***JAMAICA***

***IN THE COURT OF APPEAL***

***SUPREME COURT CRIMINAL APPEAL NO. 152/95***

***BEFORE:*** ***THE HON. MR. JUSTICE RATTRAY - PRESIDENT***
***THE HON. MR. JUSTICE GORDON J.A.***
***THE HON. MR. WALKER JA (AG)***

***REGINA***

***VS.***

***KORY WHITE***

***Richard Small for the Appellant***

***Hugh Wildman and Anthony Armstrong for the Crown***

***October 14, 15, 16, 1996 and January 27, 1997***

***RATTRAY P (DISSENTING):***

The Appellant Kory White was convicted by a jury in the Home Circuit Court on the 24th of November 1995 of the offences of rape and attempted buggery committed against the complainant on the 19th of May 1994.

The case for the prosecution was that the complainant had a few days prior to the 19th of May met the appellant Kory White, a young person, like herself in Hughenden, St. Andrew, whilst she was walking along the roadway. He was standing with another young person at a corner. He introduced himself, spoke to her, and gave her his telephone number. She telephoned and spoke to him on more than one occasion. She telephoned him on the 18th of May and told him that she was going next day to visit her friend Kerry in Vineyard Town.

While she was at Kerry's house on the 19th of May, the appellant arrived there driving a motor car. She told him of the places she planned to go with Kerry and he offered to take them there. When she came out she told him that Kerry was on an important telephone call and could not come so she would have to travel with him by herself. Since he was not driving in the direction of where she intended to go, she enquired why and he told her he had to drop off some things. He drove to Russell Heights to a house and invited her in. She accepted his invitation. He led her down a passage to a bedroom and she sat on a bed since there were no chairs in the room. She watched television whilst he went into a bathroom. He made amorous advances to her which she rejected. He told her: "Anyone who comes to this house have to get knock." She replied: "This is one gal you not going to touch today." Fighting off her resistance, he eventually took off her clothes. She was dressed in jeans pants and T-shirt. He had sexual intercourse with her against her will and despite her protest. As the Learned trial Judge said in his summing-up:

> "It is her evidence that she was moving and telling him to stop. She was moving up and down and going back; she moved as she did not want him to do whatever he was doing. Eventually the accused turned her over, she says, to lie on her stomach and started to insert his penis in her bottom and this is what he said: 'If yuh boyfriend ever (expletives) like that to you before?' Her evidence is that he was forcing his penis into her bottom and she was saying, 'No', but he was not successful in forcing 'it', she says, into her bottom so he turned her back over on her back again to put his penis in her vagina and she fought back with him and he eventually got off."

After this he left with her back to his car and took her back to Kerry's house. To quote the Learned Trial Judge again:

> "She was still in tears and in a temper, she says, and told Kerry about what had happened. She said she

> had a shower and disposed of her underwear, went home and spoke to her Aunt, Carey Robinson, and told her what had happened.
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> The following morning she said she went and spoke to her mother and told her what had happened and she went and made a report at the Rape Unit. But before going to the Rape Unit she called her friend and neighbour, Mr. Puddy, a police officer, and told him, the very evening of this incident, what had taken place.
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> And so eventually she went to the police on the 21st, the Saturday, she said to report the matter. She went to the Rape Unit as well and from there was sent to the Constant Spring Police Station where she eventually saw and made a report to Acting Corporal Walters who came to give evidence here."

She had received no injuries or scratches and neither did she inflict any on the appellant.

In the summing-up reference is made to Woman Constable Grace Gordon from the Rape Unit, the Officer to whom the complainant made a report on the 20th of May, 1994.

> "She was present". (The complainant) "came to Unit and she was examined by the doctor who obtained a certificate, vaginal swabs and smears and she made sealed parcels of these exhibits and took them to the Forensic Laboratory. She also gave evidence that she had received a certificate from the doctor and she was at the preliminary enquiry when the certificate and other exhibits were admitted in evidence there."

It is to be noted that no medical evidence was given in this case. With respect to the medical report the Learned Trial Judge had this to say:

> "Remember what I told you members of the jury, concerning admission of the medical report as in these courts even though they may have been admitted in the preliminary enquiry, this court did not admit them as a right.

> The doctor, the expert must be called. You have heard discussions between counsel, the prosecution and the defence as to the availability of the doctor. The doctor is not available until some time next year. There is some talk also that the doctor was not on the indictment, so therefore, the prosecution was not obliged to call this doctor.
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> Members of the jury, it is a matter for you to deal with and treat it accordingly the way you see it fit. But bear in mind what I have told you about the admission of these reports, certificates in trials of this nature in these courts."

The Evidence (Amendment) Act 1995 in force at the time of the trial does provide under Section 31D the circumstances under which:

> "A statement made by a person in a document shall be admissible in criminal proceedings, as evidence of any fact of which direct or oral evidence would be admissible."

Detective Acting Corporal Daniel Walters, the Investigating Police Officer, gave evidence of a report made by the complainant on the 21st of May and the subsequent arrest of the appellant. In respect of his evidence the Learned Trial Judge stated:

> "... you recalled what efforts, what attempts he made to make contact with other persons to whom" (the complainant) "spoke to about this incident to have witnesses for it. You saw him, you will have to assess him and say what you make of him. We heard that Kerry, the friend, has now left the island but no statement was taken from her before her departure. Who was responsible? Mr. Daniel Walters, Acting Corporal of Police, that is how he investigates his cases. It is a matter for you to say how you assess him and what you make of his evidence ..."

The appellant gave evidence supporting how they just met at Hughenden, subsequent telephone conversations, and meeting her in Vineyard Town on the 19th of May. He invited her to his house on Durie Drive,

Russell Heights to spend some time together with her and she agreed. He took her to his bedroom where they watched television. Both of them were sitting on a bed. While they spoke:

> "We got close to each other. She put her right hand on my left thigh and I came closer to her. I start to rub her down her side and then we laid on the bed and the caressing got more intense."

He told her he wanted to make love to her and she said: "All right, but use a condom." He took off her jeans and underwear, removed his clothes, put a condom on his penis and "according to him they made love for about two to three minutes." Then he said:

> "We switched positions. She knelt on the bed and I went behind her and again inserted my penis into her vagina."

He said:

> "We made love in that position for about two minutes. He withdrew his penis and he ejaculated into the condom. He got off, went into the bathroom. Keisha also used the bathroom, he says and they left the house together shortly after watching T.V. again. They left and went back to Vineyard Town, on his evidence, back to where the sister's house is."

He denied putting or attempting to put his penis into her anus.

The defence was that the complainant had consented to having sexual intercourse with the appellant and that the appellant honestly believed from her reaction and the part she played that she, in fact had consented to such sexual intercourse.

The Learned Trial Judge withdrew buggery from the jury but left it open for the jury to find attempted buggery. He told the jury:

> "The offence of buggery is where in this case, a man has intercourse with a woman, he uses his penis to penetrate her anus; and as I have said before

> penetration of the male organ in the anus is sufficient to establish this offence."

Then further:

> "If the evidence points only to an attempt at buggery that offence of attempted buggery is proved without evidence of penetration."

He further continued:

> "So, what is the evidence which has been presented by the prosecution in relation to this count for buggery? You will recall, Mr. Foreman and members of the jury, that the complainant testified that during the act of sexual intercourse the accused turned her over on her stomach and started to insert his penis in her bottom. It was also her evidence that whilst he was forcing his penis in her bottom she told him no and then he turned her over and continued to insert his penis again in her vagina.
>
> She has admitted however, that the accused was not successful in forcing his penis in her bottom."

And then:

> "That, Mr. Foreman and members of the jury, could be considered, the fact that he is trying to insert his penis in her bottom. The act of him trying to do so. What was his intention? The mens rea? What is necessary to prove that he had intended to have this penis inserted? Asking her if her boyfriend ever F---- like that before? This is why he has her on her stomach. So before you can convict this accused man of buggery - because on the evidence which the prosecution has presented, it would be an attempt to commit buggery."

And further:

> "Remember I say, for an attempt at buggery, the prosecution need not prove penetration, that is to say, the penis entering the anus. They don't have to prove that but they have to prove, as I say, the acts which constitute this attempt and that the accused man knew that he was doing what he did with a view to commit that offence. He had the intention.

> So before the accused can be convicted of the offence of attempt (sic) buggery, it must be proved, (1), that he had the intention to commit the full offence and that in order to carry out that intention he did an act or acts which is or are steps towards the commission of the specific crime which is directly or immediately, not merely remotely connected with the commission of it. And the doing of which cannot be reasonably regard (sic) as having any other intention but the committing of the specific crime.
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> ....
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> So if you accept the evidence of" (the complainant), "you feel satisfied to the extent where you are sure that she is speaking the truth, it is open to you to find that this accused man intended to commit the substantive offence and you should find him guilty of attempt (sic) buggery. If, however the prosecution's case leaves you in doubt, that is, they would have to discharge - the burden is upon them to prove this offence, if it leaves you in doubt then it is your bounded duty to acquit this accused man of the attempt (sic) buggery which I have left for you to consider."

On the hearing of the application for leave to appeal Mr. Richard Small representing the appellant submitted that the Trial Judge erred in allowing in the evidence given by the complainant that she had made complaints to four persons about what had taken place. Firstly, she told her friend Kerry as soon as she got back to Kerry's house "about what had happened." She had a shower and disposed of her underwear, "went home and spoke to her aunt Carey Robinson and told her what has happened." The following morning "she went and spoke to her mother and told her what had happened". She reported the matter to the Rape Unit, but "before going to the Rape Unit she called her friend and neighbour Mr. Puddy, a Police Officer and told him the very evening of the incident what had taken place."

Learned Counsel for the appellant has submitted that this evidence was inadmissible because (1) none of the persons to whom the complaints were allegedly made were called to give supporting evidence; (2) apart from evidencing the complaint, the witness did not give evidence as to the content of the complaint.

He is also critical of the Trial Judge's summing-up in that he maintains that this evidence was expressly left for the jury's consideration when they should have been told by the Learned Trial Judge instead to disregard it because of its inadmissibility in the absence of the evidence of those to whom the reports were allegedly made.

How did the Learned Trial Judge deal with these complaints?

> "She was asked about if when she went home at Kerry's house, if she told the helper about the incident and she said no. Mr. Foreman and Members of the jury, you are people who I would imagine are adults. Would she tell the helper about what took place? A matter for you.
>
> But she told Kerry, her friend, about what took place and she did tell Mr. Puddy, a man whom she has known over a number of years living across the street from her, she did tell him that.
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> A comment I make here, Mr. Foreman and members of the jury, if you believe that she spoke to her aunt, she spoke to her mother, she did not say anything about her father. Counsel for the crown says her father is aging. She went to Mr. Puddy, she went to him, someone who she knows. Why didn't you go to the police earlier than you did? That is the question she was asked. What was her response? 'I just never had the courage then, but I had enough courage to tell Mr. Puddy.' It is a matter for you, how you deal with what she tells the defence attorney about not going immediately to the Rape Unit because she did not have the courage to do so."

Further:

> "She was asked if there was anyone else coming here today to give evidence on her behalf because having told all these people, why are they not here? But Mr. Foreman and members of the jury, that is a police case; she has done her part, she has told the police who were the ones whom she spoke to, again Mr. Foreman and members of the jury, can you blame her if there is any deficiency on the part of the police in investigating this case? She has gone to two policemen whom she said were responsible for investigating.
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> ...
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> They are to make witnesses available for the prosecution to use or make them available to the defence, so she stands alone in that witness box to tell you what took place. It is all a matter for you; Mr. Foreman and members of the jury, whether or not you accept her or you reject her evidence, whether you believe she is speaking the truth, whether you believe that this is what took place on the 19th of May, 1994, is all a matter entirely for you, how you treat her evidence and how you find her as a person who has given evidence in this court."

And further:

> You, Mr. Foreman and members of the jury, you recalled Corporal Walters, just yesterday, you recalled what efforts, what attempts he made to make contact with other persons to whom" (the complainant) "spoke to about this incident to have witnesses for it. You saw him, you will have to assess him and say what you make of him. We heard that Kerry, the friend, has now left the island but no statement was taken from her before her departure. Who was responsible? Mr. Daniel Walters, Acting Corporal of Police, that is how he investigates his cases. It is a matter for you to say how you assess him and what you make of his evidence, and, of course, as to the arrangements."

## ***The law concerning recent complaints***

Was the evidence admissible? The law in relation to recent complaints in sexual offences in Jamaica is the common law of England. The complaint is

admissible not to establish the truth of the contents of the complaint but to show the consistency of the complainant with regard to the evidence which she gave in the witness box, and to negative consent, which is an element in this case. This rule of evidence is not an exception to the hearsay rule, but is in fact an exception to the rule against the admissibility of self-serving statements. I concur with the view of Bernard CJ in ***Diaz v. The State*** [1989] 42 W.I.R. 425 at 429, when in stating the common law position which is the law in Jamaica in this regard he said:

> "The recipient (not the maker) of the complaint was permitted to give this evidence, but only for this limited purpose."

It is for these limited purposes that the evidence is admitted. Since logically the complainant cannot establish her own consistency and cannot likewise buttress out of her own mouth her allegations of not consenting, it is clear in my view that the recipient of the complaint must give evidence not only of the fact of the complaint but the content thereof in order to make the complaint admissible for the consideration of the jury for the limited purposes for which it is admitted. This is necessary also so that the manner in which the complaint was given or elicited maybe explored since whether the complaint was spontaneous or voluntary is a very relevant consideration in determining its admissibility. [See ***Keith Mayers v. R.*** (1966)] Law Reports of Guyana p. 90.

In three of the four complaints she told Kerry, her aunt Carey Robinson and her mother "what had happened". She told Mr. Puddy, the neighbor "what had taken place". The jury would have understood this evidence to mean that she told these persons the account which she had given in evidence in the witness box. The Learned Trial Judge had a duty to tell the jury that the

evidence was not admissible and should be ignored. This he failed to do. In fact the jury would have understood it to be evidence to be considered when he said:

> "But she told Kerry, her friend, about what took place and she did tell Mr. Puddy, a man whom she has known over a number of years living across the street from her, she did tell him that.
>
> ... if you believe that she spoke to her aunt, she spoke to her mother, ... she went to Mr. Puddy, she went to him, someone whom she knows."

He also points the blame, if any, for the absence of witnesses of the persons to whom she made complaints on the investigating deficiencies of the police. He sought to excuse their absence rather than to direct that since they were not called as witnesses the evidence of the complaints was inadmissible and should be ignored. In any event he gave no direction in the law as to the limited purpose for which a recent complaint could be considered.

I am not assisted by a passage from the judgment of the Court of Appeal delivered by Mr. Justice Ognall in ***Albert Edward Wright and Sidney George Ormerod*** [1990] 90 Ch. App. R. 91 at pages 96-97 which is clearly obiter and is no authority for any proposition that in all cases where the details of the complaint have not been given in evidence the fact of the compliant being made when given in evidence by the complainant is admissible without "proof of the facts by sworn or other legalised testimony" of the persons to whom the complaint have been allegedly made. I cite the whole passage for careful consideration:

> "The first and primarily important point to note arising from the terms of that complaint is that none of that allegation formed any part of the child's evidence before the jury. We draw attention to this as the starting-point, because it cannot be doubted as a

> matter of long-established law that the whole and exclusive rationale for the introduction of a recent complaint in cases of alleged sexual crimes lies in its utility to the jury in determining whether or not the complaint has been consistent in the accounts she has given.
>
> For this purpose we refer to and agree with a passage set out in *Archbold* (42d ed,) at para. 4-308, p. 403, which reads: 'The mere complaint is no evidence of the facts complained of, and its admissibility depends on proof of the facts *by sworn or other legalised testimony.'* (My emphasis.) It must, in our view, follow that if the terms of the complaint are not ostensibly consistent with the terms of the testimony, the introduction of the complaint has no legitimate purpose within the context of the trial. It is for this reason that the courts have treated the matter in the past as is summarised in para. 4-310 of *Archbold* (42nd ed.), which summary in that paragraph we respectfully agree with and adopt.
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> It may be that if the learned judge had confined the admitted evidence to the fact of a complaint, without allowing in its detail, other considerations would have applied. But, of course, the consequences of so doing might have been to compel the defendants to adduce evidence of its terms in an effort to demonstrate inconsistency. The prejudice attendant thereon would no doubt be the subject of complaint to this Court, and we express no concluded view on it if only for the reason that it did not occur in this case. The fact is that not merely a complaint but the terms of the complaint were admitted in evidence."

Clearly the admissibility of the fact of the complaint only, without any supporting evidence must be looked at in the context of the particular case, as well as the directions of the Trial Judge to the jury on this point.

If a complainant gives evidence that "I reported the matter to the police" this is not evidence of a recent complaint but of a necessary step taken by the complainant so that police action may be taken. The attendance of the police officer at the trial to give this evidence is not necessary in order to make that

evidence admissible. The instant case of complaints made to persons other than the police and indeed to a police officer Mr. Puddy, not in his official capacity but as a family friend, cannot fall within this category. A most careful direction was required from the Learned Trial Judge which was not forthcoming. To tell the jury that this evidence coming from the complainant is not corroboration cannot be sufficient, since indeed it is not evidence at all and the jury should have been told to disregard it.

In the circumstances of this particular case, including how these two young people came to be together on the occasion, and the fact that after the alleged offence the complainant took a shower and voluntarily travelled back to her friend's home with the appellant, the absence of evidence as to any injury or supporting evidence of her distraught condition, the absence of underwear which could be examined for its condition; the admission of the evidence without a clear direction to the jury from the Trial Judge to assist them as to its status or, lack of it, must indeed have been damaging to the appellant's prospects at the trial.

On these deficiencies alone the application for leave to appeal would be granted and the appeal allowed. However, I would add that in respect of the attempted buggery the Learned Trial Judge had a duty to refer to the appellant's evidence in his defence and to remind the jury that the appellant had stated (a) that he never attempted to put his penis in her anus and (b) that he had sexual intercourse with the complainant at one stage entering her vagina from behind. A relevant consideration for the jury which should have been brought to their attention was whether that positioning and method of entry may had led the complainant to believe that the appellant was attempting

to enter her by way of her anus when in fact he was attempting to enter her by way of her vagina. If the jury were in doubt as to this the complainant would have been entitled to the benefit of that doubt. No such direction was given and the ground of appeal in that regard, that the Learned Trial Judge:

> "Failed to assist the jury by relating the applicant's defence to the count of attempted buggery. In particular the Learned Trial Judge in withdrawing the issue of buggery and leaving only the issue of attempted buggery related all of his directions to the evidence of the complainant and failed to assist the jury on how they ought to resolve the issues bearing in mind the accused's answer to these allegations"

is well-founded.

I would grant the application for leave to appeal and treat the hearing as the hearing of the appeal. I would allow the appeal, set aside the convictions and enter a verdict of not guilty on both counts.

Since my judgment is in the minority I will address the question of sentence.

The appellant was nineteen years and ten months of age at the time of the commission of the offence and on the unchallenged evidence before the Court was hitherto of unblemished character. The complainant was a young girl, apparently, in the same age group. They could both be described as adolescents.

After the verdict an event, unusual for Jamaica took place. Six of the seven jurors wrote a letter to the Trial Judge pleading for leniency. At the sentencing, character evidence was given, again unchallenged, by two persons who knew the appellant nearly all his life and who pleaded for a non-custodial sentence. The report of the Probation Officers who made

investigations was positive and recommended a non-custodial sentence. Notwithstanding this the sentence as above stated was imposed.

On the hearing of this appeal learned counsel for the appellant, Mr. Richard Small, has produced to the Court for consideration, unchallenged affidavit evidence of good character from the Pastor of the Church which the appellant attends, a neighbour who has known him for very many years, and a family psychologist, Dr. Barry Davidson, who carried out a psychological test on the appellant and made clinical observations and who concluded:

> "I am convinced that Kory is not a threat to society and with proper guidance and help could easily be a positive role model to our Jamaican youth. I believe that further incarceration would completely destroy him as I am convinced that he could not survive prison."

In the circumstances of this case and the information before the Court as it relates to the appellant I cannot discover what public or private interests may be properly served by the imposition of a sentence which commits this offender to a penal institution. Such a sentence is indeed in my view inappropriate, and carries the risk of severely damaging a young life that may be rescued to the advantage, not only of himself, but of the general public.

Had I been persuaded that the appeal against conviction should have been dismissed I would have allowed the appeal against sentence and set aside the sentences imposed. I would have substituted therefor a probation order placing the appellant for a period of two years under the supervision of a Probation and Aftercare Officer assigned to the parish of St. Andrew in which the appellant resides. For this purpose I would require the appellant to appear

before the Court of Appeal so that the provisions of Section 5(2) of the Probation of Offenders Act may be complied with.

**GORDON, J.A.**

On 24th November, 1995 in the Home Circuit Court the appellant was convicted of the crimes of rape and attempted buggery committed on 19th May, 1994, and on 7th December after hearing character evidence and a social inquiry report he was sentenced to serve five years imprisonment at hard labour on the conviction for rape and 2 years for attempted buggery. The sentences were made to run concurrently. His application for leave to appeal was refused by a Judge of Appeal and this application was pursued before us in the arguments advanced on the 14th, 15, and 16th October, 1996. Points of law were argued so we treat the application as the hearing of the appeal

The prosecution case against the appellant was contained in the uncorroborated testimony of the complainant. She said that she met the appellant on the road in Hughenden, near her home, some days before the 19th May 1994. They spoke and he gave her his telephone number. Thereafter she telephoned him on more than one occasion and on the 18th May, 1994 she told him on the telephone that she would be visiting her friend, one Kerry, in Vineyard Town the following day. While she was at Kerry's home the following day the appellant came there in the early afternoon and they spoke. She informed him that Kerry and herself planned to go to Colour World to collect some visa pictures and then go on to a place called T Sang to conduct some business. He offered to take them and was asked to wait as the complainant was manicuring her nails. The complainant after an interval, went to the appellant alone and informed him Kerry could not join them.

She went in the car and they set off on the journey as planned. On the journey, she observed that the route was wrong and he told her he was going to drop off some things. The appellant drove to a home in Russell Heights, parked, invited her in and led her along a passage to a bedroom without chairs. He invited her to sit on the bed and watch television. She accepted. He turned on the television and left her passing through a bathroom door. He returned, sat on the bed beside her and conversed for a while. Then he started to make advances which she rebuffed. He persisted and she protested. He overpowered her and had sexual intercourse with her despite her resistance and protest. In the course of his assault, he told her "anyone who comes to this house have to get knock." She said he laughed at her efforts at resistance and asked if she really wanted to fight him in view of the disparity in their sizes. He was big and she was "meagre." She was horrified by his behaviour as she did not expect such conduct from him. In the course of sexual assault on her he tried unsuccessfully to penetrate her anus and in the incident he used expletives and called her "shit" and "bitch". She said she never consented to having sexual intercourse with the appellant.

After her ordeal she returned with the appellant to her friend's home. He left her there and she told Kerry what happened. She went home told her aunt what happened and also called a friend and neighbour, Mr. Puddy who was a policeman and told him of the incident. The following morning she told her mother what happened and then she went to the Rape Unit and made a report. She later went to the police station at Constant Spring and made another report.

Detective Acting Corporal Daniel Walters received the report from the complainant on 21st May, 1994, collected the statement she gave at the Rape Unit and prepared a warrant for the arrest of the appellant. He made contact with the appellant's parents and eventually on the 20th June 1994, the appellant was taken to the Constant Spring Police Station. There Acting Corporal Walters executed the warrant. On arrest after caution, the appellant said "Officer, me have sex with her but she consented."

The appellant in evidence said he went to see the complainant at the address in Vineyard Town she had given him. There she asked him to take her to lunch at T. Sang Restaurant. He agreed but suggested that they should go to his house first and spend some time there before going to the restaurant. She agreed and they went to his home. At his home, she elected to watch T.V. and he sat beside her on the bed. They got close and began petting. Eventually with her consent they had sexual intercourse. When she left Vineyard Town sex was the farthest thing from his mind and in the bedroom sex was never even on his mind. It was when the complainant placed her hand on his thigh that the urge came on. After they made love he took her back to Vineyard Town. He denied raping her, or attempting to bugger her.

He said that the complainant is an attractive, neat young miss, but that socio-economically, they are not on the same level.

Mr. Wilmot White, the father of the appellant gave evidence that he received a message in May and he was busy but he eventually contacted Corporal Walters and arrangements were made for him to take his son to the

police station. These arrangements fell through as Corporal Walters defaulted but eventually his son was taken in.

Mrs. Pauline White, the mother of the appellant told of hearing of the incident on the 20th and she relayed what she heard to her husband. Then she was contacted by a Detective Puddy who wanted to arrange a meeting between the accused and the complainant. She was advised against the meeting.

Also called on behalf of the defence was the officer who received the report at the Rape Unit. She had the complainant examined by the doctor and took charge of exhibits. There was evidence that the doctor would not be available until sometime in 1996.

Mr. Small by leave of the court urged three grounds of appeal namely:

> "1. The learned Trial Judge erred in permitting the Crown to lead evidence of four purported complaints made by the prosecutrix to persons whom the Crown never intended to call and did not call as witnesses. The learned Trial Judge further erred in failing to direct the jury that this testimony should be completely ignored and give the jury the reasons for this direction. Instead the learned Trial Judge compounded these errors by reinforcing the jury's consideration of the impugned testimony by the manner in which he reviewed the testimony and the directions that he gave the jury in relation to it.
>
> 2. The learned Trial Judge failed to assist the jury by relating the applicant's defence to the count of attempted buggery. In particular the learned Trial Judge in withdrawing the issue of buggery and leaving only the issue of attempted buggery related all of his directions to the evidence of the complainant and failed to assist the jury on how they ought to resolve the issues bearing in mind the accused's answer to these allegations.

> 3. The learned Trial Judge erred in his approach to the issue of sentence and in particular failed to give due account to the circumstances of the applicant, the recommendations of the probation officer and the specific plea for leniency which the jury made on his behalf."

Mr. Small submitted that in the evidence there was an abundance of material consistent with consent and not a scintilla of evidence of corroboration. It was impermissible to lead evidence from the complainant that she complained to four persons, without the individuals being called to testify as to the substance of the complaint. The learned trial judge erred in allowing this evidence to be given as it left the complainant at large to give the impression she was consistent. The learned trial judge erred in admitting evidence of the fact of her complaint being made without the prosecution calling as witnesses the persons to whom they were made to give evidence of the contents of the complaint. As such, the fact of complaints being made was provisional on the witnesses being called, and on the failure of the Crown to produce these witnesses, the learned trial judge should have directed the jury to disregard that aspect of the complainant's testimony. The issues herein were finely balanced, he submitted, and the failure of the learned trial judge to direct the jury appropriately and withdraw from their consideration the fact of the report has led to a miscarriage of justice.

In **R v Lillyman** [1896] 2 QB 167 18 Cox CC 346 it was held that evidence of a complaint made by a prosecutrix shortly after the alleged occurrence and the contents of that complaint were admissible not as evidence of the facts complained of but as showing consistency of the conduct of the

prosecutrix with her testimony in court and as negativing consent on her part. To be admissible, such complaint must be made at the first reasonable opportunity **R. v Osbourne** [1905] K.B. 551; **R v John Lee** [1911] 7 Cr. App. Rep. 31. It must not be elicited by leading, inducing or intimidatory questions; it must be voluntary and spontaneous. **Keith Mayers** [1966] L.R.B.G. 90.

Since **R v Lillyman** this rule has been hallowed and in **Diaz (Anthony) v. The State** [1989] 42 WIR 425 Bernard C.J. at p. 429 stated it thus:

> " At common law a recent complaint of a sexual outrage by one person upon another was admissible in evidence on a criminal charge against the former, not to prove the truth of the matters stated but to show consistency of conduct with the victim's testimony in the witness-box and, where consent is in issue, to show that the victim's conduct was inconsistent with consent. The recipient (not the maker) of the complaint was permitted to give this evidence, but only for this limited purpose. This rule of evidence was at one time considered to be one of the exceptions to the hearsay rule: see in this connection *Archbold's Criminal Pleading, Evidence & Practice* (36th edn.) paragraph 1071, page 390. Today, it is correctly classified as one of the exceptions to the rule against the admissibility of self-serving statements; see in this connection *Archbold* (42nd Edn) paragraphs 4-307 and 4-308, pages 402 to 404. see also *Phipson: Evidence* (13th Edn) paragraphs 9-81, pages 150 et seq. and *Cross on Evidence* (5th Edn) pages 237 to 244.
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> The purpose of the rule was an attempt by the courts in the day-to-day administration of the law and of justice to balance the scales between ulterior motives on the part of a female for raising a hue and cry over the outrage (on the one hand) and the genuineness of her assertion (on the other), both of which were designed to avoid miscarriages of justice. Hence the reason as

> well for the application of the evidential rule of corroboration in cases of this kind."

The law relating to the admission of evidence of recent complaint allows for the details of the complaint to be given to enable the jury to determine the consistency of the complainant's conduct and assist in an assessment of her evidence that she did not consent. The witness to whom the complaint is made and the complainant are open to cross-examination on the details of the complaint to ferret out discrepancies or inconsistencies and to establish, if possible, evidence of concoction or lack of consistency or evidence of consent. The evidence of recent complaint is not corroboration but, when given, it is an aid to the prosecution as in the majority of cases of this nature corroboration evidence is not to be found. Where no evidence of a complaint is given, the prosecution is obliged to rely on the evidence of the complainant unsupported, in most cases, by any other evidence. The prosecution did not adduce evidence of recent complaint although the complainant testified she made a report to others recently after the incident. This failure of the prosecution weakened the prosecution case. Evidence was given that "Kerry" the first person to whom complaint was made had gone away from the island and was not available as a witness for the trial. Objection would probably have been taken had any attempt been made to lead evidence of complaint from the aunt, the mother or Mr. Puddy as they were subsequent in time to Kerry.

Mr. Small contended that the evidence led from the complainant that she told four named persons what happened should not have been admitted by the learned trial judge but, being admitted he should have directed the jury to

disabuse their minds of it. It was not in any way supportive of the complainant's story and the failure of the trial judge to deal appropriately with it in his directions led to a miscarriage of justice and must result in the appeal being allowed.

I now look at two cases to which reference was made. In **William Wallwork** [1958] 42 Cr. App. Rep. 153 the complainant, a child of five years, was unable to give evidence. Her grandmother, however, testified of a complaint she had from the complainant naming the prisoner as the person who violated her. On appeal it was held that:

> "As the basis of the admission of a recent complaint is that it goes to show the consistency of the complainant's evidence and conduct, such complaint is not admissible where the complainant herself has given no evidence."

Lord Goddard C.J. who delivered the judgment of the court said at p. 162:

> "... The evidence ought not to have been given and the learned judge ought to have told the jury to disregard it. It was not evidence against the appellant of the facts on which the complaint was founded and therefore we are bound to say that there was a wrongful admission of evidence in this case."

**Albert Edward Wright and Sydney George Ormerod:** ([1990] 90 Cr. App. Rep. page 91) were convicted of false imprisonment and indecent assault. The terms of the complaint were at variance with the testimony and Ognall J said at page 96:

> " For this purpose we refer to and agree with a passage set out in *Archbold* (42nd ed.) at para. 4-308, p. 403, which reads: 'The mere complaint is no evidence of the facts complained of and its admissibility depends on proof of the facts by *sworn or other legalised testimony*.' (My emphasis.) It must,

> in our view, follow that if the terms of the complaint are not ostensibly consistent with the terms of the testimony, the introduction of the complaint has no legitimate purpose within the context of the trial. It is for this reason that the courts have treated the matter in the past as is summarised in para. 4-310 of *Archbold* (42nd ed.), which summary in that paragraph we respectfully agree with and adopt.
>
> It may be that if the learned judge had confined the admitted evidence to the fact of a complaint, without allowing in its detail, other considerations would have applied. But, of course, the consequences of so doing might have been to compel the defendants to adduce evidence of its terms in an effort to demonstrate inconsistency. The prejudice attendant thereon would no doubt be the subject of complaint in this Court, and we express no concluded view on it if only for the reason that it did not occur in this case. The fact is that not merely a complaint but the terms of the complaint were admitted in evidence." [Emphasis added]

The Court of Appeal quashing the conviction for indecent assault, held:

> "...the judge failed to make sufficiently clear to the jury the purpose, if any, for which the recent complaint was admitted in evidence; that coupled with his further failure to make crystal clear to the jury the limited way in which they could use it, constituted serious flaws in the summing-up on count 2. Even if the doctor's evidence was capable of corroborating that of the child, as the jury were not properly directed both as to recent complaint and corroboration, the conviction on count 2 must also be quashed. The case was not one for the application of the proviso to section 2(1) of the Criminal Appeal Act 1968." [Emphasis added]

The authorities show that where evidence of a complaint is given three factors must be borne in mind:

(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 vs 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).

In determining the admissibility of the complaint these are the factors the trial judge must consider.

In the instant case evidence of the fact of a complaint and not the details was admitted. Mr. Small contended that this was impermissible and should be the basis for quashing the conviction. He placed some reliance on the dicta of Ognall J in Wright and Ormerod which is obiter. The mere fact of a complaint being made has no evidential value. It is not prejudicial to the accused nor is it supportive of the Crown's case. The prosecution gained no advantage and the defence suffered no harm. Mr. Small acknowledged defence counsel, a person of much experience, cross-examined the prosecutrix on the absence of the individuals to whom complaints had been made. The depositions disclosed the absence of the witnesses and they were not on the back of the indictment. It was known that the prosecution would be without their assistance. Efforts by the police to get them at the trial were futile. If there was any advantage, it was probably to the defence. The evidence the jury had to consider was on the issue joined between the prosecutrix and the appellant, namely consent.

Every case must be judged on its facts. In the majority of cases, witnesses and complainants testify to making reports to and of giving statements to the police without giving evidence of the contents of the report or

statement. Perhaps this is procedurally impermissible but rarely is objection taken to it.

The judge dealt specifically with the fact of complaint by telling the jury it was not corroboration. He had earlier in his summing up given proper directions on corroboration and, on being alerted by Crown Counsel, he dealt with the complaint as indicated. The challenge to his summing up in this regard was that he failed to give the usual direction on the value of evidence of recent complaint. The judge recognised there was no such evidence before the jury and, in the circumstances, for him to embark on directions on the evidential value of a recent complaint would probably be confusing. He dealt with it in my view in the correct way, by identifying it as non-corroborative of consent. This was the ideal way to go especially as he had earlier told them "You are not to speculate on anything in this case where there is no evidence to support whatever is being said." He repeatedly told them not to speculate.

Lord Goddard C.J. in **R v William Evans Wallwork** (supra) referring to the inadmissible evidence said:

> " The learned judge, having once admitted that evidence ought - and he omitted to do this - to have told the jury that it was no evidence of the facts complained of by the child. He not only did not do that, but he also referred to the evidence in his summing up."

He concluded his judgment in this manner:

> "... The Court is of the opinion that the points raised show that there were irregularities, but we dismiss the appeal because we are convinced that no substantial miscarriage of justice was caused."

We are not persuaded that there is any merit in this ground of appeal.

On the second ground of appeal, Mr. Small submitted that the account of the appellant of having sexual intercourse from behind could have led the complainant to believe he was attempting anal entry, and the trial judge could have been more helpful to the jury in his directions. He pointed out that "the act of the accused may have been such that the complainant honestly believed that he was attempting anal entry or his belief was that he was making vaginal entry."

There is an old adage which goes "he who feels it knows it." The evidence of the complainant which included her repetition of what the accused said at the time he was aggressively pursuing his intent was placed before the jury on the one hand. On the other, there was the evidence of the appellant. The judge dealt fairly with the case for the prosecution and the defence and issues were left for their resolution. He emphasised that the burden of proof was on the prosecution. This ground of appeal also fails.

The summing up as a whole was comprehensive, adequate and fair. The points raised, even if they were resolved in favour of the appellant, would not have affected the validity of the conviction as they could not, in our opinion, for the reasons stated, cause a miscarriage, a fortiori, a substantial miscarriage of justice. Were we persuaded otherwise, we would apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act and dismiss the appeal.

It was urged upon the court that in his approach to sentence, the judge was more concerned with the offence rather than the offender. The appellant had hitherto a clean record and the Probation Officer had recommended a non custodial sentence. The jury, too, had recommended mercy.

The court notes that the jury deliberated for two hours and fifteen minutes and returned a unanimous verdict of guilty. This indicates that they gave mature consideration to the evidence in the case and were absolutely convinced of the truthfulness and sincerity of the complainant. They accepted her evidence as overwhelming. Their recommendation did not come at the time of delivering the verdict, which is the usual course on the rare occasions when this practice is indulged in by a jury, but it came in the form of a letter, bearing the date of the verdict - 24th November, 1995, signed by six jurors and delivered to the trial judge on Monday 27th November 1995. It is instructive to see how the trial judge approached the task of sentencing. He said:

> " On Monday morning when I came back to deal with sentencing I had a most unusual, but not extraordinary request coming from the jury who had tried this case asking that I allow leniency upon you where sentence is concerned, and so I decided that I would further postpone sentencing to find out something more about you, and your lawyer also told me that she had intended to ask this court to allow some persons to give character evidence on your behalf.
>
> So, here we are this morning and this court has had the benefit of hearing from these two persons who were called on your behalf, Mrs. Gweldolyn Daly and Mr. Michael Lawe, who have spoken quite well about you. I have also had the benefit of looking at the social enquiry report which has set out for me a background on your life, as it were, and what recommendation, if any, the probation officer might have had in terms of informing this court so far as the recommendation is concerned."

The judge proceeded to assess the reports and recommendations and imposed the sentence he considered appropriate in the circumstances. The

sentencing exercise is at best a difficult one. The judge and the court must be aware of the state of crime in the country and the current outcry of the populace against the spate of crimes involving the defilement of women and young children.

We have seen the affidavits. We have considered them and the submissions of counsel for the appellant. We are, however, satisfied that the approach of the judge to sentencing was based on correct principles and that the sentences imposed are just. In the result the appeal is dismissed, the convictions and sentences are affirmed.