In the Court of Appeal of St Helena

Citation: SHCA 1/2023

Criminal

In the matter of an appeal against conviction

Appellant

Mike Caswell

Judgment on appeal against conviction

Heard on 17th July 2023

Before: Sir John Saunders, President; HHJ R Mayo, Member; and HHJ L Drummond, Member

1. The Appellant was convicted in the Supreme Court of St Helena on 7th March 2023 after a jury trial of one offence of assault of a child under 13 by penetration and one offence of rape of a child under 13.

2. The Appellant is entitled to appeal against conviction without the leave of the Court but we would have granted leave if it had been required as in our judgment there are arguable grounds for appeal.

3. There must be no report of this case which would enable the complainant to be identified.

4. We shall refer to the complainant as X. X was born on 20th January 2009. The Appellant was in the position of a stepfather to her. Her mother was his partner but they were not married.

5. In May 2022 X made disclosures to the police that she had been sexually abused by a number of people including the Appellant and his co-defendant in the trial Gavin Peters. As the jury were told in admissions placed before them two men who knew the family pleaded guilty to offences of raping X. Her mother AB pleaded guilty to one offence of wilfully exposing X to unnecessary

suffering which related to the sexual offending. Also the jury who convicted the Appellant convicted his co-defendant Gavin Peters of two offences of sexual activity with a child on the basis of allegations made by X.

6. The prosecution case was that the two charges brought against the Appellant took place in X's bedroom in the home where she lived with her mother and the Appellant.

7. On the first occasion, on the pretext of kissing X goodnight, the prosecution case was that the Appellant inserted his finger in her vagina. She said that the assault stopped when she slapped him in the face. On the second occasion, after a party in the house, while X was asleep she said the Appellant got into her bed and started having sexual intercourse with her until she woke up.

8. The defence case at trial was that the sexual assaults never happened. It follows that this at least raised the possible defence that the allegations were fabricated by X. In support of that suggestion the defence argued that she had several years earlier in 2017 made false allegations of sexual abuse against the co-defendant Gavin Peters and another person.

9. Ground 1 of Appeal: This relates to the directions given by the Judge in relation to the earlier complaint of sexual abuse made by the complainant in 2017 which was not pursued to trial.

10. We were told at the hearing of the appeal that prosecuting counsel first became aware of a previous complaint having been made by X when he arrived on the Island about a week before the trial started. As he correctly considered the evidence of the previous complaint was capable of being relevant evidence at this trial, he arranged for the evidence to be disclosed to the two Defendants. By agreement the material parts of that evidence were reduced to agreed facts which were put before the jury in the course of the trial.

11. The only evidence about these allegations which dated back to 2017 at the trial was contained in admissions 17 to 24. The Appellant argued at trial that the previous allegations were false on the basis of those admissions and that they demonstrated that X was a person capable of making false complaints. Accordingly, it was argued, the jury should not rely on her evidence in the current trial. The prosecution argued that, while there may be inconsistencies in what the complainant said in 2017, bearing in mind her age, there was no reason to believe the allegations weren't true, or if they weren't true that was

not a good reason on the facts of the instant case for not believing her account as given in her 2022 ABE interviews.

12. As the Appellant's case and that of his co-defendant was that X had made up the previous allegations made in 2017, it is our view that that should have been put to X in cross examination. In order to do that the defence would have required the leave of the trial judge by virtue of s. 41 of the Youth Justice and Criminal Evidence Act 1999 which provides that no question may be asked in cross-examination by or on behalf of any accused at the trial about any sexual behaviour of the complainant without the leave of the Judge. While the defence case was that the 2017 allegations never happened, that was not the prosecution case, and was not the only conclusion that the jury could have reached, so leave was required. It is likely that leave would have been given in this case but having to make an application would have had the benefit of letting the Judge know what was going on.

13. In the event it was never put to X by the Appellant's counsel that she had made up these previous allegations in 2017. The reason for that was that as a child of only 13 it was important that the cross examination should be done in a way which caused her the minimum distress. We agree with that proposition but in our view it should and could have been put by defence counsel. If it is going to be alleged that a witness has invented an allegation they need to be given the opportunity to answer it. Defence counsel put to X that the allegations the subject of this indictment had never happened and there is no reason why he should not have done the same in relation to these allegations. For the duty of the defence to put its case to a vulnerable witness see RK [2018] EWCA Crim 603.

14. What was agreed in admissions 17 to 24 was being used by the defence as bad character evidence of X. Bad character evidence can be agreed by the parties, as it was in this case, but in our view it is essential that the Judge is told what is going before the jury as bad character evidence and for what purpose. This enables the Judge to focus during the trial on the legal direction that he needs to give the jury about it.

15. The Judge in his legal directions directed the jury that this was evidence which went to the credibility of X but that they should not use it as evidence against Gavin Peters.

16. The complaint made by the Appellant is that the direction given by the Judge as to this bad character evidence was inadequate. In the updated bundle we have a transcript of the Judge's directions on the law. These were discussed with counsel by the Judge before speeches and no complaint was made about the directions by defence counsel at the time. What the Judge said at p.263 under the general heading 'character' was 'You have also heard that in 2017 (X) made a complaint of sexual misconduct against Mr. Peters. That has been put before you to assist you in assessing X's credibility, it is not there for you to decide whether he is guilty or otherwise of the allegations made in 2017. There are inconsistencies within the account made in 2017 in that it changes over time and there is an inconsistency with X's assertion to you that the first time she had sex was with Mr. C. (the appellant)'

17. The purpose of letting Counsel consider directions of law before they are given is for them to assist the Judge in getting the directions correct and not miss anything out which should be said. If Counsel consider that a direction is inadequate this gives them the opportunity to ask for further directions to be given. Counsel on behalf of the Appellant did not complain about this direction at the time. We are satisfied that had it occurred to Mr. Palfrey (Counsel for the Appellant who also represented him at trial) at the time that this direction was inadequate, he would have said so. That does not mean that, if the direction was inadequate, failure by defence counsel to mention it would estop the Appellant from taking the point now. What it does mean is that Counsel arguing the Appellant's case at trial did not consider then that this issue had not been sufficiently dealt with by the Judge.

18. Having considered this matter, we take the view that some further analysis of the potential relevance of this evidence could have been made by the Judge. Nevertheless we are satisfied that, with the benefit of the direction that was given, and the arguments put before them by counsel, the jury could not have failed to realise the true significance of this evidence and the reason why it was being adduced. The Judge directed the jury that the evidence went to the credibility of X. That was correct. He then went on to direct the jury not to use the 2017 allegations to support the prosecution case against the co-defendant. In our judgment the direction given within the context of this trial was sufficient and we have no reason to doubt that the jury used this evidence in the correct way. Mr. Palfrey did argue that as the jury were told that they couldn't use the evidence against the co-defendant that they might have used it against the Appellant. But the defence purpose in leading this evidence was

to question the credibility and reliability of the complainant. The evidence was not relied upon by the crown to support the crown case against the appellant and it is difficult to see how it could have been. We do not consider that that point has any merit.

19. Ground 2 Having been provided with a transcript of the prosecution's closing speech as part of the preparation for the hearing for this appeal, Mr. Palfrey complains that prosecuting counsel, in seeking to support the possible truthfulness of the previous allegation, went beyond what would have been permissible comment by speculating as to why certain inconsistencies may have arisen in a way which was not supported by any evidence. Further it is said that in commenting on the evidence contained in the admission relating to the medical evidence, he qualified that evidence in a way which was not supported by the evidence.

20. The proper way that this complaint should have been dealt with, if it had concerned the defence at the time, would have been for the matter to be raised with the Judge who would have given an appropriate direction to the jury telling them that it is not the function of counsel to give evidence. This did not happen. It obviously did not strike counsel at the time as being important. We also do not consider that it was important in the context of the case as a whole and do not consider that it is a matter which could have affected the verdict brought in by the jury.

21. Ground 3: the Judge erred in admitting the evidence of Santara Peters. A number of witnesses at the trial gave evidence that X had complained to them of sexual abuse by the Appellant. One of those was Santara Peters who said that she overheard X telling other people in April 2022 that the Appellant had had sex with her. Objection was taken to the admission of that evidence. It was admitted by the Judge as evidence of recent complaint admissible under s.120(4) to (7) of the Criminal Justice Act 2003. Since the trial it has been agreed by the Appellant and the Respondent to this appeal, that it could not lawfully be admitted under those subsections of s. 120. The relevant parts of s.120 (4) read as follows: 'A previous statement by a witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if

(a) any of the following three conditions is satisfied, and

(b) while giving evidence the witness indicates that to the best of his belief he made the statement and that to the best of his belief it states the truth.

22. It is accepted that (b) was not met in this case. As has been pointed out in a number of cases heard by the Court of Appeal Criminal Division of England and Wales there have been a number of occasions when this has happened and the Court has advised that counsel and judges need to be alert to ensuring that evidence of recent complaint is not admitted under s. 120 (4) to (7) unless that provision is met. This point was not argued at the time because it was overlooked by both Counsel.

23. While it was not their submission at trial, the Respondent prosecutor submits in answer to this ground of appeal that the complaint was nevertheless admissible under s. 120 (2) and therefore no harm has been done. It was admissible evidence which was admitted under the wrong subsection. S.120(2) reads as follows: 'if a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.' Under s. 120(2) there is no similar requirement to that found in s.120(4)(b).

24. At the hearing of the appeal the Respondent went further and suggested that if we rejected his argument on s. 120(2) we should consider whether the statement would have been admitted by the Judge under s.114(1)(d) of the Criminal Justice Act 2003 which is the sweeping up provision for hearsay evidence and allows a Judge to admit a statement even if it would be otherwise inadmissible if the Judge considers it to be in the interests of justice to admit it. While we do not say that such an exercise would never be permissible in an appeal hearing, it would need to be a very clear case before it was, as the interests of justice are primarily for the trial Judge to decide. In a situation where the trial Judge has not even had the opportunity to consider an application under s.114(1)(d) and express a view, a Court on Appeal would be reluctant to decide for itself rather than review a decision made by the Judge. As is made clear by the authorities there are a number of factors that the Judge would have to take into account which it may be difficult for a court on appeal to replicate.

25. Initially, in pursuing this argument before us, the Respondent relied on the cases of R-v-KH [2020] EWCA Crim 1363 and R-v-Cousins[2022] EWCA Crim 1664. Both courts were presided over by Singh LJ although Garnham J gave the

judgment in Cousins which relied on the previous decision in KH. At our request counsel were referred to a number of other authorities which we considered relevant. In particular we asked Counsel to consider R-v-Athwal [2009] EWCA Crim 789 a decision of a court presided over by Maurice Kay LJ and R-v-MH [2012] EWCA Crim 2725 which was presided over by Pitchford LJ and followed and applied the decision in Athwal.

26. We do not think it would be helpful to quote substantial excerpts from the different cases, but we do consider that there are principles that become clear from considering them. These are:

(i) the wording of s. 120(2) makes it clear that that subsection does not provide a route to admissibility. The route to admissibility comes from the common law.

(ii) The guiding principle for admissibility of evidence at common law is that evidence relevant to an issue in the case is admissible unless some other rule prevents it being admitted. For example evidence directed at rebutting an allegation of recent fabrication was always admissible under the common law. So, if it is suggested to a witness that they have recently invented an allegation, it is open to the opposing party to call evidence that the allegation was made to someone else before the date when it is suggested the allegation was fabricated. That evidence was admissible under the common law subject to it not being more probative than prejudicial because it was relevant to an issue in the case. At common law it was not admissible to prove the truth of what was said, it merely rebutted the assertion that it had been made up after a certain time. As it was not admissible to prove the truth of what was said it was not treated as hearsay evidence as the criminal law defines it.

(iii) The effect of s. 120(2) is to make evidence which was already admissible to prove that the statement was made, evidence of the truth of the statement.

While the common law rule always referred to ‘recent fabrication’ and s.120(2) omits the word ‘recent’, this is not a change in the law.

The analysis of Maurice Kay LJ in Athwal, which this court found the most helpful of the authorities, makes clear that the common law rule was never limited to statements which went to rebut only ‘recent’ fabrications. The suggestion made to the witness could be that the fabrication occurred a long time ago but evidence from an earlier period than that, which rebuts that suggestion of fabrication, will be admissible. The word ‘recent’ is omitted

before the word ‘fabrication’ in s.120(2) as that more accurately reflects the common law rule.

What is clear from Athwal and MH is that just because a suggestion is made by the defence that an allegation has been fabricated does not render admissible previous consistent statements made repeating the same allegation to a number of people.

In our judgment, what Maurice Kay LJ said at para 58 of his judgment is important:

“This case, and others before it, demonstrate that “recent” is an elastic description, the purpose of which is to assist in the identification of circumstances in which the traditional rule against self-corroboration, sometimes referred to as the rule against narrative, should not extend to the exclusion of a previous consistent statement where there is a rational and potentially cogent basis for its use as a tool for deciding where the truth lies. The mere fact that the witness has said substantially the same thing on a previous occasion will not generally be a sufficient basis to adduce the previous statement when the truthfulness of his evidence is put in issue. There must be something more – for example, the absence on the earlier occasion of a factor, say personal dislike, which is being advanced as a possible explanation for the falsity of his evidence in court. However, when circumstances have changed in such a way, it may not matter that they changed last week, last month or last year, provided that there is a qualitative difference in circumstances, but substantial similarity between the two accounts. There is no margin in the length of time. The touchstone is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence.”

27. With respect to the courts which decided the cases of Cousins and KH, it is difficult to see that the complaint statement in those cases would have been admissible under the common law rule as there was nothing apparent from the judgment which took the statements out of the category of simply being narrative. It seems to be assumed in those cases that once there is an allegation of fabrication, all previous consistent statements of the same complaint become admissible which is not what Maurice Kay LJ decided and was not how the common law was interpreted. In so far as the cases differ we

prefer the decision in Athwal which in any event was binding on the courts making the later decisions and was applied in MH.

28. We invited the Respondent to point us to any feature of this complaint evidence which would have rendered it admissible within the terms of para 58 of the judgment in Athwal. Counsel was unable to provide a convincing answer. We are satisfied that there was no such feature. Accordingly we are satisfied that not only was this complaint not admissible under s. 120 (4) to (7), which is the basis on which it was admitted at trial, but we have also decided that on a proper understanding of s. 120(2) it was not admissible under that subsection either. As we have already indicated we do not consider in this case that it would be right for us to second guess what would have been the view taken by the Judge if an application had been made under s.114(1)(d).

29. The learned Judge in his legal directions dealt with 'complaint' evidence from two other witnesses. But he did not refer to the 'complaint' evidence of Santara Peters at all and in his summary of the evidence it was only given a brief reference.

30. Ground 4: This relates to evidence given at the trial by Shaun Peters. He recounted that he had been present with the Appellant on two occasions at the Appellant's house, where the Appellant lived with X's mother, with two other men when it was suggested to him that he should go with X, which he understood to mean have sexual activity with her. He was 20 at the time and she would have been younger than 13. In evidence in chief, his evidence was that all the other three men had made this suggestion to him. In cross examination it was suggested to Shaun Peters that the Appellant hadn't been involved in the discussion. Shaun Peters agreed with this but said that the Appellant had been there and he had laughed when the suggestion was made.

31. There had been several applications made by the Appellant to exclude this evidence. First it was asserted on his behalf that this was bad character evidence not only of the Appellant's bad character but also the other two men who were said to have participated in the conversation. The Judge having heard submissions ruled that the evidence was not bad character evidence by virtue of s. 98 of the Criminal Justice Act 2003 as it had to do with the alleged facts of the offence with which the Appellant was charged. The Judge admitted the evidence on the basis that it demonstrated that the Appellant had a sexual interest in X. In our judgment it was open on the evidence for the Judge to reach that conclusion. For a person in the position of a stepfather to be

encouraging a grown man to have sex with his step daughter when she was under 13 is capable of supporting the interpretation that he was seeing her as a sex object. That would be the position whether the evidence was that he said something to that effect or that he laughed when the suggestion was made. In our judgment the evidence was capable of that interpretation.

32. A further attempt was made on the Appellant's behalf to exclude the evidence by inviting the Judge to exercise his power to exclude it on the basis it was unfair to allow the prosecution to rely on it. That application was made under s.67 of the Police and Criminal Evidence Ordinance 2003 which is the equivalent provision to s. 78 of PACE 1984 in England and Wales. The Judge having considered that submission made a written ruling which is in the appeal bundle. Having considered the detail of the ruling we are satisfied that the Judge was entitled to reach the conclusion not to exclude the evidence for the reasons he gives and accordingly we reject this ground of appeal. The Judge indicated in his ruling how he intended to direct the jury as to the proper approach to this evidence which accords with the direction he gave. In his legal directions to the jury the Judge said this: 'Only if you are sure that the conversation as described by Mr Peters took place in the way the prosecution say it did can you have any regard to this evidence. If you are sure that the conversation took place as alleged then, depending on your view of it (especially relating to Mr Caswell's part in what was said), this may support the prosecution case that Mr Caswell has a sexual interest in X. Only if you are sure the conversation took place and it does demonstrate that Mr Caswell has a sexual interest in X can you use this as some support for the prosecution case. You must not however convict the defendant wholly or mainly upon the evidence of this conversation'.

33. The defence were given a draft of what the Judge intended to say about this aspect of the case but they did not suggest that any amendment should be made.

34. The Appellant further complained in his appeal that he was not expecting Shaun Peters to be called so that the evidence was in effect sprung on the defence. We have investigated that complaint at the hearing. Shaun Peters was, we are told, a reluctant witness. There was some doubt right up until the time he was called whether he would be called or whether he would be available to be called. This is not an unusual situation in a trial such as this where prosecution witnesses are or were friends of the Defendant. In the

event Shaun Peters was available and the prosecution took the opportunity to call him. If the defence had been unintentionally misled and therefore were unprepared for his evidence to be given they could and should have applied to the Judge that the witness should be called later. They didn't do so. They did cross examine and to an extent that cross examination was successful in that it reduced the impact of the evidence so far as the Appellant was concerned. There was no suggestion that the defence had not had the opportunity to take instructions on the evidence and because of the applications that had been made to exclude the evidence, it was apparent that the defence were very familiar with what the witness was expected to say.

35. Accordingly we reject this ground of appeal relating to the evidence of Shaun Peters.

36. Ground 5: As part of the agreed facts, as we have set out at the start of this judgment, the guilty pleas of others for offences relating to the sexual abuse of X were put before the jury. These included the plea of guilty by AB to an offence of child neglect by wilfully exposing X to unnecessary suffering. At trial the prosecution wished in addition to put before the jury her basis of plea as that included details that the prosecution wished to use to support their case against the Appellant. Objection was taken to putting the basis of plea before the jury in the absence of AB. She was in custody and the Judge ruled that if the prosecution wished to adduce the detail contained in the basis of plea it had to be adduced from the witness.

37. AB was called to give evidence. We have a transcript of her evidence starting at page 233 of the bundle. The effect of her basis of plea was that X had complained to her that the Appellant had had sex with her. There was already evidence before the court from X that she had told her mother that. The real issue was when their conversations about the sexual abuse had happened because the prosecution case, as narrated in the basis of plea, was that the complaint had been made the day after one of the sexual assaults had taken place.

38. What is clear from the transcript is that having called AB to give evidence, after a few introductory questions, prosecuting counsel handed the basis of plea to the witness and asked her to read it out to the jury. The effect of this was to lead the witness' evidence. This had not been agreed with the Appellant's counsel but he did not object at the time. As described in the transcript, at the end of evidence in chief, the prosecution applied to exhibit

the basis of plea and gave copies to the jury although with the proviso, insisted on by the Judge, that they must be collected in before the jury retired to consider their verdicts. All of this was done without any objection from the defence. The Appellant does now object. The effect of what happened was to lead the witness' evidence none of which was agreed. There had been no agreement that the witness could be led through her evidence. It also had not been agreed that the jury could be given a copy of the basis of plea. We agree that this should not have happened. They should only have had a copy if and when it was cross examined on. It was not the responsibility or the fault in any way of the Judge that these things happened. If a witness is led without objection then the Judge will assume that that has been done by agreement and will not normally question what is going on.

39. In this case there was no objection to the manner of the questioning. It is understandable that Counsel for the defence may be reluctant to voice an objection for fear that the jury will think that the defence are trying to hide things from them but an objection could have been made without creating that impression with the jury. The defence had warning of what was going to happen when the document was handed to the witness. It would be perfectly normal as the document was being handed to the witness for Counsel to ask the judge for the jury to go out so that a point of law could be discussed.

40. It doesn't seem that, after the event, any complaint was made by the defence about the way in which the evidence of AB had been adduced. She was cross examined on behalf of the Appellant in the normal way and no comment was made in the legal directions or the Judge's review of the evidence as to how the evidence was adduced. No doubt the Judge would have considered doing that if asked.

41. What we have to consider is how much difference if any this breach of the rules had. Had AB not come up to proof, as seems likely in the light of what she said in cross examination, application could have been made by the prosecution to allow her to refresh her memory from her basis of plea. If she still didn't come up to proof then application could have been made by the prosecution to cross examine her on her basis of plea. It cannot be certain what would be the result of those procedures but we consider it likely that one way or another the content of the basis of plea was likely to have gone before the jury.

42. Conclusions: As we have set out in our judgment there are things that went wrong in the course of this trial. In particular we have found the complaint evidence given by Santara Peters should not have been admitted and the evidence of AB should not have been adduced in the way it was. We also consider that the evidence relating to the complaint in 2017 could have been handled better.

43. In the light of those findings we have to decide whether to allow the appeal and quash the convictions or dismiss the appeal. The appropriate test we have to apply is laid down in section 6(1A) of the Courts (Appeals and Rules) Ordinance, 2017 That is 'The Court of Appeal, even if of opinion that the point raised on the appeal might be decided in favour of the appellant, must dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.'

44. The jury had to decide whether they were sure that X's complaints of sexual offences on her by the Appellant were true. The issue was made perfectly clear to the jury and they heard the evidence of both of them and they decided that they were sure that X was telling the truth about what her stepfather had done. There is no reason to suppose that the jury did not consider the evidence relied on by the defence that X had made a false complaint in the past. The issue was clearly before the jury.

45. On our findings the jury should not have been told about the complaint evidence given by Santara Peters. That was not the only recent complaint evidence and there is no suggestion that the other complaint evidence was wrongly admitted or that the direction as to the use that could be made of that evidence by the learned Judge was in anyway inadequate or incorrect. In those circumstances we do not consider that the wrongful admission of that evidence can have caused or contributed to a miscarriage of justice.

46. The other significant error in our view was leading of the evidence of AB without permission being gained for that from the defence. As we have already made clear we take the view that it is likely that the contents of the basis of plea would have been put before the jury in one way or other even if matters had been dealt with correctly.

47. We have considered our findings on the grounds of appeal both individually and cumulatively. Having considered the issue with care we

consider that no substantial miscarriage of justice has occurred and accordingly the appeal is dismissed.