JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 7/93

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

REGINA
VS.
EDGAR MANNING
AINSWORTH MCLAREN
FRED BECKFORD

Miss Diana Harrison, Deputy Director of Public Prosecutions, for the Crown

Delroy Chuck for the appellants

May 25, 26 and June 28, 1993

WOLFE, J.A.:

The appellants were convicted on the 30th November, 1992, for the offence of accepting gratification contrary to section 4 of the Corruption Prevention Act, before Her Honour Mrs. Pauline Stellar, Senior Resident Magistrate for the parish of Clarendon, and each sentenced to be imprisoned at hard labour for a term of fifteen months. On the 26th May, 1993, we dismissed their appeals.

All three appellants were members of the Jamaica Constabulary Force on the date of the offence. Manning and McLaren were both stationed at the Milk River Police Station in Clarendon. Beckford was stationed at Frankfield Police Station, also in the parish of Clarendon.

On the 25th January, 1989, at about 6:00 p.m. Glen Eulett, a heavy-unit operator and ganja dealer, was travelling in a motor car with Cecil Hewitt. They were returning home from St. Elizabeth where they had gone on a

ganja-purchasing expedition. In the trunk of the car there were 60 lbs. of ganja. As they travelled along the Milk Spring main road in Clarendon their vehicle was intercepted by a police vehicle driven by Manning who was accompanied by McLaren and Beckford.

Manning, whom the occupants of the car knew before, addressed Eulett and asked him where he was coming from. Eulett told him St. Elizabeth, whereupon Manning asked him if he had anything there. He told Manning yes, understanding Manning to be asking about ganja. Manning requested some of the ganja. Eulett promised to pay the officer US$5,000 but the officer stated his preference for the ganja. No doubt, the market value of ganja made it more attractive than the offer of US$5,000.

All three appellants alighted from the jeep. Eulett was asked to open the trunk of the car and McLaren and Beckford removed shots from five plastic sugar-bags of ganja. Eulett, observing that he was about to lose his precious cargo, offered, in addition to the US$5,000, a further sum of $15,000, on the undertaking that the ganja was returned to him. All the appellants accepted the offer. The appellants took possession of the five bags of ganja and the documents in respect of the motor car and left towards the Milk River Police Station, whilst Eulett and his companion went in search of the money which was required to retrieve the ganja.

Five thousand dollars ($5,000) was all that Eulett could lay his hands on, by way of a loan from friends, and he took this amount to the appellants at the Milk River Police Station. It was refused. It was a matter of all or nothing. McLaren declared, "This can't do nothing. You have to go get more." Beckford said, "This can't share for the three of us, for this can't reach anyway so you will have to carry more come." Manning said, "that he owed some money at the bank on his car and he wants some more money to help pay for the car."

Eulett continued his endeavours and obtained an additional loan of $12,000 and returned to Milk River Police Station the said night at about 11:00 p.m. where he saw all three appellants, spoke to them and handed over J$17,000 to the appellant Manning. Having received the bargained amount, Manning advised Eulett to return a little later for the ganja as there were some policemen at the station watching him. Eulett then left the station.

On 26th January, 1989, at about 11:00 a.m. Eulett returned to Milk River Police Station to recover his ganja. The appellants were nowhere to be found. He spoke to the station guard who called Manning on the radio. Eulett waited at the station but the appellants did not turn up. He left the station at about 1:00 p.m. Whilst travelling along the Kemps Hill Road, he observed the police jeep, which was being driven by Manning with McLaren seated on the passenger's seat, emerging from a nearby canefield. He spoke to both men. McLaren returned the car papers to him and said, "Everything is over now so I must just cool." Eulett, thankful for small mercies, invoked a blessing upon McLaren, "God bless you, McLaren. God go with you." Having wished them God's speed he went to the May Pen Police Headquarters where he reported this double-cross.

Austin Reid, a District Constable attached to the Milk River Police Station, who had dispatched Manning and McLaren on duty at 5:00 p.m. on January 25, 1989, gave evidence that on January 26, 1989, at about 8:00 a.m. he was at the Milk River Police Station and saw the jeep which had been assigned to Manning and McLaren. In the jeep he observed vegetable matter resembling ganja on the floor. He collected some of the ganja which he showed to Manning who was seated nearby. Manning denied that he had seen the ganja before and remarked that he was not the only one who drove the vehicle so he knew nothing about the ganja. Reid handed over the ganja to the sub-officer in charge of the station, Sergeant Colquhoun.

Later that day, Sergeant Colquhoun and the witness observed Eulett talking to Manning and McLaren at Main Street in Gimmi-Me-Bit .

Sergeant Colquhoun corroborated the testimony of Austin Reid as to the handing over of the vegetable matter to him and as to seeing Manning, McLaren and Eulett together at Gimmi-Me-Bit on the 26th January, 1989. The vegetable matter collected by Reid from the jeep was submitted to the Government Analyst for examination and was certified to be ganja.

All three appellants testified on oath and denied the allegations of having accepted the sum of $17,000 from Eulett as the basis for returning the ganja to him. Indeed, each appellant denied that there was any ganja in the car. Each did admit, however, that the car was intercepted and searched but what was found was ground provisions.

Cecil Hewitt who, it is agreed on both sides, was in the car with Eulett, was called as a witness for the defence and, not surprisingly, supported the evidence given by the appellants. It must, however, be noted that the prosecution had made several attempts to obtain a statement from this witness, but without success. He appeared to have left the parish of Clarendon to reside in Hanover, subsequent to the incident.

The foregoing summary of the evidence forms the factual basis on which the learned Resident Magistrate was required to determine the guilt or innocence of the appellants. The issue to be determined was purely a question of fact, viz. did the appellants accept from Eulett the sum of $17,000 "as a reward for forbearing to prosecute him for illegal possession of ganja and dealing in ganja."

The Magistrate, with great care, recorded her findings of fact and each and every one of those findings is, in our view, amply supported by the evidence. She clearly rejected the version of the incident which was proffered by the defence and accepted the prosecution's version as true.

On appeal, five grounds were argued:

Ground 1:

> "The verdict of the learned Senior Resident Magistrate was unsafe and or unreasonable and does not accord with the evidence in that the stellar witness for the Crown, Glen Eulett, a self confessed illegal operator, was contradicted in every material particular by Cecil Hewitt, the driver of the car in which Eulett was a passenger."

Mr. Chuck, for the appellants, sought to support this ground by pointing out a number of discrepancies between the evidence of Eulett, on oath, and his statement to the police. These discrepancies, however, were peripheral in nature and, in our view, did not make the witness' testimony so substantially different as to merit it being categorized as unreliable. As to the choice between Eulett and Hewitt, the learned Resident Magistrate was much better placed than we are, as to which of the two witnesses ought to be believed. She saw and heard them both and concluded as follows, in respect of Hewitt:

> "I did not believe Hewitt's evidence. Having seen and heard Hewitt I found him to be an unreliable witness."

We see no reason to disagree. Here was a witness who was the travelling companion of Eulett and was aware of the fact that Eulett had made an allegation against the police officers. For a considerable period of time, Sergeant Colquhoun sought after him with a view to collecting a statement from him. He was nowhere to be found. As a matter of fact, he migrated from the parish of Clarendon to reside at Hopewell in Hanover, confiding only in the appellant Manning. It is strange, to say the least, that Manning did not advise him to give a statement to the police. This ground lacked merit. The evidence of Eulett was capable of founding the verdict at which the learned Resident Magistrate eventually arrived.

Grounds 2 and 5 may conveniently be dealt with together.

Ground 2:

> "The failure of the Crown to provide the defendants with statements of the Crown witnesses, having been requested, was a breach of the constitutional rights, see section 20(6), and of the common law right to a fair hearing, see pp 55, 97-99. The failure to furnish the statement of Glen Eulett and police officer Lewin to the defence amounted to a material irregularity."

Ground 5:

> "The failure of the Crown to disclose to the Court that it possessed statements from the witness, Glen Eulett, which differ markedly and disclose significant discrepancies from the evidence given by the witness amounts to a material irregularity in the trial."

Since the decision of the Privy Council in Linton Barry v. The Queen [1992] 3 All E.R. 881, this ground of appeal has increased in its popularity. In Barry's case (supra), the appellant complained that written statements made by two witnesses, Jimmy Zaidie and Daphne Matadial, to the police and not disclosed before or during the trial had been wrongly withheld from the appellant and his advisers. Lord Lowry, delivering the opinion of the Board, made it clear that the Board was not laying down, in relation to Jamaica, "the comprehensive principles almost amounting to criminal discovery" and went on to observe:

> "A comparison of the statements with the evidence of the two important witnesses reveals a small but not insignificant number of discrepancies, only one of which was disclosed by the Crown to the defence. What their Lordships find still more important in this case is that important evidence was adduced which had not been foreshadowed in the depositions. They consider that it was the Crown's clear duty to give advance warning of that evidence by furnishing the three statements to the defence. Failure to do this was in their Lordships' view a material irregularity: Reg. v. Maguire [1992] 2 W.L.R. 767, 782."

It is not difficult to recognize the rationale for their Lordships' conclusion. Having been supplied with the depositions, the defence was entitled to act upon the premise

that the evidence contained in the depositions would be the evidence which would be presented at the trial and any substantial departure therefrom should be made known to the defence by supplying it with the statement or statements in which the new evidence was contained.

An examination of Eulett's statement, however, does not disclose any substantial departure from his evidence on oath. The case presented at the trial was substantially the same as that contained in the witness' statement to the police. Failure to make the statement available to the defence, in these circumstances, was not, in our view, a material irregularity.

In John Franklyn v. The Queen and Ian Vincent v. The Queen (unreported) P.C. Appeals Nos. 20 and 21 of 1992, delivered on the 22nd March, 1993, Lord Woolf, delivering the opinion of the Board, in commenting on section 20(6)(b) of the Jamaica Constitution, observed:

> "While the language of that subsection does not require a defendant always to be provided with copies of the statements made by prosecution witnesses where the provision of a statement of a witness is reasonably necessary for such purpose, it should be provided as being a facility required for the preparation of his defence. This is in accord with the views of Foxte, J.A. expressed in the unreported case in the Court of Appeal of Jamaica R. v. Bidwell (26th June, 1991) where he indicated that 'facilities' could include a statement of a particular witness and added that 'facilities' must relate to anything that will be required by the accused in order to aid him in getting his defence ready to answer the charge. It follows that the present practice of refusing to provide to the defence statements of proposed witnesses to a prosecution, as a matter of course, is inappropriate. Where a request is made for the disclosure of statements in a case which is to be tried summarily, if it is not a case only involving petty offences, the request should be carefully considered. If there are not circumstances making this course undesirable, for example because of the need to protect the witness, then the preferable course in the interests of justice is to disclose the statement."
>
> [Emphasis supplied]

The underlined words above make it abundantly clear that the prosecution is required to provide the defence with the statement of a witness in circumstances where such a statement is necessary to enable the defence to properly prepare its case to answer the charge preferred against the accused. The object of this ruling is to prevent the defence being taken by surprise, to their prejudice. Although their Lordships' Board in Berry's case (supra) categorically stated that they did not feel bound to accept, in relation to Jamaica, the comprehensive principles almost amounting to criminal discovery, it would, however, appear that in Franklyn's case (supra) their Lordships have now decided that once a request has been made for a statement by the defence and provided the offence is not of a petty nature, after careful consideration the request should be granted, if there are no circumstances which would make such a course of action undesirable. The thinking of their Lordships appears to be that making the statement available could be regarded as giving the accused adequate facilities to assist in the preparation of his defence, as required by section 20(6)(b) of the Jamaica Constitution.

We take the view that the failure to disclose the statements to the defence in the instant case in no way prejudiced the appellants. The notes of evidence indicate that the Crown opened to the case to obtain the order of trial on indictment and that the trial lasted for a period from July 29, 1991 to November 30, 1992. There were actually eighteen trial dates over this period of sixteen months; an ample time for the appellants and their legal advisers to deal with any matters of which they were unaware at the commencement of the trial, as Lord Woolf observed in John Franklyn v. R. and Ian Vincent v. R. (supra).

In any event, the appellant Beckford stated on oath that prior to the trial he was in possession of a copy of Glen Eulott's statement and had been privy to the contents of other statements given by proposed witnesses for the

prosecution. The fact that he might have come into possession of these statements from a source other than the prosecution would, in our view, be no barrier to the defence making such use of them if it was considered necessary to do so in order to ensure the appellants a fair trial. Evidence obtained unlawfully or through an unfair act has been held admissible when tendered by the prosecution, see R. v. Leatham (1861) 8 Cox CC 498 and Kuruma v. R. (1955) A.C. 197. There can be no valid basis for limiting this rule to evidence sought to be tendered or used by the prosecution. In the circumstances of this case, the complaint that the constitutional rights of the appellants were breached is wholly untenable.

Ground 3:

In this ground the appellants complained that they were not afforded a fair hearing according to section 20 of the Constitution in that the court took the decision to proceed with the trial in the absence of one or more of the defendants and or his counsel.

On August 1, 1991, the second day of hearing, Mr. Altheus Hines produced a medical certificate on behalf of the appellant Manning indicating that Manning was suffering from asthma and requested that the matter be adjourned. After hearing from both sides the learned Resident Magistrate decided that the trial should proceed.

On August 8, Mr. Hines, once more, reported that Mr. Edwards, Q.C. was off the island to obtain medical treatment. He further submitted another medical certificate on behalf of the appellant Manning. Mr. Lyn Cook, for the appellant Beckford, not to be outdone, produced a medical certificate indicating that Beckford was ill. Both counsel applied for the hearing to be adjourned on the ground of their clients' illness as well as Mr. Edwards' inability to be present. The applications were refused. Obviously, this was an orchestrated plan to subvert the judicial process. Subsequent events clearly support this view. Counsel refused

to participate in the hearing and a writ of prohibition was issued in the Supreme Court to restrain the Magistrate from further participating in the trial. The application for the order of prohibition met the fate it so richly deserved. It was dismissed.

It is settled law that a judge has a discretion to continue a trial in the absence of the defendant even if his absence is occasioned by illness. Albeit, this discretion is to be sparingly exercised and never if the accused's defence could be prejudiced by his absence. See R. v. Howson (1982) 74 Cr. App. R. 172 C.A.

In R. v. Lloyd Chuck (unreported) R.M.C.A. No. 23/91, delivered on July 31, 1991, this court had to consider whether or not a Resident Magistrate had the power to hear any case in the absence of the accused. In answering the question, Carey, P. (Ag.) said:

> "The procedure in respect of trials on indictment in the Resident Magistrate's Court is the same as before Justices of the Peace. Section 282 of the Judicature (Resident Magistrates) Act provides as follows:
>
> 282: Save as is herein expressly provided, the procedure before any Court at the trial of any indictable offence shall be the same, as near as may be, as in the case of offences punishable summarily.
>
> The Justices of the Peace Jurisdiction Act which governs the trial of offences summarily allows trial in the absence of the accused in the discretion of the justices. See section 12 of the Act."

There can be no doubt that the Resident Magistrate does have the power to try an accused person in his absence. The real question therefore is whether the discretion which accompanies that power was properly exercised. The circumstances in which the discretion was exercised would, therefore, be of paramount importance.

The appellants were afforded the opportunity to cross-examine all the witnesses whose testimony was adduced in their absence. From the nature of the cross-examination, it

is manifestly obvious that the absence of the appellants did not in any way prejudice the presentation of their respective cases. We, therefore, conclude that the Magistrate had properly exercised her discretion when she ruled that the trial should proceed in the absence of two of the appellants and Mr. Noel Edwards, Q.C. They were not in any way prejudiced by the ruling.

Ground 4:

In this ground, the complaint is that evidence which was inadmissible and highly prejudicial to the appellants was received into evidence. Sergeant Colquhoun testified that he heard Cecil Hewitt, the defence witness, telling Glen Eulatt in the absence of the appellants that:

> "You a go dead, you make them remand Manning dem."

This evidence, it was argued, was hearsay. When it was pointed out to Mr. Chuck that the evidence was properly admissible as to the fact of the words having been used as distinct from being evidence of the truth or falsity of the statement he conceded that in that event there was no basis for complaint. With that view we agreed entirely.

Finally, we were urged to reduce the sentence as the appellants had been in custody since September 12, 1991. Each of the appellants was sentenced to be imprisoned at hard labour for fifteen months as of November 30, 1992. Prior to sentence the appellants would have been in custody for a period of fourteen months. Since sentence they have been in custody for six months, so to date they have been in custody for twenty months. The record of appeal was filed in the Court of Appeal Registry on March 15, 1993, some four months after the date of conviction. All things being equal, the appellants would have been required to serve ten months of the fifteen months imposed. So at the time of the hearing of this appeal they had already served six months of the ten months. In all the circumstances of the case, we were of the view that the twenty months in custody

was adequate punishment for the crime. We, therefore, imposed a sentence which would cause the appellants to be released on May 27, 1993.

Before parting with this appeal, we cannot help observing that the period spent in custody was due in a large measure to the conduct of the appellants and their counsel. It was patently clear that a plan had been effected to delay the trial. That officers of the court could engage themselves in such unseemly behaviour is a matter to be deprecated. The learned Resident Magistrate, on the other hand, must be commended for the patience and restraint which she exhibited in the very trying circumstances.

It is for the afore-mentioned reasons that we dismissed the appeals and affirmed the convictions but varied the sentence by imposing a sentence which would cause the appellants to be released on May 27, 1993.