**[2012] JMCA Crim 8**

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 32/2010**

**BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**

**ROHAN ELLIS v R**

**Keith Bishop for the appellant**

**Miss Joan Barnett and Mrs Denise Samuels-Dingwall for the Crown**

**15 February and 9 March 2012**

**HARRIS P (Ag)**

[1] On 29 June 2010, the appellant was convicted in the Resident Magistrate's Court for the Corporate Area by Her Honour Mrs Stephane Jackson Haisley on an information which purportedly charged him with a breach of section 80(b) of the Corrections Act. He was sentenced to 100 hundred hours of community service.

[2] The factual circumstances of the case are essentially that at about 7:00 am on 14 July 2007 the appellant, a correctional officer at the Tower Street Adult Correctional Facility, was seen with bulges in his pocket. He was asked by the overseer, Mr Howard Phillips, if he had anything to declare. This he denied. He was taken to the overseer's office where a search which was conducted revealed that he had on his person 49 cigarette lighters, nine packs of beadie (a cigar made for smoking, not produced from tobacco), 13 packs of rizzlas and five handkerchiefs. These, Mr Phillips said, were prohibited items.

[3] The police was summoned. On their arrival the appellant was taken to the Elletson Road Police Station, where he was arrested and charged.

[4] The following grounds of appeal were filed:

> "1. That the learned Resident Magistrate erred in law in not discontinuing the trial when it was brought to her attention that the matter was not referred to the Attorney General for its [sic] opinion and advise [sic] in keeping with the Public Service Regulations;
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> 2. That the learned Resident Magistrate erred in law by not upholding the no case submission; and

3. That the learned Resident Magistrate erred in law by finding that the Appellant took 'contraband' into the correctional facility although there was no provision in law for use of the word contraband and in addition the items mentioned are not classified as prohibited articles."

[5] Mr Bishop first argued grounds one and two simultaneously. Ordinarily, consideration would first be given to these two grounds. However, in the circumstances of this case, it would be appropriate for consideration to be first given to grounds two and three.

[6] Counsel argued that the word "contraband", used by the learned Resident Magistrate, is not mentioned in the Corrections Act. The learned Resident Magistrate, he argued, erred in describing the items with which the appellant was found as "forbidden, unauthorized, or prohibited" articles and therefore, prohibited within the meaning of the Act. It was further contended by him that since none of the items were specifically identified in the Act, Mr Phillips ought to have given the reasons they were regarded as prohibited.

[7] In addition, he argued that the appellant might have been misled as to the charge against him by the use of the words "unlawfully traffic contraband" as stated in the information.

[8] Miss Barnett, while conceding that the charge as contained in the information had not been made out, argued that the court, may, in keeping with section 303 of the Judicature (Resident Magistrates) Act, uphold the conviction.

[9] By virtue of section 80(b) of the Corrections Act a person can be charged with an offence. It provides:

> "**80**. Every person who without lawful authority-
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> (a) …
>
> (b) brings or attempts by any means to introduce into a correctional institution, or places or attempts to place where inmates work, any prohibited article; or
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> (c) …
>
> (d) …
>
> (e) …
>
> shall be guilty of an offence under this Act and liable on summary conviction before a

> Resident Magistrate to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year."

Section 2(a) and (b) of the Act defines prohibited articles as follows:

> " 'prohibited article' means –
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> (a) Any intoxicating liquor, drug, tobacco, money, clothing, provisions, letter, tool, or any article likely to be prejudicial to the life or safety of any person, or to facilitate any escape from a correctional institution, or to be used for purposes prejudicial to the discipline of such institution;
>
> (b) Any article, the introduction or removal of which into, or out of, a correctional institution or any part thereof is prohibited by the Correctional Institution Rules, including any article declared to be prohibited by such Rules;"

[10] It is also necessary to outline the particulars of the information. It states:

> "Rohan Ellis … did unlawfully traffic contraband in a correctional facility to wit '49 cigarette lighters 9 Lion brand beadie, 2 red handkerchief, 2 multi coloured handkerchive, [sic] 1 white handkerchive, 13 rizzla' [sic] to an inmate at the Tower Street Adult Correctional Facility situated at 2-4 Tower Street Kgn C.S.O.

> without the consent of the Commissioner of Corrections or other lawful authority contrary to Section 80(b) of the Corrections Act."

[11] Under section 64 of the Justices of the Peace Jurisdiction Act every information laid before a court of summary jurisdiction is sufficient if it contains a statement of the specific offence. The section reads:

> "64. – (1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining Justices or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
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> (2) The statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.
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> (3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required.

> (4) Any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law if this section had not been passed shall, notwithstanding anything in this section, continue to be sufficient in law."

[12] As prescribed by section 64(2) and (3) a statement of the particulars of the offence with which a person is charged must set out the offence in ordinary language and, where the offence arises out of a statutory provision, reference must be made to the section of the statute which creates it. The information laying the charge against the appellant was not in compliance with section 80(b) of the Corrections Act. Although it makes reference to section 80(b), the statement of the particulars does not reflect the spirit or intent of that section. It is without doubt that the information is inadequate in substance.

[13] Where the information is bad in law the court may render a conviction flawed. In ***R v Green*** (1966) 9 JLR 490 the accused was charged on an information under Cap 346 of section 34(1)(a) instead of section 34(3) of the Road Traffic Law and was convicted under section 34 (1)(a). Under section 34(1)(a) she was charged for failing to have

headlamps on her motor car when the charge should have been failing to have her headlamps lighted, which would have been an offence under section 34(3). The court, in allowing the appeal, held that there was no charge before the court relating to the appellant's failure to have her headlamps lighted.

[14] It is without doubt that the particulars contained in the information are not in conformity with the provisions of section 80(b) of the Corrections Act. The charge of "unlawfully traffick contraband" is at variance with section 80(b). The section does not support such a charge. Despite this, the learned Resident Magistrate convicted. On the matter coming before her, before convicting, the learned Resident Magistrate was duty bound to have examined the information to ensure that the charge which the appellant faced fell within the purview of section 80(b) of the Corrections Act and was one which could have sustained a conviction. If she had done so, she could have ensured that a new information was laid or that the information before her was amended. This not having been done, she proceeded to accept the evidence of Mr Phillips and made the following findings:

> "The information which charged accused refers to contraband, not prohibited articles.
>
> The meaning of contraband according to the Webster's Law Dictionary is '**any goods that are unlawful to possess, sell or otherwise distribute or profit or whose very existence is illegal or smuggled goods.' Synonyms given are forbidden, unauthorized or prohibited**. I find that the use of the word contraband as opposed to prohibited articles does not take away from the general meaning of the section.
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> The Court still has to consider whether the items he is charged for bringing in are prohibited articles according to the Act.
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> The articles are 49 cigarette lighters, 9 packs of Beadie, 13 packs of Rizzlas, and 5 handkerchiefs. Mr. Howard Phillips, overseer of the institution, gave evidence that these articles are prohibited articles and are not allowed inside the institution. I consider also the kind of articles they are. One of them is a cigarette lighter which is an article that is likely to prejudice the safety of any person by its very nature. I accept that these are prohibited articles."

There is clearly no charge or evidence upon which she could have made these findings.

[15] In seeking to justify her findings the learned Resident Magistrate sought to equate "contraband" to the word "prohibited" in section 80(b).

This was wrong. Further, there is no evidence to show that any of the items which were in the appellant's possession were in fact prohibited within the meaning of section 80(b). Mr Phillips said that they were prohibited items but the Correction Regulations 1991 do not speak to any of the items being classified as prohibited within the meaning of the Act.

[16] It is taken that at the trial, in compliance with section 13 of the Justices of the Peace Jurisdiction Act, the appellant was informed of the charge and it was explained to him. In the circumstances, the appellant would have been misled as to the nature of the charge he should meet.

[17] Under section 303 of the Judicature (Resident Magistrate) Act if the court is satisfied that the error would not cause or had not caused injustice to the person convicted and that any contention as to defect in an information was not raised at trial the conviction may be upheld. The section reads:

> "303. No appeal shall be allowed for any error or defect in form or substance appearing in any indictment or information as aforesaid on which there has been a conviction, unless the point was raised at the trial, or the Court is of opinion that such error or defect has caused or may have caused, or may cause injustice to the person convicted."

[18] Mr Bishop, at the end of the Crown's case, made submissions disputing the charge as, it did not fall within the context of section 80(b). The learned Resident Magistrate ought to have upheld the no case submission on this point. In all the circumstances, it could not be said that the defect or error would not result in grave injustice to the appellant. It follows that grounds two and three should succeed.

[19] Although our conclusion in respect of grounds two and three is sufficient to dispose of the appeal, we think it is necessary to make brief reference to ground one.

[20] Mr Bishop submitted that the police should not have taken action against the appellant without the consent of the Commissioner of Corrections as the advice of the Attorney General ought to have been sought, prior to the arrest of the appellant in keeping with sections 28 and 30 of the Public Service Regulations. This advice, not having been sought the trial is a nullity, he argued. In support of this submission, he cited ***R v Lambert*** [2010] 1 WLR 898. The invitation of the police into the institution to make an arrest, he contended, was no more than an attempt to oust the Attorney General's jurisdiction.

[21] Miss Barnett, in response, contended that section 30 and not 28 of the regulations is the appropriate section as section 28 contemplates that the Attorney General's advice should be sought subsequent to the referral of a report against an officer to the Public Service Commission. Although under section 30 a scheme is in place, where action had been or was about to be taken by the police, the question is whether the scheme can be suspended, she argued. The police being the lawfully constituted authority may institute criminal proceedings by virtue of their powers under the Jamaica Constabulary Force Act and are obliged to act where an offence has been committed, or is reasonably suspected to be committed, or is about to be committed, she submitted. The police, having acted without malice, the conviction cannot be said to be a nullity, and disciplinary action cannot stay the hand of the police, she argued.

[22] As rightly submitted by Miss Barnett, section 28 confers on the Public Service Commission and not the Commissioner of Corrections, a right to deal with disciplinary proceedings following a report about a public officer. Where it is apparent that a criminal offence has been committed by the officer, the Public Service Commission is mandated to seek the advice of

the Attorney General prior to making recommendation to the Governor-General that disciplinary proceedings should commence against the officer. Upon advice being given that criminal proceedings should be initiated, those disciplinary proceedings should await the outcome of the criminal proceedings.

[23] There was no evidence that a report had been made to the Public Service Commission for disciplinary proceedings to be taken against the appellant. It follows that the Attorney General's advice would not have been necessary in the circumstances.

[24] Section 30 of the regulations requires the obtaining of the advice of the Attorney General as to whether there ought to be criminal proceedings against a public officer preceding a preliminary investigation or disciplinary enquiry. It provides:

> "30. Where upon a preliminary investigation or a disciplinary enquiry an offence against any enactment appears to have been committed by an officer, the Permanent Secretary of the Ministry (or Head of Department) to which he is attached shall, unless action by the Police has been or is about to be taken, obtain the advice of the Attorney-General as to whether criminal proceedings ought to be instituted."

[25] There is no evidence that any of the prerequisites laid down by the section were observed by the Commissioner of Corrections prior to the arrest of the appellant. This, however, would not have affected the legitimacy of his prosecution. It would have been proper for a preliminary investigation to have been made, touching the allegations against the appellant and the advice of the Attorney General sought prior to his arrest. However, this does not mean that the police would not have had a right to have intervened where it was reasonably suspected that a criminal offence had been committed.

[26] The dictates of the regulations as to the receipt of advice of the Attorney General as a precursor to an arrest of a public officer are not mandatory. They are merely directory and indeed procedural. ***R v Lambert*** is unhelpful. In that case, the authorities' failure to obey a mandatory statutory prohibition which prescribes that prior to the initiation of proceedings against a person, the consent of the Attorney General must be obtained to enable the Director of Public Prosecutions to consent to the prosecution, was fatal. In the present case, the failure of the authorities to comply with directions laid down in section 30 is a mere irregularity which does not in any way affect the right of the police to have made the

arrest. As a consequence, the arrest would have been lawful. Ground one would have failed.

[27] Before parting with the appeal, it is necessary to mention that the court views with great displeasure the Correctional Department's flagrant disregard for the observance of section 30 of the regulations. We view it as inexcusable. It is our view that the regulations exist, not only for the protection of the public officer, but also for the protection of the relevant Head of Department or the Services Commission, as the case may be. Adherence to the regulations will allow for mature consideration of the issue. The Attorney General could then consider whether a criminal charge should be proffered and, if so, what would be the appropriate charge. Adherence to the section would also minimize the occasion for civil litigation against the Head of Department, in the event that a criminal charge were proffered, and there were to be a resolution in favour of the accused officer.

[28] The appeal is allowed. The conviction and sentence are quashed and a verdict of acquittal is entered.