

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CRIMINAL APPEAL 01/2009**

**BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.  
THE HON. MRS. JUSTICE HARRIS, J.A.  
THE HON. MR. JUSTICE DUKHARAN, J.A.**

**RUDYARD BENTLEY**

**v**

**REGINA**

**Keith Bishop instructed by Bishop and Fullerton for the Appellant.**

**Miss Natalie Ebanks, Crown Counsel for the Crown.**

**29<sup>th</sup> September, 22<sup>nd</sup> October and 6<sup>th</sup> November, 2009**

**DUKHARAN, J.A.**

1. The appellant was convicted for the offence of indecent assault on the 12<sup>th</sup> December, 2006 in the Corporate Area Resident Magistrate's Court at Half Way Tree. He was fined \$50,000.00 or in default six (6) months imprisonment at hard labour.

2. The relevant facts are that the complainant Beverley Mullings was employed to the appellant as an accounting clerk. On the 16<sup>th</sup> March, 2005, she was sitting at her desk when she complained of having a headache. The appellant offered her a glass of water and a panadol which she accepted. The appellant said to her that her husband

was away for eight (8) months and that she needed another man to stand in his place. The appellant went behind her and placed his arms around her and grabbed her breast. The complainant said she 'flashed' him off. The appellant continued his conversation that he wanted to be intimate with her. She was told to work late and she stayed until 7:00 p.m. The same night the appellant called her at home and told her he had some difficulty working with her as she had refused his demands for sex. The complainant said seven (7) days after the incident in which he had grabbed her breast, she made a report at the Constant Spring Police Station to her brother-in-law who is a police officer. The complainant said she did not consent to the appellant touching her on her breast.

3. The complainant admitted in cross examination that there was a pay dispute with the appellant concerning a cheque payable to her for \$35,000.00. She denied that the main reason she went to the police was to get her money.

4. Constable Mark Beepat testified that on the 22<sup>nd</sup> March, 2005 he was on duty at the Constant Spring Police Station when the complainant made a report to him. He then commenced investigations into a case of indecent assault. The following day the appellant went to the Constant Spring Police Station where he was informed of the report. He was arrested and charged for indecent assault. When cautioned, he made no statement.

5. The appellant in his defence denied that he fondled the complainant's breast. In giving evidence, he said he did not specifically recall the 16<sup>th</sup> March, 2005, the date of the alleged offence. He said before the 22<sup>nd</sup> March, 2005, the complainant was making

mistakes in her job as an accounting clerk, as payments were being made to the wrong customers. This happened on several occasions and when he pointed it out to her, he said she became disrespectful to him. He subsequently terminated her employment. She demanded her pay and he wrote a cheque for \$35,000.00. She went away and returned and said she was having difficulty in negotiating the cheque. He said he was going to post date the cheque and the complainant became boisterous. He tore up the cheque and told her to return on the Thursday. He subsequently received a call from the police that he was wanted. The following morning he went to the Constant Spring Police Station where he was arrested and charged for indecent assault. He said he only heard of the accusation on the day he refused to pay the cheque.

6. The appellant filed the following grounds of appeal:

- "1. That the learned Resident Magistrate erred in law in convicting the Appellant without finding that the Appellant intentionally touched the Complainant without the Complainant's consent and without lawful excuse; and
2. The learned Resident Magistrate erred in law by not giving the warning as to corroboration, in Court, during the summation or at any other time during the trial."

7. Mr. Bishop, for the appellant, candidly conceded ground 1 when it was pointed out to him by the Court that there was in fact evidence that the complainant did not consent to the touching or fondling by the appellant. The learned Resident Magistrate found the complainant to be a truthful witness and accepted her account of what

transpired on the 16<sup>th</sup> March, 2005 between herself and the appellant. In effect, the learned Resident Magistrate found that the appellant intentionally assaulted the complainant without her consent.

8. In ground 2, it was submitted by Mr. Bishop that the main issues were not properly resolved by the learned Resident Magistrate, which, if they were properly and fairly discussed and resolved, could have caused the matter to be decided in favour of the appellant. He further submitted that the learned Resident Magistrate erred in law in not giving a general warning with respect to sexual offences and more specifically, a warning as to corroboration. Counsel was also critical of the learned Resident Magistrate's findings as she gave no reasons as to how she arrived at her findings. For example, the delay of seven (7) days before the complainant made a report to the police was not referred to by the Resident Magistrate in a fulsome way. Counsel referred to the cases of **Regina v Prince Duncan and Herman Ellis** SCCA Nos. 147 and 148/2003 delivered February 1, 2008 and **R v Lloyd Chuck** (1991) 28 JLR 422.

9. Miss Ebanks for the Crown submitted that the learned Resident Magistrate found that the complainant was a credible and reliable witness and not acting out of spite. The Resident Magistrate having rejected the suggestion that the complainant was activated to lie about a salary dispute, there would be no reason for the corroboration warning. Counsel further submitted that the Resident Magistrate did not use the term corroboration but in the context in which she used the words "without more" meant without any other evidence. There was no necessity for the Resident Magistrate to

have warned herself in the instant case. Counsel also referred to the case of **Regina v Prince Duncan and Herman Ellis** (supra).

10. It is quite clear that the Resident Magistrate is a creature of statute. Section 291 of the Judicature (Resident Magistrates) Act states:

“... 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.”

11. The main complaint of Mr. Bishop was that the learned Resident Magistrate did not give any reasons as to how she arrived at her findings. In sum, the Resident Magistrate ought to have demonstrated her thought process in arriving at her findings. In **R v Lloyd Chuck** (supra) it was held that a Resident Magistrate was under a duty to record in a summary form his findings of fact which go to prove the guilt of the accused as Carey, P. (Ag.) at page 432 said:

“Our firm conclusion is that a Resident Magistrate satisfies the provisions of section 291 by recording in a summary form, findings of fact which go to prove the guilt of the accused ... If a conclusion is derived from inferences, then the primary facts from which the inference or inferences are drawn should be stated.”

12. Before determining whether or not the learned Resident Magistrate did demonstrate her thought process in coming to her findings, the issue of the corroboration warning should be examined. It was the complaint of the appellant that the Resident Magistrate did not give a general warning with respect to sexual offences

and more specifically give a warning as to corroboration. The issue of corroboration was discussed in **Regina v Prince Dunn and Herman Ellis** (supra). As Smith, J.A. stated at page 17:

“ ‘the rule of practice which now will best fulfill the needs of fairness and safety’ is that set out in the passage from the judgments of Lord Taylor, C.J. in **R v Makanjuola** (1995) WLR 1348 at 1351:

“...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 issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness’s evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this Court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness’s evidence as well as its content”.

To summarise

...

(2) It is a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness as indeed in respect of any witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.

(4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

(5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather as a set-piece legal direction.

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

..."

13. Smith, J.A. concluded by saying:

"This decision is, in our view, applicable to this jurisdiction. Therefore, unless otherwise enacted by statute, the

guidance given by Lord Taylor should now be followed. The rule requiring a mandatory corroboration warning in sexual cases has been weighed in the balance and found wanting. It should now only be a matter of historical interest."

14. We are of the view that there was no necessity for the learned Resident Magistrate to have warned herself in the instant case. She assessed the demeanour of the witnesses and found that the manner in which the complainant gave her evidence was forthright and frank and without spite. The learned Resident Magistrate had this to say:

"...the Court was impressed by her and believed she was being truthful. The Court rejected the suggestion that she was activated to lie about this incident because of the salary dispute on the 22<sup>nd</sup> March, 2005 and was more inclined to believe she was being harassed because she did not acquiesce to the suggestions of her boss."

15. The learned Resident Magistrate also had this to say:

"The Court found that although the complainant waited for seven (7) days before making a formal report to the police and after there was a dispute over her salary cheque, nevertheless she was a truthful witness."

With respect to the appellant, the learned Resident Magistrate said that "the Court was unimpressed with the denial by the accused and the somewhat vague way his evidence related to Mrs. Foster being at work that day."



16. The above passages relate to the findings of the learned Resident Magistrate. We are of the view that in those passages, the learned Resident Magistrate demonstrated what her thought process was as to how she came to her findings. Despite the delay of seven (7) days before the complainant made the report, the learned Resident Magistrate nevertheless found her to be a truthful witness and rejected the suggestion that she was activated to lie about the incident because of a salary dispute. The learned Resident Magistrate went on to say that she was more inclined to believe that the complainant was being harassed because she did not acquiesce to the suggestions of the appellant.

17. We do not agree with Mr. Bishop that the learned Resident Magistrate fell short of what was required in terms of demonstrating her thought process in coming to her findings. The evidence clearly disclosed that the complainant was not moved by malice in making the report of being sexually molested by the appellant. This, the learned Resident Magistrate had undoubtedly taken into account. It is clear that the strength of the complainant's evidence rendered it unnecessary for her to have given herself a warning before convicting the appellant.

18. It is for the above reasons that on the 22<sup>nd</sup> October, 2009 we dismissed the appeal and affirmed the conviction and sentence.