GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.11 OF 2002

BETWEEN:

SHELDON THOMAS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. Lloyd Noel for the Appellant
Mr. Hugh Wildman for the Respondent

2003: March 11;
October 20.

JUDGMENT

[1] BYRON, C.J.: This is an appeal by a 21-year-old against his conviction and sentence of four years imprisonment for rape. At the trial, the case for the prosecution had depended entirely on the uncorroborated testimony of the complainant and the appellant had maintained that the intercourse was consensual.

The Background Facts

[2] The appellant, in accordance with a previous arrangement, picked up the 16 year old complainant after evening school on September 24th 2001 in his father's pickup

at approximately 8.00 pm. Instead of driving her home, he took her to his father's garden, where they had sexual intercourse.

[3] The complainant's evidence was that during the trip she kept asking the Appellant to take her home after he had driven past her turning. He told her that he wanted some love. She started crying. At the garden, he had forcible sexual intercourse without her consent inside the pickup. She stated that he was wearing a condom but during the incident she heard something bursting. Afterwards he drove her home. As soon as she got home she told her mother what had happened. They immediately went to the Appellant's home. The complainant's mother told the Appellant's parents in his presence that her daughter had said he had taken her into the bush and had sex with her. The appellant retorted that they were accustomed to doing their thing. The complainant said that she said, "Boy, me and you ever do anything." and he bent his head and never answered. She said that the Appellant's father offered $100.00 for tablets in case she got pregnant and to settle the case for $1000.00 but her mother refused to accept. The following morning they reported the matter to the police.

[4] The Appellant testified that he was having an affair with her for over two years. He said that he kept a photograph of her in his room. The complainant admitted giving him the photograph and writing her name and age on the back of it. Stacy Hosten the appellant' s niece who lives at his home testified that the complainant visited him frequently. She said that on two occasions she carried money to the complainant from him and that the complainant had boasted that the money was from her man. In cross-examination she indicated that she knew that the Appellant had a steady girl friend who had a child for him. Kelvin Benjamin, [Banana] gave evidence of his trip in the van with both the complainant and the appellant on the evening of the incident. He did not notice or hear anything between them.

The Grounds of Appeal

[5] Counsel for the Appellant attacked the conviction on the basis that:

[i] the evidence was too weak to support the conviction; and

[ii] the Judge

[a] wrongly disallowed certain evidence;

[b] failed to put the defence's case to the jury adequately; and

[c] made fatal mis-directions on the law relating to recent complaint.

The Weak Evidence

[6] Counsel for the Appellant contended that there was no corroborative evidence of the complainant's testimony and there were circumstances that supported his case that they were on friendly terms. For example, it was admitted that the complainant had agreed that he would pick her up after class, that he would bring chicken and chips for her and she did take the chicken and chips home after the incident. She admitted giving him a photograph of herself with her name and age written on the back of it, and that Banana traveled in the pick up with them and he did not hear or observe any altercation between them.

[7] This argument was not sufficient, by itself, to justify upsetting the conviction. The issue of credibility is within the purview of the jury once they have been properly directed on the law. It is well settled that a conviction could be supported by the evidence of a complainant alone if a properly directed jury believes it to be true.

Exclusion of Evidence

[8] Counsel complained that it would have been possible to use Banana's evidence in a manner more persuasive to the jury if the trial Judge did not prevent him from repeating what he had told the police, and did not prevent the investigating police

officer Sergeant Hall, from indicating what Banana had told him during the interview.

[9] The record did not reveal that the Judge had excluded any evidence. No ancillary evidence was adduced on this point. In any event, Banana was a witness and gave evidence on oath and was cross-examined. It would seem to me that the evidence he gave had more probative value than anything that could be said about his prior statements during the investigative stages. Counsel did not press the point and we reject this submission as having no base.

Failure to put the Defence's case to the Jury

[10] The Appellant contended that the learned trial Judge failed to adequately put his defence to the jury. What Counsel complained of was that the Judge did not make argumentary points in favour of the Appellant. The few examples he gave in his submissions included that the Judge failed to suggest that Stacy's evidence "corroborated" the Appellant's story, and that he failed to suggest that the complainant's story was untrue because Banana did not hear or observe any conflict between them while he was a passenger in the van.

[11] I agree that a Judge is duty bound to ensure that he puts the defense's case to the jury fairly and adequately. He must at all times ensure that it is presented to the jury in a manner that is even-handed and fair. An instructive account of the Judge's duty in this regard is contained in the exhortation of Simon Brown LJ [1]:

> "Every defendant, we repeat has a right to have his defence, whatever it may be, faithfully and accurately placed before the jury…The Judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weakness of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence."

[1] In R v Nelson [1997] Crim. L.R. 234 CA.

In my view this case fell far short of a case where the summing up was imbalanced. I thought that the Judge made the issue of consent clear, he suggested to the jury that the case turned on that issue and he put the complainant's accusation and the Appellant's denials very clearly before the jury.

Recent Complaint

[12] Counsel for the Appellant contended that the Judge's direction to the jury that there was a recent complaint which was corroborative of the complainant's credibility was a fatal misdirection and must result in setting aside the verdict of the jury. He submitted that the Privy Council case of Kory White v R[2] was direct authority for that proposition. In that case, the Appellant was convicted for rape. At his trial, evidence was adduced from the complainant that she told five persons "what had happened" after the alleged incident. However, the prosecution called none of these persons to prove the terms of her complaints. One of the grounds upon which the Appellant challenged his conviction was that the learned trial Judge wrongly admitted the evidence that she had complained because the prosecution had failed to call independent witness to prove the terms of the complaint. Lord Hoffman delivered the reasons of the Board for allowing the appeal and set out in clear and precise terms certain legal principles, which govern the application of the recent complaint principle.[3]

The Law on Recent Complaint

[13] The general rule at common law is that a witness may not be asked in-chief whether he or she has formerly made a statement consistent with their present testimony. The witness cannot narrate such a statement if it was oral or refer to it if it was in writing (save for the purpose of refreshing his memory), and other witnesses may not be called to prove it.[4] This rule is subject to two well-known

[2] (1999) A,C 210
[3] Starting at p. 215 letter F.
[4] Cross & Tapper on Evidence, 8th ed. (1995), p 294.

common law exceptions. The first exception is that in sexual cases a complaint made at the first reasonable opportunity after the offence may be proved to show the complainant's consistency and to negative consent. But for this purpose it is necessary not only for the complainant to testify as to making the complaint but its terms should be proved by the person to whom it was made. If, as in this case, and the Kory White case, the recipient(s) of the complaint did not give evidence, the complainant's own evidence that she made a complaint cannot assist in either proving consistency or negating consent. It would be logically absurd to regard the complainant's own evidence that she complained, without some independent confirmation, as assisting in confirming her truthfulness[5]. The Jamaican Court of Appeal had ruled that it was grave misdirection for a Judge to tell a jury that the complainant's own evidence that she had made several reports to certain persons though not corroborated could be used to show consistency and negative consent.[6]. The other common law exception is that a witness may testify to an earlier consistent statement to rebut an imputation that the evidence is a recent invention.[7]. This issue did not arise in this case and there is no need for further development of the proposition.

[14] On this analysis of the law, it is clear that the learned trial Judge made a grave error in describing the testimony as a recent complaint because no evidence was adduced from the person to whom the complaint was made. In this case, just as in Kory White, the complainant in describing the complaint merely said "I told my mother what happened". The suggestion that evidence of a recent complaint in that form is innocuous, because it was not a repetition of the actual words used, and as such would have no evidential value was rejected by Lord Hoffman. The reason is clear. The jury would be bound to infer that the statement made to her mother was in substantially the same terms as her evidence in court. The judicial reasoning on this is longstanding, and in particular in the context of attempts to

[5] Reg v Kincaid (1991) 2 N.Z.L.R. 1 per Casey J at p.9
[6] Reg v Fletcher (unreported; 1996 Criminal appeal 20/96)
[7] Fox v General Medical Council (1960) 1 W.L.R. 10017, 1025; Nominal Defendant v Clements (1960) 104 C.L.R. 476, 479-480.

evade the rule against hearsay evidence.[8]. These propositions do not necessarily make the evidence inadmissible. The complainant in giving a coherent account of her behaviour after the incident had to describe what happened upon returning to her home. It is important, however, that the spirit of the rule against previous consistent statements not be infringed by inviting the jury to infer consistency and that her credibility was supported by the fact that she had told the same story soon after the incident. These considerations impose duties on the Judge to give careful directions to the jury on the limited value that could be attached to the evidence adduced in this manner.

[15] There is another issue that has a particular bearing in this case, which was not developed in argument but impacts on the fairness of the trial. The complainant's evidence was that after speaking to her mother, they both went to the home of the Appellant where her mother and herself made accusations to his parents in his presence. Her description of the silence of the Appellant and the financial offers of his father, must have made the jury, at least, wonder whether what transpired amounted to an admission of rape.

The Law on Accusations in the Presence of the Defendant

[16] The well-settled law is set out in 2003 Archbold at 15-316. A statement made in the presence of a defendant, accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save in so far as he accepts the statement so as to make it in effect his own. There was a grave danger that the jury would not have known how to assess this testimony and give it a greater evidential value than it deserved. I think that this required careful advice to be

[8] Reg v Lilliyman (1896) 2 Q.B. 167, at 178-179; and Reg. v Wallwork (1958) 42 Cr.App. R 153 per Lord Goddard as critiqued by Sir Rupert Cross in "Complaints of Sexual Offences (1958) 74 L.Q.R. 352-355.

given to the jury. The leading case on this subject contains a passage approved as giving practical guidance[9]:

> "Where [the statement is admitted] we think the following is the proper direction to be given to the jury – that if they come to the conclusion that the defendant had acknowledged the truth of the whole or any part of the facts stated they might take the statement, or so much of it as was acknowledged to be true (but no more) into consideration as evidence in the case generally, not because the statement, standing alone afforded any evidence of the matter contained it, but solely because of the defendant's acknowledgement of its truth; but unless they found as a fact that there was such an acknowledgment they ought to disregard the statement altogether"

The Summing-up

[17] It is therefore necessary to examine the summing up carefully to see what if any directions the learned trial Judge gave to the jury on these issues. The summing up was not very lengthy. The learned trial Judge was very specific in his directions. In addressing the legal effect of a recent complaint he said:

> "In sexual intercourses like this one, a complaint made about it by the alleged victim at the first opportunity which reasonably lends itself after the alleged incident to persons, is admissible as part of the case for the prosecution as evidence of the alleged victim consistency of conduct, and tending to negate consent and so put together supports her credibility as a witness."

He then went on to examine whether there was any evidence of a recent complaint in this case and said:

> "(The complainant) told you, "When I got home the door was closed. I knock on the door and my mother opened it. I spoke to my mother and told her what happened. After I spoke to my mother, my mother and I went to the accused's parents. They live about five houses away from us. We walked. My mother told the accused father in the accused presence that I told her that the accused brought me in the bush and had sex with me. The accused said, "Miss, we accustom doing we thing'. And her mother asked him if he and I had any sex before. He did not answer and she Annette said. "Boy, we ever did anything?" That is capable of amounting to a recent complaint."

[9] R v Christie (1914) A.C. 545 at 555 that approved the passage in R v Norton (1910) 2 K.B. 496 at 500

[18] The Judge did not give any direction on the accusation in the presence of the Appellant, his silence and the comments of his father. Instead they were invited to regard this testimony as part of a recent complaint, which had the capacity to support the complainant's credibility as a witness and negative consent. This conflicts with the basic principle that a witness cannot corroborate herself. The testimony of the complainant on this issue could not be used to support or strengthen itself evidence, which was not supported from an independent source. It was rather remarkable that the prosecution did not call the complainant's mother to adduce evidence on these matters. That omission ought to have obliged the Judge to indicate to the jury that they could not regard the evidence of the complainant as a recent complaint, which could bolster her own truthfulness.

[19] The learned trial Judge's direction is in conflict with the common law. The case depended entirely on the credibility of the complainant. This aggravates the significance of the misdirection because it suggested to the jury an illogical and irrational basis for considering that complainant's testimony was credible. This must have seriously affected the fairness of the trial and makes the conviction unsafe.

[20] I would allow the appeal, overturn the conviction and set aside the sentence.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal

I concur.

Ephraim Georges
Justice of Appeal [Ag.]