



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
FROM THE GRAND COURT, CRIMINAL DIVISION**

CRIMINAL APPEAL 004/2019

IND#0126/2016

SC#06906/2016

DS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

BEFORE: **The Rt Hon Sir John Goldring, President**
 The Hon Sir Richard Field, Justice of Appeal
 The Hon C. Dennis Morrison, Justice of Appeal

Appearances: Mr. Keith Myers for Appellant
 Mr. Greg Walcolm (Office of the DPP) – for Respondent

Date of Hearing: **11th September 2020**

JUDGMENT

Transcript of oral judgment dated 11th September 2020 and Approved for Release 4th February 2021

Rt. Hon Sir John Goldring, President

1. On 22 September 2017, after a judge alone trial, the Applicant, who was a 57 year old man with no previous convictions, was convicted by Acting Justice Owen of one count of gross indecency in respect of a 7 year old girl ('X'), contrary to section 134A(1) of the Penal Code (2013 Revision). At the time of the alleged offence, the Applicant was on bail for a sexual offence, in respect of which he was subsequently acquitted. He was sentenced to 4 years 9 months' imprisonment. He seeks leave to appeal against conviction and sentence.

The Crown's case

2. X was the daughter of the Applicant's next door neighbour. On 16 September 2016, as sometimes happened, the Applicant picked her up from school. When waiting in the car for X's father to return home, the Applicant inserted his finger into her vagina. X said that he threatened to poison her mother if she told her.
3. The Applicant was suffering from a sexually transmitted disease. On 16 September X's mother noticed that her vaginal area was red and swollen with a discharge. On 24 September, when waiting to see a doctor, and in the absence of her mother, X told the nurse she had been touched in the vaginal area, although not by whom. Examination by the doctor revealed that X was suffering from the same sexually transmitted disease as the Applicant.
4. At trial, X gave evidence. By then she was eight. Because of her age, she could not give evidence on oath. The Applicant also gave evidence. He denied the offence. It was his case that X had contracted the sexually transmitted disease innocently when using the Applicant's bathroom. There was expert evidence regarding the likely transmission of such a disease. The Crown's expert, Dr Cook, whose evidence was accepted by the judge, said it was more likely that the disease was transmitted by sexual contact than innocently. Dr Ghaly, the defence expert, said it might have been transmitted innocently.
5. The judge found that Dr Cook's evidence was "*some supporting material evidence*" implicating the Applicant, as required by section 17 of the Youth Justice Law (2005 Revision). It is Myers's submission that the judge was wrong to do so.
6. The judgment was a model of its kind. It summarised the evidence. It set out accurately what the effect of the expert evidence was.
7. In his conclusions the judge:
 - 1) Found that X was intelligent and well able to distinguish between the truth and lies. He found her to be "*a compelling, truthful witness.*"
 - 2) Found the evidence of Dr Cook to amount to "*extremely strong*" corroboration of X's evidence.
 - 3) Found that the Applicant lied when he claimed in evidence that X had regularly used his bathroom and flooded it on at least 3 occasions. He did so to suggest a range of possible ways in which X might innocently have contracted the disease.

The grounds of appeal against conviction

8. Mr Myers, in submissions which are not easy to follow and are wholly without merit, submits that there was no supporting material evidence implicating the Applicant. The judge was wrong to find there was. Mr Myers submits that it is necessary, in the light of the expert evidence, to consider the likelihood of non-sexual modes of transmission. He seeks to rely (in para 12 of his grounds of appeal) on what Dr Ghaly said in one of his reports, to the effect that there is no robust research confirming that non-sexual transmission is rare.
9. As we have indicated, the judge carefully analysed the competing suggestions regarding the possibility of innocent transmission. He accepted Dr Cook's evidence. He was plainly entitled to. It is quite clear that what Dr Cook said was capable of amounting to some supporting material evidence implicating the Applicant. Moreover, as the judge said it was an "extraordinary coincidence" that the very person who X accused of interfering with X was himself infected with the same disease at the relevant time. This application for leave to appeal against conviction is wholly without merit and is refused.

The grounds of appeal against sentence

10. In his sentencing remarks, the judge rightly said that X's parents had placed X into his care because they trusted him. His actions amounted to a very serious abuse of trust. He referred to the Victim Impact Statement. It revealed that X has been greatly affected by the Applicant's abuse. She suffered severe psychological and physical trauma.
11. Because there is no Cayman Islands sentencing guidance for sexual offences, the judge was referred to the Definitive Guideline effective since April 2014 in England and Wales. However, the offence of gross indecency in the Cayman Islands, with its maximum sentence of 12 years, would in England and Wales have amounted to an assault by penetration of a child under 13, contrary to section 6 of the Sexual Offences Act 2003, punishable by a sentence of life imprisonment. Because of that, the judge, with the agreement of both parties, considered it more appropriate to apply the Guidance in relation to a sexual assault on a child under 13, where the maximum sentence is one of 14 years. It was agreed that in doing so, the judge had to take account of the lower maximum sentence in the Cayman Islands.
12. The judge concluded that the severe psychological or physical harm placed the offence within Category 1 harm under the Definitive Guideline. The Applicant's abuse of trust meant the offence was at category A of culpability. In short, the judge concluded this was a category 1A offence. The starting point was 6 years. The range was 4-9 years. Taking account of the lower

maximum sentence in the Cayman Islands, the judge took as a starting point 5 years, with a range of 3 to 8 years.

13. The judge said that in allocating the offence to category 1A, he took into account the threat to X if she told her mother. He said he took as mitigation the absence of previous convictions. He rejected as a mitigating feature that according to the Applicant, he had suffered some abuse as a child.
14. In almost un-understandable submissions, Mr Myers seemingly advances the following argument. He seeks to row back on the acceptance below that the nearest equivalent to gross indecency in the Definitive Guideline is section 7 of the Sexual Offences Act. He submits section 6 is the nearest equivalent. That section alleges assault by penetration of a child. Its maximum sentence is one of life imprisonment. He then goes on to argue that this is a Category 3 case under that Guideline. He does so on the wholly spurious basis that this was not a case of severe serious or psychological harm. He submits there was no penetration by objects or additional degradation or other factors increasing culpability referred to in that Guideline. Accepting this offence amounted to a breach of trust, he submits that the starting point under section 6 is 6 years imprisonment with a range of 4 to 9 years. He then, for reasons which are not immediately apparent, takes 4 years as what he again refers to as the starting point and submits that the mitigating features of the Applicant's age, his difficulties in prison and his loss of contact with his family, should reduce that 4 years. There should be a further reduction to reflect the lower maximum sentence in the Cayman Islands.
15. We can deal with Mr Myers's submissions shortly. We reject them. The approach by the judge to sentence was unimpeachable. The sentence he imposed is not arguably manifestly excessive. The application for leave to appeal against sentence is refused.