

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 15/2013

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)
THE HON MISS JUSTICE MANGATAL JA (Ag)**

ASSAN THOMPSON v R

Bert Samuels instructed by Knight, Junor & Samuels for the appellant

Leighton Morris for the Crown

11 June and 19 December 2014

PANTON P

[1] The appellant was convicted on 4 January 2013, by Her Honour Mrs Stephane Jackson-Haisley, Resident Magistrate, sitting in the Corporate Area Resident Magistrate's Court for a breach of section 15(2)(c) of the Corruption (Prevention) Act. He was fined \$50,000.00 with an alternative of three months imprisonment. The fine has been paid.

[2] The allegations at trial were that he "failed without reasonable cause to provide the Commission with an estimate of cost/Quantity Surveyor's Report in relation to 309 Pines of Karachi, 16 Pine Boulevard, Kingston 6, requested under Section 7 of the Corruption Prevention Act".

The grounds of appeal

[3] The appellant filed four grounds of appeal on 21 January 2013 as follows:

- i. That the Learned trial Magistrate erred in that she rejected the no case submission made by the Defence at the end of the Prosecution's case.
- ii The learned Resident Magistrate erred in law in that in essence she treated the offence as one of strict liability and so failed to examine properly or at all the evidence adduced by law [sic] the prosecution and defence [sic] which negated mens rea.
- iii. The evidence adduced by the prosecution and the defence demonstrated that the defendant took all reasonable steps to satisfy the requests of the commissioners.
- iv. The Learned Resident magistrate [sic] failed to comprehend the difference between "an estimate" and "actual cost" and by virtue of an important aspect of the defendants [sic] defence and his attempts to satisfy requests made of him."

On 13 May 2014, an additional ground was filed. It reads:

"The learned magistrate failed to appropriately assess the evidence and in particular that which related to the need for the prosecution to prove that the Appellant's failure to provide the Commission with an estimate of cost/Quantity Surveyor's Report was without reasonable cause."

A further ground of appeal

[4] On 11 June 2014, at the commencement of the hearing, we gave the appellant leave to argue the following further ground of appeal that was filed on that very day. It reads:

"The learned Resident Magistrate misled herself on the law when she classified the nature of the offence for which the appellant

was charged under section 15 (2) (c) of the Corruption (Prevention) Act as "essentially an act of corruption."

In relation to this further ground of appeal, an examination of the record reveals that the learned Resident Magistrate said this:

"During Mr Thompson's testimony he gave evidence that amounts to evidence of his good character and so I have to consider whether or not someone of his good character would have had the propensity to commit an offence of this nature, essentially an act of corruption. I have given consideration to this."

[5] It is clear that the learned Resident Magistrate was referring to section 15(1) of the Corruption (Prevention) Act which reads:

"Any person who commits an act of corruption commits an offence and is liable –

(a) on summary conviction in a Resident Magistrate's Court ..."

However, as Mr Bert Samuels for the appellant has pointed out, this subsection does not relate to the charge before the court. The fact is that the appellant was charged under section 15(2)(c) which makes no reference to "an act of corruption". Mr Leighton Morris for the prosecution quite rightly conceded that the learned Resident Magistrate erred in this regard. In fact, he described it as an "unfortunate use of the term", but added that "there was no contamination of her mind".

[6] The question to be determined is whether that lapse on the part of the Resident Magistrate affects the conviction. It needs to be immediately appreciated that the mere

fact that an error has been made in this regard does not necessarily mean that the conviction is bad.

[7] Section 15(2) of the Act which the Resident Magistrate found was breached reads thus:

“Any person who –

- (c) fails, without reasonable cause, to give such information as the Commission may require under section 7 ... commits an offence.”

In the instant case, the appellant having complied with the requirement to submit a statutory declaration of his assets was required by the Commission to furnish further information for the consideration of the commission. To this end, he was summoned to appear before the commission. He did so with his attorney-at-law, Mr Michael Howell on 14 October 2010. The charge has its origin in what transpired at that meeting.

[8] It seems that the meeting was brief. The commission members present were the chairman, the Honourable Mr Justice Chester Orr (retired), the Honourable Mr Justice Wesley James (retired) and the Honourable Adrian Strachan. The transcript reveals that the Honourable Adrian Strachan stated that having examined the information provided up to then by the appellant, it seemed that “the major outstanding item is the lack of an estimate of the construction costs to [sic] the house in the Karachi area”. He added that he believed that was “the stumbling block”. The commission, said the Honourable Adrian Strachan, was not able to conclude the assessment on the information provided

in the absence of that information. He said that if the information was obtained and provided within a month, the commission would then be in a position to determine how to proceed in the future.

[9] Nearing termination of the meeting, this exchange took place between Mr Howell and the Honourable Adrian Strachan.

“Mr Howell : Just a further clarification. You had said you are not interested in any current values of the property; all you want to know is what the actual cost was.

Mr Strachan: If you want to provide the value, but it is not really the value we are after because as I said that can change with the market; the market puts it up and the market value is likely to be much higher than the cost of the actual construction especially with the passage of time. So what we really are after is what was actually spent in putting up the construction.

Mr Howell: And whatever was spent over whatever period of time it took to complete the property?

Mr Strachan: Yes.

Mr Howell: Okay. I think we understand that.

Mr Strachan:

Mr Howell: So I take it that you are asking us to provide this information within the next thirty days and at that point we can set a date to recommence this activity?

Chairman: Yes.

Mr Howell: That's fair enough.

Chairman: If necessary.

Mr Howell: So it may not be necessary.

May it please you, Chairman. So we can vice at this time?

Chairman: Yes."

At that point, the meeting was adjourned.

[10] The deadline of 30 days expired on 13 November 2010 but the commission did not hear from the appellant. On 3 February 2011, that is, 82 days after the deadline, the commission wrote to the appellant "requesting that the documents be furnished within 14 days". It was not until 14 months after the deadline had passed that the appellant submitted a "project report" with a total estimated construction cost (at year 2000) of just over \$4.500,000.00.

[11] It is clear that the appellant did not comply with the request of the commission within the time specified. So, clearly, there was a case for him to answer. In his evidence, he said that he took out a mortgage to purchase a service lot at 309 Pines of Karachi through the National Housing Development Corporation. He started construction in 2000. He said he could not afford a contractor so he decided to supervise the construction himself, while engaging the services of a mason and a carpenter. The mason was murdered. He employed another who died of natural causes. Since 2003 he had been making his statutory declarations and it was not until 2010 that the commission expressed a concern.

[12] The appellant said that he submitted certain documents at the commission's request but Mr Strachan (one of the commissioners) wished an estimate of what it

actually cost him to build the structure. He searched for receipts and bills and made contact with the third mason he had employed, but who was now overseas. He submitted the documents in relation to the roof. He then received a letter from the commission's secretary with the caption "Estimate/Quantity Survey". According to the appellant, up to the time of the receipt of that letter "what was in [his] head was an estimate to get documents to bring to the Commission". The appellant, in his evidence before the learned Resident Magistrate, detailed his visits to hardware stores in "inhumane [and] dusty conditions" seeking documentary evidence and as well as visits to dangerous inner city areas to consult with men who had worked on the project.

[13] The commission's secretary, not having received the information requested of the appellant, wrote to him on 3 February 2011 as follows:

**"Re: Request for Quantity Surveyors Report in Relation to
309 Pines of Karachi – 16 Pine Boulevard Kingston 6**

At the meeting of the Commission attended by yourself and your Legal Representative held on October 14, 2010; the Commission requested that the above captioned be provided.

The notes of the meeting indicated that a time line of one (1) month was given which to the date of this letter has not been complied with.

The Commission is requesting that the documents be furnished within 14 days."

This letter, the appellant said, "further cemented in [his] head that the commission would be speaking to a number of papers [he] was gathering". So, according to him, he "exercised more obedience in carrying out further diligent searching to find these

documents". Eventually, he secured the services of a quantity surveyor who produced the project report referred to earlier.

[14] Under cross-examination, the appellant said that at the time the project report was prepared he "had found a lot more documents than before". The following exchanges took place between the appellant and the prosecutor, Mr Dirk Harrison:

"Question: You understand that you were being asked to say the actual money spent in putting up the constitution [sic]?"

Answer: Yes and that's what I set out to do.

Question: It is only on the 16th April, 2012 that you provided this cost, almost two years later?

Answer: I did submit documents to Mr Grey as I found them. If he accepted the documents we would not have to be here.

Question: The documents you submitted did they speak to the actual cost in [sic] putting up the construction?

Answer: No."

[15] The learned Resident Magistrate stated her understanding of her role in determining the issues. She said that she had first to determine whether the documents submitted by the appellant constituted compliance with the request of the commission. Going by the last answer given by the appellant above, the learned Resident Magistrate would have had no choice but to find that there had been non-compliance. The next consideration, she said, was whether the appellant had a reasonable excuse for non-compliance. Finally, she said she had to consider whether the commission's request was vague or ambiguous.

[16] The Resident Magistrate further explained that in dealing with whether there had been compliance she had to "examine the exhibits, specifically the receipts and project estimate". However, she took note of the fact that the project estimate was submitted after the appellant had appeared before the court on the charge. In the circumstances, she said she "disregarded it as the relevant consideration in determining whether or not he has complied...must be the state of affairs at the time he was charged". She formed the view that the eventual submission of the project estimate demonstrated that "the request of the [commission] was not one that was impossible as the accused was capable of producing it and did so belatedly".

[17] Having examined the receipts, the learned Resident Magistrate found that they did not satisfy the commission's request. She found that there was no confusion arising from the meeting that the appellant and his attorney-at-law had had with the commission, and she observed that whatever the challenges were for the appellant, he had not brought them to the attention of the commission. She noted also that the information had been outstanding for more than 400 days. In the circumstances, she found that "nothing he provided up to the time he was charged was sufficient to satisfy the request". She concluded that the appellant had demonstrated a disregard for the time stipulated by the commission in keeping with the law. She highlighted the fact that the appellant had said under cross-examination that "time should not be interpreted as the clock ticks".

[18] Mr Bert Samuels complained that there was confusion as regards the current value and the cost of construction of the house, and that the confusion was resolved by the learned Resident Magistrate in favour of the prosecution. He submitted, however, that any confusion ought to have been resolved in the appellant's favour. It was, he submitted, the prosecution's duty to show that reasonable cause did not exist for the appellant's failure to provide the information. There was, he said, no proof that the information was clear and unequivocal.

[19] As regards the mental element in the offence charged, Mr Samuels submitted that the court below did not take into consideration section 20(5) of the Constitution, or the decision of the House of Lords in *Sweet v Parsley* [1970] AC 132.

[20] Mr Morris submitted that this was a case of strict liability. He said that the Resident Magistrate considered the reasons advanced for the delay in providing the information to the commission, and rejected them. The Hon. Adrian Strachan, he said, had explained what was required, and no good reason had been advanced for the non-compliance.

[21] The law does not support Mr Morris' view that this is a case of strict liability. In any event, the learned Resident Magistrate did not treat it as such a case. She considered all relevant factors and arrived at a conclusion which is unassailable, given the facts. A legitimate request was made of the appellant. He did not give it the attention that the law requires. He has complained of confusion but the evidence as to

what transpired when he met with the commission does not support his complaint. He was present with his attorney-at-law who clearly stated that he understood what was required by the commission. The complaint as regards confusion is therefore unsustainable.

[22] Finally, it has been noted that the appellant's searches of hardware stores with which he dealt did not produce any document that was of any use to the commission in ascertaining the cost of construction. Assuming that the appellant was the individual who would have paid for the materials and workmanship on the house, it seems strange that he was not able to even offer a rough estimate of how much he had spent. In view of his role as contractor, due to his inability to employ one, it would be reasonable to expect that he would have kept a tab (even a very rough one) of his weekly or monthly costs. So, at the end of the project, he ought to have been in a position to say that the construction cost totaled approximately 'x' million dollars. Whereas the appellant said he took a loan to pay for the lot, he never said he constructed the house by means of a loan. The position therefore is that he would have constructed the building from his earnings or savings. In those circumstances, he ought to have been in a position to provide prompt answers to the commission.

[23] Having considered the evidence and the submissions, the inevitable conclusion at which we have arrived in this case is that the learned Resident Magistrate was correct in her findings and conclusion. We are of the opinion that there has been no breach of the Constitution or of any principle relating to the burden of proof, or *mens rea*. We are

also of the opinion that when the matter is viewed in the round, the error of the learned Resident Magistrate, referred to at paragraphs [5] and [6] herein, has not affected a proper and balanced approach to the issues in the case. We find that she gave due consideration to the matters of relevance. Consequently, the appeal is dismissed and the conviction and sentence are affirmed.