[2014] JMCA Crim 50

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CRIMINAL APPEAL NO 6/2014

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

ONEIL HAMILTON v R

Michael Howell instructed by Knight Junor & Samuels for the appellant

Adley Duncan for the Crown

9 October and 5 December 2014

McDONALD-BISHOP JA (Ag)

[1] The appellant, Oneil Hamilton, was tried in the Corporate Area Resident Magistrate's Court before Resident Magistrate, Her Honour Mrs Grace Henry-McKenzie, on an amended indictment containing a single count that charged him with the offence of indecent assault. He was convicted and sentenced to six months imprisonment at hard labour. He appealed against his conviction and sentence.

[2] On 9 October 2014, we dismissed the appeal, affirmed the conviction and sentence and ordered that the sentence should commence from 9 October 2014 (he

having been on bail pending appeal). We promised then to reduce our reasons for doing so into writing. This is a fulfillment of that promise.

The trial

[3] The particulars of the offence for which the appellant was indicted were that "on a date unknown between the 1st September 2009 and the 30th June 2010, he indecently assaulted" the named complainant.

[4] The evidence led by the prosecution in seeking to establish the guilt of the appellant came from the virtual complainant; her grandaunt and guardian, who will be called Miss D for our purposes, and the investigating officer, Special Sergeant Rohan James, of the Centre for the Investigation of Sexual Offences and Child Abuse ('CISOCA'). The crucial witness for the prosecution was, however, the virtual complainant whose evidence alone implicated the appellant in the commission of the offence.

[5] The complainant at the time of the alleged incident was a girl under the age of 16 years having been born in 1997. She is related to the appellant. At the material time, she lived with the appellant and other relatives at premises at a Kingston address. She shared the same house with the appellant for a period while attending a particular primary and junior high school.

[6] The complainant's evidence, in outline, was as follows. On a particular night while she was in grade seven (she had initially said grade eight but later indicated that

it was while she was in grade seven), the appellant had a disagreement with the mother of one of his children when she visited him at his house. Following this argument, the complainant spoke to the child's mother. Her action in doing so, seemingly, angered the appellant who started cursing her and thumped her on her mouth. He told her at the time of that incident that she was behaving like a big woman and that he was going to show her something.

[7] During the course of that night, while in her bed with her five year old sister, the appellant took off all her clothes and used a razor to shave the hair from her pubic area. She was able to see him clearly from the light of the television that was on in the room. In the morning, she observed small cuts on her pubic area that was shaved. She also testified that the appellant had on a previous occasion used the flashlight of a cell phone to look into her vagina and blew air from his mouth onto her breast.

[8] There was inconsistency in her evidence as to whether she had told anyone about the 'shaving incident' within any reasonable time after she said that it had occurred. She initially said she had told no one and then she said that she spoke to her grandmother the day after. She testified that subsequent to speaking to her paternal grandmother, her great grandmother invited her to live with her, which she did. She also said that she had made a report to the police at the Central Village Police Station when she went to live with her great grandmother but that nothing happened after that. In or about July 2011, she eventually spoke to Miss D who took her to CISOCA where she made a report to the investigating officer, Special Sergeant James. The

complainant denied defence counsel's suggestions to her that she was telling lies on the appellant out of malice and spite.

[9] Miss D, the second witness who was called for the prosecution, added nothing of materiality to the prosecution's case except to indicate that the complainant was attending the particular primary and junior high school in question between September 2009 and June 2012. Her evidence, as the learned Resident Magistrate noted, served to put the date of the alleged incident in context as it managed to narrow the time frame within which the alleged offence was said to have been committed. This led to an amendment to the indictment. The complainant's birth certificate was also tendered and admitted into evidence through Miss D to prove her age. Miss D also denied suggestions from the defence that she colluded with the complainant to tell lies on the appellant out of malice.

[10] Special Sergeant James was merely a formal witness who received the complainant's report and subsequently arrested and charged the appellant. The officer testified that the appellant, upon being cautioned, made no response to the allegation made against him. There was thus nothing said to the police by the appellant that could have assisted the prosecution's case.

[11] A submission of no case to answer failed and the appellant, having been called upon to answer to the charge, gave sworn evidence in his defence. He denied the allegations made against him contending that he was not aware of the allegations until the police came to arrest him. He advanced his case that the allegations arose out of

malice and spite on the part of the complainant and Miss D. He said that the complainant had made up the stories against him because he had scolded her for her conduct and she wanted to get back at him. As for Miss D, he testified that she had acted out of malice to influence the complainant to lie on him because she does not like him. This was as a result of something that had transpired between the complainant's mother and him some years before.

Grounds of appeal

[12] The appellant filed seven grounds of appeal in challenging his conviction and sentence. They were set out as follows:

> "(i) That the Learned Resident Magistrate erred in that she rejected the no case submission made by the defence at the end of the Prosecution's case.
>
> (ii) The Learned Resident Magistrate erred in her failure to grant the defence [sic] objection to the amendment of the indictment which made it impossible for him to prepare his defence and denied him a fair trial.
>
> (iii) The Learned Resident Magistrate erred in her failure to consider or take into account the issue of malice on the part of the complainant and [Miss D].
>
> (iv). The Learned Resident Magistrate erred in her failure to advise herself that the action of the complainant raised questions of the truth of her testimony.
>
> (v) The Learned Resident Magistrate erred in her failure to warn herself about the dangers of accepting the experience [sic] of a child under 12

years old at the time of the incident that occurred at that age relating to a sexual offence.

(vi) The learned trial Magistrate erred in that she found that [Miss D] was a witness of truth and admitted her evidence (Transcript Page 20 lines 15 -18, page 21 lines 1-10) which was inadmissible and in addition having admitted such evidence, did not appropriately or adequately informed [sic] herself in assessing the evidence.

(vii) That the Learned trial Magistrate erred in the sentencing of the appellant to six months in prison instead of a non custodial sentence."

[13] At the presentation of oral arguments, Mr Howell for the appellant indicated that grounds one and six would no longer be pursued. Those grounds were, therefore, abandoned, leaving only five grounds for consideration. These grounds are considered *seriatim.*

Appeal against conviction

Ground two

Whether amendment of the indictment resulted in an unfair trial

[14] The first complaint by the appellant was that the learned Resident Magistrate fell into error when she failed to uphold the defence's objection to the amendment of the indictment. The circumstances giving rise to the amendment of the indictment and this ground of appeal are summarised as follows. The indictment originally averred in the particulars of offence that the offence of indecent assault was committed "on a date unknown between the 1st of September 2008 and the 30th day of June, 2009". During

the course of the evidence, the complainant stated that the incident took place while she was in grade eight. Later on in her testimony, upon further cross-examination, she then said she was in grade seven and then upon re-examination, she stated that grade seven was the correct grade. It was an agreed fact that the complainant was living at the premises where the appellant lived at a time when she was attending that school. The complainant's evidence as to the precise years she lived at those premises was, at best, unclear.

[15] The evidence of Miss D supported the complainant's evidence that the complainant resided at those premises in question when she was attending the particular school. Miss D, however, testified that the complainant was attending the school between September 2009 and June 2010 while she lived at the premises in question. The clerk of the courts, based on that testimony, applied for the particulars of the offence in the indictment to be amended to bring the indictment in alignment with the evidence of Miss D. The application was made at the start of Miss D's cross-examination.

[16] The learned Resident Magistrate granted the amendment despite the objection of defence counsel. She allowed the appellant to be re-pleaded on the amended indictment to which he pleaded not guilty. She thereupon deferred the cross-examination of Miss D and invited learned defence counsel for the appellant to recall the complainant for further cross-examination if he so desired. She also gave the opportunity, as she stated in her ruling on the point, for counsel to receive further

instructions from the appellant as a result of the amendment. The matter was thereupon adjourned from 10 June 2013 to 26 June 2013, that being for a period of two weeks or so.

[17] The appellant contended that he was unduly prejudiced by the amendment. He cited five bases on which he is contending that prejudice was caused to him. In summary, they are stated thus:

a) With the amendment, the offence would no longer have occurred during the period that the complainant in her sworn testimony said it had occurred.

b) He was forced to further cross-examine the complainant who testified to a new period of time never alluded to by her.

c) The amendment was made based on evidence given by a person who was not a witness to the offence.

d) The complainant upon being recalled did not corroborate the period in the newly amended indictment.

e) The amendment of the indictment appears to contradict the complainant's evidence on direct examination.

[18] Mr Howell submitted, inter alia, that "in the end, the defence was left with a period of over a 600 days span to cover in the preparation of its case, including the preparation and cross-examination of the complainant over this incredibly long period". According to learned counsel, the appellant "had no case to answer, there being no offence committed during the period complained of by the complainant. Further, and in

the alternative, it cannot be fair for an accused to properly prepare his defence for an offence which took place over a 300 day period".

[19] In treating with the issue that confronted the learned Resident Magistrate in relation to the dates alleged, invaluable guidance was obtained from Blackstone's Criminal Practice 1999 at paragraph D9.9. There the learned authors note that in order to provide reasonable particulars of the offence charged, the count in the indictment should state the date on which the offence is alleged to have occurred in so far as is known. However, if the precise date is unknown, it is permissible for the indictment to be framed alleging that the offence was committed 'on or about' a specified date or 'on a date unknown' between two specified dates as was the case in this indictment.

[20] The learned authors advance some important points, concerning errors in the dates stated in an indictment, that have been distilled and restated, in outline, for ease of reference. They are as follows:

(1) Where the evidence at trial as to time differs from the date laid in the count, that is not at all, fatal to a conviction (**Dossie** (1918) 13 Cr App Rep 158). There, however, may be cases in which the allegation as to date is not merely procedural but may determine the outcome of the case for example where the age of the victim is important.

(2) Where the defence may have been prejudiced in the preparation of their case by a divergence between the evidence as to the time and date specified in the count, the trial judge, should adjourn to allow them to respond to the

altered situation. Alternatively, it might be necessary to discharge the jury and have a second trial on indictment. Failure to allow an adjournment could result in the quashing of any resultant conviction as being unsafe or unsatisfactory. (These propositions, the learned authors, however, note, are derived from the case of **Wright v Nicholson** [1970] 1 WLR 142, which they indicate should be applied with caution in applying that decision in the present context because, *inter alia,* the appeal was not against conviction on indictment.)

(3) Since divergence between a count and the evidence as to date is not fatal to a conviction, there is, strictly speaking, no need for the prosecution even to apply for an amendment to the indictment on the divergence becoming apparent (**Dossie**). However, as a matter of practice, it may be preferable to eliminate divergence by an appropriate amendment thus avoiding confusion by the jury.

It stands to reason against this background that it was open to the prosecution to frame the indictment as it was and to seek to amend it where there was a divergence between the count and the evidence adduced at trial.

[21] The divergence between the evidence and the particulars of offence as to dates was noted during the course of the evidence of Miss D, the prosecution's second witness. The case for the Crown had, by that time, not been completed. The learned Resident Magistrate acceded to the application for amendment of the count at that

stage in the proceedings. In terms of the timing of the indictment, she would have acted properly within the ambit of the Indictments Act that provides in section 6(1) and (2):

> "6.-(1) Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit.
>
> (2) Where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been preferred in the amended form."

[22] Similarly, and even more specifically to the Resident Magistrate's jurisdiction to amend an indictment, section 278 of the Judicature (Resident Magistrates) Act provides:

> "278. At any stage of a trial for an indictable offence before sentence, the Court shall amend or alter the indictment so far as appears necessary from the evidence or otherwise, and may direct the trial to be adjourned or recommenced from any point, if such direction appears proper in the interest either of the prosecution or of the accused person."

[23] It is, therefore, accepted that the learned Resident Magistrate could have allowed the amendment to the indictment on the basis advanced by the prosecution and at that point in the proceedings, with the only pivotal question for her consideration being whether the amendment could have been made without injustice to the

appellant. In granting the amendment at the stage of the proceedings, which she did, the learned Resident Magistrate clearly addressed her mind to that critical question of prejudice to the appellant and concluded thus:

> "Amendment granted – No prejudice would be caused to the accused based on the evidence. The amendment is in keeping with the evidence thus far. No unfairness would be caused to the accused."

[24] She then proceeded immediately thereafter to re-plead the appellant, to defer the cross-examination of the witness in the box and to grant an adjournment for two weeks for counsel to obtain further instructions from the appellant. She also ordered that the complainant be recalled for further cross-examination, if the defence so desired.

[25] It is quite evident, as Mr Duncan correctly pointed out, that any prejudice to the appellant would have been neutralised or eliminated by the steps taken by the learned Resident Magistrate to ensure that the amendment led to no unfairness to him. At the point at which the amendment was done, the appellant would have been afforded the opportunity and ample time to prepare his defence to meet the new facts brought about by the amendment which only pertained to the time that the incident was alleged to have occurred.

[26] Also, the complainant alleged that the incident had occurred when she was in grade seven or grade eight and living at the premises with the appellant. She also spoke to a specific incident occurring between the appellant and the mother of one of

his children on the same evening that the offence was allegedly committed. There was no divergence in that evidence. There was thus a specific 'marker' incident and a clear time frame presented on the complainant's evidence as to the time of the alleged commission of the offence. The years, in and of themselves, would not matter in such a situation when there was a clear point of reference that the appellant could have used to prepare his defence.

[27] It should also be noted that Miss D did not give evidence purporting to be a witness as to fact. All she said was that the complainant lived at those premises while she attended the school in question between September 2009 and June 2010. Once there was credible evidence as to time on which the learned Resident Magistrate could have properly acted, then, she need not have relied solely on the witness who was alleging the commission of the offence. It was open to her to accept Miss D's evidence as to the time frame the complainant would have been speaking about when she said the incident occurred. Therefore, the complaint that the amendment was made as a result of the evidence of a witness who did not witness the commission of the offence is without merit.

[28] Even more importantly, the appellant's defence was a complete denial of the commission of the offence. He said he did not do what was alleged and that the allegations, basically, were made out of malice and spite. So, the specificity or accuracy of the dates alleged would not have been of materiality to his defence. His defence was not one that could be viewed as being 'time–sensitive' as in the case of an alibi

defence, for instance. Therefore, his defence could not have been materially impacted by any adjustment in the period the offence was alleged to have been committed. Similarly, the age of the complainant was not an important element to be proved to the extent that precision of the date the offence was allegedly committed was critical. Error in the date would, therefore, not have been such as to deprive the appellant of any other possible defence he might have had in law.

[29] In any event, the appellant was granted an adjournment to allow him to give his counsel further instructions to challenge the prosecution's case and was given ample time within which to do so. There was nothing in the circumstances that could have embarrassed or prejudiced him in his defence as the learned Resident Magistrate took all reasonable steps to eliminate such a possibility or probability.

[30] When the principles of law are borne in mind as they pertain to the amendment of the date in an indictment, it was open to the learned Resident Magistrate to conclude, as this court has done, that no injustice would have been caused to the appellant when all the circumstances of the case are examined and the defence put forward by him is taken into account. All this leads, inevitably, to the conclusion that the learned Resident Magistrate acted properly in law in allowing the amendment to the indictment.

[31] Ground two of the appeal, therefore, failed.

Ground three

Whether the learned Resident Magistrate erred in her failure to consider or take into account malice on the part of the prosecution's witnesses

[32] It was put to the complainant that she was making the accusations out of ill-will she had towards the appellant, and the reasons for the appellant saying so were put to her. She denied those suggestions maintaining that she was speaking the truth. Similar suggestions of malice were also put to Miss D, which she too denied. The appellant gave sworn evidence of what he perceived to have been the motives of the witnesses. The question of malice on the part of witnesses goes to the issue of credibility. So where there is clear evidence of malice being a motive or a possible motive for an accusation being made against an accused person, then such evidence must be approached with the utmost caution in mind in coming to a determination whether the affected witness should be accepted as credible.

[33] The learned Resident Magistrate demonstrated in her findings that she recognised the implication of an allegation of malice on the credibility of the witnesses involved. She pointed out that there were, in her words, "two conflicting accounts before the court". This recognition, on her part, came against the background of the directions in law, of which she had reminded herself, that the burden of proof was on the prosecution, that the appellant had nothing to prove and that she was obliged to treat his sworn testimony with the same standard of fairness as the evidence for the prosecution.

[34] So, obviously, with all that in mind,, the learned Resident Magistrate, in paragraphs 47-48 of her findings of facts, looked at the two cases before her and expressly and specifically identified the defence's imputation of malice on the part of the witnesses. She identified the bases being advanced by the appellant in setting up the allegation of malice and gave thought to them. She then said in paragraphs 49 and 50 immediately following this assessment:

> "49. The central issue for me to determine therefore, is one of credibility. Do I accept the evidence of the prosecution [sic] witnesses or the evidence of the accused?
>
> 50. I have had the opportunity of observing the witnesses, both for the prosecution and the accused himself as they gave evidence and had the opportunity of assessing their demeanour. Having made an assessment of the evidence of the witnesses for the prosecution and the accused himself, I make the following findings:"

[35] The learned Resident Magistrate then proceeded to make her findings that included her acceptance of the complainant as a witness of truth. She found her to be forthright and consistent in her account and found her evidence to be "credible and reliable". She observed that the complainant's evidence was not shaken by cross-examination. She expressly stated that she did not find, as was suggested by the defence, that the complainant was telling lies and making up stories because of the reasons advanced by the defence in imputing malice to her. She said of the allegation of malice in relation to the complainant: "I find nothing on the evidence to support this contention."

[36] In relation to the evidence of Miss D, the learned Resident Magistrate stated at paragraph 50(20):

> "20) I also accept [Miss D] as a witness of truth. I do not find that in bringing the matter to the attention of the police, she was acting out of malice. I see no evidence of malice on her part. By her admission, she didn't find great favour with the accused, but the events which resulted in this, happened some years ago, and I see no reason on the evidence why she would at this time, collude with the complainant to make false allegations against the accused."

[37] She then proceeded to indicate her rejection of the appellant's case in sub paragraph (21), stating *inter alia*:

> " 22) On the other hand, I do not find that the accused was a witness of truth. I do not find that he was credible and reliable. He was less than forth right [sic] in giving his testimony. I reject his account. I do not accept, as he said, that he did not carry out these acts of assault on the complainant."

[38] The learned Resident Magistrate, in rejecting the appellant's defence, nevertheless, reiterated that she knew that he had nothing to prove and that the onus was on the prosecution to satisfy her of his guilt. She then indicated in her reasoning that having gone back to consider the prosecution's case, after rejecting the appellant's case, she found that the prosecution had discharged the burden of proving his guilt to the requisite standard.

[39] It is patently clear from the foregoing extracts from the reasoning of the learned Resident Magistrate that she properly addressed her mind to the issue of malice and its

implications for the credibility of the witnesses in question and made her findings as the tribunal of fact. She cannot at all be faulted in her approach to the evidence and the conclusions she arrived at. The credibility of the witnesses was, totally, a matter for her. There is no basis presented, as a matter of law, on which this court could properly intervene and disturb her findings on the issue of malice that was advanced by the appellant at the trial.

[40] Ground three, therefore, failed.

Ground four

Whether the learned Resident Magistrate erred in her failure to advise herself that the actions of the complainant raised questions as to the truth of her testimony

[41] Ground four of the appeal bears a close connection to ground three in the sense that it also challenges the learned Resident Magistrate's findings on issues pertaining to the credibility of the complainant. Mr Howell pointed to various aspects of the complainant's testimony and submitted that the action of the complainant raised questions as to the truth of her testimony in the following regards:

(i) by not telling anyone about the incident until a considerable length of time after she had the opportunity to do so;

(ii) the complaint was not spontaneous; and

(iii) by not making an outcry when the act was supposed to have been done in the presence of her sister and where it was likely she might have been

heard by her sister notwithstanding the fact that the sister was young, or by other persons in the yard.

[42] Mr Howell also highlighted the fact that the complainant had said that she spoke to her grandmother and that a report was made to the police prior to the report at CISOCA that led to the appellant being charged. He pointed out that the investigating officer had said he knew of no such report having been made to the police. These are matters, learned counsel argued, that affected the credibility of the complainant and which the learned Resident Magistrate failed to take into account. He contended that this error on the part of the learned Resident Magistrate to consider these matters pertaining to the actions of the complainant has denied the appellant a fair trial and thereby caused injustice to him.

[43] All the concerns of the appellant expressed in this ground of appeal have been duly considered and, with all due respect, can be said to be baseless. It was totally a matter for the learned Resident Magistrate, in the exercise of her jury mind, to weigh in the equation all these matters identified by counsel in her assessment of the complainant's reliability and credibility. The learned Resident Magistrate in a very careful analysis of the evidence did identify and deal appropriately with those matters raised by the appellant. In speaking of the failure of the complainant to tell anyone of the incident, for instance, she stated in paragraph 50 (11):

> "11) …I find also that when she did not tell anyone at the time about the incident, it is not because it didn't happen. It is not unusual for victims, particularly when they are that

> young, not to say anything to anyone about any act of abuse, particularly of this nature meted out to them, especially by family members."

[44] This aspect of the learned Resident Magistrate's analysis is in harmony with the views expressed in some English authorities in their treatment of the law relating to recent complaints in sexual offences. The learned authors of Blackstone, in paragraph F6.14, in discussing the issue as to the time within which a complaint about the commission of a sexual offence may be regarded as recent for the purposes of admissibility note that:

> "Much turns on the circumstances of the case. Account should be taken of the fact that victims, both male and female, often need time before they can bring themselves to tell what has been done to them. Moreover, whereas some victims find it impossible to complain to anyone other than a parent or member of their family, others may feel it quite impossible to tell their parents or members of their family (**Valentine** [1996] 2 Cr App R 213 at p. 224)."

[45] When the reasoning and findings of the learned Resident Magistrate are examined, it is found that she did not treat any of the alleged complaints as a recent complaint and she attached no weight to such evidence in coming to a finding adverse to the appellant. Having examined her treatment of this aspect of the complainant's evidence, it is clear that there is no basis on which this court could interfere with her conclusion when she said that she believed the complainant despite the fact that there was no recent complaint.

[46] Also, in treating with this argument raised by the appellant concerning the presence of the complainant's sister at the time of the incident the learned Resident Magistrate stated:

> "The complainant had indicated in her evidence that her five year old sister was on the bed sleeping when [the appellant] shaved her vagina. The defence raised the question as to why would [the appellant] choose a time when her sister was on the bed to do so. I find however, that the complainant's sister was a very young child and that she was sleeping at the time. [The appellant] would have been aware of this, so that to my mind that would not preclude him carrying out his activity at that time."

[47] It was after taking those matters, among others, including the alleged malice, into account that the learned Resident Magistrate arrived at her finding that she accepted the complainant as a witness of truth. It was open to the learned Resident Magistrate to come to such a finding following her analysis of the evidence, she having borne in mind that the resolution of the case revolved around the credibility of the prosecution's witnesses and the appellant. She cannot be faulted in her approach and in her analysis of the evidence. The resultant conclusions she arrived at cannot be said to have been plainly or palpably wrong. Therefore, there is no merit in the argument that the learned Resident Magistrate fell into error in acting on the evidence of the complainant thereby resulting in an unfair trial and a grave injustice to the appellant.

[48] Ground four of the appeal also failed.

Ground five

Whether the learned Resident Magistrate erred in failing to warn herself about the dangers of accepting the evidence of a child under 12 years old at the time of the incident relating to a sexual offence

[49] The learned Resident Magistrate recognised from the very outset of her consideration of the case that the complainant was a young child. Having declared that fact expressly, she then reasoned:

> "7. I do not think it is in dispute that at the time of the alleged incident the complainant was a minor. As such, I will remind myself that she being a child of tender years, I must approach her evidence with caution because I am aware, that children do sometimes imagine things, do sometimes make up stories and are at times susceptible to influence from others. I must also be particularly careful in my approach to her evidence, since it is not corroborated."

The foregoing portion of the learned Resident Magistrate's reasoning serves to sufficiently demonstrate to this court that she had addressed her mind to the need to approach the evidence of the complainant with caution because of her age and also because it was not corroborated. She demonstrated that she approached the evidence with the necessary caution in mind by giving the 'young person's warning' and the reason for the warning, which was required of her. She cannot be faulted.

[50] While it is evident that she had omitted to make specific reference to the corroboration warning in the context of sexual offences, that is not fatal to the conviction in the circumstances of this case. In **R v Prince Duncan and Herman Ellis** SCCA Nos 147 & 148/2003, delivered 1 February 2008, this court, through Smith JA,

affirmed and embraced the principles explicated by Lord Taylor CJ in **Makanjuola** [1995] 1 WLR 1348 at 1351 as being applicable to this jurisdiction. This court made it clear, then, upon following the lead of **Makanjuola** that the corroboration warning is not obligatory in cases of sexual offences. As Smith JA declared after a recital of the instructive dicta of Lord Taylor CJ:

> "This decision is, in our, view applicable to this jurisdiction. Therefore unless otherwise enacted by statute, the guidance given by Lord Taylor should now be followed. The rule requiring a mandatory corroboration warning in sexual cases has been weighed in the balance and found wanting. It should now be only a matter of historical interest."

[51] The abrogation of a mandatory corroboration warning in cases of sexual offences eventually received express legislative endorsement in section 26 (1) of the Sexual Offences Act, which was passed in 2011 (admittedly after the commission of this offence and so would not apply to this offence, it being charged at common law).

[52] When the learned Resident Magistrate's treatment of the case is viewed within the context of the '**Mankanjuola** principles' which would have been applicable, there is nothing on the facts of this case to lead to a finding that she exercised her discretion wrongly in failing to give the corroboration warning as it relates specifically to sexual offences. She did state, after giving herself the requisite 'young person's warning', that "I must also be particularly careful in my approach to her evidence since it is not corroborated." The learned Resident Magistrate, as judge of law and of fact sitting alone, sufficiently and properly directed her mind to approach the evidence with the requisite caution given the absence of corroboration, in general. The fact that she did

not specifically relate it to a sexual offence is not fatal to her determination of the case upon finding the virtual complainant a credible witness whose account she did believe.

[53] Contrary to what learned counsel for the appellant also contended in arguing this ground, the learned Resident Magistrate took into account inconsistencies in the evidence of the complainant and was mindful of her lapse of memory on certain matters. She, however, treated with those weaknesses in accordance with the applicable law while at the same time giving herself the requisite young person's/corroboration warning. She assessed their relative materiality to the issue to be determined and found them not to have been material. In the end, she found that despite the shortcomings she had observed in the complainant's testimony, the complainant was not shaken by cross-examination and that she was a witness of truth on whose words she could safely rely in coming to a finding that the appellant was guilty of the offence charged. It was within her exclusive purview to come to such a finding as the sole judge of the facts and so there is no proper basis on which this court could interfere with her decision.

[54] There was thus no merit in ground five of the appeal; it also failed.

Conclusion on appeal against conviction

[55] The appellant failed in the grounds of appeal he pursued in relation to his conviction to present any basis in law upon which this court could have properly interfered with the findings of the learned Resident Magistrate. Her approach and

ultimate findings are unassailable thereby rendering the appellant's conviction for the offence of indecent assault unimpeachable.

[56] Accordingly, for these reasons, the appeal against his conviction was dismissed.

Appeal against sentence

Ground six

Whether the learned Resident Magistrate erred in sentencing the appellant to six months imprisonment instead of a non-custodial sentence

[57] The learned Resident Magistrate, in sentencing the appellant, had for her information and guidance a social enquiry report. She noted that she treated the report as being beneficial to the appellant thereby applying it to his credit. She took into account, as mitigating factors going to his credit also, his age, his dependent children, the fact that he had no previous conviction, that he was gainfully employed and, that he was seemingly hardworking. She then sought to balance these mitigating factors with the aggravating features of the case. She identified, in particular, as a significant aggravating factor, what she appropriately termed "a serious breach of trust" on his part given the age of the complainant and, moreso, the familial connection between him and the complainant.

[58] Also, the learned Resident Magistrate paid due regard and expressly gave consideration to the provisions of the Criminal Justice (Reform) Act, in particular, section 3, as she was required to do, and stated, in part:

> "... and I am aware that a custodial sentence should be my last resort. However, I am of the view that a non-custodial sentence would not serve the ends of justice for this crime. A custodial sentence is warranted… I think in the circumstances, a short custodial sentence is appropriate."

[59] In sentencing the appellant, the learned Resident Magistrate demonstrated, by her clear words, that she had paid due regard to the relevant principles of law applicable to sentencing and the objects of sentencing which led her to opine that a short term custodial sentence would achieve the ends of justice. There is no basis for this court to disturb that sentence which cannot, at all, be said to be manifestly excessive.

[60] Ground six of the grounds of appeal, therefore, failed and so the appeal against sentence was also dismissed with the consequent order made that the sentence should run from 9 October 2014.