J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 155/77

BEFORE:

THE HON. MR. JUSTICE KERR J.A. (Presiding)
THE HON. MR. JUSTICE MELVILLE J.A.
THE HON. MR. JUSTICE ROWE J.A. (Ag.)

REGINA

v

DUDLEY PETERS

Mr. D.V. Daly for the Appellant

Mr. C. March for the Crown

January 19, 1978

KERR J.A.

This is an appeal from a conviction for indecent assault in the Resident Magistrate's Court for the parish of Clarendon.

The complainant is a school girl of 10 years of age, living with her mother at Low Ground, Clarendon. The defendant, a married man lived in the same district. According to the complainant, on January 7, 1977, about 10 o'clock in the morning she went to the home of the accused to borrow a kerosene pan. He was there; they spoke and he took her from the doorway, lifted her up and put her on a bed in the room - placed her on her belly. He took off her panty and went on top of her.

While she was there, she said one Pauline Fisher came in the room and complainant jumped under the bed. After Pauline left she went home.

In cross-examination she admitted that Pauline told her to tell lies on the accused, but that what she said did in fact happen, and she did not remember the lie Pauline told her. To further cross-examination she said that Pauline told her to say that the accused lie down on her, but that indeed did happen.

Pauline Fisher, a girl of 13 years in evidence said that she

went to the accused on behalf of his wife for money to make a purchase at the shop, and on reaching the doorway of the house she saw when accused jumped off complainant, who ran under the bed. The accused then went through the back door of the house. She spoke with him and he gave her ten cents to purchase salt. She took that and gave it to the wife of the appellant.

The mother of the complaining girl took her to the Police Station and made a report. There was no medical evidence and there was no evidence of any sign of injury or sexual intercourse.

The defence is an alibi to the effect that on that day - at the relevant time defendant was not at home, that he had left earlier the morning to visit his dentist at May Pen, and reached there at about 10 o'clock in the morning when it is alleged this assault took place. He called four witnesses in support of his alibi including the Receptionist at the dentist's office, also Clifford Taylor and Egbert Brown, who travelled on the bus with him from Rock River to May Pen.

On appeal, three grounds were argued. The first ground: that the verdict of the Learned Resident Magistrate was unreasonable or unsafe having regard to the evidence, and in particular the evidence of the complainant.

Ground 2, dealt with the competence of the complainant to give evidence on oath.

Ground 3 reads:-

> "That the Learned Resident Magistrate prematurely and before the completion of the evidence of the Appellant and before hearing the evidence of his witnesses stated that he was satisfied as to the truth of the evidence of the prosecution witnesses thereby positively indicating that he had already made up his mind as to the guilt of the Appellant."

In view of the decision which we have taken, it is not necessary for us to come to any positive decision in relation to grounds 1 and 3. The record discloses that shortly after the beginning of the cross-examination of the appellant this note occurred in the Resident Magistrate's Notes of Evidence:-

> "Court is aware that the evidence is that of two young girls and although evidence is corroborated Court should warn. Court is satisfied that both witnesses of the facts are telling the truth."

Thereafter the cross-examination of the accused continued and then witnesses were called for the defence.

Attorney for the Appellant submitted that the statement, occurring as it did before the defence was completed, indicated quite clearly that the Resident Magistrate had come to a decision before hearing the defence in its entirety.

We are of the view that the expression of such an opinion at that stage transgressed the well-established principle that both sides should be heard and that in the circumstances the appellant could not be said to have had a fair trial.

We have given consideration as to whether or not in the circumstances a new trial should be ordered. We consider among other things that the appellant had been in custody for a considerable time, and that although we have made no findings or no decisions on ground 1, that ground is not without merit. We are of the view that it would not be in the interest of justice to so order. Accordingly the appeal is allowed, the conviction quashed and judgment and verdict of acquittal entered.