J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 110/1974

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

****

R. v. ESAU MARZOUCA

****

R.A. Mahfood, Q.C. and B.K. Frankson for the appellant.

Miss J. Bennett for the Crown.

Heard: January, 16, 17, 20; March 18, 1975

LUCKHOO, P. (Ag.):

On August 28, 1974 the appellant Esau Marzouca was convicted in the Resident Magistrate's Court for the parish of St. James on an indictment charging that on June 29, 1974, he indecently assaulted Gloria Samuels, contrary to s. 48 of the Offences against the Person Law, Cap. 268. He was sentenced to 4 months' imprisonment at hard labour and was ordered to receive 2 strokes. He has appealed against both conviction and sentence.

The complainant Gloria Samuels testified that at about 8.30 a.m. on Saturday, June 29, 1974, she was walking along Fort Street, Montego Bay going to deliver a message to someone at a guest house situate beyond the Old Hospital when

the appellant, whom she did not know before, came from the opposite direction driving a land rover. On passing her he waved at her and turned the vehicle around. He drove up to her, stopped and told her that he was looking for some ladies to work at the "Beachcomber" to sell garments to tourists. She told him that she was not interested in selling garments because she had been a telephone operator and had once worked as a typist whereupon the appellant offered her a job as a typist and asked her to come to his office to be interviewed. She told the appellant that she wished to see someone at the guest house to which she was then going and the appellant said that after she was interviewed he would take her there. Accordingly she entered the land rover and was driven by the appellant to the City Centre Building in Montego Bay where the appellant said he had an office. When they got there the appellant parked the vehicle and took her into a shop and they both sat at a desk. The appellant asked for her name and address which she gave and he wrote in a book. She had mentioned to him that she was unemployed at that time though she denied that she told him that things were very hard with her. The appellant told her that he would like to find out something more from her and she enquired what it was. The appellant did not answer her enquiry but told her to follow him to an inner apartment. This she proceeded to do. He opened the door of a room which she entered and then discovered it was a toilet. She asked the appellant "What is it that you wanted to find out? What you take me in here for?" He thereupon pushed her further into the toilet, closed the door and placed his back against the door. He took off his shirt and told her he wished to medically examine her. She asked the appellant if he was a doctor and he told her no but that he would like to find out certain things from people to whom he decides to give these jobs. She told him that she felt that was a doctor's duty and asked to be allowed to go outside. He said no and she tried to force her way out

of the toilet. He braced against her and stretched across to a shelf where there were three phials. He took one, opened it, put his finger into its liquid contents and told her to push out her tongue. She did not do so. He tried to force his finger into her mouth and she slapped his hand away. He replaced the phial on the shelf, held her across the back of her waist and pressed her against the front of his body. She pushed the appellant off. He opened his pants front, took out his penis and pushed his hand into the waist of her pants. In the process the button on the front of her pants was torn though it did not fall off and the pants dropped to her knees. The appellant then pushed his hand into the waist of her panty and tore it causing the panty to fall. He then pushed his finger into her vagina. She screamed and the appellant took up his shirt held up his pants and ran out of the toilet. She fixed her clothes and left the toilet. She found the appellant sitting at his desk and for the first time saw another man there. That man started to brush the place and was laughing. The appellant told her that he had not finished getting all the information he needed. She walked away and went outside the shop. On the sidewalk she saw a security guard (Pinnock) and made a complaint to him of all that had happened to her. The security guard took her to another shop in City Centre where she saw and spoke to a lady making a complaint to her as well. A policeman (Brissett) who was passing was called and she made a full report to him. Later that day she went to the Montego Bay Police Station and made another report and was sent to Criminal Investigation Department. From there she was taken to hospital. At the hospital she was examined by a doctor. Later on that day she handed the police her panty and pants which appellant had torn.

While at the C.I.D. she had spoken with Detective McCalla who left and returned with the appellant and the man whom she had seen dusting in the appellant's store. In the presence of the appellant she related what the appellant had done to her. The appellant turned his head away and said nothing. After enquiring of her where was the phial she spoke about, McCalla took her to the appellant's shop leaving the appellant at C.I.D. At the appellant's shop she pointed out to McCalla the toilet in which she said the incident had occurred. McCalla took away 3 phials and they returned to C.I.D. The phial into which the appellant had put his finger was missing from the toilet. At C.I.D. McCalla showed the appellant the phials. McCalla asked questions of the man whom she had seen dusting. This was done in her presence and also in that of the appellant. That man told McCalla that he had gone to the appellant's shop, opened it and left to have breakfast and that when he returned to the shop he saw her at the desk. She then said "If I were at the desk, how is it that when I was coming out of the toilet when the basket was falling down against the door of the toilet you came to put it in the right place and to turn the light of the toilet off?" The man said nothing. That man had been asked by McCalla if he was there when she got there and he said he was not. At the police station that man did not have on dark glasses though another man had come to the police station wearing dark glasses. She denied that Boysie Ricketts (called into court), and who later testified on behalf of the defence was the man whom she had seen dusting in the appellant's shop but identified him as the other man who had come to the police station wearing dark glasses. She denied the suggestion put to her that she went to the appellant's store and thought he was a rich man and made up this story with a hope of getting money from him.

Special Constable Pinnock testified as to the complaint made to him by Gloria Samuels. He said that at about 9.30 a.m. he was on duty at City Centre Building when Gloria Samuels came to him from the direction of the appellant's shop. She was crying and spoke to him. She asked, "the man Mr. Marzouca that has the straw shop, what transaction he has with Beachcomber shop?" He told her that the appellant had no "transaction" with Beachcomber shop. He gave the details of her complaint as follows - "She said this morning she was going out Fort Street and when she saw a jeep drive past her. The man waved his hand to her - and she waved back her hand. She said the jeep reversed back to her. The man asked her if she looking job." Pinnock said that at that stage he took Samuels into Mr. Baird's store because she was crying and others might overhear what she was saying. Mrs. Morris and Constable Brissett were present in the store. He had called Constable Brissett so that he could hear what she was saying. Samuels again told the story and "she further said the man told her he could give her a job at Beachcomber shop. She said she asked the man where she could see him again. She said the man went to his straw shop where he gave her pencil and paper to write her address. She said she did so. In addition Mrs. Samuels said the man told her to go in a room and strip. She said she asked him "what for" and if he was a doctor. She said the man told her any girl he took for Beachcomber he had to test. She said the man came into the room, forced her to take off her clothes and started to ragga ragga her. She said she squealed and the man left her. She tied herself and came out. She said the man tore her panty." When cross-examined Pinnock stated that neither Brissett nor he advised her to do anything after she had told her story. He spoke to Det. McCalla at 1.30 p.m. that day at Baird's shop. McCalla had there taken a statement from Mrs. Morris. Later that day McCalla took a statement from him.

Gloria Samuels had shown him her torn panty behind a screen at Baird's shop in the presence of Mrs. Morris and Const. Brissett. He had taken no action because he was a special constable and Const. Brissett was a regular constable.

Constable Brissett was called by the prosecution to testify. He said that at about 9.30 a.m. on Saturday, June 29, 1974 he was on duty at City Centre. He went into a shop where he saw Pinnock, the complainant and Mrs. Cislyn Morris. He said that Samuels told him something. As a result he gave no instructions. There was nothing in the matter to give instructions about. He said "Miss Samuels told me that she was going towards Old Hospital and a land rover drove up; Marzouca whom she knew long ago was the driver of the jeep. He stopped and they spoke about job. She went into the jeep and he drove her to City Centre. She said she was given a stool to sit on in the store. She did not say which store. She said Marzouca began to interview her. She said he told her to get inside the bathroom and undress. She said she refused to undress and she opened the bathroom door and left. When I saw Miss Samuels she was just normal. She did not appear distressed to me. I wrote a statement which I signed. I wrote the statement the same day of the incident." The witness was then shown his statement (made prior to the trial) which he identified whereupon the clerk of court applied to have the court treat the witness as hostile. The application was granted by the court and the witness was cross-examined by the clerk of the court as to whether in his statement made prior to the trial he had told the complainant to make a report to the C.I.D. Office. That he denied. Whereupon being confronted with his statement he admitted that he had written in his statement that he had made an entry of the complainant's report in his notebook and had given her instructions. He said that he did so because it is a rule to make entry of such reports and that the C.I.D. personnel would

deal with such reports. He offered no answer to the question why at first he had said that he had given her no instructions. He admitted that he had written his statement at the police station between 1 and 1.30 p.m. on June 29 after the complainant had made her report but she had been given instructions by him.

The witness on being cross-examined by counsel for the defence said that in his statement he also wrote that Samuels said that the man told her to undress, she refused and then left the store. He denied that Samuels went behind a screen in the presence of Pinnock and Mrs. Morris and showed him her panty.

Det. Acting Cpl. McCalla of the C.I.D. Montego Bay testified that Samuels made a report to him at about 10 a.m. on June 29, 1974 at C.I.D. As a result he went to the appellant's Straw Store at City Centre where he saw the appellant and told him of the report made by Samuels. He cautioned the appellant who said "McKie it wasn't any big thing. I did pick her up in the land rover and carry her here." He took the appellant to the Montego Bay Police Station. He took Samuels to the hospital where she was medically examined. From the hospital Samuels went to her home for and returned to the police station with the panty and pants she had been wearing at the time of the incident. These articles she handed over to him at the police station. He went with Samuels to the appellant's store to look for a phial. There he did see phials which Samuels pointed out to him but he did not take away any of them. He saw two toilets there and went into both of them in search of the phials for which he had gone. Samuels pointed out to him the toilet into which she had gone. That toilet was about 6 yards away from a desk he saw in the store. He requested two boys to come to C.I.D. Office. One of them wore dark glasses. He denied that that boy had told him

that Samuels never got up from the desk.

The appellant in his defence testified that while driving his land rover on Fort Street from the direction of Falmouth at about 8.30 a.m. on Saturday, June 29, 1974, a young lady waved to him. He slowed down and stopped. The lady ran from the right side of the road to the left where he was and asked for a lift. She came into the vehicle. He did not know the lady before. He drove towards Montego Bay and the lady said "I been out here early this morning trying to get a job and I didn't get through." She was saying something about how rough it was to get a job now-a-days. On approaching the library he asked her where she wanted to come off as he was just going to his place. She asked him where his place was and he told her it was at City Centre Building where he had a Straw Shop. She said she would come off there. He reached his shop and came out of the vehicle. The shop was then closed. While getting out the lady asked him if that was his place. He went towards the door of his shop and saw Boysie Ricketts - a maintenance man for City Centre Tenants' association. He handed Ricketts the keys for the door. Ricketts opened the door. The young lady and he (the appellant) went in the shop with Ricketts following. The lady asked if he needed help in the shop. He told her "No." The lady was complainant Samuels. She asked if he could get her on to any of the shops in the Centre. He told her it was pretty rough and asked her what she could do. She said she could sell in a store. He told her he would take down her name and address and if anything he would try to recommend her to one of the shops like Beachcomber. The lady sat in front of his desk and he behind his desk and took down her name and address. Ricketts was then dusting at a point three yards from them. He (appellant) was making up a lodgment at the time.

After taking Samuels' name and address, she said that she hoped he would help her as things were rough with her. (The learned Resident Magistrate at this point noted "Complainant nicely dressed in smart blue dress, mantilla and shoes). She asked him when she should check back with him. He told her she would not need to because if anybody wanted her she would be contacted by mail. She then said she was coming into Town on Wednesday and asked if she could check with him then. He told her that he doubted if anything would be ready by then. Ricketts was still in the shop. Samuels got up and left saying "All right, sir, I will see you on Wednesday." The next time he saw her was at the police station. There she said that he had come up and spoken to her but that was not true. He further denied the allegations she had made against him. He admitted that at the police station Samuels did mention a plastic bottle and he said that McCalla then said that he was going back to the store to look for that plastic bottle. He added that McCalla also said "Anyhow ah find that plastic bottle a going lock you up." He also said that at Sgt. Henry's suggestion McCalla took Samuels to help him find the plastic bottle while he (appellant) was left behind and that later McCalla and the complainant returned to the police station and McCalla said that he found no plastic bottle. Thereafter the complainant was sent into another room and McCalla went there also. McCalla returned followed two minutes later by the complainant. McCalla asked her to "tell the man exactly what happened now." It was then that the complainant made a report accusing him of interferring with her. He was then arrested.

When cross-examined the appellant said that Desmond Clarke is also a maintenance man on the building and that both Ricketts and Clarke sweep but only do so outside the shops. The appellant also said that about five minutes after he reached his shop he saw Clarke who came into the shop while the complainant was there but that Clarke left because Ricketts was there.

The appellant said that both Clarke and Ricketts do extra work for him inside the shop like helping to sell. According to the appellant the complainant was in his shop for about 10-15 minutes and all he did during this time apart from conversing with her was to write her name and address. He denied that she went into the toilet while she was there. He said the complainant was perfectly normal when she left the shop. After she left he gave Ricketts the lodgment which he had made up. He said that he had phials in the toilet with iodine, mercurochrome and windex (to clean windows).

Ricketts was called to testify on behalf of the defence. He spoke of being on the sidewalk near the appellant's shop when the appellant drove up with the complainant. He said he opened the store and the appellant and the complainant entered the store. They then sat at the desk. He (Ricketts) had offered the lady a seat. The appellant took out his lodgment book and wrote in it while he (Ricketts) was dusting. He heard the complainant say she had not worked for the past three months and she asked the appellant if he could help her with a job. She gave the appellant her name and address which the appellant wrote in a receipt book and she told the appellant that if he heard of anything he could contact her by the address. She then left saying that she would be back in town on Wednesday and she would check with the appellant. She had never left her seat in the store. He then went to the bank with the lodgment given him by the appellant. On his return from the bank he did not see the complainant. Later that day he was taken to the police station by Det. McCalla. He was then wearing dark glasses. He spoke to McCalla who grabbed off his glasses and said "Tek off your f..... glasses - ah want to see you face." He kept on talking and McCalla said "You. You fart" and pushed him off. In cross-examination Ricketts said that he works with the City Centre Tenants' Association but that he dusts for and helps the appellant to sell. For that he is not paid but gets "tips". He said that Desmond Clarke does likewise for

the appellant but Clarke was not in the shop when the complainant was there. He had seen Clarke there before and did not see him again until after the complainant had left. He agreed that phials are kept in the toilet. Those phials contained mercurochrome, something else for cuts and window cleaner. He did not hear what kind of name she gave the appellant and he did not hear the address.

A number of grounds of appeal were argued on behalf of the appellant. It was submitted that the learned Resident Magistrate failed to apply the correct princples and/or procedure in ruling that the witness Brissett should be treated as hostile and consequently failed judicially to exercise his discretion to treat the witness as hostile. Mr. Mahfood contended the record indicated that Brissett was deemed hostile on the basis that prosecuting counsel had a statement previously made by Brissett which contradicted the testimony given by that witness on a material point, and that the learned Resident Magistrate omitted to avail himself of the benefit of examining the contents of that statement before exercising his discretion to deem the witness hostile. Had the learned Resident Magistrate examined the statement Mr. Mahfood urged he would have observed that save in one respect of little importance the testimony given by the witness was not in conflict with the contents of the prior statement and there was a real probability that he would not have treated the witness as hostile. In this regard Mr. Mahfood referred to the case of Jackson v. Thomason (1861) 31 L.J.Q.B. 11 as indicating that there must be enquiry by the judge as to the witness's hostility by a consideration as to whether the witness's previous statement has a tendency to contradict or to be inconsistent with the witness's testimony. He also referred to R. v. Fraser (1956) 40 Cr. App. R. 160 where Lord Goddard, C.J. delivering the judgment of the Court of Criminal Appeal said that if prosecuting counsel has a statement inconsistent with the evidence given by a witness it is his duty to show the statement to the judge who must examine the statement to

determine whether the statement has a tendency to contradict the witness so that it is proper in all the circumstances to treat the witness as hostile. These authorities are relevant to the question because the provisions of s. 16 of the Evidence Law, Cap. 118 which relate to impeaching the credit of one's own witness are modelled on those of s. 3 of the English Criminal Procedure Act, 1865. The provisions of s. 16 of the Evidence Law, Cap. 118 are as follows -

> "16. - "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

There can be no doubt, as Mr. Mahfood urged, that if the learned Resident Magistrate be shown to have acted upon a wrong principle in treating Brissett as hostile it cannot be said the testimony given by the complainant that an indecent assault was committed on her by the appellant would have nevertheless been accepted by a learned Resident Magistrate had he approached this aspect of the matter in the correct way.

In Halsbury's Laws of England (3rd Edition) at p.447 an adverse witness is defined as "one who shows a mind hostile to the party calling him and by his manner of giving evidence, shows that he is not desirous of telling the Court the truth." Phipson on Evidence (11th Edition) at paragraph 1535 puts it in this way - "A witness is considered adverse only when, in the opinion of the judge he bears a hostile animus to the party calling him and so does not give his evidence fairly and with a desire to tell the truth to the Court; he is not adverse in the statutory sense when his testimony merely contradicts his proof or because

it is unfavourable to the party calling him." One way of demonstrating that a witness is hostile is to show that he has misled counsel of the side who calls him and so a previous inconsistent statement made by the witness may be relied on as evidence that the witness is hostile. The prior statement must differ directly or substantially from the evidence of the witness on a material point to be of any avail in this regard. That is not the only way, however, of demonstrating that a witness is hostile. The witness, who may or may not have made a statement prior to his testimony, may demonstrate by his demeanour while testifying that he has no desire to tell the truth and may be adjudged hostile solely on his demeanour. It is only after the witness is deemed hostile that Counsel of the side calling him may cross-examine him generally and by proof of prior inconsistent statements.

One must now turn to the record to ascertain in what circumstances Brissett was deemed hostile. The complainant Samuels had already testified as had Pinnock who stated the details of the complaint made in his presence and in the presence of Brissett and of Cisyln Morris (not called as a witness). Brissett was then examined-in-chief and gave quite a different account from that given by Pinnock of the details of the complaint made by Samuels. Indeed on Brissett's account the complaint amounted to no more than an improper invitation on the part of the appellant whom, according to Brissett, the complainant said she knew long ago. Having completed his examination-in-chief of Brissett as to the details of the complaint alleged to have been made by the complainant the prosecuting officer then elicited from Brissett that he had made a statement on the day of the incident and he had Brissett identify the statement. Obviously the prosecuting officer wished to cross-examine Brissett and realised that in order to do so Brissett must first be deemed hostile. Following upon the Resident Magistrate's note that Brissett identified his statement there appears the following - "(At this stage Mr. Bertram applied to the Court to treat witness as hostile). Application granted

by the Court." Thereupon as indicated by the record the prosecuting officer proceeded to cross-examine Brissett on the contents of his prior statement in relation to his testimony that he had given the complainant no instructions following upon her complaint and elicited from Brissett that indeed he did give instructions to the complainant, Brissett failing to give any reply to the question "why did you at first say you gave her no instructions?"

In the circumstances narrated above it would seem to be quite wrong to conclude by the mere fact that it was elicited by the prosecuting officer that the witness had made an earlier statement that the learned Resident Magistrate concluded without first examining the contents of the statement that the witness's statement differed materially from the testimony given by him. Not only was Brissett's testimony at variance with that of the complainant in many material respects; it was also very much at variance in several like respects with that of Pinnock. Further, why should it be concluded that the witness's demeanour in giving his testimony was not such that it attracted the learned Resident Magistrate's attention as to impel him to the conclusion that the witness was not desirous of telling the truth? We can see no good reason for so concluding.

In our view this ground of appeal fails.

It was also submitted that the learned Resident Magistrate failed to apply the correct principles in assessing and evaluating the evidence and that this is illustrated by his approach to the question of corroboration of the testimony of the complainant Samuels.

After stating the areas in which the case for the prosecution and the case for the defence were in agreement and were in conflict and after referring to the contention of the defence that Gloria Samuels was experiencing financial difficulties and had concocted a story in an effort to obtain a pay-off from the appellant, the learned Resident Magistrate observed that indeed Ricketts had supported the appellant on the point that at no time did Gloria Samuels go beyond the desk. The learned Resident Magistrate then proceeded to refer to certain answers given

by Ricketts and concluded that at the material time Ricketts was not in the appellant's shop. The learned Resident Magistrate proceeded to record his findings as follows -

> "Accused persuaded Samuels to enter his vehicle. He took her to his shop and eventually to a toilet there. He dipped his finger in the liquid in this phial which was among other phials and attempted to put his finger into her mouth. (There was ample time between complainant's departure and McCalla's arrival to dispose of the phial). Accused pulled down her pants and panty and pushed his finger in her vagina. Gloria Samuels became upset - supported by Pinnock who saw her crying and by Dr. Lewin who said she was distressed and emotionally upset. Report to Pinnock negatives consent. The pushing of the finger into the vagina is supported by the findings of Dr. Lewin. Gloria Samuels' evidence that she was taken to the toilet is supported by the fact (1) there is a toilet in the shop, (2) McCalla and accused also agree as to the presence of phials.
>
> Finally Ricketts was procured to give evidence in a matter of which he had no knowledge. In her own right Gloria Samuels impressed me as a witness of truth. Here I am not unmindful of the dangers of convicting on the uncorroborated evidence of a complainant but her evidence on the question of the indecent assault has in many respects in my view, been supported by other evidence from independent sources (already mentioned) that I have no hesitation in finding a verdict of guilty."

Mr. Mahfood contended that the learned Resident Magistrate in his findings has stated that the complainant's evidence was corroborated in many respects and that the learned Resident Magistrate cited illustrations that do not as a matter of law constitute corroboration. Mr. Mahfood described the phrase "supported by other evidence from independent sources" as ordinary terminology in talking about corroboration" and urged that the phrase "(already mentioned)" was clearly a reference to the matters above which, he contended, were regarded by the learned Resident Magistrate as corroboration because many of those matters or most of them could be regarded as corroboration without a careful analysis of the law of corroboration e.g. distress is normally regarded as some type of corroboration. Finally on this ground Mr. Mahfood, after referring to the case of Eric James v. R. (1971) 16 W.I.R. 272 in this regard, submitted that the learned Resident Magistrate failed to examine the evidence to find corroboration in accordance with the

correct legal principles governing what amounts to corroboration and was only able to convict in the face of his recognition of the dangers of convicting without corroboration because he felt there was a large number of matters in the case amounting to corroboration which matters are in fact not corroboration in law.

Miss Bennett for the Crown contended that the findings mentioned by the learned Resident Magistrate as supported from independent sources are all with respects to the fact of an indecent interference with the person of the complainant without her consent and do not refer to or relate to the identity of her assailant.

As can be ascertained by an examination of the findings set out in the record there are nine findings of fact made by the learned Resident Magistrate some of which, but not all, found support from a source or sources independent of the complainant's testimony. These sources in relation to those findings of fact are all identified by the learned Resident Magistrate. The learned Resident Magistrate then set out his conclusions. We understand his conclusions to be that the complainant "in her own right" impressed him as a witness of truth and that in so finding he had reminded himself of the danger of convicting on the uncorroborated evidence of a complainant; that nevertheless bearing in mind that danger it did not cause him to hesitate in convicting the appellant because the complainant's evidence, in so far as it related to the commission of an indecent assault upon her, (as distinct from the identity of her assailant), had in many respects been "supported by other evidence from independent sources (already mentioned)." The learned Resident Magistrate was carefully confining his observation to the specific bits of evidence from the independent sources he had already detailed and it cannot fairly be said that when he spoke of support from a source independent of the complainant's testimony he meant corroboration in its legal sense in a case of this kind.

In any event we are of the view that once a finding in this way is made that the complainant was indecently assaulted it ought inevitably to follow on the totality of the evidence that it was the appellant who so assaulted her.

We hold that this ground of appeal fails.

It was also submitted on behalf of the appellant that the finding of the learned Resident Magistrate that Ricketts was "not present" is unreasonable and contrary to the admissions made by the complainant and further that there was no basis for the finding of the learned Resident Magistrate that the appellant had procured Ricketts to perjure himself.

The complainant at no time admitted that Ricketts was present in the shop. She deponed that on leaving the toilet she did see a man dusting in the shop but she denied that that man was Ricketts. She said that that man had been brought by McCalla to C.I.D. later on the day of the incident and questioned by McCalla in her presence and that when the man said that he had returned to the shop from his breakfast and saw the complainant sitting at the desk she replied, "If I were at the desk, how is it that when I was coming out of the toilet when the basket was falling down against the door of the toilet you came to put it in the right place and to turn the light of the toilet off?" She said that she had also seen Ricketts at the Police Station (C.I.D.) on that occasion and that he was then wearing dark glasses. The appellant testified that both Ricketts and one Desmond Clarke worked at times in his shop and that at the material time Ricketts was in the shop. Clarke was not called to testify. The learned Resident Magistrate rejected Ricketts' evidence that he was at the material time in the appellant's store and found that Ricketts was procured to give evidence in the matter of which he had no knowledge. Having regard to the evidence it cannot be said that the conclusions reached by the learned Resident Magistrate in this regard were unreasonable.

Next it was submitted that the learned Resident Magistrate failed to pay sufficient regard to the basic improbability of the complainant's evidence and the contradictions in the evidence of the witness for the Crown; further that the finding of the learned Resident Magistrate is unreasonable and cannot be supported in the light of the evidence.

Having examined the evidence in the light of the criticisms made by Mr. Mahfood we can see no merit in these submissions.

Lastly it was submitted that the sentence of imprisonment for 4 months at hard labour and in addition to be privately whipped once with two strokes imposed on the appellant was manifestly harsh and excessive and that a fine would be an appropriate penalty in the circumstances of the case. We have given anxious consideration to this question and have come to the conclusion that the sentence ought to be varied. While it is true that the evidence discloses that the appellant by a subterfuge induced the complainant to go to his shop for the purpose of having sexual intercourse with her yet when his efforts towards achieving that purpose met with unqualified resistance on her part he desisted and indeed fled from the toilet into which he had caused her to go. We think that the justice of the case will be met by substituting a fine of $100 in default 4 months' imprisonment at hard labour for the custodial sentence imposed by the learned Resident Magistrate.

In the result the appeal is dismissed and the sentence is varied as indicated above.