

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 18/08

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MRS. JUSTICE McINTOSH, J.A. (Ag.)**

RONALD EDWARDS v R

Patrick Atkinson for the appellant

**Mrs. Caroline Hay, Senior Deputy Director of Public Prosecutions (Ag.)
and Nigel Parke, Crown Counsel for the Crown**

May 26, 29 & July 17, 2009

PANTON, P.

1. The appellant, a constable in the Jamaica Constabulary Force, was convicted on August 16, 2006, in the Corporate Area Resident Magistrate's Court (Criminal Division) of the offence of assault occasioning actual bodily harm and fined \$20,000.00 with the alternative being six months imprisonment. The conviction is now being challenged on appeal.

The prosecution's case

2. The prosecution presented one witness as to fact, the complainant Icylin Reid. She said that on May 19, 2003 at about 8.45 a.m., the appellant approached her at the intersection of Prince of Wales Drive and Great George's Street, Allman Town, while she was taking her daughter to school. The

appellant, she said, asked her: "weh de ganja deh?" She responded, "which ganja you ask me for?" She said the appellant searched her daughter's school bag which she, the complainant, had in her possession but the appellant found nothing. He proceeded to search her, and instructed her to enter the police car. The complainant protested and refused to enter the car. She advised the appellant that she was taking her child to school and would go to the police station after she had completed that task. She ignored the appellant's instruction and walked away. The appellant "draped" and "boxed" her on both sides of her face, and repeated the instruction to go into the car as she was needed at the station. They wrestled, and she and her daughter were eventually taken to the police station in the car.

3. At the police station, the appellant invited the complainant to deal with him in the manner in which she had dealt with him on the road. Thereafter, according to the complainant, the appellant hit her in her face more than once. She used one of her hands to shield her face; notwithstanding this defensive posture, her face became swollen. The appellant's colleague who had driven the police car protested at the appellant's behaviour. The police took her daughter to school, and the complainant was charged for nine offences including unlawful possession of a knife and unlawful possession of ganja. She was fined \$1,000.00 for the possession of the knife, and the other charges were not pursued.

4. The complainant, a mason by trade, said that she is called "Denise" and "Man Royal". She was granted bail within an hour of her arrest, and was treated the next day at the out-patient department of the Medical Associates Hospital. A medical certificate signed by Dr. Tricia Girand-Spence and admitted in evidence as Exhibit 1 stated that she was suffering from:

- (1) soft tissue injury to the right periorbital area;
- (2) musculoskeletal injury to her left shoulder; and
- (3) multiple abrasions to her neck, anterior chest and both hands.

The doctor said that the injuries were not serious, they are consistent with infliction by fist of hand, and are not likely to be permanent.

5. Under cross-examination by Mr. Wentworth Charles, who at that time appeared for the appellant, the complainant denied that Inspector Winston Walker was in the police car, and that he spoke to her at the school gate. She also denied that the Inspector was present at the time she was assaulted (presumably, on the road), or that he was at the police station when she went there. The first time that she saw him was at Court.

6. The complainant denied that the appellant came out of the car and first said to her "hand over the knife and the ganja cigar." She said it was the "next" officer who took the knife from her. That officer, she said, asked her where the ganja was and she replied, "you si mi wid ganja?"

7. Still under cross-examination, she admitted that she resisted vigorously being taken into the police car by the officer. She said eventually she was persuaded by one "Son-a-man" to go into the car with the child. She, the child and "the four officers" travelled in the car to the police station.

8. She denied attempting to leave the police station and being prevented from doing so by the appellant. She denied using expletives, jumping on the bench in the guard room, and punching the appellant to the face and stomach. She also denied that other police personnel came to the appellant's assistance in subduing her.

The defence

9. The appellant gave evidence that he was on patrol with Inspector Walker, Cpl. Dale and Cons. Harrison when he saw the complainant about two to three yards from the school's gate. She had a handbag over her shoulder and there was a female child clutching on to her. She was smoking what appeared to be a ganja spliff, and had an open ratchet knife in her left hand. The vehicle with the appellant stopped and he alighted and asked her for the ganja cigar and the knife. She handed over the knife, but asked the appellant, "You see me wid any ganja?" The appellant said he never saw what the complainant had done with the cigar, but as she spoke he had observed that she was swallowing heavily and Inspector Walker who had also come out of the car informed him that she had put it in her mouth. The appellant told her to open her mouth. She did but the

cigar was not found. The appellant searched the handbag but that also proved futile.

10. The appellant told the complainant that he was arresting her for being armed with an offensive weapon, and she was to accompany them to the police station. The complainant's response was:

"mi nah go a nuh b.... c.... Police Station with no police boy cause you nuh see mi wid nuh ganja."

She spun and walked away. The appellant held her. She flashed away his hand and began throwing punches thereby hitting the appellant in his stomach and face. She burst the buttons from his denim. His colleagues assisted in holding her and they placed her in the police vehicle and took her to the police station.

11. On arrival at the police station, the complainant was put to sit on a bench in the guard room. While she was being processed, she got up and attempted to leave the station through the main entrance. The appellant advanced towards her with handcuffs. She sprang at him and a brief struggle ensued, during which she hit her head on the edge of the guard room counter.

12. Inspector Walker also gave evidence. He said that he led the party of four on the patrol. Prior to leaving the police station, he had briefed the party and given certain instructions in respect of drugs and offensive weapons. He said he saw the complainant smoking a cigar while she had an open knife in her hand. He assisted the constable in placing the complainant in the car. At the

police station, he saw her jump at the appellant and there followed a struggle. Both the appellant and the complainant fell. He (Inspector Walker) and one Cons. Gray separated the appellant and the complainant. He never saw the appellant box the complainant several times nor did he see him severely beat her at the station.

13. The appellant was examined by Dr. Marc White on the very day of the incident. Dr. White found that he had multiple abrasions to the neck and upper anterior thorax.

The findings

14. The "findings of fact" of the learned Resident Magistrate are listed at pages 29 to 31 of the record of appeal thus:

- "1. That the complainant and the accused met on the road and the complainant refused to accompany the accused to the Allman Town Police Station. The Accused hit her in the face and they grabbed each other and were separated when a citizen intervened.
2. That at the station the complainant was handcuffed prior to being processed and was hit several times by the accused in the face and on the hands as she held them up to block the blows. The injuries outlined in Exhibit I are consistent with this finding of fact.
3. That at the corner of Prince of Wales Street and Great George Street the accused sustained injuries as outlined in Exhibit II (sic) when he and the complainant wrestled and hit each other. The injuries outlined in Exhibit II (sic) are consistent with this finding.

4. That no injuries were sustained by the accused at the Police Station.
5. The court rejects the assertion by the accused that without more the Complainant attacked him both at the station and on the road and sustained injuries as she fell during a tussle with him.
6. The Court finds that the account by the accused and his witness as to what transpired at the station is fabricated and notes that unlike the account of the accused that he sustained injuries there, his witness gave evidence that he sustained no injury at the station.
7. The Court accepts the Complainant as a candid and truthful witness whose account as to how she sustained her injuries is consistent with the medical evidence produced.
8. The Court finds that the complainant was handcuffed at the station when she received the injuries and did not attempt to walk out of the station while she was being processed."

15. In what appears to be an explanation of the findings of fact, headed "Reasons for Judgment" at pages 31 to 33 of the transcript the learned Resident Magistrate said, among other things:

"The defense (sic) is one of accident that the injuries resulted from the behaviour or misbehaviour of the complainant at the Police Station as she attacked the officer and fell in the process injuring herself.

It follows therefore that it is which account is plausible and supported by the wealth of evidence presented that the Court is to accept." (p. 31)

"The Court was impressed by the candor of the complainant. She spoke calmly about her deeds and

misdeeds and was believable. Much was made of the fact that she hit the accused and behaved in a manner that was very testing for the officer and on that basis the Court was asked to reject her as a truthful witness and treat her as someone who had behaved improperly in the presence of the officer.”

16. In arriving at a conclusion that the prosecution had made her feel sure of the appellant’s guilt, the reasoning of the learned Resident Magistrate contains what may be described as gaping holes. It has to be borne in mind at all times that the burden of proof remains the same whether it is an ordinary citizen or a police officer on trial. However, in the case of a police officer there are certain duties and responsibilities which have to be addressed at all times when the police officer’s actions while on duty, are called into question.

17. In the instant case, the appellant was on duty. It was therefore important for the learned Resident Magistrate to bear in mind the provisions of section 13 of the Constabulary Force Act. The section reads:

“13. The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company.”

18. The first finding of fact recorded by the Resident Magistrate was to the effect that "the complainant and the accused met on the road and the complainant refused to accompany the accused to the Allman Town Police Station." This finding suggests that both parties were walking casually on the road, going about their respective business when the request to go to the station was made. The finding as recorded also suggests that the complainant would have been within her rights to refuse to go to the station. The factual position, however, is to the contrary; so too is the legal position.

19. It is noted that the Resident Magistrate failed to make a finding as regards the evidence of the appellant and Inspector Walker that the complainant was seen smoking what seemed to be a ganja spliff, which she duly swallowed when accosted. The failure to treat with this evidence deprived the appellant of the type of consideration that his evidence required. The smoking of ganja and the possession of an offensive weapon, particularly on the public thoroughfare, are offences that merit immediate arrest. The appellant acted properly and lawfully therefore in requesting or instructing the complainant to enter the car to be transported to the police station. The appellant was entitled to regard the complainant's statement, that she would go to the police station later, as unacceptable.

20. Where a police officer sees an individual committing an offence and decides to arrest that individual, the officer is entitled to use reasonable force to effect that arrest. Where the individual resists, the officer is entitled to seek assistance in performing this duty. The evidence in the instant case was that the complainant did not merely resist – she resisted vigorously. Inspector Walker had to go to the assistance of the appellant. The complainant herself said that she was eventually “persuaded” by a man called “Son a Man” to go into the car. It is clear therefore that the learned Resident Magistrate did not give sufficient thought to the defiance of the complainant in a situation which indicated that she had breached at least two laws and was refusing to submit to arrest.

21. Where force is used to effect an arrest, the legal position is that the force used must be reasonable. If unreasonable force is used, the officer is not protected by law and would be liable for the consequences of such unreasonable force – in civil as well as criminal law. In the instant case, the appellant may only be convicted if he had used more force than was reasonably necessary. The facts indicate that he used his bare hands. This was not a case, as in others, where resort was had to a firearm. The complainant used her hands forcibly on the appellant while resisting. The appellant used his hands to nullify the resistance. He also used his hands to prevent the complainant from leaving the police station. The injuries sustained by the complainant, as described in the medical certificate exhibit I, certainly do not support the oral evidence given by the complainant. The oral evidence was that her face was punched several

times until it was swollen. The certificate on the other hand, shows one area of the face (right periorbital) suffering "soft tissue injury". This certificate as well as that in respect of the appellant (exhibit III) are more consistent with and more supportive of the evidence that the parties were wrestling, than of anything else. In the circumstances, it cannot be said that the appellant used unreasonable force on the complainant.

22. In finding no 6, the learned Resident Magistrate said that "the account by the accused and his witness as to what transpired at the station is fabricated." An appellate court does not lightly interfere with a trial judge's findings of fact bearing in mind that where credibility is the issue the appellate court would not have had the opportunity to see and hear the witness in order to make a proper assessment. This principle is of importance in considering the finding referred to above, as well as the second supplemental ground of appeal which reads:

"The learned Resident Magistrate failed to consider the Defence and in particular the Testimony of the Defence witness. This was a non-direction that amount to a misdirection in law."

23. Mr. Patrick Atkinson, for the appellant, submitted that the complainant's behaviour on the road was indicative of the type of behaviour she would have exhibited in the police station. The learned Resident Magistrate, he said, did not deal with Inspector Walker's evidence. He said it was strange that there had been no assessment of the Inspector's evidence although he was the sub-officer in charge of the station.

24. In view of the fact that the complainant said that the first time she saw Inspector Walker was in court, it was, we feel, important for the learned Resident Magistrate to determine whether Inspector Walker was present on the road and later at the station. Merely saying that there was a fabrication between the appellant and the Inspector is not sufficient. There ought to have been a determination as to his presence and the role, if any, that he played in the arrest and detention of the complainant. The importance of this may be seen in finding no. 1 where the Resident Magistrate said that "they grabbed at each other and were separated when a citizen intervened." Nowhere in the evidence was there such an occurrence, that is, the pair being separated by a citizen. In fact, the only evidence of a separation came from the Inspector who said at page 24 line 1: "I went and separated both of them." This therefore is a clear inaccuracy on the part of the learned Resident Magistrate, thereby warranting interference by us with her finding of fact in this regard, and with any inference she may have drawn from that incorrect finding of fact.

25. In the circumstances, we find merit not only in the original grounds of appeal, but also in the second supplemental ground of appeal. Consequently, the appeal is allowed. The conviction is quashed and the sentence set aside. A judgment and verdict of acquittal is entered.