GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.10 OF 2003

BETWEEN:

DEVON MITCHELL

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal [Ag.]
The Hon. Madame Suzie d'Auvergne	Justice of Appeal [Ag.]

Appearances:

Mr. Derick Sylvester for the Appellant.
Mr. Darshan Ramdhanny and Ms. Violet Lawrence for the Crown.

2005: June 28;
September 19.

JUDGMENT

[1] BARROW, J.A. [AG.]: The appellant was convicted of carnal knowledge of a female under the age of 13 years and sentenced to a term of imprisonment for 10 years. He has appealed against both conviction and sentence.

[2] Only the girl testified for the prosecution. She was 12 years old at the time of trial; the offence had taken place 1 year and 8 months earlier. The girl said she had known the appellant since she was a baby. The appellant, who also testified, said he always saw her passing to go to school and admitted to having had a number of conversations with her.

However, the appellant maintained that he was not the person who had sexual intercourse with the girl. The defence was mistaken identity.

[3] The story told by the girl is as follows. On the night of the event, at about 8:00 p.m., her stepmother sent her to bathe in the outside bathroom. She said when she was in the bathroom she heard "stone pelt on the bathroom". The appellant made a sign for her to come. He came out in the light and went under the house. She followed. He pulled down his pants and told her to pull down her panty and she did so. He made her sit down on him and placed his penis in her vagina. She said she sat facing him and that she was sitting there for an hour. She said that when she sat on him he told her "let's talk" and they talked. Then she saw someone by the fence and she got up and ran and the appellant got up and ran too. The girl ran over to her grandmother's house, which was in the same yard. The grandmother asked her what was wrong with her and she said nothing. The next day her aunt called her and started to question her. She told the aunt what happened.

[4] Cross-examination focused on identification. The girl accepted that it was dark at the time. She said that when she came out of the bathroom "he was in the dark and then he came out in the light." Her grandmother's outside light was on, she said. She accepted that there was no light beneath the house. She said that it was not possible that she could have been mistaken as to who was under the house. She said that it was not possible that it was someone else and not the appellant. When pressed with the suggestion that people make mistakes and asked whether it was possible that she made a mistake she responded that she heard his voice. Defence counsel then put to the girl that two persons could have similar voices and asked could she have been mistaken as to voice and she said yes. However, the next two questions from defence counsel elicited the evidence that the girl remained with the appellant under the house for about an hour and that they were talking. In re-examination the girl clarified that she was not mistaken that it was the appellant who was the person involved.

[5] In his sworn testimony the appellant denied that he was the person who was involved in the events that the girl described. He denied that he had given the girl money on several

occasions. He denied that he had told the police in a written statement that he had given the girl money on three occasions. When confronted with his statement, the signature on which he accepted was his, he said "it have statement there that I did not tell the police." He said that the statement about giving money to the girl was one such statement. The prosecution did not seek to produce the statement in evidence.

[6] Evidence was also elicited from the appellant that he had had conversations with the girl before and about the subject of these conversations. He said he had talked with her about how she was doing in school, about sitting Common Entrance examinations, about how he "used to see her in the road all hour in the night and I used to tell her why you don't go home". The appellant told the court that "for a little girl, she ain't supposed to be out this kind of hour", that he was concerned that someone would do her something, and that it was bad for her to be out at night "because anybody can hold them at that hour".

[7] When asked about what else he had spoken with the girl the appellant stated, "this V[1] had a sexual book." He was asked how he knew that. He replied: "She aunt say that V say that I give her the book. She tell lies on me."

Ground 1: Failure to give a Lucas direction

[8] The principal ground of appeal related to the evidence of the appellant that he had not given money to the girl on several occasions. Counsel for the appellant submitted that the appellant was shown to have told lies and therefore a Lucas[2] direction should have been given by the judge. In the skeleton argument for the appellant it was contended that a Lucas direction "was critical since the case boiled down to who the jury believed – the evidence of the complainant vs. the appellant (credibility)" and that the "prosecution relied solely on credibility to found a conviction".

[1] I see no need to state the name of the girl and have substituted an initial for the name that appears in the record of the proceedings.

[2] In R v Lucas [1998] Q.B. 720 it was established that a judge should direct a jury that a lie told by a defendant can only strengthen or support evidence against a defendant if the jury is satisfied that (a) the lie was deliberate, (b) it relates to a material issue, and (c) there is no innocent explanation for it. The jury should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour.

[9] With respect, it seems to me that that contention in the skeleton argument sets out with commendable clarity the very circumstance in which a Lucas direction should not be given. In Archbold Criminal Pleading Evidence And Practice 2003, 4-402, there appears the following statement of the law on this matter:

> "In R v Goodway 98 Cr. App. R. 11, C.A., it was held that whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a judge should give a full [Lucas direction]. … A Lucas direction is not required in every case where a defendant gives evidence, … and the jury may conclude … that he has been telling lies. It is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering."

[10] In the instant case the prosecution did not rely on a lie told by the appellant as evidence of guilt. The prosecution did not succeed in establishing that the appellant had lied: the prosecution was unable to get past the appellant's denial that he had told the police that he had previously given money to the girl. The prosecution seemed to have accepted that they had not established that the appellant had lied, according to the judge's note of the prosecution address to the jury. There is no suggestion that the prosecution relied on the appellant's answer as a lie or, as a further step, on such lie as evidence of guilt. The case that the prosecution put to the jury, therefore, did not require a Lucas direction.

[11] I consider, beyond that complaint, that the jury, on their own, may have decided that the appellant's answer was a lie. The argument for the appellant on appeal was that the jury might have inferred that because the appellant lied about giving money to the girl this was proof that he was guilty. I do not agree. The prosecution's case was that the appellant's whole defence was a lie. The prosecution's case was that the appellant lied about giving money to the girl and he lied about not being the person who had sexual intercourse with the girl. The jury was not being asked to believe that the appellant lied and therefore he was guilty. They were being asked to believe that he lied about a collateral matter and that he lied about the central matter. In short, the jury was being asked to find that the appellant was not to be believed. It was purely a case of credibility.

[12] The only relevance that the appellant's giving money to the girl had was as evidence of the appellant's previous interaction with the girl, which explained this seemingly pre-arranged and obviously willing sexual encounter to the jury. It seems clear that was the object of the cross-examination and of drawing out this evidence. This was evidence to show that the encounter was a tryst. The prosecution did not rely on the fact that the appellant had told a lie. The prosecution relied on what, on their case, was the truth: that the appellant had in fact given money to the girl before and this was additional evidence of the association between the appellant and the girl.

[13] I am satisfied that, in these circumstances, there was no need for a Lucas Direction and especially so in light of the judge's direction to the jury that they must not convict the appellant simply because they believed he was not telling the truth.

Ground 2: The judge confused the jury with an unnecessary corroboration warning when there was no corroboration.

[14] The judge directed the jury in clear terms that the evidence of the girl was uncorroborated. Unfortunately, she added right after that direction that this was her view of the evidence and that the jury was free to reject it. As was stated in Eric James v R[3], it is for the judge to direct the jury as a matter of law that corroboration does not exist. It is not a matter for the jury and they may not reject the direction of the judge.

[15] In James the misdirection was fatal because there was no corroboration and the judge failed to tell the jury so and, additionally, the judge told the jury that the medical evidence was capable of providing corroboration when as a matter of law it could not. That is an entirely different situation from the situation in the instant case in which the judge (a) told the jury that there was no corroboration and (b) directed them that certain evidence (which she thought was not capable of amounting to corroboration, in any case) was not called.

[16] As a matter of practicality, there was no possibility in this case of the jury being affected by the unfortunate remark of the judge for the reason that there was no other witness called

[3] (1970) 16 WIR 272 at 275.

by the prosecution beside the girl and there was no other evidence for the prosecution beyond the girl's testimony. Therefore, there was nothing that the jury could have been misled into treating as corroboration. Further, the judge repeatedly told the jury, right after the remark and in the context of the remark, that the girl's evidence was uncorroborated and warned them of the danger of acting on it. I am therefore satisfied that the corroboration direction was adequate and that the judge's remark to the jury that they could reject the judge's view of the evidence as to the absence of corroboration had no effect on the verdict.

Ground 5[4]: The judge should not have allowed cross-examination on the appellant's statement to the police.

[17] There were two aspects to this ground: that there was a manifest disadvantage to the defence when the statement was used to cross-examine the appellant without being produced in evidence and that the judge misapplied section 145 of the Evidence Act[5] by allowing the prosecution to use the appellant's statement to contradict the appellant on his denial that he had given money to the girl.

[18] The object of s.145 is to do the very thing that the prosecution did, namely, to permit a witness to be challenged with a previous inconsistent statement. The prosecution did not produce the statement into evidence. The appellant's denial that he had said that he had given money to the girl, which appeared in the statement, prevented the prosecution from producing the statement. The appellant's complaint is that "the exculpatory part of the [statement] was not in evidence as the prosecution extracted the portions he (sic) wanted to fit his case." The short answer to that complaint is that neither was the incriminatory part of the statement put in evidence. If the prosecution were unable to enter into evidence the incriminatory material there can be no unfairness in the prosecution not entering into evidence the exculpatory part of the statement. The unstated complaint of the appellant is

[4] Ground 3 was argued as part of ground 2. Ground 4 was not argued.
[5] The 1990 Revised Laws of Grenada CAP 92. Section 145 (1) states: " A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing and relevant to matters in question in the suit or proceedings in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

really that, notwithstanding that the prosecution was not able to prove that his denial was a lie, the jury (presumably) concluded that it was a lie. That was a conclusion that was fairly open to the jury and one that did not flow from the fact that the appellant was cross-examined about a statement that no one proved he made but flowed, rather, from what the jury thought of the credibility of the appellant.

[19] Since the statement was not admitted into evidence the appellant's complaint that there should have been a voir dire to challenge the voluntariness of the statement seems pointless. The other complaint that the appellant made in his skeleton argument under this ground, that the judge failed to adequately sum up the case to the jury, remained inchoate.

Ground 7: The judge failed to direct the jury on voice identification

[20] The judge directed the jury on visual identification and the appellant does not complain of the adequacy or fairness of that direction. The judge did not direct the jury on voice identification and it is argued that she should have done so. It is to be noted that the girl's mention that she recognized the voice of the appellant was purely in response to the suggestion that she may have made a mistake in the visual identification of the appellant. She was defending her visual identification. This, it must be remembered, was a 12 year-old girl testifying under cross-examination. The girl's identification of the man was by seeing him, not by hearing him. She did not refer to recognizing the appellant's voice in her examination in chief when she identified the appellant. It was only when her identification was challenged that she responded: "I hear his voice." There was much more that she could have said to defend her identification of the appellant, as the prosecution showed. The prosecution's case was that this sexual encounter was prearranged. This was not a case of an unknown assailant attacking an unwilling victim. As the prosecution stated in their address to the jury, the girl participated in the act. She responded to the signal of the stone on the bathroom, she complied with the beckoning, she obeyed the instruction to take off her panty, she mounted her sexual partner, she remained coupled in the female ascendant position and she conversed with her carnal knower.

[21] The judge gave an unexceptionable direction on visual identification and, apparently, thought that a direction on voice identification was not required. The judge apparently took the view that the decision for the jury to make was to either accept or reject the girl's visual identification of the appellant. It is easy to see with that view: as the case was presented there was no reliance on voice identification. One readily conceives of a case where a doubtful or uncertain visual identification is buttressed by voice identification. In such a case there would be a need for a direction to the jury on voice identification. The instant case is not such a case. I would agree with the judge that there was no need to direct the jury on voice identification.

Ground 8: The sentence of 10 years was too severe.

[22] The appellant was about 28 years of age and the girl was about 11 years of age at the time of the offence. The sentencing guidelines provided by this court in R v Winston Joseph and others[6] were issued in cases decided under St. Lucian law and, as counsel for the appellant has pointed out, account needs to be taken of differences in legislation as well as other relevant circumstances. In that decision the Chief Justice specifically adverted to the differences in the punishments contained in the statues of different member states.[7] In St. Lucia, for example, the maximum penalty for the offence of carnal knowledge of a girl under 13 years is life imprisonment while in Grenada the maximum penalty is imprisonment for 15 years.

[23] Counsel suggested that the normal starting sentence of 8 years in St. Lucia, suggested in the Winston Joseph case, should be lower in Grenada with its lower maximum punishment. This argument finds support in that case, which suggested a starting sentence for incest, which carries a maximum punishment of 15 years imprisonment in St. Lucia, of 5 years' imprisonment.[8] That suggested sentence, it must be noted, was in relation to a case where the victim was between 13 and 16 years of age. The judgment

[6] St. Lucia Criminal Appeals Nos. 4, 8 & 7 of 2000, decision re-issued 21 October 2001.
[7] At paragraph [1].
[8] See paragraph [21].

was clear that the lower the age of the victim the higher should be the sentence. In the instant case this girl was at most 11 years old.[9]

[24] In the instant case there was an absence of any of the aggravating factors identified in the Winston Joseph case, save for the significant one of the age of the girl. The aggravating factors that were identified in that case included physical or psychological suffering from a sexual assault, abhorrent perversions such as buggery or fellatio, violence beyond that inherent in the commission of the offence, repetition of the offence, previous convictions of the defendant for serious offences of a violent or sexual nature, that the victim has become pregnant as a result of the crime and that the victim is very young or very old.

[25] The mitigating factors identified in that case included a plea of guilty, that incest was consensual in the case of a girl of at least 16 years of age and there was apparent affection rather than simply predation, that the girl of at least 16 years of age made deliberate attempts at seduction and that the defendant is a first offender and/or is a youth. The mitigating factors present in the instant case were that the appellant was a first-time sexual or violent offender and, while a man of about 28 years is, in this context, hardly a youth, he may be entitled to a less harsh regard than the offender in the Joseph case who was about 35 years of age at the time of the offence.

[26] The Chief Justice was quite clear in the Joseph case that the court was giving guidance on sentencing in sexual offences with the intention of promoting consistency in the approach to sentencing. The court appreciated

> "that circumstances will differ and our aim is not necessarily to require uniformity in the sentences but in the principles which inform the exercise of discretion in sentencing".[10]

It was also stated that:

[9] The date of birth was not given. The girl was 12 years old when she testified and the offence had taken place 1 year and 8 months earlier so there was a more than even chance that the girl was 10 years old on the date of the offence. The appellant is entitled to the benefit of the doubt and therefore the girl is treated for sentencing purposes as having been 11 years old on the date of the offence.

[10] At paragraph [10].

> "The court has to adopt a sentencing policy which is aimed at combating the growing prevalence of these crimes in our country, St. Lucia while at the same time not denying persons committing these crimes the application of the basic human rights prescribed by our Constitution."[11]

[27] The specific information that founded the reference by the Chief Justice to the growing prevalence of sexual crimes in St. Lucia was not stated. In the instant case counsel for the appellant said he was not in a position to dispute the information given by counsel for the prosecution that, in the forthcoming assizes, of the 102 cases on the list 51 were cases of sexual offences. This court noted that on the list of appeals for the sitting at which the instant appeal was heard 5 of the 9 High Court criminal appeals were in relation to sexual offences.

[28] The prevalence of sexual offences in Grenada requires the court to be mindful of the important public dimension of criminal sentencing, which includes protecting the public by punishing the offender, or reforming him, or deterring him and others, or all of these things. The court needs to be mindful, as well, of the importance of maintaining public confidence in the sentencing system. Those considerations must be balanced by the core consideration that the sentence imposed should be no longer than is necessary to meet the penal purpose that the court intended.[12] Sentencing, it must be acknowledged, is essentially subjective even when appropriate guidelines are followed. An appellate court should, in such a situation, not lightly interfere with the sentence imposed by a trial judge.

[29] In the instant case, however, the notes of the proceedings do not reveal what considerations informed the judge's sentencing and that appropriate guidelines were followed. The extent to which it will be open to an appellate court to assume that a judge took an unstated consideration into account, especially in a criminal case, will depend on the extent to which there is material to show that the judge took other relevant considerations into account. If, from what the judge was shown to have considered, it may be concluded that an unstated consideration was so integral a part of what the judge

[11] At paragraph [11].
[12] See Archbold 2003 5-147.

considered that it must follow that the judge considered what was not expressed, then the determination may be regarded as safe.

[30] That is not the situation in the instant case. It is not known what matters the judge considered in arriving at the sentence that she imposed. In particular it is not known if the judge relied on the Joseph case and if, consistent with the maximum sentence in Grenada being 15 years' imprisonment as opposed to life imprisonment, which obtains in St. Lucia, she took into consideration a different starting sentence. This is a matter of significant doubt and it would therefore be unsafe to let the sentence stand. In all the circumstances I consider that a starting sentence of 5 years imprisonment would have been appropriate in the Grenada context, increased to 7 years imprisonment in view of the age of the child.

[31] I would therefore dismiss the appeal against conviction and allow the appeal against sentence. I would substitute a sentence of 7 years imprisonment.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur

Brian Alleyne, SC
Chief Justice [Ag.]

I Concur

Suzie d'Auvergne
Justice of Appeal [Ag.]