IN THE COURT OF APPEAL

SAINT VINCENT

Civil Appeal No. 8 of 1972

Between: EDWIN POLIN Defendant/Appellant

and

REGINA Plaintiff/Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Bishop (Ag.)

B. Frederick for Appellant
The Hon. Attorney General with Miss M. Joseph
for Respondent

1972, September 19

JUDGMENT

The judgment of the Court was delivered by -

ST. BERNARD, J.A.

This is an application to vary the refusal of a single judge to grant leave to the applicant to appeal against his conviction for housebreaking and larceny. We intimated at the start of the hearing of this application that we would allow counsel to argue the application and then treat it as an appeal.

At the beginning of the hearing of this application counsel asked leave of the Court to substitute four new grounds of appeal in place of those filed. These new grounds are that:

(1) The learned trial judge failed to leave the issue of identification to the jury.
(2) He failed to direct the jury on how to apply circumstantial evidence.
(3) He misdirectedthe jury on the doctrine of recent possession; and
(4) He misdirected the jury on the burden of proof.

The facts of the case are that on the 12th of April, 1971, Alice Griffith, a shopkeeper who lived at Buccament secured

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her shop at about 9.00 p.m. and left therein certain articles including a scale to the value of $64.00, ju-c beverages, cakes, scale weights, crocus bag, and a lady's watch. Later that same night, about 4.00 o'clock in the morning, two policemen, Selwyn Cumberbatch, Sgt. of Police and Erton Guy, Corporal of Police, were travelling to Vermont when they saw someone walking up the road with something in hand. They walked up to the person who was then stooping at the side of the road. Sgt. Comberberbatch switched on his flashlight and they were able to identify the person with the bag as the applicant. He dropped the bag and ran. They took the bag and later on that same day it was found that Alice Griffith's shop was broken into and the articles that were lost from the shop were the articles found in the bag which the applicant dropped when he ran. Griffith was able to identify the bag as hers and she identified the lady's watch which was found in the bag as her own watch which she had left in the shop the evening before.

The accused defence was an alibi. He stated that he was not the person who was walking on that road. He said he left on the 12th April, 1971, and went to his sister and was playing some records, and drinking. He got drunk; his sister took him home where he was living and early in the morning while he was sleeping his girl friend awoke him and told him he had to go to the mountain to get milk. He got up and went with his cutlass to the mountain and when he returned the girl friend told him three men came in the yard and rapped and called her and said Edwin sent a parcel. She told them Edwin could not send a parcel as he was in the mountain. On the 31st of May, he said he was arrested for these articles.

In respect of the first ground of appeal counsel submitted that the judge failed to leave the issue of identification to the jury and referred to a passage in the summing-up

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which he said was inadequate since the question of identification was an important one.

On page 15 of the record the judge directed the jury as follows:

> "The Prosecution are telling you that these two witnesses saw the accused this morning, they know him, one for a period of five to six years one for about six months, dropped the bag and they found in it articles which were the property of Griffith and found to be missing from her shop. The question of identification is an important one and it will be for you to say whether in fact the man was properly identified."

This Court feels that that was a proper direction to the jury and there is no substance or merit in counsel's contention.

On the second ground counsel argued that the judge should have told the jury how to apply circumstantial evidence. All the circumstances of this case were put to the jury and in our view this ground has no merit or substance whatsoever. Counsel was unable to inform the Court what the trial judge should have told the jury.

In respect of the third ground counsel contended that the judge misdirected the jury on the doctrine of recent possession. The judge told them that "if a person honestly came by an article which was recently stolen and he is asked to give an explanation, he would give it to you promptly - he would give it to you right off the cuff. If he is unable to give you an explanation or if he is unwilling to give you one then you would be entitled to find that he has stolen these articles." Counsel argued the third and fourth grounds together, and submitted that this passage amounts to a misdirection as it tends to show that there is a burden on the applicant to give an explanation. This Court is of the view that this passage in the judge's summing up was a misdirection to the jury.

Two cases may be referred to in respect of what should be told to the jury in dealing with cases of recent possession.

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The first case is that of the Queen v. William Daniel Garth (1949) 33 Cr. App. R. p 100 at page 101. The learned Chief Justice while dealing with a case of recent possession referred to the case of R v. Abromovitch (1914) 11 Cr. App. R. 45 and said the learned Recorder stated the law in this way:

> "Anyway, the prosecution have to prove guilty knowledge, and in the absence of any explanation by the accused man you are entitled to convict him of receiving stolen goods knowing them to have been stolen, if he fails to give an explanation which you .. you can possibly believe. If on the other hand, he gives an explanation, and that is one which, although you do not think it to be true, you think it might possibly be true, then he is entitled to be acquitted".
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> The learned Chief Justice continued:
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> "That was stating the law far too favourably because, of course, any explanation may possibly be true. That is not in the least what Abramovich's case (supra) lays down. I have more than once endeavoured to say what Abramovitch's case (supra) does lay down, and it is this: Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen. It must be borne in mind that the onus is always on the prosecution; but if the prisoner gives an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted. It is not a question whether the prisoner gives an account which may possibly be true, because as I have said, any account may possibly be true. A much more accurate direction to the jury is: 'if the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction'".

In a later case, R. v. John Robert Aves (1950) 34 Cr. App. R. 159 at page 160, the Lord Chief Justice in dealing with a case of recently stolen goods stated:

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> "Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b)if the jury are satisfied that the explanation he does offer is untrue. If however, the explanation offered is one which leaves the jury in doubt as to whether he knew the property was stolen, they should be told that the case has not been proved, and therefore the verdict should be Not Guilty."

Applying the principles set out in these cases, it will be observed that the learned trial judge misdirected the jury as it would appear that he was placing a burden on the applicant to give an explanation of the articles found in his possession. Despite this misdirection, however, owing to the facts of this case, the Court feels that there was no injustice suffered by the applicant. The jury by the verdict must have been satisfied in respect of identity of the applicant and it was reasonable to infer that it was he who committed the offence. This Court feels that because of the special circumstances of this case and there was no misdirection in respect of the identity of the applicant the Court would apply the proviso to section 39 of the West Indies Associated States Supreme Court (Saint Vincent) Act -

> "provided the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice had actually occurred."

We feel that a jury, properly directed on the facts of this case and in respect of the law, would have come to the same conclusion. The appeal is therefore dismissed.

E.L. St. Bernard
JUSTICE OF APPEAL