[2011] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 19/2009

BEFORE: THE HON MRS JUSTICE HARRIS, JA
THE HON MR JUSTICE DUKHARAN, JA
THE HON MRS JUSTICE M^{C}INTOSH, JA

ALTON ROSE
NORRIS HARVEY v R

Donald Bryan for the appellant Rose

Ravil Golding for the appellant Harvey

Miss Sanchia Burrell for the Crown

10, 11, 12 November 2010 and 11 February 2011

M^{C}INTOSH JA

[1] At the date of their arrest for offences contrary to section 14 (1)(a) of the Corruption Prevention Act (the Act), the appellants were serving members of the Jamaica Constabulary Force. They were charged on separate informations, in the Resident Magistrate's Court for the parish of Hanover and convicted on 6

July 2009, Alton Rose for the offence of corruptly accepting the sum of $30,000.00 directly from Kevin Green, as a gift for himself or another and Norris Harvey for the offence of corruptly soliciting the sum of $80,000.00 indirectly from Kevin Green, as a gift for himself or another person. The gifts were alleged to be for doing an act in the performance of each appellant's public function, "to wit, for releasing from custody the said Kevin Green" whom the appellant Rose had taken into custody for kidnapping.

[2] That same day each appellant was sentenced to a term of 12 months imprisonment at hard labour after which it appears that each gave verbal notice of appeal as the informations were endorsed with the grant of bail to each, "pending appeal".

[3] The trial commenced on 10 March 2009 and continued on divers days concluding on 6 July 2009, during which time the court heard an opening statement from the Crown and evidence from witnesses for the Crown, then heard evidence from the appellant Rose and an unsworn statement from the appellant Harvey, in their defence.

[4] In short, the Crown's case was that on 27 April 2008 the appellants attended at the home of the complainant Kevin Green and took him to the Green Island Police Station purporting that he would be charged for kidnapping and larceny. Mr Green was a farmer who had earlier reported a case of praedial larceny at the Lucea Police Station, committed at his farm. While at

the Green Island Police Station, the appellants solicited money from Mr Green and arrangements were made for the money to be handed over to Rose. Two days later, in a sting operation, the money was handed over and Rose (a corporal of police at the time), was found by a team of police officers from the Anti-Corruption Branch (the ACB) in possession of $30,000.00 which had been marked as part of the operation. After Rose's apprehension, the appellant Harvey, was pointed out on an identification parade and both were subsequently charged following a ruling by the Director of Public Prosecutions.

[5] It is not disputed that the appellants went to the home of Kevin Green on the morning of 27 April 2008 and that Rose made enquiries about Mr Green's admitted visit to the home of one Ricardo Walker, otherwise called Rasta Twin, at about 3:00 o'clock that morning. Neither is there any issue about the reason he gave for so doing, namely that he had taken Rasta Twin to the Lucea Police Station and handed him over there, reporting a case against him of praedial larceny of pumpkins from his farm. But whereas Mr Green's evidence is that Rose told him that he was taking him to the Green Island Police Station to charge him with kidnapping and larceny, Rose, in his sworn evidence, said that he told Mr Green that the trip to the station was to check out his account as he, Rose, was then unable to make contact with the Lucea Police Station to verify that Rasta Twin was there.

[6] What transpired at the Green Island Police Station when they arrived there at about 9:00 o'clock that morning forms the crux of the Crown's case against the two appellants. There is an office at the police station described by Kevin Green as Rose's office. Mr Green disclosed that while in that office Rose sought to impress upon him that he was facing serious charges of kidnapping and larceny which would prove to be a costly matter if it went to court – attracting sums ranging from $400,000.00 to $500,000.00. Mr Green went on to state that Rose told him that it was going to cost him some money and urged him to make up his mind what he wanted to do. When Mr Green enquired what the money was for Rose said it was to compromise the case with Rasta Twin. He stated that no sum was discussed at that time but at one point Rose told him he was to use his own conscience. He further asserted that telephone numbers were exchanged, between Rose and himself, for further communication on the matter.

[7] The meeting in that office was not denied by the appellant Rose but the tenor was entirely different from Mr Green's account. When Harvey and himself arrived at the station, Harvey had made a telephone call to the Lucea Police Station and after speaking to Harvey, he Rose, called Mr Green, his brother Joel Green and his neighbour Bethune Hume (both of whom had also travelled to the station that morning), into the CIB office, took their particulars and told them that he had confirmed that one Ricardo Walker, who was likely to make a report against the Greens, was in custody at the Lucea Police Station. As he did not

have an official report from Ricardo Walker he told the Greens that if Ricardo Walker came to the station and made a report action would be taken against them.

[8] Kevin Green, he said, spent about half an hour in the CIB office with him. He denied telling Mr Green that he was going to arrest him for kidnapping and larceny or any other offence and said he was never placed under arrest. He never told Mr Green that he should make up his mind what he was going to do and never told him that he was going to compromise the case with Rasta Twin. He stated that there was no money discussion and that he gave his number to all three men. He gives his number to all persons with whom he comes in contact, as part of his policing strategy.

[9] The Crown pitched its case against the appellant Harvey on the principle of common design, relying on the evidence of Mr Green that when they arrived at the station he and Rose went off together in an office from whence they emerged some ten minutes later, then his standing by as Rose spoke with the Greens telling them about the charges that they were facing and their seriousness. He was also present when Rose spoke about the $400,000.00 to $500,000.00 involved if the matter went to court. Then when the discussions were over with Rose and Kevin Green and his party were leaving, it is Kevin Green's testimony that Harvey called him into an office and used words to him which linked him to all that had transpired with Rose in his absence, in that

Harvey told him that "I must take care of them because they were going to take care of me". Kevin Green then told him he was going home to organize himself and Harvey responded "alright" after which Mr Green left.

[10] From his unsworn statement however, Harvey revealed no involvement with Kevin Green after taking him to the station along with his brother and Rose. He stated that he along with the others simply alighted from the vehicle and walked towards the guardroom. He then handed over the keys for the vehicle and his firearm and left the station in his private motor vehicle.

[11] The other area of the Crown's evidence which requires reviewing is related to the apprehension of Rose. Having given the matter some thought, it seems, Mr Green decided to make a report at the Area One police headquarters in Montego Bay, St James. This he did the following day - 28 April 2008 - making his report to Senior Superintendent Paul Ferguson. Under the guidance of the senior superintendent, he made contact with Rose, utilizing the telephone number Rose had provided and was able to arrive at a figure of $80,000.00 with him, as a suitable figure for the "compromise". Thereafter a sting operation involving $30,000.00 was planned with a team of officers from the ACB and on 29 April 2008 Mr Green arranged to meet with Rose to hand over the money to him. This was done in an office at the Green Island Police Station after which Mr Green gave a pre-arranged signal to the ACB team who were strategically positioned at points on the station compound. The team moved in after seeing the signal

and apprehended Rose in a passageway in the building. The money which was in his back pants pocket fell to the ground and was retrieved by Corporal Hope Rose who was one of the officers who held him and with whom he struggled while holding on to this back pants pocket. Her hand had actually joined his in that back pocket and it was when their hands were withdrawn from the pocket that the money fell.

[12] On his account, Rose said he received a telephone call from Mr Green on 29 April 2008, telling him that he wanted to speak to him at the Green Island Police Station. Seeing that Mr Green was a possible accused, he had gone to the station to meet with him. When he got there, Mr Green told him that he wanted to speak to him in the CIB office and when they went into the office, Mr Green spoke for about one minute about his farm and about getting plants and seeds from RADA. After his departure, Rose said he also left the room and was walking in a passageway, talking on his cell phone, when he heard running behind him and turned to see men in plain clothes with guns drawn approaching him. They held on to him and he screamed out for help. A struggle did ensue but he denied that a plastic bag containing money fell from his pocket. They took him to the CIB office and he was shown a plastic bag with money which he was seeing for the first time.

[13] The learned Resident Magistrate analyzed the evidence with care, in our view, and rejected the account presented by the two appellants. In particular,

she found that Mr Green spoke truthfully about the incident. She also accepted the evidence of the officers of the ACB who participated in the sting operation and accordingly found that the Crown had proven its case against both appellants. However, the appellants are critical of her findings and challenge her verdict which in their view was based on a trial conducted on defective informations.

Rose's grounds of appeal

[14] Leave was granted to Mr Bryan to argue the following "Further Amended Supplementary Grounds of Appeal" filed on 10 November 2010, ground 3 of which was not pursued:

> **Ground I** - "The information was defective it did not accord with the evidence, thereby rendering the conviction unsafe."
>
> **Ground II** - "The verdict is unreasonable or in the alternative unsafe, having regard to the evidence."
>
> **Ground III** - "The sentence was manifestly excessive."

Harvey's grounds of appeal

[15] In the notice and grounds of appeal filed on behalf of Harvey, grounds 1 – 4 read as follows:

> "1. The Learned Resident Magistrate fell into error when she rejected the NO Case

Submission made by Counsel on behalf of the Appellant;

2. The evidence relating to identification of the Appellant by the Virtual complainant should have been disallowed by the Learned Magistrate as it was compromised as the Appellant was exposed to the public before the identification parade was conducted. This amounted to a material irregularity and resulted in the Appellant not having a fair trial;

(This ground was abandoned, however, as unsustainable even on the appellant's own statement indicating his presence at certain points. Instead, he sought and was granted leave to substitute Rose's ground 1as his ground 2.)

3. That the Learned Magistrate's (sic) fell into error when she found that there was a joint enterprise/common design between the Appellant Harvey and his co-accused Alton Rose to corruptly solicit a bribe from the virtual complainant when there was no evidence to support such a findings (sic);

4. The sentence was manifestly excessive in the circumstances."
(This ground was also not pursued.)

Arguments and Analysis

Ground 1 (Rose); Ground 2 (Harvey) –

Defective informations rendering convictions unsafe

[16] Mr Bryan's submissions on this ground were adopted by Mr Golding so the joint argument was that the particulars of the charge as laid in the information

do not accord with the evidence adduced in the trial rendering the informations defective and the convictions unsafe. The appellants were faced with three different scenarios, counsel argued – one in the Crown's opening statement which indicated that the appellants had solicited money from Kevin Green so that he would not be charged with the offences of kidnapping and larceny; one in the particulars given in the informations which was so that they would release him from custody and a third one which unfolded in Kevin Green's evidence, namely that Rose had told him that the money was to be used to compromise the case with Rasta Twin. This was compounded, counsel contended, when the magistrate in her analysis of the case seemed to take the words used in the charge to also bear the meaning that money was solicited to compromise the case and this was prejudicial to Rose (and by adoption, to Harvey). Counsel further contended that this compromised his (their) defence(s) as it was difficult to determine upon what the defence(s) should concentrate.

[17] The Crown's evidence did not support an allegation that Mr Green was in custody, Mr Bryan argued, thereby calling into question the allegation that money was being paid for him to be released from custody. What remained would be the allegation that money was being paid for Kevin Green not to be charged or to compromise the case with Rasta Twin, he argued. This he contended, would have required the Crown, or even the magistrate, on her own volition to amend the informations, but this was not done. He referred us to section 6 of the Indictment Act and to **R v West and Others** [1948] 32 Cr App R

152 and submitted that the trial was tantamount to a nullity. In the circumstances, he argued, this is a fit and proper case for this court to have regard to section 303 of the Judicature (Resident Magistrates) Act and to say that an injustice was caused to the appellant(s) as the injustice does not have to be manifestly clear – all that is necessary is that it may have or might have caused an injustice.

[18] Though adopting Mr Bryan's submissions on this ground, Mr Golding added his view that both appellants ought to have been charged in respect of the same sum and in respect of this ground alone, the appeal ought to be allowed.

[19] Briefly, Miss Burrell for the Crown contended that no objection was taken at trial that there was a variance between the particulars in the informations and the evidence and that in circumstances where from the inception of the trial it would have been clear to the defence where the Crown was headed, no injustice, prejudice or embarrassment could be said to have resulted. She relied on the provisions of section 64(1) of the Justices of the Peace Jurisdiction Act submitting that when one looks at the informations as a whole, there was reasonable information as to the nature of the charges. In each case, the substance of the information disclosed the person charged, the capacity of that person, the date of the charge and the mischief that the Act seeks to address. She further submitted, that the portion which purports to particularize, beginning

with the words "to wit", indicates that this is an elaboration of sorts – this was not the substance of the offence.

[20] It was also Miss Burrell's contention that throughout the trial it was clear that the Crown was alleging that the soliciting was so that the person would not be charged. Although an amendment to the information would have been an ideal way to deal with it, she submitted, it is clear that the appellants knew what they were being tried for and what they were defending. The case went to full trial and counsel stoutly defended the appellants with a clear understanding of what the charges were that they were defending.

[21] We find merit in the Crown's argument. The substance of the offences was clearly disclosed in the informations. The appellants were charged with an act of corruption – soliciting a gift, in one case and accepting a gift in the other case, in connection with the performance of their public function and in their defence they denied that they had done so. Rose accounted for his actions that morning when he returned to the station with the Greens, accepting that he did go into the room with Kevin Green and providing his own account of what transpired there. There was no discussion about money or about compromising any case and on the subsequent occasion when money was mentioned, it was Kevin Green who introduced it stating that he wanted to compensate Rasta Twin for injuries sustained on the morning of 27 April 2008. He did not accept any gift for doing any act in the performance of his public

function and that surely would remain his answer to whatever the Crown stated as the purpose for the acceptance.

[22] Harvey's defence was also a denial. He was not even present in the room when Rose spoke to Kevin Green. He had left the station shortly after their return there. The substance of the charge having been disclosed to him in the information that was his defence and again his position could hardly be expected to be different if the purpose was for releasing Kevin Green from custody, for compromising the case with Rasta Twin or to avoid his being charged.

[23] Section 303 of the Judicature (Resident Magistrates) Act reads as follows:

> "303 No appeal shall be allowed for any error or defect in form or substance appearing in any indictment or information as aforesaid on which there has been a conviction, unless the point was raised at the trial, or the Court is of the opinion that such error or defect has caused or may have caused, or may cause injustice to the person convicted."

It has not been contended nor indeed has the record disclosed that the point taken before us which forms the subject of this ground, was taken at the trial. Further, it also seems to us that the learned Resident Magistrate was entitled on the evidence before her, to conclude that there was an element involving custody as she found that at one point Kevin Green could have been said to be in the custody of the officers, facing charges. That is why his neighbour, Bethune

Hume, felt the need to travel to the station that morning to see what assistance he could be to Kevin Green, and Kevin Green himself felt that although he was not restrained, he was not free to leave the station unless permitted to do so as he was told that he was to be charged. In those circumstances, the magistrate may well have seen no need to amend the information and the point was never raised before her.

[24] We also do not agree with the submissions of Mr Golding that the informations should have reflected the same sum in respect of each appellant. The scheme in which Harvey was found to be a participant involved the payment of $80,000.00 and therefore that would be the correct sum for the charge of soliciting. What was actually accepted however was the lesser sum of $30,000.00 so that, as Miss Burrell quite correctly submitted, the two informations could not have mirrored each other.

[25] Ultimately, the court is not of the opinion that such defect in the informations as complained of by the appellants caused or may have caused or may cause injustice to them and this ground therefore fails.

Rose's Ground 2 –

Verdict unreasonable or unsafe having regard to the evidence

[26] Rose's complaint in this ground may be put under three headings:

i) the contradictions in Mr Green's account of the passing of the money to Rose;

ii) unsatisfactory treatment of the discrepancies that arose on the crown's case; and

iii) unsatisfactory treatment of material omissions.

The passing of the money

[27] Mr Bryan submitted that Kevin Green's account of the passing of the money to Rose was vague, confusing, incoherent and contradictory and ought to have been rejected by the magistrate as unreliable. There were contradictions as to precisely when the money was given to Rose and this was material. In response, Miss Burrell submitted that as the sole fact finder it was for the magistrate to determine who or what she believed and she believed the Crown's witnesses. There was evidence from Kevin Green of the arrangement to hand over the money to Rose subsequent to his soliciting it and evidence that he did hand it over to Rose, face to face. There was also the evidence of Corporal Hope Rose of both their hands being in the appellant Rose's pocket; of feeling something slippery in that pocket; of hearing something fall when they withdrew their hands; of looking down and seeing the plastic bag which she retrieved from the floor and of seeing that it contained marked notes. The chain of custody of the money was clearly established, she said, and this evidence was more than sufficient for the magistrate's finding that the money had passed from Kevin Green to Rose. With this we entirely agree.

[28] Mr Green gave an explanation for the seeming contradictions in his evidence and his lack of recall when challenged in cross-examination. He said "The amount of things which I have been through since then and the amount of discussions that I have been through since then, you have to see with me if I forget a thing or two" and this explanation clearly found favour with the learned magistrate. She clearly accepted his evidence when he said, "I can't remember specifically if I handed over the money before or after [Mr Cameron knocked on the door] but I know I handed it over" (page 22). Then, in further cross-examination he said "He put the money in his pocket and I left his office instantly." The learned magistrate found as a fact "…that Kevin Green was transported to the Green Island police station by the members of the ACB and that he handed this BNS plastic money bag containing $30,000 to the defendant Rose in the CIB office there" (finding number 13) and when viewed with the evidence of Corporal Hope Rose (at para 27 above), whom she found to be a credible witness, there was ample support for this finding.

Discrepancies and inconsistencies

[29] The learned magistrate found the ACB officers to be truthful and reliable and accepted their evidence, Mr Bryan submitted, but she failed to show how she resolved the discrepancies and inconsistencies in their evidence. On the authority of **R v Lloyd Chuck** (1991) 28 JLR at page 422, she ought to have given reasons for favouring the evidence of one witness over that of another, he

submitted. For instance, she had visited the locus in quo. Her observations there had indicated to her that the signal could not have been observed by the ACB from the position in which Kevin Green had placed himself. However, the learned magistrate said that all the officers said they saw it and she accepted their evidence as truthful. This, Mr Bryan submitted, was palpably wrong and caused irreparable prejudice to Rose, especially in light of the issue of whether the money was actually taken from him or it fell from him. Had the learned magistrate addressed her mind to the various breakdowns in the sting operation and its impact on the evidence, counsel submitted, she would have arrived at a different verdict.

[30] In response, Miss Burrell submitted that the learned magistrate did not find that the signal was not given – she accepted that it was given but not from where Mr Green said he was. Rather, she accepted the evidence of the officers on the point as being more plausible and she was entitled so to do as a fact finder.

[31] At page 119 of the record the learned magistrate had this to say:

> "It is clear that the decision of the court in this matter will rest wholly on the view that the court takes of the credibility of the prosecution(sic) witnesses and in particular, that of the main witnesses Kevin Green and the members of the Anti-Corruption Branch…."

She then went on to address discrepancies on the Crown's case, identifying what, in her view, were chief among them and after reminding herself of the Crown's burden of proof and the requisite standard of proof added that:

> "… I must decide if the discrepancies that arise are serious or slight and what if any effect they have on the credibility of the witnesses."

We are of the opinion that the learned magistrate dealt adequately with the discrepancies which arose and while she may not have set out in detail how she resolved each of them (and we hasten to say here that there is no such obligation on the magistrate), it was clear that she considered them and thereafter arrived at her conclusions as she was entitled to do. It was for her, as tribunal of fact, to assess them, weighing them in the scale of credibility and coming to her own conclusion as to what effect, if any, they had on the evidence of the witnesses concerned.

[32] She dealt separately with the evidence concerning the pre-arranged signal. Having visited the locus in quo and made her own observations on whether the signal could have been seen by the ACB team from the position which Kevin Green said he gave it, she concluded that his recollection was faulty, being mindful no doubt of his explanation for the gaps in his memory, and upon that basis, she expressed a preference for the evidence of the ACB team. She accepted their evidence that they had all seen the signal and that he could not therefore have given it where he said he had but where the officers

said he gave it. This must certainly be the case as it was on seeing the signal that the team moved in to execute the sting operation.

Material omissions

[33] Counsel pointed to omissions concerning the retrieval of the money which, he submitted, is a material aspect of the Crown's case. For instance, what Corporal Hope Rose was alleged to have said when she retrieved the money from the floor, which was omitted from the statement of the officer to whom she had spoken, and the allegation that four officers were holding Rose at the time yet none of them saw the money fall, are factors which according to Mr Bryan were weaknesses in the Crown's case but which the learned magistrate treated as strengths. While the learned magistrate addressed her mind to omissions in the statement of Mr Green, counsel submitted, she failed to advert her mind to the material omissions in the statements of the policemen who claimed to have witnessed the recovery of the money. At the end of the day, counsel submitted, there was much shadow cast over this case and considering the seriousness of the charge and the impact it would have had on the appellant, greater care should have been taken in analyzing the evidence. Consequently, the verdict is not safe and should not be permitted to stand.

[34] Miss Burrell quite correctly submitted that ultimately the issue of omissions is inexorably linked with the issue of credibility and that the learned Resident Magistrate recognized this and demonstrated in clear language the need for

her to approach the fact of omissions with caution. On the totality of the evidence adduced before the learned magistrate, counsel submitted, which underpinned her verdict, there can be no credible view that her decision is palpably wrong.

[35] There is no denying that there were omissions both from their recorded statements, and in at least one instance, from the evidence of the ACB officers, relating to the retrieval of the money and no denying also that the learned magistrate did not specifically address those omissions. However, it is clear that she treated the entire matter as a credibility issue and in circumstances where she found that the money was passed to Rose by Mr Green, that he put it in his pocket from which it fell in a struggle with members of the ACB team and was recovered by Corporal Hope Rose, the learned magistrate was well entitled, it seems to us, to conclude that the omissions as to whether Corporal Rose called attention to its fall and whether or not the fall was observed by those involved in the struggle were not material and did not have the effect of eroding the credibility of the ACB team. She clearly was mindful of the need for caution when assessing their evidence in this regard and at the end of the day found that she could rely on their account as truthful and we see nothing palpably wrong with her approach. It was entirely a matter for her to say what she believed transpired on 29 April 2008 when Rose was apprehended. Neither was it critical, it seems to us, in which passageway he was held, as Rose also took issue with the Crown's evidence as to where he was apprehended. In this

regard, the material fact found by her was that he was held in a passage at the Green Island Police Station as he walked along, talking on a cell phone. There was a struggle in which he was subdued and taken to the CIB office where the money, the subject of the charge against him, was shown to him.

[36] There is one further aspect of this ground that requires our consideration and that is the complaint that the learned magistrate, having identified Kevin Green as a suspect and potential defendant, failed to demonstrate that she considered the effect of this on his evidence. Mr Bryan contended that the learned magistrate did not consider the factors which would render Mr Green a witness with an interest to serve as that is what her classification of him as a suspect and potential defendant would mean. Having so classified him, Mr Bryan continued, the learned magistrate was then required to determine whether or not his evidence was corroborated. Counsel submitted that there was no such corroboration, leaving this court in a position where it would be unable to say if she could safely have acted upon his uncorroborated evidence. In support of these submissions he referred us to **R v Lincoln Golding** SCCA No 134/83 delivered 21 April 1986; **R v Jonathan Stewart** SCCA No 88/89 delivered 17 October 1990; **Lloyd Chuck** (above) and **R v Vince Stewart** RMCA No 73/89 delivered 14 February 1990.)

[37] However, it is clear to us that Mr Bryan failed to note the context in which the learned magistrate referred to Mr Green as a suspect or potential

defendant. She made the comment when she was looking analytically at the words spoken to Mr Green by Harvey and her comment was clearly not intended to classify Mr Green as a witness with an interest to serve. We find no substance in this argument. As learned counsel for the Crown correctly pointed out, there was no evidence that Mr Green participated in the offence which was the subject matter of the trial nor that he had any substantial interest to serve in the form of any charge against him up to the point where he made the report to Senior Superintendent Ferguson. There was therefore no need for the learned magistrate to consider the requirements for dealing with a witness with an interest to serve and to warn herself accordingly. Indeed, the Court of Appeal made it clear in **R v Linton Berry** (1990) 27 JLR 77 that there is no obligation on a judge to give a warning where there is no basis to suggest that the witness is a participant in the material crime.

The arguments for the appellant Rose on ground 2 also fail in their entirety.

Grounds 1 and 3 of Harvey's appeal

[38] These grounds were argued together inasmuch as the complaint in both was that the Crown had failed to prove a case against Harvey. At the close of the Crown's case, a no case submission was made on his behalf which should have been upheld, Mr Golding argued, as a prima facie case had not been made out (ground 1) and, in particular, there was no evidence to support a finding that he was a participant in a joint enterprise/common design (ground

3). Counsel submitted that on the evidence adduced there was no money discussion and nothing said about compromising any case that morning when Harvey went to the home of Mr Green with Rose. What the learned magistrate used to show his involvement in a common design were really instances of his carrying out his lawful duty as a police officer. For instance, the learned magistrate's finding that Harvey took no steps to keep Mr Green in custody or to prosecute him when his senior officer failed to do so as he had the same powers and the same duty to act accordingly, was to be viewed in light of Harvey's statement that he was a force driver and having completed his assignment that morning had left the station. It was Mr Golding's contention that there were no primary facts from which inferences could have been drawn to support the learned magistrate's finding of a common design involving Harvey and for her finding that although he was not involved in the initial discussions about the money, his subsequent conduct and statement provided evidence from which she could infer that he was a party to Rose's corrupt solicitation.

[39] Mr Golding also contended that Harvey was entitled to be acquitted even on the basis of what he referred to as the "time line" where Harvey gave his time of departure from the station that morning as shortly after 9:00 am, which was supported by Rose who testified that Harvey had left the station at about 6-7 minutes after 9:00 am. This, he said, was consistent with the evidence of the Crown's witness Bethune Hume who spoke of leaving the station with the complainant Kevin Green and his brother some time after 12 noon so that no

conversation could have taken place with Harvey as testified by Mr Green. Bethume Hume had also supported the defence's case when he said that there had been no discussion about money.

[40] However, the learned magistrate had made it abundantly clear that she rejected the time line given by the appellants, and the evidence of Bethume Hume that he and the Greens had all left the station some time after 12 noon, did no violence to Mr Green's evidence that he had spent a little over six hours at the station before returning to his home at about 3:00 pm. In our view, Mr Golding's argument is lacking in substance. There was, at first, Harvey's evidence of his presence at the police station at the material time, then evidence which elevated his presence to involvement and this entitled the learned magistrate to call upon him to answer to the charge.

[41] Miss Burrell submitted that in circumstances where there is a complaint against an individual, Harvey has a strict duty towards the person accused. These strict duties are to investigate, detain and charge if necessary or appropriate and to place that person before the court. On the facts before the court, none of this was done. No entry was made in the station diary in accordance with proper procedure to support a legitimate investigation or enquiry. Instead, what happened was a departure from the strict duties incumbent upon Harvey as a police officer.

[42] The learned magistrate had every basis, Miss Burrell submitted, to find that he was a participant in the scheme with Rose. Harvey's conversation with Mr Green came after the conversation about kidnapping and larceny had taken place. The learned magistrate as judge and jury with knowledge of our cultural reality, gave her interpretation as to what the words used by Harvey may have meant, argued Miss Burrell, and those words cemented Harvey's role in the entire affair. He need not have been present for all aspects of the plan, so, while he may not have been present when the first discussion took place about the kidnapping and larceny, he adopted all aspects of this enterprise by the words he used to Kevin Green. By his words he convinced Mr Green that he was a party and at all times, even when he was not in the room, Harvey was a party to the enterprise, applying the principle of the look-out man.

[43] There was, in our view, nothing plainly wrong with the learned Resident Magistrate's finding that Rose and Harvey were on a common mission to solicit money from Kevin Green and the submissions advanced by Mr Golding to the contrary are without merit. There was evidence which the learned magistrate accepted that while Harvey was in the company of Rose, Kevin Green was told about the seriousness of the charges facing him and that they would attract sums of $400,000.00 to $500,000.00 if the matter went to court. This came after Rose and Harvey had left Kevin Green and his party in the guardroom and went off to a room for some 10 minutes.

[44] The learned magistrate also rightly accepted that after Mr Green's discussion with Rose ended, Harvey called him to another room for a private conversation in which he used words that Mr Green understood to relate to both Rose and Harvey. Mr Green clearly took the words uttered to be in furtherance of the discussions he had just had with Rose as he not only told him that he was going to organize himself (at which point Harvey gave a clear indication that Mr Green had not misunderstood him by saying "alright') but later, when he did speak to Rose about the sum to be paid, he asked him about the other officer getting his share.

[45] The magistrate, in dealing with the words spoken by Harvey, said at finding 8:

> "Given our cultural reality and expressions, I find that the context in which the words were used and the fact that they came after the defendant Rose had solicited money from Green, spoke to Harvey's knowledge of and acquiescence in the joint enterprise to corruptly solicit money from the complainant Green."

This interpretation was reasonable in all the circumstances and, as Miss Burrell submitted, they cemented his involvement in the scheme. It is trite law that all the participants in a common enterprise need not be present at every stage in the plan. It is sufficient in law if, with the intention of giving assistance, the person who is not at the actual commission of the offence, is near enough to afford such assistance, should the occasion arise. In the instant case Harvey was

not only near enough but he did his part by giving words of encouragement to Mr Green and clearly demonstrated that he was a participant in the enterprise. Accordingly, grounds 1 and 3 of Harvey's appeal also fail.

Conclusion

[46] Based on all of the above, the appeals of Alton Rose and Norris Harvey are dismissed and their convictions are affirmed. Their sentences are also affirmed and are to commence with effect from 11 February 2011.