JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 17/98

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

REGINA VS. ANTHONY LEDGISTER

F. M. G. Phipps, Q.C. for the appellant

Brian Sykes, Deputy Director of Public Prosecutions, for the Crown

November 9 and December 14, 1998

BINGHAM, J.A.:

The appellant Anthony Ledgister was tried and convicted on 29th January, 1998, in the St. James Circuit Court before Cooke, J., sitting with a jury, on an indictment for rape (count 1) and robbery with aggravation (count 2). He was sentenced to ten years at hard labour and five years at hard labour on each count. The sentences were concurrent.

His application for leave to appeal against conviction and sentence having been refused by the single judge, this application was renewed before us. After hearing the submissions of counsel, we granted the application for leave to appeal and treated the application as the hearing of the appeal. We

dismissed the appeal and ordered that the sentences commence as from 29th April, 1998.

At the time of handing down our decision, we promised to put our reasons into writing. This we now do.

The facts may be summarised as follows: The complainant, a married woman, worked at the Montego Free Zone in the Garment Factory Complex and lived at Rose Heights, Montego Bay. On 6th April, 1997, the day of the incident out of which the charges arose, she had left work and around 11:30 p.m. she took a taxi at Sam Sharpe Square on her way home. The appellant, who was known to her before and who resided in the same district as she did, called to her as she was about to enter the taxi. The complainant did not respond to his call but went and sat in the front seat of the vehicle. The appellant went and sat in the back seat of the taxi. Also seated in the back was a lady and a young man, one Weston Gayle, who was a friend of the complainant. The appellant placed a knife at the complainant's neck saying, "Hey gal, you no hear mi call you."

The driver then drove off the vehicle up Union Street going in the direction of the pump house. When the vehicle got to Brandon Hill the appellant called out to the driver telling him to stop as he wanted to come out of the vehicle to sit beside the complainant. The driver stopped and as the appellant got out he drove off the vehicle in an attempt to leave the appellant who managed to hold on to the door of the taxi and swung back

inside the vehicle. The appellant then remonstrated with the driver using an expletive and saying, "Driver, a mi yuh a do so?" He then held the knife at the driver's neck causing the complainant and the other passengers to become terrified. The complainant reacted by jumping over into the back seat.

The driver then drove off the vehicle and went to Rose Heights. He was then ordered by the appellant to proceed to a place called Beirut. When the vehicle got there the taxi came to a stop and the appellant alighted pulling the complainant from the taxi. He still had the knife in his hand. At this stage, Weston Gayle came out of the taxi. He had a golf club in his hand. He pleaded with the appellant saying, "Brethren how yuh a do the girl soh? Behave yourself and give the gal a chance." The appellant replied saying, "Don't say anything. A mi baby mother this." Gayle then waved the golf club in an attacking manner to cause the appellant to release his hold on the complainant. His response was to warn Gayle to "be careful or he (Ledgister) would cut him up." This retort was sufficient to restrict any further effort on Gayle's part to assist the complainant. The taxi then drove off.

The appellant then took the complainant to a house. He opened the door and pulled her inside. The place was in darkness. The appellant proceeded to punch the complainant in her stomach ordering her to take off her clothes. She was then forced to carry out oral sex on the appellant after

which she was sexually assaulted and robbed of the money which she had in her purse.

After her ordeal she was allowed to leave. When she got home she made a report to her aunt and the following morning she made a report to the police. She was subsequently treated by a doctor.

The medical evidence revealed abrasions at and near the base of the vagina. In the doctor's opinion, these injuries were consistent with being caused by a penis and with forceful sexual intercourse.

When challenged in cross-examination, the complainant denied that the appellant and herself had an intimate relationship. She admitted that he had spoken to her on one previous occasion at which time he had said to her, "Trust mi baby, mi a go want you." The learned trial judge saw this remark, if accepted by the jury, as being of a prophetic nature having regard to the incident out of which the charges arose.

Following the report to the police, a warrant was taken out for the arrest of the appellant. It was subsequently executed on him in August, 1997. Upon arrest and being cautioned he said, "Ah mi woman. A. a mi woman. Mi can do anything wid mi woman."

The appellant elected to give sworn evidence in his defence. He testified to being a labourer residing in Rose Heights. He said that the act of sexual intercourse was consensual. He also denied robbing the complainant of the money in her purse. He testified to being in Montego Bay on the night

in question when he came upon the complainant. Both of them travelled in a taxi. There were two other persons in the taxi including the driver. The other passenger was a lady. His house is within walking distance from that of the complainant. He started having sex with the complainant from 1996. This relationship continued right through 1996 and into 1997. They saw each other most days in each week. He described himself as a gentle lover. As far as he knew the complainant did not work. She used to come to his house about three times per week to clean and wash his clothes. He would give her anything she wanted up to the shirt off his back, if necessary. The complainant would also in his absence go to his home and look after his daughter.

The appellant called a witness, one Wesley Anderson, to support his account. Anderson recalled seeing the complainant coming to his home on a regular basis to collect the key for the appellant's house. He testified that she would clean the house and look after the appellant's two children in his absence. She would also wait for the appellant until he returned home. The appellant also said that the entire account given by the complainant was a concoction born out of jealousy by her over his relationship with his baby mother. He refused to break off this relationship. Added to this was a ring with a heart on it which had been given to him by his baby-mother. The complainant became very upset whenever she saw him wearing it

Given the respective accounts of the complainant and the appellant, it is clear that the jury, in arriving at their verdict, accepted the account given by the complainant and rejected that put forward by the appellant and his witness.

Learned Queen's Counsel who appeared for the appellant sought and obtained leave to argue four supplementary grounds of appeal. Ground 4 which relates to the question of sentence was not pursued. Grounds 1-3 read as follows:

> "1. The verdict of the jury was unreasonable and cannot be supported having regard to the evidence.
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> 2. The learned trial judge misdirected the jury.
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> 3. Improperly prejudicial evidence was admitted at the trial.
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> Particulars to ground 1
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> The appellant was convicted of unlawful sexual intercourse with A. L. without her consent. The only evidence presented by the prosecution was that of the complainant, A. L., the doctor who examined her and the arresting police officer, Leveine Garnett. There was no corroboration of L.'s evidence. The appellant gave evidence on oath admitting intercourse which he says was with consent.
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> A. L. testified that she was at Sam Sharpe Sq., Montego Bay at 11:30 (this must be night for at page 7 reference is made to 'the moon shine') - awaiting a Taxi to go home. The appellant called to her but she did not respond. She entered a taxi and sat in the front beside the driver. The appellant also entered the taxi and sat in the back

where there was another lady and a youngster named Weston Gayle, her friend.

While in the taxi a knife was placed at her neck and the appellant said, 'Gal you no hear me call you'. She was so scared she did not respond. Later in the journey, he told the driver to stop so that he could get to sit beside her, she agreed to the driver stopping - intending that he would drive off leaving the appellant outside. As the driver drove off he grabbed the door and re-entered the taxi. The appellant then put the knife at the driver's neck, creating terror all around. She jumped over into the back seat. The comment is made this is an extraordinary situation where the journey continues with appellant, with a knife, holding everybody in the taxi in terror, without protest, challenge or resistance to his action.

Arriving at Rose Hall, the appellant directed the driver to turn off in a place called Beruit where he pulled L. from the taxi, still holding the knife. According to L., Weston Gayle came out the taxi and said, 'Brethren, how you a do the gal soh? Behave yourself and give the gal a chance.' The appellant responded, 'Don't say anything, a mi baby mother this.' Gayle, according to L., waved a golf club at the appellant in an 'attacking vein' and was told by the appellant to be careful or the appellant is going to cut up Gayle (p.6). The appellant makes the comment that Weston Gayle, a friend of the complainant, was not called to give evidence before the jury. Constable Garnet's explanation for Gayle's absence is, to say the least, tenuous (p. 10).

The appellant pulled L. to a house and the taxi drove off. He pulled her with one hand, had the knife in the other and he opened the door. Inside the house was in darkness, there he punched her in the abdomen and ordered her to remove her clothes. He pushed her to the ground ordered her to have oral sex. He then said, 'Gal stan up! Ah play you a play hard. Now take off your panty. You noh take off your panty yet?' She removed

her panty, he then pushed her down on the bed where he had sexual intercourse with her.

After the act, she felt around for her purse and when she retrieved it, the Appellant said, 'Gal, give me that.' When she reached home and opened the purse she discovered J$5,120:00 and US$5:00 missing.

She told her aunt and she told the police who sent her to a doctor. She denied previous relationship with the appellant who, she said, had spoken to her once before saying, 'Trust mi baby, mi a goh want you.'

The doctor found abrasions in the region of the vagina, consistent with being caused by a penis and probably with forceful intercourse.

Constable Garnet testified that a warrant (for the arrest of the appellant) was taken out in April and '...executed on the accused in August when he was taken from the Montego Bay lock-up' (see p. 8).

It is submitted that the case should have been withdrawn from the jury as the evidence was not credible, was unreliable and the consequent verdict unreasonable. Alternatively, in the circumstances of the case, the totality of the evidence was more consistent with the defence of consensual intercourse.

Particulars to ground 2

The learned trial judge misdirected the jury when at page 8 he said, in reference to the doctor's evidence, '...if persons are having sexual relations on a regular basis ...consensual sexual intercourse **...I** ask myself, wouldn't by this time there would have been some harmony between the penis and the vagina?' In the absence of a definition of corroboration, and without indication of what is not corroboration, the jury may have believed the

> doctor's evidence supported the complainant's assertion that sex was without her consent.
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> **Particulars to ground 3**
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> The testimony of Cons. Garnet showing that the appellant was taken from the Montego Bay lock-up for the warrant of arrest to be executed (p. 8), was highly prejudicial as showing the appellant was a person of bad character."

Ground 1

Learned counsel for the appellant submitted that the account given by the complainant as to the incident in the taxi on the journey to Rose Heights was extremely unlikely. There were a number of passengers in the vehicle during the journey who could have been called to support the complainant's story. No effort was made to have any of them testify.

We were of the view that there was no merit in this complaint.

The case, as presented by the prosecution, was left to the jury as a credibility issue as to which of the two diametrically opposite accounts, viz., that of the complainant or the appellant they believed. In the absence of any misdirection by the learned trial judge as to how the jury were to approach their task, the issue as to the credibility and reliability of the witnesses was one of fact for the jury and they alone to determine. To consider what the result would have been had any of the other passengers in the vehicle testified, would be nothing but mere speculation. Nevertheless, given the

state of serious crimes in this country, it is not strange for witnesses to an incident to be reluctant to come forward and assist in the judicial process.

The learned trial judge in his treatment of the manner in which the jury ought to approach their task in weighing and assessing the evidence of the complainant and the appellant on this crucial issue of credibility expressed himself thus (p. 4):

> "So, let's now look at the evidence of the crucial witness for the crown; A. You saw her, she was standing right here. What did you make of her? Did she concoct the account which she gave you? The accused man has said yes and he gave two reasons. 1: Some two months before there was an argument about a ring with a heart on it that he had received from his baby's mother. Apparently A. didn't like it. The other reason he has given is that he refused to give up the love of his baby mother and she was upset at that. He puts this, of course, within the context of what he described that night, when two sweethearts gave themselves up to their passion, and having fulfilled their desires he escorted her home, first by taxi and then - I don't know if it was moonlight night - up to her yard; and that very next morning that same lady who according to him within that time had felt the warmth of his arms, proceeded to go to the police station and make a report against him. What do you make of that? A matter entirely for you."

From these directions it is clear that the accounts of the complainant and the appellant were fairly and adequately left for the jury to consider. Once there was evidence adduced by the Crown which was capable of belief, if accepted by the jury, it supported the verdict arrived at. There was, therefore, no basis for this complaint which fails.

Ground 2

Learned counsel for the appellant submitted that in reviewing the medical evidence, the learned trial judge's directions as to how the jury were to treat this evidence amounted to a misdirection. This was so as the evidence of the abrasions at and near to the base of the complainant's vagina were equally consistent with consensual sexual intercourse. He also submitted that the learned judge's treatment of the reports made to the aunt and the police, in the absence of any evidence from the aunt was an invitation to the jury to draw the inference that the complainant was sexually assaulted. Counsel cited in support *Kory White v. The Queen* Privy Council Appeal 12/98 (unreported) delivered on the 10th August, 1998.

Learned counsel for the Crown, in responding to counsel for the appellant submissions on this ground, submitted that in *Kory White v. The Queen,* Her Majesty's Board of the Privy Council in their statements at pages 2, 3 and 8 of the judgment concerning the several reports made by the complainant to various persons and the possible effect that this had on the verdict of the jury were not laying down any principle of general application. Their views are to be examined in the light of the particular facts and circumstances of that case.

In this case, the learned trial judge in his directions at pages 2 and 8 of the summation was directing the jury as to how to treat comments and having done so later on his summation he proceeded to review the medical

evidence and to express his own views in that area. Counsel submitted that in order to determine which was the more credible of the two accounts the jury were entitled to take into consideration the opinion evidence of the doctor. In *Kory White v. The Queen* (supra), there was only the complainant's evidence available as evidential material representing the Crown's case. In this case the doctor's evidence, while not amounting to corroboration in law, was nevertheless material evidence which, if accepted by the jury, was both consistent with and capable of supporting the complainant's testimony that she was sexually assaulted.

We are of the view that there is merit in this submission of the Crown.

As regards the challenge made by learned counsel for the appellant to the reports made by the complainant to her aunt and to the police, nothing material to the issues in the case turns on this evidence. This evidence was confined to a mention of the reports without eliciting the nature of the reports. As such there was no evidence which would have infringed the hearsay rule and be regarded as inadmissible. It was with such situations in mind that the Board of the Privy Council in *Kory White v. The Queen* (supra) was prompted to say that

> "Their Lordships accept that when the complainant herself is giving evidence, it may be difficult for her to give a fair and coherent account of her behaviour after the incident without allowing her to mention that she spoke to other people who may not be available to give evidence (within the sexual complaints exception) of what she actually said. Their Lordships would not

> suggest that the mere mention that the witness spoke to someone after the incident was inadmissible." [Emphasis supplied].

The underlined words underscores precisely the factual situation in this case and would accordingly require no particular direction by the learned trial judge. One needs to be reminded that apart from the brief mention by the learned trial judge that the complainant made reports to her aunt and the police he, in our view, quite correctly avoided making any further mention in that regard. There was, therefore, no material from which the jury could infer that the complainant was sexually assaulted unlike the situation in *Konj White v. The Queen* (supra) where apart from the report made to the investigating officer who gave evidence there was evidence of five reports made to other persons in which the complainant mentioned what had happened to her. As none of these five persons was called to give evidence there was no material capable of being treated by the court as a recent complaint. It was this situation that prompted Her Majesty's Board to remark that

> "...their Lordships think that the prosecution probably went further than could be justified by the need to allow the complainant to give a fair account of her conduct after the incident. In the absence of a ruling by the judge that the questions could be asked because of an imputation of recent invention, she should not have been allowed to say that she had told five people 'what had happened'. The inference which the jury were bound to draw was that she had made statements in terms substantially the same as her evidence to the court"

As to the directions on the medical evidence, these are to be found at page 8 of the record. There the learned trial judge said:

> "Now, let us for a moment look at the doctor's evidence, and look at it within the context of what the accused man has said. They have been going together since 1996. All of 1996, 1997. Sexual intercourse between them. They have been having regular sex, three times a week, four times a week. Regular. In point of fact, the impression I got, my impression, she is a Christian lady, she didn't like to go to disco and things like that, she was quite satisfied with the relationship, finding its full expression on the wind. That is the impression I have. Now, all of you are big people, and I ask myself this question, if persons are having sexual relations on a regular basis, and a period more than a year, sexual intercourse, consensual sexual intercourse, you know, finest expressions of love and emotion, over all this period of time, I ask myself, wouldn't by this time there would have been some harmony between the penis and the vagina? And would you expect the type of abrasions which the doctor saw. A matter entirely for you. You are to decide that"

These directions can be seen as an examination by the learned judge of the respective accounts of the complainant and the appellant and his comments on the evidence. There is nothing, in our view, to suggest that the learned judge went too far in expressing his view on this matter. The two accounts as he indicated in his directions, in each case, was a matter for the jury to consider and determine which account was to be believed. The jury in arriving at their verdict clearly saw the medical evidence as supporting the complainant's account as to what took place.

As the question of identity of the assailant was not in issue, once the question of consent or no consent was determined in the complainant's favour that was the end of the matter. The verdict which followed was inevitable.

Ground 3

This complaint relates to the evidence elicited from the officer who arrested the appellant on a warrant. He testified that he took the appellant from the lock-up at Montego Bay in order to formally arrest him on the warrant.

Learned counsel for the appellant submitted that this evidence was highly prejudicial in that it showed that the appellant was a person of bad character. With this we do not agree.

The fact that the appellant was taken from police custody for the warrant to be executed on him is not proof that he was there because he was either charged for or wanted in connection with other offences. Moreover, the fact that a person is in police custody is not evidence that he was convicted of any offence and accordingly of proven bad character. In this case, the evidence of the complainant related to an incident which was alleged to have occurred on 6th April, 1997. The warrant was taken out in April, 1997, and not executed until August of the same year.

In his directions to the jury, the learned trial judge was fully aware of the fact that the place where the appellant was taken from for the warrant to

be executed was of no relevance to the proof of the indictment before the court. In his directions to the jury, this is how he dealt with the matter:

> "Constable Garnet gave evidence. And regrettably, it came out in evidence that the warrant which was taken out in April, was executed on the accused in August when he was taken from the Montego Bay lock-up. I don't know why this had to come out because it is not relevant to the case. Ignore it totally. The fact that he was in the lock-up had nothing at all to do with this case. Please ignore that."

In the light of our earlier observations and these latter directions by the learned judge, there is nothing further that merits any worthwhile comment on our part.

It is for these reasons that we made the Order set out at the commencement of this judgment