JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 127-8/1975

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

R. v. GLADSTONE McLEAN
and
DENNIS BENNETT

Miss Eileen Boxhill for the Crown.

Mr. Patrick Atkinson for Applicants.

February 27 and March 19, 1976

HERCULES, J.A.:

These two Applicants were convicted in the St. Elizabeth Circuit Court before Wilkie J. and a jury on 12th November, 1975.

The indictment was of 4 Counts charging:-

(1) Robbery with aggravation in respect of Lancefield Gayle jointly.
(2) Wounding Lancefield Gayle with intent jointly.
(3) Larceny of Gilbert James' motor cycle jointly.
(4) Housebreaking and Larceny - George James' house - Gladstone McLean alone.

McLean was sentenced to a total of 15 years imprisonment at hard labour and 6 lashes. Bennett was sentenced to a total of 10 years at hard labour and 6 lashes.

As far as Counts 1 and 2 are concerned the evidence was that Lancefield Gayle was riding his motor cycle No. S.1160 along Ridge Pen Road in the parish of St. Elizabeth about 9.30 p.m. on 21st March, 1975, with his girl friend Mervene Dennis on the pillion. Gayle saw two men together and one waved him to stop. As he didn't readily comply, one struck him with a stick across his face and he fell. When he fell off the cycle the two men got on it and rode away. He spent three days in hospital. It is apparent that Counts 1 and 2 stand or fail together in connection with Robbery with Aggravation of Lancefield Gayle's motor cycle and wounding Lancefield Gayle with intent. The evidence in support of Count 3 was to the effect that Gilbert James parked his motor cycle S.1999 at his front step about 11.30 p.m. on 21st March, 1975.

At 7.30 next morning his cycle was missing. Albert Robinson gave evidence purporting to incriminate both Applicants that he saw them about 10 a.m. on 22nd March on a bike which he knew as Gilbert James' bike. He could give no registration number or any specific form of identification and since the Crown was relying on the doctrine of recent possession to bring home this Count, the identification of the cycle was of vital importance. This alas was missing. Robinson could go no further than describing the cycle as an S-90, but there are many many S-90 cycles on the road.

Count 4 charged only McLean with housebreaking and larceny. The evidence here was that George James had locked up his house on 22nd March, 1975, and went to Church. He returned home to find the back door kicked off. He had left $2800 in cash in a bag and this was missing. Also missing was a shot gun, cartridges, pants and 2 watches. Again the Crown was relying on the doctrine of recent possession, since McLean was found wearing a watch which James claimed was one of his missing watches. He identified it by a mark G.J. at the back. The learned trial judge passed severe animadversions on Mr. Atkinson for suggesting in cross-examination that it was a fresh mark and not one made a year before. But McLean made a statement from the dock explaining that he found the watch in a field and how he came to be held in possession.

It is unfortunate that in dealing with Bennett's statement from the dock the learned trial judge castigated Bennett's election in the following terms:-

> "In this particular case Bennett made a statement from the dock, not sworn, not tested in cross-examination. In this particular situation it was quite improper for him to have remained in the sanctity of the dock because he made some far-reaching and very serious allegations against the police ....."

Both Applicants made unsworn statements from the dock and there seemed to be a real likelihood, since it was a joint trial, that that castigation could rub off on McLean as well in relation to his explanation of possession of the watch in Count 4.

The only ground of appeal argued by Mr. Atkinson was that the verdict was unreasonable having regard to the evidence. This involved, in the instant case, a pure question of fact and there is authority for

the proposition that this court may set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong. (See R. v. Hancox 8 Cr. App. R. 193).

There were several unsatisfactory features about this trial. As regards Counts 1 and 2, the pillion rider Mervene Dennis did not assist with evidence of identification of the two Applicants at all. Then, while Lancefield Gayle purported to give some evidence of identification at the trial, there was the firm evidence of Constable DaCosta of an entry in the station diary as follows:-

> "Lancefield Gayle of Ground Hill, St. Elizabeth, reported a case of robbery with violence against two men unknown to him, offence committed at Ridge Pen about 9.30 p.m. 21st March, 1975. Complainant was riding his Honda motor cycle S-1160 when two men signalled him to stop, hit him off the cycle and took it away."

There was the further question of Bennett's position as the pillion rider. The case was left to the jury on the basis of common design. We do not think it emerged clearly or at all from the evidence that Bennett as pillion rider was acting in concert with McLean, if McLean it was. Bennett could have been merely a passenger.

As regards Count 3, neither Applicant was identified by the evidence, nor was Gilbert James' cycle satisfactorily identified. Therefore the verdict on this Count could not be regarded as reasonable.

We have already indicated how we feel about Count 4. Before parting with the case we wish to observe that it would have been better for all concerned if this indictment had been severed. There is no nexus whatever between Counts 1 and 2 and either Count 3 or Count 4.

In view of the several unsatisfactory features of the case we upheld Mr. Atkinson's contention. Therefore we granted the applications for leave to appeal and treated the hearing of the applications as the hearing of the appeals. We allowed the appeals, quashed the convictions and set aside the sentences on all Counts.