J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 176/74

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

REGINA v. LOCKSLEY HUTCHINSON

Mr. Howard Hamilton for the appellant.

Mr. O. Parkin for the Crown.

December 18, 19, 1975 and
February 20, 1976

Swaby, J.A.:

On September 27, 1974 the appellant was convicted before Robotham, J. and a jury in the Home Circuit Court on an indictment charging him with robbery with aggravation; the particulars being that he, and certain other persons unknown, on the first day of January, 1972 in the parish of St. Andrew, being armed with a gun and knives together robbed Dennis Charles of twenty dollars, two pens and a travel pass the property of the said Dennis Charles. He was sentenced to imprisonment at hard labour for a period of ten years.

On the hearing of the application the appellant's counsel obtained the leave of this Court to argue the undermentioned supplementary ground of appeal and he elected to abandon the original grounds of appeal filed and confined his arguments to the supplementary ground, namely -

> "The learned trial judge committed a grave error when at the commencement of his summation he informed the jury, at page 2, "Another one by the name of Dixon has been tried and sentenced to a term of imprisonment;" thereby indicating to the jury that the accused was an associate of a convicted criminal, which information could have nothing but a prejudicial effect upon the accused's case."

The question at issue arose in the following way. The appellant was charged jointly with certain other persons unknown with robbing Dennis Charles of the articles set out in the particulars of the indictment and it was always the case for the Crown that the appellant and two other men were together acting with a common purpose when Dennis Charles was robbed. The appellant, however, was tried alone, the fact being that he was not arrested until almost 2 years after the commission of the alleged offence whereas one Dixon, one of the accomplices, had been arrested the very night of the alleged offence, convicted and sentenced long prior to the trial of the appellant.

Dennis Charles' evidence was to the effect that at around 12.30 on the morning of January 1, 1972 he was walking along Harewood Drive in the parish of St. Andrew when he saw three men, (none of whom he previously knew) coming towards him. One of them asked him for a cigarette which he handed to one of them. He was about to move off when he

gun, searched the breast pocket of his shirt whilst the two with ratchet knives, one of whom was the appellant, searched the side and back pockets of his trousers taking away the articles abovementioned.

Charles further alleged that whilst the robbers were searching him he could make them out by the reflection of the street lights which were a normal distance apart, and also by the lights of a motor car which shone on them as it drove up and turned into nearby premises. The robbers then ran away. He then set out to go to the Maverley Police Station but on seeing a police car come up he made a report to the police and they accompanied him to the scene of the incident in search of the robbers where under a bridge nearby two of them, (neither being the appellant) were seen. They ran as the police approached them. These two were eventually arrested and one of them tried, but although he had seen the appellant on some three or more occasions after January first, 1972 and had tried to apprehend him he did not succeed in so doing until December 24, 1973 after he had boarded a J.O.S. omnibus travelling down Washington Boulevard from Dunrobin Avenue, when the appellant who was already on the bus approached him and said to him "What a way you make Cookie get ten years", to which he replied, "You mean you hold me up and I am trying to forget it, and you see me and asking me about it? Do you still carry a ratchet knife because the other times when I saw you you always draw a ratchet knife at me". Dennis Charles testified that he had understood the reference to 'Cookie' to be

The appellant who gave evidence on oath said that he could not remember where he was on January 1, 1972, but he took no part in any robbery of Dennis Charles or any other person. He did not know anyone by the name of 'Cookie'. He admitted having been on a J.O.S. bus on December 24, 1973, but denied Charles' allegation regarding the conversation they had on the bus. He said that it was Charles who asked him where he was coming from and he in answer asked Charles why he had asked him that question, and Charles is alleged to have said it was because he resembled a man who had robbed him, whereupon the appellant replied that he knew nothing about what Charles was saying. Charles had denied that he had any such conversation with the appellant.

Counsel for the appellant made two main submissions concerning the admission of the evidence relating to Dixon's conviction for the same robbery, submitting that such evidence was gravely prejudicial to the appellant, since it implied that he was a person of bad character because he associated with robbers; and secondly that upon that disclosure, the learned trial judge should have discharged the jury and ordered a new trial or failing that should at least have expressly warned the jury to disregard Dixon's bad character in considering the case against the appellant. The trial judge he contended had not taken either course, and he further complained that the judge more than once referred to this inadmissible evidence. It was admitted that counsel for the prisoner at the trial, who was not the counsel for him in this Court, made no objection to the admission of this evidence or

Stirland v D.P.P. (1944) 2 All E.R. 13 were cited with approval. With the principles enunciated in these cases we are well familiar. The cardinal issue in the instant case is as to whether the statement, albeit alleged to have been made by the appellant, "What a way you make 'Cookie' get ten years" was admissible, and if not, whether the trial judge had taken sufficiently effective steps to remove from the trial the admittedly prejudicial consequences of such admission. The relevance of the statement to the proof of the guilt of the appellant was non-existent. The fact that Dixon had been convicted of the robbery afforded no proof that of the other two participants the appellant was one. That the statement was capable of prejudice to the appellant there can be no doubt, and so one now must look to the summing up of the learned trial judge to determine whether, to use the words of the appellant's counsel, he had expressly warned the jury to disregard Dixon's bad character in considering the case against the appellant. Very early in his directions this warning appeared -

> "You have heard evidence from Mr. Charles himself that it was three men who robbed him and he told you in his evidence that two of those men were held and of the two who were held, one absconded and apparently has not been tried. Another one by the name of Dickson has been tried and sentenced to a term of imprisonment. You are not to allow the fact that one man has already been convicted on evidence given by Mr. Charles to influence you at all in considering the case against this accused man. That was another jury, and you must be satisfied by the evidence given before you in this case, you must be satisfied from his testimony that this was one of the men who robbed him, and the conviction of Dickson must not influence you at all; because, Members of the Jury, he might be quite right that Dickson was one of the men and quite wrong when he says that this accused man was also one of the men who robbed

> "The accused approached him and spoke first. The accused spoke to him and said, "What a way you make Cookie get ten years"? He said he understood him to be referring to Dixon. Members of the Jury, I must warn you that if you find that he did say this, that does not necessarily mean that he was with Cookie on the night in question. He might have had this information elsewhere that Cookie had got ten years for robbing him. This statement, even if you find that he did make it does not necessarily put him at the scene; it is something that you must take into consideration in considering the whole of the evidence."

The importance of satisfying themselves as to the identity of the appellant was left by the trial judge for the jury's consideration in these terms -

> "Members of the Jury, the important factor in the case turns solely on the issue of the identity of the accused man. It is solely on the evidence of Mr. Charles that you are being asked to say that this accused man was one of the three men who robbed him on the night in question. Mr. Charles might be quite certain in his own mind that this accused man is one of the three, but your function is to satisfy yourselves, for you must be satisfied that Mr. Charles is not making a mistake when he says that this man was one of the three men and that he had the knife in his side, one of the knives. When you come to consider the question of identity, Members of the Jury, you must do it in the light of the surrounding circumstances. You examine the length of time that the man had to observe his attackers; you look at their relative positions, the positions in which they were standing, you look at the distance they were away from one another and you also take into consideration what visual aids he had on the night in question to assist him. When you look at all those surrounding circumstances in the light of these particular factors, and you are satisfied in your own minds that Mr. Charles is right and he is making no mistake when he says that this accused was one of the three men, then and only then you can convict him. If you have any doubt at all about the identity of the man then you could not properly return a verdict of guilty in this case."

The trial judge concluded his summing-up thus -

> "..... If you accept what the accused man has told you, that he knows nothing about this robbery then you have to find him not guilty. If you are left in a state of doubt, you will have to find him

We consider that by these directions the judge adequately discharged the duty of warning the jury to disregard the conviction of Dixon in considering the case against the appellant. That case as the learned trial judge repeatedly emphasized indeed rested only upon the testimony of Dennis Charles as to his identity of the appellant as being one of the three men who robbed him and whom he had on several occasions attempted to apprehend and finally succeeded in doing so on December 24, 1973.
It was therefore open for the jury properly directed as they were to find as they did. For these reasons we dismissed the appeal and confirmed the conviction and sentence.