[2012] JMCA Crim 43

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 34/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

EARL COLLEY v R

Everton Bird for the appellant

Mrs Caroline Hay for the Crown

13 July and 28 September 2012

PANTON P

[1] The appellant appeared before the Corporate Area Resident Magistrate's Court on 11 October 2011 and pleaded guilty before Her Honour Miss Judith Pusey to the offences of possession of ganja and dealing in ganja. The learned Senior Resident Magistrate imposed sentences of 18 months imprisonment on each charge and ordered that they run concurrently. The appellant now challenges the recording of these convictions on the basis that the Resident Magistrate lacked jurisdiction as the informations were not in proper form. He also asserts that the sentences are excessive.

[2] The record of appeal does not disclose a proper statement of the facts of the case, although in the normal course of events the Clerk of the Courts would have

related the facts to the learned Resident Magistrate prior to the imposition of the sentences; and the Resident Magistrate would have recorded that which was said by the Clerk of the Courts. However, there is a document at page 5 of the record which is signed by the Senior Resident Magistrate and contains information as to the plea and sentencing process. That document which is headed "INFORMATION NO. 22013 & 22014/2011" is reproduced hereunder:

> "This accused is charged on two Informations with Possession of and Dealing in twenty-three pounds (23 Lbs.) of Ganja. He pleaded guilty to both offences and was sentenced to eighteen months (18 mths) imprisonment.
>
> **PLEA IN MITIGATION**
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> The offender prayed in aid the fact that it was his first conviction and asked for leniency. He said he had children dependent on him and he was a Higgler.
>
> **REASON FOR SENTENCE**
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> The court took onto [sic] account that it was the offender's first conviction but also considered that he was a Higgler and the vegetable matter found was his stock in trade. Twenty-three pounds of ganja is a lot of ganja and it was being carried in the marketing district almost bare-facedly in open defiance to the law.
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> Consequently in spite of the plea, the court felt that the offence would not be adequately punished with a fine. The other sentencing options of Community Service Orders [sic] Probation Orders did not seem appropriate for the offence especially in the manner in it [sic] which it was committed. The court therefore imposed a sentence of 18 months for both charges."

[3] Information no 22013/2011 charged the appellant with the offence of unlawfully having ganja in his possession, contrary to section 7(c) of the Dangerous Drugs Act, whereas information no 22014 charged him with dealing in ganja. The latter information, though it refers to the Dangerous Drugs Act, does not specify the particular section. Each information gives the following details:

- The name and number of the informant special constable;
- The date the information was laid;
- The date of the alleged offence;
- The parish in which the offence was committed; and
- The signature of the Clerk of Courts before whom the information was laid, purportedly on oath.

The details specified in the information are apparently in the handwriting of the informant, but it is clear that he has not appended his signature to the document.

GROUNDS OF APPEAL

[4] The grounds of appeal are as follows:

> "**GROUND 1**
>
> Notwithstanding the fact that the Applicant had pleaded guilty to both offences when he appeared before the learned resident magistrate on the 11th day of October, 2011, the formalities which had to be complied with to lawfully confer on the learned resident magistrate jurisdiction to hear the matter were not complied with and the proceedings were therefore a nullity as the informations laid before the court were not sworn to or signed by the policeman who purported to make the complaint against the Applicant.

GROUND 2

The learned resident magistrate erred in law in handing down the sentence of the court as the appropriate sentencing guidelines were not followed by her.

GROUND 3

The sentence was harsh and manifestly excessive in all the circumstances of the case."

The submissions

[5] Mr Everton Bird, for the appellant, submitted that the absence of the informant's signature on each information means that "in law there was no information before the court with the ancillary consequence that the court thereby lacked jurisdiction". He said that in the same manner in which a magistrate would have refused to accept an unsigned affidavit, so too ought the magistrate to have rejected an unsworn information. The information being defective, he said, could have been cured by the informant coming to court and giving evidence prior to the conviction. However, he submitted, there was no question of the appellant waiving his right to object to the irregularity by submitting to the authority of the court and pleading guilty to the charges. He contended that the appellant should not have been pleaded to the charges since "the fulfillment of the formality in regard to the information was imperative or peremptory and a condition precedent to the validity of any proceedings". Apart from the lack of the informant's signature, Mr Bird also complained about the fact that there was no mention of the section of the Dangerous Drugs Act that makes it an offence to deal in ganja.

[6] Mrs Caroline Hay, for the prosecution, responded that there was no legal requirement for the information to be signed. She submitted that the Justices of the Peace Jurisdiction Act applied to the situation, and that all the formalities required by section 64 thereof had been met. She submitted further that, in any event, section 303 of the Judicature (Resident Magistrates) Act cured any defect there may be in the form of the information.

[7] In advancing his arguments, Mr Bird relied on the case ***Dixon v Wells*** [1890] 25 QBD 249. There, a complaint was made to two justices of a borough against the appellant for a breach of the Sale of Food and Drugs Act, 1875. A summons was signed and issued by another justice who had not heard the complaint. It was served on the appellant who appeared before the stipendiary magistrate. The appellant objected on the ground that the summons was invalid and the magistrate had no jurisdiction to hear the case. The magistrate ruled that whatever defect there may be, it was cured by the appearance of the appellant before the magistrate. The appellant was duly convicted. On appeal to the Queen's Bench Division of the High Court of Justice, it was held that the summons, having been signed and issued by a justice who had not heard the complaint, was invalid; further, the defect was not cured by the appearance of the appellant as he had appeared under protest.

[8] ***Dixon v Wells*** does not help the appellant however. Jervis' Act provided that in any case where an information is laid before a justice that a person has committed an offence within the jurisdiction of that justice, and in any case where a complaint shall be made to any such justice where the justice has authority to order the payment of

money or otherwise, it shall be lawful for such justice to issue a summons directed at the person requiring him to appear before the said justice to answer thereto. The Sale of Food and Drugs Act, 1875 provided for the payment of a penalty on the commission of certain breaches. Hence, an information laid under a penal provision in that Act required the issue of a summons by the justice of the peace before whom the information was laid and an appearance before the said justice of the peace for the purpose of answering the charge. It is therefore understandable that in that case the summons would be invalid if the provision was not complied with.

[9] Lord Coleridge CJ said that it was clear that Jervis's Act "did not mean that one justice was to hear the complaint and another to sign the summons". In his reasons for judgment he referred to ***Reg v Hughes*** 4 QBD 614 which he said was twice argued in the Court of Criminal Appeal and decided by a full court over which he presided. He went on to comment on the question of whether the appellant may have been regarded as having waived any irregularity in procedure by submitting to the jurisdiction of the court. He said:

> "In that case the defendant was indicted for perjury, alleged to have been committed before justices at the hearing of a charge against a person brought up on a warrant illegally issued without a written information on oath, and the contention was that the proceedings were invalid; but the Court held that they were valid. The case establishes the proposition, that when a person is before justices who have jurisdiction to try the case they need not inquire how he came there, but may try it. That decision is binding on me, and I have no wish to depart from it.

> But the present case, I am glad to think, is not within it, and is distinguishable upon the sound ground taken by the counsel for the appellant. The document called a summons in this case was, in my opinion, no summons at all. But the accused was before the magistrate. Two distinctions, however, separate this case from those cited. First, in all the cases to which our attention has been called there was no protest made by the person who appeared, and the Courts said, applying a well-known rule of law expounded centuries ago, that faults of procedure may generally be waived by the person affected by them. They are mere irregularities, and if one who may insist on them waives them, submits to the judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time. In this case there was a protest, because when the case was called on before the magistrate the appellant took the same objection that he has taken to-day. He objected that there was no summons and no information, that the whole proceeding was irregular, and that the Court had no jurisdiction to try him because he was not properly brought there. Of course, it is assumed that if he had made no protest the cases cited would have been applicable; but his protest makes a marked distinction."

[10] In the instant case, there was no protest by the appellant. Indeed, he pleaded guilty to the charges when they were read to him.

[11] Mr Bird also relied on the case of ***The Queen v Scotton*** (1844) 5 QBD 493. The headnote reads in part:

> "Under stat. 6 & 7 W. 4, c. 65, s. 9, an information under the Game Act, 1 & 2 W. 4, c. 32, if laid by a person not deposing on oath to the matter of charge,

> must distinctly shew that the charge was deposed to by some other credible witness on oath. If the information leaves this doubtful, all further proceedings upon it are without jurisdiction: and, if the defendant is summoned and appears to answer the charge, a witness giving false evidence on the hearing cannot be convicted of perjury."

Lord Denman CJ in giving his opinion said, "The information does not shew such a deposition on oath as the Act 6 & 7 W. 4, c. 65, s. 9 requires." And Coleridge J said:

> "I agree that this question turns wholly on stat. 6 & 7 W. 4, c. 65, s. 9. In the case of an information under the circumstances there pointed out, it is a condition precedent to any further step that the matter of the information should be deposed to on the oath of the informer or some other credible witness. Here that does not appear. I should rather infer the contrary."

[12] In both cases (***Dixon v Wells*** and ***The Queen v Scotton***), there were particular statutory provisions that had not been complied with so far as the procedure in laying the charges was concerned. It is therefore necessary to examine the relevant legislative provisions applicable to the instant case. As indicated earlier, Mrs Hay referred us to section 64 of the Justices of the Peace Jurisdiction Act. It reads thus:

> "**64.-** (1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining Justices or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

> (2) The statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.
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> (3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required.
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> (4) Any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law if this section had not been passed shall, notwithstanding anything in this section, continue to be sufficient in law."

[13] It will be seen on careful examination of the section that there is no requirement for the information being laid before a justice of the peace to be signed by the informant. However, this is not surprising when one considers the provisions of section 9 of the said Act. That section states that an information need not be on oath, unless a warrant of arrest is to be issued. It reads:

> "9. Every such complaint upon which a Justice or Justices is or are or shall be authorized by law to make an order and every information for any offence or act punishable upon summary conviction, unless some particular enactment of this Island shall otherwise require, may respectively be made or laid without any oath or affirmation being made of the truth thereof, except in cases of information where the Justice or Justices receiving the same shall thereupon issue

> his or their warrant in the first instance to apprehend the defendant as aforesaid; and in every such case where the Justice or Justices shall issue his or their warrant in the first instance, the matter of such informations shall be substantiated by the oath or affirmation of the informant, or by some witness or witnesses on his behalf, before any such warrant shall be issued; …"

[14] In the circumstances, ground one fails. There was no requirement for the informant to have signed the information. The proceedings were not a nullity and the learned Senior Resident Magistrate had jurisdiction to hear and determine the matter in the manner that she did.

[15] Although there was no specific ground filed for the purpose, Mr Bird complained about the absence of reference to the section in the information which charged the appellant with dealing in ganja. He submitted that the information was defective so the proceedings thereon were null and void. He cited the cases ***Rex v* George McFarlane** (1939) 3 JLR 154 and ***R v Ashenheim*** (1973) 12 JLR 1066 in support. However, as was pointed out by Luckhoo, JA in his judgment in the ***Ashenheim*** case, at page 1069D-E, the reference in the ***McFarlane*** case was to a law that "had no connection whatsoever with the complaint laid in the information". There was therefore no alternative to the quashing of the conviction in that case. In **Ashenheim**, the appellant was tried and convicted on an information which charged her with driving in excess of the speed limit. The information quoted a section of the Road Traffic Act which did not create an offence. The Resident Magistrate convicted. On appeal, it was

held that the "defect in the information was but a defect in the particulars supplied which did not in any way cause the appellant to be misled" and so the conviction was proper.

[16] There is a more recent judgment of this court on the point: ***Anthony Skeen v R*** (RMCA No 16/2006 - delivered 27 April 2007). In that case, as in the instant one, the information bore no reference to the section of the statute creating the offence, as required by section 64(2) of the Justices of the Peace Jurisdiction Act. Smith JA, in delivering the judgment of the court, said that that did not invalidate the information, and cited ***Ashenheim*** in support. There were other complaints in respect of the information in ***Skeen***. Smith JA dealt with the matter thus:

> "The failure to state the names of the persons accused of the offence on the front of the information certainly constitutes a defect. However, in my view, this defect is not so fundamental as to render the information null and void in light of the fact that the names of the persons charged appear on the back of the information. Such a defect, in my judgment, may be cured by an amendment at any stage. Indeed this court has the power to direct that the information be amended. However, no amendment is necessary since the trial was not on the information but on the indictment. I hold, therefore, that the objection of counsel for the appellant may not be allowed by virtue of the second proviso to s. 31 of the Justice [sic] of the Peace Jurisdiction Act. Further s. 303 of the Judicature (Resident Magistrates) Act provides that no appeal shall be allowed in respect of any error or defect in form or substance of indictment or information not raised at the trial."

These words of Smith JA are applicable to the instant case. As mentioned before, there was no complaint raised at the hearing before the learned Senior Resident Magistrate.

Sentence

[17] Mr Bird submitted that the sentence imposed was manifestly excessive. He said there has been a lack of harmony in the sentences imposed by magistrates for similar breaches. The appellant, he said, "appeared before the magistrate as a person with a previously clean criminal record but was not considered eligible for sentencing to pay a fine or to serve time in the alternative, but was sentenced to eighteen months." He complained that no favourable consideration appears to have been given for the guilty plea. He further said that the learned Senior Resident Magistrate made a quantum leap in saying that the ganja was the appellant's stock in trade.

[18] An examination of the record reveals that the learned Senior Resident Magistrate did indicate that she took into account the fact that this was the appellant's first conviction. She noted also that he had said that he was a higgler and that he had children who were dependent on him. She noted that 23 pounds of ganja was a lot and was being carried in the marketing district "almost bare-facedly in open defiance to the law". Mr Bird's complaint that the magistrate made "a quantum leap" in saying that the ganja was the appellant's stock in trade is without merit, given the provisions of section 22 (7)(e) of the Dangerous Drugs Act. That section states that a person found in possession of more than eight ounces of ganja is deemed to have it for the purpose of selling or otherwise dealing therein, unless the contrary is proved by the person. The appellant has not provided an explanation that would negative that deeming provision.

In the circumstances, the comment by the learned Senior Resident Magistrate is justified.

[19] The fact that some Resident Magistrates have been imposing lenient sentences for breaches of this nature does not entitle the appellant to the privilege that Mr Bird now claims on his behalf. The offence of dealing in ganja has long been recognized as a very serious offence in our country and Resident Magistrates are expected to treat it as such. In ***Regina v Brooks*** (1992) 29 JLR 305, the appellant was convicted before Her Honour Mrs Zaila McCalla, Resident Magistrate for Kingston (as she then was), of being in possession of 37.4 lbs of ganja, taking steps preparatory to export same and unlawfully dealing in ganja. The ganja was in carton boxes that the appellant had checked in as luggage on an Air Jamaica flight from the Norman Manley International Airport destined for New York on Christmas Eve 1991. He was fined $50,000.00 or six months imprisonment on each of the latter two charges. In respect of the charge of possession, he was fined $15,000.00 or four months imprisonment and in addition ordered to be imprisoned for three months, which imprisonment should be consecutive to the sentence for dealing in, if the fines were not paid. On appeal to this court (Rowe P, Forte JA and Wolfe JA (Ag)), it was submitted that the sentence of three months imprisonment was manifestly excessive. Wolfe JA (Ag), in delivering the judgment of the court said:

> "Finally there was the complaint that the sentence of three (3) months imposed on the appellant for possession of ganja was manifestly excessive and had no rehabilitative element in it. We found

> absolutely no merit in this ground. The trafficking of drugs is big business. Because of the large sums of money involved in this business, heavy fines by themselves are no detriment to traffickers or would be traffickers. The sting of the sentence is in its custodial aspect. The legislature, notwithstanding the large pecuniary penalty it has empowered the Resident Magistrate to impose, has gone further and empowered the magistrate to impose a term of imprisonment of up to two years in addition to the fine. A sentence of three months imprisonment in the face of this barefaced attempt to export ganja, is nothing but a mere slap on the wrist. The implications of exporting ganja on our local carrier cannot go unnoticed. For the custodial sentence to have the desired effect of eradicating this scourge, magistrates would be well-advised to impose a custodial sentence in the upper half of the sentence of two (2) years permitted under the law. By no stretch of the imagination could the sentence imposed be considered manifestly excessive."

[20] It is readily appreciated that in ***Brooks***, there was an international flavor to the matter. However, the principle is applicable whether it is for export or not where the amount is far in excess of the eight ounces referred to in section 22(7)(e). It is noted also that since the decision in **Brooks**, the sentence for dealing in has been increased by the legislature. Subsequent to ***Brooks***, this Court has pronounced further on the matter of drug sentences. One such occasion was in ***Peter Coleman v Regina*** (1994) 31 JLR 347. The Court (Carey, Gordon, Wolfe, JJA) said at page 348:

> "With respect to sentence, where the charge involves trafficking in dangerous drugs, compassion does not arise. A person who deals in drugs cannot receive mercy. Judges must be firm in appreciating that

> trafficking in drugs is an international trade which is of absolutely no benefit to society. Persons involved are purveyors of death."

[21] Given the amount of ganja involved, that is, 368 ounces, the learned Senior Resident Magistrate applied the relevant principles appropriately and the sentence cannot be regarded as manifestly excessive. In the circumstances, the appeal is dismissed and the convictions and sentences are affirmed. In view of the fact that the appellant has been on bail, the term of imprisonment shall commence today.