

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 17/2012**

**BEFORE: THE HON MRS JUSTICE HARRIS JA  
THE HON MR JUSTICE MORRISON JA  
THE HON MR JUSTICE DUKHARAN JA**

**ROSHENA CHANG v R**

**Ravil Golding for the appellant**

**Miss Natalie Ebanks for the Crown**

**3, 4 October 2012 and 4 October 2013**

**DUKHARAN JA**

[1] The appellant was indicted in the Resident Magistrate's Court for the Corporate Area, holden at Half Way Tree, for 10 counts of larceny as a servant. She was tried and convicted on 20 July 2011. On 6 September 2011 she was sentenced to 12 months imprisonment on each count to run concurrently.

[2] On 3 and 4 October 2012 we heard arguments, when we allowed the appeal, quashed the convictions, set aside the sentences and entered a judgment and verdict of

acquittal. We promised to put our reasons in writing and this is a fulfilment of that promise.

### **Background to the Prosecution's Case**

[3] In May 2006, the appellant was employed as an accounting clerk with Scientific and Medical Supplies Limited of 175 Mountain View Avenue. The company was an importer and distributor of pharmaceutical products. Mr Howard Lau was the managing director and his wife Elsie Lau, one of the directors.

[4] The appellant was responsible for the preparation of invoices, requisitions, bills and cheques. She would also pay suppliers, pay the customs duties, airfares and custom brokers. All cheques drawn on the company's account had to be signed by both Mr and Mrs Lau. The appellant would prepare cheques along with the cheque requisition and present them to Mr Lau for his and his wife's signatures. The requisition form would indicate the amount on the cheque, to whom it was payable and for what purpose.

[5] The appellant was not authorised to prepare cheque requisitions when Mr Lau was unavailable, but he would leave blank signed cheques with her and instruct what they were for. She was allowed to draw her own pay cheques in her name.

[6] When Mr and Mrs Lau travelled, they would leave blank signed cheques with the appellant rather than with the office manager who was her superior. In July 2006 Mr Lau travelled to China and returned to the island in August 2006. Mr Lau did not

usually check the cheque books or the financial documents of the company; although there was a procedure for checking, he did not do it all the time.

[7] Sometime in early 2007, Mr and Mrs Lau spoke to the appellant about an affair with another employee, Mr Dean Peart. The appellant denied it. Mr Peart later found himself in problems and his employment was terminated. Following those problems, Mr Lau decided to check his books and records. Upon finding discrepancies, he reported the matter to the Fraud Squad in January 2007. Further checks into the books and records by Mrs Lau uncovered discrepancies and a further report was made to the police in September 2007. The appellant was questioned by the police and subsequently charged.

### **Defence**

[8] The appellant, in her defence, denied the charges against her. She told the court that initially, herself and Mr Lau maintained a professional rapport. However, subsequent to that, Mr Lau began flirting with her and started to invite her out for drinks. This developed into a sexual relationship in January 2007 which continued until July 2007. During the period of their relationship, the appellant said that Mr Lau, by way of cheques, gave her a loan in October 2006 to purchase a crib for her daughter and another in December 2006, for her, the appellant, to return to school. However, due to events that transpired, Mr Lau thought the school was a scam, so she used the money for other expenses. She said the loan was partially repaid.

[9] The appellant said that in January 2007 Mr Lau assisted her with the expenditures for a trip overseas that she had wanted to take with her sister, by way of a cheque, which was spent accordingly. She said that in February 2007, Mr Lau agreed with her to take her sister's United States cheque in exchange for his local cheque, which he permitted her to encash on that ground. She said he took the cheque and said he would lodge it when he travelled in two weeks.

[10] The appellant said that in July 2007, a cheque was drawn with the permission and on the advice of Mr Lau to assist her to get a credit card with the National Commercial Bank (NCB). She said the credit card was taken out with Bank of Nova Scotia instead because that was where she did her banking. She said that in the same month, Mr Lau assisted her with purchasing a motor car. This was as a result of his discomfort with the fact that she had been receiving rides home with Mr Peart. She further stated that some of the cheques given to her by Mr Lau, she would write up the requisition forms with different information from what was on the cheques, because Mr Lau told her to be more discreet as he did not want his wife to get suspicious of them.

[11] The appellant further stated that in August 2007, the chartered accountant for the company, Mr Germaine Lawrence, requested of her, documents to prepare a financial statement as he was doing an audit for 2005. She said there were calls from NCB regarding discrepancies with cheques it had received. She informed Mr Lau and he directed her to tell the representative from NCB that it was people who did contract

work. She said she asked him if he was sure and he told her it was his money and he could not get into trouble for taking his money from the bank.

[12] In August 2007, the appellant said that Mr Lau confronted her about the relationship with Mr Peart, who was a married man at the time. She said she lied to him about it initially, but then told him the truth when he informed her that Mrs Peart had told him about them. She further said that both Mr and Mrs Lau confronted her about the relationship with Mr Peart and expressed their disappointment with the affair.

[13] In September 2007 Mr Lau called the appellant into his office where she saw Mrs Lau and two police officers. She was questioned by the police about some cheques Mr Lau discussed with them. She admitted that she had written the cheques on the express instructions of Mr Lau. She said she was taken to the Matilda's Corner Police Station where she was further questioned and released.

### **Grounds of Appeal**

[14] Mr Golding, for the appellant, retained the original grounds but sought and was granted leave to argue supplemental grounds.

[15] Mr Golding sought to argue original ground one and supplemental ground two together which are as follows:

- “1. The Learned Resident Magistrate fell into error and seriously misdirected herself when she posed the following for her consideration: ‘Why is it that throughout her interrogation, arrest, charge and being harassed before the court for several years that

she would protect the very person accusing her by keeping his secret about the affair to protect his marriage ...

The secret was not valuable to her anymore when she was arrested and she had no reason, when the matter became one that put her liberty in jeopardy to protect anybody but herself. Why was this information not given to the police [sic]."

**Grounds two and three read:**

- "2. The Learned Resident Magistrate failed to properly analyse the evidence by misinterpreting and misdirecting herself on some critical aspects of it.
3. The sentence imposed was manifestly excessive as the Appellant was a first offender and she was not given the option of a fine nor was a suspended sentence given."

[16] In his oral and written submissions, Mr Golding submitted that the learned Resident Magistrate fell into error because she failed to fully appreciate all the circumstances in which the appellant came to be arrested and charged. She failed to critically analyse the evidence in arriving at an adverse verdict against the appellant. Had she done so, he argued, she would have come to a different conclusion as the evidence favoured an acquittal.

[17] Mr Golding was critical of the evidence and cited several instances where the veracity of the virtual complainant, Mr Lau, should have been seriously questioned by the learned Resident Magistrate. It was uncontradicted that the appellant obtained employment with Mr Lau as accounting clerk in May 2006, he argued. The company had an office manager, one Miss Elecia Wint, who was much senior to the appellant, he

submitted. Why were the signed blank cheques not left with her rather than the appellant? Counsel also noted that the cheques encashed all bore dates subsequent to the return of the Laus to Jamaica from China. It was further submitted by counsel that signed blank cheques were given to the appellant as far back as July 2006, some of which were to pay bills. None of the creditors of the company or those to whom cheques should have been paid made any complaints that they were not paid, nor were any demands made for payments, he submitted. Counsel further argued that it would seem to be consistent with the appellant's evidence that some of the cheques were given to her for her own benefit, and others encashed on the instructions of Mr Lau.

[18] Counsel further submitted and commented that over the period the appellant was employed, no requisitions, cheque stubs, cancelled cheques, or bank statements were demanded from her. Counsel submitted that the learned Resident Magistrate appeared not to have considered the possibility of jealousy on the part of Mr Lau, that the appellant, of whom he was fond, was having an affair with another person employed by him.

[19] Counsel submitted that the learned Resident Magistrate fell into error when she implied that the failure of the appellant to disclose her defence to the police when questioned was indicative of her guilt. The learned Resident Magistrate said that she rejected the defence but never said why she did so; only that it was a concoction that she never admitted to the police. It was further submitted that if the Resident Magistrate based her decision on that then it was fatal as the appellant had no duty to

admit anything to the police. Counsel cited the cases of **Regina v Gilbert** (1977) 66 App Rep 237 and **Regina v Chandler** [1976] 1 WLR 585 to support this submission.

[20] In response, Miss Ebanks, for the Crown, submitted that the issues raised by counsel for the appellant were issues of credibility. She submitted that the learned magistrate had the benefit of hearing the witnesses and assessing their demeanour and was entitled to say what she believed.

[21] Counsel submitted that if the court found that there was a misdirection or non-direction, then the court should apply the proviso.

### **Analysis**

[22] There is no doubt that this case raised questions of fact for the learned magistrate's determination. Where there has been an appeal from a trial judge's verdict based on his or her assessment of the credibility of witnesses who have been seen and heard, an appellate court, in order to reverse that verdict, must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong (see **Moore v Rahman** (1993) 30 JLR 410).

[23] The main issue in this appeal is credibility. The question therefore is whether in convicting the appellant, the learned Resident Magistrate had properly assessed and analysed the evidence before her. In the reasons given, it was stated by the learned Resident Magistrate that Mr Lau gave evidence that the appellant was employed as an accounting clerk from May 2006 until the irregularities were discovered sometime in



2007. The learned Resident Magistrate went no further in assessing how the alleged irregularities were discovered and by whom. There was evidence that Mr Lau suspected something based on information that the appellant and Mr Peart were having a love affair. Evidence was given that it was the wife of Mr Peart who made the discovery of the love affair between the appellant and Mr Peart. It was then that Mr Lau decided to check his books. Mrs Lau went through a thorough investigation of the company's records.

[24] The learned Resident Magistrate said in her reasoning, "[e]verything seemed to be going smoothly until he [Mr Lau] was prompted to do investigations based on information he received from the wife of one of his former employees who was admittedly the lover of the accused Miss Chang". She further stated in her reasoning that "Mr Lau did not seem to be a financially pressed individual who would be hard pressed to find money to take care of [a] young attractive girlfriend if that was his goal. Why would he do so out of company money which his wife had access to and could exercise carte blanche in investigating ...?"

[25] In stating her finding in the way she did, the learned Resident Magistrate failed to take into account what was said by Mr Lau in his evidence concerning the running of his business. He said his duties were to see to the day to day operation of the company and that bank statements which were sent to the company at the end of each month, were received by the appellant as the accounting clerk. He said he never reviewed the statements, neither did his wife, nor the other director of the company, Mr

Lyew. In cross examination Mr Lau said clearly that Mrs Lau operates her own business and she would not normally concern herself with the day to day running of his business. He said that he ran the affairs of his business pretty much on his own.

[26] The learned Resident Magistrate took none of the above into consideration and the possibility that Mr Lau could have given money to the appellant out of the company's money without his wife's knowledge. The learned Resident Magistrate failed to consider the possibility of jealousy on the part of Mr Lau that the appellant, of whom he was fond, was having an affair with an employee of his company.

[27] It is clear that the learned Resident Magistrate did not appreciate or analyse properly the defence of the appellant. There was too much detail given by the appellant in her defence for it to be a concoction. In our view, the defence of the appellant should have cast doubt on the prosecution's case, and it was not merely a case of simply believing one witness over the other, but considering whether doubt was cast on the prosecution's case to the point where one is not certain as to whether the offences were committed.

[28] There was a strong submission from counsel for the appellant that the learned Resident Magistrate fell into error when she implied that the failure of the appellant to disclose her defence to the police, when questioned, was indicative of her guilt. This is what the learned Resident Magistrate said at page 154 of the transcript:

“Why was it that throughout her interrogation, arrest, charge and being harassed before the court for several years

that she would protect the very person accusing her by keeping his secret about the affair to protect his marriage.

The secret was not valuable to her anymore when she was arrested and she had no reason, when [the] matter became one that put her liberty in jeopardy to protect anybody but herself. Why was this information not given to the police?"

[29] In **Regina v Chandler**, it was pointed out that the law has long accepted that an accused person is not bound to incriminate himself. That case shows that guilt could not be reasonably inferred from a defendant's failure to answer questions put to him by the police.

[30] In **Regina v Raymond Gilbert** it was held that the trial judge, in asking the jury to consider whether "it was remarkable that, when making his statement to the police, the appellant said nothing about self defence", fell into error and misdirected them. At page 243 Viscount Dilhorne said:

"He [the trial judge] rightly told the jury that no adverse inference was to be drawn against Gilbert on account of his refusal to answer the questions put to him by the police officer. The words of the caution made it clear that he was entitled to keep silent. As the law now stands, although it may appear obvious to the jury in the exercise of their common sense that an innocent man would speak and not be silent, they must be told that they must not draw the inference of guilt from his silence ...

'Having so directed the jury, the judge then read the statement made by Gilbert and said:

"Now, members of the jury, as I say he is perfectly entitled to maintain silence, he is not required to make a statement ... Bear in mind that we have heard this matter for the first

time. Ask yourselves the question, if it is the real explanation of what happened, do you or do you not think it remarkable that when making the statement, the accused says nothing about it. That may help you, applying your common sense to test the substance of the matter of self defence, which he has now gone into some detail in the witness box.

It is not, in our opinion, possible to read this passage from the summing up as anything other than an invitation to the jury to reject self-defence as Gilbert had not mentioned it in his statement.”

[31] In the instant case, the learned Resident Magistrate, in our view, clearly misdirected herself by asking the questions that she did. It is obvious that she relied solely on the fact that the appellant did not mention her defence to the police to come to the conclusion that her defence was false and was ‘a concoction spun late in the day to cover up her acts of dishonesty’. In our view this seriously prejudiced the appellant.

[32] In light of our findings on grounds one and two, it is unnecessary to consider the ground on sentence.

[33] Based on the foregoing, these are our reasons for allowing this appeal.

