[2017] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 2/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

ELIO DELGADO V R

Norman Godfrey for the appellant

Mrs Sharon Milwood Moore for the Crown

26, 27 June, 31 July and 26 September 2017

STRAW JA (AG)

[1] Mr Elio Delgado (the appellant) was convicted of one count of indecent assault against his stepdaughter. He was sentenced to six months imprisonment at hard labour. He appealed his conviction and sentence on the bases that: (i) his wife, Mrs Antoinette Sinclair-Delgado (who gave evidence against him) was neither competent nor compellable in that regard and so no weight ought to have been placed on her evidence; (ii) the inconsistencies and discrepancies in the evidence were so substantial that he should not have been called upon to answer the allegations against him; and (iii) the indictment charging him was bad for duplicity. He further contended that his

conviction ought to be quashed because he was charged under a non-existent section of the Offences Against the Person Act.

[2] On 31 July 2017 we allowed the appeal, quashed the conviction, set aside the sentence and ordered a new trial. The matter was returned to the Parish Court for the parish of Manchester for trial before a different parish judge. It was set for mention on 2 August 2017 and the appellant's bail was extended to that date. We promised to give reasons for that decision and this judgment is given in fulfilment of that promise.

Background

[3] The appellant was charged on indictment with the offence of indecent assault contrary to section 53 of the Offences Against the Person Act. His trial for the said offence commenced before Her Honour Mrs Desiree C Alleyne, parish judge for the parish of Manchester (parish judge) on 23 January 2014. The prosecution called three witnesses in support of its case: MK (the complainant and the appellant's stepdaughter), Mrs Antoinette Sinclair-Delgado (Mrs Delgado -the appellant's wife and MK's mother) and Detective Constable Charmaine Walters (the investigating officer).

[4] MK gave evidence of five instances in which the appellant displayed inappropriate conduct towards her while she was at home in the parish of Manchester. The first incident occurred on an evening in 2005, when she was in grade three and while she was at home alone with the appellant who she calls "Papi". She testified that the appellant came into her room and said that "he wanted to show me something and he thinks it would be better with the lights off". MK said "no" and the appellant said

"good girl I know no one can touch you and you don't speak out against it". He thereafter left the room. In another incident, on an evening when the appellant was in grade six, the appellant entered MK's room after she had finished taking off her clothes and grabbed at her multiple times. She had to jump on the bed to evade him.

[5] The three instances which directly relate to the offence of indecent assault are as follows:

1. One Friday night, the appellant entered the room that MK shared with her brother and tucked in her brother, who was sleeping on a separate bed. The appellant thereafter walked over to the bed where MK was lying down, kissed her on her vagina (although through her clothes), walked out of the room and brushed his teeth. MK testified that she told her mother that "'Papi' bend down and kissed me on my vagina through my clothes" but her mother did not say anything and she went back to her room. She indicated that she was 12-13 years old at this time.
2. One day when she was in first form at high school and family members and friends were at the house, MK went to the bathroom and on returning from the bathroom, the appellant kissed her on her mouth and pushed his tongue into her mouth.

3. One night when they were watching movies with family, the appellant placed his hand around her waist and was moving his hand down towards her vagina.

On this third occasion, MK told her mother who went on the veranda to confront the appellant. The appellant called the Alligator Pond Police Station to say that MK was accusing him of things that he did not do. They all went to the Alligator Pond Police Station and MK later made a report to Constable Arscott.

[6] Under cross-examination suggestions were put to MK that she was lying about and fabricating the incidents. She denied these suggestions. She was challenged as to whether she told her mother about what she alleged that the appellant had done to her and whether her mother assisted her while the statement containing a report of these allegations was being taken.

[7] Mrs Delgado testified that the appellant is her husband and MK is his stepdaughter. At that stage, Mr Godfrey, counsel for the appellant, objected to her competency as she was still married to the appellant at the time she was giving evidence. The Clerk of the Court responded to say that under the Evidence Act, Mrs Delgado was a competent though not compellable witness. Upon recognizing that the Evidence Act was only applicable to the Sexual Offences Act under which the appellant had not been charged, the Clerk of the Court thereafter sought to amend the indictment but later withdrew his application, based on a submission by Mr Godfrey that the indictment could not be amended since the offence was allegedly committed in

2005 before the Sexual Offences Act was enacted. The parish judge overruled Mr Godfrey's objection and ruled that Mrs Delgado could testify pursuant to common law.

[8] Mrs Delgado thereafter testified that sometime in 2010, MK came into her bedroom and told her that "Pappy (referring to [the appellant] came into her bedroom, she was lying on her back, he bent over and kissed her on her vagina". Mrs Delgado said she said nothing to the appellant because she was shocked. She spoke to him sometime later and told him not to "go near my daughter". Mrs Delgado also testified that in the summer of 2011 she saw the appellant hug MK and put his hand around her waist and then she saw her daughter, who was about 12 years old at the time, jump up suddenly. When she enquired of MK "what caused you to jump up like that?", she replied "she felt Pappy's hand slide from her waist to her vagina". Mrs Delgado said she asked the appellant "why he was sliding his hand down to an inappropriate place on her body", she state that the appellant "got angry, started quarrelling, took out his cell phone and called Alligator Pond Police Station". Mrs Delgado testified that she later called the police and made a report and that the parties proceeded to the police station the next day. However, it was not until 2012 that they went to the Centre for Sexual Offences and Child Abuse (CISOCA) where a report was made. Mrs Delgado was not cross-examined.

[9] Constable Walters, who is stationed at CISOCA, testified that on 2 August 2012, a report was made to her by MK and Mrs Delgado and she took a statement from MK. On 3 August 2012, she arrested and charged the appellant for indecent assault and when cautioned, he said nothing. She was also not cross-examined.

[10] At the close of the prosecution's case, a no case submission was made that was rejected, as the judge found that the appellant had a case to answer. The appellant thereafter rested on his counsel's submissions and so he mounted no defence.

Parish Judge's reasons for judgment

[11] In her reasons for judgment, the learned parish judge examined the issue of whether Mrs Delgado was a competent witness. She examined sections 12(1) and (2) of the Evidence Act and stated that based on the fact that Parliament made provisions for instances in which a wife or a husband can testify against the other, it was Parliament's intention to protect children and other victims of sexual abuse. While the learned parish judge acknowledged and accepted the principle at common law that a husband or wife should not testify against each other, she also acknowledged exceptions to that principle as stated in the cases of **Leach v Rex** [1912] AC 305, **Hoskyn v Metropolitan Police Commissioner** [1979] AC 474 and **Regina v Pitt** [1983] QB 25. She made the following finding at paragraph 19 of her reasons for judgment:

> "As a result of the above, the Court is of the view that judicial decisions from England support the proposition that in cases of sexual offences committed on children, a wife would be deemed competent to testify against her husband. The Court notes that from 1898 the statute [Criminal Evidence Act] was passed in England giving the wife the competency to testify, in 1912 the Judges in England reiterated that right, and therefore the court finds the argument to be without merit, that some one hundred years later, a wife is not competent to testify against her husband when he is charged at common law for indecently assaulting her child in Jamaica. That statute and the cases thereafter would be a part of Jamaica's common law."

[12] The learned judge thereafter made the following findings:

"20. The Court observed the demeanour of [MK] and was of the view that she was a witness of truth. She testified that the acts of indecent assault occurred on various dates, from when she was 12 to 13 years old.

21. The question by counsel for the [appellant] to [MK] as to whether there was a difference between saying that [the appellant] moved his hand down to her vagina as against he touched her vagina resulted in [MK] saying there was no difference. This court recognizes that the statement was not put into evidence for the court to see the discrepancy if any, and [MK] was not asked in re-examination or otherwise why she said there was no difference. Is it that he moved his hand down to her vagina and touched it? That is a reconcilable explanation but [MK] was not asked for an explanation. In any event the court observed [MK's] explanation and accepts her evidence that the [appellant] moved his hand down to her vagina.

22. [MK's] mother, Mrs Delgado's evidence was not corroborative of the indecent assault as Mrs Delgado did not testify that she saw her husband commit any offence towards her daughter. She testified that her daughter [MK] was about twelve (12) years old at the time of the last complaint, receiving the complaint from her, speaking to her husband about it, and noted that he, the [appellant] after quarrelling, called the police.

23. The [appellant] opted to remain silent which is his right. In the circumstances the Court finds that the prosecution has presented a case beyond a reasonable doubt that the [appellant] had indecently assaulted [MK]."

The learned judge thereafter found the appellant guilty of indecent assault and subsequently sentenced him to six months imprisonment at hard labour.

The appeal

[13] The appellant gave verbal notice of appeal and was granted bail pending appeal. Notice and grounds of appeal challenging the learned judge's decision were filed on 21 September 2015. The grounds of appeal as filed are as follows:

> "1. The Learned [parish judge] erred in law when she ruled Antoinette Monique Sinclair-Delgado, the mother of [MK] and the wife of the Appellant competent to give evidence on behalf of the prosecution.
>
> 2. The learned [parish judge] erred in law when she rejected the no case submission made on behalf of the Appellant in the face of:
>
> (a) The admitted and unresolved material inconsistencies in the evidence of [MK]
>
> (b) The improper admission of the evidence of Antoinette Monique Sinclair-Delgado the wife of the Appellant.
>
> 3. The Learned [parish judge] erred in law when she relied on the evidence of Antoinette Monique Sinclair-Delgado in arriving at her verdict as demonstrated in her summation when she opined 'Based on the evidence of the child and the evidence of her mother...'
>
> 4. The conviction is not supported by the evidence."

[14] At the hearing before this court on 26 June 2017, Mr Godfrey sought leave and was granted permission to argue two additional grounds numbering five and six as contained in his written submissions. Grounds five and six are set out below:

> "5. That the conviction cannot stand as the Appellant was charged, indicted and convicted under a non-existent provision of the Offences Against the Person Act.

6. The evidence which the prosecution led spoke to five distinct occasions, and the indictment contained only one count. The Appellant was thereby severely prejudiced in his defence as there was no certainty as to which incident he was called upon to answer in response to the indictment."

Issues

[15] Based on the grounds of appeal and submissions of counsel, in our view, there are five issues to be determined:

1. Was Mrs Delgado a competent witness and if so, was she compellable so that the trial judge could rely on her evidence?
2. Were the inconsistencies/discrepancies in the evidence so substantial that the appellant should not have been called upon to answer?
3. Was the appellant charged, indicted and convicted under a nonexistent provision of the Offences Against the Person Act?
4. Was the indictment charging the appellant with one count of indecent assault bad for duplicity, and if so, how would this effect his conviction by the court?
5. If the appeal was allowed, should a retrial be ordered?

Issue 1: Was Mrs Delgado a competent and compellable witness?

[16] The issue as to whether a wife or a husband can testify against each other is governed by both statute and the common law. While the learned parish judge referred to both, she used the common law to ground her ruling that Mrs Delgado was a competent witness.

[17] Sections 4, 12(1) and 12(2) of the Evidence Act are the relevant sections. Section 4 states that:

> "(1) On a trial of any issue joined, or of any matter, or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or consent of the parties, authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons on whose behalf any such suit, action, or other proceeding may be brought, or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.
>
> (2) Nothing in subsection (1) shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding."

Section 12 of the Evidence Act states that:

> "(1) The wife or husband of a person charged with an offence under any Act or part of an Act mentioned in the First Schedule may be called as a witness either for the prosecution or defence and without the consent of the person charged.
>
> (2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at

> common law be called as a witness without the consent of that person."

[18] On a proper reading of both these sections of the said Act, it is clear, as Mrs Milwood Moore had submitted, that a husband and wife are not competent or compellable to give evidence for or against each other in any criminal proceeding, except in the cases listed in the First Schedule of the Act. The Act also recognizes the competence of a spouse where it has been provided for under the common law. As of 30 June 2011, certain sections of the Offences Against the Person Act, including section 53 (under which the appellant was indicted) were repealed and replaced by the Sexual Offences Act (see section 42). The First Schedule of the Evidence Act lists several sections of the Sexual Offences Act, including section 13, which now creates the statutory offence of indecent assault. It is to be noted that prior to the passage of the Sexual Offences Act, section 53 of the Offences Against the Person Act was among the sections listed in that First Schedule. Indecent assault would therefore, both before and after the passage of the Sexual Offences Act, be a statutory exception to the rule against the competence or compellability of spouses to give evidence for or against each other in criminal matters.

[19] Mrs Milwood Moore is therefore correct when she submitted that under either regime, the legislative intent continued to allow husbands and wives to be competent witnesses against each other without the consent of the person charged. The learned parish judge did not err therefore in ruling that Mrs Delgado was competent to give

evidence against her husband as this is allowed by statute even though her assessment of the common law position was clearly wrong.

[20] An assessment of the relevant common law demonstrates the learned parish judge's error. The learned parish judge in her reasons for judgment, traced the history of the common law position on the competency and compellability of spouses. She referred to certain English statutes and relied on the decisions of **Hoskyn**, **Pitt** and **Leach**, and concluded that an argument is without merit that asserts that a wife in Jamaica is not competent to testify against her husband when he is charged at common law for indecently assaulting her child.

[21] However, when one examines the authorities relied on, it does appear that under the common law, a spouse is competent though not compellable as a witness against a spouse in cases of rape or personal violence against the spouse and possibly cases of abduction and treason (**Hoskyn**, per Lord Wilberforce, page 485). In **Hoskyn**, Lord Wilberforce, in considering the issue of the compellability of a wife as a witness, traced the development of the law in relation to her competency (pages 482-485). Similarly, Lord Salmon who concluded as follows at page 495:

> "At common law, the wife of a defendant charged for a crime however serious was not, as a general rule, a competent witness for the Crown. If a man were charged with murder, for example, much as it would be in the public interest that justice should be done, his wife, whatever vital evidence she might have been able to give was not at common law a competent let alone a compellable witness…
>
> This rule seems to me to underline the supreme importance attached by the common law to the special status of

> marriage and to the unity supposed to exist between husband and wife. It also no doubt recognized the natural repugnance of the public at the prospect of a wife giving evidence against her husband...
>
> The only relevant exception to the common law rule that a wife was not a competent witness at her husband's trial **was when he was charged with a crime of violence against her. There is some doubt as to whether this exception also applies when a husband is charged with treason, but this is not a matter relevant to this appeal**." (Emphasis supplied)

[22] At this time, based on the development of the common law, Mrs Delgado would not be competent to testify against her husband except where he is charged for having committed personal violence against her. However, she is clearly competent, based on statute law, in relation to an act of indecent assault committed against a third person. This ground of appeal that the wife was not a competent witness is not sustainable and must fail.

[23] Mr Godfrey had further contended that even if Mrs Delgado is competent, she is not compellable as these are different legal concepts. Ordinarily, as Viscount Dilhorne stated in **Hoskyn,** page 489, a competent witness is also compellable as a general rule under the common law. However, in discussing the issue that arose in that case, whether an unwilling wife could be compelled to give evidence against her husband once she was competent, Viscount Dilhorne at page 491 referred to Taylor on Evidence, 9th edition (1985), volume II, page 892, where it is stated that although a wife may be permitted to give evidence:

> "...it by no means follows that she can be *compelled* to do so; and the better opinion is that under it she may throw

> herself upon the protection of the court, and decline to answer any question which would tend to expose her husband to a criminal charge."

[24] Viscount Dilhorne also referred to **Leach**, where the House of Lords had to consider section 4(1) of the Criminal Evidence Act 1898 of England (which is similar to section 12(1) of the Jamaican Evidence Act) and in which that court held that such a spouse is not compellable. Having considered the state of the law (both common law and statute), Lord Salmon in **Hoskyn** also approved **Leach** and quoted Lord Atkinson as follows:

> "Lord Atkinson said, at p.311: "'The principle that a wife is not to be compelled to give evidence against the husband is deep seated in the common law of this country...' It seems to me that the finding that you could not infer into a statute a power to compel a wife to give evidence against her husband in a criminal matter was based on their Lordship's opinion that it was contrary to the common law to compel a wife to give such evidence and that such compulsion could be introduced into a statute only by plain and express words." (page 497)

[25] Lord Salmon reinforced the view that in relation to that case, where Parliament had made the wife competent to give evidence against her husband charged with incest, it did not make her a compellable witness:

> "This, in my view, was because Parliament did not see fit, even in such a case, to depart from the common law rule that a wife should not, in any circumstances, be compelled to give evidence against her husband: see *Leach's* case [1912] AC 305." (page 499)

[26] It is clear therefore, that a spouse, although competent is not compellable. However, as Mrs Milwood Moore submitted, no issue arose in this case concerning Mrs

Delgado's willingness to give evidence as arose in both **Pitt** and **Hoskyn**. In **Pitt**, the issue was whether it was correct to treat the wife as a hostile witness for the prosecution when she gave evidence inconsistent with her statement. In **Hoskyn**, the woman, having married the defendant two days before his trial for wounding her with intent, was unwilling to give evidence, but was still called as a prosecution witness and treated as compellable.

[27] Although Mr Godfrey did not raise the issue of compellability as a ground of appeal, he has submitted however that before Mrs Delgado's evidence was received, the learned parish judge ought to have told her that she was not obliged to give evidence against her husband. He relies on **Pitt** for this submission. In that case, the judge granted a prosecution application to treat the wife as hostile and she was cross-examined on her witness statement. The appellant was convicted and on his appeal it was allowed. The court held that a wife retained her right not to give evidence against her husband, until with full knowledge of that right, she took the oath at the trial, and once she had started to give evidence, she was to be treated as an ordinary witness, and if the nature of her evidence warranted it, she could be treated as hostile. Pain J, in giving the judgment of the court, stated at page 29, that as a result of the decisions in **Leach** and **Hoskyn**, it is clear that a wife is a competent, but not compellable witness in proceedings against her husband. He went on to say:

> "The choice, whether to give evidence or not, is hers. She does not lose that choice because she makes a witness statement or gives evidence at the committal proceedings. She retains the right of refusal up to the point when, with

> full knowledge of that right, she takes the oath in the witness box."

[28] The issue in contention in the case at bar was that there was no evidence on the record of proceedings that Mrs Delgado had full knowledge of that right. However, there is no authority that vests any such obligation on the trial judge with the force of law and it is clear that it only became an issue in **Pitt** because the trial judge permitted the prosecution to treat the wife as hostile. In fact, Pain J at page 30, in discussing this issue of the wife's knowledge, quoted the words of Darling J in **Rex v Acaster** [1912] 7 Cr App R 187 when he said:

> "The only suggestion made for the appellant is founded on a passage which occurred in the argument in *Leach's case* in the House of Lords, where the Solicitor-General asked whether it was suggested that the prosecution, when a wife came to give evidence, should raise the question whether she knew she could refuse to give evidence, and Lord Atkinson said it was for the witness to take the point and the Lord Chancellor added 'Or for the judge.' Speaking for myself, and I think for the other members of the court, in consequence of these observations I shall, when the wife - in any case where she is not a compellable witness - comes to give evidence against her husband, ask her: 'Do you know you may object to give evidence?' and I shall also do so if she is called on behalf of her husband. That I imagine, is what other judges will do for the present, though there is no decision which binds us to do it, and the point is open to argument on an appeal to this court. So far none of us here remember to have ever done it, nor did it occur to us before that it was necessary."

Pain J then went on to say at page 30-31:

> "That decision is now 70 years old and we cannot say that Darling J's counsel of prudence has become a rule of law. Nor do we seek to lay down any rule of practice for the future. This is an unusual case and we are reluctant to make it the basis for any general rule. Nonetheless, this case does

> illustrate very powerfully why it is necessary for the trial judge to make certain that the wife understands her position before she takes the oath."

[29] In the present case, as correctly submitted by Mrs Milwood Moore, no issues arose in relation to Mrs Delgado's willingness to give evidence. While it would have been a course of prudence to ensure that she had full knowledge in relation to her compellability, there is no legal basis to presume such a requirement. There was no merit in this submission.

Issue 2: Were the inconsistencies of such a material nature that the appellant ought not to have been called upon to answer the charge?

[30] Mr Godfrey had complained about two inconsistencies arising in MK's evidence. In examination-in-chief, MK had stated in relation to the last identified incident, that while the appellant had been seated beside her, he had placed his hand around her waist and began to slowly move his hands down to her vagina. She stated also that she jumped up, took his hands off her and went to her mother and told her.

[31] Under cross–examination, she was asked in relation to this issue 'if she would say she went and told her mother what happened'. She did not answer and the matter was not pressed. On another occasion, whilst being cross-examined in relation to the giving of her statement to the police, she was asked if she told her mother what happened. She stated that she did not tell her mother anything although she was seated in front of her. On re-examination by the prosecutor, she was then asked "you said you did not tell your mother in the statement when he put his hand around your waist and touched your vagina?" There was no answer, and again the issue was not

pressed. If Mr Godfrey is submitting that this is an inconsistency, it is not clear to this court whether MK ever admitted not telling her mother about the hand touching the vagina. The learned parish judge did not consider this as an inconsistency in her reasons for judgment. It is to be noted however that MK had stated, during examination-in-chief, that after she had told her mother what happened (in relation to the last incident), the appellant had gone onto the veranda; that her mother walked there to confront him and eventually calls were made to the Alligator Pond Police Station; and that all the parties went to that station where she made a report to Constable Arscott. This evidence has not been disputed.

[32] In Mrs Delgado's evidence, she had stated that the appellant and her daughter were sitting on the bed while watching a movie; the appellant had his hand around her daughter's waist; after a few minutes, she saw her daughter jump up. She further testified that about two minutes later, the appellant went on the verandah and she then asked MK why she "jumped up"; MK said she felt Pappy's (the appellant's) hand slide down from her waist to the vagina; she went on to the verandah and asked the appellant why he was sliding his hand down to an inappropriate place on her daughter's body; he got angry, he called the police, she then called the police and spoke to them and they all went to the Alligator Pond Police Station where she made a report.

[33] In light of the totality of the evidence, even if it could be suggested that there was some inconsistency or discrepancy as to how the report was made to Mrs Delgado, it certainly cannot be considered as material when there was the compelling and

unchallenged evidence of a complaint of inappropriate behaviour against the appellant on that occasion.

[34] Mr Godfrey's second complaint related to the issue of the hand sliding down to the vagina. MK was asked in cross-examination as to whether what she had told the court was different from what she had said on a previous occasion, that "he touched her on her vagina". Her answer was that there was no difference. It was counsel's contention that this inconsistency goes to the root of the matter and it was not resolved by the evidence of the witness. He contended also that it was the parish judge who rendered an explanation for the witness. The parish judge deals with this issue at paragraph 21 of her reasons for judgment (quoted at paragraph [12] herein). However, Mr Godfrey's complaint against the parish judge was not warranted as she had clearly accepted that that inconsistency was reconcilable but that MK was never asked for an explanation. She also stated that she had accepted MK's evidence that the appellant had moved his hand down to her vagina. Bearing in mind again the totality of the evidence, including what Mrs Delgado had observed and the complaint made to her, I would agree with Mrs Milwood Moore's submission that the inconsistencies do not go to the root of the matter and could not be a sufficient basis to uphold the submission of no case to answer. Accordingly this ground of appeal also failed.

Issue 3: Was the appellant charged, indicted and convicted under a non-existent provision?

[35] Mr Godfrey's submission that the appellant was charged, indicted and convicted under a non-existent provision is ill-conceived as Mrs Milwood Moore contended. The

appellant was charged and indicted for the offence of indecent assault occurring between 2005 and 2010, contrary to section 53 of the Offences Against the Persons Act. While that section of the Act was repealed by virtue of the Sexual Offences Act (Act 12 of 2009), as was previously indicated, the Sexual Offences Act was not brought into force until 30 June 2011. It would mean therefore, that at least the first two alleged incidents of indecent assault identified during the evidence, would have occurred within the relevant time frame, between 2005 and 2010, which would have been governed by the Offences Against the Person Act.

[36] However, section 53 of the Offences Against the Person Act is the section that speaks to the penalty for a conviction of indecent assault and is not the section that establishes the offence. In fact, before the passage of the Sexual Offences Act, indecent assault was indicted contrary to common law. Although the appellant was not indicted contrary to common law, he would not have been subjected to undue prejudice by being indicted under the section that prescribes the penalty for the said offence. Accordingly, this ground of appeal also failed.

Issue 4: Was the indictment bad for duplicity?

[37] The indictment on which the appellant is charged contains a single count of indecent assault committed between 2005 and 2010. The particulars allege that the appellant, between 2005 and 2010 in the parish of Manchester did indecently assault MK. The five distinct incidents that MK testified about may be termed inappropriate behaviour by the appellant. However, the ingredients of the offence of indecent assault

would, on the face of it, only have been made out in three of these incidents as summarized at paragraph [5] of this judgment.

[38] MK was unable to give specific dates for any of these incidents, however, in relation to the first of these three mentioned incidents of indecent assault, she indicated that she was 12 to 13 years old at the time. In relation to the second incident, she only stated she would have been in high school. Mrs Delgado stated that the first time MK made a report to her, would have been in relation to the kissing on the vagina. This would have been in 2010. Her daughter would have started high school that same year. In relation to the final incident, that is the night when the police were called, she indicated this was in the summer holidays in 2011.

[39] The inference to be drawn from the evidence therefore is that two of the incidents occurred in the year 2010 and the final incident in 2011. The final incident therefore may or may not have been covered by the indictment since the Sexual Offences Act came into force on 30 June 2011. It is clear, as conceded by Mrs Milwood Moore, that the indictment ought to have been drafted to include three counts. The prosecution ought to have applied for an amendment or the parish judge could have acted on her own initiative to have the indictment amended to reflect the evidence (see **Melanie Tapper and Another v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 28/2007, judgment delivered 27 February 2009). However it is abundantly clear, that a particular or specific incident on which his guilt was based was never identified at any stage of the proceedings, either at the close of the case for the prosecution, or at the time of verdict.

[40] Mr Godfrey contended therefore, that the appellant was severely prejudiced in his defence as there was no certainty as to which incident he was called upon to answer in response to the indictment. While he had conceded that the indictment was not bad for duplicity based on the wording as it could be read as identifying one single incident, he had submitted that there was assumed duplicity.

[41] Sections 4(1) and (2) of the Indictment Act reads as follows:

> "(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
>
> (2) Notwithstanding any rule of law or practice, an indictment shall not, subject to the provisions of this Act, be open to objection in respect of its form or contents if it is framed in accordance with the rules."

[42] It cannot be said that the single count did not comply with the rules as far as the evidence would allow at the commencement of the proceedings. In **Rex v Thompson** [1914] 2 KB 99, the general common law view on duplicity was expressed that an indictment was bad if it charged more than one offence in each count. In the House of Lords decision of **Director of Public Prosecutions v Merriman** [1973] AC 584, Viscount Dilhorne, in examining this said issue at pg 599, referred to the first edition of Archbold Criminal Pleading and Evidence which stated that:

> "The defendant must not be charged with having committed two or more offences in any one count of the indictment, for instance, one count cannot charge the defendant with having committed a murder and a robbery, or the like……"

Viscount Dilhorne then went on to state that:

> "…A count will not only be bad if it charges two different offences but also if it charges the commission of one offence on more than one occasion, for then it charges the commission of two or more offences."

[43] It is within this last scenario, as posited by Viscount Dilhorne, that Mr Godfrey had asked this court to have regard to the case of **R v Mintern** [2004] EWCA Crim 07, a judgment of the Court of Appeal of England and Wales, where the issue of duplicity was discussed in the context of multiple defendants charged with more than one conspiracy count. Rix LJ, at paragraphs [34] and [36], referred to Lawton LJ's judgment in **R v Greenfield** [1973] 3 All ER 1050 where Lawton LJ said:

> "'Duplicity in a count is a matter of form; it is not a matter relating to the evidence called in support of the count…'
>
> A charge which is not bad for duplicity when the trial starts does not become bad in law because evidence is led which is consistent with one or more of the accused being a member of a conspiracy other than the one charged."

[44] Rix LJ at paragraph [42] also referred to a distinction drawn by Lawton LJ between initial formal duplicity and the development of the evidence at trial and then went on to say:

> "...If an indictment is formally defective because duplicitous, that should be identified and rectified. If, however, an indictment is not duplicitous but evidence reveals that where one offence had been thought to have been charged there had emerged more than one or the possibility of more than one, then special precautions may need to be taken to ensure that the difficulties of duplicity are avoided... There was no duplicity in *Greenfield*, but the emerging problems at

> trial were addressed by what this court regarded as suitable directions. In other cases, like *Thompson* and *Levanitz*, there was duplicity, real or assumed, but there was on the facts no embarrassments or prejudice at trial, and convictions were upheld. A trial should not begin with a legally defective indictment, but in all cases it is the substance of the quest for fairness and not mere form that is important..."

[45] Both counsel in this appeal are relying on Rix LJ's statement above. Mr Godfrey asserted that the evidence created assumed duplicity which was never resolved. Mrs Milwood Moore had submitted that counsel's reliance on **Mintern** is misguided as duplicity should be treated as a formal defect which arose on the face of the indictment. She submitted that this was, in her view, completely separate and distinct from the leading of evidence which may give rise to evidence which ought properly to be the subject of separate charges.

[46] In any event, it was Mrs Milwood Moore's further submission that the defence advanced appears to be a complete denial of any act of indecent assault, so it was unclear how the defence might have varied if there had been several counts of the indictment. In reliance on **Rex v Thompson**, she argued that neither prejudice nor embarrassment was visited upon the appellant. She therefore urged the court, that if it was of the view that there had been some form of assumed duplicity, that the proviso to section 14(1) of The Judicature (Appellate Jurisdiction) Act ought to be applied. Sections 14(1) and (2) are relevant to the determination of this appeal and are set out below:

> "(1) The Court on any such appeal against conviction and sentence shall allow the appeal if they think

> that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[47] Based on the wording of the indictment in the case at bar, while not bad for duplicity in form, the evidence as led created a difficulty as to exactly which offence the appellant was to answer and these difficulties were never identified and rectified. It was the opinion of this court that there would have been a substantial miscarriage of justice as the appellant did not and could not have known the specific incident he was called upon to answer and for which he was ultimately convicted as the parish judge did not so specify. It was clear also that the evidence concerning the last incident in 2011, which immediately preceded the report to the police, may have been outside the dates covered by the indictment. The parish judge considered inconsistencies in the evidence in relation to this incident, but did she determine guilt on this specific incident, or on any one incident, or generally, based on a consideration of the totality of the evidence? Theoretically, it is possible that the appellant's ability to raise the defence of *autrefois*

convict in relation to a specific incident occurring during the relevant period may be in jeopardy. It was on that basis that this court will not apply the proviso, the appeal would be allowed and the conviction of the appellant would be quashed as there was merit in this ground of appeal.

Issue 5: Should a retrial be ordered if the appeal is allowed?

[48] The final issue for determination is whether a retrial should be ordered in the circumstances. This court is empowered to order a retrial by virtue of section 14(2) of The Judicature (Appellate Jurisdiction) Act, as set out in paragraph [46] herein.

[49] Phillips JA in **Beres Douglas v R** [2015] JMCA Crim 20, at paragraph [62] of the judgment considered this issue:

> "The test for whether or not a re-trial should be ordered was stated by Lord Diplock on behalf of the Board, in the well known Privy Council case of **Reid v R** (1978) 27 WIR 254, as follows:
>
> > 'The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal. Among the factors to be considered in determining whether or not to order a new trial are: the seriousness and prevalence of

> the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive.'"

[50] Although, as pointed out by the Privy Council in **Reid**, the factors listed are not exhaustive, the usual course is to weigh all the factors stated above. Firstly, on the seriousness and prevalence of the offence, while the actual offence may not be as serious as others that could be considered as grievous sexual assault, in general, offences of a sexual nature are extremely prevalent, especially when committed against children. It is to be noted also that the appellant would have been in a position of authority in relation to MK who is his stepdaughter.

[51] In relation to the expense and length of time involved in a fresh hearing, it could not be said that this would be onerous on the court's resources. There were only three witnesses called by the Crown and the matter could conveniently be scheduled in the parish court as it is a trial which does not involve a jury. In assessing the ordeal suffered by the appellant on trial, and the length of time that would have elapsed between the offence and the new trial, the court considered that the offence would have been committed between 2005 and 2010. The appellant was arrested on an information dated 7 August 2012. He was convicted on the 26 May 2015. There would be some delay of five to 10 years between the time of commission of the offence and

the trial, and approximately two years post trial and conviction. The appellant had however been on bail during the trial and remained on bail during the hearing of the appeal. It was appreciated however that this matter had been pending for five years, but as indicated above, a new trial should not be unduly delayed. There was also no evidence that the witnesses would not be available for the retrial.

[52] MK's testimony spoke clearly to incidents of indecent assault committed by the appellant. Although Mr Godfrey had raised the issue that no statement had been given to the authorities until August 2012, about one year after the last incident, it is the evidence that MK had made a report to her mother in relation to the first incident, and in 2011 immediately after that final incident, and that all the parties proceeded to the Alligator Pond Police Station the next day. It was not however until one year later that the parties attended the police station and written statements were collected. These issues would therefore be for the determination of the parish judge, in his or her jury capacity, to consider when weighing credibility of the witnesses.

[53] All of the above must also be balanced by a consideration that a new trial might give the Crown a second chance to put its house in order. Phillips JA referred to this issue at paragraph [65] of her judgment in **Beres Douglas**:

> "...This factor was considered by Privy Council in **Au Pui-Kuen v Attorney General of Hong Kong** [1980] AC 351 where it was held that it would be wrong to order a re-trial to give the prosecution a second chance to strengthen its case by adducing additional evidence similarly in another Privy Council case of **Nicholls v R** [2000] All ER [D] 2305 the Board dismissed the application by the Crown for a re-

> trial since in doing so would have given the Crown a chance to fix the deficiencies in this case."

[54] In the case at bar, no such concerns that were apparent. The deficiency in this case occurred as a result of a failure to amend the indictment to reflect the evidence that was led. This issue could also have been rectified if the parish judge had specified on which alleged facts a prima facie case had been made out. Phillips JA in **Beres Douglas** at paragraph [67] speaks to the consideration of the public interest:

> "It continues to be important to remember, therefore, as stated by the Full Court of Hong Kong when ordering a new trial in **Ng Yuk Kin v Regina** [1953] 39 H K L R 49, at page 60, that-
>
> > 'It is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery.'"

[55] In **Reid** at page 348, Lord Diplock on behalf of the Board, having acknowledged the importance of the public interest, stated that there were countervailing interests of justice which must also be taken into consideration:

> "The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the defendant. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witness it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between

> prosecution and defence during the course of the hearing and in his summing up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witness to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way.
>
> It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under section 14 (2) of the Judicature (Appellate Jurisdiction) Act."

[56] It was clear that the deficiencies in the case at bar were not evidential deficiencies but procedural. Evidence had been presented on which the parish judge, in her jury capacity, could convict, having properly assessed the credibility of the witnesses. There exists therefore no apparent basis for a conclusion that the prosecution may or will be given a second chance to fix evidential deficiencies in this case. Although the learned parish judge erred when she convicted the appellant without having regard to the incident for which she had found him guilty, such an error would

not affect the fact that sufficient evidence had been adduced to ground the conviction. Accordingly, when all the factors listed above are considered, this court was of the view that a new trial should be ordered as the interests of justice so demand before a different parish judge.

Conclusion

[57] The appellant suffered a substantial miscarriage of justice when the parish judge failed to specify at the end of the case for the prosecution, the specific incident of indecent assault which occurred between 2005 and 2010 for which he should answer. It is for the foregoing reasons that we made the orders set out in paragraph [2] herein.