[2014] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 28/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

PETRO EVANS v R

Sean Kinghorn instructed by Kinghorn and Kinghorn for the appellant

Miss Maxine Jackson and Mrs Tracy-Ann Robinson for the Crown

22 February 2013 and 31 July 2014

DUKHARAN JA

[1] The appellant was charged on an indictment containing one count of simple larceny. He was tried and convicted in the St Catherine Resident Magistrate's Court by Her Honour Miss Ann-Marie Nembhard. On 4 May 2011 he was sentenced to nine months imprisonment at hard labour. Verbal notice of appeal was given and bail offered in the sum of $150,000.00 with surety pending the appeal.

[2] On 22 February 2013, we heard arguments, after which we dismissed the appeal, with sentence to commence from the above date. At that time, we promised to put our reasons in writing at a later date. These are our reasons.

[3] On 21 November 2008, at about 7:45 pm, the complainant, Mr Christopher Harrison, was working as a conductor on a National Transport Cooperative Society (NTCS) bus numbered 90, along with Mr Alfred Smith. The bus was being operated as a public passenger vehicle and was owned by Mr George Robinson, a retired police officer.

[4] The said bus was stopped by a team of three police officers, who were on mobile patrol, of which the appellant was a member. The complainant recognised the appellant as a police officer who had prosecuted him for breaches of the Road Traffic Act earlier in the same month of November 2008. The appellant also recognised the complainant from the same prior incident and informed the complainant when the bus was stopped, that a warrant was issued for his arrest as he had not attended court. The appellant then informed the complainant that he would be taking him to the Waterford Police Station.

[5] The complainant was instructed to enter the police service vehicle, and he complied. He was seated in the rear of the vehicle beside the appellant on the trip to the police station. The appellant then asked the complainant "what he could do to help himself". The appellant then reached into the shirt pocket of the complainant, removed a sum of money (about $15,100.00), counted it, and only returned $100.00 and commented that it was three of them (police officers). The appellant instructed the complainant to tell his boss that he, the complainant, would work and pay it back. The complainant was taken to the Caymanas Police Station instead of the Waterford Police Station. The documents for the bus were handed back to the driver.

[6] The complainant made a report and gave a statement in relation to the incident at the Ruthven Road Police Station in Kingston on 22 November 2008, as well as at the Anti-Corruption Branch. The appellant was subsequently arrested and charged.

[7] In an unsworn statement from the dock, the appellant denied taking any money from the person of the complainant, nor did he see anyone collecting or taking money from him. He said that on the day in question he was on patrol with other officers at about 7:00 pm when he observed a Toyota Coaster bus travelling in the opposite direction overtaking a line of traffic and the driver, driving carelessly. The police vehicle chased the bus and the driver was signaled to stop. He said he recognised the conductor (complainant) as someone he had arrested before but who did not turn up for court. He told one of the other officers of his observation and that a bench warrant was outstanding for the complainant. The appellant was then placed in the back of the police vehicle. He was subsequently released at the Caymanas Police Station and the documents for the bus given back to the driver who was warned for prosecution.

[8] Mr Kinghorn, for the appellant, sought and was granted leave to amend the grounds of appeal to read as follows:

> "(i) The learned trial judge [sic] erred in law in not upholding the Submission of No Case to answer made by the Appellant's Attorney as;
>
> (a) The Crown failed under the 2nd limb of **R v Galbraith** to establish a prima facie case
>
> (b) The identification of the Accused and the alleged actions of the theft on the

part of the Accused was [sic] so poor that the Accused should not have been called upon to answer.

(c) The Crown failed to prove the requisite ingredients of the offence of Simple Larceny, namely that, 'a person steals, who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof'. The Crown has failed to prove either directly or circumstantially that the sum in question was taken 'without the consent of the owner'.

(ii) The learned trial judge [sic] erred in law in concluding that the numerous discrepancy [sic] in the evidence presented by the Crown were not fundamental and did not go to the root of the Crown's case.

(iii) The learned trial judge [sic] erred in law in treating as unimportant and irrelevant the discrepancy in the Crown's case as to how much money the Complainant [sic] has in his possession at the [sic] at the time of the alleged Larceny.

(iv) The learned trial judge [sic] erred in law in not addressing her mind to the fact that the Complainant had an interest to serve in fabricating a story against the Appellant.

(v) The sentence is excessive in all the circumstances of this matter."

[9] Mr Kinghorn argued all the grounds together. He submitted that the learned Resident Magistrate erred in law in not upholding the submission of no case to answer at the end of the prosecution's case. Counsel submitted that a *prima facie* case was not established as required under the 2nd limb of **R v Galbraith** 1981 73 Cr App R 124,

[1981] 2 All ER 1060. The identification of the appellant and the alleged actions of theft were so poor that the prosecution failed to lead sufficient evidence to establish a *prima facie* case against him.

[10] Counsel further submitted that the evidence presented by the prosecution was tenuous, inherently weak and replete with inconsistencies, for example, how much money the complainant allegedly had in his possession when he was stopped by the police. Counsel submitted that the evidence presented by the prosecution in this regard was fraught with discrepancies and uncertainty. He further argued that that area of the evidence was particularly important because the prosecution presented no corroborative evidence of the amount of $15,100.00 which the complainant allegedly had in his possession. Counsel further submitted that it was manifestly clear that the prosecution's witnesses had given contradictory evidence as it related to the amount of money the complainant would have had in his pocket on the day it is alleged he was stopped by the appellant. This contradiction, he argued, was borne out when the trip report based on the evidence of the complainant and Mr Smith is compared. Counsel submitted that the subject matter of the charge was a specific sum of $15,100.00. Where the prosecution failed to prove the stealing of the specific sum, the appellant ought not to have been called upon to answer the charge. Counsel cited the case of **R v Shippey** [1988] Crim LR 767.

[11] On the issue of identification, counsel submitted that the prosecution led no evidence of the state or condition of the lighting in the particular area that the vehicle was travelling when the alleged commission of the offence occurred. No evidence was

also led as to the state or condition of the lighting in the police vehicle at the time of the alleged commission of the offence.

[12] Counsel submitted that the Crown had failed to prove the requisite ingredients of the offence of simple larceny. Counsel argued that the indictment made it clear as to who was the owner of the money, that is, Mr George Robinson. Counsel submitted that there was no evidence from Mr Robinson that no consent was given in relation to the sum involved.

[13] On the issue of sentence, counsel submitted that the sentence of nine months imprisonment was excessive and harsh in all the circumstances.

[14] Counsel for the Crown submitted that at the end of the prosecution's case, there was sufficient evidence on which the learned Resident Magistrate was able to assess and make a determination on the reliability of the complainant. It was further submitted that the complainant had in excess of $15,000.00 in his possession. Counsel also submitted that the trip report supported the evidence of the complainant in a material way, save and except the difference of $40.00. This difference of $40.00 was not a material discrepancy because the learned magistrate had before her cogent evidence from the complainant who testified that:

> "I had Fifteen Thousand One Hundred Jamaican Dollars ($15,100.00) in my shirt pocket by collecting the bus the entire day [sic] sales. Mr. Evans stretched his hand into my shirt pocket and said, 'Make me count that money here.' By counting the money he got Fifteen Thousand One Hundred Jamaican Dollars ($15,100.00). He gave me back the One Hundred Dollars ($100.00)."

[15] Counsel submitted that the learned magistrate sitting in her dual capacity could draw the reasonable inference that the $40.00 would not have been made up of paper currency. The learned magistrate resolved this discrepancy by noting that the issue went to the credibility of the witness and that the $40.00 would not have affected the credit of the complainant.

[16] Counsel for the Crown submitted that based on the factual circumstances of the case, a **Turnbull** warning was unnecessary as mistaken identification was never asserted by the appellant as he placed himself at the scene.

[17] In response to the ground that the Crown failed to prove the requisite ingredients of this offence of simple larceny, counsel for the Crown submitted that the essence of larceny was the taking of property without the consent of the owner. However, she argued, "owner" was not limited to the person who is the legal owner as section 3(2) of the Larceny Act explicitly defines owner, which includes any part owner, or person having possession or control of a special property in anything capable of being stolen. Counsel cited **R v Harding** 1930 (21) Cr App R 166.

Analysis

[18] It was held in **R v Galbraith** that:

> "On a submission of no case to answer at the end of the prosecution case, the trial judge should stop the case and direct an acquittal if there is no evidence that the crime alleged against the accused was committed by him. However, if there is some evidence but it is of a tenuous character (eg because of inherent weakness or vagueness or

> because it is inconsistent with other evidence), it is the judge's duty, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it; but, where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury."

[19] It is clear that the instant case cannot be considered as being of a tenuous character due to inherent weaknesses or vagueness. It is also clear from the evidence of the complainant that the appellant had identified himself as being the person who would have previously arrested the complainant. It was not disputed that the appellant was present in the police car with the complainant and other police officers. Based on the factual circumstances of the case, a **Turnbull** warning by the learned magistrate would have been unnecessary, as 'mistaken identification' was never asserted by the appellant who placed himself at the scene.

[20] A trial judge can dispense with the requirement to give a **Turnbull** warning in special circumstances. It was held in **R v Slater** (1995) 1 Cr App R 584 that the need for a full **Turnbull** direction arose where there was a possibility of mistaken identification. This generally arises where the issue was whether the defendant was present and a witness claimed to identify him on the basis of a previous sighting. It was also held that where there was no issue as to the defendant's presence at or near the scene of the offence, but the issue was as to what he was doing, it did not

automatically follow that a **Turnbull** direction must be given. In applying those principles to the instant case, there was no issue as to whether the appellant was present, the issue would be whether he committed the offence - see also **R v Courtnell** [1990] Crim LR 115 where the defence was alibi. In both cases, the appeals were dismissed and there was no need for a **Turnbull** warning. The appellant, in his unsworn statement, placed himself at the scene when he stated:

> "I recognized the conductor (complainant) to be someone I arrested before who did not turn up for court … Constable Brown informed him of the warrant, searched him and placed him in the back of the patrol car …"

[21] The learned magistrate, in her reasons, addressed the issue of identification and said:

> "The issue of identification was also raised on behalf of the defendant. It was submitted by learned Counsel, Mr. Kinghorn that there was no evidence as to the identification of the defendant at the time of the alleged commission of the offence. The court did not place much weight on that."

The learned magistrate was therefore correct when she did not place much weight on that submission. A **Turnbull** direction was unnecessary in this case.

[22] In most cases discrepancies are bound to arise. The learned magistrate carefully considered that most of the discrepancies highlighted did not go to the root of the case. The discrepancy in the total sum being $40.00 short of the amount the complainant would have had in his possession at the time was not material and that would have been an issue of credibility. The learned magistrate observed that the $15,100.00

taken from the shirt pocket of the complainant was the amount of money in "paper currency" and that the trip report supported that the complainant had $15,100.00 in his possession. The salient issue for the learned magistrate, as stated, was whether the complainant was a credible witness. She so found, and we see no reason to differ from her findings.

[23] Counsel for the appellant had submitted that the Crown had failed to prove the requisite ingredients of the offence of simple larceny. The essence of larceny is the taking of property without the consent of the owner. The expression "owner" is not limited to the person who is the legal owner of the property stolen. Section 3 (2) of the Larceny Act explicitly defines "owner". It includes any part owner or person having possession or control of the subject matter – (see **R v Harding** (1929) 21 Cr App R 166). It was not necessary to call the owner of the money as stated in the indictment. The complainant was in possession and control of the sum of money involved and was merely keeping it for the rightful owner. We see no merit in this ground.

[24] On the issue of sentence, we cannot say that a sentence of nine months imprisonment was manifestly excessive in all the circumstances of this case. As the learned magistrate pointed out, the court cannot condone the type of behavior displayed by the appellant who took advantage of the complainant who was in a vulnerable position. The court must seek to protect the public from this kind of criminal activity. The police is there to serve and protect members of the society. When dishonest members of the police force set out to extort and to make unlawful demands

of vulnerable members of the society, if caught and convicted they can expect imprisonment and nothing less.

[25] It is for the foregoing reasons that we dismissed the appeal and ordered the sentence to commence from 22 February 2013.