JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' COURT CRIMINAL APPEAL NO. 5/06

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRIS, J.A.

WILLIAM PAYNE v. REGINA

Delano Harrison, Q.C., for the appellant

Michael Deans, Acting Crown Counsel, for the Crown

May 24, 25, and July 28, 2006

PANTON, J.A.

1. We heard this appeal on May 24, 2006, gave our decision on May 25, 2006, and promised then to put our reasons in writing. This we now do. The appellant is serving a term of imprisonment imposed on him on November 24, 2005, by Her Hon. Mrs. Georgianna Fraser, Resident Magistrate sitting in the Corporate Area

Resident Magistrate's Court, she having convicted him on six informations charging breaches of section 5 of the Unlawful Possession of Property Act. The articles found in his possession were:

(a) a credit card scanner, described as an electronic gadget capable of capturing and storing data of credit and debit cards;

(b) two PVC cards with magnetic strips attached with tracking information relating to two named persons and account numbers to match;

(c) a Bank of America Platinum Visa credit card bearing a name other than the appellant's; and

(d) a Chase American credit card in a name that is not the appellant's with magnetic strip with data unrelated to the appellant.

2. The prosecution's case was that the National Commercial Bank was being defrauded as some of its customers' accounts were being wrongly debited as a result of the replicating of their credit cards. Andrew Nelson, the bank's manager in charge of the fraud unit at the credit card centre reported the matter to Det. Sgt. Leroy Faulkner. The appellant's ex-girlfriend, one Colleen Stephens, who was a cashier at a leading Kingston hotel, was contacted. She informed

Sgt. Faulkner that the appellant had given her a device which she had used to "swipe some credit cards". This caused Sgt. Faulkner to form the opinion that there was a likelihood that the appellant had in his possession, unlawfully, an electronic device capable of capturing data on credit and debit card magnetic strips.

3. Sgt. Faulkner received from Miss Stephens further information which led him to Duhaney Park Drive in St. Andrew on June, 29, 2005. There, he saw the appellant in his car. The appellant, who knew Sgt Faulkner before, turned away his head sharply when he saw the officer. That act aroused the suspicion of Sgt. Faulkner. A search of the appellant's person revealed the credit cards, while the scanner was on the seat beside him. He was asked by the officer to account for his possession of these articles but he did not respond. Later, in an interview at the police station, the appellant said to Sgt. Faulkner, "officer a nuh me a de big man sah".

4. At the trial, Mr. Nelson gave evidence but Miss Stephens did not. The appellant also gave evidence denying that he had the cards

on his person or that the scanner was on the seat. He asserted that he had been asked by Miss Stephens to collect a package which he had placed in the pocket of the car, and that he had no knowledge of the contents which turned out to be the cards and scanner.

5. In convicting the appellant, the learned Resident Magistrate accepted the evidence of Det. Sgt. Faulkner, and found in particular:

> "...that the suspicion of the officer was reasonable having regard to the information he had from two persons and having regard to his own observations of the accused man's conduct at the time of apprehension."

On the other hand, she was not impressed by the evidence of the appellant and found that he had not accounted to her satisfaction by what lawful means he had come into possession of the scanner and credit cards with magnetic slips.

6. The original grounds of appeal filed by the appellant were as follows:

> "1. The learned Resident Magistrate erred in her failure to uphold the submission of no case to

answer made at the end of the prosecution's case;

2. The verdict of the learned Resident Magistrate is unreasonable and/or cannot be supported having regard to the totality of the evidence;

3.The sentence of the Court is manifestly excessive, in all the circumstances."

In addition, we granted leave to argue two supplementary grounds of appeal. These were as follows:

First supplementary ground

"The informations (nos. 6517 – 6521/2005 and 6530/2005) disclosed no offence, since section 5 of the Act, in constituting the offences with which the appellant was purportedly charged, makes no mention of and, it is submitted, does not contemplate, any question of some **belief** or cause to **believe**, in the arresting constable, Detective Sergeant Leroy Faulkner, that the things the appellant had in his possession had been stolen or unlawfully obtained".

Second supplementary ground

"The learned Resident Magistrate erred in law in permitting the reception into evidence of inadmissible hearsay evidence and in expressly relying on it in convicting the appellant: Detective Sergeant Leroy Faulkner was permitted to give evidence of "the information he had from two persons" (one Andrew Nelson, an NCB banker and one Colleen Stephens, an ex-girlfriend of appellant's (see "statement of findings of facts" – facts Nos. 4 – 5 (page 43) and see pages 15 – 17; 22 – 23)".

7. The first supplementary ground of appeal challenges the use of the word "believe" in the informations. In order to illustrate the nature of the challenge, the words of one of these informations are set out hereunder:

> "William Payne ... being a suspected person did unlawfully had (sic) in his possession one (1) black coloured rectangular shaped electronic gadget capable of capturing and storing information data of credit and debit cards under such circumstances that would cause Leroy Faulkner D/Sgt. to **believe** that it

> was either stolen or unlawfully obtained." (emphasis added)

8. Mr. Delano Harrison, Q.C., for the appellant, submitted that section 5 of the Unlawful Possession of Property Act, under which the appellant was charged does not contemplate the concept that the constable should "believe" anything. Further, he submitted that the informations as crafted do not even require Sgt. Faulkner's "cause to believe" to be reasonable, which is an express stipulation of the section. Mr. Harrison advanced the view that this failure to adhere to the specific wording of section 5 as well as section 2 of the Act means that there has been a failure to disclose an offence under the Act. He relied on **R. v. Gray** (1965) 9 J.L.R. 87 and **Harper v. Prescod** (1967) 11 WIR 183. In the former, where a breach of section 6(3) of the Vagrancy Act was charged, the information was held to have disclosed no offence as it was not stated in which of the several categories listed in the section the offender was alleged to fall. In relation to the latter case which was decided in Barbados, an essential ingredient of the statutory offence charged was not stated in the information. In both cases, the informations on their face disclosed no offence whatsoever, and so the Court refused to amend

them. Mr. Deans, in reply, conceded that the informations were inelegantly worded. However, that did not make them void, he said. He in turn relied on **R. v. Ashenheim (**1973) 12 J.L.R. 1066, **Director of Public Prosecutions v. Stewart** (1982) 35 WIR 296 **R. v. McVitie (**1960) 2 All E.R. 498, and section 64 of the Justices of the Peace Jurisdiction Act.

9. In **Ashenheim**, an information alleging a breach of the Road Traffic Law referred to the incorrect section. It was held that this defect was only as to the particulars and, the appellant not having been misled in any way, the appeal was dismissed. In **Director of Public Prosecutions v Stewart** the defendant was convicted of contravening a section of the Exchange Control Act, "contrary to paragraph 1(1) of Part 11 of Schedule 5 to the Exchange Control Act". The correct Part was Part 111, not 11. At the appellate stage, the indictment was amended. It was held on further appeal to the Privy Council that the Court of Appeal was correct to have made the amendment; and that there was no question of the count being a nullity seeing that the amendment was technical in nature and the

particulars of the offence had given full and correct information to the defendant of the facts alleged. **McVitie** is, perhaps, of the cases cited, the most similar to the instant one. There, the appellant was indicted for possession of explosives and the word "knowingly" should have been included in the particulars of offence. The English Court of Criminal Appeal held that although the omission made the indictment defective, it did not make it bad, and "knowledge" which was an essential ingredient of the offence had been established at the trial and as no embarrassment or prejudice had been caused to the appellant there had been no substantial miscarriage of justice so the proviso would be applied.

10. In the instant situation, it cannot be said that the informations disclosed no offence. They clearly did, by indicating to the appellant that it was being alleged that he was a suspected person who unlawfully had in his possession certain specified articles under circumstances that caused Det. Sgt. Faulkner to "believe" that they had been either stolen or unlawfully obtained. The only variance from the specific words in the legislation is that the informations did

not say that the circumstances "reasonably" caused the Sergeant "to suspect" that the items were stolen or unlawfully obtained. In our view, this omission or variance is insufficient for the informations to be regarded as defective. The offence alleged has been clearly stated. In any event, the evidence given by the officer indicated that he felt he had reasonable cause to suspect that the articles had been either stolen or unlawfully obtained. It is to be noted also that the Resident Magistrate made a specific finding to that effect. The first supplementary ground therefore fails.

11. The second supplementary ground faults the conviction on the basis that the learned Resident Magistrate admitted hearsay evidence and relied on it. The evidence came in the form of what Andrew Nelson and Colleen Stephens told Det. Sgt. Faulkner. At the trial, and also at the hearing before us, the prosecution submitted that this evidence was admissible to show the state of mind of Det. Sgt. Faulkner, which is important in proving cases of this kind under the Unlawful Possession of Property Act. Mr. Harrison submitted that the report made by Nelson had nothing to do with the appellant, and was

several months before the arrest of the appellant. Further, the information provided by Colleen Stephens "implicated herself and the appellant in credit card fraud at a date and time not disclosed, but plainly some considerable time before" the appellant entered the picture. However, the evidence of the state of mind of the arresting officer, he said, was admissible and of relevance only in relation to the moment in time that the officer saw the appellant in possession of the articles. Hence, by admitting the evidence in the circumstances that obtained, he contended that the learned Resident Magistrate was in error.

12. This Court (Luckhoo, P.(Ag.), Fox and Graham-Perkins, J.J.A.), has already given an opinion on the question of the admissibility of evidence in the circumstances encountered in this case. In **R. v. Whyte** (1972) 12 J.L.R. 658, Alcoa Minerals was engaged in carrying out construction work at Halse Hall, Clarendon. George Rossi, a security supervisor employed to Alcoa Minerals, saw the appellant, who was acting in a suspicious manner, remove something from a Walcott K.I.W. trailer parked on the compound and place it in the

trunk of a car on the compound. This aroused Rossi's suspicion, and he went to the main entrance gate to the compound and reported the matter to Kenneth Lamey, a police sergeant. The latter went to the car park, opened the trunk of the car, which was closed but not locked, and noticed a fire extinguisher therein. Sgt. Lamey then spoke to Donald Freenaux, material controller of Walcott K.I.W., who was in charge of fire extinguishers there. Freenaux accompanied Sgt. Lamey to the car and was shown the fire extinguisher. Freenaux testified that the fire extinguisher was of the same type used by his firm on the project, and that it appeared to be new. Six hours after the initial sighting by Rossi, the appellant was seen driving the car. He was stopped and the fire extinguisher was seen in the trunk. The appellant disclaimed any knowledge of the fire extinguisher. Sgt. Lamey arrested and charged him with unlawful possession of property. At the trial, both Rossi and Freenaux gave evidence but neither disclosed what he had said to Sgt. Lamey; nor did Sgt. Lamey say what either had told him. The Court (Fox, J.A., dissenting) held that the sergeant's state of mind and the justification for its existence were essentially questions to be determined by the

magistrate. When, therefore, the magistrate did not have any evidence of what Rossi or Freenaux had told Sgt. Lamey (who had said that he was suspicious), the magistrate was not in a position to determine whether Sgt. Lamey's suspicion that the fire extinguisher had been stolen or unlawfully obtained was in fact reasonable.

13. In giving his reasons for allowing the appeal, Luckhoo, P.(Ag.) said:

> "What was stated to Sergeant Lamey by Rossi is not known for neither Sergeant Lamey nor Rossi testified as to the content of the report. Apparently it was thought by the clerk of court who presented the case for the prosecution that the details of the report would be inadmissible in evidence as hearsay. That this is not so is well exemplified by the case of **Subramanian v. R.** (1956) 1 W.L.R. 965 where, as here, the state of mind of the testifier was relevant. However, it must be borne in mind that on a charge of unlawful possession as it is necessary for the prosecution to adduce evidence of facts which might induce a certain state of mind in the hearer, the details of the report would become admissible for that purpose only if the reporter testifies as to the facts upon which his report is based and so enable the learned resident magistrate to decide whether those facts have been established.

> In the absence of evidence as to what Rossi told Sergeant Lamey it is not known whether Sergeant Lamey was made aware of the conduct of the appellant as viewed by Rossi. The evidence of Rossi as to the appellant's conduct relevant though it is to the question of the appellant being found in possession of the fire extinguisher is only relevant to Sergeant Lamey's state of mind created by the latter's apprehension of the circumstances under which he found the appellant in possession of the fire extinguisher if the content of the report made by Rossi to Sergeant Lamey is known." (p.661 D-G)

And Graham-Perkins, J.A., in his reasoning, at p. 663G-I, said:

> "This case appears to have been conducted on the assumption that the report made by Rossi to Lamey was not admissible as an item of evidence if led through Lamey. This assumption, in my respectful view, was quite unwarranted and reflects a grave misunderstanding of the rule against hearsay. The rule has never been fully and judicially formulated, as far as I am aware, but all the authorities endorse the view that
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> "Evidence of statements made to a witness...may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.

See **Subramanian v. Public Prosecutor** (1956) 1 W.L.R. at p.970."

14. In what may well be described as a last resort, Mr. Harrison submitted that there was no evidence that the goods had been stolen or unlawfully obtained. This submission was made in respect of the original ground two which complains that the verdict is unreasonable and/or cannot be supported according to the evidence. It is obvious that such a submission could not have found favour with the Court as the appellant had no lawful basis for being in possession of these items. The fact that there was no evidence of any particular individual having been deprived of any of these items is irrelevant. If the police had such information, the charge would have been one of larceny. In the normal course of events, an individual with no known business operation is not expected to be traveling around with a credit card scanner. If he is in possession of such, then he ought to explain the basis of his possession, if called on by a magistrate so to do. His possession of the scanner along with the credit cards with magnetic strips, bearing the names of persons other than himself cannot on the face of it be regarded as normal and lawful where he

has not discharged the burden of showing that he had legitimate reasons for possessing them. In any event, as Luckhoo, P. (Ag.) said in **Whyte** (supra)**:**

> "It will be readily appreciated that the definition of 'suspected person' does not require that the constable shall suspect that the person in whose possession he finds the thing was the thief or unlawful obtainer. The circumstances under which he finds the thing in the person's possession must, however, suggest to him that the thing was stolen or unlawfully obtained by someone. Those circumstances may or may not include the conduct of the person in whose possession the thing is found. Whether the suspicion of the constable that the thing found was stolen or unlawfully obtained was reasonable or not is a matter for the resident magistrate." (p.661 A-B)

15. The appellant having failed in respect of all grounds advanced, the convictions stand. So far as the sentences were concerned, we found that the learned Resident Magistrate erred in imposing a consecutive sentence in respect of the scanner. The convictions were recorded in respect of one set of facts; that being so, there was no justification for the imposition of a consecutive sentence. The sentence is therefore varied to make them concurrent, so that the

appellant will serve twelve months imprisonment, instead of twenty-four months, from November 24, 2005.