

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Mag. App No. 66 of 2010

BETWEEN

BOSWELL CLEMENT

Appellant/Defendant

AND

WPC VALARIE LEON #13640

Respondent/Complainant

PANEL

P. Weekes, J.A.

A. Yorke Soo-Hon, J.A.

APPEARANCES

Mr. Criston Williams for the Appellant/Defendant

Ms. Dana Seetahal, S.C for the Respondent/Complainant

DATE OF DELIVERY: 10th May 2011

JUDGMENT

Delivered by P – M Weekes, JA

1. On May 11th 2009, the appellant, Boswell Clement, was convicted at the Arima Magistrates' Court of armed robbery contrary to **section 24(1) (a) of the Larceny Act** Chap. 11:12. He was sentenced to a term of three years imprisonment with hard labour. He appealed his conviction.
2. On January 14th, 2011, after hearing submissions on both sides, we dismissed the appeal and substituted the original conviction for armed robbery with a conviction for the lesser offence of larceny. We indicated that a written judgment would follow at a later date. This we do now.

Issue

3. The real issue before this Court was whether **section 75 of the Summary Courts Act** Chap 4:20 empowers the court to substitute a conviction of larceny where the evidence was insufficient to found a conviction of armed robbery but did disclose the offence of larceny.

Case for the Prosecution

4. On the 30th January 2009, Segundo Cantuca, a Spanish-speaking Colombian national (the virtual complainant) withdrew \$300,000.00 from Republic Bank Trincity to pay his employees. After withdrawing the money he put it in three briefcases which he placed in his vehicle and then drove to a worksite in La Horquetta where his workers awaited him. Around 12:30pm, having secured the briefcases in his vehicle, the virtual complainant had lunch at the campsite and

then went to a nearby warehouse approximately twenty-five metres away from his vehicle.

5. While at the warehouse, he heard glass shattering and looked in the direction of his vehicle. He saw an East Indian man breaking the glass of his vehicle and taking out a briefcase which he handed to a dark African man armed with a gun standing approximately three metres away from him. The virtual complainant subsequently identified the dark African man as the appellant at an identification parade.
6. The appellant was also identified by two of the virtual complainant's employees. They testified to seeing an East Indian man break the glass on the virtual complainant's vehicle and hand over a briefcase to the appellant.
7. The appellant and the other man walked off with the briefcase. The virtual complainant jumped into his vehicle and gave chase, however the appellant and East Indian man joined two other men and escaped in a waiting vehicle. The virtual complainant was able to see the appellant for approximately seven minutes at the scene.
8. The virtual complainant later made a report to PC Toorie at the La Horquetta Police Station. PC Toorie began enquiries on February 5th 2009 and was directed to a house on Ramgoolie Trace, Chin Chin where he executed a search warrant. A black bag containing nine hundred and sixty-three dollars (\$963.) in one dollar bills was discovered in a room occupied by the appellant. Sherwin Williams, the person in charge of the house, accompanied PC Toorie to Ramgoolie Street, Curepe where he pointed out the appellant. PC Toorie identified himself to the appellant, told him of the report being investigated and cautioned him. The appellant was searched, and two thousand dollars (\$2,000.) in one hundred dollar

bills was discovered on his person. PC Toorie enquired of the appellant how he came into possession of the money and the appellant replied “*Officer ah only get fifteen thousand dollars, them single bills is the remainder and this two thousand dollars, ah was going and give mih gyul it.*”

9. The appellant was arrested and taken to La Horquetta Police Station. On an identification parade conducted on February 7th 2009, the appellant was identified by the virtual complainant and his two employees Fabio Rincon and Fernando de la Cruz. An interpreter who had been present when the initial report was made was also present on the identification parade.

Case for the Defence

10. The appellant gave evidence on his own behalf and called no witnesses
11. He said that on 30th January 2009 at around 9:30am he had met one Richard Jairam at Cunupia Junction and accepted a lift from him to collect his salary. When he got to his job site, the contractor had not arrived so Jairam invited him to lime until he was ready to go back to work. The appellant arrived at La Horquetta at around 11:00am and was seated in the front passenger seat of Jairam’s car. when Jairam picked up two friends at a house in the area.
12. Jairam then drove to a nearby street and parked. He told the appellant that he and his friends were going down the road and would return in fifteen minutes. After twenty minutes the three men returned to the car. The appellant noticed Jairam’s friends had two bags in the backseat.
13. Jairam drove to a nearby house and went inside with his friends and returned to the car alone and told the appellant he could not drop him back to work. Jairam placed a small bag under his seat and when the appellant asked him what was in

the bag Jairam replied “*Doh study that.*” He then dropped the appellant home in Cunupia.

14. Three to four days later, Jairam visited the appellant and gave him a small black bag with money. Jairam told him “*Boy, here, take this money boy, you working hard, hard like a dog, look some money, boy.*” The appellant approximated the money to be around three thousand dollars and asked Jairam what it was for. Jairam told him “*doh study it, yuh get easy money dey, doh study it*”.

Magistrate’s Reasons

15. In her reasons, the learned Magistrate indicated that she was of the opinion that the appellant had been wrongly convicted of armed robbery. After a reconsideration of the evidence she was of the view that the prosecution had failed to prove an essential element of the offence.

16. She stated at pg 2 of her reasons:

*“To support a charge of robbery **the prosecution must prove not only the theft but also that the appellant used force or the threat of force at the time of the taking and that he put the virtual complainant in fear....** In the instant case the appellant and his accomplice said nothing to the virtual complainant and/or the other employees, did not point the gun at them nor did they confront them in any manner. In fact the incident unfolded some 25 metres away from the virtual complainant. It was not enough that the virtual complainant said that when he saw the appellant with the gun he felt afraid....The prosecution was unable to prove this and therefore an essential element of the offence of robbery was missing.”* [Emphasis ours]

17. She was also of the view that while the evidence did disclose the offence of larceny, she did not have the jurisdiction and could not convict of that offence.

The learned Magistrate states at pg 3 of her reasons:

“A court of summary jurisdiction has no authority to convict on whatever offence the evidence discloses, further whereas sections 74 – 76 of the Summary Courts Act Chapter 4:20 deems every complaint divisible and

authorizes the Court to convict where an offence included in any other offence is proved even though the entire offence is not proved, it is submitted that the offence of robbery is not covered by that section. Section 74 is reserved for offences like assault with intent to rob where the assault is proved but the intention to rob is not proved the defendant can be convicted of assault or where the defendant is charged with breaking and entering with intent to steal and did in fact steal but only the breaking and entering is proved, the prosecution failing to prove that the defendant did in fact steal e could still be found guilty of breaking and entering with the intention to steal. Also where the offence of larceny is charged but the evidence discloses kin offences of receiving, embezzlement, fraudulent conversion or conveyancing the defendant can be convicted for those offences and vice versa, robbery again is not covered under these sections.”

Grounds of Appeal

18.No grounds of appeal were filed in this matter. They were hammered out during exchanges between counsel and the bench. They can be distilled as follows:

(1) That the learned Magistrate had no power to substitute a conviction for armed robbery with a conviction for any other offence under section 75 of the Summary Courts Act Chap. 4:20.

(2) That the identification parade was flawed because of the presence of the virtual complainant’s interpreter.

Ground 1

Appellant’s Submissions

19. **Section 75 of the Summary Courts Act Chap 4:20** provides:

“Every complaint shall be deemed divisible; and if the commission of the offence charged, as described in the written law creating the offence or as charged in the complaint, includes the commission of any other offence, the defendant may be convicted of any offence so included which is proved,

although the whole complaint charged is not proved, or he may be convicted of an attempt to commit any offence so included.”

20. Counsel for the appellant submitted that section 75 should be interpreted narrowly and that a complaint under the section would only be divisible where the offence charged and the offence proved possess identical wording in the main clause eg. possession for the purposes of trafficking charged but the evidence discloses the offence of possession simpliciter or robbery with violence is charged but the evidence discloses the offence of simple robbery.

21. Counsel also submitted that robbery was not included in the offences enumerated in section 76 and that if robbery was meant to be an offence from which larceny could be found, the legislature would have set it out particularly.

Respondent's Submissions

22. Counsel for the respondent submitted that section 75 was to be interpreted to allow a conviction where the commission of any other offence is disclosed. The emphasis, she submitted, is on the commission of “any other offence whatsoever” as opposed to one included in the description of the offence in the complaint.

23. She further submitted that section 76 dealt with specific offences where the alternatives would not be automatically included in the offence charged as in section 75 and this was the reason for listing certain offences therein. The section was not meant to be an exhaustive list of offences that section 75 would cover. Section 75 was of general application, unlike section 76.

LAW

24. The Privy Council considered a similarly worded section in **Worme and Another v Commissioner of Police of Grenada [2004] 2 A.C. 430**. Section 60 of the Criminal Procedure Code of Grenada is *in pari materie* with **section 75** of our **Summary Courts Act**. Their Lordships at para 38 stated obiter:

“First, the question that Mr. Nicol raised as to whether negligent libel, as provided for in sections 252(1) and 253, is consistent with section 10 of the Constitution would arise in the present case if it would be open to a jury to convict the appellants of negligent libel under section 252(1) in the event of the prosecution failing to establish intentional libel under section 252(2). In this connection counsel referred to section 60 of the Criminal Procedure Code, the relevant part of which is in these terms:

“Every complaint or count shall be deemed divisible; and when a person is charged with a crime, and part of the charge is not proved, but the part which is proved amounts to a different crime, he may be convicted of the crime which he is proved to have committed, although he was not charged with it, or he may be convicted of an attempt to commit any offence so included, although not charged with the attempt.”

That provision appears to be aimed at a rather different situation where, in the course of trying to prove the offence charged, the prosecution prove part of that offence, which in itself constitutes another offence. The defendant can be convicted of that other offence.”[Emphasis ours]

25. Although this section was not applicable in the case before their Lordships, they opined that part of that offence charged may constitute another offence and the defendant can be convicted of that other offence. Section 75 refers to “the commission of any other offence” and the defendant “may be convicted of any offence” which is proved. The section is therefore meant to focus on the evidence led in respect of a particular charge and to see whether any other offence is disclosed in that evidence.

26. This approach has been applied by this Court in **Pogson v Ali (1976) 10 WIR 241** where the court considered **section 72 of the Summary Courts Ordinance** which is in terms identical to **section 75 of the Summary Courts Act**. In delivery judgment, Wooding CJ held that a person prosecuted for assaulting an officer in the execution of his duty may be convicted of a common assault where the evidence does not disclose that any duty was being performed. His Lordship stated at pg 241 – 242:

“We do not propose to say anything more on the matter except on the second point which was argued and which was purely a question of law. Because the learned magistrate dismissed the case without calling on the respondent, we must not permit it to appear that we are arriving at any positive findings of fact. We mention merely what the prosecution case was. It was that while on the premises of the respondent on his invitation the appellant was assaulted by him. Wherefore the appellant relied also upon s 72 of the Summary Courts Ordinance. That section provides that:

‘Every complaint shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the complaint, includes the commission of any other offence, the defendant may be convicted of any offence so included which is proved, although the whole complaint charged is not proved, or he may be convicted of an attempt to commit any offence so included.’

*A like question came up before this court on some previous occasion but the case does not seem to be reported and I cannot call it to mind at the moment. But we then decided—and it is clear from the terms of the section—that on a charge such as this of assaulting an officer in the execution of his duty, **if the facts do not bear out the commission of that offence, in that they do not show that he was acting in the execution of any duty but nevertheless support the commission of some other offence such as common assault, then the magistrate is under a duty pursuant to s 72 to call upon the defendant to answer that other offence and, if on the whole of the facts he is finally satisfied that such other offence was committed, to convict him thereof.**”*[Emphasis ours]

27. The emphasis is therefore on the evidence proving the commission of any other offence, rather than the description of the offence in the complaint.

28. The issue then arises whether the offence of larceny is contained in robbery.

Larceny is defined in **section 4 of the Larceny Act** Chap 11:12 as:

“4. Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and punishable with imprisonment for five years.”

Stealing is defined in section 3(a) as follows:

“3. For the purposes of this Act—

(a) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent, at the time of the taking permanently to deprive the owner thereof; but a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owners;”

Robbery is defined in section 24:

“24. (1) Any person who—

(a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;

(b) robs any person and, at the time of or immediately before or immediately after the robbery, uses any personal violence to any person, is liable upon summary conviction to imprisonment for ten years and upon conviction on indictment to imprisonment for fifteen years.”

29. Inherent in every robbery is a larceny. Support for this proposition can be found in JC Smith and Brian Hogan, *Criminal Law*, 1st Edn. London: Butterworths, 1965. Robbery is defined at page 392 and it reads:

“At common law robbery is the felonious taking of money or goods from the person of another, or in his presence, by violence or by putting him in fear. Essentially robbery is an aggravated form of larceny, hence the elements of larceny must be present to make out a charge of robbery.” [Emphasis ours]

30. If the learned Magistrate was of the view that, on the evidence, the offence of armed robbery was not proved but that larceny was proved, she had the jurisdiction, under section 75 of the Summary Courts Act to convict the defendant of larceny.

31. The position in Canada is the same as this jurisdiction. **Section 569(1) of the Criminal Code**, 1953 – 54, ch. 51 provides as follows:

“569. (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or

(b) of an attempt to commit an offence so included.”

32. This section was considered in **R. v. Rinnie 1969 CarswellAlta 77, 71 W.W.R. 272, 9 C.R.N.S. 81, [1970] 3 C.C.C. 218**. Their Lordships at para 11 stated:

“Some offences are included because the essential ingredients of a lesser offence are similar or form "a part of" the principal offence without being included by special words, and no notice has to be given to the accused. Thus where a person is charged with robbery and a part of the charge was not proven, but theft, being part of the charge, was proven, the accused may be convicted of theft, but he may not be convicted of receiving stolen goods because this offence is not part of the offence of robbery. In Reg. v. Fergusson, [1962] S.C.R. 229, 36 C.R. 271, 132 C.C.C. 112, Taschereau, J. (later C.J.) in giving the judgment of the court stated at p. 233:

*‘In the present case, there was only one count in the indictment, and the charge was for robbery in violation of s. 288 (b) of the Criminal Code. A count in an indictment is divisible and where the commission of the offence charged includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or of an attempt to commit an offence so included (Criminal Code 569). **Thus, a man charged with robbery may be found guilty of theft,** but a person charged with robbery may not be found guilty of receiving stolen goods, as was held by the Court of Queen's Bench in the present instance. Receiving stolen goods is a less serious offence, but is not included in a charge of robbery.’” [Emphasis ours]*

33. Accordingly, this ground of appeal fails.

Ground 2

34. The second ground of appeal can be dealt with in short order. Counsel for the appellant submitted that the identification parade was unfair because Anna Maria Lopez, an employee of the virtual complainant, who had acted as an interpreter was present at the parade. He advanced no other particulars of unfairness.

35. Counsel for the appellant at trial, had made a submission of no case to answer during which he submitted that the identification parade was unreliable as the interpreter could have tainted the evidence of the witnesses because she knew them personally. The learned Magistrate overruled the no case submission.

36. In the absence of any specific allegation by the appellant and after perusing the evidence, we find nothing in the evidence to suggest that the presence of the interpreter cause prejudice to the appellant whatever. Unfairness cannot be

inferred from her mere presence, there would need to be some specific acts or words from which it could be deduced.

37. Accordingly this ground of appeal fails.

CONCLUSION

38. In the circumstances we dismissed the appeal and substituted the conviction of Armed Robbery with a conviction of Larceny.

ORDER

39. The court substituted a conviction of Larceny for the conviction of Armed Robbery under the power of **section 75 of the Summary Courts Act**, and imposed a sentence of two years imprisonment for the offence of Larceny, sentence to run from date of conviction.

Paula-Mae Weekes
Justice of Appeal

Alice Yorke Soo-Hon
Justice of Appeal
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