**IN THE SUPREME COURT OF BERMUDA**
**APPELLATE JURISDICTION**
**2006: No. 13**

**BETWEEN:**

**ERNEST CHARLES MCQUEEN**

**Appellant**

**-and-**

**LYNDON RAYNOR**
**(Police Constable)**

**Respondent**

Juris Law Chambers, for the Appellant
Director of Public Prosecutions, for the Respondent

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**JUDGMENT**

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1. The Appellant was charged and convicted of two (2) Counts of Unlawful Carnal Knowledge (UCK) of TS, a girl between the age of fourteen (14) and sixteen (16) years of age.

2. This Appeal is against the conviction. The grounds of Appeal are that:-

(i.) The Learned Magistrate erred in law and in fact, when he ruled that admissions alleged to have been made by the Appellant whilst in police custody at the Bermuda International Airport were admissible in evidence.
(ii.) The conviction should be set aside on the ground that, upon weighing up all the admissible evidence, it ought not to be supported.
(iii.) The Appellate [Appellant] reserves the right to amend and perfect his grounds of appeal upon receipt of the record.

3. The case for the crown was that Ernest Charles McQueen had penetrating sexual intercourse twice with TS who was between the age of fourteen (14) and sixteen (16) years. The first occasion was on 8th May, 2004 when he saw her on Court Street and she went with him in his car to his apartment where they had penetrating vaginal sexual intercourse. The Appellant asked her not to tell her mother with whom he had an ongoing intimate relationship of a sexual nature. The second occasion was on 22nd May, 2004 when TS went to the Appellant's apartment to collect money which the Appellant had agreed to give her to buy an outfit for the upcoming 24th May – Bermuda Day. Following a complaint to the police a look out was posted for the Appellant and at about 2:40 p.m. on June 22, 2004, a police officer saw him standing at a counter at the airport. The officer identified herself and escorted him to the airport police station. The officer said in

evidence – although it is disputed that she cautioned him – that at 3:40 p.m. she cautioned and arrested the Appellant. He made no reply. He was documented, searched and arrested on suspicion of sexual assault.

4. In the course of examination in chief, the officer said that she had no personal knowledge of the allegation. She only knew of the requirement to look-out for the Appellant and that was the basis for her arrest.

5. It is relevant at this stage to refer to Counsel for the Appellant's attack on this issue. Mr. Attridge submitted inter alia that the officer did not believe on reasonable grounds that the offence of sexual assault had been committed. He maintained that, the arresting officer had no personal information and whilst the Appellant was arrested "ostensibly for an arrestable offence", the reality is that he was apprehended and detained in custody in respect of an allegation of Unlawful Carnal Knowledge (a misdemeanour) which is not an arrestable offence. Therefore, his arrest and detention at the airport police station and thereafter was unlawful. This unlawful detention operated unfairly against the Appellant.

6. The view of this Court is that the arrest was not unlawful. Section 454 of the Criminal Code authorises a police officer "who believes on reasonable grounds that an offence has been committed, and that any person has committed it, to arrest that person without a warrant whether the offence has been actually committed or not, and whether the person arrested committed the offence or not;" In the view of the Court the words "who believes on reasonable grounds that an offence has been committed" must be given a wider meaning than contended by Mr. Attridge namely that the officer had to have "personal knowledge" that the offence was committed. When a look-out is posted for a person and that person is sighted it would be unreasonable to expect an officer to go behind the posting and endeavour to make a personal verification of the details of the posting. In this instance the accused was seen by the police officer at a secondary counter at the airport. She had information that the Appellant had committed a sexual assault and given these factors Section 454 supra authorized his arrest.
For this reason the decision of this Court is that this ground of appeal fails.

7. To continue with the narrative, at about 4:40 p.m. on June 22, 2005 three (3) police officers attended at the police station at the Airport. The officers said in evidence that they were aware that the Defendant was in custody and they needed to speak to him regarding an allegation of UCK of TS. The notes of the Learned Magistrate show that in evidence the officers stated that one of them cautioned the Appellant. Thereafter, the Appellant was asked if he knew why he was being arrested and he replied "Yes, for having sex with a minor." The record reads that 'DC Franklyn Foggo said "Will that person be T and if the child T's carrying is his". He replied "no, he will have to do a test on that". DC Foggo asked "why don't you think it's yours". The Defendant replied "cause she's easy". Foggo asked "did he have sex with her". Defendant said "yes". Foggo asked "how many times" and the Defendant remained silent he did not reply at all. Defendant was conveyed to Hamilton Police Station'.

8. The case for the Appellant is that he denies that he made any such admission to the police officers, that he was cautioned by them and that he had had intercourse with TS.

9. Mr. Attridge submitted inter alia that because the arrest at about 4:40 p.m. on June 22, 2005 for UCK of TS was unlawful the evidence of the conversation between the Appellant and the police ought to have been excluded.

Mr. Attridge further submitted that the Learned Magistrate erred in principle when he held that:

1. (i.) the fact that the officer 'had the specific offence being investigated wrong does not render the arrest unlawful".

(ii.) the Appellant "was wanted by the police in connection with a sexual offence" and "Unlawful Carnal Knowledge is a sexual offence. Therefore, the officer acted within the law- i.e. section 454(a) of the criminal code which only requires her to "believe on reasonable grounds" that the arrest is appropriate and that the officer did have such grounds.

'2. The Prosecution did prove beyond reasonable doubt that the Appellant's right to seek and obtain legal advice was complied with. Mr. Attridge maintained that although each of the four (4) officers testified that "the Appellant was cautioned prior to the alleged questions being asked by DC Foggo presumably in accordance with the Judges' Rules (although there is no evidence of what was actually said) none of them gave evidence of the Appellant having been advised of his right to legal counsel prior to the alleged questions being asked. Based on the evidence before the Court "it is possible to infer had the Appellant been advised of his rights to and obtained legal advice when he should have been he would have maintained his right to silence when questions alleged to have been put by DC Foggo were asked. The failure of the police to advise the Appellant of his right to legal advice and to provide him with the opportunity to obtain legal advice operated unfairly against the Appellant and was contrary to his constitutional rights and his rights under the Criminal Code Act 1907'.

3. The Learned Magistrate erred in principle when he held that the 'conversations… were not in breach of [the Appellants] legal rights" and that "the conduct of the police was not in breach of any rules of practice of law".

4. Additionally Mr. Attridge submitted that the Learned Magistrate erred in principle when he held that the evidence of the "exchange" with DC Foggo would not operate unfairly against the defendant" and " it was not obtained ... by conduct which the prosecution ought not to take advantage".

5. Further the police officers failed to comply with Rule 11 and 111 of the Judges' Rules in that inter alia they failed to keep a proper record of the interview as required by the Rules.

10. In summary, Mr. Attridge submitted that the Learned Magistrate failed properly to consider the exercise of his directions and/or erred in principle when he found that:

- The Appellant's arrest was not unlawful;
- The conversations between the Appellant and the police were not in breach of the Appellant's legal rights;
- The conduct of the police was not in breach of any rules of practice or law; and
- The evidence of the conversation between the Appellant and the police was not obtained by conduct which the prosecution ought not to take advantage.

11. Mr. Attridge argued that on the basis of the individual and or cumulative effect of the matters before the Learned Magistrate he failed properly to exercise his discretion and erred in principle when he made the relevant findings.

12. In the judgment of this Court the Learned Magistrate is correct when he found that the conversations at the airport were not in breach of the Appellant's legal rights. The test to apply is whether evidence has been obtained by conduct of which the crown ought not to have taken advantage. There is no suggestion that the Appellant was willfully misled or of the evidence being elicited by trick,

oppression or bribes. There is no deliberate and conscious violation of a constitutional right.

13. In the judgment of this Court the Learned Magistrate considered whether the evidence is inevitably true or open to some doubt. Having seen and heard the witnesses he rejected the evidence of the Appellant and accepted the evidence adduced by the Prosecution as credible. It is plain that the Learned Magistrate accepted the evidence as relevant and admissible. This court cannot disturb that finding.

14. The exercise of discretion must be considered in the light of all the material facts and findings and all the surrounding circumstances.

In Herman King v R, P.C. [1969] 1 AC p. 304 at p. 305 it was held that the discretion of the court must be exercised and is not taken away by the declarations of rights even in written form. In King the search of the Appellant's premises was not authorised and was illegal nevertheless it was held "that although the search was illegal the court had a discretion to admit the evidence obtained as a result of it and the constitutional protection against search of person or property without consent did not take away the discretion of the court; and that, since it was not a case in which the evidence had been obtained by conduct of which the Crown ought not to take advantage, there was no ground for interfering with the exercise of discretion by the court to admit the evidence obtained by the search.

And at page 319 their Lordships agreed with the judgment of the Courts-Martial Appeal Court in holding that unfairness to the accused is not susceptible of close definition:

"it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence, may all be relevant. That is not to say the standard of fairness must bear some sort of inverse proportion to the extent to which the public interest may be involved, but different offences may pose different problems for the police and justify different methods."

Having considered the submissions on the facts and on the law advanced this Court can find no ground to interfere with the decision of the Learned Magistrate.

The Appeal is dismissed and the conviction affirmed.

**Dated this 11th day October 2007.**

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**The Hon. Mrs. Norma Wade-Miller**
**Puisne Judge**