

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Mag. App. No. 18 of 2002

BETWEEN

WESLEY FELIX

APPELLANT

AND

EST.SGT.CASTRO #4800

RESPONDENT

CORAM:

L. JONES, J.A.
A. LUCKY, J.A.

APPEARANCES:

MR O. CHARLES, S.C. AND MR K. SCOTLAND
APPEARED ON BEHALF OF THE APPELLANT

MR G. PETERSON
APPEARED ON BEHALF OF THE RESPONDENT

DATE DELIVERED: 26TH JUNE , 2002

JUDGMENT

Delivered by Lucky JA

The appellant was convicted for unlawfully and maliciously cutting cables, the property of the Telecommunication Services of Trinidad and Tobago Limited (TSTT) on 26th March 1992. The magistrate rejected a submission of no case to answer and, the appellant not calling any evidence the magistrate found the case proved; and, on the 12th September 1995 he was sentenced to two years imprisonment with hard labour. He has appealed against the conviction and sentence. When the appeal came before us on the 24th May 2002 the magistrate had retired and had not supplied the reasons for his decision.

The evidence

The appellant and one Knolly Slacks (now deceased) who were employees of TSTT on the date in question went to Picton Road, Laventille where they were seen removing the cover of a manhole, taking turns in entering the manhole where they cut the fibre optic cables. They remained there about an hour and a half. The appellant was subsequently identified at an identification parade on 6th June 1992 by a witness Eulice Calliste, one of the men who had observed the activities at the scene. The parade was conducted by Acting Inspector Quashie.

The appellant filed seven grounds of appeal. The main contention which is set out in the first ground of appeal is that the conviction cannot be sustained because several issues arose at the trial which required the magistrate to indicate how he resolved them. Those issues are set out hereunder:-

- (a) the evidence of identification was unreliable and prejudicial;
- (b) the magistrate did not take into account the weaknesses of the identification of Eulice Calliste;
- (c) the identification parade was unfair and it was unsafe to attach any weight to it;
- (d) the prosecution failed to establish ownership of the cables;
- (e) the magistrate should have upheld the no case submission.

The primary question therefore is whether this Court, in these circumstances, can determine from the record of evidence whether the decision of the magistrate should be upheld.

Absence of reasons

The approach to be taken by Courts of Appeal in matters where reasons have not been supplied by the presiding magistrate was considered by the Privy Council in Dean Cedeno v Kenwin Logan (unreported) 18th December 2000 in which their Lordships said at p 7:

“the authorities, while emphasising the importance of the giving of reasons as part of due process, also make clear that whether or not the ‘unreasoned’ decision should without more be set aside depends upon the circumstances of the particular case. A valuable judgment summarising the effect of the previous authorities is that of the Court of Appeal in

Flannery v Halifax Estate Agencies Ltd. (trading as Colleys Professional Services) [2000] 1 WLR 377. In *Forbes v Maharaj* it was accepted (without deciding) that there may be cases where the absence of reasons may not lead to the quashing of the magistrate's decision. To a similar effect was the judgment of Lord Lane CJ in *Reg v Immigration Appeal Tribunal Ex parte Khan (Mahmud)* [1983] QB 790 (at 794-795):

“A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal: in other cases it may not. Secondly, the appellant is entitled to know the basis of fact upon which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not.”

Cases which fall on the other side of the line are those where there is some complexity of the law or the facts which requires more than a simple statement of the conclusion (*eg. Reg v Harrow Crown Court Ex parte Dave* [1994] 1. WLR 98).

Identification

We think issues a, b and c can be taken together as they focus on the question of identification. Eulice Calliste identified the appellant. It was not a “dock identification”. He identified him at an identification parade (about which we shall comment later), having on the date in question seen him taking turns to enter the manhole where the cables were cut. He said the lighting was good and he was not mistaken. He observed the appellant and another man for an hour and forty-five minutes. In accordance with the dicta in Cedeno we are of the view that we can review the record of evidence and in doing so determine whether the magistrate's findings are correct.

The evidence on this issue was:

“During the time that the other man apart from the defendant No.2 was in the manhole his head was down and face away from me. During the time that the other defendant No.2 was down in the manhole and that person was cutting that person’s face was away from me and out of my vision. Most of the time occupied by these people was spent in the manhole, one or the other of them.”

They left about minutes to nine. Throughout one or other of the men were cutting this cables. It took them about one hour and forty-five minutes. A cable was being cut continuously throughout that time”.

When the manhole was opened they took turns in cutting the cable. They went into the manhole and started cutting the cable. They went into the manhole apart. (Witness points to defendant No.1) and says he went in first. At that time I was about two-three feet away. At that time this one (witness points to defendant No.2) was wearing a glasses. No.1 defendant remained in the hole cutting the cable about half hour. He was cutting the cable with a hackshaw”.

It seems to us that having heard the evidence and seen the witnesses, the learned magistrate, during the period of adjournment (24th July to 12th September 1995), would have applied the guidelines set out in **Rv. Turnbull** (1977) Q.B. 224; 63 Cr. App. R.132 in arriving at his decision. Calliste, had observed the appellant over a long period of time, the lighting was good and he was able to see him clearly. We note, and the magistrate would have observed that Calliste did not know the appellant before the night of the incident and that he identified the appellant at an identification parade some two and a half months after. Nevertheless having regard to the facts of this case there was ample evidence on which a reasonable tribunal, properly directing itself could have come to the conclusion that the identification was reliable.

Identification parade

With regard to the identification parade, Mr Charles had several complaints. The crucial question in our view is whether the identification parade was fair. Counsel complained that while the conduct of the parade itself may have been fair, the circumstances prior to the holding of the parade were questionable and were not in accordance with the Judges Rules for identification parades set out in Vol.33 No. 190 of the Trinidad and Tobago Gazette under the heading “Judges Rules”, “Identification Parades”, specifically guideline 2 which reads:-

“Arrangements for the parade and its conduct shall be the responsibility of “the identification officer” who shall not be below the rank of Inspector. No officer involved in the investigation of the case against the suspect may take any part in the arrangements for or the conduct of the parade”.

Counsel complained that the investigating officer, Estate Sergeant Castro, had sought the advice of the identification officer, Inspector Quashie. Castro testified that he got instructions from Inspector Quashie to apprehend Knolly Slacks (the other man with whom the appellant had been jointly charged) and that on 4th June 1992 Quashie had given him “certain advice” and had spoken to him before the appellant came to the police station. Counsel conceded that unlike the United Kingdom where the Judges Rules have been incorporated into Statute Law, the Judges Rules in Trinidad and Tobago are guidelines and do not have the force of Law as in the U.K. Nevertheless failure to adhere to the Rules could negative the effect of a parade. In support of his submission he cited **Gerald Gall** (1990) 90 *Criminal*

Appeal Reports 64. In *Gall* the investigating officer in the case brought a witness to the parade, knocked, looked in and spoke to the identification officer, then the witness entered and identified the appellant. The Court of Appeal Criminal Division (U.K.) in *Rv Jones (Terrence)* 1992 Criminal L.R. p 365 held that an investigating officer who merely takes or escorts a suspect to the parade does not commit a breach of Code D para 2.2 to PACE which states:

“No officer involved with the investigation of the case against the suspect may take any part in these procedures.”

The foregoing is similar to guideline 2 of our Judges Rules – see above. In the instant matter Castro did not take part in arrangements for the conduct of the parade. He merely escorted the witness from his home to the station where the parade was being held.

It seems to us that even if Castro had sought the advice of Quashie before the appellant was arrested, there was no evidence that the parade was unfair; and, there was no evidence of impropriety which would have directed or assisted the witness in identifying the appellant. Therefore there was in reality no issue for the magistrate to determine. A further matter raised by Mr Charles relates to evidence given by the witness Calliste in respect of the Identification Parade on which the appellant was placed. Mr Charles submitted that the witness had testified that while all the men on the parade wore glasses (spectacles) with a small white disk, no such disk was on the glasses worn by the appellant. We, however, wish to refer to the evidence given by Calliste on that issue. He said *“All of the men had on*

glasses, kind of round glasses. The lens was kind of round. On the lenses of those glasses in the room there was a small white disc. On the lenses of the glasses of defendant No.2 had no disc. His own had a disc on it.” We note that although the witness had initially said that there was no disk on the lenses of the glasses worn by the appellant, he immediately corrected himself. In this context we make the point that no evidence was given by the appellant to refute that given by Calliste and therefore no issue was joined on the matter. We find no merit in this ground.

Ownership

Lloyd Jhagdase testified that he was the General Manager Engineering of TSTT. Around 10:20 and 11pm on 26th March 1992 he visited the manhole at Picton Laventille and observed two polyethelene insulated cables, one in a 2400 pair 26H cable which was severed and one in an 1800 pair 26H cable also completely severed. In the manhole two fibre optic cables were also completely out. He went on to say:

“These fibre optic cables are part of our fibre optic toll system ...That cable forms an integral part of the company’s inter-exchange links, linking one exchange to the other”.

The finding of ownership in the light of this evidence is obvious.

The appellant did not call any evidence. The evidence of the respondent and his witnesses were not contradicted and there was no

complexity of the law or the facts. This is borne out by the magistrate's rejection of no case to answer.

For the reasons set out above we are of the opinion that the absence of the statutory reasons has not precluded our determination of the matter since the basis of the magistrate's decision was obvious.

Counsel addressed us in mitigation of sentence pointing out that the appellant has no previous convictions and having regard to his age and other considerations, the Court should consider a reduction in the sentence. We think there is some merit in that submission since it is only in exceptional circumstances that a Court will impose the maximum sentence on a first offender.

Although the facts and circumstances in the case were serious and clearly pointed to an act of sabotage, yet we think that there would be cases which could be far more serious than the instant case and it is these cases that should be reserved for the imposition of the maximum sentence.

Finally we wish to say that Parliament may wish to consider whether the present maximum sentence is adequate. We must, however, indicate that the Court would not condone any act of sabotage and vandalism particularly in respect of public property and we are of the view that a custodial sentence is appropriate in the circumstances of the case.

We would therefore dismiss the appeal against conviction, vary the sentence imposed by the learned Magistrate and instead order that the appellant serve a period of 12 months imprisonment with hard labour.

L. Jones
Justice of Appeal

A. Lucky
Justice of Appeal