JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL no. 131/65

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

R. vs HENRY NELSON

Mr. C. Orr for the Crown

Mr. N. Burgess for the appellant

25th January, 1966.

DUFFUS, P.:

This is an application for leave to appeal against convictions recorded in the Circuit Court for Port Antonio on the 18th of June, last year. The applicant was charged on an indictment which contained eight counts. Four of these counts were for larceny of goods, the other four counts were alternative counts to the larceny counts and charged the offence of receiving stolen goods. The offences were all alleged to have taken place in the Sherwood Forest and Fairy Hill districts in the parish of Portland. The larceny charges related to various periods set out in the indictment ranging between the 28th of November, 1963 and the 19th of January, 1965. The applicant was convicted on the receiving charges.

The evidence for the Crown disclosed that a number of larcenies had occurred in the districts of Fairy Hill and Sherwood Forest, and apparently, there was no trace of the person who had committed these offences. On the 25th of March, 1965, a number of police officers came across a hut which was situated in a fairly remote part of the country not too far removed from Sherwood Forest and Fairy Hill, and in this hut were discovered by the police a large quantity of articles which had been stolen from the various places mentioned in the larceny counts. According to the evidence given by the police when they approached this hut on the early morning of the 25th of March they heard voices within the hut, and as they approached nearer a man was seen to rush out of the

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hut and make his escape into the surrounding bush. This man was not the applicant in this case and there was clear evidence of this. After the police had entered the hut and seen the articles therein one member of the police party took a cutlass and made a number of cuts in an empty tin pan, which the police said they found in the hut, and they took charge of several pieces of rope, and then left the premises. Some ten chains or so away from the hut they met the applicant and spoke with him and then they left the applicant and returned to Port Antonio. The police went to the dwelling house of the applicant situtated in the little village of Drapers on the way to Port Antonio, and there they received from the applicant's house-keeper two pairs of trousers. The police stated that later that day, that is in the afternoon of the 25th, the applicant came to the police station at Port Antonio, bringing with him the chopped up tin pan which the police stated they had left in the hut. The applicant was arrested and charged for these offences. That shortly, was the case for the Crown. The articles found in the hut, I should mention, purported to have been identified by the various owners concerned and the cloth which was used to make the two trousers, found in the applicant's home, was also identified by the persons who claimed that they were the owners of the cloth.

The case for the applicant was somewhat different. It was his contention that he met the police on a track while he was on his way to his land at Downer's Hope, and that the police stopped him and questioned him and expressed the desire to search him as they believed that he had ganja on him and that he refused to permit them to search him, whereupon the police held on to him and gave him a beating, and that this had occurred not on the 25th of March but on the preceding day, the 24th of March.

The appellant who gave sworn evidence further stated that he was in blood and suffering from the injuries he had received and he was unable to get to Port Antonio on the 24th but on the following day, the 25th he got a motor car to take him to Port Antonio and there he went to see the Superintendent of Police,

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taking along with him the tin pan which the police had cut up. The applicant said that this tin pan had been with him at the time that the police met him on the way to his land at Downer's Hope. He stated that he did not have a hut on his lands at Downer's Hope, that he owned no hut in that region at all, nor was he in possession of any hut. I return now to the pan - he stated that he did not see the Superintendent of police but he saw an Inspector of police, made a complaint and to his surprise he was then arrested and charged by the police for the various offences in this indictment. He denied emphatically that he had been in possession of any of the goods which the police said they have found in the hut. He denied emphatically that he was concerned in any of the larceny charges, or that he was concerned in any of the receiving charges. He went to Doctor Martin, a medical officer at Port Antonio who examined him and treated him.

At the trial the Crown had to prove that the applicant was in recent possession of the allegedly stolen goods. The Crown gave no evidence to show that the applicant was the owner of the hut, but relied on circumstantial evidence to prove his connection with the stolen goods, and that circumstantial evidence was based firstly, on the chopped tin pan and secondly, on the pieces of rope. The police stated quite clearly that they had left the cut pan in the hut and that they had left the pieces of rope in the hut, and it was the case for the Crown that the applicant having come to the Police Station later that day and claimed that he was theowner of the pan, and that he was the owner of the ropes sufficiently identified him with the hut to place legal possession and control of the hut in him, and consequently, control and custody of the stolen goods found in the hut. In these circumstances, therefore, it was extremely important that the learned trial judge in the course of his directions to the jury should have made it abundantly clear what the defence was. The learned judge did endeavour to do so, but complaint has been taken of the manner in which the learned judge dealt with the incident concerning the pan, and as it seems to us that that was really

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the matter of prime importance in this case I shall deal with that now as briefly as possible.

The learned judge did refer in the course of his directions to the pan, but unfortunately, and possibly, due to an oversight he did not remind the jury, as learned counsel for the Crown has conceded, that the applicant was saying, not only at the trial but had been saying from the very time that the incident happened that the pan was never in the hut, but was in his personal, physical possession at the time the police found him - according to the police testimony some ten chains away from the hut but according to the applicant a distance of about a mile away from the hut, and it was indeed of vital importance to the applicant that this situation should have been made clear in the course of the summing-up.

Complaint has also been taken by learned Counsel for the applicant that the learned trial judge when dealing with the evidence of Doctor Martin on pages 13 and 14 of the summing-up misquoted the Doctor's evidence. It is necessary to set out here what the Doctor did in fact say. Doctor Martin was called as a witness for the defence. He stated that he examined the applicant on the 25th of March and that he observed that he had a contusion on his left shoulder, a sprained left index finger and a contusion with abrasions on his right shoulder. He was then asked by Counsel for the applicant the question -

'Q. Did you come to any conclusion when these injuries were inflicted?

A. Not later than twenty-four hours,'

and this is how the learned judge put it to the jury -

"You will remember, Members of the Jury, he called Doctor Martin who gave evidence of finding some contusion on his left shoulder and he had a sprained left index finger and there was a contusion with small abrasions on the right shoulder and they could have been produced by blows given to him within 24 hours of the time he saw him."

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Now, it is quite clear that Doctor Martin did not say that. He did not say that the injuries that he saw on the applicant were produced by blows within twenty-four hours of the time he saw him. It has been conceded in the course of argument by learned Counsel for the Crown that what the doctor said, namely, not later than twenty-four hours is ambiguous and might have two meanings, one, meaning being that it was the doctor's opinion that the injuries he saw were within twnenty-four hours of his examination, as stated by the learned judge, or alternatively that the injuries had occurred prior to twenty-four hours from the doctor seeing him. Speaking for myself personally here, it is my view that the latter interpretation is the correct interpretation, but I do agree that the doctor's answer was by no means as clear as it could have been. It is perhaps unfortunate that Counsel for the applicant did not clear it up at the time and it may be as Mr. Orr has pointed out that it was understood by both Counsel in the same way that the learned judge understood it, but be that as it may, it is clear that putting it in its most favourable light to the Crown the expression is ambiguous. In these circumstances, it was most unfortunate that the learned judge put it to the jury in a way which was clearly adverse to the applicant, because it must be remembered that it was the applicant's case that he had been assaulted by the police on the preceding day, the 24th of March and not on the 25th of March, the date on which the police stated the incident had occurrred. It was something that went directly to the credit of the applicant, and in this case the applicant's credit was something which was of considerable importance. If the jury had believed that the applicant was speaking the truth as to when he had received the injuries, then they might very well have accepted his story that the pan was not in the hut at the time it was chopped by the police, or if they did not even accept the applicant's story it may nontheless have created such a reasonable doubt that they would have given him the benefit of it in their deliberations.

It has been submitted by Counsel for the Crown that the jury having heard the applicant's evidence as to the pan very shortly

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before the judge gave his summing-up, they could not have forgotten, or been left in any state of doubt as to what the defendant's case was as to where the pan was when it was cut but we do not agree that that was sufficient. We think that the learned judge failed in the duty which he had to put the defence adequately and in its clearest possible light as to the real matters upon which it was based. I refer to the well known case of R. vs Clayton-Wright, 33 Cr. App. R. 22 at page 29 where Lord Goddard L.C.J. said this -

> "The duty of the Judge in any criminal trial, or, for the matter of that, in any civil trial, is adequately and properly performed if he gives the jury an adequate direction on the Law, an adequate direction upon the regard they are to have to particular evidence on such matters as accomplices or matters which require by law or practice corroboration, and if he puts before the jury clearly and fairly the contentions on either side, omitting nothing from his charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence, but that does not mean to say that he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given by experts or anyone else."

We have arrived at a very firm conclusion that in this case the learned trial judge unfortunately did omit something from his charge of the real matters on which the defence of the applicant was based.

Before parting with the matter there is one other aspect of it that requires to be dealt with and that concerns the two pairs of trousers which were found in the applicant's home. The applicant claims that these trousers belonged to him and that he had purchased the cloth which was used to make the trousers from an itinerant vendor of cloth. Similarly, the two gentlemen who claimed the cloth which made the trousers claimed that they too had purchased their cloth from an itinerant vendor. In these circumstances, it was a matter

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of prime importance that there should have been proper and adequate identification of the cloth. We have examined carefully the evidence given in support of that identification and it is far from satisfactory. None of the persons had any special marks on the cloth and the cloth appeared to be of a very ordinary or common type and it may very well be that the jury would not have convicted on the count which concerned these trousers had they not been influenced by the evidence with regard to the finding of the other stolen articles in the hut which depended so heavily on the evidence with regard to the pan.

There is another unsatisfactory aspect of the matter which has struck this Court, although it was not the subject of any argument by Counsel for the applicant and consequently, was not dealt with by the Crown and that is, that in any case even assuming that the evidence of the police was correct that the pan was chopped in the hut and left in the hut, it must be remembered that the applicant himself was never seen in the hut, but on the contrary, when the police arrived there voices were heard in the hut, and the ~~person that~~ was seen to run out of the hut was not the applicant. In those circumstances, it may very well have been that this other person, or those unknown persons whose voices were heard in the hut were the persons who were in active control of the hut and in possssion of the contents. It must be remembered that it was a field hut in a remote part of the bush and the ownership of the empty tin pan, which was apparently used for carrying water, was by no means sufficient of itself to place the applicant squarely in control of the hut, or in control of the articles found therein.

The remarks that I have made with regard to the pan apply also to the ropes. Although the learned judge did deal with the ropes it was not made clear to the jury that the applicant's case was that the ropes were also taken from him at the time he was found by the police on the track, ten chains or one mile away from the hut, depending on which version is correct.

In these circumstances, the Court has decided to treat the application as the hearing of the appeal and the Court allows the appeal, quashes the convictions and sets aside the sentences imposed.