

**IN THE COURT OF APPEAL
OF THE TURKS & CAICOS ISLANDS**

Cr. Ap. 25, 2006

CR. Ap. 28, 2006

**BETWEEN DAMONY WINDSOR
AND THE CROWN**

**BETWEEN CARLOS McDOWALL
AND THE CROWN**

**BEFORE: RT. HON. ZACCA P
 HON. JUSTICE MOTTLEY J.A.
 HON. JUSTICE LANGRIN J.A.**

Mr. C. Griffiths Q.C. for appellant Windsor
Mr. Guy Chapman for Appellant McDowall
Mr. D. Ramdhani for the Crown

**DATE OF HEARING: AUGUST 8 and 16, 2007, FEBRUARY 14,
2008**

ZACCA P.

(1) The appellant Carlos McDowall (M) was charged with three counts:

(1) Attempt to pervert the course of justice

(2) Theft

(3) Handling stolen goods

After a trial the jury found him guilty on Counts 1 and 3. The trial judge following a no case submission directed the jury to return a not guilty verdict on the theft charge. He was sentenced to 12 months imprisonment on each charge to run concurrent.

(2) The appellant Windsor (W) was charged with two counts:

(1) Attempting to pervert the course of public justice

(2) Handling stolen goods

At trial he was found guilty of both charges and sentenced to nine months imprisonment on each count to run concurrent.

(3) From these convictions both have appealed.

(4) M a police officer had been charged with the offences of wounding and damage to property. On Thursday May 26, 2005 he was granted bail, on condition that he surrendered his travel documents.

(5) The prosecution case was that Sgt. Chase went to M on May 27, 2005 and collected M's passport which was placed in the exhibit room at the police station. M denied that he had handed over his passport to Sgt. Chase.

(6) On June 23, 2005 M purchased a return air line ticket to Barbados from American Airlines. M had produced his passport on purchasing his air line ticket. His daughter also had a ticket to travel to St. Vincent via Barbados. M return ticket was for travel back to Providenciales on July 9, 2005.

(7) On June 24, 2005 M checked in together with his daughter on an American Airlines flight. It is alleged that he informed an

immigration officer that he was not travelling but had come to see his daughter off.

(8) Acting on information the police went to the airport where they met M in the departure lounge. It is alleged that at first he told the police that he was not travelling but had merely come to see his daughter off. He subsequently said that he was going on a short trip to return. M was arrested, and his daughter left on the flight. Two suit cases and a hand bag belonging to M were taken to the police station.

(9) Appellant Windsor (W) was at that time a station orderly.

(10) It is further alleged that M allowed a bag belonging to W to be searched. Neither appellant said anything. This bag was searched twice. The passport was not found. W was present and saw the bag being searched. The police was led to believe that it was M's bag.

(11) Shortly after Inspector Whittaker went to the sergeant's office where M and W were. The inspector decided to search the same bag again. It was alleged that W on this occasion claimed the bag to be his and that M's bag was another bag which was also in the room. W protested his bag being searched. In W's bag was found M's passport and the ticket to Barbados. M later stated that he had placed the passport and ticket in W's bag because he wished to retain them.

(12) There was no evidence put forward by the Crown to indicate how the passport got into W's bag. The prosecution case was that W was privy to the passport being placed in his bag. They relied on the evidence that W failed to inform the police that it was his bag which

was being searched and allowed them to believe that they were searching M's bag. His subsequent protestation was also relied on.

(13) There was no evidence that the lock on the drawer had been tampered with to allow entry into the drawer. The evidence was that there were scratches on the desk in the vicinity of the drawer. The keys to the exhibit room where the passport had been placed was kept in Sgt. Chase desk drawer in the C.I.D. Office. As already stated M denied that he had handed over his passport to Sgt. Chase as had been ordered by the Court. He had therefore retained his passport.

(14) There was therefore no evidence as to who had removed the passport from the exhibit room, assuming that the passport had been handed over to Sgt. Chase. The charge of theft was therefore withdrawn by the Judge from the jury. If the passport had been handed over to Sgt. Chase and then removed from the drawer and later found to be in the possession of M and later in W's bag the charge of handling stolen goods would have been made out against M but not necessarily so against W who had denied any knowledge of the passport being placed in his bag.

(15) In order for the conviction of handling stolen goods to succeed, the prosecution would first have to establish that the passport was in fact handed over to Sgt. Chase by M.

(16) Sgt, Chase stated that he did not give a property receipt or any form of receipt to M when he collected the passport. He also made no note of the receipt of the passport in his note book or diary. He however made a note of it in the police miscellaneous register. Sgt. Chase also gave evidence that when officers leave and return to the

station, they are obliged to make an entry in the movements diary to record what they are doing and what they have done. He made no record of his movements when he went to collect the passport. On an application to the Court prior to the trial, the trial judge ordered that the police should produce the register. It was not produced. It was only at the trial which took place in September 2006 that the Court and defence were told that the register went missing in January 2006. No explanation was given as to why and how a register which was kept in the police station went missing.

(17) Inspector Whittaker stated in evidence that when the passport could not be found, Sgt. Chase showed her the register in order for her to get the passport number. She saw a note in the register to the effect that the passport was collected by Sgt. Chase from M.

(18) Counsel for the appellants submitted that the evidence of Whittaker that she saw an entry in the register was inadmissible. For the Crown it was submitted that the evidence was admissible and that it would support the evidence of Sgt. Chase that he had made an entry in the register, and that he did receive the passport. It was further submitted by the Crown that the evidence of Whittaker as to the entry was admissible as to the truth of the entry and that the evidence goes to the credibility of Sgt. Chase.

(19) The Crown relied on the Evidence Ordinance 2001 for its submission that the evidence of Whittaker was admissible in that the entry was made by a public officer in the course of and as part of his duties. Specifically, reliance was placed on s9(1) of the Evidence Ordinance which provides:

s. 9 (1):

subject to –

(a) any rule of law whereby evidence given orally on or original trial must be given orally at a retrial;

and

(b) section 11,

a statement in a document shall be admissible in criminal proceedings as evidence of any fact, of which direct oral evidence would be admissible if –

(i) the document was created or received by a person in the course of trade, business, profession or other occupation or as the holder of a paid or unpaid office; and

(ii) the information contained in the document was supplied by a person whether or not the maker of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

S9 (2):

Subsection (1) shall apply whether the information contained in the document was supplied directly or indirectly but if it was supplied indirectly, only if each person through whom it was supplied received it –

(a) in the course of a trade, business, profession or other occupation; or

(b) as the holder of a paid or unpaid office.

(20) It is to be observed that the note in the margin of s 9 refers to "business etc. documents". In our view it is the statement contained in the document which is admissible if the conditions of s 9 are satisfied. In the present case the document was not produced and the evidence given by Inspector Whittaker was inadmissible and ought not to have been admitted by the Trial Judge.

(21) No explanation was given at the trial as to how and why the register went missing. The jury may well have concluded that it was not produced because there was no entry in the register that the passport was collected by Sgt. Chase from M. In the absence of Whittaker's evidence, the only evidence before the jury was that of Sgt. Chase. We cannot say, in the absence of Whittaker's evidence that the jury would necessarily have come to the conclusion that Sgt. Chase had collected the passport from M. The prosecution had relied on the evidence of Whittaker to support the evidence of Sgt. Chase.

(22) M had denied that he handed over his passport to Sgt. Chase. If the passport was not handed over and M had retained it, then the prosecution had failed to prove that the passport had been stolen. It follows that the charge of handling stolen goods could not be sustained. It was for these reasons that the Court allowed the appeals of M and W and vacated the conviction of handling stolen goods.

Attempting to pervert the Course of Justice

(23) In respect of W, there was no evidence given by the prosecution as to who had placed the passport in W's bag. In fact M had stated that it was he who had placed the passport in W's bag.

The prosecution relied on the actions of W during the search of his bag and contended that W was therefore assisting M in hiding his passport.

In our view this evidence was insufficient to warrant conviction of W on a charge of attempts to pervert the course of justice. W's appeal was allowed and the conviction quashed.

(24) The evidence led by the prosecution against M in respect of the charge of attempting to pervert the course of justice was of a different nature. M had retained his passport well knowing that he was ordered by the Court to hand it over. He used it for the purpose of purchasing a ticket to Barbados. He made conflicting statements as to his travel plans. He hid the passport in W's bag believing that it was his bag that would be searched. He was travelling with two suitcases and a hand bag. He had checked in together with his daughter on an American Airlines flight. He was seen by the police in the departure lounge.

(25) M's defence was that he had purchased a return ticket and intended to return as he was due to give evidence for the Crown in a criminal trial.

(26) In our view it was open to the Jury to find that M had no intention of returning and was attempting to avoid his own trial on the prior charges. This despite the fact that he had purchased a return ticket. The Jury clearly accepted the evidence led by the Crown, having regard to their verdict on the charge of attempting to pervert the course of justice.

(27) We are satisfied that the ingredients of the charge were made out and it was open to the Jury to convict M on the evidence

presented by the Crown. His appeal against his conviction on this charge was dismissed and the conviction and sentence affirmed.

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Zacca P

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Mottley JA

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Langrein JA