



In The Supreme Court of Bermuda

APPELLATE JURISDICTION 2021: 08

ISMAILA DARRELL

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

*Appeal against conviction in the Magistrates' Court
Sexual Exploitation of a Young Person by a Person in a Position of Trust
Complaint of Magistrate's Acceptance and Reliance on the Complainant's Evidence*

Date of Hearing: 02 September 2021

Date of Judgment: 24 September 2021

Appellant Mr. Vaughan Caines, Forensica Legal

Respondent Ms. Cindy Clarke, Director of Public Prosecutions

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. The Appellant was tried and convicted on 12 January 2021 in the Magistrates' Court under section 182B of the Criminal Code on Information 19CR00415 by the learned Magistrate, Mr. Khamisi Tokunbo, for having committed an offence of sexual exploitation of a young male person while being in a position of trust.
2. The offence in question, on the Crown's case, occurred on a date unknown between 3 September 2016 and 3 September 2018 when the Appellant would have been within the age range of 31-33 years old and the Complainant would have been at an age between 8-10 years. (The Complainant, reason of his age, was a "young person" under

section 182B(2) which applies to a victim who is under the age of sixteen years.) At the time of the trial when the Complainant gave his oral evidence he was just short of 12 years old.

The Crown's Case at Trial:

3. The young Complainant ordinarily resided with his parents and his two younger siblings. His family previously considered the Appellant in this case to be a personal friend who would sometimes visit their home.
4. The Appellant, despite his adult age, was living with his mother and his nephew (the "nephew"), who is a child of approximately the same age as the Complainant. The Complainant and the nephew were close friends.
5. The Complainant's evidence at trial was that the Appellant purchased items, such as candy and cricket gear, for him and the nephew. The Appellant would also take them out on boat trips. The Complainant said that he visited the nephew at the Appellant's residence on several occasions and that from time he was 8 years of age, he would on a number of occasions spend the night at the Appellant's homestead.
6. The Complainant described the Appellant's residence which was a two-storey house. He provided details on the lay-out of the house including the inside of the Appellant's bedroom. He said he initially slept upstairs on the couch and on the floor where the nephew and another person slept. Eventually, however, he started sleeping downstairs in the Appellant's bedroom where he and the Appellant shared a bed. At this stage, the Complainant told the Court that he was 8 years old and was still wetting his bed. The Complainant told the Court that the Appellant's mother directed him to start sleeping downstairs because of his bed-wetting. His young friend, the nephew, however, continued to sleep upstairs.
7. On the occasions that the Complainant slept in the Appellant's bed, the Appellant would ask if he (the Appellant) could touch the Complainant's penis. The Complainant said that on the first occasion he did not reply to the Appellant's invitation but subsequently agreed to allow this when the Appellant asked him again. The Complainant said that he (the Complainant) was not wearing an undervest but had on a pair of shorts and underpants. The Appellant was wearing boxer shorts.
8. The Complainant said that the Appellant silently touched and rubbed him on his penis underneath his underpants for a few seconds. The bedroom was dark and the door was closed. The Complainant told the Court that this reoccurred on subsequent occasions. He said [page 24-25 of the Record]:

“There was another time when he asked to touch my penis and I said yes. This time I was just wearing underpants. Touched for a few seconds. He said nothing. I was laying down. He rubbed my penis with his hand. There was a third time. The same thing happened. He asked same question- to touch my penis. I was wearing underpants and he touched me under the pants. He touched penis with his hand and it lasted a few seconds. There was another occasion. I can’t remember what happened. There was no occasion I did not say yes. (The Crown charged the Appellant with a single count of sexual exploitation.) I did not tell anyone. Don’t know why. He stopped touching me the day I went health class and they were talking about good parts and bad parts. This was the teacher. I was 10 years old in P6. After Health class I saw Izzy [the Appellant] again. He stopped touching because I told him about good parts and bad parts. That was the day my mom and dad found out. Don’t remember where I saw him or how I came to tell him.”

9. The Crown also called evidence from the Complainant’s parents to establish the close friendship which they previously believed themselves to have had with the Appellant.

The Ground of Appeal and the Defence Case at Trial:

10. On 15 July 2021 I granted the Appellant leave to appeal out of time on the single pleaded ground that *“the conviction is unsafe as the Judge erred in fact by not concluding that there was a lack of sufficient evidence to support a guilty verdict.”*
11. Prior to his trial in the Magistrates’ Court, the Appellant filed a Defence Statement dated 9 March 2020 wherein he launched a wholesale denial of the allegations of sexual touching. He continually refuted the charges throughout the trial.
12. At trial, Mr. Vaughan Caines robustly cross-examined the young Complainant and highlighted the inconsistencies between the Complainant’s denial of the assault when questioned by his mother and his subsequent affirmation of the assault when speaking to his father. Mr. Caines, in arguing this appeal, relied heavily on this example to assert a lack of credibility on the part of the Complainant. On the written submissions for the Appellant, Mr. Caines formulated this complaint as follows [7-19 and 40]:

“...

7. Via the Court’s Notes on the Parents Evidence, the Learned Magistrate acknowledged that during cross-examination the mother of [the Complainant] conceded that [the Complainant] did not tell her The Appellant had interfered with him.

8. Even after in her hysterical state she implored him to be honest with her and tell her if anything had happened between The Appellant and him.

9. She conceded that he answered in the negative informing her that nothing had happened between him and The Appellant. She also conceded that she was distraught as what she heard had rocked her to the core.

10. She further accepted that she had on previous occasions discussed such a situation with her children as she was interfered with when she was younger. Lastly, she conceded that [the Complainant] told lies, but couched it in the context that all children tended to lie.

11. She also acknowledged that she attempted to scare [the Complainant] to get to the truth by making reference to lie detector test machines to get him to tell her if he had been interfered with. As the Learned Magistrate rightly pointed out, [the Complainant] still denied being interfered with by The Appellant.

12. It was only when he was then confronted by his father did, he say yes, he was interfered with by Mr. Darrell.

Analysis of [the Complainant's] answers to his Parents & the Police Officer

13. On balance we acknowledge there is a fundamental and important and, in this matter, pivotal dynamic between an adolescent [the Complainant] and his immediate authority figures (his parents).

14. In the instant case, [the Complainant] withstood the onslaught and interrogation of his mother and told the truth; notwithstanding that she was panic-stricken and pleading with him to say if he was interfered with. Nevertheless, he was steadfast throughout that blitzkrieg and resolutely told her nothing ever happened between him and Mr. Darrell.

15. But he did not say (we say) and could not withstand the questioning of both his immediate authority figures.

16. Upon being questioned by his father and seeing and experiencing his mother's previous reactions (in which she tried to scare him into telling her the "truth"), and her continued and current (at that specific time) inconsolable state, only then did he change his story and state he was molested.

17. Therefore, to answer the ultimate question as to why [the Complainant] would say he was interfered with by Mr. Darrell if nothing happened, the answer is to please his parents and to make his mother feel better and to stop her hysterics.

18. This dynamic of pleasing authority figures was further revealed in his interactions with the Police Officer.

19. *At the first interview between [the Complainant] and the Police Officer interviewing him, the officer starts the interview by [the Complainant] “he has done nothing wrong”. This is important as there are now three authority figures enforcing and reinforcing to [the Complainant] that something has happened to him, and wanting to please them all, he concedes and tells them what they want to hear, that The Appellant touched him inappropriately.*

...

40. *Moreover, in the face of the emotionally charged interaction with his mother on 31 May 2019, that would have been the opportune time for [the Complainant] to inform her that The Appellant was interfering with him. In that specific time and space, he had no reason to lie to her. [Mr. Caines’ emphasis]”*

13. Mr. Caines added the nephew to his list of significant persons to whom the Complainant reported nothing of the assault when the subject of the Appellant arose in conversation. He submitted [38-39]:

“38. Additionally, when cross-examined about his relationship with [the nephew] (who he described as his best friend) he was asked if he shared everything with him, to which he replied yes.

39. He then further admitted to not telling [the nephew] anything about him being touched by the Appellant, notwithstanding his mother informed the Court that [the Complainant] knew about The Appellant’s arrest from Zion, indicating that the two young men did indeed share their most intimate secrets.”

14. In his oral and written submissions, Mr. Caines characterised the Complainant’s evidence as gapingly inconsistent and evasive. He submitted that the facts, if carefully scrutinised, showed that the Complainant was prone to telling lies and indeed lied about the allegations against the Appellant. One of the examples he relied on was the varying accounts by the Complainant as to how often he had been assaulted by the Appellant.
15. The Appellant, in the course of his evidence on the stand, accused the Complainant of lying about the allegations of sexual exploitation against him. He accepted, however, that the Complainant visited the nephew at his home and overnights on various occasions. According to the Appellant’s evidence, the Complainant never slept in his room save only two occasions on which he, the Appellant, woke up and found the Complainant in his bed. The Appellant’s evidence was that the Complainant otherwise slept upstairs with the nephew.
16. Describing the first occasion on which the Complainant slept in the Appellant’s bed, the Appellant said that he discovered the Complainant was present when he awoke at 5:30am and noticed that the Complainant had urinated in his bed. The Appellant said that he put a fresh towel in the bathroom and nudged the Complainant to wake up and get a shower. The Appellant’s evidence was that when he returned to his bedroom the

Complainant was going into the bathroom and was fully dressed in his pyjamas. He said he then removed his bed sheets and left the house to go to work. The learned magistrate noted the Appellant's denial of sexual touching as follows:

"...At no time did I touch [the Complainant] for a sexual purpose. I make 6:30am to work. Travel on my bike. Finish work 8:30pm sometimes 11pm at night...I was irritated when I saw [the Complainant] in my bed. Because he wet my bed and he wasn't supposed to be in my room. I never told him or encouraged [the Complainant] to sleep in my room..."

17. Referring to the second occasion, the Appellant's evidence is noted as follows:

"The second incident I woke up to make time – 5:30 a.m. – I was getting ready to get out of my bed and was surprised to see him in my bed again. I nudged him on his arm to wake him up and sent him back upstairs. He was dressed in his full pajamas [pyjamas]. I was surprised and irritated at the same time to find him in my bed. Irritated because he was in my room and wasn't supposed to be. I never told or encouraged him on that occasion to sleep in my room. He woke up and left my room and went back upstairs. I got dressed and left for work. Knocked off work 8:30. I go to bed between 8:30 and 9pm because I make 6:30 next morning. I am a heavy sleeper. Routine – shower, shorts and undervest and go to bed. My door is closed. Closed because I have a little niece who would come in and bother me."

18. The Appellant also told the Court that he was previously good friends with the Complainant's parents and that during that period he deposited money into their account to assist them with payment of their electric bill(s) and groceries. He said that he purchased items for the Complainant such as cricket gear, parts for his scrambler, a PlayStation and cards etc. When asked during cross examination why the Complainant would be motivated to lie about the allegations of sexual exploitation, he is recorded on the Magistrate's note to have answered as follows [40]:

"...He is lying on me – to please his parents. It makes sense him lying if he tells her [the Complainant's mother] what she wants to know cause [because] he don't want to see her stressed. Yes it makes sense for [the Complainant] to lie... even though I am assisting them. I have seen this happen before. It doesn't make any sense (for them to lie)..."

19. The Appellant's mother, Ms. Marilyn Darrell, gave evidence in support of the Defence case. She denied having directed the Complainant to sleep in the Appellant's bedroom and claimed that she scolded the Complainant when her son, the Appellant, told her that the Complainant had slept downstairs in the Appellant's room. According to Ms. Darrell's evidence in chief, she forbade the Complainant from returning to the Appellant's room to sleep on any subsequent occasion.

20. Ms. Darrell told the Court in her evidence at trial that there was another occasion on which the Appellant complained to her that the Complainant had slept in his bed. She said [42]:

“On another occasion... [the Appellant] told me that he woke up again and [the Complainant] was in his bed before he went to work. I scolded [the Complainant] again and reminded him he is not to go to [the Appellant’s]... room because a lot of times he comes home tired and does not need anyone to bother him. I did not tell anyone else because I dealt with it and it was in my household. I felt I had handled it and had no reason to tell anybody.”

21. That being said, Ms. Darrell added that the Complainant always appeared happy in her house and would even cry to return home. She said that the Complainant never complained about anyone or anything when he was in her home.

Analysis and Decision

22. The strength of the Crown’s case in the trial proceedings below was entirely contingent on the credibility and reliability of the Complainant’s evidence. The Appellant’s Counsel seemingly accepted that the Complainant’s evidence, if believed, established a case of sexual exploitation contrary to section 182B of the Criminal Code. Mr. Darrell’s appeal is essentially a plea to this Court to find that the learned Magistrate ought not to have believed the Complainant’s evidence on the stand. This Court is being asked to make such a finding on the basis that the Complainant was inconsistent on collateral issues and/or his previous out-of-court statements to his mother.

23. In Safiyah Talbot v Fiona Miller [2020] SC (Bda) 40 App I stated [para 24]:

“As a matter of general and established principle, this Court, in the exercise of its appellate jurisdiction, will be reluctant to go behind a magistrate’s findings of facts drawn from an assessment of witnesses’ oral evidence given at trial. This is because the magistrate, who would have had the sole advantage of observing the demeanour of those witnesses, is best positioned to evaluate the truthfulness of the evidence. It is with that logic that I would proceed with trepidation before interfering with findings of facts which were formed by the trial magistrate.”

24. In this case the magistrate found the Child to be a witness of truth and I have no proper basis to interfere with his acceptance of that evidence. The Appellant’s Counsel invites me to dismantle the magistrate’s assessment of the facts on the premise that the Child showed himself to be either unclear or inconsistent on matters which do not directly touch upon the allegations of sexual exploitation. All too often, child witnesses in cases of sexual exploitation, are aggressively cross-examined *ad nauseam* on collateral

issues. Such was the case here, as may be taken from the magistrate's synopsis of the cross-examination of the Child in his judgment [25-29]:

“... ”

25. [The Complainant] was forcefully cross-examined by counsel for the defendant. He was extensively cross-examined about what he was supposed to have said or not said during his two police interviews, with counsel using the written transcript of interviews as a basis to cross-examine or interrogate him. Many of [the Complainant's] answers in reply were that he could not recall his police interview as suggested by counsel.

26. He conceded that when his mother questioned him he denied that the defendant had interfered with him, but when questioned by his father he answered in the affirmative. He agreed that he said in a police interview that he sometimes tells lies, but did not say he gets away with lies.

27. At one point in cross-examination [the Complainant] was overwhelmed by the interrogation and withdrew from responding to the cross-examination and could not continue. The case was adjourned and resumed at a later date.

28. When [the Complainant] resumed his testimony he was further tested by defence counsel. He was accused of telling his mother the truth when he told her the defendant did not touch him, and lying to his father by saying the defendant touched him. He was repeatedly accused of lying, making up stories about the defendant asking to touch him, and touching him on his penis under his clothes. He was accused of lying to accommodate his mother's feelings so as not to upset her – of desiring to please her. He was accused of lying about telling the defendant about his health class teaching of good parts and bad parts.

29. He directly, forcefully and consistently denied suggestions that he was lying or making up stories. He denied that he himself made the decision to sleep in the defendant's bed and insisted that he did, in fact, know who told him to sleep in the defendant's bedroom. Finally he denied that anyone told him to say that the defendant touched him.”

25. In my judgment the learned magistrate was correct in finding that the Complainant was clear and consistent in his evidence of the acts of sexual exploitation heinously committed against him. The magistrate was also reasonable in his analysis of the oral evidence given by the Complainant's parents. That evidence, as corroborated by statements made by the Appellant himself, clearly established a background sentiments of amity and goodwill by the Complainant's parents towards the Appellant. As repeatedly pointed out at the trial, neither the parents nor the Child had any appearance of motive to fabricate these allegations against the Appellant. An improper motive to fabricate is often a go-to by the Defence in order to mount doubt about the Crown's

otherwise proven case. However, here, no such improper motive was shown, leaving the Crown's strong case intact.

26. The Appellant's suggestion that the Child invented these grotesque acts of criminally deviant behaviour against him was simply far-fetched. The Appellant's evidence corroborated the Crown's case that he, the Appellant, was seen as by the Complainant and his parents as a family friend who had only shown them kindness and generosity. Plainly put, the Appellant's suggestion that the Complainant lied to appease his mother is just implausible. It is as illogical as the Appellant's claim that the Complainant of his own motion left his friend's (the nephew's) upstairs sleeping area to sleep downstairs in the Appellant's bed. After all, the Complainant was at the Appellant's home for the enjoyment of a sleepover with his friend, the nephew.
27. In my judgment, the magistrate was right to fully reject the Appellant's tale that he slept through the night without being aware of the Complainant's presence in his bed. Oddly, on the Appellant's evidence, the Appellant omitted to query the Complainant as to why he abandoned his friend's company upstairs to sleep downstairs in his bed. That kind of expected questioning did not come from the Appellant despite the fact that the supposedly uninvited Complainant had accidentally urinated on his bed throughout the night.
28. (Here I would point out that when under cross-examination, the Appellant described his bed as being a mere mattress and box spring without a sheet in 2016. This is seemingly inconsistent with his evidence in chief when he explained that he removed the sheets from his bed after the Child had wet his bed). Whichever the case, this was hardly the kind of evidence that could raise reasonable doubt about the Crown's compelling case.
29. On my assessment of the record of the evidence, the Complainant's evidence was consistent and reliable whereas neither the Appellant nor his mother demonstrated themselves to be witnesses of truth.
30. For all of the above-explained reasons, I find that the learned magistrate's judgment is beyond reproach and that the appeal should accordingly fail.

Conclusion

31. I dismiss the appeal and remit this matter to the Magistrates' Court for sentencing on an expedited basis given the serious nature of this imprisonable offence and the fact that the Appellant, to whom the magistrate granted bail pending appeal, was convicted for this offence some nine months prior on 12 January 2021.
32. In the exercise of my judicial discretion, the Appellant is to be remanded into custody forthwith under section 329E of the Criminal Code (as construed in accordance with my earlier decision in *Justin Parsons v Attorney General and Minister of Legal Affairs* 2018 [2018] Bda LR 82.)

Dated this 24th day of September 2021

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE