JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No. 110/75

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

REGINA v. LEBERT WILLIAMS

Mr. W.E.C. Dawes for the appellant.

Dr. W. McCalla for the Crown.

February 25 and April 7, 1976

WATKINS, J.A.(Ag.):

The appellant, Lebert Williams, was convicted before Her Hon. Mrs. R.C. Walcott, a resident magistrate for the parish of Kingston on May 14, 1975 on an information which laid under sections 6 and 7 of the Vagrancy Act charged that "he with force at King Street and within the jurisdiction of the Court unlawfully being a suspected person was on March 28, 1975 frequenting a certain public place, to wit King Street and Harbour Street in the parish of Kingston with intent to commit a felony." On February 25, 1976 we heard and dismissed the appeal, affirmed the conviction, and ordered that the fine of $50 imposed should be paid not later than March 10, 1976, failing which the custodial sentence of 3 months hard labour would take effect. We undertook to put our reasons in writing and now do so.

Constable Franklyn Wynter of the City Centre Police Station, the sole witness for the prosecution, was on patrol duty in plain clothes along Church Street in Kingston at about 10 a.m. on Friday March 28, 1975. He said that he observed the appellant vigorously trying the handle of the right front door of a Rover motor car parked along that street. The windows of the car were closed. So also was the door which the appellant had tried to open. After looking around, the appellant withdrew from the Rover car and proceeded down Church Street to Harbour Street and having walked some six chains along this latter street he stopped where a green-coloured Escort motor car had been parked. The appellant pushed his head and hands through the open right front window of the Escort car

and the Constable who had been trailing him saw at a distance movements of the appellant's body but did not notice him take anything from the car. The appellant next proceeded up King Street and in the vicinity of Water Lane he tried to open with a chisel a pivot window of a blue Austin Cambridge motor car parked in King Street. Unsuccessful once more, the appellant moved off, but was apprehended by the constable and charged.

The defence was a complete denial of the constable's testimony as to search or attempted search of the motor vehicles.

Before us, as indeed in the court below, Mr. Dawes on behalf of the appellant urged three grounds, namely, that

(i) in view of the fact that the information did not charge a frequenting in Church Street evidence admitted as to the incident there was irrelevant inadmissible and prejudicial to the appellant.

(ii) each of the incidents having taken place in a separate street they should each have been viewed in isolation from each other and accordingly, and in particular having regard to the dictionary meaning of the word "frequent", namely "to go often or habitually to a place", no frequenting could be said to have been made out on the evidence.

(iii) even if the incidents at Harbour and King Streets were looked at together they did not make out a case of frequenting, as together they relate only to one visit on one occasion which did not amount to "frequenting".

In examining the first ground of appeal consideration of the terms of the sections of the Act under which the appellant was charged becomes necessary. Section 6 so far as relevant, states:

> "Every person coming within any of the following provisions shall be deemed a rogue and vagabond -
>
> (c) Every suspected person, or reputed thief, frequenting ..... any public place whatsoever or any place adjacent to a public place with intent to commit a felony.

And section 7, so far as relevant, is to the following effect:

> Every person convicted of being a rogue and vagabond shall be liable to imprisonment with or without hard labour for a term not exceeding twelve months ....."

It is apparent therefore from section 6(c) that in order to convict of the relevant offence proof is necessary that (a) the person charged is a suspected person or reputed thief (b) he frequented a public place or other prescribed place and (c) that he did so with a felonious intent. Who then is a suspected person? In Rawlings v. Smith (1938) 1 All E.R.11 Smith had been charged under section 4 of the Vagrancy Act of England, a section in all relevant and material particulars similar to our local Act. It was proved that at various times of the day and in different places, the respondent was looking into and trying to open the doors of unattended motor cars standing in the street. The magistrate found that Smith was loitering in a public place and that he intended to commit a felony but he held that Smith was not a suspected person on the ground of the shortness of the interval of time between his earlier actions relied on to make him a suspected person and his later actions showing that he was loitering with intent to commit a felony. With this magisterial approach the Divisional Court disagreed. Lord Hewart C.J. said:

> "The defendant ..... must be shown to be a person who belongs to the class of suspected persons, but it is not necessary that he must have acquired the status, or have fallen into the category of suspected persons upon some day earlier than the day which is charged in the information. It is enough if acts antecedent to the act in question occasioning the arrest were of such a kind as to provoke suspicion."

In evidence in chief the constable had testified to following the appellant after he had observed his various acts in relation to the Rover car parked in Church Street "because I was suspicious of his actions". These acts, antecedent as they were to the subsequent events in Harbour and King Streets were capable in law of rendering and did render in fact the appellant a suspected person; and the evidence in relation thereto, so far from being irrelevant and inadmissible, were most germane to the proof of the first and indispensable ingredient of the charge. Ground (i) therefore fails.

With respect to ground (ii), in response to a question from the Court the appellant's attorney conceded that this ground would lose all seeming validity, if instead of being separately named as they were,

all these relevant streets had borne the same description. It only remains to observe that where, as in the present circumstances, the locale of the charge encompasses three streets which (and judicial notice may be taken of this notorious and easily demonstrable geographical fact) lie in close proximity to each other, two of them being contiguous with the third and the scenes of the various segments of events being geographically close to each other, the mere accident that these streets bore separate names could hardly provide rational support for the contention that the incidents ought each to be considered in isolation from the other for purposes of the allegation of frequenting contained in the charge.

The third ground raised the important question regarding the meaning of "frequenting". Authorities are many but for present purposes, and without disrespect to Dr. McCalla who brought others to our notice, it seems necessary to refer only to Clark v. The Queen (1884) 14 QBD 92 and to the opinion of the Judicial Committee of the Privy Council in Nakhla v. The Queen (1975) 2 WLR 750. Clark was found in Victoria Road, South Shields, England by two constables at 1.30 in the morning having in his possession a portion of a pump. He gave a false account of his possession of the pump and a false name and address to the police who arrested and charged him under section 4 of the Vagrancy Act 1824. Convicted, the conviction and sentence were subsequently set aside on appeal. In the course of his judgment Grove J. contrasted the uses of the words "found" and "frequent" in the statute and went on: "The former is used as applicable to the case of a person apprehended in a building or inclosed ground, where the necessary inference would be that the purpose was unlawful, and therefore it would be enough to show that the party was there only once. But, when the Act of Parliament comes to deal with streets and uninclosed places, to prove a felonious intent you must show that the accused was seen there more than once at least: how often I decline to suggest. The word "frequent" therefore would seem to be used in contradistinction to the word "found". A single visit to a place, or once passing through a street, can in no sense be said to be a "frequenting" that place or street."

In concurring Hawkins J. added: "The mere finding upon one occasion of a man in a public street under circumstances leading to the conclusion that he intended to commit a felony is not sufficient to satisfy the statute". "What amount to a "frequenting" a street must depend" he cautioned "upon the circumstances of each particular case; I only say that one visit to it does not". Nakhla v. The Queen affords another instance in which one visit to a place on one occasion did not amount to frequenting. Nakhla and another person entered a motor car in a street in Wellington New Zealand and there discussed the possibility of Nakhla receiving stolen property. By prior arrangement the police recorded the conversation on tape. The charge subsequently brought was laid under the provisions of a New Zealand statute similar to our own Vagrancy Act. The conviction secured at first instance and affirmed on appeal to the New Zealand Court of Appeal was reversed by the Judicial Committee. The principle was upheld that the mere physical presence in a place of a suspected person who, while in the place, was proved to have a felonious intent was not by itself sufficient to constitute "frequenting".
But what however if there was more than one visit to a place each albeit in quick succession of the other, or if there was but one visit to a place, extended in duration and accompanied by various activities on the part of the person who has fallen under suspicion? Lord Morris, expressing the unanimous opinion of the Board opined: "Without seeking to define or to limit the circumstances in which "frequenting" may arise, they may include or involve inquiry as to the reason why a person goes to or is at or remains at a place and its significance or relevance in regard to the purpose or object with which he goes to the place, the events taking place while he is there and in particular the extent of his movements and the nature of his behaviour and his continuing or recurrent activities". The vicinity of Harbour and King Streets encompasses a part of what is colloquially known as "City Centre". Judicial notice may also be taken of the fact that this is a busy area and that at 10 a.m. and after on a Friday it would be particularly busy and that cars would be parked all about. In the nature of the circumstances a person minded to steal from cars must necessarily move

from car to car with dispatch. He cannot tarry for any length of time at any car. His presence at, and surveillance of, any particular vehicle must be respectively short and brisk. He must keep on the move lest he attracts attention. Brevity of presence, quickness of surveillance and legerdemain coupled with a plurality of visits, as chance may require, to different vehicles are of the essence of frequenting with a felonious intent in the circumstances. These requirements lend a distinctive character of their own to "frequenting" in the particular circumstances described. They mark the distinction between the cases of Clark and Nakhla on the one hand and the instant case on the other. In Clark's case one and only one visit was made by the accused to a single street in the dead of night. In Nakhla's case the single visit was confined to the narrow compass of the motor vehicle. In the instant case, however, the facts proved show that two quick visits, one following hard upon the other, were made by the appellant, one each to a locale within the area of Harbour and King Streets in the heart of the city during business hours. Coupled with the appellant's activities in relation to the vehicles parked on these streets, his furtive search of the Escort car and his brisk application of the chisel to the pivot window of the Austin Cambridge, the Court can have no hesitation in coming to the conclusion, as did the learned resident magistrate, that they constitute "frequenting" with a felonious intent.

Accordingly we dismissed the appeal, affirmed the conviction and sentence and with respect to the payment of the fine, gave the directions already adverted to.