JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 2/00

COR. THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag).

REGINA vs FITZROY FISHER

Ian Ramsay, Q.C. and **Deborah Martin** for the Appellant
Carrington Mahoney and **Georgiana Fraser** for the Crown

29th, 30th, 31st May and 20th July, 2000

COOKE, J.A. (Ag):

It is not in dispute that the National Water Commission was defrauded of vast sums of money. The fraudulent scheme involved the creation of fictitious job orders and corresponding fictitious payment vouchers. The object, which was achieved, resulted in cheques being issued by the National Water Commission which were subsequently encashed. It was as regard this criminal activity that the appellant along with another was indicted for conspiracy to defraud. The particulars of the offence were stated thus:

> "... and Fitzroy Fisher on divers days between August 1994 and November, 1995 in the Parish of Saint Andrew conspired together and with other persons

> unknown to defraud the National Water Commission of monies by fraudulently creating National Water Commission payment vouchers, forging signatures on the said National Water Commission payment vouchers, fraudulently attesting to the authenticity of signatures on the said National Water Commission payment vouchers and encashing cheques drawn on the National Water Commission's Bank Accounts in respect of the said National Water Commission's payment vouchers."

The appellant Fisher was convicted and sentenced to two years imprisonment. His alleged co-conspirator was acquitted. The appellant now seeks to have his conviction set aside.

Mr. Ramsay, Q.C. submitted that:

> "That the witness Lawrence, who testified as to admissions made to him by the Appellant, was a person in a position of authority and hence such alleged admissions were not admissible unless affirmatively shown to be free and voluntary and/or taken after a caution."

A determination of whether or not there is merit in this submission necessitates a review of the circumstances that gave rise to the admissions. The appellant was at the relevant time a senior internal auditor employed to the National Water Commission , a job that had nothing to do with the operational side of the accounts department. The witness Lawrence was an internal auditor and as such junior to the appellant. The National Water Commission retained the services of Security Administrative Services to investigate the discovered financial irregularities. Lawrence was assigned to work with that organisation

and in particular with David Hall who headed the investigation. The evidence in chief of Lawrence in so far as it is relevant is set out hereunder:

> "On November 10, 1995, I went to Security Advisory Management Services on Hillcrest Avenue. I went with Glenroy Watt. He was an Internal Auditor also at Mr. Hall's office. I was presented with four sets of photographs.
>
> These photographs were of persons. I was able to identify these persons.
>
> I told Mr. Hall something as a result.
>
> I left there and took four photographs with me.
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> On November 11, 1995 I went to work. After I went to Fitzroy Fisher's (accused) house.
>
> I took two photographs with me. I got them from Mr. Hall day before I saw Mr. Fisher at his home. I showed him the pictures and told him it looked like him. He never responded.
>
> I told him I had to visit Miss Neilsen the next day. I left his house and went home.
>
> On November 12, 1995 accused Fisher came to my house. He said "you convinced its me".
>
> I said pictures don't tell lies. He said it was him and he was sorry and he had embarrassed his family, friends and the Department.
>
> We went to his friend's house at Hellshire, St. Catherine. We drove in his car. Friend name is Easton Howell.
>
> Accused said it was the worst feeling since his ulcer. He said he wished he could kill himself. He asked me what he should do. I told him to go and talk to Miss Neilsen and Mr. Hall.

> I asked him what he did with the money. I suggested to him to give back the money. He said he could not. He said it was not he alone as he shared the money with another fellow.
>
> He said fellow had purchased two taxis and a Suzuki Swift. I left with my brother to Miss Neilsen's house. I saw and spoke and told her something".

Before dealing with the cross examination of Lawrence by Mr. Ramsay, Q.C. it should be stated that the photographs mentioned by Lawrence were purportedly taken at the ATM booth at the Bank of Nova Scotia in Spanish Town. Lawrence was cross-examined on two occasions. This cross-examination sought to establish two factors. Firstly that Lawrence had benefited from the departure of the appellant from the organisation - he had been promoted. Presumably this line was to undermine the creditworthiness of Lawrence in that Lawrence would wish to get the appellant "out of the way". Secondly the cross-examination was directed at establishing that Lawrence was a person in authority. In his unsworn statement the appellant said:

> "I have never told Mr. Lawrence that I was involved with any fraud at the National Water Commission neither did I tell him I disappointed my family and I felt like killing myself".

Curiously, it was never suggested to Lawrence that what he swore the appellant told him was a falsehood.

The test of whether a confession is admissible in evidence is whether or not such confession was voluntarily made. This principle was authoritatively

enunciated in the dictum of Lord Sumner in ***Ibrahim v R*** [1914] A.C. 599 at 609. It is in these words:

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority".

While this principle would appear to be simple and straightforward the application thereof has been subject to judicial consideration at the highest level. In ***Ajodha v The State*** 73 Cr. App. R 129, Lord Bridge of Harwich in delivering the opinion of the Board offered guidance as to what should be the approach of the judge as regards the respective role of the judge and jury pertaining to incriminating statements made by an accused which is sought to be tendered by the prosecution. His Lordship posited four typical situations of which the first three are not relevant. It is the fourth at p. 139 which is most instructive. It is set out below:

> "On the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence. For example, if the prosecution rely upon oral statements, the defence case is simply that the interview never took place or that the incriminating answers were never given; in the case of a written statement, the defence case is that it is a forgery. In this situation no issue as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue

> of fact whether or not the statement was made by the accused is purely for the jury. "

It is clear that there is no merit in this complaint. The issue of voluntariness and therefore admissibility does not arise. The appellant's defence, stated in his unsworn statement, was an absolute denial of the prosecution evidence. The stance of the appellant was that no confession was ever made to Lawrence. At the trial there was no material to suggest that the incriminating statements made by the appellant were other than voluntary. It is beyond comprehension to appreciate how the showing of the photographs to the appellant in the circumstances of this case was an act which thereby resulted in the confession being "obtained from him either by fear of prejudice or hope of advantage". The incriminating statements of the appellant were correctly admitted into evidence.

Because of the resolution of this ground of appeal as stated above, it is quite unnecessary to determine whether or not Lawrence was a person in authority. During the currency of the trial before the Resident Magistrate, while there was some argument as to whether Lawrence was a person in authority the record does not reveal anything to indicate that any attention was paid to whether or not the oral statements had in anyway been induced " either by fear of prejudice or hope of advantage exercised or held out by a person in authority". Perhaps it needs to be restated that a confession to a person in authority does not by that fact alone make such a confession inadmissible. The

confession becomes inadmissible when it is made in circumstances which offend the principles stated by Lord Sumner (supra).

The prosecution relied on the evidence of Superintendent Carl Major, a handwriting expert. His evidence was to the effect that handwriting on the fictitious job orders and payment vouchers and subsequent encashed cheques issued therefrom was that of the appellant. This the Magistrate accepted. The appellant seeks to fault this acceptance. The complaint was formulated as follows:

> "That the Learned Resident Magistrate erred in placing any reliance at all on the evidence of Superintendent Major who testified as a handwriting expert: Whereas the Cross - Examination showed that the methods of Superintendent Major were fundamentally flawed; further that the specimens he received were obtained from the Appellant on the basis that he should attempt to copy as exactly as possible the questioned documents, instead of writing in his own natural way".

Two aspects of this formulation may be dealt with briefly. Superintendent Major described the methods he employed. He said:

> " In coming to my conclusion, I took into account dissimilarity and similarities in the writing I examined, which are features of the design of the letters, the peculiarities of the letters. The size and proportion of the letters to each other. The relative sloping of the words or letters, the fluency of the handwriting, whether it is smooth or tremor along the way, the form of the letter, its angular or eyed, the skill, whether it was poor medium or good handwriting. The connection of the letters. Capital letters connected and disconnected. Whether it was shaded. Embellishment - whether there is absence of embellishment (flashing) which handwriting is vertical to the left or right.

> I have made allowances of natural variation in writing".

He also said he used a magnifying glass and a microscope as aids in doing his comparisons. This methodology was never challenged in cross-examination. Therefore it cannot be said with any justification that "the methods of Superintendent Major were fundamentally flawed".

Detective Inspector Fitz Albert Bailey obtained from the appellant specimen handwriting. In his unsworn statement the appellant said:

> "I went to Inspector Bailey from January to late February, 1996 to supply sixty-six pages of handwriting specimen. I could have written it in a day but because of the constant request of Mr. Bailey to write in a particular way even at times some of the specimens had to be destroyed in order to make the handwriting appear to look like what Mr. Bailey was satisfied with".

This must be the source of the last part of the complaint that the appellant was coerced to write in a particular way acceptable to Bailey. Up to that point of the trial when the appellant made those allegations there was nothing to suggest or foretell that any such assertion could or would be made. The evidence of Bailey as elicited in cross-examination was:

> "I would tell him what to write down based on the documents I had.
>
> If document had a mis-spelling I would request him to write it the same way. I told him what I required him to write."

So Bailey told the appellant what to write and not how to write. In view of all this, it is hardly surprising that counsel for the appellant did not urge this alleged impropriety in the closing address on behalf of the appellant. Clearly there is no factual basis for this aspect of the complaint.

We are now left with the issue as to whether the Magistrate erred in placing any reliance at all on the evidence of Superintendent Major who testified as a handwriting expert. To this, attention is now turned. Superintendent Major is an expert witness. What was his function? Lord President Cooper in ***Davis v Edinburgh Magistrates*** [1953] S. C.34 at 40 designated the functions of expert witnesses in this way:

> "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence".

Further he said at p. 40 that:

> "The parties have invoked the decision of a judicial tribunal and not an oracular pronouncement of an expert".

We respectfully accept that these guidelines are correct and ought to be applied. So now the question arises as to whether these guidelines were followed at this trial? It cannot be denied that Major described the methodology he used. As already said there was no challenge as to the soundness of the scientific criteria he utilized in coming to his conclusion. However, there was no demonstration to

the court of the reasoning which led him to his stated conclusion. Invariably when a handwriting expert gives evidence photographic enlargements are made. From these enlargements the expert demonstrates the similarities in the style of the specimen handwriting and that on the questioned documents. The tribunal of fact will then apply its independent judgment as to whether it can be satisfied so it feels sure that the expert's opinion is to be accepted. In this trial there were no enlargements and hence no demonstration . Under cross-examination Major said:

> "Absence of photographic record deprives the Court of a demonstration by the analyst. Such failure reduces the testimony of the analyst to the mere assertion of an opinion without any probative features."

We agree with those expressions by Major. Accordingly it is our view that Major's conclusion was no more than that of "an oracular pronouncement". Therefore when the Magistrate accepted and relied on the conclusion of Major he was in error . He did not come to an independent judgment.

There is no evidence that the Magistrate examined the handwriting on the documents and that he made a comparison . Even if this was so, that would not have provided a remedy. In ***R v Harden*** [1962] 1 All ER 286 it was determined that it was wrong to invite a jury to draw conclusion based upon its comparison of handwriting in the absence of expert evidence. In the judgment delivered by Widgery J, (as he then was) at 293(F) he described what took place at that trial:

> "The jury were supplied with photographs of the various exhibits, but no expert evidence as to handwriting was called, and neither side made any significant point on the handwriting at the trial. In the course of his summing-up, however, the learned deputy chairman repeatedly drew the attention of the jury to particular features of the signatures of customers or witnesses on the hire-purchase agreements in question, and invited them to draw conclusions therefrom as to the genuineness of those signatures. It is fair to say that the learned deputy chairman had not then had the guidance given by this court in ***R v Tilley*** [1961] 3 All ER 406 but in the light of that decision he erred in inviting the jury to reach their conclusions without the assistance of expert evidence".

This approach by the trial judge was considered a misdirection. It would seem imperative that a handwriting expert must demonstrate visually how, based on the scientific criteria he used, why a particular conclusion was reached.

The final ground of complaint, argued by Miss Martin was thus couched:

> "That in any event, even assuming that the learned Resident Magistrate was correct in accepting the aforementioned witness Lawrence, the evidence failed to make out a specific case of Fraud against the appellant.

Her submission was that the confession of the appellant was inconclusive of his guilt in respect of the specific charges averred in the particulars of the indictment (supra). We now examine her contention. The account of what the appellant said to Lawrence has already been set out. The Magistrate in his finding of facts said that:

> "I believe Mr. Lawrence that the accused Fisher told him that he Fisher was involved in the fraud and that there was also some one else".

This was a conclusion to which the Magistrate came , based on his interpretation of what the appellant said to Lawrence. The critical issue is, having decided that Major's evidence is to be disregarded can the conviction be sustained on the Magistrate's interpretation of the evidence of Lawrence? We are of the view that this conviction can only be sustained if, after disregarding Major's evidence, the confession of the appellant is such that the inescapable interpretation of what he said is consistent with his guilt and with no other rational conclusion. What did he say? He was sorry he had embarrassed his family, friends and his department. The only department to which he was speaking must be the audit department of the National Water Commission. What was he sorry about?

(i) Lawrence's evidence is that he told him(appellant) to go and talk with Miss Neilsen and Ms Hall. Miss Neilsen was the general manager of Internal Audit of the National Water Commission. She was head of the department in which the appellant worked. Did the appellant understand that talking to Miss Neilsen have to do with his proficiency or lack thereof of in respect of his assigned duties? We do not think so.

(ii) When it was suggested to him that he give back the money the appellant said he could not as he was not alone as he

shared the money with another fellow. Which money is the appellant speaking about? In the circumstances the only inference must be money illegally obtained from the National Water Commission.

(iii) The appellant said the fellow with whom he shared the money had purchased two taxi and a Suzuki Swift which is a motor car. The appellant did not say what he did with his portion of the money. It would be most unlikely that the appellant would have deprived himself in the division of "the money". "The money" of which the appellant speaks must have been considerable.

(iv) At the time when the conversation took place between Lawrence and the appellant the latter knew of the former's involvement in the investigations being carried out in respect of the irregularities at the National Water Commission. This is part of Lawrence's evidence:

> "I was on special assignment for purpose of investigation. Everybody in Audit Department knew I was in Security Advisory Management Services. Mr. Fisher must be aware of this I would discuss it with him".

It is impossible to believe other than that the appellant's statement related to the investigations of the irregularities then being carried out at the National Water Commission.

In all the circumstances we are compelled to the view that the inescapable interpretation of the words of the appellant is that he was admitting he was guilty; that he was guilty of being involved in the conspiracy as charged in the indictment.

The appeal is dismissed. The conviction and sentence is affirmed.