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10 pages.

ROYAL COURT - INFERIOR NUMBER

8th January, 1992. 3

Before: Mr. V. A. Tomes, Deputy Bailiff
Jurat Mrs. M. J. Le Ruez
Jurat A. Vibert

H.M. Attorney General
v
CC

Crown Advocate Miss S. C. Nicolle for the Prosecution
Advocate C. L. I. Davies for the Appellant

This was an appeal by CC (the appellant) against his conviction by the Police Court (Magistrate T. A. Dorey) on 19th June, 1991, of having, on the 4th June, 1991, at the toy shop premises known as Bambola, the Parade, St. Helier, indecently assaulted a four year old girl.

He appealed on the ground that the conviction could not be supported having regard to the evidence and that inadmissible evidence was not excluded.

We heard the appeal during a lengthy hearing on the afternoon of the 22nd July, 1991, following which we announced that after considering the matter with some anxiety, we had decided to allow the appeal and quash the conviction, our reasons to be handed down later. We made an order that Mr. Davies would be entitled to his legal aid costs. Our purpose, now, is to give the reasons for our decision.

The case for the prosecution relied on the evidence of the child's mother (the mother) who had observed the alleged indecent assault from the first floor of the shop premises and of the two police officers who arrested and interviewed the appellant.

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The facts alleged by the prosecution can be summarised as follows:-

At approximately 16.00 hours on Tuesday, 4th June, 1991, the mother went to Bambola toy shop accompanied by the alleged victim, her four year old daughter (the child) and her two year old son. The mother intended to buy a blackboard for the child. She could not find any blackboards in the ground floor shop and therefore asked the only shop assistant on the ground floor, the appellant, who directed her to the first floor shop above. The mother left the boy in his push-chair downstairs and went upstairs with the child. The mother had a look around and eventually found the blackboards but the one they selected did not have a price mark on it. The first floor shop assistant advised that she should wait while he went to ascertain the price. At this time the child said "I want to go downstairs" and the mother agreed, telling her not to go away but to stay at the bottom of the stairs. After a further while the mother looked over the top of the stairs (an open winding staircase) to see that the child was alright, when she was shocked at what she saw. She saw the appellant kneeling or crouching by the side of the child with his hand up the child's skirt. She moved back because she was shocked and was not quite sure if she had seen correctly. She then moved back to look over the stairs again and the appellant was still there with his hand up the child's skirt. She stood there not knowing whether to go down quickly and get the child when the appellant looked up and saw her observing him. He said "hello" and moved away, going round to the side of the counter to show the child more toys, and looking up to see whether the mother was still looking at him. At that point the mother went down stairs and called the child to her. She made no complaint at the time, but left the shop. Some two hours later she telephoned her parents in England who advised her to report the matter to the police, which she did. The child was not distressed.

Under cross-examination, the mother said that her first period of observation had lasted a few seconds and the second for

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about a minute. The Magistrate explained that a minute is the time it takes to count up to sixty, slowly and the mother said she was quite certain it was as long as that.

The mother made her complaint to the desk sergeant at the town police station at 19.30 hours on the 4th June. Detective Sergeant James Howden Adamson was informed and arranged for the child to be interviewed. On the 5th June the child was interviewed and the interview was video recorded. At 13.05 hours on the 5th June, Detective Sergeant Adamson and Woman Detective Constable Sandra Genée arrested the appellant at Bambola. The appellant was taken to Police Headquarters and was there interviewed. He denied having put his hand up the child's skirt. He said that he was amusing the child, playing with a small toy train. He demonstrated what he was doing, kneeling down (later he said crouching down, on his haunches) beside the child on the floor playing with the little train. He might have touched the child but if so he did it inadvertently. The child's story was put to him i.e. that he had put his hand up her skirt, onto her pants. He said that if his hand went up her skirt, this would not have been on purpose, it might have slipped. Woman Detective Constable Genée corroborated the evidence of Detective Sergeant Adamson but no doubt they had collaborated on the preparation of their notes. The appellant's explanation was that the toy train was moving back and forth, according whether one touched the front bumper or the back bumper, and the child was moving her feet back and forth in front of it and moving around, therefore looking from above, it could be misconstrued that he had his hand under her skirt when in fact he was just resting his hands on his knees, and the child could have backed onto his hand at the time the mother looked down.

We deal first with the ground of appeal that inadmissible evidence was not excluded. The mother in the course of her evidence said that the child was not distressed and said "I don't think she knew what was going on". The Magistrate went on, not merely to hear hearsay evidence inadvertently given by a witness or witnesses (which as a professional judge he could be relied upon to put out of his

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mind) but to elicit such evidence, apparently deliberately. He asked the mother, of the child: "Did she mention it to you at all?" The mother went on to say that she asked the child, when they got outside, what had happened and that she had added the leading question "Did he touch you or anything?", to which the child replied "He put his hand up my skirt and touched my bottom." The mother went on to say that "yesterday" (the 18th June, 1991 - 14 days after the incident) when they were going past the shop, the child said to the mother "There's that shop, mummy". The mother asked "What shop?" and the child replied "There's that shop where that man put his hand up my skirt". The mother replied "Well its all over and done with now" to which the child replied "You must go to the police mummy, tell him (sic) what happened."

Detective Sergeant Adamson was also permitted to give hearsay evidence of the interview with the child and that the child had said that the appellant had put his hand up her skirt on to her pants. After an interruption from the Magistrate the officer said: " ..... this is what the girl had told me". There was no other evidence that the officer was even at the interview with the child. The Magistrate then said "That is what the girl said that she ..... that he he had put his hand under her skirt but above her pants?" and the Officer replied "Yes".

When Woman Detective Constable Genée said that she was present whilst the child was interviewed "on video" at New Ways Family Centre, St. Helier, by the Children's Officer Mrs. Baudains, Mr. Davies interrupted to say that any evidence of what the child might have said, was hearsay. Nevertheless, the Magistrate said "Yes, well I think we'll go on but I naturally have that point in mind and if there's anything you want to object to please do so .... But I think we'll carry on with the W.P.C.'s evidence uhm ... but uhm .... of course always watching the fact of hearsay".

At the conclusion of Woman Detective Constable Genée's evidence the Magistrate asked "Is that the prosecution case?"

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Centenier Christie said "There is just the report of the video interview Sir which (indistinct) has a copy". Mr. Davies again interposed saying "Yes Sir again I would stress that the contents of that would appear to be hearsay Sir". The Magistrate replied "Yes, well I will examine them and if I consider that they are hearsay I'll put them out of my mind".

The report of the video interview is short; the interview was conducted at New Ways Family Centre on Wednesday, 5th June, 1991, by Child Care Officer, Marrie Baudains; she compiled the report; she was not a witness; therefore, the report adduced as it was by the Centenier was hearsay upon hearsay. The report states that the child was relaxed and communicative during the short interview and was keen to inform the Child Care Officer of the alleged incident. It further states that "She said that when they were in the shop a man pulled her skirt up and put his hands on her bottom on top of her pants. She was standing beside the man, looking at a toy."

In H.M. Attorney General v. Le Cocq (12 June, 1991) Jersey Unreported, the Court said that:-

"The Police Court Magistrate, for the purpose of carrying out his functions, has of necessity, to consider on the material before him, what constitutes evidence admissible against the accused, whether on committal or for deciding guilt or innocence. In the course of his duties material may very well be placed before him which is inadmissible; but this does not invalidate a decision to commit the accused for trial and it does not invalidate a pronouncement of guilt, even though such material may be very prejudicial to the accused. Segregating admissible from inadmissible evidence is part of the examining Magistrate's function; and the procedure contemplates that the Magistrate is capable of performing the duty of putting out of his mind all inadmissible material which he has seen or heard, and concentrating only upon the admissible evidence, in coming to his decision whether or not it is to commit the accused to the Royal Court for trial upon a prima facie case or to convict and sentence the accused upon proof of guilt beyond reasonable doubt".

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The rule against hearsay is stated at Archbold - Criminal Pleading Evidence and Practice - 43rd edition, paragraph 11 - 3 at p.1084:

"Former statements of any person, whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them, unless they were made by a defendant and constitute admissions of fact, relevant to those proceedings."

It was not disputed that the evidence of that which the child had said was hearsay and therefore inadmissible.

In the present case the majority of the inadmissible material was not "placed before" the Magistrate. It was adduced by him. Having been told by the mother that the child did not know what was going on, he asked "Did she mention it to you at all?" The mother responded and the whole of the hearsay evidence given by her was in response to that invitation and the Magistrate's further question "Is there anything further you'd like to tell me?" When W.D.C. Genée referred to the interview on video and Mr. Davies anticipated hearsay evidence, the Magistrate said "Yes, well I think we'll go on ..." and "But I think we'll carry on with this W.P.C.'s evidence." Fortunately, the W.P.C., showing greater discretion than her senior colleague who had placed inadmissible hearsay before the Magistrate, said "With respect Sir I was not going to say what the child had actually said actually.", and no hearsay evidence was adduced from her. However, when Centenier Christie sought to produce "just the report of the video interview" and Mr. Davies properly objected the Magistrate said "Yes, well I will examine them and if I consider that they are hearsay I'll put them out of my mind." So, here we faced a situation where Child Care Officer Baudains, who was not a witness, had compiled a report of that which the child had said, and the report was presented by the Centenier as his evidence, i.e. hearsay upon hearsay.

We regret that in the circumstances where the Magistrate had himself adduced hearsay evidence to this extent, as opposed to

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inadmissible evidence being "placed before" him, we could not be satisfied that he had put the hearsay evidence out of his mind.

The Magistrate's notes, which are by no means full notes of the evidence, did not help to re-assure us. They include: "Child said he had touched her bottom". There is nothing in the notes to show that the Magistrate discarded inadmissible evidence; rather do they tend to support the view that the inadmissible evidence acted upon his mind and was taken into account. Because the notes are not full notes we must assume that they record that which he considered to be important and he recorded what the child said.

Excluding all hearsay, the Magistrate was left only with the evidence of the mother. Other people in the shop had been interviewed but none was brought to give evidence from which we conclude that nobody else had witnessed anything untoward. We think that the mother's evidence was unsatisfactory in two important respects:-

1. At page 4 of the transcript we have the following exchange:

"Judge Dorey: ..... Was your little girl distressed at all?

Witness: No .... I don't think she knew what was going on?

Judge Dorey: She didn't know what was going on?

Witness: No".

And yet, later, in reply to the leading question from the mother "did he touch you or anything?" the child replied "He put his hand up my skirt and touched my bottom". This version was repeated on more than one occasion. In particular, the somewhat strange conversation some two weeks after the incident to which we have already referred when the child (four years of age) allegedly spoke in a very adult way, advising her mother to go to the police. On the

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other hand the video report says that the child alleged that the appellant "pulled her skirt up".

Thus, free of all hearsay, we are left with the evidence that the child was not distressed at all and did not know what was going on; which must raise a doubt whether anything objectionable went on at all.

2. According to the mother she observed the appellant with his hand up the child's skirt for a few seconds. Shocked by what she saw, she moved back because she did not know what to do at first. Then she moved back again and observed the appellant with his hand up the child's skirt for a full minute. She was "quite certain" that it was as long as it takes to count up to sixty, slowly. Only then did she decide that she was going downstairs and move the child away. In her original witness statement to the police the mother had referred only to a "few seconds". It raised a doubt whether she had lengthened the duration of her observation in order to strengthen the case against the accused.

Children do fantasise and the greatest of care is needed before convicting without corroboration in sexual cases. The leading question "Did he touch you or anything?" should not have been put.

We find ourselves quite unable to reconcile the mother's reaction with what she says she saw. We believe that the mother's reaction, if she had been certain of what she had seen, would have been different. Long before a minute had elapsed she would have screamed her child's name or at the appellant, or otherwise shouted for attention, and she would have rushed down the stairs. But the child was between her and the appellant who was on the far side of the child. We are satisfied that the mother saw something, but that she was not sure of what she had seen. She made no complaint for several hours. Recent complaint is an important factor in sexual cases. When the mother went downstairs she said that she "stood by my pushchair because I was still waiting for the gentleman upstairs to find me the

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price of the blackboard, and then I called (the child) to me when I got downstairs and I looked up again to see if the gentleman had came back (sic) and this time CC had came over (sic) to me with this little toy train and said something or other and I just said "Yes" and I just said "Come on", I said "I'm not waiting around no longer", and I just grabbed my daughter and my son and walked out". So that, far from being shocked or outraged, the mother still waited for some time hoping to price the blackboard in which she was interested and even entered into conversation, however brief, with the appellant.

As a result, the Court, unanimously, was not convinced that there was the necessary "mens rea" and was not convinced that there was an indecent assault. Applying the test that the Court had to be satisfied beyond reasonable doubt it was unanimous in its view that the finding of guilt was unsafe and unsatisfactory; accordingly we quashed the conviction.

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AUTHORITIES.

A.G.-v-Le Cocq (12th June, 1991) Jersey Unreported.

Archbold (43rd Ed'n): para.11-3: p.1084.
para.20-387: p.2139

Cross on Evidence (6th Ed'n): pp.37-8, 262.

R-v-Osborne [1905] 1 KB 551.

R-v-Wallwork [1958] 42 Cr App R 153.

R-v-Court [1986] 3 WLR 1029; (1987) 84 Cr App R 210.

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