

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 27/2011

**BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA**

DODRICK HENRY v R

Ravil Golding for the appellant

Miss Sanchia Burrell and Garcia Kelly for the Crown

13 June, 20 December 2012 and 18 January 2013

DUKHARAN JA

[1] The appellant, a sergeant of police and a veteran of 37 years in the Jamaica Constabulary Force, was indicted in the Resident Magistrate's Court for the Corporate Area holden at Half Way Tree on a charge of assault occasioning actual bodily harm. He was tried and convicted and on 2 March 2011 sentenced to 12 months imprisonment suspended for two years.

[2] We heard arguments on 13 June 2012 and reserved our decision. On 20 December 2012, we dismissed the appeal and promised to give written reasons. These are our reasons.

Prosecution's Case

[3] The essence of the prosecution's case was that on 10 September 2006 the virtual complainant, Paul Anthony Spencer, held a birthday party in the vicinity of 13 Hannah Street, Allman Town, Kingston 4 in the parish of St Andrew. At about 3:00 am while packing up the sound equipment a police patrol vehicle from Kingston Central with three officers aboard, dressed in denim, came to turn off the music. According to the complainant, one of the officers, later identified as the appellant, instructed onlookers to disperse and go home as they were making too much noise. The complainant also said that the appellant used several expletives. One of the patrons reprimanded the appellant concerning the disrespectful manner in which he spoke. This patron, known to the complainant as Marshalee, also called "Bubbler", engaged the appellant in an argument. The appellant, it was alleged, went to his vehicle and came back with a baton and threatened to hit "Bubbler", in her private parts. It was at this point the complainant said that he went over and pulled "Bubbler" away. The complainant further said that on his way back to where the appellant was, his brother Delroy Spencer, approached the appellant, touched him on his shoulder and said, "Take it easy." At this point, one of the other officers said, "Hey big man yuh can't touch the big man like that." The appellant turned around, pushed the complainant and used expletives. The appellant then reached for his firearm, hit the complainant on his shoulder, pushed him against a wall, shoved the gun in his side and hit him with the gun in his chest. The appellant then kicked at him and he used his hand to block same.

[4] The appellant and the other officers went in front of 13 Hannah Street, where the appellant took something from the vehicle and threw it into the road. The complainant said he saw smoke.

[5] The complainant said he sought medical attention at Medical Associates Hospital later the same day, that is, 11 September 2006. He subsequently made a report to the Bureau of Special Investigations where he submitted a medical certificate.

[6] In cross-examination, the complainant denied that when the appellant and the other officers arrived the party was still in progress. He admitted that before the appellant came on the scene a woman corporal came on three occasions to turn off the music. He admitted that "Bubbler" told the appellant to "low the music and let it play". He further denied that when the woman corporal came on the third occasion the appellant was present.

[7] Nicola Green testified that she got to the venue at 1:26 am; whilst there, at about 2:00 am, a female officer came and said something and the music was turned down. The female officer returned at 3:00 am and one of the music boxes was turned off. She said the female officer left and the music was still playing. She said at 4:00 am persons asked for more time. After 10 minutes the music was turned off. She further said a marked police jeep came with three police officers and "Bubbler" said "Look how the party nice. Look how we a enjoy we self. No war nah gwan and if a di land or Tivoli." She said the appellant threatened to assault "Bubbler" by pulling his firearm and pointing it at her. She further testified that she saw when the appellant hit

the complainant, kicked him and used the back of his firearm to hit him. She said she did not see the complainant doing anything when he was being hit by the appellant.

[8] In cross examination she admitted that the woman corporal came to turn off the music three or four times that night. She also claimed that the complainant fell to the ground when he was being hit by the appellant.

[9] Sergeant Marlene Sealy gave evidence that on 11 September 2006 she received a report from the complainant. She observed several bruises including one to his left shoulder. She gave him a letter to seek medical attention.

[10] Dr George Lawson gave evidence of having examined the complainant. On examination he saw a 0.5 cm abrasion to the left shoulder. There was tenderness of the area and mild restriction of movement to the left shoulder joint due to pain. There were also contusions to the left elbow. These injuries were consistent with injury due to blunt trauma. In the doctor's opinion, the injuries were consistent with the use of the handle of a gun.

Defence

[11] The appellant made a statement from the dock. He said he is an inspector of police but was a sergeant in September 2006. He said he was on duty at the Central Police Station and sometime after 10:00 pm on the night of the incident he received a call from police control informing him of loud noise along Great Georges Street in the Allman Town area. He instructed one of his patrols to visit the scene and inform police

control of their findings. At about 4:30 am he received instructions from police control to assist the Allman Town Police to have the noise turned off as it was past the time specified in the permit. He went with three other police officers, one of whom is now deceased as a result a similar incident of attempting to turn off music at a dance. He said when he got there, a dance was in progress with about 200 persons present. He saw Woman Corporal Althea Blackstock, who was dressed in uniform. He went down to where the dance was in progress joined by Corporal Blackstock and two other police officers. He had a notebook in his hand. He spoke to the selector who immediately stopped the music and announced that the dance was over and he was following the police's instructions.

[12] The appellant further stated that a female known as "Bubbler" approached him, forced herself on him, gyrating and saying that he should allow the dance to continue, as "she don't start the dutty whine as yet". He told her he was not there for that. She complained to persons that he would not make the dance go on. She came back and requested of the appellant for the dance to continue. He pushed her away when she started gyrating on him. He said he felt somebody slapping him on his shoulder, saying "Big Boss, Big Boss" and he swung around with a diary in his hand.

[13] The appellant further said that one of the Spencer brothers told him that he could not lock off his dance because his brother is an inspector and a bigger police than he, the appellant, and that he got permission for the dance. The appellant said he

walked off towards the police vehicle when bottles and stones were thrown and gun shots fired. He said he discharged tear gas to disperse the crowd.

[14] The appellant said he had no direct confrontation with the complainant. The complainant could have been hit when he swung around with the notebook in his hand. He said that was the only physical contact he had with the complainant.

[15] Corporal Althea Blackstock gave evidence for the defence supporting the appellant in all material particulars. She testified that she was stationed at the Allman Town Police Station and in the vicinity of where the music was being played. She said she made several attempts to have the music turned down but to no avail. She sought assistance from police control and a team headed by the appellant arrived at the scene. She said when the appellant arrived the music was still being played. She denied in cross-examination that the appellant hit the complainant or used a firearm to hit him or pushed him on a wall.

Grounds of Appeal

[16] Mr Golding abandoned the original grounds of appeal, sought and was granted leave to argue supplemental grounds. They are as follows:

- “1. That the Learned Resident Magistrate failed to apply the correct test in dealing with the Appellants [sic] un-sworn statement [sic] and fell into error when she held as follows:

`Based on the number of discrepancies between the statement of the defendant and

testimony of Corporal Black Stock, [sic] I reject the statement of the Defendant. I find the [sic] Corporal Black Stock [sic] is not a reliable witness ... And I find that she is not truthful.'

2. The Learned Resident Magistrate did not indicate what weight if any she attached to the un-sworn statement of the Appellant.
3. The Learned Resident Magistrate did not indicate any reason why she rejected the Statement of the Appellant, for eg. If she believed he was lying or had concocted a story.
4. The Appellant was not afforded a fair trial as the Learned Resident Magistrate did not consider his defence at all which defence was contained in his un-sworn statement.
5. The Learned Resident Magistrate did not indicate how she reconciled the fundamental discrepancies between the evidence of the prosecution [sic] witnesses which went to the root of the case.
6. The verdict arrived a [sic] was against the weight of the evidence."

Submissions

[17] Grounds one to four deal with the treatment of the defence by the learned Resident Magistrate. Mr Golding in his submissions argued that the learned Resident Magistrate failed to demonstrate that she analysed the unsworn statement of the appellant. He submitted that although an unsworn statement is not evidence in the sense that it is not real evidence, it must be considered and be examined critically. Counsel referred to the cases of *Director of Public Prosecutions v*

Leary Walker (1974) 12 JLR 1369 and **Andrew Hipolite George** (1979) 68 Cr App 210. This, he argued, the learned Resident Magistrate failed to do. In rejecting the defence she gave no consideration to the contents of the appellant's statement.

[18] Mr Golding further submitted that there were no material discrepancies in the evidence of the defence. He argued that the evidence of Corporal Blackstock supported the appellant's defence in all material particulars. There was no reason, he submitted, for the learned Resident Magistrate to have found that Corporal Blackstock was an untruthful witness.

[19] Mr Golding submitted that the findings and verdict were against the weight of the evidence and the conviction ought to be quashed and set aside.

[20] On ground five, Mr Golding submitted that the learned Resident Magistrate failed to reconcile the material discrepancies on the Crown's case. He argued that the findings of the learned Resident Magistrate were not supported by the evidence. For example, he said that if the music was already off when the appellant arrived at the scene, why would persons confront the appellant? He said this was an incorrect and unreasonable finding by the learned Resident Magistrate.

[21] Miss Burrell, responding on behalf of the Crown, submitted that the learned Resident Magistrate demonstrated that she addressed her mind to the evidence and the applicable law, and her findings can withstand the scrutiny of the complaints embodied in the appellant's grounds of appeal. She further submitted that the learned

Resident Magistrate did not have to give a basis for rejection of the defence. There is no prescribed formula or method of delivery of findings, counsel argued, as long as the magistrate clearly demonstrates that she has addressed her mind to the evidence and the applicable law, and she referred to the cases of **ONiel Williams v R** SCCA No 22/1995 delivered on 23 February 1998 and **Regina v Alex Simpson and Regina v Mckenzie Powell** SCCA Nos 151/1988 and 71/1989, delivered on 5 February 1992. In the instant case, counsel submitted, the learned magistrate embarked upon a comparative analysis and that led to a rejection of the appellant's unsworn statement, the magistrate clearly being of the view that no weight was to be accorded to it. She further submitted that the learned Resident Magistrate having rejected the unsworn statement of the appellant as to how the incident occurred also rejected the evidence of Corporal Blackstock as being an untruthful witness.

[22] It was further submitted by Miss Burrell that the learned Resident Magistrate highlighted the discrepancies in the Crown's case but found that they were not material enough to displace her findings as to the guilt of the appellant. It was counsel's contention that the learned Resident Magistrate by virtue of the trajectory of her reasons and findings clearly demonstrated her trend of thought. There is no rule that the learned magistrate must go through all the discrepancies, counsel argued, but it is clear from her reasons that she did consider the defence and found discrepancies between the appellant and his witness which she highlighted.

[23] In relation to the complaint that the learned magistrate did not deal sufficiently with the defence, Miss Burrell argued that the learned magistrate in dealing with the

case as a whole did examine parts of the defence. Although the magistrate could have repeated certain words and could have been lengthy and deliberate in her words, it was clear that her jury mind was sensitive to the need to consider the defence and it did not mean that in practising economy of words her verdict was obviously and palpably wrong. Counsel agreed with Mr Golding that if the appellant had given sworn evidence, the treatment would have been entirely different but in this jurisdiction where an unsworn statement can still be made, the adjudicator is required to look at it and to give it such weight as it deserves. Counsel also referred to **Leary Walker**. Counsel argued that the learned magistrate would have looked at it and stated her view on it and would then have looked at the Crown's case and arrived at a verdict that was supported by the evidence.

[24] In relation to grounds six, Miss Burrell argued that to succeed, the appellant would have to show that the decision was palpably wrong. The evidence must be such as to justify interference with the judge's findings of fact where, in arriving at those findings, she had the advantage of seeing the witnesses as they testified. This, counsel said, is not one of those cases which falls within the category of cases which warrants interference with the verdict reached. She was at all times aware of her duty to consider the defence and it was for her to determine whether she accepted or rejected the case for the defence, counsel submitted. According to **Leary Walker** and subsequent cases which affirmed the pellucid position of that case, it is left to the magistrate to decide the basis upon which she makes her decision. The learned magistrate said she found the prosecution's witnesses credible and, counsel

contended, the complainant's evidence was corroborated by his witness, Nicola Green, and the doctor. Sitting as judge of the facts, the learned magistrate was entitled to say whether she found the prosecution or the defence more reliable, Miss Burrell argued, and here she relied on the case of **Cecil Medder v R** SCCA No 161/2000, delivered on 5 July 2002. She contended that the treatment of the unsworn statement in **Medder** is somewhat similar to the magistrate's treatment of the appellant's statement in the instant case. There was evidence, counsel argued, upon which she could base her verdict, and it should therefore be allowed to stand.

Analysis

[25] It is quite clear from the evidence that the main issue for determination by the learned Resident Magistrate was one of credibility. It was a question of fact for her determination.

[26] There is a line of cases which shows this court's reluctance to interfere with the findings of fact of a trial judge, merely because it is of the view that if it had tried the case it would have come to a different view on the facts from that of the trial judge. However, the court will, in an appropriate case, intervene where it is satisfied that the judge acted on a wrong principle of law or misapprehended the evidence or facts to take into account irrelevant matter - see **Watt v Thomas** (1947) AC 484 and **Industrial Chemical (Ja) Ltd v Ellis** (1986) 35 WIR 303.

[27] It is necessary to analyse the findings and reasons for judgment of the learned Resident Magistrate. In this exercise, the court must look at the evidence in the

context of the magistrate's finding, and reasons for judgment, to see whether she was correct in her assessment of the evidence and came to the correct conclusions based on the evidence and the relevant factors or whether she misapprehended the evidence, failed to take into account relevant matters and came to the wrong conclusions. It was the complaint of counsel for the appellant that the learned Resident Magistrate paid scant regard to the defence. At page 61 of the transcript the learned Resident Magistrate stated:

"I have also looked at discrepancies in the testimony of the witness for the defence, Corporal Althea Blackstock and the statement the defendant gave bearing in mind that the defendant has no burden to prove his innocence."

[28] It can be seen from the transcript that the learned Resident Magistrate examined in detail the unsworn statement of the appellant and the evidence of Corporal Blackstock. At page 64 of the transcript the learned Resident Magistrate said:

"Based on the number of the discrepancies between the statement of the defendant and the testimony of Corporal Blackstock, I reject the statement of the defendant. I find that Corporal Blackstock is not a reliable witness and I find that she is not truthful ..."

[29] It can be seen from the above that the learned Resident Magistrate considered the unsworn statement of the appellant as well as the evidence of his witness Corporal Blackstock and rejected the appellant's defence.

[30] In *Leary Walker* Lord Salmon said at page 1373:

“The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused’s guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused’s unsworn statement only such weight as they may think it deserves.”

It was undoubtedly exclusively for the magistrate to have made up her mind whether the appellant’s unsworn statement had any weight and she examined the contents.

[31] It is therefore clear that by examining the appellant’s statement and rejecting it, the learned Resident Magistrate was giving it what weight she thought it deserved. The learned Resident Magistrate had the benefit of seeing and assessing the demeanour of the appellant and his witness and found them not to be credible.

[32] On the issue of discrepancies and inconsistencies, the learned Resident Magistrate said at page 60 of the transcript:

“In assessing the credibility of the witnesses in the matter I have considered what each witness has said as well as the manner in which each gave his or her evidence. I have also considered inconsistencies and discrepancies in the case for the Crown. Some of these discrepancies particularly between the witness, Ms. Nicola Green and the complainant have been highlighted, for example in respect to whether the defendant kicked the complainant, whether the complainant fell to the ground, the length of time the defendant is said to have assaulted the complainant, and the date of the incident. Ms Green testified that everything happened so fast. In regard to the discrepancies in relation to the detail of the assault, I

accept the testimony of the complainant as more reliable than that of Ms. Green.”

It can be seen from the above that the learned Resident Magistrate took into consideration the discrepancies and inconsistencies that arose on the Crown’s case and preferred and accepted the testimony of the complainant as more reliable than that of Ms Green.

[33] In relation to the medical evidence, the learned Resident Magistrate found the doctors evidence as to the injuries to be consistent with those described by the complainant.

[34] The issues, as stated, were credibility and the findings of fact by the learned Resident Magistrate. It is our view that she demonstrated what was required of her and we can find nothing to disturb her findings. Based on the foregoing, we dismissed the appeal and affirmed the conviction and sentence. However, we must comment on the fact that this was a most unfortunate case involving the appellant, a veteran of 37 years in the Jamaica Constabulary Force. It is common knowledge in this country that the citizens’ right to quiet enjoyment is violated almost on a nightly basis with loud noise emanating from sound boxes throughout the night. The police have had to face violent persons from time to time in trying to curb such nuisances. This may have been one such incident.