J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 20/1976

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.(Presiding).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Henry, J.A. (Ag.)

R. v. CHARLES INGRAM

R. Small for the appellant.

Mrs. Marva McIntosh for the Crown.

November 23, 1976

LUCKHOO, J.A.:

On November 23, 1976, we allowed this appeal, quashing the convictions and setting aside the sentences in relation thereto. In the interests of justice we ordered that there be a new trial at the next sitting of the St. Ann Circuit Court and promised to put our reasons for our decision in writing. This we now do.

The appellant Charles Ingram was convicted on February 24, 1976 in the St. Ann Circuit Court before Parnell, J. and a jury on an indictment charging (1) burglary and larceny and (2) Post Office breaking and larceny and was sentenced to imprisonment for 6 years at hard labour and 6 strokes of the tamarind on the former charge and to imprisonment for 4 years at hard labour on the latter charge. His application for leave to appeal against his convictions and sentences was granted by a single judge of this Court.

A number of grounds of appeal were urged on behalf of the appellant. In view of the order we have made for a new trial we will refrain from expressing any view in relation to the evidence otherwise than is necessary for the determination of this appeal.

There was evidence that in the night of August 26, 1975, the dwelling house occupied by Ena Gayle and her niece was broken into and a number of articles stolen therefrom. A post office housed in the same building and separated from Ena Gayle's dwelling by an internal door was also broken into by the intruder or intruders and a quantity of cash, postal orders and other articles stolen therefrom. Ena Gayle had been awakened by the sound of a voice calling out the name "Burton" and was unnerved by the sound of apparent tampering with the front door of her dwelling. She heard someone call her name. She and her niece made their escape from the building by jumping through a window and were unable to identify the intruder or intruders who broke into her dwelling house. She did, however, observe what appeared to be one of the intruders later go along a track upon which some of the stolen articles - parcels - were later found along a track in front of the post office by Police Constable West at 4.30 a.m. The track was used by people to enable them to get to their fields and it passed by the house occupied by the appellant and another house further on which was at that time unoccupied. Another missing article owned by Ena Gayle was found in an area near to the post office. A set of postal orders which were stolen from the post office was recovered by the police from a pit latrine situate about a chain from the house in which the appellant lived. Police Constable West found the sum of $5.80 made up of ten and five cent coins in a piece of cloth in the hollow portion of a concrete block at the back of the appellant's premises where there was an unfinished room. Cash comprising ten and five cent coins had been stolen from the post office.

Before the set of postal orders was found in the latrine pit and the sum of $5.80 in coins found in the hollow concrete block, P.C. West had observed the appellant's house to be in darkness.

He called out but received no reply. He then went on to search in the plantation walk behind the house for missing articles. On returning from a fruitless search there he observed light in the appellant's house, called out and received an answer from the appellant and saw the appellant looking out from the bedroom which his brother occupied. At that time both the brother and the appellant's mother were away from home and the appellant was the sole occupant of the house. According to P.C. West the appellant said that he had heard some persons trying to steal his brother's car and suggested that they must have thrown the postal orders into the toilet. Also according to P.C. West the appellant said that he had placed the sum of $5.80 in the hollow of the concrete block and that he had got the money from the sale of ganja. A pair of muddy shoes was found by P.C. West in a search of the appellant's house and according to P.C. West the appellant said that the muddy condition of the shoes was due to the fact that he had just returned from the ganja bush. A search of the house including the space in the step up between the mother's room and the brother's room by aid of a flashlight revealed no trace of any of the other missing articles. The appellant was then taking away from his house. At some time thereafter - it does not appear from the summing-up how long after - a district constable was put in charge of the house. Sometime after daybreak P.C. West returned to the appellant's house. He said he carried out a further search there in the absence of the appellant and under a board in the step up between the mother's room and the brother's room, where he had earlier made a search by aid of a flashlight, he found in a plastic bag some postal orders and $99.50 in a plastic bag which were identified as some of the articles missing from the post office.

In a statement from the dock the appellant said that he was at home at 4.45 a.m. when P.C. West and other policemen came there. P.C. West told him that there were certain articles in the driveway and that he was investigating how they got there. He told P.C. West that at about 2 a.m. he had gone to sell bananas

at a boxing plant and that while he was there rain had fallen. He agreed to P.C. West's request to be allowed to search the place and P.C. West searched two rooms. He did not allow P.C. West to search his brother's room which was locked. Thereafter Police Constable Martin went toward the toilet and said he found some postal orders in the toilet. He then told the police that in the night he had heard some strange sounds coming from the garage and had looked into the car and then returned to the house. He alleged he was beaten by the police. He was told that they would return to search his house. His request to be allowed to be present at the search was refused. They went off and about an hour and a half later returned and informed him that they had found postal orders and $99.50 under a board in the step up. He denied that he had put those things there. He was later charged with the offences of post office breaking and burglary.

In his summing-up the learned trial judge did not direct the jury that their assessment of the evidence should be approached without prejudice or sympathy. It was contended that this omission was particularly grave in this case because (a) of the nature of the charge and the likely effect of this on the community; (b) the prosecution had led evidence that suggested that the accused was a pedlar of ganja. As we indicated during the hearing of the appeal this ground is devoid of merit.

It was submitted that the learned trial judge misdirected the jury on the defence of the appellant in that he suggested that the appellant was presenting as part of his defence that he was a pedlar of ganja. In relating the evidence given by P.C. West as to what that witness said the appellant told him in relation to the sum of $5.80 found enclosed in a rag in a hollow block in the unfinished room - that the sum formed the proceeds of sale of ganja - and the further testimony of P.C. West that on finding the muddy shoes in the appellant's house the appellant said "A ganja bush me just come from", the learned trial judge told the jury -

> " Now, Mr. Foreman and members of the jury, this piece of evidence was admitted for the purpose of showing what explanation the accused man is giving. He is charged with burglary and larceny; if the Crown's case, or the suggestion of the Crown is that this money is part of the money taken from the post office then certainly any explanation which the accused man may give which would show where he got the money from and not from the post office would be his defence, and the judge cannot block evidence which goes to the man's defence, it is a matter of commonsense. And there is no argument that can be put up to say because a man sells ganja or grows ganja then he is a man that break a post office: no such argument can be put up in any court. So the accused man would be, according to the officer, telling him how he got some ten cents and five cents, selling his little ganja ..... The point I am making here is that the accused is giving these explanations, if your reject the explanation and find he is telling a lie to divert suspicion from himself, then that is a matter you can take into account in assessing his guilt or innocence. Normally a man does not tell a lie when he has an innocent explanation to offer."

There is much force in the contention that in view of what the appellant said in his defence from the dock relating to what he told P.C. West when confronted with the sum of $5.80 and with the pair of muddy shoes, the jury might have been misled or confused to the prejudice of the appellant by the trial judge's reference in the above passage to the appellant's "defence". Further, as Mr. Small observed, the trial judge did not attract the jury's attention to the fact that the appellant had never specifically admitted that he gave P.C. West those explanations in relation to the articles so found.

It was next submitted that the learned trial judge failed to fully direct the jury on the possible legal conclusions that were open to the jury if they found that the (professed) explanations of the appellant (referred to in the previous ground) were found to be untrue. Mr. Small contended that the learned trial judge ought to have told the jury that they should consider whether there was some other explanation consistent with innocence which could explain either (i) the rejection at the trial by an accused person of an explanation given at the time of confrontation, or (ii) a lying explanation at the time of confrontation, in circumstances where, as in this case, the appellant was confronted in the early hours of the morning with evidence which may have been incriminating but

which, in law, unknown to the appellant, did not have any strong weight.

While we feel that the jury might have been afforded more assistance on this aspect of the matter we do not feel that in itself this is a non-direction which would vitiate the convictions.

Two further submissions argued together on behalf of the appellant were (i) that the learned trial judge failed adequately to direct the jury on the law relating to circumstancial evidence and in particular omitted to direct the jury on the law in relation to inferences; (ii) that the learned trial judge in effect withdrew from the jury's consideration part of their function in relation to the assessment of circumstantial evidence.

The trial judge's directions on circumstantial evidence are to be found at p. 21 of the record. Those directions follow upon a resumé of the evidence adduced by the prosecution relating to the finding of the articles missing from Miss Gayle's home and from the post office and what the appellant is alleged to have said in relation to those articles with which he was confronted. One of the most telling bits of evidence adduced by the prosecution related to the alleged finding in the absence of the appellant of postal orders and $99.50 under a board in the step up between the appellant's mother's room and his brother's room. Mr. Small has contended that the appellant could only have been found to be in possession of those articles if it were shown that at all material times he was the only person who had access to the room between the time of the breaking into the post office and the time of discovery of those articles. The district constable who was put in charge of the appellant's house after the appellant had been taken away by the police was not called to testify and there is nothing in the summing-up to indicate at what point of time after the appellant had been taken away that the district constable was placed there so that it might be inferred that no person other than the appellant or some person with his complicity could have put the articles there. This was a weakness in the chain of circumstantial evidence adduced by the prosecution which, had it been brought to the attention

of the jury, might well have caused them to hesitate in making a finding adverse to the appellant.

Another valid criticism made by Mr. Small was that it was improper and prejudicial to the appellant for the learned trial judge to commend P.C. West in the way he did at pp. 5-6 of the record when proof of the charges laid against the appellant depended in such great measure on the view the jury took as to the veracity of P.C. West as indeed it did. This is what the learned trial judge had to say after relating the evidence of P.C. West as to the finding of missing parcels along the track leading from the post office in the direction of the appellant's house among other places -

> " This officer - and I will have to say something further about it whatever the results - that he strikes me as having done a fine job. This young constable, and he appears to have been the leader of searching and finding these things. He seems to have done a very quick and a good job."

We say that Mr. Small's criticism in this regard is valid not merely because of what appears in the above passage but it also appears that nowhere in the summing-up is any indication given the jury that comments made by the trial judge may not be adopted by the jury if they so think fit.

Another criticism not without merit made by Mr. Small is that in relating the evidence adduced by the prosecution that evidence is so projected to the jury as if the matters stated therein are proven facts.

Finally, Mr. Small has pointed out that nowhere in the summing-up has the judge given any direction to the jury as to the manner in which they may proceed to draw inferences from facts they find proved.

Mrs. McIntosh for the Crown conceded that in the light of these criticisms she was unable to support the convictions.

For the reasons we have given in the course of dealing with the submissions made by Mr. Small we quashed the convictions and set aside the sentences imposed on the appellant. In the interests of justice we made an order that the appellant be retried on the indictment.