

N/MLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 46/02

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A..
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)**

**REGINA
V
HORTENSE STEWART**

CLOVIS MURDOCK

Leroy Equiano for the appellants

Miss Christine Morris, Assistant Crown Counsel, for the Crown

July 15, 16, 2003 and May 25, 2005

PANTON, J.A.

1. At the end of the hearing of the submissions in this matter, we allowed the appeals, quashed the convictions, set aside the sentences, and entered verdicts of acquittal. At that time, we gave brief oral reasons for our decision. We now formally reduce those reasons to writing.

2. The appellants were charged jointly on two informations that alleged that they were in possession of cocaine, and that they unlawfully dealt in cocaine, in breach of the Dangerous Drugs Act. Their trial took place over several days between September 9, 1996 and June 26, 1998. They were tried with one Delroy Morris who was charged separately with both offences. Although the

informations on which Morris was tried do not show it, he was found not guilty and dismissed.

3. The appellants were convicted, as charged, by Her Honour Mrs. Sarah Thompson-James, sitting in the Resident Magistrate's Court at Ocho Rios, St. Ann. Each was fined \$500,000.00 or six months imprisonment and given a further year's imprisonment for the offence of dealing in cocaine. In respect of the charge of possession of cocaine, each was fined \$500,000.00 or six months imprisonment with an order that if this fine was not paid, the imprisonment should run consecutive to the sentences imposed for dealing in cocaine.

4. The main witness for the prosecution was Kenneth Richards, a staff steward on a cruise vessel called "Holiday". He said he was also a spy on behalf of Daryl Wiltshire, security manager for Carnival Cruise Lines. Wiltshire reported to Nick Stanton who was the Corporate Director for security for Carnival Cruise Lines. The activities that gave rise to the charges allegedly took place on February 9, 1995, aboard the vessel while it was docked at the Ocho Rios pier. The evidence was to the effect that on February 2 when the ship docked at the pier, Richards disembarked and was approached separately by two men whom he did not know. One of them later introduced the appellant Murdock to him thus:

"this is a customs officer who will bring in the stuff on the cruise ship first thing in the morning".

Nothing else was said between them.

5. Between February 2 and 9, 1995, Richards spoke with Nick Stanton and Wiltshire. Stanton gave him certain instructions. On February 9, the ship docked at the Ocho Rios pier at about 8.30 a.m., according to Richards who said he had an arrangement to meet Murdock on the promenade deck. He went on the deck and there he saw Morris, the third accused. The appellant Stewart, a customs officer, whom he (Richards) was seeing for the first time, came on the deck. Morris whispered something to her, and she and Morris left. About three minutes later, Murdock came on the deck and asked Richards for Morris. Richards informed him that Morris had been there a few minutes earlier. Murdock left, then returned with Stewart about eight to ten minutes later. Richards went into a lounge from where he said he was able to view the entire promenade deck. Both Stewart and Murdock, he said, were "standing at a bus stop which is mid-ship, centre of the ship".

6. Richards left the lounge and went towards them. He went into the elevator lobby where Murdock asked him if his name was Kenneth. Upon the witness replying in the affirmative, Murdock said that he had something for him but they had to go to the lower deck by the gift shop. Richards went inside the lounge near to the gift shop. Murdock and Stewart came about two minutes after. Murdock told Stewart to give a bag that she had under her arm to Richards. This bag was red, white and blue in colour, and marked "Carnival Cruise Line". Murdock took the bag from Stewart and handed it to Richards. Two immigration officers came on the scene. Murdock told one of them to go

with Richards to his locker. The immigration officer complied. Richards opened his locker while the immigration officer took a brown envelope and three other packages from a brief case and gave them to Richards who put them along with the bag in a box in his locker.

7. Richards next showed Morris the un-opened box, then he (Richards) took it to Wiltshire and left it with him. Richards then went to Stanton's office and thereafter to the captain's cabin, where Sgt. Henderson introduced himself to him. While Richards was in the captain's cabin, he noticed the box but he did not know how it had reached there. Later, while leaving the ship, Richards pointed out the appellant Stewart to Sgt. Henderson who then had the box in his possession. Richards did not know how Henderson had come into possession of the box. Richards was taken into custody by Henderson and transported to the Narcotics Division in Kingston. On the following day, while giving one of the five statements that he gave to the police, Richards saw Murdock, who had been brought in uniform to Sgt. Henderson's office, and identified him as the individual who had handed him the packages. That very day, Sgt. Henderson charged Richards, Wiltshire, Stewart and Murdock with the offences of possession of cocaine, dealing in cocaine and conspiracy to export cocaine. When cautioned, no statement was made by any of them. However, on February 14, based on instructions received from the Deputy Commissioner of Police in charge of crime, Richards and Wiltshire were released. It should be added that Wiltshire, in

giving evidence at the trial, said that he took photographs of customs officers and other Government officers or agents as they came aboard and left the ship.

8. Both appellants gave evidence denying the allegations against them. They agreed that they were on board the vessel on February 9, performing their official duties, but denied having any contact with any bag that was passed to Richards. Stewart also denied any contact with Morris. Murdock said that he never met Richards on February 2, and he had no arrangements to supply cocaine to him.

9. The learned Resident Magistrate, in convicting the appellants, found that:

- (i) Stewart and Morris were seen whispering;
- (ii) Murdock asked Richards if he was "Kenneth";
- (iii) Murdock told Richards that he had something for him, but he had to go to the deck by the gift shop;
- (iv) Murdock and Stewart arrived on the deck, and Murdock told Stewart to hand over the bag to Richards;
- (v) Stewart handed the bag to Murdock who gave it to Richards;
- (vi) Murdock told an immigration officer who was nearby to go to the locker with Richards;
- (vii) The immigration officer went with Richards and gave him other packages which Richards placed in a box in a locker;
- (viii) Richards gave the box to Wiltshire who in turn gave it to Stanton, who later handed it over to Sgt. Henderson;

- (ix) Murdock was brought to the Narcotics Division while Richards was giving a statement; and
- (x) Richards, while leaving the ship, pointed to Stewart as the person who had handed the bag to Murdock;

10. The learned Resident Magistrate deemed Richards an accomplice and said that the bringing of Murdock to the Narcotics Division while Richards was giving his statement did not affect the prosecution's case in any way. She also said that she accepted Richards' evidence that he had seen Murdock many times on the ship, and that there was this meeting on February 2.

11. The appellants filed four grounds of appeal, namely:

- (i) the learned Resident Magistrate wrongly admitted inadmissible evidence;
- (ii) The learned Resident Magistrate wrongly found facts and drew inferences from such facts that were unreasonable;
- (iii) the verdict cannot be supported having regard to the evidence; and
- (iv) the evidence adduced from the main prosecution witness was so discredited on cross-examination, and manifestly unreliable that the tribunal erred in relying on it.

12. In his submissions, Mr. Equiano said that the evidence of Richards, the main witness for the prosecution, was riddled with inconsistencies and lies. He also pointed to the discrepancies between the evidence of Richards and that of Wiltshire. He also complained about the evidence of identification which he described as improper and grossly unacceptable.

13. Miss Morris, for the prosecution, conceded as to the discrepancies between the evidence of Richards and Wiltshire, but prayed in aid the case of **R. v. Lao** (1973) 12 J.L.R. 1238, with particular reference to page 1240. On the question of identification, she contended that the evidence was satisfactory. In this regard, she referred to the evidence of Richards at page 22 of the record of appeal. There, he described the various angles from which he was able to view the appellant Stewart.

14. There is no doubt that the crucial matters for consideration by the learned Resident Magistrate were the credibility and reliability of the witness Richards. In view of the inconsistencies and discrepancies that were adverted to, we found it troubling that the evidence of Richards was accepted without a thorough analysis having been done, and without any real reasons having been given for preferring it to the other evidence in the case. We were compelled to the view that the learned Resident Magistrate erred in concluding that the evidence was such that she could have been sure of the guilt of the appellants. We set out hereunder some of our concerns, without wishing to be exhaustive.

15. The prosecution's case, as put forward through Richards, was that the appellants handed over the dangerous drug to Richards on the vessel at about 8.45 a.m. This was the most important moment in the scheme of things. Given the denial by the appellants of any such activity, the circumstances surrounding this event were important - circumstances such as the docking of the boat and the boarding of it by the appellants. The main witness maintained

that the ship docked at about 8.30 a.m. This would have meant that the appellants would have boarded the vessel immediately once it docked and proceeded with due haste to the rendezvous in order to facilitate the handing over at the time stated by Richards. This evidence of Richards has to be compared with that of the other prosecution witness Wiltshire who said the vessel docked a little before 7 a.m. This is in keeping with the evidence of a witness called on behalf of the defence at the trial. That witness was none other than the supervisor of the appellants, Christopher Chambers. He said that he was responsible for dispatching the appellants for duty, and that the appellants boarded the ship close to 7 a.m., performed their duties and were off by about 8 a.m. There is nothing to indicate that Mr. Chambers should not be viewed as an independent and reliable witness, and there was no indication by the learned Resident Magistrate that she had considered this aspect. The prosecution's story as to the transfer of the drug ought to have been put under greater scrutiny.

16. The witness Wiltshire took photographs which were admitted into evidence. These photographs showed the appellants and the immigration officers and others walking in a leisurely manner on what appears to be the pier. It does not appear that the appellants knew that they were being photographed. Wiltshire and Richards were supposed to have been expecting this delivery of drugs. Wiltshire, though armed with a camera which he used to take the

exhibited photographs, did not think it important to try to capture the moment of the transfer.

17. In relation to identification, it will be recalled that Richards said that he saw Morris whispering to the appellant Stewart. However, at page 32 of the record while being cross-examined, he stated thus:

"All I am saying is that I saw Morris talking to a person in a skirt. I cannot say who he was talking to".

Evidence of this nature is nothing but unsatisfactory when a tribunal is required to be satisfied beyond reasonable doubt.

In respect of the appellant Murdock, the witness Richards had informed the police in a statement that he could not identify the person that he dealt with. However, when Murdock turned up in his uniform at the Narcotics Division on the Friday morning, he identified him to Sgt. Henderson. In view of the earlier statement and the fact that there was evidence that the uniform of customs officers was similar in appearance to that of quarantine officers, this identification was highly suspect.

18. Richards showed a regular pattern of varying from his statements, and the learned Resident Magistrate did not seem to appreciate the seriousness of such behaviour given the nature of the charge. During cross-examination, he denied saying that a man had agreed to pay him US\$800.00 for his part in the transaction. Yet, that is exactly what was recorded in a statement that he gave to the police. Indeed, he even refused to accurately state the number of statements he had given to the police. At first, he said that he had given two

statements. However, when pressed in cross-examination, it turned out that he had given as many as five statements.

19. There is one other unsatisfactory aspect of this case that bears mentioning. Richards placed what he said he had received from the appellants and the immigration officers in a box in his locker. He did not examine what he had received. He showed the box and contents to Morris. He then took the box to Wiltshire, handed it to him in Nick Stanton's office and left. Later, he went back to Stanton's office where he remained for a while. Stanton was not in the office during the period that Richards was there. Richards then left Stanton's office and went to the captain's cabin. There, Sgt. Henderson introduced himself to Richards and opened the box. When Henderson was leaving the ship, he left with the box and contents. The point to note here is that Richards said that when he got to the captain's cabin, the box was on the captain's desk. Richards did not know how it had reached there. There was clearly a hiatus so far as the custody of the box was concerned as Wiltshire testified that he had given the box to Stanton who was not called to give evidence.

20. In the circumstances, we found that the evidence adduced by the prosecution was discredited and that it was manifestly unreliable. The convictions were therefore quashed and verdicts of acquittal entered.