REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN **APPELLANT**

AND

THE STATE **RESPONDENT**

PANEL:

R. Hamel-Smith, J.A.
L. Jones, J.A.
S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant
Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 12th January, 2005

JUDGMENT

Delivered by S. John, J.A.

1. On February 18, 2004 before a jury the appellant was found guilty of four counts of unlawful sexual intercourse and four counts of serious indecency. On March 24, 2004 he was sentenced to seven years imprisonment on each count of unlawful sexual intercourse and five years imprisonment on each count of serious indecency. All the sentences were to run concurrently.

2. In this case the appellant and the victim are cousins. At the time of the alleged offences the victim who we shall refer to as 'K'was three years old. The appellant was sixteen years of age. The offences to which the eight counts in the indictment related were alleged to have been committed during the period August 3l, 1997 and May 01, 1998. The prosecution case against the appellant at trial depended effectively on the uncorroborated evidence of 'K' who was then nine years old.

3. A number of grounds of appeal were filed but the one ground upon which heavy reliance was placed was that the trial judge erred in law when she rejected the submission of no case to answer.

4. Several witnesses testified on behalf of the prosecution, however, only two of them really gave evidence material to the counts on the indictment, namely 'K' and Cheryl Pierre-Brooks a medical practitioner. For the purpose of the judgment it is necessary to allude to the evidence of those two witnesses.

The evidence of 'K'

5. After stating her name, address and the school she attended and acknowledging that the appellant was her cousin, she said:

> "*Jomaine put his penis in my vagina and my mouth. He did that eight times to me. He put his penis in my vagina four times and in my mouth four times. He did that in his bedroom on top the bed and on the ground on the carpet. He did this on several days at different times."*

6. Under cross-examination by attorney for the appellant she said that her aunt Charmaine (her mother's sister) had taken her to Dr. Michael Telemaque on one occasion because she was itching inside and outside of her vagina. She further said that her mother had taken her on two occasions to another doctor in St. James but she could not then recall the name of the doctor. That doctor never testified either at the preliminary inquiry or the trial. In answer to a question from attorney for the appellant 'K' agreed that in her evidence-in-chief she said that the appellant had done something to her eight times. She then said:

> *"I recall telling the Woman Police Constable three times. She read back what I said before I signed it. I did not tell her it was true. I remember the lady police writing what I told her and I wrote my name to it. She read it to me for me to hear what I said. She asked me if that was true and I did say that was true. I can't remember what I told her. I saw where I signed my name. Yesterday, someone read it over for me. My mummy when she read it over I heard her say three times. I talked about that three times with mummy. After talking with mummy I realized it supposed to be eight times. When I spoke to the lady police, mummy and daddy were present."*

In response to a question, no doubt with reference to her evidence given at the preliminary inquiry, she said:

> *"I remember going to the police station. I remember telling the lawyer that I did not tell the police anything about Jomaine before I signed the paper. I was not speaking the truth."*

Testimony of Dr. Brooks

7. She said that on January 04, 1999, some eight (8) months after the event she examined 'K' and made notes contemporaneous with the examination. She sought and was granted leave of the court to refresh her memory from her notes. Her testimony then continued:

> *"My findings were: hymen not intact, probably inflicted by sexual interference. I came to findings by examining vaginal area of K.C. By sexual interference, I mean having made a differential diagnosis. I came to conclusion more probable because of what I saw was due to sexual act. In making my conclusion I would have examined the vaginal area thoroughly. On examination of vaginal area I examined the anterior and posterior areas especially looking for tear. There were none – There were no abrasions. I examined the vaginal orifice looking for elasticity – absence or presence of hymen. The elasticity of vaginal orifice at that tender age, I did not insert my hand. I inserted my little finger around the orifice to make sure that hymen was not in tact. I noted that the orifice was not irregular. It was smooth and pliable in texture. It should be noted that a four-year-old child would not have pliable orifice. It would be tightened. Because of all circumstances noted I put down sexual interference as opposed to blunt instrument which I would put sometimes."*

8. During Dr. Pierre-Brooks' cross-examination, Mr. Peterson for the appellant made an application to inspect her notes. Dr. Pierre-Brooks had no notes. In fact, she said that all the details she had given about elasticity, orifice and other details were from memory. The document from which Dr. Pierre-Brooks had refreshed her memory was the medical certificate, which she had issued upon her examination of 'K' on January 04, 1999. All that was written on that medical was – hymen not intact – probably inflicted by sexual interference.

Submission of No-Case

9. At the end of the prosecution case it was submitted for the appellant that there was no case to answer. It was put on two bases. First, that the evidence of the prosecution was so discredited as a result of cross-examination that it was unsafe for the case to go to the jury. The second basis of the submission was that having regard to the wide span in the indictment it was difficult for the appellant to properly answer the charges.

10. The judge in rejecting the submission acknowledged that there were inconsistencies in the evidence but said that it was the function of the jury to decide what they made of the inconsistencies. *"It was not the court's function,"* she said *"to weigh the evidence and to find where the truth lay, to do so she said would amount to a usurpation by the court of the function of the jury*." As to the indictment she said that it clearly outlined the conduct complained about, the place where it was alleged to have taken place and the period during which it took place. That, she said was sufficient.

11. Following the rejection of the submission the appellant gave evidence and called his uncle, his mother and Dr. Michael Telemaque, a General Practitioner to give evidence on his behalf. The appellant denied the allegations. He admitted that during the period ***August 1997 – May 1998 he had seen the victim 'off and on' at his home and had taken care of her***. He said she was his favourite cousin. He also gave evidence of his previous good character.

12. Dr. Telemaque testified that he had seen 'K' on three occasions at his office on Long Circular Road, St. James. He made notes on each occasion and with the leave of the court he was allowed to refresh his memory. According to his notes, the first visit was July 04, 1997 when 'K' was brought in with a complaint of high fever and vomiting. His diagnosis then was Acute Bacterial Tonsillitis. The second visit was on November 22, 1997, with a complaint of fever and an external vaginal itch that was present for three months. He said that he formed the opinion that the itch was due to fungal infection in the vagina. He examined her by looking at the external genitalia. On the final visit on December 08, 1997 he was told that things had very much improved. Apart from giving her some more medication he said that he did not examine her. He said that during his examination of the victim in November he saw no break of the hymen.

The Grounds of Appeal

13. In submitting that the judge erred in rejecting the no-case submission Mr. Stuart Brook for the appellant referred to several authorities but placed strong reliance on ***Sangit Chaitlal v The State (1985) 39WIR at 295.***

The Law

14. The current view in the United Kingdom today is stated in ***R v Galbraith (1981) 1 WLR 1039 124*** in these terms:

> *" (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or*

other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

15. As Lord Lane pointed out the first limb of the ***Galbraith*** test does not cause any conceptual problems. The second limb of the test must be understood, he said, in the context of a practice that developed after the passing of the Criminal Appeal Act 1966 and s. 2 (1) of the Criminal Appeal Act 1968, (which has since been repealed and replaced with some modification by the Criminal Appeal Act 1995), of inviting the judge to hold that there was no case to answer because a conviction on the prosecution evidence would be unsafe. The principles stated in ***Galbraith*** have been consistently applied in Jamaica although the 1968 Act is not part of the law in Jamaica. (See ***Daley v R [1993] 4 All E.R. 87***.

16. In ***R v Barker, (1977) 65 Crim. Rep***. a case decided before ***Galbraith***, and which involved a conviction for driving a motor vehicle with a blood alcohol concentration above the prescribed limit the appellant was convicted and sentenced to six months imprisonment and suspended for two years. A submission of no-case to answer was made and it was rejected. The matter went to the Court of Appeal where counsel asked the court to find that the conviction was unsafe or unsatisfactory. He based his argument principally on the fact that at one point in his summing-up the judge seemed to be telling the jury that the inconsistencies were such that they could not convict. That was one possible conclusion to apply to one passage of the summing-up. The court went on to say:

> *"But even if he is right and even if the judge has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case. The judge, whatever his personal views, must put the issue before the jury fairly."*

17. In the Belize case of ***Taibo v R [1996] 48 W.I.R. 74*** the Privy Council stated that the criterion to be applied by a trial judge in dealing with a submission of no-case to answer is whether there is material on which a reasonable jury could be satisfied of the guilt of the defendant. There, the Board applied ***Galbraith*** in maintaining that once there is credible material, even if the prosecution case was 'very thin' the trial should proceed.

18. On the other hand in ***R v Colin Shippey and others, [1988] Crim. L.R.*** **767** Turner J considered the scope of ***R v Galbraith***. 'S' was charged alone with rape and with two other defendants with a further rape on a different day of the same girl. The prosecution case depended entirely upon the evidence of the complainant and there was effectively little or no corroboration. After the close of the prosecution case submissions of no case to answer were made on behalf of all three accused on the basis of ***Galbraith*** (*supra)* namely that the evidence was so inherently weak and inconsistent that no jury properly directed could properly convict. The prosecution opposed the application. After reviewing ***Galbraith*** in great detail the judge said that he did not interpret the judgment in either ***Galbraith*** or ***Barker*** as intending to say that if there are parts of the evidence which go to support the charge then no matter what the state of the rest of the evidence that is enough to leave the matter to the jury. He felt it was the duty of the court to make an assessment of the evidence as a whole.

19. He said that it was not simply a matter of the credibility of individual witnesses or simply a matter of evidential inconsistencies between witnesses, although those matters may play a subordinate role. He found that there were within the complainant's own evidence inconsistencies of such a substantial kind that he would have to point out to the jury their effect and to indicate to the jury how difficult and dangerous it would be to act upon the plums and not the duff. (Emphasis mine). He accordingly upheld the submission.

20. In Australia the law has been settled since ***Doney v R [1990] 171 Crim. Law Rep. 214*** a decision of a five-member court. There, the court expressed the principle thus:

> *"If there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."*

The High Court went on to point out that the power reserved to a court of criminal appeal to set aside a verdict on the grounds that it is unsafe or unsatisfactory, does not involve an interference with the traditional division of functions between judge and jury in a criminal trial; and that there are no grounds for adding that power to the armoury of a trial judge.

21. In ***Sangit Chaitlal v State*** Bernard J.A. (as he then was) in delivering the judgment of the court expressed the view that the test as laid down in ***Galbraith*** was too restricted a view for while it may cover the case where the verdict is unsafe or unsatisfactory, it did not seem to meet the situation where the verdict was unreasonable or could not be supported having regard to the evidence (which is the language used by our statute giving a judge a somewhat wider discretion.) He opined, that in the ultimate the matter should be left to the good sense of the trial judge who must be depended upon to see that there has been no miscarriage of justice.

22. More recently in the case of ***Bethel v The State (No. 2) [2000] 59 W.I.R. 456*** de la Bastide, C.J. referred to the approach taken by the English Court of Appeal in ***R v Clinton [1993] 1 All E.R. 998*** which was based on section 2(1)(a) of the Criminal Appeal Act 1968 (which has since been repealed and replaced with some modification by the Criminal Appeal Act, 1999). The English sub-section, he said, provided that an appeal against conviction should be allowed if the conviction was considered unsafe and unsatisfactory. The corresponding provision in the Trinidad and Tobago Judicature Act is section 44(1) which prescribes that an appeal should succeed if the Court of Appeal thinks that on any ground there was a miscarriage of justice. The matter he said was considered previously in ***Solomon v The State [1999] 57 WIR 324***, where the court considered the difference in the language of the English provision as compared with ours and came to the conclusion that there was no substantial difference in the effect of both provisions.

23. In the instant case whilst there were several inconsistencies and weaknesses in the evidence of 'K' they were not necessarily fatal. It must be remembered that the unfortunate incident occurred when 'K' was three years old. We agree that at the time of the trial she was nine years of age but it was important for the jury not to lose track of those important aspects of the case. Furthermore, within recent times there seems to be a practice where some judges have come to think it right that when their own assessment of the credibility and consistency of the evidence led by the prosecution is such that a conviction on the evidence would be unsafe, they should withdraw the case from the jury so as to make sure that the accused is not the victim of a miscarriage of justice. The court deprecates that practice. As Lord Widgery C.J. said in ***R v Barker*** (supra) "………*It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying."* See too the dicta of Ibrahim J.A. in the ***State v Rick Gomes*** and ***Luis Blanco Gomez Cr. A 98/99 (unreported) at page 17*** where he said:

> *"A judge sitting with a jury, however, must be careful not to be too anxious to save a jury from themselves by relieving them of the responsibility and the right to make their own assessment of the perceived weaknesses in the prosecution's case."*

24. We are therefore of the opinion that the judge was correct in rejecting the submission of no case to answer.

25. Another very important feature of the prosecution case was the failure of 'K' to give any evidence that would link the appellant with the dates in the indictment, that is to say, August 3lst 1997 – May 01,1998.

26. In the case of ***R v Dossi (1919) 13 Cr. App. R. 158*** the indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, *"on March 19th 1918,"* and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy Chairman's summing up the jury retired, and on their return said that they found the appellant *"with regard to the date March 19th, Not Guilty. If the indictment covers other dates, Guilty*." They also found him Not Guilty of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy Chairman amended the indictment by substituting *"on some day in March"* for the words *"On March 19th, 1918,"* and the jury then found the appellant Guilty on the amended indictment.

27. It was submitted on behalf of the appellant that if a man is put on trial on an indictment which charged him with committing an offence on a specific date and no amendment was made before or during the trial and the jury found that he did not commit the offence on that date they should return a verdict of Not guilty. That, it was further submitted, was especially so where the defence was one of alibi. The judgment of the Court of Criminal Appeal was delivered by Atkin J who, in relation to the submission that there was no power in the court to amend the indictment and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days, they ought to have found him Not Guilty. He then stated:

> *"It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence."*

28. Later on in the same judgment he said at page 160:

> *"Though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment."*

29. In the instant case two situations arose:

i *Time was not an essential part of the alleged offence; and*

ii. *Whilst there was no evidence on the prosecution case to link the appellant with the dates in the indictment when the appellant gave*

evidence he provided the necessary evidence thereby filling the lacuna in the state's case. He said:

> *"When mother operated these bars in functions and fetes – when she come she would bring 'K' and I used to take care of 'K' during the period………………That period included August 31 1997 – May 01 1998.*

30. Other grounds of appeal were filed but as we indicated at the beginning of this judgment counsel relied on the no-case submission. Out of deference to Counsel we have considered the other grounds but have found no merit in any of them.

31. Having regard to all these reasons we would dismiss the appeal. The question of sentence has been adjourned to January 25, 2005 for consideration.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal

SUPPLEMENTAL

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN	**APPELLANT**

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THE STATE	**RESPONDENT**

PANEL:

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L. Jones, J.A.

S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant

Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 28th January 2005

SENTENCE

Delivered by S. John, J.A.

This judgment is a supplemental to the judgment delivered on January 12, 2005.

2. On January 12, 2005 we dismissed this appeal and deferred the question of sentence. On January 25, 2005 we heard submissions from both Counsel on the issue and reserved our decision.

3. Mr. Stuart Brook for the appellant submitted to the court that he was relying on the mitigation plea made by senior counsel for the appellant at the trial. In addition, he submitted, he was relying on the following documents also submitted at the trial namely:

(i) The probation officer's report;

(ii) A petition signed by more than 250 persons who all spoke about the appellant's glowing performance at his workplace; and

(iii) A letter written by a minor cousin living abroad who spoke of the love she had for the appellant and the high esteem in which she held him.

4. The appellant was fifteen years of age at the time of the commission of the offences. They were committed during the period August 31 1997 to March 1998. At the conclusion of the preliminary inquiry on November 23 1999 he was committed to stand trial, which did not begin until February 04 2004. The trial judge no doubt took into account the fact that he was fifteen years of age at the time of the commission of the offences but in a general way. We say general because she then proceeded to relate that a certain degree of trust had been reposed in him and that he had breached that trust. In the course of passing sentence she commented: *"You were about 3 times older than Crystal. She was entrusted in your care, and you betrayed that trust by committing these acts upon her."*

5. We have some difficulty in such a proposition. One can readily understand the reposing of trust in a male adult to baby-sit a young girl child but we do not think that the same can be said of a fifteen year old male. It may be leaving things to chance when one entrusts a fifteen year-old male with a young girl. This is not to countenance the commission of the offence in any way but in today's world to repose such a high degree of trust in such a young person may be placing the bar somewhat on the high side.

6. In Cr App 62/2000 ***Latchman v The State***, Lucky JA stated that a court is always concerned about sending young first offenders to an extended term of imprisonment. Of

course, it all depends on the circumstances of the case but nonetheless we share that reluctance if only because of the adverse consequences on the accused in such an environment.

7. It cannot be doubted that in the instant appeal the question of sentence must have been a difficult one for the trial judge, given that she had standing before her a 21-22 year old young man and was attempting to go back in time to the date of commission of the crime. Nevertheless, we express concern whether the judge took all that was required into consideration.

8. In ***R v Secretary of State ex parte Uttley*** [2004] UKHL 38 the House of Lords recognized that in circumstances such as these where the accused at the time of the offence would have been liable to a certain term of imprisonment as a young offender had he been tried within a reasonable time, that term must be taken into account when determining the sentence after a delay of a number of years. Regrettably, this was a recent decision so it could not have been brought to the attention of the trial judge.

9. In this case, the delay between committal and trial was in no way attributable to the appellant. The maximum term which could have been imposed upon him was not less than three years nor more than four years had he been sentenced pursuant to the provisions of the Young Offenders Detention Act Chap13:05. The trial judge did not take into account the maximum sentence available under the Young Offenders Detention Act at the time of sentencing. Section 7 of that Act provides as follows:

> *(1) Where a person is convicted before the High Court on indictment of any offence other than murder, or before a Court of Summary Jurisdiction of any offence for which he is liable to be sentenced to imprisonment, and it appears to such Court-*
>
> > *(a) that the person is not less than sixteen nor more than eighteen years of age, and*

(b) *that by reason of his antecedents or mode of life it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime,*

the Court may, in lieu of sentencing him to the punishment provided by law for the offence for which he was convicted, pass a sentence of detention under penal discipline in the Institution for a term not less than three years nor more than four years.

(2) *Before passing such a sentence the Court shall be satisfied that the character, state of health, and mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid.*

10. It is therefore quite clear that had he been convicted at a time when he was not less than sixteen nor more than eighteen, he could not have received a sentence of more than four years. Through no fault of his own he was deprived of that sentencing option and also deprived of the opportunity to receive such instruction and discipline afforded young offenders at the institution.

11. We have carefully read the probationer officer's report and the many recommendations that couns el has provided. They all demonstrate that the appellant is a young man of good character with many good qualities and who has never had a brush with the law. In fact, the final sentence of the probation officer's report states: "*Jomaine's personality stands in sharp contrast to the deviant acts committed.*" The judge in passing sentence acknowledged that the appellant was not a person in need of rehabilitation.

12. We, in no way wish to diminish the seriousness of the offences and do not for a moment lose sight of the fact that the victim was just three years old. However, there

must be a balancing exercise that takes into account on the one side the harm done to the victim and the need for retribution and the need to protect society from persons who commit such crimes on the other.

13. In the circumstances of this case, primarily because of the age of the appellant at the time of the offence and the fact that the trial judge, through no fault of her own, did not have the benefit of the authority referred to earlier, we think that the sentences were unduly severe.

14. Accordingly, we reduce it to a term of three years imprisonment. The sentence on each count will run concurrently from the date of his conviction.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal