JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.189/2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

ORANE GORDON v R

Mrs. Jacqueline Samuels-Brown for the Applicant.
Miss Paula Llewellyn Q.C, Director of Public Prosecutions and **Miss Sasha-Marie Smith** for the Crown.

17th, 18th, 19, 20th June and 3rd October, 2008

SMITH, J.A.:

On the 12th October, 2006, Orane Gordon, the applicant was convicted in the St. James Circuit Court of Carnal Abuse. The particulars of offence were that on the 19th December, 2004, he unlawfully and carnally knew and abused C.M, a girl under the age of 12 years. He was sentenced to 10 years imprisonment at hard labour. His application for leave to appeal was refused by the single judge in chambers. He has renewed his application for leave before this court.

The Prosecution's case

The virtual complainant is C.M. a nine year old girl. The families of the applicant and the complainant live in the same community and enjoyed a visiting relationship. On 19th December 2004, Miss D the

mother of the complainant went to church leaving the applicant at her home watching television. The complainant and her younger siblings were at their aunt's home which was nearby.

The complainant went to her mother's church to assist in the arrangement of chairs. Thereafter she returned home. The door to her house was locked. She went to her aunt's house for the keys thinking that the applicant had left them there. The keys were not there. She spoke to her aunt and left for the applicant's house which was also nearby. On reaching his house she called him and asked him for the keys. The applicant was alone at home. He gave her the keys, playfully hit her and ran inside his room. The complainant chased him into the room where she in turn playfully hit him. As she made for the door the applicant held on to her arm and pulled her back into the room. He took off her shorts and panty and put her on the bed to lie on her back, went on top of her and had sexual intercourse with her. The complainant said she shouted for help but the applicant told her to shut up. She tried to "fight him off" but he told her to "lef him alone". She bit him on the shoulder. She heard her mother calling her. The applicant told her not to answer. She did not answer. She heard her mother call a second time. This time she answered. The applicant got up off her. She put on her panty and shorts. The keys she had fell to the floor. She picked them up and went to her

mother who was outside the house at the door. She was taken to the doctor who examined her that same night.

Miss Natasha D, the complainant's mother testified that the complainant was born on the 18th September, 1995. She said that she knew the applicant from 2002 when he came to Montego Bay to live. On December 19, 2004 at about 6:00 p.m. she saw the complainant, her daughter, at church "moving chairs". When her daughter left her to return for home, she Miss D was still at church. Miss D could not say exactly when she herself left the church but when she reached her sister's house the evening news was being broadcast. The complainant was not at her sister's house. She went home with her other children. When she reached the steps leading to her house she saw the complainant's slippers at the applicant's doorway. She went to the applicant's house and called the complainant by name. There was no response. She called again. She heard the sound of keys falling to the floor. Then she heard the voice of the complainant: "me a come". Shortly thereafter she saw the complainant coming out of the applicant's house. Her evidence at this point, as recorded, is:

> "**A.** She say she a come, and after she come out me see her clothes .
>
> **Q.** Hold on. After she come out?
>
> **A.** When she come out, she stretch the key give me. Mi' tell her sey fi put on her slippers and come on.

Q. After you come out you see her clothes?

A. The front part of her clothes, the blouse tuck in her shorts and her shorts zip did draw down.

Q. The front part of her blouse did tuck in, what about the rest of the blouse?

A. The rest of it was outside."

That same night Miss D took the complainant to the Cornwall Regional Hospital (CRH) and thereafter to the Mount Salem Police Station where a complaint was made.

Dr. Mahidhar Yalamanchini, a registered medical practitioner testified that on December 19, 2004, at about 9:20 p.m. he examined the complainant at the Cornwall Regional Hospital's emergency department. He found injuries which were confined to the genitalia. The hymen was traumatized. The margins of the hymen were torn and ragged and were lined with dried blood. This, he said indicated a recent tear in the hymen and blood clots were along its regions. When asked how long it would take for blood to clot, he said that it would normally take three to five minutes. He was then asked:

"**Q:** In what sort of persons would you see a ragged hymen?

A: Ragged hymn is seen for (sic) penetration of the vagina for the first time.

...

Q. Doctor, the injury that you saw, the torn hymen, could that have been caused by an erect penis?

A. Well yes, it could have been.

Q. And could that injury have been caused within two to three hours of your seeing the patient?

A. Well yes, it could have been."

Detective Corporal Letiesha Scully of the Montego Bay Police Station testified that on December 19, 2004 at about 11:30 p.m. one Corporal Francis of the Mount Salem Police Station came to her office with Miss D, the complainant and the applicant. Detective Scully said that in the presence and hearing of the applicant, the complainant told her what took place in the applicant's room that evening. Detective Scully cautioned the applicant and he said, "I don't do that Miss."

The Defence

The applicant made an unsworn statement to the following effect. On December 19, 2004 he was at the house of the complainant's mother watching television. The complainant's mother left for church. After he had finished watching television he locked the door, using a key and thereafter went to his house. He placed the key on a table in the kitchen and went into his bedroom. While he was in the bedroom he heard the complainant calling him. He asked her what she wanted and she said the keys. He told her they were on the table in the kitchen. They spoke to each other and then he asked her to leave because he did not want her to trouble the things in the house. He heard the complainant's mother calling her. She did not answer. Her mother called a second

time. She answered. The complainant playfully "hit him" and ran off he "hit" her also. The keys fell from her hand. She picked it up and went to her mom. He heard someone calling him. It was the complainant's father. Her father placed a kitchen knife at his throat. When the applicant asked him what he was doing he said "Wey me hear sey you do? me hear say you rape me daughter". The applicant replied "Yuh a mad man, Bigman, yuh noh si K a little pickney.". The father said: "mek sure nothing nuh goh so". At that time the complainant was behind her father. According to the applicant, the complainant's father spun around and kicked her between her legs. She fell and he kicked her twice and then left the "yard". The applicant went back inside his house. Shortly after the complainant's father returned and went into the applicant's bedroom. The father had a piece of iron pipe in his hand. He pushed the applicant to the floor, injuring him and left. He heard the child's mother say "Kevin, mi can't believe se yu do that". The applicant replied "mi nuh do nothing, Miss Little if yuh don't believe me, I will go downtown in the morning and draw the money give you to bring (K) to doctor to prove that, I don't trouble her."

Grounds

Mrs. Samuels Brown sought and obtained permission to argue the following supplementary grounds of appeal.

"1. The virtual complainant being a child ought not to have been allowed to give sworn evidence as no proper or lawful voir dire was conducted, her answers to the court at this stage being elicited by means of leading questions.

2. The directions relative to the evidence adduced by the prosecution were inadequate and /or unfair in that, inter alia:

(a) The Learned Trial Judge omitted to point out that the evidence of the virtual complainant to the effect that while she was being sexually assaulted , she was "calling for help", "fighting him off screaming and shouting loudly" yet her mother who was 45 feet away, approaching and at the doorway; gave no evidence of hearing any such commotion.

(b) Invited the jury to speculate one-sidely in favour of the prosecution as to the reason why the virtual complainant made no complaint to her mother initially.

(c) Failed to point out the legal implications of the circumstances in which the "recent complaint" had been made, that is after she had been beaten.

(d) The directions relative to the evidence adduced by the prosecutions were inadequate and/or unfair in that, inter alia; that the virtual complainant had been assisted in her preparation for Court by a person sitting in Court while the virtual complainant gave evidence.

3. The Learned Trial Judge failed to give the jury adequate and/or balanced directions relative to the unsworn evidence.

4. The sentence is manifestly excessive.

5. The Learned Trial Judge's directions to the jury were inadequate in that she, inter alia, omitted to point out important discrepancies between the evidence of (a) the complainant and her mother, (b) the complainant and the doctor.

6. The Learned Trial Judge erred in allowing the prosecution to adduce the evidence of the doctor as no sufficient nexus had been established between the offence and the medical evidence.

   Further or alternatively the learned trial judge failed to give adequate directions as to how to treat with the medical evidence."

At the outset counsel for the applicant told the Court that she would not be pursuing ground 1.

Ground 2

(a) Counsel complained that the learned trial judge failed to point out the effect of the young child's evidence that she was "fighting, screaming and shouting loudly" yet her mother who was nearby and could hear the drop of a key gave no evidence of hearing any such commotion.

The child's evidence is that she was fighting and screaming and the applicant told her to shut–up. She continued to fight and bit the applicant on the shoulder. Then she heard her mother calling her. The applicant told her not to answer. She did not answer. She again heard her mother calling, this time she answered.

There is no evidence as to exactly where the mother was at the time her daughter was screaming. It was after the child was told to shut up that she heard her mother calling. The evidence does not substantiate this complaint.

(b) Counsel also complained that the judge invited the jury to speculate one-sidedly as to the reason why the child did not initially complain to her mother.

In this regard at p. 26 of the transcript of her summation the judge said:

> "She is a young girl, is it that she was nervous or afraid of what her mother's reaction would be or her father. She said she was afraid of her father beating her and as it turned out, in fact, her father did beat her."

The learned Director of Public Prosecutions submitted correctly, in our view, that the above excerpt must be examined in the context of what was said immediately before and immediately after.

Immediately before the impugned passage the learned judge said at page 26:

> "Now, she said she was afraid of her father beating her, and you have to look at the evidence as I told you, Mr. Foreman and your members. You look at it. She said she told her mother nothing happened. Now, you will have to look at that to see whether you take that as taking away from the truth of what she is saying happened. Why did she say nothing happened if something really happened?
>
> But on the other hand, you have to look at it and see what you make of it."

Immediately after, the judge said:

> "You have to look at all of these matters, and see what you make of it in terms of the credibility and where the truth lies."

We are firmly of the view that when seen in its proper context the impugned passage cannot be described as "one sided". It is, in our opinion, a fair comment on the evidence. The learned judge was entitled in the circumstances to invite the jury to consider whether the behaviour of the young child in not complaining to her mother was due to fear. It was open to the jury to accept or reject her comments, as indeed she told them earlier in her summing-up.

(c) Counsel submitted that the learned judge erred in treating the evidence of Detective Scully as to the report made to her by the child as evidence of recent complaint. It is counsel's contention that there is no evidence from the child of the fact of her making a complaint. Counsel submitted that before the terms of the complaint are received in evidence there should be evidence of the making of the complaint. (See ***Kory White v The Queen*** 53 W.I.R. 293).

An examination of the transcript reveals that only during cross-examination was the child asked about what she said to the police. At p.41 her evidence is:

Q: Now you said you bite Kevin on his right shoulder?

A: Yes, sir.

Q: Did you tell that to the police?

A: No sir.

Q. Now, you told the police that you fight off Kevin- trying to fight him off?

A: Yes sir

Q: And that fighting off constitutes what now, shout something, screaming, kicking?

A: Yes sir."

Evidence was received from Detective Scully that in the presence of the applicant, the complainant made a report to her. In this report the complainant gave her version of what took place in the appellant's house on the evening of the 19th December. The account which she gave to police is consistent with the evidence she gave in court. The applicant of course, denied it. The learned trial judge after reminding the jury of Detective Scully's evidence as to what the complainant told her directed them as follows:

> "Now, what C (the complainant) said to Detective Corporal Scully, if you accept that she said, it can't as a matter of law, can't be treated as evidence that this act of sexual intercourse happened with the accused man. The only relevance of what she said is, if you accept that she said it, that is it may show that her conduct after the incident was consistent with her evidence about it. That may possibly help you on the question of whether she has told you the truth, but it can't be corroboration, because as I

> explained to you, corroboration is independent of the complainant.

The learned Director of Public Prosecutions concedes that there is no evidence of the child making a complaint and that the learned judge erred in treating the report made to Detective Letiesha Scully as recent complaint. However, relying on the decision of the Privy Council in ***Michael Freemantle v the Queen*** 31 JLR 335 the Director of Public Prosecutions asked the Court to apply the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act. We agree with the submissions of Mrs. Samuels-Brown and of course with the concession of Miss Llewellyn, Q.C. Indeed in ***White*** (supra) at page 30 Rattray P in his dissenting judgment which was upheld by their Lordships' Board said:

> "If a complainant gives evidence that' I reported the matter to the police' this is not evidence of a recent complaint but of a necessary step taken by the complainant so that police action may be taken."

Accordingly, the evidence of Detective Scully, in this regard, although admissible as statements made in the hearing and presence of the applicant, is not admissible as evidence of recent complaint. The learned judge erred in so treating it. Is this error fatal to his conviction? The answer to this question lies in the applicability or otherwise of the proviso to section 14 (supra). We will return to this shortly.

In her written submissions counsel for the applicant complained that the person who assisted the complainant in reading over her statement should not have been permitted to remain in court while she testified. Such presence may operate as a "coercive force and impact on the voluntariness and veracity of the witness," counsel submitted. Counsel relied on her written submissions and did not seek to advance any oral submissions. We have considered the submissions and can see no merit in this complaint.

Ground 3

Counsel for the applicant submitted that the learned judge in summarizing the applicant's unsworn statement omitted to give the jury adequate directions as to how to treat with the statement. In particular the learned judge, counsel contended, omitted to tell the jury that if they accept what the applicant said or if it casts doubt on the prosecution's case he was entitled to an acquittal.

The judge directed the jury in this way (p. 33 of the transcript of the summation):

> "Now the accused is not obliged to say anything. Remember I told you that he does not have to prove his innocence. So he had three options. He could have gone into the witness box and gave (sic) evidence, in which case he could be cross-examined by the Crown Counsel. But he is not obliged to go into the witness box. He had a completely free choice either to go in the witness box or to make an unsworn statement from the dock. In which case, he can't be cross-examined

> or to say nothing in which case, he also can't be cross-examined. In this case, as you are aware, the accused Orane Gordon choose to make an unsworn statement from the dock. It is exclusively for you, Mr. Foreman and your members to make up your mind whether the unsworn statement has any value, and if so, what weight should be attached to it and it is for you to decide, bearing in mind that it is the Prosecution that has to satisfy you of the accused's guilt, so that you feel sure. It is for you to attach such weight to the unsworn statement as you think it deserves when you come to consider your verdict."

We agree with the learned Director of Public Prosecutions that this direction is unexceptionable. The learned judge clearly had in mind their Lordships' guidance on the "objective evidential value of an unsworn statement" by an accused see ***Director of Public Prosecution v Leary Walker*** (1974) 12 JLR 1369 at 1373 C-F.

Mrs. Samuels-Brown also complained that the judge's summing-up was unbalanced in that she pointed out to the jury the doctor's evidence that he found no evidence to support the applicant's statement that the girl's father kicked her. However, she continued, the learned judge did not go on to say that the doctor found no evidence of injuries consistent with the girl's evidence that she was kicking and fighting,

The short answer to counsel's complaint, is that there is no evidence that the child received any blow or injury as a consequence of her "kicking" or "fighting off" the applicant.

Ground 5

We have already considered the complaints raised here in grounds 2 (a) and 3.

Ground 6

The gravamen of the complaint in this ground is that there is no evidence to establish that the virtual complainant who gave evidence in court was one and the same person whom the doctor examined. Accordingly Mrs. Samuels-Brown submitted that in the absence of this legal nexus, the doctor's evidence should not have been left to the jury.

We do not agree with counsel for the applicant that there is an evidential gap in this regard. As the learned Director of Public Prosecutions pointed out the evidence of the child's mother, provides sufficient nexus. At page 70 of the transcript of the notes of evidence, the following exchange during cross-examination is recorded:

> "**Q:** Good, Now, let me suggest to you, you see, firstly you took (C) to the doctor?
>
> **A.** Yes, sir
>
> **Q:** And she was examined by the doctor wasn't she not?
>
> **A:** Yes sir.
>
> **Q:** And who was present when she was being examined by the doctor?
>
> **Q:** A police officer."

This evidence clearly establishes that the child's mother took her to the doctor who examined her. The complaint of counsel is not substantiated. Counsel further submitted that the learned judge misdirected the jury as to how to treat with the doctor's evidence.

At pages 32-33 of the summation, the judge is recorded as saying:

> "So, whilst the doctor's evidence is not corroboration, if you accept it, it is consistent with C.M. saying that sexual intercourse did take place with the accused Orane Gordon, it is consistent with that but not corroboration." (emphasis supplied)

The underlined words are the object of counsel's criticism. Immediately before the above passage the judge directed the jury as follows:

> "Now, remember, I told you that in this case, there is no corroboration. Remember, I told you that in order for there to be corroboration, it would have to confirm not only the evidence that the crime has been committed, but also that the accused, Orane Gordon committed the offences. So the doctor's evidence if you accept it, while it may assist you in your task of deciding whether sexual intercourse took place, whether C.M has intercourse, it is not corroboration, because remember, I told you, it does not identify the accused as being the person who committed the offence. Now, you will have to look...at his evidence and see what you make of if. (emphasis supplied)

The learned judge made it abundantly clear that the doctor's evidence was not corroborative of the complainant's evidence that the applicant had sexual intercourse with her because it did not identify him as being the person. The jury was expected to make a rational distinction between

evidence which is corroborative of other evidence and evidence which is consistent with the other evidence. Evidence which does not amount to corroboration of a witness' testimony may yet be consistent with that testimony. Indeed when applicable jurors must be told in case of sexual offence that recent complaint cannot corroborate the complainant's evidence but that it is evidence of consistency of the complainant's story.

The doctor's evidence is that the rupturing of the child's hymen could have been caused by an erect penis and that this could have taken place within two to three hours of his seeing the child. The child's evidence is that sex took place during the evening and that she was alone in the house with the applicant at that time. In those circumstances it is open to the jury to "conclude that the doctor's evidence, particularly as to the time when sexual intercourse could have taken place, is consistent with the evidence of the complainant child that sex took place at the time when she was in the applicant's house. And, of course, if the jury accepts her evidence that she was alone in the house with the applicant, it would be reasonable to say that the doctor's evidence is consistent with her evidence that sexual intercourse took place with the applicant.

Misdirection on Recent Complaint

We now turn to the question of the effect of the judge's misdirection in respect of recent complaint. As we have earlier stated the

learned judge erred in treating the report made to the police officer by the complainant as constituting recent complaint. The proviso to section 14 of the Judicature (Appellate Jurisdiction) Act states:

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the applicant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The question is in what circumstances will the Court consider that a misdirection will lead to substantial miscarriage of justice. In ***Freemantle v The Queen*** (supra) their Lordships' Board was of the view that where the evidence against the applicant is exceptionally good such a circumstance will justify the application of the proviso. In that case because of the potency of the evidence, their Lordships were "satisfied that there was no miscarriage of justice because the jury (acting reasonably and properly) would inevitably have returned the same verdict of guilty of murder if they had received the requisite general warning and explanation from the judge."

In ***R v Albert Haddy*** 29 Cr. App. R 182 the English Court of Appeal in considering a provision to the one in question said:

> "A substantial miscarriage of justice within the meaning of the above proviso has occurred where by reason of a mistake, omission or irregularity during the trial the appellants has lost a chance of acquittal which was fairly open to him. In order that the Court may apply the proviso, it is not necessary that they should be

> satisfied that no jury properly directed could have acquitted the appellant; they may apply it if they are satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would have been one of guilty."

In ***Stirland v DPP*** 30 Cr. App. R. 40 the House of Lords approved the formulation in ***R v Haddy*** . In ***Stirland*** at page 47 the House said:

> "... but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."

The evidence against the applicant was in our view, convincing. The compelling factors in the case were:

"1. The girl's evidence as to what took place in the room

2. The mother's evidence that she saw the girl coming out of the applicant's room and as to the state of her clothing- the zipper of the shorts was pulled down and the blouse partly out of the shorts.

3. The statement of the applicant that the girl was with him alone in the house that evening.

4. After the girl left the applicant's room she was in her mother's custody up to when she was examined by the doctor.

5. The doctor's telling evidence that sexual intercourse could have taken place within a 3 hour period of his examination. This would coincide with the time when the girl was in the applicant's house.

Thus, the Crown's case, unlike the situation in the ***Kory White*** case, did not depend entirely on the credibility of the girl.

In the light of these compelling factors we are satisfied that there was no miscarriage of justice because the jury acting reasonably and properly would inevitably have returned the same verdict of guilty of carnal abuse, if the judge had not misdirected them on the issue of recent complaint.

Accordingly, we apply the proviso, treat the hearing of this application as the hearing of the appeal, which is dismissed.

Ground 4

The complaint in this ground is that the sentence of ten years imprisonment is manifestly excessive. We have given the submissions of counsel for the applicant our anxious consideration and have come to the conclusion that the sentence cannot reasonably be described as manifestly excessive.

Conclusion

The appeal against conviction and sentence is dismissed. The conviction and sentence are affirmed. The sentence is to commence as of the 5th January, 2007.