# The Court of Appeal for Bermuda

113 Front Street
Hamilton HM 12
Bermuda

**CRIMINAL APPEAL No. 9 of 2007**

**Between:**

**OWEN ANTHONY REID**

**Appellant**

**-V-**

**THE QUEEN**

**Respondent**

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**Before:** **Hon. Justice Zacca, President**
**Hon. Justice Nazareth, JA**
**Hon. Justice Evans, JA**

**Date of Hearing:** **3 & 4 November 2008**
**Date of Judgment:** **14 November 2008**
**Reasons:** **28 November 2008**

**Appearances:** **Mr. P. O'Conor, QC with Mr. J. E. Durham of Trott & Duncan for the Appellant**
**Ms. P. Tyndale of Department of Public Prosecutions for the Respondent**

**PRESIDENT:**

## JUDGMENT AND REASONS

1. The appellant was charged on an indictment containing six counts of sexual exploitation of a young person in a position of trust.
   By a unanimous verdict of the Jury, the appellant was convicted on five counts, the learned trial judge having directed the Jury to find the accused not guilty on count 2. He was sentenced to four years imprisonment on each count, sentences to run concurrently. From these convictions he has appealed.

2. Briefly the case for the Crown was that the complainant is the daughter of the appellant who prior to March 2006, resided with her father, her mother, her younger brother and sister. She occupied a bedroom by herself. Her bedroom had an adjoining bathroom, and the bathroom had a door connecting directly to the appellant's study.

3. On February 15, 2004, the complainant was thirteen years old. At about 9 p.m. that night she was in her bedroom. The appellant called her into the study. He went up to her and began to massage her breasts with his hands. He also used his hands to squeeze her bottom. They were standing close together and the appellant began rubbing his penis against her through their clothing.

4. Sometime during the month of December 2004, the complainant's evidence was that a similar incident took place. In February 2005, the complainant was now 14 years old, and in her bedroom listening to music. Her mother was not at home, but her little brother and sister were downstairs in the house. She stated that the appellant came into her bedroom and told her to take off all her clothes and wait in the bed. She did as she was told. The appellant re-entered the bedroom from the bathroom with a condom on his penis. He told her to lie on her back on the bed. Again she complied. Using his fingers the appellant opened the lips of her vagina. He lay on top of her and using his penis he rubbed against her vagina back and forth until he ejaculated.

5. Sometime during August 2005, the appellant called the complainant into his study and apologised to her for what he had done. He promised not to do it again.

6. One night during September 2005, the complainant stated that she was asleep in her bed. The appellant entered her bedroom and lay on her bed. She got awake when she felt the bed moving. She was lying on her side with her back to the appellant and he was lying on his side with the front of his body alongside her back. The appellant pulled down her underwear and inserted his finger in her vagina. She said "he was pushing forcefully with his finger in my vagina and it hurt." She asked the appellant to leave her room and he did so.

7. On 22 March 2006 at about 4 a.m. The complainant was in her bedroom asleep. The appellant entered her bedroom and climbed into the bed with her. She was lying on her side with her back towards the appellant. He inserted his finger in her vagina. He removed his finger and he shifted her under him. He then began to kiss her on her lips and breast but she kept her lips tightly shut. He then asked her if anyone had gone inside her. She replied "no". He then told her "if you want to be touched, just ask me. You don't need boys—but a man and I am that one for you."
   She began to cry and told him that she was fed up and that he had promised that he would no longer touch her and that he had lied. She asked him to leave and he left. Up to the time she had not made a complaint to anyone.

8. Two days later while at school she made a complaint to the school counsellor and gave a statement to the police.

9. On March 24, 2006 she was examined by Nurse Brewster-Minors, who gave evidence. She told the Court and Jury that she was a sexual assault response team nurse and her duties were to examine persons who alleged that they had been sexually assaulted. There were no external injuries. She conducted an internal examination, that is, she looked in her vagina. The hymen was loose, and she saw some scar tissue on the right side.

10. The defence was an outright denial of the prosecution's case. The appellant denied that any of the incidents had taken place, that the complainant tends to lie and was untrustworthy and that she had reason for lying. He objected to her having boyfriends and her use of her web site. He had threatened to impose punishment on her. The

complainant at trial admitted that she had deceived her parents on occasions. She admits that she continually lied about having web sites. She admits that she had lied to her parents about boys, about seeing boys and about talking to boys.

11. The appellant relied on five grounds of appeal.
    a. That the learned trial judge erred in law in that he wrongly failed to direct the jury to disregard the evidence of the nurse entirely; and wrongly directed the jury that they could find some significance in this evidence, but did so in a way which left its potential proper role, entirely unclear.
    b. Leave of the Court was sought to rely on fresh expert evidence in the report of Dr. Jane Watkeys. This evidence was to demonstrate that any reliance upon the nurse's assertions that scaring was present would be unsafe.
    c. The learned trial judge wrongly admitted evidence about a statement by the appellant during a police interview to the effect that he had masturbated and ejaculated in the complainant's bed in her absence and after her complaint and departure from the family house.
    d. The learned trial judge failed to give a Lucas lies direction on the issue of whether he has lied about masturbating in his daughter's bed in her absence.
    e. In directing the jury to examine the evidence of what motivation The complainant may have had to lie, the learned trial judge failed to give a direction on the burden of proof.

**Grounds 1 and 2**

12. Mr. O'Connor, QC for the appellant submitted that the learned trial judge gave no adequate direction to the jury as to how they should approach the evidence of Nurse Brewster-Minors, as to the alleged findings of scar tissue within the vagina of the complainant at page 137 of the summing up. It was also submitted that the learned trial judge should have directed the jury to disregard the evidence of Nurse Brewster-Minors.

13. The learned trial judge directed the jury as follows:

> *I said I would deal with Nurse Brewster-Minors. She told you that she was the SART Nurse, the sexual assault response team nurse. It was her place to examine people who said they'd been the subject of sexual assaults. She was experienced in doing so and she examined (the complainant) on the 24th. It was in the evening at about 6:00 p.m. She didn't see any external injuries. She conducted an internal examination, in other words she looked in her vagina and she said that the hymen was loose; it has finger-like folds. That, I think, is natural. But she said she saw some scar tissue seen on the right side. She explained that scar tissue forms in response to an injury to connective tissues. She said it's a painful examination to do so, so it's difficult. She couldn't tell how many scars there were. She just saw some scar tissue. And she said she couldn't say how old the injury was. She didn't say it was a year old, or anything like that, she just said it was an old injury, but she couldn't say how old. She said a tampon couldn't cause the injury, because it isn't inside the hymen. She said that a finger, if inserted with enough force can cause the sort of blunt trauma that was necessary. She said the scar was on the right side of the hymen. She explained the hymen to you as like tissue like a sleeve*

*around the vagina, not like I think many of us thought, an impenetrable barrier across it.*

*She was cross-examined about that. And it was suggested to her that the plastic device used to insert tampons could, if used wrongly, have caused an injury like that, and I think she accepted that could have happened, though from her experience she didn't know it—it wasn't—she didn't know of that happening. She reiterated that it was an old injury. She says that she doesn't know what caused it. She says that masturbation could have caused it.*

*What do you make of that evidence, members of the jury? It's consistent with (the complainant's) story, but it doesn't support it, because it doesn't tell you how the injury occurred. As the nurse says, "I don't know what caused this scar tissue." And there was a variety of mechanisms that might have caused it. So it's consistent with it, but it doesn't support it, doesn't tell you how it occurred; doesn't tell you who did it.*

14. A medical history and assault information form was prepared at the time of the examination of the complainant by Nurse Brewster-Minors under the heading "Pelvic examination". There is a note with respect to the hymen—"Loose? Right side scar tissue." Mr. O'Connor submitted that the question sign between loose and right side scar tissue referred to the right side scar tissue. This he said cast doubt as to whether there was a scar tissue. It is usual for a question sign to be put after the matter referred to. It is clear in our view that the question sign referred to the word loose and not the scar tissue.

15. Mr. Froomkin, QC, a senior and experienced Counsel appeared at trial for the appellant. During the evidence in chief of Nurse Brewster-Minors, Mr. Froomkin stated that he accepted the evidence of the nurse.

    There is also the following interchange with Crown Counsel.

    **The Court**: You can lead, in fact, if he accepts her evidence.

    **Mr. Froomkin**: Yes, my Lord.

    There was no challenge by Mr. Froomkin as to the Nurse's evidence that there was a right side scar tissue. He appeared to have accepted the nurse's evidence that she did in fact see a scar. The thrust of the cross-examination was to suggest that a tampon which is contained in plastic could have caused such an injury if applied with blunt force. There was evidence that the complainant has started using tampons.

16. The nurse was not questioned by Mr. Froomkin or Counsel for the Crown as to the question sign. It was never suggested to her that the question sign related to the words "right side scar tissue."

17. It was sought by the appellant to have the medical report of Dr. Jane Watkeys Consultant Community Paediatrician—Swansea NHS Trust served as fresh evidence. Mr. O'Connor wished to rely on the report to cast doubt on the evidence of Nurse Brewster-Minors. In her report she stated:

    *The examination proforma states that the examination of the vagina, was negative for trauma, the hymen was loose, ? right side scar tissue.*

    Questions were posed to Dr. Watkeys by the appellant's counsel, one of which was:

(3) When should a genital examiner write a '?' before recording a finding such scarring? What would it mean? Dr. Watkeys answered "the question has already been answered."

It is to be noted that the question sign is placed after the questions posed. The examination proforma did not show a comma after the word loose. It was inserted in her report by Dr. Watkeys. Why she should have done this is not clear. Perhaps it was to support the meaning of the question sign. She appears to have answered the question by inserting a comma. This did not form part of the proforma and should not have been inserted by Dr. Watkeys in order to interpret the meaning of the question sign. In our view it does not support the contention of Mr. O'Connor. In her report she also states:

> *I have not seen or heard of any evidence that the insertion of a tampon causes scarring, though I suppose it is possible. I would not expect masturbation to cause scarring and believe it is highly improbable.*

In her conclusion, Dr. Watkeys states:

> *If scarring is present then it is consistent with the history given of forceful penetration blunt trauma. Unfortunately it is difficult to know if scarring is present or not."*

One can understand her conclusion because she did not examine the complainant. She also stated that damage to the hymen can be caused as a result of a sexual assault, and could be caused by a finger, penis, or object.

18. There was no dispute as to the principles to be applied in admitting fresh evidence. Having considered the fresh evidence, we are satisfied that if it had been adduced before the jury along with all the other evidence in the case, there could not have been a reasonable doubt in the minds of the jury as to the guilt of the appellant. This Court has no doubt as to the safety of the conviction which would lead us to say that an injustice has been done. The evidence could also have been available at the trial.
    In the circumstances we refused the application to admit the report of Dr. Watkeys.

19. The evidence of the complainant was that the appellant had inserted a finger in her vagina, forcefully so that it hurt. Nurse Brewster-Minors saw a right side scar. There is no evidence to support that a scar was not seen. In fact, Mr. Froomkin at trial accepted that a scar had been seen. It was a matter for the jury to find whether the scar had been the result of the appellant's finger being inserted in the complainant's vagina.

20. We are satisfied that there was no error on the part of the learned trial judge leaving Nurse Brewster-Minors evidence for the consideration of the jury. We also find no error in the direction of the trial judge with respect to the Nurse's evidence.

**Grounds 3 and 4**

21. Grounds 3 and 4 relate to the Appellant's interview by the police which was recorded and played to the Court as part of the Prosecution case. It was an unusual situation. The police officers concluded the interview at 2:35 pm on 30 March 2006, its second day. They resumed it 14 minutes later, explaining that "Mr. Reid has further requested to make a statement for the record".

22. The Judge described what followed -

> *Now, in considering what he said, you need to bear in mind that, the day before that, DC Burrows tells you the police executed a search warrant at his house and that they'd taken away a set of sheets from the bed in (the complainant's) bedroom and had also taken samples from both (the complainant) and himself, for DNA purposes.*
>
> *In respect of the sheets from (the complainant's) bed, when he reopened the interview he explained to the police that he had slept in it, on occasion, over the last couple of years, when (the complainant) was staying away from home, because of his bad back. He then goes on to say that he slept in it earlier in the week of the interview.*
>
> *Now, (the complainant) was out of the house by then. She had been removed. But he says he slept in the bed then and that he had masturbated and ejaculated in the bed, and he explained that he did that because he found sexual relations with his wife difficult following (the complainant's) allegations.*

23. The Appellant repeated this, in substance, in his oral evidence at the trial, although by then it was known that no forensic testing was carried out on the sheets, and there was no evidence that any trace of semen was found. But the Appellant's claims that he had slept in the bed, and had masturbated and ejaculated in it during the short period between The complainant leaving the house and the police removing the sheets, remained in evidence, and the precise status of the evidence gave rise to some difficulties, both at the trial and at the hearing of this appeal.

24. Although the evidence of his interview was introduced as part of the prosecution case, counsel for the prosecution said nothing about it in her closing speech, and the Judge reminded the jury that she had not done so. Leading counsel for the defence did refer to it, but only to the extent of saying that it could not be relevant to any of the charges brought. That was because the only reference to seminal fluid in the complainant's evidence was in respect of the offence alleged to have been committed in February 2005 (Count 4), and evidence as to whether or not semen was found in March 2006 could not be relevant to that. Although she alleged that a further offence was committed on 22 March 2006, only two days before she left the house, she did not suggest that ejaculation took place on that occasion.

25. Understandably, therefore, the Judge interrupted his Summation in order to raise the matter with counsel. He said that he was "unsure how to address the question of his interview and what he said about semen in the bed. I can't tell what weight you place on it." There followed a lengthy discussion which ended with the Judge saying "Okay. I'm not helped by either side. Maybe enlightenment will come overnight".

We have to agree that he did not receive from counsel the assistance he was entitled to expect. He resumed his Summation next morning with his own analysis of the relevance of the evidence and with the following directions, which we should set out in full.

> *The prosecution, in fact, said nothing about that in their closing speech, but it's there and I need to deal with it with you. It's very much a matter for you what you make of that, but you may think that means that he was concerned that the police would find his semen on (the complainant's) sheets. There is, of course, no evidence that the police did, in fact, find semen on the sheets. Burrows tells you that forensic testing wasn't, in fact, carried out. And in any event, the Defendant says that he had washed the sheets, after that. But even without any scientific evidence, you have his own admission that he had recently ejaculated in (the complainant's) bed, and if you divorce that for a moment from his explanation for it, it is evidence that his semen was, or would have been, on (the complainant's) bed sheets.*
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> *Now, if his semen was on (the complainant's) bed sheets, that is evidence capable of supporting her testimony. Whether it does or not is very much a matter for you and what you make of the evidence. But in considering that, there are two things you need to bear in mind. The first is whether you think that his explanation for how it got there is, or might be, true. If you thought that his explanation is, was, or might be true, then there would be an innocent explanation for his semen being there and it would take you no further, and you should therefore disregard the fact of his semen being there.*
>
> *In considering that, you are, in many ways, back to having to decide whether or not you think that he's credible, that is, a believable witness. But in doing that, remember that it's not for him to make you sure of the truth of his explanation, but rather for the prosecution to make you sure that it's not true; that's because of the burden of proof, as I have explained it to you. But in considering that, you can also look at the realities and the likelihood of such an explanation. You can ask yourself whether It's plausible, in all the circumstances, whether he would have done such a thing.*
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> *If you get to the position where you were sure that his explanation was not true, then the presence of semen could indicate that something sexual had happened in that bed, but remember that (the complainant's) account of the last occasion, her account of what happened on the Wednesday of the previous week does not include ejaculation. So the presence of semen does not fit in with the specifics of what she in fact told you.*

26. Ground 3 in the Notice of Appeal originally alleged that the Judge was wrong to admit this evidence, but this was withdrawn, because the evidence was admitted with the agreement of the Appellant. He had even insisted that the recording of the whole of the interview should be played to the jury. There remained, in Ground 3.1, "Alternatively, the Learned Judge gave no adequate direction to the jury on their approach to that evidence." Ground 3.2 stressed the fact that the complainant did not suggest that ejaculation took place on the final occasion, charged as Count 6, nor on the occasion in late 2005 charged as Count 5. Ground 3.5 suggested that the Judge "falls into error when he poses the question in terms of the actual presence of semen……If the evidence has any proper relevance, it is really my apprehension about it which is the issue".

27. Ground 4 raised a separate point. It contended that the Judge should have given a 'Lucas lies' direction in this regard…… "this is a classic case in which the jury should have been warned about jumping to the conclusion of guilt, if they concluded that I had been lying about that….".

28. For the Appellant, Mr. O'Connor QC submitted that the Judge was wrong to tell the jury that this evidence was capable of supporting the complainant's testimony. The Prosecution had not relied upon it as doing so, and the complainant had not alleged that ejaculation took place on the last, and the only relevant, occasion (Count 6). Moreover, even on the Judge's analysis, a Lucas direction was called for. If the Appellant did give a false explanation for the presence, or assumed presence of semen on the sheets, the jury should have been reminded that he might have done so for reasons unconnected with his guilt or innocence of the charge brought against him.

29. Counsel also submitted that there was no evidence which could enable the jury to decide whether the Appellant's claim that he had masturbated and ejaculated in the bed after the complainant left the home was true or untrue, and the Judge's direction was inappropriate, for this reason.

30. Ms. Paula Tyndale, for the Prosecution, submitted that the Judge was correct to analyse the Appellant's statement as he did. There was, first, his "admission" that traces of his semen were present or might be found on the sheets taken from the bed, and secondly, his explanation of why that was or could be the case. If the jury concluded that the explanation was false, the admission, and the false explanation, nevertheless remained evidence upon which it could rely. She further submitted that a Lucas direction was inappropriate, and that the evidence was relevant to the Appellant's credibility, in any event.

31. Our conclusions are as follows. The significance—we do not say, at this stage, the relevance—of the evidence, was that the Appellant was willing to admit, when he was first interviewed by the police, that he had recently been in the bed, after his daughter left the house, and in the circumstances he explained. Moreover, he volunteered the fact that he his semen might be found on the bed-sheets, when she did not allege that he had ejaculated on the last occasion she complained of. If his explanation was, or might be, true, the facts that he had used the bed and had ejaculated in it, after she left, were simply not relevant to the issue whether he had assaulted her previously, or not.

32. However, if the explanation was untrue, the jury was entitled to consider why the Appellant had made the admission and volunteered the further information which would account for the presence of semen on the sheets. Indeed, it was inevitable that the jury would speculate, and we hold that the Judge was right to take the view that he should give the jury some direction as to how they should regard the evidence. The first part of his direction, that they should disregard the evidence if they thought that

the explanation offered by the defendant was or might be true, was certainly correct. Should he have given the same direction, that they should disregard the evidence, if they were satisfied that the explanation was untrue?

33. If there was no basis on which the jury could decide that the explanation was untrue, independently of the central issue whether the complainant's allegation as regards Count 6 was correct or not, it would follow that the evidence could not assist the jury to decide that issue, and it should be disregarded altogether. But the Appellant repeated his explanation in the evidence he gave to the jury, and there was other evidence, specifically from his wife, which bore on the question whether the explanation was or might be true. In these circumstances, we hold that the jury could be invited to consider whether the explanation was true, or not, and the Judge was required to give a direction as to its relevance, if the jury was satisfied that it was not.

34. The next question is whether it was necessary in those circumstances for the Lucas lies direction to be given. We were referred to the leading authorities R v Lucas [1981] 73 CR-APR-R 159; R v Goodway [1994] 98 CR APP-R11, and Mr. O'Connor submitted that the situation is analogous to that which arises when a defendant raises an alibi defence which the jury is satisfied is false; in such cases, a Lucas direction is given and the jury is reminded that the defendant may have had other reasons for its falsity, independently of his guilt or innocence of the offence charged. Conversely, however, the direction is superfluous when the lie is directly concerned with the defendant's guilt or innocence, as it is when no reason other than an attempt to deny liability can sensibly be attributed to him.

35. On these grounds, we hold that a Lucas direction was not required, and would have been inappropriate in the present case. Mr. O'Connor suggested that the Appellant might have offered a false explanation for any traces of his semen that were found on the sheets, because his DNA might be identified as the result of his sleeping in the bed when he said that he did (i.e. if that part of his explanation was correct), and that he might have left traces of semen involuntarily, if the masturbation part was incorrect. We did not find this submission easy to follow, and in any event we are satisfied that, if the Appellant lied about why traces of his semen (or DNA) might be found on the bed-sheets, realistically his motive for doing so could only be his denial of guilt of the charge made against him.

36. Finally, the Judge reminded the jury that the complainant did not suggest that the Appellant ejaculated on the last occasion of which she complained, and in these circumstances, it is submitted, the evidence cannot be relevant to, or be regarded as "capable of supporting" her testimony. As the Judge said, "the presence of semen could indicate that something sexual had happened in the bed" but it "does not fit in with the specifics of what she in fact told you". However, her account of the incident did not preclude some amount of ejaculation by the Appellant, if in fact the incident took place, and in our view, his false explanation supports her evidence of the incident, without contradicting it.

37. For these reasons, we reject Grounds 3 and 4 of the Appeal.

**Ground 5**

38. Mr. O'Connor submitted that in directing the jury with respect to the motive for the complainant's lying, the judge ought to have told the jury that there was no burden on the appellant to prove that she was lying. The issue of her lying was a live issue in the case. The complainant at trial had accepted that she had deceived her parents on occasions; she admits that she continually lied about having web sites; she admits that she had lied to her parents about seeing boys and about talking to boys; she lied about taking her father's cell phone without his permission; admits that in relation to the cursing incident, she had cursed the boy and used the 'F' word; admits that she had torn sheets out of her planner.

39. In his direction to the jury as to how they should assess the credibility of witnesses the trial judge at page 111 stated:

> *In considering the evidence, you are entitled to draw inferences, based on the evidence which you accept…. In doing that, you should bear firmly in mind what I said to you about the standard of proof. You can only draw an inference, that a conclusion, which is adverse to the accused of it is one of which you are sure…You should first ascertain the direct evidence of which you are sure.*
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> *Page 107—now in this case, as in all criminal cases, the prosecution must prove the defendant's guilt. He does not have to prove his innocence. How does the prosecution succeed in proving the defendant's guilt? The answer to that is by making you, the jury, sure of it. Before you can convict the defendant, you must be sure of his guilt; nothing less than that will do.*
>
> *If, after considering all the evidence you are sure that the defendant is guilty, you must, please, return a verdict of guilty. On the other hand, if you are not sure, then your verdict must be not guilty.*

40. In directing the jury as to the credibility of the complainant, the learned trial Judge said at page 117:

> *In a sense, it's her word against his. But that's not quite the proper approach. Because of the burden of proof, as I explained it to you, you have to be sure the complainant is telling the truth before you can rely on her evidence. <u>The defendant does not have to make you sure that he is telling the truth; it's enough if you think that he might be telling the truth.</u>*

41. In his directions to the jury on the statement made by the appellant in respect to his masturbating on the complainant's bed, the trial judge at page 158, stated:

> *In considering that, you are, in many ways back to having to decide whether or not you think that he's a credible, that is, a believable witness. But in doing that, remember that it's not for him to make you sure of the truth of his explanation, but rather for the prosecution to make you sure that it is not true; that's because of the burden of proof, as I have explained it to you.*

42. Because of her admission that she had lied on several matters, the trial judge told the jury that in considering her evidence there was a special need for caution before they could rely upon her evidence against her father (page 163).

43. Looking at the directions, in its totality, it s our opinion that the jury could have been in no doubt as to the continuing burden of proof on the prosecution. The complainant had accepted that on several occasions she had lied to her father. There could be no doubt that the jury on her evidence would have come to the conclusion that she had lied on those occasions.

44. For these reasons, we dismissed the appeal and affirmed the conviction.

*Signed*

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Zacca, President

*Signed*

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Nazareth, JA

*Signed*

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Evans, JA