J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS Nos. 218 and 220 of 1974

BEFORE: The Hon. President
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Henry, J.A. (Ag.)

R. v. CHARLES JONES and RAYMOND WHITE

Miss Sonia Jones for appellant Charles Jones.

Messrs. K. St. Bernard and R. Small for appellant Raymond White.

Mrs. Shirley Lewis for the Crown.

October 27, & November 9, 1976

Henry, J.A. (Ag.):

On October 27, 1976 the appeals in this matter were allowed and the convictions set aside. At that time we promised to put our reasons in writing. We now do so.

The appellants were two of three men jointly charged with robbery with aggravation of a revolver the property of one Martel Peterkin. They were tried together in the absence of the third man and convicted. Their applications for leave to appeal having been refused by a single judge they requested that the applications be considered and determined by the court.

The vital issue in this case was the question of identification. Mr. Peterkin in his evidence stated that all three of the men who robbed him were known to him prior to the incident and although he did not know their correct names he knew them as Scobel (the applicant Jones), Raymond (the applicant White) and Patter-foot, and he knew the street where White lived. He further went on to say in cross-examination that when he reported the matter

to the police he gave the names of the men as well as descriptions; and this was supported by evidence elicited from Cpl. Hall in cross-examination. If the jury accepted Mr. Peterkin as a witness of truth, if they accepted this evidence and if they were satisfied that the circumstances under which the robbery took place afforded him sufficient time and opportunity to recognize his assailants it is clear that they would have been fully justified in convicting the appellants. It is equally clear that Mr. Peterkin being the only prosecution witness on the question of identity his credit worthiness was a matter of vital importance. In the course of cross-examination certain passages from his deposition which appear inconsistent with his evidence were put to Mr. Peterkin and when he denied some of them the entire deposition was put in evidence. In our view only those portions of the deposition which were inconsistent and which the witness had denied ought properly to have been admitted in evidence and if this course had been adopted the error in the summing-up which we regard as fatal to the conviction would have been avoided. When he came to deal with the question of discrepancies the learned trial judge began by giving the jury directions to which no objection whatever could be taken. Unfortunately he concluded that part of his summing-up with the following words:

> " Now you will bear in mind the evidence given as to how the deposition was taken, and what explanation has been given. And you will bear in mind too this, that when it comes to variations between the deposition of a witness and his evidence in the trial you have to look at the nature of the variation and see what you make of them. But basically the important thing is that you should look to see whether there is a substantial agreement between what the witness has said here in this court and what he said at the preliminary inquiry into this matter. And if you find that there was substantial agreement between the witness' evidence in this court and the preliminary inquiry, then that is sufficient.
>
> You have heard the deposition read and in fact you will have the deposition with you when you retire, and you will have to decide whether there is in fact substantial agreement between what Mr. Peterkin has said in this court and what he said on a previous occasion before the magistrate, and, as I said, if you find there is substantial agreement, well, that would be sufficient; if you are not satisfied then, you decide what you make of these differences or variations;

> " to what extent do they affect the credit of Mr. Peterkin. Are those variations such that you can, that you can consider that Peterkin is a completely untruthful witness on whose evidence you cannot rely at all? Or, what is your view of Peterkin's evidence, taking into account these variations. So, that is how I suggest to you you look at these difference or variations on which comments have been made by counsel on both sides. "

These directions were clearly wrong. It invited the jury to do precisely what they were not entitled to do. In his evidence at the preliminary inquiry Mr. Peterkin had given substantially the same account of the robbery that he gave at the trial and he had identified the accused men as being the persons who robbed him. The jury may therefore well have felt that there was "substantial agreement" between what the witness said at the trial and what he said at the preliminary examination and that, following the directions of the learned trial judge this was sufficient. Indeed they may have been led to conclude that once there was this "substantial agreement" it was unnecessary to consider the "discrepancies or variations" at all. Ordinarily too much significance ought not to be attached to inconsistencies, but in this case the inconsistencies were in our view, of considerable importance. At the preliminary examination Mr. Peterkin had said inter alia that when he made the report to the police he did not tell the police that he knew the men or their names before. The jury were not of course entitled to act on this evidence in substitution for evidence to the contrary given at the trial but they were entitled to ask themselves why Mr. Peterkin had altered his testimony, why he denied having altered it and whether they could reply on his evidence in this regard at the trial. He was, on his own admission in court at the time when Det. Hall gave evidence at the preliminary examination. The suggestion of counsel for the appellants is that Mr. Peterkin tailored his evidence at the trial to fit that of Det. Hall. This is something which the jury were entitled to consider. If they rejected the evidence suggesting that Mr. Peterkin reported to the police the names of his attackers they may well have entertained grave doubts not only as to the extent to which they could rely on Mr. Peterkin's evidence but also as to the

extent to which they could rely on the evidence of Det. Hall. We are not unmindful of the fact that the jury saw Mr. Peterkin and were in the best position to assess his veracity. Nor are we unmindful that in all probability the jury were addressed by defence counsel as to the consequence of the inconsistencies in his evidence. We are however of the view that the directions of the learned trial judge in the passage we have quoted above may well have nullified both anything which may have been urged in this regard by defence counsel and what the learned trial judge himself said earlier in his summing-up. We considered the verdict in the circumstances to be unsafe and we therefore treated the applications for leave to appeal as appeals, allowed the appeals and set aside the convictions.

In view of what took place during the course of the trial we think it may be of assistance to set out by way of reminder the following principles.

Evidence given by a witness at a preliminary enquiry can never be treated as corroboration of his evidence at the trial. Evidence given by a witness at a preliminary enquiry is not relevant to the trial except in so far as such evidence conflicts with his evidence at the trial. If there is a conflict, the jury, having due regard to any explanation offered by the witness, are entitled to take that conflict into account for the purpose of deciding whether the evidence of the witness ought to be rejected as unreliable either generally or in so far as it conflicts with his earlier evidence. The jury cannot however reject the evidence at the trial and act instead on the evidence at the preliminary enquiry unless the witness admits that the conflicting evidence at the preliminary enquiry was truthful.

A police station diary is not a public document. Evidence as to the contents of an entry in a station diary cannot therefore be led to establish the truth of such contents but only to establish the fact that such an entry was made. The fact that the entry was made can generally be relevant only as to the

credit of the person who made it and evidence of that fact must therefore come from that person. It follows that where for the purpose of impeaching the credit of a witness a particular entry by him is put in evidence other entries in the diary even though relating to the same subject matter do not automatically go into evidence with it.