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ROYAL COURT

15th January, 1992 5

Before: The Bailiff, and
Jurats Orchard and Hamon

Attorney General
- v -
Francesco Maccioni

Police Court Appeal: Appeal against conviction in respect of two charges of indecent assault.

W.J. Bailhache, Esq., Crown Advocate
Advocate D.E. Le Cornu for the appellant.

JUDGMENT

BAILIFF: In this Judgment, I shall refer to the victims of the assaults as 'A' and 'B'.

This is an appeal by Mr. Francesco Maccioni from his conviction by the Assistant Magistrate of two offences of indecent assault. The first is said to have occurred between November and December, 1989, at the Springfield Stadium on a

young girl aged nine at that time, to whom I shall refer as 'A'; and the second to have taken place on the same premises between 8 o'clock and 10.45 on the evening of the 7th September, 1990, on a girl then aged ten, to whom I shall refer as 'B'.

The first charge - that of the offence against 'A' - came to light as a result of the second charge, because 'B' had been taken to Springfield on the evening of the 7th September, 1990, in order that her mother, possibly with the child, could play Bingo. She was there with her aunt.

In the course of that evening something happened which caused the child to become upset.

The prosecution has said that what happened was that the appellant, who was the barman, went downstairs with the complainant and another child called R ; that he sent R away and having done so indecently touched 'B'.

As a result of what she told her stepsister later that evening or possibly the following day, it turned out that 'A' had also complained to her sister fairly shortly afterwards that something had happened to her at Springfield in 1989, and, of course, it followed that enquiries were undertaken by the police, resulting in the two charges.

Now it cannot be said too often that, in cases of a sexual nature involving children, corroboration although not required as a matter of law, is almost always looked for in practice and had this been a jury case, a most careful warning would have had to have been given to the Jury in this respect.

The Crown Advocate, Mr. Bailhache, has suggested that corroboration could lie in a number of ways and he suggested

that one of the stronger ways was the fact that there had been a similar occurrence before that of 1990, in the case of 'A', in December, 1989. Against that submission, there is authority for suggesting that whilst more than two occurrences could be classed as a system and hence be admissible as part of similar facts, two occurrences alone might be due to a coincidence. I find that authority at p.339 of "Criminal Evidence" (2nd Edn.) by Richard May, who is a circuit Judge on the Midland and Oxford circuit. I read from the passage at paragraph 12/94:

> ***"In such a case..."*** (and he was then referring to a case where an employer had indecently assaulted a number of his employees in a similar way) ***"the effect of the evidence is cumulative. The evidence of one girl alone may not carry much weight. The evidence of two may be due to coincidence. The evidence of a number of girls if in similar detail must, unless they have conspired together, have considerable probative force".***

He also says at paragraph 12/95:

> ***"Usually there will be more than two witnesses involved. Lord Reid says in Kilbourne that this sort of evidence could only be admitted if it showed that the evidence was pursuing a system and that two instances would not be enough to constitute a system. However in the DPP v. Boardman there were two witnesses involved and the House of Lords approved a direction that each could corroborate the other".***

But I also would like to add what Lord Reid actually said in the DPP v. Kilbourne which is referred to in paragraph 16/26 of Archbold (43rd Edn.):

> ***"Once there are enough children to show a system ... I can see no ground for refusing to recognise that they can corroborate each other".***

This Court does not consider that the two children in this particular case under these circumstances constitute such a

system and therefore we are not prepared to say that the Magistrate could have found corroboration from that source.

It was suggested that the condition of the child - that is to say the condition of 'B' - could be corroboration in her case; but again one has to be careful; there is a clear warning given in Archbold, at paragraph 16/9 that one must be very careful before drawing that conclusion.

It is suggested that there is corroboration because 'B' had said that at one stage she was being "kissed and cuddled" by the appellant and there is the evidence of R who saw her at some stage being kissed and cuddled. Mr. Bailhache suggests that in cases of this nature it is possible for witnesses to confuse time, and that makes their evidence stronger not weaker.

But he placed his greatest reliance on the question of the admission of the appellant himself to the police officers. Part of what he said to the police officers was removed, but his statement, which he is allowed to alter in any way he wishes, was put in and it was not challenged. In that statement, he makes some clear admissions. First of all, he referred to the occurrence on the 7th September and he made his statement on the 14th September. He said: "We were messing about and I was saying, "Come on, that's enough"." He admits that they came downstairs but were running up and down the steps. They were laughing. We have not had the advantage, which the Magistrate had, of visiting the scene. But the statement goes on: "And if I did that, it was by mistake, I did not do it purposely. I remember touching her hand." (That is 'B' of course). "I do not remember touching her skirt. I don't think so, I didn't mean any harm. Maybe I touched her, but not intentionally".

He then talks about 'A' further on, "'A' is N's grand-daughter - she is always messing about. There was a big spider on the steps and I was scaring her with the spider. I touched her bum and scared her and she ran off".

There is clearly an admission that, certainly so far as 'A' is concerned, he touched the child, but he regards it as an innocent touching and not one which would carry with it any *mens rea*.

All that was a matter for the Magistrate to bear in mind. I should say that the Court has noted how very carefully the Magistrate applied his mind to this difficult case. He was at great pains first of all to ensure that the two girls could give their evidence without fear or without being worried, and also to ensure that each of them knew that they were going to have to tell the truth. Therefore we do not wish anything we say to imply any direct criticism of the Assistant Magistrate in his conduct of this case.

In the admissions, and in his evidence-in-chief, upon which the appellant was not cross-examined - and we agree with Mr. Bailhache that there is no requirement for the Magistrate to cross-examine, except I think it is fair to say that if a witness is not cross-examined then his evidence as given in examination-in-chief goes unchallenged except of course by other witnesses; it may also well be that the Magistrate considered that it was not necessary to cross-examine the appellant because he rejected his evidence, as Mr. Bailhache suggested; or he might have felt that the rest of the evidence, in fact, contraverted it.

Even if he did do so, he would have to go on to address this point, which would be a point which a Judge would have to

put to a Jury: the accused admitted in his statement acts which, if unexplained, could tell against him. However, he gave an explanation; he said he wanted to scare one girl and with the other it was an accident. The Jury would have to be told that if those explanations were accepted then the accused would have to be acquitted. They would also have to be told that the rule goes further: even if the Jury did not actually accept his explanations but thought they might be true, he would have to be acquitted.

We have come to the conclusion that if the Magistrate had addressed this last point, he would have been left, in our opinion, with some doubt in his mind and would therefore have had to acquit the appellant.

But Mr. Le Cornu has also gone into the question, in some detail, of the evidence. Apart from what is said to be corroboration in respect of the case against the appellant concerning 'B', there is this question of the arm wrestling and there is a conflict of evidence as to exactly what took place. Mr. Bailhache said "well, everything took place". But it might have taken place in a different sequence. The mother of 'B' is very clear that the first thing 'B' said to her was that she had been 'touched up'. Later on she said that she had been 'arm wrestling'

Mr. V ., - who was a prosecution witness let me add - agreed that there was some arm wrestling and was adamant that only he and the appellant had gone down to the cellar to look for a gas leak. He saw nothing untoward in the behaviour of the appellant towards any of the children that evening.

'B's aunt also referred to arm wrestling, as the first words which 'B' had repeated to her, which her mother had asked her to do.

Therefore the Court considers that there was evidence to support the defence that if something took place which upset the child, it was perhaps some roughness by the accused with this arm wrestling.

As regards the question of hearsay, the Crown has properly conceded that a considerable amount of such evidence was allowed in, but we are satisfied that it was peripheral and could have had little or no effect on the ultimate decision of the Assistant Magistrate.

After considering the matter the Court has come to the conclusion that it would be unsafe to allow these convictions to stand.

I would also just add as regards the need for a complaint to be recent, that it might be possible to say that the complaint of 'B' to her mother at Springfield was sufficiently recent, but we think that all the other complaints in relation to 'A' were not sufficiently recent.

Therefore under the circumstances, we are going to allow the appeal and the convictions are quashed with costs.

Authorities

Richard May: Criminal Evidence (2nd Edn.) paras. 12-94.

Archbold (43rd Edn.) p. 480 S. 307; Ch. 16, S. 16/26.

A.G. -v- Curtin (8th January, 1992) Jersey Unreported.