JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 31/92

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

REGINA

VS.

MICHAEL LORNE

Frank Phipps Q.C., Lord Gifford Q.C., Bert Samuels and Miss Tracy Hamilton for Appellant

Miss Diana Harrison, Deputy Director of Public Prosecutions for Crown

September 23, 24, 25, 29, 30; October 1, 2; and November 19, 1992

CAREY P. (AG.):

The appellant is an attorney-at-law. On 27th February 1992 in the Resident Magistrate's Court, St. Andrew, before Her Honour Mrs. N. McIntosh, after a trial which extended over nearly six months, he was convicted of receiving a 1984 Aska motor-car, the property of the University of the West Indies, knowing the same to be stolen and was sentenced to be imprisoned for twelve months at hard labour. He now appeals to this Court against his conviction.

The case against the appellant can, we think, be stated quite shortly. The motor-car, the subject matter of the conviction was stolen from the car park of the Registry, at the campus of the University of the West Indies in the parish of St. Andrew on 12th April 1988. On 30th June that year he negotiated a loan from the Blake Road branch of the Bank of Nova Scotia in Kingston in the

sum of $40,000.00 being the balance of the purchase price of this car. He gave the name of the owner of this car as Robert Allen and the application form [Exhibit 1] in respect of the loan shows that he required disbursement of the loan to be made to this person. The bank, in making the disbursement, drew a cheque in favour both of the applicant for the loan, the appellant, and the alleged owner, Robert Allen. This cheque was handed to the appellant, who would be expected to ensure that it reached the hands of the other signator, Allen. When this cheque reached another branch of the bank, for encashment, it had been endorsed by the appellant who also verified that the other signature was that of the other endorsee i.e. Robert Allen. The cheque was presented to the bank by the appellant's secretary. She was accompanied there by one Paul Walsh and both had been despatched there at the instance of the appellant. The cheque was encashed. It bore no endorsement either by the appellant or the other endorsee, making the proceeds payable to Walsh.

Robert Allen the purported owner denied owning or selling the Aska motor-car to the appellant. He neither received any cheque nor did he affix his signature thereto. Apart from allowing the car to be parked on his premises for a short time at the request of Walsh, he had no dealings with this vehicle.

When the police interviewed the appellant on 22nd March 1991 he told them that he had purchased the car from Paul Walsh. He also produced to the police a document purporting to be signed by Walsh, certifying that Walsh was the owner of the same car. This document bore the same date as that which was among the bank's records showing Robert Allen as owner. While the latter gave the balance owing as $60,000.00, that tendered to the police showed the balance, of the same date, as $40,000.00.

The exercise which the Road Traffic Act enjoins as to the transfer of motor vehicles, took place at the Tax Office in Kingston on 29th July 1988. The appellant who was present acknowledged that he did sign some documents. That transaction was fraudulent. A member

of the staff of that Collectorate who has been convicted of such fraudulent practices prepared fraudulent documents which enabled that scheme to be perpetrated.

On 29th July 1988 when possession of the car became fixed in the appellant, there was evidence which allowed the doctrine of recent possession to operate. The appellant was in possession of a recently stolen motor-car. He was either the thief or the guilty receiver subject to such explanation as he might proffer.

The appellant gave evidence on oath. He referred to his loan application of 30th June 1988 (Exhibit 1) which showed Robert Allen as the person to whom the disbursement of the loan should be made. He admitted that he signed that document and that the Aska motor-car would provide the security for the loan. He acquired an Aska motor car from Walsh. The agreement for sale prepared by himself was given to Rhett Armstrong, the loans officer at the bank in the presence of Walsh. Such a document formed no part however of the bank's records. He testified that subsequently at the bank, in the presence of Armstrong, Allen and Walsh, "it was agreed" that there would be some transfer arrangement involving Walsh transferring the vehicle to Allen who in turn would transfer it to him, the appellant. Armstrong approved this scheme. In the event, another set of papers was prepared showing Allen as the owner of the car. But having given this explanation as to the creation of a document showing Robert Allen as owner, under cross-examination he swore that he was not aware of the document extracted from the bank's record (Exhibit 3) showing Robert Allen as owner. Indeed he had not seen this document until after he was charged.

With respect to a similar agreement (Exhibit 13) prepared on his instructions to show that Walsh was the owner of the car purchased, he explained that it was created to show that Walsh had received $40,000.00 and further to convince Detective Corporal Ebanks, the investigating officer, that Walsh did indeed exist.

The appellant also stated that he had no discussion with Allen regarding the car. The document [Exhibit 3] was given to the bank by Allen but this he immediately amended, by swearing it was given by Walsh. He also said this and we quote from p. 68:

> "Q: Did you agree to that - the bank being given a document indicating you were buying car from Mr. Allen?
>
> A: Me?
>
> The document meant to me that it purports to indicate that Mr. Allen was the owner.
>
> I understood that Mr. Allen was now the owner. Mr. Walsh was there. He completed it before he left. I did not see anything unusual about that as an attorney.
>
> I was still under the impression that I was buying the car from Mr. Walsh. I don't know where the document is that showed Mr. Allen as owner.
>
> A document showing Mr. Allen as owner was supplied to the bank."

The disbursement in regard to the car was by cheque payable to the appellant and Robert Allen. It was brought to the appellant by Walsh. It occasioned him no surprise that Allen's name was on the cheque although he had purchased the car from Walsh. He verified the signature of Allen. He had never ever seen Allen write, and indeed, did not know if the signature was Allen's.

With respect to the transaction at the Tax office on 29th July when the car was transferred to him, he admitted that he attended there with Walsh and Allen. A number of forms were delivered to them but he recalls completing one only. There was, he said, a form indicating a transfer from Allen to himself. That form is not among the archives of that Collectorate. The registration plates were delivered on the following day.

Rhett Armstrong, the loans officer at the Blake Road branch of the bank gave evidence on behalf of the appellant. He spoke of the application for the loan to purchase the motor-car by the appellant. He mentioned conversations between himself and Walsh.

He prepared the documentation and inserted Robert Allen as owner - "because, he was the person selling the car" (to the appellant). He said, Allen it was, who furnished him with the document of ownership [Exhibit 3]. He handed over the cheque to Walsh, - "because he came for it."

With regard to the transfer scheme, he did not authorize it. He received a sales agreement between Walsh and Lorne which he discarded. He subsequently received a sales agreement from Allen which was brought to the bank by Walsh and Allen. Exhibit 3 is not the document he had received, although he had placed it on the files.

The defence called other witnesses to substantiate aspects of the evidence given by the appellant or to refute evidence adduced on behalf of the prosecution. At this juncture, a recital of such evidence is not necessary but will be mentioned hereafter where it is relevant to understand some argument raised by counsel.

We now consider the submissions made first by Lord Gifford Q.C. as to the facts of the case and those made by Mr. Phipps Q.C. in relation to certain points of law raised in the grounds. We desire to state that having regard to those submissions, we required Miss Harrison, Deputy Director of Public Prosecutions to assist us as regards one aspect of those submissions advanced by Lord Gifford.

Essentially, Lord Gifford argued that the verdict was unreasonable and could not be supported having regard to the evidence. He supported this main attack by some despairing sallies against "fundamental findings", which, he urged, the learned Resident Magistrate failed to make. He also launched a feint in his ground No. 3 which we set out:

> "That the Learned Resident Magistrate came to her conclusion of guilt herein by a destructive analysis of the Defence rather than on the strength of the Crown's case. That accordingly, she erred in law by failing to apply the fundamental principle that the burden of proof lay throughout upon the Prosecution."

On the prosecution case, especially from two of the documents tendered viz. Exhibits 1 and 13, the appellant had in his possession a stolen car which had two owners, Robert Allen and Paul Walsh. Both documents undoubtedly emanated from the appellant. But these two owners were never in fact joint owners. The appellant had dealings with both. He told the bank, the owner was Robert Allen and the bank duly drew a cheque in his favour for the car. But he told the police some three years after this, that he had no dealings with Allen but with Paul Walsh. Allen said he had no dealings with the appellant. Thus the argument that the prosecution case depended entirely upon the evidence of Allen as a witness of truth, is not only to overstate the case but is, in our view, wholly misconceived. Even if Allen had not given evidence, the fact of two documents prepared whether by or at the instance of the appellant, was such, at the very least, as to raise the gravest suspicions of the honesty and credit of the appellant. It is true to say that the evidence of Robert Allen, if believed, would bolster the prosecution case.

In her findings, the learned Resident Magistrate was careful to note that she considered the status and character of Allen. She recorded as follows (p.116):

> "In assessing the evidence relating to Robert Allen I find beyond reasonable doubt that he was not a party to these transactions. I have approached his evidence with the utmost caution and, in the final analysis, I find him to be a witness of truth. The fact that he may be a person of questionable character does not render him incapable of belief and I find that he spoke truthfully when he stated that he did not consent to his name being used as vendor in Exhibit one nor did he attend at the Bank of Nova Scotia's Victoria Avenue and Blake Road branch in connection with this motor vehicle. ..."

It is as plain as it can be that the learned Resident Magistrate appreciated fully that Allen although not an accomplice, was a person whose evidence she should scrutinize with the greatest care. Her language demonstrates that she had in mind R. v. Beck (1982) 1 All E.R. 809. This Court deprived of the opportunity of seeing and hearing Allen, must pay a deal of respect to the assessment of his credibility by the Magistrate. We see no reason to fault her approach to this witness who, as we have indicated, did not, at all events, play a pivotal role in the dealings regarding this stolen motor-car.

Lord Gifford dealt with the evidence given by handwriting experts called on behalf of the defence a Mr. Frangipans and Superintendent Major for the prosecution. He urged that the former had discredited the evidence of Allen who had denied affixing his signature to the sales agreement lodged at the bank on behalf of the appellant. This witness compared a signature which was undoubtedly written by Allen on the back of a form of application for a passport (Exhibit 20) and the signature purporting to be that of Allen appearing on Exhibit 3.

He testified as follows (p. 96):

> "I examined the signature on the back of document marked 20 and signature on Exhibit 3. I found it bears an overwhelming amount of similarities but I am limited by the amount of examples. I would have to have more handwriting examplors in order to render a further or stronger opinion. We don't use term conclusion because handwriting is an opinion science."

Under cross-examination, he swore:

> "It is correct that I am saying I am not able to make a conclusive finding as to whether they were written by one and the same person."

The sum of that evidence is of the order of zero, and in our view, eminently justified her findings that (p. 119):

> "... on his comparison of Exhibits 3 and 19 (20) and I find his opinion that they show overwhelming similarities of no assistance."

With respect to the prosecution's questioned documents expert, Lord Gifford, ventured his opinion that any opinion given by that expert must have been flawed based as it was on a comparison between the cursive writing of the signature on Exhibit 3 and the specimen handwriting of Allen which was a form of unjoined cursive. Superintendent Major referred to it as "handwriting in a disjoined form."

There was not a tittle of evidence that this expert was unable to give an opinion based on the material with which he was supplied. He stated quite definitively:

> "I am satisfied that the specimen were as helpful as they could be."

That being so, we are quite unable to agree that from the handwriting evidence alone, the Resident Magistrate ought to have concluded either that Allen signed the sales agreement or may have done so; and therefore could not be believed when he feigned ignorance of the transaction. Her findings that she accepted the evidence of Superintendent Major as to his findings made on a comparison of Exhibit 3 and specimen is supported by the evidence and we are not persuaded of any error in her approach to the evidence nor in the conclusion at which she arrived.

The transfer exercise with respect to the stolen motor-car from Walsh to the appellant at the Tax Office was carefully scrutinized. The submission being made by Lord Gifford was that there was no causal connection between the appellant and the admitted fraudulent transaction which occurred. He complained that the evidence was more or equally consistent with the appellant being an innocent purchaser.

It was in relation to this aspect of the appeal that Miss Harrison was requested to respond. She made the point that the appellant was present at the Tax Office when the fraud took place and that by virtue of the applicable regulations under the Road Traffic Act was obliged to fill out and sign a number of application forms as was the transferor. The dishonest Tax Officer, Phillip Cooke, who assisted in the scheme, played his part hardly for the love of it. It was not a matter of being put on enquiry but the circumstances were such, that he, as a reasonable person and a lawyer could not fail to see what was taking place. The Resident Magistrate was entitled to draw the inference that he was a party to what had occurred.

In order to appreciate the complex and tedious procedure which the law lays upon us all to prevent what occurred in this case, it becomes a melancholy necessity to detail that process.

Regulation 25A(4) directs as follows:

> "(ii) on transfer of ownership of a motor vehicle, the registered owner of that vehicle shall deliver the certificate of title to the transferee who shall proceed in accordance with regulation 33."

The registered owner of a motor vehicle immediately before he transfers it to a purchaser must therefore have in his possession:

(i) a current certificate of fitness;

(ii) a current registration certificate;

(iii) a registered title;

(iv) a current licence affixed to the wind-shield of the vehicle;

(v) a set of registration plates in respect of the owner attached to the vehicle.

Regulation 33 requires the transferor to apply to do so and to surrender his existing certificate of title and registration certificate to the Licensing Authority. The transferee completes section II of the Form S2 which is the certificate of title. Section III is required to be sworn to before a Justice of the Peace by the transferee and the transferor. According to the evidence of Ferina Fernandez, an acting Collector of Taxes, a transfer Form D was also required. The transferee would also apply for registration plates. The appellant said he filed the appropriate application but the Revenue authorities did not find any such record. What was produced, was an irregular application for registration plates prepared by Cooke in relation to the plates issued to the appellant for the stolen car (Exhibit 6).

There was no record at the Tax Office of any transfer whatsoever involving the stolen motor-car. The transfer scheme about which the appellant gave evidence, viz., a transfer between Walsh and Allen was never recorded. There is no record of any transfer involving Allen and the appellant or Walsh and the appellant. In order to have his purchase registered, the appellant and the transferor would have been required to complete Sections I and II of the Form S2. The appellant stated that both owners viz., Allen and Walsh were present during this exercise. But he never stated which of these owners transfered the car to him. The learned Resident Magistrate made an important finding when she stated at p. 116:

> "I find that the accused man lied when he said he went to the Tax Office and completed an application form for new plates other than Exhibit 6. He also lied when he said his application had a registration number other than NE 1013 and when he spoke of a member of his party checking on the plates which were on the vehicle to ensure that the correct number was being recorded on his application. That check would hardly have been necessary with the 'two owners' of the vehicle present and in possession of the ownership documents which were required to be produced and which would contain the registration numbers."

In our view, the learned Resident Magistrate was entitled to find as she did. The requirements of the Road Traffic Act were flouted by the appellant, an attorney-at-law, in circumstances which showed he was joining in the endeavour to have the stolen car registered in his name. Once he obtained a registration certificate from the Tax Office, all would be well. He has produced a registration certificate and a certificate of fitness issued some years after this exercise (Exhibits XI and XII) which relate to the stolen vehicle, but the procedure which actually was followed and about which he could speak, he chose to remain silent.

It is curious, to say the least, that Cooke the unquestioned fraudster in the Collectorate, left behind positive proof of his fraudulent involvement viz. the Form T1 (Exhibit 6) but the one document to which the appellant specifically referred, i.e. a T1 form has disappeared. But the other forms which the law required to have been completed also have disappeared. Why should Cooke who neglected to cover his tracks in relation to Exhibit 6 trouble himself to dispose of other documents which were necessary for the transfer process? These are considerations which the learned Resident Magistrate plainly had in mind. She was entitled to regard the appellant's conduct in relation to his other dealings with the stolen car, in order to arrive at her verdict. It was one circumstantial factor which when added to other factors cumulatively could lead in one direction alone.

We come now to deal with the transaction at the bank regarding the negotiation for the loan and the findings made by the learned Resident Magistrate in that regard. She found that the appellant and his witness Rhett Armstrong disagreed on nearly every material aspect of the bank transactions. It was argued very strenuously by Lord Gifford that her findings were unjustified, inaccurate and unfair. The learned Resident Magistrate he said "failed to take proper account of: (i) the time gap of three and a half years since the events being described; (ii) the fact that Mr. Armstrong was

testifying about a routine application similar to over a hundred which he processed in the same period; (iii) the fact that their evidence was similar in its essentials but differed on minor points of detail."

It is perfectly correct that the events about which the appellant and Armstrong testified occurred some time before but neither person indicated, so far as we can judge from the notes of evidence (and we were assured by Lord Gifford not only as to their accuracy but that they were almost verbatim) that they had any difficulty in recalling those events. Mr. Armstrong and the appellant were friends. Armstrong referred to him in evidence as "Miguel". The loan application far from being routine, had unusual features, if these witnesses were to be believed. Their evidence suggests that some problem arose about who was the person who could transfer the car, Walsh or Allen.

The documents produced by the bank's witness were four in number viz.:

(i) a loan application by the appellant dated 30th June 1988;

(ii) an appraisal form in respect of the Aska motor-car dated 24th June 1988 signed by Rhett Armstrong;

(iii) a sales agreement signed by Robert Allen as owner;

(iv) Bank of Nova Scotia cheque dated 5th August 1988 in favour of Robert Allen/Michael Lorne for $40,000.00.

There are some features in respect of these documents which warrant our attention. It is obvious that the loans officer had appraised the stolen car before the loan application was signed. The loans officer certified (inter alia) that ownership was established by "Reg. slip" whatever that is meant to connote. The loans officer certainly would be aware of the ownership and no one doubts that the appellant would at that time also be aware of the name of the owner. The bank was satisfied it was Robert Allen. The appellant

was satisfied it was Robert Allen for he required the disbursement of the proceeds of the loan to Robert Allen. The bank duly prepared their cheque to cover that disbursement. The name Paul Walsh is not to be found in the bank's records.

That name surfaced when the police having discovered that the appellant was in possession of a stolen car interviewed him and learnt that he had purchased it from Paul Walsh. The date of this interview was 22nd March 1991. Final payment for the car as represented by the bank's cheque was 8th August 1988. Seeing that the security for the loan was the car, no payments could be due on the car. The bank would have taken a lien on the car but it was not registered at the Collectorate. Armstrong gave evidence of a lien because he spoke of a bill of sale being prepared in respect of the car. At trial, the defence were obliged as an evidential burden to explain the acquisition of this stolen car which had two owners not being joint owners who had sold it to an unsuspecting appellant.

The viva voce evidence given by the appellant and his witness Armstrong, the quondam loans officer of the bank was at odds with the documents tendered as we previously stated. The learned Resident Magistrate found material differences. Lord Gifford argued that the discrepancies related to trivial matters or should have been attributed to faulty recollection, a period in excess of three years having elapsed since the events described. We do not propose to set out all the examples of the discrepancies but we will give an illustration or two. While the appellant mentioned a loan application showing Paul Walsh as vendor, Armstrong gave no evidence of preparing such an application but speaks to one showing Allen as vendor. Another discrepancy noted by the Resident Magistrate was put in this way (p. 114):

> "The accused and his witness also disagreed on the circumstances leading to the issue of the cheque representing the loan amount, the accused saying that it was issued after he had submitted documents indicating that the car had been transferred to him and his witness saying that the cheque was issued before the car was transferred to the accused. He even supported that with a statement of the bank's policy at the time."

These examples are sufficient for our purposes to dispose of the arguments and to demonstrate that the conclusion at which the Resident Magistrate arrived, were more than justified on the facts.

There was some reference to a witness, called by the defence into the witness-box but who was withdrawn, because, as Mr. Phipps told the Court, the witness had been spoken to "by the Crown". This witness a Mr. Bullock was manager of the King Street branch of the Bank of Nova Scotia where the cheque [Exhibit 4] was encashed by Paul Walsh who had been accompanied by the appellant's secretary. One thing is at least tolerably clear, the secretary could not have been sent to identify Paul Walsh as Paul Walsh. The only inference which any reasonable tribunal could draw was that the secretary was despatched to the bank to represent Paul Walsh as the endorsee of the cheque Robert Allen. Given those facts, the Resident Magistrate stated that the accused lied when he claimed to have acted on Bullock's instructions in verifying the signature. She then added gratuitously we would think, that Bullock gave no such instructions. This statement was criticized on the footing that there were no primary facts from which such an inference could be drawn. This could hardly be regarded as the strongest argument advanced in this case. It is as plain as plain can be, that she concluded as she did, because she did not accord any credence to the evidence of the appellant that any bank manager in his right mind could give any such instructions.

It was also argued that the Resident Magistrate had taken judicial notice of banking hours which was not a matter of which judicial notice could properly be taken.

The matter of complaint arose in this way - the learned Resident Magistrate made a finding that the cheque (Exhibit 4) was encashed on 5th August 1988 and not on 8th August as appears by the bank stamp. Whether the cheque was encashed on the 5th or the 8th was a matter of absolutely no importance or significance whatever in the case. Nothing turned on the eventual conclusion that the appellant's secretary lied when she said that the bank was closed on Friday, 5th August. We are not attracted by that feint for the reason that the practice whereby bank transactions on a Friday afternoon are treated as having taken place on the Monday following, is a notorious fact.

Lord Gifford's painstaking search through the records revealed another alleged failure on the part of the Resident Magistrate. It was contained in the following ground No. 2:

> "2. That the Learned Resident Magistrate erred in law in failing to make findings of fact which it was incumbent upon her to make in the instant case.
>
> **PARTICULARS**
>
> (a) The evidence was overwhelming that the appellant was not the first possessor of the vehicle after the theft.
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> (b) The evidence from both Crown and defence witnesses was that PAUL WALSH was in possession of the vehicle after the theft and before the Appellant came into possession of it. See the finding of fact (p. 119, para. 3) that the witness ALLEN had kept the vehicle at the request of Walsh for 4 to 5 days.
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> (c) But the Learned Resident Magistrate made no finding as to whether Walsh was feloniously in possession (whether as thief or receiver); nor as to whether Walsh transferred possession to the Appellant. Without such findings a case of dishonest receiving could not be established against the Appellant."

The Resident Magistrate returned a verdict of guilty of receiving the stolen car. She found that the motor-car was stolen. It was not incumbent on her to identify anyone as the person who stole the motor-car. Paul Walsh was not charged before her. No determination of his complicity in any crime was called for, on her part. Moreover, the legal basis of the Crown's case was that the appellant was found to be in recent possession of a stolen vehicle. There was evidence to raise that presumption. In point of strict proof, that was all that was required of the prosecution. Of course the prosecution had the burden of proving guilty knowledge at the time the appellant received the car. The Resident Magistrate discounted altogether the appellant's story regarding some transfer scheme involving Walsh, Allen and the appellant and held that "there was no transfer of the Aska motor-car from Paul Walsh to Robert Allen." We are of opinion that the findings suggested by Lord Gifford as essential to be made by the Resident Magistrate were wholly unnecessary for purposes of determining the guilt or innocence of the appellant.

The last of the errors ascribed to the Resident Magistrate was particularised in ground 3 which stated as follows:

> "3. That the Learned Resident Magistrate came to her conclusion of guilt herein by a destructive analysis of the Defence rather than on the strength of the Crown's case. That accordingly, she erred in law by failing to apply the fundamental principle that the burden of proof lay throughout upon the Prosecution."

In the circumstances of this case, the Resident Magistrate had a duty to consider the explanation proffered by the appellant to see whether it was untrue. She would be well aware that if the explanation left her in doubt, the verdict would be in favour of the appellant. R. v. Aves 34 Cr. App. R. 159; R. v. Abramovitch [1914] 11 Cr. App. R. 45. The Resident Magistrate in setting out her findings and reasons therefor, did so with admirable lucidity and

meticulous care. She demonstrated that the defence of the appellant was contrived, tortuous and beyond credulity. The appellant and those of his witnesses not being those crown witnesses who were called on his behalf or his handwriting expert, told lies to support that defence. The appellant himself was guilty of deceitful and fraudulent conduct. There was little doubt that her analysis of the evidence was effectively destructive of the defence.

We must now test the validity of her analysis against the evidence in the case. We begin with the bank transaction. Their records are transparently clear that a loan was negotiated by the appellant to complete payment on a car purchased from Robert Allen. A cheque to cover that final payment was made to the appellant who endorsed it. The car was security for the loan. The bank would have a lien on that car. No one else could have any lien existing thereon. But the appellant produced a history of payments by means of four endorsements on a file jacket and two notations on a sheet of paper attached thereto. These show the payment of some twenty seven thousand five hundred dollars ($27,500.00) between 30th August 1988 and 28th April 1989 to Paul Walsh and one Skyers, a police officer, on behalf of Walsh. The payment on 28th April but signed for on 4th May 1989 is worth highlighting:

> "28/4/89 - I Kenneth Skyers received from Mr. Michael Lorne the sum of eight thousand dollars ($8,000.00) which represents final payment for the purchase of one Isuzu Motor Car - Aska. The said car was purchased from Mr. Paul Walsh who sold the said car to Mr. Lorne.
>
> This amount is being received by Mr. Skyers on behalf of Mr. Walsh who instructs Mr. Lorne to pay same to Mr. Skyers on his behalf. This represents the final payment and the purchase price is now fully paid to the vendor.
>
> /s/ ?
>
> 4/5/89."

It is to be borne in mind that this is a file kept by a lawyer. This repetitious note even on the most indulgent construction cannot qualify as a receipt. It is akin to a police statement. What possible need could there be to prepare such a convoluted historical note as to the purchase of the car at the time it was done? We think it is obvious that the note was prepared in the belief that it could provide an answer to allegations being made against the purchaser with respect to the acquisition of the stolen car. We entirely agree with the Resident Magistrate when she dismissed these payments as "mere contrivances designed to deceive the Court." She pointed to the fact that when the police requested receipts with regard to the purchase of the car on two occasions in March 1991 during the investigations, none was produced.

What was the explanation providing for Robert Allen's name being inserted in the loan application which was executed by the appellant on 30th June 1988? Why was there a document showing Allen as owner of the car? His name could not have been inserted without the knowledge of the appellant. There was also a document showing that the loans officer was satisfied that the owner was Robert Allen [Exhibit 2] and he certified that ownership was established.

The appellant gave a graphic story of visiting Paul Walsh's establishment accompanied by his mechanic, of talking terms about the Aska and deciding to go to his bank manager. He spoke with Armstrong, the loans officer who advised that the owner would need to bring in proof of ownership and the car would have to be inspected and appraised. He took Walsh to the bank and introduced him to Armstrong. This occurred in May. An agreement for sale between himself and Walsh was prepared and placed on the file.

This tale plainly was at odds with the actual records produced from the bank. This tale could not be true. Whither have the other documents flown? They have disappeared just as the application form for plates signed by the applicant did.

The absence of these documents was explained in this way. Walsh told the appellant that he was going to Miami to buy parts and that he would be willing to transfer the car to the appellant. But the appellant demurred. The reason for that refusal was that he had another car in mind. This is beyond belief. Records for the sale had already been prepared and lodged at the bank in the file relating to the loan application. The appellant was not doing justice to himself.

The explanation which can aptly be described as tortuous, continued. Another meeting took place between Armstrong, Walsh and the appellant. Walsh put forward the idea that he would transfer to "one of his brethren", (in the event, Robert Allen) who would in his absence transfer to the appellant. Agreement having been reached, new papers were signed and 'Allen's' name was included in this new loan application. If this were true, Armstrong must have been a party to at least deceiving the bank. But Armstrong's evidence was not in agreement with the appellant's.

The Resident Magistrate dealt with the explanation in these words (p. 115):

> "In my view the transfer would have been at best nonsensical. From the bank's point of view - and this is admitted by the accused - there was no need for a new application. The car was being purchased from Paul Walsh and the bank had documents to that effect. That was all that concerned the bank. It was up to the accused to arrange to have the car transferred to him and, to that end, he did not even ask Mr. Walsh about the duration of his stay abroad. If it were a short stay why couldn't the conclusion of the transaction await his return? Further, was Mr. Allen really the appropriate brethren to whom the car should be transferred when he too must have been expecting to leave the island?"

it also justified her finding (p. 116):

> "On the totality of the evidence I therefore find that the bank was deceived in this loan transaction into accepting as collateral a car which was falsely represented as the property of Robert Allen. The accused man falsely represented that he was buying this vehicle from Allen when, on his own admission, that was not so."

We mention one other aspect of this case which relates to the endorsement of the cheque payable to Robert Allen and the appellant. The appellant verified the signature of Robert Allen whom he had never in his life seen sign his name and whose signature he did not know. He sent a male person with his secretary to collect the proceeds of the cheque. An honest person would have endorsed the cheque over to the new payee. But he did not. The male person he despatched with his secretary was not Robert Allen. Would any reasonable tribunal believe that a reasonable person, especially a lawyer would have acted in this way? We think not.

In our view, we have said enough to show that the Resident Magistrate's analysis of the defence was impeccable. There were other explanations which we could detail to show that they were all contrived to explain away his knowledge that the car was stolen. These were but parts of the tangled web which the appellant wove in an endeavour to cover his tracks. His explanations were entirely beyond credulity. Accordingly we can find no basis whatever for holding that the learned Resident Magistrate was unmindful of the principle of law that the burden of proof lay upon the prosecution.

We have been at great lengths in dealing with this factual aspect of the appeal and have given it our most anxious and careful consideration. Lord Gifford has put forward his submissions forcefully and fairly and has said everything which could possibly be said in favour of the appellant. In agreement with the Resident Magistrate, we are satisfied that the several explanations given by the appellant

could not reasonably be true. We have no warrant for differing from her conclusion, that they were untrue.

Mr. Phipps Q.C. made submissions on two points of law with which we will now deal. The first point was raised in two grounds of appeal which were in the following form:

> Ground 6:
>
> "That the Learned Resident Magistrate erred in placing reliance (to the prejudice of the Appellant) on what she found to be 'marked differences' in the signatures of Kenneth Skyers on exhibit 18 (p. 117, para. 2), when there was no expert evidence before her a (sic) to whether any such supposed differences indicated that the signatures were written by different hands."
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> Ground 9:
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> "The Appellant was prejudiced in his defence when he was deprived of the opportunity to call Corporal Skyers to give evidence at the trial to prove an important part of his defence.
>
> No assistance was given to the Defence by the prosecution or the Courts, despite the issuance of Subpoena and requests made in Court to have Skyers attend to testify under Section 260 of the Judicature Resident Magistrate's Act."

The argument proceeded thus - the Constitution guarantees that where a person is charged with a criminal offence, he shall be afforded a fair hearing. To that end, pursuant to section 20(6)(d), "he shall be afforded facilities ... to obtain the attendance of witnesses ..." The Resident Magistrate as an arm of the State did nothing effective to secure the presence of the defence witness Skyers. The defence was thereby deprived of an opportunity to present his defence in full, in the absence of this witness. This he maintained constituted a breach of the appellant's right to a fair hearing. The Resident Magistrate compounded this constitutional breach by making findings of fact on documents (Exhibits 16, 17 and 18) in relation to which defence was not fully presented and about

which the defence wished to call the witness Skyers. This error was prejudicial to the appellant whom she condemned for continuing to deceive the Court when he presented those exhibits.

The submissions are attractive but they are wholly misconceived. Any person charged before the Court is entitled to a fair hearing. That fair hearing must be one according to law. Without attempting to be exhaustive, the trial must be in accordance with the law, whether statutory or common law and the appropriate rules of procedure and principles of evidence must be applied. Section 20(6) spells out some requirements of fairness on the part of the State to enable this ideal to be attained. We set out the sub-section:

> "(6) Every person who is charged with a criminal offence -
>
> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice,
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
>
> (e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language."

The allegation here is that he was not afforded facilities to obtain the attendance of the witness. We would think that the provision by the State of an office of the Clerk of the Courts who has the power to issue subpoenas either at the instance of the Crown or the defence for the attendance of witnesses amounts to a facility to obtain the attendance of witnesses. When the defence applies for the issue of subpoenas for the attendance of their witnesses, it would be the duty of the Clerk of the Courts to issue those subpoenas to the police whose duty would be to serve those documents upon the witnesses. The Witnesses' Expenses Act provides the procedure where a witness who has been served can be compelled to attend by the issue of a warrant - see section 11:

> "11. (1) If any person shall, without reasonable excuse to the satisfaction of the court, make default in obeying any subpoena, summons, process or order lawfully issued by the court for his attendance as a witness, or for production by him of any written or other evidence in any legal proceeding the court may, subject to the provisions of subsection (2) and subsection (3) -
>
> (a) if such subpoena, summons, process or order be issued on the direction of the court or on behalf of the Crown -
>
> (i) impose on such person a fine not exceeding two hundred dollars and, in default of payment thereof, commit such person to prison for a period not exceeding one month, unless the fine shall be sooner paid; and
>
> (ii) issue a warrant in the form prescribed in the Second Schedule under hand to bring and have such person at a time and place to be therein mentioned before the court, to testify, or to produce the said written or other evidence;
>
> (b) if such subpoena, summons, process or order be issued on behalf of the defence, on proof of a tender of payment of such person's proper travelling expenses under regulations made under section 15, impose

> " on such person a fine not exceeding two hundred dollars and, in default of payment thereof, commit such person to prison for a period not exceeding one month, unless the fine shall be sooner paid:
>
> Provided always that the powers conferred by this section shall be in addition to and not in substitution for any other powers possessed by the court, and any remedies possessed by the party at whose instance the subpoena, summons, process or order is issued."

In the case of defence witnesses, a condition precedent to the issue of a warrant, is the tender of conduct money. By providing the Clerk of the Courts and police officers, facilities are provided, but these services must be invoked. There is absolutely no need to issue a subpoena for the attendance of a willing witness. In this case, the witness, a police officer, Skyers, as the Record shows, was off the island. Nevertheless argues Mr. Phipps Q.C., the State in the shape of the Resident Magistrate must use the authority of her office to demand the presence of the Commissioner of Police to answer for one of the men serving under his command. In our judgment this is not to act in accordance with any rule of law to ensure justice according to law. It is to arrogate to the Resident Magistrate dictatorial powers. That cannot be right. We were not at all attracted by that argument.

The finding by the Resident Magistrate or differences in the signature of Skyers on Exhibit 18 were in our opinion not of the slightest significance in the totality of the case. Any evidence of payments by the appellant after the loan was disbursed to him could have no relevance to the stolen car for reasons which we have already detailed and do not intend to repeat. Nothing we see is therefore to be gained in considering whether the Resident Magistrate was entitled to find differences in handwriting in the absence of expert opinion on the point. The point is wholly academic. The Cout did nothing which breacned any procedural rule or which breached any provision of the Constitution, either in letter or in

spirit, so as to deprive the appellant of his witness. It is obviously the responsibility of the accused person to prepare his defence and call witnesses to support his case. The State must provide the facilities to assist in ensuring this, and so far as this case was concerned, we were told that the defence requested the issue of a subpoena for Skyers but there was never any proof of service. The efforts, if any, made by the defence itself to locate its own witness were not communicated to us. It can only be assumed that it was supposed that the State has the responsibility to locate the whereabouts of and bring before the Court, witnesses for the defence, wherever they might be. We were not given the basis for that supposition but we ourselves are very well aware that no authority exists at law which would sanction the gratuitous conduct suggested by Mr. Phipps. We are not to be taken as saying that if a Resident Magistrate discovered that the police were remiss, or dilatory in serving subpoenas he or she could not resort to some administrative action. The Resident Magistrate has responsibility for the due administration of justice in a parish. But no such failure was alleged or proved.

The other point of law raised by Mr. Phipps was that the Resident Magistrate was required to return a verdict on both counts of the indictment as he has no power to dispense with the requirements of the Judicature (Resident Magistrates) Act, section 280 which necessitates that the Magistrate must declare a verdict on what is tried. Such a failure he argued vitiates the trial and rendered it a nullity. He conceded readily that he had no support in authority or in principle but put it forward for our consideration.

The precise point was made in R. v. Chuck (unreported) R.M.C.A. 23/91 dated 31st July 1991 where it failed. We do not find it necessary to re-visit that case nor the cases therein cited viz.: R. v. Roma (1956) Crim. L.R. 47; R. v. Seymour (1954) 1 W.L.R. 678;

R. v. Lewis [1965] 9 W.I.R. 333 all of which bear on the topic. The concession by learned counsel makes the point wholly academic. There has been a proper adjudication of the facts and a verdict was returned which is supported by the evidence. The order "no verdict on count 1" is in accord with the authorities. Moreover we can see no prejudice or unfairness whatever to an accused person. Therefore no irregularity has arisen, the trial has not been rendered a nullity.

Finally he submitted, without enthusiasm, that there was no proof that the car, the subject of the charge, was stolen. We need only say that there was abundant evidence that the car the property of the University of the West Indies was stolen from the Registry car park and the same car was found in the possession of the appellant. This ground was hopeless.

For all these reasons, we are not disposed to interfere with the verdict of the Resident Magistrate.