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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 46/98

BEFORE: THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

REGINA
vs.
COURTNEY HILLARY

Sylvester Morris for applicant

Carrington Mahoney and **Miss Lorraine Smith** for the Crown

January 29, and March 1,1999

PANTON, J.A. (AG.)

The applicant was convicted in the St. Catherine Circuit Court on April 2, 1998, on two counts of carnal abuse before Granville James, J., and a jury. He was sentenced to serve seven years imprisonment at hard labour on each count; the sentences were ordered to run concurrently.

On January 29, 1999, having heard the application for leave to appeal, we refused same and promised to put our reasons in writing. This we now do.

The first count of the indictment charged the applicant with carnal abuse "on a day unknown between the 1st and 31st (sic) days of November, 1995" whereas the second count had the date of offence as 6th April, 1997.

The complainant, who was aged ten years at the time of the first offence, lived with her cousin and the latter's husband at Cumberland, St. Catherine. The offences

were committed in the complainant's bedroom. The first offence was on a Friday morning whereas the second offence was committed at about 8:30 p.m. while the complainant's cousin was attending a church service.

According to the complainant, the applicant experienced difficulty with penetration on the first occasion whereas on the second occasion sperm fell on the floor and the applicant used a rag to wipe it from the floor. The complainant made no immediate report of these incidents to anyone.

A few days after the second incident, the complainant decided to return to her home in Portland. On her return, she saw her mother and sister but did not complain to them. However, on the urging of her brother, she disclosed that she had been sexually molested. About three months after the second incident, the complainant and her mother made a report to Det. Sergeant Gift Drummond at the Rape Unit in Spanish Town. The applicant, when arrested and cautioned, said, "You have medical evidence?"

At the trial, the applicant gave evidence in which he denied having sexual intercourse with the complainant. This, he said, would have been impossible as his wife was always at home with him. In addition, he said that his wife and himself had been married for two years, they were in love and had been experiencing marital bliss.

At the hearing before us, the applicant abandoned the grounds of appeal that were filed on January 21, 1999, but we gave him leave to argue the following grounds that were filed on January 27, 1999:

> "1. Inadmissible statements of the complainant were allowed in as evidence at the trial of the Applicant eg.
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> (a) Page 23 where the complainant called the name of the accused on being questioned by her brother.

(b) Page 19 - 20 first paragraph where witness repeated to a doctor, identifying the accused as the one having sexual intercourse with her. The judge failed to direct the jury on the alleged complaints made. So that, the jury was not helped in any way as how to deal with the effects of the complaints

2. That the Learned Trial judge failed to instruct the Jury on the complaint's credibility in relation to her admitted lies on her allegation against two men who she had claimed to have molested her on the occasion when she accused them of having deprived her of her handbag. In particular her propensity to wrongfully accuse others of misconduct.

3. That the evidence discloses motives in the complainant to tell untruths against the Applicant. The Learned Judge failed in his summing up to point to these motives. In particular:

(I) Applicant rebuking her for telling untruths. To wit the handbag episode,

(II) Rebuking her for her late coming home from school, and generally to her behaviour and telling untruths,

(III) That the complainant obviously wanted to go home to her mother and as such needed a reason to give to her mother to allow her to stay in the country as against staying with her cousin, where discipline was strict.

4. That the verdict is unreasonable and cannot be supported having regard to the evidence."

Mr. Sylvester Morris submitted that the learned trial judge permitted the admission of inadmissible evidence which was highly prejudicial to the interests of the applicant; and that, having done so, he failed to give appropriate directions to the jury. He referred to the following passages in the summing up:

> (1) "She said when her brother spoke with her, her brother ridiculing her about coming from town and come back to country, she didn't feel good about it, so she said to her relative, the brother, that none of them know why she run away and come to country. And the brother said. "Talk man, talk". And it was then that she disclosed why she had run away, namely, sexual interference that she is alleging that the accused committed with her." - page 23.
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> (2) "Subsequently a report was made in Spanish Town to the police. The police took her to the Spanish Town Hospital. She saw a doctor there and she repeated that the accused had sexual intercourse with her more than once and that she felt bad when he was having sexual intercourse with her" - pages 19 and 20.

Mr. Morris complained that the first passage quoted above contained hearsay which was inadmissible as it amounted to a recent complaint and the brother to whom it was made was not called to give evidence. He relied on the recent Privy Council decision of **Kory White v. The Queen** [1998] 3 W.L.R. 992.

In that case their Lordships adopted the following statement in **Cross and Tapper** on Evidence (8th edn. 1995) at p. 294:

> "The general rule at common law is that a witness may not be asked in-chief whether he has formerly made a statement consistent with his present testimony. He cannot narrate such statement if it was oral or refer to it if it was in writing (save for the purpose of refreshing his memory), and other witnesses may not be called to prove it."

> purpose of refreshing his memory), and other witnesses may not be called to prove it."

Their Lordships then referred to what they described as two well-known common law exceptions to this rule. One of these is relevant to this case. This is what they said:

> "The first permits proof of complaints in sexual cases. If a complaint is made at the first reasonable opportunity after the offence, it may be proved in evidence to show the complainant's consistency and to negative consent. But for this purpose it is necessary not only that the complainant should testify to the making of the complaint but also that its terms should be proved by the person to whom it was made. If ... the recipients of the complaints do not give evidence, the complainant's own evidence that she made a complaint cannot assist in either proving her consistency or negativing consent."

Miss Smith, who responded on behalf of the Crown, submitted that the prosecution's case did not include a recent complaint. The evidence as to what the complainant had told her brother was elicited in cross-examination by the defence. That being so, the applicant could not be heard to complain about it.

We agree with Miss Smith that the circumstances were such that the **Kory White** case had no relevance.

Mr. Morris complained further that the damage that he perceived to have been done to the applicant's case by the words in the first passage was made worse by the evidence of the repetition of the allegation of the sexual assault to the doctor several weeks after the incident. In response, Miss Smith submitted that Mr. Morris had misinterpreted the passage as the evicence of repetition was not to the doctor but rather to the prosecutor at the trial. The doctor, she pointed out, was called but he gave no evidence of any statement having been made to him by the complainant. We agree

with Miss Smith's submission. As a result, we are of the view that there is no merit in this ground of appeal.

GROUNDS 2 and 3 - The credibility of the complainant

The third particular listed under Ground 3 was abandoned by the applicant as there was no evidence to support it.

Mr. Morris was highly critical of the manner in which the learned trial judge dealt with the question of the credibility of the complainant in his summation to the jury. He said that the judge merely indulged in recitation rather than guiding and helping the jury.

An examination of the record reveals that the complainant admitted during cross-examination to lying to the applicant about the theft of her schoolbag. She had reported to the applicant that two men in a car had robbed her of her bag. The matter was reported to the police. However the complainant later informed the applicant that her report was untrue.

The learned trial judge, in warning the jury about the need for corroboration, instructed the jury thus:

> "You must be very sure that she has spoken the truth before you can act on this evidence." (page 8)

He elaborated at page 9 by saying:

> "Experience has shown that young girls of tender age, they sometimes display great imagination. Sometime they have fanciful ideas, but you as the judges of the facts of this case, it is for you to determine where the truth lies.... Both cannot be speaking the truth. It is entirely for you, as the judges of the facts of the case, to determine where the truth lies."

At page 22, he said:

> "Then she was asked in cross-examination about a bag and she said that she lied about the bag. She

> didn't try to cover it, she came straight and said she did tell a lie about the bag."

Further, he said at page 27:

> "What the defence would ask you to say is that she lied there, is she lying now. But there it is, it is a question of fact and you will bear in mind that she admitted that she lied."

And, at page 28:

> "Here again the defence is asking you to say that she is not a person who you should believe but you are the judge of the facts of the case, Mr. Foreman and Members of the jury, and if you believe what she said in that witness box no matter what happened in the past, you see the fact that a person told a lie on another occasion is no proof that that person is lying on this occasion. But the defence is asking you to say that she lied then and she is lying now."

We are of the view that the passages quoted indicate that the learned trial judge was not only aware of the importance of the issue of the credibility of the complainant but that he also gave the jury adequate directions in that respect.

GROUND 4 - Insufficiency of evidence

It was submitted that there was no evidence to support the verdict of guilty on Count 1 as there was no evidence of penetration. This submission was based on the fact that the complainant had said that the applicant had tried to insert his penis in her vagina but it could not hold. Mr. Morris appears to have overlooked the evidence of the complainant that she experienced pain during the incident and that afterwards she had seen blood on her hand and her pants.

In order for it to be said that there was carnal abuse, there had to be evidence of penetration. For more than a century and a half it has been established that the

slightest degree of penetration suffices: **R. v. M' Rue** (1838) 8 C & P. 641; **R.v. Allen** (1839) 9 C.& P.31.

An examination of the record reveals that the learned trial judge gave to the jury a comprehensive reminder of the evidence relating to count one, along with appropriate directions as to penetration and the verdicts open to them depending on what view they took of the facts. It is sufficient, we feel, to quote two passages; firstly, at pages 10 and 11:

> "I will come back to the evidence later on; but the evidence in relation to Count 1, so far as I am concerned, and this is a question of fact, this is really for you, but I am giving you direction on this. This does not clearly show that the accused's penis had entered the girl's vagina, and I will tell you exactly what she said at a later stage.
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> Now, if you believe the girl that the accused, he first attempted to insert his penis in the vagina and that it did not actually go in - because the law is that the least bit of penetration would suffice to prove sexual intercourse. If you are not sure that that penis had entered the vagina in relation to Count 1, and that the accused, as the complainant said, was trying to insert his penis in the vagina 'but it could not hold,' as she said at one stage, then in such a case he would have committed - if you believe what she said, he would have committed an attempt - he would be guilty of an attempt to commit carnal abuse, attempting to do so. Because if you are not sure that the penis entered the vagina but in trying to put it in, if you are satisfied, based on what she said, that the penis actually entered the vagina, no matter how slight it entered, then sexual intercourse would have taken place, and the offence of carnal abuse would have been committed.
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> So when you consider your verdict in relation to Count 1, based on the evidence you have heard,and based on the evidence that I will review, you are to ask yourselves the question, do you believe that the penis entered the vagina? If the answer is yes, that would be carnal abuse. If the

> answer is no, or you are not sure, based on what she said, you could find him guilty of attempt to commit the offence of carnal abuse. I hope that is clear, Mr. Foreman and members of the jury."

and then at pages 15 to 17:

> "Now Mr. Foreman and Members of the Jury, you remember what I said to you about attempt, it is for you as the judges of the facts of the case to determine what was the extent, if any, of penetration and if you do not believe that there was any penetration, or if you are not sure that there was any penetration then you ask yourselves the question, did the accused attempt to insert his penis in her vagina. And then that would be an attempt to commit the offence of carnal abuse.
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> She said he was forcing himself, he was trying to put it in. She started bawling and he covered her mouth with his hand. After a time he stopped and she went outside. She said that when he was trying to put his penis in her vagina she was in her room. She said that when she went outside she saw blood on her hand. She did not know where the blood came from at the time, but she later saw blood on her pants.
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> Let us pause here Mr. Foreman and Members of the Jury. She saw blood on her hand, she did not know at the time where the blood came from, but later on she saw blood on her pants. Now there you are being asked by the prosecution to draw the inference that that blood came from her vagina. But there are other factors that might have caused it.
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> It is known that sometimes girls at a very early age start having their period, and the possibility exists, the possibility exists, that she could have started having her period at that time; that the blood that she saw on her panty and the blood she saw on her hand could have come from that source; she was having her period. That is a possibility. I am not saying that it's so, but I am putting it to you, Mr. Foreman and Members of the Jury, as the judges of the facts of the case, what the possibilities are, and if you have any doubt you are to give the benefit of the doubt to the accused.

> The doctor gave evidence that the hymen was absent, but there is no evidence of when that hymen was ruptured or when it became missing. So you cannot from that, what the doctor said, conclude that when this girl saw blood on her that at that time she had lost her virginity. But again it's a question of fact for you.
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> She went on to say his penis could not hold and when she said it couldn't hold I take it to mean that it could not go in her vagina. And she said it felt painful. You bear in mind as I repeat what I mentioned to you about the attempt if you are not sure that there was any degree of penetration."

This ground, like the others, found no favour with us.

Having found that there was no merit in the application, we ordered that the sentence should commence on July 2, 1998.