

✓ 140

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 80/81

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Rowe, J.A.

R. v. CLIVE GORDON
ELWIN FAIRWEATHER
CHARLES BESSENTIE
JUNIOR OTTAR
ERNEST BUDDO

Mr. Ian Ramsay for the Appellants

Mr. Lloyd Hibbert for the Crown

January 21, 22, 29, February 4, & March 5, 1982

ROWE J.A.

The appellants Gordon, Fairweather and Bessentie, were on February 10, 1981 members of the Jamaica Constabulary Force and their combined service was then approximately thirty years. Along with two civilians Ottar and Buddo, they were convicted by the learned resident magistrate for Clarendon on two counts of an indictment which charged them jointly with house-breaking with intent contrary to Section 41 (a) of the Larceny Act and for robbery with aggravation, contrary to Section 37 (1) (a) of the Larceny Act and sentenced to terms of imprisonment. They all appealed against their convictions and sentences and at the conclusion of the arguments on February 4, 1982, we allowed the appeals against conviction on the count for house-breaking with intent, and set aside that conviction and entered verdicts of acquittal. We dismissed the appeals against conviction on the count for robbery with aggravation, but considering that the sentences imposed were manifestly excessive, we allowed the appeals against sentence and reduced the sentences of four years imprisonment with hard labour imposed on Gordon, Fairweather and Bessentie to periods of eighteen months; the sentence of Buddo from four years imprisonment with hard labour to nine months

120

and the sentence of Ottar from three years imprisonment with hard labour to one of six months. The reasons set out herein are those which moved the Court to make the orders referred to above.

So runs the prosecution's case. In the remote village of Longsville in the parish of Clarendon, Novelett Hall, a domestic servant, retired to bed in her 100 square foot room with her two babies on the night of Tuesday, February 10, 1981. Near to midnight she heard knocking on her window and male voices outside. She opened her door at their command and two policemen the appellants Gordon and Bessentie with guns in their hands entered her room. They searched her clothes basket and enquired of her where a man called "Boobo" lived. She understood them to be referring to one Calvin Jackson and at first denied any knowledge of him. It was her uncontradicted evidence before the magistrate that the policemen threatened to shoot her if she did not give the information whereupon she pointed out Boobo's house and the men left.

No explanation was offered as to why the two policemen should show interest in the contents of this woman's clothes basket. The crown relied upon what transpired later that night at Jackson's house as evidence of what was the intention of the men who forced their way into Hall's house. We were, however, persuaded by the arguments of Mr. Ramsay, that the apparent purpose for this intrusion was to obtain exact information about Jackson's residence. There was no general search of Novelett Hall's room and the interrogation was confined to questions about Jackson. In our view, unwarranted and high-handed, as the intrusion may be, there was not sufficient evidence that they evinced an intention to steal therein. The conviction on the count for housebreaking with intent cannot stand.

In that same village of Longsville, Calvin Jackson and his wife Terrygene were asleep in their home at midnight on February 10, 1981. They were awakened by banging sounds from the verandah and orders from

171

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men outside to, "open up, Police." The door was opened and the occupants saw the appellant Bessentie at the doorway dressed in policeman's uniform and with a gun in his hand and the appellants Gordon and Buddo were behind him. Bessentie told the Jacksons that they were from Kingston from the Narcotic Squad and that his Head of department had sent them down to investigate some illegal business Mr. Jackson was in, viz. illegal trafficking in ganja and consequently they were going to search the house. Jackson denied any knowledge of the allegation made against him and he told the appellants that they were free to search the house. A thorough search was carried out. The bedrooms were searched, the bathroom and kitchen too; the trunk, the wardrobe, the bureau, the mattress, boxes and the refrigerator. In a box they found a pump. One officer said, "That's why they can't catch the plane." Another say, "This is pump that pump fuel into the plane." Jackson told the policemen that it was a new pump given to him and that it had never been used. Jackson was told that he was going to be arrested. He began to get dressed to accompany the policemen and he then asked for their names. Gordon replied, "you asking for our names and I am considering what to do with you?"

Mrs. Jackson was more concerned that her husband was being arrested and taken away and so she enquired where would they be taking him. The reply was Narcotics Division, Kingston." Bessentie addressing Gordon, said, "Corporal Morgan we can't leave this man. How we carry the stuff and don't carry the man?" Gordon walked towards Jackson and said to him, "you look to be a very genuine guy and I am going to give you a chance but I am going to take the pump." Bessentie said, "we cant leave this man, we have to bring him in." Gordon took the pump and he and Buddo walked away. Gordon then called out to Bessentie, "leave the man alone" and at this Bessentie left the house. Shortly after the Jackson's heard a car drive away.

122

Irvin Hall the brother of Novelett Hall, was awakened by Novelett and from the information he received from her he proceeded towards the home of Calvin Jackson. At Jackson's gate he saw a white Peugeot motor car and the appellants Fairweather and Ottar. These appellants told him that Superintendent had sent them from Kingston and that while police operations were on, no one was allowed to move about. Hall said he saw 3 men come from Jackson's house with a pump to the car and he then went to Jackson's house.

It appears from the evidence of Raymond Jackson that a third household had been disturbed on that night. He heard men asking his mother for Boobo and from the tenor of his mother's reply he apprehended danger and so he ran to his cousin who took him by truck to the May Pen Police Station and made a report that gunmen were in Longsville terrorising the villagers. The police at May Pen responded immediately and Det. Cons. McPherson and Cons. Forbes were despatched to investigate. About a mile from Palmers Cross on the road to Birds Hill, the police car intercepted a white Peugeot travelling in the opposite direction. With drawn revolvers the two constables jumped from their car and ordered the five men who were in the Peugeot to alight. They obeyed and the appellant Fairweather said, "A me Fairweather, don't shoot." Cons. McPherson told all five appellants that from information he had received they had been involved in a robbery at Longsville. According to the evidence of McPherson, Fairweather replied, "We never rob anybody." On the other hand Forbes said Fairweather replied, "All a we a police, help us." It was common ground that the others did not make any reply. Det. Cons. McPherson cautioned the appellants and asked them if any of them had any firearms. They said "No." He then asked if any firearms were in the car. The appellant Fairweather said "No." Det. Cons. McPherson searched the men and found in Buddo's waist a screw-driver. He found nothing on the other men. In his search of the car he found a .38 calibre Smith and Wesson revolver loaded with 6 live rounds of .38 ammunition in the pocket of the car facing the

5.

left front seat and on the rear seat of the car he found another .38 calibre Smith and Wesson revolver also loaded with 6 rounds of .38 ammunition. These two revolvers were claimed by Fairweather and Bessentie. In the car Det. Cons. McPherson found a travelling bag containing one pair police regulation boots, one regulation red seam pants, two regulation caps with red stripe and one pair blue overalls.

In the trunk of the Peugeot motor car in the presence of the five men, Det. Cons. McPherson found a paper bag with vegetable matter resembling ganja. He brought his find to the attention of the appellants but no one said anything. Later that morning he arrested and charged all five men jointly for possession of ganja. When cautioned Fairweather said; "McPherson, if you give me a chance now we tender me resignation; me shame." The others said nothing.

There was in the trunk of that car a red fluid pump in a box. McPherson asked the men where they got this pump. The appellants Gordon and Fairweather said, "a when we left out of Jackson's yard we see it in the road and we take it up."

The two constable radioed to May Pen for assistance. During the wait, the appellant Buddo was seen to remove the front registration plate from the Peugeot motor car and tried to throw it away. On examination, this registration plate was found to be N.W. 65 but was so folded to appear as W65. At the rear of the car was a similar registration plate W65 but when removed and unfolded read NW65. Underneath these fraudulent plates appeared the registration plate FN 9933 both at the front and rear of the vehicle. The appellants offered no explanation for the use of the double set of registration plates.

In the course of their cross-examination the police constables maintained that none of the appellants asked that they be taken back to Longsville to verify that they had been making investigations.

Sergeant Salmon who came to assist the two constables said that when he told the appellants Gordon, Fairweather and Bessentie that he would be taking them to May Pen Police Station, they aksed him not to do so but to take them to where the complainant was.

At the close of the case for the prosecution the attorneys appearing for the appellants made long submissions on facts and law to the learned trial judge urging that there was no case for the appellants to answer. He ruled against the submissions and when called upon to present their defences, Mr. Mitchell on behalf of Gordon, Fairweather, Bessentie and Buddo advised the resident magistrate that they would be offering no evidence and that the defence rested. Mr. Campbell on behalf of Ottar advised the resident magistrate to the same effect. Thereupon the Resident Magistrate announced his verdict. Pleas in mitigation were made by Mr. Mitchell and Mr. Campbell as a result of which sentence on Ottar was postponed to July 2, 1981 while the others were sentenced on that day, the 26th of June.

Mr. Ramsay contended before us that the learned resident magistrate did not properly address his mind to the fact that Gordon, Fairweather and Bessentie were policemen and therefore entitled to the protection of the provisions of the Suppression of Crime (Special Provisions) Act 1974.

Section 4 of that Act in so far as is relevant provides:-

- "4 (1) In a special area, any member of the Security Forces may, without warrant, and using such force (if any) as may be reasonably justified in the circumstances:-
- (a) undertake a search of any premises, place, vehicle, person or thing;
 - (b) seize, take away and detain any vehicle or article which he reasonably suspects is intended to be used, or has been used, for or in connection with the commission of any offence or is or has been unlawfully obtained or possessed;
 - (c) arrest any person upon reasonable suspicion of his having committed or of being about to commit an offence;"

and Section 5 gives to him the following protection:

"5 - where any member of the Security Forces purports to act in the exercise of authority conferred by or under this Act he shall be presumed to be acting within such authority in the absence of proof to the contrary."

In February 1981, the whole Island of Jamaica was declared a special area for the purpose of Sections 4 and 5 of the Act. Although no specific mention was made during the course of the trial of the provisions of the Suppressions of Crime (Special Provisions) Act the three appellants who were members of the Constabulary Force were entitled to the protection afforded by the provisions of that Act. However, there was one vital issue which the learned resident magistrate had to decide, viz. were these policemen acting as thieves under the colour of authority or were they acting as genuine police officers in the execution of their duties. If on the totality of the evidence, all the facts pointed to the direction that they were acting as thieves under the colour of authority then the presumption in their favour enacted by Section 5 of the Act quoted above would be rebutted.

It was admitted by the Crown that there was no direct evidence from the Narcotics Branch of the Police Force that the three appellants were not sent on a police mission to Longsville. In our view the other evidence, which the learned resident magistrate had before him was so overwhelming that it provided strong and clear affirmative proof in rebuttal of the statutory presumption. The operation was carried out at the dead of night. The men travelled to that remote village in a private motor car bearing licence plates doubly false. They gave false name for the appellant Gordon. When the appellants were accosted by the two constables they denied possession of firearms although as police officers they would ordinarily have been entitled to carry firearms if they were acting in the execution of police duties. Two of the appellants, Fairweather and Gordon, gave absolutely false accounts of how they came into possession of the pump, and Fairweather offered to resign if he was given a chance on the ganja charge as he was ashamed. Now if Fairweather had been

acting as a Police officer at Longville of what ought he to be ashamed? If Gordon had taken the pump from Jackson's home as an article which was intended to be used in furtherance of the ganja trade, why did he manufacture the story of finding the pump by the wayside? If the civilian appellants were not privy to and acting in concert with the policemen why did Buddo try to remove the false licence plates, and why did they not contradict Fairweather and Gordon as to the circumstances relating to the acquisition of the Pump? In the absence of any explanation whatsoever, we are of the view that on the facts the inescapable inference was that these appellants were acting as thieves. The statutory presumption was rebutted. Consequently in our view there was no merit in grounds 1 (a) and 1 (c) of the Grounds of Appeal.

In support of Ground 2 (c) Mr. Ramsay argued that this court should order a new trial as Section 280 (2) of the Judicature (Resident Magistrate's) Act, dealing with the procedure to be followed where no evidence is adduced by the defence at the end of the Crown's case, was not complied with. The hearing of the appeal was adjourned to enable Mr. Ramsay to file affidavits from the attorneys who appeared at the trial and he produced an affidavit from Mr. Mitchell and another from Mr. Campbell both of which the Court looked at. Paragraphs 8 - 10 of Mr. Mitchell's affidavit are reproduced hereunder:

"8. That the Learned Resident Magistrate then asked me whether I was calling evidence and I advised the Court that I would not be doing so and that the Defence would rest in the cases of Elwin Fairweather, Charles Bessentie, Clive Gordon and Ernest Buddo: That Mr. Ainsworth Campbell for Junior Ottar similarly responded to the Learned Resident Magistrate's query and advised that the Defence rested in respect of Junior Ottar: That thereupon the Learned Resident Magistrate without rest or pause or intimation of any kind immediately embarked upon his Judgment at the end of which he found the following verdicts:

"Count (1) Bessentie and Gordon - Guilty
Count (2) No verdict
Count (3) All five (5) accused - Guilty"

- "9. That after I had advised the Court that the defence rested and Mr. Campbell had done the same the Learned Resident Magistrate did not ask any Counsel present whether they wished to address him further; nor did he ask if the right was being waived by any of us: nor indeed did he pause to allow any time for reflection.
10. That my attention has been subsequently drawn to the provisions of Section 280 ss. (2) of the Judicature (Resident Magistrates) Act and I beg to state frankly that I recalled it vaguely but that at the time of the case and at the material time therein I did not have the actual provisions before me: That in fact I laboured under the misunderstanding that I had no further right of address after the No-Case submission had been over-ruled, and the Defence rested."

Mr. Campbell specifically adopted paragraph 8 of Mr. Mitchell's affidavit and went on to give his contribution in paragraph 4 - 6 as set out hereunder:

- "4. That I wish to state categorically that as regards the final right of address to the Court for the purpose of Summing up the evidence;
- (a) that at no time did the Court invite me to address;
- (b) that at no time did I waive my right to address;
- (c) that at no time did the Learned Resident Magistrate ask me if I was waiving my right to address.
5. That I verily believe that the aforesaid breach arose as a result of a misunderstanding between Bench and Bar; that a very tense and strained atmosphere existed between the Bench and Bar from the very beginning of the case and grew progressively worse nearing the close of the case: That I verily believe that this situation and tension hampered and/or prevented communication between Bench and Bar at this important juncture as aforesaid.
6. That in my No-Case submission I dealt primarily with Law in the sense of insufficiency of evidence and would have welcomed the opportunity to Sum-Up on the facts and elaborate upon them in relation to my client if matters had not taken the unfortunate course they took."

The record carried no notation as to addresses by the attorneys or as to waiver of their rights to address after their no case submissions had been over-ruled. It is undoubted that Section 280 (2) of the Judicature (Resident Magistrates) Act provides that if no evidence is tendered by or on behalf of an accused person, he or his counsel "shall be allowed if he or they shall think fit" to sum up the evidence. We entirely agree with Mr. Ramsay that this right of address is a part of the trial but it may be waived by the accused or his counsel.

Mr. Ramsay referred to and relied upon the decision in R. v. Daisy Campbell (1946) 5 J.L.R. 45. In that case the Solicitor for the appellant did not address the Resident Magistrate either before verdict or before sentence. In his grounds of appeal the Solicitor complained that he had in effect been denied the right of address and that he had intended to address the magistrate. On the other hand the Resident Magistrate said he formed the impression that the Solicitor did not desire to address him and consequently he proceeded to conclude the case without hearing him. In giving the judgment of the Court, Carberry J. (as he then was) said:

"The right to address the Court is conferred by Section 283 (2) of Chapter 432 and the waiver of this right should be clear and unambiguous, and a note should be made of it. It appears to us that the failure of the appellants Solicitor to sum up the evidence at the end of the case may have been due to a misunderstanding between himself and the Resident Magistrate, and that in consequence the appellant has been deprived of a right which may have had some effect on the ultimate decision."

A new trial was ordered.

We do not understand this decision to mean that if a Resident Magistrate does not make a note of a waiver or otherwise by the attorney-at-law of his right to address that that will by itself be fatal to any conviction arrived at. It is indeed a good practice for

129

a trial judge to make a note of any significant occurrence during the trial of a case and this would include whether or not he was addressed by the accused or his counsel. The broad distinctions between the instant case and that of R. v. Daisy Campbell supra are firstly that in the instant case all the attorneys for the accused and for the Crown had addressed the Resident Magistrate very fully on facts and law in the no case submissions, and these submissions were duly recorded; secondly that either through ignorance or inadvertence neither of the attorneys for the defence had any desire to address the court after their no case submissions had been over-ruled, thirdly that each attorney in answer to the Resident Magistrate as to whether he would be calling evidence said, in the words of Mr. Mitchell,

"I advised the court that I would not be doing so and that the defence would rest the case."

and lastly, the record shows that Mr. Campbell did indeed extensively concern himself with the facts during his no case submission.

In all the circumstances, there were the clearest indications that there was no shadow of misunderstanding between Bench and Bar and that the true position was that for their own reasons the attorneys were not exercising and did not intend to exercise their undoubted right to further address the Court and were indeed resting on their earlier submissions. And so we found no merit in the ground of appeal 2 (c).

As we said earlier, together the three policemen had nearly thirty years of service. Their convictions meant that they would be dismissed from their positions in the Jamaica Constabulary Force with consequent loss of pension rights. They had no previous convictions and from the character reports given to the Resident Magistrate they had been considered to be very hardworking police officers. Whereas

12.

we are of the opinion that in the circumstances custodial sentences were warranted, we thought that sentences of four years imprisonment were manifestly excessive and so we allowed the appeals against sentence and substituted a term of eighteen months in each case. The two civilians were obviously the minor partners in the scheme and their sentences were reduced to reflect our view as to their share of responsibility.