**REPUBLIC OF TRINIDAD AND TOBAGO**

**Cr. App. No. 18/2005**

**IN THE COURT OF APPEAL**

**BETWEEN**

**GORDON CUNNINGHAM**

**APPELLANT**

**AND**

**THE STATE**

**RESPONDENT**

**PANEL:**

R. Hamel-Smith, CJ, (Ag.)
W. Kangaloo, J.A.
P. Weekes, J.A

**APPEARENCES**

Messrs. T. Guerra S.C. and R. Clark-Wills for the Appellant
Ms. J. Honoré-Paul and Mr. R. Gaspard for the State

**DATE OF DELIVERY: October 27th 2006**

**JUDGMENT**

Delivered by P. Weekes, JA

On August 29, 2005 at the Port of Spain Assizes before a judge and jury the appellant was convicted and sentenced on three counts of sexual intercourse with a female under the age of fourteen. Each count related to a 12 year old girl, G.F. The appellant was sentenced to 10 years hard labour on each count with the sentences to run concurrently. He appeals against convictions and sentences.

The appellant lived with his wife who was the aunt of G.F. It was the case for the Prosecution that after school each day G.F. would go to the home of either her grandmother or aunt and that on three occasions, first, an unspecified date in October 1999 and then twice on unspecified dates in November 1999, the appellant, at the grandmother's and at his own home, forced himself upon G.F. and had sexual intercourse with her.

For the defence the appellant denied ever having sexual intercourse with G.F and he raised an alibi for each occasion.

Six grounds of appeal have been advanced. We will deal with them sequentially but for Ground Three, which will be addressed last.

**Ground 1**

***The learned trial judge exercised his discretion wrongly when he failed to uphold the submission of no case to answer made on the appellant's behalf.***

The ground is founded on the basis that the G.F.'s evidence was uncorroborated and fraught with admissions of lies on her part. Counsel for the appellant drew the Court's attention to what he found to be the most egregious of these inconsistencies and submitted that they rendered the evidence of the G.F. inherently weak and unreliable and

that in the circumstances the trial judge, in order to prevent a miscarriage of justice, ought to have withdrawn the case from the jury.

Counsel relied on the authority of ***Sanjit Chaitlal (1985)30 W1R 295***, in which our Court of Appeal endorsed the test set out by Lord Parker CJ, in his ***Practice Note [1962] 1 Act E R 448***. He said ***"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it…. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."***

Counsel for the State conceded that there were several inconsistencies in the evidence of G.F. but submitted that the critical issue was whether they rendered the evidence manifestly unreliable. He argued that they did not have that effect. He observed that given the age of G.F. at the time of the events and at the time she gave evidence, the inconsistencies were matters that a tribunal properly directed could and should consider on the issue of her reliability and credibility and further that if it were found that she was mistaken on any issue whether such mistakes were material was a question properly left to the consideration of the jury.

We are of the view that the inconsistencies identified in G.F.'s evidence were not of such quality and/or nature to make the issues of her reliability and credibility beyond resolution. They were matters that jurors, as mature members of our society, are well equipped to comprehend, analyse and resolve given the totality of the witness's evidence. Judges must be careful not to usurp the function of the jury in the fact-finding exercise and the matters raised in this ground were such that the judge considering the no-case

submission applied his good sense. We find that in the circumstances there was no miscarriage of justice in allowing the case to go to the jury.

This ground cannot succeed.

**Ground 2**

***The trial judge erred when having left the issue of corroboration to the jury he did not go further the to tell them what in law constituted corroboration.***

Even though the trial judge had told the jury that there was no corroboration or support for G.F.'s allegations, counsel for the appellant submitted that he should have gone on to give them the classic definition of corroboration. Counsel conceded that to define corroboration after telling the jury that there was none might confuse them but he argued that the fact that G.F.'s evidence was riddled with inconsistencies made it incumbent on the trial judge to define corroboration and then direct the jury that not only was there no support for her evidence but that its shortcomings detracted from it.

The ***Administration of Justice Miscellaneous Provisions Act No. 28 of 1996*** abolished the obligation on the trial judge to give a corroboration warning and made the warning discretionary. The form of the warning is also a matter for the trial judge.

In the instant case the trial judge found it necessary to give a direction on corroboration and tailored his direction to suit the case before him. He directed the jury as follows;

> "*Members of the Jury, the Prosecution is depending solely on the evidence of G.F. in order to prove the essential ingredient of sexual intercourse in the three charges of sexual intercourse with a female under 14 years of age before you. The law provides that I must warn you of the special need for caution before you act on G.F.'s evidence. It is not supported by any other evidence. In these circumstances, it is dangerous to convict the accused on her unsupported evidence. Therefore, you will approach her evidence with caution. You must carefully weigh, scrutinize and assess her evidence within the context of the heavy burden that rests on the Prosecution to make you sure of the guilt of the accused. The Prosecution must make sure of the truthfulness of G.F.*

We can find no valid complaint in the exercise of the judge's discretion. The jury were made aware that the prosecution's evidence stood alone and were alerted to the standard they needed to apply in examining and analysing it. No useful purpose would have been served by defining corroboration in this case, rather it may well have served to distract and confuse the jurors.

The issue of corroboration was quite separate and distinct from that of the witness's credibility and having dealt with them separately in his summation there was no duty on the trial judge to combine them in the manner suggested by counsel. On the issue of corroboration it would not have been at all helpful to direct the jurors that her inconsistencies detracted from corroboration, especially in the light of the jurors having already been told most clearly that her evidence was unsupported.

The ground of appeal cannot succeed.

**Ground 4**

***The appellant was not given the opportunity to put his defence fully.***

The gist of this complaint is that the appellant had a witness that he proposed to call in his defence but that the witness was not called.

Counsel for the appellant, who was counsel, senior counsel, at trial submitted that the defence was not allowed to call its witness who would have supported the appellant's alibi. He said that at the time the witness was to be called he (the witness) was unavailable and the defence sought an adjournment. After perusing a document under the hand of the proposed witness, the trial judge opined that the defence would not be prejudiced in the absence of this witness. The document purported to be a timetable of classes at an educational institution showing the classes in which the appellant was enrolled. It was the appellant's defence that at the times of the alleged offences he was at classes and it was not challenged by the prosecution that he was registered for and attended classes during the relevant period. The document was not an attendance register

purporting to show when the appellant actually attended classes. There was no proof from the proposed witness nor any other indication to the Court that the witness had personal knowledge of the appellant's attendance. The trial judge did not refuse the application for adjournment, he just expressed his opinion on the utility of the timetable. Counsel did not pursue an application for adjournment.

Counsel for the appellant told us that even though he had spoken to the proposed witness and expected that the witness would have confirmed from his personal knowledge hours of arrival and departure from the school by the appellant, thereby supporting his alibi, he did not persist in an application for adjournment. The State responded that counsel for the appellant made a decision not to pursue his application for adjournment – a decision he made having full knowledge of all the pertinent circumstances. The trial judge never ruled that the witness could not be called. The State relied on the case of ***Gautam [1988] Crim. L. R. 109*** and submitted that counsel's decision, even if it later appears to have been mistaken or unwise, is not to be regarded, generally speaking, as a proper ground of appeal. He also argued that without a proof from the proposed witness this court could not find that the appellant had been prejudiced. Finally, counsel for the State observed that the indictment was framed in such a way that in respect of all three counts the dates were stated to be "during the period" and that the proposed witness would have had to be in a position to speak to all working and/or class dates between 30th September to 1st December 1999.

We are of the opinion that senior counsel, being seized of all pertinent information took a deliberate course in deciding not to pursue the application for adjournment. The trial judge's comment was appropriate given what was before him and it was for trial counsel, if he knew that there was more information which could be to the benefit of the appellant, to exercise his discretion whether to persist in his application. No complaint can legitimately be made of the trial judge's comment on this issue.

The ground of appeal fails.

**Ground 5**

***The trial judge's comments were calculated to give the impression that the only possible candidate for sexual intercourse with the virtual complainant was the accused.***

Counsel for the appellant complained that the trial judge should have told the jury specifically that the fact that G.F. was not a virgin did not go to the culpability of the appellant but only to the fact that she might have been sexually active. He argued that the trial judge should have told the jury that G.F. might have been sexually active with persons other than the appellant and by not so doing he gave the jury the impression that the only explicable reason for her hymen not being intact was sexual intercourse with the appellant.

The State countered that all the trial judge did was to assist the jury with how they should treat with the expert medical evidence. In repeating the doctor's evidence the trial judge told the jury that "the hymen was not intact by reason of a blunt instrument most likely to be sexual intercourse". The State pointed out that the judge told the jury that they could accept or reject this evidence, that it related to only part of the case and that in reaching its verdict the jury must have regard to all the evidence.

This court fails to see how the trial judge's repetition of the expert's evidence could or did suggest to the jury that the only possible reason for the absent hymen was intercourse with the appellant. First, there was no categorical statement that sexual intercourse was the only possible explanation for the absence of the hymen even thought it was the most likely one. Secondly, for the judge to raise the issue of intercourse with other persons would have been speculative and irrelevant since there was no evidence of it and in any event it would not settle the issue of whether the appellant had had intercourse with G.F. as alleged. It would have been inadvisable, for the judge to so direct.

This ground of appeal too fails.

**Ground 6**

***The Prosecutor used emotive language e.g. "hard back man" which was calculated to cause prejudice to the appellant in a manner not supported by the evidence.***

Counsel for the State at trial, in her address to the jury, referred to the appellant as a "hard back man". Counsel for the appellant complains that this term was not suggested or given in evidence by any witness and that it was based purely on the appellant's appearance and employed to engender emotional prejudice against the appellant.

The state responded that to the extent that the appellant was an adult male he was indeed, from the evidence, a "hard back man". Counsel argued that the term is a colloquial one commonly used and understood in our society to mean an adult male. He said that the use of the term was not so gross, prejudicial or irredeemable to be condemned as unfair, nor could its use imperil the safeness of this conviction. Counsel for the State relied on the case of ***Randall (Berry) v R (2002) 60 W1R, 103***.

It is clear that prosecuting counsel should always conduct him/herself as a minister of justice and this would include during closing addresses. It is further the duty of the trial judge to control the proceeding and enforce proper standards of behaviour by counsel. It is all a matter of degree. Counsel may comment forcefully and even colourfully where appropriate but must be careful never to cross the line and act in a manner calculated to or capable of appealing to the emotions of the jury. The vernacular and colloquialism have their place in addressing a jury but their use must never result in unfair prejudice against an accused. Where counsel seems to be straying into forbidden territory the trial judge must put an immediate stop to it and, where necessary, attempt to ameliorate any wrong in his summation.

While the term "hard back man" does have a particular connotation it was not entirely inappropriate in the context of the prosecution's case, that the appellant, an adult male had knowingly had sexually intercourse with an under age female. It might have been preferable perhaps that counsel not use the expression but its use cannot be said to have

been so reprehensible that it was a departure from good practice or to have been short of the proper standards of behaviour. Counsel on both sides at trial would be well advised to weigh carefully their comments in addresses to the jury.

We do not find that the appellant was prejudiced by the use of this term so that his trial was unfair and his conviction unsafe.

This ground of appeal cannot succeed.

**Ground 3**

***The judge incorrectly exercised his discretion in allowing the prosecutor to re-examine G.F. about a statement she had given during the course of the police investigation into her report.***

At trial G.F. had testified about the three incidents of October and November 1999. She had also spoken about communicating with a family member on the 5th December 1999 and subsequently giving a statement to a police officer on the 16th December 1999. She recounted that on the 20th December 1999 she was examined by a medical doctor and on that day gave a further statement.

Under cross-examination she repeatedly said that before the 20th December she had never complained of the appellant having sexual intercourse with her, that on the 16th December she did not tell the police "what went on" and that the allegation she had made before the 20th was that the appellant had "fingered" her. According to G.F. the first time she complained of the appellant having sexual intercourse with her was after she had been examined by the doctor on 20th December. G. F. never expressed any difficulty in remembering what she had told the police and when.

In re-examination after having the witness testify that her memory was fresher at the time she gave her statement the prosecutor sought to have G.F. shown her statement of the 16th December 1999. The judge allowed this course and after reading her statement, G.F.

testified that she had indeed made the complaint about sexual intercourse with the appellant on the 16th December 1999.

The judge allowed the witness to have regard to her statement on the authority of the case of ***R v Ali [2004] 1 Cr. App. R. 39***, concluding that the court had a residual discretion to allow re-examination on a previous statement where it was necessary to avoid the jury being positively misled as to the existence or the terms of an earlier statement.

In our view the authority of the ***R v Ali*** was misapplied against the background of the evidence in this case. There was no inconsistency in G.F's evidence on the issue of when she had first complained of sexual intercourse with the appellant, neither between her examination-in-chief and cross-examination nor within the cross-examination. She had not spoken of the matter under examination-in-chief at all and under cross-examination she repeatedly and unequivocally answered questions on that issue. One could well understand the frustration of the Prosecutor who held in his hand proof that the complaint had been first made on a date prior to that given by G.F. The issue was of critical importance in the context of the case for the defence, which was that of fabrication. Credibility was the main issue for the jury's consideration and were it found that G.F. had not complained of sexual intercourse until after she was examined by the doctor that would certainly have been an important factor in the jury's determination on her credibility as a whole.

However, the case of ***R v Ali*** is applicable only in a limited context. It does not justify the reception of all or any relevant proof in the hands of the re-examiner. ***R v Ali*** addresses the question of re-examination to prove consistency. It recites the well established exceptions to the rule against admissibility of previous consistent statements (none of which applies to the instant facts) and then goes on to provide "a further residual discretion in a judge **to permit re-examination to show consistency** when there was something either in the nature of the inconsistent statement, or in the use made of it by the cross-examiner, to enable such evidence to be given. It was that residual discretion, necessary in the interests of justice, which permitted, and indeed required, close

examination of the position in relation to a suggestion of recent fabrication, as well as the need in all cases to ensure that, as a result of a question put in cross-examination, the jury was not positively mislead as to the existence of some fact or the terms of an earlier statement." The authority warns that corrections under the residual discretion should not be permitted where the Prosecutor was seeking, not to correct an evidential position, which would otherwise be erroneous, or misleading, but to add to the evidence in order to establish consistency in a manner prohibited by the general rule.

In the instant case the thrust of the re-examination was not to show consistency in the witness as far as her evidence was concerned. On the evidence she had been perfectly consistent. The fact that she was mistaken did not arise out of the evidence but from the peculiar knowledge of the Prosecutor based on the statement of which he had sight. Unfortunate as it may seem, the law provides no exception to the settled rules of evidence that would allow G.F. to refresh her memory under re-examination. The facts of this case cannot be fitted under the principles of ***R v Ali***.

We find that the judge erroneously interpreted the authority of ***R v Ali*** and so exercised his discretion incorrectly.

Although not cited by either counsel, the Court also had regard to the case of ***R. v. Sutton 94 Cr. App R. 70*** which dealt with a prosecution witness being allowed to refresh his memory under re-examination. In ***Sutton***, shortly after certain pertinent events, a prosecution witness had given a statement to the police. Under examination and cross-examination he gave answers, which were contradictory and/or inconsistent with the contents of his statement. The witness, (as in the instant case), did not say in the course of his evidence that he had any difficulty in remembering details of what he was being asked.

The Court of Appeal held that provided that the proper basis is laid a witness may be asked to refresh his memory under re-examination notwithstanding his failure to admit any lapse therein and quoted with approval the dictum in ***Richardson (1971) 55 Cr App***

***R 244*** that a court should not deprive itself by artificial rules of practice of its best chance of learning the truth. The court found that there was no difference in principle between a witness departing from his statement on a material point of detail and a witness omitting such a point.

While this Court endorses the view in ***Richardson*** it is also mindful that rules of evidence cannot be conveniently thrown to the wind in the pursuit of truth. Rules of evidence, especially exclusionary ones, serve a purpose and that purpose and intent must be examined before the rules are sidelined.

The term "refreshing memory" used in the context of the rules of evidence refers to a witness having regard to a document recorded in a timely fashion in order to bring back to mind details of a particular event/s which pre-date the document. It is the fact that the recording was made close to the event/s when details were fresh in the witness's memory that gives potency to the rule. The term "refreshing memory" is often used loosely in courts to mean reminding a witness of any matter for example, "on what date did you give your statement to the police", when the witness is using the statement, not to bring to mind the details of an event which pre-dates the statement, but to recall some other matter concerning the statement itself. Where a witness is asked whether he said so-and-so in his statement to the police and refers to the statement to remind himself whether he did that is not refreshing memory in its strict sense.

In the instant case G.F. was not trying to recall events pre-dating her statement when she looked at it. She was simply bringing to mind what she had or had not said in the making of the statement. On its facts the case of ***Sutton*** is therefore distinguishable.

There is however another consideration on this issue. The case for the Defence was an alibi and that G.F. had, for some unknown reason fabricated these allegations against the appellant. The clear and single intent of the line of cross-examination at issue was to suggest that the fact that G.F. had not complained of sexual intercourse at the first opportunity i.e. her first statement to the police, supported the defence case that the

allegations were fabricated. The credibility of G.F. was an issue of vital importance and the timing of her complaint would have been a key factor in determining it. The question of what she had reported to the police, and when, arose during cross-examination and it was clear from the statement of the 16th in the hand of the prosecution that G.F had made an error on a material issue.

While this is not a case of refreshing memory, there is in ***R v Richardson*** yet another expression of the principle that it is in the interest of justice that courts be careful not to deprive themselves by artificial rules of practice of the best chance of learning the truth. In this case there was reliable evidence within the statement that G.F. had in fact complained of sexual intercourse with the appellant the first time she made her report and it was incumbent on the prosecution through re-examination to bring this out as it was, if not determinative, at least persuasive, on the issue of her credibility, especially in light of the cross-examination by the defence. This was akin to rebuttal and guidance can be gleaned from the principles and learning on that issue. The ex improviso principle of rebuttal is applied by the Court recognising that the prosecution is expected to act reasonably to suggestions put in cross-examination to its witnesses. The relevance of what G.F. said to the police in her statements and the timing thereof could not reasonably be foreseen by the prosecution in the context in which it arose.

Where a matter arises ex improviso it is a matter for the trial judge's discretion whether rebuttal evidence can be led either in the re examination or after the case for the defence is closed. See ***R v Frost (1839) 9 C. & P. 129,*** 159. Even where the prosecution, as in this case, had previous knowledge of the rebuttal evidence, if its relevance could not be seen or if it could have been regarded as marginal before the cross-examination the trial judge has a discretion to admit it.

Of course, the trial judge's discretion is limited and he should not allow rebuttal evidence where the evidence was clearly relevant (not marginally, minimally or doubtfully relevant) and within the knowledge for the prosecution when it presented its case see ***R v Levy and Tait 50 Cr. App R 198***. Applying this reasoning to the instant case we find that

the trial judge, while applying an incorrect principle, was correct in allowing the witness to refer to her statement, in recalling what she had indeed said in that statement. He acted in the interest of justice and fairness.

The question that now arises is whether the trial judge's application of the wrong principle resulted in a miscarriage of justice. We find that it did not. The evidence was in fact relevant and admissible in the context of the unfolding evidence. In the circumstances the trial judge's error did not put the appellant at any disadvantage nor did it result in any prejudice to him.

In the circumstances we find it appropriate to apply the proviso.

The appeals are dismissed and convictions and sentences affirmed. The sentences are to begin from date of conviction.

R. Hamel-Smith
Chief Justice (Ag.)

W. Kangaloo
Justice of Appeal

P. Weekes
Justice of Appeal