JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 3/97

BEFORE: THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA VS. DENZIL HALSTEAD

Lord Anthony Gifford, Q.C. for the appellant

Miss Kathy Pike for the Crown

March 4 and 30, 1998

PATTERSON, J.A.:

The appellant was convicted on the 8th January, 1997, at the Home Circuit Court of rape and was sentenced to ten years imprisonment. He appealed against his conviction and sentence by leave of a single judge. We dismissed his appeal against conviction, but we quashed the sentence of ten years imprisonment passed at the trial and passed a sentence of six years imprisonment in substitution therefor. We now state the reasons for our decision.

Lord Gifford, appearing for the appellant, had two complaints. He said that the learned judge erred in law in admitting as evidence of recent

complaint, the report made by the complainant G. J. to her mother on the 3rd June, 1996. His other complaint was that the learned judge erred in law in directing the jury that the said evidence "was capable of being regarded as evidence of recent complaint such as might show consistency on the part of the complainant."

The complainant's mother testified that on the 3rd June, 1996, the complainant and one Michelle came to her and the complainant told her, "Denny rape me." That is the impugned bit of evidence, and this is how the learned judge directed the jury in that regard:

> "So the fact that G. said to her mother, 'Denny raped me' is not corroboration of what had happened, but is evidence to show that she is saying still, two weeks after, that it was Denny who raped her. Now it happened, she said, two weeks after the incident. It is for you to say whether or not you find that she is being consistent saying two weeks after because some time has passed and now she is saying Denny. In law it can still be regarded as recent complaint because some persons might not, it is said, want to tell the first person that they see. She may not have wanted to tell it to her uncle, but it's for you to say when she tells you that she was ashamed, she couldn't repeat it, but because of what she regards as seeing his face before her, "I subsequently couldn't take it any longer', then told her mother, whether she is being consistent in saying that it was Denny who raped her and she told her mother two weeks after. It's a matter for you. As I said, it's merely recent complaint, it is not regarded as corroboration. It is for you to examine the evidence and say what facts you find."

The main point was whether, in the circumstances of this case, the impugned evidence was admissible as a recent complaint. The principle on which such evidence is admissible was settled in ***R. v. Lillyman*** [1896] 2 Q.B. 167. That case clearly established that upon the trial of an indictment for a sexual offence against a female, the fact that a complaint was made by the prosecutrix and the particulars of the complaint may be given in evidence by the prosecution, "provided it was made as speedily after the acts complained of as could reasonably be expected."

It is the trial judge who must decide whether the complaint is admissible or not, and its admissibility will depend on whether there is evidence to support a finding that the complaint was made as speedily as could reasonably be expected. The complaint must be made on the first opportunity that reasonably offers itself after the offence {***R. v. Cummings*** [1948] 1 All E.R. 551; ***R. v. Kory White*** (S.C.C.A. 152/95, delivered 27th January, 1997 - unreported) }. If a considerable time has elapsed between the occurrence of the offence and the making of the complaint, the evidence is inadmissible. In ***R. v. Rush*** (1896) 60 J.P. 777, a girl who had been sexually assaulted was questioned by her mother on the day after the assault. The statement she made to her mother was excluded from evidence. Wright, J. said:

> "...that the lapse of time between the committing of the offence and the making of the statement was important in these cases. When counsel proposed to open and put in evidence such

> statements, the judge's attention should first be called to the time that had elapsed since the occurrence and the making of the statement, in order that the judge might be enabled, to say whether or not the lapse of time would be an objection to the admissibility of the statement. In the present case the statement was not made immediately after the alleged offence was committed, and he should not allow evidence of the particulars of the statement to be given."

The admissibility of the complaint will depend also on whether it was spontaneous in the sense that it was voluntary and unassisted. The fact that the complaint was made to others before it was made to the witness who gives the evidence of it does not render it inadmissible (***R. v. Wilbourne*** [1917] 12 Cr. App. R. 280).

In ***R. v. Kory White*** (supra), Gordon, J.A. summarised the necessary factors that a trial judge must consider in determining the admissibility of a complaint in sexual cases:

> a) "The complainant must give evidence.
>
> b) The complaint must be made as speedily as could reasonably be expected: ***Osbourne*** (1905) 1 K.B. 551, ***Mayers v. R.*** (1966) L.R.B.G. 90.
>
> c) The complaint must be made voluntarily and spontaneously and must not be elicited by leading, inducing or intimidatory questions: (***Mayers***) (supra)."

The evidence in the instant case clearly proved that the complaint of which the mother of the complainant testified was made on the 3rd June,

1996, and that the alleged offence was committed on the 20th May, 1996. Fully fourteen days had elapsed between offence and complaint. The complainant during that time was living with her uncle, but she did not complain to him - she said she was ashamed. One week after the incident, she testified that she complained to one Michelle, but Michelle was not called as a witness nor were the details of that complaint given in evidence, they would not have been admissible. No valid reason for the long delay was advanced. We concluded that the complaint was not made as speedily as could reasonably be expected, and accordingly, the report made by the complainant to her mother was wrongly admitted as evidence of recent complaint. It follows that the directions of the learned trial judge to the jury on that issue were otiose.

Where, as in this case, the trial judge has wrongly admitted evidence, the court will generally quash the conviction. But the court will dismiss the appeal, if satisfied that upon consideration of the nature of the evidence so admitted, and the directions to the jury on that score, no substantial miscarriage of justice has actually occurred. The statutory provisions are contained in section 14(1) of the Judicature (Appellate Jurisdiction) Act which reads:

> "14--(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on

> the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

In considering the applicability of the proviso mentioned above, the court must give fair consideration to the whole proceedings and conclude whether there is a probability that the wrongful admission of the evidence affected the minds of the jury in arriving at their verdict. The proviso will be applied only if there is no such probability. If without the inadmissible evidence there remains such evidence that any reasonable jury, properly directed, would or must have convicted, then no miscarriage of justice would have occurred, and the appeal will be dismissed.

We considered the strength of the case as a whole. The evidence established beyond doubt that the complainant, a student of Dinthill Technical High School, aged fifteen years and ten months, was forcibly sexually assaulted on the 20th May, 1996. On that day she was living at her uncle's home in Portmore. She had a boyfriend named Ricardo who resided with his uncle, the appellant, at Greendale. Ricardo and herself had been friends for about eighteen months prior to May, 1996. She recalled seeing the appellant in April, 1996, while on her way to a netball field, and that he

told her then that Ricardo was a "lucky guy", and if he (the appellant) did not get her, he would rape her. That bit of evidence seemed to have gone unchallenged; the appellant admitted seeing the complainant on a netball field.

The complainant continued her evidence by saying that on the 20th May, 1996, after 11:00 a.m. she telephoned Ricardo. The appellant answered and told her that Ricardo was not in, he would be back soon. She telephoned again about half an hour later, and again the appellant answered. This time he told her that Ricardo had returned and that he said she should come over now. On her arrival at the appellant's home she entered Ricardo's room by a door opening on to the verandah. Ricardo was not home. She turned on the television and sat on a hassock watching it. A bathroom separated Ricardo's room from that of the appellant's and the doors from each room leading to the bathroom were apparently open. She locked the door to the verandah from Ricardo's room. The appellant entered Ricardo's room where she was, held her by the hand and said, "Hey gal, you know a long time you mus' give me some pussy." She shouted saying, "Let go me hand", and the appellant then said, "Hey gal, man place you in and anything can happen. Stop the noise in the people them place." The appellant squeezed her neck and dragged her into his room while she was still screaming. He threw her on the bed, closed the door, pulled off the shorts and panty that she was wearing and then had intercourse with her against her will. This she said

was about 12:30 p.m. After he had completed the act, she said he told her, "Gal, if you call me name me shoot you in a you face." She bled from her vagina. She was ashamed. She did not report the matter to her uncle; he was not at home when she got there. She was ashamed and could not tell it. She was haunted by the face of the appellant each night she went to bed and she "couldn't take it any longer." About a week after the incident she told a friend Michelle what had happened. After another week had elapsed, she made a report to her mother and on the 5th June, 1996, she reported the matter to the police.

The gist of the cross-examination was that the appellant had told her on the telephone that Ricardo had gone to computer classes that would last from 11:30 a.m. to 3:00 p.m. It was suggested that she did not arrive at the appellant's home until sometime around 3:00 p.m., by which time other persons were on the premises. She denied all that. What is interesting, however, is that although her testimony was uncorroborated, the appellant confirmed her story in many material particulars. In his sworn testimony he admitted seeing her on the netball field, but it does not appear that he said when it was, nor did he admit or refute her evidence of what she testified he said on that occasion. He admitted that on the 20th May, 1996, he received the telephone calls from the complainant (he said it was three such calls). On the third occasion, he said, "I told her that he was gone to Spanish Town but if she wanted to come she could still come over." He said she came about

ten to fifteen minutes after they spoke. He opened the gate for her. She went into Ricardo's room. He followed her into Ricardo's room. He admitted holding her by the hand, but said that he did so to retrieve from her a jersey that she had taken from Ricardo's room. The complainant, he said, then left the house and he did not see her again. A few days after that he heard he was wanted for rape.

The testimony of the appellant did not support the suggestions put to the complainant in cross-examination. We were of the view that it strengthened the prosecution case. He called witnesses, but their evidence did not support his story, instead it tended to show that the complainant and the appellant were not at the home of the appellant at the time she said the incident took place. One Courtney McDermott said the complainant was at his home from 10:30 a.m. on the relevant day. He accompanied the complainant to Ricardo's home reaching there at about 3:00 p.m. Another witness said that she and Ricardo arrived at the appellant's home at about 11:30 a.m. She said the appellant was not home then; she had left him in Spanish Town. She said that Ricardo went to his bed and slept until after 3:00 p.m. The complainant did not arrive until 3:00 p.m. while Ricardo was still asleep.

At the end of the day, there was a very strong case pointing to the guilt of the appellant, without the inclusion of the impugned evidence. The directions of the learned trial judge to the jury contained in the impugned

passage quoted above made it clear that the evidence of recent complaint was of very limited value and certainly did not corroborate the testimony of the complainant. His directions emphasised that it was the uncorroborated evidence of the complainant that called for their careful consideration and ultimate decision as to the guilt or innocence of the appellant. After instructing the jury on the ingredients of the crime of rape, this is what he said:

> "Now, in examining the evidence, you must see whether or not those aspects of it are proven. In this case there is no corroboration. In this case there is no independent (sic), independent of the evidence of G J saying all these things; that sexual intercourse took place, and the accused was the man who did it and that she did not consent. She is only the one who said that. So in law you also look for corroboration. And why you do that, it is because it is said that it is dangerous and unsafe to convict a man of a charge like this on the uncorroborated evidence of a person who said she was raped. Why that is done, is because it is very easy for a woman to say, 'I was raped.' And to say, 'George Brown did it,' and it is hard for a man to disprove it.
>
> So you must look at her evidence very carefully and see whether or not - even if there is no corroboration - whether you believe it or you don't believe her. If you don't believe what she is saying to you, well, it is the end of the case. Even if there is no corroboration in this case, that is there is no evidence independent of herself, it does not mean it is an end to the case, because in spite of the fact that there is no other person who came to say, 'I saw what she said happened to her,' if you believe that she is speaking the truth; if you can accept her evidence, you can rely on what she is saying along with the rest of the evidence, then it means that in spite of the fact

> that there is no independent evidence but hers, if you believe it, you can act on it and come to your final verdict; that is because you are the judges of the facts, and you are the only ones who can say what happened on this particular day."

The inadmissible evidence of the report made by the complainant to her mother stood apart from the real issue in the case which was contained in the evidence of the complainant. The defence was a denial of the complainant's story. The primary consideration of the jury must have centred on the testimony of the complainant. We were satisfied that the inadmissible evidence could not have been a material consideration of the jury in arriving at their verdict. Having regard to the directions of the learned trial judge, we formed the view that if the inadmissible evidence had been excluded, the jury, would have arrived at the same verdict. Accordingly, we found that there was no substantial miscarriage of justice and dismissed the appeal against conviction.

We considered the question of the length of the sentence imposed on the appellant. Undoubtedly, rape is a heinous crime, and, except in very exceptional circumstances, attracts a custodial sentence. There are no exceptional circumstances in the instant case. The appellant was aged thirty-six years at the time of his conviction. He has no previous conviction in Jamaica, although he admitted that he had been convicted in England of the offence of importing cocaine and was deported to Jamaica following his conviction. He has a good work record, and he is reputed to be of a quiet

disposition. Those are mitigating factors that we took into account in considering the appropriate sentence. But much more importantly, we considered whether or not there were aggravating circumstances that would impact unfavourably on the length of the sentence. We were not unmindful of the fact that the appellant had ravished a young girl - not yet sixteen at the time of the offence. The fact that she admitted that she was sexually active then is not a mitigating factor. We took into account the fact that no weapon was used to subdue the complainant, and that the violence used was not in excess of what was necessary to achieve his purpose. It seems clear that the appellant took advantage of a situation that presented itself that day. That in itself did not evoke our sympathy, but, coupled with his hitherto good character and the other factors that we have mentioned, it assisted us in forming the view that the appellant was not beyond rehabilitation. We did not have a doctor's report on the examination of the complainant. Although she may not have suffered any physical damage as a result of the rape, the mental effect cannot be denied.

We do not alter a sentence passed by a trial judge merely because we would have passed a different sentence. We will interfere only if the sentence is shown to be manifestly excessive in view of the circumstances of the case or if the sentence is wrong in principle. In this case, we took into consideration the circumstances and factors mentioned above. We concluded that a sentence of ten years imprisonment was manifestly

excessive, and so in place of it we passed a sentence of six years imprisonment to run from the 8th April, 1997.