

ROYAL COURT

21st October, 1991

152.

Before: The Bailiff, and
Jurats Myles and Le Boutillier

Attorney General

- v -

Robert Francis Attard

Police Court appeal against conviction in respect
of one count of aiding, assisting, or
participating in a criminal act (larceny).

Advocate S.C.K. Pallot for the Crown;
Advocate Miss S.E.Fitz for the appellant.

JUDGMENT

BAILIFF: This appeal arises from the conviction of the appellant before the Assistant Magistrate on charges of stealing a number of items from B & Q Limited on 5th February, 1991.

The evidence shows that he went to those premises with a co-accused who was convicted and sentenced, and that that co-accused undoubtedly stole items and threw them over a fence adjacent to the store and was seen doing so. Shortly afterwards

both men were approached by the staff and Rawnsley-Gurd walked out after refusing to stop and the appellant followed him and both men then made off.

There are two grounds of appeal: first that there was a breach of natural justice inasmuch as the learned Assistant Magistrate had made his mind up about the guilt of the accused, or even if he had not done so, the exchange which took place between counsel and the learned Assistant Magistrate would have given that impression to an impartial observer.

There are two exchanges to which we were referred. The first is on p.1 of the deposition. The deposition starts after the appellant's name had been called:

"MISS FITZ: The pleas are not guilty on all charges, Sir.

If I might just give a brief explanation?.

JUDGE TROTT: I think you'd better.

ADVOCATE FITZ: Yes, Sir.

JUDGE TROTT: Because I have had the benefit of looking at statements".

It is suggested by Miss Fitz that that indicates that the Assistant Magistrate had made his mind up.

That is not necessarily the impression that would be given, because in our system the Magistrate, as Mr. Pallot has rightly said, has to read the statements before the case appears before him, otherwise he is not in a position either to examine the witnesses, or the police, or to cross-examine the defence witnesses, if any appear. It is not an ideal system and it has been criticised by the Judicial Committee of Sir Godfray Le Quesne and the matter is being examined as to whether we should continue with that practice or not. But whether we do or don't

that is the present arrangement. We do not find that the Magistrate can be faulted for making that statement. It was nothing more than a statement of what he had to do according to the Law.

The second part on that page to which Miss Fitz takes exception is this exchange. First of all there is a discussion about the co-accused, then follows:

"MR. TROTT: Yes, I see, and in the case of Mr. Attard?

MISS FITZ: He pleads not guilty certainly to any involvement, Sir, any known involvement.

JUDGE TROTT: Are you sure?

MISS FITZ: Yes, Sir.

JUDGE TROTT: You know what happens to mitigation?"

Now it is said that that indicates again that he has made his mind up and that if there is a mistake in the plea and the accused is found guilty, it may well go against him in mitigation. We find that argument difficult to accept. The words "known involvement" are equivocal and the Assistant Magistrate, we think, was attempting to find out what exactly the plea was and of course we accept Mr. Pallot's argument because it is, we think, the better explanation that the Assistant Magistrate was merely indicating to Miss Fitz that if there were a plea based on a false apprehension of the law, that would not be mitigation.

So far as the first ground is concerned, we do not think that it is sustainable.

The second ground however is somewhat different. The second ground is that the learned Assistant Magistrate misdirected himself as to the Law. The passage upon which the

appellant relies is to be found at p.53. I should say here that it was accepted eventually by the Assistant Magistrate and by the prosecution at the beginning of this appeal that in fact the appellant did not throw any items over the fence at B & Q.

After some discussion about what one of the store employees saw, and at the top of the page at the end of the first part of her address, Miss Fitz says this:

"MISS FITZ: The only point that came across clearly was that he did see Mr. Gurd throw items and that he didn't see Mr. Attard do so. Now, Mr. Beuzeval said (inter)....

JUDGE TROTT: Well, if I accept that.

MISS FITZ: Yes, Sir.

JUDGE TROTT: That means he was nevertheless an accessory, because you can be an accessory to a crime without doing a darn thing at all."

Taken at face value, that is clearly not the case, but we are invited by Mr. Pallot to interpret that widely and to relate it to some questions and answers that were given before the Royal Commission on the Criminal Law of Jersey in 1847. I read from the bottom of p.53 where the Assistant Magistrate appears to accept the contention that the appellant threw nothing over the fence.

"JUDGE TROTT: Alright, I accept for the purposes of your argument what has happened, that Mr. Attard has said, is that he's (indistinct) what you're trying to say.

ADV FITZ: So do you accept Sir that only Mr. Gurd threw items over?

JUDGE TROTT: Yes".

Now the passages in the Royal Commission, or the questions and answers are these; they are to be found in Series No. 2 of the questions and there are three questions asked:

"5. When a party is charged with an offence, what is the result if it appears that he was

(1) Not the actual perpetrator, but present at the time of the offence, and assisting the actual perpetrator by council, watching, or otherwise?" (Well, that clearly is not applicable here).

"(2) Not present, but that he instigated or assisted, by council or otherwise, the actual perpetrator before the time of the perpetration?" (There is no evidence in this case to suggest that he did).

"(3) Not present, but that he, after the perpetration, assisted, by council or otherwise, the actual perpetrator

(firstly) in attaining the end aimed at (as, for instance, by disposing of property stolen) by the actual perpetrator?

(secondly) in escaping from justice?"

Clearly the answer to that third question would be: if not present, but that he, after the perpetration, assisted, by council or otherwise, the actual perpetrator, he would be found guilty as an accessory after the fact. Mr. Pallot invites us to change the words at the beginning of that question from not present to whether present or not. We think that is a sensible suggestion and we accept it in that form, which to some extent is against the appellant but let us examine it in that form.

Whether present or not, well, he was present after the perpetration that is clear. It is suggested by Mr. Pallot that he assisted the perpetrator, that is to say Mr. Rawnsley-Gurd, in escaping from justice by running away himself and thus making it more difficult for the staff and eventually the police to catch the perpetrator. We think that is an unwarranted extension of the Law; it is not the Law; each case of course will depend on its facts, but if you merely run away having seen something happen, unless you actually do something which positively hinders those attempting to catch the perpetrator, it would, I think, be stretching the words in this excerpt from the Royal Commission questions to say that you were assisting the perpetrator to escape from justice.

What happened in this case? The two men left the store and went down the road. Can it really be said that by doing that the appellant actually assisted Mr. Rawnsley-Gurd to escape? I do not think it can be.

Then we come to the nub again of the complaint, which is found in the remarks of the learned Assistant Magistrate at p.61 of the deposition, when he suggests, at the time he was passing sentence, that the accused was guilty:

"I had, and I still have no doubts that you assisted in the thefts, as you had at least three opportunities to extricate yourself from the crime. In simplistic terms when the articles were thrown over the fence you should not have stood by, you should have reported the matter. When you were asked, in front of the staff, you again you...you could have cleared yourself but again you chose to make a get-away with your co-accused. You could have gone to Police Headquarters or called to report the incident and lent such assistance as you were able to do so."

I am afraid that it not the Law. Each person of course should assist, but it does not become a criminal offence if you do not, except in specific instances. Therefore we are left with a feeling that it would be unsafe to allow this conviction to stand. The appeal is therefore allowed, the conviction is quashed with legal aid costs.

Authorities

- A.G. -v- Devonshire Hotel Ltd (1987-88) JLR 577.
- A.G. -v- Le Cocq (12th June, 1991) Jersey Unreported.
- Russell on Crime (12th Ed.) p.146/7.
- Smith & Hogan: "Criminal Law" (6th Ed.) P.136/7.
- Clarkson & Keating: Criminal Law Text & Materials (2nd Ed.)
p.510/5.
- R. -v- Clarkson (1971) 3 All ER 344.
- R. -v- Allan & Others (1963) 2 All ER 897.
- First Report of the Commissioners appointed to inquire
into the State of the Criminal Law in the Channel Islands:
Jersey: 1847: Questions: Series No. 2: p.6.