

**IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

IND. # 6/96

C.I.C.A. # 20/96

DAVID LARSTON WEBSTER

-VS-

REGINA

BEFORE: The Rt. Honourable Edward Zacca, P.C., O.J. - President
 Rt. Honourable Mr. Justice Telford Georges, P.C. - J.A.
 The Honourable Mr. Justice James Kerr - J.A.

Mr. Keith Collins for the Appellant
Mr. Ivor Archie for the Crown

December 9, 11, 1996 & April 3rd, 1997

REASONS FOR JUDGMENT

KERR. J.A. :

The appellant was charged in the Grand Court on an indictment containing two counts - the first for defilement of a girl under the age of 16 years contrary to section 122(3) of the Penal Code for that he on October 27, 1994, at West Bay, Grand Cayman, unlawfully and carnally knew Rebecca Ann Wood, she being under the age of 16 years. The second, which was alternative to the first, charged the appellant with indecent assault contrary to section 120 (1) of the Penal Code. The trial was by Williams, J., who, at the election of the appellant, sat without a jury. On July 12, 1996, the appellant was found guilty on the first count for attempting to commit the offence of defilement and sentenced to two years imprisonment; adjudication on the second count was accordingly deferred.

The complainant is the daughter of James Wood, a Doctor of Philosophy (Ph.D.) on Zoology and his wife, Fern, and at the time of the offence was 12 years of age, being born on September 29, 1982. Both parents were then employed at the Turtle Farm at West Bay, he being the Managing Director and she the Resource Manager. Their home, the manager's residence, was on the Turtle Farm lands but separated from the farm property by a fence. The appellant was the gardener and handyman on the farm and at the time of the incident had been so employed for a year. His duties did not extend to the manager's residence and generally did not involve being within the confines of the residence.

Dr. Wood's evidence relevant to the charge was to the effect that on the morning of October 27, both parents left for work at about 7:45 a.m. leaving at home the complainant who was on a term break from school. About 9:55 a.m. Dr. Wood returned to the home to get a key. He attempted to enter the house by way of the car porch but the entrance door to the house, which was usually open, was now double-locked. He used his keys to open the door and entered the house. He noticed that the door to the complainant's room was closed and when he tried to open it, found that it was locked. He then took an alternative route by way of the living room and a hallway and as he approached this room door he saw the appellant coming out of the complainant's room naked with his clothes in his hand. The appellant then said "sorry Mr. Jim I don't want any problems about this". The complainant then came out of the room behind the accused; she had on her clothes. She was crying. The accused then went into the nearby bathroom. Dr. Wood held the complainant's arm saying, "Let's go see your mother". He told the appellant to get out, he was going to call the police. On the way to the mother, the appellant now clothed, caught up with him and again said, "I do not want any trouble over this". Leaving the complainant with her mother, he went to his office and made a report by telephone to the police at West Bay Police Station. Detective Kurt Walton who received the report, promptly went to the farm, and after speaking with Dr. Wood, contacted other police officers including Sergeant Welcome. Later that day at the

Central Police Station, George Town, he took a statement from the appellant. This statement was tendered in evidence by consent.

On the following day Detective Walton took down in writing the Questions and Answers he conducted with the prisoner. The admissibility of this document was challenged but after the voir dire on this issue, the learned trial judge ruled it admissible and the record of the interview was tendered in evidence. In the statement, the appellant said:

“At about quarter to 10:00 a.m. I was standing outside of the entrance gate of the farm on the west side when Rebecca came there. At this time I was looking through some football forms. Rebecca then pulled me by my arm and said, “David please come over to my house with me”. She jerked one of the forms from me so I started to follow her. She ran over to her house and I followed behind her. I stood up by the door in the car porch and I asked her for the form back. She then handed it back to me and I stepped forward into the house. I then went over by the organ in her bedroom and we started to talk. She then asked me, “David what do you want to do with me now”. I told her I didn’t want to do anything. She then came over and pulled my pants down. I began to get weak and tempted but I got a hold of myself and picked up my pants and started to walk out of the room. At this time I heard a knock on the door and Rebecca opened the door and I saw Mr. Jim appear in front of us. He told me to leave and I did leave. I was trying to explain to him that nothing had taken place, but he wouldn’t listen to me. I wish to add that I have known the Woods family for the past year and a half and to me they were my best friends, whereby I respected them and they respected me.”

In the interview he denied raping or assaulting the complainant and that when Dr. Wood saw him coming out of the room he had on all his clothes. However, there were internal inconsistencies as well as manifest discrepancies between the earlier statement and his answers at the interrogation including that he went from the car park into the house because the complainant was pulling on his pants and that he went in the bedroom to pull up his pants because he saw the complainant's father coming. This last statement he corrected by saying that he did not see the father coming it was the complainant who said so.

Dr. Jane Horgan at the George Town Hospital examined the complainant that same day at about 1:10 p.m. Her relevant findings which were contained in the statement tendered at the Preliminary Examination were:

“The patient’s demeanor was good; she doesn’t seem to fully understand the (sick) nature of the allegation. Her hymen was intact. There was some redness and tenderness in the vulva and introitus area of the vagina”.

The doctor took samples of the patient including pubic hair, vaginal swabs and blood. It was conceded by Counsel for the Prosecution that the results of the tests on all such exhibits were negative.

The application of Crown Counsel to tender and read into evidence the deposition of the complainant who was absent at the trial was vigorously opposed by Defence

Counsel. In the end, the learned judge, after considering the relevant circumstances and the submissions of Counsel, granted the application. This ruling is the subject of this appeal and will be dealt with later.

The complainant in her deposition said that about 9:30 that morning she was alone at home and while in the car porch playing with her dog she saw the appellant in the yard. He said to her "I'm going to rape you". When he said this he was in the bedroom, having gone from the car porch through the kitchen. He called her to the bedroom. She went. She was scared. She got on the bed; he went on top of her and put his penis in her vagina. He put some white stuff on her stomach; she did not see where it came from. He was on her for about 15 minutes. When he got off her he went to the bathroom for toilet paper with which he wiped the white stuff from her tummy. At that time her clothes were off; she did not remember who took them off. The appellant had his clothes off. After he wiped the stuff off her tummy her father came; the appellant was still in the house. Her father took her to her mother and later that day she was examined by the doctor.

In cross-examination, she said that she was not going to school that day because it was mid-term break. She knew that the appellant was associated with the football club. He was not doing work in the yard that day. She was quite friendly towards him, sometimes playing with him, throwing stones and water at him. On that morning the appellant had a football coupon in his hand. She took it from him and moved towards

the house. He followed her and took the coupon from her near the kitchen door. She sometimes tugged on his shorts. The kitchen door is very near her bedroom door. The other door in her bedroom opens near to the bathroom and from this door she could go to the living room. She locked the door of the kitchen before her father came. She can't remember locking the bedroom door. Her father first tried the door to the kitchen and the appellant tried to escape through the other door. He did not have on his clothes then. She was scared of her father finding her with the appellant. She showed the doctor who examined her where the appellant put the white stuff on her stomach.

In re-examination, she said that she did not take off the appellant's pants.

The sole ground of appeal argued was that "the learned trial judge erred in allowing the prosecution to read and use as evidence against the appellant, the deposition of the complainant under section 133 of the Criminal Code". The provisions of section 133 so far as are relevant, read:

"where any person has been committed for trial for any offence, the deposition of any person taken before the committing court may, if the conditions hereinafter set out are satisfied, without further proof be read as evidence on the trial of that person whether for that offence or for any other offence arising out of the same transaction, or set of circumstances, as that offence. The conditions hereinafter referred to are the following -

- (a) the deposition must be the deposition either -
 - (I) -----

- (ii) of a witness who is proved at the trial, by the oath of a credible witness, to be dead, insane, absent from the Islands, so ill as not to be able to travel or otherwise incapable of giving evidence;
 - (iii) -----;
 - (iv) -----; and
- (b) the deposition must purport to be signed by the magistrate before whom it purports to have been taken”.

The material evidence upon which the application rested was given by James Wood who had been residing in Texas since January, 1995, shortly after the incident. He said that in 1989 the complainant was diagnosed as having attention deficit disorder with hypo-activity and that her intellectual development was retarded for a 12-year old. She visited child psychiatrist, Dr. Nguyen of Texas for evaluation and treatment. Whenever he spoke to her about the incident she became agitated and apprehensive. She was very upset after giving evidence at the Preliminary Examination saying, “they tried to make it look like her fault”. He said that at the moment she was in Texas. As a result of conversation with her he spoke to Dr. Nguyen as to the possible effect on the complainant on her being asked to testify again. Dr. Nguyen’s letter to the Attorney-General of the Cayman Islands dated June 27, 1996, with address, psychiatry clinic of Amarillo, Texas, which was tendered and admitted in evidence, in its operative part reads:

“Mr. and Mrs. Jim and Fern Wood, the parents of Rebecca Wood,

recently informed us of the possibility that Rebecca will have to testify in a court case regarding the individual who is being charged with sexually assaulting her. I am a Psychiatrist who had a chance to evaluate Rebecca's mental condition a couple of times on 1/13/95 and 4/8/96. It is my strong belief that having Rebecca subjected to testifying in court against her perpetrator will be a very traumatizing experience which should be avoided. Rebecca is going through a healing process and this experience will re-open extremely painful wounds, the harmful consequences of which will be hard to predict. I strongly advise that she not be made to testify in court".

Appellant's Counsel launched his attack against the ruling by contending that the prerequisite conditions of unavailability as set out in the provisions of the law were not met. In particular, the evidence fell far from establishing that she was "so ill as not to be able to travel or otherwise incapable of giving evidence". The Judge ought not to have admitted in evidence the letter of Dr. Nguyen as: (1) his qualification as set out in the letter was not sufficient to render him a reliable expert; (2) the evidence of inability to attend Court should be given by some competent witness on oath and; therefore, the prosecution should have called the doctor; and (3) in any event the father of the complainant under cross-examination had said: Rebecca is not physically ill and unable to come. I believe she will be able to come at short notice". He expressed the hope that Counsel for the Crown would not rely on "absence from the Islands".

In reply Counsel for the Crown submitted that the application rested on: (1) absence from the Islands; and (2) the witness was so ill as not to be able to travel or otherwise incapable of giving evidence and that the conditions were separate and distinct. In relation to (2) above the conditions: (i) may include emotional or psychiatric condition or illness; (ii) the Prosecution need not prove that psychological damage would inevitably result if the deponent was required but only that there was serious risk - R.v. Thompson 74 Cr. App. R - 318-9; (iii) (a) the evidence of the deponent's condition does not have to come from a doctor - R. v. Noakes [1917] 1KB 581; and (b) in any event, the certificate of Dr. Nguyen was admissible under section 23(2) of the Evidence Law. On this last it is enough to say that section 23 (2) permitted the admission of Dr. Nguyen's certificate into evidence, on the face of it the doctor was qualified to give such a certificate and it was open to the learned trial Judge to rule as he did.

In dealing generally with this question of the reading of the deposition, the learned trial Judge said:

“Section 133 of the Criminal Procedure Code gives the Court a discretion to determine whether or not the Court should permit the reading of the deposition of a witness at the trial of an accused in the absence of the witness. The section sets out the conditions under which the discretion ought to be exercised. In addition there is case Law dealing with the issue.

Each case to be dealt with on its own particular facts and the Court has to consider among other things whether this deposition can be read in without doing injustice to the defendant, and the discretion should be exercised so as to ensure the fair trial of the accused”.

Unlike the Jamaican Legislation, the Cayman Legislation makes no distinction between unavailability of the witness through death and unavailability for other causes.

In Scott v. R. [1989] A C 1242, The Privy Council was concerned with whether or not in the light of the distinction in the Jamaican statute the Judge had power to exclude the deposition of a dead witness. After an examination of a number of authorities including **R.v. Sang** [1980] A.C. 402 and **R.v. Linley** [1959] Crim. L. R. 125, it was held that “in the light of these authorities their Lordships are satisfied that the discretion of a Judge to ensure a fair trial includes a power to exclude the admission of a deposition”.

Now the conditions as set out in the provisions of the Cayman Law are separate, distinct, and should be read and considered disjunctively. It is for the trial Judge to decide on his assessment of the evidence whether or not the requisite unavailability of the witness has been established. In our view the Judge was not in error in the approach as expressed in the passage quoted above. However, it is clear from the statement of

principle in Scott v. The Queen (post) that unavailability does no more than set the stage for the exercise of the judicial discretion. Of this the learned trial Judge was plainly aware.

Now in R.v. Nesbet [1990] **Criminal Law Review** page 579 it was said that a Judge when exercising his discretion as to permitting the reading of a deposition should address his mind to the all important question of the quality of the evidence.

We are of the view that this would involve, inter alia, consideration of the issues in contention, the probative worth of the evidence in the deposition in relation to the essential elements constituting the offence and whether or not there was corroborative evidence and the cogency of such evidence. In R.v. Linley [1959] **Criminal Law Review** 123 - Ashworth, J, refused to permit the reading of the deposition of a witness who was so ill that he would never be in sufficiently good health to attend the trial on the ground that his evidence was substantially the case for the prosecution and would have to be challenged for its accuracy.

In support of his contention, that the reading of the deposition denied the appellant a fair trial, Counsel for the appellant submitted that at the Preliminary Examination the defence attorney clearly stated that the questions asked were, "all the questions asked were all the questions for the complainant at the time" and this would

have put the prosecution on notice that the defence intended to ask further questions at the trial; that from the depositions it would be clear that the cross-examination was exploratory and not full, as the defendant's case had not been put to the complainant and thus her absence at the trial denied the defence the opportunity to test the complainant's veracity. On this the learned trial Judge in his ruling said:

“In this particular case there was opportunity to xx the witness at the P.I. and that opportunity was taken. Mr. Collins who appeared at the P.I., and now at the trial says xx at the P.I. was not full xx and he would have like to have an opportunity at the trial to put the case of the defendant to the complainant. However, that in itself would not be sufficient ground for the Court in refusing to allow the deposition to read in evidence”.

The concern of the appellant's counsel is understandable as the cross-examination at the Preliminary Examination was limited, confined and aimed at obtaining from the complainant evidence of her invitation and inducement to the appellant to have sexual intercourse, matters that would not excuse him, having regard to the nature of the offence. When, as in the instant case, for tactical or other reasons, Defence Counsel limits his cross-examination of a witness at a Preliminary Examination, he ought to have in

contemplation the risk of unavailability of the witness at the trial; a fortiori, when the witness is a minor and with her parents no longer resident in the Islands.

In Scott v. The Queen at page 1258 Lord Griffith said:

“In the light of these authorities their Lordships are satisfied that the discretion of a Judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislation when it gave statutory sanction to their admission in evidence”.

and later at page 1259:

This much however can be said that neither the inability to cross-examine nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion”.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion.”

That the learned trial Judge deferred his ruling until he heard evidence from Doctor Horgan who examined the complainant is indicative of his awareness of the

necessity to consider the evidence in its relation to the other evidence in the case against the appellant. This having been done, he said:

“We know from the interview and the Questions and Answers of the defendant by the Police that his defence is one of denial and if he elects to give evidence I assume he will reaffirm that. The question of putting the case of the accused to the complainant would therefore hardly advance the issue and in any event in the finality the Court sitting as Judge and Jury will have to determine what evidence it accepts and what it rejects.

The Court is required to balance the interest of the accused in the terms I have previously indicated taking all the circumstances of the case into consideration. As against the evidence given by Dr. Wood as to the effect of the complainant being required to give evidence is likely to have on her, as well as taking into account the opinions expressed by Dr. Son Vi Nguyen about the traumatic effect that giving evidence is likely to have on the complainant and how this will retard her healing process.

We have to bear in mind that the complainant is of tender years and in my view I have some difficulty in seeing how her presence would advance the case very much one way or the other.

Taking all the circumstances into consideration and on the facts of this case I do not consider that any injustice or unfairness would result to the accused if the deposition of the witness was

read and in the exercise of my discretion I so order”.

We are of the view that the learned Trial Judge with manifest awareness of the guiding principle and applying the approach advocated in Scott v. The Queen, was right in granting the application to read into evidence the deposition of the witness.

The accused exercises his right not to give evidence and the case for the defence rested on his voluntary statement and in the record of the interview, the admissibility of which surprisingly had been challenged.

In his reasons for judgment, the Judge adverted to inconsistencies between the caution statement and his answers in the record of the interview and, as it was open to him, he rejected the exculpatory parts and in particular, said:

“The accused in his question and answer changed his story and said Rebecca was pulling on his pants while he was by the door and that he saw her father coming and so he went inside to pull his pants back up. He also tried to make out that Rebecca pulled him into the room. This is not a believable story and I totally reject it”.

and later:

“When one looks at the evidence in the context of this case one would have to be naive in the extreme to say that the presence of the accused in Rebecca’s bedroom was for an innocent purpose. The explanation of the accused is

incredulous. I do not accept his explanation, I do not find it to be credible; in many instances it is contradictory, and it does not have the ring of truth to it”.

In his careful review of the evidence for the prosecution, the Judge said:

“There is evidence in this case which is capable of amounting to corroboration of the complainant’s story. Such is to be found in the deposition of Dr. Horgan which was read into the record by consent when she said “There was some redness and tenderness in the vulva and introitus area of the vagina” of Rebecca. In addition to that when Dr. Wood said he saw the accused coming out of Rebecca’s room naked. I accept these two pieces of evidence and I find them to be corroborative of the complainant’s story”.

He warned himself of the caution to be exercised in relation to the complainant and particularly the “evidence of a child in a case of this nature”. He considered the fact that the specimens taken when tested were negative and he rejected the complainant’s evidence that Doctor Horgan swabbed her stomach. He disregarded all evidence of complaints to her parents on the basis that they were not spontaneous.

However, he stated that he believed that the complainant was interfered with by the appellant in the manner she described. The credibility of this evidence apparently flowed from the cumulative cogency of the doctor’s findings and the evidence of the father whom he found a truthful witness and one “who did not attempt to embellish his

evidence". In the end he found that the appellant, "attempted to have intercourse with Rebecca" as "the evidence as to penetration is not sufficiently cogent".

We are of the view that the evidence in its totality presented a strong case against the appellant.

For these reasons the appeal was dismissed and the conviction affirmed.