



IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 17 of 2019

IND#0071/2017

SC#04091/17

BETWEEN:

AB

Applicant

- and -

Her Majesty the Queen

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
The Hon Sir Richard Field, Justice of Appeal
The Hon. Sir Michael Birt, Justice of Appeal

Date of Hearing: 7th September 2020

Appearances: Mr. Keith Myers, Attorney at Law for the Appellant
Ms. Darlene Oko Office of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 7th September 2020 and Approved for Release 29th January 2021

PRESIDENT:

1. On the 5th of March 2018 the Applicant was convicted by Mr. Justice Quin of three counts. Count 1 was of rape, counts 2 and 3 of indecent assault. He was sentenced to 10 years' imprisonment. He now seeks leave to appeal against conviction.

The Crown's case

2. The alleged victim was Ms. X, the Applicant's step-daughter. Count 2, the first in time, was said to have been committed when Ms. X was about 9 years old. It was alleged the Applicant inserted his two fingers in Ms. X's vagina. Count 1, the allegation of rape, was said to have occurred when

she was 11. Count 3, the second indecent assault, alleged that the Applicant placed his hands inside Ms. X's pants. That was said to have occurred when, as she put it in evidence, she was 11, going on 12. By the time of the trial, she was 15.

Ms. X's evidence

3. The case against the Applicant essentially depended upon Ms. X's evidence. Her evidence in chief was adduced by way of two recorded police interviews, amplified by her oral evidence.

Count 2

4. Ms. X said the offence occurred when her mother was in hospital giving birth to her sister, KP. KP was born on the 30th of November 2009. The family at that time was living at Frank Sound. She said the Applicant came into her bedroom. He walked her to his. When on the bed he pulled down her underwear. He put two fingers inside her vagina. She told him to stop. He told her not to worry. He finished and got up. She put on her underwear and left, saying nothing. She told no-one. She said she was scared to do so. She said the Applicant would ask if she had told her mother. She sometimes did not answer him.

Count 1

5. Again, the mother was in hospital. She was giving birth to AP. AP was born on the 12th of March 2011. At the time the family was living at Bodden Town. Ms. X said the Applicant came into her bedroom. He said, "*Don't worry and don't say anything*". He unbuttoned his pants and inserted his penis in her vagina. He was on top of her. As she put it in her interview, "*He had his hands to where my neck was and inserted his penis into my vagina. I cried. I told him to stop, pushed him off but he came back. When I tried to get up, he pulled me back on the bed. I continued pushing him off. It never lasted long because I was crying to get away. When he finally stopped, he told me to go and bathe.*" She said in her police interview that the Applicant told her he would not hurt her. She went back to her room, having tried unsuccessfully, she said, to wake her brother.

Count 3

6. Ms. X said that that offence occurred before her 12th birthday (14th June 2013). It took place when she and the Applicant were in a motorcar. They were going shopping. She was in the back seat. She said the Applicant drove down a short, dark road. He stopped and "*came onto the back seat where I was sitting. I knew something was going to happen. I pushed my way out. He pushed his way in and forced his hands on my pants. I pushed him off and told him to stop. He lifted the*

buckle on my pants. He forced his hands into my pants. I kicked him off." She described walking off. She said the Applicant drove up to her and she got back into the car. They went to Foster's supermarket, but she remained outside. The Applicant, she said, said to her, "*Make sure you don't tell your mother anything that's going on.*" She said she did not.

How X first came to tell anyone about these events

7. On Friday the 26th of May 2017, X went to a "*rally concert*" at the Family Life Centre. She was with her 15-year-old cousin (JM). One of those present was a school teacher and youth worker called Stephanie Gordon. Ms. Gordon said that after the gospel rap artist had finished singing, he gave a short sermon in which he spoke about abuse. He called for those who were experiencing or had experienced abuse to come to the altar for prayer. Ms. X was one of those who did so. The cousin, JM, described the state Ms. X was in. She started crying. She said she needed to talk to JM, which she did. Ms. Gordon came over because she saw Ms. X in tears. As Ms. Gordon put it, Ms. X was "*really, really, crying.*" Ms. Gordon said she'd never seen her like this. JM told Ms. Gordon that X had said she'd been abused by her stepfather. When Ms. Gordon asked if that was true, Ms. X nodded her assent. She never told Ms. Gordon then or later the detail of the abuse. Ms. Gordon said that she would have to report it to the authorities. Ms. X said she knew but she would like the chance to speak to her mother. Ms. X wanted Ms. Gordon to be present. Because it was very late, Ms. Gordon contacted the mother the next day. Ms. Gordon said to the mother that she needed to speak to her about something Ms. X had said. It was very important. Although Ms. Gordon pressed for a meeting, it never took place. Every time a meeting was planned, as Ms. Gordon put it, "*something happened and we did not meet.*" That occurred about five times. Sometimes the mother gave as a reason for not meeting, that her relationship with Ms. X had improved.
8. By August 2017, no meeting had taken place. On about two occasions when a meeting was intended to take place, Ms. X herself said she did not want to disturb the equilibrium of the family. Finally, when the mother had refused another meeting, Ms. Gordon suggested to Ms. X that she write a letter to her mother. Ms. X agreed. Another witness, Ms. Patterson, spoke of Ms. X disclosing the abuse to her and telling her she intended to write a letter. In the end, Ms. X did not give her mother a letter, although she said she had written one. She told her mother what had happened. A meeting was arranged, this time including a pastor. Again, it did not take place.
9. As to the letter, Ms. X told the police that she had written it "*on pen and paper*" in the last week of

July 2017. She said she thought she still had it. She said she typed it out on an iPad about a week before she was interviewed by the police on the 16th of August 2017, so that it would be "clear". When Ms. X returned to the police station on the 17th of August 2017, she had a copy of the typed letter. It was Exhibit 4 in the trial. The original copy of that typed letter was still on the iPad. Ms. X said she could not locate the original handwritten letter. She said in evidence that the original was not exactly word for word the same as the typed letter. She probably made some changes and added some things. She also said, "*There was nothing different*" between the two documents.

10. Before the trial began, Ms. X searched again for the original of the letter with a police officer and a social worker. No letter was not found. A second attempt was made to locate the letter on the day before Ms. X was due to give evidence. No-one was at the house. No letter was located.
11. We shall briefly refer to some parts of Exhibit 4, which the judge set out in full at paragraph 17 of his judgment. It began, "*Dear mummy, I was only 9 when I was sexually harassed by my mother's husband [AB].*" A little later it said, when dealing with the events of count 1, "*He told me that I must not tell my mom and not worry about anything. My mom was in the hospital that night, after giving birth to my first baby sister, KP.*" A little later the letter stated, "*He put his fingers inside of my vagina.*"
12. As to the count 1, the letter stated, "*The second time this happened, I was about 11...He then sat me on my bed and unbuttoned his pants. He was wearing jeans without his shirt. He pulled down mine and laid me down. After, I saw him take out a condom. I covered my eyes and cried as he put his penis inside of me. I told him to stop multiple of times, over and over. I told him I was going to tell my mom. After he got his pleasure, he put his pants back on and told me to go and bathe and he left the room.*"
13. As to count 3, the letter spoke of the Applicant "*forcing his hands into my pants.*"
14. Ms. X was asked about the contrast between the words, "*dear mummy*" and "*I was only 9 when I was assaulted by my mother's husband*". She said she added the words "*dear mummy*" to the typed letter. They had not been on the original. In other words, the original had been in the third person.
15. The absence of the original letter at trial, founds a submission by Mr. Myers, on behalf of the Applicant, of an abuse of process.

The involvement of the police

16. The mother, having been told by X of the abuse, did not at first inform the police. She told the police she did not do so because when confronted with the allegations, the Applicant's reactions were not those of a guilty person. The mother said she wanted to investigate the allegations herself. She said she wanted to take Ms. X to hospital to establish whether or not she was a virgin. That did not happen. She said she did not follow up with counselling because it was all forgotten. It was only on the 14th of August 2017 that the mother first referred the matter to the police. By then it was apparent that Ms. X's natural father knew of the alleged abuse. The Applicant also went to the police. He submitted a statement. In that statement, he said in essence that Ms. X was lying about the abuse. Having submitted the statement, the Applicant refused to answer any questions.

The trial

17. The Applicant and his wife both gave evidence. In short, they both said Ms. X was lying. They both referred to her in terms of being a habitual liar.

The judge's findings

18. The judge reminded himself that a later complaint does not necessarily mean an untrue complaint. He had to examine the circumstances and the family dynamics (paragraphs 162 to 167). He considered what were said to be inconsistencies in Ms. X's evidence. As they are relied upon by Mr. Myers as calling into question the safety of the convictions, we shall set them out.
19. First, in the letter, and when interviewed by the police, Ms. X had said that when count 2 was committed, her mother was in hospital giving birth to KP. In fact, she was giving birth to AP. She said in the letter that when count 1 was committed, her mother was giving birth to AP. In fact, she was giving birth to KP. Ms. X said in evidence she was simply confused.
20. Second, in her interview of the 15th August 2017, Ms. X said the count 2 offence took place on the first night her mother was in hospital. In her interview of the 17th August, she said it was the second. There was also a difference as to whether the Applicant called her into his room or walked her over to his room.
21. Third, in her interview of the 15th of August 2017, Ms. X had not said that when count 2 was committed, the Applicant had pulled down her underwear. She said that during the interview of

the 17th of August.

22. Not surprisingly, the judge concluded that these differences did not call into question Ms. X's overall credibility. He concluded they were minor and not fundamental. Ms. X was simply confused as to which child was being born when her mother was in hospital. Ms. X's sister was similarly confused when she gave evidence. How Ms. X got to the Applicant's room was not of fundamental importance. As the judge put it, "*The complainant gave her evidence clearly, and in my view, was genuinely trying to help the Court in using her memory as best she could, given all the circumstances and delay.*"
23. Mr. Myers additionally relies on the following matters as calling into question the safety of convictions.
24. During cross-examination regarding count 1, Ms. X at one time said, "*Well, he did, but I'm probably not best to say he did commit the offence. Well, he did, but I'm probably not remembering the time or where it was.*" She had spoken of a closet door, when the suggestion was there was no such door. She maintained there was. At one point in the course of her police interview, she said no when she claimed she had intended to say yes. In respect of count 2, she said she did not remember whether her vagina was bruised.

The letter

25. It was submitted at trial that the letter was manufactured: that it consisted of lies. Attention was drawn to the inconsistency between "*dear mother*" and the later part, in which the third person was used, something to which we have already referred. Again, this is a matter relied upon by Mr. Myers.
26. The judge did not agree that the letter was manufactured and consisted of lies. He found Ms. Gordon, who had suggested that Ms. X write the letter in the first place, to be an impressive witness. The context was her frustration at the mother's failure to meet and her various excuses. The judge too said he was concerned with the contents of the letter, not its format, an observation criticized by Mr. Myers.
27. At paragraph 179 of his judgment, the judge said:

"What is very important is that I find the substance of the allegations as set out in the letter,

written by the complainant, are entirely consistent with her first account to her mother...and also consistent with her accounts to the police and to the court. The defence introduced a number of exhibits and one was in [exhibit] 6D. These were texts between the complainant and Ms. Shawnette who was a good friend of her mother. The complainant explains to Ms. Shawnette that she is writing a letter to her mother. Ms. Shawnette advises her to make sure the details are clear. The evidence of these texts is compelling and, in my view, amount to corroboration of the complainant's accounts -- account."

28. The judge said he regarded it as "extraordinary" the mother did not find time to meet Ms. Gordon and Ms. X, if she really wanted to get to the bottom of the allegations (paragraph 182).

The lack of medical evidence

29. It was suggested below that the lack of medical evidence called into question the allegations. The submission below appears to have been that such an examination might have revealed that Ms. X was sexually promiscuous and therefore less worthy of belief. The judge unhesitatingly and rightly rejected that submission, which Mr. Myers has not pursued. It was alternatively submitted that were it to be shown that Ms. X was a virgin, that called into question the rape allegation. As to that, the judge said (paragraph 187):

"Physical evidence regarding loss of virginity at that age is at best neutral in relation to sexual assault. It's not determinative of whether penetration took place or not. In this case, the allegation of both digital and penile penetration was short and without any allegation of additional violence. Both allegations were over a relatively short period of time, and neither could be said to be a form of forceful penetration. In fact the complainant candidly admitted that he didn't go all the way."

30. The judge did not accept the suggestion that Ms. X had invented these allegations because she wanted to move out of the house and away from her mother in particular. He found that Ms. X's fear was solely of the Applicant. He was very critical both of the Applicant and the mother. He said that "*both the defendant and the mother tried to destroy the character of Ms. X at every opportunity.*" He observed that the mother exhibited a complete lack of objectivity and concern for her daughter. He rejected the Applicant's evidence. He did not accept the Applicant's account supported by the mother that Ms. X was a chronic liar. He was sure, he said, that the Applicant and the mother had together sought to conceal the existence of the allegations, in the hope they would never surface (paragraph 191).

31. At paragraphs 195 to 199, the judge set out his conclusions. At paragraphs 195 and 196, he said:

"The complainant came across as a measured, intelligent, young, 15-year-old girl; neither seeming older or younger...she did not paint or even attempt to paint the defendant in a bad light. Although there were frequent moves and a fairly chronic lifestyle, she shared a genuine love for her sisters and her brother. The Court watched and listened to her detailed police interview the 17th of August, 2016. The Court watched her give her evidence in chief and...she was subjected to 3 days of intense and probing cross-examination. The Court had full opportunity to assess her demeanour, honesty and character...In my view, she came across as a sincere, bright, well-adjusted young girl who was really trying her best to recall the events and to answer all the questions put to her in a truthful and forthright manner. She did not criticize the defendant and was quick to admit that he had helped her as a young child. She did not exaggerate or embellish the allegations."

32. In paragraph 196 he said:

"...In my view, the complainant's account is compelling because there are 3 different incidents and neither one is nearly as serious as it...could have been, if one's aim was to tell malicious lies against the defendant. Her accounts of the three incidents reveal details, and a clear recall of many details. She recalled what she was wearing, she recalled he said he wouldn't hurt her but she needed to know what life was like. She recalled that the defendant telling her not to tell her mother. Her evidence was presented fairly and there was no hint of embellishment or exaggeration or dishonesty."

33. He said of the delay, that she did not tell anyone because she didn't know how to. She said she was scared. She was confused, embarrassed and ashamed and didn't know how to say it. He said (paragraph 182),

"The youth rally [of 26th May 2017] and the prayer at the altar, triggered the making and disclosure of this complaint."

34. He finally said (paragraph 199):

"Having given this matter very careful consideration, I don't believe the defendant and I reject his account. He was always trying to paint the complainant in the

worst light possible. His evidence was continually inconsistent regarding his relationship with the complainant. Furthermore, there is no evidence either from the defendant, or his wife, or from cross-examination of the complainant, to suggest her evidence is unreliable or dishonest. The complainant's evidence is entirely consistent, consistent with the evidence of other witnesses and supported by the text exhibits. The complainant maintained her allegations despite very considerable pressure from a strong-willed mother to recant and the threat of very unpleasant consequences if she was to disclose these sexual assaults. I find the evidence of the defendant and his wife to be inconsistent, implausible and unreliable."

35. He concluded that Ms. X, as a well-adjusted 15-year-old, had told the truth about the sexual assaults and he said that he believed her account of the 3 incidents. He said he was sure that she was a truthful and reliable witness.

The Grounds of Appeal

36. Mr. Myers' submission is that the judge failed to give sufficient weight to the inconsistencies in X's evidence. He applied too great latitude in assessing her evidence compared to that of the Applicant and the Applicant's wife. He relies upon what he describes as the discrepancies in Ms. X's evidence which we have set out. He submits that the judge dealt with them in an inadequate way. He submits that Ms. X was treated with a degree of indulgence not offered to the Applicant and his wife. Mr. Myers is very critical of the judge's comment to the effect that he was more concerned about the content of the letter as opposed to its format. Mr. Myers is very critical of the judge's criticisms of the Applicant, and, particularly, the Applicant's wife. He submits they were unjustified: that in all the circumstances, the judge treated the Applicant's and his wife's evidence as carrying less weight than that of Ms. X. Mr. Myers drew to the attention of the Court, the evidence of those witnesses for the prosecution, who suggested that Ms. X might have a motive falsely to make allegations. We bear that submission in mind.

Our conclusion

37. We do not accept that these convictions were arguably unsafe.
38. While it may be the judge went further than he needed to in his criticisms of the mother, it is quite clear that he considered the evidence before him as a whole and with great care. At the heart of his

consideration was his assessment of the credibility of Ms. X. He reached his conclusions in respect of that issue on the basis of the evidence he heard. He set out his reasoning cogently. He was unarguably entitled to reach the conclusions he did. In short, Mr. Justice Quin did what the judge in a judge-alone trial is required to do. We emphasise that it isn't for this court to seek to retry the case or to call into question or interfere in decisions which the judge below, who heard all the evidence, was entitled to reach.

39. As to the submission that the absence of original of the letter meant that the trial amounted to an abuse of process and should have been stayed, that is wholly without merit. We observe that no such submission was made at first instance.
40. Mr. Myers seeks to rely upon English cases such as *R v F* [2011] 2 Cr App R, a case in which the successful appellant was facing allegations of abuse said to have occurred some 30 or 40 years previously, a quite different circumstance from the present.
41. In short, we do not accept the absence of the original letter can begin to amount to an abuse of process. It would, had it been available, have amounted to another piece of evidence. The fact that it was not available was something that the trial process was well able to take into account, as in the circumstances it plainly did.
42. Finally, on the specific instructions of the Applicant, Mr. Myers submits that there was no evidence of penetrative sex. There was no medical evidence of it. The evidence on count 1 falls short in that respect. We do not agree. We need only quote one part of Ms. X's evidence. She said, "*He did not have his penis in me for long, but it felt bad and uncomfortable.*" That of itself was sufficient evidence of penetration. There was other evidence into which we need not go.
43. In our judgment, for the reasons we have set out, this application for leave is wholly without merit and is refused.

A final observation

44. We make this final observation. Ms. X was cross-examined (we should make it clear, not by Mr. Myers) for no less than 3 days. It is clear from the judgment that that cross-examination roamed far and wide. While of course it is always necessary for a complainant's evidence properly to be examined and tested, to cross-examine a 15-year-old girl for 3 days in respect of these 3 allegations

seems to us unacceptable. No doubt, judges will be alert to keep such cross-examination focused and relevant.