JAMAICA

IN THE COURT OF APPEAL

R. M. CRIMINAL APPEAL No. 26 of 1972

BEFORE: The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A. (Ag.)

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REGINA v. ALLAN MURRAY (APPELLANT)
and
DERRICK WINT

****

Ian Ramsay for the Appellant.
Courtney Orr for the Crown.

May 24 - 26, ~~June~~ , 1972

FOX, J.A.:

On 14th March, 1972 the appellant Allan Murray was convicted by Mr. V.O. Malcolm, a Resident Magistrate for the parish of Saint Andrew, on an indictment charging him jointly with Wint with unlawful wounding. On appeal, a single point was taken. Mr. Ramsay contended, that the evidence did not establish that in wounding the complainant the appellant was acting in concert with Wint, but that such injury as had been inflicted was the result of independent action of each accused. In this situation, Mr. Ramsay submitted that on the authority of R. v. Scaramanga (1963) 2 All E.R. 852 the conviction was wrong and should not be allowed to stand.

The Crown's case as to the facts of the offence rested upon the evidence of the complainant Lloyd Ottey. No other eye-witness was called by the prosecution. The arresting

/constable said .....

constable said merely that on the night in question he saw Ottey (apparently at the Vineyard Town Police Station where Ottey had come to make a report), that at that time Ottey was "bleeding from wounds to his face, shoulder and head", and that he had sent him to the Kingston Public Hospital. The constable said that when arrested on 18th January Murray said nothing upon caution. The note which the magistrate made of Ottey's evidence in chief is short and can be fully stated.

"Lloyd Ottey sworn:

Plumber, 2 Jarrett Lane, Kingston. 9th January, 1972 I was on Mountain View Avenue No. 63 Saint Andrew, Both accused were there this 10:00 a.m. and 12:00 p.m.

I had quarrell with Murray about card game. Murray juck me with a knife upper left breast - cut and bled. At that time I had a bottle of stout in right hand drinking. Someone came between both of us - I throw bottle at Murray can't say if it caught him. Murray and I started fighting cut me several more times in face bled - fight until we reach outside - Wint hit me in head back - cut and bled - I reported matter to Vineyard Town went to Kingston Public Hospital got stitchings."

Mr. Orr accepted the law as laid down in Scaramanga but submitted that on the evidence, an attack upon the complainant by both accused was shown to have taken place in such a short time and in such close proximity as to bring the case within that category where if accused persons are present and together participating in an attack upon a common victim each may be regarded as aiding and abetting the other in wounding the victim, and on the principle in Mohan v. R. (1966) 11 W.I.R. p. 29, both could be properly convicted on an indictment jointly charging them with that offence.

/In replying .....

In replying to this submission, Mr. Ramsay in his turn accepted the law as laid down in Mohan, but submitted that on a proper construction of the printed evidence, a Mohan situation had not been described, and that that authority therefore did not apply. The issue in the appeal was in this way resolved to the question of the effect of the evidence in the case. In view of the extensive submissions which were made as to the proper approach in assessing the significance of that evidence, some general observations on the subject are appropriate.

By section 27 of the Judicature (Resident Magistrates) Law, Cap. 179 "..... the Magistrate shall take notes of the evidence in the trial of all indictments .....", and by section 300 of that Law, "the notes of evidence taken by the Magistrate ..... shall be read and received by the Court of Appeal as the evidence in the case". In considering the printed evidence and in endeavouring to ascertain its significance, it would be altogether unrealistic for the Court of Appeal to ignore the circumstances under which the magistrate's note would have been made, and the variable factors which could have affected its making, and in this way its possible meaning. Firstly, the Court of Appeal should never forget that the magistrate's note does not pretend to be a verbatim record of all that was said. Secondly, the impossibility of capturing those nuances of meaning to which the spoken word is susceptible should at all times be appreciated, and particular account taken of the extent to which this deficiency is likely to be intensified when a condensed note of what was said is all that is available, and when, as is so often very probable, the language used by the witnesses is not formal English, but the lingo in common parlance by the substantial majority of our people. A third and critical consideration involves an understanding of the general nature of the pressures under which the magistrate may be required

/to direct ...

to discharge his functions. The pressures consist of a host of variables; the physical condition and arrangement of the courtroom; its auditory capacity; the state of the magistrate's list, with emphasis on the number and the nature of the cases before him; the demand on his physical and mental resources resulting from continuous occupation of the central position in an adversary system of trial; the quality of the assistance to him from members of the bar and the officers of the court in the day to day operation of this system. Finally, the court must never fail to show its awareness of the essential demand upon the faculties of the magistrate, which is to judge the case.

In relation to this demand, the requirement that the magistrate make a note of the evidence, though important and necessary, is distinctly subordinate. For in trying a case, a magistrate must listen with care and understanding to the witnesses, and intelligently observe their demeanour. In this way, he takes advantage of the opportunity to assess at the critically relevant time, namely when it is given, the extent to which evidence is truthful and accurate. The fundamental concern of the magistrate should be to preserve and enlarge this opportunity. It would be to the highest degree retrograde and unhelpful, if by way of its pronouncements and its decisions in cases when the significance of the magistrate's note of the evidence come up for critical scrutiny on appeal, this Court should imply that the concern to assess the truthfulness of the evidence was not at all times paramount to the concern to record the evidence, or worse still, that this latter concern could, on any occasion, usurp and take precedence over the former. On the other hand, it would be equally unfortunate if by way of such pronouncements and decisions, the impression is given that this Court is prepared to eke out the imperfections

/of the .....

of the magistrate's notes by accrediting suppositions as to what must have been in fact the evidence before him. The problem involves striking and maintaining a correct balance; of exerting an authentic sense of proportion in an area circumscribed by imponderables. This is not always easy.

With these general considerations in mind, we take the view that the magistrate's note of Ottey's evidence is capable of showing that during an attack upon Ottey by Murray, Wint came to the aid of Murray in circumstances amounting to a participation by both accused in the attack. Even if it is accepted that the printed evidence is also capable of showing an independent attack by each accused on Ottey, we think that it would be fair to say that this does no more than leave in balance the judgment of this Court as to the actual situation before the magistrate. In such a case, the rule described by Lord MacMillan in Watt v. Thomas (1947) A.C. 484, at 491 as the guiding principle in a parallel situation, applies. The balance should be brought down in favour of the magistrate for the reason that, having heard the evidence, it must be assumed, until the contrary is shown, that he rightly assessed that evidence and correctly applied the proper law to the facts he found. We, therefore, agreed that the appeal as to conviction should be dismissed.

As to sentence, we considered that a penalty of twelve months imprisonment with hard labour was manifestly excessive. There was no medical evidence as to the severity of the wounds Ottey received. He was treated at the hospital and sent home. The injuries were inflicted in the course of a quarrel in which all parties appear to have been drinking. The reprehensibility of the appellant does not appear to have gone higher than the conduct to be expected of a person engaged in a brawl of limited

/proportions. ...

proportions. The appellant is recorded as having two convictions. He should not of course be sentenced on his previous record. In addition, in the absence of this information in the printed record, we were informed by counsel that these convictions were for minor assaults more than twelve years ago. In sentencing the appellant, they should therefore have been ignored by the magistrate. In the Crown's case, there is no information as to any particular incident in the quarrel between Murray and Ottey which precipitated the physical clash between them. According to the defence, Ottey was under the influence of drink and was boisterous and provocative. The magistrate could have allowed this to be a significant factor in his decision to sentence Wint to the payment of a fine. Even although Murray was more aggressive than Wint, the substantial provocation was directed at Murray. In sentencing Murray, proper allowance should therefore be made for this position.

For these reasons, we agreed that the appeal as to sentence should be allowed; the sentence of twelve months set aside, and in substitution therefor there should be imposed a fine of $60 and in the alternative imprisonment with hard labour for three months; with two weeks with a surety allowed to pay the fine.

This is a majority decision of the Court.

GRAHAM-PERKINS, J.A.

I regret that I am unable to share the conclusion arrived at by Fox and Robinson, JJ.A., as to the propriety of the convictions in this case, and I set out my reasons hereunder.

The appellant and one Derrick Wint were convicted on an indictment which charged them jointly with unlawfully wounding Lloyd Ottey. There had been separate informations in relation to the appellant and his co-accused. The record discloses that the learned Resident Magistrate made an order for an indictment in the following terms:

> "Indict the accused (the appellant) as charged herein before me this day and join Derrick Wint as co-accused ....."

Having regard to the provisions of ss. 272 and 273 of the Judicature (Resident Magistrates) Law, Cap. 179 it is, perhaps, not unreasonable to assume that the Magistrate must have been informed that the evidence that would be led in support of an indictment against both accused would disclose one or the other of two factual situations. These two situtations are very lucidly described by Lord Pearson in the advice of the Privy Council in Mohan v. Reginam (1967) 2 All E.R. 58, in the following passages at pp. 61 and 62.

> "It is however clear from the evidence for the defence, as well as from the evidence for the prosecution, that at the material time both the appellants were armed with cutlasses, both were attacking Mootoo, and both struck him. It is impossible on the facts of this case to contend that the fatal blow was outside the scope of the common intention. The two appellants were attacking the same man at the same time with similar weapons and with the common intention that he should suffer grievous bodily harm. Each of the appellants was present and aiding and abetting the other of them in the wounding of Mootoo.
>
> That is the feature which distinguishes this case from cases in which one of the accused was not present or not participating in the attack or not using any dangerous weapon, but may be held liable as a conspirator or an accessory before the fact or by virtue of a common design, if it can be shown that he was party to a pre-arranged plan in pursuance of which the

> fatal blow was struck. In this case one of the appellants struck the fatal blow, and the other of them was present aiding and abetting him. In such a case the prosecution do not have to prove that the accused were acting in pursuance of a pre-arranged plan."
>
> "A person who is present aiding and abetting the commission of an offence is without any pre-arranged plan or plot guilty of the offence as a principal in the second degree."

It will be observed that, assuming the absence of evidence demonstrating a common design or pre-arranged plan, the application of the principle enunciated in the first two passages quoted above essentially depends on proof of an aiding and abetting.

It is, I think, equally reasonable to assume that such information or advice of which the magistrate was seized prior to his order for an indictment did not disclose the sort of situtation - a third situation - emerging in such cases as R. v. Scaramanga (1963) 2 All E.R. 852, R. v. Parker (1969) 2 A.E.R. 15, and R. v. Merriman (1971) 2 A.E.R. 1424. In R. v. Scaramanga (supra) Lord Parker, C.J., said, at p. 856,

> "In our judgment, except where provided by statute, when two persons are jointly charged with one offence, judgment cannot stand against both of them on a finding that an offence has been committed by each independently. Accordingly, it would seem that the conviction of the appellant for malicious damage should, prima facie, be quashed, It was, however, urged on behalf of the prosecution that, in the light of Messingham's case and Dovey's case, the court should ascertain what malicious damage was first inflicted and, if the author were the appellant, uphold his conviction on that ground. This court, however, is clearly of opinion that such a course is not open to them."

In R. v. Parker (supra) Donaldson, J., delivering the judgment of the court said, at p.17,

> "In our judgment the application of the principle which formed the basis of the decision in R. v. Scaramanga does not

> depend on whether one accused pleaded guilty and there was in consequence no 'finding' in relation to that accused in the sense of a verdict by a jury. The principle is wider. It is clear law that if a person is accused of stealing two articles, he can be convicted if it be proved that he stole one only. It is clear that if two persons are accused of stealing jointly one or other or both may be convicted of that joint stealing. Alternatively, either but not both could be convicted of stealing independently or each may be convicted of stealing jointly. In each of these cases the essential feature is that one offence is charged and one offence is proved. R. v. Scaramanga and the other decisions therein cited proceed on the basis that in the absence of statutory provisions ..., if only one offence is charged it is not open to the court or jury to find two offences proved."

I accept the above passages as an accurate statement of the law in relation to the third situation.

In my view the question on which this appeal turns is which of the three situations above noted was disclosed by the evidence adduced before the Resident Magistrate in support of the indictment. The evidence on which the prosecution relied was that of the complainant Ottey. I quote the material part of his evidence:

> " 9th January, 1972 I was on Mountain View Avenue, No. 63 Saint Andrew. Both accused were there this 10.00 a.m. and 12.00 p.m.
>
> I had a quarrel with Murray about card games. Murray juck me with a knife upper left breast - cut and bled. At that time I had a bottle of stout in right hand drinking. Some-one came between both of us - I throw bottle at Murray can't say if it caught him. Murray and I started fighting cut me several more times in face bled - fight until we reach outside- Wint hit me in head back - cut and bled -
>
> XXd (Murrary)
>
> Two of us had wrestling in yard. You did have a knife - you did juck.

XXd (Wint)

You did hit me in back of head with stone."

That was the evidence led. I emphasise the word 'the' because I regard it as of critical importance. The most careful and fair reading of Ottey's evidence cannot, in my view, be held to reveal either of the first two situations above noted, as distinct from the third. I am compelled to the conclusion that this evidence is, at the very highest, capable only of establishing that a different offence was committed by the appellant from that of which Wint was found guilty. I certainly cannot read this evidence as revealing either (i) that the appellant's act was done in pursuance of any pre-arranged plan or plot with Wint to wound Ottey, or (ii) that the appellant and Wint were together present and aiding and abetting each other in wounding Ottey by attacking him at the same time and with the common intention that he should suffer. I am firmly of the view that Ottey's evidence as recorded by the Magistrate in his notes shows no more than that at some point of time between "10.00 a.m. and 12.00 p.m." on the 9th January, 1972 during the course of a quarrel and a fight with the appellant he received certain injuries, and that at some point of time - 10.00 a.m. and 12.00 p.m. - (it is not know precisely when) on the same day he also received an injury at the back of his head at the hand of Wint. From the framework of the evidence recorded it would seem at least to be perfectly clear that after Ottey had been examined by the clerk in charge of the prosecution as to the incident with the appellant he was asked a question in these or similar terms: Did Wint do anything to you? Ottey's reply to this question quite clearly was: "Wint hit me in head back". It seems equally clear that neither the clerk nor the Resident Magistrate thought it necessary to investigate the circumstances under which Wint hit Ottey. Both appear, quite unaccountably , to have been satisfied that once Ottey's evidence revealed that he suffered injuries at the hands of the appellant and Wint that was sufficient to support the joint charge. This was clearly not so. More was required, as I have indicated, to embrace the first or second situation to which I have referred. If Ottey's evidence disclosed more than it does on the printed record the Magistrate, in keeping with his duty, should have taken the appropriate notes.

If the conviction of the appellant; and indeed that of Wint, are to be held to be justified this Court must necessarily approach the Magistrate's notes of Ottey's evidence on the basis that these notes do not faithfully and accurately reflect the real substance of all that must have been given in evidence by Ottey in proof of the joint charge in order to lead the Magistrate to conclude that that

joint charge had indeed been established. For part I have not least the least doubt whatever that this Court cannot so approach the Magistrate's notes. Section 27 of the Judicature (Resident Magistrates) Law, Cap. 179 provides:

> " .... the Magistrate shall take notes of the evidence in the trial of all indictments ..."

This section imposes a clear and positive duty on a Magistrate to take notes of the evidence adduced before him. It does not say that he shall take verbatim notes, nor does it say that he shall take sketchy notes. He required to take notes. This can only mean, if any intelligent meaning is to be given to the section, that he shall take notes of all the evidence material to the issues he is called upon to resolve in any particular case. In fulfilling the obligation imposed on him the Magistrate performs a duty which he owes to himself, the prosecution, the defendant, and, certainly not least of all, to the Court of Appeal.

Section 300 of Cap. 179 provides:

> "The notes of evidence taken by the Magistrate ... shall be read and received by the Court of Appeal as the evidence in the case."

This Court is, by the very unequivocal terms of this section, statutorily directed to "read and receive" the Magistrate's notes of evidence "as the evidence in the case". This section does not, and cannot, in my view, enable this Court to read and receive the Magistrate's notes of evidence as if they formed a part only of the evidence in the case so as to enable it to supplement any deficieny that may be thought to be apparent, or to infer that other material evidence must have been given. If the Magistrate's notes are silent as to some material particular this Court must, in my view, assume that no evidence was given thereon. In this connection I would respectfully adopt the observations of Wooding, C.J., in Abiram v. Ramjohn (1964) 7 W.I.R. 208. The learned Chief Justice, dealing with the obligation on a Magistrate to take, or cause to be taken, notes of evidence in a case where no notes had been taken, said, at pp. 209 and 210,

> "The failure to do so in our view precludes this Court from assuming that evidence was

> given in the proper way before the Magistrate ... And .... we consider that it would be an extremely dangerous precedent if we neglected to bear in mind the provisions of the Ordinance to which I have referred and if we proceeded on the footing that evidence was given in fact although none was recorded. In view of the statutory provisions, we must proceed in this case on the footing that no evidence was given before the Magistrate which was considered at all material."

There does not appear to be any difference in principle between a case in which a Magistrate takes no notes and one in which his notes are assumed to be silent on some essential material going to the validity or otherwise of a conviction.

I would also refer to, and adopt, the observations of Crane, J., in Canterbury v. Joesph (1963) 6 W.I.R. 205 when dealing with the failure of a Magistrate to take notes of evidence. The learned judge said, at p.206,

> "Magistrates are statutorily enjoined to take notes of evidence in all cases before them, for it is only by the taking of proper notes of the evidence can the cause of justice be served on a review of their decisions in the court of appeal."

At p.207 he said:

> "There can be no short cut to the laborious task of the recording of evidence in any case."

I concede, without the least reservation, the catalogue of pressures and difficulties (as set out by Fox, J.A.,) with which Magistrates have to cope from day to day in the performance of their all important judicial functions. I cannot, however, concede that these pressures and difficulties -(the remedy for the removal of which must be sought, and urgently sought, elsewhere) can in any way be allowed to influence the approach of this Court when called upon to review the findings and decisions of Resident Magistrates. This Court must in the end be bound by the printed record constituted by the Magistrate's

notes of evidence. Any appellate licence in reading and receiving evidence which is not "the evidence in the case" must inevitably lead this Court into the very real danger of judicially repealing the very clear and precise provisions of the Judicature (Resident Magistrates) Law noted above. With the greatest respect to the majority view expressed in the judgment of Fox, J.A., I am quite unable to see how the principle enunciated by Lord Macmillan in Watt v. Thomas (1947) 1 A.E.R. 582, at p. 590, can be said to have any application to the question raised in this appeal. In any event the question whether there is, in any case, sufficient evidence to justify a particular conclusion is essentially a question of law, a question almost invariably at large in an appellate court and a very different question from a judge's perception of evidence depending as it must on the advantage he enjoys of seeing and hearing a particular witness. No question arises in this appeal as to the truthfulness or falsity of Ottey's evidence. That evidence was clearly accepted by the Magistrate. The critical question is: Having accepted that evidence was the Magistrate right in concluding that it gave rise to the legal result that the appellant and Wint were guilty either on the basis of a pre-arranged plan, or of the principle in Mohan v. Reginam (supra). As I have already indicated I cannot regard Ottey's evidence as giving rise to that legal result. For the above reasons I held that the appeal should be allowed.