JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 6/2010

BEFORE: **THE HON. MRS JUSTICE HARRIS, J.A.**
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag)

SHELDON HEAVEN v R

Canute Brown for the appellant

Vaughn Smith for the Crown

2 and 11 June 2010

BROOKS, J.A. (Ag)

[1] On 26 June 2009 Mr Samuel Myers and the appellant Mr Sheldon Heaven were involved in a fight. Mr Myers alleged that the appellant used a piece of stick to strike him on the upper back. Mr Myers received injuries and made a complaint to the police. The appellant was arrested and charged. He denied having struck Mr Myers. He was tried in the Resident Magistrate's Court for the parish of Westmoreland, for the offence of assault occasioning actual bodily harm. On 8 December 2009 he was convicted. Sentence, by way of the payment of a fine of

$20,000.00, was imposed. The appellant paid the fine and avoided the alternative of three months imprisonment at hard labour.

[2] He has appealed against the conviction. On his behalf, Mr Brown argued, as a consolidated ground of appeal, that the verdict of the learned Resident Magistrate is unreasonable having regard to the evidence. Mr Brown, with leave, also argued an additional ground of appeal, namely:

> "The medical certificate that was admitted in evidence was wrongly admitted in that the essential conditions set out in section 50 of the Evidence Act were not satisfied."

We shall treat with the issue of the medical certificate first.

The medical certificate

[3] Section 50 of the Evidence Act stipulates certain requirements to be satisfied, before a medical certificate may be admitted in evidence. The section states:

> "(1) Notwithstanding anything contained in any law, but subject always to the provisions of this Part, any certificate or report, **if accompanied by a sworn statement by the medical practitioner who has signed the certificate** or report, shall be admitted in evidence in any criminal proceedings before a Resident Magistrate or Justices, or at any Coroner's Inquest, without the medical practitioner being called upon to attend and to give evidence upon oath.

> (2) Where, in any criminal proceedings before a Resident Magistrate or Justices it is intended to put in evidence a certificate or report as provided in subsection (1), the prosecution **shall, at least three clear days before the proceedings**, serve upon the defendant written notice of such intention, together with a copy of the certificate or report, **and the defendant, at the commencement of the proceedings, may object to the admission of the certificate or report, and may require the attendance of the medical practitioner to give evidence on oath**." (Emphasis supplied)

[4] Mr Brown complained that the medical certificate admitted into evidence was not accompanied by a sworn statement by the medical practitioner. He submitted that the certificate was therefore inadmissible as evidence. It was his further complaint that there was another difficulty attending the admission of medical certificate. The certificate was served on 17 November 2009, which was the date that the trial commenced. Mr Brown submitted that such service was in breach of the requirement of section 50(2) that the document be served "at least three clear days before the proceedings".

[5] Mr Smith, for the Crown, submitted that although the document did not comply with the requirement of section 50(1) concerning the oath, there was no breach of the spirit of the requirements of section 50(2). He submitted that the appellant had had notice of the intention of the prosecution to tender the document. Learned crown counsel brought to

the court's attention that although the certificate was served on the first day of the trial, the Crown did not seek to tender it into evidence until 8 December, 2009, when the second witness for the Crown was called. In any event, submitted Mr Smith, the document was admitted into evidence without objection from defence counsel (not Mr Brown).

[6] There is no dispute that Dr Ravi Avvaru, who completed and signed the medical certificate, did not swear to the accuracy of its contents before a person authorised to administer oaths. The certificate did not, therefore, comply with the provisions of section 50(1) of the Evidence Act. Based on the judgment of this court in ***R v Ezra Hall*** (1980) 17 JLR 146 at p. 148 B, it ought not to have been received in evidence. The fact that there was no objection from the defence did not cure that defect. The option to object does not affect the procedure outlined in subsection (1). The option is referred to in subsection (2) in the context of the time of service of the document. The latter aspect is procedural. The requirement that the contents of the certificate be sworn to as being accurate goes beyond mere procedure. It affects the credibility of the document. It is our view that that requirement cannot be impliedly waived by the defence. No other provision in the Act affects this point.

[7] As to the second complaint, Mr Smith would seem to be on good ground. Section 50(2) expressly gives the defendant, who is served with a

certificate, the option to object or to consent to its admission into evidence. Although the service was not in advance of the commencement of the "proceedings", it was in advance of the date that the Crown sought to tender it. This gave the appellant the opportunity to consider the document and decide whether he wished the medical practitioner to attend or not. In this case, the spirit of subsection (2) was observed. Of equal importance is the fact that there was no objection by the defence. Had the document been otherwise in order, it is our view that, because of the absence of an objection at the trial, no complaint could properly be made, at this stage, about its admission into evidence.

[8] Authority for the latter proposition may be found in the case of ***The Attorney General for the Cayman Islands v Carlyle Rudyard Roberts*** PCA No. 53 of 2001 (delivered 21 March 2002)***.*** In ***Roberts,*** their Lordships considered the case of a statutory requirement that a certificate should not be received in evidence, unless three days' notice was given of an intention to tender the document. As in the instant case, the statute used the word "shall". There was no evidence of the notice having been given but there was no objection to the evidence when it was tendered at the trial. Complaint was made, on appeal, that the evidence had been wrongly admitted. On the point being argued before the Privy Council, their Lordships found that a "defendant who is represented at his trial will be taken to have given up the right to object to the admission of a

certificate in evidence if he allows the evidence to be led without objecting to it..." (paragraph 30 of the judgment). We are of the view that that principle holds good for the instant case.

[9] There is a principle to be extracted from the circumstances of this case. It is that Clerks of Courts, Resident Magistrates and indeed, defence counsel, must be alert to ensure that medical certificates and the like are in compliance with the provisions of section 50, before they are tendered and admitted into evidence.

Whether the verdict is unreasonable

[10] Mr Brown submitted that the virtual complainant, Mr Samuel Myers was not a credible witness. In those circumstances, learned counsel submitted, the learned Resident Magistrate was wrong in relying on Mr Myers' evidence in arriving at a verdict of guilt.

[11] The basis of Mr Brown's submission is that when he was being examined in chief, Mr Myers testified that the appellant used a wooden stake ("a short piece of stick") to strike him on the upper back. Of the injury, Mr Myers said:

> "The skin was rubbed off where the stake impacted my skin. Yes it bled. Blood was running for about 10 seconds, then it stopped."

It was only in cross examination, Mr Brown complained, that the witness Myers accepted that he received other injuries when he fell to the ground during the tussle. He testified:

> "During the fight I held him in his hair. I'm taller than him. I fell on my back, he fell in front of me. I fell on the roadside. The roadside has stones, marl and gravel. I received multiple bruises to my back. I received the bruises when I fell on the stones – on my lower back....I held his hair, he held my feet. We were in a tussle; other persons were pulling at each of us; combined forces caused me to fall."

He denied a suggestion that the sole cause of his injury was his falling on his back.

[12] Learned counsel submitted that, in light of the appellant's case, that it was the fall which caused all of the injuries, Mr Myers' failure to mention, in examination-in-chief, the fall and the injuries to his lower back, seriously eroded his credibility. On Mr Brown's submission, the improper admission of the medical certificate, most likely, improperly bolstered Mr Myers' evidence and affected the learned Resident Magistrate's findings.

[13] Mr Brown was also critical of the way the learned Resident Magistrate dealt with the issue of Mr Myers' injuries. He submitted that, in her findings, she erred in failing to distinguish between the injury to the upper back and that to the lower back. The learned Resident Magistrate,

after citing case law (***R v Roberts*** (1971) 56 Cr App R 95) on the point, in fact said, at page 15 of the record:

> "Clearly therefore, it is not only the injury to the upper back that the accused would be responsible for but all the injuries to the back in light of the evidence of [the] complainant as to how he got those injuries."

[14] The learned Resident Magistrate incorporated that reasoning into her findings. She said, "[t]he injury to the Complainant's lower back was also as a consequence of the attack upon him by the accused." (Page 20, finding 5)

[15] Mr Brown's submissions find no favour with us. Firstly, on the issue of the medical certificate being improperly applied in the analysis of the evidence, the learned Resident Magistrate expressly distinguished the effect of the document from the rest of the evidence concerning the injury. At page 20, finding 4, she said:

> "Injury was graze/abrasion to the upper back of the Complainant where the stake impacted him. And this evidence is accepted **based on the very cogent account of the Complainant** and that of Cons Balfour Brown who saw the injury – **evidence which stands independent of the Medical Certificate tendered into evidence as Exhibit 1**." (Emphasis supplied)

In the circumstances, we find that the improper admission into evidence, of the medical certificate, is not fatal to the conviction in the instant case.

The learned Resident Magistrate was entitled to independently assess the evidence of the virtual complainant Mr Myers, and that of the investigating officer, as she in fact said she did, and find that the appellant had inflicted a blow causing an abrasion to Mr Myers' upper back.

[16] Secondly, from finding 4, it is clear that the learned Resident Magistrate, despite her finding that all the injuries could be ascribed to the appellant, specifically identified the injury to the upper back as having been inflicted by the appellant. In light of this view of the matter, it is unnecessary for us to closely examine the question of whether the appellant was liable for all of Mr Myers' injuries. It is sufficient to observe that the learned Resident Magistrate, having heard the evidence, seen the witnesses and considered case law on the point, came to the view that he was so liable.

[17] Thirdly, the learned Resident Magistrate, as she was entitled to do, expressed herself to be impressed with the demeanour of the complainant. She heaped encomiums on his testimony and demeanour:

> "Mr. Samuel Myers, the Complainant, gave clear, cogent, credible and compelling evidence. His high intelligence did not go unnoticed by the court...he has self assurance...[h]is account...was unshaken even under that most rigorous cross-examination...[t]he 'quality' of his evidence was excellent" (Page 16 of the record)

Based on that assessment of Mr Myers, it is not surprising that the learned Resident Magistrate found Mr Myers to be "a witness of truth and one upon whom the court can place reliance".

[18] Mr Smith submitted that the issues for determination by the learned Resident Magistrate were essentially questions of fact. He said that those issues were amply ventilated before her. Learned counsel for the Crown submitted that the learned Resident Magistrate analysed the evidence and based her findings of fact thereon. The judgment, he submitted, was reasonably arrived at and therefore, should not be disturbed. He cited, as authority for these submissions, the case of ***R v Joseph Lao*** (1973) 12 JLR 1238. In ***Lao***, this court found that an appellant, who complains about a verdict being against the weight of the evidence in the case, "must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable". Henriques P, in delivering the judgment of the court, approved the following quotation as a principle on which this court operates:

> "The court will set aside a verdict on this ground, [that the verdict is unreasonable and cannot be supported having regard to the evidence] where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

[19] We cannot say that the learned Resident Magistrate's verdict was obviously and palpably wrong. In fact, we consider it a carefully

reasoned one which examined all the issues and was brought to conclusion in a manner which was in accord with the evidence. It is for that reason that we find that no substantial wrong was caused by the improper reception of the medical certificate into evidence. The provisions of section 305 (3) of the Judicature (Resident Magistrates) Act may, therefore, be properly applied. It states:

> "The Court [of Appeal] may, notwithstanding it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if it considers that no substantial miscarriage of justice has actually occurred."

[20] As a result of these findings the appeal is dismissed and the conviction and sentence affirmed.