IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 30/81

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

TREVOR MYRIE & MORELAND WALKER v. REGINA

Mr. K. Von Cork for Myrie
Mr. R. Palmer for Walker
Mr. G. Andrade and Mr. W. Alder for Crown

15th July, 1981

CAREY, J.A.:

This matter comes before this court by leave of the single judge, and is an appeal against conviction and sentence in the Home Circuit Court at a trial which lasted some seven days and was completed on the 17th of March of this year.

Having regard to the view which this court takes of the matter, we do not propose to make any comment on the facts in this case (save in one respect which we shall mention later), or set them out in any other than the barest outline. These appellants were charged on an indictment for robbery with aggravation. They were, in fact policemen; one being a member of the Jamaica Constabulary, the other being a District Constable. On the 14th of February last year, as the Crown's case disclosed, these men left Harbour View and went up into the hills of St. Andrew where it is alleged they robbed one Miss Maudrina Whiley of Two Thousand Five Hundred Dollars.

Learned counsel for the prosecution has quite candidly and properly conceded that the convictions cannot be supported.

We are constrained to observe that this summing-up was singularly unhelpful because it lacked a plan, consisted for the most part of the trial judge's strongly stated and tendentious views on certain aspects of the evidence and failed to put the defence fairly to the jury, and contained a serious misdirection with which we must deal.

As an example of the sort of commentary, which we thought was unfair and which was repeated, we refer to page 6. Having briefly indicated the nature of the prosecution's case and the defence and given directions on robbery with aggravation and gone on to suggest, quite properly, that the question for the jury's determination would be whose version was going to be believed, and just before rehearsing the evidence adduced on behalf of the prosecution the learned judge said this:

> "But I might remark at this stage, for it is a matter solely for you. Here it is that if you say we catch men with ganja, ten men, and they say we come from up a house up the hill, don't know where the house is up the hill, don't know who else live up the house at the hill, you just hear a woman. If it is ganja you are going to raid, because you have been tipped off and you have ten men with ganja, and you hold two and eight have escaped, what do you think, Mr. Foreman and members of the jury, wouldn't you say I go for ganja, I catch ganja? These are persons trained in detecting crime. These are persons who had gone in the pursuit of that particular thing, they say to detect crime. They carry a van, going to take ganja in the van. So you catch the men, you catch the ganja, you have found what you went for. So you think of that, because it is a matter for you what you believe as to these two stories. It is a simple enough story."

Then at page 12, while still reminding the jury of the evidence of the same witness, the victim of the robbery, the learned judge said this:

> "But what I want to remark on is this, and I think I must have touched it already, if you go on a ganja raid, you don't know this woman, the first accused said he had taken three people up there with him, and you are going up the hill I presume with all the people and you catch all these men and they drop the ganja, you are going up a hill where they say the woman is, this is the woman's

> house, you don't know the area because it is the informant who met you at Red Hills, is an astute policeman going to leave two policemen armed down there and he alone takes two men into the unknown? Would you, Mr. Foreman and members of the jury? Ask yourselves, wouldn't two of you go up there? For we have two men, we don't have to have the ten, and see what else, and leave one man down there to watch the ganja for the men have already run? There is nothing you can do with it, and I assume Mr. Watt is there with the van."

Another typical example of commentary which we did not consider particularly useful in assisting the jury was to be found at page 22 where the learned trial judge was dealing with a point apparently raised by the defence in their address to the jury, that contrary to the prosecution, ganja was found in the van used by the applicants that night.

> "Much was made, of course, about the Crown not producing the certificate of the examination of the van. And the defence, of course, say they had to go through the trouble to seek the gentleman who examined the van. But, Mr. Foreman and members of the jury, the story here is that the van was burnt out. We do not know when Dr. Lee examined the van. I don't know. It is for you gentlemen to say if ganja had been burnt out in a burnt van if when you examine the van you are going to find out at that stage whether vegetable matter called ganja is found there. It would burn up. You are cigarette smokers, you would know about it. The resin cannabis sativa was found in what he examined. There was no doubt that he examined the contents of the van. It would be for you to say when the fresh ganja got there, because burnt ganja and fresh ganja would give two different kinds of examination. Much has been said too, and I do agree with what is here, by the defence, when they say they have good Samaritans. As it stands these days citizens really have to help the police, because the complaint we have been hearing from day to day, no vehicles, no vans. So there is nothing extraordinary in Mr. Watt having lent his van, and maybe on other occasions, because people do lend their vans, and Mr. Livingston is Mr. Watt's good friend, and Mr. Livingston and Mr. Watt and Mr. Myrie had decided to use Mr. Watt's van, and you must accept that a van which can be used on one occasion can be used on another occasion. I will not tell you to accept that, but it would be reasonable to ask yourselves if that is not possible. And the citizens who we heard about giving gas, citizens will fill up the vehicle and make it available. It is the duty of good citizens, as the defence counsel told you. View the thing, we want

> to find out about this van now, we are talking about it. Is that the circumstances under which the van went to Cyprus Hall and why it didn't take up one man from Red Hills? The police have a right to go where they want. You don't have to tell any mission, because it is a secret, so you don't take out an advertisment about it, so the van was there, the car was there. The prosecution has accepted and has stated that they were there. What Mr. Richards is saying is: yes, he did have the van examined. They did not tell us what happened. At one stage I think it was mentioned that they could not at that stage, at one stage find the certificate. That was defence counsel telling you. However, the forensic man did come and tell you about his examination."

Again the learned trial judge, having reminded the jury of the statement from the dock of the appellant Myrie, which consumed just a little over one page of the typescript, (pages 27-28) used a further three pages, viz., (pages 28-32) to comment on that statement. It is enough to indicate that those comments read rather like a prosecuting counsel's closing speech.

We would call attention to R. v. Campbell, 14 J.L.R. 45, in which it was held by this court that the result of a trial judge undisguidedly ridiculing evidence of an accused person is to make that trial unfair. It should need no emphasis that the plain duty of a trial judge is to put the defence fairly and adequately before the jury. Failure to do so may well result in the conviction being quashed.

As to the misdirection which related to the applicant Walker the trial judge having given a direction with respect to common design, went on to say this at page 27:

> "Again, if you believe the second accused when he told you that he was at the foot of the hill and his presence at the foot of the hill was that he was acting in concert with Mr. Myrie who was gone up there, then the fact that he was not actually in the house at the time the money was taken, if you are satisfied that that was so, his very presence there would be to give assistance to all those or whoever took the money, he would be as equally guilty."

There was some conflict in the crown's case as to the number of men who had gone up to Miss Whylie's house and robbed her. Moreover this applicant had not been identified as being present at the house at the time of the robbery nor was there any evidence that he had been seen at the foot of the hill from which it could be referred that he was acting in concert with the robbers. It was his defence that he had gone on a ganja raid with his colleague and had remained at the foot of the hill to guard ganja which had been recovered. In that passage the jury were being invited to return a verdict of guilty on the basis of common design because his mere presence at the foot of the hill was sufficient to demonstrate his complicity. The jury should have been told that for the doctrine to be evoked they must be satisfied so they felt sure from evidence which the learned trial judge should have identified that his presence at the foot of the hill was pursuant to some preconcerted plan to rob Miss Whylie. In the circumstances of this case we consider this a serious misdirection.

In the light of all these defects in the summing-up to which we have alluded, we are clearly of the opinion that these led to a substantial miscarriage of justice.

The only question before this court is whether a new trial should be had, or whether the appellants should be acquitted. In Au Pui-Kuen v. The Attorney General of Hong Kong, [1979] 2 W.L.R. 274, it was pointed out that in the opinion of the Board, in determining whether a new trial should be had or not, there were many considerations, not least of which was that the interest of justice should be served and this was not confined to the interest of the prosecutor and the accused in the particular case, but the interest included the interest of the public. Persons who are guilty of serious crimes should be brought to justice and should not escape justice merely because of a technical blunder by the

judge in the trial or the summing-up to the jury.

In this case, it is our firm view that such evidence as was gleaned from the summing-up was sufficiently credible and we disagree with the suggestion voiced by Mr. Von Cork that the evidence was so tenuous that consequently the appellants should be acquitted. In the event, the appeal is allowed, the convictions and sentences are set aside and in the interest of justice, we order a new trial to be had.

CARBERRY, J.A.:

Very well, a new trial is ordered and the two accused are remanded in custody pending the new trial, which we hope will be speedy.