[2014] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 27/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MRS JUSTICE LAWRENCE-BESWICK JA (Ag)

ROBERTO NESBETH v R

The appellant in person

Alwayne Smith for the Crown

26, 27 November 2013; and 2 May 2014

MCINTOSH JA

[1] On 8 February 2011, the appellant stood before the Senior Resident Magistrate for the parish of St Thomas, charged on an indictment with the offence of unlawful wounding. The particulars of the offence were that on 24 August 2008, the appellant unlawfully and maliciously wounded Kevin Anderson and, after his plea of not guilty was entered, his trial commenced, concluding with his conviction for the said offence on 15 March 2011.

[2] Approximately one month later, on 13 April 2011, he was sentenced to two years imprisonment at hard labour, which was suspended for a period of two years. The appellant was most dissatisfied with this outcome, however and, after sentence was imposed, verbal notice of appeal was given by counsel who then appeared for him. By virtue of the provisions of section 296 subsection (1) of the Judicature (Resident Magistrates) Act, the appellant was then required to draw up his grounds of appeal and file them with the clerk of the court, for transmission to the Court of Appeal, within 21 days after the date of the judgment, but he failed to do so. The subsection adds that, upon failure to comply, the appellant "shall be deemed to have abandoned his appeal" and Mr Smith argued for the Crown that the appeal had accordingly been abandoned. However, we determined that the proviso to the subsection which empowers the court to hear an appeal though the grounds were not filed within the stipulated period, if the appellant can show good cause for the failure to comply, was applicable in this case and the matter proceeded to a hearing.

The grounds of appeal

[3] The appellant filed a document on 18 July 2011 headed "In the Court of Appeal of Jamaica" in which he expressed his complaints concerning his conviction and sentence and it was from this document that learned counsel for the Crown was able to extract the following as the appellant's grounds of appeal, in order to address them in his submissions:

Ground 1 - That the appellant did not receive a fair trial as he was not represented by counsel in circumstances where the blame could not be attributable to him. Accordingly he was denied the right to defend himself through legal representation of his own choosing.

Ground 2 - That the court erred in preventing him from cross examining the complainant – Kevin Anderson – concerning the possession of the land in dispute. Such evidence was material to his defence and thus he did not have a fair trial.

Ground 3 - The Crown (Government) failed to prove its case beyond a reasonable doubt.

We are satisfied that these grounds capture the essence of the appellant's complaints and, as he seemed to have had no difficulty with their formulation, we adopt them as such.

Ground 1

[4] The document referred to above provides a useful insight into what occurred in the court below, leading up to this ground of appeal. It disclosed that the matter first came before the court in 2008 and at paragraph B page 2 the appellant stated that on 13 December 2010, he was informed by the court to prepare for trial on 8 February 2011. On the trial date, the appellant appeared without legal representation and, when asked by the court what he was going to do, he replied that he had counsel. The following exchange is extracted from the document:

> "Court: What are you going to do Mr Nesbeth?
>
> Mr Nesbeth: I have counsel your Honour.
>
> Court: Well then, if you have Counsel, your counsel is supposed to be here Mr Nesbeth. We don't wait on

Counsel. This case has been going on for two years. So what are you going to do Mr Nesbeth? You need to call your Attorney.

Mr Nesbeth: I don't think anyone will be in their office at this time".

This is not attributed to the court but would seem to be the court's response:

"We don't have time to wait. We move for trial."

The learned Senior Resident Magistrate then proceeded to hear the evidence for the prosecution.

[5] The extract bears no endorsement by the learned Senior Resident Magistrate but, the document in its entirety was copied to the court's office and forms a part of the record dispatched from that office to the Court of Appeal. Additionally, at the beginning of the learned Senior Resident Magistrate's notes of the proceedings, she records the following:

"NB Defendant indicated for first time he has lawyer.
Matter since 2008 – to commence
Tried: 8th February 2011."

The appellant contends that in moving to trial, as the learned Senior Resident Magistrate did, she violated his constitutional right to counsel. He further argued that, in her haste to try him, the learned Magistrate abused her discretion.

[6] The appellant also contends that there was bias and prejudice exhibited towards him from the beginning of his case because the clerk of court (whom he referred to as the Government), knew that his attorney was not available and ought to have spoken up advising the court of his attorney's position. He had engaged the services of his attorney some two months prior to the trial date and so had done all that he could do to secure legal representation. In his oral presentation before us he disclosed that he did not call his attorney to ask why he was absent and that it was his secretary who, on the following day, told him of the attorney's action in going to the court's office on the morning of trial to indicate his unavailability. The absence of his attorney was through no fault of his, he said and the matter ought therefore to have been adjourned. In sum, the appellant argues that he was denied a fair trial as he was not represented by counsel of his own choosing. He added that the very authorities relied on by the Crown support him in this regard.

[7] Mr Smith correctly identified the basis of ground 1 as the amendment to the Jamaica Constitution entitled the Charter of Fundamental Rights and Freedoms, Act 2 of 2011 ("the Charter"). He identified in particular section 16(1) of the Charter which expressly guarantees to the citizen who is charged with a criminal offence the right to "a fair hearing within a reasonable time by an independent and impartial court established by law".

[8] Learned counsel for the Crown submitted that a fair hearing is one in which evidence is presented to an impartial tribunal for resolution of issues which have been

defined in advance of the proceedings and the right to counsel plays a crucial role in that scenario since it is intended to give defendants the opportunity to access counsel with skill and knowledge to meet the prosecution's case. In Jamaica, counsel continued, our courts have developed principles in relation to the right of an accused person to be represented at trial and to bolster his submission he referred to decisions in cases such as ***Regina v Leonard Small*** (1966) 9 JLR 334; ***Regina v Buckley Willocks (no. 2)*** (1972) 12 JLR 1029; and to the Privy Council decision in **Frank *Robinson v Regina*** (1985) 22 JLR 276 where Lord Roskill had this to say at page 282:

> "Their Lordship do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full, could all too easily lead to manipulation and abuse."

[9] Since the right is not an absolute one, Mr Smith argued, regard must be had to the particular circumstances of each case. In the instant case the appellant had exercised his right in that he had retained counsel, Mr Smith contended, but failed to take the necessary steps to ensure his counsel's attendance and it is for this court to consider whether there was a miscarriage of justice in the circumstances. The learned Senior Resident Magistrate was not bound by law to grant an adjournment, he argued, and, given that the matter was before the court from 2008, she was justified in her decision to proceed with the trial.

[10] Additionally, counsel contended, the appellant had been given sufficient time to settle his representation and prepare for his trial and when his attorney failed to attend on the trial date he did not seek an adjournment to have his counsel present nor did he make any effort to contact him. Mr Smith accepted that the court did not on its own volition adjourn the matter to accommodate the appellant in settling his representation. Nonetheless, Mr Smith argued, it was clear from the record of the proceedings that the appellant suffered no disadvantage in the conduct of his trial.

[11] This was not a complex trial, counsel submitted and the notes of evidence clearly showed that the appellant was well able to put questions to the complainant to challenge his credibility, to bring out facts tending to show malicious intent on the part of the complainant and to highlight discrepancies and inconsistencies in the complainant's account of the event. As Mr Smith put it, in his written submissions "he was also quite effective with the police officer" who gave evidence for the prosecution, with regard to previous inconsistent statements concerning the wounds and his statement under caution. He gave evidence on oath and was seemingly not shaken by cross-examination, counsel further contended. In all the circumstances, Mr Smith argued, the appellant suffered no disadvantage from the absence of counsel in the conduct of his trial and ground 1 should therefore be dismissed.

Discussion

[12] We agree with Mr Smith that the appellant's complaint that his constitutional rights had been breached is grounded in the provisions of section 16 of the Charter

and, in particular, sections 16(1) and 16(6)(c) which read as follows:

> "16.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> ...
>
> (6) Every person charged with a criminal offence shall:
>
> ...
>
> (c) be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice."

It is therefore for this court to determine whether:

(i) the appellant was afforded a fair hearing, within a reasonable time;

(ii) whether the appellant suffered any disadvantage by the learned Senior Resident Magistrate proceeding to trial in the absence of his counsel and;

(iii) whether proceeding to trial as she did amounted to an improper exercise of her discretion.

In our judgment the answers to these questions will resolve the issue raised by the appellant in ground 1.

[13] There is no complaint concerning the time frame for the preparation for trial. The appellant confirms that he was given from 13 December 2010 to prepare for trial on 8 February 2011 and had made use of that time to retain counsel. However his

complaint is that he did not have a fair trial because he was not represented by counsel at his trial in circumstances where the absence of his counsel was through no fault of his and he was accordingly denied the right to defend himself through counsel of his own choosing. But, when on his account of the proceedings, the learned Senior Resident Magistrate extended to him the opportunity to contact his attorney with the words "Mr Nesbeth what are you going to do. You need to call your attorney", it should have been clear to him that the magistrate was urging him to contact his attorney and indicate that the court was ready to proceed. That must be the inference to be drawn from the words attributed to her by the appellant "we don't wait.. We don't have time to wait on counsel". He was not there being denied his right to counsel. He had chosen his counsel and was being encouraged to have his counsel attend. Instead, all he did was to indicate that it was futile to attempt any contact with his attorney through his office as no one would be available to receive the call.

[14] Interestingly, while the appellant was having that exchange with the learned Senior Resident Magistrate, he had no knowledge of the alleged action of his attorney that morning. It was not until the day following the trial day that he learnt about it from his attorney's secretary. In that event, he would therefore not have been in any position to advance any explanation to the court for his attorney's absence. However, since his attorney had a secretary, a call to his office may well have put him in a position to advise the court accordingly and seek an adjournment. He clearly did not do all that he could in this exercise and Mr Smith may well be correct in his contention that

the two receipts which the appellant exhibited indicating payment to his attorney suggest that he may not have properly or adequately instructed his attorney to ensure his presence on the trial date. Hence when the Senior Resident Magistrate afforded him the chance to contact his attorney he declined to do so and later did not even ask his attorney why he was absent.

[15] Lord Roskill at page 283 in the ***Frank Robinson*** case agreed and adopted, as do we, the words of Sir Joseph Luckhoo JA in ***R v Pusey*** (1970) 12 JLR 243, who in a decision from our court, had this to say:

> "While we fully appreciate that the Constitution of Jamaica enjoins that every person who is charged with a criminal offence must be permitted to defend himself by a legal representative of his own choice if he so desires, yet the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future, sufficient funds to retain the services of counsel."

In the instant case if the appellant was having any financial challenges in having his attorney in court for the trial, he did not say. As Lord Roskill put it in ***Frank Robinson*** (though in relation to an accused in a murder case but it seems to us to be of general application), "if a defendant ... does not take reasonable steps to ensure that he is represented at trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights".

[16] Again we turn to Lord Roskill in the ***Robinson*** case, and adopt his opinion that the exercise of the judge's discretion to proceed with the trial could only be faulted if

the provisions of the Constitution make it necessary for the magistrate, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation. But that is not the Jamaican position. Additionally, this court has held in ***Delroy Raymond v Regina*** (1988) 25 JLR 456 at 458 (quoting Carey P (Ag) who delivered the judgment of the court dealing with section 20(6) of the Constitution) that "In considering whether an adjournment should be granted a trial judge is obliged to balance a number of competing factors", including the number of times the matter has been before the court, the availability of witnesses and the length of time between the commission of the offence and the trial date.

[17] In ***Pauline Gail v R*** [2011] JMCA Crim 44, the court held that one of the factors to be considered by the court was old cases cluttering up the court's list and this was one such. In our opinion, an adjournment should not readily have been accommodated in the instant case as the surrounding circumstances made it important for the court to deal with the matter before it escalated further. At the core of the contention between the complainant and the appellant was disputed ownership of land. It was already the subject of a cross case as alluded to by the attorney in his plea in mitigation and the Senior Resident Magistrate was entitled to exercise her discretion as she did in a matter which was clogging up the court's list for over two years. She clearly regarded this as a matter which needed to be dealt with without further delay.

[18] Having received information from his attorney's secretary the following day he now erroneously seeks to place responsibility on the court staff to represent his attorney's position to the court. It is therefore useful at this stage to point out that the prosecution holds no brief for defence counsel to represent his position to the court. It is for defence counsel, if faced with a difficulty, to attend on the court or to make arrangements with other defence counsel to appear on his behalf and make the required application for an adjournment.

[19] In this regard we take note of the case of ***Dave Dennie v Regina,*** an oral judgment delivered by Smith JA on 14 July 2008, to which reference was made in ***Pauline Gail*** and in which account was taken of defence counsel's efforts to advise the clerk of court of her appearance in the matter. Defence counsel attended, spoke to one of two clerks of the court and secured a trial date before leaving, as the Magistrate was not yet in attendance. It is unclear whether the appearance of counsel was communicated to the magistrate who proceeded to accept the guilty plea of the appellant in the absence of his attorney and Smith JA in delivering the judgment of the court said:

> "... It is quite clear that he was never able to avail himself of the services of his attorney whom he had retained specifically to represent him in this matter and who had herself shown an intent to do so when she had appeared in court earlier that morning and agreed to an adjourned trial date. We are therefore of the view that the appellant was denied the right to be represented by a legal representative of his choice and it is on that basis that the appeal must be allowed."

[20] The present case is entirely distinguishable from ***Dennie*** where the attorney filed an affidavit clearly indicating that she was retained and intended to represent the accused. She attended court and, in circumstances where the magistrate was late, spoke to the clerk of court and secured another date. There is no affidavit in this case and no indication as to whom the attorney spoke. It clearly was not in court. Further, the record shows that an attorney appeared in court for the appellant on 15 March 2011, when the learned Senior Resident Magistrate handed down her decision and it bears no indication that there was any application, made by him, for instance, to reopen the defence prior to the delivery of the decision. He was also present on 13 April 2011 when the appellant was sentenced, made a plea in mitigation and gave verbal notice of appeal on his behalf.

[21] It is recognized that the Charter has substituted the word "entitled" for the word "permitted" in the pre-amended section 20(6) of the Constitution and we readily agree with Mr Smith that "entitled" puts more force into the right. Nevertheless the pre-amendment authorities are still helpful to a consideration of this issue and the principle that the right is not an absolute right remains unaltered.

[22] The court must now determine whether as a result of the absence of legal representation there was any risk of a miscarriage of justice having occurred. The authorities have held that this question must be approached with great care, mindful of the difficulties which any person defending himself necessarily encounters, however fair

courteous and helpful the trial judge is. The appellant in the present case is an educated man (as observed by the learned Senior Resident Magistrate in her findings and the social enquiry report later ordered showed that he pursued an Associate's Degree in Visual Communication and read for a Bachelor's degree in Visual Communication), though not in the law. But no complex issues of law were involved and the record indicates that he acquitted himself well in his cross-examination of the prosecution's witnesses, challenging important issues such as credibility and discrepancies and inconsistencies. He gave evidence on oath and maintained his position on cross-examination. We are satisfied that there was no disadvantage to the appellant and no miscarriage of justice was occasioned to him by the absence of counsel. The Constitution gives him a right to defend himself and when told by the Senior Resident Magistrate that the trial should move on he exercised his constitutional right to defend himself.

[23] Although the appellant did not refer to any case in particular, he expressed his opinion that the authorities relied on by the Crown supported his arguments on this ground. We have not found this to be so. It may be that he had in mind the case of ***Pauline Gail*** in which the court held that an adjournment should have been granted to the appellant so that the attorney of her choice could have been present to represent her at the conclusion of her trial. However, this case is easily distinguishable from the instant case. Counsel for Miss Gail had herself communicated her position to the court and sought the adjournment. The matter was part-heard and the attorney had

participated up to a point. She gave illness as the reason for her unavailability and enlisted the assistance of another counsel to seek the adjournment. None of these features is present in the instant case. (***Dennie*** is another case which, though not cited by the Crown, was mentioned in ***Pauline Gail*** and has been dealt with above.)

[24] ***Delroy Raymond*** cited by the Crown is also distinguishable from the instant case. In that case the court held that the appellant must not be prevented from exercising his right to have counsel of his choice and that the judge failed to consider that legal representation to which the appellant was entitled was not forthcoming through no fault of his making. The court further held that in not granting an adjournment in those circumstances the judge had wrongly exercised his discretion. In the present case, the appellant was not prevented from exercising his right to counsel. He had done so and it cannot be said that the learned Senior Resident Magistrate failed to consider his legal representation. Having been told that he had counsel, she extended the opportunity to him to have his counsel attend for the trial. He declined, said nothing more than that efforts to contact him would be futile and later wished to impose a duty on the "administration" to speak for him.

[25] In the final analysis, the appellant was not denied his entitlement to have counsel of his own choosing. What transpired after he exercised his right to choose was his own responsibility and since the Constitution also gives him the right to defend himself, he went on to exercise that right and did not show himself to have been in any

way prejudiced by the absence of counsel. In all the circumstances ground 1 is unsustainable and fails.

Ground 2

[26] In this ground the appellant launched a further attack on the fairness of his trial, this time complaining that he was not permitted to cross-examine the complainant concerning the possession of the land in dispute which, he argued, was material to his defence. But as counsel for the Crown pointed out, the record showed that the learned magistrate did allow the appellant to ask questions pertaining to the land and terminated the questions only when he attempted to introduce the second man with the gun. The cross- examination relating to the land is extracted below:

> "Question: Did you get permission to go on the land?
>
> Answer: No
>
> ...
>
> Question: You say I came to you and got you to show me land
>
> Answer: Yes
>
> Question: Are you aware I lease the land that I farm
>
> Answer: After we fight 2008 December the supervisor say he can lease me the land and we must not war over it. I told supervisor that I not going to lease it because he is going to kill me over it so I don't lease it. He lease it."

There were no more questions relating to the land but he cross-examined about the injuries sustained in terms of their location and how the complainant said they were inflicted. The only question which the learned Senior Resident Magistrate disallowed was a question which commenced with the words "When you saw the man holding gun on you..." and this was nevertheless followed by a question about the gun: "You say gun was fired" which resulted in a negative answer. The questions about the land extracted above then followed. It is therefore clear that he was allowed to raise the land issue and in her findings the learned Magistrate referred to the "verbal dispute" that morning between the complainant and the appellant "as to who controlled that spot".

[27] The appellant in his document attributes words to the Senior Resident Magistrate to the effect that she would take no further questions about the land. These words are not reflected in the notes of the proceedings but in any event he thereafter refers to material not relevant to the trial before the learned Senior Resident Magistrate as it related to another incident in December 2007, which he felt would have established his innocence. However, it was the evidence which was before her relating to the incident on 24 August 2008 that the learned Magistrate had for her consideration and it was upon that evidence that her verdict was based. The appellant was not in any way prejudiced in this regard by the absence of legal representation. The ownership of the land was not the issue before the learned Magistrate but whether on the facts she accepted as true, being the sole tribunal of fact, the appellant inflicted the

injuries which were the subject of the complaint. Ground 2 therefore is without substance and fails.

Ground 3

[28] The appellant asserts here that the Crown failed to prove its case against him beyond a reasonable doubt and contends that there were discrepancies and inconsistencies in the evidence of the complainant and his witness about the location of the injuries. He also identified the absence of a medical certificate to support the complainant in his evidence of the injuries and that it was physically impossible for the complainant to have received his injuries as described by him.

[29] In our judgment, the learned Senior Resident Magistrate in her findings dealt adequately with the discrepancies and inconsistencies which were matters for her as the tribunal of fact to determine. She dealt with the error made by the complainant regarding the date of the incident which the appellant challenged in cross-examination and showed how she resolved that discrepancy. The chronology of events leading up to the incident given by the complainant was not challenged, she found and she accepted that the error in the date of the incident was the complainant's and that it was not material. She reminded herself that it was open to her to accept parts of a witness's evidence and reject parts not found to be reliable. She considered the appellant's challenge to the complainant's account of how the injuries were inflicted as the

appellant suggested that they would have been more serious injuries in the scenario as described by the complainant.

[30] The learned Senior Resident Magistrate also dealt with discrepancies between the investigating officer's evidence concerning the location of the injuries and the complainant's version. She was able to see the resulting signs of the injuries shown to her during the trial and accepted the complainant's account of them. She found support for the injury to his finger from the appellant himself who said he saw a cut below the complainant's right middle finger. So that although there was no medical certificate there was support from the police officer and from the appellant that the complainant was injured.

[31] It was for the learned Senior Resident Magistrate as the tribunal of fact to determine whom or what she believed. She rejected the appellant's account of the incident that morning. In her findings she said:

> "I reject the [defendant's] account as somewhere in that account should have been an explanation for the Complainant's injury. I find the omission to be due to the fact that the injury was inflicted by the [defendant]."

The Magistrate also added that:

> "I found the [defendant] at best to be economical with the truth. An example of this was in cross-examination in relation to the ownership/possession of the land. He sought to put up his lease as his right but according to the Complainant whom I believe, not the whole truth as to how he came to lease the land. He did not challenge the complainant on this."

She, having had the advantage of seeing and hearing the witnesses, clearly accepted the complainant as a witness of truth and accepted his explanation of holding up his machete before him which minimized the impact of the chops directed at him by the appellant. In all the circumstances the learned Senior Resident Magistrate was entitled to find that the Crown had proved its case to the required standard. Ground 3 was therefore without substance and also failed.

[32] Based on all of the above the appellant's appeal is dismissed and his conviction and sentence are affirmed.