[2015] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 35/1997

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

PAUL BROWN
JEFFREY LITWIN v R

Mrs Jacqueline Samuels-Brown & Nicholas Edmond for the appellants

Miss Natalie Brooks & Mrs Paula-Rosanne Archer-Hall for the Crown

20, 21, 22 January 2010 and 27 November 2015

PANTON P

[1] The appellants were tried together over a period of 17 days commencing in 1991 and ending in 1992 for breaches of the Customs Act. At the end of the trial, they were convicted and on 28 February 1992 at the election of the Commissioner of Customs, the learned Resident Magistrate imposed fines on them. Each appellant gave verbal notice of appeal.

[2] The appellant Paul Brown filed four grounds of appeal on 20 March 1992, the last permissible date for such filing. He also filed supplementary grounds of appeal on 21 November 1997 and a further supplemental ground on 17 September 2009.

[3] The appellant Jeffrey Litwin failed to file grounds of appeal within the time specified by the Judicature (Resident Magistrates) Act. Section 296 of the Judicature (Resident Magistrates) Act provides for the filing of grounds of appeal within 21 days after the judgment of the court.

[4] On 24 September 2009, Mr Litwin filed a notice seeking leave to rely on the original grounds of appeal as well as the supplementary grounds and the further supplemental ground filed by Mr Brown.

[5] Section 296 (1) of the Judicature (Resident Magistrates) Act reads as follows:

> "296. – (1) Notwithstanding anything contained in any law regulating appeals from the judgment of a Magistrate in any case tried by him on indictment or on information by virtue of a special statutory summary jurisdiction the appellant shall within twenty-one days after the date of the judgment draw up and file with the Clerk of the Courts for transmission to the Court of Appeal the grounds of appeal, and on his failure to do so he shall be deemed to have abandoned the appeal:
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> Provided always that the Court of Appeal may, in any case for good cause shown, hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the time hereinbefore prescribed."

[6] Mrs Samuels-Brown applied for permission to make submissions on behalf of Mr Litwin. However, no good reason was advanced for his failure to respect the provisions

of section 296(1). In the circumstances, Mr Litwin was deemed to have abandoned the appeal of which he had given verbal notice, so his appeal stands dismissed.

The nature of the case

[7] As regards Mr Brown, the case against him was that he:

a) was knowingly concerned in dealing with certain vehicles with intent to defraud Her Majesty of duties payable on them;

b) was concerned in importing restricted goods into the country; and

c) harboured restricted goods.

There were seven vehicles that featured in the charges. The prosecution's case was that motor vehicles were bought and disassembled in England. They were shipped to Jamaica as motor vehicle parts and then reassembled with a view to being registered and sold as motor vehicles. By this method, significantly less customs duties were paid by the importer than if they had been shipped into the country in their whole manufactured state as motor vehicles. An import licence is required for the importation of motor vehicles.

[8] The appellant was a director of a company, Commercial Motors and Equipment Ltd (CME Ltd) that was responsible for the importation. According to the prosecution, Mr Brown gave a statement to the police confirming his directorship and the importation. However, in an unsworn statement that did not allow for cross-examination, Mr Brown said he did not import any vehicles into the country. He stated

that he signed a caution statement but he did so "because Mr. Grant came in the room twice while the statement was being given. First at the beginning of the statement and then at the end". This reference to "Mr Grant" is to the superintendent of police who laid the informations on which Mr Brown was tried.

[9] The main witness for the prosecution was Detective Sergeant Winston Lawrence who was attached to the Customs Enforcement Branch of the Department of Customs and Excise. He gave evidence of going to 77A Parkway, Riverton City, St Andrew, where he saw the appellant Brown and Mr Litwin, both of whom he knew before. He also saw there some completed trucks, as well as some portions of trucks, that is, pieces of the cab sections and chassis. He told Mr Litwin that he had a search warrant to inquire into the importation of the vehicles on the premises. Mr Litwin told him, in the presence of Mr Brown, that he was to speak to Mr Brown who would have all the answers, as he Mr Litwin had to go off then with the police.

[10] Detective Sergeant Lawrence told Mr Brown that he was there to inquire as to how the vehicles had been imported into the country, and whether the importation had been done by means of import licences. Mr Brown told the sergeant that the vehicles belonged to CME Ltd, a company operated by himself and Mr Litwin. Having been cautioned by the sergeant, Mr Brown then said that a company in England operated by Mr Litwin sent the parts to Jamaica and they were fitted up at 77A Parkway. He said he had not been granted import licences for the vehicles. The sergeant arranged for the vehicles to be taken to 230 Spanish Town Road where Mr Brown was questioned further. He was again cautioned and he proceeded to dictate a statement which the

sergeant recorded in writing. Constable Owen B Grant witnessed the taking of this statement.

[11] Evidence was tendered to show the rate of duty charged on imported trucks as compared with that charged on motor vehicle parts. In the former case, the rate was 88.32% whereas in the latter case, the rate was 33.85%.

[12] The learned Resident Magistrate found Sergeant Lawrence to be a truthful witness. She accepted what he said the appellants said to him. She found that they were directors of CME Ltd, a company which has as its main objects the carrying on of the business of importers, hirers, manufacturers, assemblers, dealers in and storers of various types of motor vehicles including trucks. Mr Brown told Sergeant Lawrence that the vehicles (identified in the informations that were before the court) were owned by CME Ltd and had been sent to Jamaica "knock down" and were assembled at 77A Parkway, the registered address of CME Ltd.

[13] The learned Resident Magistrate found that the statement given by Mr Brown to Sergeant Lawrence was voluntarily given, and that it only added some details to the information already given to the sergeant, making it clear for instance that in "knock down" form meant, in parts. Mr Brown said that the vehicles were cleared through the customs as auto parts and then reassembled in Jamaica. Steps were then taken to have the reassembled vehicles registered and licensed. No import licence was ever issued for any of the vehicles.

[14] The appellant Brown filed a total of 12 grounds of appeal between the date of the judgment of the learned Resident Magistrate and 17 September 2009. The grounds raised issues in respect of: autrefois acquit, the need for the holding of a voir dire, the taking of the cautioned statement, the sentence, and the delay in respect of the disposition of the matter.

Autrefois acquit

[15] In supplementary ground 1, the appellant complained that he was tried on charges that had already been dismissed. Mrs Samuels-Brown submitted that the informations filed in 1990 "were repeats of the 1989 Informations" on which no evidence had been offered. It was she said undeniable that the same evidence on which the prosecution sought to ground the 1989 informations was the very same evidence relied upon for the 1990 informations. Consequently, she said the plea of autrefois acquit ought to have prevailed; in any event, the new charges were an abuse of the process of the court, she said.

[16] The transcript reveals that after the prosecutor had opened the case before the Resident Magistrate, Mrs Samuels-Brown had submitted that the subject matter of the 1989 informations was the same as the 1990 ones, except that the new ones were in a "more aggravated form". She relied then on the case **R v Benson** (1961) 4 WIR 128**.** There followed a detailed comparison by the prosecutor of the two sets of informations, at the end of which, the learned Resident Magistrate upheld Mrs Samuels-Brown's submissions in respect of four informations (numbered 6999, 7008, 7014 and

7020/1990), and directed that the trial was to proceed in respect of the informations numbered 6998, 7000–7, 7013, 7015-19, 7021 and 7028/1990.

[17] Miss Natalie Brooks for the prosecution submitted that for the plea of autrefois acquit to be available to the appellant, it had to be shown that he was put in jeopardy of conviction on the earlier charges and that they were dismissed. She relied on **R v Dabhade** [1992] 4 All ER 796. In the instant case, Miss Brooks contended, there was no evidence that the appellant was dismissed. She said that the appellant was pleaded on new informations and that the old ones were withdrawn. The old informations were defective so they were withdrawn and new charges substituted, she said. As regards the submission that the trial of the appellant was an abuse of the process of the court, she said that that was far from being the case, and relied on **Dennis Thelwell v Director of Public Prosecutions and The Attorney General** SCCA No 56/1998 – delivered on 26 March 1999.

[18] In **Connelly v Director of Public Prosecutions** [1964] 2 AC 1254, the nature and extent of the doctrine of autrefois acquit was one of the questions certified by the Court of Criminal Appeal of England for the consideration of the House of Lords. Lord Reid expressed the view that the authorities show that "many generations of judges have seen nothing unfair in holding that the plea of autrefois acquit must be given a limited scope". He said he could not disregard the fact that, "with certain exceptions it has been held proper in a very large number of cases to try a man a second time on the same criminal conduct where the offence charged is different from that charged at the first trial".

[19] Lord Morris of Borth-y-Gest, in his speech, set out what he thought were the governing principles. The main ones are:

> (1) a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;
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> (2) a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;
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> (3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; and
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> (4) what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings. (pages 1305-1306).

Lord Morris added that the test is "… whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which

on the first charge there could be a conviction" [page 1309]. He then quoted Archbold's (Pleading and Evidence in Criminal Cases, 2nd ed (1825), at p 53) thus:

> "When a man is indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and, if he be thus indicted a second time, he may plead autrefois acquit, and it will be a good bar to the indictment.
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> The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."

[20] The case **R v Dabhade** captures the principles that apply in respect of the doctrine of autrefois acquit. Therein is a review of several cases on the subject. We need only reproduce the headnote to demonstrate why this point fails on appeal. The headnote reads:

> "The appellant, who was employed as a bookkeeper, was entrusted with a number of signed blank cheques by a director of his employer with directions to pay certain bills as they became due while the director was abroad on business. The appellant made out one of the blank cheques for £6,000 payable to cash, cashed the cheque and appropriated the money. He was arrested and charged with obtaining money from his employer by deception, contrary to s 15(1) of the Theft Act 1988. When brought before the magistrate he pleaded not guilty and elected summary trial and the matter was then adjourned for a full hearing. At that hearing the prosecution offered no evidence on the charge of obtaining by deception, which was whereupon dismissed, but the prosecution then preferred a further charge of theft, contrary to s 1(1) of the 1968 Act, which the magistrate declined to try summarily, instead committing the appellant to the Crown Court

for trial. At his trial the appellant raised the plea of autrefois acquit on the ground that he had been lawfully acquitted of the offences contained in the indictment. The judge rejected that submission and the appellant was convicted of theft. The appellant appealed on the ground that the judge's rejection of his plea in bar was wrong in law.

Held – For the principle of autrefois acquit to apply, the defendant had to have been put in jeopardy of conviction at the earlier proceedings and had to demonstrate that the earlier proceedings had been commenced, ie by a plea in summary proceedings or by his being put in charge of the jury in a trial on indictment. If thereafter a charge or count was dismissed, albeit without a hearing on the merits (eg on the basis that the prosecution were unable to proceed), there was a well-established principle that the prosecution could not thereafter institute fresh proceedings on the same or an essentially similar charge or count. However, if the summary dismissal of the charge or count was because it was apparent to the prosecution that it was defective, either as a matter of law (eg for duplicity) or because the evidence available to the prosecution was insufficient to sustain a conviction on the charge as laid, it could not properly be said that the defendant had ever been in jeopardy of conviction on the original charge and if, moreover, the context in which a charge was summarily dismissed was a rationalization or reorganisation of the prosecution's case, so that a new charge was substituted which was regarded as more appropriate to the facts, then the consensual dismissal of the original charge, on the substitution of the new one, would not give rise to the application of the doctrine of autrefois acquit. On the facts, since the original charge of obtaining property by deception was so fundamentally incorrectly framed that the defendant could never have been properly convicted of it and since the prosecution had determined at or before the full hearing to proceed no further on that charge but to substitute the charge of theft the appellant was never in any real sense in jeopardy on the original charge. Accordingly, the principle of autrefois acquit did not apply and the appeal would be dismissed."

[21] This court considered the doctrine of autrefois acquit in the case **Dennis Thelwell v DPP and The Attorney General**. There Forte JA (later to become President of the Court) in the leading judgment quoted from the minority judgment of Lush J in **Haynes v Davis** [1915] 1 KB 332. Lush J had himself quoted from Russell on Crimes Vol II 1982 edition:

> "— at common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence; if he was in 'jeopardy' on the first trial … He was so in jeopardy if (1) the court was competent to try him for the offence; (2) the trial was upon a good indictment, on which a valid judgment of conviction could be entered; and (3) the acquittal was on the merits, i.e. by verdict on the trial, or in summary cases by dismissal on the merits, followed by a judgment or order of acquittal."

[22] Lush J then added his own opinion on the meaning of the words "acquittal on the merits" as follows:

> "I quite agree that 'acquittal on the merits' does not necessarily mean that the jury or the magistrate must find as a matter of fact that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be acquitted as in law he was not guilty, and to that extent the expression 'acquittal on the merits' must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudicating upon it. That is why this expression is important, however one may qualify it, and I think the antithesis is between an adjudication of not

> guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the Court cannot proceed to find if he is guilty … In my opinion the statement that a man must not be twice placed in peril or in jeopardy means that he must have been tried on the first occasion and that all the three conditions I have named have been fulfilled. If any one of them has not, still more if all of them have not, been fulfilled, he has not been in peril … Unless there has been an acquittal after adjudication on the facts or 'merits' there is no ground for the plea of autrefois acquit." (p 339)

[23] Forte JA in his judgment stated that the burden of proving that the conditions to be fulfilled exist must be on the person alleging that he has already been acquitted of the same offence. In the instant case, what transpired was that defective informations were withdrawn by the prosecution and new ones substituted. It cannot be that an accused person can properly claim to have been acquitted by the mere withdrawal of informations, in a situation where there has not been any adjudication by the court, or any acknowledgment by the prosecution that the informations were being withdrawn because the accused had committed no offence.

[24] In the instant case, the appellant has not shown that there has been a breach of any of the principles set out above. The circumstances indicate that the charges proceeded on by the prosecution were different from those which had been withdrawn, in that, the intent alleged in the new charges was different from those in the old charges; further, there were differences in the description of the motor vehicles. Lord Devlin, in **Connelly**, said that for the doctrine of autrefois acquit to apply, "it is necessary that the accused should have been put in peril of conviction for the same

offence as that with which he is then charged. The word "offence" embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law." (page 1339). The appellant was certainly not so imperiled.

[25] Consequently, we found that there was no merit in supplementary ground 1. The raising of a plea of autrefois acquit in the circumstances of this case was misconceived. The grounds in this regard fail.

Voir dire

[26] Supplementary ground 2 reads:

> "The Learned Resident Magistrate fell into error when she failed to hold a voir dire in respect of a confession allegedly made by the Appellant Paul Brown to the investigating officer. The Appellant raised the issue of voluntariness and through his attorney specifically requested that a voir dire be held."

Mrs Samuels-Brown submitted that at the end of the case the evidence relied on to establish the nexus between the appellant and the offences came substantially from the "alleged cautioned statement" made by the appellant. She pointed to what she said were errors in relation to the taking of the statement, and submitted that the errors were to be treated as fundamental and fatal to the conviction.

[27] Mrs Samuels-Brown submitted that given that the voluntariness of the statement had been raised, and a *voir dire* requested, the learned Resident Magistrate erred in not holding a *voir dire*. In her oral arguments, she said that the *voir dire* was necessary

seeing that there was no evidence other than the statement. Miss Brooks' response was to rely on the case **R v Craigie et al** (1986) 23 JLR 172.

[28] We agree with Miss Brooks that there was no need for a *voir dire*. As observed by Kerr P (Ag) in **R v Craigie et al**, a Resident Magistrate is "judge of the law and tribunal of fact". Consequently, "a preliminary test of admissibility by way of a *voir dire* was impractical and unnecessary" (p 183G). We would add that a *voir dire* in such circumstances would be a cumbersome process that adds nothing to the finding of the truth and ensuring that justice is done. This point also fails.

Cautioned statement

[29] The exhibits in this case have apparently disappeared. There was delay in the dispatching of the record of proceedings to the Court of Appeal while the officers searched for the exhibits. The search proved fruitless as in 2009, the court administrator at the Corporate Area Resident Magistrate's Court at Half-Way-Tree informed the registrar of the Court of Appeal that "despite a search made for the documents, we are unable to locate same". Among the exhibits was the cautioned statement. We were therefore not in a position to examine the statement itself. The inability to do so, however, does not affect the appeal, given the other circumstances in the case.

[30] The appellant gave an oral statement which is at page 30 onwards of the record of proceedings. It is this oral statement made to Detective Sergeant Lawrence that forms the basis of the convictions recorded against the appellant. The learned Resident

Magistrate acted on the evidence of Detective Sergeant Lawrence whom she believed. The written statement, if it is a repetition of the oral statement, would therefore be irrelevant. In the circumstances, the impact of the cautioned statement was minimal.

Delay

[31] There is no doubt that there has been serious delay in the disposition of this matter at every stage of the proceedings. However, it is unlikely that delay of this nature will occur again. As far as the convictions are concerned, it is settled law that delay will not interfere with a conviction if there is evidence to support that conviction. In **Melanie Tapper v DPP** [2012] UKPC 26, an appeal from this court, the Privy Council said that not even extreme delay between conviction and appeal, "in itself", will justify the quashing of a conviction which is otherwise sound. The Privy Council also doubted whether leave to appeal should have been granted.

[32] We wish to state clearly that we are not happy with the delay that has occurred in this case and, as said earlier, we do not expect a repetition. The evidence in this case came from the appellant himself who admitted importing the parts, with a view to putting them together to make complete motor vehicles thereby evading the duties payable on the importation of motor vehicles; and he did this without a licence for the importation of motor vehicles. In the circumstances, the point as to delay fails.

Sentence

[33] In sentencing the appellant, the learned Resident Magistrate imposed fines which were on the basis of an election by the Commissioner of Customs of treble the value of

the goods. Mrs Samuels-Brown has challenged this method of sentencing, by submitting that the Commissioner was not competent to participate in the sentencing exercise. This procedure, she said, "offends against the fundamental constitutional principle of separation of powers". In any event, she submitted that the appellant was excluded from the exercise and there was no evidence of the value of the goods to indicate how the final figures were arrived at. The prosecution, quite rightly, conceded that there was no evidence of value and so the fines imposed had no basis.

[34] Due to the lack of evidence to substantiate the fines, we do not find it necessary to deal with the other points raised. It is sufficient to say that the sentences imposed by the learned Resident Magistrate must be quashed. Substituted therefor is a penalty of $5000.00 for each offence, as provided in section 210(2) of the Customs Act. There is no need to state an alternative as the appellant paid the fines that were imposed. However, he is to be refunded the excess amounts that were paid, as soon as possible.

[35] The appeal against conviction by both appellants is dismissed. The appeal by the appellant Brown against sentence is allowed. The fines imposed on him are set aside, and substituted therefor is a fine of $5000.00 on each offence.