IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2018/0005

REGINA

V

CG

APPEARANCES

Mr Kenroy Hyman and Mr Henry Gordon for the Crown.

Mr Warren Cassell for the defendant.

2018: JULY 10

JULY 13

RULING

On submission of no case to answer

1 Morley J: On 10.07.18, I heard submissions on whether there was a case to answer on six counts of indecent assault on five schoolchildren[1]. I ruled there was no case on counts 2 and 6 without allowing an amendment, which I refused, and there was a case on counts 1, 3, 4, and 5. I promised written reasons which are these.

[1] Neither the defendant nor the complainants or other children will be identified as this is a sexual offence allegation, the witnesses are entitled to anonymity, and the defendant was in due course wholly acquitted, all being therefore entitled to anonymity.

2 CG is a school teacher at Montserrat Secondary School. On about 10.01.18, at the school he hugged four schoolgirls, in possibly new year greeting, covered by counts 1, 3, 4 and 5, named respectively SG aged 14, AT aged 15, MT aged 15, and CC aged 15. Of itself the hugging, though perhaps professionally unwise, is not said by the prosecution to be indecent, who instead point to more. Concerning SG, it is said he put his tongue in her ear; AT, he touched her breast; MT, he pulled up on her breast; and CC, he kissed her cheek. Each girl was video interviewed respectively on 22.01.18, 22.01.18, 07.02.18, and 09.02.18, and the video played as examination in chief (as permitted on Montserrat).

3 Other children were also video interviewed who witnessed events: DD, aged 15, on 22.01.18, JR, aged 15, on 07.02.18, and CB, aged 16, on 09.02.18.

4 In a spirited submission, defence Counsel Cassell pointed to many weaknesses in the prosecution case, not so much on count 1 but particularly on counts 3, 4, and 5. These are all good jury points, ably made, raising doubt on exactly what happened. However, each complainant does report precisely what is alleged on their respective counts. Of particular help has been the schedule of evidence prepared by Crown Counsel Gordon, capturing in detail what was said in the interviews, filed with the court for 09.07.18. As such, reviewing the evidence, under the second limb of the well-known test in R v Galbraith 1981 2AER 1060[2] there was nothing tenuous or inherently unreliable in what each complainant specifically said, notwithstanding others may describe events differently, and so it will be a matter for the jury whether they are sure there was touching as described, and if so, if it carried an indecent intent, about which they will be directed in full.

5 Therefore there is a case to answer on counts 1, 3, 4, and 5.

6 Concerning count 5, there had been earlier court-led unease the prosecution was being inconsistent. CC reported a hug and kiss, which did not bother her, and said exactly the same had occurred to her friend JL, who has not been interviewed. On 05.07.18, at 12.53, during trial, when asked by the court what was the difference between what happened to CC to merit prosecution and to JL which did not, Crown Counsel Hyman said that on investigation what

[2] See Blackstones 2016 D22.50.

happened to JL *'may not have been indecent'*. This compounded the unease as it was difficult to see how what identically happened to CC should be prosecuted. Pressed further on 10.07.18, during submissions, and assisted by the DPP Oris Sullivan who addressed the court on 06.07.18, Counsel Hyman finally resiled from his earlier statement. The court is prepared to accept he misspoke on his feet on 05.07.18, but would remind counsel to be careful what is said on the record. Prosecution counsel have a duty as ministers of justice to act fairly and to be reliable as to their words and deeds. If Counsel Hyman had not resiled, (which he did with great diffidence and irritation), the court would have had to stop the case on count 5 as an abuse of process, as bringing the administration of justice into disrepute for running inconsistent cases on identical facts. The correct position, as ably argued by the DPP was that JL had not made a statement and so the event concerning her could not be prosecuted, but the Crown's case should be that both events, being identical, were indecent assault. Counsel Hyman having resiled, and been permitted do so, I have allowed count 5 to continue.

7 However, I have stopped counts 2 and 6.

8 Count 2 was an allegation by SG, also in her interview of 22.01.18, that on an occasion earlier than January 2018 she had a lift from the defendant in his left hand drive jeep, when he told her he would date her if she was older and placed his right hand on her left leg. The timing of the event was pleaded to be on a date inclusively between 1 and 15 December 2017.

9 Count 6 was an allegation by KR, interviewed on 07.02.18, aged 15, that on an occasion earlier than January 2018, at the school the defendant had hugged her and kissed her ear. Contact was witnessed by AL, aged 15, interviewed on 15.02.18. The timing of the event was pleaded to be on a date inclusively between 1 and 15 September 2017.

10 During the trial the court twice asked Counsel Hyman how he would prove the timing in counts 2 and 6. There seemed to be no evidence at all of the pleaded dates. Either the court was ignored or counsel forgot to tidy up this difficulty. On 09.07.18, Counsel Hyman asked to amend counts 1, 3, 4 and 5 as to the dates, so that date of the January event was altered from being categorically 10.01.18, to being inclusively between 8 and 10 January 2018. There were other

minor amendments too, recorded on the indictment by the court. However, there was no application to amend counts 2 and 6, notwithstanding the earlier inquiry.

11 During submissions on 10.07.18, Counsel Hyman finally had to concede there was no evidence of the pleaded dates, so that no jury could be sure the events occurred in the pleaded time frame. He therefore asked to amend the timing on both counts 2 and 6 to the period inclusively 1 January to 31 December 2017.

12 This is poor prosecution practice. Ordinarily a date amendment, being not a material averment, can be permitted at any time. However, it brings the administration of justice into disrepute for an observer to see such scant attention being paid by the prosecution to a problem twice flagged up by the court and then not addressed during indictment amendment the day before. Moreover, there had been ample time during the presentation of the Crown's case to cure the query by taking a further statement, or even applying to address it in chief when hearing on videolink from SG and KR. As such, it is my judgment that to allow the amendment now as an afterthought, and in such wide date terms, would be an abuse of the court's process, and therefore an injustice, to accommodate such lazy prosecution practice.

13 In the Criminal Procedure Code on Montserrat at s115(1) it reads:

> Where, before a trial upon indictment or at any stage of the trial, it appears to the High Court that the indictment is defective, the High Court shall make an order for the amendment of the indictment that the High Court considers necessary to meet the circumstances unless, having regard to the merits of the case, the required amendments cannot be made without injustice.

14 Applying the section, the indictment being agreed defective as regards the pleaded dates on counts 2 and 6, amending the dates as sought cannot be made without injustice, having regard to the 'merits of the case', namely not simply the allegations but also the history of the trial. The amendments being refused, it has been agreed there is no evidence on which the jury could conclude the events took place, if at all, within the pleaded times, and so there is no case to answer as pleaded on counts 2 and 6.

15 Accordingly, the trial shall proceed on counts 1, 3, 4, and 5, and the jury shall be directed to return a verdict of not guilty on counts 2 and 6 as pleaded (and did so on 10.07.18).

The Hon. Mr. Justice Iain Morley QC

High Court Judge

13 July 2018