

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 19/2010

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA**

KEVIN FRANKLYN v R

Leroy Equiano for the appellant

Mrs Diahann Gordon-Harrison and Leighton Morris for the Crown

24 November and 20 December 2010

DUKHARAN JA

[1] The appellant was convicted for the offence of indecent assault on 1 February 2010 in the Corporate Area Resident Magistrate's Court holden at Half Way Tree. He was sentenced to 18 months imprisonment at hard labour.

[2] The relevant facts disclose that the complainant was nine years old at the time of the incident and 11 years at the time of trial. She used to live at Temple Hall in the parish of St Andrew. She knew the appellant for over one year and used to see him

every day. They would speak to each other. On a day unknown, between 1 September 2007 and 5 September 2007, the complainant went to the home of the appellant who lives with his grandmother, an aunt and an uncle. At some point in time the complainant was watching television with the appellant's grandmother. The appellant brought breakfast for his uncle's grandmother and sent her around to an entertainment room. While the complainant was alone, the appellant entered the room, dropped his pants and took out his penis. He dropped the complainant's lower garments and when he did that the complainant said, "he was licking out my vagina with his tongue".

[3] The evidence also reveals that on a prior occasion the appellant had taken the complainant from a bed she was sharing with another girl and placed her to lie with him on a bed he was lying on. However, nothing further happened on that occasion.

[4] The complainant subsequently told her mother and they went to the Half Way Tree Police Station on 6 September 2007 where a report was made and the complainant medically examined. The appellant was subsequently arrested by Detective Sergeant Veron Johnson on 11 September 2008 for indecent assault, and when cautioned he made no response.

[5] The mother of the complainant gave evidence that she knows the appellant for approximately six to ten years and would see him almost on a daily basis. She said the complainant would call the appellant Uncle Kevin. In cross examination, she said the complainant has a medical condition as it relates to her brain. She had an operation on

17 November 2008 in Miami, Florida. However, she said that the complainant is not prone to side effects such as hallucinations.

[6] The appellant, who was a serving member of the Jamaica Constabulary Force, gave sworn evidence. His defence was one of denial. He said that he was living at Temple Hall from October 2005 to November 2007 in rented accommodation. He denied that the complainant ever had occasion to sleep in his room and denied ever having licked her vagina with his tongue or rubbing his penis on her belly. He said he had never touched her inappropriately. He said he had a relationship with the mother of the complainant which ended in 2006.

[7] The appellant has appealed his conviction and sentence and has advanced two grounds which are as follows:

1. The evidence led by the Crown was not sufficient to warrant a conviction.
2. The decision of the learned Resident Magistrate was against the weight of the evidence.

[8] Mr Equiano, who argued both grounds together, submitted that the quality of the evidence was lacking and not enough to support a conviction. He argued that the main issue in the case was the credibility of the complainant. He further submitted that the only reference to a possible date of the incident was in reference to "after hurricane Dean." This type of uncertain evidence made it almost impossible for the appellant to defend, and this uncertainty robbed him of the opportunity to call any evidence to

counter the testimony of the witness and for him to rely on an alibi. He further submitted that the complainant made a report to her mother about abdominal pain and as a result went to a gynaecologist. He contended that there was no medical evidence as to whether or not the pain was related to the incident. He argued that the evidence of the mother, having made observations, would have been of assistance to the defence if she was able to say if the complainant was suffering from venereal disease when she said she was not sexually active. This, he, submitted would have gone to her credibility.

[9] Mrs Gordon-Harrison for the Crown submitted that the indictment bore a single count for indecent assault which required the prosecution to place emphasis on the quality of the evidence. The main incident took place in a single day and she further submitted that the acts described, satisfied the elements of the offence in sufficient quality and clarity for the learned Resident Magistrate to have made a determination. With respect to the date of the offence in the indictment, it was further submitted that the date only becomes material when it is part of the offence. In the instant case, the time of the indecent assault was not a material ingredient. In relation to the absence of medical evidence, it was submitted that this was not relevant in advancing the case of the appellant. The learned Resident Magistrate articulated this quite appropriately and the mother's observation of the complainant was not legally germane to the ingredients to be established in a case of indecent assault. In support of her arguments, Mrs Gordon-Harrison cited the cases of **Thompson v Wilson** 12 JLR 336 and **R v Dossi** 1918 CAR 158.

Issues

10. The first question which arises is whether the uncertainty as to the date of the offence robbed the appellant of an opportunity to call witnesses or to rely on an alibi. The indictment was amended to read "a date unknown between 1st September 2007 to 30th September 2007." - In **R v Severo Dossi** (1918) CAR 158, Atkin J said at page 159:

"From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence." And although the day be alleged, yet if the jury finds him guilty on another day the verdict is good ..."

And at page 160 he continued:

"Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified on the indictment."

[See also **R v Thompson and Wilson** (1971) 12 JLR 336]

11. In the instant case, very shortly after the incident, a report was made to the police on 6 September 2007, well within the time specified in the indictment. I see no merit in the arguments advanced by Mr Equiano on this point.

12. In relation to ground two, it is quite clear that the central issue in this case was the credibility of the witnesses. The learned Resident Magistrate stated in her summation, the following passage:

"The Court heard from the complainant ... and found that she was an intelligent young girl who spoke frankly and who was forthright as she testified. The Court accepted the complainant as a witness of truth. The Court had the opportunity to observe the demeanor of the complainant as she answered the questions posed to her in the Voir Dire and as she gave her evidence and the Court was impressed by her demeanour. She was not shaken under cross examination by learned Counsel for the Accused man."

13. It is clear from the above passage that the learned Resident Magistrate was impressed by the demeanour of the complainant and assessed her as a witness of truth. The learned Resident Magistrate also considered the evidence of the mother of the complainant, concerning a condition from which the complainant suffered. This condition is a malformation of the blood vessels of the brain. It was suggested to her in cross examination that this condition manifested itself by causing the complainant to hallucinate. However, the response was that the condition did not cause the complainant to hallucinate and affected her only in the form of headaches as well as in the form of seizures. The learned Resident Magistrate found that the witness spoke frankly and was forthright about the complainant's condition and the manner in which it affected her. The learned Resident Magistrate said:

"The Court found her to be a witness of truth and accepted her evidence as credible and found that her daughter's condition affected her only in the manner she described."

14. The learned Resident Magistrate assessed the evidence and demeanour of the appellant and found that he was not a witness of truth.

15. In **R v Joseph Lao** (1973) 12 JLR 1238 the headnote reads:

“... where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence ... He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable ...”

It cannot be said that the learned Resident Magistrate findings were unreasonable and unsupportable. She demonstrated in her summation, a comprehensive and thorough appreciation of the facts and the issues arising from them. She took into consideration the relevant factors and gave herself the requisite warnings before giving her decision.

16. In view of the conclusions arrived at above, the appeal is dismissed and the conviction and sentence are affirmed.