[2012] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 15/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

JOSEPH GREY v R

Trevor Ho-Lyn for the appellant

Jeremy Taylor and Mrs Suzette Whittingham-Maxwell for the Crown

16 January and 17 February 2012

HIBBERT JA (Ag)

[1] On 16 January 2012, we allowed the appeal and promised to put our reasons in writing. This we now do.

[2] This appeal has its genesis in the prosecution of the appellant for the offence of using a motor vehicle as a public passenger vehicle without there being in force a road licence for the purpose.

[3] At the trial before a Resident Magistrate for the parish of St James, the appellant pleaded not guilty to the charge. The prosecution led evidence that the appellant was seen beside his parked motor vehicle in the vicinity of the

Montego Bay No.1 Post Office shouting his destination to "would be" commuters. After three students boarded the vehicle, the appellant drove off and was later stopped by the police. The three students informed the Transport Authority route inspector, in the presence of the appellant, that they had taken the vehicle as a taxi to go to school. When the appellant was asked whether or not he heard what was said, he offered no response.

[4] The appellant, who was unrepresented by counsel, gave evidence on his own behalf denying that he had committed the offence for which he was charged. He stated that while he was driving in the vicinity of the post office, he saw two male students, whom he knew before. He stopped and asked them if they were going to school. They boarded his vehicle along with a female student who was standing with them. Shortly after he drove off, he was stopped by the police and the inspector from the Transport Authority. He denied that the students said they boarded his vehicle as a taxi.

[5] During the course of his evidence-in-chief the appellant stated that "The male student is here today to give evidence." During cross-examination he gave the names of the two male students as Carl and Gust.

[6] At the end of the testimony of the appellant, Reggie Bernard gave evidence on behalf of the defence. He stated that he is called 'Hulk' and that he, his friend Nicholas and a female student were the ones who boarded the appellant's vehicle. He said they all walked away after the vehicle was stopped.

[7] There were grave discrepancies between the evidence of the appellant and that of Reggie Bernard, especially as it related to the date and time of the alleged offence. The appellant upon being found guilty indicated that the student who gave evidence was not in the vehicle that day.

[8] Consequent on this disclosure, he was charged and indicted for the offence of perjury contrary to section 12(1) of the Perjury Act which states:

> "12 -(1) Where any of the following authorities, namely, a Judge of the Court of Appeal, a Judge of the Supreme Court, a Resident Magistrate, a Coroner, or a Justice of the Peace, is of the opinion that any person has, in the course of proceedings before that authority -
>
> (a) committed the offence of perjury; or
>
> (b) willfully made an oath a statement of fact or alleged fact, material to the issue or matter in question, such as to constitute an offence under section 11,
>
> the authority may order the prosecution of that person for either or both of those offences (as the circumstances may warrant) where there appears to be reasonable cause for such prosecution."

It should be noted that section 12(1) of the Act creates no offence, but merely empowers a judge or magistrate or other relevant authority to order the prosecution of a person who commits perjury during proceedings before that authority.

[9] The particulars of offence stated that the appellant:

> "On the 4th day of May 2011 in the parish of St James unlawfully, willfully, falsely, fraudulently, deceitfully, malicious [sic] or corruptly made a statement on oath which he knows to be false."

To this indictment the appellant pleaded guilty and was sentenced to be imprisoned for 45 days.

[10] It is from this conviction and sentence that the appellant appealed. The sole ground of appeal stated:

> "That the Learned Resident Magistrate erred in fact and law in her conduct of the case and thereby circumvented the safeguards for a fair trial and thereafter imposed a wholly inappropriate sentence given the circumstances of the case."

[11] Before embarking on his substantive arguments in support of this ground, Mr Ho Lyn pointed out that the indictment lacked particularity and that the notes of evidence disclosed nothing from which an offence of perjury alleging that the appellant made a false statement could properly be charged.

[12] Mr Taylor agreed with these observations but suggested that the indictment be amended to reflect the provisions of section 10(1) of the Perjury Act which provides that:

> "10 – (1) Every person who, aids, abets, counsels, procures or suborns, another person to commit an offence against this Act shall be liable to be proceeded against, indicted, tried and punished as if he were a principal offender."

[13] There are provisions in the Indictments Act for the amendment of indictments. Section 6 (1) provides:

> "6 – (1) Where before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice… ."

[14] The power to amend is also given to the Court of Appeal by section 61 of the Criminal Justice (Administration) Act. It states:

> "The Court of Appeal may, if it shall think fit, amend all defects and errors in any indictment or proceeding brought before it under this Act, whether such amendment could or could not have been made at the trial, and all such amendments as may be necessary for the purpose of determining the real question in controversy shall be so made."

[15] We are of the view that to allow the amendment which was sought would cause an injustice, hence this was refused. Although the appellant pleaded guilty to the charge, we took into consideration the fact that there was no evidence to support the charge, as framed, and that he was not represented by counsel. Based on the evidence which the appellant had given and the circumstances which gave rise to the charge of perjury, we were satisfied that the appellant did not appreciate the nature of the charge which he faced.

[16] In ***R v Forde*** [1923] 2 KB 400, Avory J in delivering the judgment of the court stated at page 403:

> "A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."

This passage was cited with approval and adopted by Griffiths LJ in ***R v Phillips*** [1982] 1 All ER 245. We accepted that this is the correct approach to be adopted by a Court of Appeal and find that both alternatives are applicable to the instant case. Consequently, we agreed that the plea of "guilty" should not be allowed to stand. For the reasons stated, we allowed the appeal, quashed the conviction, set aside the sentence and ordered that a judgment and verdict of acquittal be entered.

[17] Before leaving this matter, we urge prosecutors when drafting indictments under the Perjury Act to pay attention to section 13 of the Act which sets out the form which indictments should take.