

JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 158/77

BEFORE: The Hon. Mr. Justice Kerr, J.A.  
The Hon. Mr. Justice Melville, J.A.  
The Hon. Mr. Justice Rowe, J.A. (Ag.)

R. v. FREDERICK RAMPASSARD

Mr. D.V. Daley for the Appellant

Mr. C. Marsh for the Crown.

January 19, 1978

ROWE, J.A. (Ag.)

Frederick Rampassard, a sixty-year old gentleman from Clarendon was convicted by the Resident Magistrate for that parish for stealing one Chevrolet Impala differential valued at \$350.00 and three automatic transmissions, the property of Ira Lindo and fined sixty dollars, or two months imprisonment.

The Crown's case was that on the 28th June, 1976, Mr. Lindo purchased two wrecked Chevrolet Impala motor cars from Mr. Diggs-White, an attorney-at-law. Mr. Diggs-White permitted Mr. Lindo to leave the wrecked vehicles on Mr. Diggs-White's premises. In February 1977, Mr. Lindo went for his motor cars. They were where he had left them but the differentials were missing. Mr. Lindo enquired of the appellant if he had removed the differentials from the motor vehicles and the appellant acknowledged having done so but added that he acted with the permission of Mr. Diggs-White. A report was made to the police and Mr. Diggs-White was interviewed in the presence of Mr. Lindo and the appellant. At this confrontation the appellant maintained that he had removed the differentials with the express permission of Mr. Diggs-White, while Mr. Diggs-White denied having given such permission to the appellant. The appellant was summoned for larceny and eventually convicted.

This appeal turns upon the fifth ground of appeal appearing in the Supplementary Grounds which reads:-

"That the learned Resident Magistrate erred in law by calling Leslie Diggs-White as a witness after the accused had given evidence in his defence, and despite the fact that there was evidence that the said witness was present at Court before or during the evidence of the Arresting Constable."

Mr. Rampassard had been saying from the outset that he had removed two differentials from two motor vehicles from the premises of Mr. Diggs-White, with the permission of Mr. Diggs-White. As Mr. Daley rightly pointed out in his submissions, at no part of the relevant time was either vehicle on the premises of the complainant, and therefore it was the duty of the Resident Magistrate at the end of the day to make up his mind whether Mr. Rampassard's account was credible, because there was no other real evidence as to how he came into the possession of the motor vehicle apart from his own. When the case for the prosecution was closed, and the case for the defence was closed, the only real explanation which the Resident Magistrate had before him, as to how Mr. Rampassard came into the possession of the vehicle, was Mr. Rampassard's evidence. Although Mr. Diggs-White was in the precinct of the Court during the trial, the prosecution elected not to call him as a witness for the Crown.

At the close of the case for the Defence the Resident Magistrate of his own motion directed that Mr. Diggs-White be called as a witness. Mr. Diggs-White duly attended Court and duly contradicted the things that Mr. Rampassard said, and on the basis of Mr. Diggs-White's evidence, the learned Resident Magistrate found that Mr. Diggs-White was a witness of truth and that Mr. Diggs-White gave no permission to the appellant to remove the differentials and the automatic transmissions from the vehicles.

The common procedure followed in the criminal courts is that the case should rest as nearly as possible upon the case presented by the prosecution and the case presented by the defence. The principle is exemplified in the decision of the Court of Criminal Appeal in England, in the case of R. v. Cleghorn (1967) 51 C.L. p. 291, where the Lord Chief Justice in giving judgment of the Court said:-

"The general rule of practice that a witness may be called by the judge after the case for the defence has been closed only if some matter has arisen ex improviso in the course of the case is not an absolute one and may be departed from in special circumstances. Where, however, on a charge of rape after the close of the case for the defence the judge called a witness who had been in close proximity on the occasion of the alleged rape, and whose evidence (if believed) materially strengthened the case for the prosecution and the trial thereafter assumed a different aspect, and the defendant himself was recalled and two further witnesses for the defence were called, there was no justification for the departure from the recognised general rule, and the conviction in that case must be quashed."

At all material times, the issue before the Resident Magistrate was whether or not Mr. Diggs-White had given permission to Mr. Rampassard to remove any of the parts of the two wrecked motor vehicles. It could not therefore be said that his evidence arose ex improviso, or that there were any special circumstances which would warrant the Resident Magistrate calling him after the close of the defence.

In his findings of facts the Resident Magistrate relied heavily upon the evidence of Mr. Diggs-White without which evidence he could not properly have convicted the appellant. In our view the procedure adopted by the calling of this vital witness led to a miscarriage of justice and the appeal must be allowed and the conviction and sentence set aside.