CR.APP.16/2005 241

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

PETER HALLORAN - APPELLANT

AND

THE STATE - RESPONDENT

CORAM:
Hon. Justice Sir John Muria JA (Presiding)
Hon. Justice U.H. Tejan-Jalloh JA
Hon. Justice A.N.B. Stronge JA

HEARING: 6 July 2005
JUDGMENT: 12th October, 2005

Advocates:
Appellant: *N.C. Browne-Marke, Esq.;*
Respondent: *A.K.A. Barber, Esq.;*

JUDGMENT

Delivered this 12th **day of** October **2005.**

MURIA JA: The appellant was tried at the High Court of Sierra Leone on one Count of indecent assault on a girl under the age of 14 years contrary to Section 9 of the *Prevention of Cruelty to Children Act (Cap.31) 1960.* He was found guilty on the charge and sentenced to 18 months imprisonment. Two other accused were charged with the offence of conspiring to pervert the course of justice and tried together with appellant. The two accused were acquitted of the

offence of conspiracy. The appellant has now appealed to this court against both his conviction and sentence. He has been granted bail pending the hearing and determination of his appeal.

The appellant was formerly employed by the Special Court of Sierra Leone as Investigator. While in Sierra Leone, he, together with his other working colleagues, namely, Mandy Cordwell, Ralph La Pierre and Sharon Holt shared a house at 6 Wilberforce Valley. As he had made arrangement for his girlfriend and child to join him in Freetown by the 14th June 2004, the appellant sought to find a nanny for the child. It would appear that the girl, Kadie Kabia (P.W.4) was introduced to the appellant by the second accused on 30th May 2004. The second accused who was employed as a houseboy at 6 Wilberforce Valley, is the brother of P.W.4. The appellant had given some ability test to P.W.4 but it is not clear on the evidence that she was actually employed as a nanny by the appellant.

The evidence of P.W.4 herself, however, shows that she had been at the house on 31st May 2004, 1st June 2004 and 2nd June 2004. It was the houseboy (2nd accused) who showed P.W.4 around the house on 31st May 2004, showing her the vacant room which she would be using to sleep in and told her that on occasions she would have to sleep with the appellant's wife. P.W.4 slept at the house, in the vacant room shown to her, on Monday 31st May 2004 and Tuesday 1st June 2004. On Wednesday morning 2nd June 2004, Mrs. Mandy Cordwell (P.W.1) met her in the house and asked if she could have a small talk with her, to which she had no objection. P.w.1 asked her where she had been sleeping and she replied that she had been sleeping in the vacant room. When asked by P.W.1 if the appellant had gone into that room to sleep with her, she denied sleeping with the appellant. It is correct to say that as a result of the "small talk" between P.W.1 and P.W.4, information was passed on to Janet Tommy (P.W.2)

by P.W.1 and on which the interview between P.W.2 and P.W.4 was conducted. (see page 74 of Record). P.W.4 was further interviewed by Joseph Senesie Vandy (P.W.3) culminating in the making of Exhibit G which is P.W.4's statement containing the allegations adversed to the appellant. Consequent upon the making of Exhibit G, the appellant was arrested and charged with indecently assaulting P.W.4. The appellant denied throughout that he indecently assaulted P.W.4 in any way whatsoever.

As it transpired both P.W.4 (the alleged complainant) and the appellant denied any form of indecent assault. It therefore must be obvious that the prosecution must rely on some other evidence to support their case against the appellant. The witnesses called by the prosecution were P.W.1 whose evidence, at its highest confirmed the presence of P.W.4 in the house between 31st May 2004 and 2nd June 2004. She gave evidence at the trial that she saw P.W.4 in the house and on Wednesday 2nd June 2004 she had "small talk" with P.W.4 resulting in some information which she (P.W.1) obviously had written down and later passed on to P.W.2 and P.W.3. On the evidence, the allegations of indecent assault were not made by P.W.4 in the first place to P.W.1 or to any other person but had their origin from the information obtained by P.W.1 during the "small talk" between herself and P.W.4. This information was clearly the origin of the allegations against the appellant. The evidence of P.W.2 and P.W.3 concerned with their interviews with P.W.4 and the accused, including the appellant. Both P.W.2 and P.W.3 confirmed that they conducted the interviews based on the information given to them by P.W.1. The doctor (P.W.5) gave evidence of her examination of P.W.4 on 16th July 2004 and her report was exhibited as Exhibit F1 and F2. The doctor's examination of P.W.4 was clearly conducted based on the allegations contained in the Police Medical Report Form. It is important to note that the female police officer, named Mary who accompanied P.W.4 to the doctor for medical examination told the doctor it was *"another white lady called Mandy suspected that the child has been assaulted. She asked her, and Kadie explained about the incident"*. Officer Mary was

relating to the doctor what P.W.1 told her and that clearly cannot be accepted as admissible evidence. Ibrahim Kargbo (P.W.6) gave evidence that he received the items alleged to have been collected from the appellant's room by the police. These were one pair of blue jean trousers, one maroon polo shirt and DVD action film. These items were simply tendered by the Police Exhibit Clerk as exhibits kept in custody. No attempt had been made by the prosecution to identify these items for the purpose of linking them with any of the accused or P.W.4. Those items, like P.W.5's medical report, were admitted in evidence despite strong objection by Counsel for the appellant. The other prosecution witness was Ralph La Pierre (P.W.7) whose evidence was that relating to his discussion with P.W.1 about P.W. 4's presence in the house and driving P.W.4 and P.W.1 to the various locations including, the Country Lodge at Hill Station. Usufu Dafae (P.W.8) gave evidence but his evidence has little to do with the appellant. Albeito Fabbri (P.W.9) gave evidence of an investigation he conducted and report made on the appellant's conduct. P.W.9's evidence, in particular his report, had been ruled inadmissible by the trial judge. It is of little use to the prosecution case.

Leaving aside Exhibit G (the previous inconsistent statement of P.W.4), the sworn evidence of all the prosecution witnesses, taken at their best, amounts to no more than a case of grave suspicion that something might have happened between the appellant and P.W.4. It was, therefore, incumbent on the prosecution to look elsewhere for evidence to support their case. My reading of the record of this appeal lead me to the conclusion that the only material that the prosecution had buttressed their case on was Exhibit G where the alleged complaints of indecent assault were mentioned. As I have stated earlier, in her sworn evidence, P.W.4 denied all the allegations of indecent acts committed upon her by the appellant. She further stated in her sworn evidence at the trial that it was P.W.1 who made her say what she told the police in Exhibit G. Most importantly, P.W. 4 was the principal witness for the State and right from the beginning of the trial denied any form of indecent assault on her by the appellant.

She gave no evidence whatsoever at the trial that she was sexually assaulted. When one turns to pages 80 – 85 of the record, it is obvious that PW4 was recounting what she told the police in Exhibit G and the Doctor in Exhibit F1 & F2. All these, as he put it "Mandy was the one who told me to say all these things about the 1st accused". The legal status of Exhibit G is therefore central in this appeal, and to that I now turn.

The law regarding previous inconsistent statement made by a witness has been well settled. The authorities are abundant. We refer to *R v White* (1922) 17 Cr. App. Rep.60 which was followed in *R v Harris* (1927) 20 Cr.App.Rep.144 for the principle of law in this regard, namely, that previous inconsistent statements made by a witness are inadmissible and so do not constitute evidence on which the Court can act. They can only be used to discredit the witness and thereby rendering his evidence at the trial negligible. These two cases were followed in *R v Golder* [1960] 3 All E-R-457; (1961) 45 Cr. App R 5. See also *R v Jason Norman Honeyghou and Neal Satles* [1998] EWCA Crim 2527. Reiterating the principle just stated, the court in *R v Golder* said (at 459; 11):

> "When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act."

The same directions apply in a trial by a Judge alone. Failure to properly direct the jury or judge himself (where he is sitting alone) along the line stated in *R v Golder* amounts to a serious error: *R v Oliva* (1965) 49 Cr.App.R.298.

In the present case, there was absolutely no evidence from the principal witness (P.W.4) of assault committed upon her by the appellant, indecent or otherwise, at the trial. As a result of that, the prosecution sought to treat her as a hostile witness with a view to putting to her the contents of Exhibit G. While the prosecution was permitted to cross-examine P.W.4 on her previous inconsistent statements, the purpose for doing so must be not to substitute those unsworn statements for her sworn evidence at the trial, but to destroy her credit and show that her sworn evidence was unreliable. Mr Barber of Counsel for State contended that P.W.4's statement was properly admitted because she had been declared hostile, quoting *Archbold Criminal Pleading, Evidence and Practice 1997 Edition*, paragraphs 8-97, 8–100 and 4-405. Counsel was unable to furnish the Court with copies of the authority cited, nor copies of any of the other authorities he relied on. I express the Court's displeasure of such conduct by Counsel. Despite Counsel's failure, I have been able to consult the *36th, 41st and 2001 Editions of Archbold Criminal Pleading, Evidence and Practice* on the subject of hostile witness. I do not accept the submission by Counsel that since P.W.4 was declared hostile witness, her previous inconsistent statement was properly admitted. Such a contention implies that as long as P.W.4 was declared hostile witness her unsworn previous inconsistent statement could be admitted for all purposes, including substituting those unsworn statements for her sworn evidence in Court. That is "all wrong" as the court pointed out in *R v White* (above). See also *Archbold Criminal Pleading, Evidence and Practice, 41st Edition*, paragraph 4-306, p.360 where the learned author, referring to *R v White* and other cases said:

> "Where permission is given by the Judge to treat a witness for the prosecution as hostile, but, on being confronted with unsworn statements made previously in the absence of the prisoner, the witness, although admitting having made the statements, swears that their contents are untrue, the contents of those statements do not become evidence, and although the jury may be directed as to their effect upon the credibility

Since there was no evidence whatsoever at the trial from the prosecution witnesses to show that there were acts of indecent assault committed upon P.W.4 by the appellant, the inescapable conclusion must be that the conviction was founded on P.W.4's unsworn previous inconsistent statement (Exhibit G). Such a finding is contrary to both law and the admissible evidence in this case and ought not to be allowed to stand.

I make mention two of the cases *R v Pestano* [1981] Crim. L.R 397 and *R v Maw* [1994] Crim.L.R. 841 referred to by the learned trial judge. The cases of *Pestano* and *Maw* are concerned with the appropriate warning to the jury regarding the reliability of the sworn evidence of the witness given at the trial after having been confronted with his previous inconsistent statements. The other English cases on this subject are *Governor of Pentonville Prison, ex parte Alves* [1993] A.C.284; *Goodway* [1993] 4 All ER 894; and the Australian case of *Discroll v The Queen* (1977) 137 CLR 517. These cases, however, appear to extend the principle in *R v Golder* (above) on the warning to be given to the jury on the reliability of the witness's sworn evidence in the light of his previous inconsistent statements by accepting that it was not always necessary to direct the jury that such sworn evidence should be regarded as unreliable. As pointed out in *Thomas* [1985] Crim. L.R. 445, there may well be that in certain circumstances the witness has rational or convincing explanation for the earlier contradictory statement.

Assuming for the moment that the principle stated in *Alves, Goodway* and *Driscoll* had been applied in the present case, did the circumstances of the case demonstrate that P.W.4 has rational explanation for her earlier inconsistent statements? In her sworn evidence, P.W.4. explained why and how Exhibit G came about. She said it was P.W.1 who made her said the allegations against the appellant contained in Exhibit G. She said that P.W.1 made promises to her of benefits if she did. It is, of course, a matter for the learned trial judge to accept or reject any such explanations.

Be that as it may, I do not see it altering the legal effect of P.W.4's previous inconsistent statement, (Exhibit G) in this case in the light of the authorities referred to in this judgment. It is not evidence upon which the jury (or judge sitting alone) can act upon (*Golder*); it is not evidence of the truth of the facts stated therein (*White*); and its effect is generally to render the sworn evidence of the witness negligible (*Harris*). In my judgment Exhibit G should hot have been admitted in evidence at all. In fact since its relevance is only to P.W.4's credibility, it should not have been put before the jury or trial judge: *Darby* [1989] Crim.LR 817. The result is that there was no admissible evidence before the court to prove the charge against the appellant, let alone, the elements of the offence.

In the light of the conclusion I reach that Exhibit G is inadmissible, I accept Mr. Browne-Marke's submission on the issue of corroboration that since there was no admissible evidence of the offence being committed, the inevitable logical consequence was that there was no account of the commission of the offence by the appellant that needed to be corroborated: See *Baskerville* [1916] 2 KB 658; See also *Blackstone's Criminal Practice (1999)* p.1943. Also see *Williams v Reginam* (1957-60) ALR SL 135, WACA.

The learned trial Judge was of the view that the evidence of Mandy Cordwell (P.W.1); Ralph La Pierre (P.W.7) and Dr. Adama Turay (P.W.5) corroborated the alleged victim's (P.W.4) evidence in this case. If His Lordship was referring to P.W.4's sworn evidence at the trial, then plainly that was incorrect. As it is clearly shown that the sworn evidence of P.W.4 mentioned no incidents of the commission of the offence upon her by the appellant. It is therefore impossible to justify in law a finding that the witnesses, P.W.1, P.W.7 and P.W.5, corroborated P.W.4's evidence in this regard. Besides, the corroboration must be evidence which confirmed that the offence of indecent assault has been committed and that it was the appellant who committed it: *R v Baskerville* (above).

Other grounds of appeal urged upon us to determine include the lack of proof of the age of the alleged complainant as one of the elements of the offence in this case. I feel that in view of my conclusion on the admissibility of Exhibit G, it is not necessary to dwell on this ground. However, in view of the clear acceptance by His Lordship of the prosecution submission that the age of the complainant must be that stated in the indictment relying on the presumption under Section 15(2) of the *Prevention of Cruelty to Children Act (Cap.31) 1960* (Cap.31), I must point out that the presumption is a rebuttable one. It does not take away the onus on the prosecution of having to prove the element of the offence, namely, that the girl is under the age of 14 years. In other words, the presumption does not operate as proof of a fact, proof of which is central to the offence. This has been clearly held in *Dillion v R [1982] A.C. 484.* The onus remains throughout on the prosecution. In the present case, apart from the age of P.W.4 mentioned in the charge, the only other support for the prosecution case on the age of P.W.4 were from Exhibit G and Exhibit F1 and F2 all of which were inadmissible evidence. In the absence of admissible evidence to substantiate the age of P.W.4, I am of the view that the father's evidence was capable of rebutting the presumption relied on by the prosecution as to the age of P.W.4. In any case, There must surely be a lurking doubt as to proof of that element of the offence in this case.

On the ground that the case for the prosecution should have ended on the no case submission and the appellant acquitted, I feel that I need not dwell in that. I need only add that, had Exhibit G not been admitted in evidence, there would be no evidence clearly to proceed beyond the end of the prosecution case. The test in *Galbraith* [1981] 1 WLR 1039 would apply. That test was stated by Lord Lane CJ at p.1042 B-D:

be obliged to do so: See *James Thomas Reffell v R* (1963) SLLR 102. I do not see this case as one of those borderlines cases that can safely be left to the discretion of the learned trial judge.

The error in the trial, in my judgment, was due to the learned trial judge's acceptance of, and acting upon inadmissible evidence, in particular, Exh. G. Such an error had deprived the appellant of a chance of acquittal which in my judgment should fairly have been opened to him: *Cohen* (1909) 2 Cr.App.R.197. See also *Haddy* [1944] KB 442. Consequently there has been a miscarriage of justice and the appeal against conviction is accordingly allowed.

It is unnecessary to deal with the other complaints raised by the appellant in this appeal nor do I considered it necessary to deal with the appeal against sentence other than to say that the sentence of 18 months imprisonment imposed upon the appellant must be quashed.

Order: Appeal against conviction and sentence allowed.
Conviction and sentence quashed.

.....

Hon. Justice Sir John Muria

TEJAN-JALLOH JA: I have had the great advantage and privilege of reading in draft the Judgment of my learned Brother, Sir. John Muria. He had set out powerful reasons for his conclusion that the appeal be allowed on the law pertaining to inconsistent statements, hostile witnesses and corroboration. However, I wish only to add a few remarks of my own. The appellant at the lower Court was tried in three counts, namely, count 2 with one Sheka Fofana, of the offence of Procuring girl under the age of 14 contrary to Section 10 of the Prevention of Cruelty to Children Act, (Cap. 31), Count 3 alone, with the offence of Unlawful Carnal Knowledge contrary to Section 7 of the Prevention of Cruelty to Children Act, (Cap 31) and Count 4 alone, with the offence of Indecent Assault contrary to Section 9, of the Prevention of Cruelty to Children, (Cap. 31).

At the close of the case for the prosecution, the appellant was acquitted and discharged of the above-mentioned first two counts but convicted and sentenced to 18 months in respect of the Count of Indecent Assault. It was a joint trial and two other accused persons charged with one count of Conspiracy to pervert the course of Justice and one of them with the appellant with the offence of procuring a girl under the age of 14 contrary to Section 10 of the Prevention of Cruelty to Children Act (Cap.31) were acquitted and discharged after a submission of no case to answer by Counsel.

It is against the conviction and sentence of the offence of Indecent Assault that the appellant has appealed to this court. The grounds of appeal, seven on conviction and two on sentence have been relied upon. They are set out at pages 179 to 181 of the Record. I need not recite them here.

The Court is concerned with the admissible evidence led by the prosecution at the lower Court against the appellant in respect of the count of Indecent Assault. My learned brother has eloquently reviewed such evidence as disclosed in the record and has applied the relevant Statutory and case law pertaining to the doctrine of Inconsistent Statements, Hostile witness and corroboration as the evidence. I entirely agree with his application and decision as regards inconsistent statements and corroboration.

However, in my experience in the bar, a hostile witness' name is usually stated at the back of the Indictment and this gives the prosecution a discretion to call him. In the

instant case P.W.4's name was not at the back of the Indictment, but was called as an additional witness. In my view, it makes no difference that prosecution has discretion to call her as a witness and was indeed called. It turned out that the Trial Judge agreed to treat her as a hostile witness and in his Judgment decided that her evidence was negligible. It seems to me it is for this Court to determine whether this negligible evidence supports the offence of Indecent Assault and not to apply the principle in Golder's case i.e. an outright rejection of the viva voce evidence.

I have examined the evidence and in my evaluation it falls short of the evidence required for a successful conviction of an offence of Indecent Assault. Accordingly, I will allow the appeal, set and aside the conviction and quash the sentence.

.....

Hon. Justice U.H. Tejan-Jalloh

APP NO. 16/05

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN: Peter Halloran - APPELLANT

AND

The State - RESPONDENT

CORAN:- HON. Justice Sir John Muria J.A. (Presiding)
HON. Justice U.H. Tejan-Jalloh J.A.
HON. Mr Justice A. N. Bankole Stronge – J. A

BROWNE- MARKE & CO. FOR APPELLANT

A.K.A. BARBER Esq. – LAW OFFICERS DEPARTMENT FOR THE STATE

JUDGMENT DELIVERED BY THE HON. MR. JUSTICE A.N. BANKOLE STRONGE-J.A ON THE 12TH DAY OF OCTOBER, 2005

My Lords,

I have had the privilege of reading with utmost consideration the erudite Judgment of my noble and learned brother. I regret being obliged to differ from that Judgment. I have given a full reconsideration of the Judgment of the Court below and it humbly appears to me that the result reached by the Court is right for the reasons hereunder stated.

This Appeal is by the Appellant, Mr. Peter Halloran against his conviction and sentence by High Court in Freetown on a four(4) count indictment . The Appellant is charged in Count 2 with another person with the offence of Procuring a girl under the age of 14 contrary to Section 10 of Cap. 31 of the Laws of Sierra Leone 1960. In Count 3 the Appellant is charged with the offence of unlawful carnal knowledge Contrary to Section 7 of Cap 31 of the Laws of Sierra

Leone 1960. In Count 4 the Appellant is charged with the offence of Indecent Assault contrary to Section 9 of Cap 31 of the Law of Sierra Leone 1960. The appellant does not face a charge in count 1. The Appellant was convicted and sentenced on count 4 on the 21st February 2005. The sentence of the Court was eighteen (18) months imprisonment.

The Appeal is brought pursuant to section 57 (b) and 57(c) of the Court's Act 1965, Act No.31 of 1965)as amended by section 6 of the Court's Act of 1966 which enacts as follows:-

Section 57

a) A person convicted by or in the "Supreme Court may appeal to the Court of Appeal:-
b) With the leave of the Court of Appeal or upon the certificate of the Judge who tried him that it is a fit case for Appeal against his conviction on any ground of Appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of Appeal.
c) With the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by Law"

For SUPREME COURT in the above enactments read High Court.

The powers of the Court of Appeal on the hearing of such an Appeal are spelt out in sections 58(1) 58(2) 58(3) 58(4) and 59(1)59 (2) and 59(5) of the Court's Act, supra, which enacts as follows:-

> 58(1) Subject and without prejudice to sub-section (2) the Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the Appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any

ground there was a miscarriage of Justice, and in any other case shall dismiss the Appeal.

58(2) On an appeal against conviction the Court may notwithstanding that they are of the opinion that the point raised in the Appeal might be decided in favour of the Appellant dismiss the Appeal if they consider that no substantial miscarriage of Justice has actually occurred.

58(3) Subject to the special provision of this Act the Court of Appeal shall, if they allow an Appeal against conviction quash the conviction and direct a judgment and verdict of acquittal to be entered.

58(4) On an Appeal against sentence the Court of Appeal may leave the sentence unaltered or pass such other sentence warranted in law (whether more or less severe in substitution therefore as they think aught to have been passed.

59(1) If it appears to the Court of Appeal that an Appellant, though not properly convicted on some Count had been properly convicted on some other Count, the Court may either affirm the sentence passed on the appellant at the Trial or pass such sentence in substitution thereof as they think proper, and as may be warranted in law by the verdict on the Court on which the Court consider that the Appellant has been properly convicted.

59(2) Where an Appellant has been convicted of an offence and the Court which tried him or the jury (as the case may be) could have found him guilty of some other offence, and on the finding of such Court or Jury it appears to the Court of Appeal that such Court or the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the Appeal, substitute for the verdict found by such Court or jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence

passed at the Trial as may be warranted by Law for that other offence, not being a sentence of greater severity.

59(5) Where the Court of Appeal is of the opinion that the proceedings in the Trial court was a nullity, either through want of jurisdiction or otherwise the Court may order the Appellant to be tried by a Court of competent jurisdiction.

The Trial was held at the Freetown High Court as a result of proceedings having been taken:

Under section 144(2) of the Criminal Procedure Act No. 32 of 1965 as repealed and replaced by section 3 of the Criminal Procedure Amendment Act 1981, Act No.11 of 1981 (viz: Order for the Trial to be by Judge alone). The Indictment as preferred as stated earlier reads as follows:-

COUNT I

STATEMENT OF OFFENCE

CONSPIRACY CONTRARY TO LAW

PARTICULARS OF OFFENCE

SHEKA FOFANA and Abdul Fofanah on the 21st day of June 2004 at Freetown in the Western Area of Sierra Leone conspired together with other persons unknown to pervert the course of Justice.

COUNT 2

STATEMENT OF OFFENCE

Procuring a girl under the Age of 14 contrary to section 10 of Cap 31 of the Laws of Sierra Leone 1960.

PARTICULARS OF OFFENCE

Peter Halloram and Sheka Fofanah on the 31st day of May 2004 at Freetown in the Western Area of Sierra Leone did procure Kadie Kabia a girl under the age of 14 years to Wit, 13 years, to have unlawful carnal connection with the said Peter Halloran.

COUNT 3

STATEMENT OF OFFENCE

Unlawful Carnal knowledge contrary to section 7 of Cap 31 of the Law of Sierra Leone, 1960

PARTICULARS OF OFFENCE

Peter Halloran on a day unknown between the 31st day of May 2004 and the 3rd day of June 2004 at Freetown in the Western Area of Sierra Leone unlawfully and carnally knew and abused Kadi Kabia a girl under the age of 14 years to wit 13 years.

COUNT 4

STATEMENT OF OFFENCE

Indecent Assault Contrary to section 9 of Cap 31 of the laws of Sierra Leone 1960

PARTICULARS OF OFFENCE

Peter Halloran on a day unknown between the 31st day of May 2004 and 3rd day of June 2004 at Freetown in the Western Area of Sierra Leone indecently assaulted Kadi Kabia a girl under the age of 14 years, to wit ,13 years.

The Trial commenced on the 23rd September 2004. At the close of the case for prosecution, the Learned Trial Judge upheld a No- Case submission as regards the 1st and 2nd Accused in respect of counts 2 and 3. The 1st Accused, the Appellant, here was accordingly acquitted and discharged on Counts 2 and 3. The 2nd Accused was accordingly acquitted and discharged on Count 2. The 2nd and 3rd Accused were to state their defence on count 1 and the 1st Accused, the Appellant, on count 4.

On the 21st of February, 2005 the Presiding Judge, the Honourable Mr. Justice "S. A. Ademosu J in his Judgment recorded the verdict and sentenced the Court as follows;-

VERDICT		
COUNT 4	**1ST ACCUSED**	**GUILTY**
COUNT 1	**2ND ACCUSED**	**NOT GUILTY**
COUNT 1	**3RD ACCUSED**	**NOT GUILTY**

SENTENCE

1ST Accused 18 months imprisonment.

It is against this verdict of guilty and sentence thereon that the Appellant has appealed to this Court on questions of mixed Law and fact, pursuant to sections 57(b) and 57(c) of the Court's Act 1965 Act No.31 of 1965 (As Amended by section 6 of the Act No.2 of 1966) on Thirteen (13) ground of Appeal as follows:-

GROUNDS OF APPEAL :

1. The learned Trial Judge erred in Law when he held on the 14th October 2004 (pages 88-89 of the records) that the statement

of the alleged victim, Kadi Kabia (Exhibit G) made on the 16th July 2004, could be admitted into evidence notwithstanding the Rule against narrative, otherwise known as the Rule against previous consistent or inconsistent statements .

2. The learned Trial Judge erred in Law when he held on the 8th November 2004 (page 93-94 of Records) that a pair of jeans and a maroon polo blouse(exhibit H&K respectively) could be admitted into evidence notwithstanding the provision of section 9,30,31 & 34 of the Criminal Procedure Act,1985 and the absence of any nexus between the said exhibits and the oral evidence led, and notwithstanding the absence of any identification of the exhibits by Kadi Kabia (PW4), the alleged owner of the said exhibits, or by Mandy Cordwell(PW1) the witness who allegedly found the same without first obtaining a search warrant.

3. The learned Trial Judge erred in Law in admitting into evidence the ipse dixit of Ralph La Pierie (PW7) at page 95 lines 29-30 of the records, that".....with the conversation with Mandy, I concluded that some sexual assault had taken place during the last three or four nights ....." on the ground that such evidence amounted to rendering an opinion on matters which were within the competence of the Court, and not the witness, who was not in any event called as an expert.

4. The Learned Trial Judge erred in Law in admitting the ipse dixit of Ralph La Pierre (PW7) at page 9, 7 lines 23 of the records that 2nd Accused said he knew that Kadi was sleeping in 1st Accused's bed" on the ground that the reported statement of the 2nd Accused in the absence of the 1st Accused (now appellant), and as they were jointly accused and tried it was inadmissible against the 1st Accused (Appellant). Alternatively, that the said reported statement of the 2nd Accused ought to have been excluded on the basis that its prejudicial effect against the 1st Accused (appellant) outweighed its probative value.

5. The learned Trial Judge erred in Law in failing to acquit the Appellant of the offence of Indecent Assault on a No Case submission made by Appellant's Counsel (pages 112-118) on the grounds firstly, that there was no evidence at that stage warranting the Appellant to be called upon to Lead evidence in his defence, secondly, that having decided as a matter of Law that corroboration of the evidence of the complainant – victim was mandatory in respect of section 7, 9 and 10 of the PREVENTION OF CRUELTY TO CHILDREN ACT, CHAPTER 31 OF THE LAWS OF SIERRA LEONE 1960 and having gone on to acquit the Appellant of the offences charged under section 7 and 10 of the said Act, it was inconsistent and insupportable in Law for his Lordship to hold that the Appellant had a case to answer in respect of the Lesser Charge of Indecent Assault, where all three offences were based on the same evidence led by the prosecution.

6. Alternatively, the Learned Trial Judge erred in Law in failing to uphold the no case submission made by the Appellant and thereby deprive the Appellant of his right to have the case against him dismissed for failure by the prosecution to prove an essential element of the offence, and for failure to provide corroboration where corroboration was required by Law, without the necessity of calling upon him to lead evidence in his defence.

MISDIRECTION IN LAW AND FACT-ERRORS IN JUDGMENT

7. The learned Trial Judge erred in Law in that he failed to direct himself adequately or at all on the burden and the standard of proof; that the burden of proving every element of the offence with which the appellant was charged, and of his guilt thereof, remained on the prosecution throughout the case, and that the burden never shifted, and that if there was any reasonable doubt in the prosecution's case, such doubt had to be resolved in favour of the appellant. The learned Trial Judge did not at any stage in his judgment (pages 142-177) refer to or advert his mind and /or attention to the burden and standard of proof. He merely stated at page 176 lines 10-14 that **"guided by all the principles of law I have cited above and having given this**

matter as careful consideration as I can the inference I draw from the facts is that I have no doubt at all in my mind that the first accused took most improper liberties with the girl who was only anxious to get a job.

8. The Learned Trial Judge erred in Law in that he failed to direct himself adequately or at all on the provisions of section 14 of the Prevention of Cruelty Act Chapter 13 of the Laws of Sierra Leone, 1960, to the effect that the Appellant could not be convicted on the evidence of one witness unless such witnesses evidence was corroborated in some material particular by evidence implicating the accused. Further, the Learned Trial Judge erred in Law and in fact in that held at page 175 lines 3-4 of his judgment, that Dr. Adama Turay's (PW5) report, exhibit F" **confirmed PW.4's story that the 1st Accused played with the breast of PW4"** when in fact, the report did not, and could not possibly confirm such a fact. In addition, the Learned Trial Judge fell into greater error, when he held at lines 4-5 on page 175, that "I have taken into account the fact which the 1st accused could not deny when contrasted with the log book" when in fact the log book did not form part of the evidence; when he held at lines 6-9 on the said page 175 that "the 1st Accused told deliberate lies to the police and on material issues out of a wish to conceal a disgraceful behaviour" without spelling out the lies. The Learned Trial Judge thus held that such unspecified lies corroborated the allegation that the Appellant had committed the offence of indecent Assault. He held further, at page 176 line 1 that "corroborative evidence may be direct evidence or inferential". The Learned Trial Judge erred gravely by treating his apparent disbelief of the Appellant's statement and evidence as corroboration of the prosecution's case.

9. The Learned Trial Judge erred in Law in that he failed to direct himself that the evidence of a complaint made by an alleged victim, irrespective of the number of times it is repeated, could not under any circumstances, amount to corroboration of the alleged victim's evidence –page 147 LL. 2 –4 and 6-10: page 153 LL. 5-6

10. The Learned Trial Judge erred in Law and in fact in holding in effect, that the alleged victim's (PW4's) testimony was corroborated by the evidence of other witnesses for the prosecution namely, **Mandy Cordwell, Ralph Pierre and Dr. Adama Turay**, whereas in fact the said Mandy Cordwell never related the terms of the complaint throughout her testimony nor did she testify that she was present when the offence was committed, nor did she identify or tender in evidence any thing of substance which would constitute corroboration or in the least, supportive evidence; Ralph La Pierre never spoke to the alleged victim (PW4) and Dr. Turay (PW5)saw PW4 the alleged victim 7 weeks after the alleged incident, and merely recited in her medical report information clearly given to her by the Police.

11. The Learned Trial Judge erred in Law in failing to hold that as PW4, Kadi Kabia had been treated with his leave, as a hostile witness, and had subsequently denied the truth of the contents of her statement to the Police (exhibit G), the effect in Law was to render her evidence in Court negligible, that it could not in those circumstances ground a conviction for the offence of Indecent Assault- page 172 L.20- page 174. L25.

12. The Learned Trial Judge erred in Law and in fact, and thereby misdirected himself in that he failed to consider adequately or at all, the case of the Appellant; he made prejudicial statements in his judgment; and he allowed himself to be influenced by matters which were not given in evidence:

    a. He quoted portions of the statement of the Appellant, exhibit A and on his then co-accused, he omitted those portions which were favourable to the appellant, and read out and laid emphasis on those which were apparently unfavourable;

    page 156 questions and answer quoted; but the rest of the page where the Appellant explains what transpired in his room on Sunday 30th May 2004 is omitted.

Page 157: The questions and answers after line 10 and which appear on page 6 of the Appellant's statement (i.e page 28 of the records) are omitted.

Page 158: All the questions and answer after line 24 therein which appeared on Page 8 of the Appellant's Statement are omitted.

Page 159 : at lines 15-16 the Learned Trial Judge states that the Appellant did not answer the other questions put to him on the advice of his legal adviser, whereas in fact, the appellant was asked, and answered at least 4 other questions thereafter.

b. He dismissed, at page 171 of his judgment, without considering adequately or at all, the evidence led by the Appellant through two witness at pages 126-130 of intimidation by state authorities of the alleged victim, PW4 to compel them to ensure that PW4 gave evidence confirming her statement to the Police, the contents of which she has expressly denied in Court. He wrongly held at page 171 LL3-5 that these witnesses "**were the ones being accused of schooling the girl (i.e PW4) to charge her statement to the Police**" whereas no such evidence had been led in the case. Further, at LL 17-19 thereof, the Learned Trial Judge held that" I believe as a fact that they are the ones who told PW4 to change her story and put the blame on PW1 (Mandy Cordwell) in the absence of any evidence whatsoever to support such a conclusion.

c. He held at page 149 LL.22-25 that the Appellant through his Counsel, never suggested to PW4 Kadie Kabia that the contents of Exhibit G were words put into her mouth, or the allegations contained therein were made as result of inducements held out by PW3 Sgt. Vandy, when the Learned Trial Judge well knew that the said statement was only tendered in evidence after PW4 had been examined and cross-examined in full- page 88 LL.16-19.

d. Despite irrefragable and uncontroverted evidence from PW4 that she did not sleep with, or in the Appellant's room, but in the spare room; and in the absence of any evidence from any of the occupants of the house including PW1 and PW7 that they went into that room during the period of time in question, the Learned Trial Judge came to the conclusion at page 174 LL.21-22 that she had slept in the Appellant's room for two consecutive nights; that the Appellant therefore had the opportunity to commit the offence-page 176 LL.2-3; and that he was therefore guilty of the offence charged .

e. The Learned Trial Judge ignored direct evidence from the father of PW4 Hassan Fofanah, DW3 that PW4 was over the age of 15 years, and instead chose to rely on: (i) statement of the 2nd accused Exhibit B, which the 2nd Accused later disavowed as having been obtained from him through beatings; (ii) on exhibit G which was disavowed by PW4; (iii) on exhibit F which was hearsay; and (iv) on exhibit A, where the Appellant states that PW4 told him, and she wrote down in his presence that she was sixteen years old, but that he had been later told that she was 13 years old. The Learned Trial Judge thereby erred in Law and in fact in failing to hold that the prosecution had not proved beyond reasonable doubt, an essential element of the offence with which Appellant was charged, to wit , that PW4 was under the age of 14 years.

f. The Learned Trial Judge misdirected himself in Law and in facts in that he failed to take judicial notice of the customary method used by illiterate persons of counting the number of years by seasons as was done by DW3 at page 128 line 23 to page 129 line 2.

g. The verdict is unreasonable and cannot be supported having regard to the evidence adduced by the prosecution at the Trial.

B. **SENTENCE**

1. The sentence of 18 months imprisonment passed on the Appellant, was manifestly excessive, he being a first time offender, and in all the circumstance of the case.
2. The Learned Trial Judge erred in Law and in fact in failing to exercise the discretion given to him by section 231 of the Criminal Procedure Act, 1965, namely to impose a fine on the Appellant, instead of a term of imprisonment.

I wish to state that the work of this Court would be more expeditiously dispatched, not by the multitude of Grounds of Appeal, but by the cogency and merit of those Grounds of Appeal. Some of the Grounds of Appeal reproduced above could have been merged together under one or two topics thereby saving time and labour.

The Appellant was granted leave to argue his Appeal against conviction and his appeal against sentence.

The facts which emerge from an examination of the Records of proceedings in the High Court were these:-

The Appellant, Peter Anthony Halloran, Mandy Lee Cordwell, PW1, Ralph La Pierre, PW7, at all, material times lived at No.6 Wilberforce Valley, Freetown, Shiaka Fofanah, 2nd Accused was requested by the Appellant to look out for a girl to work as a Nanny. The 2nd Accused was able to secure a schoolgirl, Kadie Kabia, PW4 for the job. At about 2p.m. on Sunday 3rd May 2004, Sheika Fofanah came with Kadie Kabia, PW4, the alleged victim accompanied by a sister and a brother. Together they had discussions with the Appellant. After the discussions the visiting party left the house.

g. The verdict is unreasonable and cannot be supported having regard to the evidence adduced by the prosecution at the Trial.

B. SENTENCE

1. The sentence of 18 months imprisonment passed on the Appellant, was manifestly excessive, he being a first time offender, and in all the circumstance of the case.
2. The Learned Trial Judge erred in Law and in fact in failing to exercise the discretion given to him by section 231 of the Criminal Procedure Act, 1965, namely to impose a fine on the Appellant, instead of a term of imprisonment.

I wish to state that the work of this Court would be more expeditiously dispatched, not by the multitude of Grounds of Appeal, but by the cogency and merit of those Grounds of Appeal. Some of the Grounds of Appeal reproduced above could have been merged together under one or two topics thereby saving time and labour.

The Appellant was granted leave to argue his Appeal against conviction and his appeal against sentence.

The facts which emerge from an examination of the Records of proceedings in the High Court were these:-

The Appellant, Peter Anthony Halloran, Mandy Lee Cordwell, PW1, Ralph La Pierre, PW7, at all, material times lived at No.6 Wilberforce Valley, Freetown, Shiaka Fofanah, 2nd Accused was requested by the Appellant to look out for a girl to work as a Nanny. The 2nd Accused was able to secure a schoolgirl, Kadie Kabia, PW4 for the job. At about 2p.m. on Sunday 3rd May 2004, Sheika Fofanah came with Kadie Kabia, PW4, the alleged victim accompanied by a sister and a brother. Together they had discussions with the Appellant. After the discussions the visiting party left the house.

Counsel for the Appellant commenced his argument by arguing Ground 1 of the Appellant's Appeal. Because of the crucial importance of this Ground of Appeal and the reliance placed on it by Counsel for the Appellant, I shall again reproduce it verbatim

GROUND 1 : The Learned Trial Judge erred in Law when he held on the 14th October 2004 (pages 88-89 of the Records) that the statement of the alleged victim, Kadie Kabia made on the 16th July 2004 could be admitted into evidence notwithstanding the Rule against narrative. Otherwise known as the Rule against previous consistent or inconsistent statements.

PW4 made a statement to the Police (Exhibit G) that supports the allegations as laid in the charge against the appellant. She is to be examined on that statement and she offered evidence that is in part a confirmation of the contents of Exhibit G and in part an outright disagreement with that Exhibit. At page 81 of the records the alleged victim said:-

> " I told black women that the man slept with me and rubbed my breast ".

At page 83:-

> "I admit telling the Police that the 1st Accused inserted his fingers into my Virgina"

At page 84 :-

> "I told the doctor that the man rubbed my breast. I did not tell the doctor about my virgina".

From the above statements from the lips of alleged victim it is therefore not correct to say that PW4 (the alleged victim) denied any form of indecent assault.

In R.V. Golder 1960 3A.E.R. 457, 1961,45 CR. APP. Rep. 5. The accused was charged with theft of a watch. At the trial a witness repudiate a deposition that she made before a committing Magistrate and the Counsel for the prosecution obtained leave to treat her as an adverse witness and cross-examined her. He did not, however, succeed in extracting from her an admission that her disposition was

Counsel for the Appellant commenced his argument by arguing Ground 1 of the Appellant's Appeal. Because of the crucial importance of this Ground of Appeal and the reliance placed on it by Counsel for the Appellant, I shall again reproduce it verbatim

GROUND 1 : The Learned Trial Judge erred in Law when he held on the 14th October 2004 (pages 88-89 of the Records) that the statement of the alleged victim, Kadie Kabia made on the 16th July 2004 could be admitted into evidence notwithstanding the Rule against narrative. Otherwise known as the Rule against previous consistent or inconsistent statements.

PW4 made a statement to the Police (Exhibit G) that supports the allegations as laid in the charge against the appellant. She is to be examined on that statement and she offered evidence that is in part a confirmation of the contents of Exhibit G and in part an outright disagreement with that Exhibit. At page 81 of the records the alleged victim said:-

> " I told black women that the man slept with me and rubbed my breast ".

At page 83:-

> "I admit telling the Police that the 1st Accused inserted his fingers into my Virgina"

At page 84 :-

> "I told the doctor that the man rubbed my breast. I did not tell the doctor about my virgina".

From the above statements from the lips of alleged victim it is therefore not correct to say that PW4 (the alleged victim) denied any form of indecent assault.

In R.V. Golder 1960 3A.E.R. 457, 1961,45 CR. APP. Rep. 5. The accused was charged with theft of a watch. At the trial a witness repudiate a deposition that she made before a committing Magistrate and the Counsel for the prosecution obtained leave to treat her as an adverse witness and cross-examined her. He did not, however, succeed in extracting from her an admission that her disposition was

true, still less that it was the Appellant Golder who handed her the stolen watch".

In the instant case the evidence in chief of PW4 is not entirely inconsistent with her previous statement to the Police. She admitted that her statement to the police was true and that she was indecently assaulted by the Appellant. PW4 , said quite definitely that when she made her statement to the Police (Exhibit G) PW1, Mandy Cordwell was not present. How could it then be said that it was PW1 who made her say what she told the Police, Exhibit G". Exhibit G is evidence upon which the Learned Trial Judge can act. There was ample evidence before the Court to prove the charge against the Appellant. In the light of the evidence led the Learned Trial Judge was right to hold that there was corroboration.

Having held that Exhibit G" was properly admitted I find no substance in the Ground that the learned Trial Judge should have upheld the no case submission by the prosecution. This is in line with the test laid by Lord Lane in GALBRAITH (1981) 1 W.R. 1039. I hold that there has not been a miscarriage of justice and accordingly dismiss the Appeal against Conviction and order that the sentence of 18 months imprisonment be upheld.

Order: Appeal against conviction and sentence dismissed.

Conviction and Sentence upheld.

A. N B STRONGE - J.A