JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS 81/65, 83/65

BEFORE: The Hon. Mr. Justice Duffus, President
The Hon. Mr. Justice Waddington
The Hon. Mr. Justice Shelley (Acting)

R. vs DESMOND MYERS
CECIL SILVERA

Mr. K.A. Simmonds for the Crown

Mr. R.N.A. Henriques for Desmond Myers

Mr. H.R. Hamilton for Cecil Silvera

10th March, 1966.

SHELLEY, J.A. (Acting)

The appellants were charged together with a third person, one Leonard Davis on indictment for warehouse breaking and larceny. They were tried in the Home Circuit Court on the 26th of April, 1965. They were not represented by Counsel. All three persons charged were convicted.

My reference to the facts will be very brief. A Crown witness, one Brown testified that he saw these appellants and the third man Davis remove a chest from the warehouse involved, at about 4.30 on the morning of the 17th of December, 1964. He soon after made a report to the police, and the three men were arrested. A fourth person, one Stanley Allen, otherwise called 'Shakes' was subsequently arrested and charged for this same offence. 'Shakes' made a written confession, a copy of which was served upon each of these appellants before their case came to trial. At the trial immediately after they were pleaded, the appellants were asked whether they wished to call witnesses. Myers gave the name of one Rainford Drummond, who turned out to be a witness for the Crown,

/and Silvera...

and Silvera named one Barnes, who was present at the trial. Each appellant indicated that he was calling no other witness.

During the trial, however, Silvera first, and then Myers afterwards raised the question of this statement given by 'Shakes', and sought to put it in evidence. They got no further in that effort than adducing in cross-examination the fact that Stanley Allen, otherwise called 'Shakes' had been arrested and was charged with this same warehouse breaking and larceny, and was in custody. That fact, that is that they got no further than that in their effort to put this statement in evidence, is the substantial ground of this appeal.

Mr. Henriques for Myers - and he has been supported in this ground by Mr. Hamilton for Silvera - has urged that the trial judge failed to assist the appellants to put the issue of the facts stated in 'Shakes' statement before the jury, and further that in his summing-up, the learned trial judge withdrew from the jury a matter which was material to the defence, that matter being the statement of this man, 'Shakes'.

Mr. Simmonds contended that the trial judge has no duty to assist the defence in preparation and putting of its case and pointed out some of the dangers involved in offering such assistance.

Now, what was the judge's direction on this statement? The learned trial judge said to the jury in his directions:

" The witness went on to say 'I did hold one Oswald Shakes.' "

(That is no doubt in reference to the evidence of Detective Pusey who made the arrest.)

" I may remind you that what Myers was urging you by way of an address to you - remember he told you that there was somebody else involved in the case, he gave a statement, and if that person were here, he (Myers) would not be here. Members of the jury, whether there /was a third...

" was a third, fifth or sixth person involved that is not for you to consider here, what you have to consider here is: Does the evidence indicate that these three men - all of them, or any of them - committed the offence with which they are charged. As to whether anybody is guilty and is not being tried before you now, that matter does not arise at all, your business is to consider whether evidence was put before you to indicate that the accused men - all, or any of them, is guilty of the crime with which they are charged. So never mind whether Mr. Shakes was involved, you are not concerned with that."

Mr. Henriques asked leave of this Court to hear fresh evidence under the provisions of Section 26 of the Judicature (Appellate Jurisdiction) Law, 15 of 1962. We have not heard that fresh evidence, but we have, under the provisions of the same section, seen the statement which this man 'Shakes' allegedly gave.

It appears that during the trial, the learned trial judge did at one stage say that he would like to see the statement, but there is nothing on the records to indicate that he did in fact see it, and the direction above suggests that he probably did not see it. Upon reading this statement it becomes obvious that what Myers and Silvera were seeking to do, was to put before the jury a statement which, if accepted, would have been most material to their defence. It seems that this statement could not have been admitted in evidence, there seems to be no doubt about that. As I said before, these accused got as far as showing that a fourth person had been arrested for this same offence, but got no further, whereas the facts contained in the statement might have strengthened their defence considerably.

The substance of Mr. Henriques' and Mr. Hamilton's submissions, as I say, is that the trial judge ought to have assisted the appellants to bring the facts contained in the statement before

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the jury. The way to do that was obviously to call 'Shakes'. At no stage in the proceedings were the appellants informed that that was the way to bring these facts before the jury. True enough they were asked before the trial commenced, what witnesses they wanted, and before the end of the case of each of the appellants, whether he wished to call any other witness, and each said:'no', nevertheless, one of two situations may have existed - either these appellants knew that that was the way to get the evidence before the jury, but whilst they were willing to have the statement in, they were not anxious to have 'Shakes' - that may have been the situation, but it is also possible that they may have been totally ignorant as to how these facts could properly have been brought before the jury.

Several cases have been cited before us on the question of the duties of the trial judge in cases where prisoners are not represented. There can be no doubt at all about it, the well-established principle in our system of justice, is that where persons on trial are not represented they should have the maximum assistance possible from the Court. It is unfortunate that we have not got to the stage where impecunious persons charged with all serious offences such as this have legal aid, and although admittedly it puts a heavy burden on the Court, because there are risks involved, nevertheless, in this particular case we feel that the learned trial judge ought to have told the appellants that the way to bring the facts contained in the statement before the jury was to call ' Shakes', and to have left it to them to decide whether or not they wished to call him. We cannot speculate whether or not they would have called him and if they did what effect 'Shakes' evidence might have had on the jury, and we, therefore, have decided that this matter should go back for a new trial.

I might say that learned Counsel argued that the learned trial judge misdirected the jury on the question of common design;

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because of the decision we have reached on the other ground, we find it unnecessary to express any view on that matter. We will allow the appeals against the convictions; the convictions will be quashed, and in the interest of justice we order a new trial at the current session of the Home Circuit Court. The prisoners will be remanded in custody.