

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

SCA #: 0035/2015
CASE #: BC00015/2013

‘N’

v.

THE QUEEN

Appearances:

Mr. Delroy Murray of Murray &
Westorborg for the Applicant

Ms. Nicole Petit for the Crown/Respondent

Before:

Justice Michael Mettyear (Actg.)

Heard:

21st and 29th September 2016

PREAMBLE

1. Section 12 of the Youth Justice Law (2005 Revision) states:

“12. (1) In relation to any proceedings in any court, such court may direct [and this court so directs] that-

- (a) no published report of or comment on the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any young person concerned in the proceedings, either as being the person by, against or in respect of whom the proceedings are taken, or as being a witness in the proceedings; and*
 - (b) no picture shall be published as being or including a picture of any young person so concerned in the proceedings.*
- (2) Whoever publishes any matter in contravention of subsection (1) is guilty of an offence and liable on summary conviction, in respect of each such offence, to a fine of five thousand dollars or to imprisonment for six months.*



2. Therefore, for the avoidance of any doubt, in any report of this matter, no words or descriptions shall be used which could identify the complainant by name, age, address, educational institution(s) or otherwise. This also means that none of the civilian witnesses shall be identified by name, age, address, institution(s), or otherwise.

JUDGMENT

3. This is an appeal against convictions recorded against 'N' following a Summary Court trial before Magistrate Gunn. Judgment was given on the 1st May 2015. The Defendant¹ was convicted of cruelty to a child (charges 1 – 3) and of indecent assault on a female (charges 4, 6 and 7). Sentences totalling 18 months' imprisonment were imposed on the 25th November 2015. There is *no* appeal against the sentences imposed. The defendant has been on bail pending appeal since the 26th November 2015.
4. Only a brief account of the facts is necessary.
5. The victim, whom I shall refer to as 'S', is the daughter of the defendant. She was aged between 10 and 12 at the time of the offences. She was born on the 21st December 1999. She lived with her father, her stepmother and the stepmother's son, whom I will refer to as 'O', at an address in the Cayman Islands. At the trial she gave evidence over three days.



¹ For convenience I will refer to him throughout in this way although he is now the appellant.

That is much too long for a child to be giving evidence. In a jurisdiction that allows the court to time limit advocates - for instance England and Wales - I would expect, in a relatively straightforward case like this, a day to be allocated for the totality of her evidence, at the very most. Ironically, however, her long stay in the witness box did at least give the Magistrate an excellent opportunity to assess her credibility.

6. The Charges:

- a. *Charge #1*: Relates to an incident when the defendant is alleged to have hit 'S' over the head with a bible;
- b. *Charge #2*: Is an alleged incident where the defendant hit 'S' with a pipe whilst questioning her about her sexual conduct with another. To placate him and stop further violence she lied to him. She suffered marks to her arms and a leg;
- c. *Charge #3*: Is an allegation that the defendant struck 'S' with a shoe on two occasions;
- d. *Charges #4 and #6²*: Arose on the same occasion when the defendant is alleged to have been in bed with 'S' whilst the stepmother was away. It is claimed that he touched 'S's' breasts and vagina over her clothing. When 'S' attempted to resist, he told her to be quiet and put his hand over her mouth;
- e. *Charge #7*: Is a further allegation of vaginal touching in which the defendant is said to have attempted to go inside her pants, but desisted when she threatened to tell his wife.

S' gave evidence in support of each of these allegations and identified the Defendant as the culprit.

In her general evidence she admitted that she disliked her father and could not bear to be in the same room with him.

² See paragraph 13



7. A friend of 'S', who the Magistrate called 'I.R.', gave evidence of what 'S' had said to her on various occasions about the defendant's conduct towards 'S'. This included reference to both physical and sexual touching. She also gave evidence of seeing violence used against 'S'.
8. A social worker, 'B', gave evidence of seeing 'S' after 'B' had been contacted by the stepmother regarding problems in the family, specifically relating to the defendant making allegations of sexual impropriety between 'S' and 'O'.
9. 'S' had told 'B' about lies she had told her father and said she had done this to placate him, to stop the beatings. She said that 'S's initial complaints against the defendant related to physical assaults, but that, on direct questioning, 'S' revealed sexual matters as well. This particular progression is not unusual. It may initially be much more difficult to reveal to a stranger a sexual complaint than it is to discuss a physical one.
10. By consent, evidence was read from 'O'. 'O' said that the defendant regularly beat 'S'. He described the beatings as "*almost like a normal thing, routine*". 'O' said he had never seen the defendant touch 'S' sexually.
11. The statement of the defendant's wife was also read by consent. She described the defendant as being overprotective of 'S', but rough with her. She described seeing him assault her on a number of occasions, although not the assaults identified in the charges.



12. The only other thing I need to mention about the Crown's case is that the defendant's police interview was produced. It makes strange reading in places and shows evidence of some odd thoughts. However from the defence point of view what is important is that the defendant denied the charges.
13. Submissions of no-case made at the end of Crown's case were inevitably and correctly rejected for all but charge #5. A detailed ruling was given by the Magistrate.
14. The Defendant did not give evidence. The standard question was then put to counsel for the Defendant, Mr. Murray, to which he answered in the affirmative. However, defence evidence was called. Ms. 'J' was 'S's former foster carer. She was allowed to give evidence of questionable admissibility, but I need not dwell on it as it does not form part of the appeal. Of the defence case it is necessary to say nothing, other than to record that the Magistrate correctly drew an adverse conclusion from the defendant's failure to give evidence, and she correctly concluded that the evidence of Ms. 'J' did not, overall, damage the Crown's case.



GROUND OF APPEAL

GROUND ONE

15. Ground one reads:

“The Magistrate erred in relying on the evidence of the Social Worker and failed to appreciate that such evidence was fundamentally flawed in that it breached the principles that the complaint of a sexual nature must be provided voluntarily by the Complainant and not be prompted or suggested by any person charged with the investigation of the matter.”

16. The social worker referred to is ‘B’. It is important to bear in mind how she became involved in the case. She was not a police officer investigating the case. Nor was she a person specifically given the task of officially interviewing a young person with a view to that person being a witness in a criminal case. She became involved following bizarre allegations being made by the defendant about ‘S’ and ‘O’, which the defendant’s wife, thought were adversely affecting the family. The Defendant’s wife asked ‘B’ to help. During the course of her help ‘B’ spoke to ‘S’ who at first revealed that the defendant had physically assaulted her and then, on further questioning, ‘S’ made the sexual allegations which form the sexual charges faced by the defendant.



17. Of course, the interviewing of children needs to be conducted carefully. Generally, prompting or leading questions are to be avoided. In rare instances the interview process may be so flawed that the evidence gathered may be rendered inadmissible. In the present case I know very little of what took place between 'S' and 'B'. As far as the Summary Court proceedings are concerned, the matter was dealt with very briefly by Mr Murray in cross examination. His examination of 'B' begins at page 94, behind tab 4. The portions he relies on are:

a. At Page 96 (p58) line 21:

Mr. Murray: *"And after she said yes, 'B, you asked her, has your father ever been sexually inappropriate with you?"*

'B': *"Yes I did ask that question, correct"*

b. At Page 96 (p60) line 23:

Mr. Murray: *"You then asked her if her father had ever touched her on her vagina and breasts?"*

'B': *"Yes, yes, yes. She said, yes, and I am confirming, yes I did ask her that."*

Mr. Murray: *"Thank you. And to that question that you asked her, she said yes?"*

'B': *"Correct..."*

18. In repeated questioning of 'S', during cross examination, she said that she had no recollection of the questions asked by 'B'.



19. It is on the basis of those short exchanges that Mr. Murray submits that the evidence of the detailed complaints made by 'S' to 'B', the police and the court are undermined and inadmissible. The submission is not sustainable. It deserved the short response that the Magistrate gave at page 172 of her judgment when she said:

"I dismiss the possibility that 'S' had fabricated the allegation of sexual touching upon being prompted by [B's] questions..."

20. Two other points were taken by Mr. Murray under Ground One, although they had not been specifically pleaded.

21. The first point concerned "recent complaint". Mr Murray submitted that part of the evidence of I.R. concerned complaints made to her by 'S'. This is clearly correct. He went on to submit that such evidence was hearsay and could only be admissible if it amounted to recent complaint. In the present case, he claimed, it was complaint, but not recent complaint. He said at one point that in cases such as the present "there must be a recent complaint". Of course, there is no such requirement and never has been. I took him to mean that if there is a complaint it must be recent. He added that, with the abolition of the requirement for corroboration, the need for the complaint to be recent is even more important.

22. Without expressing a view one way or the other on the correctness of Mr Murray's submissions, I will concentrate on what actually occurred in the present case.

23. The first thing to note is that no objection was taken at the time to the admissibility of such evidence. That is not fatal to Mr Murray's argument, but it does indicate that at that stage it did not seem to him to be inadmissible. In my judgment, his first thought was correct.



24. Miss Petit, for the Crown, pointed out that it had not been the Crown's original intention to adduce evidence of complaint from I.R. Miss Petit said that her first statement only dealt with what I.R. had seen, not what she had been told. It was only after the long cross examination of 'S' that the Crown sought and obtained a further statement from I.R. dealing with complaint.
25. In the cross-examination of 'S' it is perfectly clear that Mr. Murray was suggesting to 'S' that her first mention of sexually inappropriate behaviour came as a result of the questions put to her by 'B'. Although he never managed to get the answer he sought, he was at least left in a position to submit that the first mention did follow 'B's' questioning. In such circumstances it is not surprising that the Crown would wish to rely on any evidence they could deploy to show that 'S' had made complaint prior to speaking to 'B'. This is what I.R. provided. It was highly relevant and clearly admissible.
26. The second point was an allegation that the Magistrate was factually wrong on page 172 of her judgment in saying that IR's evidence was that 'S' had alleged sexual touching to her at a particular time. I have found this difficult to understand on the evidence that I have seen, but in any event in the context of the case overall, even if a mistake had been made, it can have no bearing on the safety of the conviction.
27. There is no merit in Ground One.



GROUND TWO

28. Ground two reads:

"That after the Learned Magistrate had given her verdict in the matter the Defence became aware of an irregularity which may have had the effect of altering the finding of the Learned Magistrate that the Complainant was a witness of truth on whose evidence she could rely, in that, the Complainant, whilst under oath, deliberately lied to the Court."

29. The detail of this is that a point came during the trial when 'S' was giving evidence on the second day of her cross-examination when discussions were taking place about the afternoon's sitting schedule. 'S', on hearing that the court was proposing to sit until 4 or 4.30 p.m. raised objection claiming to have made an appointment with school friends which would require her to leave before that time. After some discussion it was decided not to allow 'S' to leave earlier than planned as the trial's progress had to take priority. Later, out of court, Miss Petit caused enquiries to be made as to the detail of why 'S' wanted to finish early. Unfortunately, a full answer did not emerge until the day of sentence on the 25th November 2015. The answer appears in an undated statement from 'B', headed "*Interview with (S)*".

30. What emerged was that 'S' had not told the truth about why she wanted to leave early. She claimed in the interview that instead she was fed up with being questioned because the lawyer was "*jumping down my throat, he made me feel very indecisive...I had to find a way to get out for some time.*"



She went on *"I am not used to court and he was annoying me, you expect me to sit there and listen to all of that without feeling some type of way? So I had to find a way to get out that"*.

31. This information was conveyed, very properly by Miss Petit, to Mr. Murray on the day she received it.
32. Mr. Murray does not accept that any actual or implied criticism of him is fair. It is not necessary for me to pass judgment on that issue. What matters is the perception of 'S' and I see no reason to doubt that she did have the perception she claimed.
33. Of course, it is a serious thing for a witness to tell a lie. Especially if told on oath in court. The issue of 'S's' credibility was very much in issue during the case. 'S' readily admitted that she had told lies to her father about sexual matters he alleged against her. Admitting - to placate him and spare herself from beatings - things she had not actually done. The Magistrate also concluded that 'S' lied in court about visiting a porn site on one occasion and concluded that she lied *"to try and present herself in a better light."* However her general conclusions about 'S' put her conduct in context. She concluded that 'S' was *"immature for her age and at times had difficulties maintaining her engagement with the trial process"*.
34. The Magistrate's overall conclusion, after what she described as *"cross examination for 3 days at great length on a great many things"* was that:

"'S' gave evidence to the best of her ability given her age, ability and given the passage of time. 'S's' evidence was corroborated by other evidence, which itself speaks to her credibility on matters where there was no corroborating evidence".



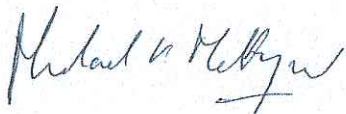
In passing, it is better not to use the old confusing term corroborating in this context. Here it is clear that the Magistrate was meaning supporting evidence.

35. I find it impossible to accept that the Magistrate's clear conclusion on guilt would have been any different had she known prior to returning her verdict that a lie had been told by 'S' in an attempt to shorten, for the day, her cross examination. I am sure that she would have understood, but not condoned 'S's conduct. She would have seen it as proof-positive of her assessment of 'S' as being immature and not always engaging with the trial process.

36. I find no merit in Ground Two.

37. The appeal is dismissed and the Defendant must be returned to prison to complete his sentence.

Dated this the 17th October 2016



**Mr. Justice Michael Mettyear (Actg.)
Acting Judge of the Grand Court**