[2020] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CRIMINAL APPEAL NO 12/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

PHILLIP STEELE V R

Keith Bishop and Raoul Lindo for the appellant

Miss Paula Llewellyn QC and Miss Patrice Hickson for the Crown

14 January 2016 and 25 June 2020

MORRISON P

Introduction

[1] This is an appeal against a conviction in the former Resident Magistrate's Court (now Parish Court) for the parish of Saint Elizabeth for the offence of receiving stolen property, contrary to section 46(1) of the Larceny Act ('the Act'). The appellant, who was at the time a member of the Jamaica Constabulary Force, was convicted on 15 May 2015, after a trial before Her Honour Mrs Sonya Wint-Blair, as she then was ('the

Resident Magistrate'). On 9 June 2015, he was sentenced to six months' imprisonment at hard labour.

[2] The allegedly stolen property was a grey 1999 Toyota Corolla motor car ('the Corolla'), the property of Mr Donovan Smith ('the complainant'), a used car dealer based in Black River in the parish of Saint Elizabeth. Among other things, the complainant was also in the business of renting motor cars from time to time.

[3] The appellant was originally jointly charged with Mr David Brown. However, on 16 June 2014, after a number of witnesses had already given evidence for the prosecution, the Crown offered no further evidence against Mr Brown. He thereafter became a witness for the prosecution.

[4] The appellant's principal contention on appeal was that the Resident Magistrate "misdirected herself when she concluded that there was sufficient evidence to prove beyond a reasonable doubt that the Appellant knew or reasonable [sic] ought to have known that the vehicle which he had received in the month of December 2008 was stolen or otherwise unlawfully obtained"[1]. The appellant also complained that the sentence imposed by the Resident magistrate was manifestly excessive.

[5] The appeal was heard on 14 January 2016. At the conclusion of the hearing, we dismissed the appeal and affirmed the appellant's conviction and sentence. With profuse apologies for the delay, these are the promised reasons for the court's decision.

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[1] Appellant's skeleton arguments filed on 1 December 2015, para. 2

The evidence

[6] The facts of the prosecution's case were as follows.

[7] In December 2008, the complainant rented the Corolla to Mr Leeton Gray. The chassis number of the Corolla was AE 1105296402 and the registration plate number was 7085 EH. Mr Gray's cousin, Mr Oral Francis, collected the Corolla on Mr Gray's behalf. When Mr Francis collected the Corolla, the complainant gave him one key for the car, copies of the original registration and fitness certificates, and the original certificate of insurance.

[8] On 22 December 2008, while still in possession of the Corolla, Mr Francis drove it to his home, parked it by his window, locked it up, locked his gate with a chain and a padlock and went to bed. The following morning, as he got ready to leave home, he opened his door, saw his gate wide open and discovered that the Corolla was gone. He had given no one permission to remove it.

[9] Mr Francis reported the theft of the Corolla to the Black River Police Station that same day.

[10] In January 2009, Assistant Commissioner[2] of Police Oral Dobson ('ACP Dobson'), who was the officer in charge of the Saint Ann's Bay Police Station, received certain information which led him to summon the appellant, who was then a constable under his command. ACP Dobson told the appellant that he had received information that he

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[2] The notes of evidence refer to ACP Dobson's rank as that of "Assistant Commander of Police" (Record, page 37). However, this was clearly a typographical error.

had been seen driving a motor vehicle suspected to have been stolen. The appellant admitted to driving the car in question, but stated that it belonged to a friend who was in police custody. The appellant stated that he did not know of the car having been stolen and, in any event, the friend had been released from custody and the car had been returned to him. ACP Dobson was satisfied with this explanation and did not pursue the matter any further.

[11] Sometime early in 2009, the appellant rented an apartment in an apartment complex in the Boscobel Housing Scheme in Saint Mary from Mr Hubert Donald. After the appellant moved into the apartment, Mr Donald on more than one occasion observed a silver grey Toyota Corolla, in the driveway of the premises, and a couple of blocks down from it on the opposite side of the property. He had a conversation with the appellant about where to park the car, which had "a big, shimmy [sic], loud muffler"[3]. The first time Mr Donald saw the car, "a couple of guys" were there with the appellant, while he (Mr Donald) admired the rims on it, which he described the rims as "shiny MAG rims … Sports rims, shiny rims, wider than normal"[4]. But he did not see the shiny rims on the car the second time he saw it. On that occasion, "it had dark coloured rims, standard looking, dark to black"[5]. The appellant did not deny that he was the driver of the car, nor was the landlord challenged at the trial as to the truthfulness of his evidence.

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[3] Record, page 47
[4] Record, page 48
[5] Record, page 48

[12] At about 7:30 am on 31 March 2009, Constable Howard Phillip, who was a uniformed member of a police patrol in the Boscobel Housing Scheme, signalled the driver of a grey Toyota Corolla motor car to stop. When the driver emerged from the car, he identified himself as Special Constable Phillip Steele, the appellant. The car's licence plates bore different numbers in the front (8538 DF) and the rear (2556 EY). Copies of the registration and fitness certificates were also found in the car. Those documents showed the details of the complainant's Corolla and its owner's identity.

[13] The chassis number was checked and Constable Phillip contacted police control by radio and requested information on the vehicle. The information which came back was that the vehicle was the reportedly stolen property of the complainant.

[14] The appellant told the police officers that he had borrowed the car from a friend and offered to take them to that friend. The appellant also said that a bag of clothing which was found in the back of the car belonged to the friend. The group then set out for the friend's workplace at the Rio Nuevo Battle Site in Saint Mary.

[15] Upon the arrival of the appellant and the police officers at the Rio Nuevo Battle Site that same morning, the appellant pointed out one Mr David Brown as the friend in question. In the appellant's presence, the police officers asked Mr Brown if he knew him, to which he answered yes. Mr Brown was then asked, again in the appellant's presence, if the Toyota Corolla was his (Mr Brown's), to which he answered no. The appellant said nothing in response to this and the police officers determined that they

should all go to the Oracabessa Police Station to sort out the matter. Once there, the appellant and Mr Brown were taken into custody pending further investigation.

[16] The following day, 1 April 2009, police officers attached to the Black River Police Station travelled to the Oracabessa Police Station in Saint Mary. There, they were shown and took charge of the Toyota Corolla. The car was dispatched by wrecker, and the appellant and Mr Brown were taken by car, to the Black River Police Station. The appellant and Mr Brown were handed over to the station guard on duty at the station.

[17] The complainant went to the Black River Police Station on 2 April 2009. There, in the presence of the appellant and Mr Brown, the complainant matched the information from the original registration and fitness certificates for the Corolla, which were still in his possession, with the corresponding information on the grey Toyota Corolla which the appellant had been seen driving in Saint Mary a couple of days before. The complainant used his key for the Corolla to open the driver's door, but then discovered that it did not work in the ignition. He observed that the section below the ignition switch on the vehicle had been tampered with, the radio was missing, the exhaust pipe was different and a section below the air-conditioning knob was also missing. He asked both the appellant and Mr Brown what had happened to the car, in response to which the appellant answered that he had taken the radio out of the car and changed the exhaust.

[18] Mr Brown's evidence was that he and the appellant were old friends. Over the years, the appellant had often loaned him whichever car he was driving at the particular

time. In 2008, or early 2009, he saw the appellant driving a silver Toyota Corolla car and the appellant told him that "a fi him ride this now"[6]. The appellant in fact loaned him the Toyota Corolla occasionally in late 2008 to early 2009. Around Christmas Day 2008, he borrowed that car and drove it to his baby's mother Lisa's house. While there, the police arrested him and placed him in the lock-up. The appellant visited him in the lock-up and asked him for the key to the Toyota Corolla, but he told him that it was with Lisa. After he was released from custody in 2009, he saw the appellant driving the same silver Toyota Corolla a couple times. On one occasion, he observed that the Toyota Corolla had "a big muffler … on it, big music in it, tint was, on it, now it was clear glass those changes were made"[7]. He knew that the "big sound" in the Toyota Corolla was the appellant's from a Honda motor car which the appellant once owned. The appellant confirmed to him that he was the one who made the changes to the Toyota Corolla. He (Mr Brown) did not own a Toyota Corolla.

[19] The appellant gave evidence in his defence. He testified that, on 30 March 2009, he borrowed the Toyota Corolla from Mr Brown, who was his friend. While he was on his way to return the car to Mr Brown the following day, he was stopped by the police. When he was asked for the documents for the car and his driver's licence, he produced that latter but told the police officers that he did not have any documents for the car, although he had searched for them. The police officers pointed out to him that the car bore two different registration plates, a fact of which he was previously unaware. Mr

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[6] Record, page 53
[7] Record, page 54

Brown lied when he told the police officers that he was not the owner of the car, as he had previously told the appellant that he had recently purchased the car from the proceeds of a six-month stint of farm work which he had completed in the United States of America in late 2008. In December 2008, while Mr Brown was in custody, he had borrowed the car from him and, with Mr Brown's consent, collected it from Mr Brown's baby's mother's house. After Mr Brown's release from custody in early January 2009, he retrieved the car from the appellant's house. Mr Brown visited him and parked the Toyota Corolla in the driveway at his house in Boscobel on an occasion when he had a little get together. Also present at the get together were a couple male friends and his girlfriend. While his friends were there, his landlord (described by the appellant as "Mr McDonald") passed by, saw the car in the driveway and said how much he admired it. He did not borrow the car from Mr Brown again until 30 March 2009, the day before he was stopped by the police. The clothes and shoes which the police saw in the car that morning all belonged to Mr Brown. Although he borrowed the car from Mr Brown about three times in all, he had never checked the documents because of the closeness of his relationship with Mr Brown and his trust for him.

[20] The appellant relied on the evidence of two witnesses. The first of them, Mr Keldorn Black, said that while he had seen Mr Brown driving a Toyota Corolla on more than one occasion, he could not say who owned the car. The second, Mr Miguel Steele, the appellant's cousin, said he had seen Mr Brown driving the Toyota Corolla on three occasions, but he had also seen the appellant driving it on other occasions as well. He did not know for sure to whom the car belonged.

The findings of fact

[21] The Resident Magistrate's findings of fact covered 15 printed paragraphs in all[8]. In summary, the Resident Magistrate found that:

1. A Toyota Corolla rented by the complainant to a customer was stolen and not returned to him. The theft of this motor car was reported to the Black River police on 23 December 2008.

2. The defendant was in possession of the Toyota Corolla which had been stolen from the complainant.

3. At the time the defendant received the motor car he had to have known that it was stolen.

4. The motor car recovered from the defendant was substantially altered by someone exercising expensive acts of ownership. The changes to the vehicle were consistent with that person using it for his own pleasure rather than being a temporary driver of the vehicle.

5. Having been alerted by ACP Dobson that the vehicle was stolen, the defendant took no steps to ascertain the legitimacy of the vehicle nor did he cease driving it.

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[8] Record, pages 131-139

6. When the defendant was found driving the vehicle, he claimed not to have a set of the registration documents, but the police officer found them in the glove compartment of the same vehicle on that same day, 31 March 2009.

7. The vehicle wore two different registration plates on the front and on the rear, a fact which could not have escaped the defendant.

8. The appellant's evidence that he had borrowed the car from Mr Brown was rejected and Mr Brown's evidence that he did not and had never owned a car was accepted.

9. The appellant's evidence was not credible, his demeanour was stiff and wooden, clearly rehearsed, and unconvincing.

10. The appellant lied in several respects, as did his witnesses, and guilty knowledge is inferred from the changes made to the vehicle and the lies told by the appellant both in and out of court.

11. Despite some inconsistencies between the witnesses, which were slight and not serious, the prosecution's case was proved beyond reasonable doubt.

The grounds of appeal

[22] The appellant relied on six grounds of appeal[9]:

> "(a) That the verdict is unreasonable or in the alternative unsafe, having regards [sic] to the evidence.
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> (b) That the offence of receiving stolen property was not made out on the evidence according to law.
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> (c) That the learned Resident Magistrate erred in finding that there was sufficient evidence to satisfy proof beyond reasonable doubt that the Appellant was a receiver.
>
> (d) That the sentence is manifestly excessive.
>
> (e) The Trial Judge erred in her summation which was neither fair nor adequate.
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> (f) The Trial Judge erred in that she failed to and/or neglected to properly present and consider the Appellant's case."

[23] We will consider grounds (a), (b) and (c) together, followed by grounds (e) and (f), also together, and ground (d)

Grounds (a), (b) and (c)

[24] Mr Lindo provided us with admirably detailed skeleton arguments in support of these grounds. We trust that we do them no disservice by summarising them in the following way.

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[9] Grounds (a)-(d) were filed on 18 June 2015, and the court granted leave to argue grounds (e) and (f) at the outset of the hearing on 14 January 2016. The formulation of the grounds herein is taken from para 6. of the appellant's skeleton arguments.

[25] Although section 46(1) of the Act requires the prosecution to prove beyond reasonable doubt that the appellant knew the Corolla was stolen when he was said to have received it in December 2008, none of the witnesses for the prosecution gave any evidence from which it could be inferred that the appellant had the requisite guilty knowledge at the relevant time. The verdict was therefore unreasonable in the light of the evidence (ground (a)). The prosecution failed to adduce evidence of the circumstances in which the appellant came into custody of the Corolla in December 2008, or of his state of mind at that time. This was an irremediable flaw, since the essential question for the court was whether, at the time the appellant came into possession of the vehicle, he intended to receive it knowing it to be stolen (ground (b)). The Resident Magistrate's finding that the prosecution had proved the case against the appellant beyond reasonable doubt was not based on the evidence (ground (c)).

[26] Mr Lindo referred us to a number of authorities in support of these submissions. It may be convenient to consider them briefly before coming to the prosecution's responses.

[27] We will first set out section 46(1) of the Act:

> "46.-(1) Every person who receives any property knowing it to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour), and on conviction thereof liable –
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> > (a) in the case of felony, to imprisonment with hard labour for any term not exceeding ten years;

> (b) in the case of misdemeanour, to imprisonment with hard labour for any term not exceeding five years."

[28] **R v Smythe**[10] was a decision of the Court of Appeal of England and Wales under the provisions of the Theft Act 1968. That Act, of course, does not apply in this jurisdiction, but Mr Lindo drew attention to Kilner Brown J's observation on the ambit of the word 'receive':

> "Now the word 'receive' itself indicates a single, finite activity. Before the Theft Act 1968 the word 'receive' was regarded as such and the essential characteristic of the offence was guilty knowledge of the receiver at the moment of receipt."

[29] In **R v Palmer**[11], the appellant was charged with receiving stolen property. In his summing-up to the jury, the Chairman of the Buckinghamshire Sessions told them this:

> "It is for you to say whether you are satisfied beyond any reasonable doubt that they [the appellant and a co-defendant who was tried with her] had a guilty knowledge, that they had every reason to believe and to know that those things were stolen property … The whole essence of the accusation is the point whether the prisoners knew that the property was stolen property."

[30] However, as the Court of Criminal Appeal pointed out –

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[10] (1981) 72 Cr App R 8, 13
[11] (1936) 25 Cr App R 97, 100

> "The whole essence of the controversy … was whether at the time when they received the stolen property they knew it was stolen property. The summing-up amounts to a statement to the jury that a person can be found guilty of receiving property well knowing it to have been stolen if, having innocently received the property, he afterwards finds that it was stolen."

[31] In **R v Dickson and Gray**[12], another decision of the English Court of Criminal Appeal, the headnote reads as follows:

> "… it is not sufficient in directing the jury in a receiving case, to direct them that once it is proved that the goods have been stolen and that they have been received and that the accused knew they were stolen, that is an end of the matter. A receipt with felonious intention must be established and the jury must be so directed. If it were otherwise a police officer who received goods in the course of his duties knowing them to be stolen could be convicted of receiving."

[32] And finally, I will mention the well-known cases of **Director of Public Prosecutions v Morgan**[13] and **Beckford v R**[14], to which Mr Lindo referred to make the point that mistake of fact is a defence where it prevents the defendant from having the requisite *mens rea* for the offence with which he is charged; and **Palmer v R**[15], to make the further point that, in order to raise a defence, a defendant needs do no more than to introduce some evidence of it in order to require the prosecution to disprove it beyond a reasonable doubt.

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[12] [1955] Crim LR 435, 436
[13] [1976] AC 182
[14] [1987] 3 All ER 425
[15] [1971] AC 814

[33] For the prosecution, Miss Hickson did not dissent from the proposition embodied in the dicta quoted above from **R v Smythe**, **R v Palmer** and **R v Dickson and Gray**, which is that, in order to establish the offence of receiving stolen property knowing it to be stolen, the receiver must be proved to have been in possession of the stolen property, knowing it to have been stolen at the time he or she took possession of it. In our view, given the clear language of section 46(1) and the well-established learning on the point, she was right not to do so.

[34] Albeit differently expressed in respect of each, this proposition underpins the appellant's grounds (a), (b) and (c). Miss Hickson submitted that the Resident Magistrate clearly had all of the elements of the offence in mind, including the requirement of knowledge by the appellant that the Corolla was stolen at the time he received it, in arriving at her finding that the case against him was proved. In this regard, she referred us in particular to the following passage from the Resident Magistrate's findings of fact[16]:

> "**The ingredients of the offence**:
>
> 54. The prosecution had to prove the following ingredients of the offence of receiving stolen property.
>
> 1. The Larceny: I find as a fact that there is no dispute that a Toyota Corolla rented by [the complainant] to a customer was stolen never returned him [sic]. The theft of this motorcar was reported to the Black River police on the 23rd of December, 2008 by Oral Francis.

[16] Record, pages 131-132

> 2. The Receiving: I find as a fact that there is no dispute that the [appellant] was in possession of the Toyota Corolla motorcar which had been stolen from the complainant. The prosecution had to prove the criminal intent to receive as well as knowledge that the motor car was stolen.
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> 3. Evidence of guilty knowledge: I find as a fact that at the time the [appellant] received the motor car he had to have known that it was stolen. This is proved either directly by evidence which should be corroborated or circumstantially, by proving that the [appellant] or [sic] denied the motorcar was in his possession.
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> I find as a fact that in the instant case, the only live issue before the court is that of the mens rea of the [appellant] as there is no issue joined on the actus reus."

[35] Miss Hickson also directed our attention to the Resident Magistrate's findings in relation to changes which the appellant made to the Corolla while it was in his possession[17]:

> "55. I find as a fact that the prosecution's case proves that the motor car recovered from [the appellant] was substantially altered by someone exercising expensive acts of ownership, the ignition switch could no longer accommodate the original key, the vehicle needed one key to open the driver's door and a separate key to start the engine; there were sports, mag rims, a big muffler, stereo set and tint on it when t his [sic] vehicle was identified by it's [sic] legal owner. None of these modifications had been present when the vehicle was rented.
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> 56. I accept the proseuction's [sic] witnesses as to the vehicle's appearance before and after these changes were made to it. I find as a fact that these changes were

[17] Record, pages 132-134

consistent with the owner of the vehicle using it for his own pleasure rather than that of a temporary driver of the vehicle. These changes were made before the get-together as Hubert McDonald [sic] remarked on the appearance of car when he arrived. This was before Dave Brown was taken into custody in December 2008. This is in direct contrast to the defendant's witness Kelldorn Black who said when the vehicle picked him up it had no modifications to it. Mr Black's evidence was neither cogent nor reliable. His demeanour was that of a much rehearsed witness, it was clear that he was untruthful.

57. I find that ownership was evidently vested in [the appellant] as he had appropriated and was exercising dominion and control over this motor vehicle. The [appellant] did not say in evidence in chief that he visited Dave Brown in the lock-up and asked where the keys for the vehicle were. Though Dave Brown says so and the [appellant] agreed he went to the lock-up in cross-examination. In chief the [appellant's] evidence was that he went to Dave Brown's girlfriend and asked for the keys. He drove away in the car and maintained exclusive possession thereof. Though [the appellant] denied in cross-examination that he kept the motor car the entire time Dave Brown was in custody, he also said that Dave Brown came to get the car from him when he was released.

58. Couple this bit of evidence with the undisputed conversation between ACP Dobson and the [appellant]. When the [appellant] was alerted that the vehicle was stolen, he took no steps to ascertain the legitimacy of the vehicle nor did he cease driving it. These are unchallenged facts which formed the linchpin of the prosecution's case and I so find."

[36] Miss Hickson then took us to the Resident Magistrate's specific finding that the appellant had the requisite *mens rea* to ground the offence of receiving[18]:

> "67. Guilty knowledge is inferred by [sic] the changes made to the motor car and the lies told by the [appellant] both in and out of court. This third ingredient of the offence is therefore proven, beyond a reasonable doubt."

[37] Pointing out that the evidence on which the prosecution relied was largely circumstantial, Miss Hickson accordingly submitted that the element of guilty knowledge on the appellant's part was amply proved and that the Resident Magistrate was correct to so find.

[38] Miss Hickson referred us to **R v Lloyd Chuck**[19], a decision of this court which we found helpful in considering this matter. The defendant in that case was charged with two counts of receiving a stolen motor car knowing the same to be stolen. The case for the prosecution, which we take from the judgment of the court, was to the following effect.

[39] Two cars belonging to separate car rental companies were rented to customers in the ordinary way. One of the cars, as it happens, was a Toyota Corolla, while the other was a Toyota Starlet, The cars were stolen from the customers by a person or persons unknown and were in due course sold by the defendant to two innocent

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[18] Record, page 138

[19] (Unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 23/1991, judgment delivered 31 July 1991

purchasers. The cars were eventually recovered from the purchasers and returned to their true owners. Shortly after the cars were stolen, fraudulent applications were made to the Collector of Taxes for registration plates in respect of each in the names of fictitious persons. When interviewed, the defendant told the police that he had been given the cars to sell by these fictitious persons. He produced no records of these transactions. The prosecution relied on the fact of the defendant's possession of recently stolen goods, the fraudulent transfers and his lack of any reasonable explanation.

[40] The defendant was convicted in the Resident Magistrate's Court and one of his contentions on appeal was that learned Resident Magistrate who conducted the trial ought to have upheld the submission made on his behalf that there was no case to answer. In rejecting this submission, the court said the following[20]:

> "There was evidence that the cars, the subject of the charge, each belonged to a car hire firm and were hired to customers from whose custody they were removed. These persons had of course no authority to part with the cars. Indeed, in each case, the particular car was never returned, and when next an agent of the company saw their property, the colour had been changed, in the case of the Toyota Corolla, from a dark maroon to red and with respect to the Starlet, from white to silver. That constituted circumstantial evidence that the cars had been stolen. These cars were each sold by the [defendant] to innocent purchasers from whom the cars were recovered. Fraudulent applications were made for new registration plates in respect of the Corolla within 5 weeks of its loss and in respect of the Starlet within 15 days. This was to enable transfers to be made to

[20] Judgment of Carey P (Ag), at pages 16-17

> fictitious persons, and from these persons to the innocent purchasers to whom the [defendant] sold the cars.
>
> When the police interviewed the [defendant], he admitted selling the cars but said he had been asked to do so by persons whose identity or whereabouts he never vouchsafed. He produced no record of these transactions.
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> On that evidence which is not exhaustive of the Crown's case, the Resident Magistrate, in our view, was entitled to call upon the [defendant] for his defence. All the ingredients in proof of the charges of receiving were present. The cars were stolen property. They were in the possession of the [defendant], in the case of the Corolla within 5 weeks of its loss and as to the Starlet within 15 days of its loss. That constituted evidence of recency, sufficient to be considered by the Resident Magistrate in her jury capacity. The 'explanation' to the police was entirely unsatisfactory. The inevitable conclusion was that he knew the cars were stolen. The case did not depend wholly on the evidence that the [defendant] was in possession of recently stolen property. The requirements of the Road Traffic Act in the transfer of motor vehicle were not followed and there was evidence that fraudulent documents were prepared to the knowledge of the [defendant] to effect the transfer of these vehicles."

[41] It seemed to us that, although not identical, the facts of **R v Lloyd Chuck** bore some clear similarities to the facts of this case. In this case, there was uncontradicted evidence that the Corolla was stolen on or about 22 December 2008 and a report made to the police the following day. Starting shortly after that, the appellant was seen driving the vehicle on a number of occasions. By his own admission, the appellant made a number of changes to the vehicle, consistent with someone exercising ownership over it. On evidence which the resident magistrate believed, the appellant told Mr Brown, referring to the Corolla, that "a fi him ride this now". The appellant, a police officer, drove the Corolla for several months with different registration plates on the front and

back, while the papers showing the identity of the true owner of the vehicle were actually inside of it. Despite having been told by ACP Dobson in January 2009 that it was being said that the vehicle which he was seen driving was stolen, the appellant continued to drive it, so much so that he was still driving it two months later when the police stopped him along the roadway. The Resident Magistrate rejected the appellant's contrary account of the circumstances in which he said he was in possession of the vehicle, explicitly preferring, as she was best placed to do, the evidence of Mr Brown. And the Resident Magistrate also found, as she was again clearly entitled to do on the evidence, that the appellant had told a number of lies both in and out of court.

[42] In these circumstances, and taking into account the passages from the Resident Magistrate's findings of fact which we have set out above, it seemed to us that the Resident Magistrate (i) was fully aware of the principle that, in order to prove the offence of receiving stolen property contrary to section 46(1) of the Act, it had to be shown that the appellant knew that the Corolla was stolen when he took possession of it; and (ii) was fully justified in her finding that that requirement was amply met by the circumstantial evidence in the case.

[43] In our view, this conclusion sufficed to dispose of grounds (a), (b) and (c), as it could not possibly be said that (a) the verdict of the Resident Magistrate was unreasonable or unsafe having regard to the evidence; (b) the offence of receiving stolen property was not made out on the evidence according to law; or (c) there was

insufficient evidence to prove beyond reasonable doubt that the appellant was a receiver.

Grounds (e) and (f)

[44] On ground (e), Mr Lindo submitted that the Resident Magistrate's summation and assessment of the evidence were neither fair nor adequate, in that she failed to give due consideration to the strengths and weaknesses of the case for the prosecution as well as the case for the defence. In particular, he submitted, she failed to give any or any adequate consideration to the evidence of the witnesses for the defence. And, on ground (f), the submission was that the Resident Magistrate failed to weigh the case for the defence in the same scale as the case for the prosecution and made no careful and thorough assessment of the appellant's evidence before rejecting it. The appellant's testimony that he believed that the Corolla belonged to Mr Brown and that he did not know that it was stolen amounted to a defence of mistake of fact and ought to have been fairly assessed as such.

[45] Again citing **R v Lloyd Chuck**, Miss Hickson pointed out that, under section 291 of the former Judicature (Resident Magistrates) Act (now Parish Court), the Resident Magistrate's only duty was to provide "a statement in summary form of his findings of fact on which the verdict of guilty is founded". In this case, the Resident Magistrate had gone much further than that and her findings of fact had fully covered all the salient features of the case for the prosecution as well as the case for the defence. As regards the latter, the Resident Magistrate did a full analysis and it was clear that she gave the appellant's evidence the same level of scrutiny that she did the evidence of the

prosecution witnesses. And finally, in relation to the defence of mistake of fact now being advanced on the appellant's behalf, it was clear that, as the Resident Magistrate appreciated, his defence at trial was that he had borrowed the car from Mr Brown. In any event, the appellant could not have been labouring under any mistaken view of the facts after he was spoken to by ACP Dobson in early January 2009.

[46] We agreed with Miss Hickson. At a very early stage of the summation, the Resident Magistrate reminded herself that the appellant was presumed to be innocent and that the prosecution had the burden of proving his guilt by satisfying her so that she felt sure of his guilt[21]. She stated that the appellant's evidence "has been weighed in the same scale as that of the prosecution and has been given the same level of attention and scrutiny"[22]. Further, that if she believed the appellant's evidence, he would be acquitted, if it left her with a reasonable doubt, he would also be acquitted, and, even if she disbelieved him, she would still be obliged "to return to the prosecution's case for further review to ensure that the prosecution has discharged both the legal and evidential burden of proof"[23].

[47] The Resident Magistrate then reviewed the evidence of each of the witnesses for both prosecution and defence in the same painstaking detail[24]. Next, she gave herself certain warnings, as to the appropriateness or accuracy of which the appellant took no

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[21] Record, pages 101-102
[22] Record, page 102
[23] Record, pages 102-103
[24] Record, pages 104-124

issue. First, while noting that the appellant had not explicitly asserted his good character, she assumed that he was a man of previous good character and, on that basis, warned herself of the potential effect of his good character in relation to his credibility and his propensity to have committed the offence[25]. Second, considering that the appellant had in her view told lies during his evidence, she warned herself that, in keeping with the principle enshrined in **R v Lucas**[26], in order to amount to corroboration of the prosecution's case, the lie had to be deliberate, relate to a material issue and reflect a realisation of guilt and a fear of the consequences of the truth[27]. And third, in relation to Mr Brown's evidence implicating the appellant, she treated him as a witness with an interest to serve and warned herself of the need to examine his evidence with particular care[28].

[48] It is against this background that the Resident Magistrate finally turned to an analysis of the evidence and stated her findings in the terms set out at paragraphs [34]-[36] above. In our view, in the light of all that we have already stated, it was impossible to say that the Resident Magistrate's summation and her assessment of the evidence were either unfair to the defence or inadequate in all the circumstances of the case; or that the Resident Magistrate failed to weigh the case for the defence in the same scale as the case for the prosecution and made no careful and thorough assessment of the appellant's evidence before rejecting it. In our view, the appellant's

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[25] Record, pages 124-125
[26] (1981) 73 Cr App R 159
[27] Record, pages 125-126
[28] Record, pages 130-131

belated attempt to set up a defence of mistake of fact inevitably faltered in the face of the fact that the resident magistrate disbelieved his evidence and accepted Mr Brown's.

[49] On this basis, we therefore concluded that grounds (e) and (f) should be rejected.

Ground (d)

[50] On this ground, Mr Lindo pointed to the fact that the appellant was a man of previously good character, who was well regarded by members of his community. On this basis, he submitted that, while he could not take issue with a sentence of six months' duration in itself, the Resident Magistrate ought to have given consideration to other sentencing options, such as, for instance, a suspended sentence, a community service order or a probation order. In this regard, Mr Lindo referred us to the provisions of the Criminal Justice (Reform) Act ('the CJRA') and the decision of this court in **Marc Wilson v R**[29]. In that case, this court allowed an appeal against the imposition of a custodial sentence and substituted a non-custodial sentence, on the basis that the sentencing judge did not appear to have considered the provisions of the CJRA relating to the circumstances in which a non-custodial sentence might be appropriate.

[51] In response to these submissions, Miss Hickson was content to say that sentencing was a matter entirely within the purview of a sentencing judge and that in

[29] [2014] JMCA Crim 41

this case no basis had been shown for this court to disturb the Resident Magistrate's exercise of her sentencing discretion.

[52] The relevant section of the CJRA is section 3, which provides as follows:

> "3.-(1) Subject to the provisions of subsection (2), where a person who has attained the age of eighteen years is convicted in any court for any offence, the court, instead of sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law.
>
> (2) The provisions of subsection (1) shall not apply where-
>
> (a) the court is of the opinion that no other method of dealing with the offender is appropriate; or
>
> (b) the offence is murder; or
>
> (c) …
>
> (d) the person at the time of commission of the offence, was in illegal possession of a weapon referred to in the First Schedule, a firearm or imitation firearm.
>
> (3) Where a court is of opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender."

[53] As McDonald-Bishop JA observed in **Marc Wilson v R**[30], this section embodies the principle that "a sentence of imprisonment must always be viewed as a last resort and should be imposed only after it is recognised that no other sentencing option can achieve the ends of justice".

[54] As captured in the record of proceedings, the Resident Magistrate's brief sentencing remarks were as follows[31]:

> "Sentence: Mitigating Factors
>
> - Age, contrite, candidate for rehabilitation, child, conviction will scar, hitherto of good character. Unblemished record-police officer and positive SER, well respected in community.
>
> Aggravating Factors
>
> - Brazenness of act, lied to ACP Dobson, lied to Constable Phillips when apprehended, lied in court. Has indicated in SER that he believes the court had a reasonable doubt but went on to convict him anyway, casting blame on judicial system. Lengthy trial defence delay for 5 – 6 years due to counsel issues, court accommodated them all, deterrence is factor, honest police officers are sullied by the actions of the dishonest ones. Consequences of findings [sic] oneself on wrong side of law as civilian no different when police officer, law must be applied fairly and evenly to all.
>
> Sentence: 6 months imprisonment at hard labour."

[55] In the well-known case of **R v Ball**[32], Hiberry J stated the general principle which has been constantly applied in this court in appeals against sentence[33], which is that

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[30] Para. [64]
[31] Record, page 95

"this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence". However, Hilbery J then went on to state the exception to this rule, which is that "when a sentence appears to err in principle … this Court will intervene".

[56] It is clear from the note of her very brief sentencing remarks set out above that the Resident Magistrate sentenced the appellant to six months' imprisonment without having given any prior consideration to the possibility of a non-custodial sentence. This was, as section 3 of the CJRA makes clear, an error in principle, which therefore entitles us to consider what alternative sentence should have been imposed in this case.

[57] Having done so, however, taking into account in particular the aggravating factors which the Resident Magistrate itemised, we came to the conclusion that the Resident Magistrate would inevitably have concluded that there was no alternative to a custodial sentence in this case. On the evidence which the Resident Magistrate accepted, the appellant, a police officer of some experience, participated in the criminal act of receiving the Corolla shortly after it was stolen, knowing it to have been stolen, treated the vehicle as his own property over an extended period, ignored the clear warning of ACP Dobson and, when apprehended, sought by implication to pass off responsibility to his friend of many years. As Mr Lindo tacitly acknowledged, a sentence

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[32] (1951) 35 Cr App R 164, 165

[33] See **Alpha Green v R** (1969) 11 JLR 283, 284, **Marc Wilson v R**, at para. [70] and **Meisha Clement v R** [2016] JMCA Crim 16, at para. [42]

of six months' imprisonment in these circumstances could not possibly be said to have been manifestly excessive.

[58] We therefore rejected ground (d) as well.

Conclusion

[59] It is for these reasons that, despite Mr Lindo's thoughtful and energetic advocacy, we concluded that the appeal should be dismissed and affirmed the judgment of the Resident Magistrate.