J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 140/69

BEFORE: The Hon. President
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Edun (Ag.)

R. v LEONARD JOHNSON

Mr. H. Edwards for the Crown
Mr. Charles Leiba for Appellant

14th April, 1970

ECCLESTON, J. A.

The appellant was convicted in the Home Circuit Court, Kingston on the 18th of December 1969. He was granted leave to appeal by a single judge. He was charged jointly with Lloyd Davis on an indictment for robbery with aggravation contrary to Section 34 Sub-section 1(b) of the Larceny Law Chap. 212.

The particulars of offence were that Lloyd Davis and Leonard Johnson and a certain other person unknown on the 15th day of September 1968 in the parish of St. Andrew, being armed with a revolver together robbed George Chambers of a Smith and Weston revolver.

The case for the crown consisted mainly of the evidence of George Chambers, a Security Guard, who was riding his bicycle on his way home toward Seaward Pen from his work at Lyon's Wharf. On reaching the junction of Australia and Binns' Roads he saw three men standing on the bank opposite to where he was riding. Two of the men were the two accused whom he said were known to him as "Muggy", that is Davis, for five to six years and "Putter", that is Johnson, for five years. Johnson, he says, ran across, grabbed his two hands and Davis came across with a revolver, pointed it at his belly, pulled the trigger twice but nothing went off. He was frightened and took his eyes off Davis and then he heard an explosion from

the revolver. He was however, not shot. Davis then hit him on the head using the butt of the revolver, giving him a wound which bled. Johnson took from his, Chambers's back pocket, a revolver which he Chambers was carrying and both men left together, riding away in the same direction. They were the only two persons who approached and interfered with him. He went to the Olympic Way police station where he made a report and afterwards to the public hospital where he received treatment. On the following day he went to the same police station and made a report to Detective Corporal Reynolds and handed over to him a pair of trousers which had a torn pocket. The other witness for the crown was Detective Reynolds who made investigations and arrested the accused.

The appellant gave evidence on oath and his defence was an alibi. He said that on the night of the 14th of September he had gone to a dance where he had imbibed too much drink and went home and slept it off, and only after he was awakened by his cousin, Iona, next morning, that he heard from her of the incident of a man being held up and his gun taken away. He said he remained at home all that day. He denied knowing Chambers or the accused Davis. He stated that he was not present nor did he do that act. He called no witnesses.

The defence of Davis was also an alibi. He called a witness, Kenneth Webb, a schoolboy of 15 years of age who said that he was in his yard at 37 Australia Road, when he saw Chambers riding by on his bicycle. He saw two men grab Chambers backways off the bicycle. One pushed his hand in Chambers' pocket and took his gun and when they saw the crown coming down on them they hit Chambers on the head and rode away down Australia Road. He says that he knew Davis and that Davis was not oneof those two men. He described the men, one as short and brown and the other as tall, thick and black with a big body. He said he did not see either Davis or Johnson at the scene that morning when Chambers was robbed. He said Chambers asked him a week before the trial if he was there when he was robbed and he told him yes. He said Chambers told him to say in court that it was Johnson and Davis who did it, displaying in his presence a Ten Dollar note, but he did not agree to say so in court.

There was further evidence by Davis' sister, Gloria, that Davis slept at home on that night.

One ground of appeal has been taken, namely, that the verdict is unreasonable having regard to the evidence.

Counsel for the appellant has stressed that the verdict of the jury is inconsistent as they accepted evidence from Chambers, the only witness for the prosecution as to the facts and convicted Johnson and at the same time they rejected evidence from Chambers and acquitted Davis. Counsel's complaint is that the credibility of the complaining witness is not divisible and so if Davis is found not guilty Johnson should also be found not guilty.

Counsel for the crown has informed the court that because of the inconsistencies in the evidence of Chambers he is not in a position to support the conviction and directed the court's attention in particular to page 30 paragraph 2 of the record where it is apparent that the learned trial judge in his summing-up expressed the view that the evidence of Chambers was unreliable. At page 5 of the record the learned trial judge had this to say:

> "If you are satisfied that Davis and Johnson were acting in concert, were acting together, that they intended together to rob Mr. Chambers and what they did was in pursuance of this intention to rob Mr. Chambers and that it was in pursuance of that intention Johnson took this revolver from Mr. Chambers's pocket as he told you, then the taking by Johnson would equally be a taking by Davis. If you are satisfied that they were acting in concert. If you were to come to the conclusion that they were not acting in concert, that they were acting independently of each other, then there would be no taking by Davis and you could only convict him of an offence subject to what I will tell you later on as to his presenting his revolver to Mr. Chambers in the circumstances and in the way he did. But if you feel he was acting independently of Johnson you couldn't convict him of this offence of robbery with aggravation, you would have to acquit him."

Further at pages 9 and 10 the learned trial judge had this to say:

> "You have to be satisfied that the taking was by violence or putting him in fear and there is no evidence on which you can say that Johnson himself did anything which could amount to putting Mr. Chambers in fear but if you believe that Johnson was acting in concert with Davis and that Mr. Chambers was in fear having had this revolver presented to him and apparently an attempt made to fire it at him, then it would be open to you to say that the action of Davis was the action of Johnson therefore the taking by Johnson was by violence and putting him in fear. On the other hand if you were to come to the conclusion that Johnson acted independently of Davis you could not convict him of robbery with aggravation but it would be open to you to convict him of larceny from the person. You have to be satisfied

> before you find robbery with aggravation that this accused Johnson acted together with someone else in the course of this robbery. Of course, if you are satisfied that he acted in concert with Davis it would be open to you to convict him of robbery with aggravation as he is charged."

At page 25 the record discloses the following;

> "Members of the Jury, have you arrived at your verdict?
> We have.
> Is your verdict unanimous? That is are you all agreed?
> We are all agreed.
> How say you, is the accused Lloyd Davis guilty or not guilty of this charge?
> Lloyd Davis is not guilty.
> Is Leonard Johnson guilty or not guilty?
> Guilty as charged, and so say all of us."

There has been no complaint with the directions of the learned trial judge but it does appear strange that after the jury had acquitted Davis he should have accepted their verdict that Johnson was guilty of robbery with aggravation which verdict did not accord with his directions. According to his directions, at most Johnson could only have been guilty of larceny from the person.

A court of appeal has power to substitute the correct verdict where the verdict is irregular. However, in this case the evidence of Chambers in cross-examination so teems with inconsistencies when compared with that in-chief, and on material aspect so replete with contradictions, when compared with that of Detective Corporal Reynolds to whom he made his report in particular, as regards the identity of these two accused and his means of knowledge, that for the verdict to stand it would amount to the credibility of this witness being treated as divisible and accepted against one accused and rejected against the other and this could not be done. It maybe helpful to turn to the case of R. v Hunt (1968)2AER 1056 for guidance. Lord Parker, Chief Justice at page 1058,D, states:

> "There is a useful passage in regard to the approach that the court should make which is a judgment given by Devlin J. in R. v Stone (unreported) in this court in 1954. Devlin J. there said when an appellant seeks to persuade this court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict the burden is plainly on him. He must satisfy the court that the two verdicts cannot stand together meaning thereby, that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion and once one assumes that they were an unreasonable jury or that they could not have reasonably come to the conclusion then the conviction cannot stand but the burden is on the defence to establish that."

Applying that approach this court is satisfied that no reasonable

jury who had applied their mind properly to the facts in this case could have arrived at the conclusion they did. This is not a case of substituting a verdict where one is found to be irregular, but rather that it would be unsafe to let the verdict stand.

The appeal is allowed, conviction quashed, the sentence set aside.