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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.124/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

REGINA vs. GEORGE DINGWALL

Delano Harrison for the appellant

David Fraser and Dawn Eaton for the Crown

February 23, 24 and October 11, 1999

HARRISON, J.A.

The appellant was tried and convicted of the offence of carnal abuse of R.W. at the Home Circuit Court on 4th October, 1996, and sentenced to seven years imprisonment at hard labour.

At the hearing of this appeal we allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict of acquittal. As promised these are our reasons in writing.

The prosecution's case was that on a day unknown between the 1st day of December, 1993, and the 31st day of January, 1995, the appellant, who was the pastor of the church attended by the complainant and her aunt, called the complainant over to his house. He asked her if anyone was at her home, closed the windows and doors, took off her panty and shorts, put her in his lap, inserted his penis in her vagina and had sexual intercourse with her. She cried and he placed a bit of cloth in her mouth and then gave her one hundred dollars ($100.00). The complainant's aunt, Deborah Clarke gave evidence that the complainant was born on 23rd April, 1985, and therefore

at the date of the offence was under the age of 16 years, namely under 12 years of age. She further stated that the appellant was the pastor of her church, she was accustomed to visit the pastor's house to assist his wife who was ill, and the complainant made a report to her. The medical evidence revealed that on examination by the doctor in March, 1995, the hymen of the complainant was ruptured.

The appellant gave evidence that he is a minister of religion and lived with his wife across the road from the complainant's family. He agreed that the complainant's aunt, Deborah would come to his house to assist his wife. The complainant only came to his house when her aunt was there and the latter would send her back home. He said that the aunt Deborah ceased coming to his house after he rebuked her for showing him a picture of a nude man and women. He denied that he had had sexual intercourse with the complainant and also denied every allegation in respect of the charge.

Counsel for the defence, at the trial, suggested to the complainant that her aunt, Deborah Clarke told her what to say in her allegations against the appellant. This the complainant denied.

The ground of appeal argued before us was:

> "That the learned trial judge misdirected the jury with respect to the law governing corroboration as it related:
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> (1) to the evidence of virtual Complainant, R.W.a child of tender years (11 years old at the material time), and
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> (2) to the offence of carnal abuse with which the Appellant was charged.

In support of this ground, counsel for the appellant argued that the learned trial judge failed to warn the jury of the risk of convicting on the uncorroborated evidence of children of tender years, because of their succeptibility to influence by third parties, the

inclination to fantasize because of a fertile imagination or such children's fallibility of memory. This warning should be in addition to the general warning necessary in sexual offence cases.

We observed that the learned trial judge directed the jury in these terms, in dealing with the evidence of the child complainant. At page 3 of the transcript:

> "The indictment states, between the 1st of December, 1993 and the 31st of January, 1995. Now, whatever time it may have been it would still put the girl to be under twelve, because even now, a year and more, two years later, she is still under twelve, so much so at the time."

at page 5:

> "R is a girl of tender age."

at page 10:

> "... you remember it was suggested to the little girl that it is the aunty who put her up to make these allegations. So you are people with common sense and you will go through the evidence for yourself and if you find, because suppose you come to the conclusion that Deborah did put up the little girl to come and tell lie on him, you throw out the case right away. But I cannot tell you what to believe. All the evidence is before you and you can accept or reject. And in dealing with a witness' evidence, you may accept part of it and you may reject part. You may accept all or you may reject all."

at page 14:

> "It was never directly put to Debbie, to her aunt, it was never directly put to her that she put up the little girl to say these things. That was not put to Debbie. It was put to the little girl that it is the auntie who told her what to say."

at page 17:

> "... he denied each and every allegation made against him in connection with this charge. So you have to ask yourself, is R making it up, or is it as counsel suggested to you, that it is the aunty who tell her to say he did this thing?"

and at page 18:

> "You, Mr. Foreman and members of the jury, will have to, as it is your task to do, to determine who is speaking the truth. Did the little girl make it up? Is there any explanation why she would do a thing like that? Remember that he is the head at the church. The little girl travels with them sometimes too, you know, and after more than a year, because it first took place in the Christmas holidays, the last one was January, 1995, and the crown is not specifying any particular one, except that the girl told you when was the first time.
>
> If the evidence of the prosecution convinces you so that you feel sure, that notwithstanding his status, this incident did take place. Remember I told you that in offences such as this one where you look for corroboration and I told you what corroboration is. There is no corroboration in this case that he did anything and I gave you the warning of the dangers of convicting on evidence which is not corroborated."

In so far as the learned trial judge failed to point out to the jury the danger of acting on the uncorroborated evidence of a child of tender age and the reasons for such caution, he was in error.

On the trial of a sexual offence the learned trial judge must warn the jury, that in practice it is dangerous and unsafe to convict the accused on the uncorroborated evidence of the complainant and the reasons for that warning. If the complainant is a child of tender years, the said judge as a matter of practice is obliged to give an additional warning of the danger of acting on such evidence unless it is corroborated, for the reason that such a child may be subject to, (a) flights of fantasy, (b) the influence of adults or (c) unreliability, due to fallability of memory. However, the jury should be told that in each case, despite the warning if they believed the witness they may act on the evidence of such a child.

In **R.v. Vince Stewart** (1990) 27 JLR 19, the Court of Appeal in allowing an appeal against a conviction for robbery with aggravation on the ground that the

Resident Magistrate did not warn herself in respect of evidence of the nine year old complainant, said, (per Gordon J.A.), at page 22:

> "'It is settled that the sworn evidence of a child will, as a matter of practice, require itself to be corroborated. Where a child gives sworn evidence the jury must be directed that it is dangerous to convict unless the evidence is corroborated but that they may convict if convinced the child is telling the truth. The reasons the warning is necessary are (1) the fallibility of memory and (2) susceptibility to influence."

In **R.v. Simon Hoyte** SCCA 72/96 delivered 2nd June 1997 (unreported) the Court of Appeal in dismissing an appeal against a conviction for rape, noted (per Forte, J.A.) at page 5:

> "Firstly the learned trial judge, though he fused it with the general warning did refer the jury specifically to the danger of convicting on the uncorroborated evidence of "very young children young girls."

The Court of Appeal there was clearly of the view that the trial judge had satisfied the requirement of a double warning in the circumstances of the case. Forte, J.A. confirmed further the previous stance of the court. He commented at page 4:

> "In advancing his arguments Mr. Hines relied on the judgment of this Court in **R. v. Earl Britton** SCCA 31/96 delivered 14th October, 1996 (unreported) in which we said that the general warning in sexual cases in which the complainant is of tender years, was not sufficient, but that a specific warning in that regard should be given to the jury. We did in that case adopt the dicta of Byron J in **Abraham (Nelson) v.R** [1992] 43 WIR in which he said:
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> > 'Although the jury could properly convict if they believed the complainant, it was crucial for their attention to be focussed on the danger of acting on her uncorroborated testimony. The warning the judge gave was ineffectual because she never told the jury, as the circumstances of this case required her to, that the tender age of the complainant was a circumstance which created risk of unreliability and inaccuracy, over imaginativeness and susceptibility to influence by third persons, and it was dangerous to convict on her testimony for that reason'."

In the instant case, although the learned trial judge properly warned the jury of the danger of convicting on the uncorroborated evidence of the complainant, he failed to give the second warning necessary where the complainant is a young child of tender age, namely, 12 years old. Counsel for the Crown did concede that the reliability of the complainant should be examined by the jury both as a child and generally as a witness in a sexual case.

Directing the jury as he did in that respect, that:

> "... suppose you come to the conclusion that Deborah did put up the little girl to come and tell lie on him, you throw out the case right away...

and,

> "So you have to ask yourself, is R making it up, or is it as Counsel suggested to you, that it is the aunty who tell her to say he did this thing?"

was insufficient, and the learned trial judge did not go far enough to warn them of their need for caution because of the susceptibility of such a witness to influence by adults, flights of fantasy and general unreliability.

In the instant case the complainant did deny the suggestion that her aunt, the witness Deborah Clarke, had told her what to say.

Although the requisite warning is not given, if a court finds that there is corroboration of the complainant's evidence, that omission to warn the jury would not necessarily be fatal. In this case there was no corroboration of the evidence of the complainant.

We were of the view that the absence of the warning to the jury was a material misdirection depriving the appellant of a proper consideration of the evidence against him. In these circumstances we made the orders referred to.