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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 60/89

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

R. v. KEITH THOMAS

Errol Carter for appellant

Paulette Williams for Crown

December 13, 1989 & February 14, 1990

GORDON, J.A. (Ag.)

On the 31st May, 1989 the appellant was convicted on an indictment in the Richmond Resident Magistrate's Court in the parish of St. Mary for the offence of wounding.

The complainant alleged that he was assaulted and injured by the appellant at Richmond Farm Prison on 7th July, 1988. On behalf of the appellant two grounds of appeal were urged -

- "(1) That the learned Resident Magistrate erred in law in allowing a witness for the crown namely MR. NEDDY HERD (sic) to give UNSWORN AND UNAFFIRMED EVIDENCE at the trial of the accused KEITH THOMAS.
- (2) That the learned Resident Magistrate further erred in law when he relied on the said evidence of MR. NEDDY HERD (sic) insofar that he described the said evidence as being 'VERY IMPORTANT' by virtue of MR. HERD (sic) being a Corrections Officer colleague of the accused KEITH THOMAS."

Miss Williams, at the invitation of the Court conceded that the Resident Magistrate erred when he allowed the witness to relate facts pertinent to the case without being sworn. She, however, urged that there had been no miscarriage of justice because the Resident Magistrate accepted the complainant as a witness of truth. She admitted with candour, in response to a question posed by the Court, that the fact that the Resident Magistrate placed reliance on the "evidence" of Nedley Hurd, she could not be sure that the decision of the Resident Magistrate as to the guilt of the appellant was uninfluenced by Mr. Hurd's statement.

In relation to Mr. Hurd whom the appellant in his grounds of appeal described as "Needy Herd" the Resident Magistrate found -

"Although the supporting witness for the prosecution, Nedley Hurd, gave unsworn testimony I consider his evidence. I was impressed with his demeanour and found him as an impartial witness who spoke the truth. I accepted his evidence when he said that the Complainant was beaten and kicked by the accused while outside the prison compound. I also believe him when he said at no time was the Complainant armed."

At common law the evidence of a witness must be on oath. The Oath's Act provides for a witness to be "sworn" or "affirmed". The Juvenile's Act provides for the reception of the unsworn evidence of a child provided the child understands that the truth should be spoken - this evidence must be corroborated. The Evidence Act allows an accused to make an unsworn statement in defence to the charge. The course adopted by the Resident Magistrate in admitting Mr. Hurd's statement is not known to the law and cannot be supported.

Mr. Carter urged that the proper course the Court should adopt was to allow the appeal and quash the conviction. He relied on R. v. Hines & King [1971] 12 J.L.R. 545. There should be no retrial he said. We do not find the case of Hines of any assistance. In that case, Hines was not allowed to take an oath in the manner he found binding on his conscience and he was thus deprived of his right to give sworn testimony in his defence. The Court held therefore that his conviction could not stand. There is nothing in the report to suggest that the subject of a retrial was canvassed. The Resident Magistrate having admitted in evidence, as evidence, the unsworn statement of Nedley Hurd, we are unable to say with certainty that his findings of fact, viz., "I accept his (complainant's) evidence and found him to be a witness of truth when he said he was beaten and kicked by the accused outside of the prison compound" was not influenced by the support the complainant's evidence received from Nedley Hurd.

We, therefore, allowed the appeal, quashed the conviction and set aside the sentence and in the interest of justice, we ordered that there be a new trial before another Resident Magistrate.