

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 2/2009

**BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.**

KEVIN MCKENZIE v R

Applicant unrepresented

**Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and
Alwayne Smith for the Crown**

1 March 2010

ORAL JUDGMENT

PANTON, P.

[1] The applicant Mr Kevin McKenzie applied for leave to appeal in this matter. He was convicted and sentenced on 18 December 2008 on an indictment which contained three counts. Counts one and two charged separate acts of carnal abuse committed in the year 2006 on days unknown. Count three charged the offence of indecent assault on a day unknown in 2005. The indecent assault alleged here was that the applicant inserted a finger in the vagina of the teenage

complainant. The issue to be decided, as the learned trial judge Mrs. Justice McDonald-Bishop stated in her directions to the jury, was the question of the credibility of the witnesses; more specifically whether the applicant had had sexual intercourse with the complainant. On count one, the applicant was sentenced to five years imprisonment; on count two he was sentenced to seven years imprisonment and on count three; he was sentence to two years imprisonment with an order that all the sentences were to run concurrently.

[2] He applied for leave to appeal to the single judge who, although extending the time for the filing of the application for leave to appeal, refused the application and did not recommend legal aid.

[3] This case was one in which the complainant is the daughter of a lady who had an intimate relationship with the applicant. The complainant was, at the time of these incidents, a student at a High School in the parish of Clarendon. In respect of the indecent assault which took place during 2005, the complainant's mother received an urgent call to visit her mother in Portmore, late at night, and requested the applicant who was her boyfriend to stay with the complainant. During the course of the night the complainant awoke to find the applicant stooping by her bed and to use her language "he was moving his finger up and down in my vagina". This act she said caused her much pain, she

bled and indeed the sheet on the bed was removed by the applicant and washed and hung on the line the next day. When she told the applicant that she was going to tell her mother, the applicant said that her mother would not believe her, and in the end she did not make any complaint to her mother of this incident. At the time, she was a grade 7 student which in olden days they would call first form. The very next year when she had advanced to grade 8 she came home one afternoon in July at about 3:00 p.m. The applicant was at the house while the complainant was watching television. The applicant pulled up her clothes and proceeded to have sexual intercourse with her. She cried and he apologized saying he never meant to hurt her and asked her not to mention this incident to anyone.

[4] The second count on the indictment which charged carnal abuse was in respect of an incident which took place when she had advanced to grade 9. She was getting ready to attend a rehearsal for a pageant that she had entered in the month of December 2006 and, as happens in the country parts from time to time, she took a bath on the outside of the house. She wrapped herself in a towel and went into her mother's room to get dressed. The applicant proceeded to remove the towel, pushed her on the bed and had sexual intercourse with her.

[5] The evidence given at the trial by the mother indicated that during 2006 when all these things were happening, she herself was pregnant. She told the jury that she was more or less overwhelmed by love for the applicant.

[6] When the complainant had told the applicant on this last occasion that she would tell her mother, the applicant laughed, and his response was that things were just beginning. Eventually, the complainant made a report to the counsellor at the school who happened to have been a doctor. The doctor did not give evidence but he called the police and eventually the mother was advised of all that had taken place. The applicant, when arrested and charged said "Officer, a lie them a tell pon me, is because her mother want me to married to her a mi disagree".

[7] At the trial, the applicant gave the usual unsworn statement. Applicants must be realizing by now that juries are getting very tired of such statements. In the unsworn statement he declared his hardworking nature and how much of a family man he was who had not assaulted the complainant in any way. The learned trial judge gave a long summation which covered every possible aspect of the case. Her generosity in the summation was quite obvious and the jury quite properly, in short order, returned a verdict of guilty. Indeed, there was a unanimous verdict after, initially, there being an indication of a six to one verdict. They retired at

first at 10:29 a.m. and returned at 10:48 a.m. with a six to one indication. They were instructed to retire again and on the second retirement, which lasted from 10:53 a.m. until 11:00 a.m. (7 minutes), they returned with a unanimous verdict. It was a simple case where the applicant was clearly untruthful and the complainant, her evidence was believed. We see absolutely no reason to make any decision which would adversely affect the conviction or indeed the sentences.

[8] In the circumstances, this hopeless application for leave to appeal is refused. The sentences are hereby ordered to run from 18 March 2009.