

ST. LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4 OF 1991

BETWEEN:

NELSON ABRAHAM

Appellant

and

THE QUEEN

Respondent

Before:

The Honourable Mr. Justice D. Byron, J.A. - President

The Honourable Miss Justice M. Joseph, J.A. (Ag.)

The Honourable Mr. Justices. Singh, J.A. (Ag.)

Appearances: Mr. P.I. Foster for the Appellant

Mr. E. Walker, Director of Public Prosecutions and Mr. Innocent for the Respondent

1992: Jan. 30, 31,

May 25.

JUDGMENT

BYRON, J.A

On 14th October, 1991 the appellant was convicted of Unlawful carnal knowledge and sentenced to 12 years imprisonment. The evidence adduced by the prosecution was that the complainant was a girl of about eleven and a half years on 30th January 1990 when according to her story the accused had sexual intercourse with her in his house after she had been sent there by his girlfriend for a bath tub. The accused, who was a family friend, admitted that the complainant was in his house at the time she said but denied any sexual contact with her and said that she was fighting on a bed with his daughter of the same approximate age. His version was supported by his daughter who gave evidence at the trial. It was not until some 4 days later that the complainant told her grandmother that the accused had sex with her. She explained that she had been scared to do so before. The accused was confronted and he denied the allegation then and there and has consistently done so ever since. A medical examination was conducted by Dr. Allison St. Rose on the 2nd February 1991. Her deposition was read at the trial because she was in England pursuing further studies at the time of the trial. Her evidence was minimal. She said:

"On examination I found the hymen was stretched. There was heavy bleeding while examination with a speculum."

The doctor did not describe the condition of the stretched hymen nor express any opinion as to its cause or consistency with the issues in this case. Although the doctor did not say that she found any injury at all she did not express any opinion as to the cause of the bleeding. In her summing up the Judge quite properly told the jury that there was no corroboration in this case, The case became an issue of whether the jury could convict on the evidence of the complainant, contradicted as it was by the accused and his daughter.

Several grounds of appeal were argued, but I would deal with only three issues here.

This was an important point because if the evidence of this witness should have been unsworn then the conviction would have to be quashed as it was not corroborated.

Article 1203 of the Criminal Code provides:

"(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, magistrate, or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, magistrate or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence."

The Judge conducted an enquiry as to the fitness of the witness to be sworn and it established that the virtual complainant made her first communion in 1986 when she was 8 years old, some five years before the enquiry. (Other evidence in the case established that she was on 13th June, 1978). It also established that she attended secondary school and that she believed that she had a Heavenly Father and that she knew about God and heaven and hell and had a religious education.

Counsel's complaint was that the Judge failed to apply the modern secular approach by not specifically asking the witness what it meant to take the oath or whether she understood the added responsibility of telling the truth on oath.

He argued that the proper principle was stated in **Blackstone's Criminal Practice 1991 edition at F-4.19:**

"Nowadays, in recognition the fact the divine sanction of the oath is probably not generally recognised amongst the adult population, a more secular approach has been adopted. Children should not be questioned about their understanding of God. The modern test, it was held by the Court of Appeal is:

Whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct. (Hayes (1977) 1 **W.L.R.** 234 at

237)."

That quotation came from the speech of Bridge L.J. in the following context at p. 236:

"If the series of questions and answers started with the question "Do you think there is a God?" and the answer "Yes" there would really be no substance in **Mr.** Charlesworth's complaints, but the fact that the earlier questions and answers, on their face, reveal the boy declaring that he is wholly ignorant of the existence of God does lend some force to the submission that if the essence of the sanction of the oath is a divine sanction, and if it is an awareness of that divine sanction which the court is looking for in a child of tender years, then here was a case where, on the face of it, that awareness was absent. The court is not convinced that that is really the essence of the court's duty in the difficult situation where the court has to determine whether a young person can or cannot properly be permitted to take an oath before giving evidence. It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of **the** solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an

ordinary duty of normal social conduct."

In my view Bridge L.J. was not saying that enquiries as to the child's appreciation of the divine sanction is an inappropriate method of testing the child's ability to understand the nature of the oath.

I understand him to say that where the child has had no religious education and does not know about or believe in God, the child could still be sworn if the judge is satisfied that the child understands the

added responsibility to tell the truth which is involved in taking an oath over and above telling the truth **as** an incident of the ordinary duty of normal social conduct. I do not think that by emphasizing that a secular approach is acceptable within the context of the decline of religious practice in England, the Court of Appeal laying down any principle intended to undermine the concept that belief in God and the divine sanction, which is inherent in taking the oath, was an inadequate basis for appreciating the nature of an oath. In my view the fact that a person believes in God and understands the significance of the divine sanction does provide a reasonable basis for concluding that he understands the nature of an oath, which is the statutory test which the witness must satisfy.

Clearly where a child is of the age of 13 years (this trial took place in October 1991) which is on the borderline of the age where a judge may not consider it necessary to carry out any preliminary examination as to fitness of the child to be sworn, the nature and depth of the judge's questions would be affected by his impressions of the child's intelligence, quickness, command of language, and religious knowledge and educational level. In this case a 13 year old who is in secondary school, and who has been a communicant for over 5 years and has a religious education ought to understand the nature of an oath and when coupled with the fact that the judge has seen and heard the girl it would seem to me that the judge had sufficient information to determine whether or not the child understood the nature of the oath.

There is no doubt that the judge's mind was adverted to that question because, not only did this enquiry take place before the oath was taken but in making her ruling the judge specifically expressed the view that the witness "fully understands oath".

In my view therefore this ground of appeal must fail.

Ground 3 - Wrongful admission of deposition.

At the trial the deposition of Dr. Allison St. Rose was read. Counsel for the appellant conceded that the statutory conditions providing for it to be read in accordance with Article 942 of the Criminal Code were complied with.

He submitted however that the trial Judge ought to have either excluded it or adjourned the trial under Article 942(3) which prescribes:

"If it is made to appear to the judge that the witness who made any such deposition may, within a reasonable time, be capable of attending to give evidence and that the ends of justice require that the witness should be examined personally before the jury, the Court may postpone the trial on such terms as may seem proper."

The witness' father who is also a doctor testified that his daughter left St. Lucia on 20th January, 1991 to go to the U.K. to further her studies in medicine. No one asked and he did not volunteer any information as whether or when she planned to return to St. Lucia. No evidence was adduced at all on the question of her availability in St. Lucia for the purposes of this trial.

In my view there was evidence to support the Judge's ruling that the requirements of **Article 942** were satisfied. There was no evidence on the record from which it could be apparent to a judge that the witness could have attended at a reasonable time.

There is a difference of opinion as to whether the deposition should have been excluded on the ground that its admission **was** prejudicial to the accused. I do not think that it should have been excluded. In my view the importance of the testimony was that it disclosed the physical state of the

complainant's vagina four days after the alleged incident. This testimony was however not capable of corroborating the complainant's testimony either as to penetration (because her hymen was still there and the doctor expressed no view as to the nature or cause of it being stretched) or as to the identity of the accused as a person who had any sexual contact with her. This testimony should also be viewed in the light of the case for the accused who denied sexual contact with the complainant. In my opinion the evidence was a factor which the judge should have pointed out to the jury as a basis for testing the credibility of the complainant's story.

This was important in this case because he was charged with both carnal knowledge and indecent assault and the exact nature of his interference with the girl, if any, was critical. In my opinion her description of what transpired should have been examined in the context of the doctor's evidence to see whether it could be believed that sexual intercourse had taken place in the circumstances that she described. In my view the evidence was not prejudicial to the accused. The doctor did not say whether the bleeding she observed was the result of natural causes or not and the jury should have been told that, particularly in the context that the doctor found no injuries.

The problem that occurred concerning this matter was that the judge gave directions to the jury on this point as follows:

"Now the Crown has placed for your consideration that Dr. Allison St. Rose in her deposition has stated that the child's hymen was stretched and that there was blood. So the Crown is asking you to find that there was penetration since the law says even the least degree. On the other hand the defence is saying, "I know nothing about this, the child has lied to me". And as I have told you that doctor's evidence does not corroborate Hildera Nelson it only shows that the child was interfered with, cannot say it was Nelson Abraham."

It was clearly wrong for the Judge to tell the jury that the medical evidence shows that there was interference, because the doctor never said so. The most important question in this case for the jury to answer was whether there was penetration and if not whether there was other sexual contact amounting to an indecent assault. That direction was likely to cause the jury to believe that it was not their duty to consider whether there was penetration because the Judge said the medical evidence showed that there was.

The most important point raised by the appellant in this case was that the Judge erred in dealing with the important question of warning the jury how to deal with the uncorroborated testimony of a child in a sexual case.

Counsel for the appellant submitted that although the Judge warned the jury that it was dangerous to convict on the uncorroborated evidence of the complainant the only explanation she gave of the reason for the warning was:

".....for it is easy for a woman to make this type of allegation against a man and it is very difficult for the man to disprove it."

No where in the summing up did the Judge tell the jury that it is also dangerous to act on the uncorroborated evidence of children of tender years.

The law on this issue is well settled and the omission constitutes a serious error.

The principle is stated in Blackstone's Criminal Practice

F.5. 14 -

"At common law, the sworn evidence of a child of tender years was an established category of evidence that required a full corroboration warning. There was no specific age at which a child ceased to require the warning. As in the case of the assessment of the competence of a child (see F4.19), it was a matter left to the discretion of the trial judge, who had the advantage of seeing and hearing the child give evidence (see **Morgan [1978] 1 WLR 735, at p. 739**)."

In the leading Guyana Case the State v Kellman (1975] 26 **W.I.R. 438**: Haynes J.A. expressed the principle at p. 440:

"But it was obligatory on the trial judge as a matter of law to warn the jury in terms, or effect, that in the eye of the law it was dangerous or unsafe to convict on either count on the uncorroborated evidence of Carol or Barbara for two reasons: firstly, because the charges were sexual offences; and, secondly, as each girl **was** regarded by the common law as a child 'of tender years'."

And at **p. 453 Luckhoo C** said:

"In law, a warning of the danger of acting on the uncorroborated sworn evidence of children is just as necessary to be specifically stated as it is likewise to say that in all charges of sexual offences it is not safe to convict on the uncorroborated testimony of the complainant, but that they may do so if satisfied of its truth. So that in a case of sexual offence involving a young person each ground for the warning should be mentioned. (See **R v. Gammon** (26)). Even if the witness has a sufficient understanding of the nature of an oath to enable his or her evidence to be sworn, the jury must be warned of the danger of acting on it without corroboration, according to the particular reason or reasons which may exist in the particular case. •

In the House of Lords **R v Spencer 1987 1 A.C. 128 at 140**,

Lord Ackner stated the proposition:

"Where there is no corroboration, the rule of practice merely requires that the jury should be warned of the danger of relying upon the sole evidence of an accomplice or of the complainant in the sexual case, or upon the evidence of a child. The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance. The jury are, of course, told that while as a general rule it is dangerous so to act, they are at liberty to do so if they feel sure that the uncorroborated witness is telling the truth."

In this case the issue was of great importance. There was no evidence corroborating the testimony of the complainant. The jury were left to determine the case purely on their assessment of her credibility. This accused denied her story and said she was lying. The accused's daughter who was also of tender years gave evidence that the complainant lied on her father. Although the jury could properly convict if they believed the complainant, it was crucial for their attention to be focused on the danger of acting on her uncorroborated testimony. The warning the Judge gave was ineffectual because she never told the jury, as the circumstance of this case required her to, that the tender age of the complainant is a circumstance which creates risk of unreliability and inaccuracy, over imaginativeness and susceptibility to influence by third persons, and it was dangerous to convict on her testimony for that reason.

In the circumstances the conviction cannot be allowed to stand. We have agreed however that the justice of this case requires a retrial, and we set aside the conviction and sentence, and order a retrial.

JOSEPH, J.A.(Acting)

I agree that there were misdirections by the learned trial Judge as adverted to by the learned President and will be mentioned by my learned brother.

I too consider that the appeal should be allowed and a retrial considered.

SATROHAN SINGH,J.A. (Acting)

The appellant was convicted in the High Court of St. Lucia before d'Auvergne J. on October 14, 1991 for the offence of unlawfully and carnally knowing a girl aged 11 years, contrary to

s.215 of the Criminal Code of St. Lucia Cap. 250.

He was sentenced to imprisonment for 12 years. that conviction and sentence.

This appeal questions

The case for the prosecution was that on January 30, 1990 at about 5 p.m. the victim, at the request of one Delphia, the girl friend of the appellant went to the appellant's home to get a bath tub for her. The appellant took her in his room, pushed her on the bed, removed her panty, "fingered" her and then pushed his penis in her vagina. She told him to behave himself but he paid no heed. When he was finished she left and went back home to her grandmother. On that day she saw both her grandmother and her mother but she told them nothing of the incident as she said she was afraid. She felt upset on the first day after the incident. She told her aunt of this, but not of the incident. The first time she spoke of the incident was on the Friday following the incident and that was to her grandmother. It was on that day she was examined by a Dr. St. Rose who found bleeding from her vagina and a stretched hymen.

At the trial d'Auvergne J permitted her to give sworn testimony, admitted the depositions of Dr. Allison St. Rose into evidence without the doctor being present and testifying, and admitted in evidence as a complaint, the report of the incident made by victim to her grandmother on the Friday after the incident. These issues are all challenged by the appellant in his grounds of appeal. The appellant also challenges the learned trial Judge's direction to the jury on the burden and standard of proof in her summation to the jury and further contends that in the summation she usurped the functions of the jury. The final ground of appeal was that the sentence was excessive.

The first ground of appeal argued is that the learned trial Judge failed adequately, properly or at all to inquire into the capability and or capacity of the virtual complainant, a person of tender years, to understand the nature of taking the oath.

At the trial the virtual complainant who was still 11 years old was treated by the Judge as a child of tender years.

Article 1203 (1) of the Criminal Code of St. **Lucia Cap. 250**

provides as follows:-

"In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, magistrate, or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge,

magistrate or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

On this issue the learned trial Judge questioned the victim and recorded these answers:-

"My name is..... I live at Boguis. I go to the Vide Boutielle Secondary School. I am in Form IV. I have made my First Communion. I made my First Communion in 1986. I was then eight (8) years old. I have a heavenly Father. He lives in Heaven. If I do something bad he will punish me. I know bad angels live in hell. If I do something bad I will go to hell. I know what is the Holy Bible, it is made up of different scriptures."

She then ruled that the witness fully understood the oath.

Mr. Foster's argument is that there was nothing in the enquiry which indicated that the witness understood what was involved in the taking of the oath, that she was not asked whether she understood the added responsibility to tell the truth and that she was not asked if she were to take the oath and swear on the Bible what it would mean. Learned Counsel's contention is that the Judge only dealt with the divine sanction and not with "truth and lie".

A child of any age may be called as a witness in a criminal case, provided that such child appears sufficiently to understand the nature and moral obligation of an oath in which case she will be sworn, or is possessed of sufficient intelligence to justify the reception of her evidence and understands the duty of speaking the truth in which case she will give her evidence unsworn. A child's competency depends not upon her age but upon her understanding. **R v. Williams** (1835) 1 C & P 320. The evidence should not be excluded merely because the Judge thinks the case is not a fit one for a child to give evidence at all. The question for consideration is whether the child understands the nature and obligation of the oath or the duty of speaking the truth **R v.**

Moscovitch (1925) 18 Cr. App. R. 37.

Whether a child understands the nature of an oath is a question for the Judge and the judge would put preliminary questions to the child to enable the Court to form an opinion. The Judge also would judge the situation on the child's demeanour. The Judge would ask himself, having heard what the witness said, having seen the way in which the witness behaved and having noticed the witness' behaviour on the questions being asked, whether the witness was someone who realised the gravity of the situation. The questions to be asked should go towards satisfying the court that the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth. the Judge's notes show answers directed towards appreciation by the witness of the solemnity of the occasion but none in relation to the responsibility to tell the truth. Mr. Foster submitted that the fact of no such notes meant that the Judge did not ask those questions. I do not agree. The fact of no such note by the Judge is not per se conclusive that no such questions were asked and answered to the satisfaction of the Judge. The record shows that the trial Judge carried out a similar exercise in relation to a child witness for the appellant and that those questions were asked so the Judge must have known of the above requirement when she questioned the victim. Indeed, in her summation she reminded the jury that they heard when the victim was questioned "whether she understood what was God and telling a lie".

The learned trial Judge having carried out the enquiry and having seen and heard the child, she is the best person to decide whether the witness was competent to give sworn evidence. The enquiry was done in the presence and hearing of the jury and the jury were reminded of the enquiry at the

summing up stage of the matter. I can find no legal justification to interfere and this ground of appeal fails.

As his second ground of appeal, the appellant complains that the learned trial Judge failed adequately, properly, or at all to direct the jury on the burden and standard of proof.

Mr. Foster, in arguing this ground of appeal, concedes adequate and proper direction by the learned trial Judge at the commencement and again at the end of her summing up to the jury but contends that during the summing up when she uses the words "you must be convinced" "burden" (on the prosecution), "prove their case", without more, at different parts of the summing up, that she should have gone on to repeat to the jury the standard required, and that in not doing so, it was open for the jury to regard the standard to be on a balance of probabilities and not necessarily beyond a reasonable doubt and that they must have been confused as to what standard they should apply.

I find no merit in this argument. No where in the summing up is the standard of proof on a balance of probabilities mentioned, and, the proper direction having been given both at the commencement and towards the end of the summing up, the jury must have understood that when the above directions were given that the standard of proof remained throughout as beyond a reasonable doubt.

The appellant's third ground of appeal concerns the admissibility by the trial Judge of the deposition of Allison St. Rose on the basis that the witness was out of the jurisdiction. On this issue the Judge heard from the evidence of the father of the witness that she was in the United Kingdom furthering her studies in medicine, that he saw her leave St. Lucia on British Airways and that she had not yet returned. The Judge also heard evidence from the Clerk of Court who was present when St. Rose gave her deposition before the Magistrate at the Preliminary Inquiry. This witness identified the deposition and testified to the effect that all the legal requirements for the taking of such a deposition were complied with. The trial Judge then admitted the deposition in evidence.

Mr. Foster's objection as I understand it is three-fold. Firstly, that the depositions do not show that Allison St. Rose was a Registered Medical Practitioner. Secondly, that no enquiry was made whether or not the witness would have been returning within a reasonable time. His third objection related to the Judge's discretion to exclude the deposition at Common Law.

Mr. Foster's argument on the first objection is that in the absence of evidence from the deposition, the prosecution should have gone on to prove that Allison St. Rose was in fact registered as a Medical Practitioner in St. Lucia. I do not agree that there is this absence of evidence. The witness' deposition describes her as a doctor and shows that she was at the relevant time employed by the Government in that capacity. In the absence of evidence to the contrary, the jury could properly draw the inference that at the relevant time she was a medical practitioner registered to practice her profession in St. Lucia.

As regards Mr. Foster's second objection, s.3 of **Article 942**

of the Criminal Code of St. Lucia Cap. 250 provides:

"If it is made to appear to the judge that the witness who made any such deposition may, within a reasonable time, be capable of attending to give evidence and that the ends of justice require that the witness should be examined personally before the jury, the Court may postpone the trial on such terms as may seem proper."

Mr. Foster contends that the burden of satisfying this requirement was on the prosecution and they have not done so.

The record shows no evidence relevant to this requirement upon which the trial Judge could have exercised her discretion to postpone the trial. This section does not impose any duty on the

prosecution to adduce evidence on this issue. this submission.

I see no merit in

With respect to Mr. Foster's third objection, the law on the admissibility of depositions in so far as it relates to the Common Law power in the Judge to exclude such depositions is adequately reflected in **Scott & Barnes v. Regina (1989) Cr. App. Reps.** p. 153 per Lord Griffiths at p. 161

"In the light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is however, a power that should be exercised with great restraint. The mere fact the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence and which could have been explored *in* cross-examination: but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case. In an identification case it will in addition be necessary to give the appropriate warning of the danger of identification evidence. The deposition must of course be scrutinised by the judge to ensure that it does not contain inadmissible matters such as hearsay or matters that are prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury. Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it will be unsafe for the jury to rely upon the evidence in the deposition.

It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it. But this is an extreme case and it is to be hoped that prosecutions will not generally be pursued upon such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then **even** if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the

summing up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition."

The record of appeal is silent on the issue whether the learned trial Judge alluded to this Common Law discretion before she admitted the depositions into evidence. I recognise that in these circumstances we ought to presume that she did. The question then arises whether it was properly done.

The incident in this case is alleged to have taken place on Tuesday, January 30, 1990. The doctor examined the alleged victim on the Friday after that Tuesday and found bleeding of the vagina and a stretched hymen. The doctor gave no opinion or no evidence to connect those findings with the incident on the Tuesday. That was a serious lacuna in the doctor's evidence bearing directly on the question of relevance and which adversely affected the quality of the evidence in the deposition which is the crucial factor that should determine the exercise of the discretion. It made the evidence more prejudicial than probative and the Judge ought to have excluded same. Indeed, the danger in admitting that deposition evidence manifested itself most vividly when the learned trial Judge herself erroneously told the Jury in her summing up that the doctor's evidence showed that the victim was interfered with.

The fourth ground of appeal is that the "learned trial Judge erred in allowing hearsay evidence of the virtual complainant and of the grandmother Ursula Melius to be given in evidence, concerning the virtual complainant's accusation of intercourse by the appellant, and further and/or in the alternative failed to direct the jury as to its evidential value, of not being evidence of the truth of the matters stated".

The evidence shows that despite the victim seeing her grandmother and mother on the very day of the incident she made no complaint to them as she was afraid and that it was only on the Friday subsequent to the incident when she started feeling sick that she spoke of it to her grandmother.

The learned trial Judge admitted this evidence as a complaint in a sexual offence. Mr. Foster argues that it was not made at the first available opportunity and as such this evidence is hearsay and cannot be categorised as a complaint.

The law on the admissibility of a complaint after the commission of a sexual offence, is that it must be made at the first available opportunity and it is the trial Judge to decide whether the complaint was made as speedily as could reasonably be expected. In so doing the Judge must apply the right principles. In **R. Cummings (1984) 1 All E.R. 151** Chief Justice Goddard at p.552 sets out the law in this manner:-

"It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably **be** expected.

Who is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered, and he had to give a decision there and then whether it is admissible or not. It must, therefore, be a matter for him to decide and a matter for his discretion if he applies the right principle. There is no question here that Hallett, J., did apply the right principle. He had clearly in mind the fact that there must be an early complaint. Whether it was reasonable to expect the prosecutrix to complain the moment she got back to the camp to a man she hardly knew, or whether it was more reasonable that she should wait till the morning and complain to Mr. Watson, her friend, were matters

which the learned judge had to take into account. He did take them into account, and he came to the conclusion that in the circumstances the complaint next morning was in reasonable time. If a judge has such facts before him, applies the right principle, and directs his mind to the right question, which is whether or not the prosecutrix did what was reasonable, this Court cannot interfere".

Because of the fear expressed by the child, it is open for this Court, in the absence of anything to the contrary to say that the Judge was not incorrect in admitting the evidence as a complaint. However, the record shows that when she came to sum up the case to the Jury, the Judge gives the impression that **the** principle of law she applied was the incorrect "first person **she** told principle".

Mr. Foster also complains that whilst the trial Judge properly dealt with the issue of complaint vis-a-vis corroboration she did not go on to give the jury directions as to its evidential value. Learned Counsel contends that she should have gone on to tell the jury that such a complaint is not evidence of the truth of what is stated therein. Mr. Innocent for the Crown answers Mr. Foster with the submission that because evidence is not corroborative it is commonsense that it cannot be evidence of the truth. I reject as fallacious this "commonsense" approach of Mr. Innocent. I agree with Mr. Foster that the trial Judge should have directed the jury as he submitted, *in addition* to the direction that the evidence was not corroborative but merely shows consistency of conduct.

The appellant's fifth ground of appeal states that the "Learned Trial Judge usurped the functions of the jury by finding as a fact the witness Ursula Melius was a competent witness, and that the medical evidence of Dr. Allison St. Rose shows that the virtual complainant was interfered with".

In her summing up to the Jury the Judge said this:

"Now the Crown has placed for your consideration that Dr. Allison St. Rose in her deposition has stated that the child's hymen was stretched and that there was blood. So the Crown is asking you to find that there was penetration since the laws says even the least degree. On the other hand the defence is saying 'I know nothing about this, the child has lied on me. And as I have told you that doctor's evidence does not corroborate it only shows that the child was interfered with, cannot say it was Nelson Abraham".

Mr. Foster argues that when the trial Judge used the words "it only shows that the child was interfered with" she was there usurping the functions of the jury by making that finding of fact, especially when no such opinion was expressed by Dr. St. Rose, and when the doctor's examination of the victim was not until the Friday after the incident on the Tuesday. Learned Counsel also argued that it was an incorrect finding of fact. I find that this was an incorrect interpretation of the evidence of the doctor from the deposition.

The trial Judge in her summing up in referring to the victim's grand mother Ursula Melius told the Jury:-

and

"Now having seen that lady you will have no doubt in your mind that she did, exactly what she said she did".

"The Crown has placed for your consideration having **seen** in this box, who was brought up by a grandmother **like** Ursula Melius whether you think she would just push a door in **which** a man is and just walk in. But you must bear in mind that this accused said she did so".

The specific words complained of in this last quote are "who was brought up by a grandmother like Ursula Melius".

Mr.Foster complains here of a finding of fact by the trial Judge as to the quality of the grandmother Ursula and therefore a usurpation of the functions of the Jury. I find these to be strong opinions expressed by the trial Judge. A Judge is entitled to express opinions when summing up to the Jury but when she does so she must direct the Jury that they are not bound to accept her opinions. This was not made clear to the Jury in this matter.

The appellant complains in ground six that the "learned trial Judge failed to warn the jury properly adequately or at all as to the dangers of convicting an accused on the uncorroborated testimony of a child of tender age."

The trial Judge's summing up shows the prescribed warning being given to the Jury at different parts of the summing up with respect to the dangers of acting on the uncorroborated testimony of a female victim of a sexual offence. No where in the summing up does the Judge go on to warn the jury of the dangers of acting on the uncorroborated testimony of a child of tender years. Mr.Foster argues that both warnings are necessary.

In the **State v Alfred Kellman (1975) 26 WIR 438** Haynes J. A at

p.440 in dealing with a similar situation had this to say -

"But it was obligatory on the trial judge as a matter of law to warn the jury in terms, or effect, that in the eye of the law it was dangerous or unsafe to convict on either count on the uncorroborated evidence of Carol or Barbara for two reasons: Firstly, because the charges were sexual offences and, secondly, as each girl was regarded by the common law as a child of tender years".

At **p.453 E.V. Luckhoo c.** expresses this opinion:

"In law a warning of the danger of acting on the uncorroborated sworn evidence of children is just as necessary to be specifically stated as it is likewise to say that in all charges of sexual offences it is not safe to convict on the uncorroborated testimony of the complainant, but that they may do so if satisfied of its truth. So that in a case of a sexual offence involving a young person each ground for the warning should be mentioned. (**See R v Gammon (26)**). Even if the witness has a sufficient understanding of the nature of an oath to enable him or her evidence to be sworn, the jury must be warned of the danger of acting on it without corroboration, according to the particular reason or reasons which may **exist** in the particular case."

I agree with the submission of Mr.Foster. I find that the directions which were particularly lacking in the summing up were the omission to draw to the Jury's attention the special need for care, the special need for caution, in dealing with assessing the evidence of the victim as a child testifying on oath especially in a case of this nature where a sexual offence is involved. In sexual cases it has been recognised that the danger exists that a false accusation could be made from a variety of causes, and that necessitated the warning given by the trial Judge. But, where a child is the victim there should be this second warning because the very young could be not only unreliable or inaccurate, but prove to

be over imaginative or susceptible to the influence of third persons. I regard this omission by the learned trial Judge to be a non-direction amounting to a misdirection.

For the reasons above-stated I would order that this appeal be allowed, that the conviction be quashed and the sentence set **aside** and that there be a retrial of this matter.

C.M.D. BYRON, Justice of Appeal

MONICA JOSEPH,
Justice of Appeal (Ag.)

SATROHAN SINGH
Justice of Appeal (Ag.)