[2014] JMCA Crim 58

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 19/2011

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

VASTNEY HARVEY v R

Mrs Carolyn Reid-Cameron for the appellant

Leighton Morris for the Crown

19, 20, 25 June and 19 December 2014

MCINTOSH JA

Background

[1] Briefly, on 13 May 2013, the appellant was convicted in the Resident Magistrate's Court for the Corporate Area for the offence of assault with intent to rape. That same day, he was sentenced to 12 months imprisonment at hard labour but the sentence was suspended for a period of two years. However, the suspension of the sentence did not remove the sting of the conviction and likely consequences to him as a serving member

of the Jamaica Constabulary Force and so the appellant has challenged both in the notice and grounds of appeal he filed on 28 November 2013. Before turning to the appeal however, it may be useful to summarise the evidence adduced before the learned Resident Magistrate.

The trial

[2] The complainant testified that the appellant (whom, at page 6 of the record, she said she had known "around couple months, not sure of period, maybe a year" but later said it was more than a year and in fact they were good friends – page 10) offered to transport her to her home as she stood in front of the Constant Spring Police Station, ready to leave an event which they had attended at the station, on the night of 6 April 2010. There is a divergence in the evidence as to whether the offer of transportation moved from the appellant or was in the form of a request from the complainant but, suffice it to say, they both left the station in the appellant's private motor vehicle, ostensibly headed for her home.

[3] On her account the appellant repeatedly made sexual overtures to her as she rode in his vehicle, offering sex, he said, as an appeasement for the hurt which, according to him, a particular police officer, at the event, had caused her. She was constant in her refusal of his offer and requested to be taken home but instead of turning in the direction of her home, he turned in the opposite direction, parking the vehicle at a spot where there was a sign marked "The View". At this point, as she sat in the passenger's seat, he climbed over from the driver's seat on top of her and

reclined the seat, bringing his full weight down on her. He then unzipped his pants, took out his penis and pulled the tights she was wearing, down to her ankles, all in an effort to achieve his objective. He repeatedly expressed his desire to have sex with her, as she struggled with him, pushing him in the chest area and telling him to get off of her. This was evidence of an assault with the intention of raping her as she made it very clear that she was not consenting to his sexual advances.

[4] The complainant's evidence was that for some inexplicable reason he brought his actions to a halt and returned to the driver's seat whereupon they both readjusted their clothing and he drove her to her home. When they got to her gate he said something to her about the police officer whom he claimed had hurt her, after which she got out of the car and went inside her house where she found that all the occupants were asleep. Next morning she did not tell them about the incident but later, when she was at work, she telephoned her boyfriend, Constable Sean Roberts, with whom she said she had an intimate relationship and told him what had happened. On his advice she reported the matter to the Centre for Investigation of Sexual Assault and Child Abuse (CISOCA). Then, after a ruling from the office of the Director of Public Prosecutions, the appellant was charged and subsequently faced his trial with the result already indicated.

[5] Constable Roberts was her witness as the person to whom she first spoke of the incident. His recollection of what he was told did not fit squarely into her testimony before the court. He recalled her telling him, for instance, that it was she who begged the appellant for a ride to her home that night. He also recalled her telling him that she

had a knife with a protruding blade and she took it out "and had it". Then, at "The View" when the appellant came on top of her and pulled down her tights, as she sat in the passenger seat, she managed to fight him off, left the vehicle and walked home. It was he who figured out that her assailant was the appellant. When cross-examined Constable Roberts said the complainant told him that she had used the knife to "juck" the appellant several times while he was on top of her. There were several instances when he did not recall matters suggested to him but, when confronted with his statement, he accepted that that must have been what he had said. For instance, at first he did not recall that it was he who advised the complainant to report the matter but later accepted that he did. And he denied the closeness of the relationship with the complainant as, contrary to what her feelings for him might have been, it was his testimony that they were not in a boyfriend and girlfriend relationship.

[6] The appellant gave evidence on oath in which he admitted being at the event which the complainant spoke of and even being in her company, laughing and drinking with at least two other persons, then getting too familiar with her, while still in the company of the others, by touching her on her buttocks. He formed the impression from her body language thereafter that she found his action offensive and he apologized. There was also a reaction from the police officer in the group whom he thought may have had a romantic interest in the complainant and who thereafter, without notice, cancelled the understanding they both seemed to have had that he would take her home and left the event without her. On seeing her at the front of the

premises at about 1:30 am, seemingly without transportation, the appellant said he offered to take her home and when she accepted, he had done just that and only that.

[7] He knew where she lived having had the occasion to transport a relative of hers to that house so he took her home and then went to visit his friend, Constable Mary Allerdyce at CISOCA, arriving there at about 1:45 am. This is to be juxtaposed with the evidence of the complainant that at about that time she was being assaulted by the appellant on Mannings Hill Road in the vicinity of the sign "The View". Her evidence was that she had left the event "a couple minutes to 2:00 am" with the appellant; that the incident she described lasted for "a couple of minutes" and that when he took her to her gate and she went into her house "it was 2 o'clock exactly because I got a text message from a friend".

[8] He called Constable Mary Allerdyce in support of his defence. She testified that while she was working in her office at CISOCA on the morning in question, she received a text message from the appellant at about 1:45 am telling her that he was on the compound and when she did not react to that information, she received another text message at 2:01 am to say that he was leaving, at which point she went outside and saw the appellant seated in his vehicle. She then invited him into her office where they sat talking for over an hour. She further testified that she gave a statement to the investigating officer in this matter after she had spoken to the appellant though they had not spoken about the allegations. Or had they because she further said he was the first person who spoke to her in relation to the allegations.

The appeal

[9] The notice of appeal filed by the appellant on 28 November 2013 contained three grounds which read as follows:

> **"Ground 1**
>
> The Appellant did not receive a fair trial as evidence which could have assisted him and which was favourable to him was not adduced at his trial, to wit:-
>
> (a) evidence of the Appellant's good character;
> (b) SMS phone messages.
>
> **Ground 2**
>
> That the Learned Trial Judge erred in that:
>
> (a) she failed to analyze the evidence or demonstrate in her findings of fact the manner in which, if at all, she reconciled the several inconsistencies, discrepancies or omissions on the Crown's case;
>
> (b) She treated the Defendant's evidence in a simplistic way and was under a misapprehension as to the Defendant's assertions;
>
> thus rendering the verdict unsafe.
>
> **Ground 3**
>
> That the Learned Trial Judge erred in that the rejection of the Appellant's alibi was without a sustainable and demonstrated basis and she failed to warn herself that it was for the prosecution to negative the defence if [sic] alibi."

Ground 1

Was the appellant's trial unfair for want of evidence which was in his favour and could have assisted him, namely, evidence of his good character and the evidence of text messaging between his witness and himself?

[10] The appellant filed two affidavits in support of this ground, one in which he was the affiant and the other was from Mr Ian Broderick-Uter, a Justice of the Peace and member of the Lay Magistrate's Association. Counsel for the appellant conceded readily that these affidavits were not in the nature of fresh evidence but urged the court to consider them, in the interests of justice, as going to the issue of credibility which was central to a determination of this case. She prayed in aid of this submission, two decisions from this court namely, **Kevaughn Irving v R** [2010] JMCA Crim 55 and **Michael Reid v R** SCCA No 113/2007, delivered on 3 April 2009. Counsel for the Crown expressed the view that the information contained in the affidavits was not before the learned Resident Magistrate and that the traditional way to receive information which has emerged after the trial is by way of an application to adduce fresh evidence. He noted that the courts have always expressed great concern about material arriving after trial. In the instant case, however, we were of the opinion that the interests of justice demanded that the two affidavits be included in the material before us.

[11] Having been given the green light, so to speak, counsel for the appellant referred to the contents of the affidavits, submitting that in the appellant's affidavit he provided an explanation for the absence of character evidence from his witness, Mr

Broderick-Uter, who was available to give that evidence at the trial but was not called to testify as the attorney-at-law who then represented him, advised him that that evidence was irrelevant and unhelpful to his case. He was similarly advised in relation to the text messages, after giving his attorney his cell phone, which had the messages with time and date stamped, and requesting him to obtain a print out from Digicel. Efforts to obtain an affidavit from the said attorney were unsuccessful. Mr Broderick-Uter spoke to the quality and worth of the appellant in his affidavit and expressed his opinion, having dealt with him in a professional capacity, that he was an officer who "did his work without fear or favour". His opinion of the appellant did not change after hearing of the allegations as he felt that "it was unlikely that he had committed the offence" and he was still of that opinion. He confirmed that he stood ready to testify to this effect during the trial but he was not called upon to do so.

[12] Mrs Reid-Cameron submitted that the learned Resident Magistrate did not take into account evidence relating to the cell phone messages, which would have confirmed that the appellant was not where the complainant said he was and this would have impacted the complainant's credibility. Further, counsel submitted, the text messages which his witness Constable Allerdyce spoke of were stored and could have been made available to the court. These too would have been supportive of the appellant's case but his then attorney thought them irrelevant, counsel said. The learned Resident Magistrate ought not to have come to a decision adverse to the appellant without exploring this aspect of his defence, counsel submitted and pointed out that his

evidence was consistent with that of his witness concerning his time of arrival at CISOCA and the exchange of text messages.

[13] In her written submissions counsel contended that as the complainant's credibility was in issue "[t]here was an evidential deadlock to be resolved and thus the Appellant's good character would be of some probative significance." Counsel referred to the case of **R v Aziz** [1996] AC 41 and the words of Lord Steyn at page 50 where his Lordship said:

> "[I]t has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question."

She further expressed the view that adducing good character evidence may have tipped the balance in the appellant's favour and not resulted in his testimony being treated summarily with an expression of disbelief by the learned Resident Magistrate. The record disclosed that the appellant had been a serving member of the Jamaica Constabulary Force for 13 years, she said, and had no previous convictions. Counsel submitted that the appellant was deprived of this evidence and the consideration of his good character in terms of the two components spoken of by Lord Steyn and this resulted in his trial being unfair. She conceded that the omission of a good character direction may not necessarily lead to a conviction being overturned but submitted that it nonetheless renders the conviction unsafe and the trial unfair.

The Crown's response

[14] In his written submissions counsel for the Crown contended that it is the duty of defence counsel at trial to put forward all that was available to aid his client. He referred the court to the case of **R v Pendleton** [2002] 1 WLR 72 and to the opinion of their Lordships' Board that:

> "The Court of Appeal will always pay close attention to the explanation advanced for failing to adduce the evidence at the trial, since it is the clear duty of a criminal defendant to advance any defence and call any evidence on which he wishes to rely at trial."

He continued at page 4 of the submissions by contending that evidence such as good character evidence and SMS messages should have been within the contemplation of a reasonable defence in this case and the decision of the learned Resident Magistrate ought not to be faulted because of the failing of the defence.

[15] Mr Morris also referred us to the case of **Kevaughn Irving** and pointed out that there the court held that "[i]t bears stressing that the failure to adduce the evidence of the good character of an accused person will not automatically result in the allowing of an appeal based thereon". The circumstances have to be carefully examined, the court said, and the impact of the failure assessed to see whether a conviction would inevitably and indubitably have resulted, counsel submitted. In addition, he referred us to the cases of **Muirhead v R [**2008] UKPC 40 in which it was stated that it is the affirmative duty of the defendant's counsel to ensure that the court is made aware of his character, and **Thompson v R** [1998] 2 WLR 927 where it was

held that a judge has no duty to give directions on good character unless such evidence is before the court.

[16] Further, Mr Morris submitted, the Privy Council in **Bhola v The State** (2006) 68 WIR 449 made it clear that where the outcome of the trial would not have been affected by the lack of a good character direction then that lack would not make a conviction unsafe. Therefore, said counsel, one must look at the evidence against the appellant to see what difference the consideration of his good character could have made to the verdict. It was his submission that the learned Resident Magistrate identified the issue as credibility and assessed the evidence in that light. At the end of the day she accepted the complainant as a witness of truth and rejected the evidence of the appellant and his witness as untruthful and unreliable.

[17] The well established principles to be followed by an appellate court when called upon to disturb findings of fact of a trial judge, counsel submitted, are those to be found in **Watt v Thomas** [1947] AC 483, where the Privy Council held that the trial judge's findings of fact should not be disturbed unless they are plainly unsound, and the local cases of **Everett Rodney v R** [2013] JMCA Crim 1, where Brooks JA, in delivering the judgment of the court, spoke of the reluctance of the appellate court to disturb a finding of fact "as long as there is credible evidence to support such a finding" and **Royes v Campbell and Another** SCCA No 133/2002, delivered on 3 November 2005, where the court held that the established principle is that the appellate court will not interfere with the trial judge's findings of fact which depend upon his view of the credibility of the witnesses unless the court is satisfied that the trial judge was plainly

wrong. It would therefore be for the appellant in the instant case to show that the learned Resident Magistrate was plainly wrong, that the decision was unsound, or that there was no credible evidence to support her findings, counsel contended. In his oral submissions, Mr Morris said that having regard to the overall findings of the learned Resident Magistrate and the overall impression of the appellant and his witness, evidence of good character or a good character direction along the lines submitted by the appellant would not have affected the findings of the learned Resident Magistrate. This ground, he said, was therefore unsustainable.

[18] It was submitted in relation to the absence of the cell site analysis that given the types of time frames and the small geographical areas involved it is unlikely that the analysis could have taken the appellant out of the area so that the defence's suggestion that the cell site analysis would have gone a great way to swinging the pendulum in the appellant's favour was a great leap. Had the telephone technology been put before the learned Resident Magistrate, counsel submitted, the most that would have resulted would have been a challenge to the complainant's ability to accurately assess time. And this was unlikely to have affected her decision bearing in mind the learned Resident Magistrate's finding that her evidence was consistent and that she was a believable witness, thus further supporting counsel's submission that this ground is without merit.

Analysis

[19] It was quite correctly accepted by counsel for the appellant that the absence of evidence of good character will not necessarily result in a conviction being set aside or

the trial being rendered unfair. The appellate court must carefully examine the circumstances of each case to see whether evidence of good character would have influenced the outcome of the trial to the benefit of the appellant (see **Bhola v The State**).

[20] Dukharan JA in delivering the judgment of this court in **Dodrick Henry v R** [2013] JMCA Crim 2, said at paragraph [27]:

> "It is necessary to analyse the findings and reasons for judgment of the learned Resident Magistrate. In this exercise the court must look at the evidence in the context of the magistrate's finding, and reasons for judgment, to see whether she was correct in her assessment of the evidence and came to the correct conclusions based on the evidence and the relevant factors or whether she misapprehended the evidence, failed to take into account relevant matters and came to the wrong conclusions."

In doing our analysis we looked, for instance, at the case of **Kevaughn Irving** in which Panton P at paragraph [27], quoted from this court's decision in **Michael Reid v R** where Morrison JA, delivering the judgment of the court, had this to say concerning "[t]he guiding principles in respect of character evidence", as gleaned, he said, from a review of the authorities:

> "(v) The omission whether through counsel's failure or that of the trial judge of a good character direction **in a case in which the defendant was entitled to one,** will not automatically result in an appeal being allowed. …" (emphasis supplied)

[21] The appellant's complaint in the instant case was that his counsel failed to adduce the evidence of his good character, which was available at the trial. His further complaint was that, as a result of this omission, having given sworn evidence, he was deprived of the standard good character direction, that is, as to propensity and credibility. **Aziz** clearly says that good character is directly relevant to credibility. Although the authorities recognise that such a complaint is self-serving, easy to make on appeal and difficult to refute (see **Muirhead**), it is generally incumbent on counsel, it seems to us, to respond to the allegation made by an appellant, when asked to do so. If he does, then the appellate court will most likely accept his word. But, counsel's failure to respond puts the appellate court in a difficult position, in which the court may well feel constrained to go to the next step, which is to consider what impact such evidence, if given, might have had on the outcome of the trial. (It is of course open to the court to take that next step if the response given by counsel or the circumstances of the case, warrant it).

[22] In the instant case the appellant has submitted that he did not adduce good character evidence at trial because his counsel, when advised of its existence, did not consider it to be relevant. However, the court has not been put in a position to assess the reason put forward by the appellant for only now raising good character, because his trial counsel has chosen not to respond. It is in these circumstances that we proceed now to consider what effect good character evidence might have had on the outcome of the trial, bearing in mind that the appellant, having given sworn evidence, would have been entitled to both a credibility and a propensity direction.

[23] In making that assessment the court considers that, taking all factors into account, including (a) the appellant's own admission of inappropriate touching of the complainant, earlier that very night, coupled with his inconsistent evidence in cross-examination that "I have never and never will make any sexual advances towards [the complainant]" (b) the fact that the supposed good character evidence spoke only to his conduct as a police officer and not to his conduct in his personal/social life and (c) the cogency of the complainant's evidence as found by the learned Resident Magistrate, the tribunal of fact, we are of the opinion that evidence of good character and good character directions would not have affected the learned Resident Magistrate's conclusion.

[24] In her written submissions counsel for the appellant referred to his status as a police officer and a person with no previous convictions as information to be gleaned from "the face of the record", in support of his good character and added, "He being a policeman with what appears to be an unblemished record at the time could have benefitted from such evidence." There was no evidence of his unblemished record before the learned Resident Magistrate during the trial and evidence that he was a police officer would not have carried with it the inference that he had an unblemished record. In **Everett Rodney** Brooks JA, in delivering the judgment of the court, said, at paragraph [38]:

> "It is also true that, ordinarily, a person who has been convicted of an offence is not allowed membership in the JCF. It does not necessarily follow however that a member of the JCF must be presumed to have had no previous convictions."

At paragraph [39] his Lordship continued:

> "It cannot be that a person, merely by virtue of his office or profession, is presumed to have had no previous convictions. In **Uriah Brown v The Queen** [2005] UKPC 18 the Privy Council treated with an appeal by a police officer against his conviction for motor manslaughter. The issue of good character was not raised at the trial. It was however, a ground of appeal, that the absence of a good character direction vitiated the conviction."

Brooks JA pointed out that not only did their Lordships' Board find that there was no inherent presumption of good character in a police officer, but, in summarising the submissions by the appellant's counsel, hinted that no such assumption could be made. In this case it seems to us that it was not for the learned Resident Magistrate to make any such assumption in circumstances where the previous unblemished record referred to by Mrs Reid-Cameron did not form a part of the evidence before her. Neither was she entitled, it seems, to make such an assumption on the basis of his length of service alone, according to the dictum of Brooks JA.

[25] In relation to ground of appeal 1(b) we considered that what the learned Resident Magistrate was faced with, on the one hand, was a complainant who did not appear to be a good judge of time and, on the other hand, a defendant (now appellant) and his witness who purported to have material that would assist in showing that the complainant was being untruthful about the commission of the offence by the appellant. We further considered that the appellant was represented by a senior and, in our view,

a very experienced attorney-at-law. If the appellant's witness had the stored message she spoke of, why was no effort made by senior counsel to follow through on this aspect of the evidence? Bearing in mind that the appellant had nothing to prove, and needed only to have sat back and waited to see if the prosecution could prove its case against him, that omission could well be seen as the tactic that was being employed. But, as expressed in the opinion of their Lordships Board in **Pendleton**:

> "It is not permissible to keep any available defence or any available evidence in reserve for deployment in the Court of Appeal."

As it turned out, the prosecution did prove its case to the satisfaction of the court so that if the omission was deliberate the appellant cannot now be seen to be trying to do what it opted not to do at the trial. The learned Resident Magistrate was entitled to come to the conclusion she did based on the evidence she had before her and she cannot be faulted for that.

[26] Counsel for the appellant has also submitted that if an erroneous or ill-advised course was taken by the appellant's legal advisor in the court below it should not be held against him and has urged this court to say that these omissions resulted in his trial being unfair. We are not of that mind, however, and agree with the approach taken by Morrison JA in **Michael Reid**, which was approved by the court in **Kevaughn Irving** and we see no basis for departing from the principle his Lordship expressed, namely, that it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction although, he noted

that there are some circumstances where a failure to discharge a duty such as raising the issue of good character, which lies on counsel, could lead to a conclusion that there may have been a miscarriage of justice. His Lordship added that:

> "The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict."

However, as we have already indicated, this, in our judgment was not a case where the omissions of counsel, in all the circumstances, would have impacted the conclusions reached by the learned Resident Magistrate.

[27] While we do not agree with Mr Wilson's submission that the evidence concerning the sms text messages would only serve to challenge the complainant's ability to accurately assess time and are of the view that it had the potential of impacting the learned Resident Magistrate's assessment of the credibility of the witnesses, we are mindful that there is no application before us to adduce fresh evidence in order for this court to make any determination of its potential impact on the learned Resident Magistrate's decision. The guidelines for such an application are well set out in **R v Parkes** [1961] 3 All ER 633 and counsel for the appellant readily conceded that in the circumstances where the defence accepts that the evidence was available at the time of trial, an application to adduce evidence of the text messages at this stage could not succeed. This court must therefore recognise that the learned Resident Magistrate could do no more than arrive at her conclusions based on the evidence that was before her and her assessment of the witnesses as they testified. Speculation can have no part to

play in our deliberations and we cannot indulge in thoughts of what might have been if the technical evidence was before the learned Resident Magistrate. That material, if it did exist (because we note that even now nothing was exhibited to the appellant's affidavit in support of his contention), ought to have been accessed during the trial.

[28] In our judgment, on the authority of cases such as **Watt v Thomas**, **Everett Rodney** and **Royes**, there is no basis for disturbing the findings of the learned Resident Magistrate on ground 1 as there was cogent evidence upon which to base her findings of fact and nothing that rendered her decision plainly wrong or unsound. Ground 1 therefore fails.

Ground 2

Did the learned Resident Magistrate fail to analyse the evidence or demonstrate how she reconciled discrepancies, inconsistencies and/or omissions arising on the Crown's case? (ground 2 (a)) and

Did the learned Resident Magistrate treat the appellant's evidence in a simplistic way and was under a misapprehension of the appellant's assertions rendering the verdict unsafe? (ground 2 (b))

The appellant's submissions

[29] In relation to ground 2(a) counsel for the appellant argued that the Learned Resident Magistrate failed to properly appreciate and analyse the evidence in so far as it revealed several discrepancies and inconsistences between the complainant and the "recent complaint" witness including even an omission and at least one admitted lie. This, counsel said, impacted the credibility of the complainant and ought to have rendered her incapable of belief especially since this matter involved an offence of a

sexual nature and there was no corroboration for her evidence in any material respect. This, counsel said, made a proper assessment of her credibility even more crucial. Mrs Reid-Cameron contended that in simply identifying about three of the differences in the evidence of the Crown's witnesses and indicating her preference for the complainant's evidence over that of the appellant, the learned Resident Magistrate had failed to adequately address the issue. There was no indication in her findings of how she addressed these weaknesses in the Crown's case and it was incumbent upon her to show how she resolved or reconciled the differences. Counsel referred us to the case of **R v Cameron** SCCA No 77/1988, delivered on 30 November 1989 to support this submission. In contrast with the inconsistent evidence of the complainant, counsel submitted, was the consistent and cogent evidence of the appellant who withstood the test of cross-examination. It was unclear, counsel contended, how in the midst of all the discrepancies on the complainant's case the learned Resident Magistrate could have properly found her a reliable witness and the appellant and his witness unreliable.

[30] Mrs Reid-Cameron identified a number of the discrepancies and inconsistencies. They included the variance in the evidence as to whether or not the complainant and her witness were in a boyfriend and girlfriend relationship; whether the ride in the appellant's vehicle was on the appellant's offer or at the request of the complainant; whether he had prevented her attempt to leaving the vehicle while it was in motion or whether she had stopped her efforts to leave, on her own accord; whether she walked home or was driven home by the appellant; and whether she had a knife and had used it to "juck" the appellant during the assault. However, the learned Resident Magistrate

had made no attempt to resolve or reconcile them and treat with them in the context of the complainant's credibility.

[31] In her arguments relating to ground 2 (b) counsel submitted that the learned Resident Magistrate's treatment of the appellant's evidence concerning his touching of the complainant's buttocks showed a misapprehension of the case he was advancing. It was his contention, counsel submitted, that the complainant was motivated to make a false report against him because he had touched her in the presence and view of the police officer with whom the appellant believed her to be in a romantic relationship. It was his case that this was the motive for the complainant's false report, Mrs Reid-Cameron submitted, and the learned Resident Magistrate had failed to appreciate this, which caused her to fall into error in her treatment of the appellant's evidence. Counsel submitted that her findings were therefore based on an erroneous premise and should be disturbed.

The respondent's submissions

[32] Mr Morris submitted in his response to the arguments on ground 2 (a) that in the battle of contending versions, the learned Resident Magistrate accepted the account of the complainant whom she found to be credible after having addressed her mind to the discrepancies, inconsistencies and omissions at pages 74 and 75 of the record. It was his contention that the complainant's evidence did not disclose any material discrepancy, as the real question was whether the appellant had pulled down her tights and climbed on top of her and in that she was consistent, coherent and cogent. Mr Morris accepted that the complainant's judgment in respect of time was clearly not

perfect, but, said counsel, the authorities make it clear that the giving of evidence is not a memory test and the complainant remained consistent on the material aspects regarding time.

[33] After 60 probing questions in cross examination she was resolute in her account of the incident, he said. This is to be juxtaposed with the evidence of the appellant who, said counsel, contrary to the submissions advanced on his behalf, had not been a consistent witness. For instance, the appellant denied making any sexual advances to the complainant and it was vigorously advanced that he would never do so but, Mr Morris argued, in the same breath, he spoke of touching the complainant on her buttocks and that must have been conflicting. It was his submission that the difference between those two situations could not have been lost on the learned Resident Magistrate. While the appellant would have the court believe that his evidence was consistent, the learned Resident Magistrate would have had those conflicting situations with which to make her assessment of him, counsel submitted.

[34] The learned Resident Magistrate was not persuaded by the testimony of Constable Sean Roberts and found him to be an unreliable witness, Mr Morris submitted. Although he was called as the witness to whom the complainant had first spoken about the incident, his account did not fit squarely into her testimony but, counsel submitted, there is authority to the effect that the evidence of the complainant and that of the witness to whom the recent complaint was made need not be identical as long as it is sufficiently consistent and he referred us to **Peter Campbell v R** SCCA No 17/2006 delivered on 16 May 2008. And there is some degree of consistency in the

evidence of the complainant and Constable Roberts, counsel contended. He further submitted that the overall consistency of the complainant's evidence in material respects, its cogency and sufficiency with regard to what transpired in the motor vehicle were enough to enable the learned Resident Magistrate to arrive at a verdict which was adverse to the appellant.

[35] Counsel referred us to the case of **R v Michael Rose** RMCA No 17/1987, where in delivering the judgment of the court on 18 March 1987 Rowe P had this to say:

> "We are of the view that where the learned resident magistrate has more than one witness before him, if having regard to the demeanour of the witnesses he is of opinion that a particular witness for one reason or another is not speaking the truth, it is open to the trial judge as a tribunal of fact to reject the witness and if he finds that another witness in the same case is speaking truthfully then he has the right and it is within his province and jurisdiction to so find…"

Counsel further submitted that a magistrate sitting alone is the sole arbiter of facts and in similar vein it is her exclusive domain to determine the strength or weaknesses and believability of any witness before her. She has no duty to discard the evidence of a witness because it contains discrepancies and/or inconsistencies and for this submission he relied on **Steven Grant v R** [2010] JMCA Crim 77. Additionally, counsel submitted, in cases where credibility was the central issue, factors such as body language, demeanour and response to questions were vital tools and in the instant case, the learned Resident Magistrate, who alone had the benefit of these tools, was best placed to address the issue.

[36] It was to be noted, Mr Morris submitted, that all the discrepancies, inconsistencies and omissions arose out of the evidence of Constable Roberts whom the learned Resident Magistrate rejected, so recognising that she was left only with the evidence of the complainant there would have been no need for her to reconcile these differences on the Crown's case. For this submission counsel relied on **Michael Rose** and argued that in exercising her discretion, as she did, she had the full weight of the authorities behind her.

[37] Counsel submitted that there is no merit in ground 2(b) as it was clear from her summary of the case for the defence, before arriving at her overall findings, that the learned Resident Magistrate appreciated the link that the appellant sought to make between the "offended" officer's departure from the station without the complainant and the touching of her buttocks in that officer's presence and further linking that as the motive for her report against him. She clearly assessed his defence and rejected it, Mr Morris submitted.

[38] And addressing the totality of the submissions on ground 2, Mr Morris referred the court to cases such as **Michael Rose; Dodrick Henry v R; Kirk Mitchell v R** [2011] JMCA Crim 1 and; **Alton Rose and Norris Harvey v R** [2011] JMCA Crim 4 to bolster his submission that there was no need in all circumstances for the trier of fact to put the evidence through any great analysis, but that it was sufficient that what was said demonstrated that the issues had been adequately considered. Referring particularly to the issue of the discrepancies and inconsistencies he pointed out that the word used by the learned Resident Magistrate was 'despite' making it clear that any

discrepancies, inconsistencies or omissions as there were, were not material enough to have affected her decision. Referring us to **Watt v Thomas** and **Everett Rodney** counsel submitted that the authorities have expressed strong views on the circumstances under which an appellate court may interfere with the findings of the tribunal whose duty it is to determine the facts in a trial and the instant case does not reveal any of the circumstances described in those cases. There is nothing in the instant case to show that the learned Resident Magistrate was plainly wrong in the decision she arrived at and no lack of credible evidence to support it. Accordingly, her findings ought not to be disturbed.

Analysis

[39] We find that there is merit in the submissions of counsel for the Crown. The learned Resident Magistrate is not required to address every single discrepancy, inconsistency, omission or conflict that may arise in a trial. In the instant case, the learned Resident Magistrate showed that she had them in her contemplation when at page 74 she wrote:

> "There were inconsistencies and discrepancies and omissions on the Crown's case. **I have considered all of them.** There are a few that I will mention …" (emphasis supplied)

She then indicated that they were to be found in the evidence of the complainant and her witness. Then she went on to say that notwithstanding their presence she was convinced of the truthfulness of the complainant and, as the tribunal of fact, that was a

matter entirely for her. In **R v Fray Diedrick** SCCA No 107/1989 (delivered on 22 March 1991 and referred to in **Kirk Mitchell**), Carey JA in delivering the judgment of the court said at page 9:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial."

We adopt those words and add that the same would apply to a resident magistrate in a trial in that court.

[40] Those differences in the evidence highlighted by counsel for the appellant were such that, in our opinion, the learned Resident Magistrate would have been well within her right to regard them as immaterial. Concerning them, it seems to us that the point of significance was that she was travelling in the appellant's vehicle with him and not so much how she came to be in it. Again, whether he it was who stopped her from coming out of the vehicle or she decided not to do so, on her own accord, only served to show that on both accounts there was an attempt to exit the vehicle (which could well indicate that there was something happening in it from which she wished to escape) and it hardly seems as important as her evidence that she was still in the vehicle when the assault took place. Then there were those differences between the evidence of the complainant and the witness whom the learned Resident Magistrate rejected. Analysing the difference between his evidence and that of the complainant would have been pointless. In our opinion, there was enough on paper to indicate that

in arriving at her decision the learned Resident Magistrate made full use of the advantage she had of seeing and assessing the witnesses, including the appellant, as they testified (see **Watt v Thomas**).

[41] Further, as Mr Morris quite correctly submitted, there was no failure on the learned Resident Magistrate's part to appreciate the appellant's evidence relating to the physical contact with the complainant's buttocks earlier that night. It was very clear that she was under no misapprehension about that aspect of his defence. She said she did not believe the appellant's account and found his evidence that he had upset the complainant so much by touching her on her buttocks that she made a false report to the police, difficult to accept, especially when, according to his account, after that act she nevertheless accepted a ride from him. The touching of her buttocks was while they were in the company of others, according to him, and the magistrate was being asked to believe that after that she was placing herself in a position where she would be alone with him in his vehicle. But, there was an added reason for the ill-will, Mrs Reid-Cameron said, in that this touching was alleged to have taken place in the presence of the officer in whom she clearly had an interest, according to the appellant's account, as they had both become upset.

[42] However, while the learned Resident Magistrate did not specifically mention that aspect of the account, it is clear that that was also included in her rejection of the motivation. The learned Resident Magistrate wrote (see page 73 of the record):

> "I assessed Constable Harvey's evidence, **his entire account** and his asking the court to say that it may have

> been because he touched her on her bottom that she got so upset, so upset was she that she told this lie on him. So upset was she after receiving this touch on her bottom yet she ventured to ask him for a ride home. I found this difficult to accept. I did not believe Constable Harvey's account." (emphasis supplied)

That upset feeling must have been because of the circumstances in which it occurred, namely, in the presence of her "special friend". The learned Resident Magistrate was careful to note that she had assessed the appellant's entire account and his evidence was that she was a person with whom he would on occasions "play, socialize, run jokes". She would even grab his genital area and make sexual comments, he said, so it would be reasonable to infer that this time it was the presence of her "special friend" that would have made the difference. That would be a part of the account which the learned magistrate would have assessed and rejected, so ground 2(b) is entirely unfounded.

[43] We turn now to Mrs Reid-Cameron's submission on the absence of corroboration for the complainant's evidence, this being an offence of a sexual nature. It was clear from her findings that the learned Resident Magistrate was mindful of this and at page 75 of the record she had this to say:

> "I am cognizant of the fact that this is a sexual offence and there exists no corroboration. I warn myself of the dangers of convicting in a case of a sexual offence in the absence of corroboration."

She then went on to evaluate the complainant, having considered, she said, the totality of the evidence and found the complainant to be a truthful witness. This would accord

with the standard direction required in a case involving a sexual offence, that notwithstanding the absence of corroboration, if the witness is believed, full reliance may be placed on the evidence of the witness and the absence of corroboration would not be detrimental to the prosecution's case. The learned Resident Magistrate did what she was required to do and in all the circumstances the complaints in ground 2 have not been made out. That ground also fails.

Ground 3

Finally, was the rejection of the appellant's alibi defence without a sustainable and demonstrated basis and did the learned Resident Magistrate fail to warn herself of the prosecution's duty to negative the defence?

The appellant's submissions

[44] In this ground, the appellant's contention is that the learned trial judge did not deal adequately with his alibi defence. She merely recounted the circumstances of his alibi and rejected both his evidence and that of his witness, out of hand. It was unreasonable, Mrs Reid-Cameron submitted, to base her rejection on their unimpressive demeanour. There was clear evidence from the appellant and his witness as to his presence elsewhere at the time when the complainant alleged that the offence was committed, counsel submitted, and the learned Resident Magistrate had only the shifty and unreliable evidence of the complainant as the alternative to the consistent evidence of the appellant and his witness.

[45] It was further submitted that, in addressing the appellant's alibi defence the learned Resident Magistrate failed to show an appreciation that the burden of

disproving the alibi was on the prosecution. There were no obvious discrepancies between the appellant and his witness and the record did not disclose anything that would go towards undermining their credit as opposed to the evidence of the complainant which was not of the quality to be relied on in any effort to disprove the appellant's alibi defence. Her evidence as to when the incident took place was clearly unreliable so that when compared with what was offered by the defence, it made the learned Resident Magistrate's rejection of the appellant's alibi unreasonable, Mrs Reid-Cameron submitted.

[46] Counsel further submitted that the text messages would have been of considerable assistance in a determination of this issue, but this was not probed. Counsel contended that even though the defence had no burden of proof the text messages would have helped to provide some clarity to the matter. Their absence put the appellant at a disadvantage and deprived him of a fair trial. Mrs. Reid-Cameron submitted that this was relevant to all three complaints and she urged this court to find that his trial was unfair and to set aside the decision of the learned Resident Magistrate.

The Crown's response

[47] For the Crown, Mr Morris submitted that in law there is no requirement for the learned Resident Magistrate to demonstrate a basis for the rejection of the appellant's alibi defence. By accepting the evidence of the complainant as truthful the learned Resident Magistrate need say no more as that implied a rejection of the appellant's alibi. He referred us to the Privy Council decision in **Nigel Coley v R** (1995) 46 WIR

313 where, counsel contended, it was suggested that the depth of any alibi warning need not be great in every case. Counsel also referred us to **R v Noel Phipps, Shawn Taylor and Phillip Leslie** SCCA Nos 21, 22 and 23/1987, where the court was of the opinion that if any accused man's defence was a total denial, no particular direction need be given and submitted that based on how the defence in the instant case was conducted, it amounted to a complete denial, as the appellant was denying that he did anything to the complainant in his vehicle that night. In most circumstances where there was a complete denial there was no need for the learned Resident Magistrate to go into any great detail, counsel said. He referred to page 74 of the record and submitted that what the learned Resident Magistrate had to say there about the approach to be taken on the rejection of the alibi was sufficient.

[48] Mr Morris further submitted that time is not usually of the essence in offences of a sexual nature and referred us to **R v Dossi** (1918) 13 Cr App R 158 and **R v Thompson and Wilson** (1971) 12 JLR 336 in that regard. He added that the question is usually one of fact as to whether the alleged sexual impropriety could have taken place. In the instant case, counsel submitted, the appellant raised the defence of alibi together with his denial and in the circumstances the learned Resident Magistrate's directions to herself were quite adequate. This ground was without merit, counsel contended and together with the other grounds failed to raise any question of the fairness of the appellant's trial sufficient to disturb the conviction of the learned Resident Magistrate.

[49] In her response to the authorities, Mrs Reid-Cameron submitted that as it relates to the series of cases relied on by the Crown the court should bear in mind the two striking features running through them, namely that in the cases such as **Michael Rose** and **Dodrick Henry** each defendant gave an unsworn statement and there were witnesses who gave different versions. **Kirk Mitchell** was distinguishable as he gave no evidence and made no statement in his defence. In the instant case, the appellant gave evidence on oath and there was nothing to undermine the defence.

[50] There was no credible evidence to support the acceptance of the complainant's evidence and it did not appear that the learned Resident Magistrate had made use of the benefit she had of seeing and being able to properly evaluate the witnesses where there are discrepancies and inconsistencies. Further, she gave no indication of how she resolved them.

[51] Counsel sought to distinguish the cases generally and in relation to **Noel Phipps** she submitted that contrary to the Crown's submission in the instant case, that a general direction was sufficient so that the learned Resident Magistrate need not have gone into details about the appellant's alibi defence, time was the issue in this case and the appellant had called a witness. In those circumstances, a little more would be required of the learned Resident Magistrate.

Analysis

[52] It appears to us that this complaint is not well founded. At page 73 of the record the learned Resident Magistrate recognised that the appellant raised an alibi defence

and called Constable Allerdyce as his supporting witness. She assessed his witness and was not impressed with her demeanour, her reluctance in cross-examination to say the appellant was her friend or anything more than a colleague. She said:

> "I assessed also her attitude to questions posed in cross-examination, and having done so I formed the view she was less than credible. I did not accept her account that when she saw Constable Harvey, it was at 2:01, nor did I believe her when she says that she got a message from him at 1:45 to say he was outside."

It was after all of that that the learned Resident Magistrate said she did not believe that they were being truthful and she rejected his alibi defence. And it must have seemed strange to her that this police officer went to an office where police officers are assigned and had to be waiting outside for 15 minutes. Then Constable Allerdyce only found it possible to go out to the appellant after he told her that he was leaving. In addition, she had asked him to bring for her some form of refreshments but when he called indicating that he had arrived she demonstrated no interest in her request and did not respond to his call. The whole account did not sit well with the learned Resident Magistrate and she rejected it. As the tribunal of fact, that was her prerogative.

[53] Now, while the appellant's counsel would discount the learned Resident Magistrate's reliance on the demeanour of the witnesses, as counsel for the Crown submitted, demeanour was a powerful tool available to her and she can hardly be faulted for utilising it. In the seventh edition of the Modern Law of Evidence authored by Mr Adrian Keane under the heading "The Demeanour of Witnesses" Mr Keane writes thus:

> "The way in which a witness gives his evidence is often just as important as what he actually says. While some witnesses may appear to be forthright and frank, others may present themselves as hesitant, equivocal or even hostile. Whatever form it takes, the demeanour and attitude of a witness in the course of giving his evidence is real evidence which is relevant to his credit and the weight to be attached to the evidence he gives."

We are in full agreement with the opinion therein expressed. It accords with the views of the courts of this jurisdiction and the learned Resident Magistrate was therefore entitled to place reliance on her assessment of the demeanour of the witnesses in coming to her decision in this matter.

[54] She followed her rejection of the alibi defence with these words:

> "I bear in mind that although I do [not] [sic] believe him and although I have rejected his alibi, I cannot say he is guilty because of that, I still have to get back to the Crown's case and determine whether or not the Crown's case leaves me in a state where I feel sure."

In other words, the Crown's case must negative his alibi defence and leave her in a state where she feels sure of the appellant's guilt. It was her warning to herself that it is the Crown that must prove its case and that proof would necessarily involve negativing the defence of alibi. If she believed the prosecution's case then it would mean that the appellant was where the prosecution's witness said he was and doing what the prosecution's witness said he was doing.

[55] We accept as settled that there is no requirement for the learned Resident Magistrate to give a basis for her rejection of the defence. There is no formula or specific words that must be used in delivering a magistrate's findings as long as the magistrate clearly demonstrates that she has addressed her mind to the evidence and the applicable law (see **O'Neil Williams v R** SCCA No 22/1995, delivered on 23 February 1998 and **Regina v Alex Simpson and Regina v McKenzie Powell** SCCA No 151/1988 and 71/1989, delivered on 5 February 1992). In the instant case the learned Resident Magistrate expressly rejected the appellant's alibi defence after her assessment of the evidence of the appellant and his supporting witness (see pages 73 and 74 of the record). It was clear that she considered and rejected the alibi defence. Her acceptance of the complainant as a witness of truth who gave credible evidence would also have carried with it an inference that the appellant's alibi defence was rejected. Furthermore, in referring to her duty to revisit the Crown's case and determine if it met the required standard she had exposed her appreciation of the prosecution's burden of proof. Ground 3 also fails.

Conclusion

[56] In the final analysis, this appeal is dismissed and the conviction and sentence of the learned Resident Magistrate is affirmed.