

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 36/2000

**BEFORE: THE HON. MR.JUSTICE FORTE P.
 THE HON. MR.JUSTICE WALKER J.A.
 THE HON. MR. JUSTICE PANTON J.A.**

**R v JANICE BERNARD
 ERROL RICHARDS**

**Frank Phipps, Q.C. for Bernard
George Soutar for Richards**

**Kent Pantry Q.C, Director of Public Prosecutions and
Mrs. Nadine Guy for the Crown**

April 30, May 1, 2, 3, June 4, 5, and July 31, 2001

WALKER, J.A.:

On June 5, 2001 we dismissed the joint appeal of these appellants and affirmed their convictions and sentences. We now record our reasons for so doing.

On April 9, 1999 in the Resident Magistrate's Court of the Corporate Area before Her Honour Miss Rickman, Resident Magistrate, both appellants were convicted on an indictment which charged them jointly with Owen Ellington for the offence of conspiracy to defraud. The particulars of the offence as stated in that indictment read as follows:

"Janice Bernard, Owen Ellington and Errol Richards on divers days between the 23rd day of August, 1995,

and the 6th day of June, 1996, in the parish of St. Andrew, conspired together and with other persons unknown to defraud the Jamaica General Insurance Company Limited of money by falsely representing that motor car registered 3774BH had been stolen and that the said Janice Bernard was entitled to compensation".

The trial of the case commenced on February 10, 1998 and ended more than one year later on April 9, 1999. On the last mentioned date each of the appellants was sentenced to serve a term of imprisonment of twelve months at hard labour. Previously, Ellington had been discharged on a no case submission made on his behalf at the close of the case for the prosecution.

The appellants' convictions are founded upon facts which are manifold. The appellant Richards was at all material times a Constable of the Jamaica Constabulary Force and the appellant Bernard was his common law wife and the mother of his children. Richards and Ellington, who was a Superintendent of Police in the same Force, were very close friends, both men having trained together at the Police Training School. No doubt as a result of the friendship between the men, Richards had access to Ellington's 1992 Toyota motor car licensed 8920AU which he (Richards) drove from time to time. The car which was acquired by Ellington in April, 1992 was originally licensed and insured in Ellington's name. The insurance policy on the car was renewed on an annual basis by the insurers, the Jamaica General Insurance Company Limited (the Company). One such renewal expired on August 23, 1995. On the morning of August 24, 1995 Richards went to the Spanish Town police station and reported the car as having been stolen from Bernard's residence. Later that day the insurance policy on the same car was renewed by the Company in the names

'Owen Ellington and/or Janice Bernard'. Quite significantly, no report of the theft of the car was made to the company at this time or, for that matter, at any other time. The period of coverage on this latest renewal of the insurance policy on the car was August 24, 1995 to August 23, 1996.

On January 15, 1996 both appellants went to the Company's offices when and where they saw and spoke to Sandra Eldemire, the supervisor of the Motor Vehicle Department. On this occasion Richards, who Eldemire mistook for Ellington, gave instructions that the insurance policy on the car should be transferred from the joint names of Ellington and Bernard into the latter's name only. To that end a Cover Note was prepared in Bernard's name only and this document was collected by Bernard later the same day. On receipt of the Cover Note Bernard completed a proposal form and also produced her driver's licence which was photocopied and the copy retained by the Company. The expiry date of the Cover Note was February 13, 1996.

On January 16, 1996 an application was made to the Central Motor Vehicle Registry for transfer of the car from Ellington to Bernard. The relevant application form was signed by Bernard and dated November 16, 1995. The particulars noted thereon revealed that a new registration plate numbered and lettered 3774BH was assigned to Bernard pursuant to this transfer.

On January 26, 1996 the Company issued a certificate of insurance in Bernard's name only for motor car bearing licence No.3774BH, but which was, in fact, the same motor car that had previously been licensed 8920 AU. The chassis no. and other particulars of the car confirmed that this was so.

On April 22, 1996 Bernard reported the theft of the Motor car licensed 3774 BH to the police at the National Stadium police station.

On May 30, 1996 both appellants attended at the Claims Department of the Company. Then and there Bernard introduced herself to a supervisor, Audrey Salmon, and Richards introduced himself to the same officer as Bernard's fiancée. The purpose of the appellants' visit was to take payment of an amount of \$400,000.00 pursuant to a claim made on the company in respect of motor car licensed 3774 BH that had been reported stolen. In this regard a Release (EX.20) was prepared for Bernard's signature. This Release read in part:

"Received from the JAMAICA GENERAL INSURANCE CO.LTD. the sum of Four Hundred Thousand Dollars Only in full discharge and satisfaction of all Claims and Demands whatever upon the said Company under the above Policy in respect of theft of 1992 Toyota Corolla licensed 3774BH (Total Loss) on or about the 21st day of April 1996".

The Release was signed by Bernard who was then advised that she had to hand over the Title for the car duly signed and stamped by the Collector of Taxes, the keys, registration papers, certificate of insurance and all other documents relating to the car before the Company's cheque in settlement could be issued. Bernard was unable to comply with all these requirements on the spot. She said that she would ask Richards to deal with the matter of producing the necessary documents as she, herself, could not return to the office the next day. On the following day Richards attended at the Company on Bernard's behalf and presented a new title for the car. The title was in Bernard's name but it was not signed, nor did it bear the stamp of the Collector of Taxes. The insurance money was not paid on that day and, in the result, was never paid, the Company

having been alerted subsequently by way of an anonymous telephone call as to the intended fraud. It was the prosecution's case based on the evidence of retired Snr. Superintendent of Police Carl Major, whom the prosecution tendered as an expert witness in handwriting, that the signature, 'O. Ellington' and the name 'Owen Ellington' appearing, respectively, on the front and back of the Motor Vehicle Certificate of Title (Ex. 17) were all made by the appellant Richards. Major came to this conclusion after comparing these writings with specimen handwritings provided by Richards.

In her defence the appellant Bernard gave evidence in which she admitted her relationship with the appellant Richards and said that she was accustomed to drive motor cars belonging to him. One such car was Toyota motor car licensed 8920AU in the name of Owen Ellington. On August 22, 1995 she drove that car to a garage. Later that day she saw Richards place some guns, teargas, bullet proof vests and binoculars in the car. Afterwards, Richards drove the car away, returning to her home in the car the following night of August 23. On August 24 the car went missing. She had nothing to do with the car after driving it on August 22. She denied that she made a false report of a stolen car licensed 3774BH to the Stadium Police Station, in the process disavowing the signatures on a statement taken by Corporal Norval Brown of that Police Station from a woman of the same name who had made a report of the theft of the same car on the same date (Ex. 19). She also denied that she attended at the office of the Collector of Taxes to have the car transferred from Ellington to herself, or that for such a purpose she signed the application form (Ex. 22); that she went to the Company's offices in January 1996 to transact

business in relation to the car licensed 3774 BH; that she signed the proposal form for insurance of that car (Ex. 11); that she made a false claim on the Company in respect of that car; that she signed the Release (Ex.20); that she conspired with Richards and others to defraud the Company of money in excess of \$400,000.00 . She acknowledged the copy of her driver's licence (Ex. 12) and her passport (Ex.33). She said that apart from going to see her medical doctor on the morning of May 30, 1996 she went nowhere. On that day she had bruises on her face and portions of her hand were black and blue, all injuries she received as a result of having been hit by someone. The appellant's visit and her injuries were substantiated by the appellant's witness, Dr. Susan Minott - Arscott. Also testifying for the appellant was Mr. Dennis McGuire, a forensic evidence examiner who examined two photographic enlargements of questioned handwritings along with specimen handwritings provided by the appellant Richards. He also examined the chart (Ex. 31) which was prepared by retired Snr. Superintendent Major.

The chart showed photographic enlargements of portions of specimen handwritings taken from Ellington and Richards which Major had compared with signatures appearing on the Motor Vehicle Certificate of Title (Ex. 17). Having done this examination the witness McGuire opined as follows:

"I was presented with the question who had authored the signature on the left top corner of Exhibit 31 – chart 1.

The writing beneath the top left one and the writing below it to the right of centre of chart and to determine if any of those 3 writings were written by the person who wrote the Owen Ellington specimen identified as having been written by Errol Richards.

My findings are that the upper left questioned writing was probably written by Errol Richards. The one immediately below that one cannot be used for handwriting comparison. In addition the 3rd questioned writing cannot be used for handwriting comparison and identification purposes".

The upper left questioned writing to which the witness referred was the signature 'O. Ellington' that appeared on the face of the Motor Vehicle Certificate of Title (Ex. 17). Another of the appellant's witnesses, Mr. Charles Rousseau, one of the Managers of the Company, gave evidence of the procedure adopted by the company for dealing with claims for stolen motor cars. He said "the loose system that operated would not be restricted to exploitation by outsiders".

In his defence the appellant Richards made an unsworn statement. He said that the motor car licensed 8920 AU had been bought by Ellington in April, 1992 on a concessional basis which prohibited the vehicle being transferred without payment of duty within a period of three years from the date of purchase. Before this period had elapsed there was an intention to transfer the car to Bernard but because of the restriction this was not done although Bernard's name was added to the insurance policy on the vehicle and she was given "the exclusive right" to drive the vehicle. Between August 22 and 23, 1995 he drove the vehicle and eventually parked it at Bernard's residence some time after 10:00 p.m. on the latter day. Between that time and the early morning of August 24 the car was stolen. At the time of the theft the car was loaded with police property including binoculars, a nightscope, a firearm and rounds of ammunition, a rain coat and a police vest. The title and all other documents for the car were stolen with the car. On the same morning he reported the theft to

the Spanish Town police station. The car was never recovered and he never saw the car again. The appellant said he had a Power of Attorney from Ellington over the car and, therefore, had no need to sign Ellington's name in any dealings with the car. He said he was known to the prosecution witnesses Margaret Senior and Sandra Eldemire, both employees of the Company. Senior knew him as "School Boy Ritchie", and Eldemire had dealt with him in relation to a motor car licensed 7261BG. As for the prosecution witness Audrey Salmon, another employee of the Company, on April 1, 1997 he had had occasion to speak with her regarding a claim for Toyota Corolla motor car licensed 5250BL. On that occasion he had asked her whether she had seen him before or knew him and she had answered negatively. In effect he denied any involvement in a conspiracy to defraud the Company.

The appeal of Bernard

The main thrust of this appeal was that the verdict of the learned Resident Magistrate was unreasonable and could not be sustained on the evidence. Mr. Phipps Q.C. argued, firstly, that there were inherent contradictions in the case for the prosecution when considered against the background of the evidence of the defence witness, Rousseau, as to the "loose system" operated by the Company and the possible exploitation of the system by "outsiders". We found no merit in this submission. In the present case there was not a scintilla of evidence, whether direct or inferential, to suggest that anyone within the Company was a party to the appellants' scheme aimed at defrauding the Company. In any event, even if there was such evidence, it could not have

affected the guilt of this appellant having regard to the nature of the offence with which she was charged. That offence charged that the appellants conspired together and with other persons unknown .

Secondly, Mr. Phipps submitted that it was incompetent for the Resident Magistrate to have accepted the evidence, which he described as dock identification evidence, of the prosecution witnesses Eldemire, Salmon and Samms. Taking the three witnesses separately, as far as Eldemire is concerned her evidence was that on January 15, 1996 Bernard collected a cover note which she (Eldemire) prepared on instructions given to her earlier the same day by Richards whom she knew. Her knowledge of Richards was later on in the trial corroborated by Richards in his unsworn statement. At the time that she received Richards' instructions on January 15 he named his girl friend as Janice Bernard and authorized the transfer of the insurance policy from the joint names of Owen Ellington and Janice Bernard into Bernard's name only. Later the same day when Bernard collected the Cover Note, Eldemire photocopied Bernard's driver's licence (Ex. 12) and retained the photocopy for the Company's records. In these circumstances Eldemire's identification of Bernard in court was not dock identification of the type which the law regards as unsatisfactory and impermissible. As regards the witness, Salmon, her evidence was that on May 30, 1996 both appellants attended at the Company together and spoke to her. At that time Bernard said "I am Janice Bernard, I am here to see the Claims Manager". After that Richards identified himself by saying "I am her fiance". During this visit Salmon said that acting on the instructions of the Claims Manager she (Salmon) prepared a Release (Ex. 20) which was later proved to

have been signed by Bernard. Accordingly, Salmon's identification of Bernard in court did not stand alone. It was buttressed by Bernard's signature on the Release and did not qualify as impermissible dock identification. As for the witness, Samms, she did not identify Bernard by pointing her out in the dock in court. Her identification of the appellant was based on the number of her (the appellant's) driver's licence which was 7819451114. She had in January, 1996 personally noted that number on the Motor Vehicle Certificate of Title (Ex. 17), having copied it from the original driver's licence which was presented to her by Bernard and a male companion at the Central Motor Registry on the occasion of the transfer of the car from Ellington to Bernard. At the time of authorizing this transfer she had satisfied herself that the photograph in Bernard's driver's licence was that of the person who presented the application for transfer and the person with whom she was dealing. The complaint of dock identification is, therefore, misconceived in this instance. Next Mr. Phipps argued that having regard to the status of these three prosecution witnesses as officers of the Company (Eldemire and Salmon) and the Central Motor Vehicle Registry (Samms), the learned Resident Magistrate should have given special consideration to the question whether they fell into the category of accomplices *vel non*, or that of persons with an interest to serve. The Resident Magistrate, so the argument continued, had a duty to warn herself of the dangers involved in convicting the appellant on an acceptance of the evidence of any of these three witnesses. Not having indicated in her findings that she had done so, the verdict of the court was invalid and should be quashed. We reject this submission entirely. There was not the slightest hint of

complicity or other interest on the part of any of these witnesses, and their occupational status could not, per se, categorize any of them as either an accomplice *vel non* or a person with an interest to serve. Nor did a loose system of operation in the Company make any of them so. Accordingly, it was not incumbent on the Resident Magistrate to administer unto herself any special warning in that regard.

On another aspect of this appeal Mr. Phipps referred to the fact that in dismissing Ellington on a no case submission made at the close of the prosecution's case, the Resident Magistrate found that the evidence of the witness Samms was "totally destroyed in cross-examination". That being so, Mr. Phipps submitted that Samms' testimony should have been excluded entirely from the court's consideration of the case against Bernard. Mr. Pantry's reply to this submission was that the finding of the court, expressed in the particular context of Ellington's case, related to the defendant Ellington only and must be interpreted in that way. It was not intended to be of general application.

In our view, however one interprets this finding of the court, it is sufficient to say, as Mr. Phipps was quick to concede, that the conviction of the appellant is sustainable without the evidence of the witness Samms.

Complaint was also made as to the sufficiency of the evidence of handwriting adduced by the prosecution and, particularly, as to the fact that no specimen handwriting was taken from any employee of the Company. Such evidence as there was, Mr. Phipps submitted, was unreliable and should not have been acted upon by the Resident Magistrate. We found no merit whatever in this complaint.

Finally, the appellant complained that the Resident Magistrate misdirected herself in law as was evident from her findings in relation to the registration certificate (Ex. 14). That finding was expressed in this way:

"I draw the inference that it must have been taken there either by Mr. Richards who had gone to the Insurance Company in respect of same matter on a previous occasion or by Ms. Bernard herself who had been given a proposal form and exhibit 12 to her and got in exchange exhibit 10".

On this point Mr. Phipps' submission, which was made in writing, ran thus:

"Janice Bernard, like every accused in a joint criminal trial, was entitled to have the case against her considered separately. This principle applies equally to charges of criminal conspiracy. It was the responsibility of the court to find overt actions by Bernard, as primary facts, in order to infer that she was a party to a criminal agreement.

In this case, it was important to determine who had submitted **Exhibit 14** to the insurance company in order to lay the foundation for a later claim for compensation. Without this document there could be no claim, and without a positive finding on this issue the prosecution case would collapse.

It is submitted, where the court could not say which of the accused had submitted the document there can be no finding that it was done by either of them.

When the court said that it was either Bernard or Richards who had submitted the document (Exhibit 14) this means the learned Resident Magistrate could not say which it was. To use a finding that it was one or the other of the accused in order to infer criminal agreement in both caused a grave injustice to both. Each was prejudiced by what would have been the overt act of the other as a primary fact from which to draw an inference."

The fallacy in this submission is immediately obvious. It lies in the contention that in the circumstances of this case it was not permissible for the Resident

Magistrate to find that one or other of the appellants took the registration certificate to the Company, and that in the absence of such a finding the case for the prosecution must necessarily collapse. The nature of the offence with which the appellants were charged was conspiracy to defraud. From a legal standpoint the act of one conspirator done in furtherance of the conspiracy was the act of the other. On the evidence adduced by the prosecution every other act done in furtherance of the conspiracy charged was done by one or other of the appellants in person. It was an irresistible inference for the Resident Magistrate to draw that it must have been one or other of the appellants who took the registration certificate to the Company, it being one of the pre-requisites for obtaining the insurance money. The Resident Magistrate cannot be faulted for having drawn that inference. Furthermore, we would observe that a failure on the part of the Resident Magistrate to make such a finding could not, *ipso facto*, have led to the collapse of the prosecution's case. There was ample evidence otherwise to justify the conviction of the appellant.

On the matter of sentence, Mr. Phipps submitted that the appellant's sentence was manifestly excessive in light of her antecedents and the fact that she was not the dominant partner in the commission of the offence. We think that even if not the dominant partner she was at least an equal partner in this fraudulent exercise. She supported the male appellant every step of the way by word and deed. For this reason we see no warrant for interfering with the sentence imposed by the Resident Magistrate.

The appeal of Richards

Firstly, it was submitted that the verdict was unreasonable and unsupportable on the evidence. Specifically, Mr. Soutar argued that the finding of the Resident Magistrate that the writings 'Owen Ellington' and 'O. Ellington' appearing on the front and back of the Motor Vehicle Certificate of Title (Ex. 17) were done by the appellant Richards was not justified on the evidence. That was so, Mr. Soutar said, because when asked in cross – examination how many writings were on that document at the time he showed it to the defendant Ellington, the investigating officer, Assistant Commissioner of Police Osbourne Dyer said that he did not recall and had not recorded that detail in either his note book or his statement. Furthermore, Mr. Soutar argued that a notation on Exhibit 22 (which was a photocopy of Ex.17) showed that Exhibit 17 was not handed over to Dyer until July 3, 1996, whereas Dyer said that he had the Exhibit in his possession and produced it to Ellington on June 24, 1996 and to Richards on June 25, 1996. Mr. Soutar's argument is misconceived. It is so for two reasons. Firstly, it is a *non-sequitur* to say that since the witness, Dyer, could not recall how many writings were on Ex. 17 at a particular time, it followed that the questioned writings on the document must have been made at a subsequent time. Secondly, the notation on Exhibit 22 reads "Original taken by Insp. Lawrence of the R.P.D" and was dated "3rd July, 1996". Quite clearly that date was the date on which the notation was made and not the date on which the original document (Ex. 17) was handed over to Dyer. In actual fact the following question and answer appear in the cross-examination of Dyer:

"Q. The signatures surrounding the area provided for signature of Registered Owner is in

condition that you handed it over to Superintendent Major?

ANS. Yes Sir."

On another ground of this appeal it was contended for that the evidence of identification of the appellant was so discredited as to be worthless and incapable of supporting the appellant's conviction. More particularly, it was submitted that the evidence of the prosecution witness Eldemire of having mistaken Richards for Ellington was incredible. It was impossible, Mr. Soutar argued, for Eldemire to have on January 22, 1996 included the licence No. 3774BH on the Company's note of the cessation of Ellington's interest in the insurance policy covering that motor car (Ex. 16) when, on the evidence, that date first became available to her on January 26, 1996. Mr. Soutar's argument is plainly misconceived for the evidence showed that the motor car was effectively transferred from Ellington to Bernard on January 16, 1996. That transfer was effected on the basis of an application form which was dated November 16, 1995 and filed in the office of the Collector of Taxes on January 16, 1996 (see Ex. 22). Pursuant thereto a motor vehicle registration certificate dated January 16, 1996 was issued to Bernard showing registration plate No. 3774 BH. It is clear, therefore, that the particulars of the new registration plate were known to Bernard on January 16, 1996, and the reasonable inference to be drawn is that Bernard must have communicated that information to the Company at some time prior to the company's note of January 22, 1996.

On yet another ground of appeal the appellant complained that the evidence of the witness Audrey Salmon was unreliable and should not have been accepted and acted upon by the court. Specifically, it was submitted

that Salmon's evidence should have been rejected because of the failure of the witness, who was an employee of the Company, to observe proper procedures prior to preparing the Release (Ex. 20). Suffice it to say, we found this ground to be wholly without merit.

Finally, it was argued on behalf of the appellant that the Resident Magistrate erred in accepting the evidence of the prosecution witness retired Snr. Superintendent Major in preference to that of the defence witness, Dennis McGuire. On this aspect of the case this is how the Resident Magistrate expressed herself in her findings of fact:

"Mr. Major's evidence shows that he is an expert with training abroad and fifteen (15) years practical experience. On July 4, 1996 he received a number of documents from Assistant Commissioner Dyer, Motor Vehicle Certificate of Title, five (5) sheets specimen handwriting Exhibits 17, 24 and 25 which he gave to the Police photographer to make enlargements of certain writings on front and reverse of Title. Original documents and enlargements returned to him. Enlargements of signature of Owner and those in section 1 on reverse, address and third writing. He examined and compared with Exhibits 24 and 25 and came to the opinion that signatures on Exhibits 17 was written by Errol Richards. I accept the evidence of Mr. Major and have no doubt that signatures 'Owen Ellington' and 'O. Ellington' on front and back of Exhibit 17 were written by accused Richards.

On April 2, 1997 he received application Proposal Form for Insurance, Exhibit 3. After doing usual photographing and enlarging he examined.

On February 4, 1998 received Exhibit 17 and Exhibit 20.
On February 19, 1998 received Exhibit 21.

His opinion is that they were all written by the same person.

I have looked at all these exhibits and with an untrained naked eye – I find them rever... (sic) similar and find as a fact and am satisfied and feel sure they were written by same person.

Mr. McQuire (sic) called on behalf of the defence for Bernard never examined any writing purported to be done by her and on his examination of other writings formed the opinion that they were probably written by Richards.

I accept Mr. Major's evidence in preference to that of Mr. McQuire (sic)".

Indeed, the correctness of the Resident Magistrate's finding appears to us to be strengthened by McGuire's confession of possible inaccuracy on his part which the court recorded thus:

"Much of what I answered Mr. Soutar was from memory and may not be accurate".

Again, the Resident Magistrate's conclusion is fortified by the fact that McGuire came close to agreeing with Major's opinion as when looking at the chart (Ex. 31) he (McGuire) said in evidence:

"My findings are that the upper left questioned writing was probably written by Errol Richards."

That questioned writing, it will be remembered, was the signature 'O. Ellington' which appeared on the face of the Motor Vehicle Certificate of Title (Ex. 17)

In the result we think that the Resident Magistrate acted well within her competence to accept the evidence of Major in preference to that of McGuire and we see no good reason to differ from her on that account. This ground of appeal must, therefore, fail and with it the appellant's entire appeal.