[2023] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00022

DEAN HYMAN v R

Norman Godfrey for the appellant

Ms Judi Ann Edwards for the Crown

20 September 2022 and 10 November 2023

Criminal Law – jurisdiction of the Parish Court - information laid, warrant of arrest obtained and person arrested and charged by INDECOM officer – no power to arrest and charge pursuant to the Independent Commission of Investigations Act, 2010 –process irregular - preliminary objection taken at trial to the jurisdiction to make an order of indictment on an invalid information - objection overruled - trial on indictment not nullified by irregularity in the process of bringing the person before the court; Judicature (Parish Courts) Act sections 272 - 275

Criminal law – evidence - credibility - inconsistencies and omissions in the evidence of the sole eyewitness - no explanation given for material inconsistency in the evidence of the witness – judge of the Parish Court erred in relying on the evidence of the discredited witness to convict

Criminal Law – verdict - verdict unreasonable and not supported by the evidence – risk of miscarriage of justice

Criminal Law - sentence - unlawful wounding - sentence not manifestly excessive

EDWARDS JA

Introduction and background

[1] On 11 February 2021, the appellant was tried, convicted and sentenced to two years' imprisonment at hard labour for the offence of unlawful wounding, in the Manchester Parish Court, by a senior judge of the Parish Court ('the learned judge of the Parish Court'). The appellant gave verbal notice of appeal and was admitted to bail, pending the hearing of his appeal. On 4 March 2021, he filed notice and grounds of appeal challenging the conviction and sentence.

[2] The facts, in brief, were that, on 8 December 2016, the female complainant and the appellant, who at the time was a district constable, were on a staircase at Big Youth Plaza, Lannaman Court, Christiana, Manchester, conversing. At the time, the complainant and the appellant were friends. The appellant was off duty but he was armed with his service firearm. Whilst they were there talking, the appellant's service firearm was discharged, resulting in the complainant being shot and injured in her thigh, close to the groin. The appellant took her up, called for assistance and she was taken to the hospital by police personnel who arrived on the scene. The appellant travelled with her in the service vehicle to the hospital and stayed with her in the emergency room until she was attended to.

[3] The Independent Commission of Investigations ('INDECOM') sent one of its investigators, Ms Judith Jones ('the INDECOM officer'), to the scene of the incident, to conduct an investigation. She also went to the Christiana Police Station where she spoke to the appellant and served him with an interview notice to attend on the Mandeville INDECOM office and submit a statement, which he did. In the appellant's statement to INDECOM, he asserted that the shooting was accidental.

[4] The complainant gave statements to INDECOM on two occasions: 13 December 2016 and 20 December 2016. In the statement given on the 20 December 2016, to the INDECOM Officer, who was also the investigating officer in this case, the complainant

indicated that she and the appellant were hugging when she felt him use the gun to touch her on her left thigh, after which she heard a sound like a gun shot. However, at the trial her evidence was that the appellant was about a step away, at an arm's length from her, when, whilst being verbally abusive to her, he took his firearm from his waist, pointed it at her, "crooked" his finger on the trigger and shot her.

[5] On 23 August 2017, the INDECOM officer executed a warrant on the appellant and "arrested and charged" him for unlawful wounding.

[6] On 6 February 2019, the first day of the trial in the Parish Court, the Clerk of Courts applied for an order of indictment in the matter but the appellant's trial attorney, Mr Godfrey, raised a preliminary objection. The gravamen of the objection was that the charge had been invalidly laid since the INDECOM officer did not have the power of a Constable to arrest and charge, and that, furthermore, she could not have arrested the appellant in her private capacity, having not seen the commission of the offence, as was required for a lawful citizen's arrest. The Clerk of Courts acknowledged that, in that regard, the information was defective but argued that, nonetheless, since the appellant was to be tried on indictment for unlawful wounding, pursuant to the Offences Against the Person Act (OAPA), the endorsement of the order for indictment, on the information, would cure the defect.

[7] The learned judge of the Parish Court agreed with the Clerk of Courts and dismissed the preliminary objection. Although she accepted that the INDECOM officer had no power to arrest and charge the appellant nor to lay the information before the court, she held that, as a judge of the Parish Court, she was not limited by the information, no matter how defective. She concluded that she had no power to refuse to make the order for indictment solely on the basis that the information was defective, in circumstances where the accused was brought before the court charged with an indictable offence and the Clerk of Court had properly laid out the particulars of that offence. She reasoned that the purpose of the information was to bring the accused before the court for an enquiry

to be made as to which charges he should be tried for but that the trial itself would be on the indictment and not on the defective information.

[8] The learned judge of the Parish Court referenced section 272 of the Indictments Act of Jamaica (which we believe should really have been a reference to section 272 of the Judicature (Parish Courts) Act) ('the Parish Courts Act'), which, she said, made it clear that a judge of the Parish Court was not limited to the information when proceeding to trial by way of an indictment. That section, she said, gave a judge of the Parish Court the power to permit a defendant to be indicted for additional charges which were not on the information. It also allowed a judge of the Parish Court to make an order for indictment for a totally different offence from that which was originally on the information.

[9] The learned judge of the Parish Court also made reference to section 22 of the Criminal Justice (Administration) Act (which we believe was intended to be a reference to section 12) which, she said, provided that "no judgment upon an indictment shall be stayed or reversed because of technicalities where the court shall appear by the indictment to have had jurisdiction over the offence". She, therefore, granted the request for an order of indictment which was duly endorsed on the information and signed by her.

[10] The matter proceeded to trial and the Crown called two witnesses apart from the complainant. These were the INDECOM forensic examiner and the INDECOM officer. The medical report, in respect of the complainant, was entered into evidence by agreement. At the end of the Crown's case, the appellant's counsel made a no case submission on the basis that the complainant's evidence had been discredited because it was so inconsistent with her statements to INDECOM, and no explanation had been given by her for the divergent accounts. It was also argued that the prosecution had not negatived accident, which could not be ruled out, and therefore, had failed to make out a *prima facie* case. In response, the Clerk of Courts argued that the inconsistencies were not material and that the complainant had given an explanation for the divergence when she explained that at the time she gave her first statement she had just come out of surgery.

[11] The learned judge of the Parish Court rejected the no case submission and called upon the appellant to answer. He gave an unsworn statement from the dock, in which he said, in essence, that the gun, which had not been holstered, had fallen from his waist and whilst he was trying to catch and secure it, the complainant was accidentally shot. The appellant called no witnesses. The learned judge of the Parish Court, however, rejected the appellant's statement, and found that the complainant was a witness of truth and that the prosecution had proved its case beyond a reasonable doubt.

The Evidence

A. The prosecution's case

[12] The complainant, who was 18 years old at the time of the incident, gave evidence that she had known the appellant for about four months, would see him every other day or every two days, and that they were just good friends. She said that on the day in question, the appellant called her at about 2:00 pm or 3:00 pm, asking, as she put it, "whe me deh". She said that she answered him with "attitude", responding with the words "me deh ah Alligator Pond, ah wah?" She, nevertheless, went to meet the appellant and he began talking about the friends she had gone out with, verbally abusing her about one friend in particular by the name of Michael. She said they argued about this friend "situation". At the time of the argument, they were standing on the staircase in front of each other. She said the appellant, who was about a step away from her, took his gun from his waist and pulled a "long black thing" out from the bottom of the gun and put it in his pocket. They argued, and then he put the "long black thing" back in the gun and "selected" the top of it. She observed that the top of the gun was flexible and that there was a little hole in the side of it. She said the appellant told her not to look at him and what he was doing but although she told him that she was not looking, she nevertheless watched him. She said that because she did not "understand a gun" she asked him if he was going to kill her.

[13] She said she walked off and he called her back and asked her to give him a hug. She gave him a "scornful" hug and he asked her to hug him up. She then hugged him

tightly. She said that after she did so, she saw the bullet come from the top of the gun through a side "thingy" and the appellant squeezed it and forced it back down inside the long "thing" that came out the bottom of the gun. He then drew the top of the gun and put it back in his waist. She said that after the hug, the appellant was being verbally abusive to her about her friend Michael. At that time, he had the gun in his hand and, based on her demonstration in court, he "crooked" his finger on the trigger. She said the appellant then pointed the gun at her and shot her in the left thigh.

[14] The complainant said that after she got shot she was feeling weak and she asked the appellant what he had done to her. The appellant, she said, responded by saying "something like Chrissy boo". He picked her up and took her to the bottom of the staircase. He went back up the stairs and she asked him to take her handbag down for her. He did not take her handbag on his return. He made a call during which she heard him say "emergency, emergency at Big Youth Plaza". The police came and persons put her in the front seat of the police car. There was someone in the back and another officer drove. She was getting weaker and an officer told the appellant to speak to her so she did not "fade", which he did. She was taken to the emergency room at the Percy Junior Hospital accompanied by the appellant and another officer, and was subsequently airlifted to the University Hospital. She indicated that the wound in her thigh was located by the groin area, and described it as being circular, extremely swollen and had blood spraying from it. She said she had another wound on the back part of the same leg which she said was draining as if "the bullet came out the other side of the leg".

[15] During cross-examination, the complainant said that, before the appellant asked her to hug him, she had shared a "KFC" meal with him and that she had been there talking with him about three to five minutes after they hugged. It was whilst she was there talking to him that she heard a loud "Bow" and felt a "lick" to her foot. Even though she agreed that the events would have been fresh in her mind when she gave her first statement to the INDECOM officer on 13 December 2016, she admitted that she had not "put several things in it that she was now saying in court". There were at least six major

allegations made in her evidence in court which she agreed were not in her statement of 13 December 2016, including the fact that the appellant had taken the gun from his waist.

[16] The complainant also said that when the appellant shot her, he was about an arm's length away from her, and that no part of his body was touching her. However, she agreed that in her statement of 20 December 2016, given to the INDECOM officer, she had stated that the appellant had "rocked back his head with a fierce expression", she then gave him a tighter hug, at which time she felt him use the gun to touch her on her left upper thigh, and she then heard "bow" like a gunshot. She disagreed with the suggestion that that account of how she was shot was different from the account she was giving in court and disagreed that both versions could not be true.

[17] Further in cross-examination, the complainant said that the appellant was one step away from her when she was shot, and that if she had stretched her arm out she could have touched him. She said the appellant was directly in front of her and the firearm was positioned directly in front of her. She later agreed that the account in her second statement given to the INDECOM officer, of how she came by her injury, was different from her account given in court. She denied she came by her injuries accidentally.

[18] On re-examination, when asked why she had not put it in her first statement that the appellant had taken the gun from his waist, she said that when the first INDECOM investigator came she had just come out of surgery and the officer could not finish because she (the complainant) was sleeping. She said the INDECOM investigator had only asked a few questions then left. She then told the court that "[t]he first time he never pointed the gun at me, he touched me on the thigh. The second time, he shot me".

[19] Miss Alicia Brown also gave evidence for the prosecution as the forensic examiner employed to INDECOM and assigned to this case. On the day of the incident, she was handed a transparent plastic bag containing a Glock pistol, a magazine, and 16 cartridges. She said a visual examination of the items revealed what appeared to be blood on the firearm and the magazine. She took photographs of them, swabbed them, placed them

in separate packages and sealed and labelled them in the presence of the police. The firearm and magazine were placed in a gun box, which was labelled and secured. This, along with the cartridges, was handed to the police, and the swabs were placed in a secure location. She also went to the scene of the shooting and took photographs, as well as swabs of a substance which appeared to be blood, from various areas at the scene. These swabs were placed in separate packages and labelled. The items, including the swabs taken from the firearm and the magazine, were subsequently taken to the Institute of Forensic Science and Legal medicine ('the Institute'). Miss Brown was also handed the clothes that the complainant had been wearing when she was shot and they too were taken to the Institute. Buccal swabs were also taken from the complainant, sealed, labelled and submitted to the Institute. All the items were submitted for a forensic analysis to be done and Miss Brown later received a DNA case summary. That DNA case summary was tendered into evidence as an exhibit. It showed that the complainant could not be excluded as the major contributor to the mixed profile of the DNA found on the appellant's firearm, as well as on the magazine.

[20] The INDECOM Officer, Miss Judith Jones, gave evidence of visiting the complainant at the hospital and taking a statement from her on 20 December 2016. She stated that she arrested, charged and executed a warrant on the appellant. She cautioned the appellant and he made no statement.

B. The appellant's unsworn statement

[21] The appellant gave his account of events in an unsworn statement from the dock. He told the court that he was at the plaza visiting a friend when the complainant, who was a friend of his, contacted him by way of telephone asking where he was. He told her, and she came to the entrance of the establishment where he was, to see him. He met her at the door and she asked if he had eaten. She gave him a KFC meal which she had brought for him. She refused to enter the establishment where he had been, so they went to the staircase at the side of the building and there he had the meal. They were there talking about various things, including an event she was promoting for him. They

were being friendly and running jokes. He said they were not standing on the level part of the staircase. He then felt his firearm, which was not in a holster at the time, falling inside his pants. He reached in and pulled the firearm out of the leg of his pants and tightened the grip on his belt. He tried to replace the firearm to his waistband. He then felt a hitch on the belt of the pants and what felt like a "backward motion of the slide". This, he said, caused a round to be chambered.

[22] He proceeded to remove the firearm from his waistband to ensure the round was not chambered. He began turning away from the complainant, and as he did so, he lost his grip on the firearm. Whilst he was trying to catch the firearm, he heard an explosion. He then heard the complainant screaming. He asked "what happened?" and realized that she had been shot and that blood was coming down her left thigh. He took her to the lower level of the staircase and tried to get assistance. A few minutes later, a service vehicle came to the scene, and he was assisted by the police officers on duty in putting the complainant into the vehicle. They rushed the complainant to the Percy Junior Hospital, with her in his lap. After the nurse on duty took charge of the complainant, police officers took him to the Christiana Police Station. He later spoke to personnel from INDECOM.

The grounds of appeal

[23] On 4 March 2021, the appellant filed three original grounds of appeal as follows:

> "1. The verdict is unreasonable and is against the weight of the evidence;
>
> 2. The Learned Trial Judge erred in law when she rejected the Appellant's No Case Submission and thereby deprived him of a fair trial;
>
> 3. The sentence is harsh and manifestly excessive in all the circumstances and cannot be justified."

[24] At the hearing of the appeal, counsel for the appellant, Mr Norman Godfrey, sought and was granted leave to rely on two additional grounds as outlined in his skeleton submissions, filed 29 August 2022, as follows:

> "(4) The Learned Trial Judge erred in law when she rejected the preliminary submission as regards the INDECOM investigators initiating the prosecution of the Appellant as she could not have properly initiated the process either in her capacity as a private citizen or in her capacity as an officer of the Commission. The information charging the Appellant with unlawful wounding was therefore void Ab [sic] initio and of no effect; and
>
> (5) The Learned Trial Judge erred in law when she accepted the complainant's evidence without any explanation from her for the proven and admitted inconsistencies."

[25] For convenience, we will deal first with ground 4, then grounds 5, 1, and 2 together. Ground 3 will be dealt with thereafter.

Whether the learned judge erred in law in rejecting the appellant's preliminary submission that the information charging the appellant which was laid by the INDECOM officer was void *ab initio* and of no effect - ground 4

The submissions

A. *The appellant's submissions*

[26] Mr Godfrey, submitted that, because the INDECOM officer arrested and charged the appellant in her professional capacity, which she had no power to do under the Independent Commission of Investigations Act, 2010 ('INDECOM Act'), the information was void *ab initio* and the proceedings were a nullity. He submitted that it was not merely a defect in the information that could have been cured, but rather, the want of authority on the part of the INDECOM officer meant that there was, in effect, no information before the court. He argued that the INDECOM officer's action in charging the appellant was in breach of section 28 of the INDECOM Act, and amounted to an offence. The Privy Council case of **Commissioner of the Independent Commission of Investigations v Police Federation and Others**; **Dave Lewin (Director of Complaints of the Independent Commission of Investigations) v Albert Diah** [2020] UKPC 11 ('the

INDECOM case') was relied on in support of this submission, particularly paras. 30, 33, 34 and 47.

[27] Counsel submitted that section 272 of the Parish Courts Act may only be used to "cure" an information properly before the court, which was not the case here. Further, he argued, since the learned judge of the Parish Court had the power to decline to grant the order for indictment, her rejection of the point *in limine* deprived the appellant of a fair hearing.

B. *The respondent's submissions*

[28] In respect of the validity of the trial, Ms Edwards, for the Crown, conceded that the INDECOM officer had no authority to initiate the proceedings in the light of the Privy Council's ruling in the **INDECOM** case. She argued, however, that where the offence is an indictable one, the information only "acts" to bring the accused before the court, and it is the indictment order that "clothes" the judge with the jurisdiction to try the matter. In such a case, once the indictment order is signed, the trial is valid, and the learned judge of the Parish Court was not required to enquire into how the proceedings were initiated. She relied on **Wayne Hamil v R** [2021] JMCA Crim 12, for the principle that any issue arising in a defective information is cured by an indictment order being made and signed by the judge of the Parish Court. Since the order was made and signed in this case, she argued, the learned judge of the Parish Court had the jurisdiction to try the case, and was, therefore, correct when she ruled that her jurisdiction was not limited by the defective information. As a result, counsel for the Crown submitted, the proceedings were not a nullity.

[29] Section 272 of the Parish Courts Act, as well as the cases of **R v Monica Stewart** (1971) 17 WIR 381 and **R v Owen Hughes** (1874-80) All ER Rep Ext 1535; (1879) 4 QBD 614, were also relied on in support of these submissions.

Discussion

[30] The parties agreed, and correctly so, that based on the Privy Council's decision in the **INDECOM** case, INDECOM officers have no power to prosecute "incident offences" in their official capacity pursuant to the INDECOM Act 2010 (see paras. 27 and 43 of that case). The Crown, therefore, properly conceded that, since the offence in this case is an "incident offence", the process by which the appellant was arrested and brought before the Court was defective, as the information was laid and the warrant of arrest was executed by the INDECOM officer, who had no authority to do so.

[31] Based on the complaint made in this ground of appeal, the question for this court is whether that defect in the process would render the information that was before the court void *ab initio*, and the subsequent trial on indictment a nullity. The answer to the question posed by this defect in the process can only be answered by an examination of the relevant legislative provisions and the applicable principles to be found in case law.

[32] The appellant was charged and convicted of the offence of unlawful wounding contrary to section 22 of the OAPA. Section 268 of the Parish Courts Act gives a judge of the Parish Court the jurisdiction to try that offence on indictment. Sections 272 to 275 of the Parish Courts Act, read together, stipulate the manner in which the trial of an indictable offence brought before the Parish Court is to be initiated and conducted. Sections 272 to 274 provide:

> "272. On a person being brought or appearing before a Judge of the Parish Court in Court or in Chambers, charged on information and complaint with any indictable offence, the Judge of the Parish Court shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Judge of the Parish Court, that the accused person shall be tried, on a day to be named in the order, in the Court or that committal proceedings shall be held with a view to a committal to the Circuit Court.

> 273. It shall be lawful for any Judge of the Parish Court, in making any order under section 272 directing that any accused person be tried in the Court, by such order to direct the presentation of an indictment for any offence disclosed in the information, **or for any other offence or offences with which, as the result of an enquiry under the said section, it shall appear to the Judge of the Parish Court the accused person ought to be charged and may also direct the addition of a count or counts to such indictment.** And, upon any such enquiry, it shall be lawful for the Judge of the Parish Court to order the accused person to be tried for the offence stated in the information, or for any other offence or offences, although not specified in the information, and whether any such information in either case did or did not strictly disclose any offence.
>
> 274. The trial of any person before a Parish Court for an indictable offence, shall be commenced by the Clerk of the Courts preferring an indictment against such person and there shall be no committal proceedings." (Emphasis added)

[33] Section 275 provides the procedure for the arraignment of the accused after the indictment has been preferred, as well as the procedure to be followed by the judge of the Parish Court, including the vacating of the order for trial, if he or she takes the view, from the evidence, that a more serious charge beyond the judge's jurisdiction should be preferred.

[34] The decision of the former Court of Appeal in **R v Joscelyn Williams et al** (1958) 7 JLR 129 (CA) and of this court in **R v Monica Stewart** are authority for the position that section 272 (of the then Judicature (Resident Magistrates) Law, now section 272 of the Parish Courts Act) must be complied with, as it is a condition precedent to the proper exercise of the jurisdiction of the magistrate (now judge of the Parish Court). At page 133 of **R v Joscelyn Williams et al**, it was stated as follows:

> "**It is that section which gives him jurisdiction**, after such inquiry as may seem to him necessary, to make an order either for the trial of an accused person by indictment or the taking of a preliminary investigation in the charge preferred against him. **It is this order of the Resident Magistrate that empowers the Clerk of the Courts to act under section 274 of the law and**

> **prefer his indictment against the person named and on the day named in the order for the offence or offences which the Resident Magistrate acting under section 273 may order the accused person to be tried for**.
>
> Section 272 does not require the order of the Resident Magistrate to be under seal but in the language of this section the order **'shall be endorsed on the information and signed by the Magistrate**, that the accused person shall be tried, on a day to be named in the order'; as we have already indicated, and state again, **the endorsation of this order and signature of the same by the Resident Magistrate are acts to be performed prior to the presentation of an indictment or the taking of a preliminary examination**." (Emphasis added)

[35] In **R v Monica Stewart**, Edun JA, writing on behalf of this court, found, similarly, that the words in section 272 of the Judicature (Resident Magistrates) Law "constituted the condition precedent which the resident magistrate had to comply with before assuming any jurisdiction at all" (see page 385). The irregularity in that case, had to do with the fact that no order was endorsed and signed by the magistrate on the information, as required by section 272. No objection had been taken at the trial that the indictment was bad. Counsel for the Crown, in that case, sought to distinguish the case from that of **Joscelyn Williams et al**, in that, in **R v Joscelyn Williams et al**, an objection to the validity of the indictment had been taken at the trial. However, this court, in assessing what it considered to be the issue raised in the appeal, that is, whether or not the plea of guilty entered by the appellant was rendered a nullity because of the non-compliance with section 272, in the absence of an objection at trial, determined that the resolution to that depended on which jurisdiction the court was exercising.

[36] Edun JA distinguished the meaning of the word "jurisdiction" as used in two entirely different contexts, and the effect an irregularity in either type of "jurisdiction" would have had on the validity of the trial. The first context in which he found that the word "jurisdiction" may be used is where it refers to the authority of a court or judge to deal with the individual brought to court by a particular process. Edun JA held that, where "jurisdiction" is used in that first context "an irregularity or illegality in the mode of

bringing a defendant before the justices, if not objected to at the hearing, does not affect the validity of the conviction". The second context is where the word "jurisdiction" is used to refer to "the power of a court or judge to entertain an action, petition or other proceedings", and there was non-compliance with the law that bestowed such jurisdiction on the magistrate (as was the case in the matter on appeal before it). In the latter context, a magistrate would have no jurisdiction to adjudicate on the matter at all. Edun JA concluded that, in such a situation, the irregularity was not one that could be cured by amendment or by the appellant's willingness to submit to the jurisdiction of the court. There being non-compliance with the law that gave the magistrate jurisdiction to try the matter, the trial was declared a nullity and the conviction was quashed. In **R v Monica Stewart**, this court adopted the reasoning in **R v Owen Hughes**, in arriving at its decision.

[37] The case of **R v Owen Hughes** established that the information only serves as a basis for a summons or warrant to be issued to apprehend the accused and bring him before a court that has the jurisdiction to try the matter. In **R v Owen Hughes**, it was held that, although the warrant upon which the accused had been brought before the court was illegal, this did not invalidate the proceedings or conviction, as the justices had jurisdiction to hear and determine the charge otherwise.

[38] In **R v Owen Hughes**, 10 judges (the full court) of the English Court for the Consideration of Crown Cases Reserved heard the case by way of a case stated from the Crown Court. The facts of that case are instructive. Hughes had been charged for perjury, based on allegations that he had perjured himself in a case involving an accused John Stanley. It had been alleged that Stanley had assaulted Hughes, who was a Constable of Police, and had obstructed him in his duties. Hughes had procured a signed warrant from a magistrate for Stanley's arrest by laying an oral information before a Clerk to the justices. Stanley was arrested and charged. A written information on oath was necessary to justify the issuance of a warrant of arrest but even though there was none, Stanley was tried summarily by the justices, without objection, and convicted. The question reserved for the full court's opinion, in summary, was whether Hughes ought to have

been acquitted of the charge of perjury on the basis that Stanley's trial was a nullity because there had been no written information on oath to justify his arrest on the warrant.

[39] The decision of the full Court was by a majority (Kelly C B dissenting). In his judgment, at page 1537, Lopes J held that the warrant of arrest was merely a process, the purpose of which was to bring the accused before the justices, and that it did not affect their jurisdiction to try the case. He further held that, if the justices had jurisdiction to hear the charge, the means by which the accused was brought before them was immaterial. Hawkins J agreed, stating that, however unlawful the process which brought Stanley before the justices, once he was before them, he stood before them charged with an offence over which they had jurisdiction. Of the jurisdiction of the justices over Stanley's case, he said (at page 1538 of the judgment) that, "a charge having been made before them of an indictable offence, committed within their jurisdiction by a person then bodily present…the justices were bound to take cognizance of it". He held that the hearing proceeded on a valid charge, and it was during that hearing that Hughes perjured himself.

[40] In coming to his decision, Hawkins J stated his opinion on the facts in the case, at page 1537 as follows:

> "I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact from the case as stated, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued–a warrant signed by a magistrate not only without any written information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of the illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to *Caudle v Seymour* (1841, 1 QB 889), and *Morgan v Hughes* (1788, 2 Term Rep 225), per Ashhurst, J**.** Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates to answer a charge which up to that moment had never been legally preferred against him, yet before those magistrates, and in his presence, a charge was made over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded, and in support of the charge it was that

> the defendant was sworn, and in giving his evidence sworn corruptly and falsely. The case expressly finds that the alleged perjury was committed 'on the hearing of a charge against John Stanley at petty sessions for an assault on him Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty'..." (Emphasis added)

[41] At page 1539 of the judgment, Hawkins J explained his conclusion regarding the validity of the conviction against Hughes for perjury in this way:

> "The illegality of the warrant and of the arrest did not, however, affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information, followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged."

[42] These principles emanating from **R v Hughes**, **R v Joscelyn Williams et al**, and **R v Monica Stewart**, have been applied in recent decisions of this Court, including **Wayne Hamil v R**, **Michael Francis v R** [2021] JMCA Crim 6, and **Anthony Castelle v R** [2022] JMCA Crim 62).

[43] In the instant case, the Crown placed heavy reliance on the decision of this court in **Wayne Hamil v R**. That case involved an application for leave to appeal, brought by a police officer, against his conviction for wounding with intent to cause grievous bodily harm. He had been arrested and charged by personnel from INDECOM, who had laid an information and obtained a warrant to arrest him. The matter was brought before a Resident Magistrate (as they were then called) for the parish of Hanover, who made and signed an order, which was endorsed on the information, for a preliminary enquiry to be held in respect of the charge. At the end of the preliminary enquiry, the magistrate made an order that there was sufficient evidence for Mr Hamil to be tried for an indictable offence, beyond his jurisdiction, and committed Mr Hamil to the Hanover Circuit Court to stand trial. He was there tried and convicted. On appeal, it was argued, as a ground of appeal, that the charge had been illegal, and that the trial, therefore, amounted to a nullity. This court found that, notwithstanding the illegality in the initiating process, the

preliminary enquiry was valid, the applicant had been arraigned on an indictment which had been validly preferred, and the subsequent trial was, therefore, not a nullity.

[44] Fraser JA (Ag) (as he then was) giving the judgment of the court, in that case, discussed at length the nature and role of an information in commencing criminal proceedings for an indictable offence, in accordance with section 9 of the Justices of the Peace Jurisdiction Act ('JP ACT'). Having assessed several authorities, including **R v Hughes**, **R v Joscelyn Williams et al**, and **R v Monica Stewart**, he concluded that the magistrate had complied with all the requirements of section 272 of the Judicature (Resident Magistrates) Act, from which she derived her jurisdiction (see paras. [102] to [113]). He concluded that the commencement of the proceedings by the INDECOM investigator "had no continuing significance after the learned resident magistrate had assumed jurisdiction over the matter, and made and signed an order for a [preliminary enquiry] to be held" (see para. [115]). At para. [122], he explained that:

> "The limited role of the information laid by Mr Morris in this case has been analysed, guided by the principles in **R v Hughes**. Also, it has been repeatedly emphasised that the trial of the applicant proceeded on a document other than that which the applicant challenges as being a nullity, or at the very least irregular and subject to being set aside *ex debito justitiae*."

[45] Then, at para. [123], he concluded:

> "The critical point in the instant case is that the trial of the applicant did not proceed on that initial charge laid by Mr Morris. It proceeded, after a valid [preliminary enquiry], on a valid indictment preferred by Crown Counsel on behalf of the DPP — the individual constitutionally charged with prosecuting crimes before the courts of Jamaica. It was not a situation, therefore, as in **Benjamin Leonard MacFoy v United Africa Company Limited**, that subsequent steps taken would collapse, based on the ruling in the **INDECOM** case. **This is so, as the process which was followed did not depend on the validity of the information laid by Mr Morris**." (Emphasis added)

[46] Admittedly, the circumstances in that case differed somewhat from the instant case, as it involved a preliminary enquiry and a committal to the Circuit Court for trial, rather than a trial on indictment in the Parish Court. Notwithstanding, this court in **Anthony Castelle v R**, in thoroughly addressing the very same issue, in similar circumstances as in this case, accepted the reasoning of this court in **Wayne Hamil,** as being applicable in finding that the trial in Castelle's case was not a nullity.

[47] In the case of **Anthony Castelle v R**, Mr Castelle, who at the time was a Senior Superintendent of Police, was tried on indictment and convicted before a judge of the Parish Court for the offences of unlawful wounding contrary to section 22 of the OAPA, and misconduct in a public office, contrary to the common law. He had been investigated, arrested, charged, and brought before the Parish Court, following the laying of an information by an INDECOM officer. The judge of the Parish Court considered section 272 of the Parish Courts Act, and granted an order for indictment, which was duly endorsed on the information and which she signed. It was argued as a ground of appeal that, since the prosecution had been initiated by an INDECOM officer, who had no power to do so, the charges were a nullity, and the judge of the Parish Court had no jurisdiction to make an order for indictment and embark on the trial.

[48] Laing JA (Ag), writing on behalf of the court, conducted an in-depth analysis of the jurisdiction of a judge of the Parish Court to try indictable offences, as well as the nature and role of informations and indictments in commencing matters before the Parish Court. Laing JA (Ag) considered that the issue the court had to decide was "whether the [Judge of the Parish Court] had jurisdiction to make and endorse the order for trial of the appellant on an indictment, in circumstances where the information on which the appellant had been brought before the court was not properly laid" (see para. [31]).

[49] Having examined several cases, including **R v Hughes**, **R v Joscelyn Williams et al**, **R v Monica Stewart**, and **Wayne Hamil v R**, he concluded at paras. [34] and [35] that although the case concerned a trial on indictment in the Parish Court, the effect of the procedural irregularity was the same as in **Wayne Hamil v R**. Laing JA (Ag)

determined that although the process was begun by INDECOM, that fact had no further significance after the order for indictment was signed. He, therefore, concluded that that procedural breach did not render the trial a nullity, and determined that the grant of the order of indictment and the preferring of the indictment by the Clerk of Court "cured" the defect in the originating process. The validity of the appellant's subsequent trial was found to have been unaffected by the procedural breaches.

[50] In the instant case, we are of a similar view. Although the information and the warrant of arrest, which together constituted the process by which the appellant was brought before the Parish Court, was laid and obtained without lawful authority, that did not invalidate the subsequent trial on indictment conducted by the learned judge of the Parish Court. The jurisdiction of the learned judge of the Parish Court to try the matter emanated from section 272 of the Parish Courts Act, with which she fully complied. The laying of the information, and the warrant of arrest issued as a result of it, served only to bring the appellant before the Court. So that even though there was an irregularity in the process of bringing the appellant before the court, once he was before the court and the learned judge of the Parish Court made the order for an indictment to be preferred, endorsed it on the information, signed it, and the Clerk of the Courts preferred the indictment in accordance with section 274 of the Parish Courts Act, the information ceased to have any further relevance to the proceedings.

[51] We did give some consideration to the contention of counsel for the appellant that the objection to the jurisdiction of the learned judge of the Parish Court to make an order for indictment endorsed on an invalid information ought to have been upheld, since the objection had been taken before the order for indictment was made, and the learned judge of the Parish Court had accepted that the INDECOM officer had no authority to commence the proceedings. The basis of counsel's contention was that, since the INDECOM officer had no authority to commence proceedings and to obtain a warrant of arrest, there was no valid information before the court on which an order could have been made. Counsel argued that the statutory enquiry the learned judge of the Parish Court was authorized to make could only be properly made when an accused is properly

before the court. The appellant, in this case, he said, had objected to the jurisdiction of the court to try him before the order had been made, and that objection ought to have been upheld.

[52] We, however, disagree with this contention for the reasons outlined below.

[53] The information and the warrant of arrest or a summons are the process by which an accused person is either brought or made to appear before the court. An information may be oral, in which case a summons to appear may be issued arising from it. However, section 31 of the JP Act provides that, where the offence is indictable and a warrant for the arrest of the accused person is required, the information must be in writing and on oath or affirmation. Section 64 of the JP Act also provides for the form that the information must take for it to be sufficient. It must contain a statement of the specific offence with which the accused is charged and sufficient information about the particulars of the charge.

[54] If the offence is summary, the accused is tried summarily based on the charges and the validity of the information may become entirely relevant to the validity of that trial. In such a case, if there is no valid information before the court, it may be entirely arguable that an accused who raises an objection there and then, and who does not submit to the jurisdiction, is entitled to go freely from the court that day, or at the very least is entitled to an adjournment, unless a valid information is there and then laid in his presence. Furthermore, subject to any statutory prohibition, a summons could be issued for the accused to reappear before the court at a later date to take his trial (see generally the judgments of the court in **R v Hughes** and of this court in **R v Anthony Lewis** (unreported), Court of Appeal. Jamaica, Resident Magistrates' Miscellaneous Appeal No 2/2005, judgment delivered 16 February 2006, pages 12 and 13). It is, however, not necessary in this case, for this court to conclude definitively on that position.

[55] If the offence is indictable, the information merely serves the purpose of providing the means by which the judge is informed of the allegations of the offence for which the

accused is before the court. In such a case, for the trial to be valid, an order for indictment must be made; it must be endorsed on the information and signed; an indictment must be drawn up and preferred; and the trial proceeds on the indictment. As the cases have shown, where this condition precedent is fulfilled, the information on which the accused was brought before the court has no further significance. If the person who laid the information and sought and executed a warrant had no authority to do so, then the arrest is unlawful and issues of false imprisonment, and the like, may arise. This, however, does not affect the jurisdiction of the learned judge of the Parish Court to try, on indictment, the offence for which the accused was brought before the court. The illegal arrest would not vitiate the subsequent trial on indictment, regardless of whether an objection had been raised before the order was made.

[56] In the instant case, the jurisdiction of the learned judge of the Parish Court to try the offence for which the appellant was indicted, was not affected by the defect in the proceedings which brought the appellant before the court. Although the point was raised at the trial and an objection was taken, and whilst procedurally, it would have been entirely prudent for a new information to be laid and the defective one withdrawn when the objection to the information was made, as was done in the **INDECOM** case, the jurisdiction to make an order for indictment, endorsed on the information was not affected by this failure.

[57] The preliminary objection taken by trial counsel was one which only affected the jurisdiction involving the process by which the appellant was brought to court. In the circumstances of this case, however, it did not affect the jurisdiction to try the appellant on an indictment validly preferred. The appellant was tried on a valid indictment, and whilst the manner in which he was brought before the court may affect constitutional and as said before, civil issues, such as false imprisonment and such the like, it in no way affects the validity of the trial and his conviction.

[58] Furthermore, we are bolstered in the view we have taken, by the fact that the provisions in section 273 of the Parish Courts Act make it plain that the judge of the

Parish Court is not confined to the offences disclosed in the information, and may order that an accused be tried on indictment for any other offence which it appears to him or her, after the necessary enquiry, that an accused ought to be indicted for. The judge of the Parish Court also has the power to order that additional counts be included in the indictment. This shows that, once the appellant was brought to court for an indictable offence, the jurisdiction of the judge of the Parish Court to try him was not reliant on the validity of the information or what was contained therein. A further point which could be made is that, according to section 274 of the Parish Courts Act, the trial of the appellant for the indictable offence of unlawful wounding did not commence until the indictment was preferred against him by the Clerk of Court, so that apart from securing his presence in court, the information and the warrant had no relevance to the appellant's subsequent trial.

[59] This ground, therefore, is without merit.

Whether the learned judge erred in accepting the complainant's evidence having regard to the inconsistencies that were proven and admitted in that evidence, and for which there was no explanation - ground 5

Whether the learned judge erred in rejecting the appellant's no case submission - ground 2

Whether the verdict was unreasonable and against the weight of the evidence - ground 1

Submissions

A. *The appellant's submissions*

[60] Counsel for the appellant submitted that the credibility of the complainant was completely destroyed by the inconsistencies in her evidence which rendered her evidence unreliable. Counsel pointed to the fact that the complainant gave a completely different account of the incident in court than she did in her statements to the INDECOM investigators. He argued that the difference did not merely result from the omissions in her first statement but also from the fact that her evidence of how the shooting took

place, given in court, was different from that given in her second statement and, therefore, required an explanation. Counsel asked us to note that even though the complainant admitted in court that her account of how the incident took place was different, she gave no explanation for the difference. Counsel submitted that the inconsistencies in the complainant's evidence were material, and since she was the sole eyewitness to the incident and had been totally discredited, the learned judge of the Parish Court had erred when she failed to uphold the no case submission. The cases of **Regina v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 & 52/1986, judgment delivered 3 June 1987, **R v Curtis Irving** (1975) 13 JLR 139 and **Negarth Williams v R** [2012] JMCA Crim 22, were relied on in this regard.

[61] Counsel submitted that the learned judge of the Parish Court having failed to uphold the no case submission, further erred when, having identified the inconsistencies in the complainant's evidence, she failed to resolve them. He argued that the learned judge of the Parish Court would not have been able to resolve the inconsistencies, because no explanation had come from the complainant which could be relied on to resolve the conflict in her evidence. Additionally, counsel submitted that the learned judge of the Parish Court failed to say whether the inconsistencies she identified were material or not. These errors, it was contended, resulted in an unreasonable verdict which was not supported by the evidence.

B. *The respondent's submissions*

[62] Counsel for the Crown submitted that the inconsistencies in the complainant's evidence, which were highlighted by the appellant, were not so significant as to render her evidence, as a whole, unreliable. Counsel contended that there was sufficient evidence to establish a *prima facie* case, and that the learned judge of the Parish Court properly rejected the no case submission. Counsel found support for this submission in Lord Parker's Practice Direction in **Practice Direction (Submission of No Case)** [1962] 1 WLR 227, and **Regina v Galbraith** [1981] 1 WLR 1039.

[63] Counsel further contended that most of the differences highlighted by the appellant were omissions from the complainant's statement, and that it was usual for the prosecutor to elicit further detailed facts in court. She maintained that this was also true of the inconsistency as to the distance between the appellant and the complainant at the time of the shooting. Counsel submitted that the omissions were not so significant as to render the evidence "manifestly unreliable", and as such, the issue was one of credibility that had to be assessed by the learned judge of the Parish Court using her "jury mind".

Discussion

[64] In deciding whether to accede to the no case submission, the learned judge of the Parish Court would have had to consider limb two of the test in **Regina v Galbraith,** as to whether "the prosecution's evidence taken at its highest was such that no tribunal of fact properly directed could properly convict upon it". In the instant case, where the complainant was the sole eyewitness, this would have depended on the view taken by the learned judge of the Parish Court of the credibility of the complainant's evidence.

[65] Generally speaking, the creditworthiness of a witness is a matter for the tribunal of fact, and as such, inconsistencies arising in the evidence of a witness are to be resolved by that tribunal of fact, after hearing all the evidence (see the case of **Regina v Brown & Ors** (1997) 34 JLR 497 at 509). However, where those inconsistencies are of such a nature as to totally discredit the witness so as to make his or her evidence so "manifestly unreliable" that "no reasonable tribunal could safely act on it", the issue goes beyond the giving of mere directions and the case must be withdrawn (see **R v Curtis Irving** and **Regina v Galbraith** at page 1042).

[66] In this case, we agree with the submission of counsel for the appellant that the conflict in the complainant's evidence was such as to render her evidence as a whole, manifestly unreliable. That being so, the learned judge of the Parish Court, sitting as both judge of fact and law, ought to have acceded to the no case submission and dismissed the case. We say so for the reasons outlined below.

[67] The complainant's evidence in court as to the sequence of events were somewhat difficult to follow. However, what we have gleaned from her account of what took place, which she outlined in her examination-in-chief, is that she would have seen the appellant take out his firearm at least twice, whilst they were in conversation. The first time he took the firearm out, she said he took a long black thing from it and then he put the long black thing in his pocket. Later, when she repeated this bit of evidence, she said he put the long black thing in his waist. She said they had a little argument and he put it (presumably the 'long black thing') back in the gun and selected the top of it. He told her not to look at what he was doing but she looked anyway and asked him if he was going to kill her. She said she asked him this because she did not understand guns. She then walked off and he called her back for a hug and she gave him a scornful hug. She said that after she hugged him the bullet came from the gun through the side and the appellant squeezed it back in and forced it into a long thing that came out at the bottom of the gun and he hit the bottom and put the gun in his waist. She then said that she wanted to clarify that all this happened before the hug and whilst they were arguing about Michael. She said that it was when he pulled the bottom of the gun the first time, that she walked off and he called her back for the hug. She said after the hug he was being verbally abusive about her friendship with Michael. At that time, he had the gun in his hand and his finger "crooked" on the trigger. It was then that she was shot.

[68] The complainant gave statements to two different INDECOM investigators on two separate occasions after the incident. Her first statement omitted several facts, which she later asserted in court had taken place between her and the appellant. These omissions related to material aspects of the case, bearing on the sequence of events leading up to when she was shot. Her second statement was inconsistent with her evidence in court with regard to how the injury to her thigh was inflicted. This inconsistency was a material conflict in her evidence going to the root of the prosecution's case, and by extension, to the question that the learned judge of the Parish Court had to determine, that is, whether the prosecution had negatived the defence of accident.

[69] Under cross-examination, the complainant admitted that certain factual assertions she was making in court were not contained in her first statement to INDECOM. These assertions were:

i. that the appellant had taken a gun from his waist;

ii. that she saw the appellant take something from the bottom of the gun;

iii. that she said to the appellant "ah kill you ah gon kill me" and walked off;

iv. that there was any conversation between herself and the appellant about Michael;

v. that the appellant had pulled the flexible part of the gun and a bullet came from the side; and

vi. that the appellant had crooked his finger on the gun.

[70] These factual assertions were about matters that the complainant agreed she would never forget. As pointed out by counsel for the appellant in his written submissions to this court, there was no indication, on the evidence, whether these matters appeared in her second statement taken on 20 December 2016. Indeed, no questions in cross-examination were asked of her regarding any omission from the second statement. Interestingly, the complainant had admitted in cross-examination that, even though, on 13 December 2016, the INDECOM officer had not asked her about certain less important facts, she had volunteered those facts which were in the statement.

[71] Of greater significance, is the fact that the complainant's evidence in court of how she was shot was entirely different from what she described in her second statement which she gave to the INDECOM officer. The complainant, in her evidence-in-chief, said that the appellant was at arm's length away from her and not touching any part of her

body, was being verbally abusive regarding her friend Michael, pulled his gun from his waist, pointed it at her, "crooked" his finger on the trigger and shot her in her left thigh. She felt weak, she said, and asked him what he had done to her. The complainant stated, as well, that, after the two had hugged, the appellant verbally abused her about her friend Michael. They were there for another three to five minutes after the hug and it was whilst they were there talking, she said, that she heard a loud "bow". This evidence, on its own, and once the learned judge of the Parish Court accepted it to be true, would have been sufficient prima facie evidence that the appellant had deliberately shot the complainant.

[72] However, that evidence, cannot be viewed in isolation, for apart from the critical omissions from her first statement, the complainant admitted, in cross-examination, that in her second statement to INDECOM she had said that she and the appellant were hugging when he used the gun to touch her on her left upper thigh and then she heard a "bow" like a gunshot. Upon being confronted with that aspect of her second statement, her response was that she did not remember "every single thing" as she had just come out of surgery when the INDECOM officers came. She disagreed with the suggestion that this version and the one given in court could not both be true but later agreed with the suggestion that the version contained in her second statement was a different account from that given in court. She also agreed that after she heard the sound (of the shot) she asked the appellant what had happened. In fact, she agreed she "bawled" out "Lawd Dean ah wah do me".

[73] It was suggested to her that it was not true that whilst the appellant was hugging her he placed the firearm on her thigh and injured her and her response was that she could not recall. On further cross-examination, she said the appellant did place the firearm on her thigh and the second time he pointed the gun at her. In re-examination she repeated that the appellant had placed the firearm on her thigh and the second time he pointed the gun at her. However, this bit of her evidence is different from what she had said in examination-in-chief where she made no mention of the appellant placing the gun on her thigh at all, as well as from what she had said in her second statement to

INDECOM, where she made no mention of him pointing the gun at her before he shot her.

[74] In re-examination, the complainant was asked why she had not said in her first statement that the appellant took the gun from his waist. Her explanation was that she had just come out of surgery and could not finish giving the statement as she had fallen asleep. The investigator, she said, only asked a few questions and left. She gave this explanation after having accepted, in cross-examination, that the events would have been fresh in her mind (albeit not everything) on 13 December 2016, and that she would never have forgotten that the appellant had taken a firearm from his waist because it was significant.

[75] Several things are of significance with regard to the explanation the complainant sought to give in re-examination. Firstly, her explanation in re-examination was made in response to a question posed as to a specific omission she made in her first statement (that she failed to mention that the appellant had pulled the gun from his waist). It did not address all of the other omissions from that statement, or the remaining inconsistencies in her evidence. Secondly, in so far as the evidence indicates that the complainant gave two statements on two different occasions (13 December 2016 and 20 December 2016), her explanation for the omission could only be viewed as being in reference to the first statement and not to the second. Thirdly, that explanation may have been enough to explain away the omissions from her first statement but did not explain the conflict in her second statement with what she was saying in court. The complainant's evidence is that following the incident she was taken to do an X-ray, then "instant surgery", and was later airlifted to the University Hospital where she woke up in the recovery room the next morning. There is no evidence that she had also just come out of surgery on the second occasion that the INDECOM officer visited her seven days later to take her second statement.

[76] The complainant would, therefore, have given no explanation which could account for the difference in her evidence of how the shooting took place, having agreed that the account she gave in her second statement was different from the one given in court.

[77] We disagree with counsel for the Crown that "most of the differences were omissions that amounted to further details of facts usually elicited by a prosecutor in court". The complainant's evidence in court was a completely different story as to what had happened, including a different sequence of events, a motive alluded to for the first time, and more significantly, an admittedly different version of how she came to be injured. The learned judge of the Parish Court, as the judge of fact and law was duty bound to resolve the conflict created by what was said in the second statement and what was said in court. She was duty bound to do so based on the explanation given for it by the complainant and not by any "well-meaning conjecture", as the two accounts, being entirely different, could not both be true.

[78] The authorities, particularly those dealing with cases where the trial judge sits alone without a jury, demonstrate that where there are inconsistencies in a witness' evidence, particularly where that witness is the sole eyewitness relied on by the prosecution, as was the case here, and the inconsistencies relate to a material aspect of the case, there ought to be an explanation from the witness for the inconsistencies before the evidence can be viewed as reliable (see **Regina v Noel Williams & Joseph Carter** at page 7).

[79] **Regina v Noel Williams & Joseph Carter** was a case of unlawful possession of firearm and robbery with aggravation in which the applicants were convicted on the basis of eye-witness testimony that was inconsistent on material aspects of the case. This court quashed the conviction on the basis that "the inconsistency between the evidence in Court and the statement to the police was material in a vital aspect of the case and unexplained and standing by itself no positive finding of fact could be made on this point" (see page 8). Notwithstanding the positive view the trial judge had taken of the witness, this court said, at page 7:

> "It is clear that the judge was impressed by the witness Morris. However, having in his own words admitted the inconsistency, then unless it is immaterial some explanation is essential before the evidence in Court can be accepted and relied on in relation to that particular point. It seemed to us that [the witness'] evidence that when he ran out on his verandah he saw two men rushing from under the verandah of Apartment 'E' is clearly inconsistent with his statement to the police that when he rushed out on the verandah 'Mark' [Williams] was standing at the eastern corner of the building. If that is so then the sequence of events is certainly shaken. There may be a credible explanation but the explanation must come from the witness; it cannot be supplied by well-meaning conjecture."

[80] In **R v Leonard Aughle** (1988) 12 JLR 66, (which was not one of the cases cited by counsel in their submissions in this appeal but which we believe is a useful illustration of the point] the appellant had been tried and convicted for assault occasioning actual bodily harm on a boy of 10 years' of age, in the Resident Magistrate's Court for the parish of Saint Catherine. The mother of the boy gave evidence that she had seen the appellant beat him all over his back with a machete. She had taken him to a doctor and the medical certificate was tendered into evidence at the trial. The medical certificate did not support the mother's evidence, as it showed an infected abrasion on the back of the head and the doctor's note reported that the child was "allegedly hit by a leather belt". The child had given evidence but had not been examined on a *voir dire*, so that his evidence carried no weight. The appellant admitted that he had spanked the child with a belt, having been authorised to do so by the mother, following an altercation between their two sons. This court found that the mother's evidence was seriously discredited by the evidence contained in the medical certificate and, in the circumstances of the case, the learned Resident Magistrate ought not to have accepted it. The conviction was quashed.

[81] The same principle is applicable in cases where the trial judge sits with a jury, even though issues of credibility are for the jury to decide. There still remains, in such cases, the inherent discretion in the trial judge to withdraw the case from the jury if, in his or her view, the sole witness called in proof of the charge has been so discredited that no reasonable jury could properly rely on his or her evidence. The case of **R v Curtis Irving** is one such example.

[82] In **R v Curtis Irving,** the applicant appealed his conviction for murder, having been found guilty by a jury after his third trial for the offence. The prosecution's case was hinged on the evidence of an alleged eyewitness whose evidence in court was inconsistent with his evidence at the preliminary enquiry, including as to whether he had seen the applicant chop the deceased, and where exactly he had seen the deceased and the applicant. He admitted to several untruths and contradictions in his evidence at the preliminary enquiry and there was not much success in getting him to give explanations for them. This court quashed the conviction having considered that, due to the "incomprehensible maze of admitted untruths and blatant and unexplained contradictions and inconsistencies in the evidence" of the witness, it was "impossible to understand how any reasonable jury could have returned a verdict adverse to the applicant" (see page 141). If the judge had withdrawn the case on this basis, the court said, he would have been well justified, and that the circumstances of the case warranted the judge going beyond merely giving directions to the jury.

[83] In **Negarth Williams v R**, this court also provided guidance on how a court should treat generally with the evidence of a sole eyewitness who had been discredited due to inconsistencies and contradictions in his evidence. The sole eyewitness in that case had given evidence at the trial of the appellant for murder that was diametrically opposed to previous statements he had made at a previous trial, in respect of a material aspect of the case. The material inconsistency surrounded the question of whether he, himself, had been in possession of a gun before and during the incident. No explanation was given for the inconsistencies in his evidence in this regard. Forensic evidence proving that there had been gunshot residue on the witness' hands shortly after the murder was admitted into evidence, contradicting his oral evidence that he had not been in possession of a firearm. The court found that the trial judge ought to have stopped the case and directed the jury to return a formal verdict of not guilty. Not having done so, the judge further erred in his directions to the jury.

[84] At para. [24] of **Negarth Williams v R**, this court stated that the witness "being the sole witness as to fact at the trial and his credibility having been severely challenged

by the defence by way of previous inconsistent statements made by him under oath, the defence was entitled to have its challenge of his testimony at the trial, fairly and forcefully placed before the jury. This was not done by the learned trial judge and for that reason the conviction cannot stand". So in that case, not only were there inconsistencies which affected the overall credit of the witness but the jury were not adequately assisted with how to deal with them. This court held, that as a result, the conviction could not stand. This court relied on several cases, including **Regina v Noel Williams & Joseph Carter**, **R v Curtis Irving**, and the Privy Council decision in **Eily and others v R** [2009] UKPC 40, in quashing the conviction.

[85] In the instant case, it is essential to examine how the learned judge of the Parish Court, sitting as a judge of fact and law, assessed the evidence. She identified inconsistencies and indicated that she had to consider whether the divergent accounts of how the complainant had come by her injury were material. Even though she, thereafter, concluded that this divergence amounted to an inconsistency in the complainant's evidence, she did not say whether she viewed it as material. She considered the unsworn statement of the appellant and noted that it indicated that there had been friendly conversation between the appellant and the complainant at the time, and no hostilities. However, she considered it significant that the appellant's counsel had not put it to the complainant that the two were having a friendly conversation about the promotion of an event, and not an argument about the complainant's friend. The learned judge of the Parish Court took the view that that was an important omission "since the discussions of the parties around the time of the incident was [sic] a factor in determining whether the shooting was accidental or deliberate".

[86] The learned judge of the Parish Court stated that she would give the appellant's unsworn statement what weight it deserved considering that the appellant did not give evidence on oath and was not subjected to cross-examination, as was the complainant. She went on to examine whether the appellant's account of how the firearm went off, to support his defence of accident, was reasonable. She found that it was not. She determined, without expert evidence, that "the gun would not have fired, if his

explanation was to be believed, as he did not say that his hand was on the trigger". She also questioned why the appellant would be trying to catch the firearm in a manner that would cause him to press the trigger. She, therefore, rejected his account.

[87] The learned judge of the Parish Court, having rejected the appellant's account then went back to the complainant's evidence of how she said the injury was caused, to see if the prosecution had proved its case beyond a reasonable doubt. In doing so, however, she simply rehearsed the complainant's account given in court and accepted it. She accepted what the complainant said the appellant had been doing with the firearm, which she said "was clear evidence that the appellant was not behaving normally with the firearm". She also accepted that the appellant had verbally abused the complainant about her friend, and that the complainant saw when the appellant pulled the trigger. In that regard, the learned judge of the Parish Court found that accident was negatived on the evidence, saying of the complainant's evidence:

> "She saw when he actually pulled the trigger. That is where accident is negatived. The argument about wanting to know where she was, telling her that she and Michael were not just friends, deliberately taking steps to activate the gun and pulling the trigger."

[88] She also accepted the complainant's evidence that the parties were not being friendly at the time of the incident and were in fact arguing because the appellant was upset with her. This, she found, along with the complainant's evidence as to what the appellant was doing to the gun with his hands, gave credence to her finding that the shooting was deliberate.

[89] What is of concern to us, however, is the fact that the learned judge of the Parish Court accepted and relied on the version given by the complainant in court, despite the material inconsistency in her account of how the shooting took place, for which there was no explanation given. She accepted the complainant as a witness of truth based on her demeanour and accepted the complainant's explanation for the omissions in her first statement, saying of the complainant that "she had multiple surgeries since the incident and had come out of the first of such surgeries when the officer came to take her

statement", and that "the first time the Officer came to take her statement it could not even be completed". She found that the complainant's evidence showed that there were two different scenarios, one where the appellant hugged her, and one where he pointed the gun at her and shot her. However, as far as the evidence shows, it was in cross-examination that the complainant first mentioned that the gun had been placed on her thigh and that was when she was confronted with what she had said in her second statement. It was in re-examination that she sought to say that the appellant did not point the gun at her the "first time" but only touched her on her thigh with it, and that the second time he shot her. There was no explanation why she would have said something so completely different in her statement.

[90] Furthermore, although the learned judge of the Parish Court considered that the complainant's evidence showed that there were two separate sequences of events, first where the appellant hugged her (and presumably touched her on her thigh with the gun) and the second where he pointed the gun at her and shot her, this was not, strictly speaking, the complainant's evidence. Her evidence-in-chief makes no mention of the gun being placed on her thigh at all, during the hug. Her belated attempt to explain away the inconsistency in her second statement where she said she was shot during the hug by describing it as the "first time" does not explain the fact that her second statement indicates she was shot at that time. Nowhere in that statement does it mention a second time where he pointed a gun at her. Therefore, the learned judge of the Parish Court was not on firm footing when she found that it was "clear that she is speaking of two scenarios". The complainant did not have two different scenarios in her second statement and indicated only that she was shot during the hug when she felt the gun on her thigh. Although the complainant spoke of being hugged in her evidence-in-chief she did not say the gun touched her. Her credit was, therefore, seriously impeached and could not be rehabilitated by the "well-meaning conjecture" of the learned Parish Court Judge.

[91] It is clear, therefore, that although the learned judge of the Parish Court, in dealing with the inconsistencies in the case, had earlier recounted the complainant's evidence that she had given statements on two occasions to two different INDECOM officers, she

showed little awareness of the fact that the account of the incident given in both statements was different from the account given in court. The simple explanation given by the complainant could cover, at best, only the inconsistencies created by the omissions in the first statement but provided no explanation for the material conflict in the evidence on the prosecution's case, created by the second statement and the complainant's evidence given in court. If this had been a trial by jury, the trial judge would have been duty-bound to point out to the jury the inconsistencies in the evidence and whether there were any explanations for them or not, leaving it to the jury to determine whether they were material and the impact the inconsistencies may have on the credibility and reliability of the witness. It would largely have been a matter of speculation for this court to determine what effect it would have on the minds of the jury or how it may have affected their verdict. In some cases, the inconsistencies may be such that the case would have to be withdrawn from the jury on the basis that no jury properly directed could act on that evidence to arrive at a verdict of guilt.

[92] However, this being a trial where the tribunal is one of fact and law, we are able to assess the reasons of the learned judge of the Parish Court for her verdict from her reasons for judgment, which indicate the effect of the evidence on her mind and the impact it had on her in coming to her verdict.

[93] Based on the authorities cited above, and our own assessment of the evidence that was before the learned judge of the Parish Court, and her reasons for judgment, we are in a position to determine that she erred. The learned judge of the Parish Court fell into error when she found that the complainant had provided an explanation for the conflict in the evidence. Furthermore, in finding that there was an explanation for the conflict, and accepting the evidence given in court as true and credible, the learned judge of the Parish Court failed to consider the impact of the inconsistency and any weakening effect it may have had on the complainant's credibility, and as a logical consequence, on the prosecution's case. She also failed to consider that the version given by the complainant in her second statement that had been given at a time closer to the event

when the matter was fresher in her mind, and for which there was no explanation, could have supported the appellant's defence that the shooting was accidental.

[94] The learned judge of the Parish Court was plainly wrong to have accepted and relied on the evidence of the complainant to call upon the appellant and having done so, to have convicted him without resolving the inconsistency in the complainant's account of how she was shot. This is so because, as argued by counsel for the appellant, the learned judge of the Parish Court did not and, in any event, could not resolve this major inconsistency in the complainant's evidence because there was no evidence on which she could act to resolve it. There was nothing to explain away the entirely different version of the shooting contained in the second statement, which the complainant admitted giving, from what she stated in court. At the end of the case, the conflict in the prosecution's case remained unexplained, the complainant's credibility and the reliability of her evidence, on a material issue, were severely affected, and no factual finding could have properly been made from it to support a conviction.

[95] It has also occurred to us that, in finding that accident was negatived by the complainant's evidence in court that she saw when the appellant pulled the trigger, the learned judge of the Parish Court failed to see and consider the significance of the utterances of the complainant which she had agreed in, cross-examination, that she had made when she was shot. The complainant agreed that she had "bawled" out "Lawd Dean ah wah do me?" when she heard the loud "bow" and felt a "lick" to her foot. However, in our view, consideration should have been given to the question, which arises naturally from this evidence, that if the complainant had seen the appellant point the gun at her from an arms-length away and also saw him crook his finger on the trigger, as she said she did in the witness box, was it likely that her first spontaneous utterance would be to ask what had happened to her. Would she not have known she was shot by the appellant, having as she said, seen him point the gun and pull the trigger?

[96] We also gave consideration to the fact that the forensic report, which was tendered into evidence by agreement, showed that the complainant's blood was on the appellant's

gun. Although no issue was taken with this in the trial or in this appeal, again it has occurred to us that the evidence which was before the learned judge of the Parish Court, gives rise to the question of how blood came to be on the appellant's gun. Was blood more likely to get on the gun if the complainant was shot whilst they were hugging or whilst they were at an arm's length away? Or did the blood get on the gun in some other way? The answers to these questions become relevant when one considers the conflicting evidence given by the complainant.

[97] In the final analysis, we agree that the verdict is unreasonable and is not supported by the evidence and there is a risk of a grave miscarriage of justice.

[98] These grounds, therefore, succeed.

Whether the sentence is harsh and manifestly excessive - ground 3

[99] In the light of this court's decision on the grounds relating to the conviction, it hardly seems necessary to deal with the ground concerning sentence. However, considerable submissions were made on this ground and, therefore, we will say a few words regarding it.

[100] In respect of sentence, counsel for the appellant submitted that the learned judge of the Parish Court did not indicate whether imprisonment was the only option available and did not consider that imprisonment should not have been the starting point in a case such as this one. Counsel also submitted the learned judge of the Parish Court failed to demonstrate how she arrived at a sentence of imprisonment for two years and seemed to have wrongly taken account of a "perceived" relationship between the complainant and appellant and the disparity in their ages, despite the evidence on the prosecution's case that they were just good friends. Counsel further complained that the learned judge of the Parish Court failed to consider, as a mitigating factor, the appellant's actions in assisting the complainant to get medical assistance after she had been shot. Counsel suggested that a non-custodial sentence would have been more appropriate in the circumstances of this case.

[101] Counsel for the Crown, in written submissions filed in this court, initially submitted that the learned judge of the Parish Court had employed the correct methodology as prescribed by **Meisha Clement v R** [2016] JMCA Crim 26, and that even though the sentence was outside the usual range, it was warranted by the aggravating factors in the case. At the hearing of the appeal, however, counsel for the Crown agreed that the learned judge of the Parish Court ought to have considered the appellant's actions after the complainant had been shot, as a mitigating factor, and was, in light of that, wrong to have said that the appellant had shown no remorse. She agreed that the other aggravating factors did not warrant the second year of imprisonment which had been imposed. Counsel, therefore, accepted that a term of imprisonment of one year would have been a more appropriate sentence, in the circumstances of this case.

[102] In sentencing the appellant, the learned judge of the Parish Court considered the four principles of sentencing, but noted that the major consideration for the court in the matter, however, was deterrence. In considering whether a non-custodial sentence was appropriate based on the Criminal Justice (Administration) Act, she took account of the appellant's good character, that he had no previous convictions, and that he was an officer of the law. However, she concluded that the fact that the appellant was an officer of the law was an aggravating feature, since officers of the law are charged to protect, reassure and serve.

[103] She also considered that the complainant was an 18-year-old girl who went out to enjoy herself with friends; that the appellant had become upset with the complainant because she was also friends with Michael; and that the appellant shot her with his government issued firearm. She found, therefore, that the seriousness of the offence warranted a sentence of imprisonment.

[104] The appellant's assertions, therefore, that the learned judge of the Parish Court did not consider whether imprisonment was the only option, and should not have used imprisonment as the starting point are without merit.

[105] Having considered that the maximum sentence within her jurisdiction for this type of offence, was three years' imprisonment, the learned judge of the Parish Court used a starting point of 18 months due to the gravity of the offence and the fact that the "violence meted out to the complainant" resulted in grave physical injury and psychological harm. She considered the fact that the appellant had no previous convictions, had four children dependent on him and was previously of good character, as mitigating circumstances which warranted a reduction of the sentence by six months to 12 months' imprisonment. She then considered the fact that the case went to a trial, the appellant was a mature individual and that he expressed no remorse, as additional aggravating circumstances which warranted the addition of another year to the sentence. It is, therefore, not correct to say that the learned judge of the Parish Court did not demonstrate how she arrived at her sentence.

[106] We do agree, however, that she failed to consider the appellant's immediate actions in assisting the complainant to get medical attention after she had been shot, as a mitigating factor and, as such, wrongly considered that the appellant had shown no remorse to be an aggravating factor. As a result, she would have erred in increasing the sentence by one year, on that basis. The concession of counsel for the Crown that a one-year reduction in the appellant's two-year sentence would have been appropriate, was therefore, inevitable.

Disposal of the appeal

[107] The appellant having shown that there is merit in his grounds of appeal, we take the view that there is likely to have been a miscarriage of justice in this case. The appellant is, therefore, entitled to have his appeal succeed and his conviction and sentence set aside. We also are in agreement with the submission from his counsel that ordering a retrial would only serve the purpose of giving the prosecution a "second bite of the cherry" to have the complainant provide an explanation for the conflict in her evidence. We did give anxious consideration to the fact that the complainant in this case

received a serious injury, however, we do not believe the interests of justice would be best served in ordering a retrial.

[108] The appeal against conviction and sentence is, therefore, allowed. The conviction is quashed, the sentence is set aside, and judgment and verdict of acquittal is entered.