JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No.103/74

BEFORE: The Hon. Mr. Justice Graham-Perkins - presiding
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A.(Ag.)

R. v. CYRIL SMITH

R. Small for the applicant

E. Hall for the crown

October 4, 5 and 8, 1974

GRAHAM-PERKINS, J.A. :

The applicant was convicted before Wilkie, J., by the majority verdict of a jury, of the off ence of robbery with aggravation. The case advanced by the prosecution was to the following effect. A Mr.Kenneth Reid lives and carries on the business of a small shop at Gully Road in St.Ann's Bay. On March, 11, 1974, Reid locked up his shop and house at about 9 p.m. and retired to bed. Shortly after he heard a bang "and they had burst the window" to his bedroom. Three men entered that room through the broken window. One held a knife to his throat while the other two searched the bedroom and the shop. They took money from the till and a juke box, as also some tins of sardines, a record player and a flashlight. The men left but not before one of them had tied and gagged him. He made a report to the police. He recognised the applicant as one of the men who entered his bedroom. This he was able to do by the aid of a light from a parafin lamp in his room. About three days after this incident he saw the applicant come towards his gate. The applicant looked at him and ran off. About one month later he saw the applicant on the road. He made a report at a police station whereupon an officer accompanied him to certain premises in which he had, at some time previously, seen the applicant. There he saw the applicant and identified him "as the man".

In his evidence Reid said that he had seen the applicant "around the town" prior to March 11. Significantly, however, he was unable to say what part the applicant played during the robbery, for example, whether he was the one who had tied and gagged him, or the one who had held a knife at his throat.

The applicant gave evidence. He denied any participation in the events described by Reid. He knew Reid by sight. They lived on the same road. He was in a betting shop when Reid approached him and asked if he remembered him. Before he could answer a policeman marched him off to the station.

In a commendably short summing-up the learned trial judge sought, on at least two occasions, to impress on the jury that the critical issue they would be required to resolve was that relating to the identity of the applicant. After dealing at fair length with the circumstances in which Reid claimed to be able to recognise and identify the applicant as one of the robbers he said:

> "But there is one important aspect of this case, that the complainant said that he had seen the accused man before that. He had seen him around the town before the incident occurred.....so it was not a situation where he was seeing this man for the first time. He is saying he had seen him around the town before that and he saw him that night and his hair was very high and though it is cut off now he is able to identify him. He referred to high hair and the cutting of it as a disguise."

At the end of his summing-up he asked both attorneys if there was any other matter with which they wanted him to deal. Miss Donna McIntosh who appeared for the applicant replied -

> "M'lord, just one point. I don't know if your lordship dealt with the point raised on page five of the depositions, line ten....."

To this query Wilkie, J., answered : "I think I have dealt with that." We were advised by Mr. Small that the relevant portion of Reid's deposition disclosed that at the preliminary enquiry he had said

/ he had not

he had not seen the applicant prior to the robbery at his home on the night of March 11. Although it is not clear from the summing-up whether this earlier inconsistent statement was put to Reid at the trial we are of the clear view that it must have been since it is otherwise not a little difficult to understand why the trial judge should have thought that he had dealt with the matter. Nor is it to be supposed that Miss McIntosh would have directed the judge's attentiion to the contradictory evidence if it had not been put to Reid. Reither does it appear whether Reid admitted or denied that he had said on an earlier occasion that he had not seen the appplicant prior to March 11. What is certainly very clear from the summing-up however, is that the learned trial judge had not dealt with this very crucial contradition as he appears to have thought he had done. In the result the jury must have been left, albeit unwittingly, with an imperfect appreciatiion of Reid's evidence on the one real issue as to the identity of the applicant, since the direction quoted above was in violent conflict with a serious flaw in that evidence. In the view of this Court this was a singularly unfortunate situatiion and it would, quite obviously, be futile to speculate on the extent to which the applicant's case was thereby affected. We observe, in passing, that after retiring for 27 minutes a the jury returned without having reached unanimity. They retired again and were out for some 40 minutes.. They returned, still divided. There are other features of Reid's evidence that may fairly be described as odd but we find it unnecessary to advert thereto.

A more fundamental matter, however, is this. At the hearing of this application on Monday, Mr. Small applied for leave to adduce additional evidence pursuant to the provisions of s.26 of the Judicature (Appellate Jurisdicti.on) Law, 1962, which empowers this Court to order "any witness who would have been a compellable witness at the trial to attend and be examined before the Court..." After hearing Mr. Small and reading the Affidavit of the witness, a Miss Dorothy Ricketts, we were satisfied that the evidence she proposed to give fell squarely within the well established principles by which this Court is guided on an applicatiion to call fresh evidence. See

R. v. P-ge (1967-1968) 11 W.I.R. 122. Accordingly Miss Ricketts was examined. Indeed, she was subjected to a thoroughly searching examination which revealed the following. She had been a friend of Reid for some three or four years, and had slept at his home from time to time. She also knew the applicant. He is the brother of her former school teacher. On March 11, she went to Reid's home at about 11 p.m. Reid let her in and they went to bed, Reid having left an oil lamp "burning low". Shortly after they had got into bed the panes of a window were broken and two men entered the bedroom. Another man remained outside. One of the men who entered the room held a knife at Reid's throat and asked where his money was. The other man tied him up and proceeded to take money from his till and juke box, a record player and other things which he passed to the man who had remained outside. She recognised the three men as persons she knew. She gave the names by which she knew them from her school days. One of them was, at one time, a in a class with her. She remained with Reid until 10 a.m. the following day. She did not report the incident to the police; neither did Reid, up to the time she left him. She and her mother were threatened by one of the men. The applicant was not one of the three men who had robbed Reid at his home. She did not know that he had been charged with, and convicted of, this robbery until May 15. She advised the applicant's sister immediately.

That evidence was clearly relevant to the issue of the applicant's identity. Equally clearly, it was credible evidence in the sense that 'it was well capable of belief', and, from the point of view of the applicant, would not have been available to him on the occasion of his trial. Having heard that evidence we were required to decide how we should approach it. We think that the proper approach is that stated by Widgery, J., as he then was, delivering the judgment of the Court of Driminal Appeal in Reg.v. Flower, (1966) 1 Q.B.146, at p.149, in the following terms:

> "When this court gives leave to call fresh evidence which appears at the time of the application for leave to be credible, it is still the duty of the court to consider and assess the reliability of that evidence when the witness

appears and is cross-examined, and this is particularly true when evidence is called in rebuttal before this court. Having heard the fresh evidence and considered the reliability of the witness, this court may take one of three views in regard to it. First, if satisfied that the fresh evidence is true and that it is conclusive of the appeal, the court can, and no doubt ordinarily would, quash the conviction. Alternatively, if not satisfied that the evidence is conclusive, the court may order a new trial so that a jury can consider the fresh evidence alongside that given at the original trial. The second possibility is that the court is not satisfied that the fresh evidence is true but nevertheless thinks that it might be acceptable to, and believed by, a jury, in which case as a general proposition the court would no doubt be inclined to order a new trial so that that evidence could be considered by the jury, assuming the weight of the fresh evidence would justify that course. Then there is a third possibility, namely, that this court, having heard the evidence positively disbelieves it and is satisf ied that the witness is not speaking the truth. In that event, and speaking generally again, no new trial is called for because the fresh evidence is treated as worthless, and the court will then proceed to deal with the appeal as though the fresh evidence had not been tendered."

It is fair to say that in the case before us, there was no evidence called in rebuttal. Nevertheless we were thoroughly impressed by Miss Ricketts. Her obvious candour, her demeanour, her straight forward simplicity and answers to the wide-ranging questions which she could not have anticipated, all combined to stamp the hallmark of truth on her evidence. In the particular circumstances of this case we are also satisfied that her evidence is conclusive of this applicatiion. We therefore treat the hearing of the application as the hearing of the appeal which we allow. The conviction and sentence are set aside.Mr.Hall, quite properly in our view, did not, in the end, urge this Court to order a new trial.