[2013] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 16/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

HOWARD CAMPBELL v R

Anthony Pearson for the appellant

Dirk Harrison and Miss Yanique Gardener for the Crown

8 and 9 March 2012 and 21 June 2013

DUKHARAN JA

[1] The appellant was indicted in the Resident Magistrate's Court for the Corporate Area, holden at Half Way Tree, on a charge of uttering a forged document. He was tried and convicted and on 13 December 2010, fined the sum of $60,000.00 or three months imprisonment.

[2] On 8 and 9 March 2012, we heard arguments and we allowed the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal. We promised to put our reasons in writing and this we now do.

Prosecution's case

[3] The prosecution's case was that on 18 March 2009, the appellant uttered certain forged documents in relation to a 2000 BMW motor vehicle. He had presented himself as a suitable surety at the Corporate Area Resident Magistrate's Court for the bail of one Dorraine Campbell to be processed. Irregularities were discovered and the police were called. This resulted in the appellant being arrested and charged for uttering a forged document contrary to section 9(1) of the Forgery Act.

[4] Mrs Reneta Mullings-Gordon, an acting deputy clerk of courts at the Corporate Area Resident Magistrate's Court, gave evidence that part of her duties was to assist in verifying documents in the processing of bail granted to accused persons. She stated that on 18 March 2009, at about 1:30 p.m., she was dealing with documents pertaining to bail for one Dorraine Campbell that the proposed surety, the appellant, had submitted. The documents were two passport size photographs, a motor vehicle title, registration and fitness certificates and the Advantage General cover note with the stamp Frazer, Fontaine and Kong Insurance Company. She said after interviewing the appellant she made checks to verify the documents. In relation to the cover note, she contacted Frazer Fontaine and Kong and spoke to one Mrs Kimberly East. Having been given some information, she caused a copy of the cover note to be faxed to the insurance company. She said she received a response by way of letter from Frazer, Fontaine and Kong. As a result, she contacted the Half Way Tree Police Station. Detective Sergeant Michael Anderson came and she gave him a copy of the document, said something to him and pointed out the appellant.

[5] Miss Andrea Marie Clennon, who was employed to Frazer, Fontaine and Kong at the relevant time, said she was the senior vice president of operations dealing with insurance coverage. The cover note in question was faxed to her with the appellant's name on it. She said there were attempts to forge her signature. The Frazer, Fontaine and Kong stamp was on it. When shown the cover note which had been exhibited, she said that was not her signature as she did not sign it. She said the cover note was not issued by Frazer, Fontaine and Kong nor was it issued by Advantage General.

[6] Detective Sergeant Anderson said he received a call from the Corporate Area Resident Magistrate's Court. He visited the court's office where a report was made to him about a motor vehicle cover note and the appellant was pointed out to him. He said he informed the appellant of the report and detained him, pending further investigations.

[7] Detective Sergeant Anderson said after concluding his investigations and receiving certain information, he arrested and charged the appellant for uttering forged documents and when cautioned he made no statement.

[8] In cross-examination, he said while at the CIB office, the appellant spoke but he did not recall what he said and he did not make a note of the appellant speaking to him. He said most of what the appellant said, he could not recall. He cannot recall if when cautioned, the appellant shrugged his shoulder. The appellant told him that he had paid his friend $21,000.00 to look about the insurance for him. The officer said

that the appellant gave him the name of the friend but he could not recall the name the appellant gave him.

[9] A no case submission was made by counsel for the appellant at the close of the Crown's case, but the court ruled that there was a case for the appellant to answer.

Appellant's case

[10] The appellant gave evidence and denied that he knowingly forged the cover note. He said he was the owner of several motor vehicles, including the 2000 BMW. He said that the vehicle was insured with Insurance Company of the West Indies (ICWI). He left Jamaica and on his return discovered that an accident was not reported and hence he would not have been able to renew the policy with ICWI. He said he enquired as to where he could get insurance coverage and a friend of his, Glenroy Thomas, said he would contact his broker and get coverage.

[11] The appellant further said that he gave Mr Thomas $21,000.00 as part payment on the cover note. Mr Thomas, he said, gave him the cover note.

[12] He said he used the cover note, along with other documents for the BMW motor vehicle to procure bail for his son at the Half Way Tree court. He said while waiting, the police came and he was handcuffed and taken to the Half Way Tree Police Station. He said he asked the police what he had done wrong. The police told him that the cover note was not genuine.

[13] The appellant said he gave Detective Sergeant Anderson the name and telephone number of Glenroy Thomas, who actually spoke to him. He denied that he knew the cover note was a forgery.

Grounds of appeal

[14] Mr Pearson for the appellant sought and was granted leave to argue supplemental grounds. They are as follow:

> "1. The Learned Resident Magistrate erred in holding at the close of the case for the prosecution that there was a case for the Accused man/Appellant to answer.
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> 2. The Learned Resident Magistrate erred in holding at paragraph 10 of her Findings of Fact that the Appellant uttered Cover Note number 2283051.
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> 3. The Learned Resident Magistrate erred in rejecting the evidence of the Accused man/Appellant for all the reasons, which she set out at paragraph 13(a) to (g) of her Findings of Fact.
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> 4. The Learned Resident Magistrate erred in holding at paragraph 15 of her Findings of Fact that the Appellant uttered Cover Note number 2283051.
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> 5. There was no evidence led in the case capable of convincing the Learned Resident Magistrate that the Accused man/Appellant had the requisite mens rea for the offence of uttering a forged document (to wit:- knowing it to be forged AND with either of the intents necessary to constitute the offence of forgery).
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> 6. The Learned Resident Magistrate erred in holding in her Reasons For Findings of Fact at paragraph 16 that the Mens Rea which the Crown has to prove was "Intent To Defraud" {That was not the submission made}

7. The Learned Resident Magistrate erred in placing the [sic] great reliance, which she did on the Investigating Officer as the true tenor and substance of his evidence was "I can't recall."

8. The Learned Resident Magistrate erred in holding that the Accused man/Appellant was evasive in giving his evidence."

[15] Mr Pearson argued grounds one and seven together. He submitted that knowledge of the forgery was an essential ingredient to be proved by the Crown and knowledge referred to, is actual knowledge. He said the learned Resident Magistrate correctly identified the main issue as to whether the appellant knowingly uttered the forged document with intent to defraud or deceive. He further submitted that the Crown relied on the evidence of three witnesses. Nothing in their evidence could be construed as importing knowledge to the appellant. There was nothing to prove that when the appellant handed over the cover note to the clerk, he had any intention to deceive or defraud.

[16] Counsel submitted that further investigation by Detective Sergeant Anderson would have had to be done to ascertain that the appellant knew that the document was forged. The only investigation the officer carried out was to call the insurance company.

[17] Counsel was critical of the evidence given by Detective Sergeant Anderson. He submitted that most of what the appellant said to him, he was unable to recall, and that there was a selective recollection of what the appellant told him. He further submitted

that the officer was unable to recall the name of the friend that the appellant gave to him concerning the cover note. Counsel further submitted that there was not one scintilla of evidence that would go to show that the appellant knew that the document tendered was a forgery. There was nothing, he added, that emerged from the Crown's case that knowledge could be imputed to the appellant.

[18] In response to grounds one and seven, Mr Harrison, for the Crown, submitted that there was sufficient evidence to establish a prima facie case against the appellant, and the learned Resident Magistrate properly rejected the submission of no case to answer. He relied on the case of **Regina v Galbraith** [1981] 1 WLR 1039; [1981] 2 All ER 1060. He submitted that the offence was already committed when the investigating officer was called. In all the circumstances he said, there was sufficient evidence for the jury mind of the learned Resident Magistrate to consider.

[19] In relation to grounds two, six and eight, Mr Pearson submitted that the facts, as found by the learned Resident Magistrate, were not accurate when she said that although the appellant made no admission that he knew that the cover note was forged, the Crown sought to prove the requisite knowledge from the surrounding circumstances. He further submitted that there were no surrounding circumstances. There has been no resolution of the issue of uttering with knowledge and no evidence produced by the Crown to show that there was any mens rea to commit the crime of uttering forged document. Counsel further submitted that on the issue of dishonesty, the learned Resident Magistrate relied on **R v Ghosh** (1982) 75 Cr App R 154 CAR 154

which laid down the objective and subjective tests. Counsel submitted that the test was the subjective one and that case had no parallel with the instant case.

[20] On ground eight, Mr Pearson submitted that the learned Resident Magistrate made an unfair comment when she described the appellant as being evasive when he gave his evidence. He said if the contest was to accept the investigating officer or the appellant, then the description of being evasive was misplaced as the investigating officer could not recall most of what the appellant had said to him.

[21] The submissions of Mr Pearson on ground five were subsumed by ground one.

[22] Mr Harrison submitted that although the mere handing over of the documents was not an offence, the circumstances in this case amounted to the appellant having knowledge of the fraud and he could not have believed he was acting honestly and that he knew that his conduct was tantamount to guilty knowledge. Counsel submitted, that in the circumstances, the intent to defraud was found in the appellant, in that when he was denied coverage by one company, he asked Mr Thomas to get coverage for him. Counsel relied on **R v Ghosh and Albert Grant v R** RMCA No 21/1997 delivered 27 April 1998.

[23] On ground five, Mr Harrison submitted that this ground was without merit. He cited the case of **Welham v The Director of Public Prosecutions** [1961] AC 103. Counsel further submitted that the brokerage firm, the insurance company and the courts office by extension would be defrauded. He submitted, the Crown placed

reliance on the fact that the appellant paid $21,000.00, and his receipt (exhibit 1) indicated that $38,000.00 was paid. He would have obtained more benefit than he had paid for in all the circumstances and he could not have believed he was acting honestly by uttering this document, counsel argued.

Analysis

[24] The appellant was charged and indicted under section 9(1) of the Forgery Act, which states:

> "1. Every person who utters any forged document, seal, or die, shall be guilty of an offence of the like degree (whether felony or misdemeanor), and on conviction thereof shall be liable to the same punishment, as if he himself had forged the document, seal, or die."

Section 9(2) states:

> "2. A person utters a forged document, seal, or die, who, knowing it to be forged, and with either of the intents necessary to constitute the offence of forging the document, seal, or die, uses, offers publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence, or puts off such forged document, seal or die.

[25] The learned Resident Magistrate, in our view, correctly identified the ingredients necessary that the prosecution would need to prove the offence against the appellant. They are (1) that the appellant uttered the document in question; (2) that the document issued was forged; (3) the mens rea of the offence that the appellant knowingly issued the forged documents; (4) the intention was to deceive and defraud.

[26] The facts that were not in issue were (1) that the appellant tendered a cover note numbered 2283051; (2) that the cover note was tendered to satisfy the requirement for the appellant to become surety for his son Dorraine Campbell; (3) that the cover note was invalid and forged, in that, (a) the signature on the cover note did not belong to the person authorized to sign cover notes at the insurance company, (b) the cover note was not issued by the insurance company; (4) that the investigation commenced when the police was called in when it was discovered that the cover note was forged and (5) that the appellant was arrested and charged for uttering a forged document.

[27] The main issue in this case for determination by the learned Resident Magistrate was whether the appellant knowingly uttered the forged document (cover note) with the intention to defraud and to deceive. The mens rea for uttering a forged document was defined in **Welham v The Director of Public Prosecutions**.

Lord Denning, after reviewing the law on forgery, agreed with "East on Pleas of the Crown" Vol 2 page 852 which states:

> "Put shortly 'with intent to defraud' means 'with intent to practice a fraud' on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud that is enough."

[28] Did the learned Resident Magistrate properly reject the submission of no case to answer? In **Regina v Galbraith** it was held that:

> "…the case was to be stopped when there was no evidence that the person charged has committed the crime alleged and also was to be stopped if the evidence was tenuous and the judge concluded that the prosecution's evidence was tenuous."

The learned Resident Magistrate found at page 33 para 10 of the transcript that:

> "There is no doubt that the Accused uttered the forged Cover Note number 2283051. The fact that is in issue is whether or not at the time the Accused issued the Cover Note he knew that it was forged and intended to defraud and deceive."

In continuing she said, at para 11:

> "[11] In considering this issue I paid particular attention to the evidence of the investigating officer and what was said or not said by the Accused when he was informed that the Cover Note was forged. The Accused made no admission that he knew that the Cover note was forged so the Crown sought to prove the requisite knowledge from the surrounding circumstances."

[29] It is clear from the above passage, that the learned Resident Magistrate gave particular attention to the investigating officer, Detective Sergeant Anderson. There was nothing in the evidence of the two other witnesses for the prosecution that could be construed as importing knowledge to the appellant.

[30] The evidence of Detective Sergeant Anderson was of critical importance in determining whether the conduct of the appellant, after he was taken into custody, had the requisite knowledge of the forgery. It is necessary to look at how the learned Resident Magistrate treated the evidence of both the investigating officer and the

appellant. This is what the learned Resident Magistrate said at page 37, para 19, of the transcript:

> "In reviewing the evidence of the Accused I paid particular attention to the evidence of the investigating officer. The officer gave evidence that after telling the Accused that the Cover Note was forged at first he said nothing. Afterwards the Accused then told him a man got the Cover Note for him. I accept the investigating officer's evidence that the Accused;
>
> a. did not give him any information concerning this man who was supposed to have acquired this document for him.
>
> b. merely shrugged his shoulder when he was informed that the Cover Note was forged.
>
> c. mentioned this man who is supposed to have sourced this Cover Note some time after the Accused was arrested and charged."

Continuing at para 20, the learned Resident Magistrate said:

> "I considered the shrug that the Accused made after he was arrested and charged for the offence before the court. The shrugging of the shoulder could be interpreted as;
>
> (a) Acceptance that he knew that he committed the offence or,
>
> (b) Inability to give an explanation for the forged document."

And at paras 20, 21, 22 and 24, the learned Resident Magistrate continued:

> "This shrug is followed by an explanation a considerable time after the Accused is arrested and charged. The explanation is about this gentleman who would have gotten him the Cover Note. I take into consideration the demeanour

> of the Accused whilst giving evidence which I found to be evasive. I find that based on the circumstances that the Accused had the mens rea to commit this offence."

[31] It is also clear from the findings of the learned Resident Magistrate that she gave credence to the evidence of the investigating officer. An analysis of the investigating officer's evidence clearly shows that in vital areas of his evidence, he was unable to recall quite a lot of what was said to him by the appellant. In cross-examination, he said at page 89 of the transcript:

> "He spoke but I don't recall what he said. I gave a statement and in the statement I did not make a note of him speaking to me. … Most of what he said I cannot recall. He could have shaken his head. I cannot recall if he shrugged his shoulder. The time at which he spoke and I cannot recall if it is before caution."

Further, in cross examination he said,

> "When I told him I was charging him he did not shake his head and shrug his shoulder. Upon been [sic] cautioned he said nothing. I don't know if he shrugged his shoulder but he did not shake his head."

[32] In re-examination, the officer said the appellant did give him a name for the friend but he could not recall the name. The evidence of the appellant is that he gave the name Glenroy Thomas to the officer and two telephone numbers to contact him. His evidence was that the appellant called Mr Thomas and that he the officer spoke to him.

[33] It can be gleaned from the evidence of the investigating officer that he was quite selective in how he gave his evidence. It is rather puzzling to understand how the learned Resident Magistrate could have found the officer to be a credible witness. His evidence, in our view, left a lot to be desired. He was unable to recall most of what was said to him by the appellant. The learned Resident Magistrate found that the shrugging of the shoulder could be interpreted as an acceptance that the appellant knew he committed the offence or, his inability to give an explanation for the forged document. However, the evidence of the officer in cross examination is that there was no shrugging of the shoulder or shaking of the head by the appellant.

[34] In our view, the evidence elicited by the Crown was rather tenuous and it was unsafe for the learned Resident Magistrate to have found as she did.

[35] As stated, we allowed the appeal, quashed the conviction, set aside the sentence and entered judgment and verdict of acquittal.