**[2014] JMCA Civ 47**

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CIVIL APPEAL NO 3/2013**

**BEFORE: THE HON MR JUSTICE DUKHARAN JA**
**THE HON MRS JUSTICE McINTOSH JA**
**THE HON MR JUSTICE BROOKS JA**

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| **BETWEEN** | **BIRDIE HUMES** | **APPELLANT** |
| **AND** | **CLIVE WILSON** | **RESPONDENT** |

**Miss Judith Clarke instructed by Judith M Clarke and Co for the appellant**

**Miss Danielle Archer instructed by Kinghorn and Kinghorn for the respondent**

**6 November 2014**

**ORAL JUDGMENT**

**BROOKS JA**

[1] On 23 April 2012, a Resident Magistrate for the parish of Saint Catherine gave judgment in favour of Mr Clive Wilson in respect of a claim that he brought against Ms Birdie Humes. The claim was for damages for words defamatory of him, which he said that she had uttered. Ms Humes is aggrieved by the decision and has appealed to this court for it to be set aside.

[2] The defence stated at the beginning of the trial was a denial that Ms Humes had used the alleged words. The learned Resident Magistrate recorded the defence to be:

> "[The] Defendant denies using the words you are a thief, you are a obeah worker, you thief my brother's land. A thief you thief a England. That's why you can't go back there. She denies speaking with the plaintiff on the 26th January 2008."

[3] The major issue at the trial was whether Ms Humes was present at the time and place that the words were said to have been uttered. Mr Wilson said that although he did not see Ms Humes at the time, it was her voice that he heard. He said he knew her voice before, and the words came from a window of a house belonging to Ms Humes' brother, Mr Carl Humes. Mr Carl Humes and Mr Wilson are neighbours and there was, at the time, a yet unresolved land boundary dispute between the two men.

[4] Having heard evidence from Mr Wilson, who was the only witness in support of the claim, and Ms Humes and her niece for the defence, the learned Resident Magistrate ruled that Ms Humes had used the words alleged and that the words were defamatory of Mr Wilson. She awarded damages to Mr Wilson in the sum of $200,000.00 along with costs.

[5] Among the grounds of appeal filed on behalf of Ms Humes is a complaint that the learned Resident Magistrate erred in giving judgment for Mr Wilson because there was no proof of publication of the words. In her written submissions, Miss Clarke, on Ms Humes' behalf, submitted, in respect of this point, that proof of publication is an

essential element of proving the tort of slander. Mr Wilson, learned counsel submitted, in calling no witness to support his testimony, had failed to prove this essential element.

[6] In the written submissions filed on behalf of Mr Wilson, learned counsel submitted that there is no requirement in law for a third party to give evidence that he heard the impugned words. No authority was cited in support of that submission. In the hearing before us, the court brought to the attention of Miss Archer, appearing for Mr Wilson, the authority of **Moberly v Commissioner of Police for Metropolitan London and Another**, unreported, 13 May 1987. Having seen the authority, and although citing a distinguishing feature therein, Miss Archer conceded that the issue of credibility, on which the learned Resident Magistrate spent much time, was not, by itself, sufficient to prove the element of publication of the alleged slander.

[7] Miss Clarke is correct on this point. The learned editors of Gatley on Libel and Slander 10th ed accurately state that in order to prove slander, the claimant must adduce evidence other than his own testimony of the words used by the defendant. They state at paragraph 32.11:

> "Where there is no admission by the defendant that he spoke the words complained of or words to like effect, the claimant must call evidence of what the defendant said and of who heard him. The witnesses will usually be those who were present… **Evidence of the claimant as to what was said, and as to the presence of other people, may be insufficient, as the fact that there were other people around does not of itself entitle anyone to draw the conclusion that those people must have heard what was said**…." (Emphasis supplied)

It is conceded that the learned editors do not state that independent evidence must be adduced, but the evidence proffered must be such that third parties must have heard the words used.

[8] The learned editors cited **Moberly** as authority for the highlighted portion of the extract set out above. In that case, the English Court of Appeal ruled that a claimant alleging slander had failed to prove publication of the words spoken. The words were said to have been used in the waiting room of a court building. Other people were present at the time but no other witness was called to state that they heard what was said by the defendant in that case. The defendant who had used the words testified that he had sought to speak with the claimant privately.

[9] In this case, Mr Wilson testified that, another man, Mr Junior Cross, was with him at the time that the words were used and that there were other persons passing along the roadway within earshot of the voice at that time. He said that Mr Cross could have heard what was said. He also testified that Mr Cross had attended court on previous occasions when the case had been adjourned but was off the island at the time of the trial. There was evidence that Mr Wilson and Mr Cross were working on a motor car at the time but there was no evidence as to any reaction by Mr Cross or, indeed, any of the passers-by.

[10] Unfortunately, the learned Resident Magistrate, in her reasoning, focussed almost exclusively on the denial by Ms Humes. She referred to Ms Humes as raising "the defence of alibi" (paragraph 14 of the written judgment). She found that Ms

Humes was not speaking the truth about being elsewhere when the words were used, and ruled that Ms Humes had spoken them. That, however, was not enough.

[11] The learned Resident Magistrate erred in failing to consider the issue of publication. In the absence of evidence of publication of the slander, Mr Wilson's claim should have failed and judgment given for Ms Humes.

[12] In the circumstances, the order is as follows:

1) The appeal is allowed.
2) The judgment of the Resident Magistrate's Court delivered herein on 23 April 2013 is set aside and judgment for the appellant substituted therefor.
3) Costs to the appellant both here and below. The costs in this court are fixed at $15,000.00. The costs in the court below are to be taxed if not agreed.