EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCRAP2017/0005

BETWEEN:

FRANKLYN PERKINS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Janice M. Pereira	Chief Justice
The Hon Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Terrence F. Williams	Justice of Appeal [Ag.]

Appearances:

Mr. David Brandt for the Appellant
Mr. Henry Gordon for the Respondent

2018: November 26;
November 28.

High Court criminal appeal – Indecent assault – Right to give unsworn statement – Recent complaint – Appropriateness of judge's questioning – Adequacy of judge's directions relating to complainant's distress – Section 137 of Criminal Procedure Code of Montserrat – Compensation awarded

ORAL JUDGMENT

Introduction

[1] WILLIAMS JA [AG.]: The appellant is a physician who, at the time of trial, was 67 years of age and had been practicing for almost 40 years. On the 1st day of December 2017, he was convicted by a jury on an indictment charging him with the offence of indecently assaulting a young lady of 19 years contrary to section 122(1)(b) of the Penal Code.[1] The young lady was his patient and shall be referred to as L in this judgment. The learned trial judge sentenced him on 12th March 2018 to 18 months imprisonment suspended for 18 months and to compensate L in the sum of EC$10,000.00 in 3 months or serve 6 months imprisonment in default.

[2] This appeal proceeded on five grounds filed by the appellant's counsel in a notice of motion dated 6th November 2018.[2] The grounds were:

> "GROUND 1
> The Learned Trial Judge erred in law when he ordered the appellant to pay $10 000.00 in compensation to L in three months or serve 6 months in default, separate from the suspended sentence without first ascertaining the Appellant's means.
> GROUND 2
> The Learned Trial Judge failed to direct the jury effectively or at all on the law of recent complaint and wrongly allowed in evidence the particulars of recent complaint allegedly given to her boyfriend by the virtual complainant after she was beaten by him.
> GROUND 3
> The learned judge misdirected the Jury and himself on the issue of demeanour. At page 135-136 of the record he said:
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> > "Sharmen Williams told you that on returning to the office she observed L was perturbed and nervous. This is not evidence of what happened with Dr. Perkins, nor evidence that L is telling the truth. It is merely evidence that something had happened. It remains your task to determine what."
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> GROUND 4
> The learned Trial Judge cross-examined the Appellant in a way more suitable for a prosecuting counsel than a judge: such questions greatly impaired his defence to such a degree to make it disappear.

[1] Cap. 4.02, Laws of Montserrat, 2013.
[2] The other grounds, in the notice of motion, were abandoned.

GROUND 5
The Learned Trial Judge erred in law when he failed to give the Appellant the right to give an unsworn statement from [the] Dock."

Facts

[3] L's evidence was that she went to the appellant's surgery accompanied by her boyfriend. She went to the examination room where she met the appellant. After the examination, the appellant requested that L hug him. On doing so, he held on to her, rubbed and kissed her in the manner described in the indictment, and pulled her to his chair. The assault went on for about half an hour, ending as the appellant's secretary came knocking at the door.

[4] L left and went outside to her boyfriend, she was crying and trying, with difficulty, to speak. L told her boyfriend that the appellant "was inside there feeling [her] up". She then "told him what happened and he [got] vex" whereupon her boyfriend hit her once on the foot in disapproval of her "permitting" the assault.

[5] L's boyfriend confirmed that L was in the examination room for over a half hour. It was his enquiry as to how much longer L would be that led to the secretary knocking on the examination door. L exited looking sad. He asked her what happened, and she related a fulsome account. In cross-examination he admitted to hitting L on her foot because she was not responding to him and seemed in shock. Afterwards, she started to tell him what had happened. In re-examination he explained that L's detailed account was after he hit her.

[6] The prosecution also called, Sharmen (Charmaine) Williams, L's co-worker who testified that, on the day in question, when L returned from her doctor's appointment, she seemed perturbed and nervous.

[7] At the close of the Crown's case, the learned trial judge advised the appellant as to his options of giving sworn testimony or remaining silent. The appellant gave sworn testimony denying the assault.

Submissions by the parties

[8] I shall treat with the grounds as argued.

[9] On ground 5, counsel for the appellant argued that the common law right for a defendant to give an unsworn statement was extant and that the judge erred in not advising the defendant accordingly. Counsel conceded that the judge's advice to the defendant was in harmony with section 137 of the Criminal Procedure Code[3] as that section makes no reference to the option of an unsworn statement. However, counsel argued, the right to make an unsworn statement had to be abrogated by an express provision.

[10] On ground 2, counsel for the appellant argued that the content of the complaint after L reported to her boyfriend that the doctor had "touch [her] up" ought not to have been admitted because that content came after the boyfriend had hit her on her leg. This meant that the complaint was not voluntary. Further, counsel argued that the complaint ought not to have been admitted as L did not testify that she had related the details of the incident as her boyfriend testified had been complained by her to him. No authority was relied on for either proposition. Importantly, as shall be discussed below, counsel for the appellant conceded that the complaint related in the boyfriend's testimony was consistent with L's examination in chief.

[11] Counsel for the respondent countered by arguing that there was no requirement that the complainant must first describe the details of the complaint made for the witness testifying as to the recent complaint to confirm. Counsel for the respondent went on to submit that the evidence did not support the appellant's assertions that L was beaten.

[12] On ground 3 much was made of the judge's directions as to evidence of L's distress. The directions were:

[3] Cap 4.01, Laws of Montserrat, 2013.

> "Sharmen Williams told you that on returning to the office she observed [L] was perturbed and nervous. This is not evidence of what happened with Dr. Perkins, nor evidence that [L] is telling the truth. It is merely evidence that something had happened. It remains your task to determine what."[4]

[13] Counsel for the appellant, in arguing ground 3, submitted that the direction should have been similar to that recommended in paragraph 20-13 of Archbold 2012:

> "The weight to be given to evidence of the complainant's apparent distress varies infinitely, and a jury should be directed that although such evidence may amount to corroboration, they should be satisfied that there is no question of it having been feigned before they treat it as such; it should not be routine to direct the jury that little weight should be accorded to such evidence, although in an appropriate case, they should be alerted to the sometimes real risk that such evidence might have been feigned…"

[14] Counsel conceded that the judge's direction did not tell the jury that L's demeanour could be corroborative but emphasised that insufficient guidance was given as to how to treat it.

[15] Counsel for the respondent distinguished the cases relied on in Archbold and contended that there was no need to direct a jury that the demeanour could have been feigned because of the "temporal proximity". Counsel also reminded the Court of the proviso and noted the strength of the prosecution's case.

[16] As regards ground 4, counsel for the appellant criticised the following examination of the appellant by the judge:

> "Question: In the circumstance that Mr. Brandt is exploring if these things had happened would it be okay in the context of being a doctor conducting an examination to assume she was consenting?
> Answer: In a doctor's context it would not be okay.
> Question: Is that what really happened here. That those things she describes and you thought she was consenting. Is that what really happened?
> Answer: No"[5]

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[4] At pp. 135-136 of the record of appeal.
[5] At p. 109 of the record of appeal.

[17] Counsel deplored these questions as smacking of the prosecuting advocate. When asked to state precisely what was wrong with the questioning, counsel explained that the judge had asked the appellant a question in the appellant's professional capacity when he was not being so tried. No authority was cited in support.

[18] Counsel for the respondent pointed out that the questioning followed from a topic, including hypotheticals regarding his profession, which had just been traversed by the appellant's counsel in re-examination.

[19] Ground 1 concerned the order for compensation. Counsel for the appellant claimed that the judge did not consider the appellant's means. Counsel was at pains to caution against making assumptions in this regard. Criticism was also levied for the fact that L had not requested any compensation. When asked to state the appropriate quantum of compensation given the appellant's means, half of the sum ordered was proffered.

[20] Counsel for the respondent answered this ground by stating that the law did not require the victim to request compensation, or that the judge conduct a means test. Nevertheless, the judge had means in mind and had evidence of means. Counsel noted that the award was a small one, appropriate for cases where there was no physical injury or no proven psychological harm. Finally, he argued that the sentence was, on a whole, lenient and that, given the appeal of the compensation, this Court could review the entire sentence. In reply, counsel for the appellant urged the Court to not regard the appeal of the compensation order as an appeal of the entire sentence.

Right to make unsworn statement

[21] The option of a defendant making an unsworn statement was not known to the early common law. In England, the law developed from a defendant not being able to give any evidence at his trial; to his being able to give an unsworn

statement; to the options of unsworn statement, sworn evidence, or silence; and now, to sworn evidence or silence. The historical development of the law was recently, and comprehensively, explained by Morrison JA in Dennison v R.[6]

[22] In Montserrat, the relevant history is much more recent. The current code, properly called the Criminal Procedure Code (No 2) does not include the option of the unsworn statement. The current code repeals and replaces the previous code that included such a provision. This state of affairs has implications for the true construction of the statute. If the right to give an unsworn statement existed at common law, it has been clearly unambiguously revoked given the legislative history of repealing the statutory provision that codified the common law.

[23] There is no merit in this ground.

Recent Complaint

[24] Receiving evidence of an alleged victim's recent complaint is a singular feature of the trial of sexual offences. In earlier times, it was felt that failure of the victim to raise the "hue and cry" militated against the truth of her allegation. Today a recent complaint is admitted to show consistency between the complaint and the evidence given by the alleged victim. In Kory White v R,[7] for example, the Privy Council allowed an appeal where the victim's evidence that she had made such a complaint was admitted but the prosecution did not call the witness to whom the complaint was made. Consistency could not have been assessed.

[25] Regina v S[8] is consistent with these principles but notes that the extent of the consistency depended on the facts of each case. The recent complaint need not disclose the ingredients of the offence or the full extent of the unlawful sexual conduct alleged by the complainant, but it had to disclose evidence of material and relevant unlawful sexual conduct.

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[6] [2014] JMCA Crim 7 at paras. 3-4.
[7] [1999] 1 AC 210.
[8] [2004] 1 WLR 2940.

[26] Part of the appellant's argument on this ground is the claim that L did not testify that she told her boyfriend the details of which he testified. The short review of the evidence above shows that this assertion is incorrect.

[27] The appellant's arguments also fail on consideration of the authorities. As already stated, the test is the consistency of L's testimony as against her boyfriend's account of her recent complaint. Counsel for the appellant conceded that there was no disparity. In Ahmed v HM Advocate,[9] a five-judge panel of the Scottish Appeal Court held that a recent complaint was rightly admitted although the alleged victim had denied making the complaint, the question for admissibility being consistency of the terms of the complaint with her evidence. It is useful to extract some of the dicta of the Court delivered by the Lord Justice General :

> "[12] Where it is admissible, its true value lies in the evidence of the recipient of the statement that it was made to him or to her. Testimony by the complainer that she complained to another or others is of no value unless that other or those others speak to hearing the complaint from her (*R v Kincaid*, per Casey J, p 9; *White v R*, per Lord Hoffmann, p 215). The significance of the evidence of the recipient is that his or her testimony that the statement was made – and made recently after the event – supports, as a matter of credibility, the testimony of the complainer about the matter complained of.
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> [13] Once that is recognised, there is no logical requirement that the complainer herself should testify as to having made the complaint to which the recipient speaks. There may be very good reasons why she is unable to do so. The trauma of her experience may be such that, while she is able to speak to the assault, she is unable to recall what she may have said to others about it shortly after the event. It has been recognised in other jurisdictions that it is not essential that the complainer speak to having made the complaint (*Lillyman v R*, per Hawkes J, pp 169, 170, as interpreted and applied by Somers J in *R v Nazif*, pp 125, 126; see also *Timm v the Queen*, per Lamer J, pp 333, 337; *R v Kincaid*, per Casey J, p 9).
>
> [14] Counsel for the appellant relied for authority principally on two cases. First, in *White v R* the Privy Council dealt with a case in which at trial the complainant had spoken to having complained to five persons of having been sexually attacked by the accused; but none of these persons was

[9] [2010] JC 41.

called as a witness. Counsel for the appellant focused upon the following words at p 215, used by Lord Hoffmann in delivering the advice of the Board:

> 'If a complaint is made at the first reasonable opportunity after the offence, it may be proved in evidence to show the complainant's consistency and to negative consent. But for this purpose it is necessary not only that the complainant should testify to the making of the complaint but also that its terms should be proved by the person to whom it was made.'

If the second sentence is taken at face value and in isolation it suggests that there is a dual requirement, including that the complainant should testify to the making of the complaint. But this passage must be read in the wider context of the matter being discussed on that page. It had been submitted for the appellant that the evidence of the complainant of having made the five complaints was inadmissible, as being excluded by the rule against proof of prior self-consistent statements. His Lordship then explained that there were two well-known common law exceptions to that rule, the first of these being that which permits proof of complaints in sexual cases. It was in that context (namely, where a complainant had given evidence of a prior complaint or complaints) that the quoted passage appears. It cannot be taken to be an authoritative statement that evidence by a complainant or complainer of having made a recent complaint is a pre-condition to the admissibility of evidence of the recipient having heard it. It may also be noted that on the same page Lord Hoffmann quotes a passage from Casey J's judgment in *R v Kincaid* (p 9); on that same page Casey J had said, under reference to *R v Nazif*, that '[it] is not even necessary for [the complainant] to give evidence that she did so complain'. Lord Hoffmann does not suggest that that view is ill founded."

[28] Their Lordships then referred to the contrary dicta in the case of MacDonald v HM Advocate[10] and held:

> "[16] It accordingly appears that in that case the Crown did not examine the complainer as to whether or not she did say, or may have said, something *de recenti* to her fellow residents, with a view to her testifying, if it was the case, that she had no recollection of doing so; or her even denying that she had done so. We discuss below the propriety of doing so. However, so far as the court opines at paras 9 and 10 that the objection should have been sustained because there was no evidence from the complainer that such a statement had in fact been made, or if it had, what its terms were, we are unable to agree with that opinion. No authority is cited in support of it. The court does not appear to have been favoured with citation of the authorities from other jurisdictions which were placed before us and to which we have

[10] [2004] SCCR100.

> referred. We see no logic in excluding as inadmissible the evidence of the recipient of a *de recenti* statement merely because the alleged maker has not spoken to it. It is the fact that the statement was made which is evidentially significant. The recipient is as well able to speak to that as the maker and, as we have noted above, it is the recipient's testimony which is potentially material."

[29] I am satisfied that the rule regarding the admissibility of a recent complaint does not require the complainant to give detailed evidence of what she told to the recipient, so long as the recipient's evidence is consistent with the complainant's evidence of the sexual assault. In this case L's evidence that she told her boyfriend that the appellant "touch [her] up" was consistent with the details of what he said she told him, and with her evidence in chief. The failure of the complainant to give detailed evidence of what she told the recipient can only go to the weight to be attached to the recent complaint.

[30] The second assertion is that L was beaten to give her account. This too is not reflected in the evidence.

[31] This ground is without merit.

Questions by Judge

[32] It was not contested that a judge is permitted to ask questions of any witness including the defendant. It is not apparent, why the judge's two-question examination is considered to be improper and akin to a cross-examination. The transcript does not reflect any basis for the appellant's strident criticism.

[33] Cases, such as R v Hulusi and Purvis[11] and R v Zarezadeh[12] discussed judicial intervention. It is certainly wrong for a judge to "descend into the arena" as if an advocate. However, nothing is wrong with questions aimed at clearing up ambiguities. Convictions will likely be quashed where the examinations tend to

[11] (1973) 58 Cr App R 378.
[12] [2011] EWCA Crim 271.

persuade the jury to disbelieve the evidence for the defence, interventions that effectively hinder counsel's conduct of the defence, or where interventions may have stymied the defendant relating his evidence.

[34] The judge's questions did not fall outside the permissible ambit. This ground fails.

Directions on evidence of distress

[35] In this appeal the issue was not admissibility of evidence of distress but as to the adequacy of directions.

[36] R v Zala[13] is a fairly recent case as to directions on the alleged victim's distress. The case repeats the dicta from the cases relied on in the passage from Archbold relied on by the appellant. It is useful to quote from Lord Thomas, CJ:

> "35. Thus in the ordinary kind of case where evidence is given of a complainant's distress immediately after the incident in question it is for the judge to look at the circumstances of each case and tailor the directions to the facts of a particular case, emphasising to the jury the need before they act on it to make sure the distress is not feigned and drawing to their attention factors that may affect the weight to be given to the evidence."

[37] The direction warning the jury against feigned distress is part of a direction that includes such distress, if accepted, as being potentially corroborative. Interestingly, example 7 at page 20-6 of the English Crown Court Compendium (June 2018) advises that directions on evidence of the distress of the victim when making the complaint should remind the jury that it is ultimately their task to determine the truth of the account and that the presence, or absence, of distress is not a reliable indicator of whether the witness is telling the truth. These sample directions make no reference to feigning.

[38] The judge's direction, in the instant case, removed any consideration of distress from the jury. In the circumstances there was no need to balance the jury's

[13] [2014] EWCA Crim 2181.

consideration by advising them of the possibility of feigning. The directions were essentially in keeping with the Crown Court Compendium.

[39] There is no merit in this ground.

The Compensation Order

[40] Section 28 of the Penal Code provides that a convicted defendant may be adjudged to make compensation. A compensation order is part of the sentence of the court: R (on the application of Faithfull) v Ipswich Crown Court.[14]

[41] Compensation orders permit a victim to receive some reparation for loss or injury suffered without the psychological trauma, and expense, of civil litigation. The fact of compensation may well assist in mitigating an offender's sentence, although not to the extent that the convicted person can buy themselves out of punishment for crime: see for example R v Inwood.[15] If the award is acceptable to the victim, the court's resources are saved by not having to be engaged for civil proceedings.

[42] In England guidance on the making of compensation orders has developed to include:

(a) The trial judge ought to raise the possibility of compensation being ordered and hear submissions from the parties: Crown Court Compendium (June 2018) Part 2.

(b) The victim does not have to apply to the court before a compensation order can be made: Holt v DPP.[16]

(c) The onus is on the offender to inform the court as to his means: (R v Bolden[17] and R v Johnstone.[18]

[14] [2008] 3 All ER 749.
[15] (1974) 60 Cr App Rep 70 at p. 73.
[16] [1996] 2 Cr App Rep (S) 314.
[17] (1987) 9 Cr App Rep (S) 83.
[18] (1982) 4 Cr App Rep (S) 141.

(d) A compensation order is designed for the simple, straightforward case where the amount of the compensation can be readily and easily ascertained: R v Donovan.[19]

(e) To make an assessment, there must be evidence as to whether the victim suffered loss and if so, what loss. R v Horsham Justices, ex parte Richards.[20]

(f) The order should not exceed the sum that would be awarded by a court in civil proceedings: R. v. Flinton (Darren Martin)[21]

[43] It is important to note that a sentencing hearing was conducted in this matter. The appellant called character witnesses. The judge considered L's victim impact statement. He had evidence of the appellant's long employment as a physician for the government and in a private practice. From these, it was not difficult for the judge to determine that he was of means to pay the fairly minimal compensation order. Indeed, it is the view of this Court that the order was not outside the range expected if L had taken the matter to the civil courts.

[44] An appellate court may interfere with a sentence where the sentencing judge exceeded his jurisdiction that is, gave a sentence greater than the maximum; where the sentence was manifestly excessive; or where the procedure adopted in sentencing was unfair. Given the foregoing, these are not made out.

[45] The guidance to specifically advise the parties as to the possibility of a compensation order is a good one but is not derived from statute. It helps with the organising of submissions and particularly alerts the convicted person to submit as to his means. However, in the instant case it cannot be said that the failure to so do caused any unfairness. This ground fails.

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[19] (1981) 3 Cr App Rep (S) 192.
[20] (1986) 82 Cr App Rep 254.
[21] [2008] 1 Cr App Rep (S.) 96.

Order

[46] The appeal against conviction and sentence is dismissed.

I concur.
Janice M. Pereira
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar