JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 61/89

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. LEE PERRY

Delroy Chuck & Miss Helen Birch for the Appellant

Mrs. L. Errar-Gayle for the Crown

November 5 & December 17, 1990

FORTE, J.A.:

This is an appeal from the appellant's conviction on the 5th April, 1989 in the St. James Circuit Court for the offences of burglary and robbery with aggravation and for which he was sentenced to seven years and ten years respectively, the sentences ordered to run concurrently.

On the 5th November, 1990 we heard the arguments, dismissed the appeal and promised to put our reasons in writing. This we now do.

The facts out of which the convictions arose are set out hereunder.

In the night of the 2nd September 1987, the home of Mr. James Snead, was broken into, while he and his wife were asleep in bed. He awoke to find two men standing over his bed. They were both armed with knives and exhibited violence to him stabbing him in his left side and threatening other acts of violence if he did not produce money. In fear, he opened his

safe from which the men took approximately U.S $2,000.00 and J$500.00. A Rolex wrist-watch which he was wearing was also taken from him. In the end, having searched the room, the men took other items of jewellery, a television and a video set. It was later discovered that they had also taken Mr. Snead's car. After their departure, it was discovered that a louvre blade was missing from a window in a bathroom upstairs and that the front of the house that had been locked at 11.00 p.m. on the previous night was open. Neither Mr. Snead nor his wife subsequently made any attempt to identify the appellant as one of the men who came into their home.

However some days after, the appellant was arrested and brought to the police station. It was there while he was in custody, that the relevance of a watch taken from his hand when he was brought into custody, was discovered. He called from the cell to Cons. Hamilton, one of the investigators in the case, saying "Mr. Hammie like how you have access to the watch, see if you can mask it for mi and I will give you a money". Cons. Hamilton, who understood that the appellant was then asking him to hide the watch, became aware that some connection existed between the watch and the investigations he was undertaking. Consequently, he made further investigations, and true enough the watch taken from the appellant was subsequently identified by Mr. Snead as the stolen Rolex watch, which had been forcibly taken from his hand on the night of the robbery.

The prosecution also alleged that the appellant gave a caution statement admitting his participation in the offences of burglary and robbery for which he was charged. As this forms the substance of the only ground of appeal argued, it will be dealt with later in this judgment.

The appellant was subsequently arrested and charged with the offences and on being cautioned said "A Bunny force me into it sir".

At a later date, after the appellant had been brought to Court, and during the course of the preliminary examination into the charges, the complainant Mr. Snead, on attending Court, observed and subsequently positively identified a pair of "Sneakers" shoes the appellant was then wearing, as his, and as one missing from his home on the night of the robbery.

In his defence, the appellant made an unsworn statement, in which he denied any participation or presence at the robbery. In respect of the "Sneakers" he alleged that they belonged to him, having been given to him by his mother. He maintained that he gave no caution statement to the police; that he was beaten as a result of which he signed a statement presented to him by the police.

It is this statement which formed the basis for the complaint in this appeal. It arose from the fact that at the trial, the prosecution led evidence to prove that the original caution statement taken from the appellant had been lost at a time after it had been tendered and admitted in evidence at the preliminary examination, and had remained lost at the time of the trial. As a result, evidence was also produced to prove the accuracy of the typed copy statement which was tendered for admission. This was done through the evidence of Miss Rose Lightfoot, the typist employed to the Court's office who gave unchallenged evidence that it wasshe who had typed the produced copy. She had done so from the original, after which she checked it against the original for accuracy. In the face of no challenge of the witness and no objection to secondary

evidence (i.e. the copy) of the statement being admitted, the learned trial judge after conducting a voire dire in relation to the voluntariness of the statement, admitted it in evidence.

Before us, Mr. Delroy Chuck for the appellant abandoned the original grounds of appeal and sought and was given permission to argue the following ground of appeal:

> "The learned trial judge failed to adequately direct the jury on the weight to be attributed to the caution statement."

In developing his arguments, Mr. Chuck stated that he had no complaint in respect of the admission into evidence of the secondary evidence i.e. the typed copy of the caution statement. He, however contended that the learned trial judge should have given clear and specific directions to the jury that the statement in evidence, being a typed copy, as opposed to the original or even a photocopy, was not the best evidence, and consequently they should approach it with care in determining what weight they could give to it. No cases were cited to support this contention. The learned trial judge dealt with the caution statement in this way:

> "The statement, having been put in evidence, it is a matter for you as the judges of the facts to decide, first of all, whether or not that statement was made. If the answer to that question is 'yes' ..... If you decide that you accept the evidence of the police that that statement was freely and voluntarily given, then you go on to ask yourselves, what does the statement mean? ..... And, finally, Mr. Foreman and Members of the Jury, it is for you to decide what weight and value you attach to that caution statement".

Though in this passage the learned trial judge did direct the jury on how to treat with the caution statement there is no specific directions in the terms advanced by learned counsel for the appellant.

These were circumstances in which the maker of the copy having testified that the typed copy was checked against the original and found to be correct, was never challenged in cross-examination in respect of that evidence, nor was any challenge made to the content and substance of the statement. The appellant's contention at the time of the voire dire, and again before the jury, related not to the inaccuracy of the copy statement as regards the lost original, but to the signing of the statement, as he alleged that he was compelled, through threats and violence to sign an already prepared statement i.e. not one given by him.

In our view, where secondary evidence of a caution statement is admitted into evidence, there is no duty on the trial judge to give specific directions to the jury unless there has been some dispute as to its accuracy. As no such issue arose in this case, there was no obligation on the learned trial judge to give the directions for which the appellant contends. It is our opinion that in the circumstances of this case, where there was no dispute as to the content of the statement and as to its accuracy, the omission of the learned trial judge to give such directions cannot be a cause for complaint. In any event, we agree with the submissions of Counsel for the Crown that there was ample evidence in the case independent of the caution statement and upon which the jury could have correctly come to their verdict.

The possession of the watch and of the pair of "Sneakers" was evidence from which the jury could have inferred that the appellant was either the thief, or that he received them knowing them to be stolen. The appellant was not charged for receiving, but in any event the evidence of his possession of these articles supported his conviction for burglary and robbery when considered together with the evidence of:

(1) the appellant's conduct in relation to the watch when he asked the Constable to 'mask' (hide) it for him, and

(2) the appellant's oral statement to the Constable after arrest and caution i.e. 'A Bunny force me into it sir' which in our view amounted to an admission of his presence at the commission of the offences.

For those reasons, we dismissed the appeal and affirmed the convictions and sentences.