[2012] JMCA Crim 49

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 8/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA

ELORDA SMITH &
EVERTON GOULBOURNE v R

Miss Deborah Martin for appellant Goulbourne

Elorda Smith not appearing or represented

Loxly Ricketts for the Crown

7 and 8 May and 28 September 2012

McINTOSH JA

[1] Elorda Smith and Everton Goulbourne were convicted in the Resident Magistrate's Court for the parish of Westmoreland on 21 February 2011, the former for the offence of corruptly accepting "the sum of $45,000.00 from Jerome Dalling as a reward in order to forbade [sic] the prosecution of the said Jerome Dalling for an alleged breach of the Larceny Act" and the latter for the offence of corruptly soliciting the sum of $50,000.00

from the said Jerome Dalling for the same purpose, contrary, in each case, to section 14(1) of the Corruption Prevention Act (the Act). After the guilty verdicts were entered Elorda Smith was sentenced to pay a fine of $250,000.00 while Everton Goulbourne was sentenced to pay a fine of $200,000.00, each with an alternative of six months imprisonment at hard labour if the fines were not paid.

[2] Both appellants filed notice and grounds of appeal on 25 February 2011 challenging the learned Resident Magistrate's decision. However, after filing his notice and grounds of appeal, Mr Smith took no step in furtherance of his appeal.

The prosecution's case

[3] Jerome Dalling (hereafter the complainant) gave evidence of an incident which took place, he said, between 1 April and 17 May 2007, at about 6:30 to 7:30 pm, in Savanna-la-mar, Westmoreland. He had parked his minibus on the roadway and eventually went into his aunt's hairdressing shop on the said road, leaving a few passengers in the bus, one of whom was his girlfriend. While in the shop he observed a white jeep with the appellant and Mr Smith aboard. They were known to him as police officers and he recognized the jeep they were travelling in as a government vehicle which he had seen before. Observing that it had stopped in front of his bus, the complainant said he left his aunt's shop and walked towards the bus, whereupon he was summoned by Mr Smith who remained seated in the jeep. The complainant said Mr Smith then questioned him about ownership of the bus and requested the vehicle documents, which he produced.

[4] The complainant further testified that after Mr Smith perused the documents he handed them to the appellant who then approached him and engaged him in conversation for about 15 minutes. The appellant told him that the licence plates on the vehicle bore letters that had not yet been issued and indicated that the minibus was going to be seized by the police. Thereafter the appellant requested the keys for the vehicle and drove it away. According to the complainant Mr Smith then gave him the appellant's cellular telephone number as well as his own number. The vehicle documents were never returned to him.

[5] Later that evening he went to the Savanna-la-mar Police Station and spoke to two police officers there concerning the matter but no statement was recorded from him. He said from the night of the incident and during the weeks that followed, he exchanged telephone calls with the appellant and with Mr Smith. He was able to recognize the voice of the appellant as he had heard it before and when it was suggested to him in cross-examination that he did not know the appellant's voice he responded, "I know Mr Goulbourne very well. I know his voice. I speak to him face to face not only on the phone." It was his testimony that during one of the telephone conversations with the appellant he was told that he was facing 10 charges but when he asked what those charges were, the appellant did not respond. The complainant further testified that the appellant then requested payment of $50,000.00 to "drop the charge" but he told the appellant that he did not have $50,000.00. This request was subsequently pursued by Mr Smith in several telephone conversations with the complainant in which Mr Smith told him that time was running out for the payment of

the $50,000.00. Eventually, the complainant handed over the sum of $45,000.00 to Mr Smith and later made a report at the police Anti-Corruption Branch in Kingston.

[6] Among the other witnesses called by the prosecution was the investigating officer, Sergeant Redway, who gave evidence of the requirement to make entries in the appropriate station diaries and property registers by officers involved in the recovery of stolen vehicles or seizure of vehicles. He testified that in the instant case, there was an entry in the station diary at the Frome Police Station (exhibit 2) to the effect that: (i) the minibus was examined by forensic experts and confirmed to be a vehicle reported stolen on 15 June 2006; (ii) it was recovered on 2 April 2007 and (iii) it was handed over, at the request of an insurance company, to its insured.

The case for the defence

[7] At the close of the prosecution's case the attorney who then represented the appellant Goulbourne unsuccessfully submitted that the prosecution had failed to make out a prima facie case against him and the appellant was called upon to answer the charge. He elected to give evidence on oath in which he confirmed his participation in the seizure of the complainant's minibus, sometime in April of 2007. However, he denied having any subsequent conversations with the complainant and produced copy telephone bills for his cellular telephone service during the period April and May 2007 as evidence that no calls were made from his cell phone to the complainant's cell phone as alleged. The appellant also testified that he had no discussions with his co-accused Elorda Smith about collecting money from the complainant.

[8] The prosecution objected to the attempt by the appellant's attorney to have the copy documents admitted into evidence on the basis that there was no evidence as to their authenticity and there was the possibility that they might have been subjected to tampering. However, although disagreeing with defence attorney's submission that they were admissible as an exception to the hearsay rule, the learned Resident Magistrate nevertheless admitted the copy documents as exhibit 7. These documents were later shown to the complainant who admitted that he did not see recorded on them any calls being placed to his cell phone from the appellant's cell phone.

[9] In cross-examination the appellant said he learnt that the minibus was reportedly a stolen vehicle 13 days after its seizure but took no steps to contact the complainant in this regard. He also testified that he had made no entry in the station diary either at the Frome or the Savannah-la-mar police stations concerning the seizure of the minibus. He thought that Mr Smith had done so.

The grounds of appeal

[10] The appellant filed a total of 11 supplemental grounds of appeal on 2 May 2012 and these formed the basis of the arguments advanced on his behalf. They are set out below in their entirety.

> "1. That the Learned Resident Magistrate (LRM) erred in not upholding the No Case Submission made on behalf of the Appellant: -
>
> The submissions were that:-

(i) the evidence of the Complainant had not met an acceptable threshold to form the basis for voice identification,

(ii) the contradiction in the evidence between what the Complainant said and the telephone records was such that the Complainant was so manifestly discredited that the Appellant ought not to have been called upon to answer to the charge.

2. That the LRM erred when she found as a fact, having regard to the evidence, that the Appellant departed from his duty when he failed to charge the Complainant or return the motor vehicle in circumstances where there was uncontradicted evidence that:-

(i) the vehicle had been given to the legal owner BCIC,

(ii) that the Complainant for the larceny had no interest in pursuing the criminal matter or,

(iii) that the Complainant Dalling was not considered a suspect to the larceny or receiving of the vehicle.

3. That the LRM erred when she found as a basis for rejecting the admission of Dalling that he did not see his phone numbers on the copy bills presented to him, that 'calls to Goulbourne were on a private number' (see pg. 130 of the record). That the evidence of the Complainant was that numerous calls were placed to and from the Appellant's cellular phone and his, and that the Appellant had also called from a private number (see pgs. 12-13 of the record).

4. The LRM erred in finding that Exh. 2 did not indicate who made the entry on the 2nd May, 2007, when the entry states on the face of it that it was made by the Appellant Goulbourne. She further erred in finding that the entry did not state how the bus came to be in the custody of the Police; it states 'it was recovered on April 2007'.

5. The LRM erred in finding that the Appellant 'ab initio' departed from known duties and rules of the Police (see pg. 132 of the record) in circumstances where: -

(i) Sgt. Gray gave evidence about his investigations into the initial larceny,

(ii) there is evidence that the vehicle was returned to the legal owner, and,
(iii) there was uncontradicted evidence from the appellant Smith that the Complainant was never viewed by them as a suspect for any offence.

6. The LRM erred in finding that 'Smith said that it as [sic] his intelligence and investigations which led to the arrest of Mr. Bitter 'Last February', and that this was 'incredible', 'untruthful', and 'an attempt at damage control' (pg. 132 of the record) when the evidence was that the seizure of the motor vehicle was based on intelligence he got from [sic] informant relating to Bitters (pg.33), and that Bitters was held and charged after his, [sic] Appellant's arrest in February, for a charge not relating to Dalling.

7. The LRM erred in finding that the corruption was to,

(a) do that which they could not - return the stolen bus to Dalling or (b) not to do that which they should charge Dalling for offences when;

(i) the allegations outlined in the evidence was [sic] that 'Goulbourne said he have ten charge for me' without specifying what the charges were, and

(ii) Goulbourne was asked to explain circumstances of handing over to BCIC, the proven owner and never asked to answer to allegations of soliciting,

(iii) there was no basis for charging Dalling.

8. That the LRM erred in deciding in her reasons that she would be attaching no weight to Exhibit 7 (pg. 133 of the record), the copy phone records after accepting into evidence the response of the witness Dalling when shown the records, and after admitting them as exhibits;

(i) without advising Counsel of her concerns so that steps could be taken to address them, thereby prejudicing [sic] Appellant,

(ii) without there being any evidence to ground the basis of her concerns, and

(iii) in circumstances where their content had been put to the Complainant and he had responded.

9. That the LRM erred in not assessing the evidence of voice identification of the Appellant by the witness Dalling in circumstances where, though it was agreed that though he had sight of the Appellant there was no evidence as to what he relied on to satisfy himself that it was the Appellant's voice on the phone especially in circumstances where there was nothing else to support the assertion of the calls and so much to contradict it.

10. That the LRM erred in finding that the Appellant omitted to do an act; or did an unlawful act (pg. 135) as these were requirements for a breach of Sec 14(1)(b) of the Corruption Prevention Act, and proceeding to convict for breaching Sec 14 (1)(a) of the said Act.

11. That the Information Number 3462/08 was bad in that it alleges a breach of Sec 14(1) of the Corruption Prevention Act, an act with three (3) subsections, each defining a separate offence, and thus denying the Appellant the ability to know specifically the allegations he had to meet and further leading the LRM into errors in her assessment and conclusions based on the totality of the evidence."

Arguments and analysis

Ground one

[11] It was the contention of Miss Martin that at the close of the prosecution's case there was no sufficient evidence amounting to a prima facie case of voice recognition and as this was one of the highlights of the no case submission, it ought to have been upheld. Additionally, the submission focused on the contradictions in the testimony of the complainant pertaining to the alleged telephone calls and in the face of the appellant's telephone records for the relevant period, the complainant was so manifestly

discredited that the appellant ought not to have been called upon to advance a defence.

[12] On the other hand, Mr Ricketts argued on behalf of the Crown that the approach of the learned Resident Magistrate was correct and in keeping with the established guidelines for accepting or rejecting a submission of no case as outlined in Lord Parker's Practice Direction [1962] 1 WLR 227. It was his contention that the main issue in the instant case was credibility and that was to be determined by the magistrate, as tribunal of fact, at the end of the day. When the prosecution closed its case, counsel submitted, all the elements of the substantive charge had been satisfied and the learned Resident Magistrate had correctly ruled that the trial should continue.

[13] We are of the view that the learned Resident Magistrate was well within her right to reject his no case submission and to call upon the appellant Goulbourne to answer the charge. Our courts have approved and consistently applied the principle in Lord Parker's Practice Direction when determining whether or not such a submission should be upheld. According to Lord Parker's formulation of the principle:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it."

Authorities such as **R v Galbraith** [1981] 2 All ER 1060 and **Taibo (Ellis) v R** (1996) 48 WIR 74 reinforce the principle providing further guidance to trial judges whether

sitting alone or with a jury. Chief Justice Lane's formulation of the principle as captured in the head note in **Galbraith** is set out below:

> "On a submission of no case to answer at the end of the prosecution [sic] case the trial judge should stop the case and direct an acquittal if there is no evidence that the crime alleged against the accused was committed by him. However, if there is some evidence but it is of a tenuous character (eg because of inherent weakness or vagueness or because it is inconsistent with other evidence), it is the judge's duty, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it; but where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty then the judge should allow the matter to be tried by the jury."

And in **Taibo** it was held, following **Galbraith**, that on a submission of no case to answer the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is not only entitled but is required to allow the trial to proceed. This criterion would be of general application whether the tribunal of fact to be satisfied is a judge sitting alone or a jury.

[14] In the instant case the complainant's evidence had not been so discredited as a result of cross-examination nor did it appear to have been so manifestly unreliable as to warrant withdrawing it from the magistrate's jury mind. There was evidence for her consideration on the issue of voice identification and it was for her as tribunal of fact to

assess such contradictions and inconsistencies as she found, within the context of the witness' level of intelligence and ability to recall details accurately, with particular reference to the passage of two years between the date the incident occurred and the date the witness was giving evidence of it. Only after this exercise would the learned Resident Magistrate be required to come to a conclusion as to their impact on the credibility of the complainant, with due regard to the totality of the evidence. In our opinion, the submission of no case to answer was properly rejected and accordingly ground one fails.

Grounds two and five

[15] It is convenient to combine the arguments in relation to these two grounds. They involved complaints that the learned Resident Magistrate fell into error in her conclusion that the appellant Goulbourne had departed from known duties and rules of the police force when he failed to charge the complainant, or return the minibus to him in circumstances where it was established that the vehicle had been stolen and was returned to its legal owner who had no interest in participating in any criminal prosecution. In addition, Miss Martin argued, the complainant was never even considered by the police to be a suspect in the larceny of the vehicle or as its receiver.

[16] However, Mr Ricketts contended that this amounted to a misunderstanding of the learned magistrate's findings as she made no findings relating to any failure to charge the complainant. According to Mr Ricketts, the magistrate's findings clearly related to the failure of the officers to make appropriate entries in the station diary

concerning the seizure of the vehicle, in accordance with the strict duty which was theirs as part of legitimate investigations in such circumstances. Counsel submitted that the learned magistrate also commented on what appeared to be the stance taken by the two officers, in seeming to suggest that their inaction was based on the instructions of the officer who initially investigated the larceny of the vehicle. The learned Resident Magistrate had correctly reasoned that there was no evidence that that officer had instructed them not to make the appropriate entry and not to put the person found in possession of the vehicle before the court, counsel submitted. Further, he contended, the learned magistrate also pointed out that the lack of interest of a complainant did not preclude the matter being taken to court as it would then be for the court to take the necessary action in that regard. It was in the context of those observations, Mr Ricketts submitted, that the learned magistrate expressed the view that the appellant had departed from his duties and the rules governing police investigative procedures.

[17] We are of the view that Mr Ricketts' submissions are correct. The learned Resident Magistrate clearly found it significant that prior to its seizure the police seemed to have had an interest in the vehicle (see page 130 of the record), yet when the vehicle was seized, found to have been stolen and tampered with and bearing false licence plates, no charge was laid against the complainant in whose possession it was found. She referred to section 13 of the Constabulary Force Act as providing authority to the police to arrest on reasonable suspicion of an offence being committed and expressed the view that in the circumstances of the instant case there was basis for

reasonable suspicion of the commission of an offence such as receiving under the Larceny Act.

[18] The duties which the learned magistrate found that the appellant and Mr Smith departed from, however, were not concerned with any failure to charge the complainant or to return the bus to him. The learned Resident Magistrate accepted the evidence of Sergeant Redway concerning the duty to make records in the relevant station diaries and general property registers in the course of legitimate investigations involving seized or stolen motor vehicles and, inasmuch as, on his own admission, the appellant had seized the complainant's bus and had made no entry in the relevant police record, he had failed to follow the established procedures. Thus, at finding number 8 the magistrate wrote:

> "That both Mr Smith and Mr Goulbourne departed from the strict duties incumbent upon them as police officers in a legitimate investigation to make entries in the station diaries or general property books regarding their seizure of the bus."

The complaint in grounds two and five is clearly without foundation and cannot be sustained.

Grounds three and eight

[19] These grounds concern the rejection by the learned Resident Magistrate of the copy bills introduced into the evidence by the appellant, based on her finding that they were of no evidential value. Miss Martin argued that this was an error in the face of the complainant's acceptance that the documents were the appellant's cell phone bills and

that they did not disclose any calls made from the appellant's cell phone to his cell phone, as this was contrary to his evidence in chief that there had been several phone calls made to him from the appellant's cell phone and from a private number in addition to calls made by him to the appellant's cell phone number. The appellant was further aggrieved that after admitting the documents into evidence, the learned magistrate rejected their contents without alerting the defence to her concerns about their deficiencies.

[20] Miss Martin submitted that in circumstances where the complainant accepted that the calls were made from cell phones, it was unfair for the learned magistrate to say that the calls must have come from a private line. It was her contention that the complainant resiled from his position that the calls were made from a cell phone only when the documents shown to him did not support that and the learned magistrate ought to have demonstrated in her analysis of the evidence why she rejected the initial evidence of the complainant. Further, Miss Martin contended, the rejection of the copy bills caused severe prejudice to the defence.

[21] In his response, Mr Ricketts pointed out that the documents were arguably incorrectly admitted into evidence as they were tendered for the truth of their contents to challenge the evidence of the complainant and thus constituted inadmissible hearsay. In addition, counsel contended, the documents failed to satisfy the requirements of section 31G of the Evidence Act and the learned Resident Magistrate, although accepting that they were evidence, rightly decided not to accord them any weight, giving her reasons for so deciding. Mr Ricketts also pointed out that the documents did

not satisfy the best evidence rule, being photocopies. He submitted that in her review of the evidence the learned Resident Magistrate had resolved that there was communication between the appellant and the complainant and in so doing had addressed her mind to the evidence of when the calls were made in comparison to the call records (see page 3). There was therefore a sufficient analysis of the evidence relating to this issue, counsel submitted and consequently, there is no merit in these grounds.

[22] It is well settled that matters concerning the weight to be accorded to evidence presented in a trial are for the tribunal of fact. Once evidence has been ruled as admissible it becomes a matter for the tribunal to determine what weight, if any, should be accorded to it. In the instant case, the obstacles to the acceptance of the contents of the documents, pointed out in the magistrate's finding, are undoubtedly matters of substance entitling the magistrate to determine that they had no evidential value. These were matters which ought to have been within the contemplation of the appellant's then attorney and the onus would therefore be upon counsel to take the appropriate steps to remedy the deficiencies. It is no part of a magistrate's function to advise the defence on how to present its case.

[23] Miss Martin had sought to rely on the case of **John Eric Spiby** (1990) 91 Cr App R 186 where it was held that computer printouts produced without the intervention of a human mind were real evidence outside of the scope of the relevant English legislation governing admission of documentary evidence of information fed to a computer by a human being and, as there was evidence that the computer was functioning correctly at

the material time, the evidence was admissible. In the instant case there was no evidence as to how the printouts were produced or whether the computer from which they were generated was functioning correctly (requirements of section 31 G of the Evidence Act) so that **Spiby** is of no assistance to the appellant.

[24] Having rightly rejected the contents of the documents, as it appears to us, the learned Resident Magistrate had only the viva voce evidence for her consideration. Hers was the task of determining where credibility was to be found and in coming to that determination she had the important advantage of seeing and hearing the witnesses. Based upon her assessment of the evidence she accepted that the calls of the appellant to the complainant on a private number were not made from the number which was the subject of the copy documents. She rejected the denials of the appellant and expressed, in her findings, her satisfaction that the complainant was a credible and honest witness upon whom she could and did rely. She believed his evidence that the calls were made, and copy bills which were unsupported by any certification of authenticity or accuracy could not displace that. We see no basis to disturb her findings on this issue and grounds three and eight therefore cannot succeed.

Ground four

[25] In our view ground four is entirely misconceived. Firstly, it is not correct to say that the diary entry – exhibit 2 – indicated on its face that it was made by the appellant. It is true that his name was stated in the entry but that is no indication that it was made by him and it is his evidence that he made no entry in the diaries at either Frome

or Savanna-la-mar police stations, the two relevant stations in this matter. Even in the face of the admission of Sergeant Redway's extract from the station diary at Frome Police Station, as exhibit 2, the appellant maintained in his evidence that he had made no diary entry. Further, we agree with the magistrate's finding that the entry did not state how the bus came to be in the custody of the police. The entry only indicated when the bus was recovered and not how. In any event, the defence could not rely on Sergeant Redway's extract of this entry for the truth of its contents as it infringed the rule against hearsay and the learned Resident Magistrate correctly placed no reliance on its contents. According to Mr Ricketts, the prosecution had introduced it into evidence not for the truth of its contents but simply to show that that was the only diary entry in the matter and its authorship had been denied by the appellant. This ground is unsustainable.

Ground six

[26] Ground six concerns the learned magistrate's finding on the lack of credibility in the defence of Mr Smith and, in his absence, it seems to us that any comment in this regard would be entirely inappropriate.

Ground seven

[27] The appellant criticized the learned Resident Magistrate's finding that the corruption was to do that which the appellant and his co-accused could not do, namely to return the bus to the complainant or not to do that which they should, which was to

charge the complainant for an offence or offences. This was an error, Miss Martin submitted, because the allegation was as to 10 charges being laid without specifying what those charges were and the request for his comments on the matter was concerned only with the circumstances of the return of the vehicle to the insurance company with no mention of any allegation of soliciting.

[28] In addition, Miss Martin contended, there was no basis for charging the complainant. Although there was evidence at the trial that the bus was stolen, Miss Martin argued, there was nothing to indicate that the complainant was told this. The complainant was told about driving the bus with false licence plates, engine tampering but nothing to indicate that he was ever a suspect with regard to a charge of larceny. It was Miss Martin's further contention that returning the bus to the complainant would have been an act of corruption so that, in effect, the charge would mean that the appellant would have been soliciting payment for not doing an act of corruption. Counsel submitted that in circumstances where: (i) on the prosecution's case the insurance company claimed the bus as owner; (ii) Sergeant Gray confirmed to Sergeant Redway that the bus had been stolen in Montego Bay; (iii) Mr Smith testified that the complainant was never a suspect; and (iv) there was nothing to indicate that the complainant was a receiver or was a suspect with regard to a charge of larceny or even an offence under the Road Traffic Act, it was unclear why the learned Resident Magistrate felt that there was a failure to act on the part of the appellant.

[29] Mr Ricketts' answer was that the learned Resident Magistrate's reasons and findings were in keeping with the principles to be distilled from the judgment of this court in **Dewayne Williams v R** [2011] JMCA Crim 17. The learned magistrate made it clear,

counsel submitted, that the corrupt action of the appellant was that he, with full knowledge of the bus being stolen and the claim being settled by the insurance company, threatened to charge Dalling unless $50,000.00 was paid (finding 9). It was his further contention, relying on dictum in **Dewayne Williams**, that it was not necessary for the prosecution to prove that the appellant who had requested the money did that which he was bribed to do, so that the magistrate had correctly found that even if the appellant and his co-accused had no reason to press charges against the complainant or could not return the bus to him that did not make their action any less corrupt, "for the policemen knowingly acted dishonestly and corruptly".

[30] We find merit in the submission of Mr Ricketts and agree that the learned magistrate's finding of corruption on the part of the appellant is unaffected by the absence of the specifics of the 10 charges with which he threatened the complainant. The appellant was charged with corruptly soliciting the sum of $50,000.00 as a reward for not prosecuting the complainant for an alleged breach of the Larceny Act. The evidence disclosed circumstances which had the makings of such a breach in that a stolen minibus was found in the complainant's possession bearing fake licence plates and subsequently found to be the subject of engine tampering. The complainant was told that the plates were not genuine and that there had been engine tampering. That surely was sufficient to cause a reasonable person to apprehend that he may be regarded as being involved in some criminal way in what had been disclosed to him and this is borne out by the evidence of Mr Smith that in several of their telephone conversations the complainant asked if he was going to be in any trouble about the bus so that when the appellant told him that there were charges for him to face in this matter and in effect,

threatened to prosecute them unless he was paid $50,000.00, the fact that specifics of the charges were not given had no impact on the elements of the charge of soliciting which the learned magistrate found to have been proved.

[31] In our opinion, the return of the vehicle to the insurance company and the alleged lack of interest in prosecuting a criminal charge on the part of the owner of the stolen vehicle were no bar to proceedings being brought before the court. Criminal prosecutions are not dependent on the interest or lack thereof of complainants. It is indeed arguable whether the stolen vehicle when recovered ought to be returned to the owner without recourse to the court in circumstances where the police clearly had a suspect in mind and ought to have had criminal proceedings in their contemplation. The task of the police is to investigate and on the conclusion of their efforts to take the case before the court, not to adjudicate upon the matter at the police level. The learned magistrate was clearly not impressed with the assertion of the defence that the complainant was not considered a suspect as, in her view, the circumstances gave rise to at least reasonable suspicion upon which to base a charge against him and it seems to us that on the evidence there was nothing irrational about such a conclusion. There was no evidence that the officers told him that he was not a suspect. In any event, all that was needed were circumstances which could give rise to prosecution and for that to be used to the advantage of the solicitor. The solicitor need have had no plan to actually prosecute. All that was needed was a factual background that could give rise to criminal charges (see **Dewayne Williams**). Ultimately, we concluded that the complaints in ground seven cannot succeed.

Ground nine

[32] The appellant's complaint in this ground is the absence of a careful analysis of the evidence as to the complainant's ability to recognize his voice. Miss Martin submitted that it was accepted that the complainant and the appellant had seen each other before, at a roadblock and that they had spoken, though the date of that encounter is unclear. It was also admitted, counsel said, that there was some conversation on the occasion of the seizure of the bus but without more, that was not sufficient for voice identification. Miss Martin argued that in circumstances where there were contradictions, discrepancies and inconsistencies as to whether or not calls were made, there should have been a careful demonstration in the evidence and in the analysis of the learned Resident Magistrate that she had assessed the basis for the complainant's ability to identify the appellant's voice. Counsel submitted that there was no such analysis and the evidence did not disclose a sufficient basis for the magistrate's finding that the appellant was correctly identified as the caller who threatened to charge the complainant unless the sum of $50,000.00 was paid.

[33] Mr Ricketts did not share Miss Martin's view as it was his contention that the learned Resident Magistrate thoroughly dealt with the relevant considerations and principles regarding voice identification assessing the evidence in terms of the appropriate length of time the voice was heard, the number of words used and the length of the conversation. Further, counsel submitted, the learned magistrate considered and rejected the defence's challenge to voice identification via telephone on

the basis that there could be distortion in the sound of the voice as to make its identification unreliable and quite rightly disagreed with the submission that "a telephone voice is so different/distorted that Dalling could not possibly say the voice he heard was that of Goulbourne's." The learned Resident Magistrate made it clear, Mr Ricketts submitted, that she accepted the complainant's evidence that the voice of the caller who solicited the $50,000.00 was that of the appellant.

[34] It is not in dispute that the learned Resident Magistrate was correct in her reasoning that the case against the appellant depended on the evidence of the complainant's recognition of his voice as that of the person who solicited the sum of $50,000.00 (page 6). In coming to her conclusion that the evidence disclosed sufficient opportunities for the complainant to be able to recognize the appellant's voice, she took guidance from the Court of Appeal decision in **R v Rohan Taylor et al** SCCA Nos 50 - 53/1991, delivered on 1 March 1993, which was referred to with approval in **Siccaturie Alcock v R** SCCA No 88/1999, delivered on 14 April 2000. Gordon JA in delivering the judgment of the court in **Rohan Taylor**, had this to say:

> "Voice identification falls to be considered under the general law. There is no legislation that governs its admissibility. … The common law principles apply."

[35] His Lordship then went on to review some authorities on voice identification including the case of **R v Clarence Osbourne** SCCA No 87/1991 where, in delivering the judgment of the court on 23 November 1992, Carey P (Ag) (as he then was) made it clear that in identification cases dependent on other than visual means a **Turnbull**

direction was not necessary. Adding that the directions given must depend on the particular circumstances of the case Gordon JA gave the following guidance:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act."

[36] The court held that the evidence of voice identification of one of the appellants in that case was tenuous and therefore unsafe on which to act. The identifying witness had known the accused before the incident only for a short while, during which time she had seen him on the road but had never spoken to him. On two occasions he had been to her house seeking to purchase ice and she summoned the ice vendor for him. These, the court found to be fleeting instances of exposure to the sound of the appellant's voice and were insufficient to ground a conviction based on voice identification.

[37] In the instant case, the learned Resident Magistrate considered the opportunities which the complainant had to become familiar with the sound of the appellant's voice. In finding number 7 the learned magistrate stated:

> "Dalling was in constant telephone communication with both Smith and Goulbourne, on their cell phones, on a landline and from an unknown private number."

She referred to sufficient words being spoken by the appellant that would facilitate that recognition and although she did not indicate what constituted sufficient words, there was, in our opinion, sufficient evidence on which that finding could be based. Though there was no direct evidence of the number of words spoken at the time of the relevant recognition of the appellant's voice, it is reasonable to conclude from the background of several telephone calls on the subject of the bus and what was happening to it, leading up to that particular call, that that conversation would have provided sufficient opportunity for the complainant to hear and recognize the appellant's voice. Additionally, it is of significance that the learned magistrate considered that there was a combined effect provided by the line of conversation that would have reinforced the complainant's recognition of the appellant's voice. Further, some support for the learned magistrate's reliance on recognition of the appellant's voice via the telephone is to be found in the case of **R v Deenik** (1992) Crim LR 578 where identification of a voice heard over the telephone was accepted as good identification and the conviction was upheld on appeal.

[38] The evidence accepted by the learned Resident Magistrate was that the telephone conversations concerning the bus took place over a period of weeks during which time the complainant spoke only to the two officers involved in its seizure, namely, the appellant and Mr Smith. The latter admitted to receiving calls from and making calls to the complainant (though not in terms of the complainant's evidence)

and the complainant was clearly able to make a distinction between their voices, identifying one of them as playing a particular part and the other as playing another part. The magistrate was satisfied that given her assessment of his level of intelligence such an intricate plan was beyond the complainant's capabilities.

[39] In **R v John Keating** (1909) 2 Cr App R 48, referred to in **Rohan Taylor**, the appellant was convicted on the evidence of a witness who heard a voice and declared it to be the voice of the appellant. That was the only evidence of identification. His appeal was dismissed, the court holding that the facts were before the jury and they had decided on them. Gordon JA commented that the evidence of voice identification was critical in the conviction in **John Keating** and that that court was of the view that the conviction was correct. Similarly, it seems to us, the facts were before the learned Resident Magistrate in the instant case and she declared herself to be satisfied that the appellant had telephone conversations with the complainant and that in one such conversation the appellant solicited the sum of $50,000.00 from the complainant (page 133). Based on the foregoing considerations, ground nine also fails.

Grounds 10 and 11

[40] The appellant's challenge in these two grounds relate to what Miss Martin referred to as the imprecise wording of the information which charged the appellant, leading the learned Resident Magistrate into error as she confused the requirements for the offence under section 14(1)(a) with that under section 14(1)(b) of the Act. These are two separate and distinct offences, Miss Martin argued, and the prosecution's failure to

specify the particular subparagraph under which the appellant was charged caused the learned magistrate to treat the alleged breach as an act of corruption under section 14(1)(b) instead of looking for the ingredients required by section 14(1)(a). Counsel contended that the learned Resident Magistrate made findings that the two officers omitted to act by failing to arrest the complainant or failing to hand over the bus to him, both of which fell in section 14(1)(b). However, Miss Martin submitted, the learned Resident Magistrate's assessment seemed to cover both sections 14 (1)(a) and 14(1)(b) of the Act.

[41] Counsel further contended that the wording in the information was vague enough for the appellant to be able to say that it was not clear what charge he was facing and this was prejudicial to him. For that reason, Miss Martin argued, the information was defective and, though not directly on point, she referred to the case of **Amos v Director of Public Prosecutions** [1988] RTR 198 where the information was held to be bad for duplicity with the result that the conviction was quashed, contending that trial on this defective information should suffer the same fate.

[42] Mr Ricketts disagreed. He submitted, and quite correctly in our view, that the wording of the information charging the appellant was sufficiently clear for the appellant not to be misled or deceived as to the charge he was facing. Counsel contended that the absence of the reference to subparagraph (a) presented no difficulty as it was clear from the information that the charge was soliciting and only 14(1)(a) dealt with soliciting. That subparagraph also contains a reference to acts of commission or omission and at the very beginning of her reasoning (on page 129) the

learned magistrate clearly set out the requirements for the offence in terms of section 14(1)(a). Mr Ricketts referred to the case of **Regina v Ashenheim** (1973) 20 WIR 307 where the Court of Appeal considered an incorrect reference to the penalty creating section in an information, instead of the offence-creating section, as a defect in form which did not mislead the appellant and the appeal was dismissed. In the instant case, counsel argued, the offence-creating section was stated in the information complete with the correct ingredients proven by the evidence. It was therefore counsel's submission that there was no valid cause for complaint about the wording of the information.

[43] It is useful at this point to refer to the provisions of section 14(1) of the Act, which read as follows:

> "A public servant commits an act of corruption if he –
>
> (a) corruptly solicits or accepts, whether directly or indirectly, any article or money or other benefit being a gift, favour, promise or advantage for himself or another person for doing any act or omitting to do any act in the performance of his public functions;
>
> (b) in the performance of his public functions does any act or omits to do any act for the purpose of obtaining any illicit benefit for himself or any other person;
>
> (c) fraudulently uses or conceals any property derived from any such act or omission to act."

We find it unnecessary to state the definitions for public function and public servant as provided in section 2 of the Act because there is no issue in that regard. Suffice it to

say that the learned Resident Magistrate did satisfy herself that the particular elements of the case before her were covered by the relevant definitions. What was therefore left for her determination was whether the action of the officers amounted to corruption within the meaning of the Act.

[44] For our part, it is immediately clear that the relevant section in keeping with the wording of the information and the evidence adduced at trial was section 14(1)(a). Section 14(1)(b) is clearly not applicable and we are unable to agree with counsel for the appellant that the learned Resident Magistrate made any findings consistent with that section. Her reference to the officers doing what they could not do, namely returning the bus, in addition to her reference to them not doing that which they should, namely charging the complainant with the appropriate offence(s), was clearly because she found that there was some intimation that the complainant paid to get back his bus (see page 5 of her reasons). Her finding was that either would amount to corruption and this did not take her out of the provisions of section 14(1)(a) which included doing an act as well as omitting to do an act.

[45] Clearly, once it was accepted that the telephone call requesting the payment of a sum of $50,000.00 was made by the appellant against the background of a threatened prosecution for 10 charges the offence would have been made out. The appellant need not even have had any charges or any plan to return the bus in his contemplation. For the charge of soliciting it was necessary only for the complainant to be induced into the belief that he was paying for the appellant to make the charges go away or to return

the bus which he was not authorized to do. Grounds 10 and 11 are lacking in substance and therefore fail.

Conclusion

[46] In the final analysis, we have come to the conclusion that the appellant failed to substantiate the challenges made to the learned Resident Magistrate's reasoning and findings of fact. In our opinion, she ably acquitted herself in her analysis of the evidence and her application of the relevant legal principles and we see no reason to disturb her decision. Accordingly, the appeal of the appellant Everton Goulbourne is dismissed and his conviction and sentence are affirmed.

[47] For completeness we must add that the appeal of Elorda Smith is dismissed for want of prosecution.