[2010] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 20/2009

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag.)

RICHARDO SHORTER v REGINA

Miss Audrey Clarke and Miss Vonique Mason instructed by Bryan Clarke for the appellant

Miss Maxine Jackson for the Crown

21 April and 11 June 2010

PANTON, P.

[1] The appellant was convicted on 18 June 2009 before His Honour Mr George Burton sitting in the Resident Magistrate's Court, Lucea, Hanover, of the offence of assault occasioning actual bodily harm, and fined twenty-five thousand dollars, with the alternative being ninety days imprisonment. On 21 April 2010, this court allowed his appeal, quashed the conviction and set aside the sentence. In the interests of justice, a new trial was ordered to take place before another Resident Magistrate.

[2] The circumstances are that the appellant and one Viora Campbell had a dispute on 17 October 2008. Arising from that dispute, District Constable Pearl Grayson instituted proceedings by way of summons against the appellant who was served to appear in the Resident Magistrate's Court, Lucea on 11 November 2008. He duly appeared, and there are notations on the information suggesting that the matter was mentioned on 4 and 16 December 2008 as well as 14 April 2009. Eventually, it was tried on 18 June 2009 with the result indicated earlier.

[3] The appellant was unrepresented at his trial. The record of the proceedings shows that there were two witnesses for the prosecution – Ms Viora Campbell, the complainant, and District Constable Grayson. The appellant briefly cross-examined them, and he gave evidence and was cross-examined by the Clerk of the Courts. The complaint against the appellant was that he had pushed the complainant causing her to fall, and that he hit her on the head while she was on the ground. A medical certificate, which was signed but not sworn, was admitted in evidence. It purports to show the complainant as having suffered bruising of the right arm, scalp, right thigh and right knee. In his defence, the appellant said that the complainant threw water on him, and was walking towards him when he pushed her and she fell. He then walked away. However, she got up and proceeded to attack him. He ran to avoid further confrontation.

Grounds of Appeal

[4] The appellant filed notice and grounds of appeal on 25 June 2009. The sole ground of appeal filed then was framed thus:

> "… the trial of the Appellant contravened his constitutional rights because it took place in the absence of his counsel."

On 10 November 2009, the appellant filed "additional grounds of appeal" namely:

> "1. That the Appellant on account of being unrepresented did not have a fair trial.
>
> 2. That the trial of the Appellant in the absence of his Counsel was a material irregularity.
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> 3. That the admission of the medical report of Dr. Rajeswar Nareddi was a material irregularity.
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> 4. That the learned Magistrate failed to address his mind to defences other than self defence and the Appellant was not made aware that he could have availed himself (sic) defences other than self defence or that he could have called witnesses to assist his presentation and establishing of those defences.
>
> 5. That the verdict of the learned trial judge is unreasonable and cannot be supported having regard to the evidence.
>
> 6. That there was a substantial miscarriage of justice in the trial of the Appellant."

The undisputed facts

[5] The appeal was argued on the basis of facts that appear to be undisputed. These facts have been extracted from affidavits filed by the Clerk of the Courts and Mr Clarke, and are set out as follows:

(i) The appellant retained the services of Mr. Bryan Clarke, attorney-at-law, on 16 June 2009 to conduct the defence at the trial scheduled to be held in the Lucea Resident Magistrate's Court (on 18 June) two days later.

(ii) At the time the services of Mr. Clarke were retained, he told the appellant that he would have been unable to attend court on the trial date, but would send a message to the court.

(iii) On 17 June 2009, Mr. Clarke spoke with the Clerk of the Courts advising her that he had a matter set for 18 June 2009 in Lucea, but he (Mr. Clarke) was due in the Resident Magistrate's Court, Ramble on the said day.

(iv) Mr. Clarke did not give the name of the case to the Clerk of the Courts.

(v) Mr. Clarke's secretary called the Court's Office on 18 June 2009 and left a message with someone other than the Clerk of the Courts as to the name of the individual to be represented by Mr. Clarke;

(vi) At no time during the proceedings was the appellant asked if he had an attorney-at-law.

(vii) At no time did the appellant indicate that he intended to retain an attorney-at-law.

(viii) At no time during the proceedings did the appellant indicate that he had retained Mr. Clarke.

The Evidence Act

[6] We formed the view that there was merit in grounds 1 and 3 of the additional grounds of appeal; hence there was no need to consider the other grounds. As regards ground 3, it is not debatable that the medical certificate was wrongfully admitted. The Evidence Act requires a medical certificate to be in a particular form for it to be admissible in evidence. Section 50 provides as follows:

> "50. (1) Notwithstanding anything contained in any law, but subject always to the provisions of this Part, any certificate or report, if accompanied by a sworn statement by the medical practitioner who has signed the certificate or report, shall be admitted in evidence in any criminal proceedings before a Resident Magistrate or Justices, or at any Coroner's Inquest, without the medical practitioner being called upon to attend and to give evidence upon oath.
>
> (2) Where, in any criminal proceedings before a Resident Magistrate or Justices it is intended to put in evidence a certificate or report as provided in subsection (1), the prosecution shall, at least three clear days before the proceedings, serve upon the defendant written notice of such intention, together with a copy of the certificate or report, and the defendant, at the commencement of the proceedings, may object to the admission of the certificate or report, and may require the attendance of the medical practitioner to give evidence on oath."

In the instant case, the medical certificate did not conform to the statutory requirements quoted above and there is no note to indicate that the learned

Resident Magistrate had informed the appellant of his right to object to its admission. Based on that non-compliance, the document was not admissible (***see R v Ezra Hall*** (1980) 17 JLR 146 at p. 148 B). Further, having wrongfully admitted the certificate, the learned Resident Magistrate explicitly relied on it in arriving at his verdict. This is what he said at page 15 of the record (para. 7 of the Reasons For Verdict):

> "The Medical Report in Exhibit 1 speaks for itself. This complainant is hypertensive and diabetic. She incurred bruises and swellings all over her head and body including decrease (sic) range of motion which could exacerbate her medical condition … "

Right to representation by attorney-at-law of choice

[7] In respect of ground 1, Miss Audrey Clarke for the appellant submitted that he had been deprived of a fair trial as he had not had the benefit of the services of the attorney-at-law whom he had retained. She also pointed to the fact that there was no record of any inquiry having been made of the appellant as regards representation when he appeared in court.

[8] The right to a fair trial is provided for, and protected by the constitution. It involves the right to be represented by the attorney-at-law of one's choice (see section 20(1) and (6)(b) and (c) of the constitution). In the instant case, the appellant's trial proceeded without his attorney being present due to the fact that the court was unaware of the attorney being involved in the case. Notwithstanding the decision that we have made, the appellant cannot escape

blame for this situation. It was his duty to inform the court that he had an attorney. The fact that he did not, however, does not mean that he had abandoned his right to an attorney, or that he should be penalized for the failure by having a conviction recorded against him. As Miss Maxine Jackson for the Crown has conceded, it is only right that prior to the recording of a conviction, there should have been a proper trial.

[9] There seem to have been shortcoming on all fronts as regards this matter of the appellant's representation. Firstly, he did not communicate to the Court the fact that he had an attorney-at-law. Secondly, neither the Clerk of the Courts nor the Resident Magistrate seems to have made an inquiry of him concerning his representation as the record of the proceedings does not indicate such. Thirdly, Mr Clarke, the attorney-at-law did not properly communicate the fact that he had been retained to represent the appellant.

Responsibilities of an attorney-at-law

[10] An attorney-at-law who has been retained has certain responsibilities. It is perhaps appropriate to take this opportunity to remind attorneys of what is expected of them when retained. In ***R v Curtis*** (1968) 11 JLR 98, it was held that it is counsel's duty when retained to represent an accused in court, to be in court when the case is called up, and if he cannot be there, to take steps to see that someone else represents his client. In dismissing the appeal, Waddington, P. (Ag) said:

> "In the instant case the appellant had retained counsel from some time before and it was entirely the fault of counsel why the appellant was not represented when the case was tried on July 9. As far as the resident magistrate is concerned, the court cannot say that she acted in any manner which could be said to have denied the appellant his rights to natural justice. As I have said before, there was an overwhelming case against the appellant. He cross-examined the witnesses for the Crown and he also made an unsworn statement which was not accepted by the court.
>
> This court is quite satisfied that there was no miscarriage of justice in this case and in the circumstances the appeal is dismissed." (p. 100 D-E)

Earlier, at page 99I – 100A, Waddington, P. (Ag.) had said in respect of the fairness of a trial in the absence of retained counsel:

> "This is not the first time that this point has been taken in this court. There is a judgment of this court to which unfortunately I cannot at the moment refer, in which the court laid it down quite clearly that it is counsel's duty when retained to represent an accused in court to be in court when the case is called up …"

The case which Waddington, P. (Ag) was having difficulty in calling to mind is probably ***R v Stewart*** (1964) 8 JLR 392. There, it was held that where a date is fixed for the trial of a case it is the business of counsel to see that he is present in court on his client's behalf. If he cannot be present at the proper time he should make arrangements to ensure either that his client is represented in court or that his case is not taken. It is not the business of the court to wait on counsel.

[11] It is important that attorneys-at-law realize that the aforementioned cases form part of the general body of rules that govern their conduct when retained. They go hand in hand with the rules, such as the Legal Profession (Canons of Professional Ethics) Rules, made under the Legal Profession Act.

[12] The foregoing are our reasons for quashing the conviction and ordering that the appellant be retried before another Resident Magistrate.