[2011] JMCA Crim 54

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CRIMINAL APPEAL NO. 29/2010

BEFORE: THE HON. MRS JUSTICE HARRIS JA
THE HON. MISS JUSTICE PHILLIPS JA
THE HON. MRS JUSTICE MCINTOSH JA

SHADRACH MOMAH v R

Miss Melrose G. Reid for the appellant

Miss Meridian Kohler for the Crown

7, 29 July and 28 October 2011

MCINTOSH JA

[1] On 7 July 2011, we heard arguments in this appeal against the appellant's conviction and sentence in the Resident Magistrate's Court for the Corporate Area in June 2010 and we delivered the following decision on 29 July 2011:

> "1. The appeal is allowed in part. In relation to the charge of possession of forged documents and conspiracy to deceive the appeal is allowed and the convictions and sentences are quashed. Verdicts and judgment of acquittal are entered.

2. In relation to the charges of larceny by trick the appeal is dismissed and the convictions and sentences are affirmed.

3. The Deportation Certificate is quashed."

We now give our reasons for the decision.

[2] The appellant first appeared before the criminal division of the Resident Magistrate's Court for the Corporate Area on 14 April 2010 facing one charge of possession of forged document, one charge of uttering forged document, two charges of conspiracy to deceive and two charges of larceny by trick. From the summary of the case provided by the learned Resident Magistrate, it was revealed that the matter came up before the court repeatedly over the period April to June 2010 with the appellant being represented by different attorneys. However, on 4 June 2010, a date set for trial, the appellant appeared without legal representation, advising the court that his attorney was not available that day. The learned Resident Magistrate then caused enquiries to be made from the attorney named by the appellant, after which she clearly formed the view that the attorney named did not in fact appear for him. The learned Resident Magistrate decided that, in that event, the trial should proceed and on being pleaded to the six charges which the indictment before her contained, the appellant pleaded guilty to each charge.

[3] Sentence was postponed to 21 June 2010 when the appellant appeared with his legal representative who then advised the court that the appellant wished to change his

plea from guilty to not guilty of all charges. The learned Resident Magistrate then twice enquired into the reason for his altered position but no reason was forthcoming either from the appellant or his counsel. The request for a change of plea was denied and the learned Resident Magistrate again postponed sentence to 28 June 2010 on which date the appellant was sentenced as follows:

For possession of forged document - fined $30,000.00 or six months

For one count of conspiracy to deceive - fined $25,000.00 or six months

For one count of larceny by trick - fined $40,000.00 or six months.

He was admonished and discharged on the second counts of conspiracy to deceive and larceny by trick as well as on the charge of uttering forged document and, if the fines imposed on the other counts were not paid, the alternative sentences were to be served concurrently. The learned Resident Magistrate thereafter acceded to a request from an immigration officer who was present in court, that she certify the appellant as being a convicted person. This was pursuant to the provisions of the Deportation (Commonwealth Citizens) Act ("the Act").

[4] Eleven days later, on 9 July 2010, the appellant filed a notice of appeal containing four grounds which after some amendment with the leave of the court read as follows:

> "1 The learned Resident Magistrate erred in law when she accepted the pleas of the appellant without legal representation.
>
> 2. The learned Resident Magistrate erred in law in refusing to allow the appellant to withdraw his pleas upon Counsel [sic] application to the Magistrate for a withdrawal.

3. That the sentence is manifestly excessive.

4. The learned Resident Magistrate erred in law in signing the Certificate recommending deportation."

Counsel was also granted leave to argue an additional ground, namely that:

"5. The Learned Resident Magistrate erred in law in not recognizing that the Appellant was pleaded on the wrong section of the relevant Law/Act on Information no 3623/10."

That was with respect to the Information which charged possession of a forged document, to which the charge of uttering the forged document was added in the order for the indictment endorsed on it and signed by the learned Resident Magistrate.

The Arguments

Ground one – Did the magistrate err in accepting the plea of the appellant who was unrepresented?

[5] Miss Reid submitted that the appellant gave the court clear indications of his need for legal representation and, notwithstanding the number of attorneys who had previously represented him, he demonstrated an intention not to face the court unrepresented. Although he was less than frank, on 4 June 2010, when he advised the court of the status of his legal representation, there was nothing to suggest that he had on any previous occasion deceived the court in this regard, Miss Reid said. In light of the fact that he had previously been represented the learned Resident Magistrate should have assisted him with an offer of legal aid, she said, if it was determined that he was unable to retain counsel. Miss Reid submitted that the learned magistrate was

in the position of an arbitrator with a duty to see that justice was done. However, her focus was on the readiness of the case for trial instead of balancing the scales of justice.

[6] She cited two cases in support of her submissions that the trial was unfair namely, ***Joseph Carter*** (1960) CAR 225 as authority for the proposition that when a defendant is unrepresented the judge should protect him and ***R v Middlesex Crown Court, ex parte Riddle*** [1975] Crim. L.R. 731 regarding the responsibility of the judge towards an unrepresented defendant. She submitted that in the instant case the learned Resident Magistrate offered no protection to the appellant and erred in allowing him to be pleaded without legal representation. The stance taken by the learned magistrate to proceed with the trial, although the appellant was unrepresented, may well have unduly impacted on or pressured the appellant to plead guilty, counsel contended, so that, in all the circumstances, the interests of justice were not served.

[7] Miss Meridian Kohler based her arguments in response on a chronology of the events leading up to the learned magistrate's decision to proceed with the trial, pointing out that the appellant had had five different attorneys appearing for him up to 4 June 2010. The learned magistrate took into account the prosecution's readiness for trial not only on 4 June 2010 but on previous occasions as the witnesses were constantly in attendance. Further, on 4 June, the appellant was seeking a two week adjournment, she submitted, to allow for the attendance of an attorney whom the court learnt did not in fact appear for him.

[8] Counsel referred us to the case of ***Beacher v R*** [2007] CILR 6 where it was said that "The reasonableness of an adjournment request must be considered in the light of all the circumstances, including the adequacy of the defendant's efforts to obtain counsel in a timely manner". She submitted that there is no proposition in law which prevents a court from accepting an unequivocal plea from an accused who is unrepresented especially where that status was due to his own failure to ensure counsel's attendance. It was Miss Kohler's further submission that the learned Resident Magistrate exercised her discretion judicially in not granting the adjournment and properly took the decision to proceed with the trial. In all the circumstances, Miss Kohler argued, there was no injustice to the appellant.

[9] We did not find the authorities relied on by Miss Reid to be helpful to the appellant. ***Joseph Carter*** is easily distinguishable from the instant case in that, the appellant had been told of the hearing only that morning and had expected that it concerned bail. His application for an adjournment to have legal representation was refused and at the trial he was denied the opportunity to call witnesses. In addition, the judge had commented unfavourably about the lack of supporting documentary evidence (which no doubt would have been the responsibility of his counsel had he been permitted to have one) so that the court concluded that the appellant had not received a fair trial. Equally distinguishable is the ***Middlesex Crown Court*** case where the applicant complained that he was denied the opportunity of making a final speech. The court held that there was no clearer example of the requirements of

natural justice than that a man should have a fair chance to state his own case in his defence.

[10] The appellant in the instant case knew well that the matter had reached to the trial stage even before 4 June 2010 and the basis on which he sought an adjournment was found to be false. There was no indication and no complaint made that he was denied an opportunity to state his defence. Further, he gave no indication that he was unable to retain counsel, which may have necessitated an offer of legal aid to him and, in any event, on his subsequent appearance before the court, it was clear that he was not in need of such assistance as he had counsel with him. In our view, the learned magistrate could not be faulted for seeing his request for an adjournment as a delaying tactic and for deciding that the time had come for the trial to proceed. The interests of justice require that the interests of both sides be weighed in the scale and be balanced. There was nothing to prevent the learned Resident Magistrate from proceeding with the trial in the circumstances of this case and to accept the guilty pleas offered by the appellant. Ground one therefore failed.

Ground two – Did the magistrate err in refusing the appellant's request to withdraw his guilty plea?

[11] In her written submissions, Miss Reid contended that while the learned Resident Magistrate has a discretion to accept or reject an application to withdraw a plea of guilty, the authorities tend to favour its acceptance. She referred us to the case of ***S. (An Infant) By Parsons (His Next Friend) v Recorder of Manchester and***

Others **(H.L. (E))** [1971] A.C. 481 as support for the proposition that in a court of summary jurisdiction a plea of guilty may be changed at any time before the case is finally disposed of by passing sentence. She also referred to ***R v Plummer*** [1902] 2 K.B. 337, where the court held that an unequivocal plea of guilty may be withdrawn, with the leave of the court, before sentence and to ***R v Bow Street Stipendiary Magistrate, ex parte Roche*** The Times Law Report, February 5, 1987, DC which she said provided guidelines for a trial judge in dealing with applications for a change of plea where the accused is unrepresented. In this case, Miss Reid submitted, the learned magistrate should have acceded to the application of the appellant when he appeared with counsel.

[12] Miss Kohler referred us to an extract from Blackstone's Criminal Practice 2007 section D 11.87 where the case of ***R v South Tameside Magistrates' Court, ex parte Rowland*** [1983] 3 All ER 689 was discussed as supportive of the view that

> "Even if the accused was unrepresented when he pleaded but instructs solicitors during an adjournment, prior to sentencing and is advised by them that he has a defence, the court is not obliged to accede to a change of plea."

In that case, Miss Kohler submitted, the magistrates had accepted a submission from their clerk that to allow a change of plea was a matter for the absolute discretion of the magistrate and once an unequivocal plea had been entered the discretionary power should be exercised judicially, very sparingly and only in clear cases. Authorities such as ***R v McNally*** [1954] 1 WLR 933 and ***R v Dodd*** (1981) 74 Cr App R 50, also discussed in Blackstone's work are to like effect and it was counsel's submission that the appellant

in the instant case was in a similar position to the appellant in ***McNally*** where the Court of Appeal approved the trial judge's decision to refuse a change of plea holding that the accused could not possibly have misunderstood the two straightforward charges of burglary and had unequivocally accepted his guilt. Similarly, Miss Kohler submitted, the appellant in the instant case could not possibly have misunderstood the two straightforward charges of larceny by trick and in the absence of any reason advanced by him as to why the discretion should have been exercised in his favour, the learned magistrate could not be said to have acted unreasonably in not acceding to his request. She had asked the appellant why he wanted to change his plea, Miss Kohler said, and he declined to say. Accordingly, counsel submitted, the magistrate could do no more than to refuse a baseless request.

[13] There are three propositions to be distilled from ***Dodd*** as summing up the general principles of law in this area, namely: (i) that the court has a discretion to allow a defendant to change a plea of guilty to one of not guilty at any time before sentence; (ii) the discretion exists even where the plea of not guilty is unequivocal and (iii) the discretion must be exercised judicially and, we would add, very sparingly and only in clear cases (see ***ex parte Rowland***). In our view, the appellant failed to show that the learned Resident Magistrate had not exercised her discretion judicially in refusing his request for a change of plea. The magistrate was quite entitled to ask for his reason and he was equally entitled to refuse to provide it but he ought not to complain if his request is thereafter denied. Before exercising her discretion, she was in effect extending an opportunity to him to be heard by providing her with a basis for exercising

her discretion in his favour and he clearly refused to avail himself of this opportunity not once but twice, even after his attorney intervened. In that event, in the face of his earlier unequivocal acceptance of guilt, the learned magistrate cannot be faulted for refusing his request. Therefore, ground two also failed.

Ground five - Errors in the offences charged

[14] It is convenient, in our view, to deal with ground five at this point having disposed of the grounds relating to the appellant's plea to the indictment which the magistrate had before her. Miss Reid submitted that there was an error regarding the charge of possession of forged document (which would also embrace the count for uttering forged document). There was no need for her to develop her arguments on this ground, however, as Miss Kohler met this challenge head on, conceding that there were difficulties not only with the charge of possession of forged document (and similarly with the charge of uttering forged document) but also with the offences of conspiracy to deceive. These she said were not supportable in law and on the evidence and should therefore be quashed.

[15] We bear in mind that the Resident Magistrate's Court is a creature of statute deriving its jurisdiction from the Judicature (Resident Magistrates) Act (the Act) as well as from any other statute which specifically gives it jurisdiction. Section 268 of the Act sets out the criminal offences over which a Resident Magistrate has jurisdiction and they include offences in certain sections of the Forgery Act but these do not include section 11 which deals with possession of forged documents. Further, the Forgery Act

specifies the documents and items to which it relates and they do not include forgery of the document which the appellant was alleged to have had in his possession. It is therefore quite clear that the charges of possession of and uttering forged document were unsustainable. Similarly, the charges of conspiracy to deceive could not be sustained as the common law offence of conspiracy contemplates not only an agreement or plan involving more than one person but an agreement or plan to commit an offence known to law. In this case the only person alleged to be involved in this conspiracy was the appellant and the charge of conspiracy to deceive is unknown to our law. Therefore the only offences for which pleas could properly have been entered on the indictment before the court were the offences of larceny by trick.

[16] As Miss Kohler quite correctly submitted, the taint in the indictment resulting from the unsustainable offences of possession of forged document and conspiracy to deceive did not extend to the offences of larceny by trick. It is quite acceptable to sever the convictions of the appellant, Miss Kohler submitted, quashing some while upholding the others and for this proposition she relied on the case of ***The King v Phillips*** [1939] 1 KB 63. In that case two accused had been committed to trial on a 17 count indictment. Phillips was arrested while the committal proceedings were in progress and the evidence taken before he was joined concerned seven of the 17 counts but they both were convicted on all counts. On appeal by Phillips, it was argued that the convictions were impugned and should be quashed because of the irregularity. The court held however that as the counts were separate and distinct, the convictions should only be quashed in relation to the seven counts and the others would stand. We

approved of and applied this principle in the instant case and regarded the determination of grounds one and two as being applicable only to the two counts of larceny by trick. This ground of appeal therefore succeeded insofar as it related to the charges of conspiracy to deceive and possession of and uttering forged document.

Ground 4 - The certificate recommending deportation

[17] Miss Kohler did not seek to advance any arguments in support of the issuance of the deportation certificate although she did disagree with Miss Reid on the section of the Deportation (Commonwealth Citizens) Act (the Act) by virtue of which it was issued. Whereas Miss Reid argued that the applicable section was section 7(1) requiring the service of a notice stating the grounds upon which the certificate was being sought as well as a hearing into the matter, Miss Kohler argued that the relevant section under which the learned magistrate acted was section 6(1) which did not have those requirements. Miss Kohler conceded however that there may be room for argument that on the principles of natural justice and fairness, the learned magistrate should have afforded the appellant an opportunity to be heard before deciding to issue the certificate. She submitted that this would seem to be in keeping with the provisions of section 3 of the Act, as the magistrate would need to weigh certain considerations in exercising her functions, considering, for instance, whether the recommendation was to be in addition to or in lieu of sentence. Counsel referred to the case of ***R v Fazlollah Nazari and Others*** (1980) 71 Criminal Appeal Reports 87 where the court laid down guidelines to be followed in considering whether deportation should be recommended.

These guidelines, she said were in keeping with what natural justice would require and since on the face of the record of the proceedings there was no indication that the appellant had been given an opportunity to be heard before the recommendation was made Miss Kohler conceded that the certificate could not stand and should be quashed

[18] We commend Miss Kohler for the thoroughness of her research in this matter and for the concessions made which were clearly warranted. This certificate issued by the learned magistrate was defective for more than one reason. First, it incorrectly states the statute under which the magistrate is empowered to make a recommendation for deportation as the Immigration Restriction (Commonwealth Citizens) Act instead of the Deportation (Commonwealth Citizens) Act (the Act). By virtue of section 3 of the Act, the magistrate is required to state that the person recommended falls within one of the categories identified as follows:

> "(a) a convicted person in respect of whom the court certifying to the Minister that he has been convicted recommends that a deportation order should be made in his case, either in addition to or in lieu of sentence; or
>
> (b) an undesirable person; or
>
> (c) a destitute person; or
>
> (d) a prohibited immigrant."

In the instant case the applicable paragraph was paragraph (a). The magistrate was therefore required to certify the fact of the conviction and state whether deportation was recommended in lieu of sentence or in addition to sentence. The learned

magistrate did endorse the certificate with the sentences she had imposed and added that "His removal was also recommended" (our emphasis) so that it was clearly in addition to sentence. However, according to the wording of the document there was no reference to the appellant's conviction. It read as follows:

"CERTIFICATE OF CONVICTION

IMMIGRATION RESTRICTION (COMMONWEALTH CITIZENS) ACT

I, ……Resident Magistrate for

the ……

HEREBY CERTIFY THAT:

1. At a Resident Magistrate's Court held at ……..

on the …….. day of ……. before me

the defendant ……pleaded/was found

guilty to indictments charging him/her with the offence(s) of ……

and was sentenced on the …… day of …….

to ……..

Now the said offence(s) being specified under ……

of the……...

Given under my hand and seal of the court…."

The learned magistrate inserted the offences in section one without any adjustment to the wording to indicate whether this related to his plea or to his conviction and followed that with the sentences which she imposed, certifying that all of the offences

(possession of and uttering forged document, larceny by trick and conspiracy to deceive) were specified under the Forgery Act. It was clear that the certificate had to be quashed.

[19] Undoubtedly, the form of the certificate needs to be amended and greater care must be exercised by magistrates in completing the document. Most importantly, magistrates would be well advised in the exercise of their function under section 3 of the Act, to adopt the approach to be distilled from ***Nazari and Others,*** as the statutory provisions under consideration in that case are similar to the provisions in the Jamaican statute. In particular, magistrates should hear from the convicted person before coming to a determination on whether the certificate should issue. As Miss Kohler quite correctly submitted, this would accord with the principles of natural justice.

Ground three - Was the sentence manifestly excessive?

[20] Miss Reid was granted leave to argue this as her final ground of appeal and it was most noticeable that she did not pursue it with her customary vigour. She did ask the court however to pro rate the fine if the convictions on the two counts of larceny by trick were to stand. Although the Crown is not normally concerned with sentence Miss Kohler was moved, in this instance, to refer us to the provisions of section 282(2) of the Judicature (Resident Magistrate) Act which empowers a magistrate to impose a maximum sentence of three years imprisonment and fines amounting to $1,000,000.00 and pointed out that the appellant was fined only $40,000.00 on one count of larceny by trick, with an alternative sentence of six months imprisonment if the fines were not

paid and was admonished and discharged on the second count. Therefore, she submitted, the sentences could not reasonably be regarded as being manifestly excessive and with this we entirely agree. In our view, the magistrate was exceedingly lenient and we did not disturb the sentences she imposed.

[21] For all of the reasons outlined above, we arrived at the decision which was delivered on 29 July 2011 and set out in paragraph [1] herein.