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[2010] JMCA Crim 101

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 26/2009

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA (Ag)

RICHARD MARTIN v R

Mrs Dionne Meyler -Reid for the appellant

Miss Natalie Ebanks for the Crown

29 and 30 April 2010

ORAL JUDGMENT

MORRISON JA

[1] This is an appeal from the appellant's conviction by the then Senior Resident Magistrate for the parish of St. James for assault occasioning actual bodily harm, for which he was sentenced by the learned Magistrate to six months imprisonment.

[2] The offence was allegedly committed on 7 September 2005 when the complainant, Mr Howard Kerr, was allegedly assaulted by the appellant, a police officer, along Long Lane, Montego Bay in the parish of St James.

[3] The case is unusual because the complainant died on 9 January 2007, before the trial, a victim of violence unrelated to the case in any way. However, it was decided to proceed with the prosecution on the basis of the complainant's statement to the police, which he had given on 13 September 2005, and this statement was admitted pursuant to section 31D of the Evidence Act, the statutory pre-conditions of admissibility of such a statement having been met. Nothing now turns on this. The statement was accordingly read into evidence as the first item of evidence before the learned Resident Magistrate and became exhibit 1.

[4] The complainant stated :

> "1 am a business man. I am thirty five years old. I reside at Bogue Village and my postal address is No. 2 Post Office in Saint James.
>
> On Wednesday 7th September, 2005 at or about 6:15 p.m. I was driving my motor car along Union Street in Montego Bay. On reaching a point I turned left into Long Lane. After I turned into the lane I saw a motor car parked in the middle of the lane with the brake lights on. I tooted my horn a couple times for the driver to remove because it was impossible to pass. However, instead of having the car removed the driver alighted with a gun in his hand and he walked towards my car.
>
> He stopped beside me while I was around the steering wheel and he said the girls them say that I have his name in a mix up. I told the driver of the other car who I identified as Constable Richard Martin, that I am not interested in what he has to say or what the girls have to say. This respondent put the firearm in his pocket and I asked him to have his car

red as I would like to proceed. After I told him to have the car removed he said, "Pussy me a go lock you up." I said to him, "What this for." I noticed that he started to speak to someone on his cellular telephone.

I then used my phone to call one of his senior officers who in response asked me to hand my telephone to the respondent so that he could speak with him. However, he boxed the phone from out of my hand and it fell in the road and he ordered another officer who was dressed in uniform to handcuff the pussy, meaning me. I became very upset, knowing that I did nothing and during the process I used an indecent language, and I was held by the uniformed police officer and the respondent and one of the uniformed men put a pair of handcuffs on me.

The respondent took a baton from one of the men which he used to inflict two blows to my body, and another one used his firearm to hit me in my chest. I walked with one of the officers who behaved quite civil to a point in the parade and I was transported from there to Montego Freeport Police Station where I was charged for Indecent Language. I was given my own bail to attend Court on the 16th of September, 2005. While I was at the cell waiting for the bail bond to be written up the respondent came to the cell and said he want to speak to me on my way to the C.I.B. office. I was held by the respondent and about five other police officers and the respondent used his fist and punched me about three times.

I was actually rescued by Sgt. Wright, the officer in charge of the cells from the respondent and others. As a result of the assault, I had to see a doctor by the hospital. I was examined, x-rayed and given prescription."

[5] The prosecution called Dr Nordia Howell, the doctor who treated the complainant at the Cornwall Regional Hospital on 8 September 2005. Her findings were stated by her to be as follows:

> "He had bruises on his right forearm, swelling to left forearm, laceration to his left index finger and tenderness to his left chest."

She was asked:

> "From your examination are you in a position to say how the injuries were caused?"

Her response was:

> "Injuries were caused by blunt trauma. Blunt trauma consists of injuries caused by an object that would not readily allow penetration. A baton would be such an object, yes. A fist would cause blunt trauma."

When Dr Howell was cross-examined by counsel who appeared at the trial for the appellant, she stated :

> "Yes there was something missing from the medical report. That is there was a left forearm injury."

She was asked: "What is the forearm?" and her response was, from the elbow to the wrist."

Dr Howell then entered into an interesting discussion, upon which, happily nothing now turns for the purposes of the appeal, as to the distinction between "abrasions" and "bruises".

[6] Towards the end of the cross-examination, the following exchanges took place between the doctor and counsel:

> "Q. Based on observation it would be evident to your trained eyes. The forearm would have come into contact with a heavy object?
>
> A. Yes and it causes bruising.

Q. Police handcuff, what police use. Do you know what it is?

A. Yes, I have seen persons in one. The area I saw, that would be in the area where the handcuff would be, yes? Yes, I have seen handcuff near up.

Q. Would it cause the abrasion or the bruise that you saw?

A. Only the one on the right.

Based on the drawing that I have here the one on the right.

Q. Based on the drawing, say it's an (sic) handcuff, what would that have meant?

A. The drawing from the right forearm the abrasions had a distance between them of 2cm. The one on the left forearm was more oblong something like. Meaning it's almost the shape of an egg. The dimensions of the swelling that were there 4cm x 1.5 cm.

Q. That swelling is the same area where a handcuff would be normally?

A. Yes."

That was the case for the prosecution.

[7] The appellant gave evidence in his own defence. He gave a completely different version of the altercation from the one that was given in the complainant's statement. On his version, the complainant was depicted as the aggressor, as a result of which the complainant himself was charged with abusive language, resisting arrest, assaulting the police and disorderly conduct.

Nothing came of those charges, which were in fact still pending at the time when the complainant unfortunately died.

[8] The appellant's evidence was supported by Constable Richard Lattibeaudiere, who was also part of the police party that day on Long Lane and I think it is fair to say that Constable Lattibeaudiere fully supported the appellant in his account of what had taken place. He testified to being called to the scene by Constable Martin. The man was pointed out to him and he said that the complainant became boisterous, used a lot of indecent language which actually coincides with what the complainant himself said and thereafter he said that:

> "One of the Constables attempted to hold on to the man, the man boxed away the Constable's hand and he then gave Constable Anderson his handcuff which Constable Anderson used to handcuff the right hand. The man began to resist and struggled (sic)."

At the end of the day, it was the evidence of the police officers that the complainant had literally "to be dragged to Sam Sharpe Square and then to the Freeport Police Station".

[9] In addition to Constable Lattibeaudiere, the appellant called as a witness the retired Sgt Euklin Wright, who was the sergeant in charge of the lock-up at the relevant period in September 2005. We do not find Sgt Wright's evidence to be particularly helpful, since he retreated into what is in these circumstances, standard police language, which is "I cannot recall". We

therefore do not think that he took the case much further, one way or the other. Save to say that he said that "he did not recall the incident in which the policemen attacked the complainant at the police station and in which he is said to have been the one who rescued the complainant. He said that if such an incident had taken place, he was sure that he would have some record of it.

[10] The learned Resident Magistrate made detailed findings of fact in which she reviewed the evidence fully. On this evidence, she found the appellant guilty of assault occasioning bodily harm as charged. She regarded the evidence of the doctor as having corroborated the complainant's evidence that he sustained injuries and she recounted the injuries which the doctor had observed. Then she regarded the evidence of the defence witness Constable Lattibeaudiere as having corroborated the complainant's evidence in relation to one of the injuries, that is, the injury to the complainant's right wrist. Of course, that raises a question because the case the defence was putting forward was that the injury was caused by the handcuff and not by any action carried out by the appellant himself. Nevertheless, the magistrate found that that was some corroboration of the complainant's story.

[11] The learned Resident Magistrate also came to the conclusion that the prosecution's case was logical and credible, which is how she described it. She did not find the defence's case impressive particularly in relation to the cause of the injury. She said:

> "The evidence does not suggest that the handcuff was the cause of the injuries to the forearm. Constable Lattibeaudiere's evidence was that the handcuffs are designed to tighten if the accused struggles and he did say that Kerr was struggling a lot and was boisterous. However, there is no evidence that the abrasion the doctor observed was all around the complainant's wrist. The doctor also stated the most permanent injury was to the left forearm not the right. She said the injury to the left forearm was from the elbow to the wrist. It was oblong in shape like an egg, 4cm each."

[12] The magistrate then used an unusual formulation in reasons for judgment which is to say; "It is my submission that this injury was likely to have been caused by a baton rather than handcuffs". She therefore rejected the defence's submission that the complainant's injury was caused by the handcuff, and again pointed out that there were injuries to both forearms and an injury to the left index finger and the chest.

[13] As a result of this, the learned magistrate found that the case had been proved. She did take into account the fact of the complainant of being absent and not being subjected to cross-examination, but nevertheless, she felt that the account given in his statement was "credible and logical".

[14] On appeal, Mrs Dionne Meyler-Reid appeared on behalf of the appellant and, we think it is fair to say that she took every point that could conceivably have been taken on behalf of the appellant. We say that in a way that is intended to be entirely to her credit. But we think that she would agree, as

appeared during the course of her argument, that some of her grounds were of lesser strength than others. For instance, she spent some time discussing the question of identification when, in the accepted sense of the word, "identification was not the burning issue in the case". She also spent some time on the contention that the learned magistrate had reversed the burden of proof. Again, we do not think that it was established that that was so. But most of counsel's efforts were concentrated on her grounds 1 and 2, which had to do basically with whether the evidence which was before the learned Resident Magistrate was sufficient to ground the conclusion which she had arrived at. In particular, she highlighted the inconsistency between the complainant's evidence as it appeared on the statement and the doctor's evidence.

[15] The important point is that the complainant in the statement spoke to the appellant having used his baton to inflict two blows to his body and that another police office used his firearm to hit him in the chest. Notwithstanding that statement, the findings of the doctor were that he had bruises on his right forearm, swelling to his left forearm a laceration to his left index finger and tenderness to his left chest. I think that, it being accepted that it would be the duty of the prosecution not only to prove that it is the appellant who inflicted the blow, but that the appellant was also the person who caused the injuries to the complainant, that by itself gives rise to a question whether the Crown's case could be said to have been established.

[16] The Crown in response referred us to the case of ***R v Joseph Lao*** (1973) 12 JLR 1238, a case much cited by the Crown in this court, particularly in matters such as these. The case makes the point that in cases such as this, it is necessary for the Court of Appeal to look carefully at the judgment of the Resident Magistrate and not to, in effect, substitute its own judgment for the magistrate's judgment, and to take the approach that if the judgment in the court below can be supported, it ought to be supported unless the verdict can be shown to have been so against the weight of the evidence as to be unreasonable and insupportable.

[17] Notwithstanding the heavy burden thus cast on the appellant on appeal against the magistrate's finding of fact, we have been struck by the impossibility of reconciling the complainant's statement of the injuries he received with the doctor's evidence. Further, it seems to us that, having in the end agreed that the injuries could equally have been caused in the manner contended for by the defence, as by the prosecution and there being no other evidence to break the tie, so to speak, between the prosecution and the defence, at the end of the day the doctor's evidence was entirely neutral and took neither the case nor the prosecution nor the defence one way or the other.

[18] In these circumstances, bearing in mind that it is the Crown that bears the burden of proving its case beyond reasonable doubt against the appellant, it appears to us that it cannot be said that that burden was discharged. In

addition to this, it is difficult to appreciate the basis upon which the Resident Magistrate rejected the evidence of Constable Lattibeaudiere in particular, which seemed to give a fair and balanced view of the altercation at the root of this prosecution, bearing in mind that Constable Lattibeaudiere was actually one of the police officers who came on to the scene after the altercation had actually begun and he might therefore have been thought to have given evidence that seemed to be consistent and reliable.

[19] Taking all of these things into account, we are accordingly of the view that this is a case in which it has been demonstrated, as it is required to be demonstrated by **Joseph Lao,** that the magistrate's verdict is so against the weight of the evidence as to be unreasonable and unsupportable. In our view, therefore, the appellant succeeds and the result is that the appeal is allowed; the conviction is quashed and the sentence set aside and the court directs that a judgment and verdict of acquittal be entered.