

C.A. CRIMINAL LAW - 3 Counts of Fraudulent Conversion - R.M. Gout  
(Appellant bailiff Resident Magistrate's Court) - whether verdict unreasonable  
and/or cannot be supported having regard to the evidence -  
Sentence - whether sentence excessive - Appellant aged 60 -  
suffering from heart condition - JAMAICA will lose office of bailiff by  
verdict of conviction - whether non - custodial sentence would  
meet the ends of justice.

IN THE COURT OF APPEAL

Appeal against conviction dismissed. Appeal against sentence allowed.

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 82/88

For sentences of imprisonment fines of \$4,000 on each count or 4 months  
imprisonment substituted

BEFORE: The Hon. Mr. Justice Campbell, J.A.  
The Hon. Mr. Justice Downer, J.A.  
The Hon. Mr. Justice Gordon, J.A. (Ag.)

Cases referred to

R. v. Owen Higgins & Others - R.M. CA No 45/86

R. v. NIGEL THELWELL

Original sentence?  
Evidence

K.D. Knight for Appellant

Miss V. Grant for Crown

November 3, 1988

CAMPBELL, J.A.

The appellant Nigel Thelwell was until 1987 the bailiff attached to the Resident Magistrate's Court, St. Elizabeth. He was convicted on the 9th of February, 1988 on an indictment containing 3 counts of fraudulent conversion. The facts supporting the conviction are that a writ of seizure and sale had been dispatched to him to levy execution against Holland Dillon in respect of an unpaid judgment debt of some \$6,000.00 outstanding against the latter as guarantor of a loan which had been given to his son. The appellant approached Dillon and they appeared to have entered into an agreement under which some \$2,500.00 was to be paid within a very short time, the balance to be payable \$250.00 per month.

The Crown's case is that on the 6th of October, 1982 Dillon paid \$800.00 in cash to the appellant. On the 8th of October, 1982 he again paid a further \$1,200.00 in cash. On each of these occasions he asked for a receipt and was told on the first occasion that he would be given the receipt when everything had been paid. On the second occasion he was told just to wait. Dillon was not satisfied with the refusal of a receipt as a consequence he saw his attorney who advised him on the

appropriate step that he should take. In the light, no doubt, of this, Dillon in making a further payment to the appellant did so by manager's cheque made out in his own name which he endorsed over to the appellant. There is no dispute as regards the receipt by the appellant of this cheque payment but he disputes the cash payments. Continuing with the Crown's case the evidence is that these sums were not paid over into court for transmission to the judgment creditor. In consequence of this, Mr. Dillon found himself back in court and had to pay all over again. The matter having been reported, investigation was carried out culminating in the appellant finding himself in court. The evidence of the appellant in defence was that he never received the sums of \$800.00 and \$1200.00 in cash or at all. This assertion in court by the appellant is remarkable in that very early in the investigations when his attention was drawn to the complaint that he had received certain payments which he had not paid into court and he was specifically asked to comment on the cash payments, he made no answer thereto. In court he justified the receipt by him of the cheque for \$1,000.00 on the basis that it was a refund of monies which he had paid over to Mr. Dillon as payment in advance for certain refurbishing work which was to be done to furniture which he had handed over to Mr. Dillon.

The learned Resident Magistrate having considered the evidence and no doubt having seen and assessed the credibility of the Crown Witnesses, the appellant and his witnesses, came to the conclusion that the Crown's version was credible and acceptable to her. She rejected the version presented by the appellant and found him guilty on all three counts.

Before us Mr. Knight endeavoured to show that the verdict of the learned Resident Magistrate was unreasonable and/or cannot be supported having regard to the evidence. He struggled in an endeavour to show us that a different view of some of the facts which he highlighted could have, or ought to have been taken by the learned Resident Magistrate. He however, frankly conceded that the difficulty he faced was the inexplicable conduct

of the appellant manifested by his failure at the earliest opportunity to say something in respect of the cash payments which he was said to have received, when he was invited so to do by the investigating officer at a time when there was no question of his being arrested much less of his being charged.

We are of the view that having regard to the evidence which was placed before the learned Resident Magistrate, she inevitably had to come to the conclusion of guilt. The evidence in our view was very clear and once the issue of credibility was determined against the appellant the conviction as we have said was inevitable.

Learned counsel on a second ground argued that the sentence was manifestly harsh and/or excessive. He conceded that before the learned Resident Magistrate a medical certificate which he sought to present before us and which we allowed him to present had not been tendered. It is his contention that had such certificate been presented, her view as regards the propriety of a custodial term would likely have been different. The medical certificate discloses that the appellant is suffering from a heart condition and that he is in constant need of medical supervision involving the monitoring of his meals. We are not altogether satisfied that this medical certificate could not have been obtained before and presented to the Magistrate, however, as Mr. Knight has forcefully submitted, the sins of the counsel ought not to be exacted on the appellant. It is in these circumstances that we consider anxiously the medical certificate which he tendered. He also reminded us of the decision of this court in R. v. Owen Higgins & Others R.M.C.A. No. 45/86.

It is true that there are certain circumstances in the present case which appear similar to R. v. Owen Higgins et al (supra) but there are also dissimilar circumstances. This is to be expected because in general, no two sets of circumstances pertaining to an offence and the offender will ever be completely similar. Thus a decision on a non-custodial sentence in one case may persuade but does not mandate a similar decision in another

case albeit portraying some similarities. Each case has to be considered on its own merits. We are however not unmindful of the fact that the appellant, by virtue of his conviction would lose his office as bailiff. We have also considered his age and medical condition. He is aged 60 years and suffers from a heart condition as disclosed in the medical certificate. We feel disposed to accede to the submissions of learned counsel on his behalf that in the circumstances a non-custodial sentence would meet the ends of justice. In conclusion we find that on the facts the learned Resident Magistrate was fully justified in concluding on the guilt of the appellant. The appeal against conviction is dismissed. The appeals against sentences are allowed. In substitution for the sentences of imprisonment which were imposed we hereby substitute a fine of \$4,000.00 on each count with alternatives of 4 months imprisonment in default. The terms of imprisonment in default are to run concurrently. The appellant is given one month within which to pay the fine, subject to provision of two sureties to be approved.