JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 122/87

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

REGINA

VS.

ISMAY SMITH
MICHAEL LINDSAY

Carlton Williams for the Applicants

Miss Y. Sibble for the Crown

February 23, 1988

ROWE P.:

Between the 13th and 14th of July last year the applicants Ismay Smith and Michael Lindsay were tried in the Clarendon Circuit Court by Mr. Justice Patterson and a jury on an indictment which contained four counts, two of which are no longer of any concern to us. They were convicted on counts one and two for burglary and robbery with aggravation. Smith was given a sentence of six years imprisonment and Lindsay a sentence of four years imprisonment. Two other men were convicted with them, they have not appealed or more precisely we do not at this time have any papers in relation to appeals by them but having regard to what we are about to say it is likely that one or other of them will wish to put in applications for leave to appeal out of time.

The prosecution's case, so far as can be gleaned from the summing-up, was that on the night of the 15th of January, 1987, a large group of men, either fourteen, fifteen or twenty-eight, but in any event, a large group of men, went to the home of Mr. Gladstone Brown in the dead of night at about 2 o'clock. One called out 'Police', and at that time somebody kicked down the door to his house and some fourteen or fifteen men entered into his one-room house.

Mr. Brown said that there was light in that house and he had a witness, Mr. Carradice, who was in the house with him. Mr. Carradice also said there was light but the Crown's case began to come apart at the seams when one witness said it was a "Home Sweet Home" lamp and the other one said it was a "tilly lamp" that lit up that room. In the final analysis no point turns on that discrepancy.

The Crown's case was that these men were armed with machetes, knives and sticks and on Mr. Brown's account, while the men were in the room with him, one man took down his pants which was hanging in that room and removed therefrom Two Hundred Dollars. He was taken outside and from there he was taken to a place called Wanstead, some three miles away. He remained captive for two hours while the men grilled him about ganja which they claimed had been stolen. Mr. Brown said he knew nothing about that. Mr. Brown also said that his bicycle was taken from his house that night while he was outside the house.

Mr. Carradice, the other Crown witness said that Mr. Brown was outside the house, he had been taken outside of the house by the men, when one Stone removed from the pants pocket the Two Hundred Dollars. He said that this taking was not done in the presence of the other accused persons nor was it done in the presence of Mr. Brown.

The learned trial judge directed the jury on the question of common design as he was obliged to do having regard to the facts of this case.

Now the police had given evidence that the applicant Smith said upon arrest: "Mi go at him house but mi never lick him," and one man Stone said: "Mi lick him officer, because him thief wi ganja."

The defence of all the applicants which was tendered in the form of long unsworn statements was that the five persons who were charged along with these two applicants engaged themselves in the communal cultivation of a ganja field, that when the ganja became ripe and was reaped it was left in a hut under the care of Mr. Brown, that Mr. Brown told them that he had found a purchaser, but one day before the sale could be arranged when five of them went to look at the place where the ganja was stored they found that it had been removed. They got information that the ganja had been removed by Mr. Brown. They each said that they went to Mr. Brown's hut at a separate plot of land, found him, and took him back to Wanstead. There they had a conversation with him. They interrogated him and in the process one man beat him. All the accused at trial including these two applicants said that they did not go to Mr. Brown's house on the night of the 15th; they did not steal anything from his house, and they did not beat him.

As we have said, the learned trial judge gave directions in relation to common design. He correctly told the jury that they must consider the charges separately in relation to each of the accused and he told them in relation to the joint enterprise that if one of the accused or one of the co-conspirators went beyond what had been agreed as part of the joint enterprise the others would not be liable for the consequences of the unauthorised act and he told them further that it was for them to decide in every case whether what had been done was part of the joint enterprise or went beyond it and was unauthorised by the joint enterprise.

When he came however, to deal further on with the case put forward by the prosecution he simply said:

> "The prosecution is saying that when these men entered they were all acting together, it was all part and parcel of a joint enterprise. They entered with knives, machetes and sticks.

> "There is some discrepancy in the evidence as to how many of them had machetes. We are told that all of them had knives and all had sticks although the last witness said that all fourteen men had hooky machetes, and having entered they took money from the pocket of Mr. Brown, they took money from under the mattress and they took a bicycle from inside the house. The intention, the prosecution is saying, if you accept that evidence, is that they intended to steal. That is one of the felonies that they intended to commit and Mr. Foreman and members of the jury, the intention the prosecution is saying is shown clearly in the second count, which is robbery with aggravation. The second count charges all five men that they on the 15th of January, 1987, in the parish of Clarendon being armed with offensive weapons, robbed Gladstone Brown of Two Hundred Dollars and a bicycle."

The complaint made by Mr. Williams is that when the learned trial judge came to leave the question of robbery and of burglary to the jury he simply told them that the prosecution was saying, "they," meaning all the accused men took the money, that "they", meaning all the accused, took the bicycle from inside the house and that the prosecution was saying, that "they," meaning all the accused intended to steal. We have accepted the submission as correct that it was the duty of the learned trial judge to have isolated the act of the man Stone and to have told the jury that if they believed that the act of Stone was the act of all the applicants, indeed of all the men, who went there, then they could infer that stealing was one of the purposes upon which these conspirators had agreed.

It is to be recalled that there was no evidence of any general searching of the premises. On the other hand there was evidence that the complainant, Mr. Brown, was taken from his home to Wanstead and he was kept there for two hours and therefore a possible inference arose that this large body of men had gone there with a view to taking Mr. Brown for interrogation. This inference clearly arose having regard to the way in which the men behaved on that particular night and this was not in any way put to the jury.

The learned trial judge invited the jury to say that the primary purpose for the visit of the men to Mr. Brown's house was to steal and as we have said there was an equally compelling inference that that was not their

intention. The man Stone could very well be acting completely on his own. We think therefore that the summing-up was defective and the applicants were deprived of the possibility of acquittal. Had the jury directed that not all of them were necessarily part of a pre-conceived plan to steal they may have returned an entirely different verdict.

For these reasons a majority of us are of the view that the conviction cannot stand and we therefore treat these applications for leave to appeal as the hearing of the appeal, the appeals are allowed, the convictions quashed, the sentences set aside and verdicts of acquittal entered.