[2014] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 20/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLLIPS JA

KEVON BLACK v R

Leonard Green for the appellant

Adley Duncan for the Crown

14 January 2013 and 31 July 2014

HARRIS JA

[1] On 7 March 2012, the appellant, Kevon Black, was convicted in the Resident Magistrates' Court for the parish of Saint James for breaches of sections 8a, 8b and 13(5) of the Dangerous Drugs Act. Under section 8a, he was charged with unlawfully dealing with cocaine and under section 8b, he was charged with possession of cocaine. He was sentenced to a fine of $25,000.00 or a term of three months imprisonment for each of the offences. Under section 13(5), he was charged with attempting to export cocaine and a fine of $50,000.00 or term of three months imprisonment and an additional 10 days imprisonment was imposed.

Case for the prosecution

[2] The evidence, for the prosecution, came from its sole eye witness, Detective Corporal Owen Taylor. At about 5:30 pm on 20 February 2010, Corporal Taylor was at the Sangster International Airport when he stopped and interviewed the appellant who was booked on a flight for London. Thereafter, he took the appellant to a room at the airport. After obtaining a urine sample from the appellant, which produced a positive test for cocaine, Corporal Taylor left him alone in the room for 15 minutes and went about 6 yards away, during which time he continued to survey the room. Upon his return to the room, he was greeted with an unpleasant odour. This led him to observe blood and faeces on the appellant's trousers and underwear. He also saw 22 plastic packages covered with blood and faeces under a table in the room. On opening the packages he saw a substance which appeared to be cocaine.

[3] After caution, the appellant said to Corporal Taylor, "Boss we can talk". The corporal inquired as to the source of the packages. The appellant told him that the packages were offered to him by a girl who had been given the assignment to transport them but she was unable to carry it out. Upon further caution the appellant said to him, "you can get the phone from the white man I can make a call and you get half million and you change the cocaine to ganja." The appellant was taken to the police station by Corporal Taylor, who ordered that he be taken to the Cornwall Regional Hospital.

[4] On 22 February 2010, sealed envelopes containing the packages, the trousers and underwear of the appellant were taken by Corporal Taylor to the forensic laboratory for analysis and in July 2010 he collected the forensic certificates, which were admitted into evidence as exhibits, showing that the packages contained cocaine and that the DNA profile obtained from the packages could have originated from a source similar to the DNA profile found on the appellant's clothes.

Case for the defence

[5] The appellant, a mechanic living in London, arrived in Jamaica on 19 January 2010. On his return journey to London on 20 February 2010, while at the Sangster International Airport, he was approached by a tall white man who informed him that he was with the "UK Narcotic" and requested that he follow him to a room. This man, he said, conducted a search of his body and his luggage and then requested a urine sample from him. This, he was unable to supply, as he had earlier used the toilet. The man then informed him that his failure to supply the urine would result in his summoning the police to take him to the hospital to produce the sample.

[6] Four men were present in the room to which the appellant was taken, three of whom subsequently left. The man who remained was taken to the door of the room and the appellant was offered a seat on a chair on which a deposit of liquid was present. Corporal Taylor, accompanied by another man, soon arrived and said to him, the appellant, "Where is the drugs?". He told him he had none. Corporal Taylor told him that he smelt something "funny" in the room. Corporal Taylor, then,

with the aid of the other man in the room, lifted a table, began moving some boxes around and then took one of the boxes, left the room, went to the bathroom and returned with a pair of gloves and a silver tray. He then put "some things" on the tray and went back to the toilet where he washed them off.

[7] The tall white man returned to the room. Corporal Taylor told that man about his discovery. He instructed Corporal Taylor to take the appellant to the hospital. Corporal Taylor, thereafter, began interrogating the appellant about drugs, took his trousers and underwear, and summoned two police officers who transported him to the hospital at about 6:15 pm where he underwent x-rays twice and a rectal examination, all of which proved negative. The appellant said he was taken to the police station on 21 February 2010.

[8] It was disputed by the appellant that he had excreted the packages containing cocaine. He denied telling Corporal Taylor that he had taken over an assignment which was given to a woman to transport the drugs. He also refuted that he had offered Corporal Taylor a bribe. He said that he did not know why Corporal Taylor had taken his clothes and that he first became aware of the charges against him when he attended court.

[9] A clerk from the medical records of the Cornwall Regional Hospital, Miss Jillian Mushington, gave evidence on behalf of the appellant. She stated that the appellant

was brought to the hospital by the police on 20 February 2010 and was discharged on 21 February 2010. She also said that he was x-rayed.

[10] The Prisoner Charge and Property Book, which had been subpoenaed by the defence and tendered into evidence as an exhibit, bore an entry date, 21 February 2010, showing that the appellant was taken into custody by one Corporal Taylor. In cross-examination, Corporal Taylor denied that the entry was made by him. His signature did not appear in the book at the point of the entry.

[11] One original ground of appeal was filed and leave was granted for four supplemental grounds to be argued. The original ground is:

> "(a) That the Learned Resident Magistrate erred in fact and law and the verdict is unreasonable and cannot be supported by the evidence."

The supplemental grounds are:

> "1 The conviction of the accused is unsafe in that the learned trial judge [sic] failed to apply the appropriate legal standard when he found that it was the accused Kevon Black who was the one who had passed out pellets in the room while soiling his clothes and wrongly relied on the conclusion expressed in the DNA Case Summary dated January 25, 2011 that the blood and faeces found on the pellets was [sic] very similar [sic] in DNA found in the appellant's clothes.
>
> 2. The learned Resident Magistrate erred when he made no finding regarding the prosecution's failure to produce the appellant's clothing in court as part of the evidence adduced in support of the prosecution's case that those items of clothing were marked with bloodstain and faeces.

3. In finding that the witness Owen Taylor made a 'mistake' when he said Owen Taylor testified that the appellant was taken to the Freeport Police Station the same day of the incident, the learned trial judge [sic] made a finding that was not supported by the evidence and by so doing wrongly concluded that this 'discrepancy' did not go to the root of the prosecution's case.

4. The learned Resident Magistrate erred when he did not uphold the no case submission made on behalf of the appellant and he failed further, to demonstrate in his reasons for judgment, that he gave any or any adequate consideration to the defence put forward by the appellant nor did he demonstrate that he used the correct judicial approach in applying the appropriate standard of proof before arriving at a conclusion that the appellant was guilty for [sic] the offences of Illegal [sic] Possession of Cocaine, Dealing in Cocaine and Attempting to export Cocaine."

Submissions

[12] The main thrust of Mr Green's submissions was that the magistrate failed to properly assess and address the evidence and apply the principles relating to the burden and standard of proof. In this case, he argued, a special duty was imposed upon the learned magistrate to exercise great care in his application of the proper test in the determination of the critical issues arising in the case. The burden and standard of proof being fundamental to the determination of a criminal case, the learned magistrate must, by his language demonstrate that he knows the law. The case of ***R v Duncan and Ellis*** SCCA Nos 147 and 148/2003, delivered on 1 February 2008, was cited by counsel in support of his submission.

[13] In seeking to support his contention that the learned magistrate failed to apply the law, counsel first drew attention to a statement made by the learned magistrate at the commencement of his findings in which the learned magistrate said that the accounts given by the police officer and the appellant are irreconcilably divergent without giving reasons for the finding. He then went on to argue that the learned magistrate found that the appellant's urine contained cocaine and that he would not have encountered difficulty in passing urine, despite the absence of evidence to support such finding. Further, he argued, the learned magistrate wrongly relied upon the forensic certificate in concluding that the pellets contained cocaine.

[14] Counsel also made reference to other aspects of the evidence adduced the prosecution which he said were unsatisfactory and insufficient to found a conviction. Referring to Corporal Taylor's evidence, counsel submitted that there were deficiencies arising from his evidence, in particular the date on which he said that the appellant was taken to the police station. The police officer said the appellant was taken to the police station on 20 February 2010, while the Prisoners Charge and Property Book showed the date to be 21 February 2010, he submitted and this the learned magistrate found to be a mistake which demonstrates that the learned magistrate failed to appreciate that on his evidence, a guilty verdict was unsupportable.

[15] It was also counsel's submission that the learned magistrate gave little or no consideration to the defence as he failed to rehearse the defence in a coherent manner. It was not enough, he argued, for the learned magistrate to have stated that the appellant was untruthful when he ought to have been satisfied that the evidence adduced by the prosecution left him in no doubt as to the appellant's guilt.

[16] There was no evidence adduced to show that the blood and faeces were the appellant's, he argued, in that there was nothing to show who took the swabs on the clothes which were taken to the forensic analyst, or the circumstances under which they had been taken. Nor was there evidence that the clothes were packaged and sealed and delivered to the analyst, he submitted. Further, the incident occurred in February 2010 but the certificate was not obtained from the analyst until July 2010, he argued, and significantly, the clothes were not exhibited at the trial. The forensic certificate contained the opinion of the analyst from which the learned magistrate ought to have drawn conclusions in making appropriate findings, provided he was satisfied with the integrity of the process and he ought to have been satisfied that he felt sure that the evidence adduced by the prosecution left him in no doubt of the appellant's guilt, he argued.

[17] Mr Duncan, in response, argued that the issue in this case was one of credibility and it was not obligatory on the part of the learned magistrate to have rehearsed every finding. The learned magistrate is taken to know the law that the prosecution should prove its case beyond reasonable doubt and there is nothing in

his findings demonstrative of the fact that he did not apply the law, he argued. In ***Lowell Forbes v R*** [2010] JMCA Crim 81, he submitted, this court clearly stipulated that it is not incumbent on the learned magistrate to "set out in great detail every thought on the issue." The learned magistrate, he submitted, in recognition of the radical divergence in the prosecution's case and that of the appellant, was cognisant of the fact that both versions could not be true and obviously had a preference for the evidence adduced by the Crown. The learned magistrate, in his findings, was obliged to show that he rejected the appellant's case and accepted the case advanced by the prosecution in support of the offences for which the appellant was being tried, and this he did, counsel submitted.

[18] The absence of evidence as to whether swabs were taken and by whom is speculative, counsel argued. In any event, he contended, this would not have jeopardized the conviction, as there were similarities between the samples in the swabs and none of the possibilities in the DNA report would have rendered the conviction flawed. He further submitted that it is not unusual for time to elapse between the receipt and the testing of the samples and this would not have been such as to cause concern. He cited ***Sheldon Heaven v R*** [2010] JMCA Crim 33, in which medical evidence was wrongly admitted but there was other evidence which supported the Crown's case, and in which a conviction was sustained. The learned magistrate properly relied on the DNA evidence and even if there were the absence of DNA evidence, he argued, Corporal Taylor's evidence was sufficient to support a conviction. Citing ***R v Jadudsingh and Jadusingh*** [1963] 6 WIR 362

and ***Charles Salesman v R*** [2010] JMCA Crim 31, counsel argued that the Crown's failure to produce the appellant's clothes at the trial was not fatal, as failure to have done so only went to weight.

[19] The learned magistrate was generous to the appellant in finding that there was a discrepancy in relation to the time the appellant was taken to the police station, he submitted. It was his further submission that the police officer took the appellant to the police station on the date on which the cocaine was found and gave instructions for him to be taken to the police station, therefore, the date on which he was taken to the hospital does not amount to a discrepancy as this was supported by the evidence of the medical technician. The learned magistrate did not err in concluding that the discrepancy did not go to the root of the Crown's case and the evidence which went to the heart of the Crown's case was with respect to the recovery of the cocaine and that which transpired immediately before and after, he submitted.

Analysis

[20] Arguments were first presented on ground four by Mr Green. Counsel argued that this ground goes to the heart of the appellant's complaints. In this ground, the challenge is that the evidentiary material presented by the prosecution was woefully inadequate to sustain a conviction. The arguments advanced on this ground essentially subsumed all other grounds. As a consequence, it would be convenient to consider all issues arising in all the grounds simultaneously.

[21] At the end of the case for the prosecution, a no case submission was made by counsel who then appeared for the appellant. The learned magistrate called upon the appellant to answer the charges. Mr Green's contention that the evidence presented by the prosecution was extremely weak and manifestly inadequate to sustain a conviction, gives rise to the question whether the evidence on which the conviction had been founded was insufficient and therefore, the submission of the no case should have succeeded. In the well known and often cited case of ***R v Galbraith*** 73 Cr App R 124; [1981] WLR 1039, Lord Lane gave guidance to the approach to be adopted by a trial judge where a submission of no case is raised. At page 126 he said:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence, on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to tried by the jury. It follows that we think the second of the two schools of thought is to be preferred."

[22] The relevant principles governing the approach to a submission of no case were revisited by the Privy Council in ***Director of Public Prosecutions v Varlack P.C.A*** 23/2007, delivered 1 December 2008. Lord Carswell, delivering the judgment of the court, said at paragraph 21:

> "21. The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in ***R v Galbraith*** [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences."

Reference was also made by Lord Carswell to ***R v Jabber*** [2006] EWCA Crim 2694, in which Moses LJ, speaking to the issue of a submission of no case, said at paragraph 21:

> "The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

[23] In ***R v O'Neil Hall and Others*** SCCA Nos 112,115,116 and 118 /2004, delivered 28 July 2006 at page 15 this court, treating with the approach to a submission of no case, said:

> "Credibility is normally a matter for the jury (see ***Brooks v DPP*** [1994] AC 568 at 581). Where the prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness's credibility, reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty then a no case submission should be rejected."

[24] The quality of the evidence is the critical decisive factor which directs a trial judge's discretion in making a decision on a submission of no case. As can be gleaned from the foregoing extracts from the authorities, a case ought not to be withdrawn from the jury where credible evidence, upon which a reasonable jury properly directed can act, exists. However, in balancing the scales of justice, if the evidence presented by the prosecution is found to be very poor so that an accused's right to a fair trial would be compromised, then, a conviction cannot be sustained on such evidence.

[25] Was the evidence adduced by the prosecution, in this case, so manifestly inadequate that the appellant ought not to have been called upon to answer the offences for which he had been charged? The answer to this question requires the examination of the evidentiary material which was before the learned magistrate. There was evidence from Corporal Taylor showing that although the appellant was

left alone in the room at the airport, the room was constantly under observation by him after he had left for a short while; on his return to the room he observed, under a table, close to where the appellant was seated, the pellets which were soiled with blood and faeces; the appellant who had been earlier neatly clad, was dishevelled and blood and faeces were found on his clothes; the appellant gave a urine sample which tested positive for cocaine and there was DNA evidence revealing the presence of cocaine on the pellets and on his clothes.

[26] The issue of credibility is critical in this case, the determination of which lies in the domain of a jury. The test is whether the evidence furnished by the prosecution is such that, if it is found to be credible, a reasonable jury could have convicted upon it. The evidence adduced by the Crown has met the requisite test. It is without doubt that on evidence provided by the prosecution, the learned magistrate had sufficient material for him to have formed the view that a prima facie case had been made out against the appellant. As a consequence, he rightly rejected the submission of no case and called upon the appellant to answer the charges preferred against him.

[27] It is now necessary to turn to the other issues arising. It would be useful at this stage to recount the findings of the learned magistrate in relation to all grounds, except ground three which will be referred to later. He said:

> "The account given by the Investigating officer and the account given by the Accused are diametrically opposed that it is

strange to conceive that they are speaking about the same incident. The Accused is extremely evasive of the allegations.

Suffice it to say he agrees that he was confronted by the investigating officer at the time in question at the Sangster's International Airport. The investigating officer declares that he first requested a urine sample from the Accused which he received. He carried out a test which shows [sic] that the sample was contaminated with cocaine and so he detained him in a room with the intention to prepare the Accused to be examined at the hospital. The Accused however gave evidence that it was a white British officer who requested the urine sample from him and because he recently went to the bathroom he was unable to provide a urine sample. This cannot be true as it is quite easy to provide a sample of urine whether or not one had just used the bathroom. I find that he did give the investigating officer the urine sample. The Accused admits that he saw the investigating officer took [sic] some things from underneath a table, after putting on a pair of gloves and wash them off and put them in a tray.

He was careful not to describe the things at all. These things turn [sic] out to be 22 pellets of cocaine. What then could the investigating officer be washing off. It suggest [sic] that the substance on the pellets must have been fresh and capable of being dissolved.

The investigating officer testified that on his return to the room where he left the Accused, he found the Accused no longer neatly clad and a very foul scent emanated from the room. As a result he asked the accused to stand and then noticed that the Accused [sic] pants and underwear were soiled with what appeared to be blood and faeces and the room was smelling of faeces. As a consequence he looked underneath the table in the room and found 22 pellets of cocaine also soiled with what appeared to be blood and feaces. While the Accused admits that his pants, shorts and underwear were taken by the investigating officer he denies that any blood or faeces were found on the clothes and that he did not smell anything foul at all in the room.

The forensic certificate exhibit 3 concludes that blood and faeces were found on the pellets and when compared with the blood and faeces found in the clothes were very similar in DNA.

> I therefore infer that it was the Accused who passed out the pallets in the room while soiling his clothes in the process. It must be that the Accused is being untruthful when he says that there was no foul scent in the room. Why did not the Accused remain neatly clad as the officer had left him? It must have been the haste to pass out the said pellets before the officer returned."

[28] Mr Green, relying on ***R v Duncan and Ellis***, rightly submitted that, although a judge, sitting alone, is presumed to know the law, he must show that he has applied it. In that case, the issue as to the judge's application of the law within the context of the burden and standard of proof had been raised and although the findings of the judge had been found to be lacking in details, on the evidence adduced and such findings as he made, there was sufficient to sustain a conviction. In ***Lowell Forbes v R***, the issue as to whether a Resident Magistrate's findings revealed that she had properly applied the law was also raised. McIntosh JA, speaking to the issue, said at paragraph [29]:

> "The Resident Magistrate had no duty to set out in great detail her every thought on the issue. The authorities make that clear. Her duty to provide reasons for her decision is discharged if she demonstrates in her examination of the evidence pertaining to the issues that she had all the necessary considerations in mind. (see Regina v Alex Simpson; Regina v McKenzie Powell SCCA Nos 151/88 & 71/89 decision delivered 5 February 1992)."

[29] Mr Green's first point of attack against the learned magistrate's reasons was that he erred in stating that it would be untrue if someone said that he was unable to provide a urine sample even if that person had used the toilet immediately before the sample was required, despite the absence of evidence to support a finding that

the appellant had passed urine. There, is in fact, no evidence to support such a finding. This must be treated as an issue on which he misdirected himself but this, in itself, would not have amounted to a substantial miscarriage of justice which would have rendered the conviction flawed. The real question was whether there was evidence disclosing that the appellant had passed urine contaminated with cocaine and the DNA evidence showed that the pellets, which the appellant excreted, contained cocaine.

[30] It is perfectly true, as Mr Green contended, that the appellant's clothes taken by the police were not tendered into evidence as exhibits. But the question is whether although the appellant's clothes were submitted for forensic analysis and were not exhibited at the trial, this would have precluded the learned magistrate from relying on the results of the forensic certificate. We think not.

[31] The production of the clothes at the trial would have been desirable as they were capable of being used in the proceedings. However, their absence would not have prevented the learned magistrate from making a proper finding on the DNA evidence. In ***R v Jadusingh and Jadusingh***, the appellants were charged with possession of ganja. Vegetable matter, which was found by the police at the home of the appellants, was analysed and certified to be ganja. Prior to the trial the ganja was replaced by grass, which had been exhibited. The complaint at trial was that the product exhibited affected the safety of the conviction. The court found that this went to the weight of the evidence and held that there was clear and convincing

evidence on which a finding on the facts could be established that the vegetable matter was ganja.

[32] In ***Salesman v R*** [2010] JMCA 31, the complaint related to the absence of photographs taken at the scene of the crime. The court found that there was sufficient evidence upon which the judge could have acted without the photographs. At paragraph [57] the court said:

> "It seemed that without those photographs and the spent shells, counsel was of the view that the complainant ought not to have been believed that anyone was shot at and that there was any damaged vehicle. However, we did not find this argument to be sound. In addition to the viva voce evidence of the complainant, the learned judge had for his consideration the evidence of Detective Malcolm who spoke of seeing the vehicle that night and observing what as a police officer, seemed to him to be bullet holes and an indentation at the top of the car also apparently caused by a bullet. This was consistent with what the complainant had said and [he] was never challenged. Therefore, the absence of the photographs still left the trial judge with material upon which he could act."

[33] It is clear that, the learned magistrate could have accepted the DNA evidence notwithstanding the absence of the appellant's clothes at the trial. The verdict of guilty was dependent upon the acceptance of Corporal Taylor as a reliable witness as well as upon the DNA evidence. It is clear that the learned magistrate accepted both. Clearly, the DNA evidence and the direct evidence from Corporal Taylor were capable of proving the charge and would have had the capacity in law of supporting a conviction. In any event, in the absence of the DNA evidence, there was ample material by way of Corporal Taylor's evidence, upon which the learned magistrate

could have relied. Even if the DNA evidence were to be disregarded, as Mr Duncan righty submitted, there was cogent evidence from Corporal Taylor to show that the burden of proof placed on the prosecution was discharged and the requisite standard of proof was met.

[34] There is also the complaint by the appellant concerning the lack of evidence with regard to the taking of the swabs from the appellant's clothes and whether they were sealed at the time of delivery to the analyst. This, in our opinion, would not have affected the integrity of the DNA evidence. There is nothing to show that the material from which the DNA profiles were obtained was contaminated before it was submitted for analysis. Further, as Mr Duncan rightly submitted, the question as to whether swabs were taken or by whom, would not have jeopardized the conviction as comparable profiles existed in the swabs and none of the possibilities in the DNA report would have rendered the conviction unsafe.

[35] The appellant also complained about the date on which he was taken to the police station. Corporal Taylor stated that he took the appellant to the police station in the afternoon of 20 February 2010 and issued instructions for him to be taken to the hospital. The evidence of the Medical Record Technician shows that on 20 February 2010, the appellant was brought to the hospital by the police. The appellant stated that he was taken to the hospital on the day of his arrest and released from the hospital on 21 February 2010. The Prisoner Charge and Property Book entry shows that he arrived at the police station on 21 February 2010. Mr

Green described the difference between Corporal Taylor's evidence and that of the entry in the Prisoner Charge and Property Book as to the date of the appellant's arrival at the police station, as a material discrepancy going to the root of the prosecution's case.

[36] It is undeniable that a difference exists as to the date on which Corporal Taylor said that the appellant was taken to the police station, and the date which is recorded in the Prisoner Charge and Property Book. This could be treated as a discrepancy, despite the fact that Corporal Taylor's signature did not appear against the entry in the book. The learned magistrate, in addressing this issue, said:

> "According to the Station Diary exhibit 4, the Accused was not taken to the station until the following day. While the investigating officer testified that the Accused was taken to the Freeport Police station the same day of the incident and while no explanation has been given regarding the mistake in time, I find that this discrepancy does not go to the root of the case for which the Accused was charged. The Accused is charged with possession, dealing and attempting to export cocaine from Jamaica."

[37] Discrepancies are pre-eminently for the jury. It was for the learned magistrate, as the tribunal of the facts, before him, to determine what weight he would give to the discrepancy as to the issue relating to the date on which the appellant arrived at the police station. This is an issue of fact giving rise to the matter of credibility. Obviously, the learned magistrate treated the date on which the appellant was taken to the police station as bearing little or no weight. Although he described the disparity in the dates as a mistake as to time, for

which no explanation was given, this in itself, would not have prevented him from treating it with such weight as he thought fit. As Mr Duncan rightly submitted, the discrepancy did not go to the heart of the prosecution's case, as the evidence surrounding the recovery of the cocaine is that which was of significance. The appellant was charged with possession of, dealing in and attempting to export cocaine. It would have been necessary for evidence to be adduced to show that these offences had been committed, and, in fact, cogent evidence had been adduced to support the charges. The critical issue, therefore, is whether there was before the learned magistrate, compelling evidence to show that: the appellant was left alone in the room which was under the continuous surveillance of the police officer; he excreted pellets which the DNA certificate showed contained cocaine and he offered the police officer a bribe to change the charge. The question as to the date on which the appellant was taken to the police station is merely a peripheral issue. We cannot say that the learned magistrate was incorrect in finding that the discrepancy as to the date, did not go to the root of the Crown's case.

[38] The issue in ground three is whether the learned magistrate failed to have given due and adequate consideration to the appellant's case. In raising this issue, the main concern of the appellant was that he did not receive a fair trial. While it is true that the right to a fair trial cannot be compromised, ordinarily the focus of the court is the assessment of the overall fairness of a trial. What is of importance is the fairness of the proceedings as a whole.

[39] As earlier indicated, the issue of credibility was germane to this case. The learned magistrate was the sole arbiter of the facts. He, being the tribunal of the facts, it would have been open to him to decide who and what he believed. He did not fail to have given consideration to the appellant's case. He assessed the evidence of the appellant and found him to be extremely evasive. It is clear that he found the appellant to be untruthful and accordingly rejected his evidence.

[40] In ground (a) the appellant's criticism is that the verdict, being unreasonable, is against the evidence. The question is whether in the circumstances of this case the verdict is unsafe or unsatisfactory. Section 14 of the Judicature (Appellate Jurisdiction) Act expressly provides that the appeal should be allowed, "if the verdict of the jury... cannot be supported having regard to the evidence. "In ***Rv Barnes*** (1943) 28 Cr App R 141 Humphreys J, after alluding to section 4 (1) of the English Criminal Appeal Act 1907, the provisions of which are substantially similar to section 1 of the Judicature (Appellate Jurisdiction) Act, speaking to the approach to the construction of these words, said at page 142:

> "Those last words have been interpreted in more than one case in this Court as amounting to this: if the Court thinks that the verdict is, on the whole, having regard to everything that took place in the court of trial, unsatisfactory."

[41] It cannot be denied that the findings of the learned magistrate are economical. Although he could have given more details of his findings, it cannot be said that he was oblivious to the principles of the burden and standard of proof. It

was perfectly permissible for him to have placed reliance on the DNA evidence despite the fact that the appellant's clothes taken for analysis were not exhibited in court. He omitted to have made a finding relating to the absence of the clothing at the trial. He ought to have made a finding on that issue but his failure to do so would not have been fatal to the conviction. He dealt with the evidence before him from the prosecution and the defence. He saw and heard the witnesses. It was for him to make a determination as to whom he believed. It cannot be said that some of the responses by the appellant under cross examination would make him a witness who was worthy of belief. Corporal Taylor was unshaken in cross-examination. It is very clear that the learned magistrate would have had a preference for Corporal Taylor's evidence which he undoubtedly found to have been credible.

[42] It is a well established principle that an appellate court will not interfere with a guilty verdict where a question of fact is involved unless it is shown that the judge is palpably wrong. In ***Joseph Lao v R*** (1973) 12 JLR 1238, Henriques P, adopted, with approval, the following extract from Ross on the Court of Criminal Appeal, 1st Ed at page 88:

> "It is not sufficient to establish that if the evidence for the prosecution and defence , or the matters which tell for or against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal- that the verdict was against the weight of evidence- is not a sufficient ground. It does not go far enough to justify the interference of the court. The

> verdict must be so against the weight of evidence as to be unreasonable or insupportable."

It cannot be said that the learned magistrate was plainly wrong in making his findings and arriving at his conclusion.

[43] In light of the foregoing considerations, we have come to the conclusion that there is no reason to conclude that the verdict was assailable on the ground that it was unsafe and unsatisfactory. We are therefore, not satisfied that there is any good reason for interfering with the appellant's conviction.

[44] We would dismiss the appeal and affirm the judgment of the learned magistrate.

[45] The delay in issuing this judgment is regretted for which we must tender our sincere apology.