[2015] JMCA App 31

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 7/2014

APPLICATION NO 177/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**LLOYD COLE**	**APPLICANT**
AND	**REGINA**	**RESPONDENT**

Hugh Wildman for the applicant

Mrs Suzette Whittingham-Maxwell for the Crown

5 March and 31 July 2015

MORRISON JA

Introduction

[1] The applicant is a retired medical practitioner. On 12 December 2011, after a trial before Her Honour Mrs Georgiana Frazer in the Resident Magistrate's Court for the Corporate Area, he was found guilty of the offence of indecent assaulting the complainant, who had attended his office as a patient. On 15 August 2012, after a sentencing hearing at which he was represented by Mr Howard Hamilton QC (who did

not appear for him in the main trial), the applicant was sentenced to do 360 hours of community service at St Joseph's Home for the elderly.

[2] On 20 August 2012, the applicant filed notice of appeal against his conviction and the appeal was in due course listed for hearing in this court on 29 September 2014. However, by notice of abandonment signed by him in the prescribed form[1] on 23 September 2014, and filed in this court on 24 September 2014, the applicant abandoned the appeal.

[3] By notice of application for court orders filed on 21 October 2014, the applicant applied to this court for an order relisting his appeal. The ground of the application was that the act of abandonment of the appeal was a nullity, "as the Applicant was improperly advised and persuaded by his then Attorney-at-Law to abandon the said appeal". The application was heard by this court on 5 March 2015 and refused. These are the reasons which were then promised for the court's decision.

The evidence at the trial

[4] Because the principal point taken on behalf of the applicant was that he was improperly advised to abandon his appeal, it is necessary to recount the evidence upon which his conviction was based in somewhat greater detail than might ordinarily have been called for on an application of this kind.

[1] Rule 3.22(1) of the Court of Appeal Rules 2002 states that: "An appellant may at any time abandon his or her appeal by giving notice to the registrar in form B15."

[5] The complainant, who was a student at the material time, was the main witness for the prosecution. Her evidence was that she consulted the applicant professionally at his office on 31 January 2010. Her complaint was that she had been bleeding from her mouth earlier that morning. She was accompanied by a gentleman whom she described as her stepfather, which is how we will refer to him hereafter. The complainant's account of what then took place was as follows. At the outset of the consultation, the applicant asked her stepfather to step outside. The complainant told the applicant what was the nature of her complaint, after which he used a flashlight to look into her eyes and mouth. The applicant then told her to go to a room at the back of the office and remove her clothes. In answer to the complainant's enquiry as to why she was required to do this, the applicant said that he needed to check to see if she had any infections. The complainant was hesitant to do so and, while she was alone in the back room, she placed a call to her mother on her mobile telephone to ask her what to do. Her mother told her to go ahead, since the applicant was a doctor and should know what he was doing. Accordingly, as she had been instructed to do, the complainant removed her brassiere and panty.

[6] The applicant then joined her in the back room. After sounding her chest with a stethoscope, the applicant told her to open her legs. With a glove on his right hand and "a transparent liquid on his fingers", the applicant inserted his fingers into her vagina and moved them up and down, asking her if she felt pain. He then used his left hand to rub the nipple of her right breast. The applicant next kissed her on her lips, whereupon she started to get angry. The applicant then pulled down his zipper and took out his

penis, asking her if she "was being turned on". After the complainant told him that she was very uncomfortable, the applicant removed his fingers from her vagina, gave her a piece of tissue and stepped out of the room. While still in the back room, she again called her mother and told her what had happened. After putting on her clothes, the complainant went back into the applicant's office, where she was given a prescription and a "sick leave paper". The applicant told her that he had diagnosed her to be stressed.

[7] Upon leaving the applicant's office, the complainant was taken by the stepfather in his car to her mother's shop. When the complainant told her mother what had happened, her mother immediately closed the shop and returned with the complainant to the applicant's office. The complainant's mother angrily confronted the applicant and asked him if he had sexually abused her daughter, to which the applicant answered yes. Then, "begging" the complainant and her mother not to report the incident, the applicant offered money instead. The complainant and her mother then went to the police rape unit where she made a report.

[8] When the complainant was cross-examined by the applicant's counsel at trial (not Mr Wildman), she agreed that she had said in her statement to the police that, while she was in the back room at the applicant's office, the applicant had "braced himself on [her] and [she] felt him hard"; and that the applicant had "asked for a piece". It was put to her that she was not speaking the truth and that her story was "made up and concocted". The complainant denied this and also denied telling the applicant that she had been bleeding from her vagina or suffered from anxiety. But she

agreed that she told the applicant of "a scenario [she] had in the past". She also agreed that she told the applicant that she suffered from high blood pressure. When she went to the rape unit, the complainant said, she had been examined by a doctor, who had told her what was the problem which had caused her to bleed from her mouth. The following exchange between counsel, the court and the complainant then took place:

> "**Question**: Do you mind telling us what was the problem?
>
> (Court points out possibility of hearsay and enquires as to how this is material)
>
> Counsel responds:
>
> It is material because it checks the credibility of her statement and also determines if it would be consistent with medical issues she had before she went to [the applicant].
>
> **Answer**: The doctor said he did not see why [the applicant] told me to take off my clothes because it was a dental issue."

[9] In re-examination, the complainant said that the applicant's hand was still in her vagina and his penis was out when he asked her for a piece. Asked what she took him to mean by "a piece", her answer was, "Sex."

[10] The complainant's mother also gave evidence for the prosecution. She supported the complainant's evidence of having made two telephone calls to her mother telling her what the applicant had said and done to her while she was in the applicant's office. She also supported the complainant's evidence of having gone back to the applicant's office with the complainant that same morning and confronted the applicant with what she had been told. She testified that when she asked the applicant if it was true that, as

the complainant had alleged, he had put his fingers "into her vagina and ask her for a piece", the applicant's answer was, "yes, but I did not have sex with her". The complainant's mother also testified that the applicant told her that she should not bother to report the matter to the police and that, if it was money she wanted, he could provide it. When she was cross-examined, it was put to her, and denied, that the whole exercise of sending the complainant to see the applicant was "to concoct something so that money could be extracted from the doctor". The complainant's mother testified that she and the stepfather had ceased living together after she discovered that he had taken money from the applicant, contrary to her express instructions. However, she denied being part of a plan with her daughter and the stepfather "to get [her] daughter to attend the doctor and to create mischief so as to get money from [him]".

[11] Apart from formal evidence given by the arresting officer, that was the case for the prosecution.

[12] Giving evidence in his defence, the applicant agreed that the complainant had consulted him professionally on the morning in question. But his account of the encounter was as follows. The complainant's complaints were of blood in her mouth and nose some days previously, and earlier in her vagina. She also told him that she had been "diagnosed … with high blood pressure by her teachers", was under stress and unable to sleep at nights and finally, that she had recently been raped. As a result of this, the applicant said that he felt it obligatory to examine the complainant fully, since bleeding from any point in the body "requires thorough systemic examination and investigation"; and bleeding in association with high blood pressure, especially in a

teenager or someone in the early twenties, requires "a confirmation through examination and investigations". The complaint of stress also gave rise to an additional obligation for systemic examination and investigation. However, when he tested the complainant's blood pressure, it was 120/70, which the applicant described as "perfectly normal", so it was therefore not necessary to do any further investigations at that time.

[13] A routine systemic investigation revealed no bleeding from the complainant's nose, mouth or vagina. The vaginal examination was done with a pair of sterile gloves and the use of a speculum and a routine breast examination was carried out, for the purpose of –

> "… looking for breast tenderness lumps, unusual lumps or thickness of breast tissues, pregnancy related discoloration around the nipples possible milk like substances emanating from the nipples and possible cancer of the breast which require thorough four quadrant examination and axillae armpits for possible nodes."

[14] The applicant said that his examination of her led him to conclude that there was nothing wrong with the complainant, save for a possible mild urinary tract infection, for which he gave her a prescription. He declined to accept the $2,000.00 proffered by the stepfather in payment for the consultation with the complainant. So the applicant accepted that he did insert his fingers into the complainant's vagina and that he checked her breasts, but insisted that he did so "as part of the examination". He denied taking out his penis while examining the complainant or otherwise indecently assaulting her. He denied kissing the complainant or asking her for a piece. He also denied telling her mother that he had done so or offering to give her any money. Subsequently, on 12

March 2010, he received a telephone call from someone telling him to expect a call from someone else later on that day. Suspicious, he arranged for a technician to set up a recording device that same day. At about 4:00 pm another call came in and it was recorded by the technician, while he listened in. He thought that the voice on the line could be that of the complainant's mother. Then he later received a call from someone whom he identified as the complainant's stepfather, who he knew before. He was urged by the stepfather to pay some money to settle the matter out of court. There was also a further call from a lady urging him to settle out of court. He did not report these calls to the police, though he did turn the matter over to his lawyer.

[15] The stepfather gave evidence on behalf of the applicant. At the request of the complainant's mother, with whom he was living at the time, he had taken the complainant to the applicant's office. He also returned there with the complainant and her mother later the same morning. He did not hear what the applicant and the complainant said to each other, but it appeared to him that the latter wanted to fight the former. By the time of trial, the stepfather said, he was no longer living with the complainant's mother, because she showed him "bad face" from the time of the incident when he declined to call the applicant "about some money", as she had instructed him to do. Under cross-examination, the stepfather said that he paid the applicant $2,000.00 after he had seen the complainant, but that the applicant returned this to him afterwards. After he was confronted with his statement to the police, the stepfather accepted that he had told the police that the applicant had asked him to "forget it and he would give anything even money" and that that was the truth. He also

accepted that he had told the police that the complainant's mother had asked the applicant, "why he put question to her daughter and why he push up his finger into her" and that the applicant had replied, "yes I did it".

[16] The applicant's next witness was the technician to whom the applicant had made reference in his evidence. After he had set up the recording device which the applicant had requested on 12 March 2010, the technician recorded two calls made to the applicant's number between 4:30 to 4:50 pm that same day.

[17] The first call was from a female and lasted about 15 minutes. When the recording of this call was played in court, the learned Resident Magistrate considered that, although she was able to recognise the applicant's voice, the voice of the caller was neither that of the complainant nor her mother. The applicant's voice could be heard making enquiries, such as "what are they planning to do?"; "are they planning to go to the police?"; "what are they doing?", while the unidentified female voice responded, "I don't know", to many of the questions asked. The second call was from a person who identified himself as the complainant's stepfather. When the recording of this call was played in court, the stepfather was heard asking, "The lady talk to you today?" to which the applicant was heard to respond, "Court date set for 25th and demonstration planned." The stepfather went on to indicate that he wanted "this thing done away with" and that "[a] de mother a de problem I can't tell her where I go".

[18] After these two calls were received, the recording device was taken away by the technician. In answer to the learned Resident Magistrate, the technician said the female

caller had identified herself as Carol and said that she was calling on behalf of someone named Rambo.

[19] The final witness called on behalf of the applicant was Dr Lloyd Goldson, a medical doctor specialising in obstetrics and gynaecology. At the time of trial, he had been a doctor for some 33 years. He described the applicant as "a very caring and hard worker", who "does more than the average doctor does". Dr Goldson spoke to the applicant's character as follows:

> "His character generally based on what I know about him; he is in good standing in the community in Liguanea where he works. I know he lives where he works and patients can come to him night and day and that he was even robbed there once. Every year he puts on a treat for children in the community. He has a scholarship fund for children."

[20] Dr Goldson was asked what examinations would be necessary in the case of a female patient who presented herself with a history of having been raped, bleeding from her mouth and nostrils and high blood pressure. His answer was that he would take the patient's blood pressure, do a urine examination and, in respect of the report of rape, a speculum examination to see if there were any abrasions, lacerations or tears. In addition, if he had the facility, he would do a swab to detect any semen. Further, if the rape allegation was not really recent but there was a report of bleeding from the mouth and nose, he would want to do blood investigations by taking samples for laboratory analysis.

[21] Under cross-examination, Dr Goldson said this:

> "In my 33 years I would not consider it appropriate for a doctor to insert his finger in a 17 year old's vagina moving it back and forth while having his other hand on her breast and kissing that 17 year old on her lip.
>
> If he is examining her vagina I expect him to have on a pair of gloves. I do not see the need for the breast and vagina to be examined at the same time that would not be appropriate as a Doctor. I do not think it appropriate behaviour while performing vaginal exam of a 17 year old to take out one's penis that is totally inappropriate."

[22] And that was the case for the defence. But at this point, an application was made by the applicant's counsel for the complainant to be recalled, as "there was an important omission on Defence's part to obtain her medical status and her mental status". The application was refused by the learned Resident Magistrate, on the ground that no reason had been advanced "[to] justify such a drastic departure from accepted evidential procedures". The application was renewed by the applicant's counsel upon the resumption of the trial, after a short break, a few weeks later. However, it appeared that this time the application was to reopen the prosecution's case and to recall two witnesses. The application was again refused by the learned Resident Magistrate, who took the view that there was nothing in it which had arisen "ex improviso or through neglect or deliberate suppression of information on the part of the Crown".

The judgment and verdict of the Resident Magistrate

[23] Giving judgment in admirable detail, the learned Resident Magistrate first gave the applicant the benefit of a full good character direction, indicating that she gave "considerable weight" to the evidence of his good character. But this notwithstanding,

the learned Resident Magistrate said, she found that the applicant had been "less than candid with this Court". Citing, among other things, the evidence of the telephone calls, she rejected the applicant's suggestion that the complainant and her mother had tried to blackmail him. To the contrary, she pointed to the stepfather's admission that, in his statement to the police given on the day of the alleged incident, he had said that the applicant had offered money "to buy their silence". She also considered the calls recorded by means of the device installed by the technician as "contrived and self serving". Taking all things together, she found that the applicant was not a witness of truth and rejected his evidence in denial of the charges against him.

[24] But, the learned Resident Magistrate continued:

> "Notwithstanding my disbelief and rejection of the Defendant's case; I am aware that I can only convict him if the [C]rown proves the charge beyond a reasonable doubt. I appreciate that the central issue is one of credibility, and particularly the credibility of the complainant. I have given myself the appropriate warning in relation to corroboration and I am mindful that females, young and old can and do tell lies and make false accusation [sic] of a sexual offence. I am also mindful that such allegations can be made for a variety of reasons and for no reason at all; and that such accusations are easy to make but can be difficult to refute by persons who are entirely innocent. I acknowledge that there is no corroborative evidence of the alleged offence and warn myself in this regard and [sic] the need to exercise caution in relying upon the uncorroborated evidence of this complainant.
>
> Having recall of the complainant's demeanour; I find the complainant notwithstanding a lack of corroboration of her evidence to be a credible and reliable witness who gave an honest account of what transpired. I am satisfied that she was not influenced by any adult or any other person to perpetrate any lies and neither is she motivated by any

> oblique reasons to make these allegations. She was extensively cross examined by counsel for the defendant and was not discredited in any material particular."

[25] The learned Resident Magistrate then considered the legal ingredients of the offence of indecent assault, observing, among other things, that, in order to sustain a conviction for the offence of indecent assault, "the Prosecution must prove … [t]hat the defendant committed an assault and battery on the complainant". Following on from this, the learned Resident Magistrate made the following findings of fact:

> "1. I find that the Accused is not a truthful witness and I reject his evidence in so far as he seeks to deny the charges [sic].
>
> 2. I find that the Crown's witnesses and in particular the complainant are truthful and credible; and that the incident related by the Complainant happened in the way she described. That the Accused man had repeatedly thrust his fingers in and out of the Complainant's vagina while squeezing one of her breasts and making suggestive remarks to her and attempted to kiss her.
>
> 3. I find that there was no plot by the complainant and her mother to ensnare [the applicant] and thereafter extort money from him. That [the stepfather] was on a frolic of his own; if he either asked for or accepted money from [the applicant]; he was merely capitalizing on an opportunity that presented itself.
>
> 4. I find that the complainant had presented at [the applicant's] office with a complaint of bleeding in her mouth only and had been concerned about this unexplained loss of blood; and that the issue was resolved as a dental issue subsequently by another doctor. I accept that the complainant had made no complaints of suffering from hypertension or effects of a recent rape or sought any treatment for such conditions, but that such details had been elicited by the doctor only as part of ascertaining her medical history.

> 5. I accept the evidence of Dr. Goldson that having regard to the scenario as presented by the Complainant there was no need for [the applicant] to have performed a vaginal or other physical examination of the complainant's private parts and in all the circumstances of the case these gestures were not innocent and not the standard acceptable procedure that obtains in a physical, medical examination of a patient, but had a sexual undertone or overture.
>
> 6. Having regard to the elements of the offence, I find that the prosecution has discharged their obligation in proof of the offence of indecent assault and that the accused man intended to indecently assault the complainant and in fact did so.
>
> 7. Having rejected the denial of the Defendant and bearing in mind the corroboration warning I am nonetheless satisfied so that I feel sure of the guilt of the Accused; based on the evidence presented by the prosecution and accordingly I find the Defendant guilty as indicted."

The appeal

[26] In his notice of intention to appeal filed on 29 August 2010 in the Resident Magistrate's Court, the applicant challenged his conviction on the following grounds:

> "1. The Learned Resident Magistrate erred in law in failing to recall the Complainant for Cross Examination at the request of the Defence on a vital issue, which said refusal operated to the prejudice of the Appellant thereby rendering the verdict of guilty unsafe and should not be allowed to stand.
>
> 2. The verdict of the Learned Resident Magistrate is unreasonable and against the weight of the evidence."

[27] As we have already indicated, this appeal was abandoned by notice of abandonment of appeal signed by the applicant and filed on 24 September 2014.

The application to withdraw the notice of abandonment

[28] In support of the application, the applicant relied on an affidavit sworn to by him on 21 October 2014. This was his account (at paras 15-25) of the circumstances in which he came to sign the notice of abandonment of the appeal:

> "15. Mr. Howard Hamilton Q.C. was retained by me to represent me in the appeal.
>
> 16. The appeal was set for hearing on the 29th September 2014.
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> 17. A few days before the 29th September 2014, I was visited at my office at 139 Old Hope Road, by Mr. Howard Hamilton Q.C. and Mr. Earle Whitter [sic] Q.C.
>
> 18. Prior to this, Mr. Hamilton Q.C. had told me that he was going to get the assistance of another Attorney. And so I should pay him an additional sum, which I did.
>
> 19. On the day when both Attorneys attended on my office, I immediately assumed that the other Attorney he was referring to was Mr. Whitter [sic], whom I knew before.
>
> 20. On attending my office, both Attorneys made reference to the appeal that was pending in the Court of Appeal on September 29, 2014. They both pointed out to me that the Learned Magistrate had covered herself and that it would be easier to climb Mount Everest than to win the appeal.
>
> 21. They both suggested that I abandon the Appeal and that they would ensure that the matter does not become public or my name be included on the list of sexual offenders.
>
> 22. They produced two documents and showed them to me requesting my signature to be affixed to them. I was opposed to signing these documents as I insisted that the Appeal be argued. Both Attorneys went on to state that if I insist on the Appeal be [sic] argued,

there is a possibility that the sentence could be increased.

23. This picture presented by the Attorneys caused me to become scared and distraught. They insisted that I sign the documents and that they would ensure that no publicity be brought to the matter and it would remain under the radar.

24. Having being [sic] prevailed on by the Attorneys, I reluctantly signed the documents without reading them. I was shown where to affix my signature and I did.

25. The Attorneys left my office with the signed documents."

[29] The applicant went on to state that, having subsequently taken further legal advice indicating that he had "strong appealable grounds" of appeal, he immediately advised Mr Hamilton QC of this development. He also advised Mr Hamilton that his new attorney-at-law, Mr Wildman, was prepared to assist him with the appeal free of cost, "as he thought that it was an injustice".

[30] So on 29 September 2014, the applicant deponed, he attended court for the hearing of the appeal. Mr Hamilton QC and Mr Witter QC, who were also in attendance, joined him in the foyer of the court. Both attorneys-at-law showed him two sheets of paper, told him that his name had been delisted, there would be no hearing and the matter was over. In these circumstances, the applicant's affidavit concluded (at paras 35-36):

> "35. The '***abandonment***' of the Appeal on the advice of Mr. Howard Hamilton Q.C. and Mr. Earle Whitter [sic] Q.C., was done in circumstances based on improper advice

> imposed on me by the Attorneys. It is clear that my mind did not go with my act.
>
> 36. Having regard to the conduct of the Attorneys in having me sign the documents under pressure and on improper advice, renders the abandonment of the Appeal a nullity." (Emphasis in the original)

[31] In response to a request from counsel for the prosecution, affidavits in response to the applicant's allegations were produced by Messrs Hamilton and Witter. Mr Hamilton, who was called to the Bar at Lincoln's Inn in November 1959, was admitted to the Inner Bar in Jamaica in 1984. Mr Witter, who was called to the Bar at Lincoln's Inn in July 1972, became a member of the Inner Bar in 2007. Both gentlemen specialised in criminal law.

[32] In his affidavit sworn to on 4 March 2015, Mr Hamilton gave the history of his professional relationship with the applicant, starting with his having been retained to represent him at the sentencing hearing before the learned Resident Magistrate. Notice of appeal was subsequently filed on the applicant's behalf by Messrs Frankson & Richmond, attorneys-at-law, and Mr Hamilton was instructed by that firm to represent the applicant on the appeal. Thereafter, Mr Hamilton deponed, he had conferences and discussions with the applicant and he also carefully read the transcript of the proceedings at trial. On this basis, Mr Hamilton formed the considered opinion that the transcript disclosed no "meritorious or arguable grounds of appeal" and he advised his instructing attorneys accordingly. Mr Hamilton's opinion was based on the fact that the Resident Magistrate, (i) having found the prosecution witnesses to be truthful and credible and the applicant to be neither candid nor truthful, had resolved "all essential

questions of fact in favour of the Prosecution and against the … applicant"; (ii) gave herself all appropriate warnings in relation to corroboration and the treatment of the evidence of young persons/complainants in sexual cases; and (iii) gave herself appropriate directions in relation the applicant's previous good character. Further, Mr Hamilton considered that the evidence of the witnesses for the defence had tended to strengthen, rather than weaken, the case for the prosecution and that, in the result, neither the Resident Magistrate's conduct of the trial nor her verdict could be faulted.

[33] Importantly, on the circumstances in which the applicant came to sign the notice of abandonment of the appeal, Mr Hamilton went on to say this (at paras 12-20):

> "12. My instructing Attorneys-at-Law decided to seek the opinion of other Counsel, experienced in the practice of Criminal Law and in the event, Mr. Earl Witter, Q.C. was briefed to further advice on the merits or otherwise of the Appeal.
>
> 13. That on Sunday September 21, 2014, learned Counsel Mr. Earl Witter, Q.C. and I attended upon the applicant at his office and residence at 139 Old Hope Road, Kingston 6, for the purpose of conveying to him personally, the opinion at which I had arrived and in which my learned friend concurred.
>
> 14. That we jointly advised the Applicant that we could find no meritorious or arguable ground of appeal and that we would be constrained to so apprise the Court of Appeal, when the appeal came on for hearing on September 29, 2014. We then advised him of an alternative course of action, which was for him to sign and have filed a Notice of Abandonment, having regard to our opinion as outlined at paragraph 10 above.
>
> 15. That not without hesitation, the Applicant accepted the opinion and advice. However, he expressed his concern over the consequences of the appeal not proceeding, let alone succeeding. He was no less concerned about the probable adverse publicity which would have resulted, his name being entered on 'the sexual offenders list', as well as his

registration as a medical practitioner. His mention of a 'sexual offender list' we took to mean, a reference to the 'Sex Offender Register'. Having regard to the provisions of the Sexual Offences Act, 2009, SS. 29, 30 and 38, we were able to assure him that his conviction would not result in his name being placed on that Register.

16. He was also very concerned about his case being 'plastered' all over the newspaper. I told him that, while there were no guarantees, if his case was not actually listed for hearing by the Court of Appeal, it was possible that the outcome of his appeal might escape the eyes of the news reporters.

17. I crave leave of this Honourable Court to refer to paragraph 18 of the Applicant's affidavit aforesaid and say that upon the recommendation of my instructing attorneys-at-law, Mr. Earl Witter, Q.C., was briefed to give an opinion and advice on the merits of the pending appeal. In that regard, I caused the applicant to pay the retainer requested by learned Counsel. The Applicant therefore well knew that Mr. Witter had been engaged in the matter. I am therefore surprised by the assumption deponed to by the Applicant in paragraph 19 of his affidavit.

18. That referring to paragraph 20 of the Applicant's affidavit, I say that it was in the course of the conference with the applicant on Sunday, September 21, 2014 and the rendering of our advice that the trial transcript disclosed no meritorious or arguable ground of appeal, that Mr. Witter compared the challenge of mounting a successful appeal to 'the climbing or conquest of mount Everest'.

19. That referring to paragraph 21, I say that the contents thereof nuances the truth, which is, as stated in paragraphs 12-14 hereof. In particular, I deny that either Mr. Witter or I 'suggested' that the Applicant 'abandon the appeal'. Nor did either of us undertake to 'ensure that the matter does not become public or (his name) included on the list of sexual offenders'.

20. That the contents of paragraphs 22-25 of the said affidavit are entirely false. It was the Applicant who, after receiving our advice regarding the probable success of the pending appeal, canvassed with us the merit of an appeal against sentence.

> We then advised him that apart from the difficulties that would be encountered in mounting such an appeal at that stage, that it would be most unwise to do so having regard to the Court's power and/or discretion upon any such appeal, to impose a more severe penalty. Further, that having regard to the case for the Prosecution which the learned Resident Magistrate had found proven and, the sentencing options available to her that the community service order made was in fact most lenient. No documents whatsoever were presented to the applicant for his signature at that time. It was on or about the 23rd day of September, 2014, in consequence of the Applicant's voluntary election indicated to us at the conference of the 21st day of September, 2014, that I presented Dr. Cole with the form of Notice of Abandonment which he read and thereafter duly signed, in my presence, without any form of hesitation or coercion whatsoever. I exhibit hereto marked 'HRH03' a true copy of the Notice of Abandonment which I saw the applicant sign."

[34] While Mr Hamilton accepted that, as the applicant had stated, he had made the transcript of the trial proceedings available to Mr Wildman at his request, he specifically denied having been told by the applicant that Mr Wildman was prepared to assist with the appeal free of cost. Mr Hamilton stated that his and Mr Witter's attendance at the Court of Appeal on 29 September 2014 had been with a view to advising the court of the fact that a notice abandoning the appeal had been signed and filed. However, as it turned out, this was not necessary, since the appeal was not in fact listed for hearing. Lastly, Mr Hamilton deponed, the exchanges between the applicant, Mr Witter and himself had taken place in counsel's robing room, not in the foyer of the court.

[35] In his affidavit sworn to on 4 March 2015, Mr Witter spoke of his having been instructed by Messrs Frankson & Richmond to give an opinion on the merits of the appeal. He also came to the view that there was no merit in either of the original

grounds of appeal filed on the applicant's behalf and that there were no other meritorious or arguable grounds which could be advanced. Having so advised his instructing attorneys-at-law and Mr Hamilton, this is Mr Witter's account of what next ensued (at paras 8-12):

> "8. In the result, Mr Hamilton, Q.C. and I, with the concurrence of Mr. Barrington E. Frankson, the senior partner in the firm of Frankson & Richmond, decided jointly to advise and/or inform the appellant/applicant of our considered opinion. For this purpose, we decided to confer with him, by appointment, at his office and residence situate at 139, Old Hope Road, Kingston 6. This we did in the morning of Sunday, September 21, 2014.
>
> 9. At the conference referred to in paragraph 8 above, Mr. Hamilton, Q.C., and I orally conveyed our opinion to the Applicant, as solicitously but as forthrightly as we could have. Neither of us was surprised by the reaction or disappointment shown by the Applicant upon receipt of what was plain bad tidings. His distress was palpable. He expressed utter disgust at the way the attorney-at-law who had appeared for him at his trial had handled his defence. Nevertheless, he accepted our opinion and advice, albeit reluctantly. We carefully explained the basis of our opinion which essentially was that, as the tribunal of fact and judge of the relevant law, the learned Resident Magistrate (as she then was) had demonstrated her awareness of the Prosecution's onus of proof; that she had found the Prosecution's witnesses truthful, and him not; that credibility was an important and essential issue; she had resolved disputed issues of fact in favour of the Prosecution and against him, as it was open to her to do; that she had in exercise of her discretion, given herself an appropriate warning and directions in relation to corroboration and the treatment of the evidence of 'young persons' although, arguably, that was unnecessary in the circumstances of the case; that in the end, she had found the essential ingredients of the offence proven; that she had rejected the defence and thus arrived at the verdict of Guilty in a manner that could not, in our view, be challenged successfully. In relation to her directions regarding corroboration, I was

myself mindful of the decision of this Honourable Court in ***R v Prince Duncan and Herman Ellis, SCCA Nos. 147 & 148/2003***, delivered February 1, 2008.

10. Thereafter, our discussions turned to an appraisal of the most effective means or method of dealing with what he called 'damage control': avoidance of the outcome of his appeal making the news.

11. The Appeal had been placed on the Cause List for hearing in the week commencing Monday, September 29, 2014. We informed the Applicant that in light of our advice and having regard to the exigencies, that there were two options or courses of action open to him: and it followed, to us. He could either execute and cause to be filed a Notice of Abandonment of his Appeal in accordance with Rule 3.22 of the Court of Appeal Rules, whereupon the Appeal would have been deemed dismissed OR Counsel could appear when the matter came on for hearing and inform this Honourable Court that the Appeal was not being pursued. We told him that if the first option were accepted by him that his appeal would likely not be listed for hearing, (being deemed dismissed). Hence the possibility or probability of avoiding adverse and embarrassing publicity."

[36] Mr Witter admitted, as the applicant had said, that he had "characterized and/or compared the challenge of presenting and arguing his appeal successfully to 'climbing or conquering Mount Everest'". However, neither he nor Mr Hamilton had suggested to the applicant that he abandon his appeal: abandonment of the appeal was one of the two options presented to the applicant and the one "which he voluntarily elected". While it was he who prepared the notice of abandonment in accordance with the rules, Mr Witter deponed, he was not present when it was signed by the applicant. Mr Witter confirmed Mr Hamilton's account of their discussions with the applicant on the feasibility of an appeal as to sentence only, pointing out that it was the applicant who raised the

possibility of an appeal against sentence and "Mr Hamilton and I advised him that seeking leave to do so would have been entirely unwise having regard to the power or discretion of [the Court of Appeal] to impose a harsher penalty". Mr Witter also confirmed Mr Hamilton's account of what took place at the Court of Appeal on 29 September 2014.

The applicable principles

[37] Mr Wildman for the applicant observed in his skeleton arguments that the principles are not in doubt. In order to demonstrate this, we were very helpfully referred to some of the relevant authorities, one a decision of this court and the others from the English Court of Appeal.

[38] First, we will mention this court's decision in **R v White** (1971) 12 JLR 463, a case decided under the provisions of the Court of Appeal Rules, 1962. In that case, an application was made to withdraw a notice of abandonment of an appeal from conviction and sentence in the Home Circuit Court. It was held that such an application will not be entertained unless something amounting to a mistake or fraud is alleged which, if established, would enable the court to say that the notice of abandonment should be regarded as a nullity.

[39] Next there is **R v Sutton** [1969] 1 WLR 375, in which Winn LJ, giving the judgment of the court, said (at page 377) that –

> "… the court will not entertain these requests for leave to withdraw notices of abandonment unless it is apparent on the face of such a request and application that some

> grounds exist for supposing that there may have been either fraud, or at any rate bad advice given by some legal adviser, which has resulted in an unintended, ill-considered decision, to abandon the appeal."

[40] Then, in **R v Munisamy** [1975] 1 All ER 910, explaining Winn LJ's dictum quoted above, James LJ said this (at page 912):

> "But we do not think that Winn LJ was referring to bad advice in the sense of wrong advice. Indeed it would be very difficult to assess whether advice that was given was wrong or right. It may appear to be right at the time it was given, but wrong in the light of knowledge obtained thereafter. What Winn LJ was saying was there had to be something so defective in the information given to the applicant that the court could say: 'Well, in this particular case there was such a fundamental mistake in the mind of the applicant when he purported to abandon, that his act of abandonment may be properly treated by the court as a nullity'.
>
> In a sense the expression that has been used and is now well established, namely 'withdraw abandonment', is not strictly accurate. One cannot in the strict sense withdraw a notice of abandonment. What one can do is put before the court sufficient facts to satisfy the court that the abandonment is falsified and rendered a nullity."

[41] And then in **R v Medway** [1976] 1 QB 779, after a full review of the authorities, a five-judge court rejected a submission that the court enjoyed an inherent jurisdiction to allow withdrawal of a notice of abandonment in special circumstances. Speaking for the court, Lawson J added this (at page 798):

> "In our judgment the kernel of what has been described as the 'nullity test' is that the court is satisfied that the abandonment was not the result of a deliberate and informed decision; in other words, that the mind of the applicant did not go with his act of abandonment. In the nature of things, it is impossible to foresee when and how

> such a state of affairs may come about; therefore it would be quite wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and such like, which purports to be exhaustive of the types of case where this jurisdiction can be exercised. Such headings can only be regarded as guidelines, the presence of which may justify its exercise."

[42] To these authorities, we would add the recent case of **Smith v R** [2014] 2 Cr App R 1, in which the effect of the earlier authorities, including **R v Medway**, was summarised by Jackson LJ as follows (at para. 58):

> "(i) a notice of abandonment of appeal is irrevocable, unless the Court of Appeal treats that notice as a nullity;
>
> (ii) a notice of abandonment is a nullity if the applicant's mind does not go with the notice which he signs;
>
> (iii) if the applicant abandons his appeal after and because of receiving incorrect legal advice, then his mind may not go with the notice which he signs. Whether this is the case will depend on the circumstances; and
>
> (iv) incorrect legal advice for this purpose means advice which is positively wrong. It does not mean the expression of opinion on a difficult point, with which some may agree and others may disagree."

[43] The general principle which emerges from the authorities is therefore that leave to withdraw will only be granted if it is shown that the applicant's abandonment of his or her appeal was not the result of a deliberate and informed decision. While it is not possible – or desirable - to make an exhaustive list of the types of case in which leave will be granted, matters such as fraud, mistake or bad legal advice may always be relevant considerations.

The submissions

[44] As foreshadowed by the applicant's affidavit, Mr Wildman's primary submission was that Messrs Hamilton and Witter's advice that the proposed appeal was hopeless was bad advice. The main point identified by Mr Wildman in his skeleton arguments was that the learned Resident Magistrate failed to warn herself "that it is dangerous to convict on the uncorroborated evidence of the complainant", thus rendering the conviction incurably bad. But Mr Wildman also contended that, by telling the applicant that there was a possibility that the court might increase the sentence in the event that the appeal did not succeed, counsel were guilty of intimidation, especially in a context where there was no appeal against sentence.

[45] Then, in his oral submissions before us, Mr Wildman added a number of instances in which it was said that the Resident Magistrate had allowed inadmissible hearsay evidence; the failure of the Resident Magistrate to deal with the issue of recent complaint; and the fact that the Resident Magistrate had confused assault with battery. The cumulative effect of all of these lapses, it was submitted, was that the applicant had good grounds of appeal, the advice which he was given to the contrary was bad and his abandonment of the appeal was therefore a nullity.

[46] In response to these submissions, Mrs Whittingham-Maxwell for the prosecution submitted that while there may have been an element of hearsay in some of the evidence to which we were referred by Mr Wildman, such instances as there might have been were generally irrelevant to the issue which the Resident Magistrate had to

decide. As regards the question of corroboration, Mrs Whittingham-Maxwell submitted that the law has moved beyond a requirement for a corroboration warning in every case of alleged sexual assault; and that, in any event, the learned Resident Magistrate did give an adequate warning in this case, since the non-use of the word 'dangerous' did not vitiate the warning. And as regards the question of sentence, Mrs Whittingham-Maxwell submitted, firstly, that in the absence of an appeal against sentence, any advice given on this issue would be irrelevant; and secondly, that the court should in any event prefer counsel's account of the context in which sentence was discussed to that of the applicant. In all the circumstances, Mrs Whittingham-Maxwell submitted, the real issue in this case had to do with the question of credibility and there was no error in the advice given by counsel, in that the learned Resident Magistrate's conclusion on this score could not be faulted.

Discussion

[47] We think that it is relevant to observe at the outset that no attempt was made on this application to support either of the grounds of appeal filed on behalf of the applicant on 29 August 2010 (see para. [26] above). To this extent, therefore, we must take it that the applicant accepts the correctness of the advice of Queen's Counsel that an appeal against the decision of the learned Resident Magistrate on those grounds would not have stood a good chance of success. We agree entirely with this assessment.

[48] The first of those grounds challenged the learned Resident Magistrate's refusal to accede to the applicant's request to reopen the prosecution's case after the close of the case for the defence, a novel application if ever there was one. This was plainly a matter for the discretion of the Resident Magistrate, with the exercise of which this court would ordinarily, as has often been said, be loath to interfere in the absence of a serious departure from principle. The contention in the second ground was that the verdict was unreasonable in the light of the evidence. This ground was, it seems to us, equally unpromising in a case which turned entirely on the contest of credibility between the complainant and the applicant. If, as in the event turned out to be the case, the complainant was believed, there was no question that the evidence she gave was sufficient to support a conviction for the offence of indecent assault.

[49] This leads us then to the matters prayed in aid by Mr Wildman in his skeleton arguments and in his submissions before us. We propose to consider them under the headings, (i) corroboration/recent complaint; (ii) hearsay evidence; (iii) sentence; and (iv) miscellaneous complaints.

(i) Corroboration/recent complaint

[50] In **R v Gilbert** [2002] UKPC 17, it was held by the Privy Council that, contrary to the traditional view that a warning on the dangers of acting on the uncorroborated evidence of complainants in sexual cases was mandatory, it is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness. Whether the judge chooses to give a warning and, if so, in what terms, will depend on

the circumstances of the case, the issues raised and the content and quality of the witness's evidence. And further, even where some warning is to be given, no special form of words is required and it will be for the judge to decide the strength and terms of the warning. The principle of **R v Gilbert** has been applied by this court in, among other cases, **R v Prince Duncan & Herman Ellis** (SCCA Nos 147 & 148/2003, judgment delivered 1 February 2008); and **Erron Hall v R** [2014] JMCA Crim 42.

[51] In the instant case, the learned Resident Magistrate was accordingly not required, as a matter of law, to give a corroboration warning. But, in the exercise of her discretion, she chose to do so, in terms which we have already set out (at para. [24] above) and which, in our view, cannot be faulted. While it is true that, as Mr Wildman complained, she did not adopt the traditional formulation that "it is dangerous to act on the uncorroborated evidence of …", there is no requirement that she should do so. It seems to us that it was therefore entirely sufficient for the learned Resident Magistrate to indicate, as she did, that she had warned herself of "the need to exercise caution in relying upon the uncorroborated evidence of this complainant".

[52] Messrs Hamilton and Witter's conclusion was that the learned Resident Magistrate had, in the exercise of her discretion, given herself the appropriate warning and directions in relation to corroboration, although, as Mr Witter put it, "arguably, that was unnecessary in the circumstances of the case"[2]. This advice was entirely in keeping with the modern law on the topic and, in our view, it cannot be faulted.

[2] Referring specifically to the decision of this court to the same effect in **R v Prince Duncan & Herman Ellis** (SCCA Nos 147 & 148/2003, judgment delivered 1 February 2008).

[53] As regards the question of recent complaint, it is true that the learned Resident Magistrate did not give herself an explicit direction on the limited effect of the complainant's evidence of having made a complaint to her mother about the applicant's behaviour and her mother's evidence of having received it. Such a direction would have made it clear that "the complaint is not evidence of the facts complained of, and cannot be independent confirmation of the complainant's evidence since it does not come from a source independent of her, but may assist in assessing her veracity" (The Modern Law of Evidence, Adrian Keane and Paul McKeown, 9th edn, page 176). But, as has been seen, the learned Resident Magistrate emphasised that there was no corroborative evidence of the alleged offence and on that basis warned herself of the need to exercise caution in relying upon the uncorroborated evidence of the complainant. This direction makes it clear, it seems to us, that the learned Resident Magistrate was fully aware of the fact that the evidence of recent complaint could not have corroborated the complainant's evidence.

(ii) Hearsay evidence

[54] First, Mr Wildman complained that the complainant's evidence of her telephone conversation with her mother after the applicant had told her to take off her clothes (para. [5] above) was hearsay and inadmissible. Mrs Whittingham-Maxwell's answer to this was that the evidence was part of the complainant's narrative of the event and as such part of the *res gestae*.

[55] In fact, we doubt whether the evidence can properly be categorised as hearsay at all. At common law, any assertion, other than one made by a person while giving oral evidence in the proceedings, is inadmissible if tendered as evidence of the facts asserted (Keane and McKeown, op. cit., page 273). So, as Lord Wilberforce put it in his classic judgment in **Ratten v R** [1971] 3 All ER 801, at page 805, "[a] question of hearsay only arises when the words spoken are relied on 'testimonially', i e as establishing some fact narrated by the words". In this case, the complainant's evidence of what her mother said to her was plainly not being relied on testimonially, that is, as proof of the truth of anything said by her mother, but was merely part of the complainant's narrative.

[56] Mr Wildman next complained about the complainant's mother's evidence that she was told by the complainant in that same telephone conversation that the applicant had told her to take off her clothes. Now this evidence, we agree, in accordance with the same definition of hearsay which we gave in the preceding paragraph, was clearly hearsay if and to the extent that it was relied on as proof of the fact that the applicant did tell the complainant to remove her clothes. But absolutely nothing turns on it, since it is common ground – indeed, it is part of the applicant's own case – that the applicant did in fact instruct the complainant to do so.

[57] Finally under this head, Mr Wildman submitted that the learned Resident Magistrate's specific finding that the complainant's problem of bleeding from the mouth "was resolved as a dental issue subsequently by another doctor" (see para. [25] above) was based on pure hearsay. Again, we agree with Mr Wildman on this score, since the

only evidence on the point was the complainant's statement of what she was told by the doctor at the rape unit (see para. [8] above). But again, in our view, nothing really turns on this: the essential issue in the case was not the proper diagnosis of the complainant's condition, but whether she was indecently assaulted by the applicant during the course of the intimate physical examination which he admittedly performed on her.

(iii) Sentence

[58] On this point, there is a clear factual dispute to be resolved - between the applicant, on one side, and Messrs Hamilton and Witter, on the other. On the applicant's account, Queen's Counsel were the ones who raised the possibility that, if he insisted on the appeal being argued, the sentence could be increased (see para. [28] above). But on Mr Hamilton's account, supported by Mr Witter, it was the applicant who, having been advised that the pending appeal was unlikely to succeed, first canvassed the merit of an appeal against sentence (see para. [33] above). It was in this context, Mr Hamilton said, that the applicant was advised that "apart from the difficulties that would be encountered in mounting such an appeal at that stage, that it would be most unwise to do so having regard to the Court's power and/or discretion upon any such appeal, to impose a more severe penalty".

[59] The first question that arises is how should this court go about resolving the dispute. In **Ebanks v R** [2006] UKPC 16, in the not unrelated context of a complaint on appeal of incompetent representation at trial by counsel, the Privy Council considered

(at para. 18) that, "in the absence of any written record, an appeal court has to consider the respective accounts of the appellant and of his former counsel and evaluate them in the light of the other relevant circumstances". Further (at para. 19), that while there may be cases in which the appeal court may find it desirable to hear evidence from those concerned,"there may be cases where, having regard to the surrounding circumstances, the court feels able to resolve the dispute without hearing evidence". In our view, the instant case clearly falls into the latter category, given the detailed accounts provided on affidavit by the respective players and the surrounding circumstances.

[60] The second point to be noted is that there was no appeal against sentence. Therefore, the possibility that this court might increase the sentence imposed on the applicant by the learned Resident Magistrate, pursuant to the power given by section 14(3) of the Judicature (Appellate Jurisdiction) Act[3], simply did not arise. It seems clear from (i) Mr Hamilton's reference in the discussions with the applicant to the difficulties that would be encountered in mounting an appeal against sentence "at that stage"; and (ii) Mr Witter's reference (see para. [33] above) to "seeking leave to do so", that what both counsel had in mind was the fact that there was no appeal against sentence.

[61] It is in these circumstances, it seems to us, that the applicant must have been told that, should he choose to introduce the element of an appeal against sentence, he

[3] Section 14(3) provides that: "On an appeal against sentence, the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal". Section 23 makes this subsection applicable to appeals to this court from judgments in any matter tried in the Resident Magistrates' courts on indictment, or on information in virtue of special statutory summary jurisdiction.

would be in danger of facing an increased sentence. We would in any event have found it inconceivable to suppose that two Queen's Counsel of Messrs Hamilton and Witter's experience would have failed to appreciate that an increase in sentence would not be possible in the absence of an appeal against sentence. We accordingly have no hesitation in preferring their account of these discussions to the applicant's.

(iv) Miscellaneous complaints

[62] Mr Wildman made other complaints, including that the learned Resident Magistrate had said in her judgment that "there is no contest as between [the applicant's] evidence and that given by the [C]rown's witnesses". In our view, there is nothing in this complaint. The Resident Magistrate's remark was made in the context of her assessment of the credibility of the applicant's version of his encounter with the complainant. It therefore seems to us that it could only have been a reference to the fact that, since the applicant did not deny carrying out a physical examination of the complainant, the only question that arose for determination was whether it took place in the manner described by the complainant or the applicant.

[63] Then Mr Wildman also complained, somewhat faintly, it must be said, that the learned Resident Magistrate confused assault with battery in her analysis of the law. We must confess to finding the true nature of this complaint somewhat elusive. It suffices to say, we think, that if, as the learned Resident Magistrate found, the applicant's examination of the complainant proceeded in the manner described by her, there can

be no doubt that he was guilty of the offence of indecent assault. For, as Lord Ackner observed in **R v Court** [1988] 2 All ER 221, at page 229 –

> "…it is self-evident, that the first stage in the proof of the offence [of indecent assault] is for the prosecution to establish an assault. The 'assault' usually relied on is a battery, the species of assault conveniently described by Lord Lane CJ in *Faulkner v Talbot* [1981] 3 All ER 468 at 471, [1981] 1 WLR 1528 at 1534 as-
>
> > 'any intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile or rude or aggressive, as some of the cases seem to indicate.'"

Conclusion

[64] For all the reasons which we have attempted to state, we considered that the applicant's contention that he should be allowed to withdraw his notice of abandonment of the appeal on the ground that he signed it as a result of incorrect legal advice was not supported by the material which was placed before us. In the light of the careful manner in which the learned Resident Magistrate conducted the trial and stated her conclusions, in a matter turning entirely on her assessment of the credibility of the evidence, it appeared to us that the applicant was correctly - and quite properly - advised that his appeal to this court stood very little chance of success. It also appeared to us that any further suggestion that the applicant's signing of the notice was the result of intimidation or duress of some kind had not been made good. We therefore concluded that the applicant's mind did in fact go with the notice of abandonment

which he signed. In the result, the notice fell to be treated as irrevocable and the application to withdraw it was accordingly dismissed.