IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 84/74

B E F O R E : The Hon. Mr. Justice Edun, Presiding

The Hon. Mr. Justice Graham-Perkins

The Hon. Mr. Justice Robinson.

R. v. W I N D E L L G R E E N

Mr. R. Small for the Appellant

Miss Joyce Bennett for the Crown.

31ST J A N U A R Y, 1975

GRAHAM-PERKINS, J.A.,

The applicant was tried before Parnell, J., and a jury and convicted on two counts of an indictment which had charged robbery with aggravation and shooting with intent. The first count charged that the applicant and three other persons, McPherson, Knight and Bell being armed with a gun and a knife, robbed Rupert Williams of a bag containing a quantity of money and a brief case. The second count charged the applicant alone with shooting at Septival Thomas with intent to do him grievous bodily harm.

It is necessary to set out shortly the evidence on which the Crown relied in support of this indictment.

On December 18, 1973, sometime between 11 A.M. and midday, Rupert Williams, a person whose job it was to drive a van and deliver cigarettes at various business places in Clarendon, arrived with his young assistant, James Braithwaite, at the business place of a Mrs. McKenzie. He left his van and transacted some business with Mrs. McKenzie. On his return to the van he was set upon and robbed by three men, two of whom he later identified at the Mocho Police Station as Bell and Knight, who like the applicant were convicted on the first count. After robbing him, the three men ran up the street. He saw Bell with a gun and at the station he also saw his brief case which another witness claimed to have seen Knight drop some distance from the scene of the robbery. Braithwaite, who witnessed the robbery, was unable to identify any of the three actors in this piece because, as he says, they wore masks.

Mr. David S

Mr. David Simms was on his way from McKenzie's shop where he saw Williams 'doing' some business'. He saw four men sitting on a wall some four to five yards from that shop. One of these men was Knight whom he knew before. He spoke to them and continued on his way. Simms subsequently identified McPherson and the applicant as the other three men he saw sitting on the wall. He had gone some four to five chains past these men when he heard a voice shout: 'Thief'. He returned to McKenzie's shop but did not see any of the four men.

The trial judge in his summing-up dealt with the events in what he called stages. The first stage related to what he described as 'opportunity', and the second to the robbery. He then dealt with what he described as 'the escape from the scene and the chase and capture' as the third and fourth stages.

Mr. Elliott now enters the picture. He lived some three-quarters of a mile from the scene of the robbery. At about 12.30 p.m., he 'saw people running up and down'. He ran from his home and he saw two men 'running up and down in the bush across the road.' He approached the two men. He saw Septival Thomas going towards them. One of these men was later identified as the applicant. Elliott said that he saw one of the men, the applicant, 'draw a gun at Thomas and Thomas lay down'. He then threw a rock at the applicant hitting him in his chest. He, Thomas, said another man 'backed' the applicant into a cave whereupon the applicant said: 'Come let me give you some of the money and free me.' Elliott saw the applicant with a bag containing money which bag was later identified by Williams as his bag. This bag, Elliott claimed to have been taken from the applicant. Another man went into the cave and found a home-made gun.

Thomas' evidence was to the effect that while he was approaching the applicant at thepoint about which Elliott spoke, the applicant held the gun at him and said: 'If you come one foot nearer I will shoot'.

The foregoing was, in substance, the case advanced by the prosecution.

We think it unnecessary to deal with the evidence in relation to...

to the second count. Suffice it to say that we agree entirely with Mr. Sang in taking the stand that he could not support the applicant's conviction on this count. In fact, the applicant was acquitted on the substantive charge, but found guilty of an attempt. The trial judge's directions on this count must have been of precious little assistance, if any, to the jury. The evidence, as he attempted to review it, appeared to be quite meaningless.

In relation to the first count the applicant's defence was that he had no part in the events concerning the robbery of Williams. He admitted being in the area, having gone there to purchase goods. Some distance from the scene of the robbery he saw people running. Some of them appeared to think that he was one of those that had taken part in the robbery. He sought to escape from them as they made it clear they were after him. Eventually, they caught him.

The applicant challenges his conviction on a number of grounds which, on any view, are not without merit. Nevertheless, inview of the order we propose to make, we deal with two only of these grounds. The first relates to the trial judge's directions as to common design, with particular reference to the fact that the applicant was not identified as one of the three men taking part in the robbery of Williams. It is clear that his conviction could proceed only from a finding by the jury that he was a party to that robbery, either as a principal in the first or a principal in second degree.

In the particular circumstances of this case, a very careful direction was called for. True it is that the trial judge did give directions in relation to the principle of common design. He said:

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> Now, where you have two or more persons acting together in order to effect a common purpose, that is one special object in view to accomplish, then so long as each is not going outside what had been agreed upon, each is looked upon as the agent for the other and the act of one is the act of the other one.

I....

" I generally give the jury a practical example. Three or four men go out to hold up a bank or rob a payroll. One man may be the driver of the car and the engine is in motion and he has it parked outside the bank premises while one man would stay outside, stand as a kind of watchman; two will go in now to take the money. Well, the man who is outside - his job it is to drive the car - would be equally as guilty as the man who went inside to take the money from the teller. Although he doesn't go inside, he is watching to see if any policeman is coming because each would be doing his part. "

Nowhere, however, did he attempt to relate these directions to the evidence adduced by the prosecution. This was, undoubtedly, the most critical area of the case as far as the applicant is concerned. As already observed, he was not identified as one of those taking part in the robbery. The gun with which he was alleged to have threatened to shoot Thomas some three-quarters of a mile from the scene of the robbery was a home-made gun of unusual features. No attempt was made by Williams or Braithwaite to identify this gun as the one used in the robbery. What is even more fundamental is that although there was no evidence that the applicant was seen to run from the scene of the robbery, the directions quoted above proceeded, in the context of the evidence led by the prosecution, on the assumption that the applicant was in fact one of those involved in 'the escape from the scene, the chase and the capture.'

The truth is that an examination of the summing-up reveals that the judge sought to analyse and examine the evidence of each witness for the prosecution in favour of every point advanced by the prosecution and against any advanced by the defence. He did not once seek, as the applicant legitimately complains, to give a balanced direction to the jury. By leaving his directions as to common design completely in vacuo, he failed in our view, to give the jury the assistance they must have required in order to assess and appreciate the evidence as it related in differing ways to each of the accused. That evidence was not in our

view inconsistent with the applicant's ex post facto entry into the fourth stage without having been a party to the robbery, nor was it inconsistent with an innocent presence on the wall near to McKenzie's shop prior to the robbery. These and other situations which the applicant was entitled to have the jury consider, were completely ignored by the trial judge.

Another complaint which we think unanswerable is that which relates to the way in which the trial judge dealt with the applicant's defence.

He said:

" Now, bearing in mind that the defence is that they were not there - the defence is that a robbery did take place but they are not the men at all - what that really means is they didn't have the opportunity of committing the offence. It is now nearly two minutes to two. A man can't be in May Pen and in Mandeville at one and the same time, so if an offence is taking place now in May Pen and it can be shown that at this time the man is in Mandeville, he would not have had an opportunity of committing it. Impossible. Being humans we cannot be present everywhere. It is only the Almighty who is present everywhere. "

The applicant's defence was not that a robbery had taken place, but 'that they are not the men at all.' Nor did the applicant say that he did not have 'the opportunity of committing the offence.' Indeed, he admitted that he was in the area, but that he was there on lawful business. Nevertheless, the trial judge devoted a considerable portion of his summing-up to an examination of the evidence in order to show that the applicant had an opportunity to take part in the robbery. By so doing, the trial judge attributed to the applicant a defence he had not advanced, and then proceeded to demolish it. When this is viewed on the background of his directions as to common design it cannot, in our view, be said that the applicant's case was fairly or adequately put before they jury if, indeed, it was put at all.

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As already indicated, we will not deal with the several other unsatisfactory features of the summing-up. We are, however, constrained to observe that it appears that at least one witness in this case was quite rude to one of the attorneys for the defence. Unfortunately, this does not appear to have incurred the condemnation of the trial judge. We quote the following extract, and it is not the only one in the summing-up:

> " There were one or two times when there was what you may call 'humourous bits' in it - for instance when certain gentlemen were being cross-examined. I remember, for example, when Mr. David Simms, whose evidence I shall remind you of later on, was being questioned by Mr. Johnson, he stood up in that witness box, listened carefully, and when Mr. Johnson said he wanted to ask him a question, he said: 'Yes, but don't ask me any foolishness' - things like that. "

We are quite unable to see the humour in blantant rudeness, and more so in the presence of a trial judge, and we express the hope that the foregoing circumstance is exceptional and that no Court in this Country will be reduced to comedy. More particularly those Courts which are concerned with the life and liberty of this Country's citizens.

Finally, we take the view that the interests of justice require that we order a new trial in respect of the first count only of the indictment. In making this order, we are guided by the principles enunciated by this Court in R. v. Stephenson, judgment in which was handed down on December 17, 1974.

The application is treated as the appeal, which is allowed in respect of both counts. The conviction and sentences are set aside. The applicant will stand his new trial at the next session of the Clarendon Circuit Court, until which time he will remain in custody.