Privy Council Appeal No. 19 of 1981

Roy Dillon – – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JANUARY 1982

Present at the Hearing:

LORD FRASER OF TULLYBELTON

LORD SIMON OF GLAISDALE

LORD RUSSELL OF KILLOWEN

LORD ROSKILL

LORD BRIDGE OF HARWICH

[*Delivered by* LORD FRASER OF TULLYBELTON]

The appellant is a police constable in Jamaica. He was convicted on indictment before a Resident Magistrate of having negligently permitted two prisoners lawfully in his custody to escape. There was no evidence from warrants or court orders or other written documents of any authority for holding the prisoners in custody. The issue in the appeal is whether it was necessary for the Crown to prove that the prisoners had been lawfully arrested or were being lawfully detained.

At the close of the case for the prosecution, the attorney who appeared for the appellant submitted to the Resident Magistrate (A. J. Lambert Esquire) that there was no case to answer, on the ground that it was incumbent on the Crown to prove that the prisoners were in lawful custody and that it had omitted to do so. The learned Resident Magistrate, without making any specific finding as to the lawfulness of the custody, convicted the appellant on both charges. The appellant appealed to the Court of Appeal of Jamaica which by a majority (Robinson P. and Robotham J. A. (Ag.), Watkins J. A. dissenting) dismissed his appeal.

The facts were found by the Resident Magistrate and are not now in dispute. On 25 April 1976 the appellant was a member of the Jamaica Constabulary Force, and on that day he was on duty in the downstairs cell block at the Central Police Station lock-up in the parish of Kingston. His duties there included guarding the cells and ensuring that prisoners in custody did not escape. Among the persons in the cells for which the appellant was responsible were Paul Bryan and Robert Blackwood.

While the appellant's immediately superior officer was engaged on duties elsewhere, the appellant opened the cells occupied by Bryan and Blackwood and negligently permitted them to escape.

As regards the circumstances in which the prisoners were then being held in the cells, the evidence was to the following effect. Bryan had been arrested on 28 February 1976, and, according to the constable who made the arrest, he had been " charged for shooting with intent ". That expression was not further explained, and it is not clear whether Bryan had been taken before a magistrate or whether a charge had merely been preferred by the police. In any event he escaped from custody on or about 2 March 1976 but was recaptured on 24 March 1976. There was no evidence to show whether he had been brought before a magistrate at any time between 24 March and his escape on 25 April 1976 or that on the latter date any written authority existed for his detention. But if he had not been brought before a magistrate during that period of a month, his continued detention would by 25 April have become unlawful, as the learned Director of Public Prosecutions rightly conceded.

The evidence relating to Blackwood was that a detective officer of the constabulary had seen him in the remand section of the General Penitentiary in Kingston on 16 April 1976, and that on 23 April 1976 he had been transferred from the penitentiary to the central lock-up with a view to his being placed on an identification parade in connection with cases of murder which were being investigated. There was no evidence as to any power pursuant to which he had been in the remand section of the General Penitentiary, or had been transferred to the lock-up or held there.

The argument for the Crown, which was accepted by the learned Resident Magistrate and by the majority of the Court of Appeal, was that the Crown did not have to prove that the prisoners were in lawful custody as the Crown was entitled to rely on a presumption to that effect in accordance with the maxim *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. Alternatively reliance was placed on the provisions of section 16(2) of the Prisons Act (of Jamaica), to be mentioned below.

Their Lordships will consider first the question whether the presumption, quoted above, is applicable to the circumstances of this appeal. In Hawkins' *Pleas of the Crown* (7th Edition, 1795) Vol. III, Chapter 19, page 252, the learned author considers what shall be judged an escape and states *inter alia* the following rules:—

> " *Section 1.* First, there must be an actual arrest; . . . ."
>
> " *Section 2.* Secondly, as there must be an actual arrest, such arrest must also be justifiable; for if it be either for a supposed crime, where no such crime was committed, ... or for such a slight suspicion of an actual crime . . . . as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large: And it seems to be a good general rule, that wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape."
>
> " *Section 3.* Thirdly, ..."
>
> " *Section 4.* Fourthly, as the imprisonment must be justifiable, and for some crime, so must its continuance at the time of the escape be grounded on that satisfaction which the public justice demands for such crime; . . . ."

Accordingly in Archbold's *Pleading, Evidence and Practice in Criminal Cases* (40th Edition, 1979) at paragraph 3428, dealing with the evidence required for proving an indictment against a constable for negligently permitting an escape, we find this:

> "Prove that AB is a police constable and that he had JN in actual custody *under a lawful warrant*. See 2 Hawk., Chapter 19 Sections 1, 4. And lastly, prove the escape . . ." (Emphasis added).

Their Lordships are of opinion that it was essential for the Crown to establish that the arrest and detention were lawful and that the omission to do so was fatal to the conviction of the appellant (subject to the argument based on section 16(2) below). The lawfulness of the detention was a necessary pre-condition for the offence of permitting escape, and it is well established that the courts will not presume the existence of facts which are central to an offence (see *Reg. v. Willis* (1872) 12 Cox C.C. 164, *Scott v. Baker* [1969] 1 Q.B. 659).

Moreover this particular offence is one which touches the liberty of the subject, and on which there is, for that reason also, no room for presumptions in favour of the Crown. If there were to be a presumption that any person *de facto* in custody was there lawfully, the scales would be tipped in favour of the *fait accompli* in a way that might constitute a serious threat to liberty. It has to be remembered that in every case where a police officer commits the offence of negligently permitting a prisoner to escape from lawful custody, the prisoner himself commits an offence by escaping, and it would be contrary to fundamental principles of law that the onus should be upon a prisoner to rebut a presumption that he was being lawfully detained, which he could only do by the (notoriously difficult) process of proving a negative.

On the other hand, there is not likely to be any difficulty for the Crown in proving the lawfulness of the detention, when it exists. Production of the warrant for arrest, or of a magistrate's order for detention, or of a suitably certified copy, is normally all that is required, and it should be in the possession of the person in charge of the prison or lock-up. Thus we find that in the case of a person charged with an offence and remanded in custody to any prison or lock-up, the Prisons Act provides (section 18) that the person is to be delivered to the superintendent of the prison or the person in charge of the lock-up "together with the warrant or commitment". That is a recognition of the fact that, without some written voucher or authority, the person in charge of a prison or lock-up would not be entitled to receive and detain a prisoner in custody—see *Rex v. Fitzgerald and others* (1920) 55 Irish L.T.60. The only circumstances in which more than comparatively formal evidence would be required are where there is no written authority for the prisoner's detention, for example, in a case where he has been lawfully arrested without a warrant and has escaped before there has been time for him to be brought before a magistrate. But no such circumstances exist in the cases of either of the prisoners Bryan and Blackwood. Bryan had been detained for over a month from the date of his recapture (24 March to 25 April). Blackwood had been detained for 9 days from the date when he was first seen in the penitentiary (16 to 25 April) and in any event what is primarily required in his case is authority for his removal from the penitentiary to the lock-up—authority which would apparently be given by an order issued by the Minister under section 22 of the Prisons Act.

Their Lordships are therefore of opinion that the presumption ought not to have been admitted in this case.

The alternative argument for the Crown was based on section 16(2) of the Prisons Act. That sub-section has to be read in the context of section 16 as a whole and of section 15. These sections provide as follows:—

"15.—(1) Every person sentenced to imprisonment shall be committed to and detained in a prison:

Provided that any person sentenced to a short term sentence may, in place of being committed to and detained in a prison, be committed to and detained in a lock-up. ["short term sentence" means a sentence of imprisonment for a term not exceeding 14 days—section 2].

(2) Every person awaiting trial or remanded in custody may be committed to and detained in either a prison or lock-up.

16.—(1) Every prisoner whenever he is confined in any prison in which he may lawfully be confined, or whenever he is being taken to or from, or is working in the custody or under the control of any member of the prison staff beyond the limits of, any such prison, shall be deemed to be in the legal custody of the Superintendent of such prison.

(2) Every person whenever he is confined in any lock-up in which he may lawfully be confined, ... shall be deemed to be in the legal custody of the person in charge of such lock-up."

The argument for the Crown on this point was simple and ran as follows. The prisoners were confined in a place in which they might lawfully be confined (the lock-up) and therefore they were deemed to be in the legal custody of the person in charge of the lock-up. "Legal" means the same as "lawful" and therefore the prisoners were lawfully in the custody of the person in charge of the lock-up. The identity of that person is not in issue and it is unnecessary to consider whether he was the appellant or one of his superior officers. The learned Director of Public Prosecutions for Jamaica, who appeared as Counsel for the Crown, conceded that, on his argument, the deeming provision was absolute and that it was effective not merely until the contrary was shown.

Their Lordships are unable to accept that argument. It goes too far. If the suggested construction of section 16(2) were correct it would apply also to section 16(1). It would mean, as Watkins J.A. pointed out in his dissenting opinion, that even if a prisoner's initial arrest or detention was illegal, once he had been placed in a prison or lock-up in which he might lawfully be confined, the illegal arrests or detention would become irrelevant and would be covered with a mantle of legality. Their Lordships agree with the learned Judge of Appeal that such a construction could be entertained only upon the most express assertion of it by the legislature. It would in fact provide a conclusive answer to any suggestion that a person detained in either a prison or a lock-up was not lawfully detained there. It would leave no room for *habeas corpus* proceedings in respect of persons detained in a prison or lock-up, and it would be inconsistent with section 64 of the Prisons Act which provides that nothing in the Act shall affect the power of a Judge of the Supreme Court to direct persons confined in the Island to be brought before the Court by a writ of habeas corpus.

In their Lordships' view the purpose of section 16 is to define the person in whose custody a person confined in prison or lock-up is deemed to be, and who is legally responsible for his custody, so that any proceedings by way of *habeas corpus* or for any other remedy can be properly directed. So construed section 16 is consistent with section 64 (relating to *habeas corpus*) and with Part IV of the Act as a whole. For example

section 17 imposes on superintendents of prisons and persons in charge of lock-ups the duty of keeping and detaining all persons committed to their custody until such persons are discharged by due course of law. Section 18 relating to persons remanded to a prison or lock-up has already been mentioned. Section 20 provides that every prisoner and person detained in a lock-up shall be released immediately upon his " becoming entitled to release ", but the recognition that such a person may become entitled to release appears to be inconsistent with the Crown's argument that, once detained in a place where he may lawfully be detained, he is deemed to be in legal custody. Unless the legality of his detention can be tested by reference to the order under which he is detained there is no means of ascertaining when he becomes entitled to release. On the other hand if he may " become " entitled to release by the expiration of his term of sentence (or any of the other lawful means mentioned in section 20) there seems to be no reason in principle why he cannot be so entitled from the time when he began to be detained there.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed with costs to the appellant and his convictions quashed.

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In the Privy Council

ROY DILLON

v.

THE QUEEN

DELIVERED BY
LORD FRASER OF TULLYBELTON

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