In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 54

FIONA MILLER
(Informant)

Appellant

-v-

X

Respondent

JUDGMENT

(in Court)[1]

Appeal by Informant-sexual exploitation by a person in a position of authority or trust-section 182B (1)(a) of Criminal Code-whether unsworn evidence capable of corroborating sworn evidence of complainant-assessment of credibility of child witnesses

Date of hearing: October 31, 2016
Date of Judgment: November 23, 2016

Mrs Takiyah Simpson[2], Department of Public Prosecutions, for the Appellant
Ms Elizabeth Christopher, Christopher's, for the Respondent

Introductory

1. The Informant appeals against the acquittal of the Respondent on February 9, 2016 in the Magistrates' Court (Wor. Archibald Warner). The Respondent was required to answer the case advanced on Counts 1, 8 and 9 on an Information dated November

[1] The present Judgment was circulated to counsel without a hearing. It has been anonymised to protect the identity of the child complainant.
[2] Formerly Ms T. Burgess.

19, 2014. These charges alleged that, being a person in authority or trust towards the Complainant ("C"), a young person, the Respondent:

(a) between September 1, 2013 and June 28, 2014 touched her buttock for a sexual purpose;

(b) between August 2, 2014 and August 28, 2014, touched her mouth with his mouth;

(c) between August 2, 2014 and August 28, 2014, kissed her on the mouth and rubbed her thigh.

2. The Informant's right of appeal against an acquittal is limited to "*any decision in law which led the court of summary jurisdiction to dismiss the information*" (section 4(1)(a), Criminal Appeal Act 1952). Three grounds of appeal were relied upon:

(1) the Learned Magistrate erred in law in finding that corroboration was required for C's evidence when in law none was required and erred in law in finding that that C's sister ("S") who gave unsworn evidence was incapable of corroborating C's evidence ;

(2) the Learned Magistrate erred law in finding that C consented to the acts complained of under Count 9 as in law she was incapable of consenting;

(3) The Learned Magistrate erred in law in approaching the evidence of C in the same way as an adult's evidence should be approached.

The proceedings in the Magistrates' Court

3. The Prosecution case rested primarily on the evidence of C, who was between the ages and 12 and 13 at the time of the offences and 13 at the time of the trial. It was supported by the unsworn evidence of S who testified that she was a witness to all three counts. She was 9 years old at the date of trial. The Learned Magistrate granted the Prosecution's application for S to give her evidence hidden from the Respondent's view by a shield. C's mother ("M") produced C's birth certificate and described the relationship between the Defendant and her family. In addition to being C's teacher, he had counselled her during her divorce and frequently visited her home afterwards to see the children. She said this made her "*feel uncomfortable as he had no reason to come by*", neither she nor any other adult gave evidence which directly incriminated the Defendant in any way. However, under cross-examination M agreed that after her

separation the Defendant occasionally brought food to the home and that she would ask him for lifts.

4. C testified that she was 12 years old when the Defendant first kissed her at school and thereafter such kissing occurred on a daily basis, either in the classroom on in the Defendant's office. The kissing was accompanied by touching on her thighs and buttocks through her clothes. She was in contact with the Defendant by cell phone outside of school hours almost daily; the Defendant would call her on her brother's cell phone and she would call the Defendant using her own cell phone. Under cross-examination C agreed the school space was physically small but with multiple doors and the Defendant's wife taught there and his grandchildren were students there as well. She also admitted that in her Police Witness Statement she had said the doors were always open when in fact sometimes they were open and sometimes closed. She also admitted that she had not mentioned anything more than kissing happening at school to the Police.

5. S testified that she had seen the Defendant kissing her sister C when they were alone in her classroom or his office through peeking through the door. She also observed buttock-touching, "*4 times…This… happened like every day*". When it was put to her that she had never mentioned seeing the Defendant touching C's "butt" in her Witness Statement, she said that she could not recall what she said in the statement.

6. Count 9 related to an incident said to have occurred at the family home around Cup Match when he visited the home to "*help my mother with her math*". Her mother and sister were both home at the time. Under cross-examination she stated that the Defendant had been invited to the home for mussel pie and other food when this incident occurred. C invited the Defendant into her room to show him something on her kindle. She agreed that her room was the only room in the house with internet access at the time. She testified that inside her room they hugged and kissed and ended up with the Defendant on top of C on her bed. Her sister came into the room, C told the Defendant S had seen them, and he got up and left. C denied the Defence version of what happened and S confirmed C's account of the bedroom incident and says she reported the incident to her mother. Under cross-examination S agreed that she had told the Police that when she informed the Defendant that she had seen him kissing her sister the Defendant had merely laughed. She also agreed that she had not mentioned in her Police Witness Statement that she had seen any kissing taking place in the bedroom.

7. Detective Constable Dionne Williams under cross-examination admitted that some of the allegations made against the Defendant resulted from information supplied to her by C's brother ("B") whom she spoke to befores he spoke to C herself. M had earlier admitted under cross-examination that B was under treatment for mental health problems which included hallucinations.

8. The Defendant, a man of previous good character and a religious leader, gave evidence in his own defence. He denied all the allegations made against him. Firstly, he described the small private school as an open plan space with doors between different classroom spaces usually left open. The Defendant agreed he was invited to the family home for mussel pie. He agreed that he went to C's room at her invitation to look at her kindle and did not deny that S had come into the room and found him on top of C. This happened after playful tugging for the kindle during which he tripped on her bed and tumbled accidentally on top of her. When he heard S's voice he got up and returned to the living room but did not stay long as other guests had arrived.

9. Under cross-examination the Defendant admitted that C would occasionally be in a classroom on her own and that he had spent time with her in the absence of others in his office. However, he insisted that often other persons would be present. He admitted they were quite close and that C would, more so than any other student, stay behind to talk to him. He admitted talking to C on the phone outside of school and calling the family home. He also admitted that in 2013 a meeting was held at the school as a result of C telling a fellow student that the Defendant had been kissing her. The issue was resolved because, as the Defendant understood it (having not been present at the meeting), C subsequently denied the incident had occurred. As regards the bedroom incident, he explained that he did not mention anything to the girls' mother when he returned to the living room because "*other family members and friend* [sic] *had arrived so I did not have the opportunity.*" After this incident, the Defendant attended a meeting of fellow worshippers and the sisters' family and gave the same account of the incident as he gave in his evidence at trial.

10. The Crown submitted that both C and S were both credible witnesses and there was no reason advanced as to why they should lie. S had corroborated C's evidence. Her "every day" allusion should be interpreted as meaning frequently. The Defence submitted that S's evidence itself required corroboration and that C as the victim and as her sister was not sufficiently independent. S was not credible because she first mentioned seeing touching at school in the witness box and seeing kissing in the bedroom in the witness box. The trial concluded and judgment was reserved on January 12, 2016.

11. In his Judgment delivered on February 9, 2016, which ran to over 12 typed pages, the Learned Magistrate recorded the following findings pertinent to the present appeal:

> "[S]*'s testimony was a deposition pursuant to Section 41* [of the Evidence Act 1905]. *I ruled that S's deposition is incapable of corroborating any testimony /evidence given by* [C].

Similarly, [C]*'s evidence is incapable of corroborating* [S]*'s evidence because, inter-alia,* [C]*'s evidence is not from an independent source, it is from C herself.*

In any event I find that [S]*'s deposition is unreliable. It is specious and nonspecific….*

In all the circumstances regarding Counts 1 and 8 separate and distinctly, and having considered the quality of the evidence as discussed earlier; I find the evidence of [C] *specious, inconsistent nonspecific, and; generally, considering the Defendant's good character and after the application of good character warning as such I cannot be satisfied so that I feel sure I am not satisfied so that I feel sure based on all the evidence that the Defendant is guilty of Count 1; and separately and distinctly not guilty of Count 8.*

I have carefully considered the evidence of as it relates to Count 9. The likelihood of concoction looms large and the presence of unreliable evidence- the Defendant was invited into [C]*'s bedroom by her with the knowledge of the mother-the bedroom door was open [it is not a big house]. Would a man of good character behave in this way especially in this domestic environment…*

In all the circumstances I find the Prosecution evidence on this Count 9 to be unreliable and specious…"

Findings: merits of the appeal

Ground 1

12. Section 327 of the Criminal Code provides as follows:

> "*327. The rules requiring corroboration in sexual offences are abrogated and, accordingly, where an accused is charged with a sexual offence—*
>
> *(a) corroboration is not required for a conviction; and*
>
> (b) *and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.*"

13. This has been the legal position for over 20 years (since 1993). Section 32(2) of the Evidence Act 1905 abolished all non-statutory corroboration requirements (with effect from 1994). However, subsection (3) of section 32 provides:

> "(3) *Nothing in subsection (2)— (a) precludes a judge from advising a jury to consider, in their discretion, whether evidence ought to be corroborated by*

other evidence; or (b) excuses a judge from otherwise assisting a jury in their consideration of any evidence, where the interests of justice warrant."

14. The legal position for over 20 years has been that corroboration in sexual offences or cases based on the sworn evidence of children is not required in all cases but that triers of fact may be required in particular cases to consider whether or not the interests of justice suggest that it may be desirable to look for corroboration of 'suspect' evidence. Ms Christopher referred the Court to Bermudian Privy Council decision in *Laing-v-The Queen* [2013] UKPC 14 and Lord Hope's following reasoning:

> "*8. Mr Fitzgerald pointed out that, when the rule that required corroboration of evidence was abolished in Bermuda in 1994, it was stated in section 32(3) of the Evidence Act that nothing in subsection (2) which abolished the rule precludes a judge from advising a jury to consider, in their discretion, whether evidence ought to be corroborated by other evidence where the interests of justice so warrant. He said that, so far as he was aware, this was the first case in which such a warning had been given in Bermuda. But that provision, although not in the same terms, serves the same purpose as section 32(1) of the Criminal Justice and Public Order Act 1994 which abolished the corroboration rule in England and Wales, and in R v Makanjuola [1995] 1 WLR 1348, 13511352, Lord Taylor of Gosforth CJ, with reference to the evidence of an alleged accomplice, said:*
>
> > *'It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.' Mr Fitzgerald said that the real point he wanted to make was that Ms Iereria's evidence was inherently dangerous, and that the warning that was needed was not given. Mr Stevens said in reply that there was no evidence that section 32(3) had caused any difficulty in Bermuda, that Lord Taylor's observation was plainly applicable there too, that the situation in this case was very similar to that with which he was dealing in that case and that the trial judge's direction was both appropriate and adequate.*
>
> *8. The Board was not persuaded that there is any substance in the criticism of the directions by the trial judge*[3]*. She dealt with the two grounds on which Ms Iereria's evidence had to be treated with caution: grudge and motive. She warned the jury that they must treat her evidence with the utmost caution. And she told them that, as there was a special need for caution where her evidence*

[3] Wade-Miller J.

was disputed by the appellant, they would be wise to look for some supporting material. It is not arguable that her directions were inadequate or that the conviction is unsafe. Mr Fitzgerald did not seek to argue that the sentence was so plainly excessive that permission should be given to appeal on that ground. The Board will humbly advise Her Majesty that permission to appeal on these substantive issues should be refused."

15. Mrs Simpson invited the Court to find, by implication rather than by reference to any explicit finding in this regard, that the Learned Magistrate was unaware of this elementary rule of criminal evidence. Such an inference is not justified, particularly in the case of a Magistrate with extensive criminal law experience, both at the Bar and on the Bench.

16. This was in any event an obvious case for the trial Court to find that it was desirable to look for corroboration of a child complainant's disputed evidence. The Prosecution positively invited the Court to treat the evidence of S as corroboration of C's evidence, acknowledging the desirability of independent confirmation of C's testimony. In these circumstances, the suggestion that the Learned Magistrate erred by finding that corroboration was required is not supported by the Record, is misconceived and must be rejected.

17. Was the unsworn evidence of S capable of corroborating C's evidence, in any event? The Learned Magistrate ruled that it was not capable of constituting corroboration. This was, for me, a less straightforward question. A helpful starting point is the statutory definition of "corroboration" under Bermudian law. Section 32 of the Evidence Act 1904 provides:

> "*(1)Evidence corroborates other evidence in criminal proceedings if, being admissible in those proceedings, it tends to confirm that other evidence.*"

18. Ms Christopher persuaded the Learned Magistrate and argued before this Court that an essential element of the recognised common law concept of corroboration required the corroborating evidence to come from a source independent of the witness whose evidence it is sought to corroborate. This submission is clearly sound. However, Mrs Simpson was equally to right to argue that the connection between the two sisters and the likelihood that they had discussed their evidence was insufficient to disqualify S's evidence as potentially corroborative as a matter of principle. The most important legal consideration, however, is determining what is the status of the unsworn evidence of a child?

19. Section 42 of the Evidence Act provides as follows:

> "***Reception of unsworn evidence of children in criminal causes***
> *42 (1) Where, in any proceeding for any offence, a child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, then if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence,*

and understands the duty of speaking the truth, such evidence may be received though not given upon oath; and the evidence of any child, though not given upon oath, but otherwise taken and reduced into writing in accordance with the Indictable Offences Act 1929 [title 8 item 32], shall be deemed to be a deposition within the meaning of that Act:

Provided that a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of subsection (1) and given on behalf of the prosecution is corroborated." [Emphasis added]

20. Ms Christopher submitted before the Magistrates' Court and the Learned Magistrate accepted that S's unsworn evidence was incapable as a matter of law of corroborating C's evidence. Mrs Simpson contended for a purposive reading of the proviso to section 42, and the proposition that:

    (a) unsworn evidence could corroborate other evidence and support a conviction as long as it was not the sole basis for the conviction; and

    (b) in the present case, S's evidence was not being relied upon to support the conviction alone and, in any event, C's evidence could corroborate S's evidence.

21. The Appellant's argument is entirely circular and must be rejected for that reason. Once one accepts that it is desirable to find independent confirmation of C's evidence, it follows that the corroborative evidence must itself not only be independent (which in a strict sense S's evidence was). The corroborative evidence must also be inherently reliable. Where the secondary evidence relied upon to provide non-obligatory but desirable corroboration of the primary evidence is itself so unreliable that it requires as a matter of positive law itself to be corroborated, the secondary evidence is entirely worthless in practical corroborative terms.

22. There is no need to decide whether or not it is ever possible for unsworn evidence to provide corroboration in the factual context of the present case. I find that the Learned Magistrate correctly ruled in all the circumstances of the present case that:

    (a) it was desirable to look for corroboration of C's testimony; that

    (b) S's evidence did not even potentially provide the required independent confirmation of C's evidence; and

    (c) C's evidence could not corroborate S's evidence as required by section 42 of the Evidence Act.

23. Ground 1 accordingly fails.

Ground 2

24. The Appellant complained that it appeared that the Learned Magistrate was mistaken as to the age of C and must have believed she was above the age of consent based on remarks he made when orally giving his decision which do not appear in the perfected Judgment. Ms Christopher rightly submitted that this complaint was wholly misconceived when the transcript is read in a straightforward manner.

25. Ground 2 of the appeal is summarily dismissed.

Ground 3

26. The nub of the complaint under Ground 3 is that no explicit findings were made explaining why, taking C's evidence in its own right, Count 8 (which simply alleged kissing) was not proved. A supplementary point is that the Learned Magistrate erred by failing to take into account the distinctive approach to evidence required in relation to child witnesses. This ground of appeal was arguable but not substantiated:

    (a) as noted above, the Learned Magistrate did expressly find that C's evidence was unreliable ("*specious, inconsistent, nonspecific*") after listing the various inconsistencies relied upon by Defence counsel;

    (b) the Learned Magistrate acceded to the Prosecution's application for S to testify from behind a screen. This revealed an appreciation of the need for special measures to protect child witnesses;

    (c) no authority was cited at trial or before this Court in support of the proposition that assessing credibility required a distinctive approach which took into account "*the intellectual and emotional development of children, the way in which they experience events and their ability to register and recall them.*"

27. In the absence of such authority, it must be acknowledged that it is self-evident that any trier of fact must assess credibility taking into account any distinctive characteristics or vulnerabilities of witnesses. It is also true that Bermuda lags behind modern jurisdictions in terms of express statutory support for child witnesses in sex abuse cases. There is no express legislative support for screens or for video evidence. Maura McGowan QC giving a Guest Lecture in the Cayman Islands in 2014 described the English approach to such cases at that time as follows:

    "*Many special measures have been introduced; no complainant in such a case has to face their alleged attacker across a court. Their evidence can be given from behind a screen, another room in the building via video link or sometimes from a different location altogether. In many cases and for all children and young witnesses, their evidence in chief will have been taken*

before the trial and recorded on video. We currently have three pilot schemes running in which cross examination of such witnesses is being conducted in advance of the trial and they will not be required to attend the trial at all. This will be difficult for Judges, lawyers and the courts to accommodate, it will challenge the traditional way but it is essential if we are to maintain or re-build public confidence in the way we handle such witnesses."[4]

28. Whatever measures one may adopt to enable child witnesses to give their evidence in difficult cases in the most conducive manner possible, however, such measures cannot usurp the fundamental judicial task in a criminal trial. And that is to ensure that a conviction is only entered when the Prosecution has discharged the burden of proof which is the corollary of the accused person's constitutional right to be presumed innocent until proven guilty. This central task was clearly very much in the mind of the Learned Magistrate in the present case when he stated:

> "*In cases such as this the Court must be especially careful with assessing the evidence. At the end of the day the Defendant can only be convicted if the Court is satisfied so that it feels sure.*"

29. This statement reflects not simply section 6(2)(a) of the Bermuda Constitution, but also English common law principles which have long been recognised as forming part of Bermudian common law as well:

> "*Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt …If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*"[5]

30. Ground 3 of the appeal must be dismissed, because it is impossible for this Court to interfere with this central factual finding which it was properly open to the Learned Magistrate to reach and which he logically explained on objective and rational grounds which are easy to understand. That does not mean that the Court is not left with a mixture of discomfiture and suspicion about the Respondent's conduct. As Mrs Simpson fairly argued, no convincing motive for C and S falsely implicating him was ever established. On any view, it took great courage for them, with the support of their mother, to give evidence in Court against an influential and respected older man.

[4] '*Criminal Law-The Challenges Now and in the Years Ahead-Grand Court of the Cayman Islands*'.
[5] Lord Sankey in Woolmington-v-DPP [1935] AC 462 at page 481.

Conclusion

31. For the above reasons, the Informant's appeal against the acquittal of the Respondent in the Magistrates' Court is dismissed.

Dated this 23rd day of November, 2016 _____
IAN RC KAWALEY CJ