REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 23 of 2009

BETWEEN

FRANKLYN JALIPA

Appellant

And

THE STATE

Respondent

PANEL:

P. Weekes, J.A.

A. Yorke-Soo Hon, J.A.

R. Narine, J.A.

APPEARANCES:

Mr. F Peterson for the appellant.

Ms. J. Honoré-Paul for the respondent.

DATE DELIVERED: 24th July 2013

Delivered by: A. Yorke-Soo Hon J.A.

JUDGMENT

BACKGROUND

1. On 28th May 2009, Franklyn Jalipa ("the appellant") was found guilty on three counts of sexual intercourse with a minor stepchild contrary to section 10(1) of the Sexual Offences Act, 1986. On 17th June 2009, he was sentenced to ten (10) years hard labour on each count, the sentences to run concurrently.

2. The appellant has appealed his conviction and sentence and has filed five grounds of appeal.

FACTS

3. In March 2001, the virtual complainant ("JR") then aged 14, lived at Santa Cruz with her mother, her stepfather (the appellant) and her siblings.

4. One morning, in March 2001, JR was at home with her younger brother. Her mother, AB, was at work and her other siblings had already left for school. JR observed the appellant outside the house in the vicinity of her bedroom. The appellant entered the house and sent JR's brother outside to play in the yard.

5. JR was getting ready for school and was dressed only in a towel having just returned from the bathroom. The appellant entered her bedroom, and asked her to have sex with him. He told her to remove the towel. She initially refused but when the appellant began to shout at her, she became fearful and complied. JR noted the smell of alcohol on his breath.

6. JR took off the towel and lay on the bed. The appellant then lay on top of her and began to fondle her breasts. He had sexual intercourse with her and then left the room. She then went to the bathroom and continued getting ready for school.

7. At school, JR began bleeding from her vagina and she believed it was her period. Later that day, JR spoke with her sister and a week later she spoke with her mother, who took no action.

8. Approximately one week after the first incident and again while JR was in the process of getting ready for school, she went into her mother's bedroom to comb her hair. At that time, JR's younger brother was playing in the yard. The appellant was lying on the bed and asked her if she wanted to have sex with him. She attempted to leave the room but he sat up on the bed and placed his foot against the wardrobe. This prevented her from moving and she felt afraid. He again asked her if she wanted to have sex with him. She did not respond and he asked her if she did not hear what he had said. He then held her arm carried her to the bed and had sexual intercourse with her. After he was finished, she went to the bathroom and continued getting ready for school.

9. On another day, between 20th March and 28th March, 2001, everyone was at home, except AB who had gone to work. JR was lying down on her bed because she was not feeling well. The appellant entered her bedroom and sat on the bed. He told her that he would buy her a camera for her birthday. He began to fondle her breasts and she began to feel uncomfortable. He came on top of her and pulled down his underwear and trousers. He pulled aside her underwear and had sexual intercourse with her. Shortly afterwards, JR's sister came into the room to bring her some chow and the appellant left the room.

10. From April to August 2001, similar incidents would occur twice weekly both at Santa Cruz and when the family moved to Cemetery Street in Siparia. The last occasion on which it occurred was May 2002.

11. On 4th June 2002, JR ran away from home with her sister and went to Santa Cruz. They went to a neighbour whom they called "Uncle Lenny" and he took them to another person known as "Mama". The four of them went to the Santa Cruz Police Station.

12. At the police station, AB was contacted and Police Officer Rigsby recorded statements from JR and her sister. They were subsequently taken to the Mount Hope Medical Complex where JR was examined by a doctor and a medical report prepared on her behalf.

CASE FOR THE DEFENCE

13. The appellant gave evidence and he denied the allegations. He also raised the issue of alibi, stating that he was not at home at the material times when the offences are alleged to have been committed.

GROUND ONE – The Learned Trial Judge erred in admitting prejudicial evidence.

14. Mr. Peterson, for the appellant, submitted that prejudicial evidence had been wrongly admitted. He explained that the appellant was only charged with incidents occurring prior to March 2001. However, at the trial, evidence was proferred by JR that sexual encounters between herself and the appellant would happen twice a week between April and August of 2001 and that the last time any incident occurred between them was in May 2002. Counsel contended that such evidence was prejudicial because it tended to label the appellant as a person prone to committing this type of the sexual offences. The judge thus erred in law by admitting the evidence and directing the jury's attention to it in his summation. He argued that the fairness of the trial was compromised because the jury would have been led to believe that if the appellant committed the offences as alleged (between April and August), then he must have also committed the offences as charged (prior to March). The verdicts and convictions are thereby rendered unsafe as the jury would have attached undue weight to such evidence.

15. Ms. Honoré-Paul for the State conceded that the evidence advanced by the prosecution fell outside of the period covered by the indictment. She argued however that the evidence was admissible as explanatory evidence; it was advanced to offer an explanation as to why the virtual complainant ran away. She submitted that, in any event, the admission of allegations of sexual intercourse on occasions after those recited in the charges is not more prejudicial than probative since unproved acts by the appellant could not, without more, lend support to the subject matter of the charge.

16. It is trite law that a judge always has a discretion to exclude otherwise admissible evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value.

Lord du Parcq, delivering the reasons of the Board in **Noor Mohamed v The King [1949] AC 182** said (at p. 192):

> ". . . the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it."

17. Lord Steyn in Privy Council case of **Lobban v The Queen [1995] 1 WLR 877** noted the rationale behind the prejudicial/probative dichotomy. Lord Steyn explained (at page 878) that:

> "[A] trial judge in a criminal trial always has a discretion to refuse to admit evidence, which is tendered by the prosecution, if in his opinion its prejudicial effect outweighs its probative value. This power has probably existed since Rex v. Christie [1914] A.C. 545 but, in any event, it was expressly affirmed by the House of Lords in Reg. v. Sang [1980] A.C. 402. <u>The power is based on a judge's duty in a criminal trial to ensure that a defendant receives a fair trial."</u>

18. Indeed, Lord Redding in **R v Christie [1914] A.C. 545** discussed the potential danger of revealing certain evidence to the jury. At page 565, he noted:

> "...judges are aware from their experience that in order to ensure a fair trial for the accused, and to prevent the operation of indirect but not the less serious prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence. Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it.

That there is danger that the accused may be indirectly prejudiced by the admission of such a statement … is manifest, for however carefully the judge may direct the jury, it is often difficult for them to exclude it altogether from their minds as evidence of the facts contained in the statement."

19. The authors of **Blackstone's Criminal Practice 2012** at para F12.17 note that:

"…where an offence is alleged it may be necessary to give evidence of the background against which the offence is committed, even though to do so will reveal facts showing the accused in a discreditable light. The necessity to admit evidence of this kind, for its explanatory as distinct from its probative value, was well-accepted at common law."

20. In **R v TM [2000] 1 WLR 421**, M. and others were charged with serious sexual offences against other members of their family. At the trial, the prosecution sought to adduce evidence that M. had been encouraged from a young age to watch the sexual abuse of his sisters by others and later to commit such acts himself. Those matters were not the subject of charges against M, but the prosecution contended that in order to understand the evidence of the complainant the jury needed to know the background. The judge ruled that the evidence was relevant and admissible, but directed the jury that its only relevance was that M. knew that it was safe to abuse his sister, secure in the knowledge that she would not seek the protection of other members of the family. At a second trial, involving similar charges the prosecution sought to adduce similar fact evidence in relation to two defendants. Three of the other defendants applied to have the evidence excluded and the judge refused the application. The Court of Appeal held the information to be admissible as background information. The Court relied on the learning in **Reg. v. Pettman (unreported), 2 May 1985** which reads:

"…where it was necessary to place before the jury evidence of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involved including evidence establishing the commission of one or more offences with which

the defendant was not charged was not of itself a ground for excluding the evidence."

21. The importance of distinguishing between similar fact evidence and background or explanatory evidence was pointed out by Professor Birch in a useful note at [1995] Crim.L.R. 651, which reads:

"Similar fact evidence is employed as evidence which tends strongly to prove a particular fact (identity, intent, causal connection or whatever) which could be proved by other means but which the prosecution has chosen to establish by reference to other misconduct of the accused. As such, the evidence may need to be possessed of a high degree of probative value in order to buy its ticket to admissibility, for it involves 'dragging up' material which is by definition prejudicial and which might have been left out. Thus it has been said that such evidence should be admitted in circumstances where it would be an 'affront to common sense' to exclude it (per Lord Cross in Director of Public Prosecutions v. Boardman [1975] A.C. 421, 456). Background evidence, on the other hand, has a far less dramatic but no less important claim to be received. It is admitted in order to put to the jury in the general picture about the characters involved in the action and the run-up to the alleged offence. It may or may not involve prior offences; if it does so this is because the account would be, as Purchas L.J. says (in Reg. v. Pettman (unreported), 2 May 1985, C.A.) 'incomplete or incoherent without them. It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history."

22. The part of the summing-up complained about by the appellant is in the following terms:

"She said after March this happened again, **from April to August and it would happen twice a week**. She told you these incidents occurred in Santa Cruz, and she told you that it continued to happen even when they left and went to Siparia. And

she said the last time it happened was in May of 2002, and it only stopped when she ran away from Cemetary Street, Siparia where they were living at the time."

23. It was conceded that the content of the evidence fell outside the timeframe of the offences with which the appellant was charged. The question therefore is whether it amounted to background or explanatory information "without the totality of which the account placed before the jury would be incomplete or incomprehensible."

24. We are of the view that the evidence complained of was not background evidence. It was not admitted as part of a continual background of history relevant to the offences charged in the indictment, without which the totality of the account placed before the jury would have been incomplete or incomprehensible. The core of JR's evidence was that in the month of March the appellant had sexual intercourse with her on three occasions. Her account of what transpired in March was both complete and coherent without referring to similar incidents from April to August 2001. We note that the two references to incidents occurring after those encapsulated by the indictment were given without any details.

25. We therefore conclude that the judge erred in admitting the reference to matters of April to August 2001.

GROUND TWO – The Learned Trial Judge erred in failing to adequately direct the jury on the issue of good character.

26. Counsel for the appellant conceded that the judge correctly gave both the credibility and propensity limbs of the good character direction in accordance with the learning of **Mark Teeluck and Jason Ellis John v The State [2005] 1 WLR 2421**. He argued that notwithstanding such, the directions given were "vague, meager and meaningless" and that the trial judge ought to have gone further to impress on the minds of the jury that the appellant being a man of good character was more likely to be speaking the truth. In sum, he felt that the direction lacked potency.

27. Counsel for the state felt that the jury was adequately directed on both the propensity and credibility limbs of the good character direction.

28. In **Teeluck** (above), the Privy Council explained that the standard good character direction should have two limbs:

> "... the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged."

29. In the earlier landmark case of **R v. Vye [1993] 1 W.L.R. 471** the English Court of Appeal helpfully explained the law in relation to good character directions. At page 447, Lord Taylor of Gosforth CJ stated that "it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances". He explained further that the Court of Appeal will be slow to criticize any remarks made by the judge, provided that the judge indicated to the jury the two respects in which good character may be relevant, namely, credibility and propensity. This demonstrates that there are no precise words a trial judge must use when giving a direction on good character. What is of paramount importance is that, in the required cases, the jury is directed as to both limbs.

30. The judge directed the jury as follows:

> "Now you have heard that the accused man is a man of no previous convictions, and in law we refer to that as a man of good character, where you have no previous conviction. Of course, good character cannot by itself provide a defence to a criminal charge, but it is evidence which you shuld take into account in his favour in the following ways: in the first place, the defendant has given evidence, and as with any person of good character it could support his credibility. This means that it's a factor which you should take into account when deciding whether you believe his evidence or not.
>
> In the second place, the fact that he is of good character may mean that he is less likely, than otherwise might be the casem to commit this crime now. I have said these

are matters to which you should have regard in the defendant favour, but it is for you to decide what weight you place, if any, on those matters, and in doing so you are entitled to take into account, Madam Foreman, Ladies and Gentlemen of the Jury, in doing so you are entitled to take into account everything you have heard about the defendant in the witness-stand and on the evidence that is before you."

31. The above direction encapsulated both limbs of the good character direction and we find nothing in the circumstances of this case which warranted any additional directions. The judge in his summing-up directed the jury that the appellant's good character supported his credibility and there is nothing more that he could have said. It would have been made clear to the jury that they were to consider both the credibility of the witnesses for the prosecution as well as that of the appellant and there was nothing further that the judge could have directed them on without compromising his impartiality.

32. We therefore find no merit in this ground of appeal.

GROUND THREE – The Learned Trial Judge erred in directing the jury on the defence of alibi.

33. Counsel for the appellant was concerned with the impact that the use of phrase "defence of alibi" would have had on minds of the jury. He contended specifically that the jury would have mistakenly believed that the appellant had an evidential burden of proof to discharge in proving his alibi.

34. In response, counsel for State argued that the trial judge properly and adequately directed the jury on the law as it applied to alibi. Particularly, she noted that the trial judge indicated that there was no burden on the appellant to prove that he was elsewhere and in effect directed the jury that it is the prosecution who has to disprove the alibi.

35. Counsel for the Appellant criticized the following direction given by the judge:

> "...I had outlined what the State is saying and juxtaposed it with what the defence is saying. Now, in couching his defence in the way that he has done, the accused, what the accused is saying in addition to denying that he had committed these offences, he has also **raised the defence of alibi**. The defendant is therefore saying to you that he was not at the scene of the crime when it was committed."

36. We are of the view that the directions given in the paragraph immediately following the above nullified any alleged misapprehension or confusion which may have been caused by the phrase "defence of alibi". The judge said:

> "Now, as the Prosection have to prove – sorry, as **the Prosecution has to disprove his alibi – it is for the Prosecution to disprove his alibi** and **the accused does not have to prove to you that he was elsewhere at the time**. **On the contrary, it is for the Prosecution to disprove the alibi**..."

37. Similarly, at page 32, despite the legal consequences connoted by the use of the word "defence", the judge clearly and immediately explained to the jury that no burden lay on the appellant to prove his alibi. The judge stated:

> "The accused's defence in this case is a blanket denial, first of all, and then he has raised **the defence of alibi**. Arising from those defences, therefore what he is effectively contending is that the virtual complainant, [JR] has come into the witness-box and has lied to you about him, that is what he is telling you. **Now the accused does not have to prove that the State's witnesses have not been truthful. The State alone bears the burden of proofing *[sic]* to you so that you feel sure** that the witnesses for the State, and in this case, especially [JR] has given a truthful and accurate account, and that she and the other witnesses are credible and reliable witnesses."

38. We are of the view that no harm accrued to the appellant by the approach taken by the judge. Accordingly, this ground fails.

GROUND FOUR – The summing-up of the Learned Trial Judge was unbalanced.

39. Counsel for the appellant failed to particularize the way in which the summation was unbalanced in both his written and oral submissions.

40. Counsel for the respondent argued that the judge did not venture beyond the "proper bounds of judicial comment". She pointed out that the judge discussed fully the case for the appellant as well as the cross-examination of the virtual complainant, thereby dealing with both sides of the matter. Counsel further noted that the judge repeatedly indicated to the jury that they alone were the finders of fact and as such were entitle to disregard any comments he made on the evidence.

41. Without more, we are unable to find any merit in the above ground. Suffice it to say that in our view the judge fairly and adequately addressed the issues of fact by reminding the jury of the evidence on both sides and inviting them to draw the appropriate inferences.

42. This ground fails.

GROUND FIVE – The Learned Trial Judge failed to point out (or did not point out substantially or adequately) the inconsistencies between the prosecution witnesses.

43. Counsel for the appellant submitted that the verdict was unreasonable due to the failure of the judge to point out certain inconsistencies between the evidence of JR and AB which related to their creditability. In respect of this ground, counsel for the appellant complained that the judge failed to point out the following important inconsistencies:

a. Whether only JB was taking lessons in school;
b. If and how often the appellant was absent from the home;
c. Whether Bob gave JB the Nike earring;
d. Whether JB often skipped school while she attended La Pastora Government Secondary;

e. What were the goings and comings of the accused during March 2001.

Counsel complained that because the judge failed to point out the above inconsistencies, the jury was deprived of any strong warning about how to treat with them. As such, this had the cumulative effect of causing the jury to return a verdict on unreliable evidence resulting thereby in a miscarriage of justice.

44. The State submits that the judge directed the jury to analyse the evidence between JR and her mother AB. She contended that not only did the judge give the jury the proper directions as to how to deal with inconsistencies generally but he also specifically drew their attention to the inconsistencies between the evidence of JR and AB. In this regard, Counsel drew the Court's attention to the judge's treatment of the following issues:

a. whether there one window or two windows from which one could see outside;
b. whether there was any occasion on which the appellant was alone with the virtual complainant;
c. AB's recollection of the details of the appellant's movement during March 2001.

The State submitted that taken in its totality the judge's directions were adequate and no miscarriage of justice was suffered.

45. There is no duty on a judge to highlight every single inconsistency in the prosecution case: It is the duty of the judge to advise the jury as to the significance of the evidence and as such he is required only to direct the jury on those inconsistencies which are most relevant to the matter and critical to their fact-finding process.

46. In our view, the judge in this matter discussed with the jury those inconsistencies which were germane to the charges against the appellant. Indeed, from very early in the summation the judge pointed out the irrelevance of the issue of the Nike earring and warned the jury not to speculate about to the circumstances in which the virtual complainant obtained the earring.

APPLICATION OF PROVISO

47. **Section 44** of the **Supreme Court of Judicature Act Ch. 4:01**, provides that the Court of Appeal may "notwithstanding that they are of the 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 had actually occurred". Having found on Ground 1 that the judge erred by admitting inadmissible evidence, we now consider whether such an error led to a miscarriage of justice.

48. There were three separate counts in the indictment falling within the month of March 2001. This would have clearly brought to the jury's attention that this was not a one-off incident and that the appellant was inclined to commit offences of this kind. It is the State's Case that he used his relationship, proximity and opportunity to commit such offences upon this particular virtual complainant.

49. While it is indeed unfortunate that this general unspecified evidence came to the jury's attention that he had repeated the acts after the dates highlighted in the indictment, we do not think that it can be said that this evidence caused the appellant such prejudice as would result in a miscarriage of justice. If on the evidence the jury was uncertain about his commission of the acts alleged in the indictment, two passing references to subsequent acts, without giving details, could hardly be said to have changed that position.

50. Although we find that the evidence ought not to have been admitted, we conclude that such admissions did not result in a miscarriage of justice and we hereby apply the proviso. In the result, we dismiss the appeal and affirm the convictions and sentences.

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P. Weekes
Justice of Appeal

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A. Yorke-Soo Hon
Justice of Appeal

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R. Narine
Justice of Appeal