

JAMAICA

IN THE COURT OF APPEAL

R. M. CRIMINAL APPEAL NO: 74/80

BEFORE: The Hon. Mr. Justice Rowe, J.A.  
The Hon. Mr. Justice Carey, J.A. (Ag.)  
The Hon. Mr. Justice White, J.A. (Ag.)

LEROY SAWYERS  
GEORGE WATSON vs. REGINA  
RICHARD BOWEN

Appellants appear in person

Mrs. Z. Holness for the Crown

July 30, 1980

ROWE, J.A.

This is an appeal by Leroy Sawyers, George Watson and Richard Bowen from convictions and sentences on two counts of robbery with aggravation in the Resident Magistrate's Court of Lucea on 16th November, 1979 whereby following upon their convictions they were sentenced, Sawyers to four years hard labour on each count, Watson and Bowen to three years hard labour on each count, in each case the sentences to run concurrently from the date of arrest.

The prosecution's case was that on Saturday, 7th July, 1979 Mr. Hylton Allen, his wife, Norma, his son Clive, aged 11, and four small children were travelling from their grocery shop at Gurney's Mountain in a Ford Escort motorcar towards their home at Content in Hanover. Along that road there was an improvised road block. Mr. Allen stopped the car, took out his machete and went out to clear the block. Little did he know that it was not an act of nature but of the perversity of evil men. No sooner had he come out of the car that stones began to fall on top of the car and around him, and a man armed with a machete came at Mr. Allen. In the heat of the

moment and fearing for his life, he ran. He was chased.

Mrs. Allen came out of the motorcar, was herself about to run but she remembered her children and as a good mother would, she refrained from so doing. She was approached by a man with a machete, a man whom she said she had seen once or twice before, a man who wore his hair in what she called "dreadlocks style," a man who came within arm's length of her. This man slapped the machete on top of the car and demanded money. Mrs. Allen had some \$600.00 but in protection of her property she said she had none. That man is alleged to have said to her that if she did not give him the money he would rape her. Of course, that wasn't the language. It was much coarser.

Clive Allen, sitting inside the car and hearing the threats to his mother handed to the man the change, silver, some fifty dollars, and told these men to let his mother free. The men were not satisfied at all with that amount of money and while one man was still cursing and threatening Mrs. Allen one was seen to go to the back of the car. Clive wouldn't run. His smaller brothers and sisters ran away but he went to the back of the car, and he said the man who had gone to the back had something on his face but once he had reached around the back he took this thing off his face. Clive Allen said that he spoke to that man telling the man that the only thing in the trunk of the car was dog food and hog food. The man was not satisfied merely with that reply. He opened the trunk, searched about but found nothing. According to Clive Allen he and this man were at the back of the motorcar for some five minutes. He said, and I quote from the note of the resident magistrate: -

"I could see his face. He take the thing off his face. Car light still on. At back of car about five minutes. I go to back and see him take thing off face. I stayed there till they left. He never put back thing on his face. We were there about 5 minutes. See that man here today in red shirt."

and he pointed to the accused Watson.

While Clive and the man whom he says is Watson were at the back of the car, the man who had threatened and demanded money of Mrs. Watson was still there and a third man, a shorter man, pushed his hand through the window and took a basket in which Mrs. Allen had \$600.00. Mrs. Allen says she was unable to recognize this man who took up her basket with money because he had something over his face. Having taken up this basket he went towards the rear of the motorcar and sometime after he disappeared. Mrs. Allen said that the third man was somewhat behind the first who had the machete and she was unable to see that third man. This is how she put it:

"When third party came up the one that took basket had something on his face but the other one didn't come in front of me. Man with machete blocked other man so I couldn't see if he had something on his face."

So it is clear that whoever that third man was she could not see him. After Mrs. Allen and her son were robbed of the money the robbers ran away.

Mr. and Mrs. Allen made a report to the police who investigated the matter and an Identification parade was held at the Lucea Police Station by Sgt. Weir on the 23rd July, 1979, and on those identification parades Mrs. Allen and her son Clive, identified the accused Sawyers. In his defence Sawyers said he was not there on the evening of the hold-up and he took no part in the robbery.

We are quite satisfied that the learned resident magistrate had abundant evidence before him on which he could come to the conclusion that Sawyers was, indeed, one of the robbers. Mrs. Allen said she could make out Sawyers from the light of the motorcar and they were standing in front of the motorcar and the headlights were on. They were near together for a period of time. To use her own words, "It happened so fast you couldn't even say two minutes; you have to say in seconds or two minutes. I would recognize

of 505

that man again because he still wears his dreadlocks and beard and I know him because I talked to him and begged him." She says that that man is the accused, Sawyers.

The learned resident magistrate was impressed by the sincerity of Mrs. Allen, by the opportunities which she had to recognize Sawyers, and he accepted her evidence and we see no reason to upset that conviction. In relation to the appellant Sawyers the convictions and sentences are affirmed.

The appellant Watson argued that there were conflicting statements as between Mrs. Allen and Clive Allen in relation to him. Mrs. Allen is recorded as saying under cross-examination that she knew Sawyers before. She continued, "I know the middle one but I didn't see him on that night." As the appellants stood in the dock at trial Watson was the one in the middle. He admitted that he knew Mrs. Allen for some time. It was his custom to purchase goods at her shop. He knew her and she knew him and therefore had he been there on that night she would have been bound to see him and recognize and be able to identify him. Mrs. Allen did not identify the appellant Watson, on the parade but her son Clive Allen did.

The learned Resident Magistrate in his findings of fact said "Clive a young person can use imagination but he can also be <sup>very</sup> honest. Looking at his evidence as a whole in spite of inconsistencies and contradiction satisfied he had opportunity to see and later to identify the accused Watson."

We have considered the opportunity which the witness, Clive Allen had of observing the man who went with him to the back of the motorcar. We have considered the state of the light in that the headlights were on and the rear lights were on; that it was moonlight; that the two persons were together for about five minutes, that throughout that period the person was not masked; that Clive was seeing the man's face, and in those circumstances we can find no fault with the decision of the learned resident magistrate that he

was satisfied with the identification of the appellant Watson. We bear in mind, of course, that the learned resident magistrate had completely rejected the defence of Watson.

The court having rejected the appeal of the appellant Watson, his convictions and sentences are affirmed.

In relation to the appellant Bowen, he complains that his conviction ought not to stand because grave improprieties took place during the course of the identification parade; that there was an inconsistency between the evidence of Mrs. Allen and Clive and that, all in all, Clive could not have had any proper opportunity to observe and to identify the third man whom Clive says is the appellant Watson. Clive said:

"The other two come around. They walk up the road. They didn't stop at back of car. Saw their faces. I didn't look on them long. I only look and take off my eye quick two times. It was moonshine and the car headlamp on."

If, indeed, the appellant Bowen was one of those two men, the best opportunity which Clive had of observing their features consisted of two quick glances which he took in relation to those men. Mrs. Allen said the man who took the basket from the motorcar had on a mask. Clive said the man whom he saw carrying the basket away from the motorcar did not have on a mask.

The learned resident magistrate did not in his findings of fact make any reference to this glaring discrepancy in the evidence in relation to that appellant.

When one examines the identification parade forms it appears that six of the person who had appeared on the parade for the appellant Watson, re-appeared on the parade for the appellant Bowen. Of these six persons four were greater in height than himself and all the other men who made up the parade were much taller than he was. The learned resident magistrate in his findings of fact said,

"Nothing wrong with I.D. parade although some men on more than one parade and four inches shorter or taller than suspect."

The learned Resident Magistrate did not give any reason why he found nothing wrong in those circumstances. This court has had the opportunity of observing both Bowen and Watson and noting the great dissimilarities between the two men in height, physical appearance and build. Consequently, if six men relevant to a parade for Watson so as to make that parade fair were also used when one is conducting a parade for Bowen, it does not appear to this court that those men could bear any true resemblance to Bowen or provide any fair test when considering the parade for Bowen.

We are not laying down, as a general rule, that in a situation where there are multiple suspects if one or more persons used on one parade is or are re-used on another parade that that automatically makes the second parade irregular and unfair, but in the present case it does seem to us that that second parade, the one which was held for the appellant Bowen, could not have been fair. Because we think that the evidence of identification was itself weak, there being little opportunity for the witness Clive, to observe the physical features of the man whom he says is the accused Bowen and because of what we find to be an irregularity in the holding of the parade on which he was identified we are of the view that his convictions cannot stand.

His appeals are allowed, the convictions quashed and verdicts of acquittal entered.

Before parting with the case we wish to refer to a provision in Section 291 of the Resident Magistrate's Act, a provision which was introduced into the law of Jamaica by Act 45 of 1973, which requires resident magistrates trying criminal cases to take a certain positive action when accused persons are found guilty of an indictable offence tried by them or any summary offence tried by the resident magistrate under his special statutory summary jurisdiction.

That provision is this:

"Where any person charged before a court with any offence specified by the Minister (and those are the ones to which I referred a while ago) is found guilty of such an offence, the Magistrate shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded."

We draw this provision to the attention of resident magistrates so that they may be reminded that an accused person is entitled to know just what facts the resident magistrate has found in his case and ultimately that the Court of Appeal may know from the notes of evidence what were the resident magistrate's findings of fact.

What we expect are the actual findings of fact, not just comments on the evidence, and except for the very simplest cases it cannot be sufficient to record 'accept the evidence for the Crown' because many times there are inconsistencies and contradictions in the evidence of various witnesses. Unless the resident magistrates faithfully abide by the provisions of Section 291 of the Judicature Resident Magistrate Act and set out what are their findings of fact neither the persons who have been convicted nor the Appeal Court, if the matters reach the Appeal Court, can understand fully why the resident magistrate came to the particular verdict.

The result of the appeal, Sawyers and Watson, is that your appeals are dismissed and your sentences remain but it appears that the learned resident magistrate wanted the sentences to begin from the date when you were arrested. It is our view that he could not properly do that. The sentence cannot begin to run before the date on which you were convicted. We propose that in your case, Sawyers, the sentence of four years should commence on the date of your conviction and in your case, Watson, the three years should commence on the date of your conviction. You, Bowen are acquitted and discharged.