

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS  
ON APPEAL FROM THE CRIMINAL DIVISION**

**CICA (Crim) No. 0004 of 2022  
IND No. 0040 of 2021  
SC No. 0644 of 2021**

**BETWEEN:**

**TONY O'CONNELL EBANKS**

**Appellant**



**-and-**

**HIS MAJESTY THE KING**

**Respondent**

**Before:**

**The Rt. Hon. Sir John Goldring, President  
The Hon. John Martin KC, Justice of Appeal  
The Rt. Hon. Sir Alan Moses, Justice of Appeal**

**Appearances:**

**Mr Clayton Phuran of CP Attorneys for the Appellant  
Mr Neil Kumar, Office of the Director of Public  
Prosecutions for the Respondent**

**Heard:**

**3 November 2023**

**Judgment delivered:**

**12 December 2023**

**JUDGMENT**

1. This an application for leave to appeal against conviction and sentence. We say at the outset that, for reasons which will become apparent, we grant leave to appeal against conviction.
2. On 18 January 2022, the appellant was convicted of indecent assault, contrary to section 132 of the Penal Code (2019 Revision, after a trial by judge Justice St. John-Stevens (Ag), alone.

3. It was alleged that the appellant had digitally penetrated the vagina of a five-year old girl, TCE, as she lay on a bed in her aunt's house, playing with a puzzle. Her mother was not there at that time; she was being looked after by her aunt. It was not disputed that the appellant had free access to the house to use the bathroom. TCE knew the appellant as Tony; her aunt's boyfriend was also known to her as Tony. The appellant denied the offence from the moment of his arrest and, on oath, at trial.
4. The Crown was not able and did not attempt to date the alleged offence. The initial complaint was made on 14<sup>th</sup> April 2021 when, her mother, who had been washing her, observed that TCE had failed to wash her own vagina. When her mother prepared to do so, TCE said "Are you going to stick a finger in it?" Her mother replied "No. No one is supposed to stick their finger in your vagina". TCE responded "Yes Tony did".
5. TCE's mother complained immediately to the police who conducted an ABE interview with TCE within fourteen days thereafter. TCE repeated that she had been lying on a bed in her aunt's house doing a puzzle when "Tony came inside the room and pushed his finger in her vagina".
6. The appeal is advanced on two grounds: first that the judge admitted the evidence of the child complainant, without any consideration of the requirements of section 17 of the Youth Justice Act (2021 Revision). The conviction depended on the competence and credibility of TCE and on the rejection of the evidence of the defendant. Second, the written judgment gives no reasons whatever as to how the judge concluded that the defendant was guilty.
7. We should note, straightaway, that the prosecution, through Mr Neil Kumar, fairly and rightly accepted the inadequacies of the judgment, the judge's failure to identify the reasons on which he based his conclusions and the serious procedural defects in failing to consider and rule on the requirements of section 132. But, it was argued, no substantial miscarriage had occurred.
8. Section 17 of the Youth Justice Act provides:

- (1) *This section applies where, in proceedings against any person for an offence, a young person is called as a witness who does not, in the opinion of the court, understand the nature of an oath.*
  - (2) *In proceedings to which the section applies the evidence of a young person who does not understand the nature of the oath may be given, if –*
    - (a) *in the opinion of the court, that person is possessed of sufficient intelligence, to justify the reception of the evidence; and*
    - (b) *he understands the duty of speaking the truth.*
9. The judge was not directed to the provisions of this section, nor did he give any ruling as to the three requirements it contains. He made no ruling as to whether the complainant understood the oath, nor as to whether she was of sufficient intelligence to justify the reception of the evidence nor as to whether she understood the duty of speaking the truth.
10. The provisions in the Cayman Penal Code differ from their equivalent under the parallel United Kingdom provision contained in section 53 of the Youth Justice and Criminal Evidence Act 1999, which requires the court only to consider competence and not the ability to understand the obligation to tell the truth. *R v MacPherson (Ian)* [2006] 1 Cr.App R 30 (2005) explains that competence depends on the child witness being able to speak and understand basic English with strangers. It also draws the important distinction between truthfulness and reliability which go to the weight to be attached to the evidence as opposed to intelligibility. The two issues are distinct but both must be considered by the trial judge before the evidence can be admitted in a Cayman Island trial.
11. *MacPherson* is also of significance in that it provides at [18] an example of a careful ruling by the trial judge as to competence, setting out his reasons for ruling the witness competent and illustrating his reasoning with an example from the record of the ABE interview. Thus both defence and the Court of Appeal were in a position to assess whether the judge was correct in permitting the evidence of the child to be given.
12. In the instant case the judge seems to have put his mind to a limited extent to the issue of whether TCE understood what telling the truth meant because he draws attention to an exchange between himself and the child when he questioned her as to whether he was wearing a blue hat.

13. The transcript shows an apparent attempt by the judge to satisfy himself TCE knew what telling the truth meant. It reads:

*The Court: ... you're going to be asked a few questions, alright? And I know you know the difference between telling the truth and lies. So I'm going to ask you to promise to tell the truth again. Alright? Yeah?*

*The witness: Yes.*

*The Court: So let me just... let's just play a game to make sure you understand. If I said to you, I had a blue hat on, would I be lying or telling the truth?*

*The witness: Hmm-hmm.*

*Social worker: Did you hear what he said?*

*The Court: Would I be lying? Have I got a blue hat on?*

*The witness: Telling the truth.*

*The Court: I said I had a blue hat on is that the truth or a lie?*

*The witness: truth.*

*The Court: Truth I've got a blue hat on?*

*Social worker, he's wearing a blue hat?*

*The witness, yes.*

*Social worker: Yes.*

*The Court: Must be a funny camera on that side.*

*Social worker: he has on a blue hat on his head?*

*The witness: no.*

*Social worker: Is that the truth or a lie?*

*The witness: A lie.*

*The Court: It's a lie isn't it I've got a blue hat on, unless it's a bad camera.*

*The witness: a lie.*

*The Court: It's a lie have you got a blue hat on?*

*The witness: No.*

*The Court: Now alright what's going to happen now right so you promise to tell the truth? Do you promise? Can you answer so I can hear you?*

*Social worker. Yes sir.*

*The witness: Yes sir.*

*The Court: Alright and if you don't understand something you just say I don't understand. Alright? If you don't hear, just asked to say again. Alright? So I'm going to move away and the camera is going to go onto a lady who is going to ask you a few questions, alright?*

*The witness: okay.*

*The Court and you must tell us the truth and just say what happened. Thank you.*

14. The only reference to this exchange in the judgment is towards the end where the judge writes:
- [83] In this regard, the defence refers to the exchange between the court and the complainant at the beginning of her evidence. The court was establishing whether the witness knew the difference between truth and lies, and what it means to promise to tell the truth.*
- [84] The fact is the Court posed the question to TCE: is the judge wearing a blue hat TC when asked “am I wearing a blue hat?” replied “yes”. The fact is the court was not wearing a blue hat. The question was examined further and she did eventually give the correct answer.*
- [85] This gave the Court an insight into how she responded to questions, and her demeanour when doing so, being a useful tool, providing a touchstone of caution, when assessing evidence.*
15. That is all the judge said about the matter. He made no reference to the requirement in section 17(2)(b) that he had to be satisfied that the witness understood her obligation to tell the truth, not merely that she understood her the difference between truth and lies. On the contrary he seems merely to have thought that it dictated a need to be cautious in accepting her evidence.
16. The judge thus failed to record, as he was required to do, that he was satisfied she understood her obligation to tell the truth; nor did he give any reason as to why he was so satisfied. He seems at one stage in the exchange we have recorded to have assumed that she knew the difference between telling the truth and lying, presumably, although he makes no mention of this, a reference to a line of questioning in the ABE interview where the witness was tested as to her ability to tell the difference between truth and lies.
17. Neither counsel for the Crown or for the Defence appear to have drawn the provisions of section 17(2) to the attention of the Judge, still less made any submissions about it. This led to a substantial and regrettable breach of section 17(2)(b).
18. It was compounded by the absence of any reference whatever to the requirement to be satisfied that TCE understood basic English (section 17(2)(a)).
19. This court emphasises that in a trial which depends on the evidence of a child witness, in this case only five years old, it is essential that all have at the forefront the requirements and purpose of section 17. The judge must satisfy himself that those

requirements are satisfied, make a ruling as to whether or not they have been and set out his reasons for so ruling.

20. Section 17 provides essential safeguards against the inherent and obvious dangers of hearing and relying on the evidence of a young child. If these requirements are not fulfilled then it is extremely difficult to know whether it was fair or safe to reach any conclusion which rested on the admission of the challenged evidence of a child.
21. The Court of Appeal has neither seen nor heard the witness and must be reluctant to form any view as to the credibility of the evidence where the judge has given no or no proper indication of the basis upon which the evidence was admitted. Were it not for the considerations to which we later turn, the Court would have been compelled to allow the appeal on this ground alone.
22. There were further serious defects in the judgment. The prosecution was unable to put a date on the offence. The judge records the initial complaint. The evidence came from her mother who reported what TCE had said when being washed.
23. The judge wrote:

*[39]. The allegation provides independent support for the fact that the complaint was made in the terms in which it was made, but the source of the complaint was the complainant herself. It is not evidence of what happened”.*
24. It is difficult to understand what the judge was intending to convey, there being no dispute as to the making of the complaint. But he was wrong to decide that the complaint was not evidence of the truth of the subject-matter of the complaint (see section 33C (3)(a)(iii) of the Evidence Act (2021 Revision)). It was. But it was an error which assists the appellant.
25. The judge did record a significant conflict between TCE’s evidence and her aunt. TCE said that when Tony put his finger inside her, she screamed for her aunt; she was “screaming from the rooftop”. Her aunt had no such recollection, she neither heard a scream nor was there ever any complaint to her. She did say that there was an occasion when the defendant was in the house with TCE and TCE was lying on the bed doing a puzzle. She left the house and when she returned she saw the defendant standing at the

bedroom door asking TCE if she was alright. TCE did not respond and nothing else was said.

26. The judge then writes:  
*[44] I have carefully considered a defence submission that this is an example of a significant inconsistency undermining TC's credibility.*
27. The judge says nothing more about it. He gives no indication of what he makes of that inconsistency or whether and if so how it figured in his process of reasoning.
28. Indeed, there is no process of reasoning at all. He records some questioning about TCE's knowledge of her own anatomy, concluding that she did know what her vagina was.
29. He records the distinction TCE drew in the appearance between Tony the defendant and Tony her aunt's boyfriend; she said the Tony who had put his finger in her vagina wore an orange shirt, wore dark glasses and was not brown in colour but peach. The defence cross-examined her on the basis that the Tony to whom she referred may have been her aunt's boyfriend. At one stage she said it was but in re-examination she repeated that her abuser was peach in colour.
30. The judge saw both the defendant and the aunt's boyfriend and records that the defendant was indeed peach-coloured while the boyfriend was brown.
31. He notes TCE's evidence that the defendant gave her too much candy and chips, not something she had said in her ABE interview.
32. But the judge never goes on to set out what he makes of any of this evidence and the part it played in reaching his conclusion of guilt.
33. The judge summarised the evidence of the defendant, denying the offence, and denying that he was ever friendly with TCE. He admitted he did have orange shirts but said the glasses he wore were blue not black.

34. The judge later commented that he has “considered carefully” the defendant’s evidence. But again says not a word as to what he made of it, whether he disbelieved it and if so why.
35. He merely set out again the questions he had posed himself earlier in his judgment identifying correctly the burden and standard of proof and then concluded that he was satisfied so that he was sure that the alleged act took place, that the defendant had committed that act and concluded that the prosecution had established beyond doubt the guilt of the defendant and:
- [90] I am satisfied so that I am sure that the defendant digitally penetrated the vagina of TCE.*
36. Nowhere does he say he believed TCE and why, nowhere does he say that he disbelieved the defendant and why.
37. That he did believe TCE and disbelieve the defendant is obvious though a matter of inference which has to be drawn from the conclusions the judge reached. It ought not to be a matter of inference. It should have been stated in clear terms.
38. It is, we accept, difficult to set out all the reasons for believing a witness and for disbelieving another. But clarity and fairness demand, in a judge alone trial, that some reasons are given even if they derive from the demeanour and manner of the witness. In this case the judge fails to give any indication of the factors which led to his conclusion. That failure is significant. The defendant is entitled to know why TCE was believed and why he was disbelieved and why he was convicted. If there is an appeal this Court should not be left to draw inferences.
39. Again, but for considerations to which we now turn, these failures of themselves would have led this Court to allow the appeal.
40. By section 9 of the Court of Appeal Act (2023 Revision):
- (1) Subject to section 12, the Court shall an appeal against conviction, if it thinks –*  
*(c) that there was a material irregularity in the course of the trial,...*

*Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if the court considers no substantial miscarriage of justice has actually occurred.*

41. There were material irregularities for the reasons we have given. But did a substantial miscarriage of justice actually occur? The cross-examination was confined to a suggestion that the witness who accused someone called 'Tony' was not referring to the appellant but to a man also known to TCE as Tony.
42. It is necessary to record some of the short cross-examination to which the judge himself had drawn attention.

*Q. Now, you've told us that Tony put his finger in your vagina.*

*A. Yes*

*Q. Do you know Tony's full name?*

*A. Uh-uh*

*Q. I'm going to ask you about somebody else now okay?*

*A. Okay*

*Q. Is Aunty Tracy's boyfriend called Tony?*

*A. Yes*

*Q. And could it have been Aunty Tracy's boyfriend who put his finger in your vagina?*

*A. Yes*

*Q. Yes thank you. No more questions from me at least.*

*The Court. Yes.*

*The witness: I didn't understand what you said.*

*The Court: All right.*

*Ms Bodden (defence counsel at trial) The last? Do you want me to repeat all of the questions or the last question*

*A. The last question.*

*Q. Okay. So you've told us that Aunty Tracy's boyfriend was called Tony as well.*

*A. Yes*

*Q. Could it have been Tony who put his finger in your vagina*

*A. Yes.*

*TCE was then re-examined:*

*Q. Tony put his finger in your vagina.*

*A. Yes*

*Q. Was, or is he auntie Tracy's boyfriend?*

*A. Yes*

*Q. What do you call Aunty Tracy's boyfriend?*

*A. Tony*

*Q. And what does Aunty Tracy's boyfriend look like?*

*A. Looks like a little... He's a little peach. He's like light peach and a little ...like kind of peach and the other Tony is black and brown.*

*Q. So*

*A. There are two Tonies because my auntie used to call them the same name.*

*Q. Right. So you've said, there are two Tonies. One is peach and one is black and brown.*

*A. hm-hmm.*

*Q. Yes which Tony—*

*A. Yes*

*Q. Which Tony put his finger in your vagina was it the Tony who is peach or was it the Tony, who is black and brown?*

*A. Its the one that is peach, I remember and he's the one who gives me too much candy and put my finger put his finger in my vagina. When he's done doing that he gives me the candy and I told him that candy is not healthy for kids and he gives me a little baby soda. He gave me soda.*

*Q. You told him candy is not healthy for kids?*

*A. Yes*

*Q. And then.*

*A. And I told him soda is not healthy for kids.*

*Q. What did you tell him is not healthy for the kids?*

*A. He gave me – he gave me the popcorn and I told him I can't eat all of that.*

*Q. Popcorn?*

*A. Yeah he gave me popcorn –*

*Q. Do you like popcorn?*

*A. And soda. Yes. But I just left them and I told Tony I can't eat all of that. I can't eat candy. I can't eat popcorn. I can't eat soda, and he just forced me to eat them.*

*Q. Now you told us about two Tonies peach Tony?*

*A. Yes*

*Q. And black and brown Tony?*

*A. Yes*

*Q. Which Tony is Aunty Tracy's boyfriend is it peach Tony or black and brown Tony?*

*A. It's the black and brown Tony. Yeah the peach one is not auntie Tracy's boyfriend but they married in the morning ...because they're really.. because.... Auntie Tracy's boyfriend.*

*Q. And just so that we are clear so we understand you, which Tony put his finger in your vagina, peach Tony, or black and brown Tony?*

*A. It's the peach Tony that did that.*

43. This passage of evidence seemed to the court to provide a good illustration of the way TCE gave her evidence. It shows with convincing clarity how well TCE could understand the questions. It is of note that at the point when the defence had elicited the apparent identification of the aunt's boyfriend as the perpetrator TCE chose to intervene by saying she did not understand. She was plainly not content with the suggestion to which she had previously assented that the perpetrator was the aunt's boyfriend.
44. Her subsequent confusion is amply demonstrated by the fact that at first in re-examination she identified the boyfriend as peach coloured whereas it was irrefutable that he was not. Once the prosecution had established that the perpetrator was peach coloured, there was no further room for confusion. The clear distinction in appearance between the two Tonys established that the witness was not identifying her abuser as the aunt's boyfriend.
45. The spontaneous account of being offered candy and sweets provides a clear picture of a witness recalling an actual sequence of events and, with the evidence of the complaint, it establishes that the penetration did occur. It cannot reasonably be suggested that she made up a story of the abuser offering her the candy and soda.
46. This court should not have been placed in a position of providing reasons, with examples, as to why the only witness of the offence was telling the truth. But the statute requires the court to consider whether a substantial miscarriage has occurred. Our reading of the way the witness gave her evidence of the crucial events makes us sure that no miscarriage of justice has occurred. For these reasons we dismiss the appeal against conviction.

*Application for Leave to Appeal against Sentence.*

47. The applicant seeks leave to appeal against a sentence of eight years imprisonment. A Sexual Harm Prevention Order was also made for a period of 12 years but this is not the subject of the proposed appeal.
48. The applicant was 54 at the time of sentencing, having been born on 24<sup>th</sup> December 1967. He had numerous previous convictions relating to dishonesty, drugs and some violence but of particular relevance were a previous conviction of rape in 2008 for which he was sentenced to three years, and a sentence of 56 months following a plea of guilty as recently as 2016 where the victim was his 11 year old step-daughter. His conditional release licence expired on 4<sup>th</sup> September 2020. Thus this offence took place in a period of only a few months after the offence (although at a date unknown) which must have been before the date of the complaint on 14 April 2021.
49. The judge, with the agreement of counsel on both sides placed the category of offending at 2B but raised the offence to a category with a range of 5 to 9 years because of the risk of future harm.
50. It is sought to argue two grounds as the bases for the contention that the sentence was manifestly excessive: first that the judge deployed the vulnerability of the victim twice, both in relation to the starting point and as an aggravating feature.
51. In our judgment there was no arguable error in the judge's identification of the aggravating features. The age of the victim and her vulnerability in a home where she might have been expected to feel safe were serious aggravating features. There was no double counting.
52. Second, it is argued that the judge wrongly considered that the applicant was in breach of the licence imposed in 2016. It is correct that the judge did seem to be of the erroneous view that the applicant was in breach of his licence at one stage of his judgment. But his account of the dates, later in the written judgment, shows that there was no such misapprehension.
53. He was clearly correct both as to the range of sentence appropriate and as to the risk this applicant poses. It is not arguable to the contrary. We refuse this application.