[2017] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 12/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HOM MISS JUSTICE P WILLIAMS JA

KWAME ABAYOMI v R

Able-Don Foote for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Mrs Karen Seymour-Johnson for the Crown

22 June 2017

MORRISON P

[1] The appellant is a citizen of the United States of America. Upon his arrival in Jamaica on 19 August 2012, he was given leave to land on condition that he should remain in the island no longer than 18 November 2012. On 1 July 2015, he was brought before the Resident Magistrate's Court (now the Parish Court) for the Corporate Area, for failing to comply with the condition upon which he had been given leave to land ('overstaying'), contrary to section 20(1)(a) of the Aliens Act ('the Act'). Upon the appellant's plea of guilty, the learned Senior Resident Magistrate, as she then was, sentenced him to a fine of $5,000.00 or 30 days' imprisonment, with a recommendation that he be deported from the island. The single issue which arises on this appeal is

whether, given the offence for which the appellant was convicted, the court had any authority to make such a recommendation.

[2] In her written reasons for sentence, the learned Senior Resident Magistrate explained that she had made the deportation recommendation pursuant to section 15(6)(b), as distinct from section 15(6)(a) of the Act. In order to appreciate the distinction, it is first necessary to mention section 15(1), which speaks to the Minister's power to make a deportation order:

> "The Minister may, if he thinks fit, in any of the cases mentioned in subsection (6) make an order (in this Act referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the Island."

[3] Following on from this, section 15(6), so far as is relevant to this appeal, provides as follows:

> "A deportation order may be made in any of the following cases –
>
> (a) if any court certifies to the Minister that the alien has been convicted, either by that court or by any inferior court from which the case of the alien has been brought by way of appeal, of any of the offences specified in the Second Schedule and that the court recommends that a deportation order should be made in his case either in addition to or in lieu of sentence;
>
> (b) if the court certifies to the Minister that the alien has been convicted by that court of an offence under this Act; ...
>
> (c) ...
>
> (d) ..."

[4] So section 15(1)(a) and (b) provides that the Minister may make a deportation order in cases in which (a) the court certifies that the alien has been convicted (by that court or any inferior court) of an offence specified in the Second Schedule, **and** makes a recommendation that a deportation order should be made either in addition to or in lieu of sentence (section 15(6)(a)); or (b) the court certifies to the Minister that the alien has been convicted by that court of an offence under the Act (section 15(6)(b)). In the former case, the court may certify the fact of the conviction to the Minister and recommend a deportation order, while in the latter case the court's only role is to certify the conviction to the Minister.

[5] It is common ground that the offence of overstaying is not an offence specified in the Second Schedule. Accordingly, Mr Foote submitted, the learned Senior Resident Magistrate erred in recommending the deportation of the appellant. In support of this submission, Mr Foote referred us to the previous decision of this court in **Regina v Jacqueline Chenowith** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 42/1997, judgment delivered 2 February 1998. The appellant in that case was charged with operating a villa without having in force a valid work permit, contrary to section 3(3)(a) of the Foreign Nationals and Commonwealth Citizens (Employment) Act. This was not an offence specified in the Second Schedule to the Act. Nevertheless, upon her plea of guilty she was sentenced to pay a fine of $200.00 or in default of payment to serve three months' imprisonment. It was held that the Resident Magistrate had fallen into error and acted without authority in imposing the added

sanction of a recommendation for deportation. That part of the sentence was therefore removed.

[6] As Mrs Seymour-Johnson for the Crown quite properly conceded, Mr Foote's submissions are obviously correct. In this case, as the learned Senior Resident Magistrate herself recognised, the offence for which the appellant was charged did not fall within the Second Schedule, so the court had no authority to make a recommendation for deportation. It follows from this that, as in **Regina v Jacqueline Chenowith**, that part of the sentence whereby the court made a recommendation to the Minister for the deportation of the appellant must be set aside.