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IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 125/79

BEFORE: THE HON. MR. JUSTICE HENRY, J.A.
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROWE, J.A.

REGINA

vs.

PAULETTE WILLIAMS

Mr. R.N.A. Henriques for appellant.

Mr. George Belnavis for the Crown.

November 21, 22; December 19, 1979.

ROWE, J.A.

On November 22, 1979, we allowed the appeal against convictions on three counts of forgery and one count of falsification of accounts, set aside the sentences of four months imprisonment at hard labour on each count, and as we promised to do, we now set out our reasons.

At least one fraudulent person employed to the Savanna-la-mar Branch of Barclay's Bank, D.C.O. devised a scheme to defraud the Bank of large sums of money by debiting the Bank's Interest Received Account and its Unearned Interest on Discount Loans Accounts and simultaneously crediting similar amounts to a number of dormant accounts at the Bank. The fraudulent person would then prepare cheques and forge the signatures of the customers who held the dormant accounts. Somehow the forged cheques were presented to the Bank's tellers and were cashed and the Accountant, Mr. Colyard, testified that the Bank's loss on these fraudulent transactions exceeded $16,000.

The appellant was charged on an indictment which originally contained thirty-one counts - ten for fraudulent conversion; 5 for larceny; 6 for falsification of accounts; 6 for forgery and 4 for obtaining money upon a forged instrument. After the close of the case for the prosecution the learned Resident Magistrate ordered that a 32nd count charging falsification of accounts be added.

At the outset of the trial, the Resident Magistrate was concerned that the indictment was overloaded with counts and brought this fact to the attention of Crown Counsel who assured him that all the counts were necessary "to show a systematic and complex perpetration of fraud". As events turned out the Resident Magistrate's fears were more than justified. The prosecution was quite unable to handle coherently the many facets of the banking system, the conglomerate way in which the Bank's staffers' duties over-lapped and most significantly the multiplicity of documents.

It is not surprising then that at the end of the Crown's case, the Resident Magistrate acceded to the no case submissions of defence attorney on twenty-eight counts of the indictment and acquitted the appellant on those counts. We pause to comment that the inherent weaknesses in an over-loaded indictment were most evident in this prosecution, and we can but repeat for emphasis the caution of the Lord Chief Justice in R. v. Hudson (1953) 36 Cr. App. R. 94 when he said:-

> "The Court has on many occasions pointed out how undesirable it is that a large number of counts should be contained in one indictment. Where prisoners are on trial and have a variety of offences alleged against them, the prosecution ought to be put on their election and compelled to proceed on a certain number only. Quite a reasonable number of counts can be proceeded on,

> say, three, four, five or six, and then, if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other Counts of the indictment. If there is a conviction, the other Counts can remain on the file and need not ncessarily be dealt with unless this Court should for any reason quash the conviction and order the others to be tried".

Since 1975, all the documents passing through the Savanna-la-mar Branch of Barclay's Bank D.C.O. now National Commercial Bank, are microfilmed at the Branch. The microfilms are retained in safe custody while the original documents are despatched to the Bank's Computer-Centre in Kingston for the journals to be prepared. On the following day the journals together with the original documents are returned to Savanna-la-mar where they are audited. In the ordinary course of business cheques would be returned to the customers on whose accounts they were drawn.

Evidence was led by the prosecution to show that on November 8, 1976, Derrick McCreath, a Clerk at the Bank, was the officer whose duty it was to microfilm all cheques and other documents passing through the Bank. When, however, he left for lunch the microfilm machine was left unlocked and accessible to others. Two microfilms of chequespurportedly drawn by H.G. Donaldson for $1,000 and $2,000 respectively and which were cashed on November 8, 1976 at the Savanna-la-mar Branch of the Bank, were produced to the Court and copies of those microfilms were produced and marked "31b" and "31c" for identity. A microfilm of a cheque purportedly drawn by H.G. Donaldson for $3,500 and which was cashed on January 18, 1977 was produced to the Court and marked "31a" for identity. Mr. Donaldson said he did not draw any of the three

cheques nor were any of these three cancelled cheques ever sent to him. This evidence seems the more credible as the journals for the Bank's transactions for November 8, 1976 and January 18, 1977 are missing from the Bank's records. Furthermore, the teller, Avis Walker who cashed the two cheques on November 8, 1976 said they had been presented by a staff-member whose identity she could not recall.

Unlike other documents which were tendered as exhibits, the three copies of the microfilms were specifically marked "for identity" only. This situation arose in this manner. Two microfilm cartridges were given to a Bank Inspector by the Manager of the Bank in Savanna-la-mar and one Herman McKoy who supervised the printing of copy vouchers for microfilms at the Computer-Centre in Kingston gave evidence that in November 1977 he received 2 microfilms from Barclay's Bank, Savanna-la-mar and he made copies of them. He said: "These three copies appear to be the same copies". They were then marked "31" for identity and the witness was not cross-examined. The Resident Magistrate made the following note apparently to explain why the documents were not admitted into evidence:-

> "Witness cannot state positively that "31" for identity made by him."

The Resident Magistrate understood that the copies of the microfilms of the three cheques were not exhibits and in the further conduct of the prosecutions's case, he carefully differentiated between exhibits and the documents marked for identity. When Det. Cpl. Robert Mason the police photographer came to give evidence, he is recorded as saying, "on 11th May, 1978 received three copy cheques and twelve sheets of specimen handwriting from

Det. Sgt. McDonald with instructions. These copy cheques "31" for identity, specimen handwriting Ex. 32".

Det. Sgt. McDonald the handwriting expert said: "Supt. John Harrison gave me three photo-copies front and back cheques and twelve sheets of specimen handwriting. These "31" for identity and Ex. 32".

In the evidence of Avis Walker, there is some inconsistency of notation. At the commencement of her evidence she is recorded as saying: "I can say I cashed two cheques of which Exhibits 31(b) and 31(c) are copies". However in cross-examination she said: "Looking at "31(b)" and "31(c)" for identity, I would say I did not cancel drawer's signature.........."

There was evidence from the handwriting expert from which it could be inferred that it was the appellant who wrote "H.G. McDonald" on the cheques of which "31a", "31b", and "31c" were microfilm copies. He however did no tabulation in respect of the cheque for $3,500 drawn on 18/1/77 and marked "31a" for identity. The Resident Magistrate took the view that in the absence of such a tabulation, the prosecution could not prove Count 31 of the indictment.

On the afternoon of June 2, 1978, the Crown closed its case. The following notation is instructive:-

> "<u>CASE</u>
>
> Prosecution in deference to suggestion of Court not to pursue Count 31 since no tabular analysis of cheque for $3,500 made would pursue the following counts. Cheque "31b" and "31c" -

Count 14	-	$3,000 Larceny.
" 23	-	Forgery.
" 24	-	Obtaining.
" 20	-	Falsification.
" 25	-	Forgery.
" 26	-	Obtaining.
Mr. F. Hamaty:	-	Would prefer to make submissions at a reserved sitting."

On the following Monday when the case resumed one would have expected the defence to have begun. That was not to be. It is noted that, "Prosecution after dialogue with bench now seeks to recall witnesses". A witness from the Bank was recalled to say that there was only one "H.G. Donaldson" with an account with that Branch. Then there follows this note:-

> "Court intimates to Crown Counsel that although Counsel in deference to Court had declined to further pursue evidence relating to "31a" cheque for $3,500 - Court on reflection is of opinion that such restriction was undue - unfair to prosecution. Court now intends to permit recall of witness(s) - Defence invited to say if they object; Mr. Watt objects - ground that such recall would be oppressive. Defence told that they may recall any witness for further cross-examination. Mr. Hamaty says defence will not require recall of any witness".

The handwriting expert was recalled and he gave evidence which would go to show that it was the appellant who wrote "H.G. McDonald" on the cheque for $3,500 dated 18/1/77, marked "31a" for identity. He was not cross-examined. At the instance of the prosecution several counts of the indictment were amended. Nothing turns on those amendments as the appellant was acquitted on all those counts. Having granted the amendments, the Resident Magistrate went on to order the addition of a 32nd count to the indictment. His note reads:-

"Court as a corrollary to the $3,500.00 transaction earlier - now intimates to Prosecution that Prosecution will be permitted if it desires to add count of Falsification."

The defence objected on the ground that it was taken by surprise, but this objection was over-ruled.

Predictably, the defence made a no case submission basing itself on the grounds that there was no evidence that Barclay's Bank was a Bank within the meaning of the Banking Act and that the microfilms "31(a)", "31(b)", and "31(c)" for identity, were wrongly used by the Crown. The defence was called upon in relation to counts 23, 25, 31 and 32, but elected not to call any evidence. The further submissions were to the effect that "31(a)(b)(c)" were not exhibits and could not be looked to for evidence on which to found a conviction. Notwithstanding the submissions, the appellant was convicted on the four remaining counts.

Mr. Henriques argued five main grounds of appeal. He did not proceed with the first ground which complained that the prosecution failed to prove that Barclay's Bank was a licensed Bank.

Ground 2 was in these terms:-

"That until documents 31(a)(b) and (c) marked for identity were received in evidence and marked as exhibits, the evidence of the handwriting expert ought not to have been received in evidence by the Learned Resident Magistrate".

The record discloses that after the documents were marked "31 for identity", Avis Walker gave evidence that she could identify "31b" and "31c" as copies of the two cheques which she had cashed on 8th November, 1976 by seeing thereon her crossing stamp and her initials. Unfortunately, after this evidence was

received, the prosecution did not seek to tender the documents as exhibits. Nor did the parties in the case treat these documents as upgraded to exhibits. In his findings of fact, the Resident Magistrate recounted evidence which would go to show that the copies of the microfilms were admissible in evidence, but at no time were they formally tendered and admitted. The defence were objecting to their reception in evidence on the ground that there were gaps in the chain of proof as to the making of the copies. It cannot therefore be said that no injustice has been done to the defence when the Resident Magistrate acted on the contents of "31 for identity" and on the opinion of the handwriting expert in relation to them, although they had never been tendered and received as exhibits.

In Ground 2, the appellant complained that in the absence of proof of who was the maker of exhibits 36(a) and (b) the Learned Resident Magistrate ought not to have admitted them in evidence as documents in proof of their contents and he relied upon the decision of the House of Lords in Myers vs. D.P.P. (1965) A.C. 1001, (1964) 48 Cr. App. R. 348. It is difficult to tell from the printed record which witness introduced into evidence the microfilms, exhibit 36, but they are distinctly mentioned as exhibits by the defence attorney in his no case submission. However, it seems that exhibit 36 referred to the microfilms of the two cheques cashed on November 8, 1976, the subject of counts 23 and 25, and the cheque for $3,500 cashed by Jacqueline Pusey on January 18, 1977, the subject of count 31.

We have already adverted to the fact that Derrick McCreath said he could have been the one who did the microfilming on November

8, 1976, but there was no attempt made by the prosecution to show who could have made the microfilm of January 18, 1977.

The facts of the instant case bear a striking resemblance to those in Myers vs. D.P.P. (supra). In that case, manufacturers of cars kept microfilm records of the block number which was indelibly stamped on the engine of each car. The microfilms were prepared from cards filled in by workmen and thereafter the cards were destroyed. The person who was in charge of the microfilm records introduced them into evidence. The House of Lords held that this evidence was hearsay and inadmissible. Myers vs. D.P.P. (supra) was followed in Jamaica in R. v. Homer Williams 11 J.L.R. 185. In the latter case evidence to prove the identification of a bicycle consisted of the testimony of a witness who compared the serial number on the bicycle with the serial number on the importer's invoice, but this invoice had not been prepared by the witness. The appellant was convicted and on appeal it was held that the evidence derived from the invoices was not admissible since it could not be any more admissible than the invoices themselves, and the invoices would not be admissible evidence to prove the serial number unless they were produced by some person who had prepared them or perhaps had witnessed their preparation or had made a physical check of the serial number of each bicycle against the invoices.

The learned Resident Magistrate sought in his findings of fact to equate the original microfilms which were produced from proper custody with one of the books used in the ordinary business of the Bank. Part II of the Evidence Act deals with Banker's Books which are defined to include ledgers, day books, cash books, account

books, and all other books used in the ordinary business of the Bank. Sections 33, 34 and 35 of the Act make provision for the reception in evidence of an examined copy of an entry in a banker's book which is proved to have been one of the ordinary books of the Bank at the time when the entry was made. A microfilm of a cheque is neither a book nor an entry in a book. The cheque itself would not be regarded as one of the books of the Bank. In our view, Part II of the Evidence Act does not provide statutory basis for the reception into evidence of microfilms. We do expect science to be ahead of the legislator but an inconvenience so glaringly demonstrated in 1964 still awaits retification in Jamaica. As Mr. McCreath could not say with any degree of certainty that he had made the microfilms of the two cheques the subject of counts 23 and 25 and as there was no evidence as to who made the microfilm in respect of the cheque for $3,500 the subject of count 31, we are of the view that these microfilms were received in evidence in breach of the hearsay rule.

Mr. Henriques argued the fifth ground, but somewhat faintly, which was in these terms:-

> "The responsibility for the correctness of the indictment lies on Counsel for the prosecution and the Resident Magistrate ought not to have allowed the addition of a new Count (to wit) Count 32 after the close of the Crown's case as the Accused was prejudiced thereby - R. vs. Johal and Ram (1972) 66 Cr. App. R. 348 C.A."

In a trial on indictment in the Resident Magistrate's Court, there is a clear duty on the Resident Magistrate to ensure that the indictment is appropriate to the evidence to be led

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or actually led in the case. It is the Resident Magistrate who makes the order for indictment before the accused can be called upon to plead to the charge - sections 272 and 273 of the Judicature (Resident Magistrate's) Act, and the power of amendment of the indictment reposes in the Resident Magistrate. Section 278 of the Judicature (Resident Magistrate's) Act states:-

> "At any stage of a trial for an indictable offence before sentence, the Court shall amend or alter the indictment so far as appears necessary from the evidence or otherwise, and may direct the trial to be adjourned or recommenced from any point if such direction appears proper in the interest either of the prosecution or of the accused person".

In R. v. Egbert Wilson (1953) 6 J.L.R. 269, the former Court of Appeal had to consider the effect of Section 281 of the Resident Magistrate's Law which was in exactly the same terms as section 278 of the Act quoted above. There the learned Resident Magistrate had ordered that seven counts of falsification of accounts be added to the original indictment which contained but two counts for larceny. He did so at a time when there was no evidence before the Court to support those charges. The Court of Appeal held that the Resident Magistrate was discharging a statutory duty when he ordered the additional counts of falsification. Carberry, J. as he then was, said at page 270 of the Report:-

> "It has been held by this Court that this section imposes a duty on a Resident Magistrate to amend an indictment by adding counts where the evidence makes it necessary to do so....... The Legislature by using the words "or otherwise" in the context "as far as appears necessary from the evidence or otherwise" expressly indicated that the power of amendment was not limited to what was necessary from the evidence, and we are of opinion, that the addition of counts to cover facts in the possession of the prosecution and not yet put in evidence is comprehended by the words "or otherwise"."

This fifth ground of appeal is based on a false premise and fails.

The final ground argued by Mr. Henriques was that the recalling of the expert witness by the learned Resident Magistrate to question him further on 31(a)(b) and (c) marked for identity was improper as it was not done for the purpose of clearing up any ambiguity, but to adduce further evidence highly prejudicial to the accused.

It is undoubted law that a judge has a discretionary power to recall witnesses at any stage of the trial provided that in a case where the judge sits with a jury such recall is prior to the completion of the summing-up. This principle was re-affirmed in R.v. John McKenna (1956) 40 Cr. App. R. 65 where Byrne J. said:-

> "It is, in the opinion of this Court, sufficient to say that the course taken by the learned Commissioner is one which has been recognised as being a perfectly proper course for many years. It is only necessary to refer to Sullivan (1922) 16 Cr. App. R. 121; (1923) 1 K.B. 47, where it is at once to be seen that a judge, in the circumstances in which the learned Commissioner acted in this case, has complete discretion whether a witness shall be recalled, and this Court will not interfere with the exercise of his discretion unless it appears that thereby an injustice has resulted."

McKenna was charged with exporting articles including steam rollers, lorries, tractor engines and concrete mixers against regulations prohibiting the exportation of articles made wholly or partly of iron or steel. At the close of the case for the prosecution, it was submitted on behalf of the defence that there was no case to answer on the ground that there was no evidence that any of the articles in question were made wholly or mainly of

iron or steel. The Commissioner thereupon recalled one of the prosecution witnesses in order to give evidence of the materials of which the articles were made and, after the witness had given evidence, ruled that, there was a case to go to the jury.

The Court of Criminal Appeal held that there was no injustice and added that in their opinion without the evidence of the recalled witness there would have been sufficient evidence for the case to have gone to the jury.

In the instant case, the learned Resident Magistrate had prevailed upon the prosecution not to lead any evidence from the handwriting expert in relation to count 31 of the indictment and at the end of the prosecution's case, the prosecutor expressly abandoned the count. At the same time the prosecutor abandoned all but six of the then 31 counts of the indictment. Had the defence counsel made their submissions that very afternoon, there would have been no question of the resurrection of count 31. The addition of count 32 was wholly dependent upon count 31 and if the evidence to support count 31 was improperly admitted count 32 would be bound to fail.

We are of the view that distinct injustice would be done to the appellant in relation to counts 31 and 32 if the convictions on those counts were allowed to stand. The appellant had gone away from Court on the 2nd June 1978 in the safe knowledge that no further evidence would be offered on count 31. The prosecutor

at the instigation of the learned Resident Magistrate had said so and there the matter ought to have been allowed to rest.

It is for these reasons that we allowed the appeals, set aside the convictions and quashed the sentences.