C.H. ... Evidence — whether inadmissible relied on by R.M. — whether facts found by R.M sufficient to constitute the offence charged — Appeal dismissed

Cases referred to
① Radcliffe v Reginam (1971) 3 All E.R. 801
② R v Kellett (1975) 3 All E.R. 468
③ Regina v Toney Times Law Reports, 15/12/92 p608 and 609

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 16/93

Evidence
Criminal Practice

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA VS. MARY LYNCH

Frank Phipps, Q.C. & Anthony Pearson for the appellant.

Terrence Williams for the Crown

June 7, 8, 9, 28, 1993

DOWNER, J.A.

In this appeal, Mary Lynch seeks to set aside the conviction and sentence imposed on her 26th March, 1993 by Her Honour Miss Gloria Smith exercising criminal jurisdiction in the Resident Magistrate's Court at Half Way Tree. The sentence was six months hard labour on count 2 of an indictment which charged her with attempting to pervert the course of justice. The particulars of the offence read as follows:

> "Mary Lynch on the 10th day of December, 1992 in the parish of St. Andrew attempting to obstruct impede and pervert the due course of public justice did certain acts which had a tendency to pervert the course of public justice to wit: unlawfully and unjustly dissuading, hindering and intimidating Lorna Williams in order that the said Lorna Williams might alter her deposition given before a Resident Magistrate on the preliminary enquiry of the Regina vs. Mary Lynch for murder."

" 9. That as a result of this, Williams became very disturbed and therefore sought advice."

The supplementary grounds of appeal, argued by Mr. Phipps challenged the admissibility of the words spoken by Lynch's cousin, so it is important to advert to the context in which these words were used.

In recording the evidence of Lorna Williams sequentially, Her Honour recalled that:

> "Her cousin seated on bench spoke - She said 'Thats why dem have fe kill some of them.' Cousin spoke about ten seconds after Mrs. Lynch had spoken - I did not like the statement that was made. I was disturbed when Mrs. Lynch spoke to me - She was making a statement. She was telling me something. She was not telling me in a pleasant manner. Previous to that occasion Lynch has spoken to me in that manner.
>
> Mrs. Lynch is sometimes aggressive - I say that because of the way she behaves in respect of everybody - including myself.
>
> After that day I did not report the matter to the Police. I spoke to someone about the matter and I received certain advice. I later spoke to the Police."

The crucial feature of this aspect of the eivdence is that the words of Mary Lynch and those of her cousin were almost simultaneous with an interval of about ten seconds between them. Further, those words explained why the complainant sought advice. Firstly, she was disturbed by the words the appellant used and the manner in which they were delivered. Secondly, the words used by the cousin featured among the factors which impelled her to go to the police.

Against this background, it is now appropriate to consider the issues raised on appeal.

Was inadmissible evidence relied on by Her Honour to record an adverse finding against the appellant?

It was contended by Mr. Phipps that the surrounding circumstances referred to by Her Honour in her findings at paragraph 12 were the words uttered by the complainant's cousin who was not called to give evidence. Further, it was contended that these words were used to infer the intent of the appellant. An examination of the necessary findings of the Resident Magistrate does not support this submission. Once the court accepted that the appellant used the words in issue, the manifest intent of the appellant, was her attempt to get the complainant Lorna Williams to alter her deposition, which she had just made at the preliminary enquiry. This enquiry was in respect to a charge of murder preferred against the appellant. The intent was inferred from the words used by Mary Lynch.

In addition to those words used, the court found that the appellant Lynch was accompanied by her mother, her two cousins, and a gentleman, and that they surrounded the complainant when the words were used. The action of surrounding the complainant was capable of "intimidating" as averred in the indictment. The necessary inference was that the Resident Magistrate found intimidation.

We now turn to the threat by the cousin which was relied on by the appellant as being hearsay and so inadmissable. Since they were simultaneous with the words used by Mary Lynch, they were relevant as being part of the sequence of events which persuaded the complainant to report the matter to the police. The well-known citation by Lord Wilberforce in Ratten v. Reginam (1971) 3 All E.R. 801 at p. 805 is appropriate to explain the legal significance of these words. It reads thus:

> "... In their Lordships' opinion the evidence was not hearsay evidence and was admissible as evidence of fact relevant to an issue.
>
> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', i.e. as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in Subramaniam v. Public Prosecutor (1950) 1 WLR 965 at 970.:
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> > 'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.'
>
> A fuller statement of the same principle is provided by Dean Wigmore in his work on Evidence. He emphasises, as their Lordships would emphasise, that the test of admissibility, in the case last mentioned, is relevance to an issue."

The purpose of referring to the words used by the cousin was to show their effect, on the mind of the complainant. Those words helped to persuade her to seek advice and ultimately led her to report the matter to the police. Paragraphs 11-23 of 43rd edition of Archbold helpfully cited by Mr. Phipps supported this contention. It is derived from Ratten (supra) p. 806, and it reads:

" 2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e. are the relevant facts or part of them."

Equally instructive for this case is the preceding paragraph on the same page. It runs thus:

" 1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing, in a broader sense, what was happening. Thus in O'Leary v. Regem (1946) 73 CLR 566, evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J. said (1946) 73 CLR at 577:

'Without evidence of what, during that time, was done by those men who took any significant part in the matter and specially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.'

What is the test laid down for admitting the words used by the cousin. At p. 807, Lord Wilberforce in Ratten puts it thus:

"... But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression 'res gestae' may conviently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings."

A Resident Magistrate is obliged by section 291 of the Judicature (Resident Magistrates) Act, to:

> "Record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded."

This statutory formula follows closely the course of the common law provisions, for a Special Verdict in the criminal law. Here is how Archbold states it in the 36th edition at paragraph 586:

> "... Such verdict must state positively the facts themselves, and not merely the evidence adduced to prove them, and all the facts necessary to enable the court to give judgment must be found:"

A classic example of a Special Verdict is to be found in The Queen vs. Dudley & Stephens (1884-85) 14 Q.B. 273. In recording the findings on which the verdict of guilty is found, it is necessary for the Resident Magistrate to set out the facts in summary form, so as to enable the court to give judgment. By so doing, the facts on which the verdict of guilty is found, can be put in its proper context. The manner of recording the facts in this case which was of some difficulty, was exemplary. This ground of appeal therefore fails.

Were the facts found by the Resident Magistrate sufficient to constitute the offence as charged?

Mr. Pearson on behalf of the appellant contended that the facts as found, were not capable of constituting the offence charged and he relied on R. v. Kellett (1975) 3 All E.R. 468 and Regina v. Toney Times Law Reports pp. 608 and 609 dated December 15, 1992. Since Mr. Williams for the Crown relied on Kellett (supra) from the outset of these proceedings, it is important to examine it.

> "... it is the course of justice to which the conduct is directed and that is what must be protected in every case, not the justice of the result in the particular case. Once legal proceedings have set the course of justice in motion, it is important that it should be allowed to flow unobstructed and undiverted, and that perjury should be exposed and truth ascertained only by examination and cross-examination of witnesses in open court and justice should be administered in the way which is ordinarily pursued: Skipworth's Case per Blackburn. (1873) L.R. 9 Q.B. 230 at 233."

Mr. Pearson was prepared to assume that the finding that the words used by the appellant was correct. Even so he contended that the appellant and the complainant were friends for upwards of 25 years and the words used were but a cordial attempt to persuade her to recall the truth. Such a submission ignores the fact that the complainant was skilfully cross-examined in this regard by Mr. Pearson, and despite that, the appellant sought to have the complainant alter her deposition. Moreover, the circumstance which obtained, having regard to the finding that the complainant was surrounded by members of the appellant's family, was that intimidation was to be inferred. Accordingly, this ground of appeal also fails.

Therefore the appeal is dismissed, the conviction and sentence is affirmed, the sentence to run from the date of conviction.