[2013] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CRIMINAL APPEAL NO 18/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

KIRK WILLIAMS v R

Robert Fletcher for the appellant

Miss Natalie Ebanks and David McLennon for the Crown

12, 13 June, 31 July and 22 October 2013

LAWRENCE-BESWICK JA (Ag)

[1] This is an appeal from the conviction and sentence of Mr Kirk Williams for simple larceny contrary to section 5 of the Larceny Act, in a trial before the St Catherine Resident Magistrate's Court. On 16 February 2012, the learned Resident Magistrate found the appellant guilty of the charge and subsequently sentenced him to 18 months imprisonment at hard labour. On 31 July 2013, we dismissed the appeal against conviction and allowed the appeal against sentence. The sentence of 18 months imprisonment was set aside and a

sentence of 18 months imprisonment suspended for a period of two years was substituted therefor. As promised we now give the reasons for our decision.

[2] On 1 March 2012, the appellant filed an original ground of appeal that the verdict is unreasonable having regard to the evidence. Supplemental grounds were filed on 7 June 2013 and are:

> "1. The learned Magistrate in her summation denied the accused a clear, fair and balanced consideration of critical aspects of his defence. These omissions amounted to a misdirection thereby denying him a real chance of acquittal.
>
> 2. The trial and summation was [sic] conducted on an assumption which was incorrect which led the learned Magistrate to misdirect herself on a critical issue of fact.
>
> 3. The learned Magistrate failed to give certain critical warnings in law which amount to irreversible misdirections.
>
> 4. The sentence is manifestly excessive."

The Prosecution's Case

[3] The prosecution's case was that on 9 January 2012, at about midnight, a team of police officers, including the appellant, responded to a call in Portmore, St Catherine to assist a lady who, at that time, was about to give birth and who needed help to reach the hospital. Several police officers went to the house and the appellant and another officer entered the house to help in the process of moving her and the child, who by then had been born, to a vehicle to be transported to the hospital.

[4] During this exercise, the appellant left the house in order to place his firearm in the police vehicle which was outside the premises. One of his colleagues, Constable Damion Arnold, who was seated at the driver's seat of the car, observed him pushing an item into a bag which was on the floor of the front passenger seat of the car. He asked the appellant what he was putting in the bag. The appellant replied that it was a diary given to him by another officer.

[5] The appellant returned to the house, and shortly after, with other police officers, conveyed the mother and child to the hospital. Later that morning, an occupant of the house reported that her iPad was missing. She had placed it on a chair near the door of the house before the police came and sometime after they left, it could not be found. At about 6:00 am that day enquiries were made of the officers who had been on the scene, including the appellant, if they had seen an iPad at the house. They all denied any knowledge of the whereabouts of the iPad. However, at about 8:45 am that day Constable Arnold reported to his superior officer, Corporal Smith, that he had seen the appellant placing an item looking like an iPad under the seat in the vehicle. This report was made in the presence of the appellant, who then commented that what he had had that morning was a diary.

[6] However, after having denied that he knew anything about this iPad, the appellant later informed his superior, Corporal Steve Smith, that he had taken it. He told Corporal Smith that on entering the house he had heard a beep, looked

down, saw an object, picked it up, checked, and realised it was an iPad. He then heard the lady of the house coming and he put it under his arm because he did not want her to see him and embarrass him.

[7] After giving that account to Corporal Smith, the appellant retrieved the iPad and handed it over to him. There was also evidence that he said that he regretted the incident and had wanted to secretly take the item back to the premises. He was arrested and on being cautioned he said; "I was stupid." The complainant identified the iPad as being hers.

Appellant's case

[8] The appellant's case was that, although he had taken up the object he had no intention of keeping it. Indeed, he did not know that it was an iPad. According to him, when he entered the house to assist the female in distress, he was carrying his M16 gun. Corporal Smith instructed him to put it down and return to assist with the removal of the female. He exited the house and on leaving, his foot hit something at the verandah area of the house. The object skidded in front of him, going into the yard and he took it up. Corporal Smith then called him for assistance and so he went to the service vehicle, and gave the M16 to Constable Geovanni Brown who was nearby, in order to return to the house. He had both his diary and the item which he had picked up, in his hand. He went back inside and assisted and he was not sure what he did with the item but he took neither the item nor the diary back inside.

[9] He said he first became aware of the iPad when Constable Tanecia Campbell asked the officers who had been to the house that morning if they had seen anything fall from the female as she exited the house and he told her that he had not. At that time, he had had no recollection of what had transpired at the house, relating to picking up the object. After speaking with Constable Campbell, he returned to the service vehicle to pick up his diary and bag which were in it. When he opened the door he saw the object beside the front passenger seat in which he had travelled that morning. He picked it up, opened it and realised it was the iPad. He said he did not know how it got inside the vehicle.

[10] He then told Corporal Smith what he had found and showed him. He also testified that he thought he should have remembered what had happened, but his mind had not been on the object but on the female and her child. He only knew of an iPod and he had understood Constable Tanecia Campbell to have been enquiring about an iPod, not an iPad.

Submissions

[11] Counsel first argued supplemental ground one, on behalf of the appellant, by urging that the magistrate had been unfair and unbalanced in her treatment of the issues, in particular, the issues arising on the evidence for the defence and that the appellant was thereby denied a real chance of an acquittal. He

submitted that in a trial, the issues concerning both sides should be seen to be addressed although the judge is sitting as judge of both law and of fact.

[12] It was counsel's contention that one of the instances of the unbalanced approach of the learned Resident Magistrate to the evidence was shown in her approach to the disputed issue of the appellant's intention to steal. He argued that she summed up the elements critical to her finding that the appellant had the intention to steal, but in so doing, she failed to fully appreciate a "linguistic ambiguity" which was at the core of the case for the defence. It was counsel's argument that this "linguistic ambiguity" arose because of the Jamaican culture where "a" is sometimes used interchangeably with "o", which, in this instance resulted in mistakes being made in referring to an "iPad" or an "iPod" interchangeably when they were in fact two separate devices.

[13] The unbalanced approach of the Resident Magistrate was also evident from the fact that she did not consider that the credibility of Constable Arnold was in issue, counsel submitted. Counsel made reference to the constable's testimony that he had noticed the appellant enter the house and then return with an object resembling an iPad which he tried to force into his bag, then quickly place it under the front passenger seat. He asked the appellant what it was, to which he replied that Constable Martin had given him something. Counsel argued that if Constable Arnold were being truthful, then it would be curious for the appellant to deny knowing about the item in such circumstances where he knew that Constable Arnold had seen him with it. Consequently, urged

counsel, the appellant's account that no such conversation took place was more credible and ought to have been accepted.

[14] Constable Arnold, he argued, had also been shown to embellish evidence, and further, the magistrate had not recognized that the fact that there was no apparent motive for him to lie was never an issue.

[15] Counsel contended that the unfair approach to the case taken by the learned Resident Magistrate is further evident by the fact that she failed to consider the denials by the appellant in the context of what counsel described as "critical facts". These facts were that the court documents initially referred to an iPod, rather than an iPad, and the appellant had initially been charged, indicted, pleaded and tried for stealing an iPod, not an iPad. Additionally, the "Questions and Answers" which the appellant did, had referred interchangeably to "iPod" and "iPad". These "critical facts" showed that throughout the case, errors were being made, by all, between "iPad" and "iPod". This situation, counsel said, showed that there was ambiguity about what item had been taken, but the Resident Magistrate, in considering the appellant's denial, unfairly failed to address her mind to the issue that the ambiguity existed and was at the core of the defence's case.

[16] Counsel further submitted that the learned Resident Magistrate did not address her mind to the evidence that the appellant had indicated that he only knew an iPod and did not know that an item existed named an iPad. His denial

of knowledge of an iPad, believing the reference was to iPod, was not "evasion and concealment", as described by the Resident Magistrate, but rather it was genuine, and reflected a misunderstanding of what was being said to him, and on neither the account of the prosecution nor of the defence was there evinced an intention to permanently deprive the owner of the iPad. The magistrate had therefore not appreciated "the nuances of the defence" when she relied on the evidence of Constable Arnold in finding that the appellant had had the requisite intention to steal, he argued.

[17] The final complaint that counsel had about the unfair and unbalanced consideration by the Resident Magistrate was that she did not consider the appellant's defence that he had not remembered that he had the iPad between when he returned to the station and when enquiries were made of him.

[18] In written submissions counsel for the Crown stated that the magistrate reviewed the essential features of the evidence to include the defence, and her summation, when viewed in totality, reflects that she faithfully and accurately considered the appellant's defence and she fairly considered all aspects of the case. Counsel for the Crown submitted that the appellant's defence was illogical, but the Resident Magistrate had considered it in a balanced manner and was entitled to reject it. The Crown argued further that the learned magistrate's conclusion that the appellant intended to permanently deprive the complainant of the iPad could not be impugned, based as it was on evidence.

Analysis

[19] Counsel's complaint, that the magistrate erred in finding that the inconsistency in Constable Arnold's evidence was immaterial, is unjustified. The evidence of embellishment by Constable Arnold about which counsel complains is that he had at first testified that the appellant had said he was sorry to steal the iPad, but in cross-examination, he admitted that the appellant had not said all those words, but rather, had said he was sorry to have taken "the thing". The magistrate found this inconsistency to be "immaterial given the totality of his evidence which in material respects had been supported by other prosecution witnesses". She had a basis to so conclude as she had determined that the appellant knew the valuable item that he had taken. The words used by the witness, in the circumstances of this case, did not affect his credibility.

[20] It is true that the learned Magistrate did not specifically refer to an ambiguity in the use of "iPad" and "iPod". However, whether the stolen item was referred to as "the iPad", rather than "the thing", was immaterial. In any event, Constable Arnold had testified that the appellant had said he had stolen the iPad whereas, in cross-examination, he referred to him having admitted to "taking" it, which is clearly less incriminatory.

[21] In our view, the learned magistrate addressed her mind in a balanced manner, to the case of the prosecution as well as the case for the defence. She reminded herself of the appellant's evidence that he did not know what the

object was, and that he did not understand that the enquiries were about an iPad, not an iPod. He had explained that, because of that, he had denied knowledge of the iPad. Further, she considered the appellant's evidence that he had turned the iPad over to Constable Smith after having "stumbled upon it in the service vehicle". The learned magistrate also considered the defence that he had not remembered that he had the iPad between when he returned to the station and when enquiries were made of him and concluded that that provided evidence that the appellant was intent on concealment.

[22] The evidence entitled her to find, as she did, that the appellant "clearly had knowledge of the object which he had taken into his possession" (page 73 of transcript). Counsel's submission about the effect of what he described as "linguistic ambiguity" did not find favour with her. She had ample basis to reject the appellant's evidence, and to find that "his failure to place the iPad back in the house, the careful concealment of it in the police vehicle, the passage of several hours without disclosing to anyone that it was there and the accused's denial of knowledge about the iPad, are inconsistent with and erode any prospect of a finding that he intended to return it".

[23] As it concerns the credibility of Constable Arnold, the magistrate stated:

> "The Court found all the officers who testified for the prosecution to be credible, in particular, Constable Arnold who maintained his integrity under challenge by Counsel for the Accused." (page 75 of the transcript)

She had in fact considered the accounts of the conversation between Constable Arnold and the appellant when the latter had the item resembling an iPad in his hand and was also mindful of what counsel for the appellant had described as Constable Arnold's embellishment. She described Constable Arnold's account as being "far more plausible".

[24] The submission on behalf of the appellant that the magistrate failed to consider the denials by the appellant in the context of what counsel described as "critical facts", also lacks merit. The magistrate accurately and thoroughly recounted the details of the defence and found that his account was not believable and that it "reeks of untruth" as it did not provide a reasonable explanation as to how the iPad was accidentally placed in the service vehicle and had not been replaced inside the house.

[25] The issue as to whether or not the learned magistrate was balanced in her summation must also be considered as it concerns the intention of the appellant. In assessing whether or not the appellant knew that the item he had was of value the magistrate considered the evidence and concluded at page 73 of the transcript that:

> "...by his conduct, the Accused clearly had knowledge of the object which he had taken into his possession. He was meticulous in placing the object in the police vehicle, even though there was an emergency situation which required his urgent attention. That careful treatment was consistent with handling something of great value, which needed to be concealed; not just a diary, and bore the taint of criminal intent to take possession of it and avoid detection."

[26] The Resident Magistrate carefully assessed the evidence and had sufficient evidence to conclude that the appellant's conduct showed his intention to conceal that valuable item and his intention to evade and that there was "clear evidence of an *animus furandi*, i.e. the necessary *mens rea* existing in his mind". She had good reason to reject his evidence that he had not intended to permanently deprive the complainant of the iPad and had only kept it to avoid embarrassment. Her focus was on the actual item stolen and on whether the appellant was aware of stealing it. She ascribed no great importance to the name of the item alleged to be stolen, being satisfied that it had value.

[27] What was important was that the appellant had taken property belonging to another person. The magistrate found that the iPad was not the appellant's property. She further said that "even if he had found it on the ground in the yard he would have no claim of right to it. There was no question that it had belonged to someone at the property".

[28] The learned magistrate fairly assessed the defence and dealt adequately with it. The appellant's complaint as to the learned magistrate's treatment of his defence as unfair or unbalanced is without merit.

Incorrect Assumption - Misdirection

[29] On this ground of appeal counsel essentially argued that the magistrate had erred in assuming that the appellant had admitted to knowing that he had taken an iPad. He argued that the evidence disclosed that the appellant did not

know the iPad was in the vehicle and that the magistrate had only briefly referred to the appellant's evidence that he thought he was being asked about an iPod. Counsel for the Crown responded that the verdict was not based on assumptions, but rather, was consistent with the evidence.

[30] This ground was, in our view, similar to the previous ground discussed above, having at its core, the purported incorrect interchanging of the words, "iPod" and "iPad". The learned Resident Magistrate found that:

> "[T]here is incontrovertible evidence that he knew that he had taken possession of the iPad. DSP Smith and Constable Campbell gave unchallenged evidence that the accused had told them at the Police Station that he 'planned to return the iPad without anyone knowing.'" (pages 73-74 of the transcript)

That unchallenged evidence was given during the trial, long after the appellant and his counsel had become aware of the "linguistic ambiguity" on which they relied. Yet the evidence of the officers concerning the iPad was unchallenged. In our view, the magistrate did not misdirect herself based on an incorrect assumption. This ground of appeal also fails.

Irreversible Misdirections

[31] The next ground of appeal on which counsel relied was that the learned magistrate failed to give certain critical warnings in law which amount to irreversible misdirections.

a) Burden and standard of proof

[32] Counsel submitted on behalf of the appellant that the magistrate had failed to warn herself that having rejected the defence's case she was required to return to the prosecution's case and consider if she were satisfied so that she felt sure of the appellant's guilt, before she could properly convict him. The transcript records that the learned magistrate stated:

> "The burden, therefore, rests on the prosecution to prove its case, through evidence led, to the extent that I feel sure of the Accused man's guilt." (page 62)

This shows the basis for the prosecution's submission that the magistrate had dealt with the burden and standard of proof adequately. The Resident Magistrate did not indicate, as she could have, that she should return to the prosecution's case, having rejected the case for the defence. However, there is no requirement for constant repetitions of the law during the course of the summing up especially where the judge sits alone. The magistrate has shown in her summation that she directed her mind to the varied aspects of the law which are pertinent to the case. She referred sufficiently to the burden of proof which rests on the prosecution (page 62) and the standard to be attained.

b) Lies

[33] Counsel for the appellant complained that the magistrate seemed to have rejected the account of the appellant that he had kicked the object, and instead

accepted the prosecution's account that he took it up from a chair. This, he said, meant that the learned magistrate had viewed the appellant's account as a lie and she ought to have given herself the appropriate directions on lies.

[34] Counsel for the prosecution submitted that where lies are not the core of the Crown's case and there is other evidence to buttress a conviction, a **Lucas** direction is not necessary. In the case at bar the larceny would have occurred at the time of the taking of the iPad. That would be before the appellant lied, she submitted, and the lies would not have formed the intention to conceal the object. Counsel submitted further, that even if the court found that a **Lucas** direction ought to have been given, no miscarriage of justice was caused by its absence, and the proviso should be applied, and affirmed the conviction.

[35] In ***R v Lucas*** (1981) 73 Cr App R159 the Court of Appeal laid down criteria to be satisfied for the accused's lies (in or out of court) to qualify as corroboration. The court sought to remove what it regarded as confusion about the extent to which lies may provide corroboration. Lord Lane CJ opined:

> "Statements made out of court, for example statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration. There is no shortage of authority for this proposition… It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate." (at page 162)

However, in **Lucas** the court was concerned with the effect of an accomplice's lies and whether they would be corroborative.

[36] There followed a period in jurisprudence when it was unclear as to whether the **Lucas** type direction extended to other types of cases. Then in **R v Goodway** [1993] 4 All ER 894, the English Court of Appeal (the Lord Chief Justice presiding) stated that the **Lucas** direction was mandatory in all cases where the accused's lies might have been relied upon by the prosecution in support of their case.

[37] Subsequently, in **R v Burge and Pegg** (1996) 1 Cr App R 163, Kennedy LJ in opining that a **Lucas** direction is not always necessary said:

> "…. a ***Lucas*** direction is not required in every case in which a defendant gives evidence, even if he gives evidence about a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. The warning is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering". (page 172)

In **Burge and Pegg***,* the court summarized four circumstances in which, in their judgment, a ***Lucas*** direction is required:

> "1. Where the defence relies on alibi.
>
> 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.
>
> 3. Where the prosecution seek to show that something said, either in or out of court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.

> 4. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so."

This court in **Eaton Douglas v R** SCCA No 180/1999, delivered on 8 October 2001, viewed the **Burge and Pegg** judgment as being "very helpful and instructive" (at page 27).

[38] The Resident Magistrate made a finding that the appellant had denied on two occasions that he had taken the iPad or had even seen it (para 8). This must be treated as a lie. The magistrate did in fact regard as untrue his statement that he discovered the iPad when he went to collect his bag and diary. Part of the case for the appellant was that he did not know that the item was an iPad. This would lead to the conclusion that the magistrate found that the appellant was lying. However, there would not have been the necessity for her to have given a **Lucas** direction.

[39] We are in agreement with counsel for the Crown that there was sufficient evidence from the witnesses in proof of the appellant's guilt as the larceny had occurred at the time of the taking and asportation of the iPad, which was prior to the lies being told.

[40] This ground of appeal concerning irreversible misdirections therefore also fails.

[41] Credibility was the main issue arising on the Crown's case. There is no doubt that the magistrate was mindful of this. Before her were questions of fact for her determination. This court is slow or reluctant to intervene in decisions arising out of questions of fact unless such decisions are palpably wrong - See **R v Joseph Lao** (1973) 12 JLR 1238 and **Industrial Chemicals (Ja) Ltd v Ellis** (1986) 35 WIR 303. It cannot be said in this case that the learned magistrate was wrong in convicting the appellant.

Sentence Manifestly Excessive

[42] Counsel for the appellant submitted that the sentence of 18 months imprisonment imposed was manifestly excessive. He argued that the learned magistrate appeared to have wanted to punish the appellant whereas she ought to have first considered his rehabilitation. He submitted further that the character evidence presented by the appellant was such that his sentence ought to have been much less than the one imposed. Counsel argued that even though the judge had rejected the defence, she nonetheless should consider it in passing sentence.

[43] We are mindful of the fact that the learned Resident Magistrate was correct in observing that the appellant committed the offence in circumstances where he held a position of trust and where in circumstances of extreme distress to the complainant and her family. We are, nonetheless, of the view that the sentence imposed is manifestly excessive. We so conclude because:-

a) this was an offence of non-violence;

b) the appellant has no previous convictions;

c) the item was recovered from the appellant within hours after he stole it;

d) the item has been returned to its owner;

e) the appellant is reported by his previous commanding officer, Deputy Superintendent of Police Terrence Bent, as having worked exceptionally well as a police officer for the five years during which he was under his command; and

f) the appellant was captain for five years of the Police National Football Team.

Conclusion

[44] The learned Resident Magistrate gave thorough consideration to the facts and the law in this matter. We find no reason to interfere with her verdict of guilt. The foregoing are our reasons for dismissing the appeal against conviction, and allowing the appeal against the sentence of 18 months imprisonment which had been imposed and substituting a sentence of 18 months imprisonment suspended for a period of two years.