[2018] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 5/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

MICHAEL SHAW v R

KD Knight QC and Able-Don Foote instructed by Knight Junor and Samuels for the appellant

Mrs Natiesha Fairclough-Hylton for the Crown

29, 30 January, 16 February and 23 March 2018

SINCLAIR-HAYNES JA

[1] The failure of Mr Rupert Barrington Blackwood to declare to customs at the Norman Manley International Airport that he was carrying US$16,000.00 led to the arrest of Mr Michael Shaw, a customs officer. Mr Shaw (the appellant), was charged for two offences for acting contrary to section 14(1)(a) of the Corruption Prevention Act. The particulars of the first offence charged on information number 2014/7050 were:

> "Being a public servant to wit, a customs officer, corruptly accepted US $2,000 [sic] from Barrington Blackwood to do an act in the performance of his public function, to wit: returned US $16,000 of [sic] Barrington Blackwood which had been detained at customs by the said Michael Shaw."

He was also charged on a second information number 2014/7051, the particulars of which were as follows:

> "That [be]ing a Public Servant, to wit, a customs officer, corruptly solicited US$1,400.00 from Barrington Blackwood to do an act in the performance of his public function, to wit return US $16,000.00 which had been detained at Customs by the said Michael Shaw."

[2] He was convicted by Her Honour Mrs Grace Henry McKenzie and sentenced to eight months imprisonment on both informations with sentences ordered to run concurrently. Being utterly aggrieved by the learned parish judge's decision, he has appealed to this court and filed the following grounds of appeal:

> "1. The evidence adduced by the prosecution was insufficient to establish the offence charged.
>
> 2. The sentence imposed was manifestly excessive.
>
> 3. The learned Trial Judge fell into error when she failed to uphold the submission of No case to answer."

[3] The following supplemental grounds were also filed on his behalf:

> "4. The Learned Trial Judge failed to properly assess the evidence of the Complainant in circumstances where he was the sole witness capable of establishing the ingredients of the of the offence and his evidence was substantially discredited by admitted untruths as to render the same manifestly unreliable.
>
> 4(a). The Learned Trial Judge failed to take into consideration in assessing Mr, Blackwood's evidence the cumulative effect of the several untruths upon his veracity.
>
> 5. The Learned Trial Judge erred in rejecting the Defendant's evidence considering the totality of evidence before her rendering the verdict unreasonable and unsupportable having regard to the evidence."

At the hearing of the appeal, leave was granted to the appellant to file two additional supplemental grounds of appeal as follows:

> "4(b) Having regard to grounds 4 and 4(a) above, the verdict is unreasonable and/or unsafe."
>
> "5(a) The learned parish judge failed to treat Mr Blackwood as an accomplice; failed to warn herself of the dangers of convicting on his uncorroborated evidence."

[4] We heard his appeal on 29 and 30 January 2018 and on 16 February 2018, we quashed his conviction, set aside the sentence, and entered a judgment and verdict of acquittal. We promised reasons for our decision and this is a fulfilment of that promise.

The evidence in the court below

[5] Six witnesses testified on behalf of the Crown. Only one, Mrs Aldith Wright-Douglas, who was the appellant's supervisor at the material time, was present at the point in time the offence was allegedly committed. The others were formal witnesses.

The complainant's evidence

[6] Mr Blackwood arrived at the Norman Manley International Airport on a flight from the United States on 24 February 2014. Accompanying him were four pieces of luggage. The appellant searched the luggage. An envelope which contained the money was detected by the appellant in the attaché case. According to the complainant, the money was in two envelopes which were visible upon opening the case.

[7] It was the complainant's evidence that he told the appellant that the envelopes contained US$10,000.00 but the appellant told him that it was more. He was instructed

by the appellant to close the suitcase and accompany him. He was taken to a room where he saw the appellant's supervisor. The appellant told him that he would confiscate the money because he should have declared the amount of money he was carrying on the customs form. He did not respond.

[8] The supervisor, Mrs Aldith Wright-Douglas, approached them and she also told him that they would confiscate the money and that he would have to return with proof of its source to have it returned. He told her that he did not have any more money so "might as well [they put him] back on the plane". The supervisor instructed the appellant to give him $500.00 of the money and he did.

[9] At that juncture, they began "doing a lot of paper work". The supervisor remained but she was in "a little boothe right next to where [they] were". The appellant, the complainant said, was writing and having him sign and "was going back and forth to his supervisor". He was unable to hear what the appellant said when he was 'going back and forth' to the supervisor.

[10] The appellant returned and completed the paper work. After which the appellant told him:

> "We can talk yuh know."

His response, however, was:

> "After all those paper work?"

[11] The appellant, he said, told him not to "worry about it". It was also the complainant's evidence that he was "kind of felt happy" when the appellant said that

they could talk. He understood the appellant to mean that they could negotiate and that "he wanted some of the money".

[12] The complainant then instructed the appellant to "take five hundred dollars ($US500.00) out of [his] money and give [him] the rest". The appellant however told him that:

> "Five hundred dollars [was] too small, the supervisor want some too"

and asked him if "[he] couldn't even offer seven hundred dollars (US$700.00) each". It was at that juncture that he, the complainant, told the appellant to take US$2,000.00 and "give him the rest".

[13] The monies comprised of 100 and 50 dollar bills. The appellant counted the 100 dollar bills; took US$2,000.00; returned the balance to him, and placed the money in his bag. The complainant told the supervisor, while she was sitting in her boothe, that, "It was nice doing business with [her]" and he "walked out". According to him, he told her that, "[b]ecause she was hanging down her head and not even looking at [him]".

[14] He described the supervisor's booth as "pretty close" with two sides. He explained that her booth did not have a glass enclosure and he expressed the opinion that:

> "Obviously she heard everything which was going on."

[15] The only time the complainant said he spoke with the supervisor was when she instructed the appellant to give him the $US500.00. It was his evidence that although he provided the appellant and the supervisor with his annuity statement, which was proof of the source of the money, they behaved as if they did not wish to see it and both told him they were going to confiscate the money.

[16] Under cross-examination, he testified that he had three pieces of luggage and his attaché case. It was his evidence that upon his arrival, he filled out an immigration form and the information he provided was true and correct. He however admitted that he lied when confronted with his statement on which he had falsely declared that he was not carrying over US$10,000.00 or its equivalent.

[17] He also admitted lying that he did not have a cellular phone when he was specifically asked if he had. The cellular phone and the cash were discovered when he was asked to place his luggage on the table for examination. He admitted being upset when the discovery was made and because of that he told the appellant that:

> "Of all the time [he had] been travelling to Jamaica it [was] the first time [he] had been treated in [that] way."

[18] He further admitted that after the appellant had searched the three bags which he placed on the table, he, the appellant, pointed to the attaché case which he had kept on the trolley and told him that he wanted to see it. He denied that his jacket was covering the attache' case at the time the request was made. The complainant also

admitted lying on the customs form that he had three pieces of accompanied luggage when in fact he had four. It was also his evidence that it was an error.

[19] He agreed that when the appellant told him that he did not declare the money, his response was that "[he] was not aware it was enforced in Jamaica that much". He also agreed that the appellant told the supervisor that he was found with money, which he did not declare.

[20] He accepted that whilst the documents were being photocopied, he was complaining about how badly he was being treated. He further accepted that the appellant told him that if he provided proof of the source, the money would have been released.

[21] Under cross-examination, he agreed that he was given $500.00 but he claimed it was not for hotel and car rental. According to him, he had an apartment in Jamaica so he would not have said that. He asserted that he was given the sum because he did not have any more money.

[22] He admitted being told that the balance would be detained until he provided proof as to its acquisition. He also agreed that it was at that point in time, he showed Mrs Wright-Douglas the annuity statement. He, however, denied showing the statement to Mrs Wright-Douglas and the appellant at the same time. He insisted that he first showed it to the appellant.

[23] He denied that at the time he showed the document to the supervisor, she instructed the appellant to copy the statement and return the money to him. Soon after, it was suggested that he had spoken to the officer and then to the supervisor and his answer was that, "all three of [them] were right there". He was again asked if had heard the supervisor instruct the appellant to copy the document and his answer was, "I think I did". He however testified that he was unable to say whether the appellant went and copied the document and returned because the appellant was "moving all over the place".

[24] He agreed that he told the parish judge that he had told the appellant that he could take US$2000.00 and give him the "rest". He explained that he told the appellant that because the appellant harassed him.

[25] The following morning, he telephoned a friend who was a police officer and spoke to him about the matter. On the advice of his friend, he went to the police headquarters and reported the matter.

Mrs Aldith Wright-Douglas

[26] Mrs Aldith Wright-Douglas on 24 February 2018, testified on behalf of the Crown. It was her evidence that whilst she was seated in her office, the appellant entered. He was accompanied by the complainant who was a passenger. The appellant told her that "he needed to verify cash" that the passenger had.

[27] The complainant "was very angry" and demanded to know why he was being harassed. Angrily he told them:

"I live in Jamaica. I am a Jamaican."

[28] The appellant informed him that the procedure was to verify how much he had. The appellant instructed him to empty his pockets so he could see if he had cash. The complainant told the appellant that he was Brown Sugar's producer.

[29] She attempted to calm the complainant by explaining the procedure of verifying the amount of cash in his possession. She enquired of the appellant if he had declared the money and he told her he had not. She informed him that failure to declare money over US$10,000.00, or its equivalent, was a breach of the Customs Act. She and the appellant asked the complainant if he had any proof as to the source of the money. The appellant had asked the complainant before he began counting the money and again while he was counting it. She asked the appellant when he began counting. At that point in time she was at her desk.

[30] The complainant told them that he was a businessman and he had withdrawn $50,000.00 from his annuity account leaving the balance which was found. The appellant offered him a seat in her office and instructed him "to take out all currencies" which the appellant checked.

[31] Mrs Wright-Douglas explained that there was a partition which was approximately 4 feet high between her desk and the appellant's. She returned her chair "up to her desk" when the appellant began checking "the currency" because there was something which she had to do.

[32] Whilst the appellant was counting the money, she heard him ask the complainant for proof. The complainant asked her what was meant by proof. She told him it meant a bank statement or bank receipt.

[33] Mrs Wright Douglas explained that three forms were required to be completed if monies were seized or detained. If however the money is verified, it is returned. She consequently "stepped out of the supervisor's office to go to the photocopy machine". She gave the appellant two forms. A Form A and a Form B and returned to her seat after the appellant was finished counting the money. It was also her evidence that she thought he was still counting when she went to her seat.

[34] After she had sat for a while, the appellant told her that the complainant had US$16,000.00 in his possession. She asked the complainant to provide proof as to the origin of the money. He told her that he did not know what he would do if the money was detained because he had no money for hotel or taxi. She offered to give him US$500.00 from the US$16,000.00, on humanitarian ground.

[35] Although she was not "standing over" the appellant while he wrote up the forms, (she was then sitting at her desk), she expected that he was in fact doing so. The appellant then took the C5 Customs Declaration Form. She instructed the appellant to photocopy the document and advised him "to release the money" to the complainant. She verbally admonished the complainant to declare his money "next time...or else [he] would be in breach of the Customs Act".

[36] The appellant copied the document as instructed, and she saw him hand it to the complainant. The complainant took up his belongings and left. She, however, did not count the money that was returned to the complainant.

[37] Under cross examination, it was her evidence, confirming the appellant's, that she witnessed him return the money to the complainant after the complainant provided her with evidence that the sum was withdrawn from his annuity.

[38] She further testified that she had known the appellant with whom she worked "alongside" for about six to eight years. During those years she had never seen him "acting in any manner unprofessionally" nor has she ever received any report about him acting unprofessionally or corruptly.

Mr Kevin Carter

[39] Mr Kevin Carter, a director at the Jamaica Customs Agency, was assigned to the passenger terminal at the Norman Manley International Airport at the material time. His evidence validated the procedure which the appellant employed. He told the court that if an officer is not satisfied with the answers stated on the C5 form, the officer would conduct a search of the passenger's luggage to verify the answers. Failure to respond truthfully is considered a breach of the Proceeds of Crime Act (POCA) and also a breach of section 209 of the Customs Act.

[40] The customs officer is expected to draw the attention of the supervisor to discrepancies. If the supervisor agrees that there is a discrepancy, the passenger and the customs officer go to a sterile area, which is usually the supervisor's office to verify

the cash. The supervisor's presence throughout is necessary to authenticate the procedure. The passenger should be advised that he has breached section 75 of the POCA.

[41] A statement is taken from the passenger as to the reason for the failure to declare. He outlined the procedure if the cash is seized. He further testified that the supervisor has the discretion to return cash over US$10,000.00, which was not declared, if proof of its source is provided and there is no reason for suspicion.

[42] It was his evidence that it was not "irregular" for a portion of detained cash to be returned to the passenger for taxi fare and for hotel accommodation but they were warned about the practice.

Constable Kadian Brown

[43] Constable Kadian Brown was at the material time attached to the Major Organized Crime and Anti Corruption Agency (MOCA). He testified that having examined the the POCA form which was exhibited, he observed that US $16,000.00 which had been written, was struck out and US$15,500.00 was inserted beneath with the initials "RB". The name "Rupert Blackwood" was written near the bottom of the form.

The defence

[44] The appellant testified that at the material time, he was a customs officer at the Norman Manley International Airport. In the course of his duties, he examined the complainant's C5 form on which he declared that he was carrying US$10,000.00. The

complainant verbally declared that he was not in possession of a cellular phone. He was instructed to place his luggage on the examination table.

[45] The complainant objected to him searching his luggage. He said:

> "I am a Jamaican citizen, why are my bags being searched and I am no criminal?"

The appellant's co-worker attempted to "calm him down" by telling him to allow the customs officer to do his job.

[46] Examination of the complainant's luggage revealed a cellular phone which he informed the complainant might be dutiable. He noticed a bag on the "trussel" which had a jacket over it. He instructed the complainant to put it on the examination table. The complainant was "being very loud" and enquired why he was being treated in that manner.

[47] Whilst examining the bag, he found an envelope. He asked the complainant why it was "so big". The complainant told him that $3000.00 was in the envelope but did not declare the type of currency. He tore the envelope and discovered a number of US$100.00 bills. He informed the complainant that if he was in possession of more than US$10,000.00, and he failed to declare it, he might be in breach of the Customs Act. He also found a United States Passport. The complainant had however presented a Jamaican Passport.

[48] Under cross-examination, he told the court that he discovered the envelope with the cash by removing some paper. It aroused his suspicion because it was "a letter size

envelope and it was very fat". Consequently, he told the complainant that it "it looked like it is more than ten thousand dollars".

[49] The complainant continued to behave boisterously and spoke loudly. The appellant informed him that it appeared that he was in possession of more than US$10,000.00. The complainant continued being loud and asked him why he was asking him so many questions and "he was no criminal".

[50] He denied telling the complainant that if he did not have proof, he would put him back on the plane. As was his duty, he instructed the complainant to accompany him to the supervisor's office to verify the amount and source of the money. The complainant loudly said:

> "Me nah follow you go no whey and you can't tek wey no money."

[51] Mrs Aldith Wright-Douglas was the supervisor on duty. He introduced the complainant to her and told her the circumstances under which the cash was discovered and his desire to verify the amount. The complainant began shouting. He said:

> "Why am I in here? I am no criminal."

The complainant was loud and boisterous and told them that he wanted to go home. The supervisor tried to "calm him down". She offered him a seat but he refused the

offer. She explained to him that it was a simple procedure the appellant was required to do.

[52] It was the appellant's evidence that the complainant "was arguing, saying a lot of stuff". The appellant instructed him to take the envelope from the bag and empty his pocket. The complainant took a while after which he told the appellant that he would not accompany him. It was only after his co-worker calmed him down that he followed.

[53] The supervisor gave him the POCA forms which she told the complainant to fill out. He told the supervisor that he did not want the appellant to touch his money. He wanted to count it. The supervisor told him that the appellant was required to count the money in his (the complainant's) presence. The complainant said many things but he did not listen. His focus was on counting the money, which amounted to US$16,000.00. They were all $100.00 notes.

[54] He asked the complainant to verify the source of the money. The complainant pulled his "chair in" and told him to take $500.00 "and mek mi gwaan". He warned the complainant and told him that he was bribing a customs officer and he could be "locked up for this".

[55] He denied asking the complainant for anything or for money for the supervisor or himself. He testified that the complainant said :

"How you a move like you a nuh waa in de street yout?"

[56] The complainant then pulled in his chair, went to the supervisor's desk and spoke to her. He returned to the appellant's desk and gave him a piece of paper and explained that he had taken US$16,000.00 from his annuity of $US50,000.00 cheque. The appellant examined the paper. The complainant asked him if he were to take away all his money, how he would survive because he did not have any money for hotel, taxi fare and for spending. The appellant told him to speak to the supervisor. He spoke to her and she instructed the appellant to give him five hundred dollars "to offset his expenses".

[57] The appellant took the paper and the C5 form to the supervisor and she told him that the documents made her "comfortable" about releasing the sums to the complainant. She instructed him to copy the documents, fill out, the POCA forms and return the money to the complainant. He went and copied the documents.

[58] He returned, filled out the form and asked the complainant to sign. The complainant signed the form and was given a verbal warning by the supervisor who told him that if he travelled again and was found in breach of the Customs Act, the funds would be detained. The complainant took up his bag and his money and left. Upon exiting the room he said, "mi wi buk you a road".

[59] The appellant denied ever telling the complainant that "we can talk yuh nuh" or that there was any conversation in which the complainant said: "After all that paper work". He denied telling the complainant not to "worry about it". It was his evidence that at that juncture no paper work was done. He denied soliciting a higher sum for the

supervisor. He denied having had any conversation in which he requested US$700.00 and the complainant telling him to take US$2,000.00.

[60] The appellant explained that the supervisor had only left her desk to go for the forms at the point in time they arrived at her office.

Submissions

[61] Four grounds were argued in relation to conviction and one in relation to sentence.

Ground 1 - The evidence adduced by the prosecution was insufficient to establish the offence charged.

[62] Ground 1 was not argued. Mr Knight QC opined that that ground was subsumed in the other submissions.

Ground 2 - The sentence imposed was manifestly excessive.

The appellant's submissions

[63] Ground 2 was argued by Mr Able Don Foote. He contended that the sentence imposed by the parish judge was manifestly excessive. He postulated that it was unreasonable to have imposed a custodial sentence without the option of a fine. Counsel submitted that the parish judge erred in principle in imposing a custodial sentence on the appellant, notwithstanding his hitherto impeccable character about which evidence also emanated on the prosecution's case and the favourable social enquiry report. Consideration ought also to have been given to the fact that he was a first time offender and that his mother was an amputee.

The learned parish judge, he argued, failed to heed the overarching principle that a sentence of imprisonment ought to be the last resort. He cited the cases, **Christopher Brown v R** [2014] JMCA Crim 5 and **Dwayne Strachan v R** [2016] JMCA Crim 16.

The Crown's response

[64] Crown Counsel pointed to section 15 of the Corruption (Prevention) Act which provides that a first offender can be fined up to $1,000,000.00 or to a term of imprisonment not exceeding two years or both. She submitted that the sentence imposed by the learned parish judge cannot be considered manifestly excessive having regard to the circumstances. She relied on **Meisha Clement v R** [2016] JMCA Crim 26 and concluded that the learned parish judge considered all the circumstances before she concluded that a custodial sentence was warranted. According to counsel, she demonstrated her appreciation of the principles.

Ground 3 - The learned Trial Judge fell into error when she failed to uphold the submission of No case to answer.

The appellant's submissions

[65] Mr Knight posited that the learned trial judge ought to have upheld the no case submission on the second limb of Lord Parker's Practice Direction because the evidence adduced by the prosecution was manifestly unreliable and no jury properly directed could safely convict upon it. The case, he said, should have been withdrawn from the jury and a verdict of acquittal entered. He directed the court's attention to the Privy Council case, **Wilbert Daley v The Queen** PC No 33 of 1992, **R v Curtis Irving** (1975) 13 JLR 139 and **R v Collin Shippey** [1981] 2 All ER 1060.

The Crown's response

[66] Mrs Natiesha Fairclough-Hylton, for the Crown, however argued that there was sufficient evidence to ground the offence that the appellant corruptly solicited the sum of US$1,400.00 from the complainant to do an act in the performance of his public function. She also contended that there was sufficient evidence on which the learned parish judge could have found that the appellant intentionally and corruptly accepted the sum of US$2000.00 from the complainant. She directed the court's attention to the following conversations which she postulated clearly demonstrated that the Crown had proven that the appellant intentionally and corruptly solicited the said sum.

1. The appellant told him that they could "talk" and he was not to worry about the paper work which had been done.

2. The complainant told him to take US$500.00;

3. His response that the US$500.00 was too small because the supervisor also needed some;

4. His question as to why an offer of US$700.00 each could not be made and as a result he told him to take US$2000.00

She relied on the case **Dewayne Williams v R** [2011] JMCA Crim 17 in support of her contention.

[67] She also relied on the complainant's evidence that he felt happy when the appellant told him that they could "talk" as he understood the appellant to mean they could negotiate and that it was the complainant's evidence that he felt that he would not have been able to leave without the appellant "getting the money".

[68] She submitted that evidence as to the purpose of the money was before the learned parish judge. In further support of her contention, Crown Counsel submitted that the complainant had been told that the money would have been confiscated but it was never confiscated.

[69] In reliance on Kevin Carter's evidence, she submitted that the fact that the appellant returned money on his supervisor's instructions, indicates that he was doing an act in the performance of his public function.

[70] Counsel posited that the main issue that arose in this case was that of credibility. The learned parish judge, she submitted, dealt adequately with the issue of credibility and she outlined her reasons for accepting the complainant's evidence. She referred to the parish judge's finding at page 110 that:

> " [T]he words 'we can talk you know', constituted an offer made deliberately from Mr. Shaw to the complainant, Mr Blackwood, with the intention that they should enter into negotiations, which was corrupt in nature."

Counsel also relied on the parish judge's statement at page 110 of her reasons that:

> "I had the opportunity of observing the demeanour of all the witnesses who gave evidence at this trial, particularly the complainant and the accused and I will bring this to bear in my assessment of their credibility."

And paragraph 15, that:

> "...I find that Mr Blackwood's account was more credible than that of the appellant's. I say that having considered all the evidence in the case and the character of both the complainant and the accused; I paid keen attention to the demeanour of both. Mr Blackwood I find was forthright and did not seek to disguise or hide anything from the court."

Counsel submitted that issues of credibility are to be decided by the tribunal of fact. She also relied on Brooks JA's statement in **Everette Rodney v R** [2013] JMCA Crim 1.

[71] In respect of ground 3, Crown Counsel posited that the learned parish judge was correct in not upholding the no case submission as there was clear evidence from the complainant that the appellant had told him, "[w]e can talk yuh know". Those words were construed as the appellant indicating to the complainant that they could have discussions about the return of the seized money, which action would have been corrupt. The Crown having led evidence to prove the ingredients of the offences charged, the learned parish judge was correct in her finding that the elements of the offence were made out.

[72] It was Crown Counsel's submission that although the complainant told lies, his evidence was not so discredited that he could not be believed. The learned parish judge had to decide who to believe and the state of the evidence was not such that she should not have called upon the appellant to answer. The evidence was not rendered so manifestly unreliable and incapable of belief. The issues of credibility that arose were for the learned parish judge's jury mind and she dealt with those issues and indicated why she found the facts as she did.

Ground 4 - The Learned Trial Judge failed to properly assess the evidence of the Complainant in circumstances where he was the sole witness capable of establishing the ingredients of the of the offence and his offence and his evidence was substantially discredited by admitted untruths as to render the same manifestly unreliable.

Ground 4(a) - The Learned Trial Judge failed to take into consideration in assessing Mr, Blackwood's evidence the cumulative effect of the several untruths upon his veracity.

[73] Mr Knight argued, that the complainant's evidence was riddled with admitted untruths in relation to: the completion of the required customs form ; the accompanied luggage; the amount of money he had in the attaché case; whether or not he was carrying electronics; and his oral answers to the officer.

Learned Queen's Counsel relied on **R v Curtis Irving** [1975] 13 JLR 139 and **Colin Shippey.**

[74] Learned Queen's Counsel submitted that the learned parish judge merely "looked at each untruth" and concluded that none went to the root of the charges, instead of considering the cumulative effect of the several untruths, which he submitted undermined the complainant's credibility being the witness as to the fact. Queen's Counsel submitted that the complainant was "a proven teller of false tales" yet the parish judge accepted his evidence over that of the appellant. Mr Knight referred the court to the following cases from this court: **Harry Daley v R** [2013] JMCA Crim 14, **Andrew Stewart v R** [2015 JMCA Crim 4 and **Patrick Williams v R** [2016] JMCA Crim 22.

The Crown's response

[75] According to Mrs Fairclough Hylton, the complainant's evidence was not riddled with untruths. In giving his evidence, he did not seek to speak untruth as to what transpired at the material time at the airport. During the trial, he was not caught in any untruth. There was no inconsistency between his evidence and statement to the police. The fact that he did not speak the truth to the appellant, she argued, does not automatically mean that he cannot be accepted as a witness of truth at the trial.

[76] The learned parish judge, she submitted, identified and adequately assessed each lie the complainant told and she warned herself of the need to approach his evidence with caution in the circumstances.

Ground 5 - The Learned Trial Judge erred in rejecting the Defendant's evidence considering the totality of evidence before her rendering the verdict unreasonable and unsupportable having regard to the evidence.

[77] Mr Foote, in arguing this ground, contended that the parish judge's rejection of the appellant's evidence was unreasonable because his testimony was uncontradicted, consistent and was supported in many respects by the witnesses for the prosecution. His evidence was reasonable and probable and ought to have cast doubt on the complainant's evidence. The appellant, counsel argued, was therefore entitled to a verdict of acquittal in his favour. For that proposition counsel directed the court's attention to the cases **Harry Daley v R**; **Hardy v Gillette** 1976 VR 392 and **Patrick Williams v R**.

[78] Mr Foote pointed out that the complainant, the principal witness, was a self confessed liar whereas the appellant's evidence was unshaken. The supervisor, the Crown's witness, who was in the room, supported the appellant's case but the learned parish judge regarded her as a witness for the defence. The parish judge, counsel submitted, failed to highlight the discrepancies and inconsistencies in the complainant's evidence. It was counsel's submission that the parish judge's rejection of the appellant's evidence in light of the supervisor's evidence was unreasonable. He relied on the case, **Sherwood Simpson v R** [2017] JMCA Crim 37. He also referred us to Anderson J's statement in the Australian case **Hardie v Gillette** [1976] VicRp 36, that:

> "On general principles, where uncontradicted evidence, which is inherently reasonable, probable, and conclusive of the matter, has been given, the court is bound to accept it. It is unnecessary to examine the many cases to that effect which are in the reports, and it is sufficient merely to refer to some of them…There is the qualification, of course, that no judge or tribunal is bound to accept evidence which is in itself inherently improbable and unreasonable which is hesitating, shuffling, inconclusive and unconvincing."

Counsel also referred the court to the case of **Shyan Walters v Ingrid Vickroy Bernard** [2014] JMSC CIV. 169 in which Batts J cited with approval, Anderson J's dicta.

Ground 5(a) - The learned parish judge failed to treat Mr Blackwood as an accomplice; failed to warn herself of the dangers of convicting on his uncorroborated evidence.

[79] Mr Foote postulated that by virtue of section 14(2) of the Corruption Prevention Act, it is an offence to offer money. The complainant, having offered the appellant money, transformed himself into a criminal. Counsel submitted that it was unreasonable to convict on the uncorroborated evidence of an accomplice. For that submission, he

referred the court to the Privy Council case from the Supreme Court of Mauritius of **DPP v Dharmarjen Sabapathee** Privy Council Appeal No 29 of 1966. The learned parish judge, he submitted, ought to have warned herself as to the danger of convicting on the uncorroborated evidence of an accomplice. Counsel also referred the court to the cases **R v Cassells** (1965) 8 WIR 270 and **R v RM for St Andrew ex Parte Erwin Walker** (unreported) Supreme Court of Judicature, Jamaica, Suit No M63/1980, judgment delivered 16 February 1981.

[80] Mrs Fairclough-Hylton however countered learned counsel's argument by asserting that the learned parish judge was the fact finder and it was her duty, having assessed all the evidence, to decide who and what she believed and her reason for not believing the appellant's account.

[81] It was her further submission that, in all the circumstances, the complainant lacked the mens rea necessary for an accomplice because at the point the offer was made, he was vulnerable and powerless. The appellant took the money. She submitted that the learned parish judge's warning to herself that she must approach the evidence with caution because of the complainant's lies, was sufficient.

Mr Knight's reply

[82] In relying on the case **Everett Rodney** v R [2013] JMCA Crim 1, learned Queen's Counsel contended that the parish judge either did not apply her mind to the principles or that her application was wrong. This court therefore has the jurisdiction to overturn her verdict. He drew our attention to **R v Beverly Champagnie,**

Ransford Taylor and Trevor Bailey (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 22, 23 and 24/1980, judgment delivered 30 September 1983.

[83] Queen's Counsel argued that the complainant was the prosecution's witness. The parish judge was therefore obliged to warn herself that the complainant's evidence was uncorroborated. She should have warned herself about the danger of convicting on such evidence especially in light of the fact that the complainant was a witness with an interest to serve. Not only had he an interest to serve, on his evidence he was a confessed liar. Had the parish judge, directed her herself to the danger of convicting on the uncorroborated evidence of an accomplice, the court could have been satisfied that her directions had reached the required standard.

Law/analysis

Grounds 1 and 3

[84] Grounds 1 and 3 will be dealt with together. The crux of both grounds 1 and 3 is whether there was sufficient evidence before the learned judge to establish the charge. The test for determining whether a prima facie case has been established against an accused is that enunciated by Lord Lane CJ in **R v Galbraith** [1981] 1 WLR 1039 at page 1042:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the

> prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case, (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury....
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[85] As submitted by Mrs Fairclough-Hylton, on the Crown's evidence, the first limb of the test enunciated in **Galbraith** was satisfied. The question is whether the second was. The complainant was a self confessed liar but was his evidence rendered so manifestly unreliable that it was incapable of belief.

[86] Although the complainant lied repeatedly, it was, nevertheless, within the learned parish judge's province whether to believe the complainant's evidence that the appellant told him, "we can talk yuh nuh" and his question if the complainant could not offer $700.00. It was also within her purview to have accepted the complainant's evidence that he gave the complainant the amount he said he did.

Those assertions required rebuttal by the appellant.

Grounds 1 and 3 therefore fail.

Was the evidence properly assessed?

[87] Grounds 4, 4a, 4b and 5a will be dealt with together as the pith of the complaints registered by those grounds is essentially whether the learned parish judge properly assessed the evidence. The determination of credibility is a sacrosanct right of the finder of fact. This court will therefore only interfere if it is shown that, "the verdict is so against the evidence as to be unreasonable and insupportable". See **R v Joseph Lao** (1973) 12 JLR 1238. Or, put another way, the learned parish judge was palpably wrong.

[88] The learned parish judge found the complainant's account to be more credible than the appellant's. The learned parish judge noted that evidence was adduced as to the appellant's good character whereas the complainant admitted to lying on a number of occasions. She however opined that:

> "In the final analysis, none of the falsehoods alleged or admitted , is of such significance, that it undermines the complainant's credibility and lead me to conclude that I cannot believe his evidence."

[89] She concluded that, "despite his [the appellant's] impeccable character" he "was less forthright in the manner in which he gave his testimony". She proffered the following reasons for her conclusion:

I) Their demeanour.

II) The forthrightness with which the complainant testified.

III) The appellant's lack of forthrightness in responding to the question.

IV) His recounting of the evidence to himself before he answered which gave the impression that he had rehearsed the evidence and wanted to ensure that he "got it right".

[90] Although the learned parish judge had the advantage of having seen and heard the witnesses, the evidence as well as the directions must be considered in its totality. The requirement to do so was emphasised by the Privy Council in **Uriah Brown v The Queen** [2005] UKPC 18.

[91] The parish judge's observation that on "important aspects of the evidence" the appellant was "halting" and responded at times by "recounting the evidence to himself before he answered "thus conveying the impression that he had rehearsed the evidence and wanted to ensure that he got it right", is not ,without more, conclusive that he was not being forthright.

[92] The recounting of the evidence before answering and the need to "ensure that he got it right" is not only open to the sole conclusion that the evidence is contrived. Indeed, another reasonable view could be taken that an accused who faces conviction might want to ensure that his answers are accurate.

[93] His evidence ought to have been judged on the totality of the evidence more so in light of evidence on the Crown's case, which was more supportive of the appellant's and the absence of other evidence supportive of the complainant's version.

The number of pieces of luggage

[94] The learned parish judge accepted the complainant's evidence that he approached the appellant with the four pieces of luggage; that he was wearing his jacket and there was no attempt to conceal the attaché case with his jacket. The learned parish judge found that nothing turned on whether the money was contained in one or two envelopes.

[95] Scrutiny of the evidence was crucial in light of the diametrically opposed versions. The complainant's failure to declare that he was in possession of more than that which he declared and that he was in possession of a cellular phone, could reasonably be indicative that he did not wish that the money should be discovered. Placed in two envelopes, the fact that he was carrying a large amount of money, might not have been readily identified. Placed however in one envelope, as described by the complainant, the envelope would have bulged and attention might have been more readily drawn to it.

[96] The learned parish judge's rejection of the appellant's evidence that the attaché case was concealed by the complainant's jacket, and her acceptance of the complainant's evidence that he was wearing it, without analysis, was unreasonable. It was the complainant's evidence that he only declared having three pieces of

accompanied luggage. Although he disagreed that his jacket was covering the attaché case, he admitted that it was the appellant who pointed to the attaché case and instructed him to put it on the table. In those circumstances, a reasonable doubt was certainly raised as to whether the complainant, a self confessed liar, had in fact attempted to conceal the attaché case. In the circumstances, careful evaluation of the complainant's evidence in this regard was required.

Was there evidence of motive?

The complainant's behaviour

[97] The learned parish judge felt that there was no evidence of malice, ill will or spite on the part of the complainant and she disbelieved the appellant's evidence that the complainant conducted himself in "the loud and boisterous manner he described". She rejected the appellant's evidence that it was the complainant who offered the appellant a bribe and that he was warned by the appellant. She questioned the reason "nothing was done about it".

[98] In rejecting the appellant's testimony that the complainant said, "how you a move like you a nuh waa in the street yout", pulled his chair towards the supervisor's desk and began talking to her, the parish judge opined that the supervisor was "in the room throughout" yet she mentioned nothing about that in her evidence. The fact that the supervisor did not state all that the complainant actually said and did, does not discredit the appellant's evidence. It was the supervisor's evidence that he was angry and behaving boisterously and had to be placated.

[99] The learned parish judge also rejected the appellant's evidence that, "upon leaving the room", the complainant told him that he would "buk him a road". In rejecting that evidence the parish judge opined that:

> "...To my mind, this would be a significant piece of evidence on the defence's case, as this would suggest malice and ill-will on the part of Mr Blackwood towards Mr Shaw in making these allegations; thereby providing a possible motive. I reject this bit of evidence and find it to be a recent concoction
>
> **I find no evidence of malice, ill-will or spite on the part of Mr Blackwood.** I do not believe the complainant fabricated this account, just to get back at Mr Shaw. After all, on Mr Shaw's account, why would the complainant have done this if he had left the airport that day with sixteen thousand dollars ($16,000)? This simply does not ring true." (Emphasis added)

[100] The learned parish judge's finding that there was "no evidence of malice, ill-will or spite" on the part of the complainant belies the evidence. As pointed out by Queen's counsel, on the prosecution's case, Mrs Wright-Douglas' evidence was that the complainant was "very angry" and "was cursing" in circumstances where he would have unreasonably objected to being searched having falsely declared twice in writing and once verbally.

[101] Indeed, the complainant accepted that he was annoyed at being searched. Counsel posed the following question to the complainant:

> "While you were in your upset state you said to him 'of all the time I have been travelling to Jamaica it is the first time I have been treated this way'."

His answer was, "that is true".

[102] His answer to the suggestion that another customs officer near where he was being processed told him to calm down and explained that it was standard procedure, was not an outright denial. He said:

> "I don't remember that. I don't think it happened anyway."

[103] On Ms Wright-Douglas' evidence, the umbrage which the complaint took at being "treated like a criminal" could have been viewed as motive.

[104] Another reasonable answer to the parish judge's rhetorical question as to why the complainant would have lied, having "left the airport that day with sixteen thousand dollars ($16,000)" could be found on both the appellant's and the Crown's case. The evidence was that he was very annoyed or upset at being searched. So upset was he that attempts were made to placate him by the supervisor, the prosecution's witness. The learned parish judge was therefore not without a possible reason. Her finding that it does not "ring true" is unsupported on a balanced assessment of the evidence.

[105] Having rejected the appellant's evidence, the learned parish judge warned herself that her disbelief of the appellant's version ought not to have been the end of the matter and asserted the need to return to the prosecution's case. She however failed to do so. Her further statement was that the "case had been proved on both information numbers to her "satisfaction" which made her "sure of the [appellant's] guilt on both". That statement was not sufficient in light of the conflict between the complainant's evidence and that of the supervisor's, which was supportive of the

appellant's evidence in respect of the complainant's behaviour whilst being searched. The learned judge ought to have demonstrated how she resolved the conflict.

[106] The failure of the learned parish judge to provide reasons is not necessarily a basis for disturbing her finding if an examination of the record reveals that there was ample evidence to support her conclusion. Her rejection of the appellant's evidence in light of the supervisor's evidence and the complainant's evidence that he was displeased at being searched, without more, was unreasonable.

The judge's treatment of the supervisor's evidence

[107] In assessing the evidence, the learned parish judge vacillated in her finding as to whether the supervisor was alert as to what was transpiring between the appellant and the complainant. She said:

> "I note with interest that Mrs Wright-Douglas on her evidence, curiously, **she being the supervisor, seemed not to have been paying much attention to what was happening between Mr. Shaw and Mr. Blackwood**. On her testimony, she asked Mr. Blackwood for proof of where he got the funds. She testified that he said he had withdrawn Fifty Thousand Dollars ($50,000.00) from his annuity account and the money was the balance. She did not ask at that point whether he had any documents to substantiate what he was saying. Her testimony is that she could hear Mr. Shaw whilst counting the money asking for proof. **She said Mr. Blackwood asked her what she meant by proof and she explained to him, yet even at that time, on her evidence, he did not present any document although he would have had the annuity statement.**
>
> It was only after Mr. Shaw was writing up the forms that she claims he said, "Supe that is what he give me" and it is only then that she was shown the annuity statement.

> Interestingly, on her evidence, as supervisor, she without more, instructed Mr. Shaw to release the funds to Mr. Blackwood with a verbal warning. **On Mr. Blackwood's evidence which I accept, Mr Shaw had indicated to the complainant that the annuity statement by itself was not sufficient.** One wonders therefore what had really caused turn of events. I do not accept Mrs. Wright-Douglas' evidence in this regard." (Emphasis supplied)

[108] The fact that the complainant waited until the money was counted and the forms completed to declare that he had proof, is not a reason to impugn the supervisor's credibility. He had been duly advised by the supervisor as to what constituted proof. It was therefore his responsibility to declare that he was in possession of proof. His failure to do so, having been advised, is supportive of the supervisor's and the appellant's evidence that he was "upset" and was uncooperative.

[109] Indeed, it was the complainant's evidence that after he was taken to the room where he saw the supervisor, she told him that the money would be confiscated until he returned with proof. At that point he could have told her that he had proof but he did not. He told them he had no money and allowed them to complete the paper work which was necessary to allow him US$500.00. He also caused them to commence the necessary paper work to detain the money before he provided the proof.

[110] On the prosecution's case, a pertinent question is why he failed to disclose the fact that he was in possession of the annuity statement earlier? It is apparent that he was well aware that proof of the source of the cash might have been required, because he travelled with it.

[111] The learned parish judge failed to advert to the evidence of Mr Kevin Carter, who corroborated the supervisor's evidence that she was imbued with the discretion to return cash which was not declared if proof of its source was provided. There is no evidence on the Crown's case that the complainant was required to provide more than that which he presented.

[112] The parish judge's observation that Mrs Wright-Douglas seemed not to have been paying much attention to what was happening between the appellant and the complainant also belies the evidence. It is therefore necessary to scrutinise her evidence in respect of the learned parish judge's observation although this scrutiny will result in repetition.

[113] On Mrs Wright Douglas' evidence, from the point in time the appellant took the complainant to her office she observed what was happening. She testified that he was angry. She told of his angry utterances and his behaviour. She witnessed the appellant instructing him to empty his pocket and he told them that he was Brown Sugar's producer.

[114] She witnessed the appellant offering him a seat in the front of her office and instructing him to take out all currencies. She described the distance. The currencies were checked in her presence. Her desk was estimated by the court to have been 5 feet from the appellant's.

[115] There was a partition of approximately 4 feet between the desks but at the point in time at which the appellant checked the currencies, her chair was at the end of the

partition. During the counting of the money, she pulled her chair to her desk because there was something which needed to be done on the computer.

[116] She also asked the complainant if he had declared the money and she told him that the failure to declare money over US$10,000.00 was a breach of the Customs Act. She heard the appellant ask him for proof of its acquisition before and when he began counting. She too asked him for proof. He told her that he was a businessman and he had withdrawn US$50,000.00 from his annuity account.

[117] She heard the appellant whilst he was counting the money, asking the complaint for proof. She testified further that the complainant asked her what she meant by proof and she told him.

[118] On her evidence, she only left to get certain documents which were required to be completed in relation to the currency. She consequently stepped out of her office to go to the photocopy machine. The documents were the POCA forms A and B. She gave the forms to the appellant and returned to her seat. She was seated at her desk when the appellant completed counting the money.

[119] After the money was counted, she again asked the complainant to provide proof as to the origin of the money. The complainant told her he had no more money. It was she who offered him the US$500.00 from the US$16,000.00 for taxi and hotel.

[120] Whilst the complainant was completing the forms she was seated at her desk. It was her evidence that although she was not standing over him she expected he was

writing. The appellant took the piece of paper to her and told her that the complainant had given it to him. That document was the customs declaration C5 form which was tendered into evidence as exhibit 2.

[121] After examining the document she instructed the appellant to photocopy it. The appellant went around the section and returned with the document. She instructed the appellant to release the money to the complainant and verbally warned the complainant. Her evidence was that the complainant "packed up his stuff and stepped through the door".

[122] On that evidence it could not reasonably be concluded "that Mrs Wright-Douglas seemed not to have been paying much attention". Moreover that observation is also contradictious of the complainant's evidence which the learned parish judge had earlier referred to, that:

> "Mr Blackwood was of the view that given the close proximity of the supervisor to them, she could have heard all that was being said."

[123] Of significance is that in assessing the evidence the learned parish judge failed to advert to the supervisor's evidence that she had never seen the appellant acting in an unprofessional or corrupt manner. Her evidence presented a serious conflict on the prosecution's case that the appellant corruptly solicited money from the complainant. That critical issue was not resolved by the learned parish judge. It certainly was necessary that she demonstrated how that matter was resolved particularly in light of

the complainant's evidence that "obviously she heard everything that was going on" and especially in circumstances where the complainant is a self confessed liar.

[124] The learned parish judge also seemed to have vacillated in her conclusion that "Ms Wright-Douglas' seemed not to have been paying much attention" to what transpired at the material time. Her reason for rejecting the appellant's evidence that the complainant:

i) was loud and boisterous;

ii) offered to bribe the appellant and the appellant warned him;

iii) told the accused, "How you a move like you a nuh waa in the street yout";

iv) pulled his chair towards the supervisor's desk;

v) attempted to bribe the appellant; and

vi) was warned by the appellant that he could be arrested,

was that Mrs Wright-Douglas would have been present in the room "throughout".

It is helpful to quote the learned parish judge. She said:

> "**I note that the supervisor Mrs Wright-Douglas was in the room throughout**, yet she mentioned nothing about this in her evidence." (Emphasis supplied)

[125] The logical interpretation of that assertion is that the appellant was disingenuous because Mrs Wright-Douglas who was present throughout would have seen and heard. That comment conflicts with the parish judge's earlier observation that Mrs Wright-

Douglas seemed not to have been paying attention. It also flies in the face of Mrs Wright-Douglas' evidence that the appellant was very angry. He was "cursing like 'why are you harassing me?' 'I live in Jamaica. I am Jamaican'." And her further evidence of having to calm him. Whereas on the evidence it was not correct to find that she was not paying attention, it was also not correct to find that she would have seen and heard all that transpired between the appellant and the complainant.

The circumstances surrounding the US$500,00

[126] On the appellant's and the supervisor's evidence, the only mention of US $500.00 was in respect of giving the complainant US$500.00 out of the cash on humanitarian grounds. The necessary POCA forms to facilitate assisting the complainant with the US$500.00 were completed and signed by the complainant.

[127] The learned parish judge however accepted the complainant's version that after the paper work was completed, the appellant told him, "we can talk yuh know" and that the complainant told him to take US$500.00. There was no analysis of the appellant's evidence in respect of US$500.00.

[128] In rejecting the appellant's evidence that the complainant attempted to bribe him, the learned parish judge said:

> "Why was nothing done about this?"

[129] Something was in fact done. On the defence case, he was warned by the appellant that he could be arrested. The Customs Act confers upon a customs officer the powers of a constable. Section 3 provides:

> "For the purpose of carrying out the provision of the Customs laws all officers shall have the same powers, authorities and the privileges as are given by law to officers of the Constabulary Force."

By virtue of the Constabulary Force Act, he (the appellant) was empowered with the discretion to warn the complainant.

Conclusion

[130] Credibility is at the heart of this matter. Whether the complainant was motivated by malice was a critical issue. The learned parish judge however failed to reconcile the conflict between the complainant's evidence and the supervisor's as to whether the complainant was irate and behaved boisterously at being searched. Her finding that there was no evidence of malice or ill will on the complainant's part, hence no motive, was therefore arrived at without proper consideration of the totality of the evidence. This failure to address that conflict was therefore a serious omission amounting to crucial misdirection.

[131] The parish judge further failed to address the very critical conflict in the evidence between the complainant and the supervisor on the central issue; that is, the solicitation. In the circumstances therefore, although she had the advantage of having seemed and heard the witnesses, the parish judge failed to properly utilise that advantage.

[132] Those failures, we concluded, were sufficient to render the conviction unsafe. Grounds 4,4(a), 4(b) and 5, in light of the above, succeed. It was therefore unnecessary to consider the additional ground. We consequently made the orders set out at paragraph [4].