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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 132/97

MOTION NO. 1/99

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

R. v. GENE TAYLOR

Richard Small and Ms. Helga McIntyre for the applicant

Carrington Mahoney and Ms. Lorraine Smith for the Crown

January 26, 29 and March 1, 1999

PATTERSON, JA.:

The applicant, Gene Taylor, moved the court for conditional leave to appeal to Her Majesty in Council from a decision of this court, delivered on the 18th December, 1998, whereby the appeal of the applicant, from his conviction and sentence on the 25th September, 1997, of the offence of rape, was dismissed and the conviction and sentence affirmed. The ground of the application is stated thus:

> "...that the decision of this Honourable Court in the abovementioned matter involves a point of law of exceptional public importance and it is desirable in the public interest that the said point be submitted by way of a further appeal to Her Majesty in Council, pursuant to the provisions of Section 35 of the Judicature (Appellate Jurisdiction) Act."

Section 35 of the Judicature (Appellate Jurisdiction) Act ("the Act") provides that:

> "...a defendant may, with the leave of the court appeal to Her Majesty in Council from any decision of the court given by virtue of the provisions of Part IV, V or VI, where in the opinion of the court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

The point of law on which the applicant based his application is stated thus:

> "The questions in the proposed Appeal to Her Majesty in Council are as follows:
>
> **(1)** Is a trial judge required to expressly direct the jury to disregard evidence of a purported complaint in a case of a sexual offence where there is no evidence from the recipient capable of establishing the admissibility of the complaint within the rule laid down in KORY WHITE v. THE QUEEN [1998] 3 W.L.R. 992?
>
> **(2)** If the answer to the above question is no, what directions should be given in such circumstances?"

Mr. Small's submissions seem to be centred primarily on the opinion of their Lordships' Board in ***Kory White v. The Queen*** [1998] 3 W.L.R. 992. The main submissions are as follows:

> "Although the principal question posed in the **Kory White** appeal is answered by the Privy Council - namely that it is necessary that the recipient of a complaint must be called before that evidence can be admissible - there are a number of other important legal issues which are either not answered or, where the issue is dealt with, confusing or contradictory pronouncements have been made. These factors make it desirable that the Board should revisit the subject and clarify the law.
>
> The two questions posed for certification in this application arise directly out of the circumstances of this case and also confront the confusing or unanswered issues that spring directly from the

> inadequacies of the Board's decision in **Kory White v The Queen**."

Turning to the instant case, counsel submitted that this court recognised one of those contradictory passages, and he referred to that part of the judgment of the court at pages 5 to 6 in support of his submissions. There the court pointed out dicta in two passages in the speech of Lord Hoffman, who delivered the opinion of their Lordships' Board, which appeared to be inconsistent. The court concluded, however, that the case of ***Kory White*** (supra) was decided on its own facts, and clearly distinguished that case from the instant one. The circumstances that existed in the ***Kory White*** case do not exist in the instant case. In the ***Kory White*** case, the complainant who alleged that she had been raped testified that she had spoken to a number of persons shortly after the incident, telling each person "what had happened". None of those persons was called as a witness.

Evidence of a recent complaint made in sexual cases may be admitted to show the complainant's consistency and to negative consent. But, as their Lordships pointed out in the ***Kory White*** case, "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." Their Lordships continued by saying:

> "If, as in this case, 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."

Their Lordships' Board identified the principal ground of appeal to be "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

> the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. ... There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future'."

In our opinion, the decision of the court in the instant case does not involve nor does it give rise to a point of law of exceptional public importance nor is it desirable in the public interest that a further appeal should be brought. It seems that the principles governing the procedure to be adopted in admitting evidence of a recent complaint in sexual cases, and the way that the trial judge should treat such evidence are quite settled. The guidelines are clear and unambiguous, and trial judges ought not to fall in error in directing the jury in circumstances such as those that exist in the instant case. Even in cases where it can properly be established that the trial judge misdirected the jury that would not be a sufficient ground for the court to grant leave to appeal to Her Majesty in Council. (Ex parte MacRea [1893] A.C. 346).

In our judgment, this application fall short of fulfilling the stringent requirements for the grant of leave laid down by section 35 of the Act, and it is accordingly refused.