[2026] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA

PARISH COURT CRIMINAL APPEAL NO COA2022PCCR00006

DAMION BELL v R

Patrick Peterkin for the appellant

Jeremy Taylor KC and Ms Loriann Tugwell for the Crown

8 March 2023 and 27 March 2026

Criminal law – Parish Court procedure – Grievous sexual assault – Indecent assault – Verdict of guilty of indecent assault returned on an information charging grievous sexual assault – Whether conviction for indecent assault wrong in law – Whether guilty verdict for indecent assault occasioned any unfairness to the appellant – Whether, in the circumstances, a substantial miscarriage of justice had actually occurred – Whether a new trial should be ordered – Sexual Offences Act, sections 4, 6, 13 and 37 – Judicature (Parish Courts) Act, sections 296, 297 and 305 – Justices of the Peace Jurisdiction Act, sections 2 and 9 – Judicature (Appellate Jurisdiction) Act, section 14 – Constitution of Jamaica, section 16

BROWN JA

[1] The appellant was convicted in the Corporate Area Parish Court (Criminal Division) of the offence of indecent assault, on an information which charged him with the offence of grievous sexual assault ('GSA'). He was arraigned on 19 October 2016. However, it appears that evidence was first taken on 3 March 2017, and the trial continued on various dates, culminating with his sentence on 7 June 2018. On that date, the learned judge sentenced the appellant to 12 months' imprisonment but suspended the sentence for 24 months.

[2] The appellant, dissatisfied with the verdict and sentence, filed a notice of appeal on 18 June 2018 in the Corporate Area Parish Court (Criminal Division) that contained two grounds of appeal. That original notice and grounds of appeal was subsequently superseded by an amended notice and grounds of appeal that was filed in this court on 6 March 2023.

[3] The matter duly came before us for hearing on 8 March 2023. After hearing the arguments, we made the following orders:

1. The appeal is allowed.
2. The conviction is quashed and the sentence is set aside.
3. Judgment and verdict of acquittal is entered.

At the time of making the orders, we committed to putting our reasons in writing. Our reasons are, of necessity, preceded by a brief factual background.

Background

(a) Case for the prosecution

[4] The complainant, RG, who was 12 years old at the time of the incident, was living with her mother and the appellant, her stepfather. When the case came on for trial, RG's mother and the appellant had become husband and wife. The parents of the appellant also shared occupancy of the dwelling house with the couple and RG. RG had her own bedroom. This bedroom did not have a door but was separated from the rest of the house by a curtain.

[5] RG testified that on a day in December 2014, she was involved in an altercation with a male student at school, which left her with an injury to one of her eyes. That same night, after retiring to bed, she woke up crying, apparently from pain associated with the injury. She saw the appellant in her room. He enquired of her if she wanted medication. She said no. The appellant left RG's bedroom, and she went back to sleep. RG awoke a

second time, on this occasion, to feel the appellant's finger inside her vagina. The appellant was then sitting on the edge of her bed, about in the middle.

[6] The following morning, while RG's mother was transporting RG to school RG told her what transpired the night before. RG's mother it appears, straight away, returned to the dwelling and confronted the appellant with RG's allegations. The appellant denied the allegations. However, that night, while RG was in her bedroom, her mother and the appellant entered. RG's mother told RG that the appellant wished to apologise to her. The appellant then said it was the devil that made him do it. RG's mother then asked RG if she forgave the appellant. That enquiry elicited no response.

[7] However, the issue apparently remained unresolved in RG's mind as, about two days later, RG attempted to report the matter to her father via a telephone call. That effort was thwarted by something RG's mother said to RG, while RG was on the telephone. Sometime after these events RG went to reside with her father. It was after this new living arrangement that RG apprised her father of the event of December 2014, who then involved the police.

(b) Case for the defence

[8] The appellant made an unsworn statement, the entirety of which is missing from the record of proceedings. In her findings of fact, however, the learned judge made several references to the unsworn statement. From those references, we gleaned that the appellant denied the allegations and asserted that he grew up in a Christian home. He also stated that he was subjected to constant harassment from RG's father, ever since his relationship with RG's mother came to RG's father's knowledge.

[9] The appellant's denial was supported by RG's mother. She denied that RG made any report to her about being sexually assaulted by the appellant. She stated that if the appellant had told her something, she would have believed him because he was honest. On the other hand, in cross-examination, she also said that if RG had told her something, she would have believed her.

Grounds of appeal

[10] Below are the two original grounds of appeal filed at the Corporate Area Parish Court (Criminal Division) on 18 June 2018:

> "1. That the decision of the Learned Parish Judge was against the weight of the evidence.
>
> 2. That the evidence led by the Crown was not sufficient to warrant a conviction."

[11] On 6 March 2023, the appellant filed an amended notice and grounds of appeal at this court and sought the court's permission to argue the following grounds:

> "i. The Learned trial Judge erred in law allowing [sic] the Crown to lead hearsay evidence of a recent complaint when the Crown had not intended to call the said person to give evidence of the recent complaint.
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> ii. the Learned Trial Judge erred by misquoting the evidence in her summing up.
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> iii. The Learned Trial Judge erred in law by neglecting parts of the evidence which do not support the singular charge in the circumstances where the quality of the evidence was admittedly weak and manifestly unreliable; and
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> iv. The Verdict is unreasonable having regard to the evidence."

The Crown's preliminary objection

[12] Before the amended notice of appeal was filed, together with amended grounds of appeal, the Crown, on 23 February 2023, filed what was described as a "preliminary objection". Two principal objections were raised. First, what may compendiously be described as procedural improprieties at the trial. Second, the paucity of the two original grounds of appeal, causing them to run afoul of section 297 of the Judicature (Parish Courts) Act ('JPCA'). We will discuss the objections in that order.

[13] The Crown, in their written submissions, made the following observations in relation to the trial conducted by the learned judge. Firstly, the information (the document containing the particulars of the offence) appeared to be at variance with the heading of the notes of evidence. That is, although both the notes of evidence and the front of the information recited the charge as GSA, "indecent assault" also appeared on the back of the information, but with a line drawn through "indecent assault". Secondly, while the notes of evidence, at the commencement, recorded the plea as not guilty (to GSA), the learned judge found the appellant guilty of indecent assault. Thirdly, there was a shadow of uncertainty over the verdict as it was unclear whether the learned judge returned that verdict as an alternative to GSA or if the appellant pleaded to the offence of indecent assault.

[14] The Crown regarded these observations as benign to innocuous for, they submitted that, in the general scheme of things, the appellant suffered no prejudice. That conclusion had three premises: (a) the elements of both offences are similar, resulting in no change in the evidence relied on by the prosecution; (b) both offences are triable on information within the learned judge's special statutory summary jurisdiction; and (c) the sentence for both offences is the same.

Discussion

[15] The Crown's classificatory conclusion of an absence of prejudice to the appellant was another way of saying the trial before the learned judge did not result in any unfairness to the appellant and, as a result, there was no actionable miscarriage of justice. The overarching issue, therefore, was whether the trial for GSA that ended in the return of a verdict of guilty for indecent assault occasioned any unfairness to the appellant.

[16] We will first dispose of the incidental objection concerning the striking out of the words "indecent assault" on the back of the information. The first general point is that the description of the offence on the back of an information, which, ideally, should be accurate, is immaterial insofar as informing the defendant of the charge that brought him before the court goes. That is, the substance of the particulars of the offence is required

to be stated on the front of the information. The summons which proceeds from the information, laid before the Justice of the Peace, requires only that it states, "shortly the matter of such information and complaint" (see section 2 of the Justices of the Peace Jurisdiction Act, referred to below as the JPJ Act). So that, by analogy with an indictment, the sufficiency of an information is to be judged by (i) a statement of the offence, and (ii) particulars giving reasonable information concerning the nature of the charge. In fact, there is no variance between what is contained on the front of the information and the description on its back. That the words "indecent assault" were struck out left only the words "grievous sexual assault", which accord with the description on the front of the information.

[17] And so, we come to the gravamen of the preliminary objection, the return of a verdict of guilty for indecent assault upon the information that charged GSA. The offence of GSA is a creature of section 4 of the Sexual Offences Act, 2009 ('the SOA'). The section contemplates the commission of this offence in circumstances where the offender violates the integrity of the body of the victim by (a) penetrating the vagina or anus with any body part other than the penis or an object manipulated by him or her; (b) placing his penis in the mouth of the victim; (c) placing his or her mouth on the vagina, vulva, penis or anus of the victim; (d) causing another person to do any of the acts listed at (a) to (c), all in circumstances where the victim cannot legally consent (under 16 years of age) or, without the consent of the victim and knowing that the victim does not consent or recklessly not caring whether the victim consents or not (see section 4 (1) (a), (b), (c), (d), (e), (f) and 4 (3) (a) and (b)).

[18] Consistent with the allegations in this appeal, the appellant was charged under section 4(1)(a) of the SOA, namely, penetrating RG's vagina with a body part other than his penis (his finger). By virtue of section 6(1)(b) of the SOA, the offence of GSA is triable in both the Parish Court and the Circuit Court. In the former, the trial is summary upon an information, and in the latter, ordinarily with a jury upon an indictment. This dichotomy is of some significance in relation to possible verdicts at the end of a trial for GSA.

[19] Where the trial for GSA takes place in the Circuit Court two alternative verdicts are returnable under section 37 of the SOA, upon the indictment, if the jury is not satisfied that the completed offence has been proved. The jury may then return a verdict either of an attempt to commit GSA or an indecent assault. The relevant portion of section 37 is extracted below:

> "If upon the trial of any indictment for … grievous sexual assault, the jury is satisfied that the defendant is not guilty of the offence charged in the indictment or of an attempt to commit the offence, the jury may acquit the defendant of the offence charged and find him guilty … of an indecent assault under section 13, and thereupon the defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for an offence under … section … 13."

Not only is the return of an alternative verdict limited to the competence of a jury, but there is also no necessity for either re-arraignment or the preferring of a new indictment or addition of another count. The defendant's liability to be punished as if he had been originally indicted for the alternate offence creates the fictional substitution of the original arraignment upon an equally fictional amendment of the old indictment.

[20] However, section 37 of the SOA does not extend the gift of these fictional procedural niceties to a defendant who is subjected to summary trial in the Parish Court. Additionally, section 6(1)(b), which confers jurisdiction upon the Parish Court. merely speaks to the penalty to which the defendant becomes liable upon summary conviction for GSA in this forum.

[21] Therefore, we must have resort to the JPJ Act for guidance on the appropriate procedural competences of the Parish Court. Section 9 of the JPJ Act specifically limits each information to one offence. The section reads, so far as is relevant:

> "… and every such complaint shall be for the matter of one complaint only, and not for two matters or complaint, and every such information shall be for one offence only, and not for two or more offences …"

The section contemplates the charging of one offence and one offence only, much the same way only one offence may be charged in a single count of an indictment. Admittedly, the information which charged the appellant correctly recited the particulars of one offence only (GSA) and, by so doing, foreclosed any argument of duplicity.

[22] The procedural propriety of the information containing one offence is legislatively protected from objections arising from any perceived defect in substance or form and any variance between the information and the evidence led at the trial. If those matters are raised at the trial, and it appears to the tribunal that the defendant has either been deceived or misled, the remedy is an adjournment to allow the defendant to meet the variance in the evidence: second proviso to section 2(1) of the JPJ Act. The extrapolation from this one offence requirement is this: without legislative authority, a trial commenced on information for one offence ought not, properly, to result in the conviction of a quite different offence, even if kindred in nature as contemplated by 37 of the SOA.

[23] What the preliminary objection spotlights, however, is not so much a variance between the information laid and the evidence but the complete abandonment of the charge laid in the information. That complete derailment of the trial was portended in the prefatory sentence of the learned judge's findings of fact. The first sentence reads, "Damian Bell, the accused, is tried on information for Indecent Assault". The learned judge then adverted to the appellant's plea of not guilty and the incidence of the burden and standard of proof. The learned judge continued along the wrong track with a definition of the offence of indecent assault, together with an adumbration of the constituent elements requiring proof. For present purposes, we do not make any pronouncements on the legal sufficiency of those statements of the law. It suffices to say that the leaned judge then discussed the evidence and ultimately declared:

> "I find that the accused intentionally put his finger in RG's vagina in circumstances that he knew she was underage and could not legally consent.
>
> In all the circumstances I find the prosecution has made out the elements of the offence and has discharged its burden to

> the requisite standard. Therefore, the accused is guilty of the offence of indecent assault."

[24] Indecent assault, as indicated above, is a discreet statutory offence under section 13 of the SOA. For ease of reference, section 13 is quoted below:

> "Any person who carries out an act of indecent assault on another person commits an offence and—
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> (a) on summary conviction in [Parish Court], is liable to imprisonment for a term not exceeding three years;
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> (b) on summary conviction in a Circuit Court, is liable to imprisonment for a term not exceeding fifteen years."

The SOA does not define "an act of indecent assault". However, an accepted definition, gleaned from the evidence to be elicited in proof of the offence is this, "… an assault, accompanied by circumstances of indecency …" (Archbold Pleading, Evidence & Practice in Criminal Cases 36th edition, at para. 2921).

[25] The circumstances of indecency were as multifaceted as the human imagination could conjure and so, before the passage of the SOA, would have included all the acts now categorized as amounting to the statutory offence of GSA. The legislative intention was clearly to separate acts of groping and fondling from the more intrusive acts of assault. So that, before the passage of the SOA in 2009, it was competent for a court to find a defendant guilty of indecent assault, based on the allegations that were before the learned judge.

[26] It is convenient to address at this time, the Crown's submission that the elements of the offences are similar. As we have just showed, prior to the promulgation of the SOA, the sweep of the offence of indecent assault was rather wide. However, the SOA contracted the reach of indecent assault by the introduction of the previously unknown offence of GSA. That contraction did not sweep away the similarity of the elements. However, it would be bad for the development of the jurisprudence to continue to charge and prosecute conduct now specifically categorised as GSA that was formerly classified

as indecent assault. The historical similarity of the elements of the offences cannot, therefore, supplant the new regime inaugurated by the SOA.

[27] Those legislative changes were promulgated approximately nine years before this trial took place before the learned judge. Therefore, although the learned judge devoted much space and expended appreciable judicial effort in defining the offence of indecent assault, her eventual arrival at a verdict of guilty to indecent assault did not demonstrate a sufficient familiarity with the near decade's old legislation. In short, once the learned judge accepted that the appellant had inserted his finger in RG's vagina, the only possible verdict was guilty of GSA.

[28] The learned judge's findings of fact did not embrace any indication that GSA was within her contemplation. The legislative incompetence to return an alternative verdict (on the information not charging that alternative offence) in that forum aside, the learned judge would have had to first find that the charge of GSA had not been proved and so return a verdict of not guilty for GSA.

[29] To return a verdict of guilty for another offence not charged in the information, two primary procedural hurdles would have had to be crossed. Firstly, absent the legislative authority to return a verdict for a lesser offence upon the information charging GSA, the prosecution would have been required to lay a new information charging indecent assault. Secondly, the appellant would have had to be re-arraigned. Patently, none of that was done. The appellant, therefore, did not know that he was at the risk of a finding of indecent assault on the information that charged him with GSA. That knowledge may well have dictated even a subtle change in strategy in mounting the appellant's defence.

[30] In **Martin v Pridgeon** 1 EL & EL 778, the defendant was convicted for drunkenness under one statute, while the charge preferred was being "drunk and guilty of riotous behaviour" under a quite different statute. The justices found only the drunkenness proved and proceeded to convict him under the other statute, which

required proof of drunkenness only. It was submitted that the conviction should be upheld by placing reliance on the statutory equivalent to the second proviso to section 2 of the JPJ Act, which disallows objection to an alleged defect in the information or variance between the information and the evidence (see para. [22] above). According to Compton J:

> "[Section 2 (1)] was framed to meet the case of a variance between the summons and the evidence adduced in support of it. But the appellant has been summoned for an offence under one Act, and convicted of another and different offence under another Act. The section in question does not permit that."

[31] The principle to be derived from **Martin v Pridgeon** is that in a summary trial it is not competent to convict a defendant for a wholly different offence from that which is laid in the information. It is therefore nothing to the point that here, the offence for which the appellant was convicted falls under the same statute, which distinguishes the present case from **Martin v Pridgeon**. Equally, the other factual distinction does not dilute the applicability of **Martin v Pridgeon**. In that case, the defendant was exposed to different punishment. Here, as the Crown correctly submitted, the penalty for both offences is a maximum three years' incarceration. The commanding principle is, as was succinctly stated by Campbell CJ, "He was convicted of a distinct statutory offence". The court went on to quash the conviction.

[32] Consequently, we did not regard the procedural missteps discussed above as mere irregularities that could be swept under the carpet. The cumulative impact of these irregularities was the undermining of the trial process itself and, carrying in its wake, the very appearance of a fair trial.

[33] What happened at the trial ran headlong into the principle that the accused should know the charges against him. Knowing the charge against him is an element of the fundamental right to a fair trial, enshrined in the Constitution at section 16 (6) (a). Section 16(6)(a) is extracted below:

> "(6) Every person charged with a criminal offence shall -
>
> (a) be informed as soon as is reasonably practicable, in a language which he understands, of the nature of the offence charged."

Subsequent appellate pronouncements have served to fortify the constitutional requirement to be informed of the charge. In **Dennis Thelwell v The Director of Public Prosecutions and the Attorney General** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 56/1998, judgment delivered 26 March 1999, Forte JA (as he then was) said, at page 20:

> "…the statutory summary jurisdiction of the [Parish Court Judge] extends to very serious offences which carry with them penalties not usually associated with the exercise of jurisdiction in a Petty Sessions Court. It is important therefore that the charges which are to be faced by an accused are clearly described, and put in writing in the information, which in my view, in these circumstances are akin to an indictment in cases triable on indictment."

In this case, the appellant was never informed that he was either charged with or being tried for the offence of indecent assault.

[34] Against the background of the preceding discussion, we considered how best to dispose of the appeal. Section 296 of the JPCA sets out the general powers of this court when dealing with appeals from the Parish Courts. Section 296(1) and (4), the JPCA are relevant to this appeal:

> "(1) On an appeal under section 293, the Court of Appeal may dismiss the appeal or may allow the appeal and quash the conviction, or may allow the appeal and order a new trial.
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> …
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> (4) The Court of Appeal may notwithstanding it is of the opinion that the point raised in the appeal might be decided in favour of the accused person, dismiss the appeal, if the Court considers that no substantial miscarriage of justice has actually occurred."

Section 296(1) and (4) of the JPCA empowers this court to: (a) dismiss the appeal; (b) allow the appeal and quash the conviction; (c) allow the appeal and order a new trial; and (d) dismiss the appeal although deciding the points raised in the appellant's favour, if no substantial miscarriage of justice actually occurred. We considered these options before making the orders set out at para. [3]. Our election to allow the appeal and quash the conviction, without ordering a new trial is explained below.

[35] The law requires that for summary offences being tried on information that the evidence and verdict be in accordance with the charge contained in the information, as we endeavoured to show earlier. In this case, the verdict was not in accordance with the charge in the information. This is not an error that can be cured at the appellate stage because no information was laid for the offence of indecent assault, based on the record of proceedings. An information for indecent assault would be required since in a summary trial before the Parish Court there is no provision to return an alternate verdict for the offence of GSA. Furthermore, laying a new information at this eleventh hour could not satisfy the constitutional requirement for the appellant to know what he is charged and being tried for. Against that background, we were not satisfied that no substantial miscarriage of justice actually occurred. As a result, we did not find this appeal to be amenable to the application of the proviso (section 296(4) of the JPCA).

[36] The compass of considerations on whether to apply the proviso also embraced section 305 of the JPCA. Section 305 of the JPCA enjoins this court not to reverse a conviction emanating from the Parish Court for errors or mistakes unless injustice was either caused or may be caused to the convicted person. Section 305 of the JPCA reads:

> "No judgment or order made, or conviction imposed, by a Judge of a Parish Court shall be reversed or quashed on appeal for any error or mistake in the form or substance of such judgment, order or conviction, unless the Court is of the opinion that such error or mistake has caused, or may have caused, or may cause injustice to the party against whom such judgment, order, or conviction has been given or made."

The injustice occasioned to the appellant by the return of a verdict of guilty to an offence for which he was not charged, arraigned or tried, in these circumstances, is palpable.

[37] So then, should a new trial be ordered? The legislature neither stipulated a test nor guiding principles for ordering a new trial. To that end, we will rely on the guidance provided by this court and the United Kingdom Privy Council, addressing the issue of a retrial in appeals from the Supreme Court, under the Judicature (Appellate Jurisdiction) Act ('JAJA'). Under section 14(2) of JAJA, this court may order a retrial if "the interests of justice so require" (see **Reid v R** (1978) 27 WIR 254).

[38] Applying **Reid v R**, Brooks JA (as he then was), in **Nerece Samuels v R** [2017] JMCA Crim 17, opined that the principles established there are of general application. Brooks JA's pronouncements, captured at paras. [12]-[13] of the judgment, are set out below:

> "[12] Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, "if the interests of justice so require". The Privy Council had provided, through its judgment in **Dennis Reid v R** (1978) 16 JLR 246, careful guidance for assessing that question. Their Lordships were dealing with the result of a jury trial, but the principles are applicable to a conviction arising from a summary court … Lord Diplock outlined some of the considerations that should be taken into account in deciding whether or not to order a new trial. Among the considerations … were:
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> a. the strength of the prosecution's case;
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> b. the seriousness or otherwise of the offence;
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> c. the time and expense that a new trial would demand;
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> d. the effect of a new trial on the accused;
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> e. the length of time that would have elapsed between the event leading to the charges, and the new trial;

f. the evidence that would be available at the new trial;

g. the public impact that the case would have.

[13] Their Lordships stressed that the factors, to which they had referred, did not pretend to constitute an exhaustive list. These considerations have been considered in this court in a number of cases, including **Morris Cargill v R** [2016] JMCA Crim 6. These cases suggest that the weight to be attached to the factors stated in **Reid v R** depends on the particular facts of each individual case."

[39] We gave anxious consideration to the factors applied in **Nerece Samuels v R**, in the round. In particular, we were cognisant of the fact that events giving rise to the charge of GSA occurred in December 2014, that is over 10 years before the hearing of the appeal; that nearly two years elapsed between the commencement of the trial (19 October 2016) and sentence (7 June 2018); the withering effect that the lapse of time may well have on the memories of the parties in a fact-specific case; the possible trauma for the complainant in having to again recount the events in the presence of strangers, although *in camera*. We also considered that the operative period for the appellant's suspended sentence would have expired by the time of a new trial, and so, the appellant would have effectively served the sentence imposed and no harsher penalty could have been imposed on a retrial. Given all these factors, we did not think that the interests of justice would be best served by ordering a new trial.

Conclusion

[40] For completeness, we noted that both the appellant and Crown filed written submissions in respect of the grounds of appeal. However, having regard to the view we took of the conduct of the trial and its outcome, we did not think it a judicious use of judicial time to entertain oral submissions on those grounds. Therefore, having considered the breadth and depth of the preliminary objection and, more importantly, the legal ramifications of the procedural irregularities at the trial, we made the orders set out at para. [3] above.