JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 21/92

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

REGINA VS. DORR CAMPBELL

Ian Ramsay & Carlton Williams for appellant

Bryan Sykes for Crown

16th, 17th, 18th June & 13th July, 1992

CAREY, J.A.

At the conclusion of submissions on the 18th June, 1992, we announced that the appeal would be allowed, the conviction quashed and the sentence set aside. We intimated then that we would give our reasons at a later date and this, we now do.

The appellant is an engineer employed to the Bureau of Standards as head of the metalurgical division. He is also a part-time lecturer in the engineering department of C.A.S.T.. He was convicted in the Resident Magistrate's Court, St. Andrew on 20th September, 1991 after a trial which extended over a six month period, on a charge of obtaining money by false pretences. The statement of offence in the indictment averred:

> "... with intent to defraud Mervin Myers obtained from him $37,500 on behalf of himself by falsely pretending that could supply Mervin Myers with U.S. $5,000.00."

He was sentenced to pay a fine of $4,000 in default; 6 months imprisonment at hard labour. We desire at this stage only to comment that the protracted period over which the trial extended, could not have made the task of the Resident Magistrate at all an easy one. In our view, the ability clearly to retain in one's mind the impression created by a witness at a time, some six months later

when a decision is to be made, must be rare but the need to do so, seems a needless imposition. We will return to this matter later in this judgment because we think it is of importance.

The facts are these: On 21st May, 1990 a perfect stranger attended on Mervin Myers at his office in New Kingston and offerred to sell him US$5,000. The stranger assured him that he was from Sri Lanka, worked with the United Nations and gave his name as Dr. Maragh. The stranger had been referred to Mr. Myers by a friend of Mr. Myers himself. This friend Clara Williams gave evidence at the trial but the Resident Magistrate accepted that the stranger was not properly identified as this appellant and accordingly took no account of her evidence. Mr. Myers negotiated with Dr. Maragh to purchase $5,000(US) at a price of $37,500(J). In order to settle his debt, Mr. Myers took the stranger to his wife's office in the Havendale shopping complex where he left him in his wife's company. Mr. Myers went on home where he collected the $37,500 and returned to his wife's office. There Mr. and Mrs. Myers checked the money. Dr. Maragh told them that he did not have the entire amount but if he were taken to the medical complex where others of his United Nations colleagues were, he would get the balance. Mr. Myers set off with Dr. Maragh and with the $37,500 in the trunk of the car. Dr. Maragh gave directions which led Mr. Myers to drive to the Oxford Medical Centre but Dr. Maragh told him that was not the place. Eventually, Dr. Maragh mentioned the word "Association" which prompted Mr. Myers to ask if he meant "Medical Associates." Dr. Maragh thanked him in the most courteous terms, spoken with an accent which Mr. Myers thought somewhat Sri Lankan. At Medical Associates both men having entered the building, Mr. Myers was shown a door and told that was the office where a meeting with his colleagues would be held. He suggested to Mr. Myers who had his $37,500 in a "scandal-bag" that he should give him the bag there, so that he and his colleagues could check the bills. Mr. Myers handed over his bag with $37,500 in $100 bills to Dr. Maragh. That was the last

time Mr. Myers was to see that "scandal-bag." He and the $37,500 thus parted company ever since. All these events occurred between 11:00 a.m. and 12:45 p.m. that day.

There is one small detail which we ought to add for completeness. While Mr. Myers and Dr. Maragh were leaving the car, a man passed by and, addressing Dr. Maragh, said - "hello doc."

Some three months later, Mr. Myers saw Dr. Maragh on Holborn Road entering the JAMPRO building. In the event, the police were called. Dr. Maragh said he was not Dr. Maragh but Mr. Myers was convinced he was the Dr. Maragh who had fleeced him of $37,500 in May. Mr. Myers was taken to the police station. Mrs. Myers came there. She had received a call from her husband. The Resident Magistrate accepted evidence from the investigating officer Constable Wilton Edwards that in identifying the appellant, she used his correct name.

The appellant gave sworn evidence and raised an alibi as his defence. He called a witness, Mr. John Milne to support his defence of alibi. Mr. Milne remembered the date 21st May, 1990 very well. He said he had good reason to do so. He had been invited to attend a meeting of a regional project in Brazil in his role as a co-ordinator of a United Nations Development Programme in non-destructive testing in Latin America and the Caribbean on 28th May. Having decided that he would not be able to attend, he had to select a replacement. The appellant was one of two possibilities. On the 21st he met with the appellant at 8:30 a.m. and again at 10:00 a.m. for about 45 minutes and finally at 12 noon for half an hour. In between those times, there were inter-com and three-way conversations involving both the appellant and the other possibility also named Campbell. There was tendered in evidence the attendance register and a log-book which shows if and when any member of staff leaves office in the course of a day. The appellant was not shown therein to have left office that day.

Dr. Artnell Henry was also called on behalf of the appellant. He gave evidence of character.

A number of grounds of appeal were filed but they may be subsumed under three heads, viz:

> (i) that the witnesses were engaged in an illegal transaction, a fact to which the Resident Magistrate gave no effect;
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> (ii) that the identification evidence was unsatisfactory; and
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> (iii) that the rejection of the alibi was without sustainable basis.

Mr. Ramsay submitted that the facts which amounted to a breach of the Exchange Control Act, showed that the parties were engaged not only in an illegal, but a criminal transaction. He went on to suggest that where the loss is not recoverable at law by reason of criminal illegality, it is not sustainable in the criminal courts. For this novel proposition, he relied on **R. v. Charlton & Kow** (Unreported) S.C.C.A. 127/61 delivered 28th January, 1963.

We have no hesitation in rejecting this proposition. It is supported neither on authority or in principle. The case to which counsel referred was concerned with whether certain facts amounted in law to a breach of section 36 of the Larceny Act. The appellants in that case were each charged on indictment that - "in incurring a debt of $x ... by falsely pretending that a certain cheque ... was a valid order for the payment of $x and had authority to draw same ...". The question for the Court was whether "debt" included a debt made irrecoverable at law, the debt in that case being a gambling debt which was not recoverable at law. This Court held that "debt" in the Larceny Act did not include debts made irrecoverable at law. There never was any argument that because the incurring of the debt was an illegal transaction, that made the facts not cognizable in a criminal court. There is no principle in the criminal law analogous to the common law rule "ex turpi causa non oritur actio."

A similar point was taken in **R. v. Malek and Reyes** [1966] 10 W.I.R. 92 where the appellants were charged on indictment for conspiracy to defraud and conspiracy to effect a public mischief.

At p. 105 this Court speaking through Lewis, J.A. said this:

> " Counsel for the prosecution submitted that the illegality of the bets was immaterial. He adopted the proposition favoured by Glanville Williams, Criminal Law, 2nd Edn., para. 222 at p. 695 and cited from the American case of Gilmore v. People (1899) 97 Ill. App. 128;
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> > " The people are entitled to have the criminal punished on public grounds, for the suppression of crime and for the protection of the public against other like crimes, no matter how unworthy the source from which the proof may come.'
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> He referred to **R. v. Hudson** (1860) Bell C.C. 263; L.J.M.C. 145; 2 L.T. 263; 24 J.P. 325; 6 Jur. N.S. 566; 8 W.R. 421; 8 Cox, C.C. 305, C.C.R.; 15 Digest (Repl.) 1195, 12, 131, **R. v. Dodd** (1868) 18 L.T. 89; 14 Digest (Repl.) 188, 1533 and **R. v. Caslin** (1961) 1 All E.R. 240; (1961) 1 W.L.R. 59; 125 J.P. 176; 105; Sol. Jo. 41; 45 Cr. App. Rep. 47, C.A. Digest Cont. Vol. A, 404, 6924b.
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> We are unable to accept the submission of learned counsel for the appellants either upon authority or in principle. The case of **R. v. Orbell** (1703) 6 Mod. Rep. 42; 12 Mod. Rep. 499; 87 E.R. 804; 14 Digest (repl.) 283, 2562 shows that a conspiracy to obtain money by fraud or cheating in a public race is a matter affecting the public and an indictment will not be quashed. No case involving fraud was cited in which the fault or unworthy conduct of the prosecutor was held to be a defence. The weight of authority seems rather to be in the contrary direction. In **R. v. Peach** (1758) 1 Burr. 548; 14 Digest (Repl.) 390, 3851, the court, while refusing its aid to infamous cheats on a motion for an information for conspiracy to cheat them out of £900 by fraud at a foot race refer them to their ordinary remedy of action or indictment. In **Hudson's** case the defendants were convicted of conspiracy to defraud although the prosecutor had himself intended to defraud one of them--a case, as Blackburn, J., pointed out of 'the biter bitten.' **In R. v. Dodd**, Lush, J., overruled an objection to an indictment for forgery with intent to defraud based on the fact that the society defrauded was unregistered

> "and had illegal objects. In **R. v. Brown** (1899) 63 J.P. 790; 14 Digest (Repl.) 118, 816, Darling, J., expressed the opinion that an indictment for false pretences would lie against a person who, pretending to sell to a woman drugs in order that she might attempt to procure an abortion, supplied her instead with an innocuous substance: and in the more recent case of **R. v. Caslin** the illegality of the transaction in which the soldier paid over his money to the prostitute did not prevent the Court of Criminal Appeal from substituting a verdict of obtaining money by false pretences."

We note in passing that Mr. Ramsay appeared in that case and can only suppose that memory must have dimmed. This Court reviewed a number of cases to show that the argument was not well founded then and it remains today equally unfounded.

In our judgment, the fact that the fraudster offerred to sell foreign currency to Mr. Myers in breach of the Exchange Control Act was irrevelant to prove the obtaining by fraud which is the gravamen of the charge. There was however, no purchase or sale of U.S. dollars nor indeed even an attempt to do so. The fraudster never contemplated selling any foreign currency. It was a part of the trick or pretence to obtain $37,500.

It was also said that both Mr. and Mrs. Myers had lied to the Court in testifying that they did not know it was an offence under the Exchange Control Act to buy or sell foreign exchange. That led him to urge that this obvious lie severely eroded their credibility on the crucial question of identification. Mr. Ramsay further contended that the contrived confrontation of Mrs. Myers with the appellant greatly affected the quality of the identification evidence. He relied on a number of cases: **R. v. Hassock** (1977) 15 J.L.R. 133; **R. v. Dennis** 12 J.L.R. 249; **R. v. Gilbert** (1964) 7 W.I.R. 53, **R. v. Cargill & Reynolds** (Unreported) S.C.C.A. 130 & 131/84 delivered 4th June, 1987; **R. v. Reynolds** (Unreported) S.C.C.A. 59 & 60/84 delivered 13th June, 1984; **R. v. Haughton & Ricketts** (Unreported)

S.C.C.A. 122 & 123/80 delivered 27th May, 1982. Apart from the confrontation evidence, he pointed also to the time lag of three months between the Myers' first meeting with Dr. Maragh and their later identifying the appellant as Dr. Maragh. He categorized this factor as a weakness.

On the question of the alibi, he said that the learned Resident Magistrate improperly rejected the defence where the evidence was credible and remained unimpaired. He concluded by urging that she had misappreciated the evidence of character.

We can now deal with counsel's second head, viz identification. We have already stated that the Resident Magistrate did not accept the evidence of identification by the witness Clara Williams. In regard to the other evidence, she recorded her findings in these terms at p. 40:

> " In considering the evidence of identification I warn myself of the grave dangers of convicting where, as in this instance, the Crown's case against the accused rests wholly on visual identification. I have approached the evidence with the utmost caution and I find that the evidence to be relied on is that of Mr. Mervin Myers and his wife Lucille Myers. Both had had ample opportunity to observe the 'doctor.' Mr. Myers had spent over one hour in his company and Mrs. Myers was with the 'doctor.' for about half an hour. It was in the morning hours and at all times they were within close range in a relaxed atmosphere. Both had every reason to take careful note of the 'doctor.' Mr. Myers was about to give him a substantial sum of money in exchange for the much sought after United States dollars and hoped to obtain more from him in the near future as the 'doctor' had said in a few days his friends who were also here on assignment from the United Nations would have had more dollars for sale. Clearly this was a person with whom he hoped to establish a link and to that end, he gave him his business card.

> " Both had seen the 'doctor' for the first time on the 21st of May, 1990 and, when they reported the incident at the Half Way Tree Police Station the following day, they described him to the police. However, the defence did not enquire into the details of the descriptions and there is therefore no evidence to assist the Court in this regard. Some three months elapsed between the date of the offence and the date of the identification but I find that Mr. and Mrs. Myers had a compelling reason to retain the memory of the 'doctor's' features and that a three month period was not a long time for that recollection to remain fresh in their minds. Mr. Myers spotted the accused and without hesitation immediately accosted him. It was early evening and he was able to see him clearly and to recognise his features."

There was no question that both Mr. and Mrs. Myers were in the company of Dr. Maragh for an appreciable length of time and would therefore have had ample opportunity for observing him. There was also no question that they were honest witnesses. Having regard to the caution with which identification evidence must be approached because of the ever present risk of mistake, the Resident Magistrate was obliged to ensure that she was not however confusing honesty with accuracy. She was convinced of their credibility she noted, because the parties had every reason to remember a man who had defrauded them of a considerable sum. That statement made them more convincing as witnesses. But the validity of that statement is open to grave doubt. We venture to think that neither Mr. or Mrs. Myers had the slightest reason to doubt that Dr. Maragh was other than who he said he was - a god-send to their wishes to obtain some foreign currency. They would have been lulled into a sense of false security for the obvious reason that they were taken in by the charm and courtesy of the fraudster. We suggest that care in observing the features of Dr. Maragh would be the furthest course of action they would contemplate. It is true to say that the reason an accused is often remembered by his victim, is that he is aware an offence is being

committed against him and he wishes, and takes care to remember with accuracy the person who caused trauma in his life. Neither Mr. or Mrs. Myers were aware at the relevant time that they were victims of a fraudster. In our view, the possibility of mistake plainly arose in these circumstances.

Next, we note that the Resident Magistrate appeared to hold that the evidence of Mrs. Myers' identification of the appellant was less than satisfactory. She found that although Mrs. Myers had not been directed to the accused at the police station, she came expecting to see him, and she had previously been told the appellant's name. She accepted that in order for Mrs. Myers to have called his name, she must have been given the name by someone. She then found as a matter of fact that Mrs. Myers' identification of the appellant was from her own independent recollection. We fear that must be an unreasonable finding. If Mrs. Myers was assisted in any way in identifying the appellant, her identification could not possibly be regarded as independent. Her identification was flawed and amounted to a weakness, not a strength in the prosecution's case.

We do not think the law on this point is in doubt. It was set out in **R. v. Haughton & Ricketts** (Unreported) delivered 27th May, 1982 in which a number of cases were reviewed, we said at pp. 7 - 8:

> "... Where a criminal case rests on the visual identification of an accused by witnesses, their evidence should be viewed with caution and this is especially so, where there is no evidence of prior knowledge of the accused before the incident. Where an identification parade is held as is the case where there is no prior knowledge of the accused, the conduct of the police should be scrutinized to ensure that the witness has independently identified the accused on the parade. Where no identification parade is held because in the circumstances that came about, none was possible, again the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate

> "easy identification by a witness. It will always be a question of fact for the jury or the judge where he sits alone, to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting. In a word, the identification must be independent."

We are mindful of the period of three months which had elapsed between the victims' first sight of "Dr. Maragh" and their later identification of the appellant. The learned Resident Magistrate found that period not a long time for memory to dim. Perhaps so, but if the first observation was not as careful as it should have been, the recollection is not improved by the passing of three months. It is always important to view evidence of identification with caution. It is not enough for a trial judge or a Resident Magistrate to say that he or she is aware of the caution required in dealing with this particular type of evidence. It is as important to demonstrate that caution.

The examination which we have deliberately undertaken, shows that the Crown's case was not strong as is suggested in the reasons for judgment given by the Resident Magistrate. At the end of the day, however, although it could not be argued with any hope of success that there was no case to answer, it was a weak case.

This leads us then to consider the third head viz, the reasons for rejecting the alibi. In her reasoned findings she stated as follows:

> " In assessing the defence, I carefully noted the demeanour of the accused man as he gave his evidence and I find that he was not forthright and frank with the Court. I noted in particular that when he was asked in cross-examination about the location of Medical Associates Hospital he demonstrated an attitude reminiscent of that described by Mr. Myers which had first led him to Oxford Medical Centre and eventually to the Medical Associates Hospital. He hesitated to admit that he knew exactly where the hospital was and only did so when he was reminded that he had said he was familiar with the parish of St. Andrew. Thereafter

"he was even able to say that the hospital was only about three quarters of a mile from the office where he has been employed for the past nine years.

I find of significance his use of the word Complex when he was asked if he knew shops 1 to 4 at the Havendale Plaza. He said he did not, then he volunteered 'I do not know the details of the Complex.' This word was used by the 'doctor' on several occasions and, in my view, it is not an every day word used when speaking of a Plaza, Shopping Centre or a Medical Centre.

I also find of significance that the accused does have some dealings, in his work, with persons and projects connected to the United Nations. On the very day he was accosted he was in the company of one such person. The accused had also been exposed to the Sri Lankan accent and could certainly imitate it.

These significant features lend support to the identification evidence. I find that the defence of alibi put forward by the accused is false and that the witness called to support it is merely a witness of convenience and not a witness of truth. The evidence discloses that the date of the offence was known from the very time that the accused was arrested and charged. Yet, according to this witness, it was only after discussions with accused man and his Attorney, after the matter was before the Court, 'when the date was known,' that he finds he is able to account for the movements of the accused at the material times on the 21st of May, 1990.

He then recalls in detail all his actions up to lunch time on that day **but is unable to recall his post-lunch-**time actions. His explanations for the morning's recall is that a crisis situation had arisen on the week-end which necessitated 'intense' contact with the accused yet he had made no effort to contact the accused on the week-end even to determine if he would have been able to assist. I find that the several meetings and telephone calls he spoke of were designed simply to take up the relevant time - even to the point of drafting a letter which accordingly to the accused had already been prepared in relation to the witness and only required the substitution of his name and particulars.

> "I note too that inspite of the time delays involved which made the intense meetings necessary, all the arrangements had been put in place by lunch time.
>
> I recognise that there may be a number of reasons why an accused might put forward a false alibi and that the fact that the accused and his witness lie about where he was at the material time does not mean that he was where the identifying witnesses say he was. However, I find that if he were at work at the material time it should have been easy to establish that without resorting to lies. This false alibi is clearly intended to cover up his guilt."

The appellant gave evidence on oath. He put in evidence an attendance-register and a log-book, records kept in his office, to show that he had reported for duty and had not left the office during the material time of 21st May. These documents could not, of course, speak for themselves but to the extent that they were admitted as an "aide - memoire," they were of value. The prosecution neither objected to their admission nor cross-examined to them. Having found that the defence was contrived, one would have expected to find some cross-examination of the appellant to suggest that the documents were manufactured for the purpose and that the witness called to support the alibi, was a party to this conspiracy. But such a line of attack was never mounted.

Counsel for the Crown suggested that the Resident Magistrate had given three reasons for rejecting the alibi viz:

(i) The demeancur of the appellant was not impressive. This is a finding about which this Court can say nothing. The Resident Magistrate saw and heard the appellant. We are entitled to pay respect to that finding.

> (ii) The finding that Mr. Milne's evidence that he had several meetings and made several telephone calls were designed to take up the relevant time.
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> (iii) Her finding that the activities spoken to by both witnesses ended at mid-day.

We cannot conceive how these last two findings of fact can be regarded as reasons for rejecting the alibi. They are nothing other than

findings of fact. We are of opinion that the reason for rejection is based on the following finding that the alibi was false and the witness in support a witness of convenience.

> "... The evidence discloses that the date of the offence was known from the very time that the accused was arrested and charged. Yet, according to this witness, it was only after discussions with accused man and his Attorney, after the matter was before the Court, 'when the date was known,' that he finds he is able to account for the movements of the accused at the material times on the 21st of May, 1990."

We are not at all certain what, if anything, that statement means. The witness has to be asked to give evidence by someone, in this case, the appellant's attorney. Until the witness is told the date in respect of which he is required to speak, how can he possibly know the date? As a basis for rejecting an alibi, we would regard that cited above with the greatest incredulity. It would be wholly unreasonable.

Mr. Sykes conceded, after an attempt to support the conviction that the reasons whether those suggested by himself or that stated in the extract above could not be sustained.

We desire to add this as a summary of our opinion. The Resident Magistrate recorded her findings with obvious and great care. For the reasons we have set out, we are however constrained to dissent from her reasoning and the eventual conclusion of guilt at which she arrived. At the end of the day, the Crown had not disproved the alibi put forward by the appellant. The Crown had no material otherwise with which to destroy the alibi, and their case. The Crown's case rested on the visual identification of a solitary uncorroborated witness and had weaknesses not recognized as such by the Resident Magistrate. In that situation, the undoubted good character of the appellant should have told in his favour. The conclusion is inevitable not only that the verdict cannot be supported having regard to the evidence, but that the onus of proof which rests on the prosecution had not been discharged.

Before parting with this case, we must return to the lamentable fact that the trial extended over such a lengthy period. The record shows that the appellant was arraigned on 16th April. Thereafter it was part-heard and adjourned for the following dates - 21st May, 17th June, 3rd July, 10th September, 13th September, 16th September and finally 20th September. We think that every effort should be made as far as possible to continue a case to finality on consecutive days. The Bar is expected to give their full co-operation. It is in the interest of the attorney engaged in the case to support such a course. Justice can hardly be well served when a case is tried in little snippets as is illustrated in the instant case.