JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 9/93

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA
VS.
FITZROY CRAIGIE
DESMOND HARVEY

Canute Brown for Craigie

Richard Small for Harvey

Terrence Williams and Miss Deboran Martin for the Crown

July 5, 6, 7 and 29, 1993

WOLFE, J.A.:

Fitzroy Craigie and Desmond Harvey were jointly charged on a number of informations for offences against the Dangerous Drugs Act to wit Possession of Ganja, Dealing in Ganja, Transporting Ganja and Exporting Ganja. They were arraigned in the St. James Resident Magistrates Court in Montego Bay on the 22nd January, 1992, before Her Honour Miss Kaye Beckford, Senior Resident Magistrate for the parish. Craigie pleaded guilty to all the charges. His appeal is, therefore, concerned only with sentence. Desmond Harvey pleaded not guilty to all the offences with which he was charged and after a protracted trial lasting nine days he was found guilty of all charges. He now appeals against the convictions and sentence.

Re Craigie

The following sentences were imposed:

1. Possession of Ganja

   2 years imprisonment at hard labour.

2. Dealing in Ganja

Fined $50,000 or 6 months imprisonment at hard labour. In addition 2 years imprisonment at hard labour.

3. Transporting Ganja

Fined $50,000 or 6 months imprisonment at hard labour. In addition 2 years imprisonment at hard labour.

4. Exporting Ganja

Fined $50,000 or 6 months imprisonment at hard labour. In addition 3 years imprisonment at hard labour. See Inf. 8775/91. Sentences to run consecutively. If fines not paid defendant to serve additional 12 months imprisonment.

5. Exporting Ganja

Fined $50,000 or 6 months imprisonment at hard labour. In addition 2 years imprisonment at hard labour. See Inf. 8776/91. Sentences to run consecutively. If fines not paid defendant to serve additional 12 months.

6. Transporting Ganja

Fined $50,000 or 6 months imprisonment at hard labour. In addition 2 years imprisonment at hard labour. If all the fines are paid the appellant would be required to serve a five year term of imprisonment.

Mr. Brown moved the court to hold that the sentences were manifestly excessive when it is considered that the accused had pleaded guilty to all the offences and thrown himself at the mercy of the court.

This appellant, whilst a member of the Jamaica Constabulary Force, had been convicted for similar offences and given a custodial sentence. Four years after his release from prison he is again convicted under circumstances not dissimilar to the first convictions. However, he pleaded guilty on 22nd January, 1992, and was not sentenced until 19th May, 1992, during which time he was held in custody.

It is a principle of sentencing that whenever possible a court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which it is a mitigating factor must depend on the facts of each case

and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused. See **R. v. Davis** [1980] 2 Cr. App. R. (s) 168.

Having regard to the antecedents of the appellant and the nature of the offences, we would not conclude that the sentences were manifestly excessive, however, in imposing the maximum sentence of imprisonment in respect of Information 8778/91, it is clear that the learned Resident Magistrate did not treat the plea of guilty as a mitigating factor in the instant case. We hasten to observe that the circumstances of the offences preclude the plea of guilty from being categorised as a powerful mitigating factor which would move us to substantially reduce the sentence. However, the plea of guilty must be taken into consideration. In the event, we have decided to vary the sentence of three years imprisonment imposed in respect of Information 8778/91, which charged the appellant with exporting ganja, by setting it aside and substituting therefor a sentence of two years imprisonment at hard labour. The sentence is affirmed in all other respects. If the appellant pays all the fines he will be required to serve a total of four years in prison. The sentence of imprisonment is ordered to commence as from the 30th June, 1992, if the fines are paid.

Re Desmond Harvey

The evidence adduced by the Crown at the trial disclosed that on 3rd October, 1990, this appellant met with Gary Privatt a Special Agent employed to the Drug Enforcement Administration of the United States of America. At this meeting the appellant agreed to secure and supply ganja to the Agent. Subsequent meetings were held between the appellant and the agent at which time, plans were discussed for the delivery of the ganja to a boat for transportation to the United States of America.

On 6th October, 1990, the co-accused Craigie, at about 9:00 p.m., delivered a cargo of ganja to a boat owned by the Special Agent, which was moored in territorial waters about one half mile off the coastline of Montego Bay. The cargo was

conveyed to the United States of America and subsequently analysed as ganja. The appellant was arrested and charged with the offences.

Several complaints have been made in this appeal. However, for the purpose of disposing of this appeal it is unnecessary to address all the complaints. We shall deal only with the complaint which is related to the crucial question of identity. The single issue raised at the trial was whether or not the appellant was the person who negotiated to supply Privatt, the Special Agent, with ganja in October 1990.

Gary Privatt, a Special Agent employed to the Drug Enforcement Administration of the United States of America, testified that on 3rd October, 1990, along with Tom Hashem and David Parker he met with the appellants at the Top of the Bay Restaurant, Montego Bay in the parish of St. James. Both appellants were introduced to him by Tom Hashem as suppliers of ganja. The appellants Craigie and Harvey were introduced by the names John and Steve respectively. During the discussions Harvey disclosed to Privatt that he had been involved with exporting several tons of ganja to the United States of America. This meeting could be considered a preliminary one.

On 5th October, 1990, another meeting was convened and the the appellant Harvey who was present informed Privatt that he and his men had been checked out and that he, the appellant, anticipated doing a lot of business with Privatt. Harvey further informed Privatt that the load of ganja was now ready for delivery. Arrangements were made for the delivery of the ganja. The ganja was delivered at sea on 6th October by the appellant Craigie.

It must be noted that appellant Harvey was not known to Privatt before 3rd October, 1990. No identification parade was held for Privatt to identify the appellant. Privatt, however, testified that he had pointed out Harvey to Detective Sergeant Lawrence at the Montego Bay Court House. The only other

occasion on which Harvey was pointed out by Privatt was during the trial itself, whilst he was seated in the dock.

Constable Verrol Samuels testified that on 3rd October, 1990, he was present at the Top of the Bay Restaurant in Montego Bay where he saw both appellants in the company of Privatt and two other white men seated around a table in discussion. There was no evidence adduced to say that Samuels knew the appellant Harvey before. His identification of the appellant was also a dock identification.

The learned Resident Magistrate, in what was termed "Findings of Fact and Reasons for Judgment", when dealing with the question of identification of the appellant Harvey, recorded the following:

> "Now to the identification of the accused Harvey. I go back to the evidence of Constable Samuels. He identified the accused Harvey as being in a meeting with the accused Craigie, the witness Privatt and others. It was suggested to and denied by this witness that he did not see accused Harvey at the table. At no time was it put to this witness that he did not know accused.
>
> This witness was not sure of the licence number of the vehicle he said was driven by accused, so there is no contradiction of the witness Privatt's recollection of the licence number.
>
> The witness Privatt since he is the pivot of the Crown's case was the witness in whose evidence the Defence alleges there were numerous contradictions and discrepancies. He said he knew the Defendant Harvey as Desmond Lloyd Panton and Steve. He corrected himself later on in the cross-examination to say it was the Defendant Craigie who he knew by the name Panton. He agreed that the Defendant Harvey was not put on the first set of documents although Craigie's name was so put. He said he did not know accused full name. He said Harvey's name did appear at proceedings before a Grand Jury. Privatt said he did not review the 'complaint' prior to coming to Jamaica. All he reviewed were his notes.
>
> The Defence says that this seeming confusion over the name of accused Harvey is fatal. I look at the evidence of Constable Samuels who said he was told by Privatt and Shultz on whom he should

> "carry out surveillance and he did so on both accused. This apparent confusion over names therefore does not go to the root of the case."

Having thus summarised the evidence she found the following facts, inter alia:

> "1. There was a meeting at the Top of the Bay Restaurant between Accused Harvey, Witness Privatt and others during the day time.
>
> 2. ...
>
> 3. That Constable Samuels witnessed the meeting between accused Harvey, Privatt and others.
>
> 4. That there was another meeting between the same parties lasting for about half an hour. That this meeting also was in the day light."

This approach by the learned Resident Magistrate to the crucial identification evidence evoked the following complaint:

> "The Learned Resident Magistrate failed to adequately analyze and resolve the issues relating to identification in keeping with the law. She failed to warn herself or demonstrate that she was acting with the requisite caution in mind. In particular she failed to address her mind to the fact that there had been a dock identification of the accused in circumstances which called for the most careful review of all of the related evidence."

This complaint raises the question of what should be the approach of a Resident Magistrate in recording his or her findings of fact as required by section 291 of the Judicature (Resident Magistrates) Act. Section 291 states in part:

> "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 Magistrate 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."

Mr. Small for the appellant advanced the following propositions:

> 1. That the requirements for a Judge of the Supreme Court to treat identification evidence as being a special category of evidence and thereby requiring him to warn

himself of the dangers inherent in such evidence apply with equal force to a Resident Magistrate.

2. That the importance of visual identification is not diminished because of the forum in which it is being considered and that the dangers of a person being convicted as a result of mistaken identification are as great in the Resident Magistrates Court as in the Supreme Court.

3. That a Resident Magistrate is required to:

   (a) warn himself of the dangers of convicting on the evidence of visual identification, and

   (b) to demonstrate that care has been employed in the assessment and determination of each of the relevant issues to identification evidence.

He submitted that there was no evidence in the findings of the learned Resident Magistrate that she had properly identified the issues which arose for determination and that she had failed to consider critical issues relevant to the question of identification.

There can be no gainsaying that the propositions outlined by Mr. Small are sound. For the future guidance of Resident Magistrates we propose to examine some of the numerous authorities dealing with the approach of special evidence, in particular identification evidence, by a judge sitting alone irrespective of the jurisdiction which is being exercised.

In S.C.C.A. 6/78 **R. v. Daniel Dacres** delivered July 31, 1980, this court held per Rowe, J.A.:

> "There is no statutory requirement for the Resident Magistrate to fully record that he has directed himself on the law of corroboration in the multiplicity of circumstances when that issue is bound to arise before him neither is there any statutory dictate that he should record that he has so directed himself when the vital issue is identification of the alleged criminal."

It is to be noted that at the time of this decision identification evidence had not been categorised as evidence of a special nature. Since this decision, however, visual

identification has joined the special categories of evidence where corroboration is desirable. This has been re-affirmed by the Privy Council in **Junior Reid et al v. The Queen** Appeals Nos. 14, 15, and 16 of 1988 and 7 of 1989 or [1989] 3 W.L.R. 771.

Following upon these decisions this court in S.C.C.A. 77/88 **R. v. George Cameron** (unreported) delivered November 30, 1989, per Wright, J.A. said, in dealing with what was required of a trial judge sitting alone in the Gun Court and considering evidence of visual identification:

> "He must demonstrate in language that does not require to be construed, that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind. Such a practice is clearly in favour of consistency because the judge will then be less likely to lapse into the error of omission whether he sits with a jury or alone."

Prior to this decision, Carey, J.A. in S.C.C.A. Nos. 70, 72 and 73 of 1986 **R. v. Clifford Donaldson and others** (unreported) delivered July 14, 1988, in dealing with the question of what was required of a judge sitting alone in the High Court Division of the Gun Court trying a rape case in which there was no corroboration, said:

> "It is the duty of this court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the court to categorise the summation as a reasoned one."

This issue again arose in S.C.C.A. 39/89 **R. v. Locksley Carroll** (unreported) delivered June 25, 1990, where Rowe, P. said:

> "We hold that given the development of the law on visual identification evidence since the decision in **R. v. Dacres** (supra) in 1980 judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must

> "expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold that there should be no difference in trial by judge and jury and trial by judge alone."

In S.C.C.A. Nos. 151/88 and 71/89 **R. v. Alex Simpson** and **R. v. McKenzie Powell** (unreported) delivered February 5, 1992, Downer, J.A., confronted with the said issue, after citing a passage from **Junior Reid** (supra), said:

> "It is against this background of the requirement of a warning in clear terms, that the duties of a Supreme Court judge conducting a trial as judge of law and fact in the High Court Division of the Gun Court, must be determined. That he must give reasons for his decisions is not in dispute. Just as the reasons delivered by a judge in civil proceedings differ from his summing up to the jury, modifications also apply in the reasons for judgment in criminal proceedings. Merely to utter the warning and yet fail to show that the caution has been applied to the analysis of the evidence, will result in a judgment of guilty being set aside."

We turn now to consider two decisions of this court in respect of cases originating from the Resident Magistrates Court.

In R.M.C.A. No. 73/89 **R. v. Vince Stewart** (unreported) delivered February 14, 1990, this court had to consider what was required of the Resident Magistrate in stating his findings of facts in a case dealing with evidence of a special category. Gordon, J.A., delivering the judgment of the court, concluded:

> "Section 256 (sic) of the Judicature Resident Magistrates) Act requires that the Resident Magistrate gives a brief summary of the facts found. It does not require otherwise, but the authorities indicate that where the decision of the tribunal is governed by the application of settled legal principles, e.g. the desirability of corroboration, it must appear that the tribunal's mind was adverted to it - **R. v. Donaldson** (supra). Even if there is a presumption that the judge knows the law, there is no presumption as to its application."

Again in **R. v. Dorr Campbell** R.M.C.A. No. 21/92 (unreported), delivered July 13, 1992, Carey, J.A. said:

> "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."

It is important to make the point that in all of the cited cases the trial judges or the Resident Magistrates stated that they appreciated the need for the tribunal to warn itself of the dangers which were involved in dealing with evidence which fall within the category of special evidence. Notwithstanding this warning, the decisions clearly laid down that merely chanting the need for the warning to proceed with caution was insufficient. The tribunal was required to go further and demonstrate in a reasoned way the application of the legal principles by a careful analysis and assessment of the evidence. The findings of fact of the learned Resident Magistrate, recited herein, do not reveal that she gave herself the required warning necessary in dealing with evidence of visual identification. Not having stated the need for the warning, it is not surprising that the findings of fact do not demonstrate any application of the legal principles which are to be considered when dealing with evidence of visual identification.

We wish to re-emphasise that Resident Magistrates hearing cases in which evidence of special category has to be considered must state in their findings of fact that they are aware of the necessity to warn themselves that caution is required in acting upon the evidence and further must demonstrate in such findings that the legal principles have been applied in resolving the factual issues which arise for determination. Failure to conform to these directives from this court will be fatal to any convictions which are recorded in such circumstances.

There were many features of the identification evidence which called for a very careful analysis by the learned Resident Magistrate. Just to highlight a few -

1. There was the lapse of time between the meetings in October of 1990 and the pointing out of the appellant Harvey to Detective Sergeant Lawrence on some unknown date at the court house in Montego Bay, as also the lapse of time between the meeting in October of 1990 and the dock identifications. It was necessary for the learned Resident Magistrate to address the question whether or not the passage of time had affected the witnesses' ability to make an accurate identification of the appellant as he sat in the dock.

2. There was also the need to demonstrate that she appreciated the caution which was necessary in dealing with dock identification.

3. The credibility of the chief prosecution witness had to be given serious consideration as he prevaricated as to whether or not the name of the man he called Steve, the appellant, was included in his initial report or document as also the reason he gave for not including the appellant's name in his report.

4. The discrepancy between the evidence of Privatt and Samuels as to whether or not Privatt had ever met Samuels. If the Magistrate believed Privatt's evidence that he had never met and spoken with any police officer in Jamaica other than Lawrence and that this was in November, 1990, grave doubts would have been raised about the supporting evidence of Samuels that he was a witness to a meeting between Privatt and Harvey.

5. The inability of Privatt to recollect accurately the registration number of the vehicle driven by Harvey was a matter to be taken into consideration when considering the accuracy of his identification.

6. The fact that up to the time of being cross-examined in court the witness Privatt had not given a proper statement to the Jamaican Police Authorities.

All these, in our view, were factors which required the learned Resident Magistrate to demonstrate how she applied the legal principles requiring caution to be employed. This, in our view, she failed to do. From the findings of fact and reasons for judgment we are unable to say that the learned

Resident Magistrate demonstrated in language which did not require being construed that in coming to her conclusion adverse to the accused person she acted with the requisite caution in mind.

We think it appropriate to recall the dictum of Carey, J.A. in S.C.C.A. No. 112/88 **R. v. Everton Williams** (unreported) delivered on October 6, 1988:

> "Since we operate in a **hierarchical system** of courts, it is expected that the decisions of this court will be followed by judges of a lower court unless of course the decision can be distinguished... Despite the lack of a developed system of law reporting, decisions of this court are none-the-less circulated among the judges and it is expected that they are read, and suitable notes made to update sample directions in the juoges personal notebooks."

The dictum, we would state, applies with equal force to Resident Magistrates.

For the reasons set out herein we concluded that the ground of appeal succeeded, and consequently we quashed the convictions and set aside the sentences.

Before parting with this appeal, we would wish to make a comment on a matter which has caused us grave concern, namely, the manner in which the prosecution's case was presented to the court. The evidence revealed, and was quite rightly commented upon by Mr. Fairclough, that up to the time of cross-examination of the witness Gary Privatt, there had not been submitted to the Director of Public Prosecutions Office or to the Jamaica Police Authority a properly signed statement by the witness. This is, to say the least, a most undesirable state of affairs when one bears in mind recent decisions of the Privy Council as to the making available statements of prosecution witnesses to the defence. Those who are entrusted with the responsibility for criminal prosecutions in our country must never permit our system to be treated with such contempt, so as to ensure that we be spared this kind of experience in the future.