JAMAICA

IN THE RESIDENT MAGISTRATE'S COURT

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 66/89

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

CHRISTOPHER SMELLIE

Miss Fara Brown for applicant

Patrick Cole Crown Counsel for Crown

15th October & 4th November 1991

MORGAN, J.A.

This is an appeal from conviction in the Resident Magistrate's Court, Kingston (Criminal Division) on the 25th November 1988 by Her Hon. Miss Eleise Francis, Resident Magistrate. The sentence was a fine of $500 with an alternative of 3 months imprisonment at hard labour. At the end of the hearing we dismissed the appeal, confirmed the conviction and promised to put our reasons in writing.

Tardiness in the dispatch of appeals from the Resident Magistrate's Court is common to all parishes. This appeal was sent to the Court of Appeal registry on September 8, 1989. The Registrar requested a simple affidavit from the Clerk of the Courts, Kingston to verify the date of the filing of the appeal. It has taken two years for this affidavit (sworn to on October 4, 1991) to reach the registry. One must consider that this accused man fortunately paid his fine but he could have otherwise been waiting for 24 months to commence the alternative of 3 months imprisonment upon failure to pay the fine. It is recommended that Resident Magistrates and their Clerks of the Courts check the Appeal Register at least fortnightly

to make themselves aware of and to deal expeditiously with appeals.

In this case the appellant along with one Guscott and Junior Chen were jointly charged and tried on an Indictment for Larceny of a motor bike on October 11, 1988 valued $65,000 property of Mr. Kenneth Crosbie.

The facts are that Mr. Crosbie who deals in motor bikes advertised for sale a 1,000 c.c. Kawasaki bike. About 6.00 p.m. on October 10, Smellie, followed shortly after by Guscott, arrived to inspect it. As it was closing time and the bike was penned in by a car they were asked to return the following day. Next day both returned, Guscott in a taxi and appellant driving a Ford pick-up. Appellant surrendered his pick-up keys as a security to test-ride the bike, after agreeing on the sale price, and rode off within sight. On his return Guscott asked to test-ride and rode off. As he did so the appellant retrieved his keys and drove away in his pick-up saying he was going to see his lawyers to arrange financing for the purchase of the bike. Neither of them returned. Mr. Crosbie next saw his bike at the Cross Roads Police Station on the 17th where after identifying it as his in their presence, both men said that the bike did belong to him.

Earlier that day Mr. Crosbie's partner Michael Causwell saw the bike as he drove by Caledonia Avenue. The appellant was then sitting on another bike parked behind it, when Causwell drove up and called him by name. The appellant tried to move away but Causwel blocked his path and said, "What is going on here because this is a stolen bike'. The appellant mumbled something inaudible and started to move his bike backways till eventually he rode away. Chen who was present had said that he owned a motor bike which the appellant had taken and given him Chen that bike to ride.

The appellant in an unsworn statement from the dock said he went to view the bike, he rode Chen's motor bike to Cross Roads and he saw Mr. Crosbie's bike there. He never gave it to Chen to ride, he did not know how it got there, and that he did identify it as Mr. Crosbie's bike at the Police Station.

At the close of the case for the Crown, Counsel made a no case submission which was not upheld, and it is this ruling which

formed the base of the ground of appeal before us which was forcibly argued by Counsel.

The Resident Magistrate having found as a fact that Guscott and Smellie were together at Arnold Road on both occassions and rode the bike, that Guscott did not return with it, continued:

> "I find as a fact that Smellie and Guscott acted in concert to commit the offence of Larceny even though Guscott alone did the actual taking.
>
> At Cross Roads when the bike was found, Smellie and Chen were together and the latter admitted being in possession of it.
>
> In addition to Smellie's conduct supporting asportation of the bike his conduct at Cross Roads indicates guilty knowledge in that when Causwell confronted Smellie by calling his name he mumbled something and tried to move but witness blocked his path and when Causwell stated that the bike was stolen Smellie did not respond but moved bike backwards and left the scene."

Learned Counsel has submitted that the no case submission made on behalf of the appellant should have been upheld as the Crown failed to show that Smellie was together with or in the company of Guscott at Arnold Road, that what was presented was only that they had attended separately and their meeting there was a mere coincidence thus their conduct as shown was consistent with innocence.

She further submitted that learned Counsel's reliance on R vs Parkes (1974) 12 J.L.R. p.1509 was unsustainable as there was no clear accusation made by Causwell in his confrontation with Smellie and as such his silence was not capable of being construed as accepting the accusation.

The words used by Crosbie at Caledonia Avenue, Cross Roads can clearly be inferred as an accusation that the bike was stolen by the appellant, whom he addressed, and from whom he demanded an explanation, i.e., "What's going on here?" They were certainly speaking on even terms but in return the appellant mumbles, attempts to ride off and finally does so without any sign of outrage or expression of indignation. This conduct surely is some evidence that he admitted the charge to be true and when considered with the fact that he was together with Guscott at the time and place when the bike was stolen by means of a scam, is evidence on which a Court could rely to find that he was part of the plan to steal the bike and did steal it. The Crown relied on common design and the scope of the plan was clearly

as executed.

In R vs Parkes (supra) Luckhoo P(Ag) cited with approval the case referred to him by Crown Counsel of R vs Mitchell (2) (1892) 17 Cox C.C. 508 where Cave J in his directions to the Jury said:

> "...Now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."

This passage is directly applicable to the facts of this case.

We are of the view that the evidence adduced by the Crown was sufficient to discharge the burden of a prima facie case to call upon the appellant to answer as the Learned Resident Magistrate did.

The unsworn statement of the appellant had no effect in displacing the Crown's case in the Resident Magistrate's view as was shown by the verdict to which she came. We find no reason to disturb it.

We indeed thought it strange that a mere fine of $500 could be thought adequate punishment for larceny of a bike valued at $65,000 but observe that, very wisely, there was no appeal against sentence.

For these reasons we dismissed the appeal and affirmed the conviction.