JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 110/81

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. CAREY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

LLOYD MINTO v. REGINA

Mr. McIntosh for the Crown.

Appellant did not appear.

November 13, 1981.

CARBERRY, J.A.:

This is an appeal against the conviction of Lloyd Minto in the Resident Magistrate's Court holden in Falmouth on the 2nd day of September, 1981, before His Hon. Mr. Wilcott, Resident Magistrate for the parish of Trelawny. The case was listed for hearing today but no one appeared on behalf of the appellant, and no grounds of appeal have been filed on his behalf. However, the case is a truly remarkable one and one that this court does not feel should be passed over or lightly dealt with. Learned counsel for the Crown as well has regarded the case as so remarkable that he, on behalf of the Crown, has moved for the conviction and sentence to be set aside and we intend to so order.

This case originated in the trial of a young man called Junior Carrol for school-breaking and larceny. The Crown's case was that the canteen and store-room of a primary school at Hastings, Deeside, in the parish of Trelawny was broken into over the week-end of the 3rd to the 6th of April, 1981. When the breaking was discovered on Monday morning when school re-opened, investigations were made and Mr. Lloyd Minto, a carpenter who had a cultivation near to the school, gave information to the police to the effect that on the 5th of April, 1981, that is the Sunday night, at about half past eleven while

returning from his cultivation, he heard some noise going on in the school building, he went to see what was happening and saw that two young men had broken into the school store-room and were busy removing a bag of flour from it. He made a noise that disturbed them by rapping his cutlass against the side of the building and calling out. The young men fled.

Now he gave this evidence in court at the trial of Junior Carrol. Having reached that stage in his evidence, however, he is recorded as telling the Resident Magistrate that he did not recognise either of the two thieves. It appears, however, that in his statement to the police which led to the arrest and trial of Junior Carrol, he had told the police that Junior Carrol was one of the two young men involved in the break-in. We have, then, a situation in which in the course of a trial the key witness for the Crown had failed to live up to his statement.

The next thing that the record discloses is that the investigating officer Corporal Dennis was called to give evidence and apparently was asked and gave evidence to the effect that Lloyd Minto, the present appellant, had told him that he recognised the accused as one of the two people breaking in. It is not clear to us how a lot of the police evidence was admitted, because it was clearly not relevant to Carrol's trial, it being hearsay evidence.

The record discloses that the next thing that happened is that the appellant was recalled to the witness-stand by the Resident Magistrate and asked by him how it had come about that he had given the police this statement saying that he recognised the accused as one of the people who had broken into the school and he had come to court and said that he recognised no one. In response to this enquiry, the appellant denied that he had mentioned any name to the police and said that he did not know how the accused's name got into his statement that the police had taken. He acknowledged his signature on the statement, but did not answer when asked if he didn't see Carrol's name in the statement when he signed it.

The next event that happened was that Corporal Dennis was recalled to the box by the Resident Magistrate and under oath he read in extenso the statement which he had taken from Minto and, in effect, he related that without Minto's identification he would not and could not have arrested Carrol. At this stage, then, the situation was that the witness Lloyd Minto appeared not to have lived up to proof, and it may or may not be that he had given false evidence. Nevertheless, what happened next is quite beyond our ability to comprehend.

The record indicates that the Resident Magistrate then recorded that he took a very strong view as to witnesses who give either false statements to the police or false statements to the court. This was permissible, but after observing that this witness had wasted the time of the police, had apparently exposed the accused Junior Carrol to arrest and imprisonment pending his trial and to possible wrongful conviction and punishment, the Resident Magistrate decided that he ought to make an example of Mr. Minto and he committed him forthwith to nine months' imprisonment at hard labour. Mr. Minto was apparently then led off to serve his sentence but it appears that he got bail two days later and it also appears that a local attorney filed on his behalf a notice of appeal against his conviction. This must have presented some difficulty to the attorney. Minto, who was a witness in somebody else's trial, had never been formally charged with any offence and suddenly found himself in jail. He had not been formally charged with any specific offence. He had not been "cited for contempt of court." Indeed, to this day no one knows exactly what he has been convicted and sentenced to jail for. However, the public spirited attorney who filed the notice of appeal headed the notice of appeal as an appeal against conviction for "contempt of court" while a Court's Office clerk in preparing the notes of evidence before us has headed it as "attempt to pervert the course of justice."

Now dealing first with the position with regard to contempt of court in the Resident Magistrate's Courts, the relevant provisions are contained in Section 194 of the Judicature (Resident Magistrate's) Act. That Section provides:

> "If any person shall wilfully insult the Resident Magistrate or any officer of any Court under this Act, during his sitting or attendance in the Court, or shall wilfully interrupt the proceedings of the Court, or otherwise misbehave in Court, it shall be lawful for any constable or Bailiff or officer of the Court, with or without the assistance of any other person, by the order of the Magistrate, to take the offender into custody and detain him till the rising of the Court; and such Magistrate shall be empowered, if he shall think fit, to impose upon any such offender a fine not exceeding twenty dollars for every such offence, and in default of payment thereof, to commit the offender to prison for any time not exceeding one calendar month, unless the fine shall be sooner paid, and in case of a subsequent offence within six months, by a warrant under his hand, and sealed with the seal of the Court, to commit any such offender to prison for any time not exceeding one calendar month."
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> (emphasis supplied).

It will be noticed that the Resident Magistrate's power to commit for contempt is limited to contempts committed in the face of the court and of a specified nature. Further, there is a limit with regard to the penalty; the limit is twenty dollars for each such offence and in default thereof to commit to prison for a time not exceeding one calendar month; and in the case of subsequent offences committed within six months to commit directly to prison, again for a time not exceeding one month.

Now there is an abundance of authorities that show that, apart from statute, the power of the Resident Magistrate to commit for contempt applies only to a contempt committed in the face of the court, and I mention three of them: (a) R. v. Lefroy, (1873) L.R. 8 Q.B. 134. That case is authority for the proposition that inferior courts of record can only punish for contempt committed in the face of the court. The second authority is R. v. Brompton County Court Judge, (1893) 2 Q.B. 195, again, a case to like effect. These cases have been followed and applied in Jamaica with regard to the Resident Magistrate's Court. See R. v. Alphanso Harris, (1968) 11 J.L.R. page 1 at page 4.

In that case Moody, J.A., delivering the judgment of this court said:

> "By Section 10 of Cap. 179, the Judicature (Resident Magistrate's) Law, the Resident Magistrate's Court was made a court of record, and by Section 194 power was given to the Magistrate to deal with misbehaviour in court. This power is clearly confined to the instances given and to the extent limited. The Resident Magistrate's Court as an inferior court does not have the general authority which the superior courts have - R. v. Lefroy. The power is not inherent in the Resident Magistrate's Court as it is in courts of record, and is given by the Judicature Law which makes them courts of record and gives them a limited power over contempts of court."

The next point to be discussed is the question of whether giving false evidence, assuming that it has been given, constitutes by itself a contempt of court. The giving of false evidence does not normally fall within the purview of contempt of court. See Roach v. Garvan, (1742) 2 Atkyns 469, 26 E.R. 683 at 684:

> "There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court in abusing the parties who are concerned in causes here; and there may be also a contempt of this court in prejudicing mankind against persons before the cause is heard."

The giving of false evidence does not fall within any of those three categories and the point has been clearly put in a judgment given by the High Court of Australia, Coward v. Stapleton, (1953) 90 C.L.R. 573 at pages 578-579. In that case a clear distinction was made between the witness who refuses to answer a question in court and the witness who gives an answer but gives false evidence. The witness who refuses to answer may be guilty of contempt of court. The witness who gives false evidence is not, but may be guilty of perjury. In that case the judgment of the High Court at page 579 reads:

> "..... it cannot be too clearly recognised that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt."

In the instant case, then, there was neither the power to commit for contempt nor was the giving of false evidence, assuming that it was given, a contempt and the conviction, if it were for

contempt, cannot possibly stand.

There are other reasons why it cannot stand and that is the principle laid down in the case of Re: Pollard (1868) L.R. 2 P.C. 106 at page 120, (as modified in the recent Privy Council decision Eric Frater v. The Queen: P.C. Appeal 45 of 1980):

> "No person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him."

Neither of these things was done in this case.

One further word. There are some jurisdictions in the Commonwealth which contain statutory provisions which enable a judge to punish as for contempt a witness who gives false evidence in a case before him. That is a special statutory power which does not exist in Jamaica. But even in those jurisdictions where that power exists, the rule in Re: Pollard, referred to above, requires that an accused should be specifically told what is the false evidence that he has given, and have his attention directed to it and that he should be given an opportunity to answer or explain it if he can. Without either being told what his offence is, or given an opportunity of answering for it, no such conviction can stand. See Chang Hang Kiu v. Piggott (1909) A.C. 312; and Appuhamy v. R. (1963) A.C. 474 Privy Council cases from Hong Kong, and from Ceylon. But we emphasize once again, that we have no such legislative provision.

There were courses that were properly open to the Resident Magistrate in this case if he had been minded to adopt them. Under Section 12 of the Perjury Act, the Resident Magistrate could have directed that the witness, Lloyd Minto, be charged for the offence of perjury. This would automatically have required some investigation. It would have required that he be specifically charged with what it was that he said in evidence which was untrue and would have given him an opportunity for answering that charge. Alternatively, it is possible that the Resident Magistrate might have directed that a charge

of public mischief be brought against the accused. Once again this would have required formulation of the charge and he would have been brought before the court and he would have had an opportunity to answer. Minto's conduct deserved investigation and possibly punishment. But what could not and must not be done is to summarily send a witness suspected of lying to prison without the benefit of his attention being drawn to what it is he has done wrong, without his being charged, and without the benefit of his having had any opportunity whatever to answer.

The circumstances of this case have been unique in our experience and we thought that it would be useful to say something more about them rather than merely to allow the appeal, quash the conviction and set aside the sentence. There has been here in our judgment a miscarriage of justice to an unprecedented extent and consequently, although no one appeared for the appellant, the Crown itself has been moved to ask for the conviction and sentence imposed in this case to be set aside, a very proper course to have taken, and we so order.