[2022] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE BROWN JA
THE HON MR JUSTICE LAING JA (AG)

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00012

BARRINGTON MERCHANT v R

Keith Bishop, Andrew Graham and Miss Roxanne Bailey instructed by Bishop & Partners for the appellant

Ms Kathy-Ann Pyke and Miss Renelle Morgan for the Crown

25, 26 April and 20 May 2022

LAING JA (AG)

[1] On 10 July 2015, after a trial before a Resident Magistrate (as the position was previously named, now a judge of the Parish Court) ('the Parish Court Judge') for the Corporate Area, holden at Half-Way-Tree in the parish of Saint Andrew, Barrington Merchant ('the appellant') was found guilty on an information charging him with the offence of indecent assault contrary to section 13 of the Sexual Offences Act ('the Act'). On 3 December 2015, he was sentenced to 12 months' imprisonment, suspended for 18 months.

[2] Aggrieved by his conviction and sentence, the appellant filed his notice and grounds of appeal on 7 December 2015. On 26 April 2022, after previously hearing submissions from both parties in relation to that appeal, we made the following orders:

> "1. The appeal is dismissed.
>
> 2. The conviction and sentence are affirmed."

At that time, we promised to put our reasons in writing. This is a fulfilment of that promise.

The trial

The Crown's case

[3] The case for the prosecution rested on the evidence of the sole witness as to fact, the complainant. Her evidence was that on 29 October 2013 at about 4:00 pm she was at the Passport Office (Passport, Immigration and Citizenship Agency ('PICA')), which is located at 25C Constant Spring Road, in the parish of Saint Andrew, where she was employed. She entered the elevator in the lobby on the ground floor and so did the appellant, who was also employed at PICA. The complainant stood at the back of the elevator and the appellant stood in front of her. They were the only persons inside the elevator. The complainant was looking down at her cellular phone, which she held with both hands while browsing social media. She then "felt a shadow over [her]" and when she looked up, the appellant was "already over [her]". He held her hands above her head against the 'wall' of the elevator, placed his lips on her lips, and kissed her. The elevator reached the second floor and, while exiting, he told her that he "can't wait to catch [her] to fuck [her]".

[4] The complainant told some of her friends about the incident and eventually also told Mr Lynval Houston, an immigration officer at PICA. A report was made to Human Resources, then the Centre for Investigation of Sexual Offence and Child Abuse ('CISOCA'), and subsequently, to the Half-Way-Tree Police Station.

[5] The complainant's evidence in examination-in-chief was that prior to the incident she would usually see the appellant on the compound of PICA about three times per week, but did not know his name. She admitted during cross-examination that on one occasion prior to the incident in the elevator, she was sitting with a friend when the appellant asked her for a phone call. She dialled the number for him and he said he did not get the person. Subsequently, she was on her way to school and received a phone call while in traffic. She could not hear the person so she asked the person to call back.

While at school she received a phone call and, upon answering it, the person on the other end introduced himself as Mr Merchant. She denied giving the appellant her cellular phone number or calling his cellular phone number.

[6] Mr Lynval Houston gave evidence that the complainant made a report to him in relation to the appellant, who was previously known to him and who he had supervised at the Norman Manley International Airport ('the Airport') when the appellant joined his team. He explained that he typed a letter for the complainant while she dictated it. The letter, containing her report, was sent to "Human Resource" and was copied to the appellant's supervisor, Mr Andrew Wynter (it was possibly also copied to the Chief Executive Officer of PICA).

The case for the defence

[7] The appellant gave sworn evidence and was cross-examined. His defence was a complete denial of the prosecution's case. He specifically denied being inside the elevator at PICA on the day in question with the complainant, where it was alleged that he held her hands and kissed her. He also refuted the suggestion that he told the complainant that he "can't wait to catch [her] to fuck [her]".

[8] The appellant's evidence was that he was introduced to the complainant by two female workers "sometime in the month of September going to October 2013". On that day she sought a ride from him to go to school. He advised her that when he left work he would be going to the Airport and he would not be able to take her all the way to UTECH (the University of Technology). She gave him her cellular phone number and he went back to his office. On his return, he did not see the complainant on the compound so he called her on the cellular phone number she had given to him. She answered the call and said he should call her back later, as she had already taken transportation to school. He said he did not call her back.

[9] The appellant stated that, after serving in the Jamaica Defence Force for 14 years, he commenced working at PICA as a level 4 officer assigned to the Airport. His supervisor

at the time was Mr Lynval Houston. He confronted Mr Houston about a forged document bearing a stamp with a number that was assigned to Mr Houston. Since that encounter, he was marginalised by Mr Houston, in more than one instance, and became his target. As of 1 November 2013, he was promoted to the position of Operations Manager for the Investigation and Surveillance Unit at PICA. The appellant stated that, in his position as Operations Manager, there were about two or three matters that came to his attention in respect of Mr Houston.

[10] Mr Andrew Wynter, the Senior Director for Investigations and Surveillance at PICA, testified on behalf of the appellant. He confirmed that there had been investigations regarding Mr Houston over the three years prior. He expressed that he was "very surprised" when he heard of the allegations against the appellant. When he was out of office or the jurisdiction, the appellant would act for him. That job, he said, required a person who is "very honest, high in integrity, innovative, intelligent and confident", and the appellant fit all those qualities. Mr Wynter also stated that the appellant was not involved in the investigations of Mr Houston.

The grounds of appeal

[11] The appellant filed the following grounds of appeal:

> "1. That the learned Resident Magistrate erred in fact and law in finding that the Appellant indecently assaulted the complainant despite the tenuous and/or very little evidence in support of the assault;
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> 2. The learned Resident Magistrate erred in law in finding that the Appellant was guilty of indecent assault notwithstanding the fact that the evidence does not support the conclusion reached by the learned Resident Magistrate; and
>
> 3. The learned Resident Magistrate erred in law in imposing a sentence that was inappropriate and excessive."

[12] The appellant also sought and was granted leave to argue the following supplementary grounds of appeal:

> "a. The learned Resident Magistrate failed to exercise her discretion to give an appropriate warning in light of compelling evidence that one of the prosecution witnesses had a grudge against the appellant and as such would suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence with respect to the charge of indecent assault; and
>
> b. The learned Resident Magistrate did not carefully consider and direct herself on the evidence that the complainant's witness, Lynval Houston could have influenced the complainant and point the investigation by PICA, and subsequently by the police, against the appellant."

These two supplementary grounds were treated by Mr Bishop, who appeared for the appellant, as follows: a. was renumbered ground 4 and b. ground 3. The original ground 3 was renumbered as ground 5.

[13] Upon considering the submissions in relation to the above grounds and supplementary grounds of appeal, it is apparent that there are four issues to be determined by this court, one of which was brought to counsel's attention by the court. The issues are:

> 1. Was there sufficient evidence to support the Parish Court Judge's finding that the appellant was guilty of indecent assault?
>
> 2. Was the Parish Court Judge required to warn herself in circumstances where there was evidence that the prosecution's witness Mr Houston had malice towards the appellant and could have influenced the complainant?
>
> 3. Did the Parish Court Judge err in failing to outline the ingredients of the offence of indecent assault?
>
> 4. Was the sentence imposed by the Parish Court Judge inappropriate and excessive?

Discussion

1. Was there sufficient evidence to support the Parish Court Judge's finding that the appellant was guilty of indecent assault?

[14] Mr Bishop, in his submissions, addressed his originally filed grounds 1 and 2 together, along with his renumbered ground 3 (supplementary ground b). We will, however, address ground (b) in the second issue. The appellant sought to impugn the learned Parish Court Judge's findings of fact on the basis that her conclusion was not supported by the evidence. He noted, for instance, that the complainant during her evidence-in-chief asserted that before 29 October 2013, she had only seen the appellant on the compound of PICA but had not spoken to him and did not know his name. However, in her cross-examination, she admitted to speaking to him, prior to the incident, when she lent him her cellular phone to make a call and subsequently answered his call later that day.

[15] Mr Bishop submitted that this inconsistency in the evidence of the complainant was not addressed by the Parish Court Judge. On the issue of the cellular phone call, Mr Bishop also contended that the Parish Court Judge did not resolve the question as to how the appellant came into possession of the complainant's cellular phone number. He submitted that it was implausible for the appellant to have obtained her cellular phone number by dialling a number on her cellular phone, which she claimed he asked her to do. On the other hand, Mr Bishop submitted that the explanation given by the appellant, that she had given him her cellular phone number when she asked him for a ride was more plausible and ought to have been accepted.

[16] Mr Bishop further submitted that the explanation given by the complainant as to what transpired in the elevator was far-fetched. He noted that the complainant did not raise an alarm, she never resisted the appellant, and was unable to state in which hand the cellular phone was left after the appellant held her hands above her head. He also complained that her evidence was even more incredible because of the words she stated that the appellant uttered. Mr Bishop argued that her evidence suggests that the

appellant would have been outside of the elevator in the most public area of the office when the words were said and would also have been heard by other persons in the office.

[17] Mr Bishop criticized the Parish Court Judge's approach in dealing with the evidence when she posed the question: "why would she make up such an account against someone whom on the evidence, she barely knew?". He argued that the Parish Court Judge ignored what Mr Bishop described as "personal inherent bias".

[18] Mr Bishop also challenged the Parish Court Judge's characterization of the defence as a two-pronged approach, the first being that the appellant was not in the elevator with the complainant and the second being that the complainant was not speaking the truth. He submitted that it was harsh based on the evidence.

[19] The Parish Court Judge's analysis of the evidence was criticized by Mr Bishop who argued that she did not demonstrate what distinguished her preference of the evidence of the complainant as opposed to that of the appellant, save for her assessment of their demeanour. It was submitted that this is not the final and most important test that the trial judge should use to determine credibility. The complaint was taken a step further, and it was contended that the Parish Court Judge in fact conflated demeanour with credibility. He concluded his submissions by asserting that the Parish Court Judge did not carefully analyse the evidence before her in arriving at her conclusion.

[20] Ms Pyke, on behalf of the Crown, adopted the approach of Mr Bishop in addressing grounds 1 and 2 together. She agreed that the issue was one of credibility. It was contended that the case presented by the prosecution was cogent and coherent and there were no important discrepancies or inconsistencies. Accordingly, there was no reason for the learned Parish Court Judge to reject the evidence of the complainant once she had found her demeanour to be satisfactory.

[21] It was further submitted that the complaints encapsulated in grounds 1 and 2 can be combined into a single composite ground, the essence of which is that the verdict of the Parish Court Judge is so against the weight of the evidence as to be unreasonable

and unsupportable. In support of the correct approach that the court should take where such an argument is deployed, reliance was placed on the oft-cited case of **R v Joseph Lao** (1973) 12 JLR 1238 in which it was stated, in the headnote, that the appellant is required to show that "the verdict is so against the weight of the evidence as to be unreasonable and insupportable".

[22] It was submitted by Ms Pyke that it cannot be said that the decision of the Parish Court Judge is flawed even if a reasonable tribunal would have come to a different conclusion. She also argued that there was no need for the Parish Court Judge to have given the corroboration warning and she relied on the case of **R v Makanjuola and R v Easton** [1995] 3 All ER 730 ('**R v Makanjuola**'). On this basis, it was posited that grounds 1 and 2 had no merit and should fail.

Analysis

[23] In addressing grounds 1 and 2, it must be appreciated that the main issue at trial was one of credibility. The Parish Court Judge in her analysis was focused on whether each witness was telling the truth. At para. 13 of her reasons, having satisfied herself that identification was not in issue, she stated "[t]his therefore brings me to the issue of credibility. Whom do I believe?". The Parish Court Judge then embarked on a process of examining the evidence, which demonstrated an appreciation of the difference between credibility and demeanour. At paras. 19 and 20 she stated as follows:

> "19. I ask myself in trying to assess whether she spoke the truth, why would she make up such an account against someone whom on the evidence she barely knew?
>
> 20. I keenly observed her demeanour and it was very impressive. I note too, that her evidence was consistent and she was unwavering. If there were any inconsistencies, they were slight."

[24] An accurate judicial statement on the issue of credibility is found in the dissenting speech of Lord Pearce in the House of Lords in **Onassis and Calogeropoulos v Vergottis** [1968] 2 Lloyd's Rep 403 at page 431:

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others?"

[25] The assessment of credibility is, without a doubt, a difficult element of fact-finding in the process of judicial decision-making. One of the tools available to a judge, uncontrovertibly, is, the demeanour of the witness. In this sense, demeanour covers the non-verbal behaviour of the witness. Lord Bingham writing extra-judicially in "The Business of Judging: Selected Essays and Speeches", Part 1 chapter 1 "The Judge as Juror: The Judicial Determination of Factual Issues", described demeanour at page 8 as:

> "…his conduct, manner, bearing, behaviour, delivery, inflexion; in short, anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said."

[26] In this regard, the submission of Mr Bishop that the Parish Court Judge conflated demeanour with credibility is unjustified and unfair. Similarly, it would be inaccurate to suggest that demeanour was the most important test used by the Parish Court Judge in this case to determine credibility.

[27] The Parish Court Judge utilized a methodical approach to the examination of the evidence. Having reviewed the evidence, she correctly pointed out the two issues that she considered arose for her determination, which were identification and credibility. She then examined the relevant law in the context of the applicable evidence. In making her findings of fact, the Parish Court Judge considered, contrary to Mr Bishop's submission, the issue raised by him as to the appropriate view to be taken of the complainant's

evidence that she did not immediately react, after the incident she asserted took place. The Parish Court Judge concluded that the fact that the complainant did not react instantaneously did not mean that she was lying having regard to her explanation, which was accepted. That explanation was that the kiss was unexpected and so she was in a state of shock and could not even react. The Parish Court Judge also made the following observation at para. 31 of her reasons:

> "…It is not unusual for persons who are victims of such or similar assaults to delay reporting the matter. It is a known fact that people react differently to situations such as this."

The Parish Court Judge's findings in this regard, cannot be impugned.

[28] We do not find that there was anything "implausible" in the complainant's account of what transpired in the elevator between the door closing on the first floor and opening on the second floor. The inability of the complainant to recall minor details, for example, which hand her cellular phone was in after her hands were held above her head, is not so significant as to affect her credibility. The unchallenged evidence of the complainant was that when one exits the elevator on the second floor, one does not immediately step into the offices, but one has to go through another door to get to the offices. There is, therefore, no evidential basis for Mr Bishop's suggestion that the appellant would have been outside of the elevator in the most public office area when the words attributed to the appellant were said and as a consequence would also have been heard by other persons in the office.

[29] It is quite settled that even where the credibility of a witness is not central to an issue in dispute, it may still be material. Although the Parish Court Judge did not address the inconsistency in the complainant's evidence, arising from the fact that it was only while being cross-examined that she admitted to a prior encounter with the appellant, on which occasion she was asked by him for a phone call using her cellular phone. In our opinion, this is not an inconsistency on which much weight should be placed, or which should affect the complainant's credibility negatively. Often a witness may conceal

information in order to assist in the presentation of other information which is false. However, in this case, the credibility of the complainant in respect of the incident inside the elevator does not depend on whether there was a previous, insignificant, encounter with the appellant. The two incidents are separated in time and space and the prior meeting had no bearing on the likelihood of the incident taking place in the elevator. Accordingly, the Parish Court Judge's failure to expressly address this inconsistency in the evidence is not material.

[30] As it relates to the failure of the Parish Court Judge to examine and resolve the issue of how the appellant came to be in possession of the complainant's cellular phone number, we are of the view that this is also not a material issue. The evidence of the appellant is that he called the complainant's cellular phone number and was told to call back, but he did not do so. In that respect, the appellant's evidence that he made a phone call to the complainant's cellular phone, is consistent with her evidence that she received a phone call while she was in traffic and told the person on the other end of the line to call back. This redounds to her credibility.

[31] In assessing the credibility of the complainant, the Parish Court Judge also considered the issue of motive. At para. 19 of her reasons, she stated:

> "19. I ask myself in trying to assess whether she spoke the truth, why would she make up such an account against someone whom on the evidence she barely knew?"

[32] In our view, there was no necessity for the Parish Court Judge to have considered the answer to this question specifically in terms of "personal inherent bias" as submitted by Mr Bishop. Of course, there is always a possibility that a person may tell a lie in respect of the conduct of another person who is barely known to him or her, simply because of an instinctive and inexplicable dislike. However, in the circumstances of this case, it was unobjectionable for the Parish Court Judge in exercising her judicial experience to have ignored that possibility and to have focused instead on the analysis of whether the complainant was being influenced in making the report. Ultimately, the Parish Court Judge

rejected the defence in its totality and found it to be a fabrication. However, she reminded herself that, notwithstanding such a finding, it was the prosecution's burden of proving the case. She concluded that the complainant's identification of the appellant was not mistaken, he was in the elevator with her at the material time. He held her hands above her head and kissed her on her lips without "invitation, permission or consent". She further accepted the complainant's evidence of the spoken words attributed to the appellant as he exited the elevator, as being in furtherance of his actions.

[33] We are attracted to the submission of Ms Pyke that, in essence, the appellant's complaint in respect of grounds one and two, collectively, is that the verdict is against the weight of the evidence. We are, therefore convinced of the applicability of **R v Joseph Lao** to the facts of this case, the headnote of which accurately summarises the decision as follows:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

Accordingly, for the reasons previously stated, we are unable to agree with Mr Bishop that "the verdict is so against the weight of the evidence as to be unreasonable and insupportable". Accordingly, we find that there is no merit in grounds of appeal one and two.

2. Was the Parish Court Judge required to warn herself in circumstances where there was evidence that the prosecution's witness Mr Houston had malice towards the appellant and could have influenced the complainant?

[34] The renumbered grounds three and four, are closely related, as the crux of the appellant's complaint is the potential impact of the role the prosecution's witness, Mr Houston played and the Parish Court Judge's treatment of that evidence. Accordingly, the

submissions relating to the factual basis on which there was a need for a corroboration warning is equally applicable to both of these grounds.

[35] In support of his submissions on the need for a corroboration warning, Mr Bishop placed heavy reliance on the case of **R v Makanjuola** and the guidance given by the court, that where any of the prosecution witnesses "bear the defendant some grudge, a stronger warning may be appropriate and the Judge may suggest it would be wise to look for some supporting material before acting on the impugned witnesses' evidence". Support was also found in the judgment of Morrison P in **Mervin Jarrett v R** [2017] JMCA Crim 18.

[36] Mr Bishop acknowledged that whether a corroboration warning is necessary rests within the discretion of a trial judge. However, in light of the fact that there was evidence that Mr Houston was being investigated by PICA and he played a role in assisting the complainant in making a report to PICA's Human Resources department and a statement to the police, this was a case that warranted a corroboration warning. Despite these facts, he said, there is no evidence that the Parish Court Judge considered the warning, instead, she intentionally exercised her discretion not to give it. In conclusion, it was submitted that in the absence of the corroboration warning or the treatment of the evidence by the Parish Court Judge with respect to corroboration, this amounted to a substantial miscarriage of justice.

[37] On the issue of malice, Mr Bishop contended that the Parish Court Judge's analysis of the appellant's assertion of malice on the part of Mr Houston was flawed in a number of respects. Firstly, he stated that the Parish Court Judge did not sufficiently address the undisputed evidence of the appellant's witness, Mr Wynter. Which evidence was that he knew of investigations over the three years prior to the trial, touching and concerning Mr Houston, which involved the unauthorized use of a stamp in a passport as well as disciplinary hearings at PICA involving Mr Houston. It was submitted that the learned Parish Court Judge did not ask herself why Mr Houston would have assisted the complainant to report a matter to the Human Resources and made himself available to

attend court to give evidence against the appellant whom he said he had mentored, coached and taught. Furthermore, it was argued that there is no evidence that Mr Houston made any attempt to reach out to the appellant or to alert him of the complaint made against him and to ascertain whether the allegations were true or not, since they had been working together for many years.

[38] Crown Counsel, Ms Pyke submitted that the Parish Court Judge did consider whether Mr Houston was a witness with an interest to serve. The Parish Court Judge concluded that there was no evidence of malice, nor was there evidence that he orchestrated the report. Having accepted the evidence that the appellant conducted investigations against Mr Houston, she found that even if he were a witness with an interest to serve, that did not mean that he was incapable of telling the truth. Ms Pyke contended that furthermore, even if Mr Houston had an improper motive, as Mr Bishop submitted, he did not have any control over the initiation or conduct of the proceedings. It was the complainant who made the reports against the appellant and attended the Parish Court to testify. Counsel relied on cases such as **Jason Lawrence v The Queen** [2014] UKPC 2, **Anthony Brown v R** [2021] JMCA Crim 47 and **Graeme Bennett v R** [2011] JMCA Crim 15 in support of the submission that the authorities have demonstrated that there must be evidence which warrants the warning in respect of a witness with an interest to serve.

Analysis

[39] In addressing the evidence of Mr Houston in particular, the Parish Court Judge made the following findings at paras. 25 and 26 of her reasons:

> "25. I see no evidence of malice on the part of Mr. Houston. Of course, it would probably have been wise for him to stay clear of this matter in all the circumstances, but I see no evidence that Mr. Houston orchestrated the report made against the accused. I have regard to the assertions made by the defence about Mr. Houston in assessing his evidence. I bear in mind the allegations that he has had disciplinary action brought against him and was the subject of investigations into

> corruption carried out by Mr Merchant. I bear in mind that this may mean that he has an interest to serve and is less likely to speak the truth, but nevertheless, it does not mean that he is incapable of doing so.
>
> 26. With all of this in mind, I still find that Mr Houston was an honest and credible witness and I accept his evidence."

[40] The Parish Court Judge, therefore, demonstrated an appreciation that care needed to be taken in assessing the evidence of Mr Houston. In the circumstances of this case, it is of importance that Mr Houston was not a witness of fact but gave evidence as to the circumstances under which the incident was reported. She carefully considered the assertion of Mr Houston's involvement in fabricated allegations against the appellant and decided that there was no factual basis for those assertions as made by the defence. His evidence was not material to the Parish Court Judge's consideration of the guilt of the appellant, which was ultimately determined by the Parish Court Judge's assessment of the complainant's credibility.

[41] In **R v Makanjuola** at page 732h, Lord Taylor of Gosforth CJ offered the following guidance:

> "…Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all."

[42] In our view, there was nothing present in the content or manner of the complainant's evidence that required a corroboration direction, especially having regard to the Parish Court Judge's finding that Mr Houston did not influence her in making false allegations against the appellant. Accordingly, the failure to have given such a warning would not render the appellant's conviction unsafe as submitted by Mr Bishop.

[43] It was suggested to the complainant during cross-examination, and denied, that she was just a part of a plan being put together by Mr Houston and she was used by him to silence the appellant, because the appellant was investigating Mr Houston for

corruption in at least two matters. In considering this possibility, the Parish Court Judge also considered the suggestion to Mr Houston (which was also denied) that he was the "brains behind the statement", and that he set it up and got the complainant to sign it in order to bring down the appellant.

[44] The complainant was asked in cross-examination if she spoke to Ms Josette Wilson and she admitted that she was the second person to whom she spoke after the incident in the elevator. The complainant indicated that she knew that Ms Wilson and Mr Houston were friends but did not know that Ms Wilson was Mr Houston's girlfriend. Mr Houston was also asked in cross-examination if he knew Ms Wilson. He admitted that she was a very good friend but that he would not describe her as his girlfriend.

[45] The Parish Court Judge considered the credibility of the complainant in the context of the motive attributed to her by the defence. At para. 13 of her reasons (page 57 of the record of proceedings), she stated the defence's position as follows:

> "This therefore brings me to the issue of credibility. Whom do I believe? The defence is asserting further, that the complainant is lying and that the allegations made by her is [sic] as a result of a conspiracy between herself, Mr. Houston and one Ms. Jossette Wilson, whom they are asserting is the girlfriend of Mr. Houston, to bring down Mr. Merchant because the accused was investigating a matter involving corruption against Mr. Houston. It is claimed by the defence that all of this is orchestrated by Mr. Houston to get back at Mr. Merchant."

[46] The Parish Court Judge found, at para. 21 of her reasons, that there was no evidence before the court, nor was there any evidence from which it could be inferred that there was a conspiracy between the complainant, Ms Wilson and Mr Houston to bring down the appellant. She continued at para. 22 to cite the complainant's explanation as to how she came in contact with Mr Houston, which was that a friend referred her to him. The Parish Court Judge expressed that Mr Houston struck her as a sincere and honest witness and although he assisted the complainant with her letter, that did not necessarily

mean that he was "behind the report being made by the complainant, or that he conspired with Ms. Wilson and the complainant to tell a vicious lie on the accused" (para. 23).

[47] We accept that in assessing the evidence of the complainant, the Parish Court Judge sufficiently considered and resolved in her mind the possibility of the complainant being influenced by Mr Houston, and her analysis cannot be faulted. We, therefore, find that there is no merit in these grounds of appeal.

3. Did the Parish Court Judge err in failing to outline the ingredients of the offence of indecent assault?

[48] We observed that the Parish Court Judge indicated, at the beginning of her reasons, that she was aware of the ingredients necessary to prove the offence but would not re-hash them at that time. The court, as a matter of prudence, invited the parties to make submissions on any issue which may have arisen as a consequence of such a declaration having regard to the fact the Parish Court Judge did not subsequently list those ingredients in the usual manner.

[49] Ms Pyke, relying on the case of **R v Court** (1988) 2 All ER 220, posited that the ingredients of the offence of indecent assault are, an assault, which must be committed in circumstances where it is considered indecent by a reasonable person and accompanied by an intent to do an indecent act. She submitted that, although the Parish Court Judge did not expressly state the ingredients of the offence, it is clear that she accurately applied the relevant law, which is evident from para. 30 of her reasons, where she stated the following:

> "30. While he was in the elevator, I find that he held the complainant's hands above her head and kissed her on her lips without her invitation, permission, or consent. I accept the complainant's account in relation to this. I find that this constituted an Indecent Assault upon her. …"

[50] Ms Pyke also submitted that the Parish Court Judge's finding at para. 32 demonstrated her acknowledgement of evidence of the words spoken by the appellant which was capable of proving the existence of an indecent intent. She said:

> "32. I accept the complainant's evidence that as Mr. Merchant was leaving the elevator he told her he can't wait to fuck her. …"

[51] We find the submissions of Ms Pyke on this issue to be compelling. We would commend the approach of specifically outlining the ingredients of any relevant offence for which an accused person is facing trial for the sake of clarity and the avoidance of doubt. However, in the instant case, the failure of the Parish Court Judge to have done so did not cause any uncertainty as to her understanding of the offence of indecent assault, in light of her pellucid demonstration of the application of the facts as she found them, and her reliance on these facts in her finding of guilt.

4. Was the sentence imposed by the Parish Court Judge inappropriate and excessive?

[52] This was the third ground as originally filed but having regard to the two supplementary grounds, it was renumbered as ground 5 by the appellant. The submission that the sentence was excessive was not pursued with any vigour by Mr Bishop. He relied on his submissions in the Parish Court during his plea in mitigation which cited the appellant's favourable social enquiry report, his five dependents, and his service to the country as part of the Jamaica Defence Force. On account of the appellant's exemplary record, he said, community service or a probation order would be more appropriate than a suspended sentence. Ms Pyke, on the other hand, contended that the Parish Court Judge had the authority to impose a term of imprisonment of up to three years, but she gave the appellant a suspended sentence, so the sentence was neither inappropriate nor excessive.

[53] We wish to note and adopt the observation of Lord Griffiths in **R v Court** at page 222, where he made a useful observation as to the range of conduct that may constitute indecent assault:

> "Although the offence of indecent assault may vary greatly in its gravity from an unauthorised teenage sexual groping at one end of the scale to near rape at the other, it is in any circumstances a nasty, unpleasant offence for which a

> conviction is likely to carry a far greater social stigma than a conviction for common assault. …"

[54] In the case at bar, the complainant was a junior member of staff and the appellant was a senior member of the agency. He breached the safe environment within which any employee ought reasonably to expect while at the workplace, regardless of his or her position within the hierarchy of the organization to which he or she is employed.

[55] Section 13(a) of the Act, to which the offence of indecent assault is contrary, provides that any person who carries out an act of indecent assault on another person commits an offence and on summary conviction in a Parish Court, is liable to imprisonment for a term not exceeding three years. As already established, the Parish Court Judge, imposed a sentence of 12 months' imprisonment which was suspended for 18 months. In arriving at that sentence, the Parish Court Judge considered the mitigating factors outlined by Mr Bishop, such as the appellant's educational background and employment history, as well as his favourable social enquiry and community reports. Additionally, she had regard for the fact that he had no previous convictions, an unblemished record, and was of impeccable character. As aggravating factors, she noted that this was a serious offence, the like of which is far too prevalent. Aware that a custodial sentence should be a last resort, she declared that the punishment must fit the crime. For those reasons, she arrived at the sentence imposed.

[56] Having regard to the maximum sentence of three years, we do not accept that the sentence imposed of 12 months' imprisonment suspended for 18 months can be considered to be manifestly excessive in the circumstances we do not find any merit in this ground of appeal.

[57] Accordingly, we made the orders at para. [2] above for the reasons stated herein.