JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO: 16/2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

ANTHONY SKEEN V R

Mr. Debayo Adedipe for the appellant
Mrs. Caroline Williamson-Hay for the Crown

February 19, & 23, and April 27, 2007

SMITH, J.A.:

The appellant Anthony Skeen, was convicted in the Resident Magistrate's Court for the parish of Manchester on April 5, 2006 on an indictment containing two counts. The first count charged the appellant and others with maliciously damaging the Spaldings Police Station. The second count charged him and another with maliciously damaging a Mazda motor car. On count 1 he was fined $80,000.00 or 6 months imprisonment in default of payment. He was sentenced to 12 months imprisonment on count 2.

On April 19, 2006 his attorney-at-law filed a Notice of Appeal with the following grounds:

"1. The conviction is not supported by evidence.

2. The learned trial judge erred in finding that the appellant was identified. The evidence of identification was too poor to support a conviction.

Before us, Mr. Adedipe sought and obtained leave to argue the following Supplemental Grounds of Appeal.

> "1. The appellant's trial, conviction and sentence on both counts are nullities because no valid order for indictment was made against him. The purported information (No. 10760/02) on which the order for indictment was made does not name him or any person(s) as a person(s) against whom any charge or allegation was made and it is thus not an information.
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> 2. The learned Resident Magistrate erred in law in overruling the submission of no case to answer made on behalf of the appellant. The state of the identification evidence was so poor at the close of the case for the crown that the learned resident magistrate ought to have terminated the trial and entered a verdict of acquittal in favour of the appellant.
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> 3. Having ruled that there was a case to answer the learned Resident Magistrate ought to have acquitted the appellant at the end of the case for the defence because the evidence of identification that was led could not support a conviction."

Supplemental Ground 1

Mr. Adedipe for the appellant, submitted, with skill and force, that the purported information on which the learned Resident Magistrate's order is endorsed is invalid because it does not name the appellant as a person accused. It is not the information contemplated by s. 64(1) of the Justices of the Peace Jurisdiction Act or s. 272 of the Judicature (Resident Magistrates) Act (The Act). This fundamental defect, he submitted, renders the trial on counts 1 and 2 of the Indictment a nullity.

Counsel for the appellant referred to s. 272 of the Act, ***Monica Stewart v R*** 12 JLR 465, ***Thelwell v DPP and Another*** RMCA 56/98 delivered 26th March, 1999.

Section 272 of the Act reads:

> "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."

In ***Monica Stewart v R*** (supra) the Court following its earlier decision in ***R v Williams*** 7JLR 129 held that the following words in s. 272 of the

Judicature (Resident Magistrates) Law "the magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction... make an order..." constituted the condition precedent which the Resident Magistrate had to comply with before assuming any jurisdiction at all. The Court observed that compliance with this provision must be proved "in the manner stated by s. 272 that is, by an endorsement on the information signed by the magistrate..."

In the instant case it is not disputed that an enquiry was made by the Resident Magistrate. It is also not in dispute that an order was made by the magistrate. The contention of Mr. Adedipe is that information no. 10760/02 on which the order is endorsed is not valid in that it does not name the appellant or anyone at all as a person charged. Consequently the order on that information is bad. He pointed out that no order was made on information No. 10762/02 which charged the appellant with an indictable offence.

Information No. 10760/02 does not on its face, name the person or persons charged. The parish, informant, the date it was taken and sworn to, the statement of the offence-malicious destruction of property and the signature of the Justice of the Peace or Clerk of the Courts comprise the face of this information. However, the names of four persons–David

Wright, Wain Foster, Gary Dorman and Carlos Bailey – appear on the back of the information as persons charged with the offence of malicious destruction of property.

On this information the following order is endorsed:

> "Indict the accused persons before me this day for the offence of Malicious Destruction of Property, Contrary to section 42 of the Malicious Injuries to Property Act. Add a second count as per info. 10761 and 10762/02 against David Wright and Anthony Skeen respectively for the offence of Malicious Destruction of Property contrary to section 42 of the Malicious injuries to Property Act."

The order was signed by the magistrate. Two questions arise for the determination of this court:

(1) The validity of information 10760/02

(2) If the information is valid whether the magistrate could properly endorse the order on the information which does not itself charge the appellant, for the joint trial of the appellant and others on indictment.

The validity of Information 10760/62

As stated before on the 'face' of this information there is no mention of the person or persons charged with the offence. The names of the persons charged are on the back of this information. An

information need not be in any particular form. It must state the name(s) of the person(s) charged and the offence.

If a warrant for the arrest of the person charged is requested the information must be in writing and on the oath or affirmation of the informant. However, if a summons is requested it is not necessary that the information be in writing or be sworn to or affirmed. In the latter case the information may be by parole and without oath or affirmation – see s. 31 of the Justices of the Peace Jurisdiction Act. However, where the information charges an indictable offence it must be in writing in light of the requirements of s.272. Section 31 also provides that "no objection shall be taken or allowed to any such information or complaint for any alleged defect therein in substance or in form..." This section, however, may not be invoked when the information is fundamentally flawed.

On the 'back' of information 10760/02 reference is made to the parish, the name of the informant, the names of the persons accused and the specific offence charged. The 'face' of this information has the particulars of the offence charged and indicates that the information was taken and sworn before a Justice of the Peace. In my view this is sufficient for the purpose of s.272 and enough to satisfy s.64(1) of the Justice of the Peace Jurisdiction Act which states:

> "**s.**64 (1) Every information... shall be sufficient if it contains a statement of the specific offence with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

No reference is made to the section of the statute creating the offence as is required by s. 64(2). However, this does not invalidate the information – see ***R v Ashenheim*** 12 JLR 1066 which applied s.64(4). The failure to state the names of the persons accused of the offence on the front of the information certainly constitutes a defect. However, in my view, this defect is not so fundamental as to render the information null and void in light of the fact that the names of the persons charged appear on the back of the information. Such a defect, in my judgment, may be cured by an amendment at any stage. Indeed this court has the power to direct that the information be amended. However, no amendment is necessary since the trial was not on the information but on indictment. I hold therefore, that the objection of counsel for the appellant may not be allowed by virtue of the second proviso to s.31 of the Justice of the Peace Jurisdiction Act. Further s.303 of the Judicature (Resident Magistrates) Act provides that no appeal shall be allowed in respect of any error or defect in form or substance of indictment or information not raised at the trial.

The validity of the order

The order is endorsed on Information 10760/02. This information, as I have mentioned before, does not charge the appellant. The appellant, of course, was before the magistrate at the time the order was made. He was charged on information 10762/02 with an indictable offence (the subject of count 2 on the indictment). The order states: "Indict the accused persons before me..." Thus, although the appellant was not charged on information 10760 an order was endorsed on that information directing that he be included in the indictment in respect of the offence charged in that information. Mr. Adedipe contends that this is wrong. The order, he said, was not made in accordance with s. 272 and was accordingly void. He submitted that in the ordinary course of events the information on which the order is endorsed must charge all the persons in respect of whom the order for indictment is being made. Otherwise, he said, the provisions of s.272 would not have been complied with. He referred to ***R v Monica Stewart*** (supra) and submitted that section 272 speaks to:

> "a specific accused, a specific information and
> a specific order ."

Mr. Adedipe told the Court that he could not complain if the order was endorsed on information 10762. But then, those persons charged on information 10760 would contend as counsel now contends, **mutatis**

mutandis, that the order on 10762 is void in relation to them. To determine this issue it is necessary, I think, to examine the provisions of s. 273 of the Act:

> "**273.** It shall be lawful for any Magistrate, in making any order under section 272 directing that any accused person be tried in the Court, by such order to direct the presentation of an indictment for any offence disclosed in the information, or for any other offence or offences with which, as the result of an enquiry under the said section, it shall appear to the Magistrate the accused person ought to be charged and may also direct the addition of a count or counts to such indictment. And, upon any such enquiry, it shall be lawful for the Magistrate to order the accused person to be tried for the offence stated in the information, or for any other offence or offences, although not specified in the information, and whether any such information in either case did or did not strictly disclose any offence. "(emphasis added).

Now it is clear that by virtue of s. 273 where an accused person is charged on information with an indictable offence which is within the jurisdiction of the Magistrate, the Magistrate in making the order for indictment may direct the addition of other counts. This is so even if there are no other informations charging the additional offences. Thus, if an accused person is brought before a Magistrate charged on information with larceny, the Magistrate may make an order indicting him not only for larceny but also for receiving, obtaining goods by false pretences and so on. The Magistrate may also choose not to direct an indictment for the

offence charged but instead for any other indictable offence within his jurisdiction as his enquiry under s. 272 may disclose. This so far is clear. But what is the position where several persons are charged on different informations? If for example three persons are charged separately for the same offence the practice is that the order would be made on one information. The order would probably be in the following form. "Indict the accused " A" charged on information 1, the accused "B" charged on information 2 and the accused "C" charged on information 3 before me this day for the offence of larceny, or perhaps simply: "Indict the accused A,B. & C charged on informations 1, 2 &3 respectively before me this day for the offence of larceny." In such a case if the order is endorsed on information 1, a cross reference would be made on informations 2 and 3.

A more difficult situation arises where accused persons are charged on informations with different offences which may properly be joined in one indictment in separate counts and the Crown wishes to charge them jointly in respect of each count. (This is the situation in the instant case).

If for example A,B,&C are charged separately with larceny, receiving and obtaining goods by false pretences, and if Mr. Adedipe is correct, then the magistrate could not make an order on any of the informations directing that they be indicted jointly on each of the three

counts of the indictment. The magistrate, according to counsel for the appellant, could only make such an order if all three persons were jointly charged on each of the informations. But we have seen that by virtue of s. 273 that is not necessary. An order may direct that charges not actually specified in the information be included in the indictment.

In the instant case the fact that the appellant was charged on information 10762 with an indictable offence enables the magistrate pursuant to s.273 to direct that he be indicted not only for the offence of which he was charged but for any other indictable offence or offence as his/her enquiry may disclose. The magistrate made an order as is required by s. 272. In ***R v Williams*** this Court held that such an order must be evidenced in the manner stated by s.272, that is, by an endorsement on the information signed by the magistrate. In our view where persons appear before a magistrate charged on separate informations with indictable offences and it is alleged that they jointly committed each offence then by virtue of s.273 it is sufficient for the purposes of s.272 if the order for indictment is endorsed on any of the informations. There is no need to prefer new informations charging them jointly in respect of each offence. It would, of course be otherwise if the trial was on information.

Such order must clearly refer to the other informations, as was done in the instant case, and it is desirable that cross-references should be made on the other informations. For the reasons given this ground fails.

Supplemental Ground 2 – No Case submission

The evidence on which the prosecution rely as stated in the magistrate's findings of fact is as follows: On the 20th April, 2002 at about 2:30 pm. A white Mazda motor car with three men therein was escorted to the Spalding Police station. The car was parked at the rear of the station compound and the men were placed in the guard room. About 10 minutes thereafter a large crowd armed with sticks and stones and other missiles converged on the compound of the police station and on the street in front of the station. They demanded that the men be handed over to them so that they could kill them. The police of course, refused their demands. Whereupon the crowd became boisterous and began to throw stones and other missiles. The crowd grew larger and the attack on the station intensified. The station was severely damaged. During the attack on the station some of the men went to the rear of the compound smashed the Mazda motor car and then set it on fire.

At the trial Constable Orlando Clair testified that the appellant whom he knew before was among those who went to the rear of the station. He was among those who damaged the Mazda motor car. He

saw the appellant and others overturn the car. He said he saw the appellant use a stick to hit the car and Pele chop the car with a machete. Constable Clair said he shouted "Pele and Skeen leave the car alone, Don't get involved" Pele replied. Skeen, the appellant, did not; he continued to smash the car. The car was subsequently set on fire. Detective Sgt. Williams testified that he saw the appellant among the crowd that day. He saw him throwing stones at the station. He saw him for about 15 minutes. He did not know him before.

On April 22, 2002, Constable Clair went to the Alston community with other policemen. There he pointed out David Wright (Pele) as one who was involved in the incident at the station. Two other men were taken into custody the same day. On April 23, 2002 at about 7:30 p.m. Constable Clair accosted the appellant Anthony Skeen in Spauldings and took him to the station. He was subsequently charged.

In an unsworn statement the appellant denied being at the station at the time of the incident. He said he was at that time living in Kingsland District, Manchester.

Mr. Adedipe submitted that the Magistrate erred in not accepting the no-case submission. The state of the identification evidence was so poor at the close of the case for the Crown that the learned magistrate,

ought to have stopped the trial. In this regard he referred to the following circumstances.

(i) The police station was under siege; the police were under attack.

(ii) There was a crowd of about 1,200 people armed with sticks, stones, machetes and other missiles. The people were boisterous and were demanding the release of two men.

(iii) The people were milling about

(iv) Missiles were being thrown at the station.

Further, he contended that the identification evidence of Constable Clair, on which the magistrate relied, was weak. The Constable, he said, did not know the appellant well. He relied on ***Reid, Dennis and Whylie v R***[1989] 37 W.I.R 346 and ***Evans v R*** WIR 290.

Mrs. Haye for the Crown submitted that it is not every case in which the identification was made under difficult circumstances that the trial judge is required to withdraw from the jury. She referred to the evidence of identification and submitted that the magistrate correctly rejected the no-case submissions.

As stated before, the prosecution case rested on the evidence of Constable Orlando Clair and Detective Sgt. George Williams. Both testified that they saw the appellant among the crowd at the station. Constable Clair said he knew the appellant before as Skeen. Detective

Williams did not know him before and identified him for the first time in Court – dock identification.

In applying the **Turnbull** principle the magistrate reminded herself of the need for caution and the reason for this. She then carefully examined the identification evidence adduced by the prosecution. In assessing the evidence she was mindful of what she described as "the obviously chaotic and seemingly terrifying circumstances that prevailed on the day in question." She took into consideration the "potential weakening factors in the circumstances of the identification" and "the presence of the obviously large crowd converging on the station..." In my view it is an understatement to say that the magistrate considered all the matters which would go to the qualify of the identification evidence.

The magistrate found that Constable Clair was a reliable and credible witness. She found that he was not mistaken in identifying the appellant as one of the many persons who converged on the station and proceeded to damage the station and the Mazda car. The Magistrate said:

> "I find that Constable Clair was also in a position and at a distance to enable him not only to make out the men but also to properly see their activities by the car. This I have concluded from the specific and minute details he has given as to how the car was damaged. "

She found that the identification evidence of Constable Clair in respect of the appellant was not poor. In this regard she said:

> "Given all that Constable Clair said he saw this accused (the appellant) doing on that day, his observation of the accused was not a fleeting glance neither do I find it as one of a longer duration made in difficult circumstances to render it unsafe to accept it.."

She found that he was not "so affected by the excitement of the moment so as not to pay close attention to the perpetrators." The learned magistrate found that "the absence of the evidence as to the full extent of the witness' prior knowledge of the accused is not such as to render the identification suspect and therefore unreliable." She accepted the Constable's evidence that he knew the appellant by name.

As regards the evidence of Sgt. Williams, the learned magistrate, did not attach any weight to his dock identification of the appellant.

I entirely agree with the learned magistrate that the identifying evidence of Constable Clair was not poor. This was certainly not a fleeting glance encounter. Neither could the identification be said to have been made in difficult conditions, if the evidence of Constable Clair is accepted.

In my judgment the magistrate did not err in rejecting the no-case submission made on behalf of the appellant.

Ground 3 -Unreasonable Verdict

Counsel for the appellant submitted that the evidence at the end of the defence case was no stronger than it was when the no case submission was rejected. Counsel contended that having regard to all the weaknesses that the learned magistrate herself identified in the Crown's case the crown had not discharged the burden of proof to the requisite standard.

As I have stated before, the appellant gave an unsworn statement. Of this unsworn statement the learned magistrate said:

> "I find that it does nothing to cast doubt on the reliability and credibility of the witness' identification of him. I reject his statement that he was not at the scene not simply because I think he is lying but for the reason that when I look back on the prosecution's case I am satisfied, particularly on the testimony of Constable Clair that he was present at the scene of the incident."

I am clearly of the view that the evidence of Constable Clair is sufficient to support the convictions on both counts. The judgment of the magistrate cannot in my opinion be faulted. Counsel has failed to show that the verdict is so against the weight of the evidence as to be

unreasonable and insupportable. As we have said time and time again this court will only set aside a verdict on this ground where the verdict was "obviously and palpably wrong" - see ***R v Joseph Lao*** 12 JLR 1238. This ground also fails.

Conclusion

For the reasons given the appeal is dismissed. The convictions and sentences are affirmed.