

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 21 & 22 of 1970

BEFORE: The Hon. President.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.

REGINA v. ROYSTON ENGLISH
AND
GEORGE YOUNG

Horace Edwards Q.C. for the Crown
Frank Phipps Q.C. and Earl DeLisser for
English
Z.L. Khan for Young

Heard: November 11th, 12th, 13th, 1970
December 18th, 1970

FOX, J.A.

The appellants were convicted in the Home Circuit Court on 12th February, 1970 for robbery with aggravation. Each was sentenced to imprisonment with hard labour for eight years with three lashes. The Crown's case rested in the main upon the evidence of Roy Wong. He said that at about 7.45 a.m. on the 2nd August, 1969 he came to his business premises at 16 $\frac{1}{2}$ Luke Lane, Kingston. He was walking along a passage towards his office when English called to him from behind. He stopped. English came from the street into the passage and held him up with a gun. Young then came from the street into the passage, and whilst English continued to hold him up with the gun, Young took the money and an automatic pistol which he had on his person. Both appellants then tied him and left. He released himself and made a report at a police station. At about 10.00 p.m. on the 8th August, Wong saw Young coming from a club on East Queen Street in Kingston, and pointed him out to Detective Phillips. The Detective accosted Young. Wong came up and accused Young of being "one of the men who held me up and took away my money and my revolver". Young said nothing. Detective Phillips took him to the Central Police Station. Wong accompanied them. The Detective left Wong and Young in the station yard, and went to the C.I.D. office. He returned to them after a short period. When the Detective left them, Wong said that he had a conversation

with Young. Wong said he asked Young "why he, a Chinese should do a thing like that". Young replied, "This job was on the market and if I did not come somebody else would have come and he might have hurt you". Wong told him that he would like to get back the gun. Young said, "A syndicate is involved and I will have to contact the other members of the gang first". At this point, Detective Phillips rejoined them and Young said, "If you let me go I will bring back the gun tomorrow and give you". Detective Phillips corroborated Wong as to the details of what occurred on East Queen Street, of having left Wong and Young in the station yard, of going to the C.I.D. office, of seeing Wong and Young in conversation, and of hearing the statement made by Young as he rejoined the two men. English was pointed out by Wong at an Identification Parade on 28th August, 1969.

In summing up, the trial Judge emphasised that Wong was the only witness who had testified as to the robbery and the identity of both accused, and he stressed that

"in order for you to convict the accused or either of them, you must believe in Wong as a witness of truth and accept his evidence. If you do not regard him as a witness of truth or you are left in reasonable doubt regarding his veracity, acquit the accused".

In discussing the evidence of Wong and Detective Phillips as to the events of the night of the 8th August, the Judge said:

"There were some aspects of this evidence, which I think I should make comment about. As you will observe for yourselves, Young is of Chinese extract. Wong, the complainant, is also of Chinese extract and it is a natural question, having regard to the infrequency with which Chinese are brought before the Courts for this type of offence that Wong should have asked Young why a Chinese should do a thing like that; and Young said "this job was on the market and if I did not come somebody else would have come and he might have hurt you". At that stage, Wong may have said, depending on how you interpret the expression, how you feel about it - "well, this man has committed a crime on me, but at the same time it is my fellow countryman and he doesn't seem to be too harshly disposed towards me, so I wonder if I can get back my gun?" So he proceeded and he says: "I then told him" - this is Wong in his evidence to you - "that I would like to get back the gun." And he replied, that is, Young replied: "A syndicate is involved; I will have to contact the other members of the gang first".

And at that stage Young is endeavouring to communicate to Wong that the decision as to whether he should get back the gun or not does not lie solely with him. Others have to be consulted about it.

After Young has been taken to the police station and Phillips is inside the CID room, Wong tells us of a conversation that took place between Young and himself. We don't know what the details of that conversation was, but then, at that stage Young was on the point of being taken into custody but he was still in the police yard. And Det. Phillips tells you, if you believe him, that he was present and heard Young saying: "If you let me go I will give you back the gun tomorrow." And Wong also supports that this statement was made. Counsel for the defence quite rightly attacked the veracity of this bit of evidence. But if you accept Wong as a witness of truth and you believe this was said and you also accept Det. Phillips as a witness of truth that he heard it said, then you will be quite right to act upon it; because up to this stage maybe that ground was open that since Wong's greatest concern in this matter was not so much even the money that he lost but the getting back of the pistol, then he, not having been arrested yet and the matter still being under investigation, if his words were accepted that the gun would be returned, perhaps he would not be arrested. He would be just that lucky, and it may very well be that he used the expression at that time with the hope of avoiding detention or arrest. But that is entirely a matter for you to accept or reject and to act upon it if you accept it as the truth."

The complaint on appeal is concerned with implications in this passage. Firstly it was pointed out that the Judge did not advert the jury's mind to the possibility that the conversation which Wong alleged took place between himself and the appellant Young might have been a concoction conceived for the purpose of re-inforcing Wong's identification of Young - a concoction in which Detective Phillips had participated by swearing that he heard the tail end of the conversation when Young, according to the version of the detective, was alleged to have said, "If you let me go, me give you back the gun tomorrow, Sir". It was urged that the Judge should have stressed the 'afterthought' element in this evidence in that Wong admitted that he had not spoken of this conversation before the trial. The omission was all the more serious, submitted Counsel, in view of the circumstance that the Judge had expressed

an opinion in favour of the veracity of the evidence in saying that it was a 'natural question' when Wong asked Young why a Chinese should do a thing like that. Secondly, it was contended that the Judge had failed to give proper directions as to the manner in which they should approach assessment of the evidence of the conversation between Wong and Young. It was in the nature of a confession. The jury should have been told that "what weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit". (Lord Parker C.J. in R. v. Burgess [1968] 2 All E.R. 54 at 55). Directed in this way, suggested Counsel, the jury might have taken the view that although the words were said by Young, he had neither the power nor the ability to return the gun, in fact knew nothing about it, but had made the statement without sincerity; recklessly, so to speak, and solely for the purpose of securing his release. If the jury took this view, or had a doubt about it, then, submitted Counsel, the evidence was of no weight in proving the guilt of Young.

In considering these complaints, it must not be overlooked that there is no suggestion that the Judge misquoted the details of the conversation to the jury, or that he had failed to make it clear that it was for them to decide whether it had taken place. The gravamen of the first complaint is that discussion of the evidence had been slanted so heavily and entirely in favour of its acceptance that this constituted a failure to put the defence to the jury adequately. In effect what really happened was that in the course of reviewing the evidence the Judge indicated an approach which favoured its acceptance by the Jury and omitted reference to the 'afterthought' element which, it was urged, may have thrown some doubt on the testimony of the witnesses. We cannot agree that this is so serious a defect as to warrant interference with the verdict of the jury. Test it in this manner. Suppose the Judge had indeed referred to the 'afterthought' aspect of the evidence which is suggested, and had gone on to express his own view against any thinking by the Jury along these lines, would this necessarily constitute a misdirection as to the evidence? We think not. So long as the fact of the conversation was left to the Jury to decide, and the Judge had not usurped their function, he would have been entitled to express his opinion strongly. At the very outset of his summing up

the Judge said,

"It is my duty to assist you on the facts. If, therefore, in the course of my summing up to you I express any views as to what facts you should accept or what inference you should draw, if you agree with my views you may adopt them as your own and act upon them. If you do not agree with them it is your duty to discard them and substitute your own views. It is your verdict that is asked for on the facts in this case".

In addition, after commenting on the evidence of the conversation, it should not be overlooked that the Judge reminded the Jury that it was entirely a matter for them to accept or reject and to act upon if it was accepted as the truth.

Look at the matter of this first complaint from another angle. In relation to the allegations in the evidence, what really was the answer of the defence? Wong was cross-examined at length to show that he was not speaking the truth when he insisted that the conversation did take place. It was put to Detective Phillips also that he was lying. No particular motive was suggested to either witness for the fabrication. By the questions which he asked, Counsel for the defence was content to indicate that the central issue for the Jury's consideration was whether the conversation had in fact taken place. When Young came to make his unsworn statement from the dock he said not one word in denial of the conversation. He merely supplied the material for the alibi which was his substantial defence at the trial, and left the evidence in support of the Crown's case on this aspect uncontradicted. The explanation given by Wong as to why he had said nothing about the conversation until the trial was that he was not asked. This is a reasonable explanation. When Detective Phillips came to give evidence, it was not elicited from him whether he was telling for the first time what he had heard Young say. In this state of the evidence, it is impossible to maintain that there had been a misdirection as to the facts, and a failure to put the defence of Young adequately to the Jury simply because the Judge had left the question of the conversation as a straightforward issue for their decision, and had not thought it necessary to mention a consideration which had been so tentatively articulated during the cross-examination of Wong, and which had not been pursued when Detective Phillips gave evidence later. The critical feature

of the evidence is, of course, the agreement between Wong and Detective Phillips as to what Young finally said. It is at this point that the fabrication would have reached its climax. It is here that it was reasonable to expect that the suggestion of concoction would have been most strenuously put to both witnesses. But nothing of the sort took place. Instead, as the trial progressed, there was a distinct indication that the heart had gone out of the defence on this aspect of the case, and when Young came to make his statement from the dock, it had quietly expired. So that, although (as the Judge pointed out) Counsel for the defence attacked the veracity of the evidence of Detective Phillips and Wong as to what Young had said at the station about the return of the gun;- and in so attacking that evidence, Counsel could not have failed to address strongly on the suggestion that the confession was concocted; - it is reasonably certain that when they came to evaluate the evidence the Jury could have had no difficulty in dismissing the idea of the witnesses having conspired together to commit perjury.

The second complaint must be examined in the light of the defence. Evidence of a confession is vulnerable at three points. It may be attacked on the ground that the confession was not voluntary. In such a situation, the Jury must carefully consider the circumstances in which it was made, and should receive a clear direction to this effect along the lines stated by Lord Parker C.J. in R. v. Burgess. Secondly, it may be contended that the confession was never made. In such a case, the critical issue is a simple one of fact. Thirdly, and not as frequently encountered as the first two, it may be argued that the words spoken do not amount to a confession. When this happens, the Judge may have to explain the different meanings of which the words are capable. The defence should indicate by cross-examination of the Crown's witnesses the particular ground upon which it proposes to dispute the confession. This was done in this case. The suggestion to Wong and Detective Phillips was that they were not speaking the truth as to the conversation; it had not occurred. The Judge was therefore entirely right in leaving it to the Jury to decide as a simple question of fact whether the conversation had taken place. There was never any suggestion at the trial that the words were capable of the innocent significance expounded on appeal, and in our view a direction to this effect

was unnecessary. The Judge went on to tell the Jury that if they accepted the conversation as related by the two witnesses, they were entitled to act upon it. Clearly, the Jury must have understood from this direction that in arriving at their verdict they were free to give the evidence such significance as they thought fit. It is true that the Judge did not tell the Jury that it was left to them to say what was the weight and the effect of the evidence, and that their decision on this point depended upon all the circumstances in which the confession was made. There is no real harm in this omission. The statement of Lord Parker C.J. in *R. v. Burgess* was not made in vacuo. The learned Judge was delivering a judgment of the Court of Appeal in a case where the appellant had alleged that statements had been extracted from him by force; they were not voluntary, and they were false. In recognising the new development which had been given to the law by the Privy Council in *Chan Wai Keung v Reginam* [1967] 1 All E.R.948, Lord Parker said (at p.55) "The position now is that the admissibility is a matter for the Judge; and it is therefore unnecessary to leave the same matter to the jury;" and went on to say what the Jury should be told. This form of direction is particularly desirable where the evidence of a confession is being disputed on the ground that it is not voluntary and false. It appraises the Jury of their right to consider the allegations of the defence as to the circumstances in which the confession was made and to give effect to their view by way of the value they were prepared to attach to the confession. So that, if a Jury thought that a confession was not voluntary and for that reason doubted its veracity, then despite the ruling of the Judge that the evidence was admissible because in his estimation it was voluntary, the Jury would be justified if it gave the confession no weight at all.

In this case the significance of the confession would have been obvious to any person of average intelligence. This significance had not been challenged. The defence relied solely on suggestions unsupported by evidence, that the witnesses for the Crown were lying. Acceptance of Wong and Detective Phillips as witnesses of truth was therefore the critical and the only circumstance upon which the weight and the effect of their evidence depended. There was really no other relevant circumstance about which the Jury could have been told. The omission to direct the Jury along the

precise lines indicated by Lord Parker is therefore not open to any real objection.

This appeal occupied four days in submission before us. It has occasioned extensive examination of the summing up and the printed evidence, and a careful, and at times anxious consideration of the submissions of Counsel. In the end, we are satisfied that the appeal of Young is without merit and must fail. The evidence is overwhelming if believed. The Jury arrived at their verdict within twelve minutes and it is evident that they encountered no difficulty in accepting the Crown's case. The appeal of English was stated by Counsel to depend entirely on the result of the appeal of Young. Consequently, without stating the details of the argument advanced by Counsel it is sufficient to say that the appeal of English also fails.

18th December 1970

On the application of Phipps, Q.C. order for sentences to run as from 21st September 1970.