JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 132/97

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA
vs
GENE TAYLOR

Carlton Williams for the Applicant

Brian Sykes for the Crown

9th, 10th November and 18th December, 1998

FORTE J.A.

The applicant was convicted of the offence of rape in the St. Catherine Circuit Court on the 25th September, 1997, and sentenced to ten years imprisonment at hard labour. A single judge having refused him leave to appeal, the applicant pursued his application before us, and having heard arguments on the 9th and 10th November, 1998 we then reserved our decision, which we now deliver.

The allegations of the Crown at trial involved the rape by the applicant of S.H. who was twelve years old at the time. The incident occurred on the 15th June, 1996 when S.H. was returning from a visit to her grandmother. In the process of doing so, she had to pass the home of the applicant who is her cousin. He stopped her and invited her into his home to have a jelly coconut. She entered into the house and sat in the bedroom while she was served with the coconut. After she had had the coconut, the

applicant told her to take off her clothes and on her refusal proceeded to do so himself. She bit and punched him, but he nevertheless succeeded in removing her clothing. He then undressed himself and forcibly had sexual intercourse with her, her attempts at pushing him off being unsuccessful. After it was over she left on her way home when she saw a cousin named "Shag" whom she spoke to, and later in the night at about 8:00 p.m. her father came to the home and she told him "what happen at Taylor's house". Her father then took her to the police station where a report was made.

In his sworn testimony, the applicant denied that he had sexual intercourse with the complainant and that she came to his house at all. He alleged that he was not at home at the time and date that the complainant stated that the incident took place. He put forward the reasons why the complainant would be telling lies on him. He connected it to an incident in December, 1995, when S.H who is his cousin, came to his home, and stole $500.00 from a tin. He complained to her father who refunded $300.00, and refused to pay the balance. On a later date when the father was asked for the $200.00 he told him that he is going to 'F' him.

The only issue of substance argued in the application is the treatment by the learned trial judge of the evidence of the young girl's complaint to her father. As this evidence was not disclosed in the summing-up of the learned trial judge, a transcript of the relevant part of the evidence, both of the complainant S.H. and her father were obtained. We set out firstly that of S.H and thereafter of the father.

S.H's evidence in Examination-in-chief

Q: I am going to take you back just a little bit. On your way to Glengoffe, did you speak to anyone?

A: Yes.

Q: Who did you speak to?

A: My other cousin.

Q: What is the name of that cousin?

A: Shag.

HIS LORDSHIP: That is a boy or a girl?

WITNESS: Boy.

Q: And then you went home and your sister was there?

A: Yes.

Q: Your father came there that night?

A: Yes, miss.

Q: At what stage did he come in?

A: Eight o'clock.

Q: Did you speak to him?

A: Yes.

Q: What did you speak to him about?

A: I told him that...

Q: Say that a little louder

A: I tell him what happen at Taylor's house.

Q: After you spoke to him, what did he do, if anything?

A: He took me to the hospital.

The relevant part of the father's testimony is as hereunder.

Q: I see. Now, after he spoke to you, you see, what did you do?

A: Well I go to her house and I call her and I ask her what happen and she told me...

LORDSHIP: I am not allowing that. Not allowed.

MR. SYKES: Very well, m'Lord.

Q: And then:

HIS LORDSHIP: You see, I will tell you why it is not allowed. Because she didn't give that evidence . If she gave the evidence of what she said to him then it would be allowed; but she didn't give the evidence. You can't get it from him. Not allowed.

Although the ground of appeal filed challenged the treatment by the learned trial judge of the conversation which S.H. had with Shag when she saw him on the road, counsel for the applicant conceded that the young girl merely testified that she spoke to Shag and not specifically that she told him of the incident. Counsel, however, contended that that would not be the case in relation to his conversation with her father, which he submitted was evidence of a complaint, her father having testified that she told him "what happened at Taylor's house" which the jury would understand to be the same story which she had related in Court. In those circumstances, he submitted the learned trial judge had a duty to carefully direct the jury as to how to treat that evidence to ensure that it was not treated by them as supportive of the girl's testimony.

For this proposition he relied on the case of ***Kory White v the Queen*** Privy Council Appeal No. 12/98 delivered on the 10th August, 1998 (unreported). This was a case in which the principal ground of appeal was that the judge did not give the jury adequate directions about how they should treat the complainant's evidence that she had made several statements shortly after the incident to various people telling them what happened. That case differs in some aspects from the instant case, not the least of which is the fact that no recipient of the several complaints were called to give

evidence, whereas in the instant case, though the prosecution attempted to lead the evidence of the complaint through the recipient, the evidence was disallowed by the learned trial judge, for the reason that the complainant had not given evidence of the details of the complaint. The contention by Mr. Williams that the complainant's assertion that she told her father what happened at Taylor's house was in fact evidence of a complaint finds support in the following dicta of Lord Hoffmann in the ***Kory White's*** case (supra) at pg. 8:

> "In the absence of a ruling by the judge that the questions could be asked because of an importation of recent invention, she should not have been allowed to say that she had told five people 'what had happened'. The inference which the jury were bound to draw was that she had made statements on terms substantially the same as her evidence in court".

This dicta however, appears inconsistent with another statement, later expressed by Lord Hoffmann in his judgment. With reference to the very evidence which his Lordship earlier stated should not have been allowed into evidence, he refrained, speaking for the Board, from going as far as saying that the evidence was inadmissible. This is what he said:-

> "While therefore their Lordships do not go so far as to say that the evidence of the fact that statements were made was inadmissible, they consider that the admission of that evidence made it necessary for the judge to give the jury a careful direction about the limited value which could be attached to it".

His Lordship based his earlier conclusion on the following statement (pg. 8):

> "On the other hand, it is important to avoid infringement of the spirit of the rule against previous self-consistent statements by conveying indirectly to the jury that she had given a previous account of the incident in similar terms with a view to inviting the jury to infer, not merely that her subsequent conduct was not inconsistent with her complaint but that her credibility was actually supported

> by the fact that she had told the same story soon after the incident".

It would seem that the Learned Law Lord though concluding that such evidence was not inadmissible nevertheless thought that in the circumstances of that case it ought not to have been allowed: but it having been allowed into evidence, the learned trial judge had the responsibility to give a careful direction about its limited value. Additionally, Lord Hoffmann, it must be remembered was speaking to a case in which no evidence was received from any recipient of the complaints and in which the learned judge laid great emphasis to the jury on the fact that the young girl had made several complaints, circumstances which no doubt could have led the jury to believe that these complaints supported her testimony.

In the instant case, it appears that the learned trial judge did not recognise the evidence of the young girl as evidence of a complaint and in those circumstances prevented the father from testifying as to what she had told him. What resulted from that error was that although the young girl said that she told her father what happened, there was no evidence from the father to establish any consistency in her testimony. That the latter would be the real basis for the reasons upon which such evidence is allowed was recognised in the following dicta , in the ***New Zealand*** case of ***Reg. v Kincaid*** [1991) 2 N.Z.L.R. 1,9 which was approved by their Lordships' Board in the ***Kory White*** case (supra) pg 6:

> " The immediate question is - 'How is one to know she is a truthful girl telling of her complaint?' The answer - that her own assertion that she did complain will help the jury to assess her truthfulness - needs only to be stated to be recognised for its logical absurdity. Without independent confirmation of what she said, the girl's own evidence-in-chief that she complained takes the jury nowhere in deciding whether she is worthy of belief".

See also our own case of ***Reg. v Fletcher*** SCCA 20/96 25th November, 1996 (unreported) where it was said that where the recipient of the complaint did not give evidence there was " no evidence which could be regarded as falling within the category of a recent complaint".

The learned trial judge not having allowed the evidence from the father thereafter gave no direction to the jury with regards to the principles governing recent complaint, and indeed presented the case to them as if in fact there was no such evidence.

Mr. Williams, however, contends that such evidence did come from the young girl, and consequently there being no evidence from the recipient the learned trial judge was bound by the requirement laid down in the ***Kory White*** case i.e. to direct the jury carefully as to the limited value that such evidence has in these circumstances.

In ***Kory White's*** case however, the rationale for the conclusion of their Lordships' Board was centered around the treatment of the learned trial judge of the evidence of the recent complaint as testified to by the complainant in circumstances where none of the persons who received those complaints had testified. This is evident from the following passage (at pg. 11) of Lord Hoffmann in that case:-

> "Apart from telling the jury that [the complaint] it did not amount to corroboration, he gave no indication of what use could be made of the complaints. Their Lordships consider that in the circumstances of this case, that was insufficient. The passages cited from the summing up would have indicated to the jury that the evidence about the complaints were in some way a relevant circumstance to be taken into account in assessing the complainant's credibility, upon which the whole prosecution case depended. On more than one occasion the jury had been told that it was a matter for them to decide whether the complaints had been made and whether it was plausible that they should have been made to some people but not to others. They had been directed not to blame the

> complainant for the absence of evidence confirming the complaints, because this was a matter for the police. The jury must therefore have considered that, having formed an opinion on these matters, they were entitled to put it to some use. Quite what they would have made of the direction that the complaints did not constitute corroboration is hard to say, but this difficulty is also encountered in cases of admissible complaints, when the jury has to be instructed that the evidence is admissible to show consistency and negative consent but does not amount to corroboration. As the jury had been told that even without corroboration they could convict if they believed the complainant's evidence, there must have been a significant risk that they considered themselves entitled to regard the evidence of complaint as confirming her credibility. To leave it open to the jury to take such a view was a misdirection".

Mr. Sykes, the Deputy Director of Public Prosecutions who appeared for the Crown contended, and we agree, that the above cited passage speaks clearly to the fact that the case of ***Kory White*** was decided on its own facts. This is so, especially having regard to the emphasis placed in that case by the learned trial judge on the complaints which may have led the jury to believe that that aspect of the complainant's testimony could have been put to good use, whereas he had a responsibility to direct them to the contrary - that is to say that - the evidence had no value in determining the credibility of the witness, since it emanated only from her.

The circumstances that existed in that case, do not exist in the instant case. There was nothing said by the learned trial judge in his directions to the jury which could have given them any impression that the evidence of the young girl that she told her father what happened, could in any way be used in assessing her credibility. In fact the learned trial judge, directed the jury as if there was no evidence of recent complaint in this case, and treated it merely as a part of the narrative. He was careful

to direct the jury that the case of the prosecution rested solely on her evidence, and as to the degree of care necessary in assessing her evidence. He directed the jury thus:

> "When you are considering the evidence of S.H., you know, you have to subject her evidence to the closest scrutiny, because the case rests on her evidence alone. It is not corroborated; and it is only if, despite my warning, you are satisfied so that you feel sure that she is telling you the truth, are you according to your oath, to return a verdict of guilty".

In the event, though we find that the learned trial judge fell into error when he disallowed the evidence of the father as to the story related to him by S.H, we conclude that this error would have been in favour of the applicant. Having done so the learned trial judge in his summing-up quite rightly treated the case as if there was no recent complaint, refrained from rehearsing that aspect of the young girl's testimony and gave no directions re consistency of the girl's conduct.

For those reasons, the application for leave to appeal is granted , the application is treated as the hearing of the appeal. The appeal is dismissed and the conviction and sentence are affirmed.