JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No.17/87

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. MICHAEL ROSE

Owen Crosbie for appellant

Kent Pantry and Miss Marlene Harrison for the Crown

March 9 & 18, 1987

ROWE, P.:

Michael Rose was convicted by the resident magistrate for the parish of St. Elizabeth on the 2nd October, 1986, and sentenced to three years imprisonment at hard labour. He appealed. The appeal came on for hearing before us in this court on the 9th March, and Mr. Crosbie appearing for the appellant argued two grounds of appeal. He argued at some length, he had somebody behind him prompting him, he made reference to authorities and when Mr. Crosbie was finished arguing his appeal Mr. Crosbie sat down. Thereupon, the court called upon the crown to reply to ground two only, of the grounds of appeal.

This morning Mr. Crosbie purports to say that he had not been given an opportunity to argue a particular ground which he had intended to argue. This is preposterous having regard to the way in which the case was argued. At the end of the argument for the crown Mr. Crosbie was asked if he wished to reply and he replied. The court then took a little time and went off for a break, and we considered the matter. We did not come to a conclusion on the matter and we came back and announced that we would give our decision on Thursday. Mr. Crosbie remained in court and he came back and through another counsel he asked if the matter could be put for the 18th, that is today, when he had another case before the court, and he brought to our attention R. v. Louis Chen [1966] 9 J.L.R. at p. 290. There the matter rested.

This morning Mr. Crosbie announced that he was in the process of replying when the court adjourned and went for the break on Tuesday. That is untrue to Mr. Crosbie's certain knowledge. When we returned from the short break last Tuesday Mr. Crosbie did not rise and say, "I was not finished with my submissions, I wish to say something further." Today, we hear Mr. Crosbie attempting to say that he was prevented from arguing a third ground which he had intended to argue, by the court prematurely calling upon the crown to reply. This is an unfounded statement of fact.

Having got those matters out of the way, the evidence in the case for the crown was that a man by the name of Clifton Chambers, a 35 year old farmer from St. Elizabeth was injured on the 11th August, 1986. He gave evidence on his own behalf and a witness, his brother Hudlin Chambers, was also called to give evidence. The virtual complainant Clifton Chambers said he was chucked from behind and he did not know who chucked him, he became unconscious and he knows nothing more about the matter. His brother, however, came along and said no it did not happen that way, that the virtual complainant was held by the appellant and he was chopped by the appellant from the front, a cutlass was used, and the cutlass inflicted serious injuries over the left eye and to the side of the face of the virtual complainant. As a result of these injuries Clifton Chambers was hospitalised for some period of time. Hudlin Chambers said that at the time when the virtual complainant received the injuries he was not armed in any way.

Mr. Crosbie who then appeared for the appellant submitted, after the accused had made an unsworn statement in his defence, that the crown had failed to make out a case upon which a tribunal could feel sure. It does not appear from the record that he had made a no-case submission.

The defence of the appellant was simply, "I lived at George's Valley, St. Elizabeth, I am a farmer, I am 23 years old, and I did not chop anybody."

In giving his reasons for judgment the learned trial judge said, the evidence was very short, that having observed the complainant as he gave evidence it was clear from his demeanour and how he answered questions that he knew more than he was telling the court, and that he was hiding facts. When his brother gave evidence he was forthright, he was not hesitant and the court was impressed with him and the resident magistrate further said, "I accepted him as a person speaking the truth." He said, "I found as a fact that the witness and the complainant went to where the noise was, saw the accused with a machete, two men rode up and one said in accused's hearing and pointing to the complainant, 'This is one of the man in league with what happen.' Accused held complainant in his waist and hit him with machete over his left eye. Ricky gave appellant a longer machete which he used to chop complainant on the left side of his face. Complainant did not do anything." Then he said on these facts I found appellant guilty. He went on to say, and I will mention this now, "Appellant's conviction sheet showed that he had five previous convictions, four were in Clarendon in 1981. I was then in Clarendon. I asked him if they originated from the Mineral Heights incident. He said yes, and I commented that I was the judge. I then made an error in imposing sentence without hearing from defence attorney," and the resident magistrate continued, "While I would not have closed my mind to what defence attorney had to say I doubt very much if

he could say anything to alter the sentence imposed, having regard to the previous offences of the appellant."

Mr. Crosbie filed his grounds of appeal, and he numbered them, 1, 2 and 3. The first one was:

> "The verdict is unreasonable having regard to the vital contradiction in the evidence of the virtual complainant and the witness of fact for the prosecution.
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> 2. Mistrial - the learned trial judge passed sentence without giving the defence attorney an opportunity to make a plea in mitigation and the learned trial judge said, inter alia, 'I tried and sentenced you in Clarendon on some of these previous convictions, thereby creating the distinct impression that the accused did not get a fair trial in the case being appealed or in the alternative justice did not manifestly appear to have been done by the trial of the appellant by the learned resident magistrate in all the circumstances.
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> 3. Sentence is manifestly excessive."

Before us Mr. Crosbie argued in relation to ground one that the virtual complainant's evidence was in such violent contradiction to the evidence of the brother that the learned resident magistrate could not and ought not to have preferred one witness above the other as there was nothing to indicate which of them could be speaking the truth. He said in this case the contradiction referred to the fact that one said he was chucked from behind and the other said he was chucked from before and he referred us to certain passages from Phipson on Evidence, 12th Edition, to show that the learned resident magistrate could not prefer one witness

over another in these circumstances. He said that what the crown ought to have done was to have challenged the credibility of the virtual complainant by treating him as hostile or something of that nature and that that not having been done both witnesses were put up to the learned resident magistrate as witnesses of truth and he ought not and could not in law, said Mr. Crosbie, to have made a determination by accepting one over the other. We do not believe that that is the law.

We are of the view that where the learned resident magistrate has more than one witness before him, if having regard to the demeanour of the witnesses he is of opinion that a particular witness for one reason or another is not speaking the truth it is open to the trial judge as a tribunal of fact to reject the witness and if he finds that another witness in the same case is speaking truthfully then he has the right and it is within his province and jurisdiction to so find. We therefore did not even call upon the crown to assist us in determining that particular ground of appeal against the appellant as we thought there was absolutely no merit in the ground.

Mr. Crosbie argued, generally, that the verdict was unfair in the sense that when the learned resident magistrate had heard the complainant on one day there was no evidence against the accused and nevertheless the learned resident magistrate allowed an adjournment so that the supporting witness could be called and in the meantime kept the accused in

custody.

The law provides that on a trial before a resident magistrate for an indictable offence, the resident magistrate should enquire into the facts and having enquired must make a determination whether or not the matter to be tried is within his jurisdiction and whether or not he can appropriately punish if the person is found guilty. The procedure is to be found in s.272 of the Judicature (Resident Magistrates) Act:

> "On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him, under his powers, make an order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that a preliminary investigation shall be held with a view to a committal to the Circuit Court."

It is therefore a submission without foundation in law for Mr. Crosbie to say, that because the information charged an offence of felonious wounding which is triable before a judge and jury in the Circuit Court, the resident magistrate could not enquire and make an order for indictment for unlawful wounding which he did. We find absolutely no substance in that submission.

The learned resident magistrate having been told what were the allegations on the crown's case, in the event that one witness does not come up to proof, it does not require him to dispose of the case before the other witnesses have come to give evidence. It was his duty in the circumstances referred to by Mr. Crosbie to

adjourn the case until the other witnesses could come and if at the end of the day all the witnesses have not come up to proof, then he would have nothing on which to make a determination against the accused person.

The second ground which Mr. Crosbie argued was that the learned trial judge proceeded to sentence the convicted man without a plea in mitigation and he argued that that sentence would therefore be unlawful, and that would make the whole trial a nullity. At the end of his presentation he was asked if he had any authority upon which he based this submission and he said, "the Common Law". That was his authority. We asked the Crown for assistance and the crown through Mr. Pantry replied that the resident magistrate would have been seized with all the factors which could have been taken into account to determine the appropriate sentence and accordingly it would appear that those very factors could be taken into account by this court and that this court would have a power to sentence. The crown was not saying that the sentence has imposed by the learned resident magistrate without hearing a plea in mitigation could stand.

When Mr. Crosbie was called upon to reply he said that the crown like himself had provided no authority for the proposition being advanced by the crown, and before us this morning Mr. Crosbie has relied upon R. v. Louis Chen [1966] 9 J.L.R. at page 290 and his proposition is that this case shows and fortifies his submission that sentence is a part of trial which is contrary to the belief in some quarters. He did not say which quarters and he said that

the fact that sentence was passed irregularly meant that it was unlawful, with the consequence that this court could not pass any sentence because the trial was incomplete. He said further that being an unlawful sentence it could not be varied by this court, and that the only alternative open to this court is to quash the entire proceedings and send the matter back for trial.

We have had a look at the Judicature (Appellate Jurisdiction) Act to see what are the powers of the Court of Appeal when it is dealing with appeals from the resident magistrates' courts in the criminal jurisdiction and we would like to refer to s. 23 which falls in Part V of that Act. Section 23 says:

> "On appeals under this Part the Court shall have and may exercise the powers and authorities conferred on the Court by sub-section (3) of section 14."

Now section 14 by itself was dealing with appeals from the criminal jurisdiction of the Supreme Court, but section 23 makes the provisions of sub-section (3) applicable to appeals from the resident magistrates' courts, and section 14 (3) says:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

We would like to call attention to the fact here that the court is being empowered to look at the verdict, and having regard to the verdict pass a sentence which ought to have been passed upon that verdict if the court is of the view that the

sentence ought to be varied. We are of the view, and in this we agree with Mr. Crosbie, that to pass sentence in a criminal case without first hearing a plea in mitigation is an irregularity in the trial.

The only authority which we have been able to locate which appears to assist in this particular matter is that of R. v. Alexander McGinlay and John Ballantyne [1976] 62 Cr. App. R. 156. That was a case in which two persons were charged with theft in the United Kingdom and they were convicted before magistrates and were sent to the Crown Court to be sentenced. There was a provision in the United Kingdom legislation as to how the Crown Court should proceed if it intended to impose a sentence of Borstal training, and I will read from the judgment of Lord Justice Scarman on page 157 of that Report:

> "Let it be said at once that the judge acted wrongly in sentencing these two men to Borstal training. He was acting in contravention of section 21 (1) of the Powers of the Criminal Courts Act 1973. The subsection provides that the Crown Court on committal for sentence or on conviction on indictment, shall not pass a sentence of Borstal training on a person who is not legally represented in that Court and has not been previously sentenced to that punishment by a court of the United Kingdom, unless either (a) he has applied for legal aid and the application has been refused upon the ground that he has the means to pay for his own representation, or (b) having been informed of his right to apply for legal aid and had the opportunity to do so, he refused or failed to apply."

> "So far as one can see the judge made no inquiries as to why it was that these two young men were not legally represented. We now know that proviso (a) does not apply: these boys did not have the means to pay for their own legal representation. As far as proviso (b) is concerned, they had applied on June 20 for legal aid and certainly neither of them had refused or failed to apply."

And the judge continued:

> "It does not need the authority of this Court to say that it is extremely important that section 21 should be followed by the courts of this country. It is in fact a declaration of the right of persons in jeopardy of their liberty to be legally represented before sentence curtailing liberty is passed."

The Court held, that although the sentence passed by the Crown Court was unlawful, that did not deprive the Crown Court from being able to pass an appropriate sentence. Scarman L.J. said at p. 158:

> "Mr. Somerville's submission can be very shortly stated. He says that when the Crown Court was dealing with these offences, it did not have the power to pass a sentence of Borstal training because it had failed to comply with the obligations laid upon it by section 21 (1) of the Act of 1973. We do not so read the statutory provision. Undeniably the Crown Court did have power, upon a committal by magistrates for sentence, to pass a sentence of Borstal training for these offences. It acted unlawfully because it failed to offer the defendants the opportunity of legal aid representation that was their right. But in our judgment that unlawful act of the Court did not deprive it of its character as a Court which had power to pass a sentence of Borstal training."

We are of the view that this reasoning of Scarman L.J. is applicable to a case of this nature. We say that it was an irregularity for the resident magistrate to have proceeded to sentence this appellant without hearing a plea in mitigation but this failure to allow the plea did not vitiate the court's power to sentence.

And if as I have indicated, this court, the Court of Appeal, has a power to interfere with a sentence which is improper, the exercise of that power does not interfere with a verdict regularly arrived at. A variation of the sentence does not in any way affect the trial, it simply affects the sentence which comes after the verdict has been imposed and we do not find any merit at all in the submissions of counsel for the appellant that failure to hear a plea in mitigation vitiates the entire trial, renders it a nullity and would require a new trial.

There was something which was said in this particular case by Lord Justice Scarman who is one of the most liberal of all judges and I will just mention it in passing:

> "As Mr. Sommerville indicated, if the Court took the possible view in this case that Borstal was the correct sentence, then on the literal wording of the section his argument falls to the ground, because we cannot interfere with that sentence, whether it be lawful or unlawful."

And then he continued:

> "Fortunately we do not have to consider that piece of nonsense."

We are of the view that it is quite unnecessary to have this case sent back for trial before the resident magistrate and we are prepared to hear argument by counsel as to the appropriate sentence which ought to have been passed in the instant case upon the verdict of guilty.

NOTE: Mr. Crosbie then called one witness as to character and addressed the court as to sentence. The court allowed the appeal as to sentence, and substituted a sentence of two years imprisonment at hard labour to run from the date of conviction.