[2023] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00024

NORDIA DUHANEY v R

Hugh Wildman and Miss Jodi-Ann Small for the appellant

Mrs Christine Johnson Spence and Mrs Nickeisha Young Shand for the Crown

27 June, 12, 21 October 2022 and 3 February 2023

FOSTER-PUSEY JA

[1] This is an appeal by the appellant, Ms Nordia Duhaney, challenging the decision made on 9 February 2021 by the late His Honour Mr Stanley Clarke ('the learned Parish Court Judge'), Parish Court Judge for the parish of Trelawny. This matter arises from an incident which occurred at the Coral Spring Village Housing Scheme ('the scheme'), in the parish of Trelawny. The appellant was charged on an indictment for the offence of malicious destruction of property. The allegation was that the appellant unlawfully and maliciously damaged the main gate and barrier at the scheme, being the property of Coral Spring Village Citizens' Association Limited ('the Association') and thereby did damage exceeding $367,266.25.

[2] The trial commenced on 15 April 2019 and concluded on 9 February 2021. At the trial a video of the incident was tendered and admitted into evidence. On the agreement of the prosecution and defence, a certificate, reflecting the incorporation of the

Association on 28 September 2015, was also admitted into evidence. Subsequently, the appellant was convicted and sentenced to 18 months' probation.

The prosecution's case

[3] On 17 January 2018 at about 4:35 pm, a person came to visit the appellant at her home in the scheme. However, the security guard on duty at the gate to the scheme, Ms Jacqueline Brown, refused to operate the automatic gate barrier so that the visitor could enter. As a result, the appellant contacted Ms Brown requesting that her visitor be given access. Ms Brown informed the appellant that she was unable to accede to her request due to the policy of the Association that she should not operate the automatic gate barrier for persons such as the appellant, who were on the "D list" (a list of residents of the scheme who were delinquent due to their non-payment of maintenance fees). Instead, the appellant would have to come and operate the gate barrier herself to let her visitor in.

[4] On being told this, the appellant became furious and stated: "… if I come to give access, you won't like it". On arriving at the security post, the appellant used her hand to lift the lever of the automatic barrier and started to swing it vigorously. In the words of Ms Brown, the appellant "ragga ragga" the gate. This action caused the barrier to bend, the hinges to fall off and the left side of the wall to be damaged. The matter was reported to the Falmouth Police Station on behalf of the Association, and subsequently the appellant was charged with the offence of malicious destruction of property.

The defence's case

[5] The appellant in her sworn testimony stated that she was not a member of the Association and therefore had no agreement to pay the stipulated maintenance fees. She testified that when she purchased her property from Gore Brothers, the developers, and went to live there in 2016, there was no automatic barrier that regulated access to and from the property. Instead, there was a manual barrier at the entrance. It was only in November 2017 that the Association installed an automatic barrier.

[6] The appellant deponed that on the day in question, she went to the guard house to open the barrier after Ms Brown informed her that she had to open the gate herself as she was on the list of delinquent homeowners who had failed to pay maintenance fees. She stated that she tried to open the barrier with her hand and received assistance from a gentleman who was passing by. Upon lifting the gate, the gentleman remarked: "the gate break down again". As such, they were unable to put the bar in the air. The gentleman then left as he was in a hurry. Thereafter, the appellant pushed the barrier aside and it was at that point that she realized that the arm was bent.

[7] As outlined above, the learned Parish Court Judge convicted the appellant of the offence of malicious destruction of property.

The appeal

Grounds of appeal

[8] Disgruntled with the decision of the learned Parish Court Judge, the appellant, on 19 February 2021, filed a notice and grounds of appeal in the Parish Court, and thereafter, on 30 May 2022, supplemental grounds of appeal in this court. The original grounds were as follows:

> "a. The verdict is unreasonable and not supported by the evidence; and
>
> b. The learned Parish Judge erred in law when he rejected the submission of no case to answer made on behalf of the defendant/appellant."

[9] The appellant sought leave and was granted permission to abandon the grounds originally filed and argue the following grounds instead:

> "1. The learned Parish Judge erred in law in failing to appreciate that there was no evidence in law that the Appellant, Nordia Dehaney [sic], had committed any unlawful act when it was alleged that she damaged the barrier to the property, resulting in her being charged with the offence of Malicious Destruction of Property.

2. The Learned Parish Judge erred in law in failing to appreciate that the Coral Spring [Village] Housing Scheme Association is not a legal entity that was capable of bringing a charge against the Appellant, that she maliciously damaged the property of the association.

3. The Learned Parish Judge erred in law in failing to appreciate that there was no evidence that the Appellant was party to any agreement with the Coral Spring [Village] Housing Scheme Association, in which she recognized the said association as a legal entity.

4. The Learned Parish Judge erred in law in failing to appreciate that the Appellant, Nordia Dehaney [sic], as the fee simple owner of land within the said housing scheme, was entitled to free access, to and from her property, and was entitled to use necessary force to remove any obstruction that was impeding her and her guest access to and from her property.

5. The Learned Parish Judge erred in law in failing to appreciate that the Coral Spring [Village] Housing Scheme Association could not operate as strata under the Strata Titled [sic] Act, without complying with the provision of **The Registration (Strata Titled)** [sic] **Act** as to the imposition of dues or maintenance on members, who reside in the scheme.

6. The Learned Parish Judge erred in law in failing to appreciate that the Coral Spring [Village] Housing Scheme Association was operating illegally as they did not comply with the provision [sic] of **The Registration (Strata Titled)** [sic] **Act**. Therefore, they had no jurisdiction to impose any barrier over the common area, as they purported to do, when they erected the barrier, which resulted in obstructing the Appellant [sic] access to and from her property.

7. The Learned Parish Judge erred in law in failing to appreciate that the obstruction in the form of the barrier, which it is alleged that the Appellant damaged, was not part of the Appellant's title to her property. Therefore, she was not bound to accept that obstruction which was imposed by the Coral Spring [Village] Housing Scheme Association.

8. The Learned Parish Judge erred in law in failing to appreciate that the entire operation of the Coral Spring [Village] Housing Scheme Association, in purporting to operate as a strata when they were not, is illegal, null and void and of no effect.

9. The Learned Parish Judge erred in law in failing to uphold the no case submission that was made on behalf of the Appellant at the end of the prosecution [sic] case."

[10] On 27 June 2022, we heard the appeal and reserved our decision. The record of proceedings was incomplete as it did not include the findings of fact made by the learned Parish Court Judge, who is now deceased. The court, therefore, directed that checks be made by the Parish Court for these findings. To date, these efforts have been unsuccessful.

[11] The court invited counsel for the appellant and respondent to, on or before 12 and 21 October 2022 respectively, file submissions as to the impact of the absence of these findings of fact on the appeal. We received the submissions. In light of the ultimate ruling of the court, it is not necessary to outline the submissions that were made on the supplemental grounds of appeal. We will, instead, focus on the submissions touching and concerning the unavailability of the findings of fact made by the learned Parish Court Judge.

Submissions

The appellant's submissions

[12] Mr Wildman, in the appellant's further submissions filed on 12 October 2022, argued that in the absence of the reasons of the learned Parish Court Judge, this court should be constrained to allow the appeal given the issues of law that the appellant raised on the appeal. He asked that the court allow the appeal and quash the appellant's conviction and sentence. Further, he submitted that the giving of reasons is paramount to the assessment of how the court arrived at its position of guilt. In support of this point, counsel relied on an extract from a presentation by the Honourable Justice M Weinberg AO in the Handbook for Judicial Officers – Delivery of Judgments which states:

> "What seems to be clear is the bald statement of an ultimate conclusion, even by reference to the evidence said to support it, is unlikely, in many cases, to be sufficient. There must be some process of reasoning set out which enables the path by which the conclusion has been reached to be followed."

The respondent's submissions

[13] Counsel for the Crown, Mrs Young Shand, in her further submissions filed on 21 October 2022 on this issue, relied on the cases of **Evon Jack v R** [2021] JMCA Crim 31, **R v Parker** (1966) 10 WIR 85 and **R v Cecil Stewart** (1967) 10 JLR 222. Counsel submitted that in **Evon Jack v R**, the notes of evidence were unavailable but the judge's summation was before the court. It was noted that since the appellant had complained about an unfair trial, a proper review of the matter could not be done without the transcript. Secondly, in **R v Parker**, parts of the notes of evidence and the summation were missing. There, the conviction was overturned as no further information was forthcoming. Lastly, in **R v Cecil Stewart**, parts of the summation and notes of evidence were missing, but the learned judge had provided the court with his written notes of evidence and opinion on the case allowing the court to make a proper determination of the appeal.

[14] Counsel pointed out that in the instant case, the entire summation of the learned parish court judge is unavailable and will not be forthcoming. The issue here, according to counsel, is whether the learned Parish Court Judge's summation is required to make a proper determination of the appellant's grounds of appeal. She conceded that the learned Parish Court Judge's summation is necessary in these circumstances to determine whether he had accurately recited the facts, identified the relevant issues, cited the correct law, given the proper directions or warnings and accurately identified and resolved any discrepancies, inconsistencies or omissions.

[15] Of significant note, counsel concluded that although there was a clear evidential basis for the verdict returned on the indictment, there are precedents which state that

the appellant is entitled to have her appeal considered by this court on the basis of the full summation of the learned Parish Court Judge.

Analysis and discussion

[16] Accordingly, the main issue for the determination and resolution of this appeal is the impact of the absence of the learned Parish Court Judge's findings of fact on which the verdict of guilt was founded, in the context of the fact that the appellant was charged by way of an indictment.

[17] A useful starting point in this analysis is the examination of section 291 of the Judicature (Parish Courts) Act ('JPCA') (formerly the Judicature (Resident Magistrates) Act). This section is instructive as it outlines the duties of a Parish Court Judge upon the determination of criminal matters. It provides:

> "**In all proceedings in a Court by way of indictment,** and in all summary proceedings before Courts of Petty Sessions by way of information for felonies, **there shall be recorded on or in the fold of the indictment or information**, in the form in Schedule E or to the like effect, **the plea of the accused, the judgment of the Court and in case of conviction the sentence**; **and the Judge of the Parish Court** or in the summary proceedings aforesaid the presiding Judge of the Parish Court, **shall sign his name once at the end of the record.**
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> If an appeal is lodged against any such conviction, a note thereof and of the result of the appeal shall be subsequently added by the Clerk and signed by him.
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> **Where any person charged before a Court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, the Judge of the Parish Court shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded**.

> In all summary proceedings other than as aforesaid, it shall be sufficient for the presiding Judge of the Parish Court or the Clerk to record on or in the fold of the information (the adjournments, if any, being noted), the place and day of hearing, the names of the adjudicating Judges and the finding.
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> If the notes taken in any of the cases aforesaid are taken in a book, such book shall be preserved in the office of the Clerk, and a reference to the same shall be noted in the fold of the information or indictment; if the same are taken on loose sheets, such sheets shall be attached to the information or indictment.
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> **In either case the information or indictment with the record made thereon as aforesaid, and with the notes aforesaid, shall constitute the record of the case, and each such record shall be carefully preserved in the office of the Clerk of the Courts, and an alphabetical index shall be kept of such records.**" (Emphasis supplied)

[18] The third paragraph of section 291 of the JPCA makes specific reference to offences specified by Order by the Minister. Where a person is convicted of such offences, the Parish Court Judge is to record, or cause to be recorded, in the notes of evidence, a summary of his or her findings of fact upon which the verdict of guilt is made. What are these offences? This question is answered by The Judicature (Parish Courts) (Specified Offences) Order, 1974. Paragraph 2 and the Schedule of the Order state:

> "The Offences set out in the Schedule are hereby specified as offences to which the third paragraph of Section 291 of the Act shall apply.
>
> SCHEDULE (Paragraph 2)
>
> All indictable offences
>
> All offences triable by a Parish Court pursuant to a special statutory summary jurisdiction."

[19] The learned Parish Court Judge was therefore required to record or have recorded the findings of fact on the basis of which he found the appellant guilty.

[20] D Fraser JA (Ag) (as he was then) in **Joseph Williams v R** [2020] JMCA Crim 50 expounded on the meaning of section 291 of the JPCA. At para. [55], he had this to say:

> "Therefore, it is apparent that, **in proceedings on indictment** and summary proceedings for felonies, the plea, judgment of the court, and the sentence must all be recorded on the indictment or information. **Further, where the accused is found guilty, a summary of the judge's findings on which the guilty verdict is founded must be recorded in the notes of evidence.** In respect of all other summary proceedings, however, it is sufficient for only the adjournments, place and day of hearing, name of judge and finding to be recorded. The requisite recordings constitute the record of the case and are to be preserved in the office of the Clerk of Courts. …." (Emphasis supplied)

[21] Similarly, in **Alistair McDonald v R** [2020] JMCA Crim 38, counsel for the appellant criticised how the learned judge had treated with the circumstantial evidence in that case. Brooks JA (as he was then), in his reasons for the judgment of the court, referred to the duties placed on a Parish Court Judge pursuant to section 291 of the JPCA. At para. [44] he said in part:

> "… Section 291 of the Judicature (Resident Magistrates) Act, now the Judicature (Parish Court) Act, stipulates that the Resident Magistrate is to make a record of his or her findings of fact, arising from the trial. That requirement has been assessed by this court on a number of occasions, but quite thoroughly in **Brian Bernal and Christopher Moore v R**. In that case Forte JA, as he then was, outlined a Resident Magistrate's duty in this respect, at pages 315-316, by approving a statement thereon by Carey P (Ag), as he then was, in **R v Chuck** (1991) 28 JLR 422, at page 432-433:
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> > '**Before examining the findings of the resident magistrate to determine the merit of this contention it is necessary to look at his duty in this respect. This is set**

> **out in section 291 of the Judicature (Resident Magistrates) Act** which, in so far as is relevant, states:
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> …

This court (*per* Carey JA) in *R v Chuck* (1991) (unreported) explained the section as follows:

> **'Our firm conclusion is that a resident magistrate satisfies the provisions of section 291 by recording in a summary form, findings of fact which go to prove the guilt of the accused. Where there is conflicting evidence between Crown witnesses, he should state whose evidence he accepts and whose he rejects. In that case, it is expected that some reason or explanation for the choice will be shortly stated**. **If a conclusion is derived from inferences then the primary facts from which the inference or inferences are drawn should be stated**. Findings in a summary form is not a licence for laconic statements, and we would think that clarity in expression is an advantage. The language therefore in which the findings are couched should demonstrate an awareness of the legal principles which are involved in the case. **If he must warn himself, the findings should show he has done so**.'" (Emphasis as in the original)

[22] More recently, F Williams JA in **Dwain Brown v R** [2021] JMCA Crim 33 reiterated the guidance in section 291 of the JPCA. He noted at para. [19] that Parish Court Judges should take steps to preserve the notes of evidence and the summary of facts:

> "(1) To set out a summary of their findings of fact either in the notebook in which the evidence at trial is recorded; or, if written on loose sheets, attach that written summary to the information or indictment (or even the notes of evidence).

(2) The summary of facts ought to be only that: a summary, and need not be in the nature of a treatise or dissertation – just enough so that litigants might be able to discern the reasons for the court arriving at a decision of guilt.

(3) **The notebook or loose leaves with the summary should also be preserved in the court's office, so that when, as often happens, a judge of the Parish Court is transferred to another parish or is promoted, or leaves the service, there is no challenge in finding the documents concerning the trial.**" (Emphasis supplied)

[23] Further, in highlighting the importance for judges to provide reasons for their decision, F Williams JA cited paras. 15 and 24 of **R v Sheppard** [2002] 1 SCR 869, a decision emanating from Canada which states:

> "15 Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be seen to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.
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> ….
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> 24 In my opinion, the requirement of reasons is tied to their purpose and the purpose varies with the context. **At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be**." (Emphasis supplied)

[24] We have examined **Evon Jack v R**, **R v Parker** and **R v Cecil Stewart** to which counsel for the Crown referred. In **Evon Jack v R** the applicant was convicted of carnal abuse, buggery and indecent assault. He applied for leave to appeal against his

convictions and sentences. His grounds of appeal included a challenge as to whether the evidence relied on at the trial "lacked credibility". While the judge's summation to the jury was available, the transcript of the evidence was never produced. That matter is, however, distinguishable from the one at bar, as **Evon Jack v R** was heard before a judge and jury at the Circuit Court and the notes of evidence were not available.

[25] **R v Parker** also involved an appeal from convictions for attempted rape and attempted carnal abuse and the issue concerned missing parts of the evidence and the summing up by the trial judge. Lewis P (Ag), in addressing this issue at page 86, concluded:

> "**The applicant is entitled to have his application [for leave to appeal] considered by the court on the basis of the full transcript of the evidence, if the court requires it, and of the full summing-up by the trial judge.** Since this is not available, the court has no alternative but to allow the appeal and set aside the conviction and quash the sentence." (Emphasis supplied)

The court did not order a retrial because Mr Parker was in custody awaiting the determination of his application for leave to appeal for over six months and also there was no way of determining whether the evidence against him was so convincing that the interests of justice required a new trial.

[26] **R v Parker** is distinguishable from **R v Cecil Stewart**. In **R v Cecil Stewart**, parts of the transcript (the summing-up and evidence) were missing as it appears that the shorthand writers failed to complete the type written transcripts of the summing-up and the evidence. Here, the court was able to rectify this issue by requesting that the learned judge furnish his opinion on the case and his notes at trial. In that case, the court had sufficient information to properly consider the appeal and to dismiss the appeal and affirm the convictions and sentences. **R v Cecil Stewart**, is also distinguishable from the case at bar as it concerned an appeal from convictions for charges of wounding in the Circuit court on a trial with judge and jury in which the duties of a trial judge are somewhat different.

[27] In the case at bar, the notes of evidence are available. However, they do not include a statement in summary form of the learned Parish Court Judge's findings of fact on which the appellant's verdict of guilty was founded. Having carefully looked at the supplemental grounds of appeal before this court, we find that it is challenging to make a fair and proper assessment of the various issues that arise on the appeal. The grounds of appeal challenged findings of fact as well as law. At the base of all the issues raised however, it was critical for the learned Parish Court Judge to determine whether the appellant had in fact damaged the barrier. The learned Parish Court Judge would have assessed the credibility and reliability of the witnesses who gave contrasting evidence before him in order to make such a determination.

[28] Section 291 of JPCA importantly provides that the learned Parish Court Judge's summary of findings of fact on which the verdict of guilt was founded should be preserved in the court's office to avoid issues now being faced by this court. In our experience, the learned Parish Court Judge may well have given an oral judgment with his findings of fact and the bases on which he arrived at them. It may well be that it is his untimely passing that militated against the location of the findings of fact. In this time of technological advances, Parish Court Judges, no doubt, from time to time, record their notes of evidence and their summary of findings of fact digitally rather than writing in notebooks. In such instances, we advise Parish Court Judges to ensure that these digital records are immediately turned over to the clerk of courts at the end of the hearing. If an oral judgment is recorded, this should be immediately transcribed and preserved in the court's office.

[29] We are of the considered view that the learned Parish Court Judge's summary of facts, as well as his justification and explanation of the verdict of guilt is critical for these proceedings. In all the circumstances we were led to the conclusion, in agreement with Mr Wildman's submissions, that the appellant's conviction must be quashed and the sentence set aside.

Re-trial

[30] The question as to whether it would be appropriate to order that a re-trial take place arises for consideration. Neither counsel for the appellant nor the Crown made submissions on this point.

[31] In **Vince Edwards v R** [2017] JMCA Crim 24, Brooks JA helpfully distilled the matters to be considered in determining whether a retrial should be ordered. At para. [141] he wrote:

> "Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, 'if the interests of justice so require'. **Dennis Reid v R** (1978) 16 JLR 246 provides guidance in assessing this issue. The Privy Council, in that case, **ruled that a 'distinction must be made between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder'** (see the headnote). Based on that judgment, some of the considerations that should be taken into account in deciding whether or not to order a new trial are:
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> a. the strength of the prosecution's case;
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> b. the seriousness or otherwise of the offence;
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> c. the time and expense that a new trial would demand;
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> d. the effect of a new trial on the accused;
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> e. the length of time that would have elapsed between the event leading to the charges, and the new trial;
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> **f. the evidence that would be available at the new trial;**
>
> g. the public impact that the case could have.

> That is not an exhaustive list of the relevant factors, and each case will depend on its peculiar facts." (Emphasis added)

[32] In this case, all of the notes of evidence, and even the submissions of counsel are available, however, the findings of fact that the learned Parish Court Judge made leading to the conviction, are not available. To that extent, the issue that has led to the quashing of the conviction could be described as a 'technical blunder'. The nature of the case at bar is such that much will depend on a judge's assessment of the credibility and reliability of the witnesses. In our view, the offence in question, while obviously important to the parties, cannot be categorised as serious and the time and expense that would be occasioned by a new trial does not appear likely to be significant. It is not clear what if any significant effect a new trial would have on the appellant who, in February 2021, was sentenced to a period of 18 months' probation. Mr Wildman, in response to an enquiry from the court, informed us that the appellant has not served the sentence, but was awaiting the outcome of the appeal.

[33] In continuing to assess the question as to whether a retrial should be held, we note that the offence was allegedly committed on 17 January 2018, and the matter first went before the court on 16 February 2018. After many hearing dates the appellant was convicted of the offence on 9 February 2021. The matter is not very "old" comparatively speaking. In considering the earliest time for a new trial, we can safely state that the earliest time would be in 2023 and onwards. There does not appear to be any reason why the evidence available at the new trial would be less than that available at the first trial. We do not believe that this case would have a public impact, as much, as we stated earlier, depends on the credibility and reliability of the witnesses, even ahead of the purely legal issues raised. On a perusal of the record, it is noted that the complainant and the appellant were referred to and attended mediation sessions at the Trelawny Mediation Centre, however they were unable to resolve the matter. Having balanced all of the above factors, it is our view that it is in the interests of justice to order a re-trial of the matter.

Conclusion

[34] We therefore make the following orders:

(i) The appeal is allowed.

(ii) The conviction is quashed and the sentence is set aside.

(iii) In the interests of justice, a new trial is to take place in the Trelawny Parish Court at the earliest possible time.