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IN THE COURT OF APPEAL

C. A. No. 130/65

BEFORE: The Hon. Mr. Justice Duffus (President)
The Hon. Mr. Justice Henriques
The Hon. Mr. Justice Waddington.

R. v. H U B E R T S M I T H

Mr. C. B. F. Orr for the Crown.
Mr. D. H. McFarlane for the appellant.

19th November, 1965.

HENRIQUES, J.A.:

The appellant in this case was indicted along with another man called Henry Grove at the Home Circuit Court, Kingston, in March of this year on an indictment in the following form: "Statement of Offence, First Count, Robbery with aggravation contrary to Section 34 (1) of the Larceny Law Cap. 212 as amended by the Prevention of Crime (Special Provisions) Act, 1963, Act 42 of 1963. Particulars of Offence - Hubert Smith and Henry Groves on the 12th day of December, 1964, in the parish of St. Andrew, together robbed Henry Hobson of money, £7. 5/-, a quantity of keys and a flashlight. The second count was in similar language and dealt with an alleged offence committed in respect of one Albert Tucker. Henry Groves was acquitted on both counts of the indictment and the appellant was convicted on both counts and sentenced on the first count to serve ten years at hard labour and six lashes, and on the second count, sentenced to ten years at hard labour concurrently with the previous sentence.

The Crown's case, as presented at the trial, was to the effect that on the night or early morning of the 12th of December, last year, a watchman, Edwin Hobson, at the Brooks Shopper's Fair in St. Andrew, was on duty. He had that day previously received his wages for the week to the amount of £7. 5/-, and whilst in the course of pursuing his duties in patrolling the building, he was suddenly attacked from behind by a man, who grabbed him by the neck and two other men also

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ran down on him. He was threatened that if he spoke he would be "jammed" and eventually the men tied him up and then enquired for the other watchman. He noticed at the time that one of the men had a chisel and another a pick-axe and the men then left him and went in the direction of the other watchman.

About 15 minutes later they returned and enquired of him for the other watchman. They then went away again and then returned with the other watchman, Edwin Tucker, whom they tied up and placed next to Hobson. A short time after, he stated, he heard a police whistle. The three men then took to hiding and after a time, when a shadow had passed, they came out and took from his person the amount of £7. 5/-, his keys and flashlight. They then departed and soon after, the police came upon the scene and untied the two men.

He subsequently attended an identification parade at the Half Way Tree Police Station on the 18th of December, but at that parade he failed to identify anyone. He attended a further identification parade at the Central Police Station on the 23rd of December, and there he picked out Henry Groves; he failed to identify the appellant.

Albert Tucker, the other watchman, gave evidence as to an attack made upon him early that morning, according to him, by four men and of his being relieved of the amount of £7. 5/-, his cigarettes and flashlight. On the 18th of December, he testified, that he attended an identification parade at Half Way Tree Police Station, and that he pointed out the appellant, Smith, as being one of the men who had tied his hands; and on the 23rd of December, at the Central Police Station at another Parade, he pointed out the accused Groves as the man who had stayed with them and who had a piece of yellow cloth over his face.

He was cross-examined by Smith and in his cross-examination in answer to a question put to him he said to Smith: "When you sat down you took out your cigarette and I begged you one. In order to light it, you lifted the face" and that the appellant, Smith, then said to

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him, "What a way you examining me?" and that he witness said to him, "Tomorrow when you shave I will not be able to recognize you."

The appellant made an unsworn statement at the trial. That statement amounted very briefly, to the sentence that he knew nothing at all about the matter. The other accused, Groves, gave evidence on oath in which he protested his ignorance of any knowledge of what had happened and of his complete innocence in the matter.

Learned counsel for the appellant has taken three grounds on his behalf in this appeal. First is - that the appellant had been indicted jointly with one other person, the jury having acquitted the other person charged, the appellant could not in law have been convicted under the indictment as framed. Secondly, the evidence upon which the appellant was found guilty was not adequate to justify such a finding; the verdict of the jury is, therefore, unreasonable and cannot be supported by the evidence. Thirdly, the sentence was excessive.

I will deal, first of all, with the second ground of appeal, that the verdict in this particular case was unreasonable and therefore cannot stand. Learned counsel submitted that the evidence upon which the appellant was found guilty by the jury was based on his identification by only one of the two complainants in the case, that this was a part of the facts alleged by the prosecution, which facts were in many instances indicative of clear discrepancies as regards opportunity for identification and other facts relevant to prosecution's case. The jury, he further submits, in the face of the identification of the other co-accused of the appellant by the two complainants in the case, found him not guilty. In those circumstances, he says that the verdict is inconsistent and ought not to be allowed to stand.

We have examined carefully the evidence in the case and it is impossible to say with certainty what the reason was for the differentiation by the jury between the two appellants. Perhaps it is to be found in the directions of the learned trial judge shortly before /the.....

the jury retired to consider their verdict. Those directions are at page 19 of the record: "One thing I have omitted to tell you and that is, the accused man (Groves) gave evidence on oath in the witness box and it is your duty to weigh his evidence in the same scale, applying the same yardstick, the same method of assessment as you would for witnesses for the prosecution. You will now consider your verdict." It is to be observed that the appellant made a very brief unsworn statement.

From the circumstances and facts as were given in evidence at the trial we are unable to say that this verdict is in anyway unreasonable; and that ground of appeal therefore fails.

With regard to the first ground of appeal, that in view of the form of the indictment and of the fact that the co-accused of the appellant was acquitted, the verdict of robbery with aggravation cannot stand, Mr. McFarlane has submitted and referred us to certain authorities which tend to support the contention which he is advancing. He invites this Court to take the view that the verdict of robbery with aggravation should be set aside and that a verdict of robbery substituted therefor. With this submission, Mr. Orr, who appears on behalf of the Crown, is in agreement and it is the view of the Court that the verdict of the jury obviously negatived the circumstances of aggravation charged and, therefore, the verdict in its present form is unsustainable. In view of the fact, however, that in reaching that particular verdict the jury must have considered and accepted the evidence which established robbery, we are minded under the provisions of Section 23 (2) of the Judicial Appellate Jurisdiction Law 1962, No. 15 of 1962, to set aside the verdict of robbery with aggravation and substitute therefor a verdict of guilty of robbery; and in substitution for the sentence which was passed at the trial, we impose a sentence of 7 years hard labour on each count to run concurrently.

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