**[2020] JMCA Crim 50**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SITTING IN LUCEA, HANOVER**

**RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 2019PCCR00003**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MRS JUSTICE STRAW JA**
**THE HON MR JUSTICE FRASER JA (AG)**

**JOSEPH WILLIAMS v R**

**Lambert Johnson and Ms Shayann Clarke for the appellant**

**Ms Cadeen Barnett and Malike Kellier the Crown**

**24, 27 June 2019 and 2 December 2020**

**FRASER JA (AG)**

**Introduction**

[1] By way of notice of appeal, filed 13 September 2016, the appellant sought to set aside his conviction, on 31 August 2016, by the Resident Magistrate (now Judge of the Parish Court) for the parish of Saint James. He was convicted for the offence of assault occasioning actual bodily harm contrary to section 43 of the Offences Against the Person Act. On 27 June 2019, we allowed the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal. Having indicated then that we

would put our reasons in writing, we now do so. We apologise for the delay in the fulfilment of that promise.

**Background**

**The hearing in the trial court**

[2] The evidence at trial came from three witnesses: the complainant, the investigating officer and the appellant; as well as medical certificates in respect of both the complainant and the appellant. Copies of the medical certificates were not appended to the record of proceedings, but were made available to this court during the course of the appeal hearing.

[3] The prosecution's case was that the complainant, Mr Linston James, grounds man for the St James High School, was at work on 23 October 2012 at about 9:00 am, in the process of cutting grass. His supervisor, the bursar, came and spoke with him and then left. Subsequently, the appellant, who was the school's principal, came to him and told him to stop cutting the grass. Mr James obeyed. After sitting on a wall for 10 - 12 minutes Mr James headed towards the bursar' office, located within the main office. When almost there the appellant came up behind him and said 'stop de noise inna de place'. He spun around and the appellant used his finger to stick him in the eye and then "collared him up", flung him to the ground and inflicted "peer fist" to his head. At the time, the complainant was not doing anything, had nothing in his hand and did not attack the appellant. He only tried to block the appellant's attack.

[4] The appellant painted a different picture in his testimony. Whilst agreeing that there was a tussle, he indicated that Mr James was the aggressor and struck the first blow. Further, that at no time did he stick Mr James in the eye. His version of events was that at about 8:51 am, he told Mr James to stop cutting the grass as he was disturbing classes and debris was flying all over the place. This was after both the supervisor and the vice principal had spoken to Mr James about the disturbance earlier that morning.

[5] He stated that Mr James responded by saying, "Stop wah, stop wah, go to Mrs. Stone". He explained that Mrs Stone was the bursar who was in charge of supervising ancillary staff members. He said he told Mr James to stop two more times, but he did not. He left and went to the vice principal's office whilst Mr James was still cutting the yard. He then went to the bursar's office and spoke with her. As he was leaving that office, he saw Mr James coming through the main door with a loud outburst. Mr. James was quarrelling about the appellant not wanting to sign his cheque and that the appellant had told the ministry that Mr James was not cutting the yard. He told Mr James to stop the noise and leave the office in that condition, as his clothes were full of grass. Mr James, who in his view was still in a rage, hit him in the face above his left eye.

[6] He dropped his briefcase and grabbed Mr James' clothes and there was a tussle. He pulled Mr James towards him, hit him and pulled him to the ground whilst Mr James was holding onto his tie. He held Mr James by the throat and they fell to the ground, where he brought Mr James under control. He was positioned above Mr James. Mr James took out a knife from his pocket and the appellant held the hand with the knife. A security

supervisor, the dean of discipline and the vice principal tried to separate them. The dean was holding the appellant from behind and the supervisor held on to the knife. The appellant got up, went to his office and asked the senior secretary to call the police.

[7] Mr Williams made a report shortly after the incident, and Mr James was arrested. Mr James was released a day later. Three days after his release, he visited a doctor and then made his own report against the appellant to the police. Following this report, the appellant was arrested and charged.

[8] The medical evidence indicated that both parties had sustained minor injuries arising from the incident. In respect of the complainant, the medical certificate, dated 22 January 2013, indicated that Mr James was examined on 25 October 2012, two days after the incident, and was found to be suffering from blunt force trauma to the left eye, as well a sub conjunctival haemorrhage of the left eye, consistent with infliction by a blunt object. The medical certificate in respect of the appellant, dated 22 January 2013, described swelling and tenderness on the left cheek under left eye, and tenderness palpated at right elbow, consistent with infliction by a blunt object.

[9] At the close of the prosecution's case an unsuccessful no-case submission was made on the basis that the complainant's evidence had been manifestly discredited and that the medical evidence did not support the extent of the injuries described.

**The decision of the trial court**

[10] In her reasons for judgment the learned Resident Magistrate (LRM) indicated that the main issue was one of credibility. She noted that even if she did not believe the

appellant's evidence, she had to be satisfied on the Crown's case, that the complainant's evidence made her feel sure of what he said transpired at the material time.

[11] The LRM rejected the appellant's case on the basis that there were inconsistencies evident in the defence, when comparisons were made between several suggestions made to the complainant by defence counsel and the actual evidence of the appellant.

[12] In that regard, she zeroed in on the following:

i. In the appellant's evidence he seemed to be saying that he told Mr James to stop cutting the yard three times. However, the suggestion made by counsel to Mr James was that it was only two times;

ii. Although the appellant's case was that he had left Mr James cutting the yard when he went to his office, what was suggested to the complainant was that the appellant left after Mr James had stopped cutting the yard;

iii. The sequence of events according to the appellant was that Mr James went to the office dirty and loud; was told to leave; hit the appellant in the face; the appellant dropped his suitcase and grabbed the complainant by his clothes; there was a tussle; the appellant hit the complainant; the complainant held on to his tie and they fell to the ground. However, the suggestion made to the

complainant was that the first thing Mr James did was to grab the appellant's tie and drape him, not hit him as the appellant had stated;

iv. The suggestion to the complainant that the appellant had told him the reason he didn't sign his cheques was because he did not cut the yard, was not substantiated by the appellant's evidence;

v. Also, not a part of the evidence given by the appellant, was the suggestion to Mr James that it was when he was attacking the appellant that the appellant had punched Mr James in his left eye and told him to let him go. The LRM found that the appellant never said that he punched the complainant in his left eye;

vi. The appellant gave evidence that he was on top, the inference being that he would be the one to be pulled off the complainant, but the suggestion made by counsel to the complainant was that the complainant was the one that was pulled off the appellant.

[13] On the other hand, regarding the complainant, the LRM found that he had given forthright, credible evidence which had not been discredited under cross-examination, although he had been displeased and aggravated by certain questions. The acknowledged inconsistencies extant in his evidence, the LRM found not to be material and also

considered that they were satisfactorily explained, given that he was a simple, illiterate man.

[14] In particular this is how she addressed specific inconsistencies and discrepancies that arose on the Crown's case.

i) In relation to the inconsistencies between his statement and evidence in court, she accepted his assertion that they were put there by the officer who took his statement, and that based on what the officer told him, he decided not to amend it.

ii) In relation to the discrepancy between the officer's evidence that he had asked Mr James why he did not report his injury before and Mr James' evidence that he was complaining but they paid him no mind, the LRM preferred the evidence of the complainant as being more consistent with the circumstances. Furthermore, the discrepancy was not one she found to be material to the issue before the court, as it happened after the incident and was therefore not critical.

[15] Concerning the medical evidence tendered on behalf of the complainant, the LRM found that, whilst it did not prove or disprove the complainant's allegations, it did show that he had suffered an injury to the eye. On the other hand, she found that the medical evidence for the appellant did not support his assertion that the complainant had hit him

anywhere in his face. Rather, although she accepted that the appellant suffered bruises, she found that these were consistent with his own evidence of a tussle.

[16] Having considered all the evidence, the LRM accepted the complainant's version of events, found the appellant guilty and sentenced him to a fine of $30,000.00 or 30 days' imprisonment. A stipulation was added that the sentence should not be recorded.

## The appeal

[17] The appeal proceeded on the following amended grounds of appeal:

> "i) The [LRM] failed to analyze the medical evidence properly and accordingly did not appreciate its impact on the credibility on [sic] the complainant's evidence.
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> ii) The [LRM] used the wrong criteria to assess the credibility of the appellant and did not take into account the effect of the lapse of time and how it would impact the recollection of the appellant."

[18] Also, counsel for the Crown, in their submissions, raised the additional issue of whether the LRM was entitled to order that the sentence of the appellant not be recorded. We undertook to address this issue, given the acknowledged practice of judges being requested to, and on occasion, as in this case, acceding to requests to direct that convictions not be recorded.

## Ground 1 - The [LRM] failed to analyze the medical evidence properly and accordingly did not appreciate its impact on the credibility of the complainant's evidence

### The appellant's submissions

[19] Learned counsel for the appellant, Mr Johnson, accepted that the LRM rightly found that the case turned on the issue of credibility, but argued that the appellant's conviction

was unsafe. He contended that the LRM's findings were inconsistent with the medical evidence, as her finding that the appellant's injuries were consistent with a tussle was not supported by the evidence but amounted to speculation. Counsel maintained that the LRM thereby erred on a critical matter central to the issue of credibility. The medical certificate of the appellant showed that he had an injury over the left eye, which was inconsistent with the complainant's denial that he hit the appellant, whether accidentally or in self-defence. It was therefore submitted that this brought the veracity of the complainant's version of events into question.

[20] Counsel advanced that whilst a judge may accept and reject parts of a witness' evidence, to accept that there was a tussle and not accept the appellant's assertion that the complainant was still in a rage and hit him in the face, strained that principle. Thus, it was argued, the fact that the medical evidence is consistent with the appellant's version of events, at least raised a reasonable doubt making the conviction unsafe. Counsel cited in support the case of **Brenton Brown v R** [2013] JMCA Crim 31.

**The submissions of the Crown**

[21] Conversely, Ms Barnett, counsel for the Crown argued that, having heard and observed the witnesses, considered the medical evidence and applied the correct standard of proof, there was ample credible and consistent evidence for the LRM to make the findings that she did. Counsel submitted that the LRM found that the medical evidence, consisting of the medical certificates of both the complainant and the appellant, neither proved nor disproved the allegation. Counsel cited **Nate Brown v R** [2018] JMCA Crim 16.

[22] Counsel relied on the principle that an appellate court is reluctant to disturb a finding of fact of a tribunal, once there is credible evidence to support that finding. Therefore, this court should not overturn the findings of the LRM unless she was plainly wrong. As authority for that proposition, counsel cited the cases of **Willard Williamson v R** [2015] JMCA Crim 8 (paras [124]-[125]) and **Everett Rodney v R** [2013] JMCA Crim 1 (paras [31]-[32]), which relied on the seminal case of **Watt v Thomas** [1947] AC 484. In the instant case, the respondent contended, the verdict was based on credible evidence on which the LRM was entitled to rely, and she could not be said to have been plainly wrong to do so.

**Discussion**

[23] There is no dispute that the main issue before the LRM was one of credibility, relating to questions of fact. It is well established that the approach an appellate court should take in reviewing the findings of fact of a trial court, is as outlined in the cases cited by counsel for the Crown. In **Willard Williamson**, McDonald-Bishop JA (Ag) (as she then was), relying on the authorities of **R v Joseph Lao** (1973) 12 JLR 1238, and **Watt (Thomas) v Thomas**, held that "an appellate court should only set aside the verdict of a judge sitting alone where it is obviously, palpably, or plainly wrong" (see also **Everett Rodney v R**, para. [21]). Therefore, where there has been no misdirection in law and the trial judge's finding is based on the view to be taken of the credibility of witnesses, an appellate court is only entitled to come to a different conclusion than the trial judge, where it is satisfied that any advantage to be had by the trial judge having

seen and heard the witnesses is insufficient to justify the judge's reasons and conclusion (per Lord Thankerton, **Watt (or Thomas) v Thomas**).

[24] Further, as Viscount Simon indicated in **Watt (Thomas) v Thomas**, where the trial judge's finding as to credibility is based on inferences drawn from other evidence, if the appellate court determines that an erroneous inference led to that finding, it will be justified in taking a different view of the value of a particular witness' evidence. In that regard, he stated, at pages 486-487:

> "It not infrequently happens that a preference for A.'s evidence over the contrasted evidence of B. is due to inferences from other conclusions reached in the judge's mind, rather than from an unfavourable view of B.'s veracity as such: in such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this; and if the appellate tribunal is convinced that these inferences are erroneous, and that the rejection of B.'s evidence was due to the error, it will be justified in taking a different view of the value of B.'s evidence."

[25] Concerning another entitlement of an arbiter of fact, in **Willard Williamson,** McDonald Bishop JA (Ag), relying on the authority of **Ashwood, Gruber and Williams v R** (1993) 43 WIR 294 (PC), accepted that, whilst it is open to a trial judge as an arbiter of fact to accept and reject parts of a witness' testimony, the relevance of the impeached parts of the witness's evidence to the central issues to be determined by the court is crucial to an assessment of the overall credibility of the witness (paras 104-105).

[26] **Nate Brown v R** does not assist in this matter, as in that case, there was one medical certificate which was consistent with the complainant's evidence accepted by the learned Judge of the Parish Court.

[27] In the case of **Brenton Brown**, relied on by counsel for the appellant, this court allowed the appeal, having found that there was a fundamental discrepancy between the medical certificate and the evidence of the Crown's witnesses. That certificate, provided credible independent evidence, which cast reasonable doubt on whether the appellant had committed the offences alleged. The appellant had been accused of assaulting the complainant police officer, by amongst other things, striking him on the left cheek. The medical certificate showed no bruises to the complainant's face. However, one of the witnesses testified he saw swelling on the complainant's cheek after he returned from the doctor. This court found that, the trial judge's finding that the absence of the swelling did not necessarily mean the complainant had not been attacked but could have been caused from the delay in receiving treatment, was speculative. The court also stated that the learned judge "did not show an appreciation for the impact that this medical certificate had on the credibility of the witnesses" ([para. [14]).

[28] In the instant case, having thoroughly considered the medical certificates, we are constrained to agree with the submissions made on behalf of the appellant. The findings of the LRM, in our view, cannot be reconciled with the evidence of the injuries outlined in the appellant's medical certificate. The finding that the appellant suffered bruises which were consistent with his own evidence of a tussle was speculative, as there was no

evidence that he suffered any blunt force trauma to his face during that tussle. This in a context where the LRM found that the evidence did not support his assertion that the complainant hit him "anywhere in the face". This conclusion is plainly wrong, as the appellant's medical certificate, which was accepted by the court, makes it clear that he suffered an injury to the face (on the left cheek under the left eye), consistent with his version of events, and inconsistent with the account given by the complainant that he did not strike the appellant in the face or otherwise.

[29] Therefore, while in **Brenton Brown** the error of the learned trial judge was speculating in the absence of medical evidence, in the instant case the speculation of the LRM led to the rejection of the only evidence that supported the medical finding of blunt trauma to the appellant's face, and the embrace of a possibility which was not explored or explained on the evidence.

[30] This error was compounded by the fact that the LRM used that faulty assessment of the evidence as part of her reasoning to reject the appellant's version of events, whilst at the same time observing that the complainant's medical evidence did not prove or disprove the allegations. It is true that the medical evidence of either party could not have definitively assisted the tribunal with the question of who was the aggressor in the incident. However, in the context of the appellant's testimony, the medical evidence presented on his behalf clearly raises reasonable doubt as to the veracity of the complainant's account of how the incident took place. This ground must therefore succeed.

**Ground 2 - The learned trial judge used the wrong criteria to assess the credibility of the appellant and did not take into account the effect of the lapse of time and how it would impact the recollection of the appellant.**

**The appellant's submissions**

[31] In relation to this ground, it was argued that the LRM ought not to have assessed the credibility of the appellant by using the yardstick of inconsistencies between the evidence of the appellant and suggestions made by defence counsel to the complainant; particularly since it is well accepted that denied suggestions are not evidence. Further that in highlighting about seven inconsistencies, the LRM did not consider that these may have been caused by the delay of four years in the matter coming to trial. Additionally, counsel also contended, that these 'inconsistencies', on the totality of the evidence were insignificant.

[32] Accordingly, counsel maintained that the conviction was unsafe as the appellant was not discredited on cross-examination, either generally or in relation to how he got the injury, and the medical certificate supports his account of the incident.

**The submissions of the Crown**

[33] Ms Barnett resisted this ground on the basis that the LRM used the correct criteria to assess the credibility of the appellant. Counsel submitted that, having regard to the cumulative effect of the evidence, the verdict was reasonable and cannot properly be described as unsafe. Counsel argued that, as defence counsel is a creature of instructions, it was legitimate for the LRM in her assessment of the appellant's credibility to consider the differences between the suggestions made on his behalf and his actual evidence. The

LRM having analysed the sworn evidence of the appellant to determine if his account of the events could be accepted, then appropriately returned to the Crown's case to determine who she thought credible.

[34] Concerning the effect of delay, counsel asserted that the LRM, having heard and observed the witnesses, was in the best position to assess whether the lapse of time had impacted the appellant's recollection. Counsel relied on **Vince Edwards v R** [2017] JMCA Crim 24 at para. [142]. Counsel also pointed out that the "cross-case" where the complainant in this matter was then the accused in that matter, concluded on 11 August 2014. Therefore, as there was only a difference of two years between the trials, delay would not provide a good basis to explain the weaknesses in the appellant's credibility.

[35] **Dodrick Henry v R** [2013] JMCA Crim 2 (para. [21]) was relied on for the proposition that once a judge clearly demonstrates that she has addressed her mind to the evidence and the applicable law, there is no prescribed formula for the delivery of findings. Thus, in light of the evidence adduced, counsel argued the LRM's findings indicate that she adequately addressed her 'jury' mind to the relevant issues.

[36] Counsel submitted, that the conviction was therefore safe. However, if the court was not in agreement with the Crown the court was invited to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, on the basis that the findings and reasoning of the LRM were such that no substantial miscarriage of justice had occurred.

**Discussion**

[37] It is clear from her reasons, that the LRM placed significant reliance on inconsistencies between suggestions put by defence counsel to the complainant and the appellant's evidence. This formed the primary basis of her finding that the credibility of the appellant was impeached and his version of the events should be rejected. Her acknowledgement of his good character was not enough to sustain his credibility, given the view she took of his evidence. It should also be noted that the LRM came to her conclusion to reject the appellant's evidence even before considering the medical evidence. Then, having considered that evidence, based on what we have now determined was her flawed analysis of it, that evidence was interpreted by her as being in consonance with her earlier rejection of the appellant's version of events.

[38] No authority was advanced by either counsel in relation to the question whether the LRM was entitled to treat with the suggestions in the way she did. Anecdotal evidence of the practice was the only offering. Everyone agrees that suggestions which have not been accepted by a witness do not become evidence. However, can they be used as a basis to discredit evidence subsequently given, that is different in some material particular from the suggestions made?

[39] Some assistance, albeit indirect, may be obtained from the case of **Kenyatha Brown v R** [2018] JMCA Crim 24. In that matter, a case of rape where the defence was consent, this court found that the failure of counsel for the appellant Brown in the court below, to put important aspects of the appellant's case to the complainant about which he later testified, denied him a fair trial. The court considered that, in assessing the

veracity of each side's version of events, the jury was deprived of seeing the complainant's reaction to defence counsel putting essential components of the accused's version of events to her. In that case it was therefore clear, by inference, that the court accepted that it was open to a jury, as tribunal of fact, to consider defence suggestions made to the complainant, when assessing the credibility of the witnesses in the case including the accused.

[40] However, care has to be taken to acknowledge the dissimilarity between the situations in **Kenyatha Brown** and the instant case. In **Kenyatha Brown**, the concern was the omission to put the accused's case to the complainant. In the instant case, the LRM used the fact of differences between what was suggested to the complainant by defence counsel as the case for the appellant, and the actual evidence of the appellant, to conclude, in effect, that his defence was insincere.

[41] It seems that, as a matter of common sense, the extent to which suggestions, which are not evidence, can be employed as part of the basis on which the credit of a witness may be impeached, will depend on the facts of each case. It is true that a fundamental rule of our adversarial trial process is that opposing witnesses should be given the opportunity to respond to the case advanced by the other side. This has been the required practice, at least from the development of the rule in **Browne v Dunn** (1894) 6 R 67. However, the instructions given to defence counsel are privileged and not disclosed to the court. Also, as recognised in a number of cases and recently in **Ann Marie Williams v R** [2020] JMCA Crim 40, defence counsel has wide latitude, while

displaying reasonable competence, to determine the strategy to be utilised in defending his client. Perhaps most significantly, the extent and effect of any differences between suggestions put by defence counsel and the evidence of a defendant should not be overstated. A tribunal of fact should therefore be cautious before placing too much reliance on differences between the suggestions of defence counsel and the evidence of the defendant, as the final determinant of the defendant's credibility.

[42] The need for that caution is amply demonstrated by what transpired in this case. The inconsistencies between the suggestions of defence counsel and the evidence of the appellant were relatively minor. The approach of the LRM was also compounded by the fact that the inconsistencies appear to be the only criteria used to reject the defence. This in a context where, as was demonstrated in the analysis of ground 1, the medical evidence clearly provided independent support for the version of events put forward by the appellant and a finding that there was merit in the defence relied on.

[43] Concerning the question whether the delay in the matter coming on for trial could have explained the inconsistencies, there is no indication that the LRM gave that possibility any consideration. In fact, other than her finding that the defence was inconsistent and therefore the appellant was not credible, the LRM did not say whether she found him to be mistaken or untruthful. Unlike her finding that the inconsistencies in the complainant's evidence was accounted for by the fact that he was "a simple man" she gave no comparable assessment of the appellant.

[44] However, the court is mindful of the fact that in analysing the defence, a trial judge is not obligated to express his or her thoughts on every aspect of it. Further, the absence of reasons or findings is not in and of itself a basis for disturbing the verdict of a trial judge who has had the advantage of observing the witnesses, once it can be seen from the evidence on the record, that there was a sufficient basis for the trial judge to have decided as he or she did: see **Eugene Douglas v R** [2019] JMCA Crim 28, at para. [56] and at para. [57], referring to **R v Horace Willock** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 76/1986, judgment delivered 15 May 1987.

[45] The case of **Vince Edwards**, cited by counsel for the Crown, does not assist in the instant case as the issue considered at the paragraphs indicated was whether the length of time that had elapsed since the incident, militated against a new trial being ordered. The case did not address the issue of how a trial judge should treat with the effect of the lapse of time on a witness' memory.

[46] In any event, we are not of the view that the circumstances disclosed any inordinate risk that the appellant's memory was being affected by the delay in the matter coming on for hearing. Accordingly, the LRM cannot be faulted for not having specifically considered whether the inconsistencies identified in the appellant's case might have been occasioned by delay.

[47] It therefore comes down to this. The LRM was palpably wrong and fell into error by rejecting the appellant's defence on the basis of inconsistences that were not material,

without appreciating the strong support for his version of events provided by his medical evidence. Consequently, the appellant is entitled to also succeed on this ground.

**Was there legal authority for the [LRM] to order that the appellant's conviction not be recorded?**

[48] As the appellant is entitled to succeed on both grounds argued, the discussion on the powers of the LRM regarding the order she made that the conviction should not be recorded is academic, as the conviction and sentence will have to be set aside. However, as the issue was raised and argued and concerns an ongoing practice in our jurisdiction, the court will offer some observations on the point.

**The appellant's submissions**

[49] Counsel for the appellant accepted that the practice seems to have developed from custom, as he could find no statutory authority specifically granting that power. He however submitted that a trial judge having assessed all the circumstances, including the antecedents of the defendant, should be able to make such an order. Counsel was not of the view that the Finger Prints Act, the only statute to which he referred, made it mandatory for a conviction to be recorded.

**The submissions of the Crown**

[50] Mr Kellier, counsel for the Crown contended that, the mandatory language of particular pieces of legislation indicates that the conviction ought to have been recorded. Therefore the LRM had no discretion to order it not to be. Particular reference was made to the following sections of certain statutes:

i. Sections 272, 274, 275, 280(3), and 291 of the Parish Court Act;

ii. Section 10 of the Criminal Justice (Administration) Act;

iii. The Criminal Justice (Reform) Act, section 19(1) and (3);

iv. The Criminal Records (Rehabilitation of Offenders) Act, sections 2, 3, 5, 10, 12, 14, 23, 25; and

v. The Finger Prints Act, sections 3 and 4.

[51] Counsel submitted that these provisions were to be contrasted with section 13(4) of the Drug Court (Treatment and Rehabilitation of Offenders) Act, which, provides that, subject to subsection 5, a conviction of a relevant offence "shall not form part of the criminal record of any person who successfully completes a prescribed treatment programme".

[52] Counsel also brought to the court's attention the fact that in the Australian state of Victoria, section 8 of the Sentencing Act 1991 confers upon their courts the power not to record a conviction. In this regard, the respondent cited the case of **DPP v Nguyen and Duncan** [2009] VSCA 147, (2000) 23 VR 66, paras [76] and [77]. **DPP v Nguyen and Duncan** was considered by the Caribbean Court of Justice (CCJ) in **R v Rambarran** (2016) 88 WIR 111, para. [92]. However, it was contended, that such a power is not included in our legislation.

**Discussion**

[53] Of the numerous provisions cited by counsel for the Crown, only a few are relevant in our view.

[54] Section 291 of the Judicature (Resident Magistrates) Act (now the Judicature (Parish Courts) Act) (JRMA) provides:

> "**In all proceedings in a Court by way of indictment**, **and** in all summary proceedings before Courts of Petty Sessions by way of **information for felonies**, **there shall be recorded on or in the fold of the indictment or information**, in the form in Schedule E or to the like effect, **the plea of the accused, the judgment of the Court and in case of conviction the sentence**; and the Magistrate or in the summary proceedings aforesaid the presiding Magistrate, shall sign his name once at the end of the record.
>
> If an appeal is lodged against any such conviction, a note thereof and of the result of the appeal shall be subsequently added by the Clerk and signed by him.
>
> **Where any person charged** before a Court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, **is found guilty** of such an offence, **the Magistrate shall record or cause to be recorded** in the notes of evidence, a statement in summary form of **his findings of fact on which the verdict of guilty is founded**.
>
> **In all summary proceedings other than as aforesaid**, **it shall be sufficient** for the presiding Magistrate or the Clerk **to record** on or in the fold of the information (**the adjournments, if any, being noted), the place and day of hearing, the names of the adjudicating Magistrates and the finding**.
>
> If the notes taken in any of the cases aforesaid are taken in a book, such book shall be preserved in the office of the Clerk, and a reference to the same shall be noted in the fold of the information or indictment; if the same are taken on loose

> sheets, such sheets shall be attached to the information or indictment.
>
> **In either case the information or indictment with the record** made thereon as aforesaid, and with the notes aforesaid, **shall constitute the record of the case, and each such record shall be carefully preserved** in the office of the Clerk of the Courts, and an alphabetical index shall be kept of such records." (Emphasis supplied)

[55] Therefore, it is apparent that, in proceedings on indictment and summary proceedings for felonies, the plea, judgment of the court, and the sentence must all be recorded on the indictment or information. Further, where the accused is found guilty, a summary of the judge's findings on which the guilty verdict is founded must be recorded in the notes of evidence. In respect of all other summary proceedings, however, it is sufficient for only the adjournments, place and day of hearing, name of judge, and finding to be recorded. The requisite recordings constitute the record of the case and are to be preserved in the office of the Clerk of Courts. Whilst it can be surmised that, as a court of record, one purpose of keeping such information is to ensure that a record of the criminal activity of a convicted person is available if required, the JRMA does not explicitly refer to the criminal record of a convicted person.

[56] The Criminal Records (Rehabilitation of Offenders) Act does not address whether a court has the discretion to not record a conviction. It only outlines the circumstances in which a recorded conviction may subsequently be removed from the record: see sections 2, 3, 5 and 20.

[57] Sections 3(1) and 4 of the Finger Prints Act (FPA) provide:

> "3. – (1) Where any person is charged before a Circuit Court, the Traffic Court, Children's Court, Family Court or a Resident Magistrate's Court with any offence specified in the first Schedule, **the Court may order that the finger prints and photograph of such person shall be taken**.
>
> …
>
> 4. **If the person who is fingerprinted and photographed is convicted of an offence specified in the First or Second Schedule, that conviction and sentence shall be recorded** in the space provided for that purpose on the finger print form." (Emphasis added)

[58] Thus, section 3(1) the FPA gives a judge the discretion to order the fingerprinting and photographing of persons charged with an offence specified in the First Schedule to that Act. The FPA however does not outline any criteria by which the judge is to exercise the discretion it confers. Given that assault occasioning actual bodily harm[1] with which the appellant was charged is an indictable offence not listed in the Second Schedule, it falls within paragraph 6 of the First Schedule. It is therefore an offence in respect of which the appellant could have been ordered to be fingerprinted and photographed. It is however not clear from the records on the information on which the appellant was initially charged, whether he was made the subject of a fingerprint order.

[59] It should also be noted that, pursuant to section 3A of the FPA, where a person who is taken into custody is reasonably suspected of having committed an offence, that person may consent to having their fingerprints and photograph taken without there

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[1] The charge is expressed in the indictment as being contrary to section 43 of the Offences Against the Person Act. However, section 43 does not create the offence it only indicates the penalty therefor. The offence is one at common law.

being a court order. The section contains a number of safeguards which seek to ensure that any such consent obtained is informed and that the taking of the fingerprints and photograph is in the presence of a Justice of the Peace and the person's attorney-at-law, if they have legal representation. In limited circumstances the section also allows for fingerprints to be taken without consent and without a court order.

[60] Section 3B of the FPA indicates that a person who has been convicted in a foreign state of an offence similar to an offence specified in the First or Second Schedules to the FPA and is subject to a deportation order, may, when he arrives in Jamaica, consent to the taking of his finger prints and photograph in the presence of a Justice of the Peace and an attorney-at-law, if he has legal representation.

[61] Whether fingerprints have been obtained pursuant to sections 3, 3A or 3B, by virtue of section 4 of the FPA, where a person who has been fingerprinted and photographed is convicted of an offence listed in the First or Second Schedules to the FPA, that conviction shall be recorded on the finger print form. There is no indication on the record before this court, however, as to whether the appellant was fingerprinted.

[62] It is also to be noted that these provisions speak to the recording of the conviction and sentence on the finger print form, and not explicitly to the criminal record of the relevant person.

[63] The Criminal Justice (Administration) Act, not referred to by either counsel, does however explicitly provide for a criminal record of a convicted person to be kept. It provides:

> "43. For the better supervision of criminals, a register of all persons convicted of crime in this Island **shall be kept** under the management of the Commissioner of Police, or of such other person, and in such place as the Minister may appoint, and in such form, with such evidence of identity, and containing such particulars, and subject to such regulations as may from time to time be presented by the Minister…" (Emphasis added)

[64] Section 45 further provides that:

> "The Clerks of the Circuit and Resident Magistrates' Courts **shall make returns** of persons convicted of any criminal offences in such Courts respectively, at such times, in such manner and, to such persons, as the Minister may from time to time direct." (Emphasis added)

[65] Significantly, however, the word "crime" as used in section 43 is defined in section 53 of the Criminal Justice (Administration) Act as:

> "any felony, not punishable with death;
>
> The offence of unlawfully uttering or possessing false or counterfeit coins;
>
> The offence of obtaining goods or money by false pretences;
>
> The offence of conspiracy to defraud;
>
> Any misdemeanour under section 42 of the Larceny Act."

[66] The common law offence of assault occasioning actual bodily harm for which the appellant was convicted is a misdemeanour. Hence it would not be caught by section 43 of the Criminal Justice (Administration) Act.

[67] The Drug Court (Treatment and Rehabilitation of Offenders) Act is the only legislation that has come to the attention of the court that specifically provides for a conviction not to be recorded. By virtue of section 13(4) and (5) of that Act a conviction

in respect of an offence triable by a Resident Magistrate (Judge of the Parish Court) shall not form part of the criminal record of any person who successfully completes a prescribed treatment programme, unless that person is convicted of an offence by a Resident Magistrate on more than two occasions. Even so, that legislation does not give the judge a discretion. It stipulates fixed positions where the conviction either does not or does form part of the persons criminal record, based on the number of convictions that person has.

[68] Another piece of legislation which addresses criminal records but does not vest a discretion in the court, is the Dangerous Drugs Act (DDA). Section 7G (10) of the DDA stipulates that contravention of section 7F (possession of not more than two ounces or less of ganja), or the First Schedule (prohibition of smoking in public places), will not form part of a person's criminal record, for the purposes of the Criminal Records (Rehabilitation of Offenders) Act.

[69] *En passant*, it is also useful to mention that under section 10(1) of the Probation of Offenders Act, the conviction of a person who is released under a probation order, shall be disregarded in respect of any disqualification, disability or penalty that by virtue of any enactment would flow from his conviction for the offence, unless he is subsequently sentenced for that offence. Here again, however, it should be noted that the section does not invest the court with a discretion to convict but direct non recording of the conviction; it stipulates what should happen in the event a probation order is deemed appropriate.

[70] As noted in **DPP v Nguyen and Duncan**, the existence of a discretion not to record a sentence is enshrined in the Sentencing Act 1991 of the Australian State of Victoria. Under section 8 of that Act, a court must have regard to all the circumstances of the case including: the nature of the offence; character and past history of the offender; and the effect recording a conviction would have on the social well-being and employment prospects of the offender, before deciding whether or not to record a conviction. There is however no comparable legislation in Jamaica.

[71] From the above review, it can be gleaned that in respect of the Parish Courts, a conviction must be recorded:

i. on the indictment or information and in the notes of evidence, of the Judge of the Parish Court (section 291, Judicature (Parish Courts) Act);

ii. on the fingerprint form, where the conviction involves an offence in the First or Second Schedule of the Finger Prints Act and the convicted person has been fingerprinted and photographed pursuant to section 3 and 4 of that Act; and

iii. in the criminal register, in accordance with sections 43 and 53 of the Criminal Justice (Administration) Act, once it involves:

    a) any felony, not punishable with death;

b) the offence of unlawfully uttering or possessing false or counterfeit coins;

c) the offence of obtaining goods or money by false pretences;

d) the offence of conspiracy to defraud;

e) any misdemeanour under section 42 of the Larceny Act.

[72] Had the appellant not been successful in this appeal, on the facts of this case, the only place it could be certain that the conviction would have had to be recorded, was on the indictment, pursuant to section 291 of the JRMA. This is so, as it is not clear whether he was fingerprinted and photographed, which would have enabled his conviction to be recorded on the finger print form. However, even if that had been done, it appears that his conviction would not have satisfied the criteria to be recorded in the criminal register pursuant to section 43 of the Criminal Justice (Administration) Act, as the offence for which he was convicted, does not fall within the definition of "crime" referred to in that section and part of that Act.

[73] Our review has disclosed that, at least in respect of the Parish Courts, though we suspect it may be the same for the other trial courts in our jurisdiction, there does not appear to be any discretion conferred on trial judges, to order that convictions not be recorded. Recording of convictions in different places and ways is mandated by various pieces of legislation, provided certain criteria are met. Where the Legislature has seen fit,

the circumstances in which convictions are not to be recorded are stipulated, and not made subject to discretion.

[74] This is an issue that we believe can benefit from closer scrutiny in an appropriate matter, when the decision of the court will directly impact the outcome of the case. We do however invite the Legislature to consider whether this area of law may benefit from further statutory guidance on the recording of convictions, as well as on the role, if any, judicial discretion based on relevant criteria could play in that process.

**Conclusion**

[75] It is for the reasons outlined, that the appellant succeeded on both grounds of appeal and the court made the orders as outlined at paragraph [1].