APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 92
HCA/2017/000298/XC

Lord Justice Clerk
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST CONVICTION

by

PM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Keenan, Sol Adv; Capital Defence Lawyers
Respondent: I McSporran, QC, Sol Adv, AD; Crown Agent

6 December 2017

[1] The appellant went to trial at the High Court of Justiciary at Glasgow on 10 March 2017. He faced an indictment containing one charge in the following terms:-

> "On various occasions between 1 January 2014 and 15 April 2015, both dates inclusive, at (a specified address) he did sexually assault (C), born ... March 2010…a child who had not attained the age of 13 years, in that he did induce her to touch and masturbate his penis, apply cream to her vagina and anus and he did sexually penetrate her vagina and anus with his finger, to her injury, and he did induce her to suck his penis and he did penetrate her mouth with his penis and he did thus rape

her: CONTRARY to sections 18, 19 and 20 of the Sexual Offences (Scotland) Act 2009."

[2] After the Crown had closed its case at the trial, the appellant gave evidence on his own behalf, and counsel for the appellant then made a submission in terms of section 97A of the Criminal Procedure (Scotland) Act 1995 that there was insufficient corroborated evidence which would entitle the jury to convict the appellant of part of the charge, namely the contraventions of sections 18 and 20 of the Sexual Offences (Scotland) Act 2009. (No submission was made in relation to that part of the charge which narrated a contravention of section 19 of that Act). Having heard submissions on behalf of the appellant and the Crown, the trial judge repelled the submission for the appellant. The appellant was subsequently found guilty of the charge as libelled, by a majority verdict of the jury. In due course the appellant was sentenced to an extended sentence of 10 years imprisonment in terms of section 210A of the 1995 Act, comprising a custodial term of 8 years and an extension period of 2 years.

Grounds of Appeal

[3] The appellant has been granted leave to appeal against conviction on 4 grounds, but has intimated that he does not insist on the 4th ground. The following 3 grounds of appeal were argued before us:-

1. The trial judge erred in repelling the submission in terms of section 97 of the 1995 Act in respect of sections 18 & 20 of the 2009 Act. It is submitted that there was insufficient evidence to corroborate the evidence of the complainer in respect of both of the commission of the crime and the identification of the appellant as the perpetrator.

2. In respect of the contravention of section 19 of the 2009 Act, it is now submitted that there was insufficient evidence to corroborate the account of the complainer identifying the appellant as the perpetrator of this offence.

3. The trial judge erred in directing the jury that they could take account of the complainer's behaviour and gestures during the joint investigative interview as a separate source of evidence and therefore independent corroboration of her account. At its highest, this was evidence which might only support the credibility of the complainer but could not be regarded as a separate source of corroboration. See Judge's charge page 27, line 6 to 23. It is further submitted that this was a material misdirection leading to a miscarriage of justice.

The evidence at trial

[4] In order to put the Grounds of Appeal in context, it is necessary to set out in some detail the evidence at trial. In his very full report to this court the trial judge summarised the relevant passages of the evidence as follows:-

[5] "The complainer's mother said that she entered a relationship with the accused when the complainer was about 1 year old. She had been with him for 3 or 4 years until 15 April 2015 and they moved in together quite soon after the relationship started. The complainer referred to him as her dad and he treated her like a dad as time went on. This witness suffered epileptic seizures and was hospitalised on a number of occasions before April 2015. I will come back to her evidence shortly.

[6] The evidence of the complainer consisted of the playing of recorded joint investigative interviews and the DVD of the cross-examination at a commission held on 13 April 2016. That meant that the complainer did not have to attend the trial. The evidence

of the complainer at the interview was not entirely easy to follow in terms of dates and times but the broad picture was clear. She told the interviewers that her "daddy lets me suck his winky". She said she did not like it when she sucked it because there's "slobbery" on. She was asked to say a bit more about this and said "Yeah, I don't like it cos I only do it once and daddy says do it again, just one more." She explained what a "winky" was and it was apparent she was talking about a penis. She mentioned opening the trousers and went on "and then you go up and down with it sometimes". She said "you go up and down with them and grab on tight". She was asked what she grabbed on tight to and replied, "the winky, I told you, about this, up down up down but not too hard or the it, the winky might fall off or maybe give it just a rub or a trick." She was asked what the winky felt like and said "It got some bones under it I don't know what they look like" and later said that it felt "hard like your bones". During the course of this passage of the interview she simulated masturbation with her hands. She was asked about the "slobbers" and said "it's germs, it's just because of the germs". She was asked if the slobbers were on the winky and she said "yeah" and went on "I don't like germs, cos they make you sick". She was asked where the slobbers came from and said "Erm, yeah, erm, if you peel off the skin there's tiny slobbers". She was asked where she was when daddy asked her to suck his winky and said "in his room". She was asked where her mother was and said "Erm, sometimes she's down, we, we usually do it when she's not at home". She went on "I think she's at work, I think that." She went on to indicate that she did not like sucking his winky. She was asked why and said "Only cos it has lots and lots of germs, that's why and he makes me do it once again and I only wanted to do it once." She was asked when the last time was that her daddy asked her to suck his winky and she said "Yeah I think it was right early in the morning when and then he made me suck it again but you do it like this." At that point she demonstrated by

moving her hand towards her mouth in a fairly graphic demonstration of oral sex, or fellatio. She said that her mummy was in the bed sleeping and before it her daddy gave her a jam sandwich. They were downstairs in the house and mummy was upstairs. She was asked if she could remember if it happened any other time and said "Mmm and I think we do it in the morning when mummy is downstairs, I think." She referred to her mother having seizures and falling on the floor. She had to go to hospital when that happened and had to stay there a few weeks. At a later stage she was asked if she had ever sucked her father's "willy" any other times and said she could not remember. She then agreed that she sometimes held his "willy" with her hand and put her hand up and down. She demonstrated that again. She was asked if she could remember the first time she touched "daddy's winky" and said "in the morning". She was asked which morning and said "Erm, this morning." She was asked if there had been other times that he had asked her to touch his winky and she said "No, I can't remember that really".

[7] That interview was on 15 April 2015. She was interviewed again on 20 April and repeated that daddy let her suck his winky. She demonstrated fellatio again. There was reference to pictures which she had drawn. These showed herself and her father, with his penis out, and her mother lying in a bed upstairs. She was asked about the pictures and said that they were of "daddy's winky undone" and mentioned blue cream. She said "The blue cream really stings little girls' bums" and said it was only for big girls. She was asked when she had seen the blue cream and said "Erm, when daddy was here, I mean I'm happy he's in jail now, because he always put the blue cream, stuck up my bum and it stings." She went on "It's this kind of shape and it's got a pointy bit at the top and he squirts it on his finger then puts it on my bum and then it stings, I told him." She was asked which bum he put it on and pointed to her vagina. She was then asked again what daddy put it on and said "he

puts it on his finger and then on my bum" at which point she pointed to her anus. She said that the blue stuff was in a top drawer at home. The last time she saw the blue cream was a long time ago. She was asked how many times her daddy did that and said "I just told you three times". She went on to say that "under daddy's winky skin there's some pink things and I think they're germs". She said that they were little spots and pointed to a blemish. She went on to say "Ok, it's hard to explain but under daddy's winky skin there's some pink things which they're really lumpy and slobbery, that's what they are". She agreed that daddy put the blue cream on his finger and put it up her bum and was asked if anyone else had ever put anything up her bum. She said "No, only dad, that's why I wanted him in the naughty jail." She was asked if dad had ever put anything else up her bum except for his finger and said "I think he did this to my bum there, round and round and round like that." At that point she pointed to her vagina and made a circling motion with her finger in the air. She confirmed that the pictures showed her mummy in a bed while she was downstairs with daddy and said "and then he made me suck his winky twice."

[8] One of the interviewers, PC Victoria Marshall, gave evidence. She said that she was on duty on 15 April 2015 when she was told that the complainer had said something to her nursery teacher which gave rise to the inquiry. She collected her from nursery in order to conduct an interview with a social worker, Samantha Coull. Amongst other things, she spoke of the complainer's gestures and demonstrations during the course of the interview. She also referred to the drawings, which were produced. In due course she attended the complainer's home and took a statement from her mother. She also took possession of a laptop which the complainer's mother gave her. She spoke of the other interview on 20 April and the demonstrations during the course of that. She said that when the

complainer talked of little spots she showed her her thumb where there was a tiny little red mark on it no bigger than a freckle.

[9] The complainer's mother gave evidence as I have indicated. She spoke of the background to her relationship with the appellant. She had been in hospital shortly before that as a result of a seizure. When that happened to her the appellant and sometimes her father looked after the complainer. Both parties worked and the complainer went to nursery three or four times a week for part of the day. She would take her in the morning and either she or the appellant would pick her up around 1400 hours. The complainer slept in her own room the night before 15 April and came into the bed the witness shared with the appellant in the morning around 0700 or 0800. When the witness awoke she found that the accused had got up with the complainer to get her breakfast. He did not usually do that. He worked nightshifts. She got up and got ready for work as well as getting the complainer ready for nursery. When she first saw her that day she was downstairs in the living room watching television and the appellant had gone back to bed. The appellant had been wearing a dressing gown and he took it off to go back into bed. He had nothing on underneath. The police contacted her later. She said that at that time the appellant had genital herpes, which affected his penis. He had suffered from that for a number of years. It would flare up and go back down again. She thought he had last had it a few weeks before 15 April 2015. The signs of it were like blisters at the tip or at the foreskin. They were like a mouth ulcer and were an "inky kind of clear". A few days after the first interview the complainer told her about blue stuff. She thought that she was referring to blue lubrication which the witness used for sexual intercourse. It tingled. She kept it in her drawer next to her bed. While it tingled, it felt like it burned. She then went on to say it was not in the drawer because it had leaked, having been thrown away a few days or weeks before 15 April. The complainer had

demonstrated to her that the appellant had put it up her anus. She was asked about the laptop and said that she used it occasionally. The appellant used it more often than she did. His was the name on the account. She did not often do internet searches on it and in particular she did not conduct searches for pre-teen sex, slavery or using such words as "Lolita" or whether "young girls could do porn". She had not downloaded naturist videos of young children. In the lead up to 15 April the complainer made no complaints of any pain when she went to the toilet and did not appear constipated. She was not prone to that condition. The appellant normally slept naked but he was not in the habit of wandering round the house naked. He would not put clothing on if he was going to the toilet but he would if he was going downstairs. The complainer would have seen him naked. She was asked about a police statement dated 16 April 2015 where she said amongst other things "I disclosed to the police that [the appellant] has got genital herpes. I know from being with [the appellant] at the weekend that he has a flare up of it at the moment. He usually has one or two blister type spots on his penis when it flares up. They would be scabbing over just now." She said that that would be true and that memory would be better at the time. She also confirmed, under reference to her police statement, that the complainer told her that "Daddy spun his finger like that" and that while doing so she made an action with her finger at her vagina. She confirmed that the action was a circular motion with her finger in the air. Once again I need not go into details about the cross-examination.

[10] There was medical evidence from Dr William James Harrison. He examined the complainer's genitalia on 16 April 2015. There was generalised unspecific redness in the vagina, which could be explained by a number of things. It could be caused a finger touching the area but could also be caused by poor hygiene, of which he saw no other sign. One touch with a finger would not do it. It would have to be a rough prolonged touch. It

was generalised redness and very common. There was, however, an injury to the anal area, namely a fissure and some discolouration. This could be consistent with the allegation as well as with constipation and sometimes these things happened spontaneously. The fissure was at 6 and 7 o'clock. There were two areas of blue-coloured discolouration, one between 11 and 12 o'clock and one between 5 and 7 o'clock that would be caused by pressure. It could be because of passing a hard stool but it was consistent with digital penetration. The discolouration and the fissure could all be caused by one incident and the bruising would not be expected to occur spontaneously. The discolouration was more likely to be recent, in the last two or three days before the examination.

[11] Christopher Johnstone McLaren was a student at Moray College studying early education and childcare. He was in a placement at the nursery attended by the complainer. On 15 April the complainer said that her dad let her do something private. Under reference to his police statement he confirmed that she said "My dad lets me suck his winky." He passed this information to his supervisor Pauline Ferrier. She gave evidence about being approached by Mr McLaren. She spoke to the complainer who told her also that she had sucked her dad's winky. She also said it felt "slobbery" and it was what big girls did. She motioned with her hand to her mouth and moved it up and down, simulating oral sex as well as masturbation.

[12] Derek Singer, a forensic computer analyst, examined the laptop. There were naturist videos of girls estimated to be between 12 and 15 years of age as well as searches including phrases known to be associated with indecent images of children such as pre-teen sex, pre-teen sex slave and Lolita. There was also a search for "what countries can young girls do porn" although he could not say when that was done. On the telephone which was attributed to the accused there was a search for "pre-teen underwear models".

[13] Dr Gordon Martin Guthrie was asked to examine the appellant on 15 April 2015. The appellant told him of a history of genital herpes and on examining his genitalia he found some lesions on his penis. There were three small ones on the shaft and one on the foreskin. He described these as small red raised areas on the shaft and a slightly larger one on the front edge of the foreskin. On the surface of the shaft two were 1 millimetre in diameter and one was 2 millimetres. The one on the tip was around 3 millimetres.

[14] There was evidence from Dr John Marshall, a clinical and forensic psychologist. He had access to the joint investigative interview. He said that he identified behaviour or words in the interviews which might display sexual knowledge. It was common for young children to engage in exploratory behaviour such as touching their own or another child's genitals. That would be exploratory rather than sexual at the ages of 4, 5 or 6. As they got older they would become aware that that was inappropriate. His report indicated that in general terms a child of 5 years of age or thereabouts would have no knowledge of such sexual matters. He was referring there to oral sex, masturbating and digital penetration of the anus. He said it was not reasonable for an expert to state the cause of this abnormal behaviour as that was a matter for the court but perhaps social learning theory in general was relevant. That was a phenomenon whereby children learned and repeated newly learned behaviours, due to observation and/or direct instruction. It could be, for example, through the parents or through media. The causes of childhood behaviour were incredibly complex. He could not look at a child's behaviour and say that the child had been abused.

[15] The appellant himself gave evidence. He recalled coming home from work and waking up on 15 April to find the complainer coming in to the bedroom around 0730 hours. She was coming in for a cuddle as was normal. She asked for her breakfast and when she did that nobody got peace until she got it. He walked across the bedroom and got his

dressing gown from the back of the door and went downstairs. He had no clothes on but that was not an issue as she was so young. He went downstairs, turned the television on then made her a jam roll in the kitchen. He gave her that on the sofa with a drink. He then went up to bed, having let the dog out. In due course she went to nursery and her mother went to work. Nearer lunchtime the police came to the door and said they were looking for the child's mother. They came back later and he was detained. He confirmed that there was a bottle of lubrication in the top drawer, which was not used very often. He did not remember if any of that was still in the house. He denied the allegations, saying that he loved the little girl and would not do anything to her. He had no idea why she was saying these things. He did not deny that he had genital herpes. The laptop was a family one which was used by him and his partner and sometimes a friend of his when he came round. There was no password. He was not aware of the naturist videos and he did not make any of the searches."

Submissions for the appellant

Ground of Appeal 1

(a) The commission of the crimes

[16] Mr Keenan for the appellant submitted that it was necessary to consider the evidence in relation to the commission of the offences under sections 18 and 20 separately. With regard to section 18, the Crown required to prove that the appellant had penetrated the complainer's mouth with his penis. The complainer spoke to this, but there was insufficient evidence to support her account. The trial judge appeared to suggest (at para 27 of his report) that corroboration could be found from the fact that the complainer was able to describe the marks caused by the genital herpes suffered by the appellant – but this was not

enough to corroborate that actual penetration had occurred, and similarly the complainer's demonstration of what occurred could not amount to corroboration of penetration. With regard to section 20, again the complainer spoke to being induced by the appellant to touch and masturbate his penis, but where was the corroboration? The complainer's description of the marks caused by genital herpes could corroborate that she had been close enough to the appellant's penis to see these marks, but not necessarily in a sexual context.

(b) The identification of the appellant.

[17] Issues of identification could be considered together. It was accepted that the complainer identified the appellant as the perpetrator of all 3 offences, but where was the supporting evidence? The fact that she was able to describe the marks on the appellant's penis took the Crown nowhere, unless there was evidence that there was no other way that she could have seen these than in the sexual context which she describes. The appellant lived in the same house as the complainer, and the complainer's mother gave evidence to the effect that the complainer would have seen the appellant naked. There was not sufficient evidence to corroborate the complainer's evidence that the appellant was the perpetrator. This argument applied with equal force to the section 19 aspect of the charge – see Ground of Appeal 2.

Ground of Appeal 3

[18] From page 26 line 3 to page 27 line 23 of his charge the trial judge described the gestures made by the complainer, and he commented on these at paragraph 27 of his report to this court. He summarised the evidence of the psychologist at paragraph 23 of his report, and in paragraph 27 he made a link between this evidence and the particular behaviour exhibited by the complainer in this case. However, that link was not explained in his charge

to the jury; the jury were simply told that the gestures spoken to by other witnesses can be regarded as independent evidence.

[19] In any event, the psychologist had not examined the complainer; his evidence was general, not specific to this case, and he could not state that the complainer's abnormal behaviour and her descriptions and gestures meant that she had experienced the activities libelled in the charge. To suggest that the jury could simply regard the complainer's gestures and behaviour as a separate source of evidence was a material misdirection.

Submissions for the Crown

Ground of Appeal 1

[20] With regard to identification, the advocate depute reminded us that where, as in this case, there is one emphatic source of identification evidence, very little else is required to corroborate it – *Ralston* v *HMA*, 1987 SCCR 467; *WMD* v *HMA* 2012 HCJAC 46. The complainer's clear identification evidence was supported by several facts & circumstances:-

(a) She lived with her mother in the same household as the appellant, and was well able to recognise and identify him. No other person lived there, and there was no suggestion that any other male adult had the opportunity to commit the offences.

(b) The complainer's mother spoke to the appellant being downstairs alone with the complainer on the morning of 15 April 2015 (which was the day on which the complainer first mentioned matters to her nursery teacher and was interviewed by police and a social worker, stating that something had happened downstairs in the house that morning). This evidence placed the appellant as the only person who could have abused the complainer at that time.

(c) The appellant suffers from genital herpes, and there was evidence that on 15 April there were lesions on his penis. The complainer's description of the appellant's penis was consistent with the independent evidence of these lesions.

[21] Corroboration of the commission of the crimes can also be found from facts and circumstances:-

(a) The complainer was able to describe small marks under what she called "Daddy's winky skin"; her description was consistent with lesions caused by herpes, and the marks on the appellant's penis were only 1mm, 2mm & 3mm. The complainer would have had to have been very close to the appellant's penis to see these lesions, and it was suggested that the appellant must have been sexually aroused at the time for the lesions to be visible. Moreover, the complainer described the appellant's penis as being "hard like bones".

(b) Dr Marshall's evidence was that a child of the complainer's age would normally have no knowledge of sexual matters, and that children learn and repeat behaviour which they have observed or been instructed in.

[22] In order to corroborate direct evidence, circumstantial evidence does not need to point to the precise assertion made by the complainer – it is enough if it confirms or supports the direct evidence – *Fox* v *HMA* 1998 JC 94 at page 100. The conduct alleged here was handling the appellant's penis, and oral penetration, which would be one explanation for the complainer being able to describe the penis so accurately and to demonstrate the actions which she did. This is sufficient to corroborate her account. We were referred to *Munro* v *HMA* 2015 JC 1; *Palmer* v *HMA* 2016 SCCR 71; and *Adamson* v *HMA* 2012 JC 27.

[23] Dr Marshall's evidence was independent of the complainer's and supported the evidence of the complainer because it provided an explanation for her having knowledge of

sexual matters which was consistent with the appellant's guilt (and was not otherwise explained in the evidence). There were 2 aspects of the complainer's knowledge which were particularly significant – the lesions on the appellant's penis, and her graphic simulations and descriptions of masturbation and oral sex. Dr Marshall's evidence, if accepted, pointed to the complainer having learned of such detailed descriptions and demonstrations as a result of experiencing abuse. The fact that there may be other explanations for the complainer's knowledge does not preclude that evidence from corroborating her testimony – it is of the nature of circumstantial evidence that it may be open to more than one interpretation, and it is the role of the jury to decide which interpretation to adopt – *Fox* v *HMA* at page 101. The knowledge exhibited by the complainer was a compelling element of circumstantial evidence in this case – see Walker & Walker, The Law of Evidence in Scotland (3rd edition) at para 6.6.2.

Ground of Appeal 2

[24] Only the complainer, her mother and the appellant resided in the family home. The appellant was the only adult male with the opportunity to commit the crime. There was also the evidence from the complainer's mother about the blue coloured lubricant which was kept in a drawer beside her bed, which "tingled" when applied and "felt like it burned". This supported the complainer's account of being digitally penetrated by the appellant, and the blue cream which burned when he used it on her.

Ground of Appeal 3

[25] The Ground of Appeal was inaccurate in stating that the trial judge directed the jury that the complainer's behaviour and gestures were a separate source of evidence capable of corroborating her account – he merely told the jury that this was evidence which was

independent of the complainer. The trial judge was correct to tell the jury that they could take account of the complainer's gestures; the fact that she could simulate oral sex and masturbation in such graphic detail was capable of enhancing her credibility, and when taken with Dr Marshall's evidence was indeed independent evidence which the jury could take into account. There was no misdirection.

[26] In any event, there was no miscarriage of justice. Throughout his charge to the jury the trial judge repeatedly made it clear that the jury could not convict on the evidence of one witness alone, and that corroborated evidence was required before they could convict. Dr Marshall's evidence was not seriously challenged, and no contradictory evidence was led. It was almost inevitable that the jury would accept his evidence (which in any event conformed to common sense). It cannot be said that even if there was a misdirection it resulted in a miscarriage of justice.

Conclusions and Decision

[27] In this case the complainer was aged between 3 and 5 years old when the events libelled in the indictment were alleged to have occurred, and 5 or 6 when she gave evidence at the joint investigative interviews and at a commission. She gave evidence of sexual abuse which she was able to describe and simulate in graphic detail. She identified the perpetrator of the abuse as the man she referred to as her daddy, namely the appellant – the only adult male who resided with her in the family home where she stated that the abuse occurred. In circumstances such as these, very little else is required to corroborate the complainer's identification of the perpetrator – *Ralston* v *HMA; WMD* v *HMA*.

[28] No evidence was led which might suggest that another male might have been responsible for committing these crimes. The evidence of the complainer's mother as to the

events of the morning of 15 April 2015 provided support for the complainer's account. Moreover, the complainer was able to describe seeing lesions on the penis of the perpetrator, which were consistent with the lesions found on the appellant's penis as a result of the genital herpes from which he suffered. This was a case in which the Crown relied on circumstantial evidence to provide corroboration of the complainer's evidence. We are satisfied that there was ample circumstantial evidence before the jury to enable them to find corroboration of the complainer's account that it was the appellant who was the perpetrator. This aspect of Grounds of Appeal 1 and 2 accordingly fails.

[29] With regard to the submissions for the appellant that there was insufficient corroboration of the commission of the offences under sections 18 and 20 of the 2009 Act (no issue being taken in this respect with regard to section 19), again the Crown relied on a body of circumstantial evidence to provide support for the complainer's evidence. Essentially for the reasons advanced before us by the advocate depute today, we consider that there was sufficient circumstantial evidence to support the complainer's account, if the jury chose to accept it (which by their verdict they clearly did). The descriptions and simulations given by this very young complainer in her recorded evidence were indicative of knowledge of sexual matters which would not be expected of a girl of the age of this complainer. The evidence of Dr Marshall was one of the elements of the body of circumstantial evidence which supported the complainer's account. Further elements included the lesions on the appellant's penis, which the complainer was able to describe accurately; this, and her description of the appellant's penis as being "hard like bones", is consistent with the complainer's face being very close to the appellant's erect penis, and indeed, being in physical contact with it. There was the evidence about the blue coloured lubricant, which "tingled" and felt like it burned, and the evidence of the complainer's mother in this regard.

Taking all the factors to which the advocate depute referred us, we are satisfied that there was ample circumstantial evidence available to the jury, should they choose to accept it, to provide sufficient support for the complainer's account. We do not consider that there is substance to the first or second grounds of appeal.

[30] The third ground of appeal relates to an assertion that the trial judge misdirected the jury regarding the use to which they could put the complainer's behaviour and gestures. The trial judge dealt with these matters principally from page 26 line 3 to page 27 line 23 of his charge. He concluded this passage of his charge as follows:-

> "Her behaviour, if you accept there was such behaviour, that's the gestures which the witness spoke to, can be looked at if it was something which was observed, if you accept it was observed. If you accept the interpretations of it. You saw it for yourself on the JII. That and behaviour which is observed is something you can take into account that is independent of her evidence if you accept it."

[31] This is a careful direction, and we can find nothing to criticise in it, particularly when the charge is read together as a whole, with the trial judge's repeated cautionary words that the jury could not convict on the evidence of one witness and that corroborated evidence was required before the jury could convict. The passage complained of is in the middle of a fairly lengthy section of the charge in which the trial judge is discussing the rules relating to hearsay evidence, during which he repeatedly warns the jury that they cannot use such evidence as corroboration, and it must be understood in that context, and in the context of the charge as a whole. We do not consider that it was a misdirection for the trial judge to address this issue as he did. Indeed, it would be remarkable, and to fly in the face of common sense and the uncontradicted evidence of Dr Marshall, if the jury took no account at all of the fact that a girl of the complainer's age was able to give such descriptions and gestures.

[32] Even if (contrary to the view we have just expressed) this did amount to a misdirection, we do not consider that it has resulted in any miscarriage of justice. In the course of a full and careful charge the trial judge gave the jury directions on several occasions that they could not convict the appellant on the evidence of one witness alone, and that in order to convict they would require corroborated evidence. For the reasons we have explained, there was a sufficiency of evidence which would have entitled the jury, if they saw fit, to convict the appellant. We are unable to conclude that there has been any miscarriage of justice in this case. This appeal must be refused.