[2014] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 7/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

ALWAYNE JACKSON v R

Miss Tamara A Greene instructed by Cecil R July for the appellant

Mrs Kamar Henry Anderson and Miss Patrice Hickson for the Crown

31 March, 4 April and 31 July 2014

MCINTOSH JA

[1] We heard arguments in this appeal against the appellant's conviction and sentence, on 31 March 2014 and, on 4 April 2014, we handed down the following decision:

> "The appeal is dismissed. Conviction and sentence are affirmed [save that t]he sentence of the court is varied by deleting the order for compensation. The sentence to commence on 7 March 2013."

We now seek to fulfil the promise made then to give written reasons for our decision.

A brief outline

[2] The appellant was aggrieved at his conviction and sentence in the Resident Magistrate's Court for the parish of Saint Elizabeth where on 4 May 2011 and divers days thereafter, he stood charged on a four count indictment for the offence of fraudulent conversion. His conviction covered all but one count, as the learned Resident Magistrate, Mrs Sonya Wint-Blair, returned a verdict of not guilty in relation to the second count on the indictment. He was sentenced to three years imprisonment on each of the remaining counts, each being suspended for a period of three years, during which time he was to be supervised and counselled by a probation after-care officer. The learned Resident Magistrate also made an order for compensation to be paid to the complainants as follows:

> "Compensation order of $10,000 USD to Mr Campbell and $1.3 million to Ms Reynolds."

The prosecution's case

[3] Although the appellant's trial spanned some three years (2011 to 2013), the learned Resident Magistrate was able to adequately summarise the prosecution's case at page 89 of the record, as follows:

> "The crown's case was that the defendant had received money from [sic] complainant's [sic] Elaine Reynolds and Melvin Campbell for the purchase and delivery of motor vehicles. These motor vehicles were never delivered and the complainants' money was never returned to them."

The evidence disclosed that a number of demands were made on the appellant for the delivery of the vehicles or a refund of the sums paid to him by the complainants but, up

to the time of trial, neither course was adopted. The appellant gave a number of explanations for his failure to fulfil his obligations to the complainants but, in the final analysis, they received no vehicles, no refund and nothing to substantiate the reason for that position as advanced to them by the appellant. This ultimately led to their report to the police and the subsequent arrest and charge of the appellant.

The case for the defence

[4] The appellant's case was similarly summarised, on the same page, the magistrate noting that "[t]he defence case substantially agreed with the crowns [sic] case" and continued thus:

> "The defendant admitted that he received money from both complainants to purchase vehicles on their behalf, and that he has not delivered any vehicles to either one, he also does not dispute that he has not returned their money. He raises a defence of frustration, as his agreements with the complainants could not be completed due to the unforeseen circumstances which befell a third party."

The central issue identified

[5] The learned Resident Magistrate found the conversion element of the charge to be undisputed on both the case for the prosecution and that for the defence. This left as the central issue for her determination, the question of whether the conversion was fraudulent. She referred to evidence from the appellant (who described himself as a "broker"), that the complainants had in fact given him various sums of money to purchase vehicles on their behalves and he had done so, but was unable to deliver them so as to complete the transaction because the Jamaica Customs Department had

seized them for non-payment of taxes due from a third party through whose company he had imported the vehicles. As a broker, he would import vehicles through a company known as Positive Traders, a used car dealership, he testified.

[6] The difficulty which the appellant faced was that that explanation was but one of several explanations given to the complainants for non-delivery of their vehicles. The learned magistrate was careful to note in her findings that there was no obligation on the appellant to prove his innocence, but having asserted that a state of affairs existed that prevented him from honouring his obligations to the complainants, "he ought to have supported his assertions with the evidence which would have been peculiarly within his own knowledge and has failed to do so".

[7] In her review of the evidence, the learned Resident Magistrate highlighted the appellant's testimony that representatives of both complainants had been shown vehicles on the wharf of a similar make and model as those which the appellant was to procure for them but the learned Resident Magistrate held that this did not signify that the vehicles shown were those paid for and imported into the island on behalf of the complainants as no import entry documents from customs or any other document were produced to show the nexus between the vehicles on the wharf and those for which the complainants had paid him.

[8] Further, the evidence disclosed that the appellant caused one complainant, Mrs Enid Reynolds, to overpay him on her transaction and claimed that he gave the overpayment to a third party on a date unknown and at an unknown location. The learned Resident Magistrate saw this as a demonstration of how the appellant treated with the complainant's funds and noted that to date the overpayment had not been restored to the complainant (see page 73 of the record).

[9] Additionally, the learned magistrate found that there were some conflicting documents tendered in evidence on behalf of the appellant and, even so, she was of the view that they were self-serving documents proving the dishonesty of the appellant and the mishandling of the funds entrusted to him.

[10] Having found the appellant to be less than honest, the learned Resident Magistrate returned to the prosecution's case as she was obliged to do in order to evaluate it and to determine whether the prosecution's case had been proved to the required standard. She found the evidence relating to count two wanting and noted that the prosecution did not discharge its burden of proof as the prosecution was unable to surmount the inconsistency regarding the payments allegedly made in this instance.

[11] The learned Resident Magistrate summarised her findings in this way:

> "The evidence of the complainants as to the several different accounts and excuses when taxed to explain the

whereabouts of the vehicles or money coupled with the defendant's demeanour in the witness box which was strikingly insincere, glib and cavalier; his lack of support for his assertions demonstrates *mala fides* and dishonesty on his part. It was open on the facts to find that Mr Jackson had indeed fraudulently converted the complainants' money; whether for his own benefit or for that of another is irrelevant."

Grounds of appeal

[12] The appellant filed a total of four grounds of appeal, three against his conviction and one against his sentence. The following are the three complaints against his conviction:

"1. The Learned Resident Magistrate erred in law when she failed to uphold the no case submission made on behalf of the Appellants [sic] at the close of the case for the Crown.

2. The verdict is unreasonable and cannot be supported by the evidence.

3. That the Learned Resident Magistrate erred, when in handing down her decision for count one (1) of the indictment, she found that, the Defendant/Appellant had fraudulently converted USD $10,000.00 which was to purchase or otherwise acquire a 2003 Toyota Corolla motor car for and on behalf of the said Melvin Campbell."

Ground four was formulated thus:

"4. The Learned Resident Magistrate fell into grave error, when she ordered, as part of the sentence, that the Appellant should pay compensation of USD Ten Thousand Dollars ($10,000.00) to Melvin Campbell and One Million Three Hundred Thousand Dollars ($1,300,000.00) to Elaine Reynolds. The Magistrate had no such power to impose that sentence under the Larceny Act (the Act)."

The submissions summarised
Grounds one and two

[13] In relation to ground one the appellant contended that, while it was not denied that funds were entrusted to the appellant by the complainants, there was no evidence that there was any fraudulent and/or dishonest use of those funds. Counsel for the appellant argued that there was no evidence that the appellant used the funds for his own benefit or for the benefit of some other person. The vehicles were purchased, the submission continued, so that there could be no question of conversion let alone fraudulent conversion. This submission was supported by a reference to the **Practice Note** [1962] 1 All ER 448 and the guidance provided therein by Lord Parker CJ on the treatment of a submission of no case by magistrates as well as the case of ***R v Marshall Nicholas Bryce*** (1956) 40 Cr App R 62 on the elements necessary to constitute fraudulent conversion. In the circumstances, it was submitted, the learned Resident Magistrate ought to have upheld the no case submission.

[14] The appellant's contention with regard to ground two was that it was erroneous to find, as the learned Resident Magistrate did, that the prosecution and the defence were in agreement that there was conversion of the complainants' funds, as there was no such evidence. Counsel further submitted that the requirements of section 64(2) of the Larceny Act had not been met as there was no evidence that the appellant had absconded or kept out of the complainants' way in order not to account for their funds. Nor was there evidence of any failure on the part of the appellant to give a satisfactory account of the use of the funds when called upon to do so. Although there was no

burden on him, the submission continued, the appellant gave a satisfactory explanation in his evidence, as to why the vehicles had not been delivered to the complainants at the time specified, namely that the vehicles were purchased, were on the wharf in Kingston and representatives for both complainants went to the wharf and looked at them.

[15] In her oral submissions the appellant's counsel said both complainants were aware that he was getting the vehicles through another individual and that the complainant Reynolds in particular had said that she knew that her vehicle was on the wharf but had not cleared customs. Thus, counsel argued, the learned magistrate had no basis for finding as a matter of fact that the monies entrusted to the appellant by the complainants had been converted to any purpose other than what the complainants requested. The verdict was therefore entirely against the weight of the evidence and as there was no coinciding of *actus reus* and *mens rea*, in the instant case, in order to constitute a crime, ground two should succeed and the conviction of the appellant should be quashed.

[16] On the other hand, counsel for the Crown submitted that there was every basis for the learned Resident Magistrate to have ruled that there was a case for the appellant to answer as the prosecution had raised a prima facie case which satisfied the elements of the offence of fraudulent conversion, there being no denial that money was entrusted to the appellant coupled with the evidence that up to the time of trial the

appellant's obligation to the complainants had not been fulfilled and several bare excuses were given for this failure without anything of substance to support them, thereby giving rise to a reasonable inference that the funds were misused or fraudulently and dishonestly used. There was clearly a basis for the rejection of the no case submission and ground one should therefore fail.

[17] In relation to ground two counsel referred to section 14 (1) of the Judicature (Appellate Jurisdiction) Act, which makes provision for circumstances when the Court of Appeal may disturb the verdict in the lower court, namely if it is unreasonable and cannot be supported by the evidence. Counsel referred to the case of ***Daley v R*** [1993] 4 All ER 86, PC where their Lordships' Board held that the court will only interfere to quash a conviction if there was no evidence on which a properly directed jury could convict. She further bolstered her submission by referring us to ***Keith Pickersgill v R*** RMCA No 28/2000, delivered on 7 June 2001 where Smith JA, citing ***Joseph Lao*** (1973) 12 JLR 1238, made it clear that the Court of Appeal would only interfere with a trial judge's or a jury's findings of fact if it is shown that they are obviously and palpably wrong. In the instant case, counsel submitted, the learned Resident Magistrate gave well reasoned findings and in counsel's view the appellant has not shown that her verdict was so against the weight of the evidence as to be unreasonable and insupportable. The standard required to support the challenge in this ground is a high one, counsel submitted and the appellant has failed to meet it, so that this ground should also fail.

Ground three

[18] On this ground, it was the appellant's contention that the viva voce evidence having disclosed that the complainant Melvin Campbell was acting on behalf of another, namely, one Mike otherwise called Shortman, the funds in question would not have been the property of Mr Campbell. The learned magistrate ought to have taken that factor into account in her finding, counsel submitted and, having failed to do so, she had no basis for finding that Mr Campbell was a victim of fraudulent conversion as a question of fact and a verdict of not guilty should have been recorded where he was stated to be a complainant. Ground three should therefore be determined in the appellant's favour.

[19] The short answer to this ground in the Crown's view was that it is irrelevant whether or not Mr Campbell had entrusted funds belonging to himself or another person, to the appellant. What was important, counsel submitted, was that it was Mr Campbell who handed the funds to the appellant and who gave him the instructions as to its use. Further, counsel submitted, relying on the case of ***R v Ashenheim*** (1973) 20 WIR 307 and section 303 of the Judicature (Resident Magistrates) Act, no objection can be taken to any defect in form or substance in any indictment or information unless (a) the appellant was thereby left in a state of doubt as to the charges that he was answering or (b) the point was raised in the court of trial or (c) it can be shown that the error or defect caused or may have caused the appellant to suffer some injustice. In the instant case, the appellant, not having raised the point before or shown that he

suffered any injustice and not having argued that he did not know the charge he was facing, cannot succeed on this ground.

Ground four

[20] The appellant's submission in relation to ground four was that the learned magistrate lacked the jurisdiction to make an award of compensation to the complainants, as the charging section for this offence being section 24 (1)(iii)(a) of the Larceny Act, provides a maximum sentence of seven years imprisonment, *simpliciter*. The magistrate's award of compensation was therefore an error and should be set aside, counsel submitted.

[21] This was a ground on which there was a meeting of the minds as the Crown conceded that the proviso to section 66 of the Larceny Act excludes from a sentence for fraudulent conversion any award of compensation. The learned Resident Magistrate would therefore have had no jurisdiction to award compensation to the complainants.

Analysis

[22] Applying Lord Parker's Practice Direction referred to above and the several authorities thereafter which serve to firmly cement the principles for the guidance of magistrates and judges when called upon to rule on a no case submission, it seems to us that, in the instant case, the learned magistrate was correct in her rejection of the no case submission. At the end of the prosecution's case, it could not be said that

there was no evidence from which the trier of facts could reasonably draw an inference that the appellant had misused the funds entrusted to him by the complainants, since up to the time of trial he had neither returned the funds to them nor delivered the vehicles which were to have been procured on their behalves.

[23] Additionally, the evidence indicated that he had sought to mislead the complainants with a number of explanations for his default, entitling them to form the view that "something was rotten in the state of Denmark", as the expression goes, and warranting a report to be made to the police. At the end of the prosecution's case, the evidence adduced was not discredited in any material way in cross-examination and certainly was such that a reasonable tribunal could safely convict on it. We therefore concluded that ground one was unsustainable and failed.

[24] We then moved on to consider whether, as is the complaint in ground two, the evidence in its totality was insufficient to support a guilty verdict. Section 14 (1) of the Judicature (Appellate Jurisdiction) Act provides a framework for considerations of this nature. It reads as follows:

> "14(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

An appellant who wishes to challenge the verdict of the court of trial on the ground that it is unreasonable and against the weight of the evidence must show that the verdict was obviously and palpably wrong (see ***Joseph Lao*** and ***Keith Pickersgill v R*** as this is the only basis upon which an appellate court will interfere with the findings of fact of the trial judge or the jury or, as in the instant case, the magistrate. Therefore, in order to succeed on this ground the appellant must meet this threshold.

[25] We agree with the submission of counsel for the Crown that the learned Resident Magistrate's findings were well reasoned. Substantially, she found that the real departure of the appellant's case from that of the prosecution was on the issue of whether as a matter of law the use of the funds entrusted to the appellant amounted to fraud. In this regard, the learned magistrate was influenced by the evidence of various explanations for the non-fulfillment, even up to the time of trial, of the obligation owed to the complainants by the appellant.

[26] It is clear that what the magistrate was conveying in her finding that conversion was undisputed on both cases was that it was not in dispute that the funds were received by the appellant and not in dispute that they were not returned. The inference that fraud was involved would have arisen by the attempts to explain away its use and

her own assessment of the appellant's demeanour as he testified. It was for the magistrate and not the appellant to be satisfied as to the adequacy of the explanation given and she clearly rejected his explanations. The learned magistrate did not find the appellant to be a witness of truth, while on the other hand, she found the complainants to be credible witnesses. She reasoned that there was no evidence presented to establish that the vehicles shown on the wharf were the vehicles paid for and imported by the appellant on behalf of the complainants and she regarded his exhibited receipts as "self serving and did not demonstrate a sufficient nexus between his agreement with the complainants and the payments on their behalves in respect of this agreement". Her conclusion that the appellant had converted the funds to his own use and benefit or that of another can hardly, in our view, be termed unreasonable in all the circumstances of this case. The appellant's challenge to the verdict in ground two therefore could not and did not succeed.

[27] There was no merit in ground three as the funds were received from Mr Campbell whatever its source and the transaction was entered into with him. Mr Campbell may well have a problem with his principal, but, as between the appellant and Mr Campbell, it was of no moment that the funds were provided to the latter by someone else. This transaction therefore did not call for any discussions on the law regarding agency and the authority of an agent over the funds of his principal. Ground three also failed.

[28] The appellant was on firmer ground in relation to his complaint about the award of compensation as a component of the sentence imposed by the learned Resident Magistrate. In light of the proviso to section 66 the learned magistrate clearly fell into error as she lacked the jurisdiction to make such an award. This was conceded by counsel for the Crown. Ground four therefore met with success and the magistrate's order for compensation to be paid to the complainants was deleted.

[29] It is for the foregoing reasons that we made the decision handed down on 4 April 2014, as set out in paragraph [1] above.