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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 72/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

R. V. SIMON HOYTE

Jack Hines for Appellant

Kent Pantry, Q.C. Deputy Director of Public Prosecutions and Lisa Palmer & Marlene Malahoo for Crown

6th March & 2nd June, 1997

FORTE, J.A.

This appeal was heard by us on the 6th March, 1997 when we dismissed it, and affirmed the convictions and sentences, and promised to put our reasons in writing.

The appellant was, on the 27th May, 1996 tried and convicted in the Home Circuit Court on three counts each alleging the offence of rape. He was sentenced on each count to twenty years imprisonment, to run concurrently.

The victims in all the counts were children of tender years. The offences were all committed on the same occasion, when the appellant allegedly locked all three young girls in a room, and had sexual intercourse with each of them. The first count related to the offence against N. As in the other counts, the date of the offence was uncertain each complainant being unable to give a definite date. N. however knew the appellant since 1991, when she lived with

her parents at a home next door to where the appellant lived. At that time she named among her friends S and L, who are the complainants in the other two counts of the indictment. On the day the incident occurred, the appellant had sent L and herself to the shop across the road from where he lived, to purchase something. On the way she saw S and all three returned to the appellant's house with the purchased items. They all went into the house, after which the appellant locked them inside. She could not recall if the house had more than one room, but she was certain that it was a bedroom which they had entered.

The appellant, thereafter, apparently gagged S, and tied L to an ironboard. He put N, on the bed, took off her clothes, and had sexual intercourse with her. She felt so much pain that she cried out. When he was finished with N, he took S, removed the cloth from her mouth, and undressed her, and then had sexual intercourse with her also. After he was finished with S, he untied L, and did the same with her. Each girl in turn testified to an act of sexual intercourse committed on them by the appellant, and that they also witnessed the appellant doing the same with the other two girls. No complaint was immediately made by any of the girls as they were threatened by the appellant, when he displayed a gun, and said he would kill them. They all knew the appellant as they lived in the same area, one of them actually living in the same premises in which he lived.

The appellant in his defence denied having had anything to do with any of the complainants at any time during the period named in which the offences were allegedly committed i.e. between 1st January, 1991 and 24th July, 1992.

He related an incident which took place in June 1992 when men were searching for two men called Eggan and Duppy Son, the allegation being that they had raped the girls. He maintained that his name was never mentioned in relation to that incident. During her cross-examination S, however, had admitted that she had been raped by Duppy Son, but that was on a previous occasion, long before the subject matter of this case. Of relevance also, is the appellant's contention that N.'s father and himself had previously had a dispute and consequently there was some "difference" between them.

In addition there was "bad blood" between S's family and himself. He alleged in his sworn testimony that "these people were carrying vindictive feelings" for him, and maintained that he did not have sexual intercourse with the three girls.

Against the background of those facts, Mr. Hines for the appellant filed and argued the following ground of appeal.

> "1. That the learned trial judge failed to direct the jury adequately or sufficiently in that he failed to give a second warning (in the particular if they found there was no corroboration) explaining to them and warning them that the tender age of the complainants was a factor creating risks or dangers such as:
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> (a) unreliability
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> (b) inaccuracy
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> (c) over-imaginativeness and;
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> (d) susceptibility to the influence by third persons and for these reasons it was dangerous to convict on their testimony."

This is how the learned trial judge dealt with the warning:

> "I must tell you that though corroboration of the evidence of the complainant is not essential in law, it is in practice always looked for. Experience has shown that people and for that matter very young children, young girls do say that sexual offences have been committed against them sometimes and for a variety of reasons tell lies. Such false allegations are easy to make and frequently very difficult to challenge even by an entirely innocent person.
> So, Mr. Foreman and Members of the Jury, I must warn you that it is dangerous to convict on the evidence of the complainant alone unless it is corroborated, that is, independently confirmed by other evidence."

In advancing his arguments Mr. Hines relied on the judgment of this Court in **R. v. Earl Britton** SCCA 31/96 delivered 14th October, 1996 (unreported) in which we said that the general warning in sexual cases in which the complainant is of tender years, was not sufficient, but that a specific warning in that regard should be given to the jury. We did in that case adopt the dicta of Byron J A in **Abraham (Nelson) v. R** [1992] 43 WIR 142 in which he said:

> "In this case the issue was of great importance. There was no evidence corroborating the testimony of the complainant. The jury were left to determine the case purely on their assessment of her credibility. This accused denied her story and said she was lying. The accused's daughter who was also of tender years gave evidence that the complainant lied on her father. Although the jury could properly convict if they believed the complainant, it was crucial for their attention to be focussed on the danger of acting on her uncorroborated testimony. The warning the judge gave was ineffectual because she never told the jury, as the circumstances of this case required her to, that the tender age of the complainant was a circumstance which created risk of unreliability

> and inaccuracy, over imaginativeness and susceptibility to influence by third persons, and it was dangerous to convict on her testimony for that reason."

The instant case, however, was quite different. Firstly the learned trial judge, though he fused it with the general warning did refer the jury specifically to the danger of convicting on the uncorroborated evidence of "very young children young girls." Secondly in his assistance as to how the jury should approach the issue of the credibility of the girls he reminded them of the evidence from the appellant that the young girls would have a motive to lie, given the bad relationship that existed between their families and himself. He did so in the following passage:

> "Bear in mind also what the accused man tells you. The accused man tells you that they are carrying bad feeling, bad blood, vindictiveness; these people who are concerned with these youngsters are carrying for him, that is what he tells you, you have to decide whether or not you believe that it is really not how these complainants tell you, but it is because of bad feelings between Mr. D/C and himself at his wedding, fighting, or S mother being knocked out by him whether she is now carrying feelings for him."

In my judgment, though the special warning in relation to the evidence of children of tender years must always be given, the warning given by the learned trial judge in the circumstances of this case, was sufficient to warn the jury of the necessary carefulness with which they should assess the evidence of the complainants having regard to their age, and the allegation by the defence of the motive that exists for a concoction of their evidence.

On that basis alone, the appeal would have been dismissed.

However, one additional factor in the determination of the validity of the appellant's complaint is the fact that this was a case in which there was ample evidence, which the jury could have found, corroborated the testimony of the complainants. The offence against each complainant was allegedly committed in the presence of the other two complainants. Consequently each complainant gave sworn evidence, not only in relation to the offence committed upon her, but also of witnessing the offences being committed against her two friends. Having regard to the verdict of the jury, it is obvious that the evidence of each girl was accepted by them, and a fortiori that each would have been found to have corroborated the others. In those circumstances the absence of the specific warning would not, in any event, be fatal to the conviction. We are however not to be taken as stating that where there is evidence capable of amounting to corroboration there need not be a warning as that would be dependent upon whether the jury accepted as fact, the evidence which was so capable.

Before leaving this appeal there is one other matter, though not taken as a ground of appeal which requires mention. This relates to the learned trial judge's direction on consent - where having defined the offence of rape as necessitating the proof by the prosecution of the absence of consent by the complainant he made the following statement:

> "... the prosecution has told you that in respect of the age of these children at the time when the offences were committed, the law as it stands today and then, they would not have been in a

> position to give consent. On this issue of consent, the law makes it very clear that for sexual offences, a female who is under the age of sixteen at the time of the commission of the offence can't by law give consent to an act of sexual intercourse."

Though on the face of it, this statement is correct in law, we are of the view that it discloses a misunderstanding of the legal principles, having been used in the context in which it was. The inability of a young girl under sixteen to consent to an act of sexual intercourse is as a result of legislation which makes it so. In circumstances, where sexual intercourse takes place with a young girl under sixteen years, the fact that she consented to the act, would not be a defence as the accused would nevertheless be guilty of the offence of carnal abuse. In a case charging rape of a young girl under the age of consent, the prosecution nevertheless has the burden of proving as a fact that sexual intercourse took place without her consent. If the prosecution fails, then the accused would still be liable to a conviction for carnal abuse.

The error in the directions of the learned trial judge in the circumstances of the present case, did not however call for a reversal of the jury's verdict, because there was overwhelming evidence, upon which the jury must have acted, that the young girls were subjected to the acts of sexual intercourse against their will.

For the above reasons, the abovementioned orders were made, and the sentences ordered to commence on the 27th August, 1996.