

LABRADOR v. ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): June 4th, 1998

Constitutional Law—fundamental rights and freedoms—trial in absence of accused—attendance desirable if accused’s credibility in issue even when has already consented to trial in absence—accused to be invited to testify if postal not guilty plea discloses possible defence

The appellant was charged in the magistrates’ court with illegal parking.

The appellant’s motor scooter was found in a prohibited parking zone by a traffic warden, who affixed a fixed penalty notice to the vehicle. The appellant alleged that when he returned to his scooter he found that it had been moved to the prohibited zone from where he had legally parked it. He claimed that he then sent a cheque to the court to pay the penalty in order to save time and trouble, but it was not received by the court and, accordingly, he was summoned to appear in court. The appellant, however, did not receive the summons, but only a subsequent notice that the matter had been adjourned.

The appellant was told by the court office that his cheque had not been received and that if he did not wish to attend court, he could enter a plea of not guilty and complete a form consenting to be tried in his absence and giving an explanation of the circumstances. At the hearing of the case, the Stipendiary Magistrate considered the appellant’s letter but found him guilty of the offence and of non-payment of the fixed penalty and fined him. No reasons for the decision were recorded. He appealed.

Held, allowing the appeal:

Whilst the Stipendiary Magistrate was entitled under s.8 of the Constitution to try the appellant in his absence with his consent and was at liberty to disbelieve the appellant’s account of events if he so chose, the appellant had clearly not understood the possible consequences of not attending court. Moreover, it was not possible in most cases for the court to assess a person’s credibility on the basis of a letter and since the appellant had put forward a credible defence, the better procedure would have been to adjourn the case further to invite him give evidence on oath. Accordingly, the conviction would be set aside and it would be ordered that the case be retried in the magistrates’ court. In future, it would assist all concerned if the Magistrate were to record brief reasons for his decisions (page 333, lines 5–26).

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.8(2): “. . . [E]xcept with his own consent, the trial shall not take place in his absence”

Traffic Ordinance (1984 Edition), s.99, as amended by the Traffic (Amendment) Ordinance, 1987, s.4: The relevant terms of this section are set out at page 332, lines 27–43.

The appellant appeared in person;
K. Warwick for the Crown.

15 **SCHOFIELD, C.J.:** Richard Labrador appeals against his conviction by the learned Stipendiary Magistrate on March 12th, 1998 for an offence of parking his motor scooter (registered number G65180) at Hospital Ramp, in a place where parking is prohibited.

On January 19th, 1997, Mr. Labrador’s motor scooter was found parked illegally in Hospital Ramp by Traffic Warden No. 10 and a fixed penalty notice was attached to the vehicle accordingly.

20 Mr. Labrador says that he left Gibraltar to go to his home in Spain on Friday, January 17th, 1997, and when he returned from Spain on the Monday, he found that his motor scooter had been moved in his absence from where he had parked it legally to a place where parking was prohibited. Nevertheless, Mr. Labrador says, to save time and trouble, he sent a cheque in payment of the fixed penalty charge of £5 and he has
25 shown this court his cheque stub dated January 24th, 1997, for £5. That is in sequence with other cheque stubs and therefore I have no reason to disbelieve Mr. Labrador when he says he forwarded the cheque. None the less, for some reason the cheque was not received by the magistrates’ court and no receipt was ever issued.

30 Accordingly, a summons was subsequently forwarded to Mr. Labrador, dated June 5th, 1997, summoning him to appear before the magistrates’ court on November 26th, 1997. Mr. Labrador says he never received that summons. Upon his non-attendance at the magistrates’ court on
35 November 26th, 1997, the case was adjourned and a notice was sent to Mr. Labrador informing him that the matter had been adjourned to March 12th, 1998. That notice was received by Mr. Labrador.

40 Mr. Labrador telephoned the office of the magistrates’ court and spoke to Mrs. Gustavino. He explained that he had sent a cheque for the fine and explained why his vehicle was parked in a prohibited area. According to Mr. Labrador, Mrs. Gustavino suggested that he should enter a plea of “not guilty” and explain the facts in writing so as to avoid having to attend the court in person. Mrs. Gustavino gives a slightly different account of the conversation in a statement she has tendered to this court. Her account is that she received a call from Mr. Labrador complaining
45 that he had received the summons to attend court and informing her that

he had sent a cheque by post for the £5 parking ticket. After checking the postal remittance book, she informed him that the cheque had not been received and she then told him that he would have to come to court to explain the matter himself. Then Mr. Labrador answered that he had no time to attend court. She advised him that if he did not wish to come to court then it was open for him, at his discretion, to complete the form consenting to be tried in his absence, and explaining the circumstances of the case. Mr. Labrador then told her that he was quite prepared for the case to be tried in his absence.

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There is a subtle difference between these two accounts, but not so serious as for me to disbelieve either one of the two persons who took part in the conversation. I accept that Mr. Labrador considered that he had no need to attend court and probably did not appreciate the dangers he was placing himself in by not attending to give evidence. Be that as it may, Mr. Labrador did indicate on the form provided that he was pleading “not guilty” to the charge and that he was consenting to the court dealing with the case in his absence. He also sent a letter with that form setting out his reasons for pleading “not guilty” and explaining to the Magistrate the circumstances set out above.

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At the hearing on March 12th, 1998, the traffic warden testified to the effect that he had found the vehicle illegally parked. Furthermore, the letter from Mr. Labrador was read to the Stipendiary Magistrate and it is recorded that the Clerk of the Court checked the court records and found that there was no record of the cheque having been received. In the event, the Stipendiary Magistrate found the case proved and fined Mr. Labrador £20.

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Mr. Warwick, for the Crown, has drawn my attention to the provisions of s.99(7) of the Traffic Ordinance which reads:

“Subject to subsection (7A) and (7B) below, where a police officer finds a vehicle on an occasion and has reason to believe that on that occasion there is being or has been committed in respect of it an offence to which this section applies, he may proceed under this section as if he had found a person reasonably believed by him to be committing the offence, and for that purpose the registered owner of the vehicle shall be the person liable for the offence and a notice affixed to the vehicle shall be deemed to have been given to the registered owner.”

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Sub-section (7A) reads:

“In any proceedings in respect of an offence to which subsection (7) applies, it shall be a defence for the registered owner of the vehicle to prove that—

- (a) at the time of the offence, the vehicle was in charge of some other person; and
- (b) he had exercised all such diligence as was practicable to avoid the commission of the offence by that person.”

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Mr. Labrador complains to this court that the Magistrate did not understand his letter and the explanation that he tendered for the vehicle

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being parked in a prohibited place. I have pointed out to Mr. Labrador that the learned Stipendiary Magistrate may not have believed the explanation given in the letter. This, Mr. Labrador clearly finds difficult to understand.

5 The learned Magistrate was entitled to disbelieve the explanation given
by Mr. Labrador, but unfortunately there is nothing on record to indicate
why the learned Magistrate come to the conclusion he did. Some short
note giving the reasons for his decision would have helped this court and
would have been proper to give to Mr. Labrador. Furthermore, it is to my
10 mind a most unsatisfactory procedure where issues of credibility are dealt
with in the absence of a defendant. Most certainly, the learned Magistrate
was entitled to proceed with the case in the absence of Mr. Labrador (see
s.8 of the Gibraltar Constitution), but the better procedure where a
defendant puts forward what is undoubtedly a credible defence is for the
15 case to be adjourned for him to be invited to attend court and give that
explanation on oath. Not every person who is summoned to attend court
understands the procedures of the court properly, and it is impossible to
my mind, except in an obvious case, for a tribunal to determine credibility
on the basis of a letter of explanation.

20 I consider that Mr. Labrador should be given the opportunity to tender
his explanation on oath to the learned Magistrate, so that the learned
Magistrate can test his explanation against the requirements of s.99(7)
and (7A) of the Traffic Ordinance.

25 In all the circumstances, therefore, I allow the appeal to the extent of
ordering a re-trial before the magistrates' court, so that Mr. Labrador can
there give evidence if he so wishes.

Appeal allowed.