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Record No. 1817

168-685

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In the
Supreme Court of Appeals of Virginia
at Richmond

Pen v. Com

186-48169

RICHARD JOHNSON

135-20691

v.

COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE CITY OF NEWPORT NEWS

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B WATTS, Clerk.

168 v 685

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1817

RICHARD JOHNSON, Plaintiff in Error,

versus

COMMONWEALTH OF VIRGINIA, Defendant in Error.

PETITION FOR A WRIT OF ERROR AND BRIEF IN
SUPPORT THEREOF.

*To the Honorable Chief Justice and Associate Justices of the
Supreme Court of Appeals:*

Your petitioner, Richard Johnson, respectfully represents that he is aggrieved by a final order of the Corporation Court for the City of Newport News, Virginia, entered on the 24th day of July, 1936, in a certain prosecution by the Commonwealth of Virginia, upon a warrant, against him, wherein he was sentenced to six months in jail and to pay a fine of \$100.00.

A duly authenticated transcript of the record is herewith submitted as a part of this petition.

References are to be the foot paging of the transcript of the record.

THE FACTS.

On May 26th 1936, Richard Johnson, petitioner, and two other men were seen by Det. Sergeant Peach and Det. Layton, in a roadster on Jefferson Avenue. The officers followed

the car to 18th Street, where Richard Johnson and another man got out and ran. Johnson was immediately caught and brought back to the car. A 5-gallon jug of corn whiskey was found in the car. James Delaney, driver of the car, said in Johnson's presence that it was Johnson's whiskey. Johnson denied it. Delaney however, on oath, in the Police Court, when a witness in his own behalf, said that it was his own whiskey and that Johnson did not know anything about it (Record, pp. 6 and 7).

ASSIGNMENTS OF ERROR.

First Assignment of Error.

The court erred in overruling the motion to strike out the evidence of the Commonwealth on the ground that the same is insufficient to convict the accused. (Record, pp. 5, 6, 7, and 8.)

ARGUMENT.

It will be noted that this alleged offense occurred on May 26th 1936, consequently, the Amendment to Section 50 A. B. C. Act by the 1936 Legislature does not apply.

Constitution of Virginia Section 53.

The Section upon which this charge is based reads in part:

“If any person * * * shall have * * * alcoholic beverages which are acquired by such person * * * in violation of the provisions of this act he shall be guilty of a misdemeanor.”

There was no evidence that the defendant acquired any alcoholic beverage in violation of the provisions of the Act.

Sergeant Peach said:

Q. O Yes, I forgot to ask you; where was this whiskey acquired?

A. I don't know. (Record, p. 8.)

Neither was there any evidence of how, when, where, or under what circumstances the alcoholic beverage was, if ever, acquired by the defendant.

The evidence was that it was acquired by Delaney. (Record, p. 7.)

There is no presumption from the mere possession. The presumption is that of innocence.

Kemp's Case, 80 Va. 443.

Oliver v. Commonwealth, 131 Va. 670, 108 S. E. 576.

The witness testified that there were no stamps on the bottle indicating that the whiskey was purchased at an A. B. C. Store. (Record, p. 6.)

Proof that the container had no stamps on it nor anything else to indicate that it was purchased from an A. B. C. Store, is not sufficient.

O'Brien v. Commonwealth, Va., 183 S. E. 228.

SECOND ASSIGNMENT OF ERROR.

The court erred in overruling the motion to set aside the verdict of the jury and grant the defendant a new trial on the ground that the verdict is contrary to the law and the evidence. (Record, p. 9.)

ARGUMENT.

The guilt of the accused has not been established beyond a reasonable doubt.

The case of *Dixon v. Commonwealth*, Va. 173 S. E. 521, well establishes this fact:

“In *Wooden's Case*, 117 Va. 930, 86 S. E. 305, 306, Ann. Cas. 1917D, 1032, Judge Cardwell held that ‘It is well settled by numerous cases that it is not sufficient to create a suspicion or probability of guilt but the evidence must go further and exclude every reasonable hypothesis except that of guilt’—that is to say, except that of the guilt of the crime charged. This rule applies in full force to cases involving violation of the prohibition law, except where it is modified by statute.”

The Commonwealth seems to be relying upon inferences:

In *Willson v. Commonwealth*, 160 Va. 913, 168 S. E. 344, it is said:

“Where inferences are relied upon to establish guilt, they must point to guilt so clearly that any other conclusion would be inconsistent therewith. This is true no matter how suspicious circumstances may be.”

In *Ayers v. Commonwealth*, Va., 161 S. E. 888, the Supreme Court said:

“The circumstances are suspicious; but the accused should not be deprived of his liberty on mere suspicion.”

In *Spratley v. Commonwealth*, 154 Va. 854, 152 S. E. 362, which is one of the leading cases in this country on transporting liquor, the Supreme Court said:

“The mere presence of a person in an automobile in which intoxicating liquor is being transported, with or without his knowledge, which is not shown to be owned by him or under his possession or control, single or joint, is not a crime; nor is it made by the Statutes of Virginia *prima facie* evidence of his transportation of or aiding or abetting the transportation of the intoxicating liquor in the automobile; nor is it alone sufficient to sustain a conviction of him upon a charge of transporting intoxicating liquor. *Howard v. Com.*, 138 Va. 835, 122 S. E. 112; *Waytik v. State*, 100 Tex. Cr. R. 122, 272 S. W. 131; *Murray v. State*, 19 Ariz. 49, 165 P. 315; *Stafford v. U. S.* (C. C. A. Ky.) 300 F. 537; *Howard v. State*, 193 Ind. 599, 141 N. E. 341; *Richardson v. State*, 89 Tex. Cr. R. 17, 228 S. W. 1094; *Walling v. State*, 94 Tex. Cr. R. 147, 250 S. W. 167.”

The recent case of *Clark v. State*, Ga. App. 180 S. E. 652, is a case on ‘all fours’ with the case at bar. In that case it is said:

“This evidence, being entirely circumstantial, is insufficient to exclude every reasonable hypothesis than that of the guilt of Clark. The car was not owned by him, and had not been driven by him, and the evidence fails to show guilty knowledge. *Summerville v. State*, 37 Ga. App. 18, 138 S. E. 525; *Fussell v. State*, 40 Ga. App. 224, 149 S. E. 154; *Young v. State*, 35 Ga. App. 193, 132 S. E. 453. The trial judge therefore erred in overruling the defendant’s motion for new trial.”

From a careful reading of the entire record and viewing the evidence in the light most favorable to the Commonwealth, the most that can be said of it is that it shows presence and flight.

In the case of *Griffin v. State*, 2 Ga. App. 534, 58 S. E. 781, it was held:

“Neither presence nor flight, nor both together, without more, is conclusive of guilt.”

Detective Layton who actually caught Johnson and brought him back to the car, was not called as a witness. This notwithstanding the fact that as a regular member of the Police Department he was available.

The presumption of course is against the Commonwealth.

Royal Indemnity Co., v. Hook, 155 Va. 956, 157 S. E. 414.

22 *Corpus Juris* Section 56.

The statement made by Delaney accusing Johnson (Record, p. 6.) cannot be considered as evidence against Johnson because Johnson then and there denied it and Delaney later, under oath, said that it was his own whiskey.

In 16 C. J. Section 1261 it is said:

“Statements accusing or incriminating accused, made in his presence but positively denied by him in toto, are not admissible against him. They do not show an admission, and are not admissible merely because made in his presence.”

People v. Schallman, 273 Ill. 564, 113 N. E. 113.

Com. v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

O’Hearn v. State, 79 Nebr. 513, 113 N. W. 130, 25 L. R. A. NS 542.

State v. Herring, 200 N. C. 308, 156 S. E. 538.

Therefore, because of the errors herein complained of and assigned, your petitioner prays this Honorable Court that a Writ of Error to said judgment may be granted him, and that such judgment may be reviewed, said verdict set aside and a new trial granted your petitioner.

In accordance with the Rules of the Supreme Court counsel for the petitioner desires to state orally the reasons for reviewing the decision herein complained of.

Your petitioner adopts this petition as his original brief.

Most respectfully submitted.

RICHARD JOHNSON, Petitioner,
BY: WILLIAM DAVIS BUTTS,
His Attorney.

CERTIFICATE OF COUNSEL.

I, William Davis Butts, a practicing attorney in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion it is proper that the decision complained of in

the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

WILLIAM DAVIS BUTTS,
A practicing Attorney in the Supreme Court.

THE SERGEANT'S RETURN ON SERVICE OF PETITION.

Executed this the 24 day of September, 1936, A. D., in the City of Newport News, Virginia, by delivering a true copy of the within Petition for a Writ of Error and Brief in Support Thereof, to Herbert G. Smith, Commonwealth Attorney, in person.

P. W. HALL,
City Sergeant.

Sgt's fee 75c Paid.

Writ of error and *supersedeas* awarded, the same, however, not to discharge if in custody, or to release his bail, if out on bail.

C. VERNON SPRATLEY.

Oct. 6, 1936.

Received Oct. 8, 1936.

M. B. W.

RECORD

VIRGINIA:

Pleas before the Corporation Court of the City of Newport News, at the court-house thereof, on Friday, the 24th day of July, in the year, One Thousand Nine Hundred and Thirty-six.

BE IT REMEMBERED, That heretofore, to-wit: On the 9th day of June, 1936, a certain warrant was issued by the Police Justice of the City of Newport News, Virginia, against one Richard Johnson for a violation of Section 50 of the Alcoholic Beverage Control Act of the State of Virginia, which said warrant, together with the judgment of the said Police Justice, from which an appeal was taken by the said Richard Johnson to the Corporation Court aforesaid, is in the words and figures following, to-wit:

page 2 } State of Virginia,
 City of Newport News, to-wit:

To any and all Sergeants, Sheriffs, and Constables of the
said City and State:

WHEREAS, Sgt. W. F. Peach of Police Dept. has this day made complaint and information on oath before me, Jno. B. Locke, Police Justice of the said City, that Richard Johnson on the 24th day of May, 1936, in the said City, did unlawfully have, possess, keep, carry, ship or transport alcoholic beverages unlawfully or illegally acquired: Vio. Sec. 50, A. B. C. Act:

THESE ARE THEREFORE, in the name of the Commonwealth, to command you forthwith, to apprehend and bring before the Police Justice of the said City, the body of the said Richard Johnson to answer the said complaint, and to be further dealt with according to law.

Given under my hand and seal this 9th day of June, 1936.

JNO. B. LOCKE (Seal)
Police Justice.

Upon examination of this case I find the accused Richard Johnson guilty as charged above herein, and assessed against him a fine of \$50.00 and \$8.75, costs, Total \$58.75; and sentence to confinement at the City jail farm, for a period of three (3) months.

Given under my hand and seal this 9th day of June, 1936.

JNO. B. LOCKE (Seal)
Police Justice,
City of Newport News, Va.

(On back)

Commonwealth of Virginia:

v.

Richard Johnson accused.

Charged with Vio. Sec. 50, A. B. C. Act

NOTICE OF APPEAL.

Judgment herein entered, appealed from, this 13th day of June, 1936.

JOHN W. MASSEY,
Substitute Police Justice,
City of Newport News, Va.

Supreme Court of Appeals of Virginia

CERTIFICATE OF
RECOGNIZANCE TO APPEAR IN THE
CORPORATION COURT

State of Virginia,
City of Newport News, to-wit:
Police Court of Said City.

The accused herein Richard Johnson was duly recognized by me this 13th day of June, 1936, as indebted to the Commonwealth of Virginia, in the penalty of \$500.00 with J. H. Williams of Newport News, Va., as surety to appear before the Corporation Court of the City of Newport News, Virginia, at the Court House thereof, on the 13th day of July, 1936, before which the proceedings on the within stated charge will be heard, to then and there answer the said charge there pending against him, and not to depart thence without leave of the said Court, and in the meantime to be of good behavior and keep the peace towards all of the citizens of this Commonwealth, said recognizance to remain in full force and effect until the within charge shall have been finally disposed of or declared void by a court of competent jurisdiction.

The Commonwealth's Attorney of the said City prosecuted the accused named herein, at the preliminary hearing of this case before me.

Given under my hand this 13th day of June, 1936.

JOHN W. MASSEY,
Substitute Police Justice,
City of Newport News, Va.

page 3 } And now at this day, to-wit: Being the day and
year first herein written—At a Corporation Court
held for the City of Newport News, on Friday, the 24th day
of July, 1936.

Commonwealth, Plaintiff,
Against
Richard Johnson, Defendant.

ON AN APPEALED WARRANT FOR VIOLATING SEC.
50, A. B. C. ACT.

This day came the attorney for the Commonwealth and the said Richard Johnson appeared in Court in discharge of his recognizance and pleaded not guilty to said warrant; thereupon came a jury of five persons, to-wit: W. S. Upshur, H.

P. Barney, John B. Morton, H. F. Birdsall and A. R. Boger, Jr., who had been summoned and empanelled as the law directs and who being sworn the truth of and upon the premises to speak, after having fully heard the evidence, the defendant, by counsel, moved the Court to strike out the evidence of the Commonwealth on the ground that same is insufficient to convict accused, which said motion being fully argued, the Court doth overrule the same, to which action of the Court in overruling his said motion, the defendant by counsel, excepted; and the arguments of counsel being fully heard, the jury retired to their room to consider of their verdict and after some time, returned into Court, having found the following verdict, to-wit: "We the Jury find the defendant Richard Johnson guilty as charged and fix his punishment at 6 months in jail and a fine of \$100.00 (Signed) A. R. Boger, Jr., Foreman." Whereupon, the defendant, by counsel, moved the Court to set aside the verdict of the jury on the ground that the same is contrary to the law and evidence, which said motion being fully argued, the Court overruled the same, to which action of the Court in overruling his said motion, the defendant, by counsel, excepted. Therefore, it is considered by the Court that the said Richard Johnson be imprisoned in the jail of this City for the term of six (6) months, the term of his imprisonment therein by the jurors in page 4 } their verdict herein fixed and ascertained as aforesaid, there to be kept imprisoned and treated in the manner directed by law for the term aforesaid; and that the Commonwealth recover against the said Richard Johnson the sum of one hundred dollars (\$100.00), the fine by the jurors in their verdict herein assessed against him, and the costs of this prosecution. And it is ordered that the said Richard Johnson, after the termination of his previous term of sentence aforesaid, be imprisoned in the jail of this City for the additional time prescribed by law, until the fine and costs herein assessed against him shall have been paid, or he be otherwise discharged by due course of law; and the said Richard Johnson having been on bail, no credit is allowed him for any time spent by him in jail awaiting trial on this warrant. And the accused desiring to present to the Supreme Court of Appeals of this State a petition for a writ of error and *supersedeas* to the judgment aforesaid, moved the Court to suspend execution of the aforesaid judgment for a period of sixty days from and after this date. Thereupon the said Richard Johnson is committed to jail.

The defendant's bills of exception are as follows, to-wit:

page 5 } Virginia:

In the Corporation Court for the City of Newport News.

Commonwealth of Virginia

v.

Richard Johnson.

BILL OF EXCEPTION #1.

Be it remembered that upon the trial of this case in the Corporation Court for the City of Newport News, Virginia, and after the Commonwealth, in order to maintain the issues on its side, had introduced all of its evidence and rested its case, the defendant by counsel moved the Court to strike out all the evidence for the Commonwealth on the ground that the same was insufficient to convict the accused, which motion the Court overruled, to which action of the Court the defendant at the time excepted, and defendant prays that his Bill of Exception thereon, be signed, sealed and saved to him and made a part of the record in said case and that all the evidence so introduced on behalf of the Commonwealth, which is as follows:

EVIDENCE FOR THE COMMONWEALTH.

Testimony of

SERGEANT W. F. PEACH.

DIRECT EXAMINATION.

By Herbert G. Smith, Commonwealth Attorney:

Q. You are Sergeant Peach of the Police Department?

A. Yes, sir.

Q. Did you arrest Richard Johnson?

A. Yes, sir; Mr. Layton and myself.

Q. Well, go ahead and tell us all about it?

A. On the 26th of May about 4 a. m., we saw this page 6 } roadster with three colored men in it and followed it to 18th and Jefferson Avenue. Richard Johnson and another man got out and ran; Mr. Layton ran and caught Richard Johnson and brought him up to the car.

In the back of the car in plain view we found a five gallon glass jug of Corn Whiskey. James Delaney was driving the car.

Q. Whose car was it?

A. It was James Delaney's brother-in-law's car; it was registered in his name.

Q. Did he make any statements to you?

A. Yes, sir; when he was first arrested he said in Richard Johnson's presence that it was Richard Johnson's whiskey and he got him to bring them to Newport News from Toana.

Johnson denied it, said he didn't know anything about the whiskey.

Q. You say it was a five-gallon glass jug of corn whiskey; have any stamps on it?

A. No, sir; nothing to indicate that it was bought from the A. B. C. Stores.

Q. This was at 18th and Jefferson Avenue; is that in the City of Newport News?

A. Yes, sir.

Q. Where does Delaeny live?

A. In Toana.

Q. Where does Johnson live?

A. In Newport News, 537 19th Street.

All right.

CROSS EXAMINATION.

By Mr. Butts:

Q. Sergeant you say that James Delaney said in Richard Johnson's presence that it was Johnson's whiskey?

A. Yes.

Q. Richard Johnson denied knowing anything about the whiskey didn't he?

A. Yes; said he didn't know anything about it.

Q. Now, didn't this boy say on the witness stand, page 7 } under oath, that it was his own whiskey and that Johnson didn't know anything about it?

A. He did.

Q. As a matter of fact didn't he say that he found the whiskey in a woods in Toana and that Richard Johnson didn't even know it was in the car?

A. Yes, he said that but when he was trying to get a suspended sentence he made another statement to me, he said—

Q. Never mind that; I am speaking about what he said in Johnson's presence. Didn't he say while he was on the witness stand under oath that he saw a man bury the whiskey in a woods in Toana and he went and stole it?

A. No, he didn't say he stole it, he said he got it in the woods in Toana.

Q. Now you were right there when he was tried weren't you?

A. Yes; I was there both times.

Q. I believe he said the second time that Richard Johnson did not even know the whiskey was in the car?

A. That's what he said on the stand.

Mr. Butts: That's all.

RE-DIRECT EXAMINATION.

By Mr. Smith:

Q. What attorney appeared for these men in the lower Court?

A. Lawyer Butts appeared for them.

Q. Didn't Johnson tell some kind of a story about being in a wreck and walking from Williamsburg to Toana, a distance of about nine miles, to get this boy, to bring him to Newport News?

A. Yes, sir; he said he and another colored man called "Chunky" was in an automobile wreck near Williamsburg and walked to Toana to get James Delaney to bring them home.

RE-CROSS EXAMINATION.

By Mr. Butts:

Q. Aren't you mistaken about my appearing for these men?

A. You appeared for Johnson in the first trial; page 8 } but the other boy didn't have a lawyer.

Q. Didn't some Lawyer from Richmond come down and represent Delaney?

A. I don't know.

Q. I believe he was from Williamsburg; didn't a lawyer from Williamsburg come and represent Delaney?

A. Yes; I believe he had the case re-opened, but not when Delaney was first tried and testified.

Q. O yes, I forgot to ask you; where was this whiskey acquired?

A. I don't know.

That is all.

Mr. Smith: Your Honor, that is our case.

may be made a part of the record in this case, which is accordingly done this the 19th day of September, 1936, A. D.,

and within the time allowed by law for signing Bills of Exceptions.

T. J. BARHAM,
Judge of the Corporation Court for the
City of Newport News.

Received this the 19th day of September, 1936, A. D.

T. J. BARHAM,
Judge of the Corporation Court for the
City of Newport News.

I, T. J. Barham, Judge of the Corporation Court for the City of Newport News, Virginia, do hereby certify that this is a true copy of the Bills of Exception signed by me.

Given under my hand this the 19th day of September, 1936, A. D.

T. J. BARHAM,
Judge of the Corporation Court for the
City of Newport News.

page 9 } Virginia:

In the Corporation Court for the City of Newport News.

Commonwealth of Virginia

v.

Richard Johnson.

BILL OF EXCEPTION #2.

Be it remembered that on the trial of this case in the Corporation Court for the City of Newport News, Virginia, and after it had been submitted to the jury, the said jury returned into court their verdict in words and figures as follows:

“We the jury find the defendant Richard Johnson, guilty as charged, and fix his punishment at 6 months in jail and a fine of \$100.00.”

(Signed) A. R. BOGER, JR., Foreman.

Whereupon the said defendant, by counsel, moved the court to set aside the verdict of the jury and grant the defendant a new trial on the ground that the verdict is contrary to the law and the evidence, which motion the Court overruled, to which action of the Court the defendant at the time excepted, and prays that this exception may be signed, sealed, and saved

Supreme Court of Appeals of Virginia

to him and made a part of the record in this case, which is accordingly done this the 19th day of September, 1936, and within the time allowed by law for signing Bills of Exception.

T. J. BARHAM,
Judge of the Corporation Court for the
City of Newport News.

Received this the 19th day of September, 1936.

T. J. BARHAM,
Judge of the Corporation Court for the
City of Newport News.

I, T. J. Barham, Judge of the Corporation Court, do hereby certify that this is a true copy of the Bills of Exception signed by me.

Given under my hand this the 19th day of September, 1936,
A. D.

T. J. BARHAM,
Judge of the Corporation Court for the
City of Newport News, Virginia.

page 10 } State of Virginia,
City of Newport News, to-wit:

I, F. B. Barham, Clerk of the Corporation Court for the City aforesaid, in the State of Virginia, hereby certify that the foregoing is a true transcript of so much of the record and proceedings as are required by law to be copied, in a prosecution of the Commonwealth, Plaintiff, *against* Richard Johnson, defendant, (no particular parts of said record being required to be copied by either party in writing). I further certify that notice of the application for this transcript of record has been given as the law directs and that said notice has been returned and filed in the papers of said cause in the Clerk's Office of said Court.

Given under my hand this 22nd day of September, 1936.

F. B. BARHAM, Clerk,
Corporation Court, Newport News, Virginia.

Fee of Clerk of Corporation Court \$5.00.

A Copy—Teste:

M. B. WATTS, C. C.

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