J A M A I C A

IN THE COURT OF APPEAL
SUPREME COURT CRIMINAL APPEAL NO. 221/74

Before: The Hon. Mr. Justice Luckhoo - Presiding
The Hon. Mr. Justice Graham-Perkins
The Hon. Mr. Justice Swaby

R E G I N A v. CLIFTON THOMPSON

Mr. R. Small for the Appellant.

Mr. F.A. Smith for the Crown.

20th March, 1975.

GRAHAM-PERKINS, J.A.:

At the conclusion of the hearing herein yesterday we allowed the appeal, set aside the conviction and sentence, and we promised to put our reasons in writing and this we now do.

The appellant was convicted by a jury before Rowe, J., of robbery with aggravation in the circumstances following.

On June 9, 1973, at 3:45 p.m. a Mr. Luther Chung was driving a van on Begonia Drive making milk deliveries and collections. He was about to drive off after making one such delivery when two men came up to his van and robbed him of Eight Hundred Dollars. These men then ran down Begonia Drive. Chung followed them. They turned on to Spathodia Drive, then on to Sunflower Avenue where they got into a car which was driven off by a third person; this third person was the appellant. Chung could describe this car only as an Austin.

At about 5:30 p.m. the same day, Chung, made a report to the Matilda's Corner Police Station, and at about 6:00 p.m. a Constable Cole who was on motorcycle patrol and had been alerted to look out for a yellow Austin car, saw the appellant driving a yellow Austin car on the Spanish Town Road. The appellant brought this car to a stop at Cole's request, and, on being asked by Cole if he had lent the car to anyone during the day, the appellant replied that he had not. There was a woman in the car with the appellant. Cole took the appellant to the

Matilda's Corner Police Station. At the station Sergeant Hibbert informed the appellant of the report made by Chung and cautioned him. The appellant said: "Me a hustler. Two men asked me to carry them to Mona Heights." The appellant had Fourteen Dollars in one of his pockets.

The following day, June 10, the appellant volunteered to give a statement in writing. This statement which was put in evidence by the prosecution was as follows:

> " Yesterday, I was at Spanish Town Road, Niah and Tissie say I must carry them go up Mona Heights. Them never tell me what them a go pon. When I reach up Mona they tell me fi wait for them. At Mona Heights when I turn off on the road by the Mona Theatre I heard one of them said, 'See it there.' I look up the road and see a milk van. They tell me to drop them by the corner. I stop there and they come out. I park right at the corner where they stop me. They came out and go up the road. While I was there in the car I see them running back. They come into the car and said, 'Drive the car man.' And I drive. Well I drive them down to Maxfield Avenue and Gem Road. They come out and say me must check them back later. I check them back on Moore Street, later, and they give me One Hundred Dollars. I take it and say, 'All right.' I leave and go to Spanish Town Road; is there the police stop me and tell me to follow him come here."

Following upon the foregoing statement three questions were put to the appellant as follows:

> Q. While you were on your way to Matilda's Corner Police Station, you gave Jean Moses (that is the lady in the car) Forty-one Dollars to keep for you?
>
> A. Yes, sir.
>
> Q. Was the Forty-one Dollrs part of the Hundred Dollars Niah and Tissie gave you?
>
> A. Yes.

Q. What happened to the rest?

A. I leave it at home.

At the end of the Crown's case it was submitted on behalf of the appellant that the evidence led by the Crown was such as to lead the trial judge to hold that there was no case for the appellant to answer. Rowe, J., overruled the submission.

The appellant made an unsworn statement in which he repeated substantially what he had said in his written statement. He added, however, that he was a taxi driver and that when giving the statement at the station he had told Hibbert that he had become suspicious when he was given One Hundred Dollars and that he was on the way to a friend to seek advice as to what he should do.

The appellant filed some six grounds of appeal. Only one, however, was argued before us. That ground involved a complaint that the learned trial judge erred in ruling against the no case submission. We are of the firm view that the complaint was fully justified. It may be observed that in the directions to the jury the learned trial judge said:

> " Now, in this case, Mr. Foreman and members of the jury, you will have to ask yourselves: has the prosecution established that there was agreement between this accused and two other men to commit a robbery in Mona Heights? Secondly, has the prosecution established to your satisfaction so that you feel sure that when the accused dropped the two men out of the car - when the men came out of the motor car, the accused knew that they were then going to commit a robbery and that his purpose for remaining where he was was to get them away from the scene, the robbery having been committed? Has the prosecution proved to your satisfaction that when the accused took the men back into the motor car at Mona Heights and drove them away he was then giving them the assistance to get them away from the scene of the crime with their loot intact?"

The first two questions were indeed the precise questions that arose on the evidence led by the Crown. Clearly, the answer to these questions was that no evidence had been led on which it could be found that there was an agreement between the appellant and the other two men 'to commit a robbery at Mona Heights.'

The Crown's case rested entirely on the contents of the appellant's statement given on June 10, 1973. That statement was a complete denial of guilty participation in the events constituting the robbery of Chung. It seems to us that if it were possible to exclude everything exculpatory in the appellant's statement nothing would be left except the allegation by the appellant that he had taken two men to Sunflower Avenue where they left his car and returned sometime later. It was conceded by Mr. Smith that this would not be sufficient to warrant a finding adverse to the appellant. Does the subsequent receipt of the One Hundred Dollars alter the situation? We think not. This was not inconsistent with an innocent presence at Sunflower Avenue. We observe that the robbery was not committed within the view of the appellant. It may be, and we put it no higher than that, that given other factors with which we are not here concerned, the appellant could have been charged with being an accessory after the fact. He was not so charged.

For the foregoing reasons we allowed the appeal and set aside the conviction.

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