[2015] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 15/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

WILLARD WILLIAMSON v R

Bert Samuels for the appellant

Mrs Kamar Henry-Anderson for the Crown

21, 22 January and 1 May 2015

BROOKS JA

[1] I have read, in draft, the respective judgments of my learned sisters McDonald-Bishop JA (Ag) and Sinclair-Haynes JA (Ag). The judgment of McDonald-Bishop JA (Ag) is consistent with my view of the appeal. I agree with her conclusion for the reasons given by her. Her opinion has been so comprehensively expressed that there is nothing that I can usefully add.

McDONALD-BISHOP JA (AG)

[2] The appellant, Mr Willard Williamson, a former constable of the Jamaica Constabulary Force, was on 14 April 2014, convicted in the Resident Magistrate's Court

for the parish of Saint Elizabeth by Her Honour Mrs Sonya Wint-Blair for breach of section 14(1)(a) of the Corruption Prevention Act. The single information on which he was charged, and to which he had pleaded not guilty, alleged, essentially, that he being a public servant corruptly solicited $15,000.00 from Mikisha Heywood being a gift for himself to discontinue court proceedings instituted against her for driving without a driver's licence and without motor vehicle insurance. On 14 May 2014, the learned Resident Magistrate sentenced him to four months imprisonment at hard labour. He has appealed against his conviction and sentence.

The evidence at trial: an overview

The prosecution's case

[3] The prosecution relied on the testimony of five witnesses: Miss Heywood, the virtual complainant, and four police officers who were, at all material times, attached to the Anti-Corruption Branch of the Jamaica Constabulary Force. The primary evidence on which the appellant was convicted, however, was adduced from Miss Heywood and Detective Corporal Damien Hinds, through whom audio recordings of conversations between the appellant and Miss Heywood were tendered in evidence. The evidence of the other witnesses did not advance the case for the prosecution in any material way and so will not be treated as relevant for present purposes.

[4] The essence of the relevant evidence led by the prosecution is outlined as follows. On 18 March 2009, at about 11:00 pm, Miss Heywood was driving a motor car, owned by her boyfriend, Damion Walker, along the Petersville main road in the parish

of Westmoreland when she was stopped by the appellant and Constable Raymond Johnson who were on traffic duties along that roadway. She did not know the appellant before but she knew Constable Johnson as "Raymond". They discovered that she was driving without a driver's licence and apprehended her for breach of the Road Traffic Act. They took her along with the motor car to the White House Police Station for processing. While there, Damion Walker was contacted and he attended the station.

[5] Miss Heywood was eventually processed by Constable Johnson who served summons on her, upon the instruction of the appellant, for her to attend court to answer to the charges of driving without a driver's licence and without motor vehicle insurance. She was released after she was served with the summons but the motor car was detained on the instruction of the appellant.

[6] On the following morning, Damion Walker went back to the police station and collected the motor car while Miss Heywood remained at home. He later telephoned her while she was home and spoke to her. She later received a call from the appellant on her cell phone. He identified himself to her and after speaking with him, she called Constable Johnson because of the earlier conversation she had with the appellant. After she spoke to Constable Johnson, she called back the appellant, having received his number from Damion Walker. She said she asked him, "how comes he told me that Raymond was the one who wanted the money which wasn't the truth". He told her that Raymond wanted the money. They then started to discuss "when he was going to get the money" (page 32 of the record).

[7] He requested $15,000.00 from her in order to prevent her from having to go to court because she indicated that she had to leave the island before the court date. They both discussed the matter and it was her understanding that the $15,000.00 was for that purpose. She agreed to pay the sum but not on the date he asked her to do so. She indicated a difficulty she had in finding that amount of money quickly. A date was discussed between them for payment of the money, which she could not recall but she had an option to choose between two dates given to her by the appellant. He also told her that the payment would have had to be made after 5:00 pm. On the date she wanted to pay, he said he did not work that day. They agreed to meet on Tuesday, 7 April 2009 but she was not able to make that meeting. She tried to contact him on 6 April 2009 to tell him that she could not make the meeting but was unable to do so.

[8] Not being able to contact the appellant, and clearly not satisfied with the situation, Miss Heywood contacted the Anti-Corruption Branch and as a result of discussions with officers there, a "sting" operation was devised to be carried out on 7 April 2009. The plan for the operation was to have Miss Heywood meet with the appellant on the basis that she was paying the money over to him. As part of the operation, there was to be a covert recording of their telephone conversations agreeing to meet and, also covertly, both an audio and video recording of their meeting. She was, during the course of the meeting, to hand over previously marked currency notes to the appellant and when that was completed, she was to give a pre-arranged signal.

[9] In the telephone conversation recorded between the appellant and Miss Heywood on 7 April 2009, Miss Heywood indicated the meeting spot to be at a location in Black River, St Elizabeth and the appellant agreed to meet her there. Importantly, she stated in that conversation that she did not then have the entire sum of $15,000.00; that she only had $10,000.00 at the time but that she expected her brother to bring the other $5,000.00 by the time the appellant arrived. There was no demurral or expression of surprise from the appellant to that statement. His response was, simply, "[o]kay".

[10] Some time later, the appellant arrived at the agreed location. He remained in his car while she stood at the driver's door of the car speaking to him. Thereafter, there was a discussion between them and he opened his car door in order to leave the vehicle to continue to speak with her. At that point the operation went awry. While the door to the driver's side was open, Miss Heywood mistakenly gave the pre-arranged signal that she had handed over the money to him, when in fact she had not done so. The police officers involved in the operation swooped down on the appellant in response to her pre-mature signal and the money, accidentally, fell on the driver's seat. The appellant, therefore, did not take any money from her.

[11] In response to the questioning of the police at the location, the appellant denied any knowledge of the money, which was retrieved from the car. He was subsequently arrested and charged.

[12] The recorded conversations between the appellant and Miss Heywood relied on by the prosecution were the subject of significant objection by learned defence counsel, who argued at the trial that they were inadmissible for a number of reasons and requested disclosure of the devices that were used in the recording of them. Those matters formed the subject matter of rulings by the learned Resident Magistrate who admitted the recordings and refused the application for disclosure.

The appellant's case

[13] In his defence, the appellant gave sworn testimony and relied on the testimony of Darlon Rutherford and the written statements of Damion Walker that were tendered in evidence by virtue of section 31D of the Evidence (Amendment) Act upon the application of the defence. Damion Walker was off the island at the time of the trial.

[14] The appellant did not join issue with the prosecution's case as to the circumstances leading to the issuance of the summons to Miss Heywood and the arrival of Damion Walker at the police station. He testified that Miss Heywood was processed by Constable Johnson at the police station on the night in question and that he did not speak to her.

[15] He stated that Miss Heywood attended the police station on the following morning while he was there. She then engaged him in a conversation about sex and, among other things, expressed admiration for his physique while touching him. They exchanged cell phone numbers and she left.

[16] He spoke on the phone with Miss Heywood after that day. She had called him two days later speaking about the 'ticket' she received from Constable Johnson and her not wanting to go to court. He explained to her, then, the consequences of her going as well as not going to court. She again contacted him days later indicating that she wanted to see him and he agreed to see her. They met and again engaged in sexually explicit conversation and on one occasion she actually hugged him. She also attended a police youth club meeting on his invitation.

[17] On the Friday before the sting operation, he heard from her again and she told him that she was stressed out about the matter and that she had to leave the island and so she was asking him to speak to Constable Johnson for her. He told her that there was nothing that he could do because she had already received the summons and that he could not mention the matter to Constable Johnson. She, then, in a hostile voice, accused him of only wanting sex and not wanting to help her. He told her that nothing could be done about it and that she had to go to court.

[18] He said on the Monday morning before the sting operation, he spoke to Miss Heywood again by telephone when she called him. His evidence of their conversation is recorded at page 82 of the record. During the course of that conversation, she told him that she wanted to get rid of her boyfriend and to have a "thing" with him. He told her there could never be a relationship because he was married. She told him she had a surprise for him and that "when yuh come you will see a what". He asked whether it was for sex and she said "all that too... I have that and might be more than that fi give

you". She also offered him "a change" and told him that it was she who took care of her boyfriend. He said to her "don't mention any change to me... I'm not into that". He agreed to meet her the following day but only for sex.

[19] The next morning (the day of the operation), she called him and he agreed to meet at the arranged location in Black River. They had many lengthy conversations before he arrived at Black River. When he arrived there, he invited her into the car but she refused his invitation. He said she then told him "me have one money fi gi you" and that she said "mi a go gi you today". He responded "Nicky nuh badda wid dat, you know mi nuh about dat, how money come into play, me should be giving you money, not you giving me money". She did not give him any money and he did not see her with any money. They remained talking until a gun appeared in his face. That signalled the arrival of the police party in the sting operation.

[20] He denied soliciting any money from Miss Heywood. He stated in examination-in -chief that he did speak to Damion Walker on the night of the incident when Miss Heywood was issued the summons but, then, in cross-examination he denied having spoken with him. He said he had no idea how Damion Walker got his car back and there was no discussion about money for Miss Heywood's case. He also denied having a conversation with Miss Heywood in which she told him that she had $10,000.00 and that someone would be bringing the other $5,000.00 to her.

[21] At the end of his testimony, the appellant did not explain the recorded conversations between him and Miss Heywood, which were admitted into evidence

albeit that defence counsel, on his behalf, had earlier taken objection to their admissibility. There was no dispute that he was the person recorded speaking to Miss Heywood. It should also be noted that several matters the appellant stated in his evidence as having taken place between Miss Heywood and himself were never put to Miss Heywood in cross-examination.

[22] Darlon Rutherford was called to speak to the fact asserted by the appellant that Miss Heywood did, in fact, attend a police youth club meeting with the appellant once in 2009. In addition, two statements given by Damion Walker to the police were admitted into evidence on behalf of the appellant. The significance of those statements to his case was to show that Damion Walker did not state that the appellant spoke to him about money to be paid to dispose of the case against Miss Heywood. So, there was nothing said by Damion Walker in the statements to support any assertion that the appellant had solicited money from him or Miss Heywood.

The findings of the learned Resident Magistrate

[23] The learned Resident Magistrate, after a very comprehensive review and painstaking analysis of the evidence adduced by both sides, distilled the issues under various headings and made her findings on the material elements of the case. In outline, her findings on the material issues were as follows:

(1) The uncontroverted evidence was that the appellant was an enlisted member of the Jamaica Constabulary Force in March 2009

and that his occupation at the time fell within the meaning of public servant as defined by the Corruption Prevention Act.

(2) The appellant did solicit the sum of $15,000.00 from Miss Heywood.

(3) The appellant solicited a benefit, whether for himself or another, to cause Constable Johnson to discontinue the charges laid when Miss Heywood was served with summons for the traffic court.

(4) The inference could be drawn that he may have had the intention of having a sexual encounter with Miss Heywood as well as the intention to receive the $15,000.00 in cash, which they had previously agreed upon. The two are, however, not mutually exclusive. The $15,000.00 was to pay for him to use his influence with Constable Johnson to have the traffic court case discontinued, so that she would not have had to attend court.

(5) Credibility was the central issue. The evidence of Miss Heywood was accepted as reliable even though parts were rejected. She was forthright about her plan and her unimpressive demeanour did not diminish the veracity of her evidence that the appellant solicited the sum of $15,000.00 from her for the purpose of the discontinuance of the charges brought against her.

(6) The evidence of Detective Corporal Hinds as to how the covert recordings on which the prosecution relied were made was cogent and reliable despite the suggestion of the defence that they were tampered with. The covert recordings factually and accurately captured the conversations between Miss Heywood and the appellant. The appellant did not deny that his voice was on these recordings. All the voice recordings were accepted for the truth of their contents.

(7) While the appellant's evidence on certain matters was preferred to that of Miss Heywood's, his defence in relation to the solicitation was rejected. His evidence pertaining to the matters on which Miss Heywood was not cross-examined, which included that she had promised him money because she wanted a relationship with him, was rejected.

(8) The prosecution had established, in discharging both the evidential and legal burden of proof cast upon them, that the appellant solicited money from Miss Heywood as the ingredients of the offence have each been duly proven. The evidence of solicitation is found in the evidence of Miss Heywood, the phone calls between them from the first time they spoke on the phone up to the date of the operation when they met at the Las Vegas Café in Black River.

(9) The appellant did corruptly solicit $15,000.00 from Miss Heywood while he was a public servant to forbear from performing his public duty.

[24] The learned Resident Magistrate expressly indicated and demonstrated that she gave due consideration to the principles enunciated in **Dewayne Williams v R** [2011] JMCA Crim 17 and **Jagdeo Singh v The State** (2005) 68 WIR 424 and applied them to the facts before her in coming to her finding of guilt as a matter of law.

The appeal

[25] The appellant initially filed one ground of appeal but his counsel, Mr Samuels, was granted leave to argue four additional grounds. The grounds of appeal are as follows:

> "1. Verdict is unreasonable and cannot be supported having regard to the evidence.
>
> 2. The Learned trial Judge erred in failing to warn herself as to the caution needed in relying on evidence obtained by means of voice recognition as it was approved by the Privy Council in the case of *Donald Phipps v DPP and Attorney General of Jamaica* ([2010] JMCA Crim 48) and the foundation which must be laid to satisfy proof of identification by voice. She therefore wrongly admitted in evidence the alleged telephone conversation between the accused and the complainant on April 7, 2009.
>
> 3. The Learned Trial Judge erred when she failed to grant disclosure to the Defence of (a) The recording capable cellular phone which was property of the Jamaica Constabulary Force's Anti-Corruption Branch (ACB), (b) The covert device used to record conversations, and (c) The original tape recordings.

This resulted in a miscarriage of justice in that the defendant was deprived of an opportunity to properly conduct his defence at trial.

4. The trial Judge having found that the complainant lied to the court on several issues and having said that credibility was the central issue in the case (paragraph 53 of the Findings), was estopped from accepting her as a credible witness and ought to have acquitted the accused on this basis.

5. The Learned Trial Judge failed to assess the value of Damion Walker's statements and how it impacted on the case for the prosecution and the case for the defence. Had she done so, she ought to have concluded that the evidence did not amount to an offence as created by section 14(1) (a) of the Corruption Prevention Act."

Abandonment of ground two

[26] During the course of submissions, learned counsel for the appellant, Mr Samuels, was constrained to abandon ground two concerning the issue of voice identification, having recognised the insurmountable hurdle that confronted him to successfully advance that ground in the light of all the evidence. There were thus four grounds that were argued.

[27] For convenience, the grounds were not argued in consecutive order as learned counsel treated ground one as being subsumed within ground four. Ground three was, therefore, the first of the remaining grounds to be argued following the abandonment of ground two. The analysis of the grounds of appeal is, therefore, in keeping with the order in which they were argued.

Ground three

Whether the learned Resident Magistrate erred in refusing to grant the order for disclosure of the recording devices and the original recordings.

[28] The complaint of the appellant on ground three has arisen from the refusal by the learned Resident Magistrate of the oral application of the defence for disclosure of the recording capable cell phone, the covert recording device which were used during the course of the sting operation to record conversations between the appellant and Miss Heywood, as well as the original audio recordings extracted from those devices. Before treating with the complaint of the appellant on ground three, it is considered necessary to briefly examine the pertinent evidence concerning the creation and production into court of the recordings that were, ultimately, tendered in evidence by the prosecution.

Audio recordings: Evidence of Detective Corporal Hinds

[29] The critical witness for the prosecution in relation to the audio recordings that were admitted in evidence was Detective Corporal Hinds. He was the member of the Anti-Corruption Branch who was in control of the technical equipment used in the sting operation. He testified that upon receiving the briefing as to the operation, he was introduced to Miss Heywood on the morning of the operation. He removed the SIM card from her cell phone and placed it in a cell phone which was capable of recording telephone conversations and which was the property of the branch.

[30] He made a test call from the phone to ensure that the phone was in good working condition and having satisfied himself that it was working properly, he took a

number from Miss Heywood and spoke to her. The undisputed evidence would later reveal that this was the appellant's number. Miss Heywood was given certain instructions and the recording feature on the phone was activated. Miss Heywood conversed on the phone for some time and then handed back the phone to him with the recording feature deactivated. The conversation she had was recorded and he played back the recording to her and she acknowledged that that was the conversation she had.

[31] The phone was given back to her a second time after it was reactivated for recording and she dialled a number and spoke on the phone. This conversation was also recorded and the phone deactivated at the end of it. The recording was also replayed to Miss Heywood and she acknowledged it as being the conversation she had.

[32] He also affixed a covert recording device on Miss Heywood, which was activated and she was given instructions during the course of the operation. The covert recording device was capable of recording audio and was used daily on operations by the branch. He refused to give much details concerning that device or where on Miss Heywood's person it was put because as he said "[t]his device is still in use by ACB so I cannot reveal anymore about it".

[33] After the appellant was arrested following the sting operation, Detective Corporal Hinds met with Miss Heywood and deactivated and removed the recording device, which was affixed to her. He also removed the SIM card from the recording capable phone and handed back the SIM card to Miss Heywood. The covert device was also

tested the morning of the sting operation by him and was found to be in good working condition at all material times.

[34] He kept both the phone and the covert device in his possession until he returned to the Anti-Corruption Branch. Upon his return, he transferred the recordings from the phone to his computer. He had sole access to that computer which was protected by a password known by him only. It was also properly programmed, in good working condition and no alterations were done to it. After transferring the recordings, he copied the recordings into a new folder, and then verified them. He was satisfied that they were the same recordings copied from the phone. No other data was on the phone. He copied the recordings onto a master audio CD and from that master CD copies were made on blank CDs. The CD used was non-rewritable and could not be edited or altered.

[35] He played back recordings on the folder on the computer with the audio CD to ensure that the recordings were the same as originally transferred. They were the same. He then made copies of working CDs, which he also verified with the master copy, and then labelled and sealed them. The recordings on the working CDs were the same recorded on the phone and which were transferred to the computer.

[36] The test call that was made by him was not copied to the CD with the telephone conversation. He did not consider it to be relevant to the case as it was only made to ensure that the phone was working properly.

[37] The same procedure was carried out with respect to the covert recording device and upon playing back the original recordings with those copied on CDs that were burnt he was satisfied that the conversation recorded was the same. After sealing and labelling the CDs, he handed them over to the investigating officer. He also prepared transcripts of the audio recordings that he handed over to the investigating officer.

[38] He indicated that he had deleted the recordings from the phone as well as the computer having transferred the data on CDs and having satisfied himself that the recordings were unaltered.

Application for disclosure

[39] During the course of Detective Corporal Hinds' testimony, the appellant's counsel made an application for production to the defence of the phone, covert device and original audio recordings that were transferred to the computer. He maintained, essentially, that their production for inspection was required for the purposes of cross-examining the witness because he was the only witness who had given evidence about them. He maintained that the court should not only rely on the witness' mere 'say so' concerning the recordings and so the devices that were used to record the conversations ought to be produced for inspection by the defence and the court.

[40] The prosecution objected raising, *inter alia*, public interest immunity. They contended that disclosure of those instruments was not within the public interest as it would reveal secret methods of police investigation, which may compromise future investigations. They relied on **Savage v Chief Constable of Hampshire** [1997] 2 All

ER 631. They contended further, among other things, that neither the recording capable instruments nor the computer to which the recordings were transferred was required by law to be produced in court in order to prove authenticity as the eye witness or the witness who could speak to the creation and custody of the recordings would be sufficient.

The ruling of the learned Resident Magistrate

[41] The learned Resident Magistrate, after hearing the submissions from both sides, and after considering some relevant principles of law governing disclosure and public interest immunity, denied the application for disclosure. The following is the main portion of her reasons for refusing the application:

> "In a case where the public interest engaged is the effective investigation and prosecution of [a] serious crime, which may involve resort to the use of scientific or operational techniques which cannot be disclosed without exposing individuals to risk of personal injury or jeopardizing [the] success of future operations; some derogation from the rule of full disclosure may be justified. This derogation will be the minimum necessary to protect the public interest and must never imperil the overall fairness of the trial. In this case the prosecution has disclosed the relevant recordings and evidence has been led as to the chain of custody and how these recordings came into existence. The defence has not been prejudiced in that they have the relevant material in hand, it having been disclosed. I have nothing before me to suggest that the defence will suffer any prejudice if the covert devices are not produced as disclosure of the recordings has been made. The defence has not shown that the production of the devices will be of more probative value than prejudicial effect when the balance is considered. The devices shall not be produced, the evidence of Det. Cpl. Hinds will be weighed at the appropriate time. That weighing cannot take place within the body of the trial. The defence has not demonstrated that the devices are relevant

> and of potential assistance to the defence. The devices or the computer used by Crpl Hinds have not been demonstrated by authorities cited nor legislation presented to be required to be produced in court to prove the authenticity of the recordings complained of. The evidence of Crpl Hinds as to custody suffices."

Submissions in summary

[42] Mr Samuels, relying on several authorities, made detailed submissions in advancing the position of the appellant that the learned Resident Magistrate's ruling was improper on several grounds. The gravamen of his complaint was that the refusal to order disclosure has affected the fairness of the trial and has caused a miscarriage of justice as non-disclosure had adversely affected the appellant in the preparation of his defence. He cited, among other cases, **Linton Berry v The Queen** (1992) 29 JLR 206; **Harry Daley v R** [2013] JMCA Crim 14; and **Nickoy Grant v R** [2013] JMCA Crim 30 to advance the argument that failure of the learned Resident Magistrate to order disclosure has resulted in a miscarriage of justice which has rendered the conviction of the appellant unsafe.

[43] Mrs Henry-Anderson, for the Crown, argued otherwise in her equally comprehensive submissions. She maintained that in the light of the principles of law applicable to disclosure, and particularly where public interest immunity applies, as well as those applicable to the proof of authenticity of audio recordings, the learned Resident Magistrate could not be faulted for refusing the application for disclosure. Also, relying on several authorities, she contended that the appellant has suffered no prejudice or injustice as a result of the refusal of the application. This case, she said, is

distinguishable from those relied on by Mr Samuels, in which it was found that there was unfairness as a result of non-disclosure.

Analysis and findings

[44] An apt starting point in treating with this ground of appeal concerning the issue of disclosure is to point out that within our jurisdiction, there is no legislation, rules of court or practice direction specifically designed to treat with disclosure in criminal proceedings. The issue is, therefore, governed by the common law. The case of **R v Ward** [1993] 2 All ER 577, that was relied on by both the appellant and the Crown before this court, is often cited and followed as the leading case on the subject of disclosure in criminal cases at common law.

[45] In that case, the English Court of Appeal laid down the key principles governing disclosure in criminal cases, the most relevant of which, for present purposes, have been extracted and outlined below as follows:

> (i) The prosecution has a duty at common law to disclose to the defence all relevant material. Relevant material is evidence which tends either to weaken the prosecution's case or to strengthen the defence. This duty of disclosure requires the police to disclose to the prosecution all witness statements in their possession and for the prosecution to supply copies of such statements to the defence or to allow them to

inspect them unless good reason exists for not doing so.

(ii) The prosecution is also under a duty, which continues during the pre-trial period and throughout the trial, to disclose to the defence all relevant scientific material, whether it would strengthen or weaken the prosecution's case or could assist the defence and whether or not the defence made a specific request for disclosure. Pursuant to that duty, the prosecution is required to make available the records of all relevant experiments and tests carried out by expert witnesses.

(iii) The common law has always recognised that the public interest might require relevant evidence to be withheld from the defendant. Obvious examples are evidence dealing with matters of national security or disclosing the identity of an informant.

(iv) If the prosecution wishes to claim public interest immunity for documents which would be helpful to the defence they are obliged to give notice thereof to the defence so that if necessary the court can be

> asked to rule on the matter. If in a wholly exceptional case, the prosecution is not prepared for the court to determine the issue of public interest immunity, the inevitable conclusion will be that the prosecution will have to be abandoned.

The cell phone and covert device ('the devices')

[46] It is, indeed so, as was contended by Mr Samuels, that the prosecution has a positive duty to disclose relevant material (to be used or not) to the defence. Relevant material, according to the authorities, means those that may assist the defence or undermine the prosecution's case. However, as was correctly pointed out by Mrs Henry-Anderson, and as established on the authority of **Ward**, the duty of the prosecution to disclose is not an absolute one. This is so because it is recognised that the public interest may require that relevant evidence be withheld from an accused and one such category of exclusion, which is relevant to this case, is where the item should not be disclosed on the basis of public interest immunity.

[47] The House of Lords, in **Regina v H and others** [2004] 2 AC 134, has provided significant guidance on the applicability of the doctrine of public interest immunity as it operates in criminal proceedings. For the sake of convenience, and not out of any disrespect to the formulation of Lord Bingham of Cornhill, the relevant portion of his dictum is set out in point form (but, basically, in his words) as follows:

(i) Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence fully, or even at all, without the risk of serious prejudice to the public interest.

(ii) The public interest most regularly engaged is that in the effective investigation and prosecution of serious crimes, which may involve resort to informers and undercover agents or the use of scientific or operational techniques (such as surveillance) which cannot be exposed without exposing individuals to the risk of personal injury or jeopardising the success of future operations.

(iii) In such circumstances, some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.

[48] The learned Resident Magistrate, in making her ruling, did recite the principles contained in this dictum, albeit that she did not expressly cite the authority. She, however, was evidently guided by the relevant principles derived from that authority in considering the application that was before her. A consideration of the principles stated in **Regina v H** would have been applicable because the prosecution had objected to disclosure on the basis of public interest immunity contending that what was required to be disclosed were police operational techniques and equipment which could prejudice or jeopardize the success of future police operations. The evidence of Detective Corporal Hinds did establish that those devices were such that disclosure could jeopardize future police operations and it was therefore open to the learned Resident Magistrate to accept that evidence and to give consideration to such matters.

[49] In looking at the circumstances as they were before the learned Resident Magistrate, the defence had sought disclosure for the purpose of inspection of the devices, which were used to record the conversations between Miss Heywood and the appellant. The audio recordings (and transcripts prepared from them) were, by then, already disclosed to the defence. It was the recordings, and not the devices themselves, that were being relied on by the prosecution. The evidence being relied on by the prosecution was, therefore, served on the defence in keeping with the requirements laid down in **Ward**. The learned Resident Magistrate had recognised that fact in coming to her decision.

[50] The relevant authorities have all established that it is the material in the possession of the prosecution (including the police) that may assist the defence or undermine the prosecution's case that is relevant for the purposes of disclosure. It follows, then, that the relevance of the devices, within that meaning, as distinct from the evidence produced by them and on which the prosecution intended to rely, would have had to have been first established before any duty to disclose, on the part of the prosecution, would have arisen. Furthermore, even if they were considered relevant, public interest immunity, could, nevertheless, have been applicable to bar disclosure of them. The nature of the devices being required and the purpose for their inspection would have been relevant considerations in treating with the application in the light of the evidence led by the prosecution and the claim of public interest immunity.

[51] As Detective Corporal Hinds testified, the police officers assigned to the Anti-Corruption Branch are engaged on a daily basis in the investigation of allegations of corruption against police officers. It is not hard for the ordinary and reasonable man to appreciate that corrupt police officers pose a serious risk to the security of the nation. It is, therefore, of significant public interest or of grave public importance that corruption is detected and eliminated in the constabulary force, given its role in the state apparatus.

[52] It is an established fact, and one that the court may take judicial notice of, that in the course of such investigation of alleged corruption, the police investigators do resort to undercover methods of surveillance and in so doing utilise covert devices to

obtain information. The cell phone and covert device that were used in this case were, indisputably, operational equipment generally used by the police to garner evidence during the course of undercover operations involving the alleged corrupt conduct of police officers. They were given to Miss Heywood for use in such a context.

[53] The evidence before the learned Resident Magistrate was that these same devices were being used on a daily basis, since the sting operation in this case, to carry out similar operations. It means that it would be in the interest of the police as well as members of the public, who will be required to utilise these operational devices during the course of covert operations, that those devices are not unnecessarily exposed or made readily and easily identifiable. The ability of alleged offenders to recognise those operational devices could well jeopardize the success of future operations and, indeed, could pose a risk of injury to those members of the public who are required to use them to discreetly procure information from police officers suspected of corruption.

[54] Detective Corporal Hinds had placed evidence before the learned Resident Magistrate as to the risk disclosure of those operational devices would pose to future operations of the Anti-Corruption Branch. The learned Resident Magistrate was, therefore, entitled to treat with that evidence as she saw fit. She was entitled to accept or reject it; that was totally a matter for her.

[55] It was not unreasonable or, otherwise, improper for the learned Resident Magistrate to have formed the view, on the evidence that was before her, once she accepted it as true that those devices, would, *prima facie*, fall within the class of

material identified in **Regina v H** that would attract public interest immunity. It was also not improper for her to have embarked on a balancing exercise, which she was by law required to do, in order to see whether the appellant's right to disclosure should be overridden by the public interest immunity raised by the prosecution. She was entitled to carry out such enquiry as she considered necessary to arrive at a decision.

[56] In Blackstone's Criminal Practice 1999, paragraph D 6.8, it is noted that the question of whether disclosure is in the public interest is "quite clearly one to be answered by the court…the principle in **Ward** remains intact…: the court, rather than the prosecutor (let alone the investigator) is the final arbiter as to whether disclosure can be avoided on the basis of public interest immunity".

[57] The learned Resident Magistrate, therefore, as the final arbiter had a responsibility to weigh the competing interests in order to see what would best serve the ends of fairness and justice. At the end of the hearing of the application, she ought to have been placed in a proper position to be able to balance the competing interests of public interest immunity, on the one hand, and fairness to the appellant, as the party seeking disclosure, on the other.

[58] Mr Samuels had argued that having regard to **Linton Berry**, the learned Resident Magistrate had raised improper questions and the incorrect issues regarding circumstances justifying derogation from the rule regarding full disclosure. According to him, she fell in error in stating that it was the duty of the defence to show that the devices would be relevant or would be of assistance to the defence or that they would

be more probative than prejudicial. He maintained that it is not necessary for the defence to justify the need for disclosure. It is entitled as of right to disclosure, save and except in limited cases where the public interest determines otherwise.

[59] The defence's automatic right to disclosure, articulated by Mr Samuels, is a proposition that is hard to accept in the circumstances of this case, where public interest immunity was raised in relation to devices that would, *prima facie*, fall within the class of items that would attract such protection. Furthermore, and in any event, the devices required to be disclosed would not usually be disclosed, or required to be disclosed, in the ordinary course of things.

[60] The devices were not documents whose contents were being relied on and neither were they items required to be exhibited as real evidence in the case. They were merely used to aid in the generation of evidence that had been disclosed, very much in the same way as a camera would be used to produce photographs being relied on or a computer used to produce a document that is being relied on, which would be the relevant evidence. As such, disclosure of such operational instruments is not commonplace since the relevant evidence is generally what is produced by them and the court would usually accept evidence from a witness who can properly speak to, *inter alia,* their operations and working condition at the time of use.

[61] In the circumstances, then, with the recordings and transcript having been already disclosed to the appellant by the time the application was being made, it was

proper for the learned Resident Magistrate to have been satisfied of the relevance of these items to the defence. As such, there would have been some onus on the part of the defence, in seeking disclosure of such items (which are not usually disclosed in the ordinary course of things), to illustrate their relevance in the sense defined by the authorities. The defence could not have expected, particularly, faced with an objection on the grounds of public interest immunity, that they would have been required to merely sit and fold their arms and say, "I am entitled to disclosure so let me have the devices, I have nothing to say" and then do nothing more.

[62] Even if, in the end, the duty was on the prosecution (which it was) to bring evidence to justify a derogation from the golden rule of disclosure, the learned Resident Magistrate would have had to have material before her from or on behalf of the defence from which she could discern the effect that non-disclosure of those devices would or could have had on the case for the appellant. This would have been critical because the particulars of the defence would not have been known to the learned Resident Magistrate at that stage in the proceedings for her to come to a conclusion, without assistance, as to how failure to produce those devices could have affected the appellant in the preparation and conduct of his case.

[63] For these reasons, the questions posed by the learned Resident Magistrate, on which she said she needed the assistance of counsel in treating with the matter, to include relevance of the devices to the defence, were not improper, as Mr Samuels argued. The questions only required the defence to place material before the learned

Resident Magistrate for her to appreciate whether the devices were relevant as required for disclosure and the effect non-disclosure would have had on the defence's case. When one looks at what was placed before the learned Resident Magistrate by counsel at the time of the application, she cannot be faulted for refusing the application on the grounds that relevance of the devices and prejudice to the appellant that could lead to unfairness or a miscarriage of justice was never established.

[64] The reasons advanced by counsel for seeking disclosure were: (1) the defence had a right to examine the devices in the light of the evidence of the witness (Detective Corporal Hinds); (2) the devices should have been made available to the defence for the purposes of cross-examination of the witness as he was the only one who had given evidence concerning those devices; (3) the court was being forced to rely only on what the witness said without having a chance to see the instrument and without counsel having the ability to contradict him; (4) the defence would be severely prejudiced; (5) the prosecution's duty to disclose is a determinant of fairness to the defendant and so the prosecutor, being a minister of justice, must disclose all material which is of assistance to the defendant except where there are non-material matters and matters protected by public interest immunity; and (6) there was a narrow basis on which to claim public interest immunity.

[65] As can be seen, learned counsel, at the time, had alleged no problems with the content of the recordings that were served on the defence prior to the trial. He did not mention that they were needed for the preparation of the defence and he did not say in

what way, the appellant would have been "severely prejudiced". Merely saying that the appellant would be prejudiced would have been insufficient; it would have had to be demonstrated in the special circumstances of the case.

[66] The appellant was a party to the conversations recorded and having been served with the recordings before the trial, did not, from all indications, instruct his counsel that there were deficiencies in the recordings. Also, there was no contention that the recordings were being challenged by the defence as being fictitious or that the appellant's voice was not in them. The appellant, by then, would have been in a position to advise his counsel of any alleged omissions or deficiencies in those recordings, but no such argument was advanced before the learned Resident Magistrate. The question as to the accuracy, reliability and integrity of the recordings was never raised before the learned Resident Magistrate at the time the application was being made. There was nothing put before the learned Resident Magistrate to establish that the devices were relevant material within the meaning of the law, particularly, in the context of a claim to public interest immunity.

[67] The evidence was also led before the learned Resident Magistrate that the devices were immediately engaged in other undercover operations after the data relevant to the instant case had been extracted from them. So nothing was before the learned Resident Magistrate to establish how those devices, being in the possession and use of the police for months after the event and from which the relevant data were removed, could have assisted the defence or undermine the prosecution's case.

[68] The learned Resident Magistrate was, therefore, correct in her conclusion that the defence had failed to establish the relevance, probative value of those devices, and prejudice to the appellant. There was nothing shown that could override a *bona fide* claim to public interest immunity. Indeed, the propriety of this finding of the learned Resident Magistrate that disclosure was not demonstrated by the defence to have been warranted on the ground of relevance and/or prejudice to the appellant will become even clearer after an examination of the appellant's arguments regarding the original audio recordings.

The original audio recordings

[69] Mr Samuels (in fairness to him) did not in his oral arguments stress the importance for disclosure of the recording capable devices as much as he did the non-disclosure of the original audio recordings. So, although he did not concede that the recording capable devices should not have been disclosed, his more vigorous arguments related to the original audio recordings.

[70] The original audio recordings, he said, represent the best evidence and the appellant was entitled to be served with the best evidence and not second or third generation copies. According to learned counsel, if the devices were not disclosed, then, the computer to which the data was transferred should have been disclosed for inspection by the defence. The need for the computer to have been produced, he continued, was, particularly, due to the fact that the witness had deleted the recordings after burning them on the master CD and had also deleted the test call he had made on

the phone before recording the conversation because in his view, it was not relevant. Mr Samuels, relying on the dictum of Panton P in **Harry Daley v R**, at paragraph [53], noted that in the light of such deletion, the trial was rendered unfair to the appellant.

[71] He contended too that the refusal of the learned Resident Magistrate to order disclosure of, what he called, the original audio recordings has not only deprived the appellant of a fair trial but was in breach of his constitutional right as enshrined in section 16(6)(b) of the Charter of Fundamental Rights and Freedoms. The section provides that every person charged with a criminal offence shall have adequate time and facilities for the preparation of his defence. He maintained that the failure of the prosecution to disclose the original audio recordings (the computer to which they were transferred) has caused prejudice to the appellant in preparing his defence.

[72] He contended further that no public interest issue attaches to the original recordings. The recordings were allegedly of the appellant himself to which he would have been entitled. The chain of custody that was found to have been satisfied by the learned Resident Magistrate was not a cure and could not replace the right to disclosure, he argued.

[73] In treating with learned counsel's arguments, it is important to note that Detective Corporal Hinds had chronicled, in detail, his treatment of the devices used to record the conversations and how, in the end, he extracted the recordings from the devices and verified them for their production in court (see paragraphs [34]-[38] above). There was ample evidence before the learned Resident Magistrate from

Detective Corporal Hinds accounting for the handling of the devices from they were in the hands of Miss Heywood until they were produced in court. He identified the CDs and the transcripts he had prepared and verified. He indicated that the devices used in the recordings were in proper working order and that no one else assisted in the preparation and custody of them. The chain of custody was, therefore, established which was important in proving history, authenticity and preservation of the material being relied on.

[74] Mr Samuels' argument that the best evidence should have been disclosed and so failure to do so had rendered the trial unfair is not supported in law as Mrs Henry-Anderson correctly pointed out. The 'best evidence rule', as it is known, is not applicable to recordings, audio or video. The rule is said to have survived only in relation to the contents of private written documents. Otherwise, all admissible evidence is, in general, equally accepted, though its weight may be a matter of comment: Archbold Pleading, Evidence and Practice in Criminal Cases, 43rd edition, paragraph 8-1. The point was also well made in **Kajala v Noble** (1982) 75 Cr App R 149 at page 152 that:

> "…The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago…Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility: **GARTON v. HUNTER** [1969] 1 All E.R. 451, per Lord Denning M.R. at 453e…"

This principle was endorsed and engaged by this court in **R v Lynden Levy and Others** SCCA Nos 152, 155, 156, 157 and 158/1999, delivered on 16 May 2002. Mrs Henry-Anderson relied on both authorities to reinforce the point that the disclosure or production of the devices in court was not necessary to prove authenticity of the audio recordings that were being relied on by the prosecution. Her argument is accepted.

[75] There was nothing improper for the police officer who was engaged in the creation and preservation of the recording to give evidence concerning those matters in court without the device being produced for inspection by the court. Furthermore, as Mrs Henry-Anderson correctly noted, the maker of the recordings was, in fact, Miss Heywood and she was called as a witness and was in a position to speak to the contents of the recordings, which she, in fact, did. Also, the appellant, being a party to the said conversations (and he did not deny them), was in a position to challenge the witnesses on cross-examination about anything concerning the accuracy and authenticity of those conversations. Incidentally, he did not do so.

[76] The learned Resident Magistrate was, therefore, not wrong in holding, as she did, that the question of authenticity went to the weight of the evidence and not its admissibility and that the evidence of Detective Corporal Hinds "will be weighed at the appropriate time". She was also correct in saying that "the devices or the computer used by [Corporal] Hinds have not been demonstrated by authorities cited nor legislation presented to be required to be produced in court to prove the authenticity of the recordings complained of. The evidence of [Corporal] Hinds as to custody suffices".

[77] Even though she might have said that the evidence of Detective Corporal Hinds as to custody suffices, with which Mr Samuels had taken issue, that is not taken to mean that she asserts that the chain of custody was all that was important in determining the issue. She had earlier referred to the evidence before her as to the creation of the recordings, among other things. She also considered whether the failure to produce the original tape recordings would have prejudiced or did prejudice the appellant. She saw no way in which it could have prejudiced him in light of all the circumstances as were put before her at the time of the application. Again, she cannot be faulted for that conclusion she made at the time. There was no fundamental error in her reasoning and decision, on this point, that could undermine the propriety of the decision she made that could enure to the benefit of the appellant.

[78] Mr Samuels had, however, raised before this court the way in which the appellant was prejudiced in the preparation of his defence. He cited matters that were never placed before the learned Resident Magistrate at the time of the application as relevant considerations that could have affected the appellant in his defence. In this regard, he argued that the appellant had placed in issue the veracity of the recordings in the light of his evidence of the discussions he had with Miss Heywood regarding their love affair and that she wanted to give him a 'change' as his lover. According to him, if the full text of all the conversations between the appellant and Miss Heywood were made available, the appellant would have been able to make use of it in the presentation of his defence and for cross-examination. The request for the original

recording, he maintained, was to discover whether this conversation was, in fact, recorded.

[79] It should be noted that learned counsel, in making such a submission before this court, has had the benefit of hindsight having been placed in a position to view the matter after the appellant had given evidence. At the time of the application, however, the appellant had not given evidence and no allegation was made that based on the appellant's instructions, portions of conversation between him and Miss Heywood, which took place at the time of the recording, were omitted from the recordings that were served on him. As such, the learned Resident Magistrate could not have taken into account such matters that were not told to her then. These matters as to the alleged relevance of the recordings to the appellant's defence were raised for the first time on appeal. In the absence of such matters being placed before the learned Resident Magistrate for her consideration, she cannot, at all, be faulted in arriving at her conclusion that "the defence has not demonstrated that the devices were relevant and probative and were of potential assistance to the defence".

Whether there has been a miscarriage of justice as a result of non-disclosure

[80] The question for this court, now that the trial is completed and all the evidence is available for scrutiny, is whether the refusal of the learned Resident Magistrate to grant the order for disclosure has resulted in a miscarriage of justice as contended by Mr Samuels. Even if the learned Resident Magistrate was right in refusing disclosure at the point of the proceedings that she had reached when the application was made, the

determinative question is whether that refusal has led to unfairness to the appellant that results in a miscarriage of justice.

[81] It is accepted, as pointed out by Mrs Henry-Anderson, that the pivotal consideration for this court in view of the complaint concerning non-disclosure is that stated in **Bonnett Taylor v The Queen** [2013] UK PC 8; [2013] WLR (D) 104 . There, Lord Hope, in speaking for the Board, opined at paragraph 13, in so far as is relevant:

> "But, even if it was possible to say either that the prosecution was at fault for delaying its disclosure or that the appellant's counsel was at fault for having not made use of it, it would not be enough to justify a finding that there has been a miscarriage of justice. **The focus must be on the impact which those failings had on the trial, and on the verdict that was pronounced at the end of it, rather than on attempting to assess the extent to which either the prosecution or defence counsel were at fault:** ***Teeluk v State of Trinidad and Tobago*** [2005] UKPC 14, [2005] 1 WLR 2421, para 39, per Lord Carswell. **The court must have material before it which will enable it to determine whether the conviction is unsafe."** (Emphasis added)

[82] Their Lordships did go on to establish clearly in paragraph 20 that the relevant test in determining whether a miscarriage of justice had occurred, is whether, after taking all the circumstances of the trial into account, there was a real possibility of a different outcome. In other words, as his Lordship instructed, this court must ask itself the question whether if the disclosure was made as requested, it might reasonably have affected the decision of the learned Resident Magistrate to convict.

[83] In considering the impact that non-disclosure would have had on the verdict, it is considered useful to commence with Mr Samuels' argument that nothing was on the recordings evidencing discussions about sex between the parties and that based on that, things might have been omitted that could have supported the appellant in his evidence in this regard. Counsel, however, seems to have overlooked the fact that at no time was it put to Miss Heywood during cross-examination that there was such a conversation between them on the date and at the particular time that the conversation tendered in evidence was recorded. The appellant also gave no evidence that there were any omissions in the recordings or any tampering of them. This is quite understandable based on the evidence of the appellant, which Mr Samuels seemed not to have taken into account.

[84] The evidence of the appellant was that the conversation about them meeting for sex was on the morning of the Monday before the operation, which would have been on 6 April 2009. The recordings were not done until the afternoon of Tuesday, 7 April 2009. That would have been a day after the appellant said the conversation took place. So, the time of the conversation spoken of by the appellant and that of the one that was actually recorded did not coincide and could not have coincided and so there was no way that the devices or the computer could have assisted the defence on that issue.

[85] But even more importantly on this point of fairness, learned counsel also seemed to have overlooked the fact that the learned Resident Magistrate, to the credit of the appellant (and quite generously, it may be said), had accepted his evidence that there

were conversations between him and Miss Heywood agreeing to meet for sex albeit that she did not say that such conversation had formed a part of the taped conversations. What this finding of the learned Resident Magistrate means is that the absence of such conversations from any recording would not have operated to the detriment of the appellant because the learned Resident Magistrate found that fact in his favour. He was, therefore, not hindered from putting his defence fully before the learned Resident Magistrate for consideration. As such, failure of the prosecution to disclose the devices and the computer did not affect him adversely in this regard.

[86] In so far as the evidence of the appellant was that Miss Heywood promised him 'a change' which he had refused, again, he never testified that this was stated at the point that the conversation put in evidence was being recorded. This conversation about her offering him money, on his evidence, would have also taken place on the day before the operation was carried out. That too would not have coincided with the time of the recording, as it would have occurred before. So, there would have been no omissions in the tape recordings of such a conversation because it could not have been there. The production of the devices and original recordings could not have assisted him on this aspect of his defence or undermine the prosecution's case. Accordingly, they were not relevant.

[87] Furthermore, although the appellant said that Miss Heywood had offered him money, he did not put that to Miss Heywood when she was being cross-examined to afford her the opportunity to accept or deny such an assertion. As a result of his failure

to put that evidence and other aspects of his evidence that were crucial to his defence to the witness in cross-examination, the learned Resident Magistrate, quite rightly, as a matter of law, rejected his assertion, finding as she did that his veracity was seriously undermined by the failure to cross-examine Miss Heywood about it. She concluded that it was part of his embellishment in advancing his defence. She was entitled to treat with his defence in that manner as the sole arbiter of the facts.

[88] There could, therefore, have been no unfairness to the appellant in relation to those matters highlighted by Mr Samuels because the learned Resident Magistrate treated properly with those aspects of the evidence in accordance with the law. The disclosure of the devices and original audio recordings would have made no difference to the finding of the learned Resident Magistrate because they could not have assisted the defence or undermine the prosecution's case. They were, simply, not relevant and as such, quite apart from the issue of public interest immunity that would have enured to the benefit of the prosecution, no duty on the part of the prosecution to disclose them would have arisen in law.

Deletion of the test call

[89] The final aspect of Mr Samuels' submissions relates to the evidence of Detective Corporal Hinds that he had deleted the call that he had made to test the working condition of the phone because, in his view, the call was not relevant. Mr Samuels argued that this was improper. This deletion was an exercise, he said, that ought to have been carried out at the trial and that "it re-emphasises the probative value of the

original recordings to the conduct of the trial". Arguing strongly on the authority of **Harry Daley v R**, Mr Samuels contended that this resulted in a miscarriage of justice.

[90] In **Harry Daley v R**, Panton P spoke to the importance of disclosure to a fair trial to which an accused person is entitled. In treating, particularly, with the action of the police in making deletions from recordings made during the course of investigation of the appellant on the basis that the contents deleted were not considered by them to be relevant, Panton P stated at paragraph [53]:

> "...where recordings are made and are being relied on to prove a case, the entire recordings and the context are to be placed before the court for a determination to be made by the court on the question of relevance. It is not a matter for the investigator to determine."

[91] There is nothing arising from the case for either the prosecution or the appellant (in the instant case) that could properly lead to a finding that anything pertaining to the conversations between the parties that were recorded was deleted. Detective Corporal Hinds gave evidence that the learned Resident Magistrate accepted as true, that he did no editing and had not altered or tampered with the recordings. The appellant gave evidence and he stated nothing about any tampering of the recordings or of there being any deficiencies in them. He did not challenge the contents of the recordings either through cross-examination of the prosecution witnesses or by giving evidence to rebut the prosecution's case that the recordings were complete and authentic.

[92] Furthermore, the learned Resident Magistrate had the benefit of listening to the recordings. As such, she was in a position to form her own view that the recordings

were authentic and credible. There is thus no evidence that the deletion of the test call affected the case for the appellant in any way so as to lead to an unfair trial or a miscarriage of justice.

[93] It should be stated, however, as a matter of some relevance, that officers should adhere to the dictum of Panton P in **Harry Daley v R** concerning their determination as to what is relevant for the purposes of disclosure. They should make every possible effort to ensure that all material collected during the course of an investigation (covert or otherwise) and whether considered relevant or not should, as far as practicable, be retained or recorded in an appropriate manner for future production, if the need arises.

[94] The following passage taken from Archbold 2013 paragraph 12-50(a) under the heading, "*Material produced by the police in the course of an investigation"*, proves rather instructive in this regard:

> "The duty of the police to record and retain material and reveal it to the prosecution does not only relate to pre-existing material seized by the police; proper record-keeping in an investigation, even where the investigation involves intelligence and undercover work, is essential to enable the police to comply with the fundamental obligation of ensuring a fair trial by being able to account for the documentation created during the course of the investigation and by being in a position to produce material that undermines the prosecution's case or assists the defence: **R v Malook** [2011] 3 All ER 373."

Disposal of ground three

[95] In the final analysis, the issues pertaining to the devices and the audio recordings were issues relating to the credibility and reliability of the witnesses who

spoke to their creation, preservation, custody and production in court. The learned Resident Magistrate saw and heard those witnesses. Any question as to the reliability, credibility and the weight of their evidence was totally one for her in the exercise of her jury mind. Furthermore, the appellant was properly placed to rebut the accuracy of the conversations, as he was, indisputably, one of the participants in them. He never did so. Those were all matters that fell within the province of the learned Resident Magistrate for her ultimate consideration of his guilt or innocence.

[96] This court cannot interfere with the findings of the learned Resident Magistrate on the authenticity of the recordings, in the absence of a proper basis to do so. There is thus nothing presented to propel one to agree with the arguments advanced on behalf of the appellant that the learned Resident Magistrate erred in law in refusing the application for disclosure as she did. Her order has not resulted in any unfairness to the appellant in the preparation and conduct of his case at the trial. There cannot be said to be any miscarriage of justice as disclosure of such items as requested would not have affected the decision of the learned Resident Magistrate to convict the appellant. In other words, there is no possibility that there would have been a different outcome if disclosure were made. Contrary to what Mr Samuels had urged in this court, this case is distinguishable from the circumstances that obtained in **Harry Daley v R** and **Nickoy Grant v R**, in which failure to disclose certain documents (and deletion from audio recordings, in the case of **Harry Daley v R**) was seen by this court as constituting unfairness to each appellant in the preparation of his defence. There is no

such impact on the defence in the instant case. Ground three of the appeal, therefore, fails.

Grounds one and four

Whether verdict unreasonable and cannot be supported having regard to the evidence

[97] The appellant's complaint on combined grounds one and four is that the learned Resident Magistrate having found that Miss Heywood lied to the court on several issues and having said that credibility was central to the case was estopped from accepting her as a credible witness and ought to have acquitted the appellant on that basis. Accordingly, he argued, the verdict is unreasonable and cannot be supported having regard to the evidence.

[98] The learned Resident Magistrate did recognise that the resolution of the main issues in the case rested on credibility. She expressly declared that to be so in her findings of fact. The issues for resolution would have been delineated by reference to section 14(1)(a) of the Corruption Prevention Act under which the appellant was charged.

[99] In treating with the offence for which the appellant was charged, the learned Resident Magistrate was guided by the decision of this court in **DeWayne Williams v Regina** [2011] JMCA Crim 17. Phillips JA, at paragraph [40], in speaking of the section, stated:

> "On a review of the above authorities and on an examination of the specific section of the Act, it is clear that the words

> connote an offence once a public servant purposely does an act which the law forbids such as directly or indirectly requesting money or a benefit, such as a promise for himself or another to do or refrain from doing any act in the performance of his public function. In our view, the offence is made out, and the act of corruption occurs if the public servant only solicits the article, etc., for himself and to his advantage, to do some act in connection with the performance of his public functions, which in this case was the prosecution of the traffic offence."

[100] Given the applicable statutory provision and the case advanced by each side, the critical issue for determination, in the end, was a narrow one and that was whether the appellant had solicited $15,000.00 from Miss Heywood, directly or indirectly, to discontinue the traffic case for which she was summoned to attend court or was it money offered to him by Miss Heywood in the context of her wanting him to be her lover. The resolution of that issue revolved around the credibility of the appellant and Miss Heywood.

[101] After a thorough review and minute analysis of the evidence (which, of course, was not free of its own problems), the learned Resident Magistrate rejected the evidence of Miss Heywood on some matters and preferred the appellant's testimony in relation to them. She also rejected the appellant on some matters on which she accepted Miss Heywood. Such treatment of the evidence by the learned Resident Magistrate was, definitely, in keeping with her defined function as the tribunal of fact. She is authorized by law, in carrying out her role as the sole arbiter of the facts, to accept part of a witness' testimony and reject another part and to prefer the evidence of one witness to that of another, in part or in whole.

[102] Mr Samuels identified several areas in the evidence (amounting to 10) where, he said, the credibility of Miss Heywood was impeached. He pointed to matters on which she was either rejected, inconsistent or had admitted lying to the court. The issues identified by counsel on which Miss Heywood was rejected relate, basically, to whether there were talks of a sexual nature between the parties; whether she lured the appellant to Black River by a promise of sex on the day of the sting operation; whether they spoke on the phone several times; whether she went to the police youth club meeting with him; and whether the money had accidentally fallen in the appellant's car at the time of the sting operation.

[103] Counsel also noted one instance in the trial where the complainant admitted that she lied to the court and this was in relation to her response to a question concerning her work status or occupation. According to him, this evidence in which she admitted to have lied to the court shows that she is a self-confessed liar. In addition, she had agreed in cross-examination that she had not received a summons from Corporal Johnson but in her examination-in-chief, she had said she had received it. He argued, that the learned Resident Magistrate, in finding that the offence was proved, had accepted that Miss Heywood was served with the summons but had failed to show how she had resolved that inconsistency. He maintained that given the instances in which the credit of the witness was impeached, it is inconceivable in those circumstances that the learned Resident Magistrate could have found that the prosecution's case was proven beyond a reasonable doubt.

[104] Mrs Henry-Anderson submitted, in response, that the proposition advanced on behalf of the appellant would negate the law that has recognised that the credibility of a witness is divisible. She contended that it is open to the finder of fact to accept some parts of a witness' evidence and reject other parts. She relied on the Privy Council case, **Ashwood, Gruber and Williams v R** (1993) 43 WIR 294, to make the point that the key question would be the relevance of the impeached aspects of the witness' evidence to the main issues to be decided. I accept that argument.

[105] The ultimate question, therefore, is not whether the evidence of the witness was impeached but rather on what issues she was impeached and how those issues would have affected her overall credibility on the critical issues that were for determination by the learned Resident Magistrate. In applying the principle extracted from **Ashwood, Gruber and Williams v R** to this case, it may be said that the relevance to the main issue of those matters on which the witness was rejected would lie in the extent to which the rejection of her testimony, on the bases highlighted by Mr Samuels, undermined her credibility or threw doubt on her evidence on the critical issues to be resolved. Those issues would have been the solicitation of $15,000.00 and the purpose of the solicitation.

[106] The fundamental question, therefore, is whether in light of the rejection of Miss Heywood's testimony, it can be said that her evidence relating to the main issues was concocted, untruthful or doubtful. Those were all matters for the learned Resident Magistrate as the finder of fact in assessing the witness' credibility in the context of

ascertaining whether the charge was made out. She found that the witness spoke the truth on matters that concern the material issues that arose for her determination in the case.

[107] The learned Resident Magistrate found that the offence was made out on the evidence that she accepted as being credible and true from Miss Heywood. The question is whether this finding is supported by admissible evidence. The evidence before the learned Resident Magistrate in this regard will now be outlined. After the night when Miss Heywood was served the summons (serving of the summons was supported by the appellant in his evidence at page 78 of the record), she spoke to Damion Walker who told her something. She received a call from the appellant and spoke to him based on the conversation she had with Damion Walker. After she spoke to him, she contacted Constable Johnson. After she spoke to Constable Johnson, she called back the appellant on a number given to her by Damion Walker.

[108] In that conversation with the appellant, she asked him why he had told her that" Raymond wanted money which was untrue". She said the appellant told her that Constable Johnson wanted the money. She then said in evidence, which was not rejected by the learned Resident Magistrate:

> "We started talking as to when he was going to get the money. The sum of money discussed was $15,000 Mr Williams[sic] requested the $15,000. I understood that the $15,000 was to get me not to go to court as I was to leave the island before the court date. It was my understanding as well [as] we discussed it."

Miss Heywood then said:

> "I agreed to pay the money but not on the date that he asked me to. I told him the reason I couldn't pay then was that I was short on cash having just paid for surgery for my Mom... I had an option to choose between two dates given to me by accused, he said anytime after 5:00 pm. Nothing else was discussed."

[109] The witness was cross-examined and she maintained in response to counsel that the appellant did make arrangement with her for the case against her to be discontinued and that he agreed to accept money from her to cause that to happen. She reiterated that he had requested $15,000.00 from her personally although at one point she said that he had asked Damion for the money.

[110] On the evidence that was before the learned Resident Magistrate, it would have been established that the appellant did speak to Miss Heywood personally whether or not he had also spoken to Damion Walker. He requested a specific sum of $15,000.00 from her to cause discontinuance of the traffic case against her. The time for collection, being after 5:00 pm, was stipulated by him in conversation with her. The request by the appellant for the sum would have predated the sting operation and so it is not surprising or strange that there is no recording of the request. It is for that reason that Miss Heywood had said that the solicitation had already taken place before the audio recordings were done. There was evidence from Miss Heywood before the learned Resident Magistrate that there was a separate, distinct and independent request made by the appellant to her personally for a specific sum of $15,000.00. At no time in her

evidence did she say that the appellant had asked Damion for any specific sum of money, or more particularly, $15,000.00.

[111] Following the request for the $15,000.00 by the appellant, spoken to by Miss Heywood, the operation was arranged and conversations between Miss Heywood and the appellant were recorded. The Resident Magistrate listened to those recordings, the contents of which were not disputed, and in considering the issue whether the appellant corruptly solicited the $15,000.00, she paid regard to those recordings and concluded:

> "I find as a fact that the covert audio recordings factually and accurately captured the conversations between Ms Heywood and Mr. Williamson. In any event, Mr Williamson did not deny that it was his voice on these recordings. All the voice recordings are accepted for the truth of their contents."

[112] It is, indeed, imperative for present purposes to set out in some detail the contents of the recorded conversation between the parties at the time the meeting was being scheduled for the money to be paid. This conversation, the Resident Magistrate found to have lent credence to Miss Heywood's evidence of the solicitation of $15,000.00 by the appellant. In that recording, the witness told the appellant that he had to meet her at the time because she was going to Kingston that night and her drive was almost there. They had a discussion as to whether she was going to Santa Cruz to which she answered no. The following exchange subsequently took place:

[113] The appellant is referred to as 'A' and Miss Heywood as 'B'.

"B: …Yeah, if you can leave Santa Cruz now that would be good for me.

A: **A could leave before the next half an hour**
B: Next half an hour?

A: Eeh eh.
B: Awright, listen what happen, I have ten on me but the person that is, that is coming for me has the fifteen suh by di time you get, has the five suh by time yuh get there.

A: Eeh eh.
B: By time yuh get here the person will be here.

A: Okay.
B: Then I would have the fifteen ready.

A: Okay. So where yuh driving going to town?
B: Aah.

A: Wey yuh a drive go town?
B: We, we going, we going Junction to pick up somebody else.

A: Okay.
B: When we go Junction now we drive through Junction go Santa Cruz and that would be late in the night.

A: Eeh eh.
B: Hello.

A: Yeah. Yeah, I am wondering if yuh couldn't leave it with somebody in Black River.
B: Well my boyfriend is not in Black River, he's the only person I could leave it with. And I have to run. Because that's why I was telling you 2 o'clock today.

A: Eeh Eh. The half hour be too late?
B: No half hour won't be too late.

A: Okay, Good.
B: Suh as soon as yuh, yuh, yuh get in Black River, yuh let me direct yuh over the bridge okay. Cause its not

far over the bridge, you know where Cloggy's on the Beach is.

A: Not really but mi have some idea.
B: Yuh have an idea. It's a bit, it's a bit further down from Cloggy's on the Beach.

A: Awright, when mi leave out mi wi shout yuh.
B: Okay then.

A: Good."

[114] The contents of that conversation point reasonably and inescapably to a conclusion that there was prior talk between the parties about payment to the appellant of a specific sum of $15,000.00. It was clearly an arrangement for the appellant to collect from Miss Heywood that specific sum. The collection of the $15,000.00 from her was, obviously, part of a pre-arranged plan. It is clear that he had expected to be given that specific sum of money because he did not question Miss Heywood about the money or refused to accept it. There was nothing to indicate surprise at her gesture or objection to her offer of money, especially when one notes his defence that he told her he did not want money from her. He acknowledged everything she said about getting the money for him and indicated his willingness to pick it up from her. As the learned Resident Magistrate found on the basis of this conversation, "he did not disassociate himself from this then. He assented to each of her statements about money..." She then concluded, "he went to Las Vegas café ostensibly to receive both the money and the sexual favours and I do so find".

[115] What is also interesting is that the appellant had considered whether there was anyone in Black River with whom Miss Heywood could have left the money for him. This means, that if he did not have to meet her, he would not have minded not doing so. It is, indeed, unfathomable on the content and relatively formal tone of this conversation (that we have had the opportunity to listen) how the learned Resident Magistrate found that he had an intention to meet her for sex on that day. It also raises questions as to the veracity of his defence when he said they had agreed to meet for sex. If that were so, why would he need to consider having someone collect the money from her on his behalf in Black River?

[116] This recorded conversation rendered it implausible that sex was the motive and purpose behind the meeting that evening of the operation. There was, absolutely, no talk about promise of sex in that recording. Furthermore, Miss Heywood had indicated to him her plans to travel to Kingston with other persons who she told him would have been with her that afternoon. He raised no query about her having persons with her. That was the agreed context within which they were to meet in Black River. It was clearly an arrangement for the appellant to collect from Miss Heywood $15,000.00 in keeping with a prior discussion as to how much money she should give him, plain and simple. The conversation was, therefore, consistent with Miss Heywood's evidence regarding the solicitation of $15,000.00.

[117] In any event, the finding of the learned Resident Magistrate that the appellant intended to meet her for sex would have enured to the benefit of the appellant.

Despite that, she was not wrong to hold, on a totality of the evidence, that the meeting was to collect $15,000.00 from Miss Heywood in furtherance of his request to be paid that sum in order for the case against her to be discontinued. That was the critical finding of fact that would go in proof of the offence and not the fact that he intended to meet her for sex.

[118] So, whether the appellant had spoken to Damion Walker or not about money or that he and Miss Heywood had agreed to meet for sex on the day the appellant was apprehended, that would have been totally immaterial to the issue for resolution. There was evidence that on 19 March 2009, in a conversation between the appellant and Miss Heywood on the phone, he requested from her that specific sum of money as she stated. The recording was strong and compelling evidence in support of Miss Heywood's assertion that he had asked her for $15,000.00 having personally spoken to her about it and that he had arranged to meet her to collect it. The fact that the money had not reached his hands at the time of the operation is also immaterial to the charge.

[119] Against that background, Miss Heywood, despite all of what was rejected on her evidence or the fact that she admitted lying on a matter, was quite consistent in her explanation as to what the $15,000.00 was for, and that the appellant had requested it from her. On that critical and pivotal issue, the learned Resident Magistrate found that she was not lying. She, therefore, did not see the problems with Miss Heywood's

testimony as affecting her veracity on the elements that would go to proof of the offence for which the appellant was charged.

[120] The learned Resident Magistrate, therefore, concluded:

> "I find that it was proven that Mr. Williamson solicited money from Ms. Heywood as the ingredients of the offence have each been duly proven. The remaining issues which were raised by the defence have also been resolved on the evidence. The defendant was not before the court for accepting the proffered funds, he was tried for corruptly soliciting the said funds. The evidence of solicitation is found in the testimony of Ms. Heywood, the phone calls between them commencing with the first which he made on March 19, 2009, the day after the pair had met for the first time and their subsequent communication up to and at Las Vegas café on the date of the operation. I find as a fact that the defendant corruptly solicited $15,000.00 from Ms. Heywood while [being] a public servant to forbear from performing his public duty..."

She was entitled to arrive at such a finding on the evidence and in all the circumstances that the appellant corruptly solicited the $15,000.00 from Miss Heywood for the purpose alleged in the information on which he was charged. That finding was reasonable and supported by evidence that was for the learned Resident Magistrate to accept or reject. She accepted it as it was well within her power to do.

[121] Indeed, it was in the light of the weight of such evidence (Miss Heywood's and the audio recordings) that the learned Resident Magistrate rejected the appellant's evidence concerning the arrangement to pay money to him. The learned Resident Magistrate viewed his testimony concerning that matter as an embellishment and that it "smacks of insincerity". Such a treatment of his evidence was well within her purview

as judge of the fact with which this court ought not to interfere without a proper basis in law.

[122] The complaint concerning the learned Resident Magistrate's failure to show how she resolved the inconsistency on Miss Heywood's testimony concerning whether she had received the summons from Corporal Johnson cannot assist the appellant. Even though there might have been that inconsistency in her testimony, which the learned Resident Magistrate did not expressly demonstrate how she had resolved it, there was evidence from the appellant himself (page 78 of the record) and that of the witness on whose police statement he relied, Damion Walker, that Miss Heywood was issued with summons at the police station on the night she was taken there. This matter concerning the issuance of summons to her was not a disputed fact on which the inconsistency highlighted by Mr Samuels would have had a material bearing. There was ample evidence before the learned Resident Magistrate on which she could have properly found that the summons was issued. The inconsistency was, therefore, immaterial to proof of the offence for which the appellant was charged.

[123] The learned Resident Magistrate, having accepted Miss Heywood on the core issues, once she believed she spoke the truth, was entitled to convict the appellant on the evidence led by the prosecution because at the end of it all, the matters on which her credibility was impeached were peripheral to the core issues to be determined and, so, did not go to the root of the prosecution's case in relation to the offence for which the appellant was charged. The appellant has not managed to show this court that the

verdict is so against the weight of the evidence so as to be unreasonable and unsupportable: **Keith Pickersgill v R** RMCA No 28/2000, delivered 7 June 2001.

[124] The guiding principle, in treating with the findings of the learned Resident Magistrate in the face of a challenge that the verdict is unreasonable and unsupportable having regard to the evidence, was helpfully addressed by this court in **R v Joseph Lao** (1973) 12 JLR 1238. Henriques P, speaking on behalf of the court, noted in clear terms at page 1240:

> "Fortunately, there are principles which have been laid down which can guide us to resolve matters of this kind, and in particular, to deal with the ground of appeal which has been urged here, and they are to be found summarised in ROSS ON THE COURT OF CRIMINAL APPEAL, (1st edn.) at p. 88:
>
> > 'It is not sufficient to establish that if the evidence for the prosecution and defence, or the matters which tell for and against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal - that the verdict was against the weight of evidence - is not a sufficient ground. It does not go far enough to justify the interference of the court. The verdict must be so against the weight of the evidence as to be unreasonable or insupportable. Nor, where there is evidence to go to the jury, is it enough in itself that the judges after reading the evidence and hearing arguments upon it consider the case for the prosecution an extraordinary one or not a strong one or that the evidence as a whole presents some points of difficulty, or the members of the court feel some doubt whether, had they constituted the jury, they would have returned the same verdict, or think

> that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a court composed as a court of the appeal that such cases should practically be retried before the court. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury'."

[125] The foregoing dictum embodies the principles which guide this court in treating with the findings of fact of the learned Resident Magistrate in relation to grounds one and four of the appeal, albeit that their Lordships were dealing with a trial by jury. The same considerations apply to a judge sitting alone. The authorities are also clear that where it is a finding of fact that is involved, an appellate court should only set aside that verdict of a judge sitting alone where it is obviously, palpably, or plainly wrong. There is no basis on which this court could arrive at a conclusion that the learned Resident Magistrate was plainly wrong in her findings on the material issues in the case. In such circumstances, we ought properly to defer to her findings of facts as we would not be justified in finding that she had formed a wrong opinion on the material and admissible evidence (even if we would have arrived at a different conclusion) see **Watt (Thomas) v Thomas** [1947] AC 484).

[126] There is thus no basis on which this court could properly interfere with the verdict on the basis that it is unreasonable or cannot be supported by the evidence. Grounds one and four are, therefore, rejected as having no merit.

Ground five

The learned Resident Magistrate's treatment of Damion Walker's statements

[127] The appellant, in advancing ground five of his appeal, contended that the learned Resident Magistrate failed to assess the value of Damion Walker's statements and how they impacted on the case for the prosecution and for the defence. He maintained that had she done so, she ought to have concluded that the evidence did not amount to an offence as created by section 14(1)(a) of the Corruption Prevention Act.

[128] The submission of Mr Samuels was, among other things, that the evidence regarding solicitation by the appellant from Damion Walker was obtained by hearsay through the evidence of Miss Heywood. According to him, Damion Walker was the virtual complainant in this case because it was to him that the solicitation was made on the Crown's case.

[129] There is no merit in this contention of the appellant that the offence was not made out having regard to the evidence that was before the learned Resident Magistrate as established in the examination of grounds one and four above. The prosecution, through Mrs Henry-Anderson, has conceded that Miss Heywood did speak to conversations she had with Damion Walker to say that the appellant had asked him for money. At several points in her testimony, she did make reference to what Damion Walker told her which was, in fact, hearsay. Also, Damion Walker's statements, on

which the appellant relied, did not mention anything supporting that assertion of Miss Heywood.

[130] The learned Resident Magistrate, however, did not find the offence having been made out on the evidence of any original or initial solicitation from Damion Walker but rather on evidence of solicitation from Miss Heywood as was alleged in the information on which the appellant was charged. She had ample evidence, other than the hearsay evidence, to have arrived at that conclusion and she expressly stated them in her findings of facts (see paragraph [114] above). Her conclusion as to the guilt of the appellant was not influenced by any hearsay evidence relating to solicitation from Damion Walker as demonstrated in her reasoning and her findings of fact. She found direct solicitation from Miss Heywood.

[131] It was also argued that the learned Resident Magistrate erred when she concluded that there was talk of money between Damion Walker and the appellant on "March 19, 2009, the very next day" when there was no such evidence. There was, indeed, no direct evidence of this fact and it seems that it was an inference that the learned Resident Magistrate had drawn based on Miss Heywood's hearsay evidence or from a response to a suggestion put to her in cross-examination that there was no discussion between Damion Walker and the appellant about money to which she responded that there was. The inference may have been improperly drawn but it did not go to the core of the prosecution's case because at the end of the day, the learned Resident Magistrate did accept that there was solicitation from Miss Heywood,

personally. Therefore, she had placed no reliance in her findings of fact as to the guilt of the appellant for the offence charged on any matter that related to Damion Walker.

[132] I would conclude, that the error on the part of the learned Resident Magistrate, in treating with the hearsay evidence involving Damion Walker, is not fatal to the conviction of the appellant in the light of the compelling evidence of direct solicitation from Miss Heywood. Regrettably, ground five of the appeal also fails.

Conclusion

[133] The appellant, in my view, has failed on all the grounds of appeal filed and argued. Accordingly, there is no basis on which the verdict of the learned Resident Magistrate may properly be disturbed. The conviction, should, therefore stand.

Sentence

[134] In relation to sentence, Mr Samuels did not argue any ground relating to the sentence of four months imprisonment. Given all the circumstances and the nature of the offence, the sentence cannot be held to be manifestly excessive. There is thus no basis to disturb the sentence.

Disposal of the appeal

[135] I would, therefore, dismiss the appeal and order that the conviction and sentence of four months imprisonment at hard labour be affirmed. The appellant has been on bail, so the sentence should commence immediately upon determination of his appeal, which would be 1 May 2015.

SINCLAIR-HAYNES JA (AG) (DISSENTING)

[136] Constable Willard Williamson's position as law enforcer transformed to one of accused as a consequence of a fateful traffic spot check. On 18 March 2009 Constables Williamson (appellant) and Raymond Johnson stopped Miss Mikisha Heywood (complainant) while she was driving a motor car along the Whitehouse main road in the parish of Westmoreland. She recognized Constable Johnson as a friend. Miss Heywood was not a licensed driver neither was the motor car insured.

[137] She was taken to the Whitehouse Police Station where a summons was written by Constable Johnson in the office. What should have been a mere mundane act of the handing over a summons has transformed into a tale of intrigue and lasciviousness.

Crown's case

[138] Miss Heywood's evidence was that she was assured by Constable Johnson at the station that it would be well and she needed not worry. She however alleged that Constable Williamson subsequently asked her for the sum of $15,000.00 to avoid prosecution so that she would not have to attend court because she was due to leave the island on the day she was to attend court.

[139] She complained to the Anti Corruption Branch ("ACB") of the Jamaica Constabulary Force and a trap was set for Constable Williamson. A plan was hatched whereby Ms Heywood was to lure the unsuspecting appellant to the Las Vegas Café in St Elizabeth. A covert audio recording device was placed on her. The bait was the $15,000.00 which, on the Crown's case, he swallowed hook, line and sinker.

[140] The appellant was arrested and charged for the following offence as conversations between Miss Heywood and him regarding money, were recorded:

> "Being a public servant to wit a member of the Jamaica Constabulary Force corruptly solicited $15,000.00 from Miss Mikisha Heywood being a gift for himself for omitting to do an act in the performance of his duties to wit the discontinuance of court proceedings instituted against the said Mikisha Heywood in the Savanna-La-Mar Resident Magistrate's Court for driving without a licence and driving without motor vehicle insurance contrary to section 14 (1)(a) of the Corruption Prevention Act."

[141] Section 14 (1) (a) of the Corruption Prevention Act reads:

> "14(1) A public servant commits an act of corruption if he—
> (a) corruptly solicits or accepts, whether directly or indirectly, any article or money or other benefit, being a gift, favour, promise or advantage for himself or another person for doing any act or omitting to do any act in the performance of his public functions;…"

He was tried and found guilty of the said offence by Her Honour Mrs Sonya Wint- Blair who sentenced him to a term of four months imprisonment. He has appealed against his conviction .

The appellant's version

[142] The appellant is insistent that at no time did he request money from the complainant to avoid her attending court. He said that she offered him money ("a change") to have an affair with him. He protested and she told him that she supported her men. According to him the meeting at the Las Vegas Café was a tryst for sex.

The evidence

[143] It is necessary to give an overview of the evidence so that the findings of the learned Resident Magistrate can be appreciated in context.

The complainant's evidence

[144] Miss Heywood testified that whilst she was at the station her boyfriend, Damion Walker ("Damion"), who owned the car, attended the station. The appellant however instructed Constable Johnson to detain the car overnight. She told the court that Damion returned to the station early the following morning. She remained at home. Damion spoke to her on the telephone after he left the station. She subsequently received a telephone call from the appellant. She knew it was the appellant because he identified himself and because of the conversation she had had with Damion. Also, the person on the telephone knew what had transpired the night before. After the call she spoke to Constable Johnson. Corporal Davien Hinds, the officer who was responsible for the recordings, was interposed at that juncture.

[145] Upon resumption of her evidence in chief, it was her evidence that she received a call from the appellant. The conversation was about meeting him with money "to throw away the case". She said he told her it was Constable Johnson who wanted the money. She told the court that she spoke to Constable Johnson. She went home and called the appellant on her cell phone and he answered. She had obtained his number from Damion. She asked him why he told her that it was Constable Johnson who

wanted the money and it was not true. They spoke about when he would get the money. The sum he requested was $15,000.00. That sum was, to quote her:

> "To get me not to go to court as I was to leave the island before the court date… It was my understanding as well as we discussed it. "

[146] She told the court that she agreed to pay him the money but she was unable to pay it on the date he asked her to because she was short on cash having just paid for surgery for her mother. She could not recall the date she should have paid the money but she remembered that on the date that she wanted to pay, he told her he did not work on that day. He gave her the option to choose between two dates after 5:00 pm. Her evidence is that nothing else was discussed.

[147] Her evidence is that on Monday, 6 April 2009 at 10:00 am, they agreed to meet the following day, Tuesday. She was unable to meet him. She tried calling him but was unsuccessful. She then called the police line 311 and enquired what she should do. She was transferred to the ACB. She received a telephone call. After that call she spoke to the appellant by way of telephone. She could not recall who initiated the call. That call was to determine the place at which the $15,000.00 was to be handed over. She could not recall the date which was fixed for the meeting but they agreed to meet at Las Vegas Café.

[148] She testified that they exchanged phone calls and she gave him directions to the café. During the conversation, she told him that she only had $10,000.00, but her brother would bring the balance by the time the appellant reached the location. She

and Detective Sergeant Clifford Cameron of the ACB however arranged a sting operation and she was fitted with the recording device. She was given $10,000.00 in 1,000.00 dollar bills which were marked, to give to the appellant.

[149] It was agreed that upon handing the money to the appellant, she would give an agreed signal which was to scratch her forehead. She testified that the appellant arrived as planned. She stood by his car speaking to him while he sat inside it. She however accidentally scratched her forehead and the notes accidentally spilled into the car. The ACB officers swooped down on the appellant at that time.

Corporal Davien Hinds' evidence

[150] Corporal Hinds testified that he met with Miss Heywood and Detective Sergeant Cameron. He removed the SIM card from the complainant's cellular phone (cell phone) and placed it into a cell phone which belonged to the ACB which was capable of recording telephone conversations (ACB phone). He satisfied himself that that phone was in good working condition. The complainant gave him a number which was dialed on the ACB phone. She was given certain instructions and the cell phone was activated. She spoke on the ACB phone for sometime before returning it to him.

[151] Corporal Hinds deactivated the recording. He then played the conversation that was recorded to the ACB cell phone. She acknowledged that the conversation was that which she had with the appellant. It is important to scrutinize the evidence in relation to that call.

[152] Counsel for the appellant posed the following questions to Corporal Hinds in relation to that call:

> "Question: That call was not burnt to the CD?
>
> Answer: Can't recall I said that the call wasn't relevant.
>
> Question: The number you dialed and gave the complainant to speak was not a call burnt to the CD?
>
> Answer: Can't recall."

[153] Under cross-examination, Miss Heywood said:

> "I spoke to him on cell phone, conversation not recorded by cell phone.
>
> Question: What was conversation recorded by?
>
> Answer: A device given to me by ACB which I don't wish to mention."

[154] Corporal Hinds admitted stating in his statement that after he placed her SIM card in the ACB phone which was capable of recording conversations, he dialed a number. That number was the appellant's number. He also agreed that he stated in his statement that sometime after "she dialed back" the number and spoke to the appellant. It was his evidence that those two conversations were burnt to the CD.

[155] It was his further evidence that a covert recording device was affixed to her and she was given certain instructions. She dialed a number and spoke on the ACB telephone. The conversation was again played to her and she acknowledged it as the conversation she had with the appellant. The complainant then left his vehicle. He

held his video recorder in a position for recording. A grey Toyota Caldina arrived. He activated the recorder and recorded the entire proceedings. On the termination of the operation, he met with the complainant and deactivated the recording device. He removed the SIM card from the ACB phone which was capable of recording conversations and returned her SIM card. He kept the ACB recordable phone and the covert recording device and the video recorder in his possession.

[156] After the operation, he returned to his office and downloaded the recordings from the ACB phone to a computer assigned to him. The recordings were burnt to a compact disk (CD). He compared the recordings and satisfied himself that they were the same. He then deleted the original recording from the ACB phone and the computer because both had limited space and he was satisfied that they had been burnt unto the CD. He played back the recording to the complainant as each recording ended. He made an original CD (master copy). That copy was the first CD he burnt. He labeled and sealed that CD with the exhibit seal and affixed his signature. He then made two working copies.

[157] Under cross-examination, he agreed that the ACB phone had a media card. He said the ACB phone also had storage capacity separate from the media card but its storage capacity for conversations was very limited. The media card also allowed storage of conversations but its storage capacity was limited.

[158] It was also his evidence that after he down-loaded the recordings he made transcripts. He agreed that he described the background in one of the transcripts as a

noisy and inaudible recording. He was not aware whether his computer had software capable of editing or deleting the audio or video recordings captured. He then said that to his knowledge it did not. He told the court that to his knowledge he had no software on that computer that was capable of editing, altering, or changing any programme or recording. It was also his evidence that he had heard about applications which can be downloaded to computers which can edit or delete any audio or video downloaded to computers but he had never used them. It was suggested to him that he was not being truthful when he said he has never used any of those applications.

[159] It was his evidence that he was instructed not to produce the equipment as disclosure would jeopardize future operations. He testified that the ACB phone was used on daily operations. It was one of their covert devices so its production would jeopardize future operation as the operations would no longer be covert. Police officers Detective Corporal Troy Daure, Detective Sergeant Clifford Cameron and Detective Corporal Conroy Garriques also testified about the sting operation. However their evidence is not material to this appeal.

Appellant's evidence

[160] Constable Williamson's evidence was that the complainant was taken to the station on the evening of the traffic stop. About half an hour later two gentlemen, in a motor car arrived at the station while he was seated on its verandah. One of the men spoke to him. This man was later identified as Damion. He asked Damion whether the car was his. They spoke and then he, Damion went to the processing officer. He was

not involved in the processing. He instructed Constable Johnson to call the Negril Police Station.

[161] The following morning the complainant returned to the station between 8:30 and 9:00 am. She caught his eye and beckoned to him. She inquired if Constable Johnson was there and he told her he was not. She asked if he would return that day and he told her he would but did not know when. He responded to a call.

[162] The complainant wore a tongue ring and he asked what its purpose was. She told him something of a sexual nature. The conversation, he said, was sexually intense so they walked into the station yard and stood under an almond tree where the conversation continued for 'quite a while'. She pressed his stomach and said:

> "You stomach flat eeh? You go gym? You look like you a work out man."

[163] He told her he did not; he was just a slim person. He tried to ease her hand off '*but she became more forceful*". He told her he was in uniform so she could not do what she was doing. She asked him if he did not want '*to feel how she used the tongue ring'.* They spoke for about 20 minutes and exchanged telephone numbers. She left the station. They spoke on the telephone about a day or two after. She called him and said:

> "Mr Williams, Constable Johnson take me fe fool because no money no write pon de ticket when him gimme and I don't want to go to court because I will be leaving the island before the court date."

He explained to her it was not a ticket but a summons and that: *"she would have to go to court and [be] at the mercy of the judge".* He told her if she did not attend, the judge would issue a warrant for her arrest and maybe he would be the one to arrest her.

[164] He told the court that a couple days later she called and inquired where he was. He told her he was at the station and she told him she was in Whitehouse and asked if she could '*check*' him. She visited him at the station. Again they stood under the almond tree and engaged in a long, sexually charged conversation.

[165] They met in the town of Whitehouse and she hugged him tightly. They went into Ucal's bar and had drinks which were paid for by his friend named Patrick. He invited her to the Whitehouse Police Youth Club of which he was the president and she promised to attend the following Sunday.

[166] After the meeting ended he saw her outside. He hugged her and asked her where she had been why he was just seeing her. She told him that she arrived late but she still wanted to see him. While they spoke, one of the club members handed him some books. That club member was Darlon Rutherford and he supported the appellant's evidence that he saw the complainant on the premises of the Police Youth Club with the appellant in 2009. She had attended high school with him and he had known her for seven years. He said that he was surprised to see her there.

[167] The appellant's evidence was that they (he and the complainant) spoke and hugged. He offered to take her to a particular place but she told him she could not go there because she knew the people who worked there. He heard from her again the Friday before the Las Vegas incident.

[168] Damion did not testify at the trial. The court was informed that he had migrated. He had however given the police two statements in respect of the matter. The appellant was allowed to tender into evidence his two statements pursuant to section 31D(c) of the Evidence Act. Damion's first statement says that the day Miss Heywood was arrested he went to the station. The appellant who was seated on the verandah inquired who he was. He identified himself and the appellant explained to him that the complainant was in big trouble and asked if he knew the consequences of driving without a driver's license.

[169] He, Damion , asked the appellant to explain and the appellant told him she could end up paying a big fine in court depending on the mood of the court. He, the appellant, asked the other officer whether they should call Negril Police Station or if they should give her a summons. The complainant was given a summons. The appellant instructed the policeman to keep the car and its keys until the following day. The following morning he returned for them. He saw Constable Johnson who was attending to someone. A man whom he did not know took the keys from Constable Johnson and handed them to him and he left the station.

The learned Resident Magistrate's findings

[170] The learned Resident Magistrate considered credibility to have been paramount. She also dealt with the issues of disclosure and solicitation. I will first examine the learned Resident Magistrate's findings on the issue of credibility. Her ruling on the other issues will be dealt with later. The learned Resident Magistrate said:

> "53 Issue-Credibility
>
> This was the central issue. There was no dispute that the parties had met and had had discussions on several occasions. It is the content of these discussions which I have considered. The prosecution's case was based primarily on the evidence of Ms. Heywood. In assessing her demeanour I found that she was an extraordinarily difficult witness, she was curt, aggressive and often appeared inebriated. She was also very intelligent and articulate. There was open hostility between herself and the defendant. I accepted her evidence that she had met Mr. Williamson and had spoken with him about money to have her traffic court case not placed before the court. I rejected her evidence that they did not have many telephone conversations and accepted Mr. Williamson's evidence on this point as it accords with the flow of the events which took place.
>
> 54. I find that Ms. Heywood did not seek to resile from her position that she did not want a court case. She was quite prepared to do what she had to do to this end. She embarked upon a plan to use her feminine wiles to get Mr. Williamson to pay attention. This fact is proven by Mr. Williamson's evidence in chief which I accept. Several of their discussions were sexually explicit in nature. She got Mr. Williamson to the Las Vegas Café with the promise of sexual favours as well as money. I did not accept her evidence that she had not met him at his youth club meeting. I find that she had met him there and accept Mr. Williamson's evidence and that of his witness that she had come to

the meeting. I find however, that this was simply to further her plan. Ms. Heywood played Mr. Williamson like a fiddle. Further, I rejected Ms. Heywood's evidence that the marked money accidentally fell onto the driver's seat of Mr. Williamson's car, it was the investigating officer's evidence in cross-examination which explained that she threw the money onto the seat. I find as a fact that she threw it there. I accepted her evidence otherwise as she had been forthright about her plan and her unimpressive demeanour did not diminish the veracity of her evidence. I find as a fact that her evidence was reliable."

Regarding the appellant's case, she said:

"59. I thoroughly reviewed the defendant's case and found that it raised an inconsistency in that his evidence in chief was that he spoke with Damion Walker on the morning of the traffic stop, March 18, 2009. He denied that he had spoken with him in cross-examination and he also tendered the statements of Damion Walker on his case which was admitted as exhibit 3a and 3b. Exhibit 3a says that he and the defendant had a conversation on that fateful morning.

60. There is also the matter of the defendant's evidence in chief which refers to several key matters not put to Ms Heywood.

- Such as how Ms. Heywood got his cellular number. She said it was from Damion Walker, it was not put to her that she got it from Mr. Williamson under the almond tree the next day.

- The defendant gave no evidence of Ms Heywood having a conversation with Cst. Johnson under the almond tree although that suggestion was put to her, which she denied. In fact on the defendant's case, Cst. Johnson was not at the station the morning after March 19, 2009.

- That the pair had a telephone conversation in which she said Cst Johnson took her for a fool as the ticket had no money written on them.

- That there was another conversation in which she begged him to talk to Cst Johnson which he said he would not do. She accused him of only wanting sex and and not wanting to help her.

- On the morning of the operation, in another telephone conversation, she told him she wanted to be rid of her boyfriend and have a thing with the defendant. He told her it could not be a relationship as he was married. She offered him a "change" which he refused it was then that they agreed to meet for sex and not for money.

- That on the day of the operation, just before the officers came out to apprehend the defendant, she said: "Mi tell you say me have some money fi gi yu. Mi ah go give you today." He responded: "Nicky nuh badda wid dat, you know mi nuh bout dat, how money come into play. Me should be giving you money, not you giving me money."

61. These matters not put to Ms Heywood tend to undermine the veracity and reliability of the evidence presented by the defendant. It smacks of insincerity as counsel appearing in the matter is experienced, senior counsel who is well versed in criminal trials. One of the purposes of cross-examination is not only to test the veracity of the witness but to put the case of the defendant to the witnesses. I find as a fact that as a matter of weight these matters could not have been uppermost in the defendant's mind, for they ought to have formed part of his instructions and been put to the witness. The inescapable inference is that the defendant considerably embellished his evidence in the witness box."

She later said:

"63. …I accepted his evidence that he had many meetings with Ms Heywood, these meetings were for him to collect on the promised sexual favours which had been the subject of many an enticing discussion both in person and on the telephone as I rejected her

evidence that these discussions did not take place. It was evident and it was open on the facts to find that Mr Williamson was using his masculine wiles if such a thing exists, to develop trust through their courtship by which her loyalty would be virtually assured.

64. I rejected his evidence that he told Ms Heywood that he was not into accepting money from her for these reasons. On the covert recordings at exhibits 1a and 2b, there is evidence she told him she had ten thousand dollars with her and someone would bring the other five thousand dollars, he did not disassociate himself from this then. He assented to each of her statement about money as indicated at paragraph 42. When she gave directions to meet her it was his evidence that this was for him to receive the long awaited sexual favours. It was open to me on the facts to find that the defendant went to the Las Vegas café ostensibly to receive both the money and the sexual favours and I do so find. In so far as he has denied the charge laid against him I rejected those aspects of his evidence. As this does not entitle me to return a verdict of guilty, I will now return to the prosecution's case for further review.

65. The prosecution's case was reviewed using an issue driven approach. Each ingredient of the offence was examined and the evidence presented in support of each ingredient set out. I find that it was proven that Mr Williamson solicited money from Ms Heywood as the ingredients of the offence have each been duly proven. The remaining issues which were raised by the defence have also been resolved on the evidence. The defendant was not before the court for accepting the proffered funds, he was tried for corruptly soliciting the said funds The evidence of solicitation is found in the testimony of Ms Heywood, the phone calls between them commencing with the first which he made on March 19, 2009, the day after the pair had met for the first time and their subsequent communication up to and at Las Vegas café on the date of the operation. I find as a fact that the defendant corruptly solicited $15,000.00 from Ms

Heywood while a public servant to forbear from performing his public duty."

Grounds of Appeal

[171] The appellant challenged the learned Resident Magistrate's findings by filing the following grounds of appeal:

"(1) Verdict is unreasonable and cannot be supported having regard to the evidence.

(2) The Learned trial Judge erred in failing to warn herself as to the caution needed in relying on evidence obtained by means of voice recognition as it was approved by the Privy Council in the case of *Donald Phipps v DPP and Attorney General of Jamaica* ([2010] JMCA Crim 48) and the foundation which must be laid to satisfy proof of identification by voice. She therefore wrongly admitted in evidence the alleged telephone conversation between the accused and the complainant on April 7, 2009.

(3) The Learned Trial Judge erred when she failed to grant disclosure to the Defence of (a) The recording capable cellular phone which was property of the Jamaica Constable Force's Anti-Corruption Branch (ACB), (b) The covert device used to record conversations, and (c) The original tape recordings. This resulted in a miscarriage of justice in that the defendant was deprived of an opportunity to properly conduct his defence at trial.

(4) The trial Judge having found that the complainant lied to the court on several issues and having said that credibility was the central issue in the case (paragraph 53 of the Findings), was estopped from accepting her as a credible witness and ought to have acquitted the accused on this basis.

(5) The Learned Trial Judge failed to assess the value of Damion Walker's statements and how it impacted on the case for the prosecution and the case for the defence. Had she done so, she ought to have concluded that the evidence did not amount to an offence as created by section 14 (1) (a) of the Corruption Prevention Act."

[172] Ground one was not pursued as an independent ground. It was subsumed with Ground four and Ground two was abandoned. Grounds one and four were therefore considered together. I will now consider those grounds.

Ground 1
Verdict is unreasonable and cannot be supported having regard to the evidence.

Ground 4
The learned trial Judge having found that the complainant lied to the court on several issues and having said that credibility was the central issue in the case (paragraph 53 of the findings), was estopped from accepting her as a credible witness and ought to have acquitted the accused on this basis.

Submissions by Mr Samuels

[173] Mr Samuels who appeared on behalf of the appellant submitted that it was inconceivable that the learned Resident Magistrate could have found that the prosecution had proven its case beyond a reasonable doubt in light of her correctly identifying the issue of credibility as being central to this case; and the 10 instances in which she found that the complainant's credit was impeached.

[174] He argued that it was not open for the learned Resident Magistrate to have concluded that the prosecution had proven its case to the requisite standard. He submitted that the cumulative effect of the lies told by the complainant makes a finding that the Crown has proven its case beyond a reasonable doubt, unreasonable.

[175] He submitted that this is essentially a one witness case and that witness (complainant) has declared herself to be a liar and was caught lying. The issue of

solicitation is inextricably bound up with money. Solicitation, he said, was crystallized on the prosecution's case by the meeting at Las Vegas. The meeting at Las Vegas is however tainted with unreliability as to the purpose of the meeting. The complainant lied about the purpose of the meeting. Her assertion that the meeting was in furtherance of the solicitation should have been disbelieved by the learned magistrate or should have left the magistrate in reasonable doubt.

Submissions by Mrs Henry Anderson

[176] Mrs Henry Anderson for the Crown submitted that credibility is divisible and it was open to the learned magistrate to reject portions of the complainant's evidence and find her credible on material issues. She relied on **Ashwood, Gruber and Williams v R** (1993) 43 WIR 294. She argued that the critical element is the acceptance of her evidence on the purpose for which the money was exchanged, that is for the complainant not to attend court. The magistrate was entitled to accept that the meeting was for the dual purpose of money and sex.

[177] She said that she was supported in her finding by the recording which supported the complainant on the main issue. The burden rests on the appellant to show that the verdict is unreasonable and cannot be supported by the evidence. She relies on section 14 of the Judicature (Appellate Jurisdiction) Act.

The learned Resident Magistrate's criticisms of the defence

[178] It is critical, before delving into an analysis of the evidence, to deal with the learned Resident Magistrate's criticism of the defence's case. Her finding of

inconsistency in the appellant's evidence as to whether he spoke with Damion the morning of the traffic stop was based upon a factual error. The learned magistrate's adverse conclusions as to the appellant's veracity were based upon a number of factual errors. The notes of evidence would seem to contradict many of these conclusions. For example, Miss Heywood was stopped at night, not morning(see pages 5 and 77 of the record of appeal).

[179] It was the appellant's evidence as aforesaid that he spoke with Damion on the night of the traffic stop. At no time under cross-examination did he deny speaking with Damion that night. The evidence under cross-examination was:

"Suggestion:	You called Damion Walker requesting money to drop case against complainant.
Answer:	I have no number for Damion Walker I did not call him. I only spoke to him the night of the Petersville incident.
Suggestion:	That night when you spoke to him you asked him for his number.
Answer:	I had no reason to ask him for his number I sent him to a traffic office."

[180] There is also no discrepancy between the appellant's evidence and Damion's witness statements. In his first statement to the police, he supported the appellant that he saw him on the verandah of the station and in respect of the nature of the conversation. In his second statement he sought to distinguish between Constable Johnson, the appellant and the person from whom he retrieved the keys the following

day. For clarity, it is important to quote those portions of the evidence. His witness statements read:

> The first:
>
> "On entering the compound of the White House [sic] Police Station, I saw a Police man sitting on the verandah of the station dressed in uniform and a young man whom I know as Mika's friend from White House [sic]…On entering the verandah the police man asked me who I was and I told him I am Mika's boyfriend and he said to me that she is in big trouble as well as me and if I knew what the consequence were, for driving without a drivers licence and I said I don't know and asked him to explain what that meant, and he said that if the case goes to court then maybe I would have to pay a lot of money and maybe if the Judge is in a good mood then I might pay less. After saying this to me he turned to the other Police man [sic] and asked if we should call Negril Police Station or Savanna lamar Police Station or if he should give her a summons to go to court.
>
> The other police man [sic] gave her a summons on the instruction of Williams, then he was in the process of giving me back the car keys to my motor car but Williams said no, and told the Police man [sic] to keep they key until the other day and told me to come for the car tomorrow. Then Mika, my Brother and I left the Police Station at that point.
>
> …
>
> The next day I went back to the white House [sic] Police Station at approximately 7:00 – 7:30 am. The Police that was handing my car keys to me the evening before, saw me and told me to hold on and give him a minute as he was dealing with some other persons and a gentle man [sic] that was passing where he was, took my car keys from him and took them to me."

In his second statement, at page 116 of the record of proceedings, he said:

> "In furtherance to the statement that I gave on the 10th April 2009, I am now describing the Police man [sic] that I refer

> to as Williams, who I did not know prior to the incident and whom I saw sitting on a bench on the verandah."

It is plain from both statements that he spoke with the appellant on the day she was taken to the station. It is also manifest that on the following day when he retrieved the keys he did not see nor did he have any interaction with the appellant.

The learned magistrate's assertion that key matters were not put to the complainant

[181] The learned Resident Magistrate's criticism of the appellant's failure to suggest to Miss Heywood how she obtained his cell number, ("*she said it was from Damion Walker*") is without basis. The suggestion was in fact made to the complainant. At page 58 of the record the following suggestion was put to Miss Heywood:

> "After that conversation between yourself and complainant that you both exchanged telephone numbers."

She told him he was wrong.

[182] In any event, if the suggestion had not been put, the appropriate comment ought to have been the fact that Miss Heywood's evidence that she got the number from Damion was hearsay and therefore inadmissible. Further, the evidence, which she accepted, was essentially that a relationship developed between them whereby they were in discussion about sex both in person and on the telephone. It would therefore not have been difficult in the circumstances to see how she would have obtained his number.

[183] The learned magistrate's criticism below is contrary to the evidence. It reads:

> "The defendant gave no evidence of Ms. Heywood having a conversation with Cst. Johnson under the almond tree although the suggestion was put to her, which she denied. In fact on the defendant's case, Cst. Johnson was not at the station the morning after, March 19, 2009."

At page 58 of the record, in response to counsel's suggestion that they (the complainant and the appellant) moved out to the almond tree in front of the station, she said:

> "I went to almond tree with Constable Johnson not your client."

It was therefore the complainant's evidence that she went to the almond tree with Constable Johnson and not the appellant.

[184] It is also palpable from the dialogue below that it was never the appellant's case that she spoke with Constable Johnson under the almond tree.

> "Question: In earlier testimony you indicate giving [sic] back to Whitehouse police station morning after Petersville incident asking for Corporal Johnson?
>
> Answer: Yes for Corporal Raymond Johnson.
>
> …
>
> Question: Morning after you spoke with Johnson at station?
>
> Answer: The morning I saw him at the station, spoke to him personally.

Suggestion: Constable Johnson was not at station you came there March 19?"

[185] It is unclear whether her criticism *"[T]hat the pair had had a telephone conversation in which she said Cst. Johnson took her for a fool as the ticket had no money on it and he had explained that summons don't have money written on them"*, was that he had given no evidence on the matter or whether it was not suggested to her. In any event, either criticism would also have been unfounded.

[186] At page 53 of the record, the exchange between Miss Heywood and counsel was as follows:

"Question: Recall calling accused by cell phone and saying to him Constable Johnson take me fi fool because him no put no money on the ticket for me to pay?

Answer: That never occurred.

Question: Do you recall accused saying to you it's not a ticket, it's a summons and money is not written on summons?

Answer: No I don't recall.

Suggestion: You called accused and told him on phone Constable Johnson take you for fool because he did not put any money on ticket for you to pay.

Answer: I did not."

[187] The appellant also testified in examination in chief at page 79 of the record, that:

"I spoke with complainant on the phone about a day or two after. She called me and said: 'Mr Williams, Constable

> Johnson take me fe fool because no money write pon de ticket when him gimme and I don't want to go to court because I will be leaving the island before the court date'. I told her it wasn't a ticket but a summons. She would have to go to court and be at the mercy of the judge. If she don't go to court, the judge will have issued a warrant for her arrest and it could very well be me who come and arrest her."

[188] It is also unclear whether the following criticism was that it was not put to the witness or he gave no evidence on the matter:

> "There was another conversation in which she begged him to talk to Cst. Johnson which he said he would not do. She accused him of only wanting sex and not wanting to help her."

[189] At page 81 of the record, the appellant's evidence reads:

> "I heard from her the Friday before the operation, she called me on my cell phone sounding very annoyed and said,'Mr Williams, this b.c. thing stressing me out and I have to leave the island before the court date, can I ask you please sir, beg Constable Johnson.' I said, there's nothing can be done because she got the summons already and I couldn't even mention it to the policeman. She said in a hostile voice, 'you can help me, but yu nuh wah help me, a only me hole yu want and a talk bout.'"

[190] Under cross examination the following questions were put to her:

> "Question: While speaking to accused you asked him if he could beg Constable Johnson a chance for you?
>
> Answer: Hell no (kisses teeth) excuse me.
>
> Question: Accused told you once summons written you couldn't get chance?

Answer: I hadn't asked for any chance, I don't ask for chances…"

Had the learned Resident Magistrate directed herself correctly on these issues of fact, she could not have come to the conclusion that he was not a witness of truth; that his evidence "smacks of insincerity" and that the "inescapable inference is that the appellant considerably embellished his evidence in the witness box".

[191] It is true that the appellant failed to put to Miss Heywood that on the morning of the operation, in another telephone conversation, she told him she wanted to be rid of her boyfriend and have a thing with him. He told her it could not be a relationship as he was married. She offered him "a change" which he refused. It was then that they agreed to meet for sex and not money.

[192] It was also not put to Miss Heywood that on the day of the operation, just before the officers came out to apprehend the appellant, she said: "Me tell you say me have some money fi give you. Me a go give you today". He responded: "Nikki nuh badda wid dat, you know me nuh bout that, how money come into play. Me should be giving you money, not you giving me money".

[193] Although those matters about which he testified in his examination in chief were not put to the complainant, the learned magistrate ought to have examined the evidence in totality before rejecting his evidence. I find support for this view in the work of Adrian Keane in, **The Modern Law of Evidence**, 7th edition. At page 195, regarding the effect of a party's failure to cross-examine, he said:

> "A cross-examiner who wishes to suggest to the jury that the witness is not speaking the truth on a particular matter must lay a proper foundation by putting that matter to the witness so that he has an opportunity of giving any explanation which is open to him. The rule, however, is not absolute or inflexible. Thus if it is proposed to invite the jury to disbelieve a witness on a matter, it is not always necessary to put to him explicitly that he is lying, provided that the overall tenor of the cross-examination is designed to show that his account is incapable of belief. In other cases, as was acknowledged in *Browne v Dunn,* the story told by a witness may be so incredible that the matter upon which he is to be impeached is manifest, and in such circumstances it is unnecessary to waste time in putting questions to him upon it. The most effective cross-examination in such a situation would be, in the words of Lord Morris, 'to ask him to leave the box'. The rule has also been held to be unsuitable in the case of proceedings in the magistrates' courts. It could be argued that the rule should not apply in any criminal case, because there is no obligation on the accused to put his case by adducing evidence, but there is no authority to that effect."

[194] It is worthy of note that the appellant was extensively cross-examined on those allegations and her version was put to him. The magistrate should have considered the overall tenor of the evidence. Had she done so, before rejecting his evidence purely on the basis that it was not suggested and was a recent fabrication, she might have arrived at a different conclusion.

Was the verdict unreasonable in light of the complainant's' impugned credibility on certain issues?

[195] Under cross-examination Miss Heywood told the court that she returned to the station the following morning and asked for Constable Johnson because the appellant

had told her "*baby father Mr. Johnson was the one who wanted the money, that's why I took it there*".

[196] She agreed that the appellant did not tell her that Mr Johnson wanted the money. It was her baby's father (Damion) who told her. Counsel then asked her:

> "When you told court previously that accused told you Raymond wanted the money recall that?"

Her answer was:

> "Yes I did tell court, he told me but he told my baby father and it still reach me, doesn't really matter."

[197] Regarding the tongue ring, it is necessary to quote those portions of the evidence:

> "Question: You were wearing a tongue ring and you kept exposing to accused?
>
> Answer : Seriously, do I look disturbed, I'm talking now I'm sure you're seeing my tongue ring, I did not flaunt my tongue ring at your client, eeeww (laughing)
>
> Question: Accused and you engaged in conversation of several sexual nature.
>
> Answer: (Laughing) conversation accused and I had was about lesbians. He's an acquintance [sic] of my gay brother.
>
> Question: You told accused what you could do with your tongue ring with him.
>
> Answer: (Laughing.) Disagree, wow!

Question: You held accused in a certain way and he told you you could not do that because he's in uiform [sic]

Answer: You're so wrong."

She told counsel he '*was wrong'* when he suggested that they exchanged numbers. She denied holding him*.*

[198] She further testified that since April 2011 she was employed as an entertainment co-ordinator at Decameron Fun Caribbean in Runaway Bay but she was on leave. Prior to that, she did karaoke at Rum Face in Discovery Bay and Yah So Nice, Runaway Bay. She was asked whether she had worked as a bartender and karaoke singer before she worked at Decameron and her answer was no. It was put to her that at the commencement of her evidence she had told the court that she was living in Negril and that she was a bartender and karaoke singer. Her answer was, "*Karakoe [sic] yes, bartender no".* Counsel then asked her why she told the court something that was not correct. She bluntly stated. *"I just did".* When asked the reason for lying, she however said that she did not want to say exactly what she was doing. She said that although she lied unnecessarily to the court did not mean that she lied when it was convenient.

[199] On 23 July 2013, she was reminded that on 9 July 2013, she had told the court that she was on vacation from Decameron. Her answer was that she told the court that she had no intention of returning. It was put to her that Decameron had closed its door since 30 April 2013. It is important to quote her answers:

"I don't know if you recall when I said I got leave you wouldn't ask me that.....

Question: On last date you said you were on leave from Decameron Fun Caribbean, in Runaway Bay.

Answer: Yes I did.

Question: When did that leave commence?

Answer: August?

Question: Leave commenced August, 2013?

Answer: August, 2012.

Question: Your leave began in August 2012 how much leave did you get?

Answer: Eight Months.

Question: You started working with Decameron in April, 2011?

Answer: Yes.

Question: By August, 2012 you got eight months leave?

Answer: Yes.

Question: That eight months leave expired when?

Answer: I'm not in a maths class.

Question: When should the eight months leave have expired?

Answer: I cannot check to know when.

Question: Shouldn't you know that?

Answer: I didn't look at it to know when it would be up.

Question: On July 9, 2013 when you told court that you were on leave you lied?

Answer: I am not lying, do you have proof.

Question: When you told court in July 2013 that you were on leave from Decameron were you on leave at that time?

Answer: Yes I was.

Question: Do you agree even on your testimony you were on eight months leave which would expire April, 2013?

Answer: if I had no intention of returning there why would I keep back of them no I disagree, I did not agree to take you guys money not to come back to court.

Suggestion: On what you told the cour[t] your eight months leave would have expired April, 2013.

Answer: Disagree.

Suggestion: In July when you came to court and told you were on leave you lied.

Answer: I wasn't lying.

Suggestion: If you were working with Decameron would you have know [sic] they closed permanently April 30, 2013.

Answer: I told you before I had no intention of going back to Decameron so I wasn't following them up. I have a life outside of them.

Suggestion: You're not speaking truth.

Answer: If that's what's in your head.

Suggestion: You would never have gotten eight months leave.

Answer: If I wasn't dating the entertainment manager so any string could pull sir, she was a female."

[200] During her re-examination, she said:

> "I am bartender, coordinator all of them at a time when I said I did each. I may have lied as counsel said but I've done all of the above."

It was also her evidence that she is a certified cosmetologist but she said, "*It doesn't mean I was working in 2009 in the field".*

[201] Upon being asked which officer stopped her, she told the court it was the one in denim. (In her examination in chief she had told the court that the officer in denim was Constable Raymond Johnson). She was asked if she was sure. Her answer was, "*I would want to think so since I am a liar."* Later she said she could not recall who stopped her. It was her further evidence under cross-examination by counsel that, "*the policeman who was dressed in denim approached me and I realized that he was a person I knew before named Constable Johnson and his first name Raymond."*

[202] Her evidence regarding how the $10,000.00 came to be in the appellant's vehicle was at variance with the investigating officer's. It was her evidence that she accidentally gave the signal and the members of the ACB approached the vehicle while the money was still in her hand. As she was moving away from the closed driver's door to allow the appellant to get out, the appellant attempted to open the door. In the process of moving from the door, an "*accessory"* on her hand was caught in the door and the money fell on the driver's seat.

[203] The investigating officer, whose evidence the Resident Magistrate accepted, however said that she threw the money in the car. This of course means that the learned magistrate found that she lied on this score. Why did she? The learned Resident Magistrate failed, in light of her acceptance that the complainant lied, to demonstrate that she considered how the lies impacted the case.

The summons

[204] Miss Heywood initially agreed that she was given a summons and was charged by Constable Johnson. She later denied getting a summons. It was only after penetrating cross-examination that the complainant finally agreed that she was issued a summons. It is important to examine the complainant's evidence in this regard. According to her, the night she was taken to the station and whilst Damion was present, the appellant asked Damion if he knew the consequences of what happened that night and informed him that he could be fined a large sum.

[205] The appellant became irritated with Constable Johnson and told him he should either serve her a summons and send her home or call the Negril Police Station and inform them that they were taking a prisoner there. Constable Johnson then served her the summons. It was her evidence that Constable Johnson had written the summons in the office but had not given it to her.

[206] Constable Johnson gave Damion the car keys but the appellant asked him what he was doing and took it from him and told Damion to return the following morning.

She denied that she called the appellant and told him that Constable Johnson took her for a fool because he did not write the amount she was required to pay on the ticket. She could not recall whether the appellant had told her that it is a summons and not a ticket. She denied asking for a chance and that the appellant told her she could not get a chance once the ticket was written. She denied that she wanted to speak to Constable Johnson but was told by the appellant she could not because she had received a summons.

[207] She then declared that she did not get a summons and she could not have asked him do such a thing. She again asserted that Constable Johnson wrote the summons but did not give it to her. In fact she added that, "*I still haven't gotten one to this day*". She repeated that he wrote the summons but did not give it to her.

[208] Under the pressure of cross-examination, she became less assertive and told the court that she did not recall getting one. Eventually after being reminded that on 9 July 2013 her evidence was that Constable Johnson had given her a summons, she agreed. Why did she lie about getting the summons? Was it to fortify her case that the appellant never gave her the summons because he intended to drop the charge upon receipt of the $15,000.00? Whether she was issued a summons is indeed a central issue.

[209] He told her there was nothing that could be done because she had already gotten the summons and he could not even mention it to the policeman (Constable Johnson). She told him in a hostile voice*, "you can help me but yu nuh wah help me,*

only me hole you want and a talk bout". On Friday he saw seven missed calls. He spoke to her and she told him that she thought he was vexed with her because of the conversation on Friday.

[210] Damion, however, in his statement to the police, said whilst he was at the station on the night the complainant was taken to the station, the appellant asked Constable Johnson whether he should give the complainant "*a summons to go to court*." The appellant instructed him to give her a summons and she was given a summons.

[211] The questions which have arisen as to the reasons for the inconsistencies and discrepancy remain unanswered. Could it be that she was annoyed because of his failure to assist her, hence the report? Having found that credibility was the central issue, the learned Resident Magistrate failed to properly consider the impact of the conversations (which she accepted the complainant had with the appellant) on his defence.

[212] The complainant was a confessed liar. She lied on matters of relevance and matters which were seemingly irrelevant. The learned Resident Magistrate found her to have lied on the central issues, such as the purpose for the meeting. She found her to have lied about the relationship she had with the appellant and accepted the appellant's evidence in that regard. She found her lying in respect of her visit to the Police Youth Club.

[213] Crown counsel relied on the Privy Council decision of **Ashwood, Gruber and Williams v R** (1993) 43 WIR 294 in support of her contention that the learned Resident Magistrate was at liberty to dissect the complainant's credibility and accept portions of her evidence while rejecting others. Although it was within the purview of the magistrate to so do, she must nevertheless demonstrate that she appreciated the weakening effect or strengthening effect of the complainant's impugned evidence on the case. Such demonstration was crucial in the instant case in which the complainant lied on matters central to the charge, for example, whether or not she received the summons (which the Resident Magistrate failed to consider) and the purpose of the visit.

[214] This court had the opportunity of listening to the recordings. The complainant's tone was extremely formal. There was no mention of sex. Serious questions remain as to whether the money was for the purpose alleged by the appellant in light of the Resident Magistrate's acceptance of the appellant's evidence that there had been sexually explicit conversations, and that the purpose of the meeting was for sex.

[215] An explanation was critical considering her acceptance that the meeting was also for sex in light of the complainant's very formal tone and statements on the recordings. Is it that she believed that the formality of her tone was merely an act to persuade the police who were listening? The learned Resident Magistrate was obliged to explain her findings in respect of the complainant's formal tone and the absence of any statement on the recordings that the meeting was also for sex. Such an explanation was also

critical to demonstrate that she appreciated the elements of section 14(1)(a) that is, corruptly soliciting or accepting money for omitting to do an act in the performance of his public function, especially given the absence of any such statement on the recording.

[216] The Resident Magistrate found that the complainant threw the money into the car. Did she consider why she would have thrown the money in the car instead of it falling from her hands as she testified? That question is critical in light of the learned Resident Magistrate's findings that the complainant, "Ms*. Heywood did not seek to resile from her position that she did not want a court case. She was quite prepared to do what she had to do to this end".* Indeed the learned magistrate found that "*she played [him] like a fiddle."*

[217] The learned Resident Magistrate having held the view that she was prepared to do anything in furtherance of her desire not to attend court was obliged to consider the impact of those negative findings on the her veracity. She ought to have demonstrated that she indeed did.

[218] Further, her lies in respect of the summons were not adequately dealt with by the learned Resident Magistrate. The learned Resident Magistrate ought to have considered her evidence in that regard in relation to the appellant's evidence that the Friday before the operation they had a conversation in which she was begging him to speak to Constable Johnson and he told her he could not because she had already received the summons. Bearing in mind that the learned Resident Magistrate did not

reject the appellant's evidence that they had those conversations, it was incumbent on her to demonstrate that she considered the impact of those conversations, that is the one on Friday and the conversation on Monday in which the complainant inquired of the appellant if he was upset with her.

[219] More was required from the Resident Magistrate than a mere statement that, "*I accepted her evidence otherwise as she had been forthright about her plan and her unimpressive demeanor did not diminish the veracity of her evidence. I find as a fact that her evidence was reliable".* The only evidence "otherwise" was that the accused solicited a bribe from her and her evidence in that regard was also undermined.

[220] Although the issue of solicitation will be considered under ground five, it is nevertheless necessary to examine her treatment of the discrepancy between Damion's statements and the complainant's evidence at this point. The police took two statements from Damion relating to the issue of solicitation. In neither of those two statements was there any mention of the appellant asking for any money. The learned Resident Magistrate noted that the complainant admitted under cross-examination that the appellant never asked her for money; it was Damion whom he asked.

[221] The learned Resident Magistrate was informed that Damion had migrated. The appellant was allowed to tender his statements into evidence pursuant to section 31D(c) of the Evidence Act. The statements were therefore evidence. She disallowed the appellant from relying on the statement to impeach the veracity of the complainant's evidence that he asked Damion for money. The absence of any such

conversation from Damion's statement was a material discrepancy which went to the root of the Crown's case. The learned Resident Magistrate ought to have considered not only the impact of the discrepancy on the credibility of the complainant, but also the cumulative effect of the inconsistencies and discrepancies in the Crown's case. Interestingly, she relied on the complainant's evidence regarding those 'hearsay' conversations. Henriques P in **R v Joseph Lao** (1973) 12 JLR 1238 pointed out that, in order for this ground to succeed, the verdict must be so against the weight of the evidence as to be unreasonable or unsupportable. Her findings that certain matters were either not put to the complainant or not given in evidence in chief were erroneous and unsupported by the evidence. The inference which she drew from unsupported findings that he "considerably embellished his evidence" was certainly against the weight of the evidence.

[222] Regarding Mr Samuels' complaint at ground four, ought the learned magistrate to have accepted Miss Heywood as a credible witness having found that credibility was the central issue? The pertinent questions, in my view are:

(a) had the learned Resident Magistrate not made factual errors which affected her conclusions;

(b) had she properly considered the relevant issues; and

(c) had she considered what weakening effect, if any, the lies had on the complainant's credit, would she have arrived at a different finding?

I therefore hold that there is merit in these grounds.

[223] I turn to consider ground three.

Ground 3

> **The learned trial judge erred when she failed to grant disclosure to the defence of:**
>
> **(a) The recording capable cellular phone which was the property of the Jamaica Constable Force's Anti-Corruption Branch (ACB);**
>
> **(b) The covert device used to record conversations; and**
>
> **(c) The original recordings. This resulted in a miscarriage of justice in that the defendant was deprived of an opportunity to properly conduct his defence at trial.**

Failure to disclose

[224] The appellant complained that the Crown had not produced:

(a) the cellular telephone;

(b) the original tape recording; and

(c) the covert device

Application at the trial by counsel for the appellant to produce the devices

[225] Defence counsel at the trial applied to have the witness, Corporal Hinds produce the cell phone and the ancillary devices used in the original recording. He submitted that on Constable Hinds' evidence, a recording device and cell phone were utilized and should be made available for examination by the defence. In the absence of the cell

phone and recording device, only the say so of the witness would be before the court. The defence's ability to cross-examine would be affected and the defence would be severely prejudiced without the ability to inspect the devices.

Crown's response

[226] The Crown resisted the application on the ground that disclosure was not in the public interest as it could compromise future investigations. At that juncture the court required of the defence and Crown answers to the following questions:

> "1. What is the precise reason defence wants to see the cell phone and covert device?
>
> 2. Would the defence be helped or hindered by production of the cell phone?
>
> 3. Precise grounds for resisting by the Crown.
>
> 4. Is there enough on the recording for a decision or is this a voir dire?"

[227] Cross-examination of the witness Hinds continued. The suggestion to the witness was that he tampered with the recordings. His response was that he deleted the recordings from the covert devices and computer because he felt satisfied that they had been burnt unto CD as both had limited storage capacity.

Questions which arose

[228] Three apposite questions arose for consideration. Was the court merely to accept the witness' assertion that the recordings were deleted? Should the court have relied on his word that the recordings were not tampered with? Should the court have

relied on his *ipse dixit* that the deletions were necessary because the devices lacked storage capacity?

[229] It is curious that Corporal Hinds recognized the necessity of the complainant verifying the accuracy of the recording. It was played back to her twice for her verification but that privilege was not afforded the appellant whose liberty was at stake.

[230] His (Corporal Hinds') evidence was that:

> "no other data was on the phone, upon completion of each operation the data is deleted after it's been transferred to a CD/DVD."

Similarly, data is deleted from the computer as it was his evidence that he deleted the recordings from the computer. How then could it affect other operations in light of his evidence that at the end of each operation the data is deleted from the devices? Matters which could affect national security would have been removed. There should therefore have been no need for concern.

Further submissions by counsel on behalf of Constable Williamson

[231] At the conclusion of the witness's evidence, counsel for the defendant, made the following submissions:

> (1) Counsel submitted to the learned Resident Magistrate that if the devices were not inspected, the court would be forced to rely on witnesses say so without having had an opportunity to examine

them. He submits that it was necessary to inspect the devices in order to:

(a) assist in cross-examination of the witness; and

(b) see if the instruments represent what the witness say they represent.

[232] The defence desired to inspect the devices in order to challenge the witness on the following:

(a) whether device recording capability was limited; and

(b) whether a device was without a media card;

[233] It was his further submission that the witness testified that one of the instrument's recording capacity was limited and one did not have a media card. The defence was unable to challenge this without the benefit of an inspection. He argued that without the benefit of inspection the witness becomes "the arbiter" of the issues as to his credibility and veracity. Additionally he submitted that no serial number was provided and nothing was marked. The defence, he argued would be unable to know if the correct telephone was brought.

[234] He contended that the duty to disclose at common law is determined by what is fair to the defendant. The prosecutor as a minister of justice is required to disclose all material which is of assistance to the defendant except which are not material matters and matters which are protected by public interest immunity.

[235] He argued that public interest immunity must be established by evidence. Reliance was placed on **R v Stephenson, R v Hulse and R v Whitney** [1971]1 WLR 1, [1971] 1 All ER 678, for that proposition. He further submitted that production of the devices for inspection could be done in camera.

The Crown's response

[236] Crown counsel admitted that on the Crown's case, there has been erasure of the portions of the conversation which the officer determined was not relevant. The issue, she argued, is whether it was within his ambit to determine whether that portion was relevant. The Crown however resisted the application for the following reasons:

(a) It is not within public interest as it may reveal secret methods of police investigation which may compromise future investigation.

(b) The devices from which the product is generated are not required by law to prove authenticity.

(c) The eye witness who spoke to custody of the items is sufficient.

(d) Even if the devices are relevant and of assistance to the defence, the court must enquire whether they attract protection and are covered by public interest immunity

(e) The Crown questioned the value to be derived from the disclosure of the devices, may or may not have been compromised as they are used daily in investigations.

(f) Sufficient account can be given by witnesses of truth that the recording devices "came about" in a lawful manner.

The learned magistrate's ruling

[237] The learned magistrate ruled thus:

> "A person charged with having committed a criminal offence should receive a fair trial. The right to a fair trial is one exercised within the framework of the criminal law and its administration. It is the role of the prosecuting counsel to act in criminal matters as a minister of justice and not to obtain a conviction at all costs. *Randall v R [2002] UKPC 19, (2002) W.L.R. 2237 at paragraph 10.* Defence counsel pursuant to the Canons of Professional Ethics at Canon V(m),(o) must not lead evidence known to be false and fairness dictates that the prosecution must disclose the material in its possession in accordance with the principles long established by *Linton Berry* v *R.*
>
> In a case where the public interest engaged is the effective investigation and prosecution of serious crime, which may involve resort to the use of scientific or operational techniques which cannot be disclosed without exposing individuals to risk of personal injury or jeopardizing success of future operations; some derogation from the rule of full disclosure may be justified. This derogation will be the minimum necessary to protect the public interest and must never imperil the overall fairness of the trial.
>
> In this case the prosecution has disclosed the relevant recordings and evidence has been led as to the chain of custody and how these recordings came into existence. The defence has not been prejudiced in that they have the relevant material in hand, it having been disclosed. I have nothing before me to suggest that the defence will suffer any prejudice if the covert devices are not produced as disclosure of the recordings has been made. The defence has not shown that the production of the devices will be probative when the prejudicial effect on the public interest is considered. The devices shall not be produced, the evidence of Det. Cpl. Hinds will be weighed at the

> appropriate time. That weighing cannot take place within the body of the trial.
>
> They [defence] have also not shown that the devices are relevant and of potential assistance to the defence. The devices or the computer used by Crpl Hinds have not been demonstrated by authorities cited nor legislation presented to be required to be produced in court to prove the authenticity of the recordings complained of. The evidence of the witness as to custody suffices."

The CDs of voice recordings were accordingly tendered into evidence.

Submissions by Mr Samuels on the behalf of the appellant

[238] Mr Samuels submitted that the appellant's complaint is not that he did not speak to her on the phone. The only issue is that it was not the complete text. He said the test to be applied in determining whether the devices were to be disclosed is the same for the cellular phone and the recordings but different from that to be applied in considering whether to disclose the covert device. In respect of the covert device, public interest was not a consideration. It was his submission that the appellant was entitled to the best available evidence nearest to the original (first generation) which was the covert device which was attached to her but he was provided with neither the first, second generation (cell phone) nor the third generation (the computer). He was instead provided with the fourth generation (the CD).

[239] The device for recording conversations was loaded on to a computer which became second generation. It was then loaded on to a CD (third generation). Copies of that CD were then made. He submitted that the third generation was played in court

and the appellant was given the fourth generation. He questioned how the second and third generation came about.

[240] It is his submission that the police was a part of the prosecution and it was their duty to disclose. It was improper, he submitted, for the police to delete the original recordings. The police alone made the comparisons and determined what was to be deleted from the original (best evidence). Disclosure of the cellular phone and computer were necessary to determine their storage capacity and whether any portion of the recording ought to have been returned. For that proposition, he relied on **Harry Daley v R** [2013] JMCA Crim 14, **Nickoy Grant v R** [2013] JMCA Crim 30, **R v Linton Berry** (1992) 29 JLR 206, **R v Robert Bidwell** (1991) 28 JLR 293 at 297 and **R v Ward** [1993] 2 All ER 577. He submitted that the Crown provided insufficient evidence that disclosure would jeopardize future operations.

Mrs Henry Anderson response on behalf of the Crown

[241] Mrs Henry Anderson submitted that at the heart of the matter is what is to be disclosed. She directed the court to the Privy Council case of **Bonnett Taylor v The Queen** [2013] UKPC 8.

[242] According to her, the appellant was in a better position than most defendants because he had at his disposal the opportunity to rigorously cross examine the maker of the recordings. The recordings were played to the complainant. She ensured that what was played was what transpired. She contended that the evidence of the chain of custody was before the Resident Magistrate and the recordings were played in court.

[243] She argued that it was questionable how disclosure of the devices would assist in determining that the recordings were not authentic. She used the analogy of photographer's evidence. The photographer, she contended, has only to testify about/as to the procedure he employed in arriving at the photograph. According to her it was sufficient that the complainant identified her voice on the tapes and gave the context in which she spoke. For that proposition she cited the case **Kajala v Noble** (1982) 75 Cr App R 149.

[244] According to her, it was not enough for the defence to challenge the recordings and assert that statements were taken out of context. It was for him to point out breaks in the conversation and any other complaints he may have had but he failed to do so. It was her further contention that the appellant failed to point to the probative value to be derived from disclosure of the devices. He failed to state what would be gained from disclosure.

[245] She submitted that the non disclosure of the original devices did not render the trial unfair because the complainant's evidence was available to the court for cross examination by the appellant's attorney to deal with the central issue before the court as it pertained to the recordings. Nothing prevented the appellant from properly presenting his defence. She drew the court's attention to the dicta at paragraph 13 of **Bonnett Taylor**.

[246] For the court to determine that non disclosure is material, she submitted that it must determine the impact which such disclosure will have. She said that the appellant has failed to do so. She submitted that the cases **Nickoy Grant** and **Harry Daley** are distinguishable from the instant case.

[247] According to her, the appellant is on a fishing expedition. The verdict of the court ought not to be disturbed to allow a fishing expedition. She pointed to paragraph 20 of **Bonnett Taylor** for that proposition. Nothing on the face of the evidence, she argued, supports the claim that the recordings are not authentic. It was only the appellant's evidence and counsel's submission which contradict its authenticity.

[248] No evidence has been led that any item would have assisted to prove that the recordings were not authentic. The court only has the submissions of counsel and suggestions that were put to the witness but no evidence. The reason the money was handed over was not put to the witness.

Law/Analysis

Public Interest Immunity

[249] The Crown's claim of public interest immunity for failing to disclose deserves careful examination. What were the circumstances under which it was in the interest of the public to withhold certain information from an accused? In **Ward** the court regarded as obvious examples, "*matters of national security, or disclosing the identity of an informant".*

[250] It was made plain in **Ward**, that in criminal cases where the liberty of the accused is at stake, a balancing act is required to be carried out by the magistrate in determining whether non disclosure is desirable to preserve the public interest or the interest of justice. The Court of Appeal expressed that '*very great weight'* is to be attached to the interests of justice.

[251] The following questions now arise for consideration; did the learned magistrate engage in the requisite balancing act? If the answer is in the affirmative, were the scales justly balanced? Apart from asserting that future investigations could be compromised, no cogent evidence was given as to how such investigations would be compromised.

[252] The court was provided with no forensic evidence as to the type of cell phone or the type of computer nor was any evidence provided as to their actual storage capacity. Surely such information could not jeopardize future operations. Apart from his mere assertion, Corporal Hinds provided no evidence or proper evidence to justify this claim. More information was required to satisfy the court that future operations would be jeopardized.

[253] Corporal Hinds' evidence is that the covert device which was affixed to the complainant is still used by ACB so he could not reveal "anymore". Regarding the cell phone, he said it was used on daily operations as one of their covert devices. If it were to be produced, future operations would be jeopardized. It is useful to quote him:

> "I was advised not to produce equipment in court as it would jeopardize future operations…That particular cell is used on daily operations it is one of our covert devices and if I am to produce that device it will jeopardize future operations. It will no longer be covert."

[254] It is understandable that exposure of the covert device which was affixed to the complainant might jeopardize further operations. There was however no evidence that the cell phone is peculiar in any way which exposure would then be inimical to future operations. It seems to me that more was required than the mere assertion that the cell phone was used daily and would therefore jeopardize future operations. In order for the scale to tip in favour of withholding disclosure, more evidence of a cogent nature was required in light of the requirement expressed in **Ward** that "*very great weight"* is to be attached to interests of justice. In light of the paucity of evidence provided by the witness, it cannot be said that the learned Resident Magistrate balanced the scales justly.

[255] The reasons advanced by Corporal Hinds for not disclosing the cell phone and computer are spurious. Lord Frazer's statement in **Air Canada and others v Secretary of State for Trade and another (No 2)** [1983] 1 All ER 910 that: "[p]ublic interest immunity is not a privilege which may be waived by the Crown or by any party" was quoted with approval by Gildewell LJ in **Ward**. The Crown was under a duty to provide the court with evidence as to how future operations would be jeopardized.

[256] The complainant's evidence at page 63 of the record is that after the device was fitted to her, she called the appellant. That call was not recorded by the cell phone. It was recorded by the device that was fitted to her. On Corporal Hinds' evidence, that call was transferred to the computer, burnt unto CD and then deleted from the computer. Under cross-examination Miss Heywood testified that the recording she listened to in court, she did not hear the accused ask for any money. It is illuminating to quote that portion of the evidence which speaks to that issue:

> "Question: Are you saying it was discussed on recording but you haven't heard it?
>
> Answer: <u>You will recall the recordings gave a lot of trouble. I do believe it's on the recordings.</u>
>
> Question: The recordings you listened to in court did you hear accused ask you for any money?
>
> Answer: We were way past that before recording started."

The questions which flow naturally from her answers are: could it be that the first call which was captured by the covert device, transferred eventually to CD and deleted from the computer, dealt with the purpose for the money? Were those portions supportive of the appellant? These questions are live and relevant in light of the defence that the recordings are not the full text. Her assertion that he also solicited money on the phone but that the recording gave a lot of trouble cannot be ignored in light of the appellant's complaint that it was tampered with.

[257] The Crown was under a duty to disclose all relevant material. All recordings in this case were relevant and therefore disclosable. The deletion of the recording from the cell phone and the computer were also irregular. The process was entirely under the control of Corporal Hinds. It cannot be acceptable that the court is to rely on his say so without more. According to him, the deletions were made because of limited storage capacity and their relevance. The defence was denied the opportunity of examining the devices. Even more troubling was his unilateral determination as to what was relevant.

[258] The strictures of Panton P in **Harry Daley** resolve this issue. At paragraph [53] of the decision he said:

> "Earlier, mention was made of the fact that the defence has sought disclosure of the devices used for recording the conversations. This was denied and is the source of complaint before us. We do not see the need to rule on whether such disclosure ought to have been made, given the view that we take of the process. There is an admission that there have been deletions and omissions in respect of the recordings and transcriptions that were put in evidence. We are of the view that where recordings are made and are being relied on to prove a case, the entire recordings and the context are to be placed before the court for a determination to be made by the court on the question of relevance. It is not a matter for the investigator to determine."

[259] The Crown has not provided any good or sufficient reason for not disclosing the cell phone and the computer. Their failure to disclose the cell phone and the computer therefore constituted an irregularity. The issue is whether the irregularity is material. If

it is, the appeal must be allowed. If however the failure to disclose does not result in a miscarriage of justice, the verdict of guilt can be upheld - see **Ward**.

[260] Before considering whether a miscarriage of justice has resulted, this is a convenient juncture to examine the authorities upon which the Crown relied to refute Mr Samuel's submission regarding best evidence. Heavy reliance was placed on **Kajala v Noble** [1982] 75 Cr App R 149, **R v Lynden Levy et al** SCCA Nos 152, 155, 156, 157 and 158/1999 delivered 16 May 2002 and **Taylor v Chief Constable of Cheshire** (1987) Cr App R 191 and [1987] 1 All ER 225. It was held in those cases that the court admits relevant evidence. The common thread was identification. I am of the view that those authorities are distinguishable. In **Kajala v Noble**, the issue was also identification. A group of youths had hurled missiles at the police. The appellant was identified by a witness who saw him on a BBC news report. It was however the policy of the BBC not to part with its original films. The defendant appealed on the ground that the original film existed and the prosecution was not entitled to rely on secondary evidence.

[261] In **R v Lynden Levy et al**, a video tape was made by the accused men who were found guilty of raping two young girls. The issue in that case was the identification of the accused. It was noteworthy that the video was made by the accused men. In **Taylor v Chief Constable of Cheshire**, the face of a man who was stealing from a shop was caught on video. His identification was the issue. Before the

trial it was discovered that the recording had been accidentally erased. The copy was allowed in evidence.

[262] Crown counsel's reliance on those cases in support of her proposition that the Crown in the instant case was under no obligation to provide the original was in my view misconceived. The pith and substance of the appellant's complaint was that the recordings were tampered with. In **R v Lynden Levy et al**, Smith JA (Ag), as he then was, cited the following passage from **R v Alexander Nikolovski** (1996) 3 SCR which strikes at the heart of the defence's complaint and addresses the issue.

> "… Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent testimonial evidence as well. It can and should be used by a trier of fact in determining whether - a crime has been committed, and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional unbiased and accurate witness who has complete and instant recall of events. It may provide some strong and convincing evidence that of itself will demonstrate clearly either the 'innocence or guilt of the accused'."

[263] It should be noted that in **Kajala v Noble**, Akner LJ in delivering the decision of the court observed at page 153:

> "However, no attack was made upon the integrity of the film in the sense that it had, by cutting, distorted the activities of the appellant. In such circumstances it is irrelevant that the film might not have shown the events in their true sequence, so long as the film accurately showed the activities of the defendant."

That observation is an important one in distinguishing the instant case in which the appellant attacks the integrity of the recordings. He alleged that the recordings were tampered with, that is, deletions of the recordings from the cell phone and the computer.

Whether miscarriage of justice has resulted

[264] Mrs Henry Anderson submitted that the cases **Nickoy Grant** and **Harry Daley** are distinguishable from the instant case as the appellant had ample opportunity to cross-examine Constable Hinds whereas in **Nickoy Grant** and **Harry Daley** the appellants did not. It is necessary to examine the facts of those cases.

[265] The facts of **Nickoy Grant** were somewhat distinguishable in that it concerned the non disclosure of a medical certificate. The existence of the said certificate was unknown to the applicant and he was not afforded an opportunity to cross-examine at his trial. The applicant was convicted of inflicting grievous bodily harm to the complainant on 14 March 2012. It was the witness' evidence that as a result of the injury he had completely lost vision in his left eye. No medical certificate was made available to the applicant or court. The Crown, however, had known more than a year before the trial commenced that that had existed.

[266] It was only when the matter reached the Court of Appeal that fresh evidence was adduced and a medical report came to light. The medical report revealed that the complainant in fact, had some vision in the eye. The applicant's mother had deposed

before he was sentenced that she had overheard the complainant saying that he was able to see from the eye.

[267] Lawrence- Beswick JA (Ag) at paragraphs [36] and [48] said:

> "…Here the applicant was deprived of an opportunity to properly cross-examine the complainant using all the pertinent medical evidence. A skilful cross- examiner would have been able to explore the complainant's account to expose such inconsistencies regarding his injuries as there may be."

At paragraph [48] she continued:

> "…He should know the entire case which the prosecution intends to mount against him before he prepares and presents his defence."

[268] The facts of **Harry Daley** bear much resemblance to the appellant's. In **Harry Daley** portions of the recording were deleted. The remaining portion spoke to payment of money to the complainant but there was no mention of purpose. Harry Daley was a superintendent of police. He was charged under the Corruption Prevention Act. The particulars of the charge were almost identical to that of the appellant. He was charged with corruptly accepting the sum of $15,000.00 from one Tafari Clarke "*for doing an act in the performance of his public function to wit; to offer protection to Tafari Clarke and his premises which were under threat by one 'Terry'*."

[269] In Harry Daley's case, documents were removed from his house. There was no Justice of the Peace present nor was there any representative of the appellant present during the search and the removal of the documents from his house. Mr Daley's

defence was that the former owner of the premises, who was deceased, was indebted to him. His indebtedness was reduced into writing and was witnessed by a Justice of the Peace. Mr Daley also alleged that other documents which pertained to the loan transaction were also kept at his house. It is also important to note that police made no note of the documents which were removed.

[270] The complainant had alleged that Mr Daley was extorting money from him to provide protection for the plaza. These conversations were taped. There were conversations about money but none mentioned, like the instant case, the purpose, that is, payment of protection money. The Crown also denied Mr Daley's application for disclosure of the recording devices.

[271] It is true that the appellant in the instant case was afforded the opportunity to cross–examine the witness. Mr Thompson however failed to take full advantage of the opportunity as he felt that the devices should have been tendered. Apart from suggesting to the witness that the recordings were not the full text, he did not, and neither did the appellant, in his testimony point precisely to the sections which they complained were tampered with. There were no detailed suggestion and evidence led as to what were deleted and wherefrom. The following enunciations of Lord Hope in **Bonnett Taylor** at paragraph 13 of the decision are helpful:

> "…But, even if it was possible to say either that the prosecution was at fault for delaying its disclosure or that the appellant's counsel was at fault for not having made use of it, this would not be enough to justify a finding that there has been a miscarriage of justice. The focus must be on the

> impact which those failings had on the trial, and on the verdict that was pronounced at the end of it, rather than on attempting to assess the extent to which either the prosecution or defence counsel were at fault: *Teeluk v State of Trinidad and Tobago* [2005] UKPC 14, [2005] 1 WLR 2421, para 39, per Lord Carswell. The court must have material before it which will enable it to determine whether the conviction is unsafe. So the appellant must be able to show what effect Mrs. Hartley's evidence would have had if use had been made of it at the trial. It is not enough to engage in speculation. He must be able to show what she would have said if her statement had been disclosed in time for the case for the defence to be prepared thoroughly. Only then can the court judge what the response of the prosecution witnesses would be likely to have been if proper use had been made of it in cross-examination."

Was there a real possibility that disclosure of the cell phone and computer would have caused the Resident Magistrate to arrive at a different finding?

[272] In deciding whether a miscarriage of justice has resulted because of the prosecution's failure to disclose must be examined. In **Bonnett Taylor**, Lord Hope further said at paragraph 20:

> "…the relevant test was whether, after taking all the circumstances of the trial into account, there was a real possibility of a different outcome…The Board must ask itself whether Mrs Hartley's evidence, if given at the trial, might reasonably have affected the decision of the jury to convict."

[273] An examination of the transcripts of the recordings is necessary. The following are the transcripts of the recordings.

Voice recording between Mr Williamson and Miss Mikisha Heywood

> **"A: Willard Williamson**
> B. Mikisha Haywood

A: Eeh Eh.

B: Yuh seh yuh will be calling me in the next half an hour, what happen.

A: Yeah mi a call yuh now.

B: Oh, yuh calling mi now. Where are yuh now?

A: Black River.

B: You're in Black River?

A: Eeh eh.

B: You know where to walk come over the bridge, right.

A: Eeh!

B: Know where to walk come over the bridge, yuh know where to drive.

A: Eeh eh, eeh eh.

B: Awright, just come right over the bridge, yuh can't miss. You will see a big sign mark Las Vegas Café'. The sign, sign is situated on the ground like.

A: **Eeh, eh , eeh eh.**

B: Yes, yes. My brother will almost be here with the five thousand

A: Amm, awright, good.

B: Okay."

Voice Recording between Mr Williamson and Miss Mikisha Heywood

"A. Willard Williamson

B. Mikisha Haywood

A: Hello.

B: Mr. Williams.

A: Eeh eh.

B: Mikisha.

A: Eeh eh.

B: Yeah amm. Yuh leave outta Santa Cruz yet?

A: No. No.

B: But I need you to leave now because a, a have to go to Kingston tonight and my drive is almost here. I am over by the bridge, Las Vegas Cafe' Hello.

A: Eeh eh. Yeah. So yuh coming to Santa Cruz?

B: No I am not coming to Santa Cruz. A, a need you to come to me, Santa Cruz now or I don't know what yuh doing. Hello.

A: Yes, yes, yes.

B: Yeah, if you can leave Santa Cruz now that would be good for me.

A: **A could leave before the next half an hour**

B: Next half an hour?

A: Eeh eh.

B: Awright, listen what happen, I have ten on me but the person that is, that is coming for me has the fifteen suh by di time you get, has the five suh by time yuh get there.

A: Eeh eh.

B: By time yuh get here the person will be here.

A: Okay.

B: Then I would have the fifteen ready.

A: Okay. So where yuh driving going to town?

B: Aah.

A: Wey yuh a drive go town?

B: We, we going, we going Junction to pick up somebody else.

A: Okay.

B: When we go Junction now we drive through Junction go Santa Cruz and that would be late in the night.

A: Eeh eh.

B: Hello.

A: Yeah. Yeah, I am wondering if yuh couldn't leave it with somebody in Black River.

B: Well my boyfriend is not in Black River, he's the only person I could leave it with. And I have to run. Because that's why I was telling you 2 o'clock today.

A: Eeh Eh. The half hour be too late?

B: No half hour won't be too late.

A: Okay, Good.

B: Suh as soon as yuh, yuh, yuh get in Black River, yuh let me direct yuh over the bridge okay. Cause its not far over the bridge, you know where Cloggy's on the Beach is.

A: Not really but mi have some idea.

B: Yuh have an idea. It's a bit, it's a bit further down from Cloggy's on the Beach.

A: Awright, when mi leave out mi wi shout yuh.

B: Okay then.

A: Good.

B: Awright."

Voice Recording between Mr Williamson and Ms Mikisha Heywood

"A. Mikisha Heywood

B. Willard Williamson

A: **My name is Mikisha Heywood**
Today's date is April 7, 2009
The time is now 5:46 pm

(NOISY BACKGROUND INAUDIBLE)

2:40

A: (On the Phone) where are you, alright drive come right down and you will see me standing right at the road side.

4:20

A: Hello

A: Cameron, I am the only one here now

5:25

B: A wha kind a suite this?

A: Hmmm…, wha you mean by a wha kind a suit? Wha you mean by a wha kind a suit? Me brother nuh reach all now you nuh and him say him a come yah.

B: A who dem deh, a who fa car tha grey one deh

A: A who fa car? A me car cousin car, a him and him girl over yah

5:50

B: So who and who in deh?

A: Hmm…..?

B: Who and who in deh?

A: Who and who in deh? Nuh me cousin alone and him girlfriend and dem lesbian fren. We all are lesbians you know?

B: Hmmm……

A: We all are lesbians you know

B: So yuh cousin a man tho?

A: Duh

B: Oh you cousin a girl?

A: Me cousin a man

B: Oh

A: Him do him 3 sum an thing you know

B: Wah

A: Wha you mean by wha?

B: Then you really enjoy them sinting deh?

A: Of course

B: Better more than when you and somebody one?

A: Whatever

B: Huh?

A: Whatever

B: Huh?

A: Whatever

B: Mi nuh jus a ask you, because is not anything to do with me, because mi did have lesbian fren wah mi work wid at one point and time before me a police as all when me and them go out, mi would a seh yuh like tha chick deh?

6:53

A: Suh wah yuh a duh den, yuh a go work wid the ten and mek mi come check yuh wid the five or yuh check mi back fi the five wen mi com down tomorrow.

B: Suh weh yah go now?

A: Mi a go junction

B: Go do wha

A: Then me a go town

7:07

A: Me a pick up one girl a junction

B: You fi careful you know and mind them kill you, you know

A: mind them kill me fi wah?

B: Mind other girl get jealous over you and kill you

A: Oh

B: It nuh will happen? Eehh

A: Please

B: Eehhh

A: Please

B: It will happen sometime man, you nuh think so

7:29

B: **Mek that remain little**

We a chat, emm…..

Just like how woman kill woman over man and me hear say them jealous than if a man them have nuh true.

7:50

C: (Operation continues)
POLICE, alright easy, easy, ANTI-CORRUPTION, Don't Move!! (background noisy)"

Mr Williamson's explanation regarding the conversation about money

[274] The appellant testified that he saw about seven missed calls from Ms Heywood on the Friday. On the Monday before the operation he saw about seven missed calls from her. He called her and asked her what was happening and why she called him so many times that morning. She told him that she felt he was upset with her and she asked him if he still loved her. She told him she was stressed with her boyfriend because *"she a mind him and all him want is fi live inna mi hole referring to her private part."* She told him she could not wait to get rid of him so that they could "*have a thing*

together." He told her he could not have a relationship because he was married. Her response to his answer was, "*duh.*"

[275] Mr Williamson's evidence is that Ms Heywood told him that she had something for him. He asked her what it was and she told him it was a surprise. He insisted on being told but she told him he would see what it was when he came. The conversation followed thus:

> "I asked her if it was the hole she was talking about, she said all that too. She refers to her private part as her hole. She said I have that and might be more than that fi give you. She said 'alright Mr. Williamson me have a change fi give you.' I said, 'what for?' She said, 'You nuh know say a me mind my man. I said don't mention any change to me. I said to her where she get the money from to offer me, I'm not into that. If you are inviting me for de hole then we can meet.'"

[276] On Tuesday morning she called and again inquired if he was "*vex wid her*." He told her he was not. She told him that she was reminding him to "*check her later the same day*." He told her he would. She called him sometime in the afternoon and asked if he was coming and what time he would arrive. He told her he was going to work at six and would pass by before. She called him again in the afternoon and asked if he had left. She told him where she was. He did not know the place. They had many lengthy conversations whilst he was on his way to meet her.

[277] Upon her arrival, she came to the driver's seat of his car. He tried to exit the car in order to sit with her on a flat wall which was nearby. She stood at the door and said:

"*Nuh badda come out, stay inna de car*." He reclined the seat all the way and asked her if she was getting in and she told him she was not.

[278] She knelt by the window and they chatted about "man and woman story" for about 15 to 20 minutes. Then she said:

> "me telling you say me have one money fi gi you. Mi a go gi you today."

He told her:

> "Nicky nuh badda wid dat, you know mi nuh about dat, how money come into play me should be giving you money, not you giving me money."

Analysis

[279] The conversation recorded between the appellant and the complainant would appear damning. The conversation regarding money on the recording does not support his evidence that he rejected her offer. In fact his utterances on the recordings are at variance with his evidence. The statements on the recordings might be considered inculpatory and supportive of her version. The appellant should have, in the circumstances, advanced exculpatory evidence. Ample opportunity to state that which was deleted or what was taken out of the order which it was spoken, was afforded his attorney. He too, whilst he testified, could have explained the areas that he asserted were tampered with.

[280] His version of what transpired is not consistent with the recordings bearing in mind his acceptance of the content. His complaint is the context. He has not said that his voice was falsified. On the recording (which we had the opportunity to hear) he was

not heard telling her not to bother, he should be paying her. It is important to point out that a part of the recorded conversation took place after his arrival at Las Vegas. He was heard telling her to make that wait. There is, however, no recording of her offering him money at that point.

[281] Although the appellant did not point specifically to the areas he alleged were tampered with, it is not entirely correct to say that he provided no assistance in that regard. It was his evidence, as stated above, that she offered him money and stated the reason. He also testified that he refused to accept the money. He told her not to bother. The recording however has him saying; "*Mek that remain little, we a chat emmm".*

[282] It is interesting to note that Ms Heywood's evidence regarding what transpired upon his arrival regarding the money is also at variance with the recording. It was her evidence that whilst she stood at the car she asked him if he would allow her to take the additional $5000.00 to him at his work because her brother had not arrived. Those words are not on the recording. Were they said but were deleted accidentally in the process of deletions from the cell phone and computer or is she embellishing her evidence?

[283] A video recording was made by Corporal Hinds at Las Vegas. This video should have covered the period of the appellant's arrival to his arrest. The learned Resident Magistrate rejected that evidence as unreliable and not having,

> "captured the entire sting operation, for the evidence of Det Cpl Hinds indicates what the video does not depict. It did not assist the prosecution's case. I did not consider the video evidence reliable."

[284] That statement raises the following questions:

(1) Did the video evidence assist the defence?

(2) Were assertions made by Corporal Hinds at variance with what was captured by the video?

(3) How was the conclusion arrived at that the video was unreliable?

(4) In circumstances where the video evidence might have contradicted Corporal Hinds that is, "failed to depict" what was indicated by him, how did she treat with such evidence?

(5) Why was the video rejected?

[285] Answers to those questions could have aided in a determination of Corporal Hind's credibility and the likelihood or not of him having tampered with the recordings. It was especially important that the learned Resident Magistrate explained further her reason for excluding the video in light of the enunciations made by the majority in the Canadian case **R v Alexander Nikolovski** (1996) 3 SCR which was relied upon by the court in **Lynden Levy**. The court held:

> "Courts have recognized the importance and usefulness of videotapes in the search for truth in criminal trials as this type can serve to establish innocence just as surely and effectively as it may establish guilt. A video camera records accurately all that it perceives and it is precisely because videotape evidence can present such clear and convincing evidence of identification that triers of fact can use it as the

> sole basis for the identification of the accused before them as the perpetrator of the crime."

The question which remains unanswered is in what way what was captured on the video conflicted with the evidence of Corporal Hinds and whether it conflicted with or supported the appellant's evidence.

[286] The court was afforded the opportunity of listening to the recordings. The complainant's tone was formal and gave no indication that the meeting could have been more than for the purpose she alleged. The appellant told the court that the complainant sounded miserable on the phone. It should be borne in mind that the complainant was in the presence and hearing of police officers whom she was seeking to convince that the money was to prevent her attending court.

[287] Notwithstanding the formal manner in which the complainant addressed the appellant on the phone, it is significant that the learned magistrate found the meeting was for the dual purpose of sex and collection of a bribe. It is not difficult to understand why she should have found that a purpose was for sex in spite of the formality of her tone and brevity of her words, in light of her acceptance of the appellant's evidence of their salacious conversations and meetings.

[288] Having found that the purpose was dual, she was making equal findings regarding the two positions. That is, the appellant's and the complainant's. She has not addressed why, in light of that, she has preferred the one version over the other. That is, the conversation being for a bribe as against an inducement for sex.

[289] In **R v Locksley Carol** (1990) 27 JLR 259, 265, Rowe P, emphasized the importance of judges sitting alone explaining how they treat with inconsistencies and discrepancies. He said:

> "In **Leroy Sawyers and Others v. The Queen** [1980] R.M.C.A. 74/80 (unreported), we endeavoured to give some of the practical reasons why a reasoned judgment was necessary. An accused person, we said, was entitled to know what facts were found against him and when there were discrepancies and inconsistencies in the evidence, just how the trial judge resolved them. We did not then refer to the public which has an equal interest in understanding the result of a trial so that it can have confidence in the trial process."

[290] Mrs Henry-Anderson submitted that the appellant's concern about the persons present was indicative of the fact that he knew he was about to commit an unlawful act. It is my view that his enquires do not point unequivocally to that conclusion. It must be remembered that he was a married man. Further, the evidence which was accepted by the learned Resident Magistrate was that they had the conversations and meeting regarding sex as he alleged. It was his evidence that he suggested going to a particular place and she declined because she told him she knew the person there. This statement could be considered against the background that she was in a relationship also.

[291] There are unanswered questions and areas of uncertainty regarding the deletions. The defence was also denied the opportunity to examine the computer and cell phone to determine whether indeed they lacked storage capacity as asserted by the witness. The call for inspection of those devices (cell phone and computer) cannot be

regarded as a fishing expedition. Trials ought to be conducted fairly. The prosecution cannot be allowed to make certain assertions and form certain conclusions regarding relevant evidence which it withholds from the defence and deprives it of the opportunity of testing the veracity of those assertions by examination of relevant material. That notwithstanding, the appellant has not demonstrated that there were deletions which have resulted in any miscarriage of justice.

[292] In the absence of any clear evidence of what, if any words were deleted, in spite of the foregoing the appellant has failed to demonstrate that his case has been undermined as a result of the Crown's failure to disclose. Even if the learned Resident Magistrate properly addressed those issues she could still reasonably have relied on the recordings. There is therefore no merit in this ground. This ground therefore fails.

The solicitation

[293] Regarding the issue of solicitation the learned Resident Magistrate said:

> "I find as a fact that the defendant corruptly solicited $15,000.00 from Ms Heywood while a public servant to forbear from performing his public duty."

[294] She dealt with the issue of solicitation thus:

> "44. I find as a fact that the defendant has not given…
>
> …
>
> I find as a fact that the defendant had begun to direct the proceedings in which Ms. Heywood was involved. He had taken a decision which ensured that Mr. Walker and or Ms. Heywood, their servants and or

agents would have had to return to his police station to retrieve the vehicle the next day. A day when the defendant would have commenced duties at 8:00am.

45. The next morning Damion left for the police station and Ms. Heywood who remained at home received a call from Damion then a call from Mr. Williamson on her cellular telephone. He identified himself, she recognized his voice and recounted the conversation with Damion and herself the previous night. She then called Raymond and asked him about the money requested by Mr. Williamson. She went home and called Mr. Williamson by cell phone, she had Mr. Williamson's number as she had been given the number by Damion. When she called Mr. Williamson answered and she asked him why he told her that Raymond wanted money which was untrue. Mr. Williamson responded that Raymond wanted the money. She said:

> 'The said sum of money discussed was $15,000. Mr. Williams requested the $15,000. I understood that the $15,000 was to get me not to go to court as I was to leave the island before the court date. It was my understanding as well as we discussed it'.

Ms. Heywood agreed to pay money but not on the agreed date, she recalled that on the date she wanted to make the payment, Mr. Williamson said he would not be at work on that day. She was given two dates to choose from, but it had to be after 5:00 pm, there was no other discussion."

[295] Mr Samuels sought and obtained permission to argue the following supplemental ground of appeal.

Ground 5

> **The Learned Trial Judge failed to assess the value of Damion Walker's statements and how it impacted on the case for the prosecution and the case for the defence. Had she done so, she ought to have concluded that the evidence did not amount to an offence as created by section 14(1)(A) of the Corruption Prevention Act.**

Submissions by Mr Samuels

[296] In support of that proposition counsel argued that the evidence regarding solicitation of the accused to Damion was obtained by hearsay through the witness Ms Heywood. He submitted it was Damion who ought to have been the virtual complainant since the solicitation was made to him.

[297] He argued that the trial judge erroneously stated in her findings that she would not rely on the statements of Damion which were tendered into evidence, yet she used the said statements to contradict the appellant. He submitted that she erred in accepting the complainant's evidence that Damion obtained the appellant's cell phone number in the absence of any evidence from his statements.

[298] He also argued that the deductions she made in her findings of fact, that the conversation between the accused and Damion supported a conclusion that Damion gave the accused his telephone number during that conversation was unsupported by fact.

[299] Mr Samuels also contends that statements were taken from Damion by the investigating officer pursuant to a case of solicitation. The prosecution was in

possession of those statements but did not disclose them. They were tendered by the defence by way of application under section 31D(a) of the Evidence Act. It was his submission that Ms Heywood's evidence was that she was given the appellant's number by Damion.

[300] The learned Resident Magistrate was under a duty to assess the witness' evidence and to state how she treated with the issue. It was incumbent on her to state whether she found that the evidence strengthened, weakened or destroyed the defence or prosecution's case. It was her duty to point out omissions favourable to the accused. The fact that Damion's statement mentions nothing about being given a number or having had any conversation with the appellant was damaging to prosecution's case.

[301] The learned Resident Magistrate did not rule on Ms Heywood's evidence that it was Damion who was given the appellant's number for her. She did not rule on the absence of any such assertion from the statement of Damion. Mr Samuels submitted that she ought to have ruled on the issue because it was a part of the Crown's case.

[302] He submitted that the evidence concerning how the phone number was obtained constituted hearsay. Further, he submitted that the said phone number was, on the Crown's case, obtained in furtherance of solicitation. There was no evidence of solicitation in Damion's statement. He submitted that inferences can only be drawn from proven facts and the learned Resident Magistrate relied on hearsay evidence to arrive at inferences. He said that the Crown's failure to disclose the statements

suggests that there was something to be hidden. He relied on the case of **R v H** [2004] 2 AC 134.

[303] He contended that the original solicitation was made to Damion who was not called by the prosecution. He submitted that Damion gave two statements to the police which the appellant obtained permission to have admitted into evidence. In none of the statements is there any mention of solicitation for $15,000.00 and those statements were taken pursuant to a case of solicitation from the accused.

[304] He further submitted that the appellant testified that he had conversations with the complainant which were sexually explicit and she told him she wanted to give him money because she looks after her companions. He submitted that it was the complainant who initiated the conversations about money. He submitted that inducement must be viewed in light of: the sting operation which involved an inducement for the accused to commit an offence; the appellant going along with a plan for sexual favours; and the complainant's introduction of money.

[305] In arriving at that finding the learned magistrate failed to assess the value of Damion's statements and how it impacted on the case for the defence. Had she done so, she ought to have concluded that the evidence did not amount to an offence as created by section 14(1)(A) of the Corruption Prevention Act.

Submissions on behalf of the Crown

[306] Mrs Henry Anderson submitted that the issue is whether Ms Heywood's evidence of the conversations with the accused constitutes, beyond a reasonable doubt, solicitation by the accused and there was ample evidence to support the findings of the learned magistrate. She submitted that the learned Resident Magistrate carefully assessed the credibility of the witness. She found that the witness was credible on the material issue and therefore was free to accept her evidence in that regard. The Resident Magistrate accepted her as credible on the issue of the purpose for which the money was exchanged between them. The judge preferred her evidence regarding the purpose. In para 164 of her finding, the judge said she was supported by the recording. The learned Resident Magistrate, she submitted, was entitled to arrive at her finding from the circumstantial evidence.

Learned Resident Magistrate's analysis and treatment of the evidence

[307] It is of significance that the telephone call that brought her into dialogue with the appellant was obtained from Damion whose statements mentioned nothing about the appellant giving him his telephone number or requesting Ms Heywood's. It is useful to quote the relevant portions of her evidence. At page 9 of the record she said:

> "Damion left from the police station. I remained at home. Damion called me. I received a call from Accused on my cell phone. He identified himself because of Damion and my conversation…. This was same Mr Williams because after our conversation on phone, I called Raymond and asked him about the money requested by Mr Williams."

At page 32 she testified that she spoke with Raymond on her cell phone. After speaking to him she went home and called Mr Williams and asked him how it was he had told her it was Raymond who wanted the money. They spoke about getting the money to Raymond. She said "the sum of money discussed was $15,000.00 … I understood that the $15,000.00 was to get me not to go to court as I was to leave the island before the court date".

Her evidence at page 52 of the record removes any doubt that she obtained his number from Damion.

> "Question: Where did you get accused's number from?
>
> Answer: He had given it to my friend/boyfriend who was owner of car, they had spoken, I got his number from the friend/boyfriend Damion Walker.
>
> Question: You got accused's number from Damion Walker?
>
> Answer: Yes."

That portion of the witness' evidence was not only hearsay and consequently inadmissible, but was not in Damion's statements.

[308] The learned magistrate found at that stage that the appellant and the complainant discussed money and a sum was fixed so that she would not have to attend court. It was open to the Resident Magistrate to accept that she had a telephone conversation with the appellant. The conversation was, however, premised on an inadmissible conversation which the complainant testified that Damion had with

the appellant. The learned Resident Magistrate ought however, to have demonstrated that she dealt with the following issues which arose:

> (a) the number was obtained from Damion;
>
> (b) there was no mention in his statement that he received any number from the appellant or had any conversation regarding money with him;
>
> (c) her evidence as to how she obtained the number was hearsay.

[309] Further, the complainant's evidence regarding solicitation is equivocal. She testified that the solicitation was made to Damion and at another point in her evidence she said it was to her. A finding as to whom solicitation was made to cannot be conclusive. Under cross examination she agreed that no solicitation was made to her. The learned Magistrate's treatment of this equivocation is unsatisfactory. Indeed her findings are inconsistent, inconclusive and confusing. The learned Resident Magistrate on the one hand found as a fact that:

> "Ms. Heywood's evidence in cross examination demonstrates clearly that there were discussions for payment between herself and Mr. Williamson. Her responses are set out as follows: She had admitted that she went to the Whitehouse police station after the incident at Petersville with money for Cst. Raymond Johnson because Mr. Williamson had said she should do so. She agreed with Mr. Williamson that she had attended the Whitehouse police station after the incident. She agreed that Mr. Williamson had told Damion Walker so and that she didn't want a court case so she took up the defendant's offer to keep the case out of court. '*I did not beg him to do anything until he had offered*,' was her response. She denied getting a summons from Cst. Johnson, he wrote it up but never gave it to her. She agreed when

> her evidence in chief was put to her that she had said she received a summons from Cst. Johnson."

[310] She continued immediately after those comments and findings by saying :

> "She agreed the defendant did not ask her for money, it was her baby father whom he had asked about the money but that she controlled the cash flow so it had to go through her. She agreed that the recordings played in court did not disclose her making an offer of $15,000 to keep her case out of court. The conversation was beyond that when the recording began, she explained. She did not agree that she had made an arrangement with the defendant to keep her case out of court…"

[311] Both statements are irreconcilable. The complainant's evidence was that there were discussions between her and the appellant for payment. Soon after she agreed that the defendant did not ask her for money but she controlled the cash flow so he had to go through her. The learned Resident Magistrate has not satisfactorily resolved this conflict. Her further summation and findings compounded the confusion. In disallowing the appellant from relying on Damion's statements in support of his contention that there was no solicitation, the learned Resident Magistrate said:

> "She agreed in cross-examination that the defendant did not ask her for money, it was her baby father whom he had asked about the money. In the statement of Damion Walker there is no mention of Mr. Williamson asking for money. The defendant cannot rely upon this portion of that statement as evidence that he had no conversation with Damion about money. For it was the defendant who tendered the statements of Damion Walker who was not available to attend the trial, they became Exhibits 3a and 3b."

[312] As aforesaid stated, both Damion's statements made no mention of any conversation about money. The statements were exhibits and therefore evidence which undermined the complainant's evidence.

[313] Having erroneously found as she did, she could therefore not give the statements the treatment they deserved by going on to show that the purpose for which the statements were tendered was to support the appellant's position that there was no solicitation made to Damion . This failure must be juxtaposed with the state of confusion regarding her finding *vis a vis* the solicitation made to the complainant herself.

[314] She however relied on Damion's statement to contradict the appellant evidence that:

> "the only encounter was on the station's verandah;
>
> He did not ask for Mr. Walker's cell phone number as he had no reason to;
>
> He did not give his cell phone number to Mr. Walker;
>
> He did not know if Mr. Walker had been charged."

[315] On his evidence, it is not that he denied having any conversation with Damion on the night the car was seized. His evidence, as aforesaid, was that he had no conversation with Damion the following day. The Resident Magistrate therefore misdirected herself when she concluded that:

> "This is an inconsistency on the defendant's case between his statement made in his evidence in chief and the evidence

> contained within the statements of Damion Walker. Damion Walker's statement exhibited as 3a indicates that he did have a conversation with the defendant on the early morning of the incident. The defendant's evidence in chief suggests that the court should either reject that portion of his evidence in chief or reject the statements of Damion Walker as both cannot be true. I reject the defendant's evidence in chief and I accept that he did have a conversation with Damion Walker on the morning of March 18, 2009 as set out in Exhibit 3a and supported by the evidence of Ms. Heywood which says there was indeed such a conversation, which led to her obtaining the defendant's cell phone number from Damion Walker. Damion Walker's statement says he did not get the keys from the defendant the next morning but from some other officers. The defendant had also given evidence that he was on duty again at 8:00 am that day."

Ms Heywood was taken to the station the night of 18 March not in the morning as stated by the learned magistrate. Her finding that she was taken there in the morning has apparently led to her being confused as to when the appellant and Damion spoke. It was both the appellant's and Damion's evidence that they spoke the night of the incident but not the morning Damion returned for his car.

[316] The confusion was further compounded by the inference she drew from unproven facts. She said:

> "I find as a fact that it was Ms. Heywood who gives an explanation for the inconsistency. She said that the defendant had given Damion Walker his cellular phone number and that they had had a talk about money. This was elicited from the cross-examination of Ms. Heywood. There is evidence then of two discussions by Mr. Williamson with Ms. Heywood, one with Mr. Williamson and Damion Walker and one with Ms Heywood and Cst. Johnson. I find as a fact that all these conversations were about money and all these conversations took place on March 19, 2009, the very next

> day. There is no evidence that either Ms. Heywood and/or Mr. Walker had had any prior dealings with these two policemen for there to have been so much to talk about."

[317] There is no evidence on Damion's statement that he had the conversation with the appellant as alleged by the complainant. The magistrate's conclusion that the complainant and Damion had had no "prior dealings with these two policemen for there to be so much to talk about", is entirely unsupported by the evidence. Damion's statement makes no mention of the appellant being at the station the morning he collected his car. On Damion's statement the conversation he had with Constable Johnson was certainly not protracted as he was busy. It is important to quote:

> "The next day I went back to the White House Police Station at approximately 7:00-7:30 am. The police that was handing my car keys to me the evening before, saw me and told me to hold on and give him a minute as he was dealing with some other persons and a gentleman that was passing where he was, took my car keys from him and took them to me."

[319] Although the complainant's evidence that she had a conversation with the appellant in which he requested money and the manner it was to be paid could constitute solicitation, the Magistrate's summation is in my respectful view, confusing as she proceeded to say:

> "I find that Ms. Heywood investigated Mr. Williamson's claim that Cst. Johnson wanted money from her. She did so by calling Cst. Johnson. She then called Mr. Williamson with a number given to her by Damion Walker. How he got Mr. Williamson's number has been explained as from the defendant directly. She confronted Mr. Williamson with his untruth about Cst. Johnson and it lead to a discussion about when, Mr. Williamson would receive the money. I find as a

> fact that this is a second indication that Mr. Williamson was directing the proceedings in which Ms. Heywood had become involved. The Corruption Prevention Act in section 14(1)(a) provides that "…any article or money or other benefit, being a gift, favour, promise or advantage may be for himself or another person..". (emphasis mine.) The section speaks for itself. I find that the defendant may have been acting either for his himself or on behalf of Cst. Johnson or both, it mattered not."

She continued at paragraph 49 to draw inferences from unproven facts. She said:

> "I find as a fact that the defendant had spoken to Damion Walker first and then had telephoned Ms Heywood telling her Constable Johnson wanted money. Money for what purpose? There had only been one reason thus far disclosed in the evidence. There was also evidence that Mr Williams was capable of influencing his drinking partner, Cst. Johnson. The latter listened and obeyed when the defendant said Ms. Heywood should be served the summons On March 18, 2009 and he served it on her as instructed, and again when the defendant told him not to return the car keys to Damion Walker, Cst. Johnson did as he was instructed. The defendant solicited a benefit whether for himself or another to cause Cst. Johnson to discontinue the charge laid when Ms. Heywood was served with a summons for traffic court."

[319] There was not a scintilla of evidence to support her finding that the appellant spoke to Damion in the manner she asserts except Ms Heywood's hearsay evidence. The learned Resident Magistrate chose to rely on the complainant's evidence of hearsay statements allegedly made by Damion , a witness whom she found to be untruthful on important issues. Indeed, from a self styled liar. No comment was made that the complainant's assertions of such serious nature were not stated in Mr Walker's statement. She arrived at the conclusion that the appellant wielded influence over

Constable Johnson and that he listened and obeyed without referring to the conflict in the complainant's evidence as to whether she was served with the summons.

[320] The learned magistrate continued to arrive at conclusions without supporting facts. At page 142 of the record she said:

> "I find as a fact that it was clear that Ms. Heywood did not want her case to go to court, she was willing to do what she had to do to ensure the outcome she desired. I find as a fact that, the first call was placed by Mr. Williamson, a fact which was not challenged. This was on March 19, 2009 after Damion Walker had left for the Whitehouse police station. I also find that Mr. Williamson had become aware the night before that Ms. Heywood was in a relationship with Damian Walker, he was not a traffic officer and that Ms. Heywood had been served with a summons for traffic court. The defendant had not been in the traffic office, he had remained on the verandah while Ms. Hewood was being processed. All this evidence demonstrates that the defendant had no reason to speak with Ms. Heywood again, she having left the police station. The defendant obtained Ms. Heywood's telephone number and sought out a conversation with her the day after the traffic stop. It was in Mr. Williamson's evidence in chief that he indicate it was the next day that both he and Ms. Heywood had a conversation under the almond tree in the station yard, where they exchanged numbers. No time was led by the defence as to when Ms. Heywood would have attended the police station. Was Damion Walker also there? The defence case is that it was Mr. Walker who went to retrieve the motor car on March 19, 2009. I find that the prosecution's and defence case dovetail here. On either account, there was discussion and a meeting of the minds between the parties."

[321] Again her finding that the assertion that the appellant placed the first call was not challenged, is erroneous. The appellant has at all times denied calling Ms Heywood.

In finding that no time was led by the defence as to when Ms Heywood attended the police station and her query whether Damion was also there is without basis. It was Damion's evidence (statement) that he went to the station at about 7:00 or 7:30 am. He made no mention of seeing the appellant while he was there. On Ms Heywood's evidence, Damion went to the station while she "*remained at home*." She would therefore have attended the station after he returned with the car. The appellant's evidence is that he saw Ms Heywood at the station between 8:30 am and 9:00 am. It is therefore not correct that no time was given by the appellant. Her finding that no time was led by the defence as to when Ms Heywood attended the police station and her query whether Damion was also there is without basis. There is no evidence that he returned and they were all together. Ms Heywood has trenchantly denied speaking to the appellant that morning. The magistrate's conclusion that "on either account, there was discussion and a meeting of the minds between the parties" is baffling.

[322] Can it be concluded that the magistrate's heavy reliance on what Damion is alleged to have told the complainant is so inextricably woven into her finding as to render her findings unreasonable? Mr Samuels submitted that it is. Mrs Henry-Anderson however submitted that the Resident Magistrate's omission does not go to the heart of the Crown's case. It was her further submission that the court ought to find that there was solicitation. In spite of the hearsay evidence, her evidence is that "they discussed it." They spoke on the phone. According to Mrs Henry-Anderson there has been no miscarriage of justice as there was sufficient evidence to support a verdict of guilt.

Conclusion

Grounds 1 and 4

[323] The complainant's evidence was so fraught with inconsistencies on material issues which were not properly dealt with by the learned magistrate that the danger existed of a miscarriage of justice. An example is her failure to address the impact of the complainant's lies on core matters such as whether a summons was issued. A serious consideration also is the numerous occasions on which the learned magistrate misstated the evidence and the inferences she drew and conclusions she arrived at based on factual errors.

Ground 3

[324] For the reasons expressed above, this ground fails.

Ground 5

[325] The learned magistrate's findings regarding the issue of solicitation are indeed inextricably bound up with hearsay statements allegedly made by Damion which do not appear in his statements. She arrived at conclusions which were entirely unsupported by evidence. In addressing the issue of solicitation the learned magistrate misstated and misunderstood the evidence. Although the learned judge found that the solicitation was made to Ms Heywood, she could not, on the evidence properly determine to whom solicitation was made. Of importance, the learned magistrate in assessing the evidence recognized that under cross examination, her assertion that the request was made to Damion remains un-retracted. In the absence of unequivocal evidence as to whom the solicitation was made, the learned magistrate could not properly reflect on the

important issue of solicitation and arrive at a definitive finding that the solicitation was made to Ms Heywood as against Damion.

[326] In light of the foregoing, the learned magistrate could not properly conclude that the money was for a corrupt purpose and if so to whom solicitation was made. Therefore an essential ingredient of the offence could not have been established, that is, that solicitation was made to Ms Heywood. The learned magistrate's findings are so against the weight of the evidence that the risk of a miscarriage occurring is real.

Disposal

[327] In the circumstances I am unable to agree with my learned colleagues. I would allow the appeal.

BROOKS JA

ORDER

1. By majority (Sinclair-Haynes JA (Ag) dissenting), the appeal is dismissed.
2. The conviction and sentence are affirmed.
3. The sentence is to commence today, 1 May 2015.