JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 25 of 1983

BEFORE: THE HONOURABLE MR. JUSTICE CARBERRY, J.A.
THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE ROSS, J.A.

R. v. OLIVE JUNIOR

K. D. Knight & R. Pickersgill for appellant.
Norman Wright & P. Brooks for prosecution.

15th & 16th June; 20th July, 1983

CAREY, J.A.:

The appellant was convicted before His Honour, Mr. G. Ramsay, one of the Resident Magistrates in Saint Andrew, on an information which charged that - "Olive Junior did unlawfully and maliciously damage (or injure) one "wall that runs between Parkland South Development and 15 South Ave. at "premises 15 South Ave in the parish of St. Andrew and thereby did injury "to the property of Delbert Perrier exceeding the sum of ten dollars ($10.00) "Contrary to section 25 of the Malicious Injury to Property Act." The endorsement of the sentence imposed was in the following manner:

"Complainant awarded compensation in the sum of $1800.

"Accused fined $10.

"Costs in the sum of $1500.

"All payments stayed pending appeal."

On the very first occasion this matter came before us, the Court itself, ex proprio motu, intimated to counsel that the appeal did not appear to be in the proper forum. As it could not be reached then, it was again relisted. Another Division of the Court ordered that the point as to jurisdiction should be argued. The submissions in that regard were put forward before us on 15th and 16th June, 1983, when the appeal was allowed, the conviction quashed and the sentence set aside. We observed that the hearing below was a nullity. We now give the reasons for that decision.

Section 25 of the Malicious Injuries to Property Act under which

the appellant was charged, provides as follows:

"Whosoever shall unlawfully and maliciously cut, break, throw down, "or in anywise destroy any fence of any description whatsoever, or any wall, "stile, or gate, or any part thereof respectively, shall, on summary "conviction thereof, for the first offence forfeit and pay, over and above "the amount of the injury done, such sum of money not exceeding ten dollars "as to the Court shall seem meet; and whosoever, having been convicted of "any such offence, either against this or any former enactment, shall after- "wards commit any of the said offences in this section before-mentioned, and "shall be convicted thereof in like manner, shall be liable to imprisonment "with hard labour for such term not exceeding twelve months as the Court "shall think fit."

The offence of destroying a fence is, for a first offence cognizable in a petty sessional jurisdiction. In a recent decision of this Court, the meaning of "on summary conviction" was considered. In R. v. Donovan Alexander & Albert Lee (unreported) R.M.C.A. 40/81, dated 26th March, 1982, at p. 5 of the judgment, the Court said this:

"A court of summary jurisdiction in this country thus presents some- "thing of a dichotomy. From the point of view of the Resident Magistrate, he "may thus sit as two Justices of the Peace or he may sit to exercise his "special statutory summary jurisdiction. What is tolerably clear is that "he is quite unable to exercise both jurisdictions simultaneously. In "Rex ats Livingston v. Pickerby 4 J.L.R. 4, Savary J. held that this was quite "permissible but the former Court of Appeal in Hart v. Black 7 J.L.R. 56 "expressly over-ruled that decision. Their Lordships expressed themselves "thus:-

> "'In our opinion in order to confer a special statutory summary jurisdiction on a Resident Magistrate the statute must clearly and distinctly say so. When the jurisdiction to try an offence summarily is given only to a Resident Magistrate's Court no difficulty arises; but when the law confers jurisdiction on a Resident Magistrate or Justices whether or not 'Petty Sessions' is mentioned, the jurisdiction of the Resident Magistrate is only exercisable in Petty Sessions.'

"R. v. Alexander (1961) 4 W.I.R. 102 is to like effect.

"The effect of this judgment seems therefore to be that where an "Act says 'summarily', what is to be understood is a Petty Sessions

"jurisdiction that is (a) two Justices of the Peace or (b) The Resident "Magistrate sitting either alone or with Justices of the Peace."

Both Mr. Knight for the appellant and Mr. Wright for the prosecution accepted that this was the law. Mr. Knight took the view, not unnaturally, that the appeal should be allowed because the learned Resident Magistrate had not sat as he should have, in a petty sessions jurisdiction. Mr. Wright, on the other hand, urged very strongly indeed, that there were sufficient indicia of jurisdiction to demonstrate that the learned Resident Magistrate had properly exercised a petty sessions jurisdiction.

He referred to R. v. Alexander [1961] 4 W.I.R. 102 at p. 105D where it was said by Lewis, J. (who delivered the judgment of the Federal Supreme Court comprising Archer, C.J. (Ag.) & Wylie, J., and himself) on the question whether the court should follow the approach of a former Court of Appeal of this country:

"Since the Resident Magistrate is authorised by law to exercise his "petty sessions jurisdiction in this court, we do not derive any assistance "from the endorsement and certificate." In Hart v. Black 7 J.L.R. at p. 58, the former Court of Appeal in the words of McGregor, J., suggested -

"In the absence of anything to suggest the contrary, the Court must "accept the endorsement and certificate on the record and conclude that when "the Resident Magistrate heard the complaint, he was not exercising his "jurisdiction in Petty Sessions."

Mr. Wright urged us not to follow Hart v. Black but to regard the certificate of the Clerk of the Courts as inconclusive. We do not think much significance, if any, should be placed on the format of the documents when they are intituled "In the Resident Magistrate's Court." To do so would, we think, invest a typist in the Court's Office with the power to determine the particular jurisdiction which a Resident Magistrate exercised at any given time. We thus prefer the approach of the Court in R. v. Alexander [1961] 4 W.I.R. 102. As the cases, to which references have already been made, plainly record, the Resident Magistrate might himself wrongly assume a jurisdiction not accorded him by the statute applicable to the case before him. The quest for other evidence of jurisdiction must therefore be pursued elsewhere. It is right to point out that the ascertainment of which jurisdiction is being exercised by the Resident Magistrate is a question of fact. See Smart v.

De Cordova 4 J.L.R. 46 at p. 48.

Counsel for the prosecution pressed four factors which, he said, should incline us to the view that the learned Resident Magistrate had exercised a petty sessional jurisdiction. He pointed first to a recognizance into which the appellant had entered, dated 23rd April, 1982. This document, so the argument ran, was the form prescribed by the provisions of the Justices of the Peace (Appeals) Act.

The relevant section is 13 which thus provides:

"To entitle any person aggrieved or affected thereby to appeal from "any judgment, decision, or report as aforesaid, the appellant, shall within "fourteen days as hereinbefore provided for the giving of notice of appeal, "enter into a recognizance, with one or more sufficient surety or sureties, "in a sum sufficient in the case of a judgment inflicting a penalty or "awarding a sum of money or costs to cover the penalty or sum awarded and "costs, and in a further sum of six dollars for the costs of appeal, if any "shall be adjudged; and in the case of a judgment of dismissal or refusal to "adjudicate, in a sum sufficient to cover the costs of dismissal, if any, "awarded, and a further sum of six dollars for the costs of appeal in case "costs of appeal shall be adjudged; and such recognizance shall be conditioned "for the due prosecution of the appeal according to the provisions of this "Act, and that the appellant do perform and obey all and every the judgments, "orders, and determinations of the Circuit Court or Judge to be made in the "matter; and in case the judgment appealed from shall be affirmed, then that "he do pay the amount of the penalty or sum of money adjudged, together with "all costs, as well of the judgment appealed from, as of the Circuit Court, "at such time as the said Circuit Court or Judge shall direct; and where the "appellant shall have been adjudged to imprisonment in the first instance, "the condition of the recognizance in such case shall be that the appellant "do surrender himself into custody forthwith, to undergo the term of imprison- "ment adjudged, and that he do pay all costs to be adjudged as aforesaid by "the Circuit Court or Judge, in case of the judgment appealed from being "affirmed."

An examination of the original record discloses that the appellant executed two separate recognizances, one, to which Mr. Wright referred and another, with which we must deal. As to that to which our attention was

drawn, it is perfectly true that the prescribed form was used, but that is all that can be said so far as compliance with the ipsissima verba of the section 13 of the Justices of the Peace (Appeals) Act. No sum of money whatever has been inserted in the Bond and (perhaps not unnaturally) no surety or sureties was/were provided. We do not think that a form prescribed by an Act, completed in a manner wholly different from what is required, can be said to satisfy the Act, so that it can be said that that document represents cogent or any "indicia" of jurisdiction. The other recognizance which the appellant also executed and is a part of the original record of the proceedings, is appropriate where an appeal is taken from a decision of the Resident Magistrate exercising a jurisdiction other than petty sessional.

It is plain that the two recognizances, assuming they could be relied on, in proof of jurisdiction, indicate that the Resident Magistrate for Saint Andrew exercised at one and the same time a petty sessional jurisdiction and his special statutory summary jurisdiction. We, however, derive little assistance from scrutinising recognizances and bonds executed by the appellant. It appears to us that a clerk who happens to prepare a particular form, could become the arbiter of the jurisdiction which the Resident Magistrate exercised in his court. It might well be, that that clerk was not present in court and would have no direct knowledge of the true situation. In the absence of other factors, such documents must be regarded as inconclusive.

Next, he said that the Resident Magistrate imposed no alternative in default of payment of the sums ordered. Consequently, the provisions of sections 18 - 20 of the Justices of the Peace Jurisdiction Act are applicable. Section 18 is to the following effect (so far as is material):

"Where a conviction adjudges a pecuniary penalty or compensation to "be paid, or where an order requires the payment of a sum of money, and by "the enactment authorizing such conviction or order such penalty, compensation "or sum of money is to be levied upon the goods and chattels of the defendant "by distress and sale thereof, and also in cases where, by the enactment in "that behalf, no mode of raising or levying such penalty, compensation or "sum of money, or of enforcing the payment of the same, is stated or provided "it shall be lawful for the Justice or Justices making such conviction or "order, or for any Justice for the same parish, to issue his or their warrant "of distress (in the Form (II) (a) or (II) (b) of the Schedule, as the case

"may be) for the purpose of levying the same, which said warrant of distress "shall be in writing, under the hand of the Justice making the same:"

The section thus authorises the issue by a Justice of the Peace, which, in practice, means the Deputy Clerk of the Courts, of a Warrant of Distress in circumstances where an order has been made either for payment of a pecuniary penalty or compensation and irrespective of whether the Act governing the offence charged, provides a method of recovery. The offence in respect of which the appellant was charged does not prescribe the method of recovery and as a result, the provisions of section 18 et seq. might be applicable. In our view, the failure of the Resident Magistrate to specify an alternative in default of payment, is indicative of some inadvertence on his part but cannot indicate in what jurisdiction he sat. The sums ordered to be paid would be recoverable by virtue of the operation of the sections referred to earlier or to Part V - Small Penalties Recovery - of the Justices of the Peace Jurisdiction Act.

The third point is akin to the second, viz., that the Resident Magistrate imposed a sentence of a fine and ordered compensation. The fourth point is akin to the third, viz., that the Resident Magistrate ordered costs. All these factors showed, so the argument ran, that he sat and exercised his petty sessional jurisdiction.

There is no gainsaying the obvious fact that the Resident Magistrate did not exceed the powers provided under section 25 of the Malicious Injuries to Property Act. We do not see, however, that his not exceeding the upper limit of the penalty prescribed demonstrates that he acted as two Justices of the Peace anymore than exceeding that figure would indicate that he exercised his special statutory summary jurisdiction. The order for costs could have been made by him irrespective of whether he acted as two Justices of the Peace or as a Resident Magistrate exercising special statutory summary jurisdiction. Section 27I of the Judicature (Resident Magistrates) Act allows a Resident Magistrate exercising his special statutory summary jurisdiction to order costs. In so far as the question of the sentence endorsed on the record, it can fairly be said that the Resident Magistrate followed the provisions of section 25 in that regard. That is not the same thing as saying he tried the appellant in the exercise of his special statutory summary jurisdiction. There is, in our opinion, no merit in these submissions.

It is worthy of note, however, that after he had imposed the sentence already set out, he proceeded to order a stay of execution. We were pressed by Mr. Wright to regard this "order", either as an attempt to inform a defendant of his rights or to ignore the order - in his words - to regard the "order" as mere surplusage.

Since the fine has not been paid, it is far from clear how "an order" which has been complied with, could be so cavalierly dismissed. By the provisions of section 17 of the Justices of the Peace (Appeals) Act which are as follows:

"When notice of appeal has been duly given and served and the "recognizance has been entered into as herein required, execution or further "proceedings shall be stayed in the matter appealed against; and if the "appellant be in custody, he shall be liberated until the judgment of the "Circuit Court or Judge shall be given, or unless or until the appeal shall "be withdrawn or not proceeded with by the appellant, on production of a "certificate from the Clerk of the Appeal Court that the necessary notice and "recognizance have been respectively given and entered into:

"Provided, that in case of the affirmation of the judgment appealed "from, any imprisonment which may have been undergone before liberation as last "aforesaid shall be reckoned as part of the imprisonment under such judgment." This order on the part of the learned Resident Magistrate would be nothing more than gratuitous and futile. Since the Resident Magistrate noted: "Court orders "stay of payment of compensation fine and costs awarded for one month pending "the prosecution of the appeal," he must be assumed, at any rate, by this "Court, to have made just such an order. There was in our view, nothing equivocal about that order made by the learned Resident Magistrate. Sitting as he should have been as two Justices of the Peace, he could not have made that order; he was without any power to do so: a stay came about by operation of law and not by order of the Court. However, exercising special statutory summary jurisdiction he would be perfectly entitled to grant a stay for if he did not, the fine and the rest of the award would become payable. See section 195 of the Judicature (Resident Magistrates) Act. By virtue of section 297, the Resident Magistrate, having not given time to pay, would be required to order the appellant to be liberated on bail.

We are not certain precisely what the Resident Magistrate had in mind when he recorded in his notes of evidence ".... one month for payment "pending the prosecution of the appeal." But it matters not. At all events, as a Justice of the Peace, he could not have ordered a stay pending any action to be taken by the appellant. In order to ascertain in what jurisdiction the Resident Magistrate sat, it is plain from the authorities that the endorsement and certificate on the records are unhelpful guides. We must seek assistance from the conduct of the trial, for example, orders made by him which point to one jurisdiction or the other,or by examining the Court sheet which would indicate the jurisdiction exercised by the Resident Magistrate. In making the order granting a stay of execution, we are firm in our conclusion that the learned Resident Magistrate exercised his special statutory summary jurisdiction and not his petty sessional jurisdiction. Such an order, as we have shown, points in one direction only.

Before parting from the case, we desire to make two observations. First, we consider the attempt to invoke a petty sessional jurisdiction by the prosecutor having regard to the facts in the case, highly inappropriate. This was a dispute as to whether a certain wall should have been erected and the appellant, in a recourse to self-help pushed it down. The value of the damage was found to be $1,800.00: the costs amounted to $1,500.00. We would commend the provisions of section 55 of the Malicious Injuries to Property Act to the legal advisers concerned:

"When any person convicted of any offence punishable upon summary "conviction by virtue of this Act shall have paid the sum adjudged to be "paid, together with costs under such conviction, or, shall have received a "remission thereof, from the Crown, or shall have suffered the imprisonment "awarded for non-payment thereof, or the imprisonment awarded in the first instance, "or shall have been so discharged from his conviction by any Justices as "aforesaid, he shall be released from all further or other proceedings for "the same cause."

Secondly, the words of Lewis, J., in R. v. Alexander (supra) at p. 105 remain as true today as nearly twenty-two years ago when they were stated:

"The court desires to express its opinion that the proper authorities "ought to consider whether the present system, whereby a resident magistrate "exercises in his court two different jurisdictions for the trial of summary "offences, is satisfactory. We understand that the usual practice is that "the resident magistrate's court is opened in both jurisdictions at the "beginning of each sitting and that cases are tried indiscriminately in either "jurisdiction. In our view, this practice tends to cause confusion and to "deprive the parties of the right to know with certainty what jurisdiction a "magistrate is exercising. So long as the law remains in its present state "we consider it desirable that the parties should be informed at the "commencement of the case what jurisdiction a magistrate is exercising and "that a record of this fact should be entered in the magistrate's notes."

It is eminently desirable that resident magistrates should indicate in their note books the jurisdiction they purport to exercise in hearing cases where the relevant statute speaks of a "summary trial". We do not feel that this will constitute an intolerable burden, but more importantly, it will prevent abortive trials and avoid the consequent incurring of unnecessary costs by the unfortunate litigant.

For these reasons, we allowed the appeal.