

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 27/2010**

**BEFORE: THE HON MR JUSTICE PANTON P  
THE HON MISS JUSTICE PHILLIPS JA  
THE HON MR JUSTICE BROOKS JA**

**MARCUS BROWN  
VALENTINE SPENCER v R**

**Ronald Koathes for the appellant Brown**

**Mrs Nadine Atkinson-Flowers for the appellant Spencer**

**Adley Duncan for the Crown**

**6, 7 February, 1 and 6 March 2013**

**PANTON P**

[1] The appellants who are members of the Jamaica Constabulary Force were convicted by Her Honour Miss Deneve Barnett of the offence of unlawful wounding and each fined \$120,000.00 or three months imprisonment. The particulars state that they unlawfully and maliciously wounded Jermaine Ellis.

[2] Given the decision we have arrived at, it is unnecessary to relate the facts relied on by the prosecution, or to give any opinion on the treatment of the evidence by the

learned Resident Magistrate. It is sufficient to say that the prosecution called two witnesses - the complainant Ellis and Detective Sergeant Earl Hinds, the investigating officer. A medical certificate was tendered in evidence.

[3] The credibility of the complainant was critical to the outcome of the case. However, each appellant gave an unsworn statement and the Resident Magistrate accepted the version of events as given by the complainant.

[4] At the trial, the appellants were represented by Mr Dwight Reece, attorney-at-law. The trial commenced on 26 March 2007 and was adjourned to 10 April 2007 when Mr Ellis' examination-in-chief was completed. The matter was then adjourned to 12 April 2007 when Mr Reece cross-examined the witness, following which Det Sgt Hinds gave evidence and the prosecution closed its case.

[5] After an unsuccessful no-case submission by Mr Reece, the matter was then adjourned to 20 April 2007 for the appellants to answer. On that occasion, Mr Reece was absent. The record of appeal in this regard reads thus:

"Mr Reece absent. Will be late. Spoke with Clerk of Courts. Court advises both accused of their 3 options and suggested that they seek the advice of their counsel.

Marcus Brown returns and says he will give his statement from the dock." (page 28)

[6] Thereafter the appellant Brown made an unsworn statement. When called upon, the appellant Spencer also made an unsworn statement. The record has this note:

"This accused also exercises the option to give an unsworn statement after being [sic] conferred with his counsel."

Neither appellant called a witness. By the time the Resident Magistrate was ready to receive closing submissions, Mr Reece arrived and duly addressed the Resident Magistrate. The verdicts were then returned, it seems, and the matter adjourned to 27 April 2007 for sentence.

[7] Mr Reece was again absent on 27 April 2007. The record indicates as follows:

"Austin for the Crown.

Reece absent. Clerk and Accused relay information that Mr. Reece in other jurisdiction.

Court asks both accused to ascertain from Mr. Reece whether some other Counsel will hold on his behalf.

Mr. Barrington Frankson holds for Mr. Reece and apologizes for the absence of Mr. Reece."

[8] Mr Frankson then proceeded to address the Resident Magistrate in relation to sentence. Character evidence was also given by Sgt Sheldon Gordon and Cpl Hubert Jarrett. Thereafter, the Resident Magistrate imposed the fines mentioned earlier.

[9] The following grounds of appeal were filed by each appellant:

"1. THAT the learned Resident Magistrate erred in not upholding a submission of no case to answer.

2. That the verdict was unreasonable."

Each appellant also filed a supplemental ground of appeal as follows:

### **Marcus Brown**

“The Appellant was deprived of the substance of a fair trial because of the nature and quality of the conduct of his case by counsel for his Defence.”

### **Valentine Spencer**

“The conduct of the case for the Defence was inadequate.”

Each appellant also filed an affidavit setting out his complaint, and Mr Reece filed an affidavit in response. Both appellants, strangely, could not recall Mr Reece being present at any time on 20 April 2007 although the record of appeal shows him as making submissions to the learned Resident Magistrate.

[10] The affidavit of the appellant Brown reads in part:

“8. That at 10 a.m, the matter was called up in the Lionel Town Resident Magistrates [sic] Court. Both Mr. Valentine Spencer and myself went in the dock. The magistrate asked where our lawyer was. I said my lawyer would be there soon. We waited for 1 hour to 1 ½ hours, but Mr. Reece did not attend.

9. That the magistrate said she had to proceed with the matter, she was not going to wait any longer, She said she was giving us the chance to consult counsel and both myself and Mr. Valentine Spencer called and spoke to Mr. Reece on the cell phone. The magistrate told me to ask Mr. Reece what course I should follow of which I asked Mr. Reece in that call.

10. That Mr. Reece told me in that cell phone call, that I should give an unsworn statement. That if I gave an unsworn statement they could not cross examine me.

11. That Mr. Reece said he would come to Lionel Town, when he finished his case in May Pen. That he was continuing a very important case.

12. That up to this point Mr. Reece had not discussed whether I should give sworn testimony, nor had any discussion with me whatsoever about how I should proceed in relation to the giving of testimony in the matter. That both because I was a police officer and bearing in mind the importance of the case to my career, I wished to give sworn testimony. Mr. Reece simply told me to make an unsworn statement and that they could not cross examine me in that circumstance. But there was no discussion and neither did he give me any alternative advice.

13. That in the circumstance of the magistrate's insistence that she was going to continue the case there and then, that she would delay no further, and Mr. Reece's absence, I gave an unsworn statement."

[11] The appellant Spencer's complaint was no different. It reads as follows in part:

"7. That on April 20, 2007 the matter was again heard. Mr. Dwight Reece was absent. I do not recall the Clerk of Court indicating anything to the Resident Magistrate about Mr. Reece's absence. The Resident Magistrate indicated that she would be continuing the case despite his absence, after a protracted wait for Counsel to appear. The Resident Magistrate further advised myself and Mr. Marcus Brown of the three options that we had. I did not fully understand these options. The Resident Magistrate further advised both myself and Mr. Marcus Brown to make contact with Mr. Reece.

8. That I personally telephoned Mr. Reece on his cellular telephone. He indicated that I should request another date from the Resident Magistrate for the continuation of the matter. I conveyed this request to the Resident Magistrate but she stated that she would be continuing the matter. Subsequently I was made to understand that this,

April 20, 2007 was the last day that the Resident Magistrate would be sitting in that capacity.

9. That I again telephoned Mr. Reece and he advised me to give an unsworn statement as it cannot be used against me. I therefore gave an unsworn statement. Mr. Reece was not present during my unsworn statement nor that of Mr. Marcus Brown. Mr. Reece also indicated that he would attend on the Court in Lionel Town, after his case in the Supreme Court in May Pen ended.
10. That until that juncture Mr. Reece had not discussed with me the three options open to an accused nor the ramifications of each option. If I had fully understood the options I would have chosen to give evidence as I now know that it would be given equal weight when the Resident Magistrate was examining the evidence. As a police officer, this case was a turning point in my career and I would have wanted the benefits of giving evidence."

[12] In response, Mr Reece had this to say:

- "4. That I have read the Affidavits of Marcus Brown and Valentine Spencer and note their comments therein.
5. That, prior to the trial commencing I took written instructions from each accused at which time we discussed our trial strategy and how the defence would be conducted., particularly bearing in mind that each had written statements about the incident which were in the possession of the Crown.
6. That, between the 12<sup>th</sup> day of April 2007 and the 20<sup>th</sup> day of April 2007 I commenced a murder trial in the Clarendon Circuit holden at May Pen.

7. That, on the 20<sup>th</sup> day of April, 2007 when the Appellant's case was set for continuation I communicated with my clients and the Clerk of the Court that the learned Puisne Judge was in the middle of the summation and I would be able to attend in Lionel Town after midday for continuation. That I made attempts to cause Counsel in Clarendon to hold for me but none was available on the said morning.
8. That, while in the Circuit Court in May Pen, I realized that I was being called by the Appellants who communicated that the learned Resident Magistrate said she was continuing the case without their Counsel.
9. That, we discussed the merits of sworn evidence as opposed to an unsworn statement and having done so the decision was made by the Appellants to give an unsworn statement.
10. That, at no time did I instruct anyone to give an unsworn statement. That decision I always leave to the client after full disclosure on the issue.
11. That, the issue of not being cross examined was of import to the Appellants not Counsel.
12. That, at no time between the 12<sup>th</sup> and 20<sup>th</sup> April, 2007 did the Appellants attend on my Chambers or make an appointment to alter, amend or change the instructions given prior to the trial commencing.
13. That, on completing the trial in May Pen, I attended on the Lionel Town Court as is reflected in the transcript and made submissions on behalf of the Appellants.

14. That, the assertion by the Appellants that I did not attend on the 20<sup>th</sup> April, 2007 is absolutely not true.
15. That, the learned Resident Magistrate's haste to complete the matter was based on her pending resignation from the post of Resident Magistrate to commence her private practice.
16. That I refute entirely that my conduct of the Defence caused the Learned Resident Magistrate to convict the Appellants."

[13] It should be stated that an examination of the record of appeal shows that Mr Reece cross-examined the complainant in a comprehensive manner. There can be no justifiable complaint by the appellants in this regard. The complaint is as regards his absence at a crucial stage of the proceedings, that is, at the time when a determination was to be made as to the exercise of the options available to the appellants.

[14] Mr Koathes submitted that it was incumbent on the appellant Brown to give evidence and his attorney should have been present to give him the strongest possible advice in that regard. Mrs Atkinson-Flowers adopted this submission so far as the appellant Spencer was concerned. She added that it was important for counsel to have been present to instruct the appellant on the ramifications of the options that were open to him. Mr. Duncan for the Crown submitted that the appellants have not shown how giving evidence would have assisted them.

[15] There can be no doubt that a prior discussion with the appellants as to their options would have been of some importance, but the value would have been lost if at



the time the appellants are actually called on, there is no representative on hand in the courtroom to assist and guide them. One only has to consider what the position would have been if either appellant at the time he was called on, expressed the desire to give evidence. In that situation, the question has to be asked as to who would have been on hand to lead his evidence?

[16] It is unacceptable for an accused person to have to consult his attorney-at-law by telephone when his defence is called for by the presiding magistrate. Where an attorney-at-law has been retained, it is his or her duty to be in court at the times scheduled for the hearing of the matter. If he or she cannot be there, through unavoidable circumstances, it is his or her duty to make appropriate arrangements for the case to be continued in his or her absence by having a representative there in his or her stead. There is no duty on the Resident Magistrate to await the presence of the attorney-at-law while the latter chooses to be elsewhere. Attorneys-at-law have a duty to arrange their diaries in a responsible manner. In the instant case, the situation is even more serious as the matter was part-heard. Mr Reece's primary responsibility was to the part-heard matter.

[17] The propositions in paragraph [16] are in keeping with the proper practice of law in Jamaica. If authority is needed, reference may be made to the decision in ***R v Stewart*** (1964) 8 JLR 392. The facts make interesting reading as they are not dissimilar to events that are happening 50 years later. No harm will be done by quoting in full from the judgment of the court which was delivered on 19 February 1964 by Duffus JA (later to become President and then Chief Justice).

"The appeal came before this court on January 28, when it was adjourned in view of allegations of judicial misconduct made against the learned resident magistrate. The grounds of appeal as filed by the appellant alleged that the trial was unsatisfactory in that the appellant informed the court that she was represented by a lawyer, and gave the name of the lawyer, but the resident magistrate said he was not concerned about that, and was going to try the case in the absence of the lawyer, thereby depriving the appellant of legal assistance. This court, following its usual practice where misconduct is alleged against a resident magistrate, referred the matter to the learned acting resident magistrate. His reply was received and the court also was handed a copy of an affidavit filed by the learned counsel in the court below, yesterday. The court intimated to Mr. Bovell who argued the appeal on behalf of the appellant that the court accepted the statement by the learned resident magistrate. A summary of that statement was as follows.

He presided over the morning session of the court on December 18. He asked the appellant if she had a lawyer; she told him that she had, Mr. H.P. Allen, who was not then in court. He states he asked the Clerk of the Courts if Mr. Allen had contacted him about the case. He was informed by the Clerk of the Courts he had not and that Mr. Allen's name was not endorsed on the information. The Clerk of the Courts offered to try to find Mr. Allen. The learned resident magistrate states that he spent ten minutes or thereabouts in idleness on the bench while the Clerk of the Courts went out to look for Mr. Allen and then he returned and informed him that Mr. Allen was nowhere in the building. He had contacted his chambers and received no information as to his whereabouts. The resident magistrate then proceeded with the trial.

The court takes the view that the learned resident magistrate took adequate steps to see that the appellant's legal representative was present at court and it is certainly unreasonable to expect a court to wait indefinitely on counsel. *When a trial is fixed to take place, it is the business of counsel to see that they are present in court on their client's behalf.* If they know they cannot be present at the proper time they should make satisfactory arrangements so that the client is represented in court or

proper arrangements made for the case not to be taken. We find too many of these cases occurring in which clients are apparently not exactly abandoned but perhaps forgotten in the pressure of work which counsel apparently have in the Resident Magistrate's Courts. It is most unsatisfactory but we are unable to say that any injustice has been done to this appellant in this instance having regard to the merits of the case itself."

[18] Before parting with this matter, mention must be made of a practice direction issued on 11 September 2002 by the then Chief Justice. It reads:

"By Order of the Chief Justice and with the concurrence of the Puisne Judges of the Supreme Court, the following Practice Direction is hereby issued.

With effect from the commencement of the Michaelmas Term on September 16, 2002, any Attorney-at-Law whose name is on record in respect of matters set down for trial and who is unable to attend Court should instruct another Attorney-at-Law who is fully briefed, to appear on their behalf."

[19] In the circumstances, we cannot say that the appellants had a fair trial. They had a right to expect to have their attorney present at such a crucial stage of the trial. For the reasons that we have stated, we allowed the appeals on 1 March 2013, quashed the convictions and set aside the sentences. In the interests of justice, we ordered a new trial to take place before another Resident Magistrate as soon as possible. We hasten to add that we attach no blame whatsoever to Her Hon Miss Barnett, the Resident Magistrate who presided at this trial.