JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 76/73

BEFORE: The Honourable President
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Hercules

REGINA v. PRESTON WILLIAMS

Mr D.V. Daly for the Applicant

Miss Bennett for the Crown.

17th January, 1974

HENRIQUES, P.,

The applicant, Preston Williams was convicted on the 19th of June and sentenced on the 20th of June for the offence of robbery with aggravation, and the sentence of 15 years hard labour, in addition to receive ten strokes with an approved instrument, was imposed. He applied for leave to appeal against his conviction and sentence on the 25th of June. This application was considered by a single judge of this Court on the 9th of September, 1973, when the application was refused..

He has now applied to the full Court for a consideration of his application. The applicant on the 9th of November, 1973, made an application to call additional evidence when the application for leave to appeal was being considered. In particular, he requested that the Court should order that Ethel Clark of 15 James Street, Kingston 13, in the parish of Saint Andrew attend, to be examined as to the evidence that she would give and that it be considered along with the other evidence in the case.

In order to deal with that application, it is necessary to refer both to the evidence given by the complainant, and an affidavit which was filed by Ethel Clarke which is now before the Court.

According to the complainant, Austin Brown at the trial he was a driver-salesman, employed to Lewis Kelly and Sons, and on the 2nd day of November, 1971, he was buying goods and selling customers and at the same time collecting moneys from the customer, and at about 10.30

that...

that night, he was walking along Third Street going towards Second Street, when having got to about half-a-chain from the intersection of Second and Third Streets, he saw three men approaching him and the accused Williams whom he had known for some five years was one of the men. When they came up to him, they said to him: "Hold on", and he replied: "What oonuh want now?" and they replied: "Give me the rass cloth money whe you have". At the time they said this, they all had guns pointing at him. They began to search hispockets -- searched all of his pockets and took moneys from various portions of his person amounting to five hundred dollars.

Having done that, two of the men started to leave the scene, at the same time pointing their guns at him. The applicant, however, said: "What happen sah, oonuh naw finish off the man", and he made this remark about three times and the other two men said to him: "Is all right, make him go on", and the applicant then said to him: "And take your 'R' cloth off the street." The applicant was the only witness as to the incident which he described, and from the verdict which the jury returned, it is clear that the jury accepted the version which was given by the complainant.

As I have mentioned, in support of the application for leave to call additional evidence, Ethel Clarke had given an affidavit which reads in part as follows:

> "Paragraph 2, I have known the appellant herein for about seven years. He is called 'Billy'.
>
> (3) On the 2nd day of November, 1971, at about 9.30 p.m., or later, my son, Paul Graham, and I came off a bus along West Road by the intersection of West Road and Third Street. Another woman in a black dress whom I do not know also came off the bus at the same stop.
>
> (4) As the three of us were about to enter Third Street, walking in a westerly directinn the other woman being a few feet ahead of my son and I, I saw two young men jump over a wall into West Road from a premises near to the intersection. They were followed shortly after by a third man who

who had what appeared to be a gun in one hand.

(5) The three young men went along Third Street ahead of the other woman, my son and I and as we had proceeded a few yards along Third Street I saw the three men held up a stoutly built man along Third Street.

(6) The place where the three young men held up the man was on the right hand of Third Street, facing West and about midway between the intersections of Third Street with West Road and Second Street.

(7) I saw the third young manpoint the gun at the man and heard him say "don't move". They then searched the man but I can't say what they took, if anything, and ran back past me to West Road, again jumping over the said wall.

(8) The other woman my son and I went up to the man who had been held up and asked him if he had been robbed and he replied: "Yes, Nothing much".

(9) The three of us left the said man and turned right along Second Street, the other woman slightly ahead of my son and I and at about two and a helf chains from the corner I saw six young men standing by a shop along Second Street , including the Appellant, another man called Glen, and one called Humpy .

(10) The other woman, who also appeared to know the six men, told them that they had better move away from there because a man had been robbed around the corner and "police would soon full up the place". The young man moved off and I went home.

(12) I do not knowthe name of the man who was robbed and I did not give a statement to either the police or the accused before the trial. I had heard some time after the incident that the accused was arrested on the charge but I did not offer to give evidence for him at the trial, as I was not asked to do so.

Learned Counsel for the applicant in support of his application had drawn the attention of the Court to certain

cases...

cases where the principles which should actuate a Court, in acting upon an application of this nature, and he referred to the decision of R. v. Parkes, 1961, (46) C.A.R., p.29, and the case of R. v. Page (11) W.I.R., p.122. Those principles are clearly and admirably summarised in Archbold's Criminal Pleading Evidence & Practice Thirty-Sixth Edition, at page 314, where it is stated:

> "It is only in exceptional circumstances and subject to exceptional conditions, that the Court is willing to listen to additional evidence. The principles on which the Court will exercise its discretion to allow further evidence to be called may be summarised as follows: (i) the evidence must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be credible evidence, i.e., well capable of belief."

Applying those principles to the material before us, it appears on the account given by Austin Brown and Ethel Clarke of what is supposed to have transpired on the 2nd of November, 1971, that they are completely different versions when compared, considering this question and the aspect of whether the evidence is credible, that is, well capable of belief. There are certain passages in the affidavit which must be considered.

According to Austin Brown, he was thoroughly searched and money taken from all his pockets. Acoording to the version given by Ethel Clarke, paragraph 7 of her affidavit, she said "that they saw the third young man point the gun at the man and heard him say: 'don't move'. Then they searched the man but I can't say what they took , if anything, and ran back past me to West Road, again jumping over the said wall."

In paragraph eight, whe stated "that her son and herself went up to the man who had been held up and asked him if he had been robbed and he replied 'yes, nothing much-"

It would appear that the man who had been relieved of some five hundred dollars in circumstances, in which Mr. Brown described these moneys being taken fromhim, would hardly have likely have made the remark which Mr. Clarke ascribed to him in her affidavit.

We are of the view, therefore, that the evidence which is sought to be tendered does not come within the principles which should guide the Court in admitting evidence of that nature. It is well to remember the words of the Lord Chief Justice Goddard in the case of R. v. Collins, reported at p.146, 34 C.A.R., where at page 148, he states:

" The danger of allowing further evidence to be called after conviction and the reason why the Court does not allow it save in exceptional circumstances, is clear enough. It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that, or the other thing. If further evidence were allowed in such circumstances, it could always be said: 'If this evidence had been given at the trial, it does not follow that the jury would have convicted or they might not have convicted'. That is especially true in cases where the defence is an alibi. Two or three witnesses perhaps are called to establish an alibi, which the jury reject. It is very often not difficult after conviction to find another witness or perhaps two more witnesses who would be willing to come and support the alibi, and it can always be said: 'If only the prisoner had had the evidence of A or B which is now tendered, the jury might have come to a different decision, and the prisoner should have the benefit of that possibility. That is one of the reasons why this Court is necessarily reluctant to allow further evidence to be called after conviction.

Bearing in mind the circumstances of the particular case, therefore, the Court is disposed to refuse the application.

There is further an application for leave to appeal against the sentence of fifteen years hard labour and ten strokes, which were ordered by the learned trial judge. The sentence may be said to be a severe sentence and was in fact intended to be a severe sentence, and probably to have some deterrent effect, but we do not think that sufficient regard was paid to the fact that here was a young man who through no fault of his was left entirely on his own, deserted by his mother and father and was brought up in circumstances of that nature, and that this was his first offence.

Now the offence was serious and merited punishment, nevertheless, we think that in the circumstances, a sentence of fifteen years hard

labour may be said to be excessive. In the circumstances, therefore, we allow the hearing of the application to be treated as the appeal. So far as sentence is concerned, we quash the sentence of fifteen years hard labour and ten lashes and impose in lieu thereof a sentence of ten years hard labour and five lashes. To that extent the appeal is allowed. I should mention that the application for leave to appeal against conviction is refused.