[2012] JMCA Crim 53

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 14/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

ANTHONY ELLIS v R

Garth Lyttle for the appellant

Mrs Ann-Marie Feurtado-Richards for the Crown by way of a fiat from the Director of Public Prosecutions

27 June and 5 November 2012

BROOKS JA

[1] On 13 July 2011, Mr Anthony Ellis was convicted in the Resident Magistrate's Court for the Corporate Area, for a breach of section 14 (2) of the Corruption Prevention Act (the Act). The learned Resident Magistrate accepted the testimony of the main witness for the Crown, Transport Authority Route Inspector Kenton Service, that Mr Ellis had offered Mr Service the sum of $8,000.00 as an inducement for him not to prosecute Mr Ellis and to return Mr Ellis' motor car to him. She rejected Mr Ellis' defence that it was Mr Service who had solicited the bribe. The learned Resident Magistrate, by way of sentence, ordered Mr Ellis to pay a fine of $30,000.00 or serve six months' imprisonment.

[2] Mr Ellis has appealed against his conviction and sentence. The essence of his appeal against the conviction was that the decision of the learned Resident Magistrate was against the weight of the evidence. This was so, according to the grounds of appeal, especially as the evidence revealed that Mr Service was not the person who had prosecuted Mr Ellis for unlawfully using the motor car as a public passenger vehicle and Mr Service had no authority to release the vehicle.

The evidence before the learned Resident Magistrate

[3] The events giving rise to the conviction commenced on 28 October 2010 in the vicinity of the intersection of Hanover Street and East Queen Street in the parish of Kingston. Mr Service was in the company of other Transport Authority Inspectors and members of the police force, carrying out road traffic duties. They stopped Mr Ellis who was driving by and, thereafter, Transport Authority Inspector Bryan warned Mr Ellis for prosecution. The offence was said to be unlawfully operating his motor vehicle as a public passenger vehicle. The vehicle was seized, placed on a wrecker, and taken away to be impounded.

[4] According to Mr Service, Mr Ellis asked him "weh you can do for me". Mr Service said that his reply was "what do you expect me to do for you". At some point of the exchange, Mr Ellis is said to have told Mr Service, that if Mr Service secured the release of the car, Mr Ellis would give him $10,000.00. No further discussion took place between them before they parted company that day.

[5] The scene then shifted to the following day, 29 October 2010. Mr Service testified that while he was at the Transport Authority's office at 107 Maxfield Avenue in the parish of Saint Andrew, at about 12 noon, he was summoned to the outside of the building. When he went there, he saw Mr Ellis who approached him and said "Boss me have $8000.00 if me get back me car tomorrow me give you two more".

[6] According to Mr Service, he told Mr Ellis to wait in the waiting area. Mr Service then went and spoke to his general manager, Mr Cecil Morgan, who contacted the police. Two officers, including Detective Constable Dennis Brown, attended. The four formulated a plan, and pursuant thereto, Mr Service returned to speak to Mr Ellis outside the office, "right behind the police post on the compound". The police officers could see the two men, but were themselves, out of sight.

[7] At that spot, Mr Service testified, Mr Ellis explained why he only had $8,000.00. He then counted the money and handed it to Mr Service. Thereafter, the testimony continued, Detective Constable Brown came and accosted Mr Ellis and the other police officer took the money from Mr Service in Mr Ellis' presence. The police later arrested and charged Mr Ellis for a breach of the Prevention of Corruption Act.

[8] Detective Constable Brown also gave evidence at the trial. His testimony was consistent with Mr Service's. That was the essence of the evidence presented by the Crown at the trial. It was accepted by the learned Resident Magistrate.

The grounds of appeal

[9] Mr Ellis filed five grounds of appeal. They were:

> "1. The Verdict of Guilty of the offence of Breach of Corruption Prevention Act, S. 14 (2) was unreasonable and should not be allowed to stand having regards to the evidence.
>
> 2. The Learned Resident Magistrate erred in law in holding that an offer was made by the Appellant to Transport Authority Inspector Kenton Service not to prosecute him for the substantive offence of operating his motor car without a Road Licence Contrary to Section 61 (5) of the Road Traffic Act, when Kenton Service was not the virtual prosecutor in this case.
>
> 3. The Learned Resident Magistrate erred in her finding of facts and in law, in holding that the offer was made to Kenton Service to release the Appellant's vehicle when the evidence from Kenton Service clearly shows that the vehicle could not be released except on the orders of the Judge of the Traffic Court.
>
> 4. The Learned Resident Magistrate erred in her assessment of the evidence of Kenton Service and the application of Section 14 (2) of the Corruption Prevention Act, when she accepted and acted upon the evidence of Kenton Service when he said the Appellant said "beg you a chance" when the evidence shows that he was not the Prosecuting Officer, and neither was he the one who seized the Appellant's motor vehicle. That makes the conviction and sentence unsafe.
>
> 5. The Learned Resident Magistrate fell into error in holding that the demeanour of the Appellant was "... shifty, less than forthright ..." and consequently, concluded that the Appellant made the offer as an inducement for Mr. Service not to prosecute him and to release his seized vehicle, when both acts could not be performed by Kenton Service. The Learned Resident Magistrate stated that she was satisfied beyond reasonable doubt of that, when the clear

> evidence was that another Transport Authority Inspector had already prosecuted the Appellant for that said offence and no charge was laid by the Court against the Appellant."

[10] Grounds one and five, dealing with the approach of the learned trial judge to the facts may be dealt with together. Grounds two, three, and four are related to the central issue of Mr Service's authority, or lack thereof. They may be considered together. Grounds two, three, and four shall be considered first.

Grounds two, three, and four – The effect of Mr Service's lack of authority

[11] Mr Lyttle, on behalf of Mr Ellis, argued that the learned Resident Magistrate was wrong to find that an offer could be made to have Mr Service refrain from prosecuting or to have Mr Service release the motor car, when Mr Service had no such authority. Mr Lyttle submitted that Mr Service was not the prosecuting officer, as that was Inspector Bryan, and Mr Service had no authority to return the motor car, as that was the prerogative of the judge of the Traffic Court. Neither of those things was, therefore, Mr Service's "public function" for the purposes of section 14 (2) of the Act.

[12] Learned counsel argued that the information spoke to the inducement to Mr Service to do or refrain from doing certain acts. The absence of authority in Mr Service, meant, Mr Lyttle submitted, that "no offer in Law could be made to him to satisfy the act of not prosecuting or to release the vehicle".

[13] Mrs Fuertado-Richards, in her submissions on behalf of the Crown, argued that the lack of authority in Mr Service was irrelevant. She submitted that the true issue

was who Mr Ellis thought could assist him in his plight. She went on to say, "[w]hether or not the action can be performed does not prevent the offer from being illegal".

[14] The starting point of the analysis of these competing submissions must be the consideration of the relevant section of the Act. Section 14 (2) states:

> "A person commits an act of corruption if he offers or grants, directly or indirectly, to a public servant any article, money or other benefit, being a gift, favour, promise or advantage to the public servant or another person, for doing any act or omitting to do any act in the performance of the public servant's public function."

[15] The fair interpretation of the section is that the offence is made out once the offer is made for the purpose of corrupting the public servant. The ability of the public servant to do, or to refrain from doing, the act requested, is immaterial. The principle involved was comprehensively examined by this court, albeit from the point of view of the public official, in **Dewayne Williams v R** [2011] JMCA Crim 17.

[16] Mr Williams was a police officer who, having written a traffic citation against a motorist, solicited money from the motorist in order not to prosecute him for the offence involved. At the trial, it was the officer's evidence that having written the traffic ticket he had turned the counterpart ticket in to the authorities according to the proper procedure. He was convicted for corruptly soliciting in breach of section 14 (1) (a) of the Act. Phillips JA, who delivered the judgment of the court set out, at paragraph [21] of her judgment, the submissions on behalf of the officer:

> "It was therefore, submitted, that the ticket having been issued and the counterpart having been turned over, **the appellant 'did not omit to do any act and faithfully**

> **discharged his public function, as required by Law**.' Additionally, in relation to the traffic ticket and the performance of his public functions, **his role in the matter had been spent**. So, it was submitted, that even acceptance by the court of the payment of the sum of $2,000.00 could not cure that deficiency with regard to the statutory requirements. The fact that the ticket was issued also encouraged counsel to argue that the learned Resident Magistrate misunderstood the meaning of the words, "so weh you a do, me a write the ticket you no" as they should be read with the words, "so what me a go tell the Sarge" to mean, and an inference could be so drawn, that **the appellant was not in charge, but the sergeant was, and it was the complainant who was importuning the appellant**. (Emphasis supplied)

The similarity between those submissions and Mr Lyttle's, in the instant case, is striking.

[17] In assessing the submission, Phillips JA reviewed a number of cases which, although concerned with differently worded legislation, were all concerned with the concept of corruption. These included **Cooper v Slade** (1858) 6 HL Cas 746, **R v Carr** [1956] 3 All ER 979, **R v Smith** [1960] 1 All ER 256, **R v Mills** (1978) 68 Cr App Rep 154 and **Jagdeo Singh v The State** (2005) 68 WIR 424. Some of the dicta from these cases demonstrate the mischief that the Act is aimed at preventing.

[18] In **Cooper v Slade**, Willes J said at page 773:

> "I think the word 'corruptly' in this statute means not 'dishonestly', but **in purposely doing an act which the law forbids as tending to corrupt**…Both the giver and the receiver in such a case may be said to act 'corruptly'." (Emphasis supplied)

[19] In **R v Carr**, Lord Goddard CJ, in a brief judgment, said, in part:

> "…the bribe was given to him as an inducement to show favour. **It does not matter if he did show favour**. If the

> person did what is called double-crossed, and did not do what he was bribed for, that is no reason why he should be acquitted of taking a bribe." (Emphasis supplied)

[20] In **R v Mills**, Geoffery Lane LJ said at page 158:

> "…in our judgment it is enough that the recipient takes the gift knowing that it is intended as a bribe. By accepting it as a bribe and intending to keep it he enters into a bargain, despite the fact that he may make to himself a mental reservation to the effect that he is not going to carry out his side of the bargain. **The bargain remains a corrupt bargain, even though he may not be intending to carry out his intended corrupt act**." (Emphasis supplied)

[21] In **Jagdeo Singh v The State**, a lawyer was convicted of having solicited and received money from his client, in order, he said, to offer it as a bribe to a magistrate, to have the magistrate grant bail to a particular person. There was no evidence that the magistrate had any knowledge of the impropriety. On appeal to the Privy Council, their Lordships opined that the client had committed an offence against the legislation, which was similar in terms to the Act in the instant case. In delivering the opinion of the Board, Lord Bingham of Cornhill said at paragraph [14]:

> "It would seem plain that [the client] Basdeo committed an offence against section 3(2) when, on 11 November 1999, she promised to pay money to the appellant to be used to induce the magistrate to grant bail and the prosecutor not to oppose it. The language of the subsection squarely covers such a case, as [counsel for the appellant] was inclined to accept. **It would be no defence even if (which was not the case here on that date) the offeror did not intend the transaction to progress beyond acceptance of the money and had an ulterior motive of exposing corruption**: *R v Smith* [1960] 2 QB 423. While Basdeo might, theoretically, commit an offence against section 3(2) without the appellant committing an offence against section 3(1), that would be a surprising

result, the more so since, on the prosecution case, the appellant instigated the transaction." (Emphasis supplied)

[22] The Board also cited at paragraph [16], with approval, the following dictum from **R v Harrington** (2000) (unreported):

> "…Furthermore, in our view, on the plain wording of the statute, it is not necessary to prove that any member, officer or servant of a public body was in fact aware of what was going on when the improper offer was made or the bribe was passed, **provided that the apparent purpose of the transaction was to affect the conduct of such a person corruptly.**" (Emphasis supplied)

[23] After considering these cases, as well as others, Phillips JA summarised the relevant principle, in the context of the Act, as being the purpose of the transaction. The learned judge of appeal stated at paragraphs [40] – [42]:

> "[40] On a review of the above authorities and on an examination of the specific section of the Act, it is clear that the words connote an offence once a public servant purposely does an act which the law forbids such as directly or indirectly requesting money or a benefit, such as a promise for himself or another to do or refrain from doing any act in the performance of his public functions. In our view, the offence is made out, and the act of corruption occurs if the public servant only solicits the article, etc., for himself and to his advantage, to do some act in connection with the performance of his public functions, which in this case was the prosecution of the traffic offence.
>
> [41] **What can also be gleaned from the authorities is that the offence is committed once the apparent purpose of the transaction was to affect the conduct of the complainant corruptly**. In keeping with the wording of our statute the 'person' must be a public servant. **It matters not whether the complainant was fully aware of the intention of the appellant, or whether the appellant intended to conclude the corrupt transaction**.

> [42] **R v Carr** shows that **it is not necessary for the prosecution to prove that the appellant, who had requested the money, did that which he was bribed to do**. So it was not necessary for the Crown to prove that the appellant had aborted the prosecution of the traffic offence, or that a bench warrant had been issued for the appellant's arrest as he failed to pay the fine, or to attend court. The arrangement between the appellant and the complainant to meet to effect the corrupt bargain, and then later the acceptance of the money by the appellant would separately both be offences under the statute." (Emphasis supplied)

The authorities on the point support Mrs Fuertado-Richards' submissions.

[24] Where the principle is, that an intention to corruptly affect the conduct of the complainant is unlawful, it is equally applicable to the person offering a bribe to the public servant as it is to the public servant soliciting the bribe. The offer communicates the intention to corrupt. That is the intention of the offerer. It is immaterial that the public servant lacks the authority to carry out the offerer's request. The offence against section 14(2) is committed when the offer, with the requisite intent, is made. The learned Resident Magistrate was, therefore, correct when she stated in her reasons for her decision that "[b]ased on the provisions of the [Act] the complete offence is committed simply by the offer being made [with the requisite intent] even without any acceptance of it".

[25] In applying the principle to the instant case, the learned Resident Magistrate found that Mr Ellis had offered, and handed over the money to Mr Service, not as fees due to the Transport Authority, but for Mr Service's own purposes, in exchange for Mr Service quashing the prosecution and returning the vehicle to Mr Ellis. The fact that Mr

Service, on the evidence, lacked the authority to do so, is not material; what is material is that Mr Ellis thought that Mr Service could secure those benefits for him. The provision of those benefits would, however, clearly be in contravention of the correct, established process.

[26] For those reasons, grounds two, three and four must fail.

Grounds one and five

[27] These grounds attack the learned Resident Magistrate's findings of fact. Mr Lyttle submitted that the evidence was not in a state that allowed the learned Resident Magistrate the opportunity to properly say that she was satisfied beyond reasonable doubt. Mr Lyttle hinged this submission on the evidence that Mr Service was not the prosecuting officer but Mr Bryan. In light of what has been said above, in respect of grounds of appeal two, three and four, it must be said that Mr Lyttle is not on good ground with this submission.

[28] It was open to the learned Resident Magistrate to believe Mr Service, as she did, that it was Mr Ellis who attended the Transport Authority's premises, uninvited, and offered Mr Service the bribe. It was open to her to find, as she did, that Mr Ellis was not credible and his demeanour was unimpressive. It was open to her to find, as she did, that the evidence of Mr Service and Detective Constable Hinds-Miller was credible. Based on those findings, and there being evidence to support them, it cannot be said, as ground one complains, that the verdict was unreasonable. These grounds also fail and the appeal must, consequently, be dismissed.

Conclusion

[29] The issue to be resolved by the learned Resident Magistrate turned on the credibility of the witnesses that she saw and heard. The evidence that was placed before her was sufficient to establish that Mr Ellis had offered and delivered to Mr Service, the sum of $8,000.00 with the intention that Mr Service would use his position as a public servant in the Transport Authority to improperly secure the return of Mr Ellis' motor car and quash the prosecution which had been set in train the day before.

[30] It is immaterial that Mr Service was not the prosecuting officer and that, on the evidence, only the judge of the Traffic Court could have ordered the release of the vehicle. The fact is that Mr Ellis thought that Mr Service could achieve those results. His offer of the bribe, and the delivery of the money, amounted to a breach of section 14(2) of the Act. The learned Resident Magistrate was entitled to find as she did.

[31] Based on the above the orders are:

1. The appeal is dismissed.
2. Conviction and sentence are affirmed.