DOVE-EDWIN J.A. The appellant was found guilty of murder and sentenced to death on April 3, 1962, on a unanimous opinion of the two assessors who tried him and with which the trial judge agreed.

The facts were that whilst deceased was waiting for a tax receipt to be made for him in favour of appellant, appellant came from behind him and struck him on the back of his neck with a "cutlass" which caused the injury from which he died.

The defence of appellant was that he had been threatened by deceased, whom he said was planning to kill him and, to use his own words, "to free myself I went and took a matchet and stabbed him at his verandah on his shoulder."

The learned trial judge in his summing-up to the assessors left the defence of insanity quite rightly to the assessors.

On the evidence the assessors rejected the defence of insanity.

Learned counsel for appellant said that at the time appellant committed the offence he was suffering from some delusion, and quoted the case of *Rex* v. *Abramovitch* (1912) 7 Cr.App.R. 145.

In our view, on the evidence, this appeal has no substance and must be dismissed; but, we feel, however, that in cases such as this where insanity is likely to be put up as a defence, a medical report on the mental condition of the accused should be made available to the defence and it will then be up to the defence to use it or reject it.

In other words, as it was mentioned in the case of *Rex* v. *Oliver Smith* (1910) 6 Cr.App.R. 19, "it is not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit."

The appeal is dismissed.

[COURT OF APPEAL]

Freetown
July 16,
1962

REGINA . . . . . *Respondent*

v.

KABBA TURAY . . . . . *Appellant*

Ames P.
Dove Edwin
J.A.,
Bankole Jones
J.

[Criminal Appeal 2/62]

Criminal Law—Receiving stolen property—Necessity for record of judge's summing-up to jury—Rule 47 (1) *of Court of Appeal Rules* (*Vol. VI, Laws of Sierra Leone*, 1960, *p.* 338).

Appellant was convicted of receiving stolen property, and appealed. At the argument of the appeal, it appeared that there was no record of what the judge had said in his summing-up to the jury.

Held, reversing the conviction, that in a jury trial summing-up is an essential part of the trial, and that a record of the summing-up is necessary so that the appeal court can determine whether the jury was properly guided in arriving at its verdict.

Case referred to: *Tommy Wango* v. *The Queen* (October 1959), W.A.C.A., Criminal Appeal 47/59, unreported.

The appellant appeared in person.

Nicholas E. Browne-Marke (Acting Solicitor-General) for the respondent.

AMES P. The appellant was one of six persons who were tried upon information, containing a count for breaking and entering a dwelling-house and stealing gold trinkets valued at £500 and 32 yards of poplin, four sheets, six pillow cases, some crockery and a tin of rice, and secondly, a count for receiving the same knowing them to have been stolen. Each count was against all six persons jointly. None of them was defended by counsel.

There were six prosecution witnesses and each accused person gave evidence and one of them called two witnesses.

Two of the accused persons were acquitted on both counts; one was convicted on the first count and acquitted on the second; and three, of whom the appellant was one, were acquitted on the first count and convicted on the second.

The house, No. 3, East Brook Lane, was broken into between 4 a.m. and 5 a.m. and the household was awakened and chase given. One witness identified the third accused as having been inside the burgled house; another witness identified the third accused and also the first accused (the latter was, nevertheless, acquitted of burglary and stealing and convicted of receiving). These two were pursued and seen to go into No. 9 in the same East Brook lane. The matter was reported to the East End Police Station at 5.50 a.m. and police went immediately to No. 9 and forced an entry (having asked and been refused). One police constable said that the appellant and sixth accused were found " on a bed " in the bedroom; that the first and third accused were found " on the floor " in the bedroom, and that the third and fourth were found in the parlour.

There may be some mistake in the record there: the third accused is mentioned twice and the fifth accused not at all.

This constable also said that one of the witnesses from No. 3 who pursued the burglars identified the appellant as the person he pursued and that the appellant " put up a fight and said that he did not want to go." The witness referred to by the police constable gave evidence that it was the third accused and not the appellant.

The £500 gold trinkets were not recovered. The other things were found at No. 9, some plates in the house and the rest outside it at the back.

Another police constable said that the third and fourth accused were found in the parlour; and that the first accused, the appellant, and the fifth and sixth accused were found in the bedroom, two on the bed and two on the floor.

This constable also said: " I noticed second accused (the appellant) was wet on the head. He said that he went out to urinate and on returning the articles which were brought in were wet." Under cross-examination by the appellant he said: " I did not tell the rest of the accused that your head was wet. Complainant did not say your head was wet." In reply to the jury he said: " I did not search for wet clothes."

They were all arrested, and charged. The appellant made a statement denying having taken part in the burglary.

At the trial each accused gave evidence. In his evidence the appellant said that he went to bed at 8 p.m. and was there until the police came; that he

did not go outside at all and that his head was not wet. He also said that he saw the exhibits at the police station when making his statement to the police there.

He went on: " . . . I had seen Exhibit 3 before. They were in a box in the bedroom. They were outside but we decided to put them in the box. This was done the very night. This was the time I saw them. They were brought in by Hassanah around 8 p.m. He said he wanted to keep them in the box."

Exhibit 3 consisted of three plates, which Hassanah, who was the sixth accused, said were his own, and which the complainant said were part of the things stolen from the house. These plates were the only part of the stolen property (as the jury found it to be) to have been found in the house. We take the appellant's reference to " the very night " and " around 8 p.m." to mean 8 p.m. before the burglary.

Now, Mr. Browne-Marke, for the respondent, says that the case for the conviction of the appellant for receiving rests upon the evidence about his head being wet and the part of his evidence about bringing in the plates from outside. This seems to overlook the question of what he meant by " the very night " and " around 8 p.m."

One thing is certain and that is that this was a case in which a careful summing-up to the jury was required. There may have been one. It is our duty to satisfy ourselves that there was: and this is impossible because there is no record of any sort of the summing-up other than the note, " I sum up to the jury."

In *Tommy Wango* v. *The Queen* (Criminal Appeal 47/59, October 1959) the West African Court of Appeal said:

> " We have allowed the appeal, and the object of giving this judgment is to stress the fact that in a jury trial the summing-up is an essential part of the trial. We are not without some sympathy towards a judge who has no shorthand writer to take a note of what he tells the jury, but it will be appreciated that if there is no note of the summing-up neither the appellant nor counsel for the Crown can usefully help the Court of Appeal with argument, nor can this court see whether the jury were properly guided in arriving at their verdict.
>
> " The record of the trial comes up with an essential part thereof missing. We trust that hereafter when there is no shorthand writer, the judge will adjourn for a while and prepare a sufficient note of what he intends to tell the jury."

We indorse what was said there, and would add to it by drawing attention to rule 47 (1) of the Rules of this court, which reads:

> " . . . shall forward to the registrar four copies of the proceedings in the court below and, if any record has been made of the summing-up or direction of the judge, four copies thereof or, if no such record has been made, a statement giving to the best of the judge's recollection the substance of the summing-up or direction."

For these reasons we allow this appeal: and quash the conviction of the appellant and direct that a verdict of acquittal be entered.
