IN THE COURT OF APPEAL

DOMINICA

Criminal Appeal No. 2 of 1971

Between DENNIS ACKIE Appellant

and

THE QUEEN Respondent

Before The Honourable the Chief Justice
The Honourable Mr. Justice Cecil Lewis
The Honourable Mr. Justice St. Bernard

B.K. Alleyne for Appellant
A.N.J. Matthew and I. Shillingford for the Crown

1972, February 8

The judgment of the Court was delivered by -

LEWIS, C.J.

The appellant was convicted on the 29th September 1971, of the offence of receiving stolen goods and was sentenced to three years imprisonment with hard labour. He was granted leave to appeal against his conviction and sentence.

The witness Eaton Bellot lived in a dwelling house at Citronier, some of the windows of which consisted of louvres. He left his home on the morning of the 25th August 1971, having closed it up and locked his door. He said that he left some money, $686.00, in a drawer, a shot gun leaning on the wardrobe, and a lady's chain and locket on the dresser, all these in one of his bedrooms. On his return home some time later that day he unlocked his door and went in. He found both his bedroom doors open, and, on looking into one bedroom, he saw everything topsy-turvy, clothing, mattress and bedspread on the floor. Drawers were opened. On checking the house he found that three louvres had been pulled out of a window and there were muddy prints on the window ledge. On checking his belongings he observed that the money which he had left

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in the drawer was missing and the gun was missing. Later in the day he also observed that the lady's gold chain and locket was missing. He made some inquiries from some boys in the road nearby, received information, went to Shillingford's Garage, and there he saw the appellant who is a driver; and he said that when the appellant saw him coming towards him, he stepped back three times. He made a report to the police who came and asked the appellant to accompany them to the Police Station. At the Police Station the appellant emptied his pockets and brought out a quantity of money, about $40.00, which he said was the balance of $80.00 with which he had left home that morning and a packet of cigarettes. The police got a search warrant and returned to the Police Station and there they searched the appellant, and when the packet of cigarettes was taken out of the appellant's pocket, out dropped a chain which the man Bellot identified as his chain and locket. The appellant's home was searched later that day and under the bed the missing gun was discovered. A pistol was also found there; but that was not claimed by the prosecutor Bellot. In the course of cross-examination the witness Bellot said that his first reaction on finding his house broken was to send in search of a woman named Cuffy with whom he had been living and who he thought might have removed the things from his house as a joke.

The woman Cuffy gave evidence. She said she had not been to the house that day - she had been spending the week-end with her mother but that later, around 5 p.m. she did go to the house - this was after the place had been discovered broken open and she saw that the place was in a mess, as she called it. She was asked by counsel for the appellant whether she had not asked the appellant to take her to Bellot's house on 25th August to get the gun because she was afraid of Bellot, and she said no. She denied that she had taken away the gun from Bellot's home; she denied that she had removed the chain and given it to appellant as was suggested to her. Certain other allegations to which I will refer when I recount the evidence of the appellant, were also denied by her.

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A young boy Dave Winston, aged nine years, said in evidence for the prosecution that on the morning in question he had met the accused. He saw the accused park his car on the side of the road near to Bellot's house and go into Bellot's yard, and he didn't see him again. He said that he knew Bellot well. He also knew Cuffy but he did not see her that morning. It was suggested to him that his mother had been paid $12.00 to give evidence. He said he knew nothing about that and no subsequent evidence on that score was given in the case.

Then there was the evidence of Simon Darroux which went towards the identification of the gun which was found in the appelant's house as being a gun licensed in the name of Bellot.

Sergeant John said that he went to Bellot's house. He saw that three wooden louvres had been removed. The louvres were produced in court. He also went into the bedroom and saw the condition testified to by Bellot. He said that he went to Shillingford's garage and there he met the appellant, took him to the Police Station, searched him, and he related how the gold chain was found. There was a slight discrepancy between his evidence and that of the witness Bellot, in that he said the chain fell out into his hand, whereas Bellot said it fell onto the floor. The appellant, he said, when asked for an explanation about the chain, said that the witness Cuffy had given it to him. He gave evidence of the finding of the shot gun under the appellant's bed. He said that on finding it there he cautioned the appellant and asked him for an explanation, and the appellant said "It must have been brought there by a Guyanese chap who was living in my house." He asked him the chap's name, he said he didn't know his name. He asked him where the chap was and he said he must have left the State that morning. That was the evidence for the prosecution.

The appellant gave evidence on oath. He said that he had been on intimate terms with the woman Cuffy, an allegation which the woman Cuffy had denied, and that she had told him there had been an altercation between herself and Bellot and that she had left Bellot. He said she asked him to go with her to Bellot's house and get her clothes and other

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things that belonged to her. And so on the morning of the 25th August he drove her in his car to a point 60 - 70 yards away from Bellot's home, near the Anchorage Hotel. There she left him and asked him to wait for her. He drove away, he said, towards the Sea Breeze Hall about 50 yards away and bought something. While approaching, Cuffy approached the car and sat down. She brought a handbag inside of which he noticed two earrings, one gold ring, $30.00 in cash and one gold chain, the one in court; and she told him that she had a surprise for him which he would see in due time. When he arrived at Shillingford's Garage which is the entrance to Cuffy's sister's home, he discovered what the surprise was. It was a shot gun, the same shot gun in court, on the back seat and a small black pistol. He dropped her off at the gate that leads to her sister's home and she took with her the clothes, the shot gun, pistol and the bag, but she gave him the gold chain. He said he accepted the gold chain because he thought it was hers. He gave some evidence which I suppose was intended to build up towards the receipt of the chain: that he had asked her who would pay for the transportation to Bellot's house, and she told him he was talking nonsense. So apparently the suggestion was that the chain may have been given by this woman with whom he had been intimate as payment for taking her to Bellot's house to get her things. His explanation about the gun was that Cuffy had told him, again something that she denied in evidence, that she had seen Bellot shoot a dog and considered him a criminal, and thought that her life might be in danger, so she removed the gun from the house. His evidence about the finding of the chain was that he handed it to the police. With respect to the finding of the gun he said that "they called me and Sergeant John said he found the gun below my bed, I said if so he must check with Cuffy as I could give no account as to how the gun came there. I had dropped Cuffy a while ago with the said gun and saw no reason why she came to my home without my consent. I did not send her there with any gun or pistol nor did I side with her to take either." There was also some evidence about two pairs of trousers found at his home, but this does not concern the case. The appellant denied having entered the house or removed the louvres or taken

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away the missing goods.

The indictment against the appellant contained two counts. The jury returned a majority verdict of not guilty on the first count, for housebreaking and larceny, but guilty on the second count, for receiving.

It appears that both the shorthand writer and the tape recorder broke down during the judge's summing up, so that there was no transcript of the summing up which could be sent to this court. In the circumstances, the learned trial judge has given the court a report of the substance of his summing up. At the commencement of the appeal learned counsel for the appellant told this court that he had obtained, at first he said from the Registrar, and later he said from the Deputy Registrar, both of whom have denied it, a copy of the defective transcript of such part of the summing up as the stenographer was able to produce, and he asked the court to make it part of the record. The court commented on the irregularity by which learned counsel appears to have come by this transcript, which the trial judge had rejected, and declined to have anything to do with it. The case has therefore been argued upon the basis of the notes of evidence and the judge's report.

The first ground of appeal argued was that the learned judge failed to direct the jury that before they could convict of the offence of receiving they must be satisfied that the goods were stolen. In his report the learned judge said:

> "I defined larceny, breaking and entering, and receiving, and as far as receiving is concerned told them that while the burden of proving guilty knowledge remains on the prosecution, where the only evidence against the accused is that he was in possession of goods recently stolen they may infer guilty knowledge, (a) if the accused offers no explanation to account for his possession of the goods, or (b) if they are satisfied that his explanation is untrue, but if accused offers an explanation which they consider may reasonably be true and which is consistent with innocence even though they are not convinced of its truth then he is entitled to be acquitted in the absence of other evidence because the prosecution will have failed to discharge the onus of satisfying them beyond reasonable doubt of his guilt."

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Learned counsel has submitted that the reference in this report to possession of goods recently stolen is not sufficient and that there is no indication that the judge told the jury that they must be satisfied that the goods were stolen. The court finds itself unable to accept that submission because it is inconceivable that the judge in defining to the jury the offence of receiving and giving them directions about the goods being recently stolen would have failed to tell them that they must be satisfied that the goods found were those stolen from Bellot. Learned counsel referred to a case, R. v. Samad and others, (1970) 15 W.I.R. 35, a judgment of the Court of Appeal of Guyana which deals with the inadequacy of certain directions given by a trial judge in a case of murder. He cited this case in support of his submission that there were a number of inferences which the jury might have drawn from the evidence given by the appellant; and in particular he said that the judge should have told the jury that they might draw the inference that Cuffy had taken these articles from the home of Bellot merely for the purpose of protecting herself and not with the intention of depriving Bellot permanently of their possession, and that if they did so there would be no larceny of the goods and his failure to do so was a misdirection. The evidence was that Cuffy denied having taken these goods, indeed, having entered the house at all. There was also very strong evidence that somebody had broken into the house, whoever it was, by removing the louvres, and that as a result of that breaking these goods had been removed. There was also evidence of the conflicting explanations, with regard to the presence of the gun in his house which the appellant gave to the police and in his evidence at the trial. In the light of all that evidence, it would, in the opinion of the court, have been pure speculation to suggest that the removal of those goods, in particular the gun, from that house, is not larceny. But, indeed, the learned trial judge told the jury that if they believed that either Cuffy or the Guyanese man was responsible for the presence of the gun at the home of the appellant and that he did not know that it was there, or if they were in doubt on that score, then he could not be said to be in

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possession of the gun and he should be acquitted on the receiving count. Now this involves the jury believing that Cuffy may have removed the gun from those premises and put it, as the appellant suggested, into his house, and the judge quite clearly told the jury that if they believed that or were in doubt about it then they should acquit. This takes care of the suggested reason why Cuffy may have removed the gun because the judge did not exclude any such possibility from his direction. So the court is of opinion that this ground of appeal fails.

One observation that might be made upon the case from Guyana cited by learned counsel is that the directions which a judge should give to a jury and the sort of way in which it may be his duty to deal with the evidence in a case must depend upon the particular facts of that case. In a case that is complicated and where the jury need the careful assistance of a judge, it may be his duty to analyse the evidence and perhaps assist them - I won't say anything more than perhaps - assist them in the inferences that may be open to them. In the Guyana case, from the passages that learned counsel cited to this court, the complaint appears to have been that the unfavourable inferences had been stressed by the trial judge and the favourable inferences ignored. That of course would be an unsatisfactory way of summing up. But one must always remember that by and large a judge must be left to sum up a case in his own way and as long as he deals adequately with the issues which are raised on the evidence and puts the defence fairly to the jury then it is hardly helpful to examine too critically whether there are any possible inferences which he has omitted to bring to their attention the more so where such inferences border on speculation.

Then it was submitted that the judge had misdirected the jury in that he failed to tell them that they might accept the evidence of the appellant that he believed that the gold chain and locket belonged to Cuffy, and the legal consequences, if they were in doubt about his explanation. Now the learned judge told the jury that the appellant in effect was saying that it was Neomi Cuffy who gave him the chain and locket and that he

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believed that they belonged to her. And in dealing with the law relating to recent possession he told them that where as in this case the appellant offers an explanation, if they consider that that is a reasonable explanation consistent with innocence even if they are not convinced of its truth (words which merely mean if they are left in doubt after considering his explanation) then they should acquit. The court considers that this point was adequately dealt with by the learned judge.

Counsel also submitted that the verdict cannot be supported having regard to the evidence but this ground was not argued strongly and in the opinion of the court is quite untenable.

The appeal against conviction must therefore be dismissed.

With regard to the appeal against sentence learned counsel has pointed out that although there is a record of some convictions against the appellant, there are no previous convictions relating to fraud or larceny. He endeavoured to make a point with regard to the jury's verdict that the fact that they brought in a verdict of not guilty of housebreaking and larceny but guilty of receiving, shows that they accepted his story that it was Cuffy who removed the goods from the house. The court desires to make two observations about this. The learned trial judge appears to have been of the opinion that the doctrine of recent possession applies only to receiving and not in a case of burglary and larceny. That of course is not so. It may be that as his directions as to recent possession related only to receiving, the jury may have been misled into believing that the evidence of this gun and chain being found in the possession of the appellant was not evidence upon which they could bring in a verdict of guilty of housebreaking and larceny. In the present case the circumstances were such, and the possession so recent, added to the evidence that the house had been broken into, that, had the jury been properly directed they would almost certainly have brought in a verdict of guilty of housebreaking and larceny.

The other observation that the court wishes to make is that where there are alternative counts of this nature the jury should be asked whether they find the appellant guilty on either of the two counts. They should

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not be allowed to return verdicts on both counts. This court, had the verdict of not guilty not been returned on the housebreaking count would have been disposed to alter the verdict, but in the circumstances the court is unable to do so. Therefore the court has decided that the verdict of receiving must stand.

Having made those observations, to return to the question of sentence we consider that the sentence of three years is excessive in the circumstances of the case and will set it aside and impose instead a sentence of imprisonment for 12 months with hard labour.

Allen Lewis
Chief Justice