IN THE CAYMAN ISLANDS COURT OF APPEAL

CIVIL APPEAL NO. 14 OF 95

BEFORE:

THE RT. HONOURABLE THE PRESIDENT MR. JUSTICE EDWARD ZACCA, P.C., O.J.

THE RT. HONOURABLE MR. JUSTICE JAMES KERR, J.A.

THE HONOURABLE MR. GERALD COLLETT, J.A.

JUNIOR ANTHONY GRAHAM -VS- REGINA

MR. MURRAY FOR THE APPELLANT

MR. ROBERTS FOR THE CROWN

JUDGEMENT 11TH AUGUST, 1995

The Appellant, Junior Graham, was convicted on 4th, April 1995, by verdict of a jury in the Grand Court of one count of indecent assault upon a girl under the age of 16 years. He was sentenced on 6th April, 1995, to a term of 18 months imprisonment of which 6 months was suspended. He now appeals to this Court against that conviction and sentence.

The evidence led for the Crown at the trial was that of the Complainant herself, a girl aged 14 years at the date of the alleged offence, her Aunt and the investigating police officer. Her account, which was unshaken by cross-examination, was that the Appellant, a relative by marriage and a married man some 10 years her senior, had

induced her to enter a bedroom in his house by stating falsely that his wife was at home, followed her inside and pushed her down upon the bed, demanding a kiss and offering her $100.00 note for that privilege. When she refused he interfered with her clothing and sucked one of her breasts and then her navel. He also tried to put his hand in her vaginal area and pulled down his own pants and took out his penis. All this time she had resisted as best she could and finally escaped from his clutches by pretending that someone else was coming to the room, taking the $100.00 note with her as evidence.

Thereafter the Complainant went home where she encountered her Aunt Serena and told her what had happened. The Aunt took the $100.00 note and together with the Complainant went over to the Appellant's house where they confronted him. The Appellant denied it and in disgust the Aunt threw the $100.00 note at the Appellant. That was the last that was seen of the note.

A complaint was made to the police and investigations were commenced. On 15th May, 1994, the Appellant made a voluntary statement under caution to D.C. Powell in which he admitted telling the Complainant that his wife was at home, drawing her into the room and pushing her onto the bed when she resisted him. He claimed that was all that had occurred. In a question and answer interview under caution which immediately followed, the Appellant further admitted that his words about his wife had been a lie, that he 'liked' the Complainant and had wanted to kiss her when he held her down on the bed. However, he denied promising her $100.00 for the kiss and specifically he denied

that any of the subsequent acts of indecency alleged by the Complainant had occurred at all.

At the trial this statement and the record of the interview were admitted into evidence without objection. At the close of the prosecution case, Counsel for the defence informed the Court that the Appellant would not give evidence and no evidence was in fact called for the defence. After hearing addresses by Counsel on each side and summing up by the trial Judge, the Jury retired for some time and then returned with a majority verdict of guilty, 5 to 2.

In arguing the appeal against conviction, Counsel for the Appellant here has relied upon a single allegation of a misdirection by the learned Judge in relation to corroboration. At page 31 of the Record in this summing-up he is recorded as instructing the Jury that he agreed with submissions made before him by Crown Counsel that "the evidence of - concerning - the hundred dollar bill," as well as the contents of the statement of the Appellant are capable of constituting corroboration in law. Later in the summing-up, at page 41 of our Record, he repeated that "the $100.00 bill and the evidence about it is, as I have said, capable of constituting corroboration of Janice's story." He went on to tell the Jury that it was for them entirely to decide whether it did corroborate her evidence in fact.

The nature of corroboration in law and the definition of its constituent elements is a technical matter but well settled. The best definition and that most widely accepted is no doubt that of

Reading L.C.J. in R. v Baskerville (1916) 12 CAR 81 where he described it as "independent testimony which affects the accused if connecting or tending to connect him with the crime ... evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it."

Before us Counsel for the Crown was constrained to concede that this particular direction concerning the $100.00 note as corroboration was a misdirection as to the law. We agree. Properly analysed, the evidence concerning it lacks that element of proceeding from a source independent of the complainant. Of itself the $100.00 note, quite apart from the fact that it was not before the Jury, is neutral in its evidentiary effect. The evidence of the Aunt concerning it can only be said to show that the Appellant committed the offence charged by reason of what the Aunt herself had been told about it by the complainant. Therefore, while it may well be regarded as confirming the latter's testimony it cannot be identified as corroboration of her evidence.

The existence of this single misdirection in what was otherwise a full, fair and impeccable summing-up requires this Court to examine the proviso to section 6 of the Court of Appeal Law which reads as follows :-

> 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 that no substantial miscarriage has actually occurred".

The test to be applied before the Court is entitled to invoke this proviso was laid down in Hamid v Hamid (1979)69. Cr. App. R 324, where Lawrence L.J. described it as whether or not the Jury would inevitably have come to the same conclusion if it had been properly directed. That too was a case where the misdirection in issue was given in connection with corroboration.

In considering the application of this test the Court takes note that this was not the only piece of evidence before the Jury which was left to them by the Learned Judge as constituting corroboration of the Complainant's testimony. There was also the cautioned statement and the question and answer interview. These were indeed capable of affording corroboration in Law and strong corroboration at that. Taken together the words used by the Appellant amount to an admission of an assault in circumstances of indecency which would technically support a conviction for the offence charged even in the absence of the other evidence. Add to that the fact that the Appellant chose to remain silent, so that the prosecution evidence was in effect unchallenged and one is compelled to the view that the Jury would have been left with little choice other than to convict even if this single misdirection had not occurred.

We take the view that regardless of the misdirection the result of the trial would inevitably have been the same and accordingly it is right

that we should and do apply the proviso to Section 6 of the Law, no substantial miscarriage of Justice having occurred.

The appeal against conviction is accordingly dismissed.

Turning now to sentence, the Court has been invited by Counsel for the Appellant to review and to reduce it as being harsh and excessive and also because a sentence of imprisonment of this duration automatically invokes the machinery of deportation in the case of a non-Caymanian. Here the appellant is a Jamaican citizen married to a Caymanian by whom he has a three year old child. Deportation would involve a break-up of what remains, despite this offence, a coherent and supportive family unit. That would be a matter to be deprecated.

The Court should leave no doubt that it regards this offence, as indeed any offence by an adult which involves the sexual abuse of a young teenager, as a most serious offence. The protection of young girls is a social imperative which the Court is anxious to uphold and in cases of this kind an immediate custodial sentence is properly regarded as the norm. No exception can be made in the present case.

However, having regard to the family relationship involved in this case and the hints of previous familiarity which appear in the evidence, as well as the fact that the incident did not proceed any further and that the Appellant desisted, are mitigating factors. So is the fact that he is a person of hitherto good character. The additional hardship which automatic deportation would cause

particularly to the young child is also a proper factor to be taken into account when considering sentence.

Accordingly, the appeal against sentence will be allowed and instead of a term of imprisonment of 18 months with 6 months suspended we substitute a term of immediate imprisonment of 9 months to run from 6th April, 1995.