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IN THE COURT OF APPEAL

CIRCUIT COURT APPEAL NO. 171/64

BEFORE: The Hon. Mr.Justice Duffus, President
The Hon, Mr.Justice Henriques
The Hon. Mr.Justice Waddington

R. v. LLOYD HENRY

Mr. N. Samuels for the Appellant
Mr. C.B.F. Orr for the Crown

November 17, 19, 22, 1965
and December 13, 1965

REASONS FOR JUDGMENT

DUFFUS, P.,

The appellant was convicted in the Circuit Court for the parish of St. Ann on the 10th of November, 1964, on seven counts of an indictment which contained ten counts. At the conclusion of the hearing of the appeal on the 22nd of November, 1965, we dismissed the appeal in respect to convictions and sentences on five of the counts, but allowed the appeal on two counts and promised to put our reasons in writing later, which we now do.

The appellant was convicted on the following counts:- Count 1 which charged school-house breaking and larceny on the 9th or 10th of June, 1964; count 3 which charged warehouse breaking and larceny on either of the said dates; count 4 which charged taking and driving away a motor vehicle, the property of Bruce White, without the owner's consent on either of the aforesaid dates; count 5 which charged larceny of a quantity of motor car tools, the property of the aforesaid Bruce White; count 7 which charged larceny of seven goats, the property of Alva Anderson on the 10th of June, 1964; the eighth count which

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charged taking and driving away a motor vehicle, the property of Jasper Rose without the owner's consent on either the 9th or 10th of June, 1964; and count 9 which charged larceny of a pair of dark glasses, the property of Jasper Rose on either the 9th or 10th of June, 1964.

The remaining three counts of the indictment were for receiving stolen goods and these counts were alternative to count 1, count 5 and count 9 respectively, and as the jury returned verdicts of guilty on the larceny counts, the learned judge discharged them from giving verdicts on the alternative receiving counts.

The case for the Crown was as follows -

During the night of the 9th of June, 1964, the school house and the canteen of the primary school at Priory in the parish of St. Ann, were broken into and from the office of the Headmistress, a number of articles were stolen, including two mouth organs in their cases. From the canteen which was in a separate building, a quantity of tools were stolen including three cutlasses. Some of the goods which had been removed from the school office and the canteen were recovered on the morning of the 10th of June on the bank of the main road leading from Priory to Bamboo, about three or four chains away from the school, and among the items recovered was the empty case of one of the missing mouth organs which the thief had apparently removed from the case before discarding the case. That same night, Bruce White, who lived at Seville Heights, less than half a mile from the Priory School locked up his car, leaving therein a lawn mower and a quantity of small hand tools, such as screwdrivers and spanners. The car was parked under Mr. White's car porte and he removed the ignition key. Early next morning, Mr. White discovered that his car had been removed during the night without his permission. The car was found later that morning abandoned on a main road at Brittonville some ten miles from Priory. It had run out of petrol. The lawn mower and tools including the screwdrivers and spanners were missing from the car,

/the back ...

the back seat was also missing from the car and on the floor of the car was a quantity of goat's mess and a cutlass on the handle of which was carved the initials "P.H.". This cutlass was subsequently identified as one of those missing from the canteen at the Priory School.

I turn now to the facts relating to the seventh count which charges larceny of goats. Mr. Alva Anderson, the parish Agricultural Officer for St. Ann, lived at Tanglewood, approximately half a mile from the Priory School and on the night of the 9th of June, he had 13 goats tethered in front of his house. Early next morning, he missed 7 of these goats. During the night between mid-night and 1:00 a.m. Mr. Anderson heard some of the goats bleating, then he heard a motor car stop below his gate; he heard the goats bleating again and he turned his flood lights on and off, but he did not go to investigate. He then heard the door of a car slammed and the car was driven away. On the 11th of June, he went to the Spanish Town Police Station and there identified the seven goats which had been stolen. The Crown's case now moves on to the facts concerned with counts 8 and 9 which relate to Jasper Rose.

Jasper Rose lived at Brittonville and on the night of the 9th of June, his garage was broken into and his Hillman motor car removed therefrom. His car was found abandoned at White Marl on the Spanish Town Road the following morning. It had run out of petrol, the rear seat was missing and on the floor there was a quantity of goat's mess. A piece of green electric wire was discovered connecting the coil to the battery and obviously the person who had taken the car had "bridged" the ignition, not having the switch key. He missed from the motor car a pair of dark glasses, Detective Sergeant Ernest Huie of the St. Ann Police, in the course of his investigations stated in his evidence that Bruce White's abandoned motor car was found near Jasper Rose's garage and he found the lock for Rose's garage close to White's abandoned car, and he also found near to

/White's ...

White's car the back seat which had been removed from Rose's car.

I turn now to the evidence connecting the appellant with the various crimes charged. James Reid, a labourer who lived at Central Village, was on his way to his work at Caymanas Estate very early on the morning of the 10th of June when in the vicinity of White Marl, he observed 7 goats tethered on one side of the main road and nearby was the abandoned motor car later identified as Jasper Rose's missing Hillman. He made a report to District Constable Allen who in turn made a report at the Ferry Police Station. Reid and Allen after reporting at the Ferry Police Station which was fairly close by, returned to where the goats and the abandoned car were and kept watch. These two men then saw a motor van driven to where the goats were tied. The van was stopped and three men got out of it, one of whom was identified by them as the appellant. In his hand the appellant had a black brief case. The van was then taken into a river fording, just off the main road and was washed by the three men who then got back into the van which was then driven toward the main road where the goats were still tied. Just at this moment, the Police who had been summoned from Spanish Town, arrived on the scene in a Police vehicle, whereupon the van was driven at a fast rate of speed towards Kingston. It was overtaken by the Police vehicle and stopped by Detective Corporal Morrison who questioned the three men who were in the van. They were the appellant, Roy McCarthy and Roy Jackson. The appellant was wearing a red shirt on which the Detective noticed goat's hair. He was wearing a pair of dark glasses subsequently identified by Jasper Rose and in the brief case which the appellant claimed as his property, were found -

(a) a mouth organ in a case which was identified and claimed by more than one witness as one of the mouth organs stolen from the Priory School;

(b) screwdrivers and spanners which were identified and claimed by Bruce White as those which had been stolen from his motor car;

/(c) ...

(c) a piece of green electric wire which was identical to the piece found bridging the ignition on Jasper Rose's abandoned car.

In one of the appellant's pockets was found a second mouth organ which was similar to the other mouth organ and which was also claimed as having been taken from the school. Corporal Morrison said that the appellant claimed that the mouth organs and the tools were his own personal property.

In his defence, the appellant denied that he had gone to St. Ann or that he was in any way implicated in any of the crimes committed in St. Ann on the night of the 9th of June. In his evidence, he said that he was coming from Gregory Park on the morning of the 10th and when he got to the river fording at Caymanas, he observed McCarthy and Jackson washing the motor van in the river, and he asked them to give him a lift to Kingston which they agreed to do and he thereupon assisted them in cleaning and washing the van and that in the course of doing so, he had taken up a piece of tarpaulin that was in the van on which there were goat's hairs, some of which may have got on his shirt. He denied that the mouth organs and the electric wire were in his brief case or that Corporal Morrison had taken a mouth organ from one of his pockets and he denied that he had told Corporal Morrison that the mouth organs belonged to him.

On appeal the appellant relied on three grounds:-

(1) That the verdict was unreasonable and could not be supported having regard to the evidence.

(2) That the judge misdirected the jury by failing to explain or define sufficiently or at all what were the ingredients of the offence of taking away and driving a motor vehicle without the owner's consent.

(3) That the judge had misdirected the jury on the doctrine of recent possession in that he failed to "warn them that the goods must be properly identified and that there must be evidence of positive identification of the articles alleged to have been stolen."

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At the commencement of the hearing of the appeal, in answer to the Court, learned counsel for the Crown indicated that he did not propose to support the convictions on counts 8 and 9, as these convictions rested almost entirely upon the evidence of Jasper Rose which was contained in the sworn deposition of Jasper Rose taken by the Resident Magistrate at the preliminary examination and it appeared from the transcript that the learned judge had wrongly admitted the deposition in evidence, under the provisions of the Justices of the Peace (Jurisdiction) Law, Cap. 188, section 34, before the jury and permitted it to be read to them, obviously under the mistaken impression that it had been proved that the witness Rose who was not at the trial, was so ill as not to be able to travel. The only evidence that Rose was ill came from Sergeant Horace Preddie who tendered an unsworn certificate from Dr. Charles Thesigar to the effect that Jasper Rose was suffering from flu, and would be confined to his bed for three days. Learned Crown counsel readily conceded that there was no authority in law for the admission in evidence of this certificate whether sworn or not, and that in the circumstances, the learned judge ought not to have allowed the Crown to tender the deposition or to read it in evidence.

I shall turn now to consideration of the grounds of appeal. Grounds 1 and 3 may be dealt with together. It was the submission of learned counsel for the appellant that the mouth organs and the tools which were found in the possession of the appellant had not been sufficiently identified. It is perfectly true that the witnesses did not point to any special marks of identity on any of these articles, but purported to identify them by their general appearance only, therefore it was necessary to examine carefully the evidence to see whether it was reasonable for the jury to act on identification by general appearances only.

In the case of the mouth organs, the two instruments found with the appellant were both new, and were of the same make and type as those taken from the school, but there were other relevant factors. Both mouth organs were kept in their cases at the school and both of

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the cases as well as the actual instruments were missed. One empty case was discovered lying with other goods missing from the school which were clearly identifiable by special marks, about 3 chains from the school next morning. The thief, therefore, must have removed the mouthorgan from its case and then discarded the case and it seems a reasonable inference that the discarded case was the case for the uncased mouth organ found by Corporal Morrison in the appellant's pocket a few hours later, particularly as the discarded case found at Priory was identical in all respects with the other case found in the appellant's brief case, including the cost price written in ink on both cases.

It was also submitted by learned counsel that there was no evidence to connect the appellant with the warehouse breaking charged in count 3 or the charge for driving away Bruce White's motor car in count 4, but in our view, this is not so, for the evidence disclosed that one of the cutlasses which had been removed from the school canteen (count 3) was found in Bruce White's car (count 4) and this cutlass was positively identified by initials carved on the handle, and then there was a connecting link between the taking and driving of Bruce White's motor car and the removal of Jasper Rose's motor car, and that connecting link was the padlock which the thief had removed from Rose's garage when taking away Rose's car and left on the ground close to White's car when that was abandoned. It was a reasonable inference for the jury to draw that the person who had abandoned White's car with the stolen cutlass in it had taken Rose's car and there was evidence to connect the appellant with Rose's car as he was seen close to it some hours later and in the appellant's brief bag was found a piece of green electric wire identical in all respects to the green electric wire found on Rose's car connecting the coil to the battery. It was also a reasonable inference to draw that the person who had removed the mouth organs from the school office had also removed from the school canteen the cutlass found in White's car. For what it was worth, there was also the evidence of goat's mess found in both cars and goat's hair found on the appellant's shirt and the fact that the appellant was

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seen close by the goats stolen from Alva Anderson that very night, and the fact that all these crimes occurred within a few hours on the same night at places situated in close proximity to each other and along the same main road. We also considered carefully learned counsel's submissionsas to the identification of the tools charged in count 5 which had been claimed both by Bruce White and by the appellant as being their personal property respectively. This was essentially a matter for the jury and they no doubt preferred the evidence of Bruce White who said that he had had the tools for many years and the fact that he was able to pick out his tools from among a quantity of other similar tools shown to him at the Spanish Town Police Station.

To turn now to learned counsel's submission with regard to ground 2. He submitted that in the absence of positive evidence that the appellant was seen driving Bruce White's motor car, that it was wrong to convict and that the jury were not entitled to rely on circumstantial evidence only, and further, that the fact that tools from the car had been found with the appellant might have been good evidence that he had stolen the car, but not that he had himself driven it. It was the submission of learned counsel for the Crown that the Crown was entitled to rely on circumstantial evidence and that in this case, the evidence presented by the Crown presented an unbroken chain of circumstances from which it was reasonable to infer that the appellant drove the car or cars himself, bearing in mind that he had admitted in cross-examination that he was a mechanic and knew how to bridge the ignition of a car when no switch key was available or, alternatively, that the appellant was present, associated with one or more persons acting together with the common design of taking and driving away the motor cars which were used for the purpose of conveying stolen articles, some of which were found on the person of the appellant. We were satisfied that the evidence amply supported an inference either that the appellant took and drove the two cars himself or was party to the taking and driving away of these cars.

The Court was somewhat concerned about the conviction on the 7th count which charged larceny of the goats, as in the course of his

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summing-up to the jury, the learned judge informed them that Roy McCarthy and Roy Jackson who were in the van with the appellant when the police stopped it at Caymanas had given evidence against the appellant to the effect that the appellant had asked them if they "could transport some goats into Kingston for him and they told him they had no space." In fact these two persons had not given evidence in the case and the learned judge had erroneously told the jury that they had done so. This was a misdirection as to the evidence but to be of any avail to the appellant, it must be of such nature and the circumstances of the case must be such that it is reasonably probable that the jury would not have returned their verdict of guilty had there been no misdirection. The burden of establishing this lay upon the appellant and not upon the prosecution (vide Archbold Criminal Pleading Evidence and Practice, 35th Edition, para. 932).

It is quite clear that on the case as presented by the prosecution they did not rely in any way on any statement which may have been made by the appellant to McCarthy and Jackson, and it is equally clear that the circumstantial evidence on which the Crown relied to secure convictions not only for the larceny of the goats, but on the other counts, depended on a series of circumstances and events taking place prior to any conversation which may have occurred between the three men and the final link in this chain of circumstantial evidence was provided by the finding by the police of certain of the stolen articles in the actual physical possession and control of the appellant. These links unequivocally connected the appellant with the stealing of the goats, and we are satisfied that the jury would have returned the same verdict of guilt had the learned judge not misdirected them on the evidence, damaging though this misdirection may have been. We also considered the effect which this misdirection on the evidence may have had on the other counts in the indictment, and we were satisfied that if it did have any effect, that the same was negligible and quite unlikely to have affected the jury's consideration, even though the finding of the goats was inextricably bound up with the evidence

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tendered in support of the commission by the appellant of the other offences charged. Furthermore, the learned judge, after erroneously telling the jury what McCarthy and Jackson were supposed to have said, went on quite correctly to remind the jury that the appellant in his own evidence had said that he did not ask the two men to transport goats for him as he had no goats to be transported.

We were satisfied that there were no misdirections in law by the learned judge, and that such misdirections as occurred on the evidence were such that they could not have caused a miscarriage of justice. In these circumstances, therefore, we dismissed the appeal in respect of the convictions on counts 1, 3, 4, 5 and 7 and, for the reasons stated, allowed the appeal on counts 8 and 9, quashing the convictions on these two counts and setting aside the sentences thereon.

Henriques, J.A.,

I agree.

Waddington, J.A.,

I agree.