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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 79/66

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

R. vs. A N S E L S I M M S

Mr. R.O.C. White for the Crown

Mr. C.U. Hines for the appellant

17th,18th,21st,22nd and 23rd November,1966

DUFFUS, P.,

This is an appeal against a conviction for burglary and larceny recorded in the Circuit Court for the parish of St. James. The appellant Ansel Simms, was charged on an indictment containing two counts, the first count charged burglary and larceny: that on the night of the 7th of May, 1966, he broke and entered the dwelling house of one Enos Spence with intent to steal and stole therein a number of articles of jewellery enumerated in the indictment, the property of one William Phang. The second count is alternative to the first and charged the appellant with receiving some of the articles to wit: a gold chaparita and two gold bangles. The appellant was convicted on the first count and sentenced by his Lordship Mr. Justice Chambers to a term of imprisonment with hard labour for ten years and in addition to receive ten lashes with an instrument to be approved.

The case for the Crown was that Mr. Phang, the owner of the articles of jewellery, went to Montego Bay

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to deliver the articles to some customers he had there and he stayed the night at the lodging house of Enos Spence. During that night the bedroom which he occupied in the lodging house was broken into and the articles of jewellery removed therefrom. He made a report to the police the following morning and some two days later, on the 9th of May, the appellant was seen at the shop of one Walker, a jeweller in Montego Bay attempting to dispose of the gold chaparita and the gold bangles. While he was talking to the jeweller, Mr. Walker, a detective entered the shop and spoke to the appellant. The appellant denied that the articles were his and informed the detective that they belonged to Mr. Walker, the jeweller. Mr. Walker, promptly denied that this was so, thereupon, the appellant admitted that the articles were his and stated he had purchased them from a sailor sometime before giving details with regard to the transaction. The detective then asked the appellant to accompany him to the Police Station whereupon, the appellant ran from the store. He was pursued and caught. He then told a different story to the police to the effect that he had not got the articles from the sailor but that a friend of his, one Harvey, had given him the articles to sell and that he did not know the articles were stolen property. He was arrested and charged.

At his trial he gave evidence on oath. He denied having told different stories to the police officer and he set up as his defence, first of all, an alibi with regard to the burglary charge viz., that on the night of the burglary he was sleeping at his home with his girl-friend. He called his girlfriend as a witness to substantiate his story, but unfortunately, the girlfriend

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did not do so, in fact, she let him down very badly. With regard to the possession of the articles of jewellery which he was found with, he admitted that he had them in his possession but stated he had received them from the man Harvey to sell, and maintained his story to the police that he did not know the articles were stolen property.

The facts of the case therefore were comparatively simple. The case for the Crown depended on the question of recent possession of stolen property. Unfortunately, simple though the facts appeared to have been, the summing-up of the learned trial judge did not deal with them with that clarity of expression which one would have expected in a case of this kind and the result has been that this Court has had to spend several days listening to arguments and submissions by learned Counsel on a matter which normally could have been disposed of fairly rapidly. We are indeed grateful to the appellant's Counsel for the time and the energy that he has put in the matter, endeavouring to clarify the various points which were not as clear as they ought to have been.

The appellant had a number of grounds of appeal. These included complaints with regard to the directions by the learned trial judge and may be put under three heads. Firstly, a complaint that the learned trial judge had failed to define to the jury the offence of larceny. Secondly, that the learned trial judge had failed to direct the jury adequately on the doctrine of recent possession, and thirdly, that his directions to the jury on the alibi set up by the defendant with regard to the burglary were not as full as they ought to have been, and the result may have been that the jury might have thought that once

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the alibi was rejected they could treat "the rejection of the alibi as affirmative evidence of guilt." Here I am quoting from the words actually used in the grounds of appeal. There was also another ground which was not concerned with the directions to the jury by the learned judge - this was concerned with the evidence - and it was on a very short point. Complaint was made with regard to a leading question put by learned Counsel for the Crown to the witness Phang with regard to the time that he discovered that his room had been broken into and the articles stolen. The complaint was that the question was a leading question and ought not to have been permitted by the judge in the first instance, but having been allowed to be put and to be answered by the witness the learned judge ought then to have directed the jury that they should have disregarded the evidence that emerged therefrom. In fact learned Counsel for the appellant submitted that such evidence was completely inadmissible.

Learned Counsel for the Crown readily admitted the defects in the summing-up of the learned trial judge and he also readily admitted that the question with regard to the time of the discovery of the burglary was a leading question and ought not to have been put. Learned Counsel for the Crown, while substantially admitting the causes of complaint by the appellant, submitted to this Court that the case for the prosecution was so strong and so overwhelmning that any reasonable jury properly directed would have come to the same verdict, and he sought to persuade this Court that it was a fit case for the application of the proviso.

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The Court has given anxious consideration to the submissions of Counsel for the Crown as to whether it was a fit case for the application of the proviso, but we have arrived at the conclusion that this is not a case in which the proviso should be applied.

I will at this stage deal briefly with the three points of the learned judge's summing-up of which complaint was taken. Firstly, the omission to direct the jury on the law of larceny. With the aid of Counsel we have searched through the directions given by the judge and it seems quite clear that the judge failed entirely to give the usual definition of larceny. The farthest he went was to inform the jury that larceny was stealing. This Court has had occasion to give consideration to similar omissions by learned judges in the past and reference may only be made to two cases in which there were similar defects. The first of these cases was the Queen vs. Cecil Gabbidon heard by this Court on the 8th of February, 1963, (the report of the judgment is to be found in the 1963, Gleaner Law Reports at page 95). The other case was the Queen v. Beach, 6 W.I.R. 377. I will briefly read from the head note of that case. It was held that -

> " the failure of the trial judge to give any directions on the larceny part of the charge amounted to a misdirection. Proof of larceny was an essential ingredient of the composite charge of warehouse breaking and larceny and directions should therefore have been given to enable the jury to know what were the ingredients of the offence of larceny" and in the view of the Court "the failure of the trial judge to direct

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> the jury fully on the law, and his apparent omission to leave the issue of larceny to the jury and the two other unsatisfactory features of the summing-up, it would be unsafe to allow the conviction to stand."

The Court allowed the appeal and ordered a new trial.

In this case the Court feels that it was most desirable that the judge should have directed the jury on the necessary ingredients of the offence of larceny for two reasons:-

(i) The first count of the indictment charged the composite offence of burglary and larceny, and

(ii) The second count was for the alternative count of receiving,

and in both cases, proof of larceny was essential. The Crown's entire case depended on the doctrine of recent possession, and it was certainly desirable that in a case which depended entirely on the doctrine of recent possession that the necessary ingredients which go to make up the offence of larceny should have been carefully put to the jury. There can be no doubt that the learned judge spent some time defining the offence of burglary and no complaint was taken with regard to that aspect of the summing-up, but it may be that having spent so much time on defining burglary he oversighted the fact that he had not defined larceny.

Now, with regard to the other two complaints concerning the summing-up - these concern the burden of proof - and it is always desirable that directions on the burden of proof should be clear, adequate and accurate. The learned judge at the commencement of his summing-up

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dealt adequately with the burden of proof and no complaint was taken with regard thereto, but when he came to deal with the doctrine of recent possession this is what he said:-

> " If a person is found in possession of recently stolen goods it is open to you to find that person to be the actual thief, or the guilty receiver of the stolen goods. Where a person is found in possession of goods recently stolen it calls for an explanation, and if none is given, or if one is given - you heard the explanation of the accused - if he gives an explanation which you are convinced is untrue, that would entitle you to consider whether you could convict the accused, bearing in mind particularly that the burden remains on the Crown to prove the guilt of the accused so that you feel sure, and the onus remains on the prosecution throughout, not on the defence."

The complaint is that the learned trial judge did not inform the jury that even though they may not have believed the explanation given by the appellant at his trial, nonetheless if it had the effect of raising a doubt in their minds that was something they must take into consideration and must give the benefit thereof to the appellant.

This Court has on numerous occasions in the past had to deal with directions given by learned judges on the doctrine of recent possession, and it seems strange that the explanation of this doctrine to the jury always appears to give trouble to judges. It really

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ought not to because the law is clearly and accurately set out in Archbold. The reference to the passage in Archbold is to be found in the 35th Edition paragraph 2103, where the case of the Queen v. Aves 34 Cr. App. R. 159 is referred to and this is what is stated:-

> " The onus of proving guilty knowledge always remains upon the prosecution. Where the only evidence against the prisoner is that he was in possession of recently stolen property, the jury should be directed that they may infer guilty knowledge, (i) if the prisoner has offered no explanation to account for his possession of the property, or (ii) if they are satisfied that the explanation, if any has been given, is untrue. "

And this is the important part in so far as this case is concerned,

> " They should also be told that if an explanation has been offered which leaves them in doubt as to the knowledge of the prisoner that the property had been stolen, the offence has not been proved, and the verdict should be Not Guilty. "

The case of Aves which I have just referred was mentioned in a judgment of this Court in the Queen v. Francis (1964) 6 W.I.R. page 316. This latter case was approved of, and followed by this Court very shortly thereafter in the Queen v. Headley to be found in the same volume of W.I.R. at page 316. It is not enough for the judge to give general directions

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on the burden of proof at the commencement of his summing-up and not follow those directions up with more detailed directions when he is dealing later on in his summing-up with such matters as the doctrine of recent possession. He should not give a portion of the directions only and leave out a portion. It is likely to confuse and mislead a jury.

A similar complaint also with regard to the directions on the alibi set up by the accused has considerable merit. Again the learned judge failed to remind the jury that even though they rejected the appellant's alibi, nonetheless if it had the effect of creating a doubt the benefit of such doubt ought to be given to the prisoner. These were clearly defects in the summing-up and in our view, may have caused a miscarriage of justice to the appellant.

With regard to the complaint as to the leading question put to the witness Phang, that can be disposed of very briefly. The question appears on page 7 of the transcript of Phang's evidence, and this is the question:-

"Q. Did you get awake at about 4.30 on the morning of the 8th of May?

A. Yes, sir."

As stated already learned Counsel for the Crown readily admitted that this question was leading and ought not to have been put. The view the Court takes with regard to this is that where it is desired to obtain evidence on some vital ingredient of the offence, it is the duty of Counsel for the Crown to see that the questions he puts to the witness are not leading, because what

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is desired is not the evidence of Counsel for the Crown but the evidence of the witness himself, and put in that form, 'did you get awake at about 4.30 a.m.,' Counsel for the Crown is putting in the mouth of the witness a vital ingredient of the offence of burglary. If it had been necessary, the Court might have acceeded to the invitation of Counsel for the Crown and have substituted a verdict that the appellant was guilty of the lesser offence of house-breaking and larceny wherein time would not have mattered, but in view of the conclusion we have reached on the matter as a whole, it is not necessary for us to give further consideration to that request of Counsel for the Crown.

The Court is satisfied that the inadequate and deficient directions of the learned trial judge on the matters to which I have already referred have caused a miscarriage of justice, and in these circumstances, the appeal will be allowed, the conviction recorded against the appellant quashed and the sentence imposed on him set aside, but as the Court feels that the interests of justice so require it orders a new trial to take place at the current sitting of the St. James Circuit Court, if that be possible and if that is not possible, then at the next sitting of the St. James Circuit Court. The appellant will be detained in custody pending the re-hearing.