JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO: 4/2003

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (AG.)

R v CHRISTINE PARKES
CALVIN NICHOLAS

Delano Harrison, Q.C. for the appellants

Anthony Armstrong for the Crown

6th, 14th, 20th July 2005 and 7th April 2006

HARRISON, P.

These are appeals from the decision of Her Honour Mrs. Almarie Haynes, Resident Magistrate for the parish of St. Thomas on 19th September 2001 convicting the appellants on counts 2 and 4 for the offences of negligently permitting prisoners to escape from lawful custody. Each appellant was fined a sum of $1000 or 3 months imprisonment on each count. We heard the arguments herein and on 20th July 2005 we dismissed the appeals. These are our reasons in writing.

The facts are that prosecution witnesses Kevin Bandy, Garcia Deacon and Wayne Perry were inmates at the Golden Grove lockup, in the parish of St.

Thomas on 28th November 1998 when they escaped. There was a steel grill door leading to a passageway between the cells each of which had iron grill doors.

Bandy was taken into custody in September 1998 and remanded in custody by the learned Resident Magistrate for the parish of St. Thomas on several occasions. He and other inmates began cutting the steel bar of the grill door to cell no. 2, weeks and days before the 28th November 1998. They did the cutting twice per day on seven occasions between the hours of 6 – 7 p.m. He did the final cutting of the bars between 7 – 9 p.m. on the said date, whilst the television was playing in the station. The appellant Parkes had placed a lantern in the passage between the cells that night because the electricity was off.

Garcia Deacon, also an inmate of cell no. 2, said that the cutting of the bars began 2 days before the escape after Bandy came into custody. It was done in the days while the prisoners made noise. On the day of the escape the appellant Parkes passing the cell stopped and looked in, she was abused and she walked away. Between 9:00 and 10:00 p.m. the appellant Nicholas stood and spoke with the prisoners for about half an hour. Later, as they were preparing to escape, the appellant Parkes walked past and went to the kitchen. Furthermore, Cons. Davis did not come to the cell with the appellant Nicholas.

Wayne Perry, who was placed in cell no. 1 in November 1998, saw the police search the said cell during the week of the escape, but they did not find the hacksaw blade. An inmate David Lewis had the hacksaw blade and did the

cutting. When Perry was escaping he saw Cons. Lewis around the guardroom desk and the appellant Parkes was at the front gate.

Cons. Davis was on station-guard duty from 28th November 1998 until Sunday 29th November 1998. There were seven prisoners in the lockups and he checked the cells at intervals between ¾ to 1 hour; accompanied by the appellant Nicholas. At about 12:10 a.m. he heard a door slam and he took up a lantern, because of the lack of electricity and on investigating saw a side door to the building open. He went into a cell and prisoners told him something. He noticed that a steel bar about 18" long and ¾" to 1" in diameter was missing from cells nos. 1 and 2 and from the grill door to the passageway that closes off the cells, leaving spaces wide enough to permit an adult to pass through. He discovered that four (4) prisoners had escaped.

Inspector Paul Anderson was in the barracks room at 12:17 a.m. when he received a report and went to the cell block where he saw the missing cell bars and observed that four (4) prisoners had escaped. Later that day at 1:30 p.m. he and other policemen saw the escaped men and held two of them.

The appellant Parkes, was on duty from 6:00 p.m. on 28th November 1998 to 8:00 a.m. the following day. She was the supervisor of the policemen at the station then. The appellant Nicholas was the cell guard and had a duty to visit the cells every hour, except that in the case of persons charged with murder the visit should be every half-an-hour.

Sgt. Ralston Ellis, the investigating officer visited the Golden Grove police station lockups on 29th November 1998. He saw a grill door within a grilled partition leading to a passageway between the cells. He noticed that a piece of steel 18" x ¾" was missing from the said grill door and also from each of cells nos. 1 and 2. He took the 3 steel bars to the Forensic Laboratory.

The appellant Parkes in her defence, stated in evidence that she visited the cells about 3 – 4 times before midnight. About midnight Cons. Davis spoke to her. She left the Inspector's office with Cons. Davis and went to the cells and discovered the bars had been cut. She had visited the cells, once every hour. She had last seen the bars in place at 20 minutes to eleven o'clock, when she went to the cells and looked. Initially, when she was taking over, she had checked the bars by knocking them physically. She did not do so at any time thereafter. She denied that she was negligent in the performance of her duty.

The appellant Nicholas said in evidence that he was on cell guard duty on 28th November 1998 for the period 4:00 p.m. to 12 midnight. He visited the cell every half-an-hour. He had discussions with the prisoners, gave them water before midnight and saw nothing amiss. He left at 12 midnight. No one relieved him from the cell guard duty. At 12:15 a.m. Cons. Davis called him. They went to the area of the cells, saw the bars cut and discovered the escape of the prisoners. He denied responsibility for the escape.

The grounds of appeal argued were:

> "1. That the Learned Resident Magistrate erred or misdirected herself in law which (sic) she found

> the Appellant guilty on the evidence before her which clearly stated that the steel bars in the cells were cut long in advance of the escape and were removed in a very short period of time.
>
> 2. That the verdict was unreasonable and cannot be supported having regards to the evidence. The prosecution's case was conflicting on the length of time the Cell guard spent away from the cells, and in the circumstances the verdict was unreasonable.
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> 3. The evidence before the Magistrate does not support the charges of negligence on the part of the Defendants when the Court relied on the evidence of Garcia Deacon when he said that the accused visited the cells only twice on her tour of duty before the escape."

A police officer is duty bound to keep incarcerated a person who is lawfully in custody having been arrested on a warrant or remanded by an order of a magistrate or judge. Any escape by such a prisoner due to the negligence of the said officer is a culpable neglect indictable at common law (See ***R v Holden*** [1965] Crim. L. R 556).

Section 16(3) of the Corrections Act (which replaced the Prisons Act in 1985) authorizes the detention of an individual awaiting trial. It reads:

> "16. (1) ...
>
> (2) Every person awaiting trial or remanded in custody may be committed to and detained in an adult correctional centre, lock-up or remand centre."

The prosecution has an obligation to prove that the detention is lawful. There is no presumption of lawfulness because of the fact that the individual is kept in a "prison or a lockup."

In the case of ***Dillon v. R*** [1982] 1 All ER 1017, the appellant a police officer was convicted for negligently permitting prisoners to escape from the cells which he was guarding at the Central Police Station in Kingston, Jamaica. There was no evidence led that the prisoners were held in custody by means of warrants or court orders. In allowing the appeal from the decision of the Court of Appeal, Jamaica, their Lordships of the Judicial Committee of the Privy Council held that there was no presumption of lawful custody in favour of the Crown. At page 1019, their Lordships said:

> "Their Lorships are of opinion that it was essential for the Crown to establish that the arrest and detention were lawful and that the omission to do so was fatal to the conviction of the appellant (subject to the argument based on s 16(2) below) The lawfulness of the detention was a necessary pre-condition for the offence of permitting escape, and it is well established that the courts will not presume the existence of facts which are central to an offence. (See ***R v Willis*** [1982] 12 Cox CC 164 and ***Scott v. Baker*** [1968] 2 All ER 993, [1969] 1 QB 659.
> Moreover this particular offence is one which touches the liberty of the subject, and on which there is, for that reason also, no room for presumptions in favour of the Crown. If there were to be a presumption that any person de facto in custody was there lawfully, the scales would be tipped in favour of the fait accompli in a way that might constitute a serious threat to liberty. It has to be remembered that, in every case where a police officer commits the offence of negligently permitting a prisoner to escape from lawful custody, the prisoner himself commits an

> offence by escaping, and it would be contrary to fundamental principles of law that the onus should be on a prisoner to rebut a presumption that he was being lawfully detained, which he could only do by the (notoriously difficult) process of proving a negative."

In the instant case the appellants Parkes and Nicholas were the sub-officer and cell guard, respectively, on duty at the Golden Grove lock-up in the parish of St. Thomas on the date of the escape for which they were convicted.

The learned trial judge found that there was no visit to the cells every hour as is required, nor every half-an-hour as is specifically required where persons charged with murder are incarcerated. She found, at page 41 of the record:

> "I find the omission to visit the cells every half an hour as was required gross dereliction of the duty and culpable in the sense that it was without reasonable excuse or justification. Cpl. Parkes and D.C. Nicholas were police officers with the responsibility to keep watch by day and by night over the cells and to prevent the escape of prisoners from the cells. The neglect to visit the cells every half an hour by D.C Nicholas and the failure of Cpl. Parkes to ensure that he did, involves an element of culpability which must be of such a degree that the misconduct impugned was calculated to injure public interest in that the accused persons must have foreseen that such neglect could result in dangerous prisoners escaping from custody. It is the Court's view that failure to visit the cells every half an hour was without any reasonable excuse or justification."

Prisoners Wayne Perry and David Lewis, two of the escapees, had been charged with murder.

The learned trial judge considered the discrepancies between the evidence of the witnesses Bandy and Deacon. She rejected the evidence of the appellant Parkes that she visited the cells every hour and physically checked the bars. In addition she rejected the evidence of the appellant Nicholas that he checked the cells every half an hour. Furthermore, she found that the verbal abuse to which the appellant Parkes was subjected should not have caused her not to return to visit the cells, nor should the lack of electricity, though creating more difficulty to see properly, cause the appellants to be less vigilant. The learned Resident Magistrate could not be faulted in finding that both appellant were guilty of negligently permitting the escape of prisoners from lawful custody.

In any event, the appellant Nicholas, although his course of duty ended at 12 midnight, he should not have gone off duty leaving the cells entirely unattended without advising his sub-officer, the appellant Parkes. Nor should the latter have permitted him to do so.

The issue arose in argument before us, of the proof of lawful custody of the escapees. Their Lordships in ***Dillon v. R*** (supra), at page 1020, said:

> "... there is not likely to be any difficulty for the Crown in proving the lawfulness of the detention, when it exists. Production of the warrant for arrest, or of a magistrate's order for detention, or of a suitably certified copy, is normally all that is required, and it should be in the possession of the person in charge of the prison or lock-up."

The evidence of Cons. Rodney reveals that the witness Bandy had been remanded in custody "... on several occasions ... by the Resident Magistrate."

The Court Sheet for the Resident Magistrate's Court, Morant Bay in the parish of St. Thomas was provided at our request. On examination by this Court the record reveals that both escapees David Lewis, charged with the offence of murder, and Kevin Bandy charged with illegal possession of firearm, had been remanded in custody by the learned Resident Magistrate on 19th August, 1998 and the 26th August 1998, respectively, and remained in custody at the time of the said escape on 28th November 1998. This is sufficient proof that they were in lawful custody.

For the above reasons we found no merit in the grounds argued and made the order dismissing the appeal.