

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 3/2015

**BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)**

TAFFAINE ROWE v R

Melford Brown and Kristoff Brown for the appellant

Miss Sasha Marie Smith and Mrs Kimberly Dell-Williams for the Crown

2 December 2015

ORAL JUDGMENT

BROOKS JA

[1] The appellant Mr Taffaine Rowe was convicted in the Resident Magistrate's Court for the parish of Saint Elizabeth on 26 November 2014 for the offences of possession of and dealing in, ganja. He was fined \$15,000.00 in respect of the offence of possession and \$131,200.00 in respect of the dealing.

[2] Mr Rowe has appealed against his convictions and sentences. He filed nine grounds of appeal as follows:

- "1. That the learned Resident Magistrate Her Honour MRS. SONYA WINT-BLAIR, erred in her verdict delivered on the 26th day of November 2014.
2. That the exhibits were not tendered in court or an explanation given for its absence.
3. That the Defendant/Appellant was denied the opportunity to cross examine on the exhibits.
4. That there was no identification of the Defendant/Appellant.
5. That there was a discrepancy in the weight of the ganja.
6. That the Certificate states that the ganja was labelled "A", "B" and "C" whilst the Certificate receipt states that the ganja was labelled "A", "B" and "A".
7. That no evidence was given by the person who collected the certificate from the Analyst.
8. That only part of the ganja was tested.
9. That the verdict is unreasonable and cannot be supported by the evidence."

[3] The grounds may however be grouped under three headings namely:

1. Error in the identification of the accused.
2. Error with the exhibits.
3. Error in the verdict.

[4] Before examining these headings, it is necessary to give a brief outline of the evidence that was adduced by the prosecution in its case against Mr Rowe.

The prosecution's case

[5] Detective Corporal Kerry-Ann Maitland was with a party of police officers that went into the Homestead area of Saint Elizabeth on 11 August 2012. On approaching a hut in bushes there, she saw several men attending to vegetable matter that was on a tarpaulin. The substance resembled ganja.

[6] On the approach of the police, the men ran in different directions but she held on to one, whom she identified as Tafari Rowe. The first name of the person is important. Apparently all the other men escaped because it was only the vegetable matter, which the police placed in three bags, and Mr Tafari Rowe, which were taken to the police station. There, Mr Tafari Rowe was arrested. On being cautioned he said "officer a just help mi a help out". In cross-examination, Detective Corporal Maitland said that the vegetable matter weighed 56 pounds. She later agreed with a suggestion made by defence counsel, that it weighed 55 pounds.

[7] On a later date, Detective Corporal Maitland took the bags with their contents to the Forensic Laboratory. She received a receipt for them. Some months later, she sent the receipt by way of another police officer to the Forensic Laboratory. That other police officer, later that day, gave her a certificate from a forensic analyst that bore the same Forensic Laboratory identification number that was on the receipt.

[8] The certificate was submitted in evidence before the Resident Magistrate. It identified the relevant case as being Regina vs Taffaine Rowe for possession and dealing in ganja. The name Taffaine Rowe was that which was placed on the two

information forms to which Detective Corporal Maitland swore on 14 August 2012. The certificate showed that the vegetable matter in the bags was ganja and that it weighed 41 pounds. Detective Corporal Maitland testified that that was the "official weight".

The error in the identification of the accused

[9] The error in the identification was not restricted to the fact that Detective Corporal Maitland testified that she arrested Tafari Rowe but laid two information forms against Taffaine Rowe before the court. She also failed to identify, in court, the person whom she testified that she saw with the vegetable matter. More specifically, it does not appear that she was asked by the prosecutor to identify the person.

[10] The failure is fatal to the conviction. It is essential, unless the defence indicates that identification is not in issue, that the prosecution identifies the person that it asserts is the offender.

[11] This was established in the case of **Saunders v Johns** [1965] Crim LR 49. The note for that case states in part:

"The defendant was charged with exceeding the speed limit; at the beginning of the hearing his solicitor said that the issue was one of identity. A constable gave evidence that he had stopped the driver of a car which had been speeding; he gave no evidence identifying the defendant as the driver. The defendant's solicitor submitted "no case," but was overruled, the justices giving as their reasons that the defendant had appeared at court, that he had received the statement of facts, and that the driver of the car had prima facie committed an offence. The defence closed its case without calling any evidence. The justices then recalled the constable, who gave further evidence that he had inspected the driver's licence, and that the name and address therein

were the name and address of the defendant. The defendant was then convicted.

Held, allowing the defendant's appeal, that no prima facie case had been made out at the close of the prosecution case. The relationship between the name on the summons and the statement of facts did not provide any evidence that the defendant was the offending driver. To recall the constable after the defendant's case was closed was clearly wrong." (Italics as in original)

[12] In the present case, Mr Rowe's counsel made a submission of no case to answer, on a number of bases, including the fact that Mr Rowe had not been pointed out in court. Despite that prompt, the prosecutor did not seek to have the omission corrected. The learned Resident Magistrate also failed to have the omission addressed. She ruled that there was a case to answer. She erred in that regard.

[13] The learned Resident Magistrate was entitled, in the absence of the prosecution seeking to do so, to ask Detective Corporal Maitland about the then whereabouts of the person whom she had arrested.

[14] Lord Parker CJ stated in **Saunders**, that that could have been done. He said:

"As soon as the submission of "no case" was made the prosecution, or the court of its own motion, should have recalled the constable and obtained the evidence about the licence, showing that there was a prima facie case."

Whereas the finding under that heading is sufficient to quash the conviction, it may be helpful to re-state certain principles with respect to exhibits.

Error with the exhibits

[15] **R v Jadusingh** (1964) 8 JLR 407 is authority for the following principles:

- (1) The fact that there had been tampering with or removal of exhibits after they had been tested and certified by the forensic analyst would not by itself preclude the Resident Magistrate from making a finding of fact as to the nature of the exhibit.
- (2) The Resident Magistrate in the absence of the exhibit, is entitled to consider the contents of the forensic certificate together with any other evidence, including statements made by the accused, in making a finding of the nature of the substance forming the items seized.
- (3) If there is clear and convincing evidence as to what is the substance involved, the Resident Magistrate is entitled to find it to be such, despite its absence from court.

These principles may be considered in answer to two of the complaints made by Mr Rowe with respect to:

- (a) the absence of the exhibit from court, and
- (b) the discrepancy in the weight of the exhibit.

[16] There were three other complaints in respect of the exhibits. There was a complaint about a defect in the certificate. The certificate stated at one point that the three bags containing the vegetable matter was labelled "A", "B" and "A" respectively. The identification was clearly a typographical error as at other places in the certificate, the exhibits are identified by the letters A B and C respectively.

[17] The second complaint was that only a part of the substance was tested. The complaint is without merit in terms of the conviction.

[18] The analyst is entitled to take and test samples from the substances submitted. Unless there is other evidence to suggest that the substance is not homogenous or had apparent differences, the court is entitled to find that the sample accurately represented the whole.

[19] To put the analyst to the task of testing the entire item presented (which could conceivably be tons of a substance) would be impractical.

[20] The third complaint is that there was a break in the chain of custody for the production of the analyst's certificate. The police officer to whom Detective Corporal Maitland gave the receipt, and who gave the certificate to her, did not give evidence.

[21] This gap is also not necessarily fatal to the prosecution's case although each case will be dependent on its own facts. The principle is that "[p]roof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibits integrity" (see paragraph [12] of the judgment of Baptiste JA in **Hodge v R** (2010) 77 WIR 247).

[22] That principle was adopted by this court in **Brooks v R** [2012] JMCA Crim 5 (see the judgment of Morrison JA at paragraph [45]).

Conclusion and disposal

[23] Having found that the conviction cannot stand in light of the error in the identification, it is unnecessary to consider the issues involving an error in the verdict.

[24] Before parting with this appeal we must express our gratitude to counsel for the Crown, Ms Smith and Mrs Dell-Williams, for their candid approach in conceding that the conviction could not stand, and their helpful research of the relevant authorities.

[25] Based on the above analysis the orders are as follows:

- (1) The appeal is allowed
- (2) The convictions are quashed and sentences are set aside.
- (3) Judgment and verdict of acquittal are entered.
- (4) The sums paid by the appellant as fines are to be refunded to him forthwith.