The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 11 of 2009

Between:

TERRANCE VANCOUVER CAINES

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, J.A.
Stuart-Smith, J.A.

Date of Hearing: **3 March, 2010**
Date of Judgment: **18 March 2010**

Appearances: Ms. E Christopher for the Appellant
Ms. N. Smith & Mr. R. Welling for the Respondent

Reasons for Judgement

Stuart-Smith, J.A.

Introduction

1. On the 22 April, 2009 the appellant was convicted on four counts of a re- re- amended Indictment. The First count alleged sexual exploitation of a young persons by a person in a position of trust contrary to section 182(B)(1)(b) of the Criminal Code. The other three counts alleged sexual exploitation of a young person by a person in a position of trust contrary to section 182 (B)(1)(a) of the Criminal Code. He was sentenced to five

years imprisonment on each count, sentences to run concurrently. He now appeals against the conviction. At the conclusion of the hearing we announced that the appeal was dismissed. We now give our reasons.

The Facts

2. The Crown's case was that the appellant and the mother of the complainant, Ms. Danielle Simmons began a relationship sometime in mid 2005. In late September 2005 the appellant was imprisoned. Ms. Simmons conceived a son, Yiefter. During his period of incarceration Ms. Simmons and the appellant maintained their relationship and became engaged. It was also decided that he would assume the role of father figure to Ms. Simmons' daughter, Kinshasa. Ms. Simmons encouraged the appellant and Kinshasa to communicate in an effort to facilitate his pending role in her life. This communication is evidenced by letters written between the appellant and the Kinshasa. Those letters contained language alleged to be inappropriate for the nature of the relationship between the appellant and Kinshasa. He referred to her as his girlfriend, and also as "the most beautiful black woman" that he'd seen in his life. The letters evidenced establishment of trust between the appellant and Kinshasa, and also illustrate the influence and control which the appellant had over Kinshasa. He was to be her father and her teacher. The tenor of the communications also evidences the origin of the relationship of secrecy between them.

3. On the 12th April 2007 the appellant was released from prison. He went to live with Ms. Simmons, Kinshasa, and the baby boy Yiefter. Kinshasa was nine years old at that time. Ms. Simmons lived in a one bed room apartment at Salt Sea Lane, Somerset. Immediately, the appellant assumed the role of father figure to Kinshasa. He exerted controlling influence over her. There were times when he had taken Kinshasa away from the home; it was only upon return when Ms. Simmons had known about it. All incidents of sexual exploitation occurred during the period

from 12th April 2007 until the 31st July 2007 when he left Ms. Simmons' home due to the breakdown of the relationship.

4. The first incident referable to count one of the indictment occurred in the day time at the apartment in Somerset. Kinshasa could not recall the exact date or where her mother was, but the date of all the incidents had to have occurred during the approximate three months that the appellant resided with her. On that first occasion she was in the bedroom that she shared with her mother and baby brother. The appellant was changing the young boy's diaper in the crib, and came towards her when she was on the lower bunk bed. The appellant stood in front of her and she reached out, pointed to his big brown penis with her right hand and touched his penis. Kinshasa said it felt "unknown" and that she touched it for about two seconds. She said that she could not remember if any words were spoken by him or her. The appellant's presentation of himself to Kinshasa with his penis exposed was alleged to constitute the invitation to her to touch it.

5. The second incident also happened in the bedroom of the apartment but did so at night when she and the appellant were in the bedroom with the door closed. Sometime around May 2007 the appellant began to sleep in the same room as Kinshasa as apposed to sleeping in the living room with Ms. Simmons and the young boy. Kinshasa had got down from the upper bunk bed onto the lower one where the appellant was. He lit a candle on top of the dresser and rolled a condom onto his penis. Kinshasa says that the condom was orange. She rubbed her vagina against his penis back and forth; it lasted about five minutes and then the appellant stopped, he said that white stuff had come out of his penis. He flushed the condom down the toilet and they both returned to bed.

6. The third incident occurred in Dockyard by an old folks' home. It was daytime and Kinshasa did not see anyone else in the area. She went

up in some nearby trees where the appellant had a camp site. She went into the tent and he showed her various items. The appellant then took an orange condom from his bag, rolled in on his penis, and laid on his back; Kinshasa took her underpants off and got on top of him and rubbed her vagina against his penis for about five minutes until she stopped because the appellant told her white stuff had come out of his penis. She then went outside the tent to relieve herself after which they went home.

7. The fourth incident occurred when Kinshasa went to the Purple Cow Restaurant in Somerset. She and the appellant got veggie-burgers and because the place was closing, walked towards Somerset Long Bay where they sat down and ate their food. The appellant told Kinshasa that he had a condom in his bag and that it was dark and no one would see them. The appellant laid back and the complainant got on top of him and rubbed her vagina against his penis. That act lasted for about five minutes and then she stopped because he told her that white stuff had come into the condom. She then relieved herself in the nearby trees and they walked home.

8. The appellant told Kinshasa to keep these incidents a secret. She finally told her mother in November of 2007 because she thought that she should know. It was only after that time that Ms. Simmons found the letters of the appellant to Kinshasa.

9. The appellant was formerly interviewed by the police under caution. He provided comprehensive responses when questions were put to him but denied the allegations. He said that the only incidents wherein he spoke to Kinshasa about anything of a sexual nature was once when she had come home from school and said something about French kissing. Ms. Simmons had not yet mentioned or explained matters of a sexual nature to Kinshasa at that time because she had not reached puberty.

10. The appellant gave evidence. He denied that the incidents had occurred as alleged; it was all a fabrication.

Grounds of Appeal

11. There are four grounds of appeal. The first two relate to the use of a screen behind which the complainant gave her evidence. They can be considered together.

Ground 1: The learned trial judge erred in ordering that the complainant should testify behind a screen that would prevent the complainant from seeing the appellant as there was no evidential foundation for the same.

Ground 2: The learned trial judge having ordered a screen erred in permitting one that prevented the appellant from seeing the complainant given her evidence in violation of Article 6 of the Constitution.

12. Section 542A (1) and (2) read as follows:

> ***Measures to protect the complainant etc. in certain circumstances.***
> *542A (1) Where before a special court or at a preliminary inquiry or a trial an accused is charged with a sexual offence and the complainant is at the time of the proceedings under the age of sixteen years, the chairman of the magistrate or the judge, as the case may be, may order that the complainant shall testify outside the court room or behind a screen or other device that would prevent the complainant from seeing the accused, if the chairman or magistrate or judge is of opinion that such an arrangement is necessary for a full and candid account of the acts complained of to be obtained from the complainant.*
> *(2) A complainant shall not testify outside the court room pursuant to subsection (1) unless--*
> *(a) arrangements are made for the accused and the special court or, as the case may be, the magistrate or judge and jury to watch the giving of the complainant's testimony by*

means of television or otherwise; and
(b) the accused is permitted to communicate with his counsel while watching the giving of the testimony.

13. The prosecution applied for an order under that section that the complainant be permitted to giver her evidence behind a screen. In support of the application the Crown called the social worker involved in the case, Samantha Branch. Her evidence in chief is as follows:

Q. *Did Miss Tofari express any particular mode in which she would want to give evidence in court?*

A. *Well, she did say that she would feel very uncomfortable having to face the Defendant.*

Q. *Did she say why?*

A. *She said she didn't think that she would be able to give her statement, having to face him.*

Q. *Was there an alternative way suggested to her to give evidence?*

A. *It was suggested that a screen be put between her and the Defendant.*

Q. *And did Miss Tofari express anything towards that suggestion?*

A. *She agreed with the suggestion.*

Q. *For how long have you lent support to Miss Tofari in this matter?*

A. *For the last – when it first began and then for the last week.*

Her cross examination was the same effect. The complainant had been given counselling since the incident had come to light.

14. Ms. Christopher, who appeared on behalf of the appellant submitted that the judge's decision to allow the use of a screen was plainly wrong. She submitted that there was no evidential foundation for the order; that there should have been a disclosure of the social worker's files; that the judge should have heard the evidence of the complainant on the matter, presumably in chambers in the absence of the accused; and that there should have been expert psychiatric evidence. And she further submitted that mere discomfort at giving evidence was not enough to satisfy the test, and that is what the evidence amounted to; the fact that the complainant expressed herself in the words "she did not think that she would be able to give her statement having to face him" was not the same as saying that she could not. The test she said is of necessity and nothing less.

15. We do not accept Ms. Christopher's submission. To satisfy the section that the judge had to be "of the opinion that such an arrangement (use of the screen) is necessary for a full and candid account of the act complained of". Brief though the evidence was we consider the judge was entitled to form her opinion based upon it. We certainly do not think it is necessary or even desirable for the judge to hear the child asked about it in chambers. Ms. Christopher accepted that the usual way in which such applications are made depend upon the hearsay evidence of some responsible person. Samantha Branch is a professional social worker and to that extent is expert. It was not necessary to subject the complainant to psychiatric examination. The judge was entitled to conclude that there may have been a high degree of trust reposed in the appellant by the complainant and control exercised by him over her.

16. Ms. Christopher referred us to the facts of some other cases. In our judgment they do not assist. Each case will depend upon its own facts. In some cases, perhaps where an older child is involved, it may be desirable for the social worker, or whoever is concerned, to probe a little more into the grounds of belief that the complainant would not be able to give a full

account, and perhaps keep a note of the interview. But we are wholly unable to say that the judge was wrong to form her opinion based upon this evidence.

17. It is common ground that the screen provided did not enable the appellant to have a clear view of the complainant. She could not see him; he could only see a blurred outline of her. He could not see her facial expressions. She was however, in full view of the judge, counsel and jury. Ms. Christopher submitted that on its true construction, the word screen in section 542 (A)(1) was a one-way screen permitting the appellant to see his accuser. She relied on the words "that would prevent the complainant from seeing the accused" as implying that this was the only thing that would be prevented, since there was no express provision that the screen might prevent him from seeing the complainant. Secondly, she submitted that it was the accused's fundamental right, as enshrined in Article 6 of the Constitution as his right to a fair trial, that the accused was able to see and confront his accuser. And she urged this submission as an aid to the construction of the section.

18. Ms. Christopher referred the Court to the decision of the Supreme Court of Canada in Levogiannis v the Queen 1993 (160N R 371). The relevant provisions of the Canadian Criminal Code are the same as the Bermudian Code. In that case there was a one-way screen. It was argued that this was un-constitutional because the accused could not have a fair trial. It was submitted that the accused would be prejudiced in the eyes of the jury and the presumption of innocence undermined. The Court rejected the submission and held that the use of the screen was constitutional. At paragraph 41 L'Heureux-Dubé J said:

> *[41] Parliament has devised s. 486 (2.1) in such a way as to properly balance the goal of ascertaining the truth and the protection of children as well as the rights of accused to a fair trial by allowing cross-examination and by tailoring the use of screens to the*

complainants' age and confining their use to limited and specific types of crimes. Furthermore, s. 486 (2.1) of the Criminal code preserves the discretion of the trial judge to permit such use only when the "exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant". Since there was no infringement of the principles of fundamental justice nor of the right to be presumed innocent or to a fair trial, s. 486 (2.1) of the Criminal code is constitutional.

19. We reject Ms. Christopher's submissions. As she frankly accepted the fact that the Court in that case held that the use of a one-way screen was constitutional does not mean that the use of an opaque screen is not. As to the construction of the word screen, in its ordinary meaning, it is an object or device that prevents something on the side remote from the observer being seen. The fact that the section defines the object of the screen, namely to prevent the complainant from seeing the accused, cannot imply that the accused must be able to see her. This is reinforced by subsection (2) which deals with a situation where the complainant gives evidence outside the court room; in such a case arrangements must be made for the accused as well as the judge and jury to watch the giving of the evidence.

20. Nor can we accept that the appellant was denied a fair trial because he could not see the complainant plainly. The learned judge in the passage cited in paragraph 18 said that parliament has properly balanced the goal of ascertaining the truth and the protection of children as well as the rights of the accused. In the case of the R v Smellie (1919) 14 Cr Appr 128 at page 130 Lord Coleridge, CJ, said:

1) If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.

This is the position at common law and there is no reason to suppose that it is affected by Article 6 of the Constitution or that the use of an opaque screen under the provision of section 542A is unconstitutional.

21. Ms. Christopher submitted that it was important, if not essential, that the accused should be able to observe the demeanour, facial expressions and movement of the complainant so that he could give instructions to counsel. But Ms. Christopher was hard put to give any concrete example of such a need. And the combined experience of the Court was such that no examples of something in the demeanour of a witness bearing on his or her creditability, observable or comprehensible to the accused alone, could be recalled.

22. **Ground 3:** It is contended that the trial judge erred in failing to accede the appellant's application under section 329 of the Criminal Code as it went to the complainant's knowledge of sexual matters a factor relied upon by the prosecution in closing. Section 329 (1) is as follows:

> ***Evidence of complainant's sexual activity***
> *329 (1) If at a trial a person is for the time being charged with a sexual offence, no evidence shall be adduced, and no question in cross-examination shall be asked, at the trial about any sexual activity of the complainant, other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person or with any animal or thing, unless the judge gives leave therefore on the grounds that the evidence or question—*
>
> *(a) relates to specific instances of sexual activity; and*
>
> *(b) is relevant to an issue in the case; and*
>
> *(c) has significant probative value or relevance that is not substantially out-weighed by the danger of prejudice to the proper administration of justice.*

This section is normally in play where the defence is consent and the complainant's previous promiscuous behaviour is relied upon to show the likelihood of consent. In this case the application was supported by an affidavit in which the appellant stated at paragraph 4—

> *It was a week day when she told me, after she'd come home from school. She referred to the French kissing incident right after school. She basically said she knows what French kissing is. I said Oh I said that is what grown ups do when they are married. She said that she had seen people do it who are not married. I then said some people follow what they see. Then she explained what it is that you rub your tongues together. She rambled on that I acted like I wasn't really listening.*

Paragraph 5—

> *Later that evening when I was either singing or telling her a story like a Cinderella story, she said that before you tell me there is something I want to tell you. She said one time a boy put his penis her mouth. I said OK and just continued with the story.*

In our judgment the judge was entirely correct to reject the submission. The matter referred to in paragraph 4 is not within section 329 (1) at all; and neither of the matters was relevant to an issue in the case. There was nothing to prevent counsel from asking the complainant if she knew what French kissing was or what a penis is, though it is evident that she knew this. Why such knowledge should lend support to the allegation that she was fabricating her account is difficult to understand.

23. It emerged in the course of argument that Ms. Christopher's real complaint was not so much the rejection of the application under section 329, but rather comments made by Crown Counsel in her closing submission and a somewhat similar comment made by the judge at page 51 of the summing up. What Counsel said was--

> *Not Kinshasa. You remember what Kinshasa said. Kinshasa said—I touched his penis I rubbed my vagina against his penis back and forth, I took off my underpants. Surely if Kinshasa was concocting a story, she wouldn't have made herself willing partner as she did, as willing as any naïve nine year old now eleven.*

> ***Ask yourself ladies and gentlemen if Kinshasa was concocting a story, if she was lying how would she know to say that white stuff came into the condom?***
>
> ***How would she be able to say that the Defendant just rolled on the condom? Members of the jury, is that the language of a nine year old? Members of the jury is that the experience of a nine year old?***
>
> ***The Crown says no—definitely not.***

Initially, Ms. Christopher's complaint was about paragraphs 2 and 3 of that excerpt. The judge's comment is at page 51 where she said:

> *It is the defence case that Kinshasa knows about condoms because she mentioned having found one to the Defendant. And I would only caution here not to speculate. I believe that you were invited to speculate about her knowledge and I warned you that you should not speculate and you should make your determination on the evidence.*

24. In our judgment there is no substance in this complaint. There was no suggestion in the appellant's affidavit or evidence that the complainant had any extraneous knowledge of condoms or white stuff. Eventually, Ms. Christopher took her stand on the first paragraph of the Crown Counsel's comments. She should not, Ms. Christopher submits, have described the complainant as a naive nine year old now eleven in the light of the matters deposed by the appellant. There is nothing in the point. Quite apart from the fact that the judge gave the usual direction to the jury to ignore Counsel's comments if they did not agree with them, it was entirely a matter for the jury to decide what they made of her naivety or sophistication. We can see nothing improper in Counsel's submission. The Judge's comment was entirely appropriate.

25. Ms. Christopher refined the final ground of appeal as relating to the re-re-amendment of the indictment. In the course of the appellant's evidence, the judge ordered that the Count 2 of the indictment should be amended so as to bring the count in line with the evidence given by the complainant. This was well within the powers of the Court as contained in section 489 (1) of the Criminal Code of 1907 and there was no prejudice to the appellant. In the end Ms. Christopher wisely did not press this ground of appeal.

Stuart-Smith, JA

Zacca, President

Evans, JA