

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 11/92

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

REGINA VS. CLIPHANE O'CONNOR
ERROL WOODS

Delroy Chuck for O'Connor

Garth Lyttle for Woods

Miss Diana Harrison Deputy Director of Public
Prosecutions for Crown

4th & 18th May, 1992

CAREY, J.A.

These appellants are members of the Jamaica Constabulary Force who were convicted on 17th June, 1991 for the offence of neglect of duty contrary to common law in the Resident Magistrate's Court, Clarendon and sentenced to pay fines. We heard arguments on their behalf on 4th May when we dismissed the appeals intimating that we would put our reasons in writing. These now follow.

Both these police officers were stationed at the Lionel Town Police Station in Clarendon where O'Connor held the rank of Corporal and Woods that of a Sergeant. In the early morning of 2nd June, 1989 Archdeacon Wright, the Rector of St. Peters Church, Alley who lives at Alley and had been living there for a considerable number of years, called the police station at Lionel Town to advise that his house was being broken into. He made a total of five calls between 1:00 to 2:00 a.m. the last of which was broken off when one of the intruders cut the line. He called before the intruders broke in, while they were breaking in, and eventually after they had succeeded in doing so. Although he was given assurances on each occasion of police assistance, the assurances remained mere promises. The Archdeacon's house was

ransacked, electrical appliances, cutlery, a typewriter and a miscellany of other items were stolen. In addition, he was trussed, gagged and left to lie on his back in a bath tub. He managed to free himself and got to the police station at between 5:30 to 6:00 a.m. He returned home but up to 9:00 a.m. no police officer had reached the Rectory which is no more than two miles from the station.

These telephone calls for help from the Archdeacon were received by District Constable Josephs, who was the station guard on duty at the material time. There were also on duty at the station at the material time, Corporal Thorpe, the duty sub-officer in charge and Constable Turner, in reserve. District Constable Josephs testified that he received four calls which he relayed on each occasion to the duty officer, Corporal Thorpe. This officer, on receiving the station guard's first of four messages, spoke with Corporal O'Connor. He explained that a message had been received advising that thieves were breaking into a parson's residence and that he was wanted as a "force driver." A "force driver" is an officer authorized to drive police vehicles. This appellant replied that he could not go. Subsequently, Corporal Thorpe returned to this appellant and again informed him of the burglary taking place, requested his assistance, suggesting as a last resort that he should lend the keys for the Alcoa vehicle i.e. a vehicle loaned for police work by Alcoa, so that he could find a driver. The appellant declined to hand over the keys on the ground that he would be in trouble if anything happened to the vehicle.

When the third call was made, Corporal Thorpe went to seek help from Sergeant Woods, the other appellant who was the senior officer at the station. Sergeant Woods was advised of the nature of the problem but his response was that he could not go. He was again approached by Corporal Thorpe for assistance with the same result.

The Resident Magistrate found that there was a serviceable police vehicle at the police station during the relevant time.

In his defence, the appellant O'Connor said that from 9:00 p.m. he was assigned special duties viz., to patrol between the hours of 11:00 p.m. and 5:00 a.m. at the Alcoa Mineral Plant because of the high incidence of robberies at the plant. On the night in question, he went on patrol, returned to the station and placed himself on stand-by. He admitted being pressed into service by Corporal Thorpe and gave as the reason for his refusal the special assignment. He thought that had he disobeyed the special order, he would lose his job.

So far as Sergeant Wood's defence went, he swore that he was not spoken to, by Corporal Thorpe. The Resident Magistrate did not believe him. That was a matter for her and we see no reason to disagree.

Mr. Chuck who appeared on behalf of O'Connor, argued that the verdict was unreasonable and could not be supported having regard to the evidence. As we understood his arguments, he contended first, that the evidence did not demonstrate that the crime being committed was of such gravity as to override the appellant's assigned duty. He said further, that the appellant had justification and reasonable excuse for refusing, in that he had been assigned duty to stand-by for Alcoa.

Mr. Lyttle was allowed to file a number of supplementary grounds of appeal but in the event, was not able to support them, save to suggest that it was a misconception that a policeman was always on duty.

We begin by referring to a correct statement of the law regarding misconduct on the part of public officers. It is to be found in the headnote of R. v. Dytham [1979] 1 Q.B. 722 and reads:

"...the offence of a public officer wilfully neglecting to perform a duty which he was bound to perform by common law or by statute involved that the neglect had to be wilful and not merely inadvertent, and had

"to be culpable in the sense of being without reasonable excuse or justification; that the element of culpability was not restricted to corruption or dishonesty but had to be of such a degree that the misconduct impugned was calculated to injure the public interest so as to call for condemnation and punishment; that it was for the jury to decide whether the evidence revealed the necessary degree of culpability;"

We do not suppose that there could be any doubt that the failure of these appellants to respond to the call for help by a householder whose house was being broken into at 1:00 a.m. was not misconduct calculated to injure the public interest and to call for condemnation and punishment. The learned Resident Magistrate was required to determine in the case of Woods whether he was on duty so that he was obliged to fulfill his common law or statutory duty and in the case of O'Connor whether he had shown justification or given a reasonable excuse.

Section 13 of the Constabulary Force Act in prescribing the duties of a police officer provides as follows: (so far as is relevant)

'13. The duties of the Police Officer under this Act shall be to keep watch by day and by night, to preserve the Peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence,...."

These provisions show what a police officer is entitled to do, that is, what are his duties but does not answer the question when he is on duty. For example, is he on duty if he has been granted leave of absence or when any prescribed tour of duty has ended? We think a police officer is "on duty" when the particular occasion or circumstances warrant his performing the duties appertaining to his office. In coming to this conclusion, we derive some assistance from Davis v. Minister of Pensions [1951] 2 All E.R. 318 which

Miss Harrison's researches brought to light. The circumstances of that case are altogether different from the instant case but the Court there considered the question, when is a constable on duty? Is he always on duty? Ormerod, J., at p. 319 expressed his opinion in these words:

"...When the prescribed hours of duty of a constable have come to an end and an emergency arises it is his duty to attend to that emergency, and at that moment he is on duty ... but until such an emergency arises he is in the position of any other civilian."

We think this view of the learned judge is correct. To answer the question directly of whether a policeman is always on duty, the answer must be in the negative. But if he is off duty and an emergency arises, immediately he is called to arms he must take action pursuant to section 13 of the Constabulary Force Act.

With respect therefore to the appellant Woods who was in the barracks and off duty when he was called upon, he was obliged as the senior officer to respond. It did not mean in the circumstances of the case that he was compelled himself to leave the police station but he was entitled to issue such orders or instructions as would meet the emergency which had arisen. He was not entitled to say that he was off duty. That would not be a defence to the charge for the reasons we have adumbrated.

In the case of O'Connor, he sought to justify his refusal on previous prescribed duties. The question for the Resident Magistrate is whether this was a reasonable excuse. She dealt with the matter in her findings thus:

" Court finds the duty O'Connor performed that evening lasted 25 minutes which included his travel time to and from Alcoa and then he signed himself in station as reserve - that the emergency that evening arose at Alley - that, what with prisoners in custody, no Force Driver on duty, those persons assigned to duty at Lionel Town Police Station could not cope - O'Connor then the only