JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 87/2004

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J. A.
THE HON. MRS. JUSTICE HARRIS, J. A. (AG.)

KAYVON M^{c}PHERSON v R

Mrs. Jacqueline Samuels Brown & Ms. Heidi Johnson for the appellant

David Fraser, Senior Deputy Director of Public Prosecutions and Ms. Natalie Brooks, Assistant Crown Counsel for the Crown

30th, 31st January, 1st February & April 7, 2006

COOKE, J. A.

1. On the 29th March, 2004, the appellant was convicted in the Home Circuit Court on two counts of carnal abuse with a girl under the age of twelve years. In the first count the particulars of the offence stated that the offence took place "on a day between January 1, 2002 and December 31, 2002". The date in respect to the second count was the 5th day of May, 2003. He was given concurrent sentences of twelve years in respect of both counts. The appellant had been committed to stand his trial following a preliminary enquiry.

2. The complainant gave evidence on the 24th March, 2004 and she was recalled by the Crown on the following day. On the previous day she told the

court that she lived in a household with her aunt, Keisha Ewers, her grandmother, a cousin and the appellant, who was at that time the boyfriend of her aunt. She was led to the 5th May (the date of the second count). She said "nothing" happened between herself and the appellant when she came home from school. Eventually she said that the appellant "throw me on the bed". At that time the appellant was only dressed in his brief. She was on her back. Then her aunt entered the room and started to "lick up" the appellant. The police were called and the complainant and her aunt went to the Duhaney Park Police Station. At the station the complainant spoke to Cons. Delroy Burris. She said she made a report to him about the appellant but could not remember what she reported. She saw when the appellant came to the station but she did not remember saying anything to the police pertaining to him nor pointing out anyone to the police. She did not remember anything that happened after the appellant came to the station. She recalled going to the Centre for Investigation of Sexual Offences the following day and there speaking to Inspector Dutress Foster-Gardener to whom she made a report. However, she did not remember if Inspector Foster-Gardener wrote down what she said or if she signed anything. She did not remember the contents of the report she made to Inspector Foster-Gardener. When she was recalled she was immediately taxed as to the evidence she had given at the preliminary enquiry. After some questioning, a successful application was made for her to be treated as a hostile witness.

3. It was the evidence of Keisha Ewers that on the 5th May, 2003 she came home on her lunch break. She saw the appellant and the complainant there. She left them and returned to work. She returned some two hours later and when she entered her bedroom she saw her niece on the "edge of the bed" and the appellant in front of her dressed in his brief. She said she "jump to conclusions" and proceeded to hit the appellant. She and her niece went to the Duhaney Park Police Station. While they were there the appellant came to the station.

4. Cons. Delroy Burris said that about 5:45 p.m. on the 5th May, 2003, Keisha Ewers and the complainant attended the Duhaney Park Police Station. They were both speaking to him when the appellant came to the station. There and then the complainant pointed to the appellant and said: "This is the man that had sex with me". At this point Burris said he cautioned the appellant and asked him if he heard the report that the complainant had made. The appellant replied: "It is true. I am willing to make a statement." Burris took the promised statement of the appellant. This statement is reproduced hereunder.

> "TC (the complainant), she lives in the same house where I am at, 29 Lindale Avenue, Kingston 20, and being there for quite, this little girl kept on coming onto me, in due for her sexual desire. Knowing that she is a minor. I have always avoided such contact or confrontation. I spoke to a friend about this girl behaviour wanting me to have sex with her and about how persistent she is being, as I said earlier, avoid her somehow, fell weak to her persuasion, I remember on one attempt she held onto my genital

> area, where I had to push her off. I remember I reminded her that she is a minor, and I was way too old for her and could be imprisoned for having sex with her. She kept on with her persuasive behaviour for many months and I kept resisting. Eventually, I was caught in the trap. I had sex with her once, and then I told her it was wrong, and should not have happened. I tried to keep away from her, but she kept coming onto me, until it happened about two more times, okay. On the 5th May, 2003, I was left at home with her alone. I went in my room from the kitchen and she came into my room and started playing around with me, like she normally do, and when she wants me to have sex with her. I told her I was coming out of the room, because she always come and play around and then allow things to happen. I went outside to the grill, then I turned back and went back to my room. She said to me, 'Come mek mi fuck you,' and that's when it happened."

5. Inspector Dutress Foster-Gardener interviewed Keisha Ewers and the complainant. She collected statements and instructed Cons. Burris to charge the appellant with two counts of carnal abuse. She took the complainant on the 7th May, 2003 to the Hagley Park Medical Centre where the latter was examined by Dr. Clyde Morrison. It was the opinion of Dr. Morrison that the complainant had had more than one sexual experience.

6. The appellant made an unsworn statement. He denied having had sexual intercourse with the complainant. He said he went to the police station and told Cons. Burris that he had heard there was an allegation against him. He said Cons. Burris told him to relax as he was nervous. When he heard the term rape it sounded very bad to him. He sought help from Cons. Burris as he was scared. The latter told him all he had to do was to admit it and he would

not "lock me up". He was advised to "make it like she came on to me". He said that Cons. Burris fashioned the wording of the statement.

7. Leave was granted by the single judge to pursue this appeal. There were eight grounds of appeal pertinent to the correctness of the conviction and the ninth ground complained that the sentences were manifestly excessive. Grounds 1 and 2 are set out below and will be dealt with together.

> "1. The Learned Trial Judge erred in that she permitted the prosecuting attorney to ask leading questions of the complainant whereby the Appellant was adversely affected and/or was denied a fair trial.
>
> 2. There was no basis in law for treating the complainant as a hostile witness and accordingly the Learned Trial Judge erred in allowing the said complainant to be so treated. As a consequence the Appellant was prejudiced in his defence."

8. In exercising their discretion whether or not to accede to an application to treat a particular witness as hostile, trial judges should be guided by the provisions of the common law. See ***Alfred George Thompson*** [1977] 64 Cr. App. Rep. 96 at p. 98. In ***Takis Prefas and Daniel Pryce*** [1988] 86 Cr. App. Rep. 111 at p. 114 the court accepted Article 147 of Stephen's *Digest on the Law of Evidence* as setting out the common law rules. This article is now reproduced:-

> "*Unfavourable and Hostile Witnesses*: If a witness called by a party to prove a particular fact in issue or relevant to the issue fails to prove such fact or proves an opposite fact the party calling him may contradict him by calling other evidence, and is not thereby precluded from relying on those parts of such witness's evidence as he does not contradict.
> If a witness appears to the judge to be hostile to the party calling him, that is to say, not desirous of telling

> the truth to the Court at the instance of the party calling him, the judge may in his discretion permit his examination by such party to be conducted in the manner of a cross-examination to the extent to which the judge considers necessary for the purpose of doing justice. (Emphasis mine)
>
> Such a witness may by leave of the judge be cross-examined as to – (1) facts in issue or relevant or deemed to be relevant to the issue; (2) matters affecting his accuracy, veracity, or credibility in the particular circumstances of the case; and as to (3) whether he has made any former statement, oral or written, relative to the subject-matter of the proceeding and inconsistent with his present testimony ...
>
> In the case of a witness who is treated as hostile, proof of former statement, oral or written, made by him inconsistent with his present testimony may by leave of the judge be given in accordance with Articles 144 and 145."

Both these cases are from the English Court of Appeal. They reflect the proper approach to the determination as to whether or not a particular witness should be treated as hostile.

9. In this case, on the 24th March, 2004 (on the first occasion when she gave evidence) the complainant's memory of events only suffered when questions were asked of her which would produce answers which were inimical to the interest of the accused. Her "amnesia" definitely appeared to be contrived. The court was possessed of her depositions. There was therefore at that stage material before the court for the exercise of its discretion as to whether or not this complainant was desirous of telling the truth. However, no application was made at that stage. In ***R v Pestano and Others*** [1981]

Crim. L.R. 397 it was held that the application for a witness to be regarded as hostile must be made at the instant it is obvious that such witness is showing unmistakable signs of hostility. It was on the following day after Crown Counsel had embarked on cross-examination of the complainant that the application to treat her as hostile was successfully made. There is therefore merit in the complaint that cross-examination should not have been allowed prior to the exercise of the discretion to treat the complainant as hostile. Circumstances vary and it would be unwise to lay down settled procedure or considerations as to the approach of the trial judge in dealing with this issue of the exercise of the discretion to treat a particular witness as hostile. In ***R v Maw*** [1994] Crim. LR 841 C.A. it was suggested that in the circumstances of that case, the witness before being treated as hostile should have been given the opportunity to refresh his memory. This course would not have had any effect in this case as she categorically stated that she did not want to remember. Although there was a procedural error in the determination of the complainant as a hostile witness it would seem inevitable that the complainant was to be so treated. It cannot be said that the appellant by this error was denied a fair trial or that he was prejudiced in his defence.

10. Ground 3 was couched as follows:-

> "The directions relative to how the Judge ought to treat the evidence of a hostile witness were wrong in law and/or inadequate."

This complaint is entirely justified. On a number of occasions the learned trial judge directed the jury to the effect that what the complainant said at the preliminary enquiry was evidence at the trial of the appellant. This was done when in circumstances where the complainant merely admitted that the part of the deposition put to her was said by her in her sworn evidence at the preliminary enquiry and not that such evidence was true. If authority be needed, see ***Golder*** [1961] 45 Crim App. Rep. 5 at p. 9. When the complainant was being taxed she admitted to having given a deposition at the preliminary enquiry which she signed as true and correct. She denied that at the preliminary enquiry she said that one night while she was on the settee in her nightie the appellant told her to draw down her panty and then had sex with her – that the appellant pushed his penis in her vagina. When she was confronted with her deposition she agreed she had said at the preliminary enquiry that the appellant had pushed his penis in her vagina. At that juncture she refused thereafter to refresh her memory. She said "I just don't want to remember what happened."

11. This judgment, in paragraphs 2 and 10, has reviewed the extent of the evidence of the complainant. Quite clearly there is nothing in that evidence which was probative of the appellant's guilt. It is to be noted that Crown Counsel made no attempt on the first occasion that the complainant entered the witness box to elicit any evidence pertaining to count 1. The burden of the cross-examination of the complainant was about what happened one night on

a settee. This must be as regards count 1. Count 2 had to do with an alleged incident in the day on a bed during the day. It is impossible to appreciate why cross-examination of the complainant in respect of count 1 should have been allowed when there was nothing said in the trial, of the appellant, by the complainant which could be contradicted. She said nothing at all in respect of count 1. In respect of count 2 there was no contradiction of her evidence that nothing happened between herself and the appellant while she was on the bed.

12. Nowhere in the summing up did the learned trial judge analyze and thereafter give appropriate directions as to the treatment of the evidence of the complainant who had been categorized as a hostile witness. This apparently was a cause of concern to Crown Counsel. At pages 198-200 of the transcript, this is recorded:

> "MR. JOHNSON: M'Lady, I wonder if, m'Lady wants to give direction on how to treat that, TC as a hostile witness.
>
> HER LADYSHIP: Well, this is what I spoke to, didn't you hear me when I said that the prosecution was allowed to treat her in that way and what it means? You didn't hear?
>
> MR. JOHNSON: I wanted you to go further to say that sometimes the witness' -- evidence of such persons can be regarded as negligent (sic) or of little value.
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> HER LADYSHIP: Sometimes negligible or of no little value (*sic*) that after considering that they can -- negligible.
>
> MR. JOHNSON: Very well, m'Lady.

> HER LADYSHIP: This is a witness perhaps you know, because it is an unusual situation where a witness is being treated as hostile, you see, if this is a witness who is saying nothing happened and you are seeking, under the prosecution's case, to have the jury make certain inferences from surrounding circumstances.
>
> MR. JOHNSON: Very well, m'Lady, I will leave it at that.
>
> MR. CHAMPAGNIE: ...
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> HER LADYSHIP: ... Why I didn't call on you is, because, I don't know that you are able to say anything about what the prosecution is asking me to say about treatment of a witness who has to be treated as hostile, I did speak about that earlier. What I didn't say was that it was open to you to look at her evidence in a certain way since it had to come out, since it was not something that was freely given. I didn't exactly say that. This is something that had happened here and that she, TC, spoke of that, and it is for you to say what you think of that, if you think that it is evidence that carries any weight that you can rely upon, that is because of the way in which it came about. Satisfied, Mr. Johnson?
>
> MR. JOHNSON: Yes, m'Lady."

The learned trial judge had insufficient regard to the fact that the complainant was a hostile witness. She said at pages 164-165 of the transcript:

> "Now, she was recalled by the prosecution, and that is when you heard prosecuting attorney asking me to permit him to treat her as a hostile witness. So you are not to read too much into the use of that word as the prosecution is merely saying that the witness is saying something different from what was said at another stage before this trial and wanted to put that to her. So, that you may hear that this had happened elsewhere."

On page 153 the learned trial judge said:

> "And you also have evidence from the complainant, because although she didn't tell it to you straightforward in her evidence there, she has admitted that in the other court she did say that he pushed his penis into her vagina, but we will come to that when I'm dealing with the evidence. I merely say it to remind you what the prosecution is relying on."

Then at page 166-167 there is this direction:

> "Because, you see matters are heard in the Resident Magistrate's Court before they come here for the Resident Magistrate to decide whether the matter comes down here for trial, those cases that need to be tried in this court. So, at that time she is telling you that she gave evidence in a prior trial, swore on the Bible and the Magistrate did read over what was written to her. She told you all about that. And she was asked if she had told the Resident Magistrate that he had her on the settee on one occasion while she was wearing nightie and a panty and had sexual intercourse with her and she said she did not remember. And, she was asked if she told the Resident Magistrate he pushed his penis in her vagina and she said no. So, she was shown the document which you recognize as the document containing the evidence she gave to the Resident Magistrate. After she said that she admits that she told the Resident Magistrate that he had pushed his penis into her vagina, she was then asked about the statement to the police and she said she didn't remember."

At page 197 the learned trial judge directed the jury that what was said to the Resident Magistrate (preliminary enquiry) "forms part of the evidence in this case". All these directions were plainly wrong.

13. The directions to the jury pertaining to the treatment of the evidence of a hostile witness must be tailored to be in accordance with the comprehensive review of that evidence. The once common view that had been espoused in ***Golder*** (*supra*) that any evidence given by a hostile witness is to be disregarded has been subject to revision. In ***R v Christopher Parkes*** (1998) 28 J.L.R. 47 the headnote which accurately reflects the *ratio decidendi* stated:

> "**Held**:
> (i) ...
>
> (ii) there is no rule of law that where a witness is shown to have made a previous statement inconsistent with that made at the trial, the jury should be directed that evidence given at the trial should be regarded as unreliable. The explanation given by the witness for the previous statement might be acceptable to the jury but where no exception (*sic*) [explanation] is given the trial judge would be acting consistent with his responsibility to ensure a fair trial to direct a jury that the effect of the evidence is negligible
>
> (iii) Here the witness has given no evidence favourable to the defence. The trial judge was acting consistent with his duty to ensure a fair trial in telling the jury to disregard her evidence."

See also ***Driscoll v R*** 51 A.L.J.R. 731; ***R v Headlam*** [1976] 13 J.L.R. 113.

In this case there was no evidence from the complainant against the appellant in respect of count 1 and there was favourable evidence for the defence in respect of count 2 – as there was uncontradicted evidence from her that on the 5th May, 2003 nothing happened between herself and the appellant. In the

context of this case it was incumbent on the learned trial judge to direct the jury accordingly. There was no evidence from the complainant that the appellant ever had sexual intercourse with her

14. Ground of Appeal 7 was stated thus:

> "The directions to the jury relative to proof of sexual intercourse were erroneous and/or inadequate whereupon there has been a miscarriage of justice."

The learned trial judge spent a considerable amount of time directing the jury on circumstantial evidence/inferences. She thought that this was important because she introduced this aspect of her summation with the words:

> "I am going to ask you now to listen to what I am going to tell you extra carefully."

Thereafter, pages 145-149 of the transcript were taken up with general directions pertaining to those aspects of the law. These directions, it would appear, were given with the view that in the absence of any direct evidence from the complainant as to sexual intercourse, that essential ingredient could be inferred from "strong indirect evidence". After the extensive general directions the learned trial judge then particularized. This is how she directed the jury at page 151- 152 of the transcript:

> "Now, in this offence the prosecution must prove that the male sexual organ or penis of the man penetrated the female sexual organ or vagina of the female. And for the purposes of the law, the slightest degree of penetration is suffice (*sic*). Now, here the prosecution is relying on the evidence contained in a statement from the accused and indirect evidence of the circumstances. The report made at the police station and at the Centre for Investigation of Sexual

> Offences and Child Abuse, taking of the complainant to the doctor to be examined and the instructions for the accused man to be charged, those circumstances goes (*sic*) to meet this requirement."

At page 156 there is this recorded in the transcript:

> "Now, in this case, there is evidence which, if you accept it, confirms that sexual intercourse took place and that it was with the accused and that evidence comes from the statement by the accused man himself. So, that is, if you accept that, that is certainly evidence which is capable of amounting to corroboration in law. And this is what the prosecution is putting forward, in proving its case, this statement."

There are other passages in the summing up to like effect including those passages already mentioned where the jury was erroneously invited to consider the evidence at the preliminary enquiry as evidence at the trial.

15. The indirect evidence as listed by the learned trial judge was:

(a) Report made at police station;

(b) Report made at the Centre for Investigations of Sexual Offences and child abuse;

(c) Taking the complainant to the doctor to be examined;

(d) Instructions for the accused man to be charged.

All these factors illustrate a course of action based on a report made by the complainant. However, trials are not conducted on reports but on evidence given in court. Reports to the police do not go to the truth of their contents. Therefore the "indirect evidence" set out above has no probative value as to the issue of whether or not sexual intercourse took place between the

appellant and the complainant. It is to be recalled that there is her uncontradicted evidence that nothing happened between them on the 5th May, 2003. As regards the incriminating statement by the appellant, his confession is without value. It is valueless because a confession can only be relevant to a crime that has been committed. A confession as to the "murder" of "Joe Bloke" is of no effect if "Joe Bloke" is alive and well at the time of that "murder". Equally, in this case since there is no evidence of sexual intercourse either directly or inferentially the confession of the appellant is of no probative value. It was wrong to have directed the jury that the confession of the appellant was "capable of amounting to corroboration in law". There was no evidence from the complainant against the accused which could be the subject of corroboration.

16. There is merit in the submission that at the end of the crown's case the state of the evidence was such that the case ought to have been withdrawn from the jury. This appeal is allowed. The conviction is quashed and the sentences are set aside. Judgment and verdict of acquittal entered. It should be added that counsel should not regard as any disrespect to her industry the fact that the court has not found it necessary to deal with the other grounds of appeal which were argued. The court was of the view that it was unnecessary to so do for the disposal of this appeal.