JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 68/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

R. V. MARK PHILLIPS

Lord Gifford, Q.C. & Hugh Wilson for Appellant

David Fraser for Crown

December 2, 1997 & February 27, 1998

RATTRAY, P.

The appellant Mark Phillips was convicted in the Gun Court Division of the St. Ann Circuit Court by Chester Orr J presiding without a jury on an indictment charging two counts, the first being illegal possession of firearm and the second Robbery with Aggravation. He had been jointly charged with one Junior Black who was also convicted at the same trial.

The facts as revealed by the trial judge's summation of his reasons disclosed that on the 29th of July 1994 (the reasons state 19th July but the indictment reads 29th July) at about 1.30 a.m. Beverley Cross, the complainant was at her shop at Windsor in the parish of Saint Ann. Her person was heavily bedecked with jewellery - eight chains on her neck, 16 small bangles on her left hand, 4 gold rings and two pairs of ear-rings. A man "resembling the accused Phillips" came in armed with a gun and a long knife. He pointed the gun at her and robbed her of her jewellery and groceries. Another man armed with a knife also entered the premises. She identified him as the

Another man armed with a knife also entered the premises. She identified him as the accused Black. He took her to her house and ransacked the building. Eventually, the appellant came to the house, spoke to Black and they took her television set, component set and other articles placed them on the settee and ordered her to put them outside on her verandah. She complied. They took the goods, fired two shots from their guns and then left the premises. She saw about seven men on the premises but she identified only the accused Phillips and Black.

Mr. Phillip Stoddart was at that time friendly with Carol Phillips, the sister of the appellant. He gave evidence that sometime in July, he could not tell the date, the appellant Phillips came to him, asking him to pick up some things at Black's house at Lime Hall in St. Ann. He complied, and received from Black an amplifier, a tape recorder, television set and a component set which he took to his own home and kept them there. It was a Friday. The police came to his house the following Tuesday and removed the goods to the police station. He was arrested and questioned and after various appearances in court he was eventually released. The summation of the judge's reasons does not disclose for what offence he was arrested and brought before the court. It is however reasonable to assume that he was charged with receiving stolen goods knowing them to have been stolen.

On the 2nd August, that is four days after the robbery the police went to the home of Black in Lime Hall and saw both Phillips and Black amongst other persons outside the home at that time. The appellant was searched by Detective Brown who took three gold bangles from his jacket pocket which were identified by Mrs. Cross as being hers and among the items which were taken from her at the time of the robbery.

The trial judge was not satisfied with the method of identification by Mrs. Cross of the appellant as the man who was present at her home at the time of the robbery. In the summation the learned trial judge stated:

> "Now, the police having apprehended two accused men and having gotten the goods, the proper thing would be to hold an identification parade. Instead of

> that they had the goods and the accused in one room. And of course, as defence counsel points out quite properly, in those circumstances what other - well, it's like dock identification. If you see the accused man in the dock, you must say that's the man."

He finally concluded:

> "So as far as that visual identification is concerned that would have to go by the board."

The effect of this is that the evidence left against the appellant was as follows:

> (a) The finding on his person four days after the robbery of the three bangles taken by the robbers from Mrs. Cross at the time of the robbery;
>
> (b) the evidence of Mr. Stoddart that the appellant had asked him on a date in July (not stated) to collect the amplifier and other electrical goods from the home of the co-accused Black which items as it turned out were taken from Mrs. Cross' house by the robbers on the occasion of the robbery.

The learned trial judge accepted Mr. Stoddart as a witness of truth while warning himself "that he may be a witness with an interest to serve" and reminding himself "that it would be desirable for some corroboration." He specifically found that there was no corroboration of Mr. Stoddart's evidence.

The learned trial judge then took into account the following factors:

> 1. The applicant sent Stoddart to the house of the co-accused Black four days after the robbery to collect goods which were a part of the items taken from Mrs. Cross' home;
>
> 2. The applicant is found four days after the robbery with three gold bangles stolen from Mrs. Cross at the time of the robbery.

From these factors the learned trial judge concluded -

> "I draw the inference that there were a joint enterprise between Stoddart and Black and that this enterprise was not merely to receive the goods but that they went to Mrs. Cross' place and rob the goods. I take into account the nature of the goods. These are not things which pass readily. The jewellery were here. Mrs. Cross identify them and the component set was there with her marks on it. She had the receipt with her boyfriend's name, which she said came back in the same condition from the repair shop."

> I am satisfied so that I feel sure that he was a party. He was there the evening. I find him guilty."

Lord Gifford, Q.C. for the appellant has submitted that the witness Stoddart was an accomplice. The learned trial judge should therefore have identified him as such rather than categorising him as "a witness with an interest to serve." Lord Gifford, Q.C. therefore submits that the learned trial judge should have warned himself of the dangers of convicting on the uncorroborated evidence of the witness. This is what the learned trial judge said in his summation:

> "In each connection you have to take into account the evidence of Mr. Stoddart and I have to warn myself that he may be a witness with an interest to serve and in such cases the judge must issue a warning either to himself or to the jury and to remind myself, that it would be desirable for some corroboration. There is no corroboration of Mr. Stoddart's evidence. But I accept him as a witness of truth." [Emphasis mine]

There has been no evidence that Mr. Stoddart participated in the commission of the robbery. He was found in possession of the stolen goods a few days after the robbery and therefore could be categorised as "a receiver". In this regard therefore, he would be viewed as an accomplice. (See **R. v. Jennings**, (1912) 7 Cr. App. Rep. 242 , **R. v. Dixon** (1925) 19 Cr. App. Rep. 36; **Davies v. D.P.P.** [1954] 38 Cr. App. R. 11).

The learned trial judge in the summation did not identify Mr. Stoddart as an accomplice but instead warned himself that "He may be a witness with an interest to serve." He further did not warn himself that it would be dangerous to convict on the uncorroborated evidence of Mr. Stoddart. Instead, he warned and reminded himself - "that it would be desirable for some corroboration." Whilst an accomplice would be - not maybe - a witness with an interest to serve, there are many other types of witnessses who could be categorized as being witnesses with an interest to serve, for example close relatives of a complainant, whose evidence would not be subject to the same sort of taint as that which attaches to the evidence of the accomplice. The accomplice is participis criminis with the person charged. He therefore has a

compelling reason to give evidence which will extricate himself and shift the full responsibility for the crime on the accused. There is in my view also a distinct difference between doing something dangerous and doing something which is undesirable. In my opinion, therefore the learned trial judge substantially watered down the legal requirement of the necessary warning in these regards.

Having rejected the identification of the eye-witness Mrs. Cross with respect to the appellant's presence on the scene at the time of the robbery and in relying therefore on Mr. Stoddart's evidence, the learned trial judge's failure to apply the required criteria as to the higher test to which the evidence should be subjected leaves for consideration only one other piece of evidence. This was with regard to the three bangles found on the appellant which were the property of Mrs. Cross taken from her at the time of the robbery. In dealing with the goods taken from Mrs. Cross' house, the learned trial judge said:

> "I take into account the nature of the goods. These are not things which pass readily."

The goods being referred to were the electronic equipment and the jewellery. Did the learned trial judge consider separately the question of whether the jewellery found on the appellant were items which could be readily be disposed of? In such a case he would have had to consider whether the appellant was a receiver or the robber. The summation therefore does not disclose that the learned trial judge considered separately the bangles taken from Mrs. Cross and found in the jacket pocket of the appellant when he concluded that these were not items "which pass readily." He dealt in this regard with the jewellery as well as the electronic equipment taken from Stoddart's house as items of the same specie with respect to ready disposal. The learned trial judge should have considered and stated in his reasons whether or not in being in possession of the bangles the appellant was the receiver and not the robber.

Having rejected the evidence of the complainant as to the identification of the appellant as a participant in the robbery what was left to link the appellant to the

offence was (i) the evidence of Mr. Stoddart with which I have already dealt, with respect to the failure of the trial judge to warn himself that Stoddart was in the position of an accomplice. (ii) The bangles found in the appellant's pocket (which I have also dealt with) (iii) The evidence of the statement given by the co-accused Black (which was not evidence against the appellant). With respect to the latter the summation does not disclose that the learned trial judge directed himself that this statement was evidence against Black only and not evidence against the appellant.

For these reasons therefore, the appeal must be allowed, the conviction quashed and the sentence set aside. A judgment and verdict of acquittal is hereby entered.