JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 74/1974

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

ROY GRANT v. R.

D.V. Daly for the appellant.

B. Macaulay, Q.C., and
Mrs. P. Benka-Coker for the Crown.

Heard: 9th October, 1974

LUCKHOO, P. (Ag.):

On October 9, 1974, we dismissed this appeal affirming the conviction and sentence and promised to put our reasons in writing for so doing. This we now do.

The appellant Roy Grant was convicted on an indictment which charged that on February 8, 1974 he took and drove away a motor vehicle without the owner's consent, contrary to s. 38(1)(b) of the Road Traffic Law, Cap. 346. He was sentenced to a term of imprisonment of 9 months at hard labour. He was found not guilty on an indictment charging that he stole a number plate from the motor vehicle.

The case for the prosecution was to the effect that on February 4, 1974, George Ho-Sang the owner of a Ford Cortina motor car lent the car to Johnny Chuck for his use. No time was specified for the return of the car to Ho-Sang. At about 10.30 a.m. on the same day Chuck parked the car at Premier Plaza in the parish of St. Andrew. He took out the

ignition key and went to his business place. When he returned to the Plaza at about 4.30 p.m. the car was missing. A report of the loss of the car was made to the police but the evidence is not clear as to the precise point of time this was done. At about 2.55 p.m. on February 8, 1974, Detective Inspector of Police Hibbert and Det. Acting Cpl. of Police McNeish who by then had been informed of the report of the loss of the car, were on patrol duty in a police vehicle when they saw the appellant driving the car along Monroe Road. They observed that the front number plate was missing. The policemen gave chase but the appellant eventually eluded them. The car was later found parked in the parking lot of one of the supermarkets in the Corporate Area. The appellant was taken into custody on February 18, 1974 and charged with the offences of larceny of the missing number plate and of taking and driving away the car.

The appellant's defence was to the effect that he was not driving the car on February 8, 1974 and had never done so at any time. He said he was unable to recall his whereabouts on February 8, 1974. Before the learned Resident Magistrate it was submitted on behalf of the appellant that the evidence of the prosecution if accepted disclosed that an offence of taking and driving away the car was committed on February 4, 1974, whereas the information and indictment laid against the appellant charged that that offence was committed on February 8, 1974, and that the evidence was thus in conflict both with the information and with the indictment. That submission was overruled by the learned Resident Magistrate who convicted the appellant upon the indictment as laid. No application was made by the Clerk of Court to amend the indictment in this regard.

Before us a similar submission was made on behalf of the appellant and it was contended that it would not be competent for this Court to amend the indictment at this stage as such a course would be unjust, the appellant having been given no opportunity of meeting a charge that the offence took place on February 4, 1974.

It is clear that in convicting the appellant the learned Resident Magistrate accepted and acted on the testimony of the police witnesses that they saw the appellant driving Ho-Sang's car on February 8, 1974.

If it is assumed in favour of the appellant that he did not take and drive away the car on February 4, 1974, then to be seen driving it on February 8, 1974 he must, at some time after it was originally taken and driven away, have himself taken and driven it away. When he did so it was without the consent of the owner. There was not a tittle of evidence that could afford the appellant the protection of the proviso to s. 38(1) of Cap. 346 - "Provided that if on summary proceedings the court is satisfied that the accused acted in reasonable belief that the owner would, in the circumstances of the case, have given his consent, if he had been asked therefor, the accused is not liable to be convicted." Like the original taker he would himself have committed the offence of taking and driving away the car without the owner's consent. Such a conclusion was reached by the Court of Criminal Appeal in England in the unreported case of _R._ v. _Richardson_ decided in May, 1958 the following reference to which appears in D. (an infant) v. Parsons (1960) 2 All E.R. 493 at p. 495 -

> "In that case there were three men found in possession of a motor car which had been taken away without the consent of the owner. In the motor car there was what Lord Goddard, C.J. described as 'a regular arsenal of housebreaking implements'. When the appellant was tackled with the matter he said: 'We did not nick it. We got it from another bloke'." Lord Goddard, C.J. after stating these facts went on to say:
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> " What does that matter? Here were three men who were on a housebreaking expedition and were found, as I have said, with a whole arsenal of housebreaking tools. They were driving a car that they had no business to be driving, and it was shown that the car had been taken away from the owner's house or from the street without the owner's consent, and they were found

> "driving it. Whether man 1, man 2 or man 3 took the car does not matter in the least; nor does it matter whether they took it from some friend whom they had met in the street. All three knew, as the jury found, that the car was being driven without the owner's consent."

Of course as was pointed out in R. v. Stally (1959) 3 All E.R. 814 and D. (an infant) v. Parsons it does not follow that even though one man was not actually a party to the original illegal taking of the car, if he subsequently gets into it and partakes of the use of it, that makes him guilty of the offence. That, however, is not the position in the instant appeal. Here the appellant was seen driving the car. He was not merely a passenger in the car. It matters not therefore if some person other than the appellant was the original taker of the car without the consent of the owner. If the appellant was the original illegal taker of the car he cannot be heard to say that his conviction is unjust or is unwarranted by the evidence. The offence charged is a continuing offence, unlike that of inciting a boy to commit an act of gross indecency charged in Wright v. Nicholson (1970)54 Cr. App. R. 38 reference to which was made by Mr. Daly for the appellant. If he were not the original illegal taker but took and drove away the car without the owner's consent at some time subsequent to the original illegal taking again he cannot be heard to say that his conviction is unjust or unwarranted by the evidence. It having been proved that he was driving the car on February 8, 1974, without the owner's consent it was competent for the learned Resident Magistrate to conclude, as he did, that the appellant took and drove away the car without the owner's consent on that date.

For these reasons we dismissed the appeal and affirmed the conviction. We also affirmed the sentence of imprisonment for 9 months imposed by the learned Resident

Magistrate, the appellant having previously been convicted of a similar offence in 1969.