[2013] JMCA Crim 49

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 1/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

STEVE JORDINE v R

Robert Fletcher instructed by Townsend, Whyte and Porter for the appellant

Miss Maxine Jackson for the Crown

7 May 2012 and 10 October 2013

HARRIS JA

[1] The appellant, Steve Jordine, and four others were charged on an indictment for simple larceny and conspiracy to defraud. On 10 December 2011, he was found not guilty of these two offences but was convicted, in the Resident Magistrate's Court for the Corporate Area, for receiving stolen property. A sentence of 18 months' imprisonment at hard labour was imposed on him. The Crown conceded that the learned Resident Magistrate erred in convicting the appellant. The appeal was allowed. The sentence was set aside and a verdict of acquittal was entered.

[2] The brief factual circumstances giving rise to this appeal were that on 15 January 2010, an armoured truck, owned by Guardsman Armoured Limited, was on an assignment to escort money to various places in Kingston. In the truck, were four Guardsman employees: Andrea Jackson, Steve Henningham, Elijah Millwood and the driver, Errol Cameron.

[3] A plot was devised by Cameron, Clifton Kerr, and Dwayne Satchell, which resulted in Cameron leaving the truck unattended, whilst the rest of the truck's crew was away on other duties, facilitating the removal of two bags containing $44,000,000.00 from the truck by Kerr and another. Subsequent to the theft, vast sums of money as well as merchandise were found in the possession of the persons who were parties to the plot. A cautioned statement was given by Kerr which implicated the appellant who was known to Kerr as "Dust".

[4] The case against the appellant was that Kerr told the police that the appellant was involved in the theft of the money. The appellant was interviewed by the investigating officer who informed him that he was investigating a case concerning the theft of $44,000,000.00 from "Brinks and that he was a suspect". In responding to the investigating officer, the appellant said, "Me only get a ting." None of the stolen money was found in his possession.

[5] At the end of the Crown's case, a no case submission was made on behalf of the appellant. The learned Resident Magistrate ruled that he had a case to answer. The appellant remained silent.

[6] In convicting the appellant, the learned Resident Magistrate found that there was no evidence in proof of the counts on which the appellant was indicted but found him guilty of receiving stolen property. At paragraphs (9) and (10) of her reasons for judgment she said:

> "(9) I find that the crown has proven its case so that I feel sure that Mr. Kerr transported Mr. Satchell and the person referred to a [sic] 'Dust' to downtown Kingston. He waited for them and took them to Patrick City. He transported not only Mr. Satchell and 'Dust' but also a [crocus] bag to Patrick City. Mr. Kerr received the sum of $2.5 million as his portion of the robbery…
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> (10) I find that Mr Kerr did volunteer to take the investigating officer to the home of the person he referred to as 'Dust'. There is however, a disconnect or a lacuna in the crown's case. The investigating officer gave evidence that he organized a team to go [sic] the home of 'Dust' with Mr. Kerr. There is a gentleman who was seen in custody after this was done. There was however no independent evidence led by the crown that there was an individual by the name of 'Dust' who was involved in the larceny."

She continued at paragraph (12) by saying:

> "The investigating officer later that day cautions Mr. Jordine and informs him that he is investigating a case of the theft of $44,000,000 cash from Brinks and that he was a suspect. He then informs the officer that 'me get a ting.' I accept that this statement was made by Mr. Jordine after caution. Counsel for Mr. Jordine submitted that that statement can be interpreted to mean a number of things. I have reviewed the submission of counsel for the defence and I must reject his submission. The statement made by Mr. Jordine was very clear. The officer was speaking to Mr. Jordine about the theft of $44,000,000. By saying he received a ting, Mr. Jordine was responding to the sum taken. The fact that he would have received a ting from the theft of the $44,000,000 clearly shows that when he received the 'ting' i.e. the money and when he did so he was

> aware that the money was stolen or otherwise unlawfully obtained."

At paragraph (14) she said:

> "In relation to Mr. Jordine I find that the crown has not proven it [sic] case beyond reasonable doubt in relation to the offence of Simple Larceny. The evidence given by Mr. Kerr cannot be used against Mr. Jordine … Mr Jordine admitted that he received a ting from the robbery and by admitting that he acknowledge [sic] that he took money that was part of the robbery and that he had the requisite intent for the offence."

[7] As earlier indicated, simple larceny was one of the offences for which the appellant was indicted but he was, instead, convicted for receiving. Where a defendant has been charged on a count of an indictment for simple larceny, there is no power to convict for receiving stolen goods on that count. Although on an indictment for simple larceny an alternative count may be laid and an alternative verdict may be returned for receiving, larceny and receiving constitute separate offences and are therefore mutually exclusive - see ***R v Christ*** [1951] 2 All ER 254, (1951) 35 Cr App R 76; ***R v Dolan*** (1976) 62 Cr App R 36 and ***R v Smythe*** (1981) 72 Cr App R 8. The essential ingredients of each offence are distinguishable. Where a count in an indictment is laid in respect of one of the offences, such count cannot subsume both offences. Consequentially, where the evidence against a defendant is as compatible with larceny as with receiving stolen goods, the indictment should contain a count for larceny as well as one for receiving. It follows, therefore, that on a charge of larceny, a defendant cannot be found guilty of receiving unless a count for receiving is included in the indictment against him.

[8] In ***R v Seymour*** [1954] 1 All ER 1006, the evidence was that a gun had been stolen and a few days following the theft, it was in the appellant's possession. He disposed of the gun prior to his arrest. The indictment charged him with receiving for which he was convicted. The conviction was quashed on appeal. Lord Goddard CJ had this to say at page 1007:

> "In cases where the evidence is as consistent with larceny as with receiving, the indictment ought to contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to come to the conclusion whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself. Then, to prevent other difficulties which have sometimes arisen, if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the larceny count. Equally, if they come to the conclusion that it is larceny, they should be discharged from giving a verdict on the receiving count."

[9] In the case of ***R v Christ*** (supra) the appellant and another were indicted for stealing lead. The indictment included an alternative count for receiving. The evidence was that the men were seen pulling a package containing stolen lead. The jury was directed that if they accepted the evidence, it was a case that the men were caught stealing. However, the count of receiving, for which they were not indicted, was left to the jury for their consideration. Both men were acquitted on the charge of larceny but the appellant was convicted on the charge of receiving stolen goods.

[10] The appellant's conviction was quashed on appeal. Devlin J (as he then was) had this to say at page 254:

> "In many cases, when a man is found in possession of property or has been seen to be associated with property, it is uncertain

> whether the evidence for the prosecution will ultimately satisfy the jury that he was guilty of stealing it or of receiving it. Therefore, the indictment charges both counts, though they must necessarily be alternative counts."

[11] In ***R v Woods*** (1969) 53 Cr App R 30, the appellant was acquitted on two counts of an indictment on which he was charged with breaking and entering. He was convicted for receiving, the jury having been directed that such a verdict was open to them. The conviction was set aside. In quashing the conviction Phillimore LJ said at page 34:

> "The court had no jurisdiction to convict this appellant of receiving in the absence of a specific count charging the offence. In any event the direction to the jury on receiving simply will not do."

[12] It is clear from the foregoing authorities that a specific count for receiving stolen goods is required on an indictment, in order to sustain a conviction on such offence. The question which now arises is, where at a trial of a defendant, there is evidence to support a charge of larceny as well as a charge for receiving stolen goods and the indictment preferred against the defendant speaks to larceny only, could an amendment be properly made to the indictment to meet the count of receiving stolen property? It is perfectly permissible for this to be done.

[13] There are, in place, statutory provisions facilitating the amendment of an indictment before or during a trial. A general power to amend an indictment is provided for by section 6 of the Indictments Act. A specific power to amend an

indictment is conferred on a Resident Magistrate by virtue of section 278 of the Judicature (Resident Magistrates) Act.

Section 6(1) of the Indictments Act states:

> "6(1) Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit."

Section 278 of the Judicature (Resident Magistrates) Act reads:

> "278. At any stage of a trial for an indictable offence before sentence, the Court shall amend or alter the indictment so far as appears necessary from the evidence or otherwise, and may direct the trial to be adjourned or recommenced from any point, if such direction appears proper in the interest either of the prosecution or of the accused person."

[14] In ***Melanie Tapper and Another v R*** RMCA No 28/2007, delivered 27 February 2009, Smith JA carried out a comprehensive review of a number of cases on the question of the amendment of an indictment. At page 23, he made reference to the case of ***R v Egbert Wilson*** (1953) 6 JLR 269, in which this court, in dealing with the issue of the amendment of an indictment, gave consideration to the words "so far as appears necessary from the evidence or otherwise" in section 278 of the Judicature (Resident Magistrates) Act. He continued at page 24 by saying:

> "According to the head-note, Wilson was indicted in the Resident Magistrates' Court on two counts of larceny. During the course of

the trial the indictment was amended by the addition of seven counts charging falsification of accounts. When the amendment was ordered, no evidence was before the Resident Magistrate which made it appear that the amendment was necessary.

Carberry J who delivered the judgment of the Court said:

> 'It has been held by this Court that this section imposes a duty on a Resident Magistrate to amend an indictment by adding counts where the evidence makes it necessary to do so - ***R v Miller and Others***, 3 JLR 136; ***R v Harris and Others***, 1 Stephens 45.
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> It was held in ***R v McCartney*** 3 JLR 207 that the power to amend includes the addition of an alternative count. The Legislature by using the words 'or otherwise' in the context 'as far as appears necessary from the evidence or otherwise' expressly indicated that the power of amendment was not limited to what was necessary from the evidence, and we are of opinion that the addition of counts to cover facts in the possession of the prosecution and not yet put in evidence is comprehended by the words' [sic] or otherwise [sic]. The Resident Magistrate was discharging a statutory duty when he ordered the additional counts of falsification.'

From this case it can be said with a degree of certitude that a Resident Magistrate has a statutory duty to amend an indictment at any stage of trial before sentence as far as it appears necessary from the evidence or material in the possession of the prosecution."

He went on to say at page 27:

> "An amendment of any kind, including the addition or substitution of a count may be made at any stage of the trial provided that having regard to the circumstances of the case and the power of the court to direct a separate trial of any accused or to postpone the trial, the amendment can be made without injustice - see **Archbold**, 1998 1-151.

> In ***R v Teong Sun Chuah and Teong Taff Chuah*** (1991) Cr. L.R. 463 charges of 'obtaining services by deceit' were substituted for charges of 'obtaining property by deceit' at the end of the prosecution case after [sic] no case submission. It was held that no injustice was done and that the amendment only deprived the defence of a technical and unmeritorious acquittal. And that though the amendment was done at a late stage of the trial the substance of the allegation remained the same throughout and there was no prejudice to the defendants."

[15] In the present case, the learned Resident Magistrate correctly acknowledged that Kerr being an accomplice, Kerr's statement implicating the appellant could not be used against the latter. She found that no evidence was adduced by the prosecution to connect the appellant to the larceny. None of the stolen money was recovered from him. The learned Resident Magistrate found that the contents of the appellant's response to the police were sufficient for him to have been called upon to answer a charge for receiving. To answer such a charge, there would have had to have been evidence satisfying the requirements of section 46 (1) of the Larceny Act. It states:

> "46(1) Every person who receives any property knowing it to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanor, shall be guilty of an offence of the like degree (whether felony or misdemeanor), and on conviction thereof liable…"

[16] It is very clear that in order to establish that the offence was committed by the appellant there must be evidence to show that he had knowledge that the money was stolen or that it was unlawfully obtained. On the facts, there was not enough evidence adduced to show that a reasonable jury properly directed would properly conclude that the appellant was guilty of receiving. The appellant's mere statement that "me only get

a ting" would have been insufficient to satisfy proof beyond reasonable doubt that he was a receiver.

[17] Even if there were evidence upon which a conviction could have been sustained for receiving, in convicting the appellant, the procedure adopted by the learned Resident Magistrate was clearly wrong. She was of the view that the material before her disclosed that a case had been made out against the appellant. Before ruling on the no case submission, it would have been incumbent upon her to have amended the indictment to include a count for receiving stolen goods and have the appellant repleaded. Essentially, the amendment would be introducing a charge on a new count which the appellant would be entitled to answer. He would have had to be re-pleaded on the charge. After the amendment and the re-pleading, the proper course would have been for the Resident Magistrate to adjourn the hearing in order to afford the appellant the opportunity to answer the charge.

[18] Although the foregoing is sufficient to dispose of the matter, we think it would be useful to offer some guidance regarding the statutory provision by which the appellate court is empowered to amend errors in proceedings. Section 302 of the Judicature (Resident Magistrates) Act confers on this court the power to amend defects and errors after conviction by a Resident Magistrate. The section 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."

[19] In ***Director of Public Prosecutions v Stewart*** (1982) 35 WIR 296, the Privy Council upheld a judgment of this court in which the court applied section 302. The appellant in that case was convicted on two counts of an indictment. On count one, he was charged with the offence of conspiring to contravene section 24 of the Exchange Control Act contrary to paragraph 1(1) of Part II of the schedule to the Act. On appeal to the Court of Appeal the count was amended to allow punishment under Part III of the schedule and the conviction was upheld. On appeal to the Privy Council it was held, among other things, that count one was not a nullity as reference was made to the section of the Act which imposed the prohibition and even if it were a nullity this court was entitled to carry out the amendment, it being technical in nature. At pages 301 and 302 Lord Fraser of Tullybelton in delivering the opinion of the Board said:

> "Their Lordships are not satisfied that this count could properly be described as a nullity as it referred to the correct section imposing the prohibition which was alleged to have been disobeyed. In any event, they consider that the power vested in the Court of Appeal by the comprehensive words of section 302 ('all defects and errors') extends to amending the count. The power to amend an indictment after conviction can of course only be properly exercised provided that no injustice is caused to the person convicted. Section 302 was only brought to the attention of their Lordships after they had specifically inquired whether there was any statutory provision on this subject, and they regret that it had not been referred to by counsel on either side at an earlier stage of the argument.

> In the present case the Court of Appeal stated that, having regard to the evidence for the prosecution and the nature and conduct of the defence, they considered that there would be no miscarriage of justice in substituting the appropriate penalty for the common law offence of conspiracy. Their Lordships read that as meaning that amendment would cause no injustice to the defendant. The Court of Appeal was clearly entitled to take that view as the defect in count 1 was of an essentially technical nature, and the particulars of the offence gave full and correct notice to the defendant of the facts alleged against him. Their Lordships see no reason therefore to interfere with the decision of the Court of Appeal to amend count 1."

[20] An indictment must disclose the offence for which a defendant is charged. If, in the present case, there was evidence supporting an alternative count for receiving and such a count had been laid but was shown to be defective, in such circumstances, this court would be at liberty to amend the count under section 302 of the Judicature (Resident Magistrates) Act. However, as stipulated in the Indictments Act and as reinforced in ***Director of Public Prosecutions v Stewart***, an amendment to an indictment is only permissible if no injustice is occasioned as a result of the amendment.

[21] In this case the only evidence against the appellant was that given by the police officer as to what the appellant told him. This was clearly insufficient to have warranted a conviction. 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, any amendment of the indictment would indubitably operate unfairly to him as it would be a grave miscarriage of justice.

[22] The foregoing are the reasons which compelled us to conclude that the conviction was unsafe.