

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 79 of 2021**

B E T W E E N

**RONDINO RUPERT FERGUSON
Appellant**

AND

**COMMISSIONER OF POLICE
Respondent**

BEFORE: **The Honourable Sir Michael Barnett, P,
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Evans, JA**

APPEARANCES: **Mr. David Cash with Mr. Ian Cargill, Counsel for the Appellant**

 **Mr. Vernal Collie, Assistant Director of Public Prosecutions, Counsel
for the Respondent**

DATES: **6 July 2021, 28 July 2021; 4 October 2021; 25 October 2021; 4
November 2021; 9 November 2021; 18 November 2021**

Criminal appeal - Stealing by reason of employment - Plea Deal – Whether decision of the magistrate reasonable and supported by the evidence – Whether the appellant’s convictions are unsafe and unsatisfactory

The appellant, Rondino Ferguson, an employee of Bahamas Customs, and another, Bastian, were charged with two counts of stealing by reason of employment. It was alleged that between the 29 to 30 October 2019, the appellant and Bastian, stole an assortment of jewelry from John Bull amounting to \$29,844.25. It was also alleged that on 6 November 2019 he, along with another, stole an assortment of jewelry amounting to \$20,666.80. Bastian negotiated a plea arrangement with the prosecution. The appellant maintained his not guilty plea and proceeded to trial.

On 27 May 2021 the appellant, was convicted of two counts of stealing by reason of employment, he was sentenced to four years imprisonment on each count to run concurrently from the date of conviction.

On 10 June 2021 the appellant filed a Notice of Motion in the Court of Appeal against his conviction and sentence on the grounds, inter alia, that the Magistrate's decision was unreasonable and that the conviction was unsafe and unsatisfactory. The Court heard submissions from the parties and reserved its decision.

Held: Appeal allowed; the convictions are quashed and the sentences are set aside.

Although the appellant had been charged along with Bastian and the charge sheet alleged that they were concerned together, once the Magistrate accepted Bastian's guilty plea and convicted and sentenced him, Bastian's trial had come to an end. The Magistrate could have no regard to Bastian's guilty plea in determining the guilt or innocence of the appellant.

The Prosecution did not lead evidence connecting the finding of the items of jewelry in Bastian's possession to the appellant during his trial. Further, the prosecution did not lead any evidence that the items found in Bastian's home were a part of the shipments, nor did the prosecution lead evidence from the person that shipped the items to satisfy the Magistrate that the items were actually shipped. It could have been made a part of the plea agreement with Bastian that he testify at the trial of the appellant thereby providing the Prosecution with direct evidence of the thefts. Not having resorted to any of those alternatives, the evidence against the appellant could only rise to the level of high suspicion; but even high suspicion is not sufficient to meet the criminal standard of proof.

J U D G M E N T

Judgment delivered by The Honourable Mr. Justice Isaacs, JA:

1. The appellant was charged with another, one Bastian, before Stipendiary and Circuit Magistrate Derrence Rolle-Davis ("the Magistrate") with two counts of stealing by reason of employment. Bastian appears to have negotiated a plea arrangement with the prosecution; and entered a plea of guilty to the charges. His plea was accepted by the Magistrate and he was

ordered to pay a fine and to make restitution. The appellant maintained his not guilty plea and was convicted by the Magistrate following a trial and sentenced to four years' imprisonment on each count; but the sentences were to run concurrently. The appellant filed his appeal on 10 June 2021. His grounds of appeal are as follows:

"1. Inadmissible evidence was wrongly admitted by the magistrate, and there was not sufficient evidence to sustain the decision.

2. The decision was unreasonable and could not be supported having regard to the evidence.

3. Under all the circumstances of the case the decision is unsafe and unsatisfactory.

4. The decision was such that a magistrate viewing the circumstances reasonably could not properly have so decided.

5. That the sentence was unduly severe."

Background

2. Between 29 and 30 October 2019, the appellant and Bastian are alleged to have entered an area of The Bahamas Customs' warehouse, the FedEx bonded area, also referred to as the high value cage ("the HVC"), where sensitive goods are kept. He carried with him a backpack. He later exited the HVC with the backpack.
3. Some days later, it was discovered by an employee of John Bull, that fifteen Cartier watches valued at approximately \$29,844.25, were missing. The appellant was arrested and charged with Bastian with two counts of stealing by reason of employment, contrary to section 340(4) of the Penal Code. He also faced a charge alleging that on 6 November 2019, he stole an assortment of jewelry valued at \$20,666.80, the property of John Bull.
4. On the date the items were reported missing, the arresting officer, Woman Sergeant 2461 Yvette Deveaux, made a search of the appellant's residence for the missing items; but none were found.
5. During his trial, the Prosecution called a number of witnesses whose evidence, in the opinion of the Magistrate, tended to confirm the allegations made against the appellant. The Magistrate convicted the appellant of both counts and sentenced him to four years' imprisonment on each count; with the sentences to run concurrently.

Ground 1: Inadmissible evidence was wrongly admitted by the magistrate and there was not sufficient evidence to sustain the decision

6. Mr. Cash abandoned ground 1. Thus, this ground fails.

Grounds 2 & 4: The decision was unreasonable and could not be supported having regard to the evidence; The decision was such that a magistrate viewing the circumstances reasonably could not properly have so decided

7. As grounds 2 and 4 are similar, I have chosen to address them together.
8. Mr. Cash submitted that the Magistrate relied heavily on the surveillance footage of the area where the items were alleged to have been removed. His assumption seems to be based on the ruling of the Magistrate where he said that the appellant was seen entering with an empty backpack and leaving with a packed backpack at a time when it was alleged that the appellant was not scheduled to work.
9. It does appear that the Magistrate arrived at a conclusion that the backpack said to have been carried by the appellant in the video footage was empty at one point but later packed as he left the warehouse on his own view of the video footage. I have perused the Magistrate's Notes but I have not found evidence adduced by any of the prosecution witnesses who testified that there was a difference in the size of the backpack.
10. Having himself observed that the backpack appeared empty at first and then packed as the appellant was leaving the area, the Magistrate ought to have sought to elicit from the various witnesses who watched the video what they observed about the backpack to determine whether or not their observations matched his own.
11. I note that in the evidence of Grade 2 Customs Officer Corey Gibson that he saw the appellant with a backpack when he viewed the video footage. However, he also said that the appellant normally brings a backpack to work. [pg. 9 of the Magistrate's Notes]
12. It is instructive, for example, that Ricardo Hart, Safety Manager at Odyssey Bahamas viewed the footage during the trial and while he was able to identify the appellant as being shown therein, was unable to say if the appellant was opening any boxes nor could he say what was in the backpacks in the video. [pg. 2 of the Magistrate's Notes]
13. I, myself, viewed the footage and was unable to see the condition of the alleged backpack before the appellant entered the HVC. The video footage is grainy and dim due to a lack of light save from what seems to emanate from devices carried by the two persons in the HVC; and brief flashes of light when they apparently entered another room.
14. Mr. Cash also submitted that the evidence of the witnesses called by the Prosecution did not condescend to demonstrate that there were any watches in the crate to be stolen. Hence, it was unreasonable for the Magistrate to conclude that the appellant had committed the offences with which he was charged.
15. I have noted that the evidence related to the existence of the items that were supposedly stolen all emanate from an invoice or invoices. The witness Dominique Gaitor, FedEx Manager, testified that six Cartier watches were missing but he arrived at that conclusion "**according to the invoice**". [pg. 11 of the Magistrate's Notes]
16. Under cross-examination Mr. Gaitor said, "**Whatever the shipper says was in the box, the value was later assessed and resolved**".

17. Mr. Rudolf Steinlechner, the buyer for John Bull, concluded that 15 Cartier watches were missing based, it seems, on the order that he placed. However, it appears that he too was relying on the shipping details.
18. Welewski Gordon, a FedEx ramp agent, testified that on 6 November 2019, he was in a warehouse with Customs Officer Corey Gibson to open up the bond. He scanned a box from John Bull that appeared tampered with. He said that, "**On examination the watches were missing. Cartier invoices told me that**". [pg. 14 of the Magistrate's Notes]
19. Sanchia Clarke, Assistant Watch Buyer of John Bull, testified that she opened the Movado and Omega shipment and found several items missing. She said, "**The two boxes container didn't match the slip to the bottom of both boxes. Three missing pieces.**" [pg. 15 of the Magistrate's Notes]. Again, she could only surmise from the shipment information that items were missing. Furthermore, she examined the boxes on 9 November 2019, some four days after they had been at John Bull.
20. In the course of the hearing before us we heard from Counsel that Bastian had entered into a plea agreement with the Prosecution no doubt because, we were told, certain of the jewelry allegedly stolen was found in his possession. Although the appellant had been charged along with Bastian and the charge sheet alleged that they were concerned together, once the Magistrate accepted Bastian's plea and convicted and sentenced him, Bastian's trial had come to an end. In my view, therefore, the Magistrate could have no regard to Bastian's guilty plea in determining the guilt or innocence of the appellant. Significantly, the Prosecution led no evidence of the finding of the items of jewelry in the possession of Bastian during the trial of the appellant.
21. It was open to the Prosecution to bring witnesses to speak to the finding of the items in Bastian's possession and the items being shown to have been a part of the shipments perhaps using the serial numbers on the items and matching them to the serial numbers in the shipping documents. Also, evidence may have been adduced from the person(s) who shipped the items and that may have satisfied the Magistrate that they were actually shipped.
22. It could have been made a part of the plea agreement with Bastian that he testify at the trial of the appellant thereby providing the Prosecution with direct evidence of the thefts. Not having resorted to any of those alternatives, the evidence against the appellant could only rise to the level of high suspicion; but even high suspicion is not sufficient to meet the criminal standard of proof.
23. I would allow the appeal on these grounds.

Ground 3: Under all the circumstances of the case the decision is unsafe and unsatisfactory

24. Inasmuch as I have found merit in grounds 2 and 4, it follows ineluctably that there is merit in ground 3.

Conclusion

25. The decision of the Magistrate to convict the appellant is quashed; and the sentences are set aside.

The Honourable Mr. Justice Isaacs, JA

26. I agree.

The Honourable Sir Michael Barnett, P

27. I also agree.

The Honourable Mr. Justice Evans, JA