JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 90/06

BEFORE: THE HON. MR JUSTICE PANTON, P
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

REMO SOARES v R

Delano Harrison, Q.C. for the applicant

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions, Greg Walcolm, Assistant Crown Counsel (Ag) and Miss Cadeen Barnett for the Crown.

1 December 2009

ORAL JUDGMENT

MORRISON, J.A.

1. This is an application for leave to appeal against conviction and sentence given in the Home Circuit Court on the 26 May 2006. The applicant was charged on an indictment containing two counts of carnal abuse, both allegedly committed against Christine Coombs on a day unknown between 1 January 2005 and 5 August 2005.

2. The matter was tried before Miss Justice Mangatal and a jury between 19 and 24 April 2006. The applicant was convicted on count 1 of indecent assault, having being found not guilty of carnal abuse, and on count 2 of carnal abuse and he was sentenced by the learned trial judge

to two years imprisonment at hard labour on count 1, and 17 years imprisonment at hard labour on count 2, both sentences to run concurrently.

3. The applicant filed notice of appeal against conviction and sentence, setting out four grounds. However, when the matter came on for hearing before the court this morning, Mr Harrison, Q.C. sought and obtained leave to abandon those grounds and to argue one supplementary ground of appeal in substitution therefor.

The supplementary ground of appeal was as follows:

> "1. In light of the fact that the age of the victim is a critical ingredient of the offence of carnal abuse, the learned trial judge erred fatally in:
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> (a) ursurping the jury's role in relation to that ingredient of the carnal abuse offences with which the applicant was charged; and
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> (b) directing the jury in terms that plainly suggested (that evidential divergence from the non-specific dates 'charged in the indictment was immaterial in determining the applicant's guilt or innocence."

4. The ground arises out of a difference that emerged in the evidence, or what Mr Harrison described, nicely as ever, as an evidential divergence from the dates in the indictment.

5. Christine Coombs, who was the virtual complainant, was born in 1995 and the indictment as originally drafted, charged an offence which took place sometime in 2005, in which year she would have been 10 years of age. It appeared from the evidence that she was saying that the incidents, or certainly one of them, had taken place in 2004 and so Mr Harrison's complaint was that the trial judge appeared to have usurped the jury's role in that, she put the matter to the jury on the basis that her age was undisputed as she was under 12, which was the relevant age for the purposes of the statute.

6. However, before dealing with the ground, it is necessary to give a brief outline of the facts of the case. The virtual complainant gave evidence that the applicant was in effect her step father. He in fact lived with her mother and she knew him by a nickname. She gave evidence of two separate incidents, one in which he put his penis in her vagina and a second incident in which he is said to have rubbed "Blue Magic" on her vagina.

7. The applicant made an unsworn statement in which he denied these allegations and asserted his innocence. Nevertheless, the jury appears to have considered the matter carefully and, by their verdict dismissing the charge of carnal abuse on count 1, it appears they were clearly discriminating between the two incidents and applying to both incidents

the law as it had been, correctly, left to them (and there is no complaint about this, by the learned trial judge).

8. But the complaint which Mr Harrison makes, emerges from the fact that the learned trial judge, in relation to the age of the virtual complainant, told the jury that, based on the evidence of her grandmother, it was unchallenged that she had been born in 1995. The judge told the jury further at pages 24 - 25 of the transcript that:

> "You may convict the accused if you are satisfied so that you feel sure that the accused man had intercourse with Christine Coombs and that at the time when the alleged incident or incidents occurred she was under the age of 12 years. Of course, one important feature in this case is that even now she is under the age of 12 years...
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> So counsel for the accused stated that, if you accept that either incident happened in 2004, you are bound to acquit the accused man, that is not the law and I direct you to accept my directions on the point and ignore what counsel has indicated to you..."

9. Counsel then asked the judge to repeat that direction and she said it again at pages 25 — 26, as follows:

> "If you are satisfied so that you feel sure that at the time when the accused had intercourse with her, Christine was under the age of 12 years, you may convict the accused even if you are not satisfied so that you feel sure that the intercourse took place within the period set out in the indictment, that is between January 1, to August

> 5, 2005, but in that event you must be satisfied so that you feel sure that the accused had intercourse with Christine and that at the time when this occurred Christine Coombs was under the age of 12 years. "

10. Mr Harrison's complaint was that in directing the jury on this point the trial judge usurped the function of the jury by indicating to the jury that on the important feature in this case, that is, the age of the complainant, she was under the age of 12 years. This, counsel submitted, was a matter for the jury to decide whether having heard Christine's grandmother she was in fact under the age of 12 years or not.

11. It is fair to say that Mr Harrison did not press this ground with any confidence and in fact, quite the opposite, he indicated to the court that he was putting it forward with some diffidence. We agree with his assessment of the matter. The fact is that the uncontradicted evidence coming from the grandmother was that she was born in 1995 and in the circumstances, it really mattered not, whether the offence had taken place in 2005, as the indictment alleged, or in 2004, as it appears from the evidence that certainly one of the offences may have been committed. In that regard Mr Harrison himself was very helpful in putting forward two authorities; the cases of ***Dossi*** (1989) 13 Cr. App. Rep. 158 and ***Radcliffe*** [1990] Crim. L. R. 524 which make it clear that the direction which the learned trial judge gave to the jury on this question was impeccable,

because in these circumstances, the actual date in the indictment was not a critical ingredient in relation to the offence charged.

12. However, Mr Harrison's attention was attracted by the sentence of 17 years on count 2, which is the count of carnal abuse, on which the applicant was found guilty. He referred to what he submitted were all legitimate factors; the philosophy of punishment, the question of deterrence, the circumstances of the applicant himself, who was thirty five at the relevant time, the prevalence of abuse of young girls by men and also taking into account the fact that in this case, the applicant was in effect, the girls step father. Taking all of those factors into account, Mr Harrison submitted, 17 years was nevertheless manifestly excessive. On this point, this court agrees that on the face of it, 17 years appears to be somewhat outside of the range of punishment which one would expect in a case such as this.

13. As Mr Harrison quite correctly pointed out, 17 years in fact approaches and perhaps surpasses what might be an appropriate sentence for manslaughter in certain circumstances, and it certainly also approximates closely to what is the minimum period that a person sentenced for the offence of murder would expect to receive.

14. When all those circumstances are taken into account, it is the view of

the court that a sentence of 12 years imprisonment at hard labour on count 2 would therefore be appropriate in this case. The order of the court is therefore that the application for leave to appeal against conviction is refused. The application for leave to appeal against sentence is granted. The hearing of the application is treated as the hearing of the appeal, which is allowed. The sentence on count 2 is set aside and a sentence of 12 years, imprisonment is substituted. Sentences are to run from 26 May 2006.

15. We must once again express our gratitude and appreciation to Queens Counsel for the absolute candour with which he has advanced his client's position in this case.