

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 7/2007

**BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.**

PATRICK FONG v R

Anthony Pearson for the appellant

**Miss Paula Llewellyn, QC Director of Public Prosecutions and Adley
Duncan for the Crown**

16 March, 30 July and 30 September 2010

PANTON, P.

[1] On 30 July 2010, we allowed the appeal herein, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal. The following are our reasons.

[2] The appellant, a racehorse trainer, was tried with one Mahalia Reid on an indictment that contained eleven counts. These counts were for the offences of forgery, uttering forged document, obtaining money on forged document, and larceny. In the end, the appellant and Miss Reid were acquitted on all counts, except that the appellant was convicted on the charge of larceny.

[3] The record of appeal submitted to the Court of Appeal was rather untidy and incomplete. We noted the following deficiencies:

- (i) the informations and indictment were not included;
- (ii) there is no indication of the sentence imposed;
- (iii) the Resident Magistrate's findings of fact are undated;
- (iv) the index is grossly misleading; and
- (v) the certificate of the Clerk of the Courts is incorrect.

We have on several occasions reminded Clerks of the Courts of their duty to comply with the provisions of the Judicature (Resident Magistrates) Act dealing with the preparation and submission of records of appeal. We wish to remind Resident Magistrates that they have a duty to see to the proper functioning of the court over which they preside, and this includes seeing to it that the officers attached to the court perform the duties required of them by the law.

The case for the prosecution

[4] The record, so far as we were able to gather, indicates that the charge of larceny was in respect of a horse named "Asymptotic" owned by Mr Romel Wallen who had engaged the services of the appellant in 2001 to train the said horse. Asymptotic was one of two horses entrusted to the appellant, the other bearing the regal name "Sir Romel". The arrangement as to the training of the horses was terminated in writing by Mr Wallen with effect from 1 January 2003

at 6 p.m. The horses were to be turned over to another trainer, Mr Roy Jackson. As it turned out, only Sir Romel was handed over. When Mr Delroy Wisdom, assistant trainer to Mr Jackson, asked the appellant about "the other horse", the appellant told him that the horse was "in the country". It was this situation that led to the charge of larceny in respect of Asymptotic, which Mr Wallen estimated is valued at over ten million dollars (\$10,000,000.00).

[5] The evidence presented by the prosecution came mainly from the witness Wallen who said that the last time that he had seen the horse Asymptotic alive was on either 15 or 16 March 2002, and this was at the appellant's stables at Caymanas Park. When he discovered that Asymptotic had not been handed over to trainer Jackson, Mr Wallen spoke with the appellant who, according to Mr Wallen, said that the horse was in foal at Bog Walk in Lyn's stables. There had been no agreement for such an arrangement to have been made for Asymptotic. Mr Wallen said that he gave the appellant a week to transfer the horse to Mr Jackson's stables. Upon the appellant's failure to comply, Mr Wallen said that he went to the Portmore Police Station on 10 January 2003 and made a formal report of theft of the horse.

[6] The contract between the appellant and Mr Wallen required the latter to pay to the appellant the sum of \$7,000.00 per week to train both horses and for contingencies. However, Asymptotic had an injury while Sir Romel was in fine

condition. Asymptotic had never raced, whereas Sir Romel won on successive race days in December 2002.

[7] According to Mr Wallen, the appellant gave him conflicting information as to the whereabouts of Asymptotic. Apart from the statement that the horse was in foal at Lyn's stables in Bog Walk, Mr Wallen claimed that the appellant also told him that he would be transferring Asymptotic to a stable at Port Henderson. Mr Wallen said that he told the appellant that he needed to put the horse on a farm for breeding if she was not going to race due to her injury. However, he denied that he told the appellant that he did not have the money to breed the horse. He denied that he jumped at the chance to send Asymptotic to a farm in St Thomas at the suggestion of the appellant as no fees would have been involved. Indeed, he said he had no idea of the horse having been transferred to St Thomas.

[8] In examination-in-chief, Mr Wallen is recorded at page 32 of the record as having said thus:

"June 2002 I made arrangements with Mr. Fong. The proposal Mr. Fong put forward was Mr. Fong was to train the horse to pull up and I complied because he said he needed to earn some money. I wrote to Mr. Fong to go to Miss Donna Wong, the distributing clerk at CTL, giving her authority to let Fong collect my cheques to keep them until we were ready to gamble instead of a 3rd party having knowledge. This was in respect of the horse Sir Rommel."

The document authorizing the collection of the cheques bears the date "21/6/02" and was admitted into evidence as exhibit 7a. It reads thus:

"To whom this may concern

Please give Mr. Patrick Fong the purse money instantly
& any successive purse the horse may earn.

Thanking you for your cooperation.

Romel Wallen
(signature affixed)
(924-3032)"

[9] During cross-examination, Mr Wallen admitted that the Racing Commission had conducted an enquiry into allegations that he owed the appellant money for training fees and other charges. Mr Wallen was represented at the hearing by an attorney-at-law. On 18 March 2004, the Commission handed down its ruling in favour of the appellant. The amount adjudged as owed by Mr Wallen to the appellant was \$146,003.67.

[10] The Resident Magistrate admitted in evidence two certificates in respect of the death of the horse Asymptotic. These were tendered by the prosecution through Mr Christopher Henry, a registration clerk at the Jamaica Racing Commission. One certificate was unsigned, and so ought to have been treated as being of little or no value. The other, dated 12 January 2003 and signed by the appellant, shows the date of death as 18 December 2002 and colic as the cause of death. It also indicates that the place of death was St Thomas. The

appellant was arrested by Det. Sgt. Albert Robinson on 10 March 2003 and charged with the various offences referred to earlier. When cautioned, he said:

“Officer the horse dead and me report it to the Racing Commission and Rommel give me the permission to collect the money and it share fi mi and him, me even have witness who me send the money with to him.”

The case for the appellant

[11] The appellant gave evidence to the effect that he trained Asymptotic and Sir Romel from April 2001 to 2 January 2003. In respect of Asymptotic, he said he had noticed that whenever he tried to prepare her for a race she would always become lame and it would take two to three weeks for her to regain soundness. Consequently, he said, Asymptotic has never raced. He advised Mr Wallen to “turn her out of racing”, but he said that he was unable to afford the boarding fees. The appellant informed him that he had a friend in Yallahs, St Thomas who might have been able to accommodate the horse during the period that she was out of racing. The appellant then made the arrangements for the horse to be boarded. Asymptotic was sent to the friend’s farm in January 2002, the appellant said.

[12] According to the appellant, he told Mr Wisdom, the assistant to trainer Jackson, that the filly was in the country. He said he was aware at the time that the horse had died, but he did not mention it to Mr Wisdom as he had realized that Mr Wallen was planning to remove her from his stables.

[13] The appellant confirmed that Mr Wallen had authorized him to collect monies due to him from the Racing Commission, and to offset some of the bills that Mr Wallen owed him. This was apparently not sufficient to cover all that was due, and a dispute developed between the parties. An enquiry was conducted by the Racing Commission, resulting in an award in favour of the appellant.

[14] He denied stealing Asymptotic, pointing out that he registered her death with the Racing Commission. He called a witness, Mr Maurice Lyn, who said that he is also called Danny Lyn; that he does not own a farm in Bog Walk, and has no connections with horseracing. He also called Mr Everaldo Bowen a farmer at Albion, St Thomas who confirmed that he cared for Asymptotic during 2002, and that she died on the Wednesday before Christmas 2002.

[15] Mr Lawrence Heffes, businessman and company director, was the final witness called on behalf of the appellant. He said he was an owner and breeder of horses as well as president of the Jamaica Racehorse Owners Association, and the immediate past president of the Equestrians Association of Jamaica. He said it was impossible to steal a horse for breeding or racing purposes in Jamaica. Thoroughbred racing is highly regulated, he said. If you have not registered a horse up to the end of its two year old life, that horse is never allowed to race. The registration process includes blood typing and DNA testing to confirm

pedigree or lineage of the particular horse as being from a mare and a stallion as purported. He concluded:

“You can breed a stolen horse but you can only keep it and ride it, it can be of no commercial value because you cannot register it.” (page 97 record)

The Resident Magistrate’s findings

[16] At the end of the case for the prosecution, the learned Resident Magistrate had found that there was no case to answer in respect of counts 1 (uttering forged document), 2 (obtaining money by means of false documents), 4 (uttering forged document) and 5 (obtaining money by means of false document). At the end of the case, after the appellant and his co-accused had given evidence, she found that the authority given in the document exhibit 7a “was a full and complete answer to counts 6, 7, 8, 9, 10 and 11.” However, she convicted the appellant on the only remaining charge for larceny (count 3).

[17] The learned Resident Magistrate reasoned that she had to determine whether the appellant as bailee for reward of the horse Asymptotic converted it to his own use with the intention to permanently deprive the owner thereof. She found that the training agreement continued until it was terminated in writing by Mr Wallen in January 2003, and that Asymptotic was at Caymanas Track under the appellant’s care up to March 2002. She accepted that the horse was lame and had never raced.

[18] The Resident Magistrate said that an attempt had been made to make the court believe that the complainant Wallen was broke and could not afford to pay to train his horses. She rejected what she described as "the picture presented by the defence of Mr Wallen as a broke desperate man". She rejected "as a lie perpetrated by Mr Fong", the idea of Mr Wallen choosing to pasture his valuable horse on a mango farm in St Thomas indefinitely. She found that by giving different stories to the owner as regards the whereabouts of the horse, the appellant had demonstrated a dishonest intent.

[19] So far as the evidence of Lawrence Heffes is concerned, the learned Resident Magistrate said that it was trite law that where there was conversion or appropriation "in the case of the UK Theft Act 1968 which is modeled from the 1916 Larceny Act definition of fraudulent conversion and larceny of bailee, that it is immaterial whether conversion is made with a view to gain or not". So, she added, if a thief backs the prosecutor's horse into a mine shaft he is guilty of larceny no matter if he intends only loss to the owner or no gain to himself or anyone else.

[20] The Resident Magistrate found that there was an act of conversion "no sooner than when Patrick Fong removed the horse from Caymanas Track and took it to a place other than the stables at Port Henderson beach for training in water as he told the owner he would have done". She held that it was clear evidence from which conversion can be inferred to refuse to say where the horse

was or to lie about it or fail to return it on demand or deny the owner access to it. She rejected that the appellant had told Mr Wallen that he was sending the horse to St Thomas.

[21] In the final paragraph of her findings of fact, the Resident Magistrate gave what may be described as a summary of the evidence that led her to conclude that the appellant had an intent to permanently deprive Mr Wallen of his horse Asymptotic. She listed the following:

- (i) lying about the whereabouts of the horse;
- (ii) failing to take the owner to see the horse;
- (iii) failing to inform the owner of the death of the horse;
- (iv) failing to take the owner to view the carcass;
- (v) disposing of the horse without the owner's knowledge;
- (vi) presenting two different death certificates for the horse;
- (vii) the absence of a post mortem report;
- (viii) the absence of a report from a veterinarian; and
- (xi) putting in a claim for outstanding fees only after the demand had been made for the horse.

The grounds of appeal

[22] The following grounds of appeal were filed:

- “1. The Learned Resident Magistrate erred in holding that there was a Prima Facie case made out against the Appellant at the close of the Crown’s case.
2. The verdict is unreasonable and cannot be supported by the evidence.
3. The Learned Resident Magistrate failed to have any OR any proper regard as to the evidence of the death of the horse ‘Asymptotic.’
4. The Learned Resident Magistrate erred in law by holding that the Appellant as a bailee for reward fraudulently converted the horse ‘Asymptotic’ to his own use, or the use of any person other than the owner.
5. The Learned Resident Magistrate erred in law and on the facts by holding that the Appellant disposed of ‘Asymptotic’ OR caused it to be disposed of.
6. The Learned Resident Magistrate erred in finding as fact the several specific findings of fact at page 80 of the Record, which caused her to come to a verdict adverse to the Appellant on Count 3 of the indictment which charged larceny.”

The reference to page 80 in ground 6 above is correct so far as the typed notes of evidence and findings of fact are concerned, but they are actually at page 109 of the overall record of appeal.

The submissions

[23] Mr Anthony Pearson, for the appellant, said that it was common ground with the prosecution that the appellant was a bailee for reward in respect of the horse Asymptotic, and that a bailee can steal from the owner. However, he

submitted, there was nothing in the evidence that pointed in the direction of stealing. He felt that the no case submission should have been upheld in respect of count 3, as it was in respect of some of the other counts. He expressed surprise that there was a conviction of larceny given the fact that the complainant did not know what had happened to the horse. The evidence, Mr Pearson said, indicated that the horse had died, and if it had died it could not be stolen. He criticized the specific findings listed at page 109 of the record, and submitted as follows:

- (i) The failure to state that the horse has died does not indicate an intent to steal;
- (ii) the Racing Commission does not require the signature of a veterinarian to confirm the death of a horse;
- (iii) there is no requirement for a post mortem report;
- (iv) there was no evidence that the owner requested to be taken to see the horse, or its carcass;
- (v) failure to take the owner to see the carcass could not have been a factor in determining guilt;
- (vi) the evidence of Mr. Lawrence Heffes was ignored by the learned Resident Magistrate.

[24] Mr Adley Duncan, who appeared with the learned Director of Public Prosecutions, Miss Paula Llewellyn, QC submitted that as a matter of law, the knowledge or intention of the owner was irrelevant as far as a conviction for larceny is concerned. He said that the complainant had not been told that the

horse was in St. Thomas and that indicated an intention to deprive the complainant permanently. He submitted that there was no legitimate reason for the appellant to have failed to inform Mr Wallen immediately of the death of Asymptotic; hence, the inference of a dishonest intention. In the final analysis, he said, it was a matter of credibility for the learned Resident Magistrate to determine.

Conclusion

[25] We are in agreement with Mr Pearson that the prosecution did not present satisfactory proof of an intention on the part of the appellant to permanently deprive Mr Wallen of his horse. There were huge question marks as to the nature of the deprivation as well as in relation to the purpose of such deprivation. Asymptotic was lame; it had never raced, unlike Sir Romel which was healthy and had won races. The appellant had no difficulty, it appeared, in handing over the winning horse to Mr Jackson. So, the question arises: why would he wish to steal a lame horse? It is recognized that motive is generally irrelevant in proving criminal cases. However, lack of the need to prove motive should not be taken as a licence for irrationality to prevail. There was absolutely no benefit to be gained by the appellant, given the uncontradicted evidence of Mr Heffes who said it was impossible to steal a horse in Jamaica for breeding or racing purposes (p.97). It seems clear therefore that the keeping of this lame horse was more of a burden

to the appellant than a benefit. Under cross-examination, Mr Wallen is recorded as saying:

“It was my obligation and my self interest to tell him that the horse suffered from an injury. He listened and I continued to speak. He acknowledged what I said and told me he would try and see what he could do. After that we had continuous dialogue regarding the horse.” (p.41)

Mr Everaldo Bowen, a farmer, aged 54, confirmed that the appellant had left the horse in his care on his farm in Albion, St Thomas. There were other horses left in similar fashion, for pasturing. Mr Bowen said that the horse died and he burnt it as other animals on the farm had started to eat it. He also said that he never called a veterinarian to attend to the horse. In the face of this evidence, it is our view, that it was unreasonable for the learned Resident Magistrate to conclude that the absence of a post mortem report and a report from a veterinarian indicated an intention to deprive the owner permanently of the horse.

[26] The learned Resident Magistrate, in giving her reasons for convicting the appellant, said that the appellant put in “a claim for outstanding fees only after the demand for the horse was made having had the horse off the track for almost a year while collecting and cashing the purse monies for Sir Romel, from which I can safely say that he had the requisite intent required by law, to permanently deprive the owner thereof. I have no difficulty finding that by his actions he treated the thing as his own to dispose of as he saw fit regardless of the owners rights”. This statement of the Resident Magistrate’s findings suggests

that she was of the view that the claim for outstanding fees was a ruse. This was clearly an unreasonable assessment by the learned Resident Magistrate, given the evidence that the Jamaica Racing Commission conducted a formal hearing and concluded that the appellant was indeed owed a significant sum of money by Mr Wallen.

[27] For the foregoing reasons, we concluded that the conviction herein was flawed and that the appellant had succeeded on grounds 2 and 4 and 6. In the circumstances, we quashed the conviction and entered a judgment and verdict of acquittal.