[2013] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 12/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

HAROLD BRADY v R

Mrs Georgia Gibson-Henlin and Marc Jones instructed by Henlin Gibson Henlin for the appellant

Garth McBean for the Crown

25 September 2012, 18 and 25 January 2013

PANTON P

[1] On 18 January 2013, we quashed the conviction in this matter, and promised to put our reasons in writing. We now do so.

[2] The appellant, an attorney-at-law, was convicted on 7 December 2011, in the Resident Magistrate's Court for the Corporate Area for a breach of section 11(2)(c) of the Commissions of Enquiry Act. For this offence, he was fined $500.00 or 10 days imprisonment, in default. The particulars of the charge read as follows:

> "[Harold Brady] being a witness refused without sufficient cause to answer questions put to him by the Commission

> of Enquiry appointed to enquire into and report on issues relating to the Extradition request for Christopher Coke by the government of the United States of America."

Preliminary Objection

[3] At the commencement of the proceedings before the Resident Magistrate, the appellant made a preliminary objection that the prosecution was a private one and so there was a requirement, by virtue of section 60 of the Justices of the Peace Jurisdiction Act, that the summons on information be stamped. The proceedings, it was contended, would be void if there had been no stamping. The prosecution, through Mr Garth McBean, responded that a failure to stamp the document was not fatal. He also undertook to have the document stamped. In any event, he said that the appellant had cured any irregularity in this regard by appearing on several previous dates without protest.

[4] The learned Resident Magistrate ruled that "the lack of a $5.00 or $10.00 stamp cannot oust the Court's jurisdiction to hear and determine this matter". She reasoned that the appellant had by his conduct submitted to the jurisdiction of the court and it was too late to raise the matter of stamping. She also stated that in her view the proviso in section 2(1) of the Justices of the Peace Jurisdiction Act was applicable.

The evidence

[5] The prosecution called one witness, Mr Allan Kirton, secretary to the enquiry referred to in the particulars of the charge. He said that the appellant appeared before the commission of enquiry in obedience to a summons issued for him to attend on 20

January 2011. The proceedings were adjourned to 24 January 2011, for the appellant's attorney-at-law to make submissions. The commission ruled that there was no basis for the appellant not to give testimony or produce documents. After the ruling, said Mr Kirton, questions were put to the appellant by the chairman of the commission and attorneys attending the hearing. The appellant did not answer. The transcript of the proceedings was admitted in evidence.

[6] There was a no case submission. The learned Resident Magistrate, after referring to several authorities, ruled as follows:

> "… the phrase **"WITHOUT SUFFICIENT CAUSE"** as used in section 11(2)(c) of the Commissions of Enquiry Act, establishes a statutory defense [sic] as opposed to a negative element and that in the absence of constitutional support of a reverse onus of proof, I have 'read down' the offending provision and interpret it as imposing an evidential burden only. Accordingly, I call upon the accused to answer the charge being satisfied that a prima facie case has been made out by the prosecution."

The findings

[7] The appellant did not give evidence; nor did he call any witnesses. Closing submissions were made by the prosecution and on behalf of the appellant, and thereafter, the learned Resident Magistrate made findings of fact and convicted the appellant. She found that the appellant had been duly summoned to attend and give *viva voce* evidence, but indicated that he would not be sworn, nor would he answer any questions posed. The most significant finding that she made was expressed thus:

"4. I find that the exception provided in the phrase 'without sufficient cause' is a statutory defence rather than an element of the crime. It is my interpretation of the offending provision that it imposes an evidential burden only. The defendant when called upon by this Court to answer the charge rested on his no case submission, which in effect was that the disputed phrase was an element of the offence to be proven by the Prosecution. He having rested has therefore provided no evidence from which the court can determine that he had sufficient cause. Accordingly in the circumstances I find him guilty."

The grounds of appeal

[8] The following grounds of appeal were relied on:

"1. The learned magistrate erred as a matter of law when she ruled that she had jurisdiction to try the matter. This was in contravention of the provisions of s. 60 of the *Justice of the Peace Jurisdiction Act* and s. 2 of the Stamp Duty Act and the Schedule thereto which require summonses initiating private prosecutions to be stamped in order to give the Court jurisdiction. The summons in the instant case was not stamped and the Appellant did not submit to the jurisdiction of the Court.

2. The learned magistrate erred as a matter of fact and law in finding that the Appellant refused to answer questions:

a. The evidence does not disclose that questions were put to the Appellant that he failed to answer.

b. The offence is not [sic] refusing to answer questions under that statute or at common law.

3. The learned magistrate erred as a matter of law by introducing into or by accepting submissions on behalf of the prosecution that introduces into 11(2)(c) of the Commissions of Enquiry Act a reverse onus or evidential burden on the Appellant that he failed to answer questions 'without sufficient cause'.

4. The learned magistrate erred as a matter of law by failing to accept submissions on behalf of the Appellant that reverse onus provisions are unconstitutional in Jamaica since the passage of the *Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011* as offending the presumption of innocence and the right to a fair trial:

   a. She fell into further error in failing to have regard to the relevant decision of the **R. v. Oakes 26 DLR (4th) 200** with regard to reverse onus provisions in respect of a similar provision in the Canadian Charter of Rights.

   b. The learned judge misapplied the decision of **Bowe v R PCA 44 of 2005** and used it to support her ruling that the provisions of the European Convention on Human Rights jurisprudence can be used to interpret *The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011* and/or that the said decision is binding on Jamaican Courts in interpreting the *Charter.*

5. The learned magistrate erred as a matter of law in failing to accept submissions on behalf of the Appellant that even if a reverse onus provision

exists it is the duty of the prosecution to **prove the necessary facts** before calling on the accused to respond:

a. She therefore erred in failing to require the prosecution to put before her all the evidence that was before the Commission.

b. In particular she erred in failing to require the prosecution to produce the document that contained the reasons for the Appellant's objection to testify before the Commission even though the evidence disclosed that it was tendered into evidence at the Commission of Enquiry.

c. The learned magistrate failed to require the prosecution to prove to her the substance of the Appellant's objection thereby putting her in a position to make an independent assessment of its sufficiency.

6. The learned magistrate erred in failing to accept submissions on behalf of the Appellant that he was not summoned to answer questions but to give a statement and also to bring an Attorney.

7. The learned magistrate failed to take into account the fact that the Appellant acted on the advice of and through his Attorney-at-Law.

8. The learned magistrate erred as a matter of law in relying on and using cases that were not cited by counsel on either side and in circumstances where no opportunity was given to counsel to respond to the said cases prior to her ruling on the Appellant's no case submission."

The submissions

Ground one - the challenge to the validity of the proceedings and the jurisdiction of the Resident Magistrate

[9] Mrs Georgia Gibson-Henlin, on behalf of the appellant, made comprehensive written and oral submissions. She contended that the proceedings before the Resident Magistrate were a nullity on the basis that neither the information nor the summons which grounded the charge had been stamped as required by section 60 of the Justices of the Peace Jurisdiction Act. The need for the stamping, she said, was the fact that this was a private prosecution.

[10] In response, Mr Garth McBean for the prosecution referred to sections 36, 41 and 43 of the Stamp Duty Act which he said provide for unstamped documents. Section 36 states that no "instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof". Section 41 provides for the admission in evidence in criminal proceedings of instruments liable to be stamped, although they may not have been stamped, and section 43 places a duty on officers of the court to bring to the attention of the court any omission in respect of stamping, or as regards the insufficiency of such stamping.

[11] Although Mr McBean referred to these provisions of the Stamp Duty Act, he submitted that they were not applicable as they deal with the admissibility of unstamped instruments, and in the instant case it was not being sought to admit the information or summons into evidence. However, the sections were relevant, he said, as they show that the non-stamping of an instrument is not fatal to proceedings,

particularly criminal proceedings. This, he said, is reinforced by section 66 of the Justices of the Peace Jurisdiction Act, which gives the court the discretion to excuse or postpone the stamping of an information or summons. To that end, he applied to the court to exercise its discretion. In the alternative, Mr McBean argued, the appellant had waived whatever irregularity that there may have been and had submitted to the jurisdiction of the court.

[12] The attorneys-at-law in the proceedings before us as well as in the court below, proceeded on the basis that the prosecution was a private one. We disagree with this categorization of the prosecution. An examination of the history of the matter shows that the commission was established on the instruction of the Governor-General. Section 2 of the Commissions of Enquiry Act makes it lawful for him to appoint one or more commissioners, authorizing them to enquire into any matter in which an enquiry would, in the opinion of the Governor-General, be for the public welfare. In the instant case, the Governor-General ordered the commissioners "to enquire into and report on the issues dealing with the following terms of reference:

> a) The issues relating to the extradition request for Christopher Coke by the Government of the United States of America;
>
> b) The manner and procedure in which the said extradition request was handled by the Government of Jamaica and the role and conduct of the various public officials who handled the extradition request;

c) The circumstances in which the services of the Law firm Mannatt Phelps and Phillips were engaged in relation to all or any of the matters involved, by whom they were engaged and on whose behalf they were authorized to act;

d) Whether there was any misconduct on the part of any person in any of these matters and, if so, to make recommendations as the Commission sees fit for the referral of such persons to the relevant Authority or disciplinary body for appropriate action;"

[13] Section 2 of the Commissions of Enquiry Act provides that, in the absence of a direction to the contrary, an enquiry shall be held in public. The instant enquiry was conducted in public. The said Act makes the following general provisions:

i. the commissioners have the powers of a judge of the Supreme Court in respect of the summoning and examining of witnesses (section 10);

ii. witnesses are entitled to be paid expenses including travelling expenses at rates prescribed by the Witnesses' Expenses Act for witnesses who are entitled to have their expenses paid from public funds (section 11);

iii. where a person who has been summoned as a witness does not attend, the commissioners on proof by affidavit of service of the summons, may issue a warrant of arrest for the witness (section 11A);

iv. the Governor-General may direct the Commissioner of Police to detail constables to attend upon the commissioners, to preserve order during the proceedings of the commission, and to perform

such other duties as usually pertain to their office when in attendance upon the Supreme Court, and to serve summonses on witnesses, and to perform such ministerial duties as such commissioners shall direct (section 12);

v. the Governor-General may direct what remuneration to be paid to the commissioners and their secretary and any other person employed in or about the commission. The sums are to be paid by the Accountant-General out of the ordinary cash balance in the treasury (section 13);

vi. all process and proceedings before the commissioners under the Act shall be free from stamp duty (section 14); and

vii. no proceedings shall be commenced for any penalty under the Act except by the direction of the Director of Public Prosecutions or of the commissioners (section 16).

[14] In view of the public nature of the enquiry, the powers of the commissioners, the provision for the payment of the commissioners and their employees as well as witnesses out of the public purse, and the bar on the institution of proceedings for a penalty except at the direction of the Director of Public Prosecutions or the commissioners, it is our opinion that the prosecution instituted against the appellant was not in the nature of a private prosecution. This was not a private matter between the commissioners or their secretary and the appellant. Indeed, the fiat of the Director of Public Prosecutions was sought and obtained. We should think that one of the characteristics of a private prosecution is that it does not require the authority of

anyone other than the justice of the peace before whom all complaints, whether private or public, have to be laid. In the circumstances, the question of the payment of stamp duty does not arise. Furthermore, it would be inconsistent for a prosecution directed by the commissioners to attract stamp duty whereas the Commissions of Enquiry Act provides that all process and proceedings before the commissioners shall be free from stamp duty (section 14). Ground one fails. In our view, the proceedings were properly brought and the Resident Magistrate had jurisdiction to conduct the trial.

[15] Even if the prosecution was a private one, and there is a requirement for stamp duty to be paid, there is no provision to which we have been referred that invalidates the prosecution for non-payment of the duty. The learned Resident Magistrate is correct, in our view, in holding that the non-payment of the duty does not invalidate the prosecution. She is also correct in our view in holding that if there were any irregularities in the initiation of the proceedings, the appellant waived such irregularity by his repeated appearances without protest.

Ground two – the complaint that the Resident Magistrate erred in finding that the appellant refused to answer questions put to him

[16] In this regard, it was submitted that the learned Resident Magistrate ought not to have relied on the evidence of Dr Kirton, as it was inconsistent with the transcript of the proceedings at the enquiry which was exhibited. According to the submission of Mrs Gibson Henlin, the appellant was not sworn at the enquiry, and so was under no obligation to answer questions before the commission. Consequently, she argued, the appellant cannot be criminally liable as found by the magistrate. What, she submitted

that the learned Resident Magistrate has done is to find the appellant guilty of refusing to be sworn, which was not the offence for which he was being tried.

[17] Dr Kirton's evidence as it appears on pages 13 and 14 of the record may be summarized as follows:

i. the appellant was summoned to attend the commission on 20 January, 2011;

ii. the appellant attended along with his attorney-at-law, Mrs Gibson Henlin;

iii. the attorney-at-law indicated she had some objections and the matter was adjourned to 24 January 2011;

iv. on the latter date, Mrs Gibson Henlin and Mr McBean made submissions;

v. after the submissions, the chairman of the commission ruled that there was no basis on which the appellant could refuse to give testimony or produce documents; and

vi. questions were then put by the chairman of the commission and other attorneys-at-law to the appellant but he did not respond.

[18] The transcript of the proceedings before the commission shows that the chairman of the commission after a break (apparently after the completion of submissions by the attorneys-at-law) said that the fact that the appellant was not an official did not prevent him from being asked to give evidence before the commission. He then made reference to a situation in Australia, as well as to the question of

privilege which was apparently being claimed by the appellant. The chairman then said:

> "In the circumstances, we would ask Mr Brady kindly to give us evidence if he would."

We find it difficult not to construe the chairman's words as giving the appellant a choice in the matter. Anyway, after a reference by Mr Bailey, an attorney-at-law, to his interpretation of the summons that had been served on the appellant, the chairman then said:

> "I don't think it is necessary to give a statement. If you want to save time I think we can ask him to give evidence."

Thereupon, the appellant delivered himself thus:

> "Mr Chairman, members of the Commission. My position in this matter has been stated by my Attorney – that remains the same. I will not be participating in this these [sic] proceedings. Accordingly, I will not be sworn."

[19] The chairman was then asked by Mr Small for permission to cross-examine the appellant on his affidavit. The chairman responded that he had asked the appellant to give evidence and he had decided that he was not going to do so. He then pointedly asked the appellant:

> "Are you going to answer any question, Mr Brady?"

The appellant said:

"Beg you pardon, sir?"

The chairman repeated:

"Are you going to answer any questions asked?"

The appellant responded unequivocally:

"Not one, sir."

The chairman then moved on to other matters that did not involve the appellant.

[20] The summons that was served on the appellant to attend the commission of enquiry, advised him to take note of the following five points:

i. he was entitled to legal representation;

ii. he was required to submit a signed statement indicating his knowledge, role and conduct in relation to the matters particularly set out in the terms of reference which were stated in the summons;

iii. he was required to attach copies of relevant books and documents, and to bring to the enquiry the said books and documents when called to be examined on oath;

iv. he would be allowed to amplify his statement and respond to allegations raised against him; and

v. he was to make himself available for examination by the commissioners on oath and to be cross-examined by affected persons against whom he may have made allegations.

[21] In view of the content of the summons and the answers given by the appellant to the commission, we find it mystifying that the appellant is contending that the learned Resident Magistrate erred in finding that he refused to answer questions. This ground of appeal is clearly against the facts of the case, and is misconceived. This is also the position as regards ground six which alleges error on the part of the learned Resident Magistrate in failing to accept submissions that the appellant had not been summoned to answer questions but to give a statement and also to bring an attorney-at-law. Both grounds two and six accordingly fail.

Grounds three, five and seven - did the Resident Magistrate err in finding that the phrase "without sufficient cause" in section 11(2)(c) of the Act is not "an element of the crime", but rather it is a statutory defence that imposes an evidential burden on the appellant?

[22] Mrs Gibson-Henlin submitted that the phrase "without sufficient cause" was an element of the offence to be proved by the prosecution. The offence, she said, is one of failing to testify without sufficient cause, as opposed to a mere failing to testify. She said further that there was no practical reason for placing the burden on the appellant to prove that he had sufficient cause as the prosecution knew the reason for the failure. The commission, she continued, had been provided with a notice of objection and an affidavit setting out the appellant's refusal and reason therefor.

[23] On the other hand, Mr McBean contended that the section placed a legal burden on the appellant to prove that he had sufficient cause to refuse to answer questions.

Since the appellant adduced no evidence, the learned Resident Magistrate was correct in convicting, said Mr McBean.

[24] Both counsel submitted that the decisions in ***R v Hunt*** [1987] 1 All ER 1 and ***R v Elliot*** [1987] 24 JLR 291 supported their respective causes. In ***Elliot,*** the appellant was convicted for holding himself out as being registered under the Opticians Act while not being so registered. The Assistant Registrar General gave evidence that on a perusal of the register of opticians, the appellant's name did not appear. The Resident Magistrate, after hearing evidence from persons who had been attended to by the appellant for a fee, found that a *prima facie case* had been made out. On appeal, it was argued that the burden of proving that the appellant was not registered, rested on the prosecution and had not been discharged as the evidence of the Assistant Registrar General was inadmissible as it was hearsay. This court held that the evidence tendered as to non-registration was sufficient to establish a *prima facie case*, and that proof of qualification to perform the professional services under question rested on the appellant who was holding himself out to be so qualified.

[25] In ***Hunt***, the defendant was found to be in possession of a powder containing morphine mixed with two other substances which were not controlled drugs. He was charged with unlawfully possessing a controlled drug namely morphine. The regulation provided that any preparation of morphine which contained not more than 0.2% of morphine compounded with other ingredients was excepted from the prohibition on possession of a controlled drug. The prosecution failed to adduce evidence as to the amount of morphine that was in the preparation. It was contended at trial that there

was no case to answer. The judge disagreed. The defendant thereupon pleaded guilty. However, he appealed against the conviction. The English Court of Appeal dismissed the appeal. Leave was granted to appeal to the House of Lords. The following point of law was certified as being of general public importance:

> "Whether in a prosecution for possession of a preparation or product containing morphine under Section 5 of the Misuse of Drugs Act 1971, where the morphine is of an unspecified amount and compounded with other ingredients, and where the Defence seeks to rely upon the exception to the said Section 5 set out in Regulation 4(1) of and paragraph 3 of Schedule 1 to the Misuse of Drugs Regulations 1973 (as 5 amended) the burden falls upon the Defence to show that the said preparation or product comes within the said exception."

[26] Lord Templeman said that in his opinion the appeal was not concerned with defences. The simple point for him was that the prosecution had only proved possession of a powder containing morphine. There was no proof in respect of the percentage of morphine in the preparation; hence, the appellant was entitled to be acquitted.

[27] Lord Griffiths, in dealing with the certified point of law, referred to several decisions of the House of Lords and the Court of Appeal. In ***Nimmo v Alexander Cowan & Sons Ltd*** [1967] 3 All ER 187, the House of Lords was divided three - two. Lord Griffiths had this to say in respect of the decision:

> "However, their Lordships were in agreement that if the linguistic construction of the statute did not clearly

> indicate on whom the burden should lie the court should look to other considerations to determine the intention of Parliament, such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance, for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute."

[28] In the instant case, the charge is that the appellant, being a witness, refused without sufficient cause to answer questions put to him by the commission of enquiry. It is an undisputed fact that the appellant attended on the commission and offered reasons for refusing to give evidence. He filed a notice of objection and an affidavit setting out his reasons.

[29] It is our view that in any prosecution of the appellant consequent on his stance, it was obligatory for the prosecution to place the contents of the notice of objection and the affidavit before the learned Resident Magistrate for her consideration as to whether there was indeed a refusal without sufficient cause. The prosecution was required to present the entire story, not just a part of it. In the circumstances, we allowed the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal.

[30] Given the opinions expressed in the foregoing, we did not find it necessary to consider grounds four and eight.