[2010] JMCA Crim 81

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 26/2010

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MISS JUSTICE PHILLIPS JA
THE HON. MRS JUSTICE McINTOSH JA

LOWELL FORBES v R

Cecil J Mitchell for the appellant

Mrs Diahann Gordon-Harrison and Miss Michelle Salmon for the Crown

7, 8, 14 October and 20 December 2010

McINTOSH JA

[1] We heard arguments in this appeal on 7 and 8 October and gave our decision on 14 October 2010, dismissing the appellant's appeal against his conviction on 26 April 2010 in the Resident Magistrate's Court for the Corporate Area, for the offences of corruptly soliciting $15,000.00 and corruptly accepting $10,000.00, both contrary to section 14 (1) of the Corruption Prevention Act. His appeal against the sentence of 12 months imprisonment, imposed for each conviction, on 27 April 2010, to run concurrently, was also dismissed and his

convictions and sentences were affirmed. We promised then to provide reasons for our decision and endeavour to do so now.

[2] Having given verbal notice of appeal at his sentencing, the appellant filed a written notice on 7 May 2010 giving the following as the two grounds for his appeal:

> 1. that the verdict was unreasonable having regard to the evidence; and
>
> 2. that the learned Resident Magistrate failed to analyse correctly the evidence in coming to a verdict adverse to the appellant.

However, the appellant expanded on these in the following five supplementary grounds, filed on 17 August 2010, relying on grounds one to four in the arguments before us and opting not to pursue ground five:

> "1. That the Learned trial Judge fell into error in placing such great reliance on the statement of the complainant which statement had been admitted into evidence pursuant to the Evidence Act. That the Learned Resident Magistrate did not fully take into account the following, namely:
>
> (a) That the complainant Miller could not be tested as regards his credibility and demeanour as he was not available to be cross - examined.
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> (b) That on both the case for the Crown and Defence there was evidence that Miller was a shady character and hence this would affect the weight to be placed on his statement.

(c) That there was no confirmatory evidence to support Millers (sic) statement as to the main allegations that the Appellant solicited money and that the money given by Miller to the Appellant was money which had been solicited.

(d) That the Learned Resident (sic) did not address her mind properly or at all to the animosity which had developed between the complainant and the Appellant and which the complainant Miller perpetuated even after the Appellant had been charged.

2. That although the Learned Resident Magistrate *en passant* mentioned the aspect of political consideration the Learned Resident Magistrate failed to appreciate the full and proper effect that political considerations could have on the evidence of the Crown witness Martin. Further even the Learned Resident Magistrate remarked on the co-incidence of Martin now being the bodyguard of a senior politician from the parish of St. Thomas, a politician who is allied to the same political party as the political party that had been attributed to Martin by the Appellant.

3. That the Learned Resident Magistrate failed to properly assess or appreciate the essence or effect of the evidence of the Appellant and his witness Noel Edwards and that when the evidence of the Appellant and Edwards was compared and contrasted with the statement of the complainant Miller that the Learned Resident Magistrate should have at the lowest been put in doubt regarding the statement of Miller. That in particular the evidence by the Defence regarding the car parts was highly credible.

4. That the Learned Resident Magistrate placed great store on the fact that the Appellant sought to

have a groundsman remove the car parts from the police service vehicle but the Learned Resident Magistrate failed to appreciate the converse position that to leave the car parts in the service vehicle could cause that portion of real evidence to be suppressed by the Crown witnesses.

5. That the sentence was manifestly excessive."

Before turning to the arguments in the appeal it is necessary to look at the evidence in some detail, in light of the comprehensive nature of the complaints.

The case for the Crown

[3] The Crown adduced oral evidence from six witnesses and utilized the provisions of section 31D of the Evidence Act to put in evidence a statement taken from the virtual complainant, Alfred Miller, who was by then deceased. Briefly, this evidence disclosed that on 4 March 2007, a Toyota Caldina motor car belonging to Mr Miller and driven by Noel Edwards was taken into the custody of the appellant and placed on a wrecker. Mr Miller was notified of this development by Noel Edwards and he went downtown Kingston, in the vicinity of the Ward Theatre, where he not only saw the vehicle on the wrecker but also saw and spoke to the appellant who, after telling him that he would need to pay him $30,000.00 for two of his vehicles which he had seized, said he would release one if Mr Miller paid him $15,000.00 for the release of the other vehicle. Mr Miller protested saying that he had no money but the appellant insisted that

he obtain the money, telling him to "go and run the plastic" (a reference it seems to the use of a credit/debit card), otherwise his vehicle would be at the pound for two weeks or one month before he would get it back.

[4] After leaving the appellant, ostensibly to secure the sum required, Mr Miller went to the Anti-Corruption Branch of the Constabulary Force and made a report. A "sting" operation was then planned involving the marking of $10,000.00 in various Jamaican currency notes which Mr Miller had with him to give to the appellant at their arranged meeting place. During the time that the report was being made and the participation of officers from the Anti-Corruption Branch was being planned, Mr Miller was in constant communication with the appellant, giving him excuses for his delayed return. Then, in accordance with their plan, Mr Miller returned to the appellant. He had with him the marked $10,000.00. Before he reached to the designated meeting place he saw the appellant and telephoned him, whereupon the appellant told him to proceed to the meeting place. Then when he got there the appellant indicated that Mr Miller should follow him. At this point, Mr Miller gave a signal to the anti corruption officers who were close by in their vehicle and then proceeded as instructed by the appellant. He followed car number 105 to Wolmer's Arcade where it stopped and he stopped opposite the Pearnel Charles Arcade, both downtown Kingston. Mr Miller and the appellant then alighted from their respective vehicles, walked towards each other and Mr Miller handed over the marked bills to the appellant who took possession of them

after enquiring what the amount was. On being told that the amount was $10,000.00, he remarked that that sum was for him and instructed Mr Miller to go back to his car and "find more money bring come" because the wrecker man needed to be paid $5,000.00 (this would bring the total sum to the $15,000.00 figure that he had told Mr Miller he needed to pay). The appellant then walked away towards the police car and Mr Miller walked away towards his vehicle. Mr Miller next saw the anti -corruption police by the door of the police car but he was unable to hear what was being said. However, he saw when the appellant "began to run and some money blowing away".

[5] The officer who had dispatched the appellant and his colleague on their duty that morning was Inspector Ian Parker of the motorized patrol division. He testified that they were dressed in uniform and were assigned a vehicle marked with the number 105 (which was the number Mr Miller said was on the police vehicle driven by the appellant). In cross-examination, he spoke to the character of the appellant saying he was totally surprised when he heard of the incident. "I was very, absolutely surprised to learn about the allegations. He has always done his duty in a professional way". This was over the period of about one year that he came to know him and was his immediate supervisor.

[6] The officers who were involved in the sting operation also testified. The court heard first from Inspector Eaton Dwyer who took Mr Miller's report and put the arrangements in place, had the money marked and drove with Sergeant

Martin and Woman Corporal Grace Folkes to North Parade, Kingston, in the vicinity of the Ward Theatre. They had travelled in a separate vehicle from Mr Miller's and when they were at the location he saw the radio car pull up in front of the Ward Theatre. His observations of the movements of radio car number 105 and Mr Miller's car were consistent with what Mr Miller said in his statement. The two officers, who were with him, alighted from the vehicle and ran in the direction where car 105 and Mr Miller had gone. Then Inspector Dwyer observed the sergeant wrestling with a uniformed police officer at the driver's door of car 105. He identified the appellant as the uniformed officer and the defence took no issue with this identification. He saw when the appellant threw some money to the ground. People started to run towards the money and he had to back them away. When the money was retrieved and counted it was found to be intact. The inspector further testified that the appellant managed to get away from the sergeant and he made good his escape. In cross-examination he said that the sergeant was wearing ordinary civilian clothing.

[7] Woman Corporal Folkes' evidence supported Inspector Dwyer's as to how the operation went that afternoon. She observed the handing over of the money to the appellant and said after he took it he moved towards the driver's door and when he was about to go in the sergeant rushed towards him. She observed them wrestling for the firearm which the sergeant was able to retrieve. The appellant then let go of the money and ran towards the St William Grant Park.

[8] Mr Ronald Thwaites was called to speak to the death of Alfred Miller whose funeral he said he attended. He had known Mr Miller for about 12 years and had interacted with him because of Mr Miller's attention to the needs of school children and others who needed help in the Franklyn Town community. When cross-examined, Mr Thwaites said that he did not know of Mr Miller being detained by the police but would not have been surprised to learn that he was. He said Mr Miller was a businessman and a taxi operator who was also a member of the People's National Party. Thereafter the court heard from the recorder of Mr Miller's statement, Corporal Ann Wilson, who read the statement into the evidence.

[9] The final witness for the prosecution was Sergeant Derrick Martin whose evidence was that he had spoken with Mr Miller on 4 March 2007 at the office of the Anti- Corruption Branch and had taken $10,000.00 dollars from him in notes on which he had placed his initials "DM" before returning them to him. He was a part of the sting operation and was the one who had held the appellant after he had observed Mr Miller hand him the money and speak to him for about 20 seconds. After taking possession of the money the appellant had walked towards the service vehicle. He went inside and sat down, putting his firearm on the seat between his legs. As the appellant was about to close the door Sergeant Martin said he used his right foot to block it. He said he had his police regulation identification booklet around his neck and said to the appellant,

"Police Anti- Corruption". The appellant then reached for his firearm as did the sergeant and a struggle ensued. Sergeant Martin was able to disarm the appellant who then threw the money away and made good his escape through the park.

[10] In cross- examination some discrepancies arose, inter alia, as to when the appellant was taken into custody and the date when the appellant was next seen and Sergeant Martin explained that it was not the 8th of May as was indicated in his statement but the 8th of March that warrants were executed on the appellant who, by then, was missing in action for four days. He had collected a statement from one Noel Edwards and had made efforts to locate him but was unable to do so. He had not mentioned in his statement that he had the identification booklet around his neck or that he had said "Police Anti-Corruption" when he approached the appellant. He denied the suggestions put to him that he knew the appellant before and had actually approached him once to be an activist for the Jamaica Labour Party (the JLP), in St Thomas, which invitation the appellant had refused saying that he was a policeman, not a politician and did not want to get mixed up in that. He also denied the further suggestion that since then he has been expressing ill will towards the appellant.

The Defence

[11] The appellant gave evidence on oath in which he told the court that he has been a constable of police for six years. He has never been to the orderly

room (which is where police officers are sent for breaches of certain Force regulations), nor has he ever been interdicted or suspended.

[12] He recalled an incident which occurred at about noon on 4 March 2007 while he was on patrol in car 105, in the downtown area of Kingston. He saw a motorist whom he knew before as Noel Edwards and with whom he had had a confrontation the day before. On 4 March Mr Edwards was parked downtown in the vicinity of Ward Theatre and he went to speak to him with the intention of prosecuting him for offences he had committed. He seized his vehicle, took the keys for the vehicle from him, called a tow truck and gave Mr Edwards' keys to the driver. He said he "did not have any discussion with Mr Edwards about any money that I wanted".

[13] He further testified that he knew Alfred Miller but at that time he did not know whether Mr Edwards and Mr Miller knew each other. However, he subsequently learnt that they did. On the morning of 4 March 2007 he received a telephone call from Mr Miller at about 7:30 and they had a discussion concerning some car parts. He learnt that Mr Miller sold car parts three weeks prior to 4 March and he had purchased parts from him valued at about $7,500.00 for his Toyota Caldina motor car but the parts were unsuitable. He spoke to Mr Miller about it and he added that he had the car parts in court even as he testified. He had arranged with Mr Miller to meet him that day to pick up the parts and return his money. They had made about three or four

previous arrangements to this effect but they had not materialized (the appellant saying "he had me going round and round all the time about the parts") and, as a result, when they spoke at 7:00 that morning, there was a verbal war between them.

[14] He eventually met Mr Miller downtown, at about midday, before he met Mr Edwards. (It would seem then that the incident described at paragraph 12 above would have taken place after this meeting). At the time the parts were in the trunk of the police car. He collected the money from Mr Miller while he was on the outside of the vehicle and had not yet had the chance to check the money. He went into the radio car to do so and to open the trunk where the parts were. However, before he could do that a man attacked him and grabbed away his service pistol. This man did not say anything to him (as opposed to the suggestion, to Sergeant Martin (though a suggestion, unless accepted, is not evidence), that he had run down on him quietly and said "gimme di money"). He did not see the face of the person who attacked him as he was focused on the gun and his life but, (notwithstanding his evidence that he did not know this man – page 32 of the transcript) he further testified that he subsequently saw him at the Anti–Corruption Branch. He said he had run away leaving the police car as the first thing that came to his mind was that Mr Miller had brought his friends to hurt him based on the heated conversation they had earlier that day.

[15] The appellant said, "This man was not in uniform or police vest, just dressed like a normal man like those street boys downtown". (Inspector Dwyer had said in cross-examination that the sergeant's attire was not outrageous - that he was wearing ordinary shirt and pants). He continued: "I saw the man at Anti-Corruption Branch. I did not see if it was the same person but when I saw the person at Anti-Corruption Branch, I know that man from long time, from St Thomas". He understood him to be a police officer whom he mostly saw with politicians. He (the sergeant) had approached him in 2002 to be a member of the JLP but he did not comply. On 4 March, he ran because he was in fear of his life as a man grabbed away his weapon and pointed it in his direction. The only chance he had was to run for his life. He added that a couple weeks before that, a colleague of his had been gunned down on King Street. After making some calls to arrange for legal representation he turned himself in at the Anti- Corruption Branch with his lawyer. Then, about three weeks after his arrest he saw Mr Miller who told him that he should have sold the car parts and not bother him about refunding his money. It was then that he realized why Mr Miller had told lies on him. Mr Miller had further told him that if he was not in uniform he would have been shot.

[16] His evidence in cross-examination was that although it was supposed to be an exchange of money for car parts he had not walked towards Mr Miller with the parts. His colleague Constable Broadie was seated in the passenger seat talking on his phone during the incident and he had made no noise or call

for assistance from him. About three minutes after the incident, he said he called Inspector Parker and made a report to him. He said after that he had gone back to the station but did not see Inspector Parker and did not remain there. He did not make a written report and he made no entry in the station diary. He had expected Inspector Parker to do so.

[17] Kingston Central Police Station was the nearest police station to where the incident occurred, he said, but although he was in fear for his life he had not thought to go there. He had not given any thought to his colleague also being in danger. He had gone to Anti-Corruption based on what Inspector Parker told him. After the incident he was not aware that he was wanted by the police. Later, on 4 March he asked the groundsman at the motorized patrol division to retrieve the car parts from the police vehicle for him. By then he knew that he was wanted by the police for questioning. He did not think to leave the parts in the vehicle and have them discovered later.

[18] When he was cross-examined about what he had done with the money, he insisted that he had thrown the money into the face of his attacker, not in the air and in answer to a question put to him, he agreed that he had purposely thrown his money in the face of his attacker. Nevertheless, he did not know who his attacker was until he went to the Anti-Corruption Branch. It was actually words spoken by the sergeant that identified him as the person involved in the incident. But for those words he still would not be able to say who the man was.

In his words, on being re-examined by his attorney, "When I went down to Professional Standards Branch, I saw Mr Martin who I knew before and he said to me "Boy Forbes me never know say you so fast me grab wey you gun and you run like a bullet" and that is when I realized it was him".

[19] His witness Noel Edwards told the court that on 4 March 2007 at about 10:30 am he was downtown by Ward Theatre. He was standing under a tree with some friends when he saw a radio car drive up and he walked up to it. He recognized the car because the day before, the police in it had stopped him and he did not stop. The officer came out of the car asked him certain things then took the car documents and the keys and put the car on a wrecker. He then telephoned Mr Miller who was some cousin of his and spoke to him because he had seen him with this officer (known to him as Machine as he drove a Caldina, a car known as Machine). He knew Mr Miller dealt with car parts. He also knew him to have been in prison as he had visited him there. He further said that he would not say that Mr Miller was an honest man.

[20] He recalled going with Mr Miller after 4 March to "a place where they indiscipline (sic) unruly police or something like that" and he gave a statement to get back his car. Afterwards, he spoke to Mr Miller who told him that he "set up" the police by using the same money that he was to give him for the car parts, against him. He was not pleased with that. He did not know of any police looking for him. He had not gone anywhere. Before 1 March 2007, he saw the

officer and Mr Miller at a gas station on Deanery Road. He had some car parts in his car which he had bought for his Toyota Caldina motor car but they could not work and Mr Miller had taken them from him and handed them over to the officer. On 4 March 2007, when the car was seized he had had no discussion with the officer. He had just handed over the papers and the keys for the vehicle and the officer caused the vehicle to be put on the tow truck. Mr Edwards said that he came to know about this case because he was standing at his gate when he saw a radio car drive up and a police officer came out and asked him certain questions, then gave him a card with a number on it which he later called and he went to an office off Old Hope Road. He had not left the island since 4 March and was not aware that the police were looking for him.

[21] In cross-examination he said when he called Mr Miller he did not come down to Ward Theatre. He was not there for any discussion between Mr Miller and the appellant and never came to court because he did not know that the appellant had been charged. After Mr Miller died he did not make himself available to the court. It was suggested to him that Mr Miller had told him that he did not have any money to give to "Mean Machine" so he should let him take the car and he responded "Me and him never have any money argument".

The issues arising on the supplementary grounds of appeal argued and analysed

Ground one: - The issue was whether in placing reliance on the untested statement of Alfred Miller, the learned Resident Magistrate failed to appreciate the evidence of his shady character, the lack of support for his evidence relating to the offences charged and the animosity which had developed (and continued after the incident) between him and the appellant.

[22] Mr Mitchell submitted that the learned Resident Magistrate gave no indications of her thoughts as to the veracity of the allegations. He said that the magistrate seemed to have put great store on demeanour but, because she did not have the benefit of seeing the witness Miller, to be able to assess his demeanour and this witness was said to be of a shady character, she ought to have been less inclined to rely on his unsupported statement.

[23] He further submitted that although the learned Resident Magistrate addressed the evidence of the good character of the appellant and warned herself about the approach to be taken to the evidence of bad character she did not address the undisputed evidence of animosity which Mr Miller bore towards the appellant and which would have given Mr Miller motive to "set him up". That, taken together with the absence of any supporting evidence for the charges of soliciting and accepting, warranted some expression of the magistrate's reasons for rejecting this important part of the defence. In circumstances where it is a part of the defence, counsel submitted that the

magistrate is expected to say that she considered the animosity and its perpetuation and why it is that she rejected it.

[24] In response, the learned Deputy Director of Public Prosecutions submitted that the magistrate expressly and adequately warned herself of the need to approach the evidence of Mr Miller, as communicated through his statement to the police, with caution (see pages 60-61 of the transcript). Mrs Gordon-Harrison said it is an immutable position in law that issues such as this which go to credit are the province of the jury (which in this case would be the learned Resident Magistrate) and once the requisite warning is given and a finding of guilt is still returned, the decision is unassailable in this regard. Further, she submitted, the seeming complaint that there was an absence of corroboration of Mr Miller's evidence is without foundation in law as corroboration in these circumstances is not a legal requirement. On the question of whether the learned Resident Magistrate had properly dealt with the animosity which the appellant said had developed between Mr Miller and himself, Mrs Gordon-Harrison said that too was an issue of credit and once the magistrate adequately considered and resolved it that would be sufficient.

[25] After carefully examining the learned Resident Magistrate's findings, we saw no merit in Mr Mitchell's submissions on this issue. It was for the learned Resident Magistrate to address her mind to the limitations complained of in ground one, appropriately warn herself about those limitations and give to the

statement such weight as she thought it deserved. This the learned magistrate clearly did.

[26] In assessing the evidence contained in the statement, she looked to see how it squared up with the testimony from the live witnesses including the evidence of the appellant and his witness. Although, as Mrs Gordon-Harrison correctly submitted, corroboration was not required for Mr Miller's evidence on the offences charged, as a matter of law, she was entitled to look at other aspects of the case to see whether there was support for those aspects of his evidence in seeking to make up her mind as to whether he was a witness who could be believed on the main allegations. In our view, the learned magistrate made it clear that she considered the disadvantage in not having the benefit of observing Mr Miller in the witness box being tested by cross - examination and that she had in mind the warning concerning the approach to be taken when dealing with a witness said to be of bad character (a man who was also said to have redeeming qualities), then concluded that his evidence was nevertheless reliable.

[27] On the other hand, she found the appellant and his witness to be incapable of belief. She had for her consideration the appellant's evidence that Mr Miller had called him on the morning of 4 March 2007, leading to their arranged meeting later that day and giving rise to an inference that this was the set up plan, about which Mr Edwards spoke, being put in motion. However,

while Mr Edwards' evidence was as to seeing the appellant that morning at about 10:30, the appellant's evidence was of meeting Mr Miller before he met Mr Edwards. It would seem that the purpose of putting Mr Miller's meeting before the incident with Mr Edwards was to establish that it involved no seizure of any vehicle for Mr Miller and that the meeting was a straightforward one for the exchange transaction. However, bearing in mind his admitted hasty departure from the "Miller meeting" (see page 32 of the transcript) and all that transpired thereafter when would the Edwards encounter have taken place?

[28] The learned magistrate also had for her consideration, Mr Edwards' evidence of Mr Miller telling him that he had used the same money which he was to give to the appellant, as a refund, against him but Mr Miller had $10,000.00 to meet the demand whereas the appellant's evidence was as to a refund figure of $7,500.00. The evidence also disclosed that the car parts which, according to the defence, would have generated this animosity were parts which were bought for Mr Edwards' Caldina motor car, a vehicle similar to the appellant's Caldina motor car and the parts had been found to be unsuitable for the said vehicle. The same car parts were handed over by Mr Edwards to Mr Miller in the presence of the appellant who then received them from Mr Miller, yet he said that up to 4 March he did not know if they were known to each other. As tribunal of fact, it was entirely a matter for the learned Resident Magistrate to decide whom and what she believed and as Mr Mitchell correctly submitted, she was in the best position to assess the witnesses. Having had the

benefit of seeing and hearing the appellant and his witness, she did not believe their account. In that event, there would have been no need for the learned magistrate to separately address the animosity as contended by Mr Mitchell.

[29] The learned Resident Magistrate had no duty to set out in great detail her every thought on the issues. The authorities make that clear. Her duty to provide reasons for her decision is discharged if she demonstrates in her examination of the evidence pertaining to the issues that she had all the necessary considerations in mind (see **Regina v Alex Simpson; Regina v McKenzie Powell** (SCCA Nos 151/88 & 71/89 a decision delivered on 5 February 1992). After assessing all the evidence before her and giving herself all the appropriate warnings and cautions, the learned Resident Magistrate clearly found Mr Miller's evidence to be credible, such that she could rely on it in relation to the main allegations and we saw no reason to disturb that conclusion. Ground one therefore failed.

Ground two: - The issue for determination was whether the learned Resident Magistrate failed to properly consider the effect of political motivation on the evidence of Sergeant Derrick Martin.

[30] It was the contention of Mr Mitchell in this complaint that, although the learned magistrate referred to the case of **R v Anthony Wilson** (1990) 27 JLR 500, as a case concerning the treatment of evidence of political motivation, she said that she found the demeanour of the sergeant to be a sufficient basis for her to

reject those considerations. Counsel pointed to the evidence that Sergeant Martin was now bodyguard to a senior politician from St Thomas as providing some credence for the appellant's assertion that there was malice and bias born out of political considerations and submitted that even the magistrate had remarked on the coincidence of the sergeant now being bodyguard to a senior politician from St Thomas. Mr Mitchell further complained that the witness Martin played a pivotal role in the investigations into this matter and showed bias when, on being charged with the responsibility of locating the witness Edwards, he reported that he could not be found yet Edwards was easily located by the defence. The magistrate ought therefore to have found his evidence lacking in credibility and not return a verdict adverse to the appellant based on his tainted evidence, especially when it was compared and contrasted with the evidence of the appellant who was a person of good character and his witness whose evidence was highly credible. The Crown too regarded this as essentially an issue of credit and submitted that the learned magistrate addressed the issue of political motive sufficiently in her findings of fact at pages 61-62 of the transcript.

[31] It was clear to us that such political motives as were referred to in the evidence before the learned Resident Magistrate were properly addressed by her in her findings of fact. At page 61 of the transcript she expressed herself thus:

> "The defence has attacked the credibility of another crucial witness for the Crown, Sergeant Martin indicating that he has political motives.

> Counsel has asked me to address my mind to issue of politics and malice and their connection with the parish of St. Thomas. Sergeant Martin, interestingly enough, he says is now stationed at the Protective Services Division. I carefully consider all of this because in Jamaica today, political considerations are rife in every sphere."

This showed that Mr Mitchell's submission concerning the comment of the magistrate, which no doubt was designed to bolster his complaint of political bias on the part of Sergeant Martin, was entirely without foundation, as the magistrate had not, in fact, made the comment attributed to her in this ground.

[32] Additionally, we did not discover any reference in the magistrate's findings to the case of **R v Anthony Wilson** as submitted by Mr Mitchell (although the record shows that defence counsel had mentioned the case in his closing submissions) but, in our view, the circumstances in that case, with its strong evidence of party politics at work, are clearly to be distinguished from the instant case. In **Wilson** the court found that "The trial judge should have taken judicial notice of malice born out of party politics which is a notorious fact of which every ordinary citizen of Jamaica is aware" (taken from the headnote). The evidence had disclosed that a certain politician had pointed out the appellant and told the police to deal with him so that the said politician could take over the road contract which the appellant was then handling. The evidence further showed that the said politician commenced work on the road project the day after the appellant was taken into custody but the trial judge did not address this aspect of the evidence which was crucial to the defence.

[33] What the magistrate in the instant case had for her consideration was the appellant's evidence of the incident in 2002, after which he said the sergeant had malice and ill will towards him. On the evidence the manifestation of those sentiments came five years later, when the sergeant was motivated to report failure in locating Edwards. She also had the detailed evidence of Sergeant Martin outlining all the efforts he had made to locate Mr Edwards (page 26 of the transcript – he went to his home on more than six occasions between April and November 2007, sent letters to hospitals, morgues, passport office and correctional centres, then on learning during the course of his investigations that Edwards hailed from the parish of Manchester he wrote letters to funeral homes and hospitals in that parish and also made telephone calls to a number he had for him). That he had made himself available to the defence did not mean that he was readily available to the Crown. Having addressed her mind to "the issue of politics and malice" and the defence attack on the credibility of the sergeant, the learned Resident Magistrate said:

> "I have had the benefit of observing this witness give evidence and was subject [sic] to the rigors of cross examination by Counsel. There were suggestions made to him of impropriety and political motivation. He denied all of them. I found he responded with confidence and conviction, I considered his demeanour. … Defence accused him of being biased even to extent that he made no efforts to contact Noel Edwards. ... Having assessed Sergeant Martin, his demeanour, his responses to questions … I accept him as credible. I accept his account as true."

In our view the learned Resident Magistrate adequately addressed the issue. It was essentially a question of credibility. She clearly rejected the defence contention of political motivation and as tribunal of fact that was a matter entirely for her. The appellant's arguments on this issue therefore met with no success and consequently supplementary ground two failed.

Ground three: - The issue for the court's consideration was whether the learned Resident Magistrate failed to properly assess the effect of the evidence of the appellant and his witness Noel Edwards which ought to have created a doubt when compared and contrasted with the statement of Alfred Miller.

[34] It was Mr Mitchell's submission that when the evidence of the appellant and his witness was compared and contrasted with the statement of Mr Miller, the appellant being a person of good character, the magistrate should have found the defence to have been the more credible. Mr Edwards' evidence ought to have been taken to be the same as in the statement he gave to the police and, said counsel, had he been called by the Crown, that evidence would at least have raised a doubt leading to a different conclusion. Therefore the learned magistrate ought not to have rejected it lightly. Counsel submitted that the reasons advanced by the learned magistrate for rejecting his evidence, namely, that she was not impressed with his demeanour and that she doubted that he was always available to the court were wholly insufficient and as there

was nothing to impugn his evidence, in that, he was not found to be lying, his evidence ought to have been believed.

[35] In effect, Mrs Gordon-Harrison agreed that credibility was the focal point on this issue and it was her submission that the learned Resident Magistrate carefully assessed the evidence of both the Crown and the defence before arriving at her verdict, demonstrating that at all times she was fully cognizant of where the burden of proof rested (see pages 59 and 60 of the transcript). In assessing the evidence of Noel Edwards and any corresponding weight that could be attached to it, Mrs Gordon-Harrison said, considerations of credibility were central to her approach. It was within the magistrate's province and she was entitled to listen to each witness in the case and to assess each witness individually. Where issues of credit are concerned the magistrate does not in law have to explain why one witness is believed over another or to seek to painstakingly justify her assessment of the witness, although this did not mean that the magistrate can act in an arbitrary manner, counsel argued. In this case she did, in an oblique way, give reasons. She did do some element of comparing and contrasting vis-a-vis the Crown's witnesses and the appellant. In respect of the supposition that had Mr Edwards been called by the Crown, his evidence might have put the Crown's case in disrepair, Mrs Gordon-Harrison submitted that the Crown was deprived of what was in his statement and so was at a disadvantage in seeking to say what could or might have been. However, the magistrate had to deal with the evidence as it in fact unfolded. Supposition,

without more, has no place in these circumstances and one can only be guided by what was in fact the evidence before the court. The learned deputy director submitted that in spite of the validity that the appellant would like the court to attach to the evidence of Noel Edwards, the inescapable and fundamental issue is that it was an issue of credibility. If the magistrate did not find him to be credible then she was obliged to reject his evidence as unreliable in determining whether or not the Crown had proved its case. Mrs Gordon-Harrison submitted that the magistrate's approach in her findings was unassailable and she could not be faulted for her verdict.

[36] We were unable to agree with the submissions of learned counsel for the appellant that there was any failure on the part of the learned Resident Magistrate to properly assess or appreciate the effect of the evidence of the appellant and his witness Noel Edwards. Her findings of fact disclosed quite the contrary. The magistrate had this to say of Mr Edwards (at page 60 of the transcript):

> "He called Noel Edwards in his defence who admits that accused seized his car and put it on a tow truck. He knew him before as Mean Machine. He drives a Caldina which is significant because the accused also says this and this is the car for which the parts were bought. He said he had seen Alfred and that police together before."

She then referred to his evidence that Alfred dealt in car parts, was a convict and that he would/could not say that he was an honest person. The magistrate further said that Mr Edwards admitted that he had called Alfred so the latter

would have been aware of the seizure of the car and, after commenting that it would have been a remarkable coincidence that that very day, when the car is seized, he is in an exchange transaction with the same officer, she continued:

> "I assessed this witness carefully, from the tremor of his hands, to his reaction to certain questions posed, especially as it relates to making himself unavailable after the death of Mr Miller. My assessment of him was that he was a witness of convenience, could not be trusted. I didn't believe him. I reject the Defense's case. I am duty bound to go back to Crown's case so I do so now."

Of the appellant she said:

> "I assessed his demeanour in the witness box. I found his account sounded rehearsed. I did not believe his account."

[37] In her assessment of the appellant the magistrate commented on his evidence that he had not seen the face of his attacker on the one hand and on the other hand, saying that he realized that his attacker was Sergeant Martin. She found this to be inconsistent and devoid of credibility. Although she did not say how she treated with the explanation given by the appellant, it is clear that in rejecting his account and accepting Sergeant Martin as a witness of truth (whose evidence was that he did not know the appellant before the incident), she clearly rejected his explanation. It seemed to us that the magistrate must have also taken note that those words which the appellant said were spoken to him, allowing for him to identify his attacker, were only disclosed in re-examination and had never been put to the sergeant in cross- examination. We

were firmly of the opinion that the learned Resident Magistrate had more than sufficient reason for rejecting the appellant's explanation.

[38] The magistrate also commented on the appellant's failure to make a written report even though his evidence is that he went to the station that day, after the incident. She said at page 59-60 of the transcript:

> "Being a police officer there are implications when a police officer loses his firearm. He made no diary entry about this robbery. He says he told his immediate supervisor Inspector Parker yet counsel who cross examined Inspector Parker and who left no stone unturned, did not suggest this to Inspector Parker."

She found that the evidence of the telephone call was a recent concoction and there was every basis for that conclusion. The evidence had disclosed that at about 12:40 p.m., Inspector Parker had received a telephone call from a man who had identified himself as Inspector Dwyer and this had led him to East Parade where he saw and spoke to the inspector. The appellant was not there. It would have been reasonable for the learned Resident Magistrate to take into account the fact that this evidence of a telephone call from Inspector Dwyer, which came out in cross-examination, did not prompt the appellant's attorney to ask about the call from the appellant. That call would have had to have been in that same time frame as the incident would have occurred shortly after midday. Further, the evidence did not suggest that three minutes after the incident Inspector Parker would have been in a position to tell the appellant anything which could have led him to turn himself in at the Anti-Corruption

Branch. The appellant would have known where to turn himself in from the "wrong doing" in which the magistrate found that he was involved (see paragraph 43 below) and from the fact (as found by her) that Sergeant Martin had identified himself as an officer from the Anti- Corruption Branch.

[39] No doubt one of the effects which Mr Edwards' evidence was intended to have was to lend credence to the appellant's account of the arranged meeting that morning. However, the evidence which the magistrate had for her consideration was that when he called Alfred and told him what had transpired and gave him the name of the officer involved, Alfred told him that he was supposed to meet with the officer. However, by then that meeting would already have taken place since the appellant's evidence is that he met with Mr Miller before the confrontation with Mr Edwards. Furthermore, Mr Edwards said he knew nothing about Alfred meeting with the appellant after the car was seized. He had left the scene after the vehicle was placed on the tow truck and before the tow truck left. Up to that time Alfred had not come on the scene.

[40] In our opinion there was ample evidence from which the learned Resident Magistrate, as tribunal of fact, could conclude that they were not witnesses of truth. She demonstrated that she was cognizant that the Crown bore the burden of proof and having rejected the appellant and his witness she returned to the Crown's case as she was obliged to do. Then, in reviewing the Crown's case, bearing in mind the evidence for the defence, the learned Resident

Magistrate was entitled to consider whether the latter had the effect of strengthening the case for the Crown. In giving sworn testimony that was one of the possible effects of his evidence and that of his witness. That, in our view, was how the learned magistrate approached their evidence. It was no part of her duty to indulge in any speculation about the likely effects of evidence from Noel Edwards as part of the Crown's case and, as the learned deputy director correctly submitted, the magistrate was only concerned with the evidence as it unfolded and in the way it unfolded. Clearly, the state of this evidence was not such as to create any doubt in the mind of the learned magistrate about the evidence of Mr Miller and she accepted the Crown's witnesses as credible witnesses upon whose word she could rely in all material respects. Consequently, ground three was also unsuccessful.

Ground four: - The issue for consideration in this ground was whether the learned Resident Magistrate placed undue emphasis on the conduct of the appellant especially in relation to his evidence of the retrieval of the car parts and whether this sufficed as a basis for a verdict adverse to the appellant.

[41] In his submissions on this issue, Mr Mitchell referred to the dilemma in which the appellant found himself by virtue of his conduct in several instances, one of which was the removal of the car parts, according to his account of the incident. The gravamen of this complaint is that the magistrate placed great store on the fact that the appellant asked a groundsman at the Motorized Patrol Division to remove the parts from the radio car. Counsel said that instead

of considering that the appellant had done something against his interest when all he was doing was to secure the one piece of physical evidence available to him and was not attempting to thwart the investigations, the magistrate ought to consider, what Mr Mitchell referred to as, the converse position, namely that to leave the car parts in the radio car could cause that portion of real evidence to be suppressed by the Crown witnesses. We do not accept that the magistrate was under any obligation to consider that converse position which really bordered on speculation, a course on which she could not embark. The Crown's contention was that the removal of the car parts from the radio car was an issue which was appropriately dealt with by the magistrate at page 59 of the transcript and as a consequence her finding of fact in this regard ought not to be disturbed.

A matter of perception

[42] Mr Mitchell identified several areas of the appellant's conduct as "errors of judgment". His contention was that the learned magistrate ought not to have been persuaded by these errors of judgment to arrive at a verdict adverse to the appellant. However, it was clear from her findings that what counsel termed errors of judgment were to the learned magistrate, sharp indicators of the appellant's guilt.

[43] The first error of judgment, Mr Mitchell said, was that (a) he fled from the scene and (b) he did not make a report. It was an error of judgment, he said

and not careful behavior, which would have caused him to leave the scene but, said Mr Mitchell, to properly appreciate this, one must look at what was operating in the appellant's mind at the time. The appellant said he was in fear for his life and that his gun had been snatched from him. Furthermore, he thought that the inspector would have made the appropriate entry after he made the report to him. However, the learned magistrate found that he fled because he had been caught in wrong doing.

[44] Another error of judgment, said Mr Mitchell, was his failure to take the car parts with him to Mr Miller when he went to him for the money (although he explained that the parts were in the trunk of the car and that the car trunk was within arm's reach). The magistrate clearly accepted Mr Miller's evidence of being directed to another location, after arriving at the arranged meeting place for which there was ample support from the anti-corruption officers. She asked herself a most reasonable question namely, what would be the purpose of that change if it was a legitimate transaction. If everything was above board, she said, why didn't the exchange of car parts for money take place by the Ward Theatre? Yet another error was the method of retrieving the car parts. The magistrate considered this and in her findings of fact at page 59 of the transcript she said:

> "Accused … when confronted with how he came out of the car without car parts knowing this was an exchange, his response was it was in the car trunk. He says car parts were in car he left on the scene. It seems to me that this would have been the single

> most crucial piece of evidence yet he says he asked a grounds - man to collect it from the car yet at that time he says he was aware he was wanted for questioning. I must say I assessed accused as being smart and quite witty yet he is saying he secreted the very thing that was the essence of his meeting with Mr Miller, the very thing that may no doubt have helped to exonerate him."

It was clear that the learned magistrate did not regard the evidence of his conduct as mere errors of judgment but as matters which adversely affected his credibility and, as tribunal of fact,that was for her determination.

[45] In the final analysis, we found no merit in Mr Mitchell's submissions on this ground and it too failed. It was the duty of the learned Resident Magistrate to consider all the evidence before her being mindful that the burden of proof was on the Crown and that the appellant had nothing to prove. This she clearly did and arrived at her verdict based on the totality of that evidence.

Conclusion

[46] Mr Mitchell's advocacy, in the presentation of his arguments on behalf of the appellant, was indeed tenacious but, at the end of the day, those arguments could not prevail. Essentially, this appeal was concerned with the learned Resident Magistrate's findings of fact and it is trite law that such findings are not impeachable in this court unless it can be shown that they are plainly wrong. This was a task which the appellant was unable to surmount as it was not established that there was any basis for interfering with the verdict of the

learned Resident Magistrate. Accordingly, as indicated in paragraph 1 above, we dismissed the appeal, affirmed his convictions and sentences and ordered that his sentence should commence on 27 April 2010.