200 Va. 253

William Paul MASON

v.

COMMONWEALTH of Virginia.

Supreme Court of Appeals of Virginia.

Oct. 13, 1958.

Defendant was convicted in the Circuit Court, Loudoun County, Rayner V. Snead, J., on a charge of armed robbery, and he appealed. The Supreme Court of Appeals, Miller, J., held that where evidence showed that defendant had broken into store, had taken a portable television set, and had handed it to a confederate when store owner struck him with a board, whereupon defendant spun around and threw a radio at store owner and then shot at him with a pistol, there was no force used or intimidation of store owner until after defendant had handed television set to his confederate, and evidence was insufficient to support conviction for robbery.

Reversed and remanded.

1. Robbery ⚷1

No statute in Virginia defines robbery, and to constitute robbery all of the elements essential at common law must exist.

2. Robbery ⚷30

Statute prescribing the punishment for robbery prescribes a more severe punishment for crime if committed by violence to a person or by threat or presenting of a deadly weapon or instrumentality than if robbery be committed in any other mode or by any other means. Code 1950, § 18–163.

3. Robbery ⚷1

"Robbery" is the taking with intent to steal of personal property of another from his person or in his presence against his will by violence or intimidation.

See Publication Words and Phrases for other judicial constructions and definitions of "Robbery".

4. Robbery ⚷1

A robbery is an offense against the person.

5. Robbery ⚷6, 7

To constitute robbery, the taking of property must be accomplished by violence to the person who theretofore had the property in his possession, or must be accomplished by putting such person in fear of immediate injury to his person.

6. Robbery ⚷6, 7

The essential element in robbery is the violence to or putting in fear of the person whose property is taken, which must precede, or be concomitant with the taking of the property from the person or presence of the owner.

7. Robbery ⚷6, 7

The element of force or intimidation is an essential ingredient of the offense of robbery, and no violence or excitation of fear resorted to merely for purpose of retaining possession already acquired, or to effect escape, will, in point of time, supply that element.

8. Robbery ⚷24(5)

In prosecution for armed robbery, where evidence showed that defendant had broken into store, had taken a portable television set, and had handed the set to a confederate when store owner struck him with a board, whereupon defendant spun around and threw a radio at store owner and then shot at store owner with a pistol, it did not show that any force was used toward store owner or that he was intimidated until after defendant had handed the television set to his confederate, and thus evidence did not sustain conviction for robbery.

George M. Martin, Leesburg, for plaintiff in error.

Reno S. Harp, III, Asst. Atty. Gen. (A. S. Harrison, Jr., Atty. Gen., on brief), for defendant in error.

Before EGGLESTON, C. J., and SPRATLEY, BUCHANAN, MILLER, WHITTLE, SNEAD, and I'ANSON, JJ.

MILLER, Justice.

William Paul Mason was convicted by a jury of robbery and his term of confinement fixed at life imprisonment. Accused insisted that the evidence was insufficient to sustain a finding of robbery, and moved to set the verdict aside as contrary to the law and evidence. His motion was overruled and judgment entered on the verdict. We granted an appeal.

The indictment charged Mason with robbery of "Joseph Grimes, by violence and intimidation, by the threat and presentation of firearms."

[1, 2] No statute in Virginia defines robbery, and to constitute robbery all of the elements essential at common law must exist. Maxwell v. Commonwealth, 165 Va. 860, 183 S.E. 452. However, § 18-163, Code 1950, prescribes the punishment for robbery, and a more severe punishment may be imposed if the crime is committed by violence to the person or by threat or presenting of a deadly weapon or instrumentality than if the robbery be committed "in any other mode or by any other means."

[3] Robbery at common law is defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation." Clark's Criminal Law, 3d Ed., § 105, p. 373; 2 Wharton's Criminal Law and Procedure, 1957 Ed., Robbery, § 545, p. 241; Butts v. Commonwealth, 145 Va. 800, 133 S.E. 764; Jones v. Commonwealth, 172 Va. 615, 1 S.E.2d 300; Brookman v. Commonwealth, 151 Va. 522, 145 S.E. 358.

The assignment of error, that the evidence is insufficient to support a finding of robbery, requires that the proved facts and circumstances be stated:

On the night of January 18, 1958, Joseph Grimes, a partner in the firm of Grimes & Simpson, a radio-television retail business, was seated in the store in Leesburg, Loudoun county, Virginia, in which the business is conducted. The entrance to the building is recessed, and on each side are plate glass display areas. No light was on in the store, and the only illumination was from street lights. About midnight Grimes' attention was attracted to a car that was driven past the store several times. He became apprehensive, noted the license number of the vehicle, telephoned to the sheriff's office and advised the officer on duty what he had observed, armed himself with a piece of board and stood concealed in the shadows of a partition behind the north display window. Shortly thereafter accused came to the store and hurled a large cement missile through the south plate glass window. He then entered the store and took a portable television set in his arms from the display area about two and one-half feet from the hole in the glass. While he was "crouched over" and just as he was "handing the television set to a confederate through the hole in the plate glass," Grimes, who had stepped over behind accused, hit him a blow on the right shoulder with the board.

When Grimes struck Mason, the latter spun around, threw a portable radio at Grimes and then shot four times toward Grimes with a pistol. At the first shot Grimes, who was standing in the shadows, "dived for the floor," crawled behind display merchandise, and then went upstairs for a gun. When he returned, Mason had departed.

Grimes testified "that the television was out of defendant's arms and in the arms of defendant's companion before defendant threw the radio set and started shooting"; that not until accused "fired the first shot was he in fear of any firearm," and "he meant to protect his property to the best of his ability."

Accused admitted breaking and entering the store; that the pistol introduced in evidence was used by him to fire at Grimes;

and that the television set recovered shortly thereafter from the automobile being driven by him when apprehended, was the one taken from the store.

[4] Robbery is an offense against the person. Falden v. Commonwealth, 167 Va. 542, 189 S.E. 326; 2 Wharton's Criminal Law and Procedure, supra, § 545.

The precise question presented is whether the violence toward or intimidation of Grimes by throwing the radio at him or by the threat and presentation of firearms preceded or was contemporaneous with the taking, or whether the violence toward or intimidation of Grimes was subsequent to the taking. If the violence or intimidation preceded or was concomitant with the taking the offense of robbery is established; if the taking was accomplished before the violence toward or intimidation of Grimes, then it was not robbery.

The following general statement found in 46 Am.Jur., Robbery, § 19, p. 148, is pertinent to the question before us:

"The violence or intimidation must precede or be concomitant or contemporaneous with the taking. Hence, although the cases are not without conflict, the general rule does not permit a charge of robbery to be sustained merely by a showing of retention of property, or an attempt to escape, by force or putting in fear. The above doctrine has found frequent application where force or intimidation has been exercised after the property came into the defendant's hands by stealth * * *."

What constitutes a "taking" is stated in 32 Am.Jur., Larceny, § 12, pp. 897, 898; in 12 M.J., Larceny, § 4, p. 4, "taking" is defined as follows:

"All the authorities agree in stating that in every larceny there must be an actual taking, or severance of the goods from the possession of the owner. To 'take' an article, signifies 'to lay hold of, seize or grasp it with the hands or otherwise,' and doing so, animo furandi, constitutes a felonious taking."

In 46 Am.Jur., Robbery, § 6, p. 141, the essential element of "taking and asportation" in robbery is discussed as follows:

"The actual taking and asportation of some of the victim's personal property is an essential element of robbery. In other words, there must first be a larceny—felonious taking. Supplementing the taking, as in larceny, there must be an asportation or carrying away of the goods. Severance of the goods from the owner and absolute control of the property by the taker, even for an instant, constitutes an asportation."

[5] Under the authorities the taking in common law robbery must be accomplished by violence to the person who theretofore had the property in his possession (on his person or in his presence), or must be accomplished by putting such person in fear of immediate injury to his person.

[6, 7] The violence or putting in fear, to constitute the essential element in robbery, must precede, or be concomitant with, the taking of the property from the person or presence of the owner. No violence, no excitation of fear, resorted to merely for the purpose of retaining a possession already acquired, or to effect escape, will, in point of time, supply the element of force or intimidation, an essential ingredient of the offense. 77 C.J.S. Robbery § 11, p. 457. Discussion of when the taking is completed and possession accomplished is found in 2 Wharton's Criminal Law and Procedure, supra, § 559, 77 C.J.S. Robbery § 3, p. 450, and 22 Illinois Law Review 670.

[8] Here no force was used toward Grimes and there was no intimidation until accused had taken the television set in his arms and handed the article to a confederate who made off with it. The taking and asportation preceded both the violence, and

the intimidation for neither occurred until after accused had passed the article to his companion and been struck by Grimes.

The facts and circumstances unquestionably show that in time sequence the taking and asportation occurred before there was any violence or intimidation by throwing the radio or by presentation of firearm.

The evidence is insufficient to support a conviction for robbery. The judgment will be reversed, the verdict of the jury set aside and the case remanded for such further proceedings as the Commonwealth may be advised.

Reversed and remanded.

200 Va. 233

Billy Bodkin LEE

v.

COMMONWEALTH of Virginia.

Supreme Court of Appeals of Virginia.

Oct. 13, 1958.

Defendant was convicted in the Circuit Court of Rockingham County, Hamilton Haas, J., for petit larceny, and he appealed. The Supreme Court of Appeals, Whittle, J., held that it was reversible error to refuse to give requested instruction which concisely and properly presented defendant's contention that he had intended to pay for tire allegedly stolen and that he in fact had paid for same.

Reversed and remanded.

1. Criminal Law ⚷1173(2)
Larceny ⚷71(1)

In prosecution for petit larceny, it was reversible error to refuse to give requested instruction which concisely and properly presented defendant's contention that he had intended to pay for tire allegedly stolen and that he in fact had paid for same.

2. Criminal Law ⚷829(9)

In larceny prosecution, it was not reversible error to fail to give requested instruction with regard to burden of proof even though, under circumstances of case, such requested instruction more correctly covered issue than did instruction given by court.

3. Criminal Law ⚷388

"Lie detector" tests have not as yet been proved as scientifically reliable, and exclusion of evidence as to result of such test was not error.

T. W. Messick, Roanoke (Charles A. Hammer, Harrisonburg, on brief), for plaintiff in error.

Reno S. Harp, III, Asst. Atty. Gen. (A. S. Harrison, Jr., Atty. Gen., on brief), for defendant in error.

EGGLESTON, C. J., and SPRATLEY, BUCHANAN, MILLER, WHITTLE and SNEAD, JJ.

WHITTLE, Justice.

On June 17, 1957, pursuant to a jury verdict, appellant, Lee, was sentenced to serve six months in jail for petit larceny.

The warrant on which Lee was tried charged that he did unlawfully and fraudulently "dispose of and embezzle from Douglas Pearce, Inc., one 6:70 x 15 [recapped automobile] tire of the approximate value of $16.15, which was entrusted and delivered to him by virtue of his office, trust and employment with the said corporation, by selling and delivering said tire to Garland Showalter in said county and receiving the purchase price thereof and diverting said proceeds to his own use with the intent of permanently depriving