[2014] JMCA Crim 41

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 2/2014

BEFORE: THE HON MISS JUSTICE PHILLPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (Ag)

MARC WILSON v R

Vernon Daley for the appellant

Broderick Smith for the Crown

23, 25 September, 3 and 15 October 2014

MCDONALD-BISHOP JA (Ag)

[1] This is an appeal by the appellant, Marc Wilson, against his conviction and sentence in the Resident Magistrate's Court for the Corporate Area on 23 October 2013 following a guilty plea to the offences of conspiracy to defraud and possession of a forged document before Her Honour Miss Judith Pusey. These offences constituted count one and count two, respectively, on an indictment preferred against him on 31

July 2013. The appellant was sentenced to nine months imprisonment at hard labour on each count with sentences to run concurrently.

The background

[2] The background to this appeal as gleaned from the record of appeal is summarised as follows. On or around 19 July 2013, the appellant, a 25 year old final year university student, made an application for enlistment in the Jamaica Constabulary Force ("the JCF"). In support of his application, he submitted a forged Caribbean Examination Council ("CXC") certificate in his name purporting that he had passes in three subjects with grade one at the general proficiency level. The forgery was eventually discovered and the police was called in. The appellant was then arrested and charged.

[3] The appellant was charged by the police on or around 31 July 2013 on four separate informations for the following offences:

(1) conspiracy to defraud contrary to common law (Information No 13819/13);

(2) forgery contrary to section 7 of the Forgery Act (Information No 13820/13);

(3) possession of a forged document contrary to section 17 (1) (a) of the Forgery Act (Information No 13821/13); and

(4) possession of a forged document contrary to section 17 (1) (a) of the Forgery Act (Information No 13822/13).

[4] The appellant appeared before the learned Resident Magistrate on 31 July 2013 and was duly represented by counsel, Mr Daley (same counsel in these proceedings). An order for the preferment of an indictment against the appellant was made in respect of two offences, namely, conspiracy to defraud, on count one, and the offence of possession of a forged document contrary to common law on count two. The order for indictment was endorsed on the information that charged him with conspiracy to defraud. The order was duly signed. There was no corresponding information for the offence added as count two.

[5] The indictment was preferred by the Clerk of the Courts in accordance with the order made by the learned Resident Magistrate and the appellant, upon his arraignment, pleaded guilty to the two offences. Sentencing was deferred pending the receipt by the court of a social enquiry report.

[6] On 23 October 2013, after considering the social enquiry report and a plea in mitigation made by counsel on the appellant's behalf, the learned Resident Magistrate sentenced the appellant to nine months imprisonment at hard labour on both counts of the indictment with sentences to run concurrently.

Grounds of appeal

[7] The appellant initially appealed to this court on the single ground that the sentence imposed by the learned Resident Magistrate was manifestly excessive. He was, however, granted leave to argue supplemental grounds of appeal. These

additional grounds, in effect, amount to an appeal not only against sentence but also against conviction notwithstanding the appellant's plea of guilty on both charges.

[8] The supplemental grounds of appeal read:

> **"Ground One**
>
> > The learned Resident Magistrate erred in accepting the Appellant's plea of guilty to the offence of possession of a forged document on information 13821/13 as she had no jurisdiction to do so.
>
> **Ground Two**
>
> > The learned Resident Magistrate erred in accepting the Appellant's plea of guilty to the offence of conspiracy to defraud as the facts do not support the offence."

Ground one: whether learned Resident Magistrate had jurisdiction to indict the appellant for possession of a forged document

[9] The appellant's contention with respect to ground one is as follows. The learned Resident Magistrate had no jurisdiction to deal with the offence of possession of a forged document which is covered by section 11 of the Forgery Act. Therefore, a charge under section 17(1)(a) of the Act is unsustainable since it only sets out what constitutes criminal possession and does not create an offence. Additionally, the Forgery Act specifies the documents to which it relates and these do not include a forged CXC certificate. This court had made it clear in **Shadrach Momah v R** [2011] JMCA Crim 54 that the Resident Magistrates' Courts do not have jurisdiction to deal with the offences relating to possession of forged documents under the Forgery Act. Counsel relied on the

dictum of McIntosh JA at paragraph [15]. For these reasons, he said, the conviction for possession of a forged document should be quashed.

[10] It is noted that contrary to the submissions of Mr Daley, the indictment order was not made for possession of a forged document contrary to section 17(1)(a) as charged on the information but rather for possession of a forged document contrary to common law. The procedure applicable to the matter before the learned Resident Magistrate was that which is applicable to trials on indictment and not trials on information. It was for that reason that the indictment order was made for an offence other than that charged on any of the informations. Nothing is wrong in principle and in law with the exercise of such power provided the offence indicted is one that has arisen on the facts disclosed and is an offence known to law (see section 275 of the Judicature (Resident Magistrates) Act).

[11] The particulars of the offence of possession of a forged document for which the appellant was indicted on count two read:

> "Marc Wilson on the 19th day of July 2013 in the Corporate Area did unlawfully had [sic] in his possession a Caribbean Examination Certificate in the name of Marc Wilson."

The particulars are clearly defective or deficient because nowhere in the particulars did it say the certificate was forged. In any event, the appellant pleaded to it without any issue taken as to the defect for an amendment to be done. Be that as it may, the point taken before this court is that the offence, itself, is one for which the learned Resident

Magistrate could not properly have convicted because such an offence is unknown to law.

[12] Mr Smith conceded that whilst the Crown is satisfied that the offence of forgery is an offence contrary to common law, the Crown is unable to find support for the position that the offence of possession of a forged document is an offence known to common law as charged. We must commend Mr Smith for executing his role in the true spirit of a 'minister of justice' who, following his own research into the range of sentences for such offences, had seen it fair to bring it to the attention of counsel for the appellant that there might have been an error in the proceedings in relation to the offences charged. The supplemental grounds filed by the appellant emanated from Mr Smith's enlightening response to the appeal.

[13] It is, indeed, clear that offences relating to the forgery and possession of certain forged documents are created by the Forgery Act. Section 11 of the Act treats with possession of forged documents making it a felony for someone to have in his or her custody or possession certain forged documents that are specified in that section. A CXC certificate, however, does not fall within the documents or types of documents specified in the section. It follows that the possession of such a forged document is not covered under the provisions of the Forgery Act. Research has not unearthed any offence of possession of a forged document at common law. Whilst the common law created the offence of forgery, it did not create the offence of possession of a forged document.

[14] We accept the submissions of both counsel and do find that the offence of possession of a forged document contrary to common law for which the appellant was indicted and convicted is not known to law.The learned Resident Magistrate, therefore, had no jurisdiction to deal with such an offence, it being a nullity. Accordingly, the plea of guilty to that offence and the sentence imposed in relation to it cannot stand. The appellant, therefore, succeeds on ground one of his supplemental ground of appeal.

Ground two: whether plea of guilty for the offence of conspiracy to defraud should be set aside

[15] On count one of the indictment that charged the appellant for conspiracy to defraud, the particulars of offence read:

> "Marc Wilson on the 19th day of July 2013 in the Corporate Area did conspire with persons known or unknown to defraud the Jamaica Constabulary Force Training Academy by submitting a forged Caribbean Examination Certificate in the name of Marc Wilson in aid of entering in the Jamaica Police Academy."

It is the contention of the appellant that on the facts as outlined by the learned Resident Magistrate in her reason for sentence, the only person who participated in this plan to submit a forged CXC certificate to the JCF was the appellant and, therefore, the offence to which he pleaded guilty was not made out. For that reason, the conviction should be quashed and the sentence set aside.

[16] Mr Daley, drew support for his argument from the decision of this court in **Momah v R** in which it was concluded that the only person alleged to have been involved in that conspiracy was the appellant in that case and so the conviction was quashed there being no facts pointing to an agreement or plan involving other persons.

[17] Mr Smith accepted these arguments that the facts as disclosed by the learned Resident Magistrate did not support the conviction and so the plea ought to be set aside. According to Mr Smith, a conspiracy contemplates an agreement or plan involving more than one person. In this instance, he said, there was nothing on the Crown's case or by way of agreed facts to suggest that the appellant did, in fact, conspire with persons known or unknown. He also drew support for his contention from **Momah v R**.

[18] Learned counsel for both sides, obviously, have been influenced in their thinking by the facts outlined by the learned Resident Magistrate in her reason for sentence and the decision of this court in **Momah v R**. We have carefully examined the circumstances of this case, bearing in mind the record of appeal and the submissions of both counsel. Having done so, we have made some material observations concerning the procedure adopted in the court below and which, obviously, has influenced these submissions from both the appellant and the Crown that the plea of guilty to conspiracy to defraud is flawed.

Duty of Resident Magistrates to take notes of proceedings on plea of guilty

[19] Mr Daley and Mr Smith, in advancing their arguments on ground two, had only for their perusal, and which constituted the record of the appeal, a statement from the learned Resident Magistrate in which she briefly set out the facts and then gave her reasons for sentence. It is, essentially, the learned Resident Magistrate's own summary of the facts that this court and counsel have had the benefit of seeing. There are no notes that were made by the learned Resident Magistrate contemporaneous with the arraignment and the sentencing of the appellant that have been submitted for our scrutiny. So, the facts outlined by the learned Resident Magistrate are not presented as the facts that would, or should, have been outlined by the Clerk of the Courts at the time of arraignment or before arraignment on which the order for indictment would have been based.

[20] This court was told by Mr Daley that the appellant, upon his advice, pleaded not guilty to the offence of forgery because he denied being the actual forger and that resulted in no evidence being offered on that information. Further, he indicated that on the advice of counsel, the appellant pleaded guilty to conspiracy to defraud which would involve him acting with others pursuant to a plan or agreement. None of this is recorded for the benefit of this court. It is based on Mr Daley's information that the court was made to understand why it is that an order was made for the offence of conspiracy to defraud while none was made for the offence of forgery contrary to section 7 which involved the allegation that the appellant forged the document with an

intention to deceive and for which he was actually charged before the learned Resident Magistrate.

[21] This state of affairs is regrettable and is wholly unacceptable in the light of the guidance that has emanated from this court over the past 50 years as to how Resident Magistrates should treat with proceedings upon a plea of guilty. We think it is incumbent on us to, once again, remind Resident Magistrates of the procedure prescribed by this court in dealing with guilty pleas by reference to the dicta from earlier authorities. We can only hope that there will no longer be any need for such reminder in the future.

[22] In **Canterbury v Joseph (Police Constable)** (1964) 6 WIR 205, it was directed as reflected in the headnote:

> "It is the duty of a magistrate to take notes in writing of the evidence in every case, and 'evidence' means sworn and unsworn evidence, and includes facts narrated by a prosecutor as well as the statement made by a defendant when a plea of guilty has been entered."

[23] In **R v Cecil Green** (1965) 9 JLR 254, Duffus P, being guided by the authority of **Canterbury v Joseph**, also instructed:

> "This court also desires it to be placed on record, that in cases where a plea of guilty is entered by an accused, that the learned resident magistrate must note clearly what has transpired before his court. Any statement made by the Clerk of the Court or other prosecuting officer should be noted, and any statement made by the accused or by his counsel should also be noted as forming part of the record

> of the trial, otherwise, it will be quite impossible for the Court of Appeal to know what in fact did transpire in the court below."

[24] Again, in 2002, in **Regina v Evrald Dunkley** RMCA No 55/2001, delivered 5 July 2002 at page 9, Harrison JA (as he then was) was to join in the call from this court that Resident Magistrates provide notes of proceedings when pleas of guilty are given. Albeit that Harrison JA made no reference to the earlier authorities, he, similarly, instructed by stating:

> "We must also emphasize, that even in the event of a guilty plea being offered, Resident Magistrates must make a record of the proceedings including the facts as related by the Clerk of Courts, showing the order for indictment by the Resident Magistrate, as the basis for the acceptance ofthe said plea of guilty. None of this was done in this case. Resident Magistrates and Clerks of Courts must give attention to these important details especially in a criminal case where the liberty of the subject is at stake. The police statements and memorandum of the arresting officer to his sub-officer is quite out of place in the record to the Court of Appeal as was done in this case."

[25] There was no adherence to the prescribed procedure in this case and that omission has lent itself to the reliance by counsel on the summary of the facts given by the learned Resident Magistrate that was prepared after sentencing and for the purposes of the appeal. The facts she gave do not expressly indicate anything that would point to a conspiracy or the absence of a conspiracy for that matter. It is for that reason that both counsel were led to argue that the facts given **by** (not to) the learned Resident Magistrate cannot support the conviction for conspiracy to defraud. We find,

however, that the reliance on those facts is rather misplaced when all the circumstances of the case are carefully analysed.

Analysis and finding on ground two

[26] The facts before the learned Resident Magistrate would have pointed, indisputably, to the appellant being in possession of a forged document that he knew to have been forged and which he intended to use, and did use, for an unlawful purpose. At his arraignment, he admitted to being in possession of the forged document. Two facts that have arisen, reasonably and inescapably, by inference from this admission, are, either, that the appellant created the forged document himself for an unlawful purpose or that he acted with others as part of an agreement or plan to do so with the necessary intention to use it for the unlawful purpose.

[27] From the record of appeal (supported by information from his counsel to this court), it becomes evident to us that the appellant intended to, and did, join issue with the Crown that he forged the certificate. Consequently, he did not enter a plea of guilty to the offence of forgery. In the light of his stance, the Crown, obviously, did not seek to proceed on that charge but rather sought to proceed on the conspiracy charge. That charge would mean that even if he was not the actual forger, he was, at least, part of a plan or an agreement with others to use this forged certificate to defraud the JCF. The inference of him doing so was strong, reasonable and inescapable, he having not accepted that he was the maker of the document.

[28] Conspiracy can be established either directly or inferentially. In **Archbold Pleading**, **Evidence & Practice in Criminal Cases** 36th edition at paragraph 4073, it is stated that the existence of a conspiracy can be proved from circumstances from which the jury may presume it. The learned authors note:

> "Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."

[29] The facts of this case readily lend themselves to the finding of a conspiracy even if not directly stated. The fact of the appellant acting with others in an unlawful enterprise for an unlawful purpose can be presumed from all the circumstances including the admitted facts. We conclude that even in the face of the absence of notes of the actual facts outlined to the learned Resident Magistrate before the indictment was preferred, it was open to her on the facts before her to indict him for that offence, he having not accepted that he is guilty of the offence of forgery under section 7 of the Forgery Act.

[30] Furthermore, with legal advice, the appellant unequivocally accepted those particulars of the offence of conspiracy to defraud as read to him. The appellant had agreed the facts constituting the offence by his unequivocal plea of guilty. The appellant is the best person who can say whether or not there was a conspiracy and he had said so clearly and eloquently by his guilty plea upon the advice of his counsel. Why then should his admission not have been accepted by the court and acted upon

without any further proof from the Crown? We see no reason for the learned Resident Magistrate not to have accepted the plea to particulars which clearly established an offence known to law and which arose on the facts, even if, at best, inferentially.

[31] We are attracted to the reasoning and conclusion of this court in **Peter Coleman v Regina** (1994) 31 JLR 347. In that case the appellant was charged for possession of ganja and dealing in ganja to which he pleaded guilty and was sentenced. On his appeal, it was contended that the learned Resident Magistrate "fell into error" in accepting the plea of guilty without first obtaining from a chemist certification that the substance was, in fact, ganja and secondly, that the appellant "fell into error" when he pleaded guilty to charges he never understood. In upholding the conviction and sentence, the court, through Carey JA, opined:

> "The best person to know what he has is the appellant. From the outset he admitted he had ganja. Where a defendant pleads guilty, there is no obligation on the prosecution to prove anything. There was a prima facie case on the facts recounted by the Clerk of Courts to the Resident Magistrate."

The court also found that the appellant could not have misunderstood the language of the charges read to him and for that reason could not have fallen into error in pleading guilty.

[32] We are fortified in our view that the argument advanced by the appellant in respect of the charge of conspiracy to defraud is without merit. We can find no injustice being caused to him in the light of the circumstances of the case and his admission by

his plea of guilty (with legal advice) to facts constituting the offence of conspiracy to defraud. In relation to ground two, therefore, we conclude that the appellant was properly pleaded on count one of the indictment that charged him with conspiracy to defraud and having pleaded guilty, he had accepted the particulars of that offence, thereby making his conviction for it justified. Ground two of the appeal, therefore, fails. The only material question that remains in respect of that offence is whether the sentence imposed is manifestly excessive. This falls for determination later in this judgment.

The Crown's application

Whether indictment should be amended to permit the preferment of new offences in substitution of original offences

[33] Mr Smith, in agreeing with Mr Daley that the counts charging conspiracy to defraud and possession of a forged document cannot stand, had advanced the proposition that the court could amend what he saw as an error in the proceedings and substitute on the indictment the offences of forgery contrary to section 7 of the Forgery Act and uttering a forged document contrary to section 9(1) of the Forgery Act. He relied on section 302 of the Judicature (Resident Magistrates) Act and section 24 (2) of the Judicature (Appellate Jurisdiction) Act in putting forward this as an option to uphold the conviction of the appellant.

[34] Mr Smith contended that by virtue of those statutory provisions, this court is empowered to treat with what had transpired before the learned Resident Magistrate as an error in the proceedings and to permit an amendment to the indictment to more accurately reflect the facts accepted by the appellant. He submitted that in the light of the appellant's unequivocal plea of guilty and on the weight of the accepted facts, the indictment could be amended to substitute the offences proposed in the interests of justice and without prejudice to the appellant.

[35] In the light of our finding that the appellant has been properly convicted for the offence of conspiracy to defraud, there is no need for us to consider those arguments in relation to count one. There is absolutely no need for any amendment in relation to that charge, it having been allowed to stand. There would be no need, then, to substitute it with the offence of forgery (the substantive offence) which the appellant had already denied and which the Crown had decided not to pursue.

[36] We have considered Mr Smith's proposition in relation to count two that we have found to be a nullity. The statutory provisions put forward for consideration have been considered in turn. We have begun our analysis with section 302 that reads:

> "302. It shall be lawful for the Court of Appeal to amend all defects and errors in any proceeding in a case tried by a Magistrate on indictment or information in virtue of a special statutory summary jurisdiction, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made as to the Court may seem fit."

[37] The scope of the power of this court under this provision has been the subject of judicial consideration and pronouncements both at the Privy Council and in this court. In the interest of brevity, we will just state that the overarching principle distilled from the authorities is that whilst this court does have a wide power to amend all errors or defects in proceedings by virtue of the section, an amendment should not be done if to do so would cause an injustice to the person convicted: see, for instance, **The Director of Public Prosecutions (DPP) v Stewart** (1982) 35 WIR 296 (PC) and **Steve Jordine v R** [2013] JMCA Crim 49.

[38] We must point out that each case has to be assessed according to its own peculiar facts. Looking at the facts of this case, it seems to us that a charge for the offence of uttering a forged document was open to the Crown to pursue from the very outset since Mr Smith is maintaining that it is one that properly arose on the facts. Despite that, however, the appellant was never charged by the police for it and no order to add it as a count in the indictment was made by the learned Resident Magistrate. To now allow the Crown to re-open the case, to charge the appellant for a new offence and have him sentenced for such an offence, which was never put to him for him to get an opportunity to respond, would amount to an injustice.

[39] The views expressed by this court, through the words of Harris JA in **Steve Jordine v R** at paragraph [21] do resonate with us in considering this point. There it was stated, in part:

> "…However, assuming that there was evidential material before the magistrate to establish a charge against the

> appellant for receiving, this court could not carry out an amendment to the indictment by adding a count for receiving stolen goods without undue prejudice being encountered by the appellant. A defendant is accorded a right to know and answer a charge which has been laid against him. The addition of a count for receiving by this court would deprive the appellant of the opportunity to answer the new charge. Consequently, an amendment of the indictment would indubitably operate unfairly to him as it would be a grave miscarriage of justice."

[40] Furthermore, we are not being asked to amend a defect of an "essentially technical nature" as was the case in **DPP v Stewart**. We are being asked to charge the appellant for a completely new offence and to use it as substitution for one which is a nullity. In essence, we are being asked to charge an offence where none had been charged before. This must be such as to operate unfairly to the appellant.

[41] In **R v Gray** (1965) 8 WIR 272, the appellant was convicted on an information that was bad, it having charged an offence not known to law. Counsel for the Crown conceded that the information was bad but applied to the court to amend it under section 302. The court refused the application. Their Lordships in the Court of Appeal found that the information did not disclose any offence known to law and that the court was being asked to amend the information so that it would now charge an offence where none was charged before. Their Lordships stated:

> "As was said by Sherlock, Acting Chief Justice in the former Court of Appeal in **R v George McFarlane** ([1939] 3 JLR 154 at p 157):
>
> > 'To amend means to correct an error. It does not mean to substitute one thing for another and to change the entire meaning of a legal document and

> the powers of amending a written or verbal information are certainly not enlarged when dealing with a sworn one. To do what we are invited to do in this case would not be to amend an information but to transform it.'
>
> With this statement we are in complete agreement. Here we are being asked to amend the information so that it will now charge an offence where no offence was charged. This we cannot do. The appeal thereforeis allowed; conviction quashed and sentence set aside."

[42] We too will adopt, without qualification, the position taken by the court in **R v McFarlane** (1939) 3 JLR 154 and in **Gray** and so we will echo the same sentiments that we are being called upon to transform the indictment by charging an offence where none was charged before. This we will not do. The Crown had made an election. They should not be allowed, to the prejudice of the appellant, 'to change the rules of the game' in the middle of it. To allow them now to go back on the decision to pursue certain charges because things have not worked out in their favour in the way they had envisaged would be unjust. The transformation of the indictment could not be done without an injustice. Therefore, we will not accede to the application of the Crown to amend the proceedings/indictment to allow for new charges to be preferred against the appellant for uttering a forged document and/or forgery.

[43] The other limb on which Mr Smith sought to rely to preserve the conviction of the appellant is section 24(2) of the Judicature (Appellate Jurisdiction) Act. That section reads:

> "24(2). Where an appellant has been convicted of an offence and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdictof guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[44] We have already established that the offence of possession of a forged document contrary to common law is a nullity. There is no offence in respect of which a verdict could be returned alternatively to a nullity. Therefore, neither uttering of a forged document nor forgery is an offence in respect of which a verdict could have been returned by the learned Resident Magistrate on that count of the indictment. In other words, the learned Resident Magistrate could not have found the appellant guilty of any of those two proposed offences on the indictment before her. This would have been so even if there were facts that could support an indictment for such offences. Those offences would have had to be specifically added to the indictment as separate and distinct counts which is not the case. In the circumstances, the power of this court under section 24 (2) cannot be invoked to assist the Crown in having an amendment to the proceedings so that the appellant may be convicted for forgery and uttering a forged document in lieu of the offences for which he was indicted and convicted.

[45] We find that the proceedings or indictment in relation to the charge of possession of a forged document cannot be amended without an injustice and no new offence can be properly substituted for it. The application made by the Crown for an amendment to the indictment is refused. In the result, despite Mr Smith's valiant effort at seeking to preserve the conviction of the appellant on count two of the indictment, the conviction and sentence for that offence cannot stand. The appeal on ground one, therefore, succeeds. The only offence for which the appellant could properly have been sentenced and which remains for consideration in relation to the correctness of the sentence imposed on him is conspiracy to defraud.

Amendment of procedural error in proceedings before the magistrate

[46] Before proceeding to look at the ground of appeal in relation to sentencing, there is one other point that attracts further consideration of section 302 that we have seen it prudent to highlight. We have found a defect or error in the proceedings or on the face of the record that we believe should not be left without rectification. We have formed the view that in order to provide proper guidance for future proceedings in the Resident Magistrates' Courts and in the interests of justice, the endorsements made on the informations for the offences in respect of which no order for indictment was made should not be allowed to stand.

[47] The parties were alerted to this procedural error during the course of the hearing before us when Mr Daley sought to make the point, in response to the Crown's application for an amendment to the indictment, that the appellant had pleaded not

guilty to forgery and was acquitted. The question arose as to whether the appellant was properly acquitted so that he could successfully raise the plea of autrefois acquit.

[48] The Judicature (Resident Magistrates) Act sets out in sections 272-275 the procedure applicable to dealing with persons appearing before the Resident Magistrates' Courts charged with indictable offences. We will not at this time set out these provisions in detail. Suffice it to say at this juncture that what is clear from the statutory provisions is that trial of an indictable offence that falls within a magistrate's jurisdiction and which can be adequately punished by him or her cannot validly commence without (1) an order for indictment duly endorsed on the information and signed by the magistrate and (2) an indictment preferred by the Clerk of the Courts in accordance with the order for indictment and duly signed by the clerk.

[49] When the indictment is preferred for the offence named in the order for indictment, then the indictment is read to the accused person and he is asked whether he is guilty or not of such offence. Any plea of the accused is to be entered (endorsed) on the indictment. For immediate purposes, we will set out, verbatim, the relevant portion of section 275 which reads:

> "If such person says that he is guilty, the Magistrate shall thereupon cause a plea of guilty to be entered; and if such person says that he is not guilty, the Magistrate shall cause such plea of not guilty to be entered, and unless good cause be shown to the contrary, the trial shall proceed…"

[50] Turning to the record of this case, it is seen that the indictment order was made and endorsed on the information which charged the appellant for conspiracy to defraud.

There was no corresponding information in respect of the charge of possession of a forged document contrary to common law. The informations that were laid by the police in relation to the offences of forgery (No 13820/13) and possession of a forged document contrary to the Forgery Act (No 13822/13) were endorsed "No evidence offered. Dismissed" and signed by the learned Resident Magistrate. The fourth information (No 13821/13) that also charged the offence of possession of a forged document contrary to the Forgery Act bears no endorsement.

[51] A valid order of "No evidence offered. Dismissed" in relation to any of the offences could only have been properly made following a plea of not guilty by the appellant to the indictment (not the information). The appellant was, however, not pleaded to any count on the indictment that charged forgery or possession of forged document contrary to the Forgery Act. Furthermore, for there to have been a "not guilty" plea properly entered for these offences, an order for indictment would have had to be first made in relation to them before they could form part of the indictment preferred. No order was made by the learned magistrate with respect to those three informations. Accordingly, those offences did not form part of the indictment preferred against the appellant and so any plea to any of those offences in the circumstances would have been a nullity.

[52] The endorsement, "No evidence offered. Dismissed", wrongly conveys the impression that an order for indictment was made for those offences and an indictment preferred to which the appellant pleaded not guilty and the Crown then elected not to

offer any evidence. Furthermore, there was no formal verdict of "not guilty" entered. There was thus no acquittal or formal discharge of the appellant of those charges. That procedure was required to properly acquit the appellant on the basis that no evidence was offered against him. That procedure was, however, not followed. There is thus an error in the proceedings as well as on the face of the record.

[53] In all the circumstances, the proper endorsements on those informations should have been "No Order Made" to reflect the true factual and legal position. This would have brought the case in alignment with the provisions of sections 272-275 of the Judicature (Resident Magistrates) Act. By the wide powers vested in this court by section 302 to amend 'all defects and errors' in proceedings (according to the Privy Council), we would direct in the circumstances that given the clear error, the endorsements on the informations not proceeded on should be amended. In the result, those informations endorsed "No evidence offered. Dismissed" (No 13820/13 and No 13822/13) and the information not endorsed at all but which was not pursued (No 13821/13) should all be endorsed "No Order Made".

[54] This amendment would cause no injustice to the appellant because the orders as they currently stand (or the absence of an order, for that matter) cannot avail him, in any event. They could not properly sustain any plea of autrefois acquit in his favour because no verdict of "not guilty" necessary for an acquittal was entered (see for a detailed discourse on the subject, **Dennis Thelwell v The Director of Public Prosecutions and the Attorney-General** SCCA No 56/1998, delivered 26 March

1999 and **The Attorney-General of Jamaica v Keith Lewis** SCCA No 73/2005, delivered 5 October 2007).

Ground three: whether the sentence is manifestly excessive

[55] The third ground of appeal advanced by the appellant is that the sentence of nine months imprisonment is manifestly excessive. Mr Daley, quite commendably, made comprehensive and helpful submissions on that ground. Learned counsel, for our benefit, extracted all the mitigating circumstances in this case that he said would render a custodial sentence inappropriate and excessive. We have given due regard to them. These are:

(a) the plea of guilty at the very first opportunity;

(b) no previous conviction;

(c) a non-violent crime;

(d) status of the appellant as a university student with stable family background;

(e) excellent report from members of his community/favourable social enquiry report;

(f) absence of anything in the appellant's background to suggest that this was other than wholly aberrant behavior;

(g) the motive for the commission of the offence which was to secure employment to finance his tertiary education; and

(h) the appellant's usefulness to the society/not being a threat to the public.

[56] Relying on some recent authorities from this court, Mr Daley identified some established principles that he submitted the learned Resident Magistrate had failed to apply in determining the most appropriate sentence to be imposed. These principles are outlined thus:

(1) Sentencing is within the discretion of the court and is imposed by taking into account the facts and circumstances of the case as well as classical sentencing principles of retribution, deterrence, prevention and rehabilitation: **R v Collin Gordon** SCCA No 211/1999, delivered 3 November 2005.

(2) The principle of rehabilitation seemed to factor heavily in the consideration of this court in **Kirk Williams v R** [2013] JMCA Crim 51.

(3) A plea of guilty by an offender should attract special consideration by the sentencer: **Evrald Dunkley**; **Christopher Brown v R** [2014] JMCA Crim 5.

(4) The character and antecedents of the offender are also important factors to be taken into account by the sentencer in arriving at an appropriate sentence. In this regard, the community's positive

view of the offender should be taken into account: **Christopher Brown**.

(5) The court in passing sentence must look at whether the offender's criminal conduct reflected a pattern or an aberration: **Patricia Henry v R** [2011] JMCA Crim 16.

(6) If the sentencing court seeks to impose a term of imprisonment, it must have a starting point for that sentence and then apply the appropriate discount: **Evrald Dunkley**.

[57] After a demonstration of the application of those principles to the circumstances of the case, learned counsel submitted on behalf of the appellant that the sentence imposed was manifestly excessive, having regard to all the circumstances, in particular, that:

(a) The learned Resident Magistrate inappropriately focused on the sentencing principle of retribution rather than rehabilitation despite overwhelming evidence that the offender's conduct was an aberration and that he had very good prospects of making a worthwhile contribution to the society.

(b) The appellant pleaded guilty at the first opportunity but the learned Resident Magistrate failed to indicate that she had given any special consideration to this guilty plea in arriving at her sentence.

(c) The learned Resident Magistrate failed to apply the appropriate sentencing principles in arriving at a term of imprisonment. She was required to set out the best possible sentence and then demonstrate that she had applied the appropriate discounts, particularly in light of the guilty plea.

[58] Mr Daley submitted that there was a lack of emphasis on rehabilitation. According to him, the social enquiry report painted the offender as someone with a good family background and strong community ties who has no pattern of criminal conduct. His motive for acting was made clear in the social enquiry report which pointed to a need for him to gain employment to assist him in pursuing his tertiary education and reduce his dependence on his parents. Learned counsel highlighted that all efforts of the appellant at securing employment had failed and so his action was as a result of the difficult challenges he was facing at the time. It did not emanate from him being a hardened criminal so that the only way he can be reformed is through incarceration.

[59] We have considered learned counsel's submissions with all the thoroughness they deserve. We have no doubt that the learned Resident Magistrate might have faced a difficult task in striking that happy balance among all the principles of sentencing. Her task might have been made even harder by the absence of formal sentencing guidelines within our jurisdiction to indicate in a more structured way the methodology that should be employed in imposing custodial sentences for an offence of this nature

with recommended ranges and starting points. However, much guidance can be gleaned from the established authorities on how to approach this, admittedly, difficult task. The learned Resident Magistrate would have had available to her the guidance afforded by the various authorities (some of which have been cited by Mr Daley to this court), to assist her in arriving at her position on sentencing.

[60] Having looked at the reason for sentence submitted as part of the record of appeal, we do find that there is significant force in the submissions of Mr Daley. We do find that the learned Resident Magistrate failed to demonstrate the balancing act that she undertook that led her to a sentence of imprisonment for the term imposed as the most appropriate sentence bearing in mind the offence and the offender. What appears striking from her reason is that she saw, as necessary, more than anything else, the need to punish the appellant given the nature of the offence and the circumstances attendant on its commission.

[61] Clearly, the learned Resident Magistrate took into account the retributive element of sentencing more than any other. We would not at all disagree that the offence is a serious one and deserving of punishment commensurate with its level of seriousness. It does show deviousness in the mind of the appellant to design or to participate in such a deceptive scheme for his personal advancement. Also, for him to have submitted the forged document to the law enforcement body of the nation smacks of brazenness and is indicative of a blatant disregard for law and order. His conduct warrants condemnation and punishment based on the offence. The learned Resident Magistrate

made that clear and we cannot fault her pronouncements in relation to the offence. The court must, however, also look at the offender.

[62] There is nothing in the reasons advanced by the learned Resident Magistrate to indicate that she paid sufficient regard to all the positive attributes of the appellant within the context of the objectives of sentencing before choosing a term of imprisonment as the best sentence option. She did speak to some attributes of the appellant that she took into account as mitigating factors. She said that she considered that he was a first time offender of 25 years old, that he pleaded guilty and has expressed penitence and remorse. It ended there. Although she had initially said she found the social enquiry report rather helpful, she did not demonstrate how she applied the favorable community report and the good antecedents to the benefit of the appellant.

[63] What is also absent from the learned Resident Magistrate's reasoning is an indication of the discount that she allowed for the guilty plea having taken it into account. She indicated no starting point that she had used to arrive at the term of imprisonment and how the adjustments were made to arrive at nine months imprisonment bearing in mind all the mitigating and aggravating factors in the case.

[64] Even more significantly, the learned Resident Magistrate did not demonstrate that she accepted the principle that a sentence of imprisonment must always be viewed as last resort and should only be imposed after it is recognised that no other sentencing

option can achieve the ends of justice. This principle is embodied in the Criminal Justice (Reform) Act at section 3. The section provides:

> "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;**
>
> (b) the offence is murder; or
>
> (c) [Deleted by Act 6 of 2001]
>
> (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."**(Emphasis added)

[65] This principle is also entrenched in the UK statutory sentencing regime that courts should not impose a custodial sentence unless of the opinion that the offence is so serious that neither a fine nor a community sentence could be justified: see

Archbold Criminal Pleading, Evidence & Practice 2013 edition at paragraph 5-468.

[66] In looking at the reason for sentence given by the learned Resident Magistrate there is, indeed, no indication that she took this statutory provision into account. There is no indication that she considered other sentence options and had eliminated them as being inappropriate thereby leaving imprisonment as the best possible option in accordance with the statutory prescription. In fact, the reason for the imposition of a sentence of imprisonment, rather than any other sentence option, is not stated although the statute states that it should be expressly stated. The learned Resident Magistrate did not identify the overriding principle in sentencing that had propelled her to decide on a term of immediate imprisonment over and above the penalty of a fine suggested to her by counsel.

[67] We have considered all the circumstances and the principles of law placed before us and have paid due regard to the reason of the learned Resident Magistrate. We are not satisfied that she took all pertinent matters relevant to sentencing into account in arriving at her decision to impose a custodial sentence on the appellant in all the circumstances of this case. She has failed to show why it is that she had formed the view that a sentence of immediate incarceration was the most appropriate way to deal with the appellant.

[68] The circumstances are such that the appellant, having matriculated to be a student at a tertiary institution and being in his final year, seemingly, could have

qualified for admission to the JCF without the aid of such a fraudulent scheme. While his action is senseless and inexcusable, it was not a sustained activity geared at exacting money or other property from persons. It was a wholly aberrant act. In the end, he derived no material or financial benefit from his action and there is no evidence that anyone was materially affected. He is a first offender and before this infraction was of good character and good standing in his community. He is not considered a threat to society. These are all factors that could have been weighed in the equation in an effort to determine the most appropriate sentence to be imposed.

[69] We find no compelling reason to depart from the previous pronouncements of this court on sentencing that have been distilled from the authorities as being applicable to the circumstances of this case. We believe that justice could be served by the imposition of a non-custodial sentence as an alternative to immediate imprisonment. A non-custodial sentence would still achieve the ends of justice as this young man now has a blemish on his character arising from the mere fact of a criminal conviction. His good name has been tarnished, perhaps beyond repair, the effect of which is likely to mar him for a long time, if not for the rest of his life. All this could be weighty and effective enough to achieve the primary objectives of sentencing. An immediate term of imprisonment, added on all that, would, in our view, be manifestly excessive.

[70] In coming to our conclusion on this ground of appeal, we must point out that we have undertaken a review of the decision of the learned Resident Magistrate, being cognizant of the principles of law that govern our function. We would adopt the

statement of Brooks JA in **Christopher Brown** at paragraph [10] and, simply, say here that we have adhered to the principle set out in **R v Ball** (1951) 35 Cr App R 164 by Hilbery J in our consideration of ground three. As such, we would not interfere with the learned Resident Magistrate's decision on sentence because we are of the view that we would have passed a different sentence. We have seen it fit to interfere with the decision in the particular circumstances of this case because we are not satisfied that when the sentence was imposed, the learned Resident Magistrate had applied all the relevant legal principles.

[71] We would, therefore, allow the appeal on this ground, set aside the sentence of nine months imprisonment at hard labour and substitute therefor a fine of $80,000.00 or six months imprisonment at hard labour for conspiracy to defraud.

Order

(1) The appeal is allowed in part.

(2) The appeal against the conviction for conspiracy to defraud is dismissed and the conviction is affirmed.

(3) The appeal against the sentence for conspiracy to defraud is allowed, the sentence of nine months imprisonment at hard labour is set aside and a sentence of a fine of $80,000.00 or six months imprisonment at hard labour is substituted therefor.

(4) The appeal against the conviction for possession of a forged document contrary to common law is allowed. The conviction is quashed, the sentence is set aside and a judgment and verdict of acquittal is entered therefor.

(5) The endorsements of the learned Resident Magistrate on the informations charging forgery (No 13820/13) and possession of a forged document (No 13822/13) are amended to read "No Order Made" instead of "No evidence offered. Dismissed".

(6) The information charging possession of a forged document (No 13821/13) is to be endorsed "No Order Made".