JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 8/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

OWEN VHANDEL v R

Miss Althea McBean for the appellant

Miss Maxine Jackson for the Crown

9 May and 28 September 2012

MORRISON JA

[1] On 15 July 2011, the appellant was convicted by Her Honour Miss Stephane Jackson-Haisley, a Resident Magistrate for the Corporate Area, on three counts of indecent assault. On 8 November 2011, he was sentenced by the learned Resident Magistrate to six months' imprisonment on each count and the sentences were ordered to run concurrently. This is an appeal by the appellant from his conviction and sentence.

[2] The complainants in the case were two young girls, who we shall describe in this judgment as MW and AR. Two of the charges against the appellant related to MW, who was born on 22 July 2001, while the other related to AR, who was born on 4 November 2004. The three separate incidents which formed the basis of these charges were alleged to have taken place between January and October 2009, when the girls were seven and four years old respectively. At the material times, the appellant and the complainants were all occupants of residential premises in the Kingston 11 area. They were occupants of what was described by the complainants' mother, Miss CF, as "one big house". The appellant occupied one section, while Miss CF, her common law husband, DT, and the complainants occupied another. There were also other occupants of the house and the various rooms were separated by partitions made of board.

[3] MW's evidence was that at about noon on a date between January and March 2009, she went to fetch AR who had wandered into the appellant's apartment. There, in the presence of her sister, she saw the appellant lying down on a settee and she went in front of the settee. The appellant took hold of her right hand and rested it "on his belly and then his belt and then his penis". He held her hand on his penis for about a minute and, though she did not see it, she felt that "it was hard". She then pulled her hand from his and went to make a report of what had happened to her mother.

[4] On 11 April 2009, MW testified, the appellant "did it again". She had again gone to fetch her sister and, this time, he took her left hand and "rest it on his belly, belt, then his penis". Again, she did not see his penis, but it "felt hard". She also reported this incident to her mother.

[5] MW was extensively cross-examined by the appellant, who represented himself at the trial. Asked why she had felt it necessary to go to his room for her sister, MW's response was that she had been instructed by her mother, who described him as "a raper" not to go to his house. Although she was aware of an incident between her mother and the appellant which had resulted in her having been taken to court by him, found guilty and required to pay a fine of $2,000.00, MW denied his suggestion that she was telling lies against him as regards the two incidents in early 2009.

[6] By the time she gave her evidence at the trial on 16 December 2010, AR was still only six years old. Although she did not remember the date, she told the court of an occasion on which the appellant had called her into his room, grabbed her and "put his penis right at my nose". She was alone with the appellant in his room at that time, but when she left she went and made a report to DT (who both girls described as their stepfather). Briefly cross-examined by the appellant, she denied the suggestion that it was her mother and DT who had put her up "to say these things" against him.

[7] In her evidence, Miss CF, the girls' mother, could not recall if anything had happened between January and March 2009, but recalled an evening in March of that year when MW reported to her that the appellant "took her hand and rest it on his penis". She warned her, as she had done before, to stay away from the appellant.

[8] In April of that year, MW made a further report to her that the appellant had again taken her hand and rested it on his penis. Miss CF then went to the appellant's door and asked him, "What is that [MW] said you did?", to which his response was "A now she just a tell you that?" Miss CF then summoned the police, who in due course

arrived and spoke to her, to the girls and to the appellant himself, before leaving the premises. In October 2009, with the girls still making complaints to her, she made a report to the Centre for the Investigation of Sexual Offences and Child Abuse ('CISOCA').

[9] Miss CF was cross-examined at great length by the appellant. She agreed that she did not trust him and confirmed that she had warned the girls to "stay far from [him]". She also agreed that, by the time she made the report to CISOCA, she had in fact been found guilty in the Half Way Tree Resident Magistrate's Court on 5 October 2009 of assaulting the appellant and sentenced to two months' imprisonment or a fine of $2,000.00. But while that trial was in progress, she testified, "I had no idea what Mr Vhandel did to [AR]". (A curious feature of the instant case was that, throughout the trial, the appellant referred to himself in the third person, as 'Mr Vhandel', and on occasion Miss CF did the same.) Miss CF agreed that she had made no report to the police after MW's first complaint in March 2009. Asked whether, as a result of the conviction for assaulting him and her having to pay a fine of $2,000.00, she felt "animosity towards Mr Vhandel", Miss CF's answer was that "I was not thinking about Mr Vhandel, I was thinking about my kids". She denied that AR's evidence was "coached" by her, that her evidence against him was motivated by malice or that her evidence was "a litany of lies and a fabric of falsehood".

[10] Constable Christopher Brown of CISOCA gave evidence of having reviewed the complainants' statements, interviewed the appellant and arrested and charged him on 21 December 2009. Thereafter, the Crown closed its case.

[11] Giving sworn evidence in his defence, the appellant identified himself at the outset as a school teacher. He told the court he was told by the police that the allegation against him was that "you push you penis in a girl nose", to which he "made a scoffing gesture and said 'Unu lucky say it never in her mouth'". He described the charges against him as false and -

> "…the result of a cunningly, contrived conspiracy to seek revenge for their having been sentenced for unlawful assault against Mr Vhandel, that the allegations against Mr Vhandel are a malicious misrepresentation of the actual facts, deliberate distortions of the truth or just plain outright lies. The allegations against Mr Vhandel are purported to have happened before the charge, trial and sentencing of the supposed victims' mother [CF]. Up to the time of her trial and sentencing [CF] had made no allegations against Mr Vhandel although she was invited to explain when the quarrel between himself [sic] and Mr Vhandel were about [sic]."

[12] Insisting that the complainants were telling lies against him, the appellant characterised his arrest as an attempt "to stave off" the service on DT of a summons for assaulting him, for which DT was subsequently convicted.

[13] The appellant called a number of witnesses. Mr Richard James, a Deputy Clerk of Courts attached to the Corporate Area Criminal Court at Half Way Tree, recalled that the appellant was successful in a prosecution for assault against Miss CF, but could not recall what the sentence had been. Mr Philmore Scott, an attorney-at-law, indicated that on 21 December 2009 he had been present at the Half Way Tree Police Station when two police officers had conducted a question and answer session with the appellant. DT confirmed that, on 19 April 2010, he was "charged for an offence between me and [the appellant]", and that he was convicted. He also said that he had

made a complaint that the appellant had been "harassing the children", and that "[f]rom day one we warned the girls against Mr Vhandel". Detective Sergeant Kirk James, attached to CISOCA, recalled going to the premises occupied by the family of the complainants and the appellant on 16 December 2009, in the company of another police officer, for the purpose of arresting the appellant. And lastly, Constable Sharleene Griffiths, who was also attached to CISOCA, recalled meeting the appellant and speaking to Miss CF, MW and AR during the course of the investigations.

[14] The learned Resident Magistrate prefaced her findings of fact with reminders to herself to consider each count separately and that there was no corroboration of any of the incidents. She warned herself of the dangers of convicting on evidence such as that given by the complainants without corroboration. She also took into account the fact that the complainants were "two young girls" and that "[y]oung persons are sometimes proned [sic] to telling lies for various reasons and sometimes for no reason at all". Further, she reminded herself of such discrepancies and inconsistencies as were to be found in the Crown's case and stated that she did not find any of them to be fatal to the Crown's case. She considered both MW and AR to be truthful in the evidence which they gave and concluded as follows:

> "I accept that on a day between January 2009 and March 2009 [MW] was living in the same yard as Mr Owen Vhandel. I accept that she went to his house to call her sister. I accept that whilst in his room, he was in his settee lying down. I accept that [MW] was standing in front [sic] the settee and he took her hand and put it first on his belly, then his belt and then on his penis. He had her hand on his penis for about a minute.
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> I accept that on another day between January and April 2009 he again took her hand, rest it on his belly, then his

> belt and then put it on his penis. I accept that he told her that if she told her mother he would set De Lawrence and duppy on them. I accept that [MW] nonetheless told her mother. I accept that when [MW] told her mother [CF] she called the police.
>
> I accept that the mother confronted Mr Vhandel about the allegations and he said "A now she just a tell you that". I accept that it was after that that the relationship between Mr Vhandel and the complainants' family deteriorated.
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> I accept that sometime between October 2008, when Mr Vhandel came to live at the premises and December 2009 when he was arrested, he called [AR] into his house and she went. I accept that whilst in the room he put his penis at her nose. I accept that he then gave her biscuit and sweets.
>
> I accept and I am satisfied beyond a reasonable doubt that these acts by Mr Vhandel constituted an Indecent assault on both [MW] and [AR]. I find him guilty of all three offences."

[15] In all the circumstances of the case, the learned Resident Magistrate considered that a custodial sentence was appropriate and sentenced the appellant to six months' imprisonment on each count, the sentences to run concurrently.

[16] The appellant appeals from his conviction on the following grounds:

> "1. The Learned Resident Magistrate erred in misrepresenting material aspects of the evidence in her summation.
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> 2. The Learned Resident Magistrate erred in failing to consider or to take into account the issue of malice on the part of the complainant's [sic] parents in her consideration of the evidence.
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> 3. The Appellant's Constitutional Rights were breached in that he was not given all opportunity to obtain legal representation during the course of the trial.
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> 4. The Learned Resident Magistrate erred in allowing and relying on hearsay statements of purported facts contained in the Social Enquiry Report in determining the sentence to be delivered."

[17] Miss Althea McBean appeared for the appellant before us, as she had done at the sentencing stage in the court below and, as is her usual practice, presented his case on appeal with thoroughness and tenacity.

[18] On ground one, in which the appellant's complaint is that the learned Resident Magistrate "erred in misrepresenting material aspects of the evidence in her summation", Miss McBean directed our attention to a number of matters in the findings of fact. Thus, it was said that the Resident Magistrate had stated that the first report had been made by the complainants' mother in April 2009, before she was charged for the offence against the appellant. Further, in relation to the corroboration warning, Miss McBean complained that the Resident Magistrate ought to have gone on to warn herself that she should rely on the uncorroborated evidence of "such young complainants" only if the evidence was so strong that she could safely rely on it without anything more.

[19] On ground two, Miss McBean submitted that the Resident Magistrate erred by failing to take into account the issue of malice on the part of the mother and stepfather of the complainants in her consideration of the evidence. Where she did consider the issue of malice at all, she made "improper findings of fact", which were unsupported by the evidence.

[20] The complaint on ground three related to the fact that the appellant conducted his own defence at the trial. It was submitted that in the circumstances the appellant's constitutional rights had been breached by his not having been given "all opportunity to obtain legal representation during the course of the trial". We were told by Miss

McBean (in her written skeleton argument) that the appellant did in fact request legal aid representation, but that "the relevant person to make the arrangements was on leave and he opted to proceed on his own behalf". Miss McBean also complained of a further breach of the appellant's constitutional rights, in that the Resident Magistrate ought to have discharged herself from the matter immediately upon the complainant MW having, in answer to the appellant's question in cross-examination, blurted out that "me mother say you is a raper". And finally on this ground, a yet further complaint of a breach of the appellant's constitutional rights was that there was no verification of the age of the complainants and the voir dire in respect of each complainant was inadequate.

[21] On ground four, Miss McBean's submission was that the Resident Magistrate had placed "undue reliance" on statements in the Social Enquiry Report when she was considering the appropriate sentence to be imposed on the appellant.

[22] On ground one, Miss Maxine Jackson for the Crown submitted that there had been no misrepresentation of the evidence by the Resident Magistrate in her findings of fact. In addition to accurately summarising the sequence in which reports were made by Miss CF to the police and the matter in which she was charged came on for trial at the Half Way Tree Resident Magistrate's Court, the learned Resident Magistrate had dealt with the issue fully in the context of the allegation of malice. That issue, which is the subject of ground two, had in fact been fully addressed by the Resident Magistrate. As regards corroboration, Miss Jackson submitted that the Resident Magistrate's warning to herself had been sufficient and that no special formula was required to be followed for this purpose. On ground three, Miss Jackson accepted that there was

nothing on the record to suggest that the Resident Magistrate enquired of the appellant whether he had or intended to get counsel. However, she submitted, there is no mandatory right to legal representation when a person is charged with a criminal offence and what an accused person is entitled to is the right to defend himself, either in person or through a legal representative of his choice. And lastly, on ground four, Miss Jackson submitted that there was nothing on the record to suggest that the learned Resident Magistrate had relied on any irrelevant criteria in determining the appropriate sentence to be imposed in this case.

[23] Both counsel referred us to authorities, to some of which it will be necessary to refer in due course.

[24] Ground one can be shortly dealt with. It appears to us that the learned Resident Magistrate's summary of the evidence in her in admirably detailed findings of fact was perfectly accurate. As regards Miss McBean's primary complaint on this score, Miss CF's evidence was that in or about March 2009 she received a complaint from MW that the appellant had taken her hand and rested it on his penis. She made no report to the police on that occasion, but in April of that same year, having received a second report from MW, she reported it to the police, who came to the house and spoke to the girls, as well as to the appellant. (It is before she called the police on this occasion that the appellant had said, "A now she just a tell you that?" in response to her question, "What is that [MW] said you did?") In October of that year, after receiving further complaints from the girls, Miss CF reported the matter to CISOCA and this was after, as she confirmed to the appellant in cross-examination, she had been convicted and sentenced for an assault against him in the Half Way Tree Resident Magistrate's Court.

[25] The statement of the learned Resident Magistrate about which complaint is made, is as follows:

> "I also consider the date the report was first made to the police by the mother of the complainants and the date the mother was convicted. The first report made by the mother to the police took place in April 2009, before she was charged for the offence against Mr. Vhandel. However, the report to the Centre for Investigation of Sexual Offences and Child Abuse was made after she was convicted. The mother admits that she did not mention the indecent assault throughout the trial."

[26] In our view, this was a perfectly accurate summary of the evidence which we have set out in the foregoing paragraphs and the appellant's complaint on ground one cannot therefore succeed.

[27] On ground two, Miss McBean submitted that the Resident Magistrate had given insufficient consideration to the impact on the credibility of the complainants of the issue of malice, given the obvious 'bad blood' that had developed between their mother, stepfather and the appellant. At the end of her review, of the evidence, the Resident Magistrate said that the appellant's defence was that the charges were false and quoted his own words that they were "a cunningly contrived conspiracy to seek revenge for the children's mother being sentenced for assault against him". She also went on to recount the appellant's evidence that the summons issued at the behest of the appellant to DT was taken out on 27 November 2009, which was a date before the appellant was charged, observing that, "I have to consider whether this was the catalyst for the charges being brought against him". After stating the sequence in

which Miss CF's complaints to the police were made, to which we have already referred, the learned Resident Magistrate concluded as follows:

> "It appears to me that the mother did everything in her power to have the matter investigated but it was the police who delayed in arresting the accused. In her attempt to have the matter investigated, she even went to police complaints [sic]. As it relates to Mr [DT], the summons also emanated after the first report was made to the police, but before Mr Vhandel was charged and in fact Mr [DT] was sentenced after Mr Vhandel was arrested and charged... Bearing in mind all of that, specifically the fact of the first report being made before any summons or conviction of any family member of the complainants, I do not believe that these charges are a result of the charges and conviction of the mother and step-father at the instance of Mr Vhandel. I reject that."

[28] While it is true that the learned Resident Magistrate did not use the word 'malice', it is clear from this passage that what she had in the forefront of her consideration was the appellant's assertion in his defence that the case against him was "a malicious misrepresentation of the actual facts", motivated by a desire for revenge. It was entirely a matter for the tribunal of fact to assess the impact of this attack on the complainants' credibility and, in our view, the learned Resident Magistrate's conclusion cannot be faulted in the light of the evidence in the case which she accepted. Among the matters which the Resident Magistrate found to be telling was the appellant's quite extraordinary response (recounted by him), when confronted by the police with the allegation that he had put his penis at AR's nose, that "Unu lucky say it never in a her mouth." The Resident Magistrate observed, with considerable understatement, "I found this odd, to say the least". In similar vein, she also recalled the appellant's equally extraordinary response to Miss CF, when confronted with MW's allegation that, for the

second time, he had taken her hand and rested it on his penis, which was "A now she just a tell you that?"

[29] It seems to us that the Resident Magistrate was fully entitled, on the basis of the complainants' clear evidence, which she believed, and the appellant's own implied admissions, to conclude, as she did, that "I did not believe him when he says he did not do the acts attributed to him by the complainants."

[30] Ground three gives rise to a constitutional issue, which naturally arouses scrutiny even greater than usual. The appellant was, as has already been noted, self-represented at his trial. As Miss Jackson quite properly acknowledged, there is absolutely nothing on the record to indicate how this came to be so and whether any – and, if so, what - steps were taken to assist him to secure representation. It should be noted, however, that, on the basis of the appellant's own account in his skeleton arguments, it appears that the decision to proceed without representation was in fact his.

[31] Be all of that as it may, it is necessary to consider the precise nature of the constitutional right to legal representation. Prior to the enactment of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 ('The Charter of Rights'), section 20(6)(c) of the Constitution of Jamaica ('the Constitution') provided that every person charged with a criminal offence "shall be permitted to defend himself in person or by a legal representative of his choice". In ***Robinson v The Queen*** [1985] 2 All ER 594, 599, a decision of the Privy Council on appeal from this court, to which we were helpfully referred by Miss Jackson, Lord Roskill said this:

> "In their Lordships' view the important word used in section 20(6)(c) is 'permitted'. He must not be prevented by the state in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection. He must be *permitted* to exercise those rights."

[32] The Charter of Rights repealed and replaced Chapter III of the Constitution, of which section 20(6)(c) was a part, with a new Chapter III and the operative section is now section 16(6)(c), which provides as follows:

> "16(6) Every person charged with a criminal offence shall...
>
> (c) be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice."

[33] Section 16(6)(c) therefore not only preserves the purely permissive feature of the repealed section 20(6)(c), but goes further by extending to a qualified defendant in a criminal case a right to such assistance, "as is required in the interests of justice". As far as we are aware, section 16(6)(c) has yet to receive judicial consideration since the coming into force of The Charter of Rights on 8 April 2011, particularly as regards the scope of the corollary obligation to the right granted by the subsection. However, we are in any event satisfied that, given the dearth of evidence as to the circumstances in which the appellant in the instant case came to be self-represented at his trial, this is not an appropriate case for this purpose. It suffices to say, in our view, that there is no evidence that the appellant was prevented from defending himself through legal representation of his choosing.

[34] Miss McBean's first supplementary point on ground three was that the Resident Magistrate erred, by either failing to discharge herself upon MW's reference to her mother's previous characterisation of the appellant as "a raper", or explicitly disabusing her jury mind of its prejudicial effect.

[35] While we accept that MW's response to the appellant's question in cross-examination did have a clear and significant potential for prejudice, it does not follow that the result ought inevitably to have been the learned Resident Magistrate discharging herself. In this regard, the authorities are clear that each case will depend on its own facts and that the decision as to the appropriate course to be adopted in a particular case is a matter for the discretion of the court depending on the facts then before it. An appellate court will not likely interfere with the trial judge's exercise of this discretion in these circumstances (see, applying ***R v Weaver*** [1967] 1 All ER 277, ***Otis Barrett v R*** [2010] JMCA Crim 36 and ***Machel Goulbourne v R*** [2010] JMCA Crim 42). In the circumstances of the instant case, we are unable to agree that the experienced Resident Magistrate, sitting as judge and jury, erred in choosing to continue the trial, in the face of MW's wholly spontaneous and isolated outburst. It has certainly not been demonstrated that, in so doing, she acted contrary to principle so as to attract the attention of this court.

[36] Miss McBean's final complaint on this ground was that there was no "verification" of the complainants' ages and that the voir dire in the case of each of them was not properly done. As regards the question of "verification" of the complainants' ages, no reason or authority was shown to us to suggest why this should have been necessary on charges of indecent assault, and we know of none.

[37] As regards the conduct of the voir dire, we have similarly been unable to discern the deficiency of which Miss McBean complained. In the case of MW, the answers to the Resident Magistrate's questions were as follows:

> "I go to...Primary and Infant School. I go to...Church. At church I learn about God and Jesus. Jesus is good. God like it when children tell the truth [sic]. He feels bad about children who tell lies. People who tell lies when they die they go to hell. People who tell truth go to heaven. I would like to go to heaven. I am going to tell the truth."

And in the case of AR, her answers were as follows:

> "I go to church and Sunday School at.. I have a Sunday School Teacher. I learn about things. I learn about Jesus, Jesus is God. This is a Bible. It is Jesus book. It is bad to tell lies. It is good to tell the truth. When you tell the truth, when you die you go to heaven. Heaven is a good place. People who tell lies go to hell. The Devil is in hell. Hell is a bad place. When I die I want to go to heaven. I am going to tell the Court the truth."

[38] On the basis of these answers, the learned Resident Magistrate directed that both girls be sworn. In ***R v Hayes*** [1977] 1 WLR 234, 237, cited in all the texts as the leading modern authority on the subject, the Court of Appeal of England and Wales emphasised that the important consideration for this purpose is whether the child has "a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct". There can be no doubt, in our view, that the answers given by both girls in the instant case amply satisfied that test and that the learned Resident Magistrate was clearly right to allow them to give sworn evidence. Even if we had thought otherwise, we would, in accordance with

general principle, have been strongly inclined to defer to her exercise of her undoubted discretion, in the absence of any suggestion that she applied the wrong principles in coming to her decision.

[39] In support of ground four, we were shown a copy of a Social Enquiry Report which, it is true, contained some damning statements about the appellant. This report was apparently prepared and presented to the court after conviction as an aid to sentencing. However, there is absolutely no evidence on the record that the learned Resident Magistrate was unduly influenced by it in any way in her determination of the appropriate sentences for the offences for which the appellant was convicted. In any event, it has not been even faintly suggested that the sentences in fact imposed were excessive in any respect and there is therefore no basis upon which to disturb them.

[40] In the result, the appeal is dismissed and the conviction and sentences are affirmed.