J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 147 of 1974

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

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R. v. HERMAN HEADLAM

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R. Small for appellant.

R. Stewart for the Crown.

January 31; March 18, 1975

LUCKHOO, P. (Ag.):

The appellant Herman Headlam was convicted on July 9, 1974 in the St. Thomas Circuit Court on an indictment containing four counts charging that he and other persons unknown on August 4, 1973 (1) shot at Ruth Eaton with intent to do her grievous bodily harm; (2) wounded Ruth Eaton with intent to do her grievous bodily harm; (3) broke and entered the dwelling house of Ruth Eaton in the night with intent to commit a felony therein, to wit to steal; (4) being armed with a gun together robbed Ruth Eaton of money approximately $25 and a pan containing a quantity of copper coins. He was sentenced to imprisonment with hard labour for 20 years on each count and in addition was ordered to receive 10 lashes with an approved instrument in respect of his conviction on the fourth count. His application for leave to appeal against conviction on the several counts was refused by a single judge

but his application for leave to appeal against sentence was granted.

When the matter came on for hearing before the Court leave to appeal against his convictions was granted.

The case for the prosecution was to the following effect. Ruth Eaton a woman advanced in years resided in a house at Font Hill in the parish of St. Thomas. Her nephew Leo Eaton a lad twelve years of age lived there with her. Ruth Eaton retired to bed at about 11 p.m. on August 3, 1973 after locking up her premises. She left a lamp burning but it was turned down low. In the early hours of the following day while it was yet dark she was awakened by the sound of knocking on the kitchen door. She got up and went into the kitchen to investigate taking a flashlight with her. She saw nothing amiss so she turned to go back to her bedroom. As she did so she heard the sound of gun fire and received a shot in the foot. Apparently the shot had come from the outside through a hole in the kitchen door which had been inserted therein to allow the cat to go out of and to come into the house. Having been wounded by the shot in the foot she returned to her bedroom and began to shout. Two men came into the room. Each of the men had a towel around the face. They took away her flashlight and demanded money. They proceeded to smash her wardrobe and other articles in the room. They then took her into that part of the premises where she carried on a shop and she gave them twenty-five dollars and a pan containing copper coins which she had there. She was struck on the head by one of the men. She was unable to identify the men because the amount of light cast by the lamp in her house was insufficient for her to get a good look at the men and in addition there was not much of their faces left uncovered by the towels they wore.

Leo Eaton testified that he was awakened in the night by the noise of his aunt bawling. He got out of bed, went under the bed and was taken from under the bed by a man. He saw one man armed with a gun and another armed with a stick. There was a lamp burning in the hall. The men had flashlights turned on and had towels over their heads. The towels did not cover their faces but came alongside their faces. The man who had the stick he could identify by his face and that man was the accused. Because of fear he could not identify the man with the gun even though that was the man who questioned him and demanded money from him. He had accompanied his aunt and the men into the shop and saw the men take money and a pan containing copper coins. The men then made good their escape. Leo Eaton did not identify the appellant at an identification parade but instead first pointed out the appellant as being one of the men at the preliminary inquiry held in this matter in March, 1974 some seven or eight months after the incident had taken place. He did not know the appellant before the occurrence of the incident.

Cpl. of Police Miller testified that on February 19, 1974 the appellant was arrested and upon being cautioned said "I know Miss Ruth; is not me shoot her, is Junior do the shooting."

Artel Brown, acousin of the appellant, testified at the instance of the prosecution. He said that he had grown up with the appellant at Font Hill and that the appellant lived "in Town". On August 3, 1973, the appellant and two men one of whom is called "Junior" came to his house. The appellant went to another room where his father was and the other men spoke to him (Brown). With the other men he proceeded towards Ruth Eaton's shop. The appellant remained at his (Brown's) house. One of the men had him (Brown) at gun-point. The two men went towards Ruth Eaton's shop and he heard

the sound of an explosion. One of the men went into the shop while the other held him at gunpoint. They all later returned to his house where they found the appellant. Upon the application of counsel for the Crown the witness was deemed hostile and was cross-examined upon the testimony he had given at the preliminary enquiry into this matter. He admitted that at the preliminary enquiry he had said that he left his house together with the appellant and the other two men and they all went to Ruth Eaton's shop; that Junior and another of the men went into the premises while the appellant and he (Brown) stood about 10 yards away and that there was an explosion. He was also cross-examined on the contents of a statement he had given to the police on August 5, 1973, wherein he had stated that he was forced by the appellant and the other two men to go to the shop and the appellant and the other men went around the back of the building while he (Brown) went and hid in the bushes. His explanation for the contradictory accounts he gave on these several occasions was that he was forced by a policeman to give and sign that statement made on August 5, 1973 and also was forced to testify falsely at the preliminary enquiry.
He pointed out a police officer then sitting in the court room as the person who forced him to do all those things. The prosecution did not call that police officer in rebuttal of the witness's accusation.

The appellant's defence was an alibi. He testified that he resided at Font Hill and that on August 4, 1973, he was at his father's house and never went to Ruth Eaton's shop. He said that he did not know Ruth Eaton nor did he know her shop.

The first ground of appeal urged on behalf of the appellant was that the learned trial judge failed to fully direct the jury on the possible legal effects of the testimony of the witness Artel Brown. The learned trial judge had recounted the testimony given at the trial by Brown including his

admissions as to the testimony he gave at the preliminary enquiry and as to the contents of his statement made to the police and his allegation against the police officer whom he pointed out in the court room. The learned trial judge also explained to the jury that in so far as Brown was concerned the account he gave at the trial was evidence upon which they could act and that what was contained in the depositions or in the statement made by that witness was not evidence of the truth of the matters therein stated but could be used to determine whether or not the witness's testimony at the trial was worthy of credit. However, the learned trial judge did not tell the jury that if they found the explanation given by the witness for his contradictory accounts to be reasonable and were prepared to act upon his testimony at the trial that testimony went to support the appellant's defence which was in effect an alibi. This Mr. Small urged was a serious omission and was to the prejudice of the appellant. We agree that the learned trial judge ought to have emphasised this aspect of the matter the more so because of the direction as to the law relating to the evidence of an accomplice he gave in respect of the evidence of Brown. This brings us to the second ground of appeal urged on behalf of the appellant. Mr. Small submitted that the learned trial judge misdirected the jury on aspects of the law of accomplices and corroboration and failed to warn the jury on those aspects of the evidence that could not amount to corroboration. This submission may be dealt with in two parts. Firstly as to misdirection, the direction given by the learned trial judge is as follows -

" Now depending on the evidence you accept - it is a matter entirely for you whether you are going to reject his evidence in toto - entirely - whether you are going to say you cannot accept anything that this witness has said at all - depending on the evidence you accept, if you accept that he did go with these men to Mrs. Eaton's shop, you will have to decide whether he went there at gun-point or not. This is what he says, that he went there at gun-point. Now if you accept that he went there at gun-point then he went there involuntarily, he never went there of his own free will, he was not participating with these men in any of their activities at all, he was forced to go there.

On the other hand if you find that he was not forced to go, but he went there with them, then you will have to consider whether he would be an accomplice, having gone there. Now an accomplice is a person who participates in an actual crime charged. So you will have to decide whether it is established to your satisfaction that he was a participant in the particular crime or crimes.

If you find that he was an accomplice then I should tell you that it is very dangerous to rely on any evidence that he can give, and to use any evidence that he has given to convict this accused man unless his evidence is corroborated. By corroboration I mean some evidence adduced from some independent source, some independent evidence of some material fact which implicates the accused person and tends to confirm that he is quilty of the offence. So to try and simplify the whole situation, depending on what you find, if you find that he was an accomplice, that he was participating with them, acting in concert with them, and he went with them voluntarily to Mrs. Eaton's shop, then he would be an accomplice, and if you find that he is an accomplice then I must warn you that it would be dangerous to convict on his evidence - the evidence of Artel Brown, unless his evidence was corroborated in the manner that I have explained to you. So that is the evidence of Mr. Brown."

Such a direction could hardly be said to relate to the testimony of Brown as given at the trial. There was nothing in that testimony which could be said to inculpate the appellant and so render it dangerous in the absence of corroborative evidence to convict the appellant. Indeed, as Mr. Small urged the jury might well have been misled by such a direction into thinking that Brown's testimony at the trial contained material

implicating the appellant in the commission of the offences charged. For this reason alone the convictions ought not to be sustained. As to the further question of non-direction urged by Mr. Small we indicated at the hearing that there was no substance in Mr. Small's contention on that point save that we agree that the learned trial judge, having correctly directed the jury that they should look for corroboration of the testimony given by Leo Eaton, the twelve year old boy, ought to have specifically directed them that the evidence of Brown which he said itself required corroboration if Brown were regarded as an accomplice could not then be corroborated by Eaton's testimony nor vice versa. Of course this question would not have arisen had the learned trial judge told the jury that there was nothing in the testimony of Brown given at the trial which implicated the appellant in the commission of the offences charged.

Having reached the conclusions we have on the points already discussed it is unnecessary to deal with the further grounds of appeal taken, one being that in the special circumstances of the evidence of identification the verdict of the jury is unreasonable and/or unsafe save yet once more to observe that this is but one more of the countless occasions on which this Court and the trial courts have expressed dissapproval of dock identifications in circumstances where identification parades ought to have been held and could have been held.

In the result the appeal is allowed. The convictions are quashed and the sentences set aside.