IN THE COURT OF APPEAL
SAINT CHRISTOPHER

Criminal Appeal No. 1 of 1973

Between: ARTHUR MARTIN Appellant

and

THE QUEEN Respondent

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

W.V. Herbert and Miss C. Mitcham for Appellant
Lee L. Moore, Attorney General for Respondent

1973, March 2

JUDGMENT

The judgment of the Court was delivered by -

LOUISY, J.A. (Ag.)

The appellant was indicted on the 5th of January, 1973 on the following counts:

Count 1 - storebreaking and larceny; Count 2 - Larceny; Count 3 - receiving stolen property and count 4 - as an accessory after the fact to storebreaking and larceny. The trial judge withdrew counts three and four from the jury and left counts one and two for their consideration. The jury returned a verdict of guilty on count one. The appellant appealed against this conviction and sentence on six grounds but only argued the following -

1. That the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.
2. That the learned judge erred in law in refusing to withdraw the case from the jury at the close of the case for the prosecution as there was no evidence of the accused being in recent possession of the stolen goods.
3. That the learned judge misdirected the jury on the question of whether the accused could be an accessory before the fact to the offences charged as there was

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no evidence to support such a finding.

6. That the sentence is excessive.

The facts of the case are as follows:-

On the 10th of August, 1972 the Public Officers Socio Economic Co-operative Society Limited, which I will refer to hereinafter as POSECS, carried on business in a two-storey wooden building with a varandah to the front facing Bay Road and an entrance to the building on the ground floor through doors on the front side of the building. The company sold the type of goods mentioned in the first count of the indictment. The manager of the company was one Charles Elmes and he was assisted in the business by a youngster called William Connor who apparently slept on the premises.

On Thursday the 10th of August, 1972, Elmes left the premises about 7.00 p.m. but before leaving he made sure that the doors and windows of the building were properly secured. In that building there was a storeroom where the goods mentioned in the indictment were stored. The door to the storeroom was secured by a padlock. As a result of a report made to Elmes on the following day about 3.00 a.m. he went to the premises to the storeroom, he observed that the hasp had been ripped away from the door and the lock was on the staple; he went into the storeroom and inspected it and found a number of articles which he had left there missing; he later went to the Police Station at Basseterre where he saw bags of rice, looking like those missing from the storeroom and other articles.

William Connor, who was sleeping on the premises on that night, said he was in his room about 2.40 a.m. on the 11th of August when he was awakened by a noise, he said this noise was coming from the storeroom and it sounded as if something was being broken from a door, the noise continued, he said for about five minutes; after that he heard footsteps in the storeroom for about 20 minutes. Then he heard footsteps coming from the yard. He got out of bed, opened the door to his room, and went outside in some bushes near to one Mrs. Moore's premises,

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quite near to the POSECS building and spoke to Mrs. Moore. He then left and went back to a part of the garden and looked in the direction of the road. There he saw a parked car on the left side of the road near POSECS premises; he saw two men in the street taking things from three other men on the premises; but he did not recognise any of the men as it was dark. He saw the men carrying things like cartons to a car. After that he saw the lights of the car then go on, he crouched where he was, and when the car had almost passed him, he recognised the number of the car as P 2398. It is admitted that this car, P 2398, belongs to the appellant. Connor went again and spoke to Mrs. Moore, and whilst he was there, the police came to the premises, examined them and observed the door to the storeroom was broken.

Sargeant Hanley, Corporal Howston and P.C. Sargeant then left for Haynes Smith Village in the vicinity of the appellant's restaurant. On arrival there they saw motor car P 2398 parked on the side of the road; they looked in the back seat and saw bags of Indian Maid Rice, Ovaltine, Beans and other articles. The trunk of the car was later opened and they saw cigarettes, and more Indian Maid Rice. Some of the articles seen in the car bore the mark 'POSECS'. The rice found in the back seat of the car and in the trunk was the same brand which was sold by POSECS. The police searched the yard of the appellant's premises and under the steps of this restaurant they found Indian Maid Rice, Ovaltine, Sifto Salt, Strawberrics and some Kidney beans, some of these articles were also marked POSECS. The witness Elmes say that all the articles found resemble he stocked at POSECS business premises.

The police, before carrying out their search knocked on the premises of the appellant; after wa ting a few minutes they saw him coming from the north along Millionaire Street. He had a bunch of keys with him, these keys, it was admitted, were the keys of his car. The police told him that they suspected he had stolen goods in the motorcar, cautioned him and

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asked him to give an explanation as to how he came in possession of the articles, he replied, "I don't know anything about the goods, I only know about the cigarettes and batteries in the trunk of the car." A police witness said that the trunk of the car was not locked, it was open, but another one said that the trunk was locked and was opened with a key; the appellant said that it was not locked. This was the evidence before the jury when the Crown closed their case.

After the Crown closed their case, counsel for the appellant submitted that there was no evidence of ownership of the goods and that the fourth count could not stand as a receiver could not be an accessory after the fact. The trial judge ruled that there was no evidence to support the fourth count but overruled counsel's submission on the other count.

The accused then gave evidence, he stated that he knew nothing about the goods in his car except for the cigarettes in the trunk. He denied also that he knew anything about the goods found under the steps of the restaurant.

Before this court, counsel for the appellant submitted that the verdict was unreasonable and cannot be supported having regard to the evidence; on the evidence the jury's verdict was unsafe. He stated that the evidence was capable of two interpretations, it was equivocal and the trial judge should have directed the jury that they should give the more favourable interpretation to the appellant. He stated that the goods could have been placed in the car by anybody and as regards the goods found under the steps of the restaurant, they could have been placed there by anybody as the yard was an open yard to which the public had access. He stated further that the jury should have been asked to say whether the appellant was in possession of the goods in the car or under the steps of the restaurant and they should have been told further that there must be evidence that the appellant knew that the goods were there and that he had control over these goods or

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that
/he was in some way connected with the goods before they could convict him. He further submitted that the jury could not consider the doctrine of recent possession, as the question of recent possession was withdrawn from them by the trial judge. He admitted that on the evidence the trial judge had misdirected the jury by withdrawing the question of recent possession from them. He further submitted that on the question of accessory before the fact, the learned trial judge had misdirected the jury as there was no evidence to support such a charge, and in any event before a person can be convicted of an accessory before the fact to any offence, he must be so indicted. In this case he said there was no indictment against the accused as being an accessory before the fact. By addressing them on that question the trial judge confused the jury and that may have influenced them in returning a verdict of guilty on the first count. The other submission he made was on sentence; he stated that it was excessive for the offence, the maximum sentence being seven years, the appellant had no previous convictions for dishonesty and he should have been dealt with in a different manner. The appellant, he stated, was sentenced to two years, but he felt that he should have been fined for such an offence or dealt with otherwise.

In reply, the Attorney General, as regards ground 3, submitted that in the special circumstances of this case the learned trial judge was right in addressing the jury on the question of an accessory before the fact. He stated that in special circumstances, as for example when an accused has given an explanation which is consistent either with actual participation in the crime or having contributed to the crime beforehand, it is open for the jury to return a verdict of guilty on the charge, as a principal to the offence charged. He referred to the case of R. v. Bullock, 38 C.A.R. p. 151 and submitted that on the authority of this case the learned trial judge was quite right in dealing with an accessory before the fact in his summation.

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On the question of recent possession, ground 2, he stated that the trial judge may have withdrawn recent possession from the jury but that he did not withdraw possession, and gave an example of what he meant when he stated that recent possession was withdrawn from the jury and not possession. He submitted that if possession was not withdrawn, then the jury was right in convicting the accused.

On ground 1, that is the unreasonableness of the verdict, he stated that this is really a matter for the jury. They heard the evidence and it was for them to say whether on that evidence the appellant was guilty as found.

In reply, counsel for the appellant again addressed the Court on the question of an accessory before the fact.

I should state here that the legislation relating to an accessory before the fact is to be found in the Accessories and Abbettors Act, Cap. 2. Under section 3 of this act there could be no alternative verdict on this indictment of an accessory before the fact unless the provisions of the section were followed and in this case they were not.

In his summation to the jury, the trial judge directed them to return a verdict of not guilty on the third and fourth counts and as I said before, he left the count of storebreaking and larceny and that of simple larceny to them. He reminded the jury that they were told by the Director of Public Prosecution that the case depended on the doctrine of recent possession and circumstantial evidence. He explained what was meant by the doctrine of recent possession and finally said: "In this case the prosecution cannot depend on the doctrine of recent possession to establish their case. The prosecution claims that they have proved their case by means of circumstantial evidence."

The circumstantial evidence which the trial judge told the jury that the prosecution relied on is stated at page 37 of the record. It is as follows:-

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1. That the public Officers Store on the Bay Road was broken into on the morning of the 11th August, 1972 and that the articles mentioned in the first and second counts of the indictment were stolen therefrom.

2. That car P 2398 owned by the appellant was used to transport the stolen articles.

3. That less than an hour later, the said car was found parked near the appellant's shop at Haynes Smith Village.

4. That some of the stolen articles were found in the back seat compartment of the car and some were found stacked in the appellant's yard under the steps leading to his living quarters.

5. That about five minutes after the police knocked on the appellant's restaurant and shop doors, the appellant was seen walking northwards along Millionaire Street, and turned right into the street where the police were.

6. That the appellant approached the police carrying in his hand a bunch of five keys including the keys for the car.

It is on this circumstantial evidence that the trial judge later in his summation invited the jury to consider to convict the appellant.

The learned trial judge having withdrawn the question of recent possession from the jury told them to take into consideration in arriving at their verdict on the counts left to them the fact that some of the stolen goods were found in his car and under the steps of his restaurant. This direction linked with the circumstantial evidence related at 2 and 3 mentioned above would reintroduce the question of recent possession which he had already withdrawn from the jury. That, in our view, would amount to a misdirection.

There appears to be two missing links in the chain of circumstantial evidence which was put before the jury by the trial judge, the first being that the appellant was not seen anywhere near the POSECS premises that night, and the second that he was not seen in or near the car at any time

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that night.

At page 39 of the record the trial judge gave this direction to the jury regarding the circumstantial evidence already referred to above: "If from the evidence, from all the circumstantial evidence you feel that the only inference you can draw is that he drove the car himself or that he lent the car to other people who later brought some of the stolen goods to his premises, if you feel that is the only thing you can infer from the evidence, it is open to you to return a verdict of guilty on the first or second count."

In our view the jury could not, on that evidence be asked to draw the inference which they were asked to draw by the trial judge in order to convict the appellant. On that evidence, if the trial judge had not withdrawn the question of recent possession from the jury, he could properly have directed them that it was open to them to convict the appellant on either count 1 or 2 if they found in these circumstances the appellant was in possession of the goods. It is undisputed that POSECS was broken into on the morning of 11th August, 1972. That some of the articles from the premises were found in the appellant's car and under the steps of his restaurant less than an hour after POSECS was broken into. The trial judge clearly usurped the function of the jury when he told them that the prosecution cannot depend on the doctrine of recent possession to establish their case, by doing so he withdrew recent possession from them. On the evidence as it stood, the only way the jury could have convicted the appellant on the first or second count was if the issue of recent possession was left to them. In the circumstances, the Court would allow the appeal, quash the conviction and set aside the sentence. In view of this order, it is no longer necessary to deal with ground 6.

The question whether there should be a new trial arises. The authorities seem to indicate that where there is abundant or ample evidence on which the jury properly directed might

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convict there must be a retrial. This view finds support in the case of R. v. Cradden [1955] I.R. p. 130 in the following passage: "provided that the conduct of the trial was otherwise unexceptionable, there was clearly evidence, which if there was a proper charge to the jury would support the conviction there must be a retrial". We are of the opinion that in this case there was ample evidence on which the jury could say whether the appellant was in possession of the goods found in his car and under the steps of the restaurant. In our view if the jury had been properly charged on the question the evidence would support the conviction.

In the circumstances the Court will order a retrial under subsection (2) of section 22 of the Federal Supreme Court Regulations which are still in force in this State. Subsection (2) of section 22 reads: "The Court shall if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered or if the interest of justice so require order a new trial". We think a new trial should be ordered and we so order. The appellant is to be kept in custody pending his retrial.

Allan Louisy
JUSTICE OF APPEAL (Ag.)