JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 130/83

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Ross, J.A.

BETWEEN:	JOHN J. MARSH	APPELLANT
A N D:	THE QUEEN	RESPONDENT

Mr. F.M.C. Phipps, Q.C., for the Appellant

Miss Diana Harrison, Crown Counsel for the Respondent

January 24, 25, March 26, 1984

ROSS, J.A.

On 26th March, 1983, the appellant Acting Corporal of Police John Marsh was convicted on three counts of robbery with aggravation in the Resident Magistrate's Court for the parish of Clarendon and sentenced to five years at hard labour on each count to run concurrently. He now appeals against his convictions and sentences on the following grounds:

"(1) The verdict was unreasonable and cannot be supported having regard to the evidence.

(2) The sentence was manifestly excessive."

The evidence adduced at the trial is set out in some detail for reasons that will become apparent: Mr. Carlton Robinson with his wife Deloria, his brother Lloyd, their daughter Karlene and three other children lived at Longsville in Clarendon where Mr. Robinson carried on a business. At about 2.00 a.m., on the morning of 4th December, 1980, Mr. Robinson and his family were at home. Mrs. Robinson was in her bedroom counting some money when she heard someone call her and shortly after the glass louvre blades of her bedroom windows were smashed. She called for help and her husband and her brother-in-law Lloyd rushed out on the verandah going towards her room. On the verandah they met the appellant holding a gun which he pointed at them and took them into the room where Mrs. Robinson was.

In the room he took all the money that was there and he stripped the Robinsons' of the jewellery they were wearing: gold rings, gold chaparitas, gold chains, and a very valuable gold Rolex wrist watch worn by Mr. Robinson. The appellant who was accompanied by three other men then ransacked the house, taking the jewellery the children were wearing and cutting open suitcases to see whether they contained any valuables. The total value of the cash, cheques and jewellery stolen was about $45,000.00 then before they left the house they tied up the Robinsons' and two of their employees who had been outside the house. It took sometime for the Robinsons' to untie themselves, after which a report was made at the Chapelton Police Station and the police visited the scene.

Both Mr. & Mrs. Robinson testified that the appellant was known to them before the incident and had visited their home on more than one occasion. There was also evidence of Angella Smith, a neighbour of the Robinsons', that at about 3.00 a.m. that morning she saw the appellant on the verandah of her house in the company of one Miss Denton, with whom Angella was staying, and that the appellant put the gun he was carrying to her head and threatened her.

Later on that same day Mr. Robinson, accompanied by Det. Acting Corporal Williams from Chapelton Police Station went to Kingston to 230 Spanish Town Road, the operations base of the police narcotics squad. There the appellant was pointed out by Mr. Robinson to Cpl. Williams as "Kojak" one of the men who had come to Robinson's home and robbed him on the previous night, and whom he had known for about three months. Cpl. Williams' account of the meeting was that the appellant came up to the car and said to Mr. Robinson: "a how you vex up so?" Mr. Robinson replied: "just give me me jewellery, me wife's jewellery and me children jewellery and make it rest" and the appellant said, "You think a so this go." At this stage Det. Williams identified himself to the appellant who invited them to meet him again at Cooreville Gardens later that day.

At about 3.40 p.m., the same day Mr. Robinson and Det. Williams went to Cooreville Gardens where they saw the appellant who said

to the detective "come make me and you go out so go talk," and both men went some distance away; there, according to Det. Williams, the appellant said, "me give the man a ton a ganja to sell and still him only give me $40,000.00 and still owe me $40,000.00 and it no look like him decide to pay me - me no go down a him yard last night though because me was a help one white man load one plane; when you see him a go on so a pay him no want to pay me the other $40,000.00"; he went on to say: "tell me something, officer a who and you station at Chapelton'? Williams told him that it was he and Sergeant Cowan, and the appellant said that he had to go out and would come to Chapelton on the following day when he could speak as policeman to policeman. After this conversation the appellant left and the other two men returned to Chapelton.

In his defence before the learned magistrate, the appellant gave evidence and called the Commissioner of Police whose driver he was at the time to give character evidence. He denied being involved in the robbery or knowing the complainant Robinson, Mrs. Robinson, Miss Smith or even the district of Longsville where the offence occurred; he denied being known by the name "Kojak"; and he denied that the complainant Robinson and Detective Williams spoke with him at 230 Spanish Town Road or at Cooreville Gardens on 4th December, 1980, although he did admit being at work at 230 Spanish Town Road on that day. The appellant further testified that it was only in February or March, 1981, that he was questioned and first became aware of any accusation of robbery; then in November, 1981, he was charged for conspiracy to rob Mr. Robinson; a preliminary enquiry was commenced a year later in regard to this charge, and then in January, 1983, for the first time he was charged for robbery.

On the evidence for the prosecution related above it would seem to be a clear straight-forward case but Mr. Phipps described it as a strange case because originally the appellant had been charged for conspiracy and assault, and a preliminary enquiry had commenced on these charges; then that inquiry was adjourned and the appellant was subsequently charged instead with robbery with aggravation and private counsel now appeared for the prosecution; then although the incident occurred on 4th December, 1980 the informations relating to the charges of robbery were not

presented until 10th January, 1983. Further, the written statements given to the police by Mr. and Mrs. Robinson on 6th and 8th December, 1980 respectively were produced at the trial and both witnesses were questioned as to the absence of the appellant's name from the statements. It was observed that instead of calling the name "Kojak" there was a description in each statement of the men involved in the robbery and that Mr. and Mrs. Robinson each stated in their statements that if they saw the men again they would be able to identify them. However in cross-examination both Mr. and Mrs. Robinson insisted that they told Cpl. Williams (who took their statements) that they knew one of the men and that it was the appellant.

Mr. Phipps submitted that it was unnecessary to describe the appellant if the Robinsons knew him and that there was here a vital contradiction between the evidence given in court and the statements given to the police a couple of days after the incident in that the name of the appellant does not appear in the statements; that in the light of this further, unexplained and inconsistent previous statement on a vital area of the case, a verdict based on that evidence would be unreasonable. He dealt also with the evidence of Angella Smith and pointed out that here too there was a vital contradiction between her evidence and her statement to the police shortly after the incident. It was his submission that if the case depended on the evidence of anyone of these three witnesses (Carlton Robinson, Deloria Robinson and Angella Smith) there was no reliable evidence on which a conviction could be founded and that when the evidence of all three witnesses were taken together the position would be the same, in that there was still no reliable evidence on which the appellant could be convicted of the offences charged; the only other evidence for the prosecution, that of Detective Williams, does not assist to prove the robbery, he submitted.

Mr. Phipps' assertion of a vital contradiction between the evidence and statements of the two Robinson witnesses is based on the fact that in their evidence given at the trial in 1983 they say one of the robbers is the appellant, whereas in the statements given on the 6th and 8th December, 1980, they described all the robbers and state that they would be

able to identify them if they saw them again. Although it is normal to expect that if they knew one of the robbers they would have said so, it must also be noted that they did not expressly say in the statement that they did not know any of the men.

In addition there is the evidence of Mr. Robinson and Det. Williams of their visit to Spanish Town Road later on the same day of the robbery and of their meeting with the appellant and the conversations taking place. The appellant denies that any such meeting took place and, as I understand it, is saying that not only Mr. Robinson but also his colleague, Det. Williams, have fabricated that piece of evidence. If that meeting did take place, then it would clearly support the evidence of Mr. Robinson that he knew the appellant at the time of the robbery. The learned Resident Magistrate must surely have asked himself whether there was any evidence to suggest a reason why Det. Williams should have fabricated the evidence of the visit to Spanish Town Road and the conversations which the appellant had with him and Mr. Robinson, and answered that question in the negative.

The learned Resident Magistrate accepted the evidence of the complainants that they gave the name Kojak when their statements were being taken and it would be difficult to find otherwise once the evidence of the visit to Spanish Town Road is accepted.

In support of his submissions Mr. Phipps referred to Mills and Gomes v. R. (1963) 6 W.I.R. 418.

In that case the appellants were indicted for murder and at the trial a witness testified that he saw and recognized the accused inflicting injuries on the deceased in a yard on the night of the incident; his evidence at the preliminary inquiry, however, was that he did not recognize any of the assailants. He agreed that his evidence at the trial was just the opposite of what he had stated at the inquiry. The trial judge properly directed the jury that it was their duty to disregard the evidence of a witness who made two diametrically opposed statements on oath unless a satisfactory explanation therefor was given, but went on himself to suggest

explanations for the contradictions which were not justified· further, he so sought to rehabilitate the witness that, in effect, he eroded his initial direction. It was held that in the circumstances he went far beyond his proper function and the appeal was allowed.

It will be noted that in the above case there were two diametrically opposed statements on the vital question of identity. In the present case what we really have is an apparent omission (albeit a significant omission) on the part of the complainant to give the name of the appellant, or, if the complainant is believed, an omission on the part of the officer taking the statement to write down the name in the statement. There is too the evidence of the complainant and the investigating officer as to the former pointing out the appellant on the very day of the incident before the statement was taken, although this is denied by the appellant.

Another case cited by Mr. Phipps was Daken v. R. (1964) 7 W.I.R. 442:

At the trial of the appellant on charges of rape and robbery with violence the prosecutrix testified that he was her assailant and that she had pointed him out as such at an identification parade held at a police station. She admitted, however, that under cross-examination at the preliminary inquiry into these offences she stated that a police officer at the parade instructed her to point out the appellant, although later while still under cross-examination there she retracted the statement explaining that in making it she had yielded to vigorous questioning by the cross-examiner but that the statement was really untrue. Throughout the trial she maintained that retraction and stood by her explanation aforesaid. It was held that the question whether the identification of the appellant was established by credible evidence or prompted by a police officer was for the jury and the judge had properly left these issues to them with a correct and adequate direction. In the course of his judgment, Wooding C.J., said:

> "When a witness has given an explanation how he came to make the inconsistent statement by which his credit is sought to be impeached, it is for the jury to determine whether his evidence is acceptable when set against the inconsistent statement, due regard being had to the explanation offered."

In the instant case it was for the learned Resident Magistrate to determine whether the evidence was acceptable in all the circumstances and in his findings of facts he stated: "I believed the civilian witnesses that they gave the investigating officer the name "Kojak" when their statements were being recorded. For some unknown reason this was not recorded and no explanation has been given for its omission."

If, as stated, the learned magistrate believed that the civilian witnesses had given the investigating officer the name "Kojak" when their statements were being recorded and that was true, then the omission of the name from the statement was a deliberate omission by the investigating officer at the time, possibly because a colleague was involved or possibly because the complainant seemed to be only interested in the return of his property, but later when a full report had to be made to a senior officer, the investigating officer would have had to give the whole story and nothing could then be done about the statements which had already been taken by him.

In reply Miss Harrison for the Crown submitted that it is for the appellant to show that the verdict is so much against the weight of the evidence as to be unreasonable or unsupportable, and that the statements put in at the trial only go to the creditworthiness of the witnesses, and so it was for the learned Resident Magistrate to assess the creditworthiness of the witnesses having regard to the witnesses' manner and demeanour. In support of her submissions she cited R. v. Maloney Gordon (1973) 10 J L.R. 491 and R. v. Joseph Lao (1973) 12 J.L.R. 1238.

While the statements of the civilian witnesses are in certain particulars inconsistent with the evidence given at the trial, the nature of the inconsistency is not such as to destroy the credit of the witnesses as there is an explanation of the inconsistency. The learned magistrate having found that the confrontations did in fact take place undoubtedly accepted the explanation offered in respect of the inconsistency and which explanation was consistent with the attitude of Mr. Robinson that if his

jewellery was returned he would "let the matter rest" and of this the investigating officer who took the statements was well aware. There was cogent evidence adduced in court which the learned magistrate accepted and there is no good reason for disturbing his findings.

Accordingly, I would dismiss the appeal. The conviction is affirmed as also is the sentence.