

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 14/91

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. JOHN FRANKLYN

Frank Phipps, Q.C., Tom Tavares-Finson,
Patrick Bailey & Delroy Chuck for the appellant

Samuel Bulgin, Brian Sykes &
Maurice Tenn with them for the Crown

4th, 5th & 20th March, 1991

DOWNER, J.A.

On 4th January, 1991 John Franklyn whose business encompasses meat importation, farming and vending was convicted for receiving 28 paintings knowing them to be stolen.

His Honour Mr. Wesley James a Resident Magistrate in the parish of St. Catherine who conducted the trial, imposed a sentence of two years hard labour. Franklyn now appeals to this Court to set aside that conviction and sentence.

The Crown's case

The doctrine of recent possession was the basis of the finding of guilt. In giving an explanation for possession, the Resident Magistrate found the accused had given an unsatisfactory account and also that he had lied. The crucial findings of facts were as follows:

".....I find that his lies are relevant to the charge of Receiving made against him and for no other reason.

I am further satisfied that the Accused is lying in an attempt to explain away his guilt."

It is appropriate therefore to examine the circumstances by which Franklyn the appellant came into possession of the paintings and the various explanations he gave of those circumstances. It is undisputed that the paintings were sent to him in two cases from London as is evidenced by the Bill of Lading, exhibit 2. The Bill of Lading as a document of title entitled the appellant to clear the goods from the Wharf, see section 13 of the Wharfage Act. It was not ascertained in the Court whether the appellant read the Bill of Lading, but it did have a clause in section 1 pertaining to valuables, which was defined therein to include: "valuable works of art or other precious or rare objects of any kind whatsoever." Further clause 10 specifically states that:

"Except under special arrangements previously made in writing, the Agents will not accept business relating to valuables, livestock or plants. Should any Customer nevertheless deliver any such goods to the Agents or cause the Agents to handle or deal with any such goods other than under special arrangements previously made in writing, the Agents shall not be liable for any loss or damage to or in connection with the goods, however caused."

This was a circumstance the Resident Magistrate must have noted because if this had been a shipment above board, the contents would not only have been firmly in Franklyn's mind but he would also have given that information to his broker and the customs authorities.

The paintings were cleared by the appellant's customs brokers without an invoice. The C.I.F. valuation was a mere \$3,000.00 and the total duty was \$2,996.00. These paintings were carried to one of the appellant's homes in Spanish Town which was rented to Marcia Lee Betty who gave evidence on his behalf. Because he told his broker, Norman Powell that the

paintings were a gift, the matter slipped through the Jamaican Customs without any expert valuation or any proper information being given to the Customs. Valuable paintings had eluded the usually alert customs officers in London and Kingston because of a deliberate concealment of value and the failure on the part of the consignor to insure the paintings which is normal in a transaction of this nature. The inference must be that from the time he was in receipt of the Bill of Lading he had a felonious intent and this was the reason for concealing the true nature of the consignment. The consignor concealed, Franklyn concealed and the matter remained undetected for a while.

As for the ownership, possession and larceny of the paintings, the unchallenged evidence was that they belonged to the municipality of Bertona, Italy and the Mayor Mario Marcantonini gave evidence that several paintings were missing from the museum on 27th October, 1987 and that the matter was reported to the police. The first time he saw those paintings again was in Jamaica some 10 days prior to giving evidence in Court. He recognized the paintings in Court as those stolen from the Bertona museum and he also stated that someone was arrested for larceny of the paintings although the notes of evidence do not indicate where the arrest had taken place. It should be added that he said that he gave no one permission to remove the paintings from the museum.

As regards the value of the paintings found in the possession of the appellant, the Crown relied on the curator Malchiodo Gugliermo who holds a doctorate in architecture and is an expert in restoration, preservation, security, and valuation of paintings and sculptures. The valuation he stated was in the region of \$US\$2,000,000.00. He too reports that the paintings were missing from the museum. He added that he was obliged to inspect the museum at least once per week and he also identified

29 paintings here as paintings stolen from the Bertona museum. They were shown to him by the police.

The other aspect of the evidence came from the customs broker and the police. It was from the evidence of these witnesses and from the appellant's demeanour in Court that the Resident Magistrate inferred knowledge in the appellant necessary to raise a prima facie case against the accused that the paintings were stolen.

To the customs clerk Norman Powell, who cleared the goods, Franklyn said that the paintings were the ugliest things that he ever did see and that he could not put them in his house. The reason he gave for not hanging them in his house was that they were only appropriate for chasing ghosts. This could be interpreted as the facade Franklyn used to conceal his felonious intent.

Corporal Cameron was the first of the police witnesses and when he went to the home of the appellant and announced that Det. Sgt. Burgess was investigating a case of the theft of some paintings against him, the appellant replied that he did not have any knowledge of any paintings. That was on 28th April, 1990. Yet the customs clerk, Norman Powell had told the Court that early in 1988 his client, the appellant Franklyn had enquired of him the rate of duty on paintings because a friend of his had come to the house he was building and had offered to send him some paintings as a gift. Powell had subsequently told Franklyn that the rate of duty was 40% and there was Consumption and Stamp duty as well. Further, the Bill of Lading was handed to Powell towards the third quarter of 1988. Additionally, Powell had to go to the appellant to collect the duty at his place of business where meat and farm products were sold. The untruth to Corporal Cameron

was another instance of his distortions from which the Resident Magistrate inferred a felonious intent, and which was capable of raising a prima facie case of guilt.

Another instance of the measure of Franklyn's mind is to be found in his response to Sgt. Burgess at Spanish Town Road. Corporal Cameron took him to the Operation Squad Headquarters on Spanish Town Road where the appellant was introduced to Sgt. Burgess. There Sgt. Burgess told him that he was investigating the theft of some paintings and that he had visited 42 Queens Avenue in St. Catherine where the paintings were found. He was shown the crates marked J. Franklyn c/o Superior Customs Brokers, Kingston and specifically asked how he came by them, from whence the pictures came and how much he had paid for customs clearance. In response to the question concerning duty paid, the appellant said \$600.00. The Resident Magistrate however had the evidence of the duty paid, as just under \$3,000.00.

It was now the turn of Sgt. Burgess to give his account. He recounted how armed with a warrant under the Unlawful Possession Act he visited 42 Queens Avenue, Horizon Park and called on Mrs. Betty at the home she rented from Franklyn and how he found the crates which were shown to the appellant. Under caution the appellant said the paintings were given to him by his brother-in-law Stephani Kubena and two other men whose names he did not recall and that he did not know from whence the pictures came. It was against that background that he was arrested. When the Mayor of Bertona went and identified the paintings at Operation Squad Headquarters, Franklyn was sent for, and the paintings were identified in his presence. The officer made efforts to contact the appellant's brother-in-law through Interpol but without success. He was never able to ascertain the other two names from Franklyn.

One name which was never given to the police was that of Gordon Fernhead, whom the appellant on the advice of his lawyer, approached to provide the invoice connected with the paintings. It was against this background that the Resident Magistrate ruled that Franklyn had to answer the Crown's case.

The grounds of appeal

The nub of the first ground of appeal argued by Mr. Phipps was that the Resident Magistrate made a final determination of guilt against Franklyn at the close of the Crown's case. On this aspect, the record states "Court rules case to answer." This Court has examined the Resident Magistrate's notebook and we can detect no evidence in it that he made a final determination then. It is true, he summarised the evidence up to that point but that could be no basis for finding that there was a miscarriage of justice. However, we reiterate that the better practice for judges of first instance in adjudicating on submissions of no case to answer in cases of contested evidence, is to rule that there is a case to answer without recourse to a rehearsal of the evidence. As there was abundant evidence from which it could be inferred that Franklyn had a felonious intent, there was no merit in this ground. It should be noted that this ground (6) of the Notice of Appeal drafted by Mr. Chuck omitted a vital paragraph. When this was brought to the attention of Mr. Phipps, he graciously acknowledged that this was an error on the part of his junior.

It was also contended that although the Resident Magistrate recognized that he had to make a finding of guilty knowledge, he did not so find.

The accused gave evidence and stated that he was one of a group of investors which included Stephani Rubena and Gordon Fernhead who planned to build a Spanish Village in St. Ann

to coincide with the 500th anniversary of Christopher Columbus' voyage of discovery to these parts. He said that he would contribute land, which he had bought and co-ordinate the local expertise. The group was in Jamaica in 1988.

He had received a number of items from them and he had built a storeroom to house them. The paintings were one such item. Significantly he said that the things sent to him were not new. Some were old and some were antiques. Such a statement does not indicate a lack of knowledge of art. Even more significant was the introduction by the appellant of exhibit 7 the invoice. He stated that he had received it after the paintings were cleared by the broker. Although the Crown opposed its introduction, the ruling of the Court below was that it was a document received in the course of the appellant's dealings with the paintings and was admissible. The defence correctly contended that it was a document which would have "acted on Franklyn's mind." So this aspect must be examined. It must have acted on his mind because a notation thereon was that the appellant had requested Fernhead to secure the document. One inference was that the paintings must be retained indefinitely as twelve of them were to be selected by Fernhead for his own use and the others were a personal gift to the appellant for expenses he had incurred on Fernhead's behalf. In the notation, Fernhead declared himself to be a British subject resident at "Warwick", Cattell Road, England and the invoice is from Gordon's Antiques of Cattell Road, Warwick. The date of the notarisation was 6th July, 1988. The Bill of Lading indicated that the shipment of paintings was 29th May, 1988. They were cleared from Customs on 19th June, 1988. Yet the appellant never mentioned Fernhead's name during the interview with the police or to his customs brokers. The amount on the invoice is £15,000 sterling which is

a tidy sum, although far below the value given by the Curator which was in the region of US\$8,000.000.00.

A specific finding of the Court below was:

"The Accused testified that the paintings were sent to him by one Fernhead, one of the 'partners' in the Spanish project which has been planned for St. Ann and that some of them were for that project and the others were in gift for his house."

It was from this among other findings that the Resident Magistrate was able to say categorically:

"I am further satisfied that the Accused is lying in an attempt to explain away his guilt."

Since the Resident Magistrate stated that he was further satisfied that the accused was lying, it is pertinent to ask what were the prior findings which enabled him to find guilt to the extent that he felt sure. There were the varying accounts as to who sent him the paintings, firstly, a friend, then his brother-in-law and two others, then as investment as part of the project in St. Ann; then from Fernhead. He told an untruth about payment of duties. He said to the police that he paid \$600.00 when he had paid \$3,000.00 and initially to Corporal Cameron he said he knew nothing of any paintings. Further, at no stage to the police did he mention Gordon Fernhead. In this regard it is appropriate to state that there is authority for saying that it is not expected in receiving cases that an innocent accused would give different accounts as to who sent him the paintings: see Theodorus 3 Cr. App. R. 270 at 271. Franklyn was a man who from the evidence did a considerable amount of importing. He would therefore have been experienced in handling invoices and Bills of Lading and conversant with duties. It was because of these distortions and lies that the Resident Magistrate inferred that there was a felonious receipt

of the paintings and that his account of the paintings, coupled with the storage of them in Horizon Park in an outroom which were acts of concealment.

There were some further answers elicited in cross-examination which implicated the appellant. Franklyn admitted that when the police spoke to him he had the invoice which he considered important. He also stated that Fernhead had come to Jamaica after he had received the paintings and had told him that the paintings were bought in Japan and sent to Jamaica. Further, he said "the plan for all the things was to sell them including the paintings." It is clear that he concealed the invoice and Fernhead's involvement in the shipment because he feared that the police would then have a lead to his co-conspirator Fernhead. As for the planned sale, this important answer emphasized his felonious intent from the time he had received the paintings.

What is the principle of law applicable to a finding of guilty knowledge on the part of the appellant bearing in mind the doctrine of recent possession. Implicit in the judge's findings is recognition of this doctrine. The paintings were stolen on or around the 27th October, 1987 and the accused came into possession on 19th June, 1988. Having regard to the nature of the goods stolen and the time that elapsed between the larceny and the receiving, it was open to the Resident Magistrate to find that the doctrine was applicable. The Resident Magistrate's findings concerning the explanation which he found to be lies must be assessed against the law enunciated in the cases cited to illustrate the principle involved. These cases were R. v. Isaac Schama and Jacob Abramovitch 2 Cr. App. R. 45 and R. v. Hepworth Fearnley [1955] 2 All E.R. 918. At page 49 of

the first, there is the following passage:

"Where a prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution. That is the law; the Court is not pronouncing new law, but is merely restating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases."
(Emphasis supplied)

Explaining this in Hepworth Lord Goddard, C.J. at page 919 said:

"..... It is not necessary to use on all occasions the formula which was used in R. v. Schama, R. v. Abramovitch [1914], 84 L.J.K.B. 396; 112 L.T. 480; 79 J.P. 184; 14 Digest 430, 4545 because that case which is constantly cited in matters relating to receiving, lays down no more than this: if the explanation given by the prisoners which, when they have given it, becomes part of the sum of evidence in the case, leaves the jury in doubt whether the prisoners honestly or dishonestly received the goods, they are entitled to be acquitted because the case has not been proved. case is never proved if the jury is left in any degree of doubt." (Emphasis supplied)

Another important statement of principle is to be found in Sbarra [1918] 18 Cr. App. R. 118:

"The circumstances in which property is received may in themselves be sufficient proof that it was stolen and that the defendant knew that fact."

In applying these principles to the present case, the finding of the Resident Magistrate was that he rejected the explanation of the appellant as to the different accounts he gave of how he came into possession of the paintings and that it was all an attempt to explain away his guilt. In summary, there was an absence of any reasonable "explanation" which left the Resident Magistrate in any doubt as to the appellant's guilt. This was a clear finding and it was justified on the evidence.

There were two other grounds of appeal. Firstly, the evidence of the Mayor and Curator was convincing as to the identity of the paintings and were correctly accepted by the Court below:

The fifth ground of appeal reads as follows:

"5. That the appellant was denied a fair hearing contrary to section 20 (of the constitution) in that no statement in the possession of the prosecution was made available to the defence; in particular, the statement from an expert, Dr. David Boxer, indicating his opinion of the value of the paintings."

Perhaps it is useful to set out section 20(1) of the constitution which reads as follows:

"20.—(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Section 13 of the preamble to sections 14 - 20 of Chapter III of the constitution enumerates the Fundamental Rights and Freedoms. This chapter was enacted on the presumption that the procedures in the Courts which existed prior to the coming into effect of the constitution provided a fair hearing to an accused. Those procedures gave the accused adequate information to prepare his defence, to call witnesses, and to answer the charges preferred against him. The presumption was that the laws in force which contained provisions dealing with Fundamental Rights conformed to the constitution. Furthermore, this presumption was irrebuttable, as was evidenced by section 26 (8) of the constitution which reads -

"26. (1 - 7).....

(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

See D.P.P. v. Nasralla [1967] 2 A.C. 238. The essence of Chapter III of the constitution was that it enshrined timeless common law principles as to how the balance was to be struck between the rights of the individual and the role of the state. The most recent codification of such principles when the constitution was framed was the European Convention On Human Rights and those were the guiding principles prior to the appointed day for parliamentary counsel who drafted the laws on behalf of the legislature and for the judiciary who interpreted those laws and developed the common law in adjudicating on disputes, brought to the Courts for resolution. Earlier codifications which played a similar role were Magna Carta and the Bill of Rights enacted by Parliament at Westminster.

What were the actual provisions in the Judicature (Resident Magistrates) Act which were presumed to secure those provisions? Sections 67 and 272 were two of the sections which govern the commencement of the trial. It is useful to cite section 272. It reads:

"272. On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that a preliminary investigation shall be held with a view to a committal to the Circuit Court."

The procedure followed in this case was the usual one. Crown counsel opened her case on the basis of the evidence, she proposed to marshall and the Resident Magistrate made his order on the basis of section 272. There was the initial opportunity for the defence to make an enquiry regarding Dr. Boxer. His name was not on the back of the indictment so that it was obvious that he was not being called by the Crown. If his evidence was "material in the interest of the accused" in accordance with section 200 of the Act, the Resident Magistrate would have taken such steps as was necessary to secure his presence as he was a Jamaican expert on the valuation of paintings. The record discloses that no steps were taken by the defence to secure Dr. Boxer as a witness.

This ground of appeal therefore must fail. A hopeless ground of appeal cannot be made good by dressing it up in the language of constitutional law. What the ground of appeal does

demonstrates is that the framers of the constitution were correct in presuming that the right to a "fair hearing" was enjoyed by the people in Jamaica in trials in the Resident Magistrates' Courts. Also that the constitutional guarantees were meant as a protection against any future infringement of those rights.

We have given the submissions of Mr. Phipps our careful consideration and have ruled that the appeal is to be dismissed. The conviction and sentence are to be affirmed. The sentence is to run from the date of conviction.