CA CRIMINAL LAW — Burglary with intent — Doctrine of recent possession evidence of appellants previous conviction disclosed

Whether judge's directions on doctrine of recent possession adequate. Whether judge should have discharged jury and ordered new trial after appellant suggested while giving evidence that reason why police framing him was because he had been in jail and had a record. Appeal dismissed — although directions imprecise and rambling doctrine of recent possession conveyed to jury — evidence of previous conviction not accidentally elicited but necessary and consistent with defence being put forward.

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No case referred to.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 167/87

BEFORE: THE HON: MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

EVIDENCE?

R. Vs. DELROY MOULTON

Mr. Ronald Parris for appellant

Miss Yvette Sibble for Crown

November 8, 1988

CAREY, P. (Ag.) :

In the St. James Circuit Court held in Montego Bay, this appellant, Delroy Moulton, was convicted for the offence of burglary with intent, before McKain, J., and a jury and sentenced to 15 years imprisonment at hard labour The matter comes before this court by leave of the single judge who certified that the learned trial judge's discretions on the doctrine of recent possession were cause for disquiet. However, that might be, Mr. Parris who appears before us this morning, in support of the appeal, was not of the view that he could p t forward arguments of any merit in regard to that ground, and we may say at once that we entirely agree with that view of counsel. We have examined ourselves, very carefully, the summingup of the learned trial judge and although the directions left much to be desired, in that the language used was often imprecise and was somewhat rambling in form. We were clearly of the view that at the end of the day, the jury could not fail to understand that the directions were meant to convey, that if stolen property is found in possession of someone shortly after the theft thereof, there is a presumption that he is either the thief or the guilty receiver.

Mr. Parris endeavoured to argue another ground. He thought that the learned trial judge was in error in failing, he said, to discharge the jury and

to order a new trial because evidence of previous conviction had been disclosed in the course of the evidence. In dealing with this ground, it may be convenient to set out the facts which gave rise to the conviction of the appellant. On the 23rd June 1987, when Mr. Maragh awoke in the early morning presumably to go out he became aware that his house had been broken into, because he could not find a pair of his shoes, and he noticed that one of the windows have been disturbed. He went off to the police station to make a report. On a subsequent day when he returned thither, he saw the appellant wearing a pair of his shoes which he identified as such and pointed it out to the police. The appellant, at this stage, promised to work and repay Mr. Maragh for the things which had been stolen from his house and indeed, undertook to take the police to his house to locate the other items. Police officers went to his house and returned to the police station with a bag containing a number of items, two pairs of shoes, two ladies watches, a clock among other things, and these were claimed as being Mr. Maragh's property.

The defence put forward by the appellant was that the articles were undoubtedly in his possession were his, and he explained to the learned trial judge and jury how he came by them.

In so far as the particular ground is concerned, it appeared that when the appellant was giving evidence, he suggested that the reason why the police were framing him is because he had been in jail and has a record. It is that piece of evidence to which Mr. Parris called attention, and in respect of which, he thought the learned trial judge ought to have discharged the jury and order a new trial.

We cannot agree with that submission. It was essential to the defence to bring out the fact of his conviction to enable the jury to understand the nature of the defence that was being put forward by this appellant. But the learned trial judge did on more than one occasion point out that the jury ought not to take the fact that he had a previous conviction into account, as any evidence that he was a person likely to have taken things with which he was not charged. At a very early stage of her summing-up, the learned trial judge expressed herself in this fashion -

> "This morning a little talk about a certain matter, and certain things were said, but indeed, it was of no great significance, because the accused himself even told you the story and told you the reason why he thought he was wanted. Now, when you come to weigh it, you consider the things in his favour, you don't hold against him the fact that he tells you that he has some record, because you do not know what the record is for. You are not to judge in your mind and say it must be this, it must be that, what you are here to decide is whether you find that this accused man was the man who broke into Mr. Maragh's place, or if you find that he did not break into it, ..."

Later at page 27 she returned to the matter in this way:

> ".....I must caution you that although the accused himself gave what you might regard as damaging evidence against himself as to his honesty, as to his record, you will not let that affect you, only so far as you would look at what he is telling you about himself to say would you believe anything that that person tells you, and when you are looking at that, you have to say to yourself that he has told you the truth about that, so even at that you have to weigh it in his favour that he has been open enough with you about the state of his character or whatever happened to him."

As we understand the law in this regard, where the prejudicial evidence is accidentally elicited during the course of the case for the Crown that the accused person has been previously convicted, the jury may be discharged in the interest of the prisoner. The discharge of the jury, of course, always c calls for the exercise of a judicial discretion. With respect to this case, as we have indicated, this was not a situation where evidence was accidentally elicited. It was necessary to adduce that evidence in pursuance of and consistent with the defence being put forward. We note that learned counsel who appears both here and below, made no application before the learned trial judge to have the jury discharged. So it hardly lies in his mouth to appear before this court to complain, that the evidence which was necessary for the defence of his client ought now to be regarded as inadmissible and to lead to the discharge of the jury. We so merit whatsoever in this point, and in the result, the appeal is dismissed and the conviction and sentence affirmed.