JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 25/ 2009

BEFORE: THE HON. MR JUSTICE HARRISON J.A.
THE HON. MISS JUSTICE PHILLIPS J.A.
THE HON. MRS JUSTICE McINTOSH J.A. (Ag)

PAULINE GAIL v R

Mrs Pamela Shoucair-Gayle for the appellant.

Miss Dahlia Findlay for the Crown.

24, 25 February and 30 July 2010

HARRISON, J.A.

[1] The appellant was tried and convicted on an indictment before Her Honour Mrs Sharon George, Resident Magistrate for the parish of Clarendon for the offence of unlawful wounding that, she, on 4 March 2005, unlawfully and maliciously wounded Nadine Washington. On 25 February 2010, we allowed her appeal, quashed the conviction, set aside the sentence and entered a verdict of acquittal. In fulfillment of our promise to give our reasons in writing, we now do so.

The Facts

[2] The facts of the case in a nutshell are as follows: On 4 March 2005, Pauline Gail (the appellant) visited the home of Everton Johnson at 35 Glenmuir Road, May Pen in the parish of Clarendon. He is the father of her second son. Nadine Washington, (the complainant) also of May Pen, who had a relationship with Johnson, was present when the appellant arrived at the premises. Both women got into a fight and the complainant was stabbed by the appellant with an ice pick. The appellant contended that she had also received injuries to her neck, eye and arms, so self defence was an apparent live issue in the trial. Investigations were carried out by the police and the appellant was arrested and charged for the offence of unlawful wounding.

Grounds of Appeal

[3] The original grounds of appeal which were filed on September 16, 2009 state as follows:

> "(a) Unfair trial - Appellant denied right to choice of Attorney at Law who she wished to represent her at the trial.
>
> (b) Appellant denied opportunity to have witness present at her trial.

(c) Appellant denied opportunity to have her Defence presented at her trial."

[4] These grounds were amended with leave of the court to read:

"1. The learned Resident Magistrate erred in law in her failure to allow the Appellant to adequately advance her Defence by the legal representative of her choice.

2. The learned Resident Magistrate erred in her failure to allow the Appellant in the absence of her Counsel on the grounds of ill-health to:

a) either grant an Adjournment at the request of a Counsel who was holding or

b) at best allow the Appellant the opportunity to retain another Counsel.

3. The learned Resident Magistrate fell into error by compelling the Appellant to conduct, in part, the cross-examination of a Witness for the Crown which cross -examination had in large part, been conducted by the Counsel of her choice."

[5] Leave was also sought and was granted for the appellant to argue two supplemental grounds of appeal which state:

"4. The learned Trial Judge erred in law in compelling the Appellant to conduct her own cross-examination, in part, of the final witness for the Crown by using an extraneous reason to justify her action.

5. The learned Trial Judge misguided herself as she appears not to have taken into account that on the Crown's case the issue of Self-Defence arose by Admissions of the two witnesses for the Crown."

The submissions

[6] Mrs Shoucair-Gayle for the appellant, argued quite forcefully that if through no fault of the appellant's counsel, she was not available for trial, this should not be used as a ground to penalize the appellant. She submitted that the appellant was denied her constitutional right under section 20(6)(c) of the Constitution of Jamaica, in that she was not permitted to choose her lawyer. Counsel referred to and relied upon the case of **Dave Dennie v R** RMCA No. 8/2008 decided by this court on 14 July 2008.

[7] Mrs Shoucair-Gayle had also referred to section 279 of the Judicature (Resident Magistrates) Act which reads:

"279. In any trial of an indictment before Court, the Magistrate shall have the same powers of adjourning the trial, and for that purpose of remanding the accused, as are possessed by him in cases where he is taking a preliminary examination under the Justices of the Peace Jurisdiction Act; and it shall be his duty to grant such adjournments (taking care to secure the continued attendance of the accused and

witnesses by committal or by recognizance), as the ends of justice shall appear to him to require."

[8] Counsel therefore submitted that the learned Resident Magistrate had misused her discretionary powers by not granting the adjournment sought in order to have the attorney of the appellant's choice present to conduct her defence. She also referred to the case of **R v Thames Magistrates' Court Ex parte Polemis** [1974] 1 WLR 1371 in support of her submissions.

[9] Miss Dahlia Findlay, for the Crown responded quite expeditiously and submitted that the learned Resident Magistrate had properly exercised her discretion in refusing to grant any further adjournment. In the circumstances, she submitted that the appeal should be dismissed. She referred to and relied on the authority of **Frank Robinson v Regina** [1985] AC 956; [1985] 2 ALL E.R. 594.

The Chronology of Events at Trial

[10] The trial commenced on 1 December 2008 when the order for indictment was signed by the Resident Magistrate. Prior to this date, there were several trial dates so the matter was given priority to be heard on 1 December 2008. It is best appreciated if we let the record speak for itself. The following note appears in the notes of evidence for 1 December 2008:

> "Mrs Gayle absent for defendant. Crown represented by Miss M. Salmon. Order for indictment requested. Priority matter for today. Counsel absent again. Matter before court since 2005. Court List has broken down. 26 trial dates - Complainant has been attending. Court had advised accused that matter will today proceed. Examination in Chief will be taken from witnesses. She will be given one last opportunity for Counsel to be present on next date to cross-examine witnesses otherwise, she will have to conduct cross-examine (sic) herself. Clerk advised to give defendant copy of notes of evidence so that either herself or Counsel can prepare for cross-examination on next date."

[11] The complainant's evidence in chief was taken and the trial adjourned to 9 December 2008 for continuation. The learned Resident Magistrate noted as follows:

> "Mrs. Pamela Gayle absent again although advised by the Crown of today's date. Defendant again warned that will have to be own lawyer if Counsel not here on next date. Defendant advised Court that she had told lawyer of today's date. Examination in Chief being taken today."

[12] Everton Johnson's evidence was taken in chief and the Magistrate made the following note:

> "Matter adjourned for Counsel to attend. Defendant advised matter set again as priority and she needs to have a lawyer present or do matter herself. Copies of statements and evidence so far to be provided by the Clerk."

[13] On 16 March 2009 the trial continued. Mrs Gayle was present and she cross-examined the complainant. The examination of Everton Johnson continued and he too was cross-examined by Mrs Gayle. At a later stage of the trial, an adjournment was sought by the defence. The Magistrate noted as follows: "Counsel has difficulty/requesting witness to be bond (sic) over - witness b/o."

[14] The trial resumed on 20 August 2009. Mrs. Gayle was present. The medical doctor was interposed and his evidence was taken. He was cross-examined by Mrs. Gayle. Everton Johnson resumed giving evidence and Mrs. Gayle continued her cross-examination of him. The matter was adjourned to 3 September 2009 with the following notation by the Resident Magistrate:

> "Counsel requests adjournment, stating not feeling well again. Counsel warned by Court that matter will have to proceed on next date as outstanding for such a long time and since started matter has been adjourned on several occasions due to counsel's absence or request to leave early. The witness Mr. Johnson use (sic) to come to court regularly but appears to be reluctant as the court had to send for him this morning. He has indicated he is a taxi driver and that every time he comes to court and spends the whole day without anything happening he loses his income.
>
> Mrs. Gayle also advised that the Court as presently constituted will have difficulty in continuing the matter beyond the next date until

21/12/09 as will be at Supreme Court for a term. Counsel undertakes to have another counsel fully instructed if she is unable to attend on the next date. Mr. Johnson b/o and reassured that matter will continue on the next date."

[15] The trial resumed on 3 September 2009 and Mrs Gayle was absent.

The following note was made by the Resident Magistrate:

" Matter again before Court. Mrs. Pamela Gayle absent again. On last occasion she was warned that there would be no further adjournments even if ill. She agreed that if unable to make it on this occasion, she would fully instruct Counsel to appear on her behalf to avoid any further adjournments. Mr. Clue advised court that he holds for her for adjournment. Advised him of the difficulty the court had, as I will be away until the 21/12/09 and what was agreed by Counsel as to fully briefing (sic) for today if she was going to be absent.

Counsel, Mrs. Gayle advised of need to finish matter today. She had agreed to fully brief counsel if she could not attend. Mr. Clue agreed to assist and copy notes were made available to him. Matter was stood down for him to take instructions. Upon resumption at 2 pm, Counsel, Mr. Clue advised that Mrs. Gayle has insisted that she wants to do the matter herself and did not consent to him proceeding with the matter. Accordingly, he withdrew. Notes were given to defendant. The Court police assisted in reading them to her whilst the matter was stood down. This matter has had over 30 dates. It has had many adjournments due to Counsel since commencement of the trial on 1/12/08. The matter stood down.
Matter commences at 3 pm.
Cross-examination by Miss Pauline Gail".

[16] Mr Johnson was in attendance and he was cross-examined by the defendant. There was no re-examination of the witness and the Crown closed their case. The Magistrate then made the following note:

> "Accused told of rights. Elects unsworn."

[17] The defendant made an unsworn statement from the dock. She indicated to the Magistrate that she had no witnesses to call. That was the case for the defendant.

[18] The learned Resident Magistrate made findings of fact and thereafter gave reasons for judgment. The defendant was found guilty of the charge of unlawful wounding. There was a plea in mitigation of sentence and thereafter a sentence of six (6) months was imposed.

The affidavits filed subsequent to the trial

[19] The appellant's attorney, Mrs Shoucair-Gayle, in her affidavit in support of the appeal, dated 16 February 2010 asserted that on the occasions that the matter was adjourned for continuation she was ill or was recuperating at home. She deposed inter alia, as follows:

> "3. That the Appellant PAULINE GAIL voluntarily surrendered herself to the May Pen Police and was charged for Unlawful Wounding. On September 3, 2009 the case was called

up in the morning before Her Honour Miss Sharon George in the May Pen Resident Magistrate (sic) Court. The matter had been part heard. Mr. George Clue, Attorney-at-Law, was present. Mr. Clue indicated to the Court that he was holding the matter for me in respect of obtaining an Adjournment as I had been hospitalized and recently released to recuperate at home. He indicated to the Court that I had been present on the previous occasion and had in fact presented a Medical Certificate which the Resident Magistrate had seen and read.

4. That on the previous occasion when I attended Court for the trial I had produced a Medical Certificate to the Resident Magistrate. I had indicated that although I had travelled to May Pen I was unwell. The Judge informed that, if I was unable to continue the Trial on the next occasion I should brief an Attorney as she would be leaving the May Pen Resident Magistrate Court to act as Master in the Supreme Court in Kingston, and she wanted to finish all her part heard matters before leaving May Pen.

5. That before I was able to brief an Attorney-at-Law in the matter thoroughly, I collapsed at home and was rushed to the Andrews Memorial Hospital. After I was released to recuperate, I still felt I would have recovered sufficiently to be in a position to continue the part heard matter of Pauline Gail in the May Pen Resident Magistrate (sic) Court. It was on the

morning of the 3rd September 2009, when I awoke that I realized that though the Spirit was willing the flesh was weak. It was then that I communicated the situation to Mr. Clue and asked that he hold for me to request an Adjournment and indicate to the Resident Magistrate the difficulty I was experiencing.

6. That the Resident Magistrate refused to adjourn the case at Mr. Clue's request and set the matter for 2:00 p.m. that said day. The Resident Magistrate told Mr. George Clue Attorney-at-Law holding for me to borrow her papers and continue the case.

7. That Mr. Clue telephoned me before 2:00 p.m. when the Court was due to be back in session and I again indicated my incapacitation and requested that he speak to the Judge in Chambers.

8. That I am informed and verily believe that Mr. Clue carried out my request and that he was informed by the Resident Magistrate that as she was due to act as Master at the Supreme Court, she wanted to finish all her part heard matters and the request for an Adjournment was again refused.

9. That I am informed and verily believe that sometime before 2:00 p.m. Mr. Clue was given a copy of the handwritten notes from the learned Resident Magistrate's book and on resumption at 2:00 p.m. told to continue the trial. Mr. Clue advised the Court that he was not in a position to do so

and left. I exhibit hereto marked "PG1" and "PG2" respectively a copy of the Handwritten Notes/Report of Mr. George Clue and a transcription of the said Notes/Report for identification.

..."

[20] Also of note is the affidavit of Mr George Clue, attorney at law, dated 16 February 2010. He stated inter alia,:

"1.....

2. That on the 3rd day of September 2009, the matter, of R v. Pauline Gail for Unlawful Wounding, which was previously part heard, was heard before Her Honour Mrs. S. George. The Clerk of the Court on the said date was Miss Salmon.

3. That when the matter was reached, I advised the Court that Mrs. Pamela Gayle, Attorney-at-Law of 135 Tower Street, Kingston, on the record as representing Miss Pauline Gail, was seriously ill and confided (sic) to bed in Kingston.

4. That I asked the Court if the matter could be adjourned for another date at Mrs. Gayle's request to allow her to recuperate and be present in Court to represent her Client.

5. That the Court indicated that Mrs. Pamela Gayle on the previous occasion had indicated that if she was unable to attend

on the 3rd September 2009, she would brief another Counsel to conclude the matter.

6. That I was asked by the Court whether or not I was in a position to continue the Trial. I said no. Despite this a directive was given that the notes of evidence be photocopied and given to me.

7. That I took the notes and attempted to read them but made further contact with Mrs. Pamela Gayle before I finished reading the notes.

8. That Mrs. Pamela Gayle asked that I again ask the Court for an adjournment of the matter at her request owing to her ill health.

9. That I proceed (sic) to asked (sic) the Court for an adjournment of the matter at Mrs. Pamela Gayle's request, but the Court refused to grant the request.

10. That the Court then advised Mrs. Pamela Gayle's Client Miss Pauline Gail to take hold of the notes and to continue the trial herself.

11. That I did not remain in the Court thereafter."

The issues for determination

[21] The main issue in this appeal concerns the circumstances in which the appellant came to have no legal representation on the final day of

her trial. The authorities have made it quite clear that an accused may choose to defend himself or employ the services of an attorney to do so. Since the appellant in the instant case had retained the services of an attorney, the critical question is whether she was denied her right to be permitted to be represented by the counsel of her choice. Secondly, did the learned Resident Magistrate exercise her discretion judicially when she refused the application for a further adjournment?

[22] Section 20 (6) (c) of the Constitution provides:–

> "Every person who is charged with a criminal offence
> . . .
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice."

[23] **Robinson v. R**,(supra) held that the right provided in section 20(6)(c) was not an absolute right in that it was not necessary for an adjournment always to be granted in order to ensure that an accused who desired legal representation is given time to retain counsel. However, their Lordships explained that the word "permitted" used in 20(6)(c) means that an accused person "must not be prevented by the State in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection" (per Lord Roskill at page 599).

[24] In **R v Delroy Raymond** (1988) 25 JLR 456 Carey P. (Ag) stated:

> "In considering whether an adjournment should be granted, a trial judge is obliged to balance a number of competing factors. The judge would be entitled to consider the number of occasions the matter has been before the Court ready for trial; the availability of the witnesses or their future availability; the length of time between the commission of the offence and the trial date; the possibility that a Crown witness may be eliminated or suborned; whether the defence have had sufficient time to prepare a defence bearing in mind Section 6 of the Administration (Criminal Justice) Act..."

[25] There are several reasons why a trial judge should not easily accommodate adjournments. Firstly, witnesses lose interest in the cases after the frustration of several attendances at court and adjournments because counsel is not available. Secondly, when the cases do come on for trial, memories have faded and viva voce evidence becomes more and more a test of memory than a graphic recall of an important event. Thirdly, 'old cases' clutter up court lists and in the effort to deal with them, 'new cases' get pushed out of the list and in the long run suffer a fate similar to the "old cases". In this particular case, the Crown had closed their case on 3 September 2009 so it was only the defence that was left to complete the trial.

[26] It would seem from the record that the learned Resident Magistrate was quite anxious to complete this trial for several reasons. It was a very

old case and it was necessary for decisive action to be taken. However, it was also made clear by the Magistrate that she had advised Mrs. Gayle that she would have had difficulty in continuing the matter beyond 3 September 2009 until 21 December 2009 as she would be engaged in the Supreme Court during the Michaelmas term. We are of the view however, that since the case was adjourned on several dates during the course of the trial, this suggests to us that no significant prejudice to the administration of justice would have been occasioned by adjourning the case to a date subsequent to 21 December 2009 when the learned Resident Magistrate would have returned to the parish. There was also the problem of the appellant's counsel being ill. The Magistrate had stated in her note of 3 September 2009 that "on the last occasion she (Mrs. Gayle) was warned that there would be no further adjournment even if ill". She did carry out her threat and the trial proceeded without Mrs. Gayle. Furthermore, Mr. Clue who was holding for Mrs. Gayle was certainly not in a position to take over the trial. It is therefore our view, that the fairness of the appellant's trial had been compromised by the Magistrate's insistence on proceeding without affording the appellant more time in order to have the legal representative of her choice complete the trial.

[27] The question whether or not a re-trial should be ordered was considered by us. It would mean that a re-trial would take place close to five years after the date of the commission of the offence. The appellant

had been incarcerated since 3 September 2009 and because she was an appellant, she would not have commenced serving her term of imprisonment until the appeal process had taken place. She had already served four of the six months sentence that was imposed by the court at the time this appeal was heard. In the circumstances, we decided that since there would be further delay in the trial process and the appellant had been in custody since conviction, that a re-trial would not be ordered.

[28] It was for these reasons why we allowed the appeal and made the order referred to paragraph 1 of this judgment.