

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO: 40/05

**BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.**

**R v ENNIS RICHARDS
ANDREA PHILLIPS**

Mrs. Valerie Neita-Robertson for appellant Richards

Miss Deborah Martin for appellant Phillips

Mrs. Caroline Williamson-Hay for Crown

22nd, 23rd, 24th & 30th November 2006

HARRISON, P.

These are appeals from the convictions on 8th June 2005 at the Corporate Area Resident Magistrates' Court held at Half-Way-Tree before Her Honour Miss Judith Pusey of the offences of conspiracy to defraud. The appellant Richards was fined the sum of \$600,000.00 or in default twelve months imprisonment at hard labour and the appellant Phillips was fined the sum of \$300,000.00 or in default twelve months imprisonment at hard labour. Each appellant has paid the fine.

The relevant facts are that on 19th June 2000 the appellant Richards, reported that he was washing a 1995 Toyota 4 Runner station wagon motor vehicle, green in colour in front of his house at 42 Flemington Drive, Havendale, St. Andrew at about 10:40 p.m. when three men appeared one with a gun, and held him up. They ordered him into the vehicle and drove away with him. Along Red Hills Road he was ordered out of the vehicle and the men drove off. He walked back to his home barefooted and shirtless. There he advised appellant Phillips, who had been sleeping inside the home, of the robbery. They both went to the Constant Spring Police Station and made a report to one Det. Baugh.

The said motor vehicle was owned by both appellants but was insured with the Insurance Company of the West Indies (ICWI) in the name of the appellant Phillips only, because of the benefits she could receive as a public officer.

On 20th June 2000, the following day, both appellants went to the office of ICWI where they made a report and the appellant Phillips filled out a claim form in respect of the theft of the motor vehicle. On that document, exhibit 13, the appellant Phillips, in compliance with a requirement on the form under the heading "Statement - State fully the particulars of circumstances leading to the incident, and what happened after. Statement to be completed by the driver," wrote in her own handwriting, inter alia:

"I was washing my motor vehicle on the night of Thursday June 15, 2000 in the driveway at 42 Flemington Drive Kingston 10 when ... I looked up to see three men one armed with a gun pointing at me

... he waved the gun at me and told me to get in They drove on to Red Hills Road ... he signalled with the gun for me to get out. I walked home, then reported the matter to the police."

The appellant Phillips signed and appellant Richards signed the said exhibit as witness.

Subsequently in July 2000, the motor vehicle was recovered "totally scrapped" but with the 4 wheels attached and taken to the Half-Way-Tree Police Station. All the body parts and transmission were missing and the engine was scrapped. Missing also, among other things were, the four doors, bumpers, grill, tail lamps, bonnet, radiator and various other items.

ICWI honoured the claim and paid to the appellant Phillips two cheques of \$681,253.33 and \$5,000.00, each dated 3rd August 2000. Both cheques represented the insured value of the said motor vehicle less the cost of salvage of the motor vehicle which the appellant Phillips bought.

The motor vehicle was towed by the appellant Richards to the home of prosecution witness O'Neil Lewis in Yallahs, St. Thomas for repairs. Lewis gave evidence that when he got the said vehicle "All the body parts were missing, the transmission was also missing. The engine was scrapped." He said that the appellant Richards told him that a man would bring him parts for the repairing of the motor vehicle. Subsequently a man brought to Lewis, in a small panel truck, doors, fenders, a bonnet, bumpers and other parts. The doors which were green in colour had the glass windows in them. On a subsequent date, a different man

brought to him a transmission for the said motor vehicle. Lewis said, of the transmission –

“I was the one who called and located it and told him [Richards] where it was being sold ...”.

Lewis fitted to the motor vehicle, the four doors, the transmission and other parts.

In December 2000, the police went to Lewis' home in Yallahs, St. Thomas at the instigation of ICWI, removed the partially repaired motor vehicle and took it to premises of Road One Wrecking at 140 Constant Spring Road, St. Andrew.

Prosecution witness Michael McKenzie, a motor vehicle assessor, on the instructions of ICWI went to Half-Way-Tree Police Station on 21st July 2000 and inspected there the “green partially dismantled ... green Toyota 4 Runner”. He noticed that several parts were missing, including the four doors, bonnet, bumpers, grill, engine parts, 4 wheel drive transfer box and other items. He also noticed that the vehicle identification number (“the VIN”) which was JT3VN39W450181708, was etched on a plate attached to the dashboard on the driver's side and also on a sticker attached to the centre pillar on the driver's side. On 22nd March 2001 he went to premises 140 Constant Spring Road where he saw the said green Toyota 4 Runner “more or less complete”. It had then “doors, bonnet, fenders and interior. All the seats were there - dashboard console, all engine components, except a few items ...” He observed the VIN number etched on the glass windows of the doors. That number matched the VIN on the plate on the dashboard and the sticker on the centre pillar, which VIN

number he had recorded when he had viewed the motor vehicle at the Half-Way-Tree Police Station. He made a report.

Another prosecution witness Wendell Segree, a security consultant, in the course of investigations on behalf of ICWI went to Lewis' premises at Yallahs in December 2000, where he saw the said Toyota motor vehicle. He examined the motor vehicle and asked the witness Lewis to open the motor vehicle. Lewis opened the motor vehicle with a key which he had. Segree used the said key and noticed that it fitted all the doors and the ignition. He also noticed that the VIN number on the dashboard and on the glass to the windows were identical.

At the close of the prosecution's case counsel for the appellant Phillips made a submission of "no case" to answer. The learned Resident Magistrate ruled that there was a case to answer.

The appellant Phillips gave evidence. She said that the Toyota motor vehicle was owned by the appellant Richards and herself but licensed and insured in her name. They were intimate friends. The said motor vehicle was used primarily by the appellant Richards to conduct sales of his farming produce. On 15th June 2000 she was at the appellant's home. She went to sleep. She was awakened by the appellant Richards late the night and told of the robbery of the motor vehicle. On the following day she went to the office of ICWI and filed the said claim form. The appellant Richards was with her and she was instructed in the completion of the form by an employee Miss Hyacinth Brown. Miss Brown read and signed the claim form. Some days after, she was told that the motor

vehicle was recovered. She viewed the motor vehicle at the Half-Way-Tree Police Station and saw that it was "severely scrapped". The appellant Richards made various enquiries attempting to purchase a motor vehicle similar to theirs – none was found. They decided to exercise the option to purchase the "salvage" and repair it. She was paid "around \$600,000.00 having purchased the salvage." It was released to her and she handed it over to the appellant Richards and it was towed away from the police station. She gave money to the appellant Richards to purchase parts to repair the motor vehicle. She was not involved in the purchase of the parts. She next saw the motor vehicle at the Half-Way-Tree courthouse. In December 2000 she was told by the appellant Richards that the mechanic told him that the police had seized the motor vehicle. In January 2001 she was interviewed by Det. Phinn at the Fraud Squad. She was subsequently arrested and charged for conspiracy to defraud ICWI.

She said that she wrote the statement on exhibit 13 in the first person and signed it as driver and owner, because she was writing it on behalf of the appellant Richards but to be signed by him. There was no provision on the form for him to sign. She was instructed by Miss Hyacinth Brown, that since the motor vehicle was not being driven at the time that it was stolen she should sign as owner and driver. She did.

The appellant Richards gave evidence. He stated that he was the co-owner of the said motor vehicle and it was being washed by him on the night of

the 15th June 2000. Three men came up, one pointed a gun at him and forced him into the motor vehicle. They drove away with him, released him on Red Hills Road and he walked back home in shorts alone, without shirt or shoes reaching about 12 midnight. At home he awakened her and told the appellant Phillips. They went to the Constant Spring Police Station and made a report to Det. Baugh, who accused the appellant Richards of being a "drug dealer." They gave statements to Det. Baugh the following morning and went thereafter to the office of ICWI and made a report. The appellant Phillips wrote a statement at his request and at Miss Brown's direction the appellant Phillips signed exhibit 13 and he signed as a witness. He subsequently saw the motor vehicle scrapped at the Half-Way-Tree Police Station. The insurance claim was settled. They purchased the salvage and he towed it to Yallahs to the prosecution witness Lewis for repairs. He said that he purchased the parts for the motor vehicle, locally and overseas and from persons who "do his own thing and get parts overseas." He said at page 93 of the record:

"I got parts from overseas viz – transmission, doors, chairs, bonnets, bumpers. I can't remember all of them. ...

I got these overseas parts from a person who buys overseas from junkyards called 'Mendez'."

He said he had sent Mendez to the Half-Way-Tree Police Station to look at the motor vehicle while it was there. He spoke to Mendez thereafter and told him to get the parts needed. He did not see the parts. On his instructions, Mendez took the parts to Lewis. He bought the transmission from Reid and Sons – he

got a receipt. That business is now closed down. He ascertained the costs of parts and told the appellant Phillips and "asked [her] to write it down." He was not undergoing financial difficulties as Gary Welsh, the ICWI investigator said. He did not conspire to steal, nor did he steal the motor vehicle. He said he was unable to produce David Mendez, who sold him the doors, tail gate, hood and fender. The cost for the parts was \$186,000. He said, at page 107:

"In relation to fixing the vehicle, I discussed the obtaining of parts and the fixing of the vehicle with Miss Phillips, sometime I did it and obtained the parts and then told her."

When I did it and told her afterwards she did not disagree with me."

He said that it was not true that Miss Phillips and he agreed together with persons unknown to defraud ICWI by falsely pretending that the green Toyota 4 Runner was stolen and scrapped of its parts and used those parts to fix the vehicle after obtaining \$686,000.00 from ICWI.

The learned Resident Magistrate rejected the defence and convicted both appellants. This appeal resulted.

The appellants were indicted jointly for the offence of conspiracy to defraud at common law. The particulars are that:

"ANDREA PHILLIPS and ENNIS RICHARDS on the divers days between June, 2000 and December 2000 in the Corporate Area, with intent to defraud conspired together and with persons unknown to defraud **THE INSURANCE COMPANY OF THE WEST INDIES LIMITED** by falsely pretending that a Green 1995 Toyota 4 Runner motor vehicle Chassis number JT3VN39W45018708 (hereinafter called 'the said motor vehicle') and owned by **ANDREA**

PHILLIPS had been stolen from **ENNIS RICHARDS** whilst in his possession and scrapped of various parts inclusive of the hood, all doors, tail gate, centre console, front seats, door glasses (hereinafter called 'the said parts') thereby causing the said **INSURANCE COMPANY OF THE WEST INDIES** with whom the said motor vehicle had been insured to pay the sum of \$681,288.83 and \$5,000.00 to the said **ANDREA PHILLIPS** in respect of the loss of the said motor vehicle including the said parts when the said parts were available to the said **ANDREA PHILLIPS** and **ENNIS RICHARDS** and were used by them to repair the said motor vehicle."

The appellant Richards filed six grounds of appeal namely:

- (1) That the learned Resident Magistrate erred in law by ruling that the report of the witness Magan Thompson be not admitted into evidence and as a consequence deprived that appellant from presenting evidence vital to his defence.
- (2) That the learned Resident Magistrate erred in law by allowing herself to speculate on matters not proven evidentially and to draw adverse inferences for which there was no basis, having regard to evidence."
- (3) That the learned Resident Magistrate in her findings of facts erred, by finding that the source of the parts is unsupported by other authentic evidence. That finding is not supported by the evidence.
- (4) That the learned Resident Magistrate misquoted the evidence of the appellant when she concluded that the parts were acquired overseas by the dealer (pg119,127). That the finding was used to convict the appellant and consequently being erroneous cannot support the conviction.

- (5) The verdict is unreasonable having regard to the evidence.
- (6) That the learned Resident Magistrate in applying the law in recent possessions impose a burden of proof of the accused."

Mrs. Neita-Robertson for the appellant Richards argued that because the learned Resident Magistrate alluded to the question as to who benefitted from the offence, evidence as to the amount of money he spent on numerous parts other than the original parts with the VIN numbers, would show that he did not benefit from any conspiracy to steal the said motor vehicle.

This Court pointed out to counsel, that the evidence as to the amount of money spent on parts for the motor vehicle would not be relevant to determine whether or not there was a conspiracy to defraud.

The prosecution's case was, that no receipts for purchase of parts was in evidence, nor was any witness brought in proof of sale. There was therefore no evidence of any bona fide purchase of parts. In any event, the report of the witness sought to be tendered in addition to the viva voce evidence, was inadmissible being in breach of the rule against self corroboration. The learned Resident Magistrate was correct to refuse to admit the said report. That ground fails.

Ground 2 –

"The learned Resident Magistrate erred in law by allowing herself to speculate on matters not proven evidentially and to draw adverse inferences for which there was no basis, having regard to evidence."

It was argued that the learned Resident Magistrate speculated by finding that the appellant had the original parts to the motor vehicle because of the fact that Lewis had the key that fitted the doors and the ignition and that he deceitfully put in torn seats which he had not bought. She also speculated and wrongly found that Mendez was a "phantom witness" who would not have sold the original parts to the appellant and so expose himself to prosecution.

In our view the learned Resident Magistrate may well have assumed that it is way past a mere coincidence that the appellant would have been able to obtain, from Mendez, who purchased the original four (4) doors "from overseas" and he the appellant would, in addition, be able to purchase the original ignition for the said motor vehicle. The learned Resident Magistrate was aware, on the evidence, that the appellant Richards retained the key and she so found. Therefore the learned Resident Magistrate, sitting as a jury, could infer, that Lewis could only have had the key to fit the doors and ignition if the appellant Richards gave it to him. The latter would only have given him the said key – if he knew beforehand that the key would fit. Lord Bridge in the House of Lords in

R v Anderson [1985] 2 All ER 961 at 964 said:

"The evidence from which a jury may infer a criminal conspiracy is almost invariably to be found in the conduct of the parties. This was so at common law and remains so under the statute. If the evidence in a given case justifies the inference of an agreement that a course of conduct should be pursued, it is a not inappropriate formulation of the test of the criminality of the inferred agreement to ask whether the further inference can be drawn that a crime would necessarily have been committed if the agreed course

of conduct had been pursued in accordance with the several intentions of the parties.” [Emphasis added]

The learned Resident Magistrate was correct to infer that the appellant Richards’ retention and delivery of the key reveals his knowledge and possession of the whereabouts of the original parts, in particular, the doors with the VIN number etched thereon and the ignition. The further inference by the learned Resident Magistrate that he also supplied the other parts, not identifiable by any VIN numbers, was equally reasonable in the circumstances. The absence of receipts and the unavailability of David Mendez justified the finding that such parts were probably not purchased by the appellant Richards. This ground also fails.

Ground 3 –

“That the learned Resident Magistrate in her findings of facts erred, by finding that the source of the parts is unsupported by other authentic evidence. That finding is not supported by the evidence.”

It was argued that because the prosecution witness Lewis’ evidence was that the parts were delivered to him by Mendez and he had to verify their suitability to the appellant Richards and that the man who delivered the parts had parts for other motor vehicles, supported the defence that the source of purchase was authentic.

This was purely a question of fact for the learned Resident Magistrate. Because of the fact that she found that David Mendez did not exist, there were no receipts and the inference could be drawn that the other parts without the

VIN numbers were not validly purchased, the said finding of the learned Resident Magistrate is reasonable. There is no virtue in this ground.

Ground 4 complains that the learned Resident Magistrate misquoted the evidence of the appellant when she concluded that the parts were acquired overseas by the dealer (pp 119, 127). That finding was used to convict the appellant and consequently being erroneous cannot support the evidence.

The learned Resident Magistrate at page 119 found:

"These parts Mr. Richards gave evidence were acquired overseas by the dealer who sold them to him and Mr. Lewis tried to speak to an overseas mark on them (that auto parts dealer has now gone out of business.)"

The appellant Richards, in examination-in-chief, at page 93 said:

"I source these parts – some through auto parts supplies here in Jamaica e.g. hoses, belts, pulleys – simple parts, some I source from persons who have connection to source parts overseas – parts like transmission, some engine parts, driver seat. The reason I source overseas is that the major parts that the vehicle uses no one in Jamaica sold them – brand new and used at the time, so I source them from the auto parts store or some who do his own thing and get parts overseas."

...

I got parts from overseas viz – transmission, doors, chairs, bonnets, bumpers. I can't remember all of them." [Emphasis added]

and on page 94:

I got these overseas parts from a person who buys overseas from junkyards called Mendez." [Emphasis added]

This was clear and specific evidence from the appellant Richards that the parts were acquired from overseas by the dealer "Mendez". The learned Resident Magistrate did not therefore misquote the evidence. She was entitled accordingly to rely on it in her deliberations. There is no merit in this ground.

Ground 6 – The learned Resident Magistrate in applying the law in recent possession imposed a burden of proof on the accused.

The learned Resident Magistrate on page 129 said:

"I find therefore that a reasonable inference of conspiracy can be drawn between the accused and others to defraud ICWI of the proceeds of the claim as no reasonable/credible explanation has been placed before the Court as to how the accused came into possession of these identifiable parts."

and at page 122:

"The prosecution relying on the doctrine of recent possession and the ratio decidendi in ***R v John Franklyn, R v Michael Lorne and R v Lloyd Chuck*** argued that these parts being found in the constructive possession of the accused within six months of their loss points to them being unlawfully in the possession of the accused by either have been stolen by them or they being receivers of them.

Further the prosecution opines that if the items came into the possession of the accused after they purchased the salvage and their claim was settled by ICWI, then the items ipso facto was the property of ICWI.

It was therefore incumbent on the defence to offer some reasonable explanation to put to rest the presumption raised by the prosecution."

The learned Resident Magistrate accepted that the conspiracy to defraud ICWI was based on a report by the appellant Richards that the motor vehicle had been stolen at gunpoint. Robbery is larceny committed by the use of an offensive weapon, namely a gun. The original parts with the VIN number etched on the glass, and the ignition which the key in Lewis' possession fitted are unchallenged bits of evidence which gave rise to a finding of constructive possession in the appellant Richards. The learned Resident Magistrate was not incorrect to find as a statement of law, that he, having been in possession of such original parts "recently" after they, having been on the motor vehicle, were stolen, was presumed to have been either the thief or the guilty receiver. However, that presumption would only arise theoretically, on the defence's case.

The prosecution's case is that the alleged robbery was feigned. On the prosecution's case therefore the presumption that the appellant was in "recent possession ... after it was stolen," technically, does not arise. However, the learned Resident Magistrate was entitled to find, as she did, on page 129, that an evidential burden was on the appellant to give "... a reasonable/credible explanation .. as to how the accused came into possession of these identifiable parts." These were the original parts on the said motor vehicle when seized by the police and which the appellant intimated that they "fortuitously" come into his possession. A credible explanation was required on a balance of probabilities. This ground also fails.

ANDREA PHILLIPS

Ground 1 - The learned Resident Magistrate erred in not accepting the no case submission made on behalf of the accused Phillips.

It was argued by Miss Martin that there was no evidence of an agreement between the appellant Phillips and anyone to defraud ICWI.

The fact that the co-appellant Richards was her intimate friend did not cause her to be in constructive possession, as he Richards was, in respect of the original car parts.

The learned Resident Magistrate found that the appellant Phillips as owner and insured made a claim on ICWI in respect of the alleged robbery of the Toyota motor vehicle, knowing that it was not so, that the appellant was in constructive possession of the said motor vehicle and therefore had a case to answer on a balance of probabilities.

Mrs. Williamson-Haye for the prosecution submitted that the learned Resident Magistrate was correct to find that the appellant Phillips along with the appellant Richards were both in constructive possession of the original parts, both attended and made claim on ICWI and therefore both committed overt acts with the knowledge that the claim was false. There was therefore a case to answer, in respect of both appellants.

In our view, on both the prosecution's case and that of the defence, the knowledge in the appellant Phillips of the fact of the robbery of the motor vehicle, on the unchallenged evidence, was that which was told to her by the appellant Richards. In addition, there is no evidence, on the prosecution's case

that she purchased or handled any parts, nor could have known that the motor vehicle had thereon original parts subsequently fitted. No inference could therefore properly be drawn adverse to the appellant Phillips, merely from the fact that she was the person who made the insurance claim and gave the appellant Richards the money to purchase the said parts. The fact that the appellant told Mrs. Garriques of ICWI that "... she had bought the parts for the vehicle and was in the process of having it repaired" is not inconsistent with her purchase of the salvage and giving money to the appellant Richards to purchase the parts.

The inconsistency in the evidence of the appellant Phillips, in that she wrote the statement on exhibit 13 in the first person, indicative of the fact that the motor vehicle had been robbed from her, is amply explained by her in her evidence. This is evident also from the fact that on page 1 of the said exhibit 13, she expressly wrote in response to the question –

"Who was in charge of the vehicle at the time of
loss?"

the answer,

"Ennis Richards."

This information is further confirmed by the fact that when the report was made to Det. Baugh on the said night of the loss, she had reported that it was the appellant Richards from whom it had been robbed.

There was therefore no evidence from which the learned Resident Magistrate could have found possession of the original parts, constructive or otherwise in the appellant Phillips, nor any act to indicate knowledge on her part

to ground a case of conspiracy to defraud, sufficient for her to answer to such a charge.

The learned Resident Magistrate was in error not to have upheld the submission of no case to answer in respect of the appellant Phillips.

Ground two – The learned Resident Magistrate imported into her reasons for rejecting the no case submission principles of law relating to recent possession which caused her to impose a burden on the accused to satisfy her of her innocence.

The statement by the learned Resident Magistrate on page 115 that:

"The Court was of the view that a prima facie case in the face of the original parts so recently in the constructive possession of both accused raised a presumption which ought to be rebutted."

cannot be supported on the evidence, in respect of the appellant Phillips.

For our reasons expressed in respect of ground one, this complaint is valid and this ground also succeeds. Miss Martin was correct to argue that the learned Resident Magistrate was in error to comment that the prosecution was relying on something "akin to res ipsa loquitor in the civil law." There is no basis for this novel statement in her consideration of possession in the criminal law.

Counsel argued as ground three in respect of the appellant Phillips and as ground five in respect of the appellant Richards that:

"The verdict is unreasonable having regard to the evidence."

In respect of the appellant Phillips this ground clearly succeeds, in light of our view that there was no case against her and the no case submission should have been upheld.

We agree with the submission of counsel for the prosecution, in the case of the appellant Richards that this ground must fail. This Court of Appeal in the case of ***R v Lao*** [1973] 12 JLR 1238, had set out the obligation of an appellant who seeks to rely on such a ground. The headnote reads:

"Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

The Court there also relied on a statement from Archbold, 36th Edition, page 341 paragraph 934 which reads:

"The court will set aside a verdict on this ground, where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

One could not so maintain in respect of the appellant Richards.

For all the above reasons, the appeal of the appellant Phillips is allowed, her conviction is quashed, her sentence is set aside and a judgment and verdict of acquittal is entered. In respect of the appellant Richards, his appeal is dismissed.