MMLS

# JAMAICA

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO. 91/2003**

**BEFORE:** **THE HON. MR. JUSTICE FORTE, P**
**THE HON. MR. JUSTICE SMITH, J.A.**
**THE HON. MR. JUSTICE HARRISON, J.A (Ag.)**

**CLAUDE DRYSDALE v. R**

**Bert Samuels** for the Applicant
**Anthony Armstrong** for the Crown

**April 26, 27 and December 20, 2004**

**SMITH, JA:**

On the 27th April, 2004, after hearing submissions, we refused leave to appeal and promised to put our reasons for so doing in writing. The following are our reasons.

On April, 2003, Claude Drysdale, the applicant was convicted of rape before Marsh J and a jury. The particulars of the offence were that on the 17th of July 2002, in the parish of St. Thomas he unlawfully had sexual intercourse with L.W. without her consent.

In July, 2002, 15 year old L.W. lived with her mother in the parish of St. Thomas. She was at the time a 5th Form student. About midday on July 17, 2002, L.W. was at home reading a library book. She fell asleep. Her repose was disturbed by the weight of a body pressing down on her. As she opened her eyes her gaze was fixed on the face of the applicant.

She had known him all her life- this was not in dispute . The applicant was a family friend who hitherto visited her house every day and would eat at her house. She asked the applicant what he was doing. His reply was that if she was not an idiot she would know what he was about. She screamed and cried out for rape. He squeezed her throat and smothered her. She valiantly resisted his attack. A knife fell from his waist. She grabbed it and slashed his face and side. The applicant thrust his fingers "down her throat". She lost consciousness and when she came to her senses she noticed that she had on only a blouse. Her knickers and panty were off. The applicant was sitting on a sofa nearby. He ordered her at knife point to go the bathroom and bathe. When she was in the bathroom he threw her a green dress and panty and told her to put them on. She did. On her way out of the bathroom he grabbed her and threw her on a bed. He took off her panty removed his jeans and underpants. She tried to resist his approach and scratched his penis. He again held her by the throat. He overpowered her and inserted his penis into her vagina. By a trick she managed to escape from him and ran out of the house. She ran to the main road and up to the square where she saw her brother. She told him what had happened. Later she spoke to her mother who took her to the police station. Corporal Wilson took her to the Princess Margaret Hospital where she was examined and treated by a

doctor. The incident lasted about two hours, she said. She identified in court the panty and knickers which she said she was wearing at the time.

Claude Walker the brother of L.W. testified that she ran to him at the square and told him that Claude raped her.

Dr. Soa Win told the court that on July 18, he examined L.W. He saw a bruise one (1) cm in diameter at the back of her throat. He examined her vagina and took swabs and smears. The learned judge did not recount the evidence of Dr. Soa Win. Dr. Cruickshank, a government analyst attached to the Forensic Laboratory also testified. The parts of her evidence referred to by the judge are to the effect that she received five (5) sealed envelopes. One had vaginal swabs and smears. Upon examination she found trace of human blood, semen and spermatozoa. The others had among other things, a panty, and a pair of coloured shorts (knickers) which were identified by L.W. Her examination revealed that human blood was present on these items of clothing.

The learned trial judge reminded the jury that Corporal Fayann Kelly told them that she went to Government's Forensic Laboratory and received four envelopes and a certificate. On these envelopes was the handwriting of Corporal Wilson. These envelopes were identified and tendered in evidence.

The applicant gave evidence to the following effect. He knows the complainant L.W "from she was born." He had spent the night of July 16,

2002 with L.W's mother with whom he had an intimate relationship. He left the house early in the morning of the 17th July, and did not return until about 6:00 p.m. He denied having any sexual connection with L.W. He gave the court the likely reasons why L.W was falsely accusing him of rape.

**Grounds of Appeal**

The original grounds of appeal were abandoned. Counsel for the applicant, Mr. Bert Samuels, sought and obtained leave to argue the following supplemental grounds.

1. The evidence of Dr. Cruickshank was inadmissible and prejudicial and led to a miscarriage of justice.
2. The learned trial judge misdirected the jury on consent.
3. (Was not pursued).
4. The learned trial judge's direction that the recent complaint in the matter could possibly help in the question whether the jury could be sure that the complainant told the truth was a misdirection and hence led to a miscarriage of justice.

**Ground 1**

Counsel for the applicant submitted that the prosecution failed to prove the "chain of custody" of the exhibits that is, the clothing of the complainant. This failure, he argued, rendered the evidence of Dr. Cruickshank, inadmissible. The transcript of the evidence was not made

available to the court. Unfortunately the learned trial judge's review of the evidence was lacking in details. What can be gleaned from the judge's summing-up is that the panty and the pair of shorts which Dr. Cruickshank examined were identified by L.W. as belonging to her and as those which she was wearing at the material time. Dr. Cruickshank's examination revealed the presence of human blood on these items. We do not agree with counsel that the evidence of the analyst was inadmissible in the circumstances. In our view the absence of the so called "chain of custody" would go to the weight of such evidence. Moreover this evidence does not in any way implicate the applicant. At its highest it is only consistent with L.W's claim that she was sexually assaulted. There is no merit in this ground.

**Ground 2 –Consent**

The learned trial judge in his summation correctly defined rape. He then told the jury that the prosecution must prove that the complainant did not consent and that the applicant intended to have sexual intercourse with the complainant without her consent. The impugned direction came later when the judge said:

> "Now, I should tell you Mr. Foreman and your members that in our law, no female under the age of sixteen can consent. What the law is saying is that even if a female under sixteen agrees that somebody can have sexual intercourse with her, the law says that is not an agreement because she cannot consent..."

Near the end of his summing-up the judge reiterated:

> "Remember I told you in law L.W. could not consent. Remember the evidence that L.W. gave you of what the accused man did to her of putting his fingers down her throat, of what Dr. Soa Win found when he examined her."

There can be no doubt as to the incorrectness of the above directions. This Court had to deal with a similar complaint in ***R v Simon Hoyte*** SCCA No. 72/96 delivered June 2, 1997. In that case Forte JA (as he then was) said:

> "The inability of a young girl under sixteen to consent to an act of sexual intercourse is as a result of legislation which makes it so. In circumstances, where sexual intercourse takes place with a young girl under sixteen years, the fact that she consented to the act, would not be a defence as the accused would nevertheless be guilty of the offence of carnal abuse. In a case charging rape of a young girl under the age of consent, the prosecution nevertheless has the burden of proving as a fact that sexual intercourse took place without her consent. If the prosecution fails, then the accused would still be liable to a conviction for carnal abuse."

The Court in ***Hoyte's*** case did not find the error fatal to the conviction of rape because of the overwhelming evidence that the complainant did not consent. In the instant case there is overwhelming evidence that sexual intercourse took place against the will of L.W.

Indeed after giving the impugned direction the learned trial judge told the jury:

> "...Beside the fact that I am telling you in law, L... could not have consented because you heard her age, she was born on March 20, 1987. You also look on the evidence in this case of what L... said happened to her. Of the fingers being put down her throat, of the throat being squeezed, of his using his knees to control her legs, of his grabbing her from behind and throwing her down on the bed...
>
> She told you of his following her showing her the knife when she said he couldn't tell her to go and bathe and threaten to kill her.
>
> Mr. Foreman and your members if you accept all of that happened, could you find or could anybody say that she was consenting?"

Further consent was not an issue in the case. The applicant's defence was a complete denial. He told the court that L.W. and her mother had concocted the charge against him. The real issue for the jury was whether or not L.W. told the truth when she said that the applicant was the person who had sexual intercourse with her. Notwithstanding the judge's error, we are clearly of the view that no substantial miscarriage of justice has occurred.

**Ground 4 – Recent Complaint**

In directing the jury on recent complaint the learned judge said:

> "I should tell you that the evidence of what L... told her brother and what her brother said she told him, cannot in law be treated as evidence that the incident actually happened. The only

> relevance of what L...said to her brother, if you accept that she said it is that it may show that her conduct after the alleged incident was consistent with her evidence about it. That may possibly help you on the question whether you can be sure that she told you the truth. It cannot be corroboration, that is, independent confirmation of what she said happened to her."(emphasis added)

Counsel's complaint was against the underlined sentence. Counsel contended that that was a misdirection which might have led to a miscarriage of justice. Mr. Armstong for the Crown submitted that the directions given on recent complaint were correct. Consistency of conduct, he argued, was one of several factors which could help the jury to determine whether or not the witness was truthful.

We agree with counsel for the Crown. The learned judge was obviously following the specimen directions of the English Judicial Studies Board.

This ground fails.

**Conclusion**

As we stated at the outset the application for leave was refused. We ordered that the sentence should commence as of the 11th July, 2003.