

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 18/2013

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA**

WINDELLA SANDERSON v R

Lambert Johnson and Miss Kadian Myers for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Lori-Anne Cole-Montaque for the Crown

10, 11 December 2013 and 7 February 2014

BROOKS JA

[1] On 1 June 2012, when he heard that Ms Windella Sanderson, against whom complaints of criminal offences had been made, was at the airport intending to board a flight out of the island, Detective Constable Jeffery Charlton acted swiftly, too swiftly. He contacted the Area One Fraud Squad of the Jamaica Constabulary Force and had Ms Sanderson arrested and taken from the airport to the Negril Police Station, at which he was stationed. There, she was placed in the lock-up. The difficulty was that it was only after securing Ms Sanderson's arrest that Detective Constable Charlton commenced his investigation into the complaints that had been made to him against her.

[2] Ms Sanderson was eventually convicted of six counts of obtaining money by false pretences. The learned Resident Magistrate for the parish of Westmoreland, before whom the case was tried, sentenced her, on 21 June 2013, to serve nine months imprisonment at hard labour on each count. The sentences were ordered to run concurrently.

[3] Mr Johnson argued Ms Sanderson's appeal against her convictions and sentences. After hearing his submissions, as well as the concession of the learned Director of Public Prosecutions, we allowed the appeal, quashed the convictions, set aside the sentences and substituted a judgment and verdict of acquittal. We now fulfil our promise, made at that time, to put our reasons in writing.

[4] The complaints against Ms Sanderson arose from the fact that she had collected money from several persons on the basis that she would secure employment for them to work in the United States of America, but had failed to deliver on her promises. In cross-examination, Detective Constable Charlton testified that when he had had Ms Sanderson removed from the airport, he had not yet ascertained whether she was licensed by the Ministry of Labour to be involved in that activity. He said that he subsequently made those enquiries and discovered that she did have a licence and an established office, from which she operated, at Whitehouse in the parish of Westmoreland.

[5] Despite his discovery of her status, Detective Constable Charlton charged Ms Sanderson with 99 counts of obtaining money by false pretences. All 99 were included

in an indictment proffered against Ms Sanderson, but only six of those counts were pursued; no evidence having been offered on the others.

[6] In her concession that Ms Sanderson had been wrongly convicted, the learned Director of Public Prosecutions was scathing in her comments on the entire process; from Ms Sanderson's arrest through to the preparation of the record of appeal. The learned director was justified in her comments. Happily, Ms Sanderson had been granted bail pending appeal.

The evidence presented

[7] The evidence adduced by the prosecution at the trial may be summarised as follows:

1. On 7 February 2012 Ms Sanderson was issued a licence by the Ministry of Labour to carry on an employment agency under the name Sands International Employment and Travel Agency. The licence was valid for a year and allowed her agency, subject to certain exclusions, "to place persons in employment outside of Jamaica".
2. On various dates between March and April 2012 Ms Sanderson sought and received monies from each of the virtual complainants. This was on the basis that she was able to secure employment and H2B visas to allow them to work in the hospitality industry in the United States of

America. An H2B visa is what is required for persons approved for employment in that industry. Ms Sanderson promised that the first batch of persons to be employed would go away in April and the next batch in May 2012. The monies collected were to cover registration, air fare and "visa voucher".

3. April went by without any of the virtual complainants being afforded the opportunity to go to the United States. Ms Sanderson gave various excuses for her failure to deliver on her promises. Among those excuses was that she had made some errors in the process and the United States Embassy was "pushing her around". She indicated that she was attempting to secure another type of visa, a Q1, for her clients instead of the H2B.
4. Some time late in May, no employment or visas having been secured, Ms Sanderson offered refunds to some of the virtual complainants. She promised to give them refunds, but on the very date on which some of the refunds were to have been paid over, Ms Sanderson was attempting to leave the island, without having made good on her promise.

5. An official from the Ministry of Labour testified that some of the charges that Ms Sanderson had made for her services were prohibited by the regulations governing her licence. The official also testified that persons applying for an H2B visa would not normally qualify for a Q1 visa, as the former was designed for skilled workers while the latter was designed for college graduates. He testified that the normal processing time for H2B visas would be three months. It was normal, he said, for air fare to be collected after the visa had been granted, and not before.

[8] In her defence Ms Sanderson made an unsworn statement. In it she stated that she lived in the United States and operated an employment and travel agency there. In expanding the operation to Jamaica she said that she applied and secured the relevant licence and was seeking to get employment for her clients in accordance with the licence. She stated that in addition to charging a registration fee, she charged her clients for preparing resumés for each of them.

[9] She stated that she had never stolen from anyone and that she was trying to help her clients not defraud them. She called a character witness who testified that he had never known her to be involved in any wrongdoing.

The learned Resident Magistrate's findings

[10] In her assessment of the evidence presented before her, the learned Resident Magistrate was satisfied that Ms Sanderson had induced the virtual complainants to part with their money on the basis that they would be leaving Jamaica to the United States on an H2B visa. The learned Resident Magistrate found, from Ms Sanderson's subsequent representations to the virtual complainants and her attempt to leave the island, that she "had an intention to defraud the complainants" and that she was seeking to leave "without making good on her several promises to refund monies she had received" (page 281 of the record).

[11] The learned Resident Magistrate found that Ms Sanderson "was misrepresenting her readiness to enable the complainants to leave Jamaica on the H2B visa programme by giving them departure dates when they were yet to even visit the Embassy and acquire visas or be accepted by an employer". She opined that the licence had been issued to Ms Sanderson on the basis that she had jobs available for persons to be employed. In the circumstances, the learned Resident Magistrate was puzzled by Ms Sanderson's excuses to the virtual complainants "about having problems with the petition [for the visas] and the Embassy".

The grounds of appeal

[12] Ms Sanderson's grounds of appeal may be summarised as follows:

1. The learned Resident Magistrate fell into grave error by not acceding to a submission of no case to answer, as

the existence of a licence went to the heart of the false pretence as pleaded in the indictment.

2. The learned Resident Magistrate erred in allowing amendments to the indictment which left the defence in doubt as to the charges against Ms Sanderson.
3. The learned Resident Magistrate failed to take into account that the time frame between collection of the money and Ms Sanderson's arrest, was not sufficient to allow her to discharge her contractual obligations.
4. The verdict is unreasonable having regard to the evidence.
5. The learned Resident Magistrate erred in failing to take into account the character evidence given on behalf of Ms Sanderson.
6. The learned Resident Magistrate erred in failing to allow a plea in mitigation before passing sentence.

[13] In this appeal, Mr Johnson reinforced the point that he made before the learned Resident Magistrate, namely, that this was a case involving, at best, a breach of contract. It was, therefore, he submitted, not a case for the criminal courts but was purely contractual in nature and should have been aired in the civil court.

The analysis

[14] An essential element to this case was whether Ms Sanderson was licensed to perform the services that she had told the virtual complainants she would have done for them. The licence did allow her to perform those services. The witness from the Ministry of Labour sought to suggest that the charges imposed by Ms Sanderson were improperly charged. That, however, was not the basis of the criminal charges, although the imposition could have been combined with other evidence to reveal a dishonest intent. The difficulty is that there was no other evidence of any false pretence being made in order to secure the payment by the respective complainants.

[15] One of the flaws in the learned Resident Magistrate's reasoning is that, although she stated that the burden of proof lay on the prosecution, she seemed to have required Ms Sanderson to show that she had taken steps to secure visas for the virtual complainants. In her reasons for judgment she stated, in part, that there was no evidence that Ms Sanderson made any effort to perform the promised services. The learned Resident Magistrate said, at page 280 of the record:

"There has been no evidence of even a glimmer of an effort on the part of the defendant to do what she represented she could do."

[16] She found that the absence of any evidence to that effect, combined with what she regarded as lies by Ms Sanderson, in explaining the failure to deliver the expected visas, amounted to evidence of a dishonest intent. That reasoning was flawed.

[17] There is no shift of the burden of proof in charges, such as the ones laid against Ms Sanderson. It was the prosecution which had the burden of proving that Ms Sanderson had taken no step to secure the visas for her clients. The learned Resident Magistrate did say that she accepted that the burden lay on the prosecution, but apparently lapsed in seeking some explanation from Ms Sanderson.

[18] The learned Resident Magistrate cited **R v Bancroft** (1903) 3 Crim App Rep 16 in the context of the absence of evidence that any of the virtual complainants was granted an interview at the United States' Embassy. **R v Bancroft** is distinguishable from the present case and does not assist the learned Resident Magistrate's reasoning. The principle to be derived from that decision in that case is that, a "promise to do something in the future may imply a representation as to an existing fact which, if false, may be a sufficient false pretence to sustain an indictment".

[19] That facts in **R v Bancroft** were that Mr Bancroft, had solicited and received money in March and April of 1909 for advertisements to be placed in a book which was to be published "early in May [of that year] without fail". The book was never published and Mr Bancroft was arrested on 1 July of the same year. The technology now used in the publishing industry was not then available. The Lord Chief Justice, during the course of submissions by counsel, made the point that a "book cannot be published in an hour or in a day or in a week". In that case it had been proved that Mr Bancroft could not possibly have fulfilled his representations to his victims as there was nothing in place for him to have done so.

[20] Ms Sanderson's position was different. She had a licence to do what she said that she could do. That licence was secured upon the Ministry of Labour satisfying itself that she was in contact with employers who were in a position to hire workers from Jamaica. The necessary groundwork was therefore in place for her to do what the licence entitled her to do. The fact that she did not achieve her stated goals is not, by itself, sufficient to prove that she had no intention of doing so.

[21] We agree with Mr Johnson and the learned Director of Public Prosecutions that the learned Resident Magistrate drew incorrect conclusions from the evidence and as a result arrived at the wrong verdict. That verdict, therefore, had to be reversed.

[22] Mr Johnson is also correct in his submission that the learned Resident Magistrate did not direct herself on the issue of Ms Sanderson's character. Ms Sanderson specifically raised that issue as part of her defence. The issue was important to the defence and the failure to address it was also fatal to the conviction. In light of these two findings it is unnecessary to address the other grounds of appeal.

[23] Before concluding this appeal, however, it must be noted that in drafting an indictment consisting of 99 counts, the prosecutor failed to heed the guidance given by this court in **R v Errol Salmon and Others** (1977) 15 JLR 219. In that case Watkins JA addressed the disproportionate use of the resources of the court and the futility and confusion involved in burdening an indictment with so many counts, especially in the Resident Magistrates' Court. He said, at page 226:

"...in view of the fact that no more than two consecutive sentences of imprisonment for felony, one to follow the other, may be imposed upon a prisoner it seems entirely beyond all reason that so many counts [forty-nine] should have been thought necessary to be laid. In the result on nine counts of the indictment on which [one appellant's] convictions have been upheld and on nineteen counts of the indictment on which [another appellant's] convictions have been upheld they will undergo terms of imprisonment amounting in the one case to two years and in the other to one year.... [For] over a period of twelve days this indictment occupied the attention of the lower court. Without injury to the interests of justice, an indictment relieved of so many unnecessary counts, might have been disposed of within three days with the same effective results. The confusion to which over-burdened indictments may give rise and the injustices to which they are susceptible may be gleaned from the calamities which occurred in this case....The appeal occupied four full days in this court. Nor must one fail to mention the unnecessary financial burden on the public treasury of such a trial and the injustice on accused parties upon whom equally unnecessary burdens of legal representation are cast. It is to be hoped that an indictment such as this will never again appear on the records of our criminal courts."

[24] Prosecutors are reminded that when faced with a large number of informations against the same accused dealing with similar offences, they do have an alternative to charging all those counts on a single indictment. They are entitled to ask for an order for indictment in respect of the number of counts that they think will achieve the interests of justice, and ask that the remainder of charges, set out in the other informations, "lay on file", and not be proceeded with without the permission of the court (see **Connelly v DPP** [1964] AC 1254 at pages 1359-1360). The dictum recommending that process was issued in reference to an indictment, but there is no reason for the principle not to be applicable to informations.

[25] Clerks of court are also reminded of the care that they should exercise when certifying a record of appeal for the use of this court. The record in this case was presented to the court without an important portion, namely the aspect dealing with the submission of no case to answer. No doubt, this situation was facilitated by the fact that the evidence was heard over the course of several days, spread over the period September 2012 to May 2013. Clerks of court must, however, despite their busy schedules, take the time to ensure that their certificates as to the accuracy of the records are reliable.

Conclusion

[26] Ms Sanderson's licence, issued by the Ministry of Labour, entitled her to make the representations that she made to the virtual complainants. The fact that she did not make good on those representations within the time frame that she promised, was not, by itself, sufficient for her to be arrested, charged and convicted as she was. The investigating officer acted precipitously in having her detained, merely on the basis that she was about to leave the island. He compounded that error by not providing the prosecutor with evidence that Ms Sanderson had failed to take any step to secure the visas and employment that she had promised her clients.

[27] It is for the reasons mentioned above that we made the orders set out in paragraph [3] above.