of the record) commented on the submission made to the jury by counsel for the defence that the identification of the appellant was unsatisfactory and should be rejected because no identification parade was held. Though the judge did not expressly say so, this submission was relevant only to the charge of burglary in the third count. Yet, immediately after commenting on the submission and on the purpose of identification parades, the learned judge continued: "Well, in this case, what is the evidence against the accused other than an identification parade?" He answered this question by reviewing, for almost a page of the record, the evidence relating to the report by Mr. Thiffault of the loss of his watch, the finding of the appellant wearing it and the claiming of it in the presence of the appellant. There was, in fact, as has been stated, no evidence on the charge of burglary apart from Mrs. Thiffault's. Certainly, the evidence relating to the watch was irrelevant on this charge.

Then there is this passage, on pp. 16, 17 of the record:

> "And then there is the other evidence, now, of Mrs. Thiffault with regard to count 3. She said that night when she heard the noise and got up this is the man she saw and she saw him by the light and in the manner she has told you. So that is the other evidence against the accused. With regard to the watch, the complaint to the police and the police finding this man with the watch, and with regard to count 3, Mrs. Thiffault's identity of it (sic). It is true that no identification parade was held but when you come to decide on the ultimate result of this case it is a question of whom you believe. If you believe the accused in preference to Mr. Thiffault, Mrs. Thiffault and detective constable Scott then you must acquit. If you believe their evidence in preference to his, then it is a matter for you, you may convict him, but finally the conviction or acquittal is going to depend upon which of these persons you believe and which you do not believe."

Here the jury could not be blamed for thinking that it was permissible to use the evidence of Mr. Thiffault and constable Scott, including the latter's evidence of the confession, in deciding whether or not to convict the appellant on the charge of burglary. In our view, the complaint made on behalf of the appellant was justified. The whole tenor of the summing-up must have been confusing to the jury.

A further complaint was made that the learned trial judge misdirected the jury on the law relating to the doctrine of recent possession.

In explaining the doctrine the learned judge said (at p. 6):

> "And the law says, that is, the law of recent possession, where there was an act of stealing ..... and there is no eye-witness to the stealing but that stolen property is shortly after the theft found in the possession of a person, the law applies what is known as the doctrine of recent possession and presumes either that the person in whose possession the property is found is the thief or he got the stolen property from the thief and with knowledge at the time of receiving it that the property has been stolen."

The learned judge was in error in saying that the doctrine of recent possession creates a presumption of law that a person in possession of recently stolen property is either the thief or a guilty receiver. It is the jury, not the law, who may make the presumption, subject to any explanation that is offered by the person in possession. In view of further directions given which amplified the above directions we did not think that this misdirection was fatal.

It was submitted that because of the way in which the evidence relating to the counts of the indictment was confused the appellant did not have a fair trial and that the convictions should be quashed and a new trial ordered. We did not agree that both convictions should be quashed. We thought that in view of the way in which the evidence was reviewed there was the distinct danger that the jury may have used evidence which related to the first and second counts to supplement the evidence on the third count, but not vice versa. We, therefore, quashed the conviction on the third count and set aside the sentence. We did not order a retrial of the charge in this count. We thought the point was well taken by counsel at the trial that no identification parade was held. It does not appear that there was any description of the appellant given by Mrs. Thiffault to the police before his arrest or any identification of him by her prior to his appearance in court. In view of this and of the limited opportunity she had of seeing him properly when, as she said, he was in her house, her positive identification of him might well have been influenced by the fact that her husband's watch was found in his possession. We did not think there was a sufficiently strong case against the appellant on this charge to warrant an order for retrial.