J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 33/71

B E F O R E: The Hon. Mr. Justice Fox - Presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Graham-Perkins

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ROY WILSON v. REGINA

B. K. Monteith for the Appellant
P. T. Harrison for the Crown

18th November, 1971

SMITH, J.A.

The appellant was convicted in the Portland circuit court on three counts of an indictment. He was charged in the first count with burglary, the particulars being that in the night of the 20th November, 1970, he broke and entered the dwelling house of Beverley Thaxter with intent to rape therein. In the second count he was charged with assault with intent to commit a felony, namely, to rape Beverley Thaxter. And in the third count he was charged with burglary and larceny, the allegations in this count being that he broke and entered the same dwelling house presumably at the same time with intent to steal therein and stole a handbag and its contents valued at $30.00 the property of Beverley Thaxter.

On the first count he was sentenced to a term of imprisonment for twelve years and in addition to receive six strokes. He was sentenced on the second count to imprisonment at hard labour for two years and on the third count to imprisonment at

hard ...

hard labour for seven years with three strokes, all the sentences to run concurrently.

The appellant was granted leave to appeal by the single judge on the ground that there appeared to be a conflict in the convictions on counts one and three. As formulated before us the submission was that the learned judge misdirected the jury in relation to count three in that he omitted to explain that the intent necessary to establish the offence of burglary in that count was an intent to steal at the time of the breaking and entering and that this intent was not the same as the intent in count one which was burglary with intent to commit rape. In fact what transpired was that the learned judge summed up adequately to the jury on the first two counts apparently forgetting count three until it was brought to his attention by the learned counsel for the prosecution that he had omitted to direct the jury in relation to larceny. The learned judge accepted this and then proceeded to give directions in relation to count three. This is how he proceeded, he said to the jury:

> " I have mentioned to you what burglary is and larceny is the legal name for what you commonly know as stealing".

and then he went on to tell them what the definition of stealing was.

It appears, therefore, that quite clearly what the jury were left to consider in relation to count three, or at least the portion of count three which charged burglary, the jury were left to determine that charge on the basis that the intention was to commit rape, which was the intention charged in count one. They were not specifically told that the intent required to establish count three was an intent to steal. This was a fatal misdirection insofar as count three was concerned and this court had difficulty in deciding how it affected the conviction on count one.

If the ...

If the learned judge had given the proper directions in relation to the charge of burglary in count three the jury would have been left to decide whether at the time of the breaking and entering the appellant had either the intent to commit rape or the intent to steal or both, or neither. They may have been unable to determine which of the intents he had, in which event they would have been obliged to acquit of both charges of burglary. On the evidence, they may have found that he had the intention to steal at the time of the breaking and entry and not the intention to commit rape. This was open to them on the evidence because the complainant, Beverley Thaxter, said that after the appellant had assaulted her and demonstrated clearly an intention to ravish her at that time, and after an outcry, he left the room and she did not see him take anything with him. The following morning a handbag belonging to her, which had been in the room when she retired to bed that night, was discovered in the yard, open, with part of its contents lying nearby but nothing missing. If the learned judge had discussed with the jury the two intents that were necessary to establish the charges of burglary in counts one and three he would have been obliged to point out the possibility that the appellant may have broken in, taken the handbag out and searched it, left it in the yard and then formed the intention to return and to rape the complainant. In these circumstances we cannot say that had the jury been properly directed they would inevitably have convicted of the charge of burglary in count one.

After anxious consideration, we feel obliged to allow the appeal and to quash the conviction on the first count and set aside the sentence. The conviction and sentence on the second count remain. In relation to the third count, the charge of larceny was properly left to the jury and they convicted of this offence. The conviction for burglary, however, cannot stand. That conviction is quashed and the sentence set aside. The larceny charged in this count in the statement of offence was simple

larceny ...

larceny though the particulars were sufficient to support a charge of larceny in the dwelling. It is, therefore, simple larceny for which the appellant was convicted. We impose a sentence of two years imprisonment at hard labour for this offence to run concurrently with the sentence on the second count.