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23rd September, 1986.

COURT OF APPEAL

Her Majesty's Attorney General -v- Reginald Phillip Smith

Appeal against Conviction and Sentence

Judgment of the Court

President: J D A Fennell Esq., O B E, Q C.

PRESIDENT: The judgment which I am about to read is the judgment of the Court. This is an application by Reginald Phillip Smith for leave to appeal against his conviction before the Royal Court (Criminal Assize) on the 18th May, 1986, when he was convicted of one offence of breaking and entering and larceny. He also seeks leave to appeal against the sentence of four years' imprisonment to which he was sentenced on the 19th June, 1986.

The facts can be stated quite shortly. Mrs Keyworth is a widow who lives alone at "Wellingley", Coast Road, Gorey. On Tuesday, 3rd December, she left her house unattended at 1.35 p.m. to go and change her library book. When she returned at 2.40 p.m., she found the house had been ransacked. She investigated and found that a ladder had been propped up against the back of the house. It was a ladder belonging to her, normally kept in her garage. Mrs Keyworth saw that a man was standing on the ladder. She enquired what he was doing and he replied, "Cleaning windows". Naturally enough, Mrs Keyworth was not satisfied with that answer and she dialled for the police. Before she called the police, Mrs Keyworth had an opportunity to observe the appearance of the intruder. She said, in her evidence at page 65,

"He was on the small side and stocky. I noticed his clothes: he had mushroom-coloured trousers on, and an anorak, a blue anorak-type top, nothing on his head, I noticed that, and he looked to me between 35 and 40. I thought at the time he looked like a Jersey farmworker."

She went on,

"When I spoke, his face turned towards me and then he looked back again at the window. I definitely saw the outlines sideways and I am practically certain full face, but he looked when he heard my voice and then looked and looked away."

It was a nice sunny afternoon.

The other point of relevance is that the intruder, whoever he

was, removed from Mrs Keyworth's house, amongst other things, a quantity of Swiss francs. The francs were unusual in two ways. First, they were an old issue and, although legal tender in Switzerland, were not in general circulation. They had been withdrawn from circulation in 1980, according to the unchallenged evidence of Mr Laurens. Secondly, the notes were retained by a paper clip. Shortly after Mrs Keyworth had raised the alarm, the police arrived and at 2.54 p.m., Mrs Keyworth gave a description of the intruder to P C Etienne. Armed with those particulars, P C Etienne set off to search the locality. He went to Gorey Pier and, in the vicinity of The Dolphin, saw a man wearing clothing which matched the description given by Mrs Keyworth. When the man saw P C Etienne, he disappeared into the public bar. P C Etienne pursued the man and found him at the hotel reception. It was 3.13 p.m., less that 20 minutes since Mrs Keyworth had disturbed the intruder. P C Etienne asked the man in the hotel for his particulars and the applicant, Mr Reginald Phillip Smith, gave them accurately. But he told a lie to P C Etienne about how long he had been in Gorey. He said half an hour whereas Mr Le Couillard, who had given him a lift to Gorey, said that he had left him at The Dolphin at 1.35 p.m. There was no challenge to that evidence in cross-examination. P C Etienne said that Mr Smith was wearing light brown cords, a blue jacket, a body warmer which was padded and short-sleeved. He had a brown and white checked shirt, a short-sleeved shirt and he had working boots. P C Etienne invited Mr Smith to empty his pockets and from them, there was produced some blue-coloured foreign currency which had been attached together by means of a paper clip. P C Etienne said in evidence at page 91,

"I identified the currency as being Swiss bank notes and I asked Smith where he had got them from and he stated: 'I have exchanged them with a friend'".

P C Etienne had not been told by Mrs Keyworth of the loss of her Swiss notes and, accordingly, being then satisfied with Mr Smith's explanation, he pursued his enquiries elsewhere. However, shortly afterwards, when Mrs Keyworth gave the police details of her losses, the importance of the Swiss notes was realised and so Detective Sergeant Lang and Detective Constable Duffy set out to apprehend Mr Smith.

Mr Smith was apprehended near the toilets at Gorey Pier

shortly afterwards and, when confronted by Detective Sergeant Lang, he produced 370 Swiss francs from the top pocket of his shirt. Later, Mr Smith said that he had bought the notes for £40 in Guernsey from a man called John Howarth.

So the only issue in this case, as the learned Bailiff correctly said, was, "Could the Crown satisfy the Court that the intruder seen by Mrs Keyworth was Mr Smith?" The evidence fell into two parts. First, Mrs Keyworth's identification and, secondly, the possession of the notes by the applicant within twenty minutes of the burglary being discovered.

In his Notice of Appeal, the applicant took four grounds. First, that the trial Judge, in his summing up to the jury, did not adequately draw to the notice of the jury certain discrepancies in the identification evidence of one, Mrs Keyworth, the witness for the prosecution. Secondly, the trial Judge misdirected the jury as to the quality of the identification evidence given by Mrs Keyworth. Thirdly, the trial Judge misdirected the jury as to the legal doctrine of recent possession in relation to certain Swiss franc notes found on the person of the applicant and, fourthly, the trial Judge, in his summing up to the jury, referred exclusively to the evidence adduced by the prosecution and failed to refer to evidence adduced by the defence. But in his perfected grounds of appeal, the applicant abandoned any criticism of the direction on ground three, namely, the doctrine or recent possession in relation to the Swiss franc bank notes. And, accordingly, this Court is concerned with the direction upon identification.

Any case depending wholly or substantially on the correctness of a disputed identification calls for particular care in the direction given to the jury by the trial Judge. The matter was reviewed by the Court of Appeal in England in the R -v- Turnbull (1963) Crominal Appeal Report p 132 and again in R -v- Keen (1965) Criminal Appeal Report p 247.

In short, what is necessary is (a) a warning of the special need for caution before convicting in reliance on the correctness of identification; (b) the trial Judge should refer to the possibility that a mistaken witness could be a convincing one and direct the jury to remember that the test is not whether the witness is convinced of the accuracy of his or her identification, but whether they, the jury, are satisfied on the evidence that the witness is correct; (c) the trial Judge should direct the jury to

examine closely the circumstances in which the identification by each witness came to be made and the quality of that evidence; (d) the trial Judge should remind the jury of any specific weaknesses which have appeared in the identification evidence; and, finally, the trial Judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. As was said in Keen, "It would be wrong to interpret or apply the Turnbull guidelines inflexibly. They impose no rigid pattern, establish no catechism which a Judge, in his summing up, must answer if a verdict of guilty is to stand. But they do formulate a basic principle and sound practice. The principle is the special need for caution when the issue turns on evidence of visual identification: the practice has to be a careful summing up which not only contains a warning but also exposes to the jury the weaknesses and dangers of identification evidence, both in general and in the circumstances of the particular case.

Advocate Wheeler, who appears on behalf of Mr Smith, submits that the summing up was defective because first, it made no reference to the possibility of Mrs Keyworth being a convinced, but mistaken, witness. Two, there was no proper review of the circumstances in which the identification came to be made and, three, there was no review of any specific weaknesses or inconsistency in Mrs Keyworth's evidence.

We have reluctantly been driven to the conclusion that there is force in the first and third criticisms made by Mr Wheeler. The learnèd Bailiff was clearly impressed by the way in which Mrs Keyworth gave her evidence, for indeed he said so, but he did not direct the jury in the clearest terms that an impressive and a convincing witness could be a mistaken witness. In the second place, his review of the weaknesses in Mrs Keyworth's evidence was incomplete and, in one instance, incorrect. He said at page 176 (f) that:

"She had said originally that she had seen the face full view when, in fact, later on, she said she hadn't."

The truth was that this had been a fleeting glance case in which Mrs Keyworth had seen the intruder halfway up a ladder and had described the matter in this way at the trial.

"When I spoke, his face turned towards me, then he looked back again at the window. I definitely saw the outline sideways and

I'm practically certain full face but he looked when he heard my voice and then looked and looked away."
But at the confrontation at the police station later, Mrs Keyworth had admitted that she couldn't identify the applicant's features.

Furthermore, when the police officers, to whom Mrs Keyworth had given her original description, were called, they both said that Mrs Keyworth never said that she seen the intruder full face and in the case of Police Constable Duffy, he said that Mrs Keyworth stated that she did not see his face. Furthermore, at the end of the confrontation, Mrs Keyworth told Detective Inspector Le Brocq that she couldn't make a positive identification. None of these matters were canvassed with the jury in the way we believe to have been essential in a case such as this, and so, on this aspect of the case, we find the summing up to have been defective.

Mr Wheeler touched only lightly on ground four, and we are satisfied that there was nothing in that point.

But there was, of course, other evidence upon which the Crown relied which was of a particularly trenchant character. It was, first, possession by the applicant of unusual Swiss franc notes within twenty minutes of the larceny being discovered. Secondly, a lie told by the applicant about the time that he had come into the area. We are satisfied that there could be no other reason for that lie being told other than a wish to conceal the truth and the length of time that he had been in the area. Thirdly, an unsatisfactory explanation as to the origin of the Swiss notes. It is our view that, faced with this evidence, a conviction was inevitable and so, while finding that the summing up was defective in the respects I have set out, we have no hesitation in applying the proviso. Although we have decided the one point in the applicant's favour, we are clear that there has been no miscarriage of justice in this case and, accordingly, we dismiss the appeal against conviction.

We turn now to the appeal against sentence. In his Notice of Appeal, the applicant said, first, the sentence was manifestly excessive. Second, the Court took improper account of certain statistics allegedly proving an increase in offences of housebreaking. On any view of the facts, this was a carefully planned, bold and professional attack in broad daylight on the house of a widow from which a large amount of jewellery and other items to a

value of £60,000 was removed. The speed with which the proceeds vanished indicates that there must have been careful planning. None of the jewellery has been recovered.

It is clear that attacks on dwelling houses in this Island are increasing in number and, though we believe that the Court is entitled to take judicial notice of such an increase, we deprecate the introduction of sample statistics which were not supported in evidence and upon which there was no cross-examination. We equally deprecate the fact, if it be true, that no notice was given to the defence of the Crown's intention to introduce such information. Attacks on dwelling houses cause particular horror and distress to the members of the public and must be treated by the Court with severity. On the other hand, there was no personal violence shown to Mrs Keyworth and, accordingly, we specifically put out of our mind the applicant's previous conviction for indecent assault. It was not relevant and we believe had no significance in the context of this case. We have, however, been taken through the relevant authorities and, in our judgment, a sentence of four years for a man of thirty-nine with criminal convictions, albeit his last conviction for burglary was ten years ago, is not excessive and, accordingly, for those reasons, the appeal against sentence will similarly be dismissed.