BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 OF 2003

BETWEEN:

NIHON ABBEY

Appellant

and

THE QUEEN

Respondent

Before:

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| The Hon. Mr. Albert Redhead | Justice of Appeal |
| The Hon. Mr. Adrian Saunders | Justice of Appeal |
| The Hon. Mr. Brian Alleyne | Justice of Appeal |

Appearances:

Mr. Hayden St. Clair-Douglas for the Appellant Ms. H. Williams with him
Mr. Terrence Williams and Mr. Welch for the Respondent.

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2003: September 29, 30
2004: January 12

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JUDGMENT

[1] REDHEAD J.A.: The Appellant was convicted on two counts of indecency with a child and two counts of indecent assault against two young children who were both about the ages of six and seven years at the time of the offences.

[2] The appellant was the stepfather of one of these girls. The other being the daughter of a friend of the family and who spent time at the house occupied by the appellant, his wife and his stepdaughter, the victim, and her siblings.

[3] The prosecution's case is that between 1st January and 28th March, 2002, the appellant committed acts of indecency and gross indecency against his stepdaughter F and the other the child, S who was, as I said the daughter whose mother was a friend of the family particularly the mother.

[4] At the appellant's trial S gave graphic evidence of acts of indecency committed by the appellant against her and her companion.

[5] She related to the judge and jury on oath that the appellant made her and her companion suck his penis.

[6] S described in detail how the act was performed. She described a particular occasion when the appellant was wearing a pair of boxer shorts. He pulled the shorts down to his knees. She described in minute details and demonstrated how while the appellant had his penis in her mouth he had one of his hands on his belly and the other hand on her head. He shook her head up and down and told her "suck it good". She told the jury after that "I had a choke". She testified after that "white thing came from under his penis and sometime this white things went under his boxer shorts and his belly".

[7] However when her companion, the stepdaughter of the appellant, came to give her evidence she was not as cooperative with the prosecution or as explicit as S.

[8] All that this witness was prepared to say was that, pointing to the appellant, he had done bad things to her. She had also told the court, pointing to the appellant that he did bad things to her many times and pointing to her mouth. Both of the girls though of tender years were sworn.

[9] The appellant has filed eleven grounds of appeal. It was stressed strenuously on behalf of the appellant that having regard to the graphic evidence given by S in which she described how the final act took place namely, the pushing of the appellant's penis in F's bottom and F's screaming and "not walking good" after that incident, Mr. St. Clair Douglas argued very

forcefully that having regard to the evidence given by S who testified that the incident which she spoke about occurred "the last time" and having regard to the fact that the doctor examined F on the same day ("the last day"), the failure of the doctor to find any evidence e.g. of bruising or laceration, then, contended Mr. St. Clair-Douglas' this evidence of S must be regarded as very unreliable.

[10] For me to accept this contention I must be driven to an inescapable conclusion that S's evidence leads to only one inference, that is that the appellant's penis penetrated F's anus.

[11] Unhappily I cannot be driven to that conclusion for the following reasons. In my considered opinion there is a need for more details as one does not know why F screamed. If F had said for instance that after the appellant pushed his penis in F's "botty" she saw blood on the victim or on the appellant for that matter, then in my opinion it would have been easy to draw the inescapable conclusion that there was penetration.

[12] Another reason which prevents me from accepting Mr. St. Clair-Douglas' contention is that on a careful scrutiny of the evidence, two things emerge from S's evidence. Firstly the child was drawing a conclusion why F "was not walking good". Secondly this court could not be sure why she was not walking good because of the very testimony of S. I quote hereunder the questions by Counsel and answers which S gave in support of my view.

[13] "Q: When F… came out of the bedroom, how was F… walking?
A: She wasn't walking good
Q: And tell us if you know why F… wasn't walking good?
A: Because Nihon push his penis in F… botty?
Q: Where was F…'s clothes when Nihon pushed his penis in F…'s botty?
A: Down on 'she' feet"

[14] The evidence does not reveal when the child came out of the bedroom whether her clothes were still down on her feet and if they were, that may very well be a reason for the child not walking good.

[15] It is to be noted that “not walking good” was elevated by Learned Counsel for the appellant in cross examination of S to ‘walking funny’ which was put to her and which he accepted i.e she said ‘yes’ to.

[16] Learned Counsel for the appellant placed a lot of emphasis on the fact that S said that the incident with F occurred on the last day i.e. pushing of the penis in F’s bottom and if that is so the doctor ought to have discovered some injury on F’s bottom.

[17] As I said above I find difficulty with this theory. Another difficulty which I encounter is that the evidence from the witness is not clear that the incident i.e. the putting of the penis in F’s bottom took place on the same day F’s mother took her to the doctor. I say this because the evidence reveals:

“Q: When Mr. Welch was asking you about the last time do you remember the last time you say this thing happened? Do you?

A: Yes.

Q: And after that last time, you told us that Craig asked F something. Do you remember?

A: Yes.

Q: And after that last time, did you go somewhere with your mother? That was the police station

A: Yes.

[18] Mr. St. Clair-Douglas argued that the evidence is that the same day F’s mother took her to the police station was the same day the doctor examined F and therefore having regard to the doctor’s report S’s evidence is so unreliable that it should be rejected.

[19] I make the first observation that this is a jury matter and this was confessed before the jury.

[20] Moreover in my view it was never a fact in issue whether the appellant penetrated the anus of F because the appellant was not charged with buggery.

[21] In that regard the doctor's evidence could not have been of any importance except to corroborate the credibility of S's testimony.

[22] Learned Counsel for the appellant also stressed that having regard to S's evidence that the incident which she said occurred on the "last day", that Genett Henry gave evidence that on 28th March, 2002, after work she went to her sister Margaret's home. She met the children and, S and F and one R were crying.

[23] They spoke to her. She then went to Margaret at her workplace and she spoke to Margaret. Genett said she then went to the police station and made a report to the police.

[24] This witness also testified that after she made the report to the police she returned to Margaret's house and she met the appellant.

[25] The appellant denied any improper conduct with either F or S. In his testimony on oath he said he went to work on 28th March, 2002. So it was not possible for him to have committed any acts of indecency with the girls at the time S said he did.

[26] Appellant's Counsel argued most forcefully that appellant's testimony regarding his absence from the home must be credible because if he were present when Genett went to the house and the children complained to her, Genett would not have failed to confront him.

[27] Learned Counsel complained that although S said that the appellant committed acts of indecency many times there was one specific day that was mentioned, the "last time", which could only mean 28th March, 2002. Mr. St. Clair-Douglas argued that the learned trial Judge ought to have given an alibi direction in relation to this evidence. He submitted that the failure to do so resulted in unfairness to the appellant. I agree.

[28] Grounds 6, 7 and 8 could be conveniently dealt with together. There was evidence from the prosecution that on 2nd April, 2002 the appellant was making arrangements to leave the British Virgin Islands for St. Vincent. He had his sister check his baggage on a LIAT flight and while he was on his way to the Airport, the appellant was stopped by the police.

[29] The appellant gave sworn testimony. He was cross-examined by Learned Counsel for the Crown. During the cross examination of the appellant questions were put to him concerning his proposed departure from the British Virgin Islands. The appellant's Counsel objected to that line of questioning.

[30] Initially the Learned trial Judge ruled that the questions were more prejudicial than probative. Unfortunately, later Counsel for the Crown returned to the same questions. There were further objections by Counsel for the appellant followed by arguments and then strangely the learned trial Judge allowed the questions.

[31] The appellant under cross-examination admitted that his sister worked at the airport for an airline company. His sister made arrangements for him to fly to St. Vincent on 2nd April, 2002 on a one-way ticket.

[32] Unfortunately when the Judge was summing up she tied the appellant's attempt to leave for St. Vincent with the issues of lies.

[33] At pages 37 and 38 of the record the Learned trial Judge instructed the jury:

> "You heard in the evidence of cross examination of this accused … that he was at one time on his way to St. Vincent. That of itself, you cannot say the accused is guilty. You see, you have to be satisfied that there was no innocent motive for the lie, for the action, because you see members of the jury, people sometimes lie, for example, in attempt to bolster up a just cause. You have not done it but to make it look better you tell a lie…"

[34] This was undoubtedly a misdirection which could have confused the jury.

[35] From the evidence the appellant was not made out to be a liar. Mr. Williams in his skeleton arguments conceded that the prosecution did not challenge the explanation of the appellant about going to St. Vincent. I would go further that it seems to me from the evidence he gave forthright answers to the questions he was asked.

[36] Learned Counsel for the respondent submitted in his skeleton argument under ground 8 that a direction on lies was necessary because when the appellant was interviewed by the police he said that there was a lock on the bedroom door.

[37] S in her evidence told the jury that there was a lock on the door. However the appellant under cross-examination said that the lock had been smashed off the door by his wife since November 2001.

[38] He went on to say that if anyone wanted to go into the bedroom the door just had to be pushed in or out.

[39] The problem with this submission is that nowhere in the record can I find the Learned trial Judge making any reference to this point. There was no linking of that point to the direction on lies.

[40] The only reference to lies was with reference to the appellant's attempt to leave for St. Vincent. This was a misdirection.

[41] Learned Counsel for the appellant criticized the judge's summation in the issue of corroboration. He argued that her direction did not go far enough in light of the age of S and more particularly because S had on oath admitted "to previously making false claims of indecent or sexual assaults." In the cross examination of S, the record reveals the following:

[42] "Q: Did you ever tell F, your friend F that there was a time when your brother went on top of you:

A: Yes.

Q: You told F that?

A: Yes.

Q: Was that true?

A: No. I was making a joke.

Q: You were making a joke. And when you told F that Auntie Margaret came and told F that your brother went on top of you Auntie Margaret came and asked you about that?

A: Yes.

Q: And you told Auntie Margaret that was not true?

A: I told her that.

Q: You told Auntie Margaret that it wasn't true?

A: Yeah.

[43] The observation I make is that from the above it cannot be said that this witness made two false statements concerning the incident.

[44] Secondly all that was put to the child who was about seven years old at the time when she was giving her evidence was that she had told her friend who was about six years old that her brother 'went on top' of her.

[45] Mr. St. Clair-Douglas urged this court to say that this witness was in effect saying that the brother made an indecent or a sexual assault on her particularly in light of the fact that when she was asked if it was true, she replied no she was just joking.

[46] I am unable to put such an interpretation on those words because to do so would be to involve in a speculative exercise.

[47] I find it impossible to put that interpretation on the words that her brother went on top of her without more when these words were spoken by a seven year old. (If this is the case then why should the jury believe anything she said on oath at all?)

[48] Learned Counsel urged that having regard to the case as a whole and the evidence given by S who admitted being untruthful the Learned trial Judge was obliged to give a fuller direction on corroboration.

[49] In R v Gilbert 2002 SLRC it was held inter alia:

> "The rule of practice which should now be followed was that set out by Lord Taylor of Gosforth CJ in R v Makanjoula (1995) 3 All ER 730 at 731-732 in any type of case it was a matter for the judges discretion what, if any, warning be considered appropriate. Whether the judge chose to give a warning and in what terms depended upon the circumstances of the case, the issues raised and the content and quality of the evidence".

[50] Judges were not required to adhere to any formula and an appellate Court would be slow to interfere with the exercise of discretion by a trial judge, who had the advantage of assessing the manner of the witness's evidence as well as content. If a question arose as to whether a special warning should be given in respect of a witness, the question should be resolved by discussion with Counsel in the absence of the jury before final speeches."

[51] In light of the above, the direction given on corroboration by the learned trial Judge at page 26-28 of the record, in my opinion, is adequate.

[52] The learned trial Judge reminded the jury that the "allegation" against the appellant was made by children of tender years. So they must be cautious.

[53] On page 27 of the record she again reminded the jury that S is a child of tender years and this is considered "a circumstance which created the risk of unreliability, inaccuracy, over imaginativeness and susceptibility to influence by third persons."

[54] I now turn to deal with the allegation of prosecutorial misconduct. Under this head the appellant alleges the Crown had in its possession the Royal Virgin Islands Police Force Medical Form which the prosecution failed to disclose to the defence. The defence alleges that the prosecution had F medically examined and the examination showed that she

suffered no injuries. The prosecutor failed to disclose this, until he, Mr. St. Clair-Douglas requested it. As a result, a copy of the report was not sent to him until the eve of the trial.

[55] Learned Counsel contended that having regard to S's evidence in particular when she testified that after the appellant put his penis in F's "botty" she was not walking good, medical evidence was important to the appellant's case.

[56] Mr. Welch conceded that the medical form ought to have been disclosed. He says however the fact that it was not disclosed before it was requested was, as he put it 'no mala fides' on the part of Counsel. His attention was first drawn to the medical report. When the letter was written to him, it was disclosed and Counsel for the appellant made further use of the report during the trial.

[57] So there could have been no prejudice visited upon the appellant as a result of the report not being disclosed earlier.

[58] The appellant complains also under this ground that the appellant was deprived of a fair trial in that the learned trial Judge failed to prevent Counsel for the Crown from making inflammatory and emotive appeals to the jury e.g. referring to the appellant as a grade F or grade Z father. Mr. Welch in support of his argument referred to a passage from a Canadian case, Boucher v The Queen 1954 110 Can CC 263, 270: which is referred to in the Privy Council Appeal No. 27 of 2001 Barry Victor Randall v The Queen at paragraph 10.

[59] Dr. Dawn Bain was called to put in a medical report which was compiled by a Dr. Ubadike and who was absent from the British Virgin Islands. When Dr. Bain was reading from the medical report the learned trial Judge made the observation:

> "All this is what the doctor is writing that they told him, but that is hearsay. Dr. Bain is reading it from the form. That is not evidence."

[60] Mr. St. Clair-Douglas submitted that the effect of the Judge's characterization of the entries on the medical form as hearsay, and her assertion that it was not evidence was to indicate to the jury that the medical evidence was not important and that it could be safely ignored.

[61] I agree. It was wrong at that time for the learned trial Judge to so characterize the entries made in the medical record as hearsay because if the proper foundation had been laid, it could have been admitted into evidence. See S. 12 Evidence Act Cap 23 of the Laws of the British Virgin Islands and S. 23 and 24 Criminal Justice Act of 1968 of England.

[62] Finally, I deal with the appellant's complaint in failing to uphold a submission of no case to answer.

[63] Mr. St. Clair-Douglas argued that at the close of the case for the prosecution submissions were made on behalf of the appellant in relation to counts 3 and 4 of the indictment pertaining to F because Counsel argued that F did not say what acts the appellant had done to her.

[64] In my opinion it did not matter whether the evidence was given by F or S once the evidence is reliable or tenable, the jury are required to act on it.

[65] However, at the end of the prosecution's case what was the state of the evidence as a whole. As I see it, basically the only cogent evidence for the prosecution is S's evidence.

[66] This must be so because no reasonable jury could have convicted the appellant on F's evidence alone. F merely said he did bad things to her at the same time pointing to her mouth.

[67] No jury could have convicted the appellant on any of the charges on F's evidence alone.

[68] However when S's evidence is taken into account the jury may have very well understood what F meant when she said the appellant did bad things to her and pointed to her mouth.

[69] Can the evidence of S be regarded as inherently vague or weak? I think not. The most that can be argued is that S's credibility as a truthful witness was in doubt when she admitted that she was not speaking the truth when she told her friend that her brother went on top of her. Credibility is eminently a matter for the jury and therefore on a submission of no case the Judge should allow the case to go to the jury – See R v Gilbraith 1981 2 I ALLER 1060.

[70] I now look at the overall picture.

[71] So far as this appeal is concerned it is necessary to determine whether notwithstanding the misdirections referred to above, the proviso should be applied and dismiss the appeal or whether the appeal should be allowed.

[72] In my considered view having regard to the non-direction on alibi, the misdirection regarding lies and the conduct of the trial as a whole, I come to the conclusion that the fairness of the trial was seriously compromised in many instances. Reluctantly I am forced to allow this appeal. Having regard to the ages and the manner in which the evidence was given i.e. the reluctance of F and her brother to testify, the interests of justice would not be served by ordering a retrial.

[73] The appeal is therefore allowed, the conviction and sentences are set aside.

Albert J. Redhead
Justice of Appeal

[74] SAUNDERS, J.A. : I have read in draft the judgment prepared by my brother Redhead, JA and I agree that this appeal should be allowed for the reasons he has given. I would allow the appeal on the further ground that the learned trial judge's directions on corroboration were inadequate.

[75] I believe that this case called for a strong direction on corroboration. I shall briefly recap the evidence. Nihon Abbey, a grown man, was charged with four sexual offences. There

were two counts of indecent assault and two counts of indecency. The alleged victims were two minor children. The girls, S and F, were 6 and 7 years old at the time. F is Abbey's stepdaughter. S used to frequent Abbey's house when her own mother was at work. The offences were said to have taken place repeatedly between 1st January, 2002 and 28th March, 2002 when the girls were alone in a bedroom with Abbey.

[76] The prosecution's case is that Abbey had these children, over and over again, perform oral sex upon him and that on the last occasion, i.e. on 28th March, 2002, he went beyond oral sex with F. Abbey's defence was a denial of the accusations. He also set up an alibi in relation to the events of the 28th March, 2002. Reading the transcript of the evidence, one can barely avoid feeling sickened at the depraved nature of what is alleged. For this reason, I think a conscious and deliberate effort needed to be made to ensure that Abbey did not lose the benefit of safeguards that the law prescribes for all accused of crime.

[77] At the time of the trial, S was seven years old and in Grade 2 at a Primary School. She gave sworn evidence. As my learned brother observed, she gave graphic testimony of the acts of indecency. Counsel for the Crown naturally pointed to the vivid nature of this evidence as cogent proof of its truthfulness. On the other hand, counsel for the accused suggests, and it can hardly be denied that, via satellite and cable, today's unsupervised child is exposed to any manner of sexually explicit acts that can all too easily be accessed on television.

[78] S's testimony was not free from doubt and inconsistencies. She had previously accused F's ten-year-old brother of "lying on top of [her]". She admitted on oath that this was a false accusation. In cross-examination, when this subject was raised with her, she pointedly refused to give a straight answer when asked whether F's mother had questioned her about the accusation. In fact, F's brother, who gave evidence at the trial, stated that not only did his mother learn about the lie but also, as a result of the lie, his mother had given him a sound beating.

[79] S also testified positively that the accused buggered, or at least attempted to bugger, F on the last occasion the acts of indecency, for which Abbey was charged, allegedly took place. According to S, the accused "push[ed] his penis in [F's] botty". S clearly described to the jury the respective positions of the accused and of F when this buggery allegedly took place. Those descriptions were consistent with buggery having occurred, or at least with an attempt to commit the same. S further testified that because of this buggery, when F emerged from the bedroom "she wasn't walking good". Prosecuting counsel asked her what did F do "when [the accused] pushed his penis in F's botty…"? She replied "F had scream".

[80] F was taken to the hospital on 28th March, 2002, the very day the last mentioned events supposedly occurred. The examining doctor was told (clearly not by F) of the allegation that a phallus had been inserted in F's anus, the same allegation given in evidence by S. The doctor gave F a thorough examination. The results of the doctor's examination were that no injuries were noted on F. No bleeding or bruising, no scratch marks, lacerations or tears. Moreover, the doctor recorded that F had told him during the examination that no such assault had taken place on her.

[81] F was called to give evidence at the trial. She was only 7 at the time. She was overwrought by the occasion. The record reveals that she cried a lot and was unable or unwilling to give any evidence. The most that she said was that something bad had happened and that this bad thing concerned the accused. She pointed to her mouth.

[82] In sum, that was the state of the evidence against the accused at the close of the case for the prosecution. A submission of no case to answer was made in respect of the crimes allegedly committed against F. There are some judges who might have upheld it on the basis of the principles laid down in *R. vs. Galbraith*[1] and *R. vs. Shippey*[2]. I agree however that this court should not interfere with the learned trial judge's refusal to do so.

[1] *73 Cr. App. Rep. 124*
[2] *(1988) Crim. L. R. 767*

[83] In her summing up, the learned judge did not give the jury a full or classic direction on corroboration. She did however urge them to be cautious. This is the extent of what was stated by the judge on this issue:

> "……You must be cautious when considering the evidence of S, because she is a young child. In law we call her a person of tender years. You see, the tender years of S is a circumstance which creates the risk of unreliability and inaccuracy, over-imaginativeness and susceptibility to influence by third persons……
>
> …….The prosecution has placed [S] as a witness of truth. I am telling you the law says she is a young child, so be careful because she can imagine it, may not really be reliable whether you take it, and she could be influenced by third persons."

[84] Should the judge have given a more comprehensive direction on the need for corroboration of S's evidence? What approach should an appellate court take towards the manner in which a trial judge addresses this question? I think these are important matters that have been raised by this appeal.

[85] In *R vs. Gilbert*[3], the Privy Council gave guidance on the rule of practice that should be followed on the issue of corroboration with regard to complainants in sexual cases. The Board approved the following excerpt from the judgment of the Court of Appeal in *R v Makanjuola*[4]:

> "Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands on the scale of reliability and what response they should make at that level in their directions to the jury. We

[3] *[2002] 5 LRC 606*
[4] *[1995] 3 All ER 730*

> also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content."

[86] The position was summarised by the Board as follows. It is a matter for the judge's discretion what, if any warning, is to be considered appropriate. Whether the judge chooses to give a warning and the terms and strength of any such warning will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence. Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and the judge's comments as to how the jury should evaluate it rather than as a set-piece legal direction. The warning does not have to be "invested with the whole florid regime of the old corroboration rules".

[87] It will in my view be going too far to suggest that an appropriate interpretation of *Gilbert* is that this court should not review the exercise of a trial judge's discretion regarding the terms and strength of a corroboration direction. While the trial judge is in the best position to determine how such a direction should be tailored, if the record reveals circumstances that cry out for a very strong direction but this was not given, then in my view the accused may have suffered a miscarriage of justice. In such a case an appellate court should interfere. I think this is consistent with the opinion of the Board in *Gilbert.*

[88] The jury in this case was never warned that they should look for supporting material in relation to S's evidence. The premise for the caution that was urged upon them was restricted to S's young age. However, when one adds to the possible inferences arising from that tender age, the circumstances that S had admitted making a previous false complaint, in my view, of a sexual nature, and that medical evidence contradicted testimony she had given on oath of graphic details of a sexual assault, I think alarm bells should have sounded. In my view, the matter having been allowed to go to the jury, this

was a case for a strong corroboration direction and, in addition to the reasons given by Redhead, JA, I would also have allowed the appeal in the absence of such a direction.

Adrian Saunders
Justice of Appeal

[88] Alleyne, J.A. : I have had the advantage of reading the draft judgments of Redhead, J.A. and Saunders, J.A. I agree with Saunders, J.A. that this case called for a strong direction on the issue of corroboration. I too think that the learned trial judge's direction on corroboration was inadequate in the circumstances of this case. For the reasons given by Redhead, J.A., and for this additional reason, I too would allow the appeal, quash the conviction and set aside the sentence.

Brian Alleyne
Justice of Appeal