

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 72/1976

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.) - Presiding
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Swaby, J.A.

HOWARD HENRY v. REGINA

A.G. Gilman for the appellant.

G.G. James for the Crown.

April 28, 1976

Luckhoo, P. (Ag.):

On April 28, 1976, we allowed the appeal in this matter, quashed the conviction and set aside the sentence imposed by the learned resident magistrate. In the interests of justice we made an order for a new trial to take place before another resident magistrate. We now set out our reasons therefor.

The appellant was charged on an information which alleged that on January 9, 1976 he assaulted Elaine Neish occasioning her actual bodily harm, contrary to s.20 of the Offences against the Persons Act.

The case for the prosecution was to the following effect. Elaine Neish claimed that she had borne two children of whom the appellant was the father. The appellant is a policeman. Their intimate relationship came to an end on April 16, 1975. The younger child was born on July 31, 1975 and early in

August, 1975 she sent for the appellant. On August 12, 1975, the appellant went to her home and she told him that she had given birth to the child on July 31, 1975. The appellant disclaimed paternity of the child and a quarrel ensued between them. The appellant thumped her on the abdomen, back and chest. She fell against a mango tree. The appellant struck her head thrice against a coconut tree. She made a report to Cpl. Kelvin Knight at the Wakefield Police Station. On the following day she attended the Falmouth Hospital where she was treated by Dr. Daz. According to Neish she did not return to Cpl. Knight and show him a medical certificate issued by Dr. Daz which disclosed that no sign of injury was seen by Dr. Daz. Dr. Daz did not issue her a medical certificate. Dr. Daz told her that she must go to Dr. Berry because she had been badly beaten up and required to be given a thorough bodily examination. She said that Dr. Daz also told her that had she been cut he would have given her a medical certificate but as she had not been cut she had to be sounded by Dr. Berry as he (Dr. Daz) does not "sound". On Friday August 15, 1975 she went to Dr. Berry who examined her and issued a medical certificate which was tendered in evidence. Dr. Berry recorded in that certificate the injuries he found on his examination of Neish as follows -

- "(a) 1½" contusions of the centre front of her chest, centre of her lower abdomen, centre of her lower back and outer aspect of her (L) shoulder;
- (b) 1½" contusions of the back of her scalp;
- (c) strained ligaments of her lower back."

At first Neish denied that she had in the course of the quarrel threatened that she would cause the appellant to lose his work but later she admitted that she did make that threat. She also said that in the course of the quarrel the appellant said that she "was giving him Knight's child".

Lucinda Jones, mother of Neish, testified supporting Neish's story of an assault upon her person by the appellant.

Cpl. Knight testified that Neish had made a report to him on August 12, 1975 and that on the following day she

returned with a medical certificate which she showed him. As a result of what he saw in the certificate he advised her to take private proceedings. She thereupon said she was not satisfied and that she would go to her own doctor. Two days later she brought another medical certificate. He read it and collected a statement from her. The learned resident magistrate elicited from this witness the effect of the report which Neish had made to him on August 12, 1975.

The case for the appellant was to the effect that in the course of speaking with Neish about the infant child she pushed her finger into his eye. He pushed her away and did not strike her. Instead it was Neish who assaulted him by pelting him with stones.

In convicting the appellant the learned resident magistrate said that he accepted substantially the evidence given by the witnesses for the prosecution and that he did reject such part of the evidence given by Neish as regards "all matters pertaining to a medical certificate issued by Dr. Daz but held that this did not vitiate the rest of the evidence of the complainant having regard to the substantial support for her story by the other crown witnesses and by the medical certificate Exhibit 1" (that of Dr. Berry).

We are of the view that having regard to the circumstances of the case relating to the issue by Dr. Daz of a medical certificate (as found by the learned resident magistrate though denied by Neish) Dr. Daz ought to have been called by the prosecution to testify as to the nature and result of his examination of the person of the virtual complainant Neish. Testimony from Dr. Daz in this regard might well have affected the learned Resident Magistrate's acceptance or rejection of the testimony of the prosecution witnesses and the weight to be placed on the contents of Dr. Berry's certificate, as supporting Neish's testimony that it was the appellant who inflicted the injuries described in that medical certificate upon her person. Further we are unable to see how the learned resident magistrate

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could properly seek to ascertain the details of the report made to Cpl. Knight by Neish on August 12, 1975. Obviously the learned resident magistrate thought the answer given by Cpl. Knight in this regard was of importance. We cannot be sure that this did not influence the learned resident magistrate in his assessment of the admissible evidence in the case.

For these reasons we quashed the appellant's conviction, set aside the sentence imposed on him and made an order for a new trial before another resident magistrate.