JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 22 and 23 of 1975.

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

REGINA VS. VINCENT HIGGINS
AND
EZEKIEL MIGHTY

Mr. F.A. Smith for the Crown

Mr. R. Small for the Applicants

October 3, November 12,
December 2, 1975, February 4, 1976

WATKINS, J.A. (Ag.):

The applicants were convicted and sentenced before McCarthy, J.A. and a jury in the St. Ann Circuit Court on February 6, 1975 on an indictment containing four counts. The first charged both applicants jointly with breaking and entering a dwelling house in the night of the 30th of August, 1974 with intent to commit rape therein; the second charged Higgins alone with assaulting one B on the 31st of August, 1974 with intent to ravish her; the third charged Higgins alone also with indecently assaulting the said B, and the fourth and final count charged Mighty alone with indecently assaulting W, both on the same 31st of August, 1974. From these convictions and sentences leave to appeal was sought and on December 2, 1975 we granted leave quashed the convictions, set aside the sentences and ordered a new

trial on all counts, stating that we would put our reasons in writing. This we now do.

In the light of the order for a new trial we propose to limit references to the evidence and any comments thereon to what is essential to intelligent appreciation of the arguments submitted before us and to our decisions thereon.

B and W, two young girls and their younger brother D lived with their parents in the parish of St. Ann. S, a friend of the family lived nearby and it was customary, particularly during periods of absences of their parents from home, for the children to visit and stay overnight at S's home. On the night of August 30, 1974 the parents were away from home and it was the contention of B and W that between one and two o'clock in the early morning of August 31, the applicants broke into the dwelling house and attempted without their consent to have sexual intercourse with them, Higgins with B and Mighty with W, and that they successfully fought off the assaults and ran to their neighbour S to whom they made complaints, naming the applicants whom they had known for a considerable time prior to the incident.

Before us and by our leave learned Counsel for the applicants argued three supplementary grounds. We find it necessary for present purposes however, to refer only to the first two grounds, the first of which was that the learned trial judge erred in law

(a) in admitting into evidence the report made

by W and B to S that the two men who came into a room were the two accused.

(b) in failing to warn the jury that this evidence should be completely disregarded by the jury in deciding the issue of identity.

The Crown had adduced evidence that, first W, and later B, having escaped from their respective assailants, had made their way to S and told her that two naked men had invaded their home and had attacked them, whereupon S enquired if they knew the men and they severally called the applicants' names in reply. Counsel's contention was fourfold, namely (i) that under the exception to the hearsay rule whereby recent complaints made by prosecutrices in cases of sexual offences are admissible in evidence, particulars of such complaints so admissible in evidence do not include particulars as to identity, (ii) that where particulars of a complaint necessarily involves names of persons charged, then a question arises whether such names should not be omitted from the particulars of the complaints to be admitted in evidence (iii) that on the facts of the instant case the partiuclars as to identity did not form a natural part of the complaint, were given in answer to questions severally asked by S, and therefore ought not to have been admitted in evidence as forming part of the complaint, and finally (iv) that the particulars of identity having been admitted as part of the complaint there was a clear duty on the learned trial judge to warn the jury that such particulars could not be used as evidence of the truth of the statement implicating the applicants in the offences charged.

With respect to (i) Counsel relied on R. v. Lillyman (1895 - 9) All. E. R. Rep. 586. There, the prosecutrix on a three-count indictment charging various sexual offences against Lillyman deposed to the acts complained of having been done without her consent. Counsel for the Crown tendered evidence in chief of a complaint made by the girl to her mistress in the absence of the prisoner very shortly after the commission of the acts and proposed to ask the details of that complaint as made by the girl. Counsel for Lillyman objected to the admission of such evidence. The objection was overuled, the evidence admitted, and the girl's mistress deposed to all the girl had said respecting Lillyman's conduct towards her. Lillyman was convicted and upon a reference to the Court for Crown Cases Reserved of the question, inter alia, "Was the evidence so admitted rightly admitted?" Hawking, J. expressing the view of the Court which affirmed the conviction said, inter alia, -- and Counsel placed particular reliance hereon -

> "After very careful consideration, we have arrived at the conclusion that we are bound by no authority to suppose the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath, given in the witness box, negativing her consent and confirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only are the

> the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it?"

With respect to Counsel who urged this argument with some vehemence we dissent from the view that anything which fell from the lips of the learned judge in this passage under reference, or any other for that matter in the judgment, suggest that matters of identity cannot legally form part of particulars of complaint properly admitted in evidence. The passage of the judgment under reference focuses attention only on the limited evidential role of such complaints as are admissible in evidence, but the question of the scope of the contents of such complaints is examined in passages subsequent thereto and answered in the affirmative. "For when the whole statement" said Hawkins, J. "is laid before the jury, they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused." Finally, Hawkins, J. said: "Our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution and that the evidence in the case was, therefore, properly admitted." Part of that evidence included the prisoner's conduct towards her. Counsel made

reference to Regina v. Wallwork (1958) 42 Cr. App. R. p. 153 and to Sparks v. Reginam (1964) 1 All. E. R. p. 727. These were cases of sexual assaults upon young girls who by reason of their tender years were not called as witnesses at the respective trials, and the complaints made in the respective cases were likewise not admitted in evidence. If, as indeed it it, the evidential role of such complaints is to show consistency between the evidence on oath at trial of the victim and her conduct on the occasion of the assault it seems clear that if the victim does not give evidence on oath at the trial, the sole purpose for admitting her complaint fails and that such complaint in its totality, and not merely as to any particulars of identity therein cannot properly be admitted in evidence - (i) and (ii) of this ground of appeal therefore fails.

With respect to (iii), the contention of Counsel, as already noticed, was that the naming of the applicants by B and W in answer to questions asked of them by S did not form a natural part of the complaint and as such did not constitute particulars of complaint properly admissible in evidence. In R. v. Osbourne (1904 - 7) All E. R. Rep. p. 54 a similar objection was taken - and unsuccessfully there - to the admission in evidence of particulars of complaint elicited in answer to questions asked on the ground that the answers given did not constitute a complaint but a mere statement. Ridley, J. expressed the view of the Court of Criminal Appeal:

> "In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first."

In the instant case the evidence was that B and W in their nighties and with tears in their eyes had made their way to the home of their close friend and neighbour S and had begun to narrate their ordeal when S interjected with words to the effect "Do you know who they are?" - words not in any way leading or suggestive of the answer, and W and B severally named the applicants in answer. We think that the learned trial judge acted rightly in the circumstances in allowing the answers of B and W to go into evidence as part of their complaints.

(iv) and ground 1(b) are identical, and as already indicated, the contention was that the learned trial judge failed to warn the jury that the matters of identity contained in the complaints should have been completely disregarded by them in deciding the issue of identity. A careful examination by us of the summing-up discloses that this necessary warning had not indeed been given. On the other hand on two or more occasions whilst dealing with the specific and important issue of identification observations fell from the learned trial judge which strongly suggested to the jury that the particulars of identity forming part of S's evidence of the complaints made to her by W and B did indeed

constitute evidence of identity. The effect however of such misdirections may be conveniently examined in conjunction with consideration of the applicants' second ground of appeal. That ground complained that the learned trial judge effectively nullified any proper warning to the jury on the danger of convicting the applicants of any sexual offence in the absence of corroboration by telling the jury:

> (i) the prosecution has to satisfy you that the accused man or one of them was the person or persons who did all these things that are supposed to have happened there that night and it is very important, the matter of identification, because obviously people came in there and interfered with them, and,
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> (ii) But in this sexual offence case the law allows - in this case you have to accept that something happened.

It is settled law that corroborative evidence desirable in cases of sexual offences must be evidence which, independently of that of the prosecutrix, necessarily implicates the person or persons charged with the commission of the offence charged in the indictment. In the instant case the only witness other than W and B who offered any eye witness evidence was D, but his testimony if believed, whilst placing the applicants in the room occupied by B and W at the material time, furnished no evidence whatever as to their criminal activities, if any, therein in relation to either B or W. Whilst therefore the directions of the learned trial judge on the subject of the danger of

the jury's convicting the applicants on the uncorroborated evidence of the prosecutrices could not attract any valid criticism, the effect of that warning could conceivably have been lost on the jury by reason (a) of such observations as "because obviously people came in there and interfered with them" and again "in this case you have to accept that something happened" which served strongly to impose a conclusion on the evidence upon the minds of the jury on a very crucial issue in the case and (b) of the failure of the learned trial judge to warn the jury that the particulars of identity contained in the complaints should have been completely disregarded by them in deciding the other crucial issue in the case, namely, identity.

The cummulative effect of these mis-directions of the learned trial judge on such critical issues in the case is that the jury were deprived of assistance to which they were entitled in properly weighing the evidence in the case and in turn the applicants were deprived of a fair chance of acquittal. For these reasons we quashed the convictions, set aside the sentences and ordered a new trial.