[2014] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 120/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

ROBERT ROWE v R

William Hines for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Christine Johnson Spence for the Crown

27 and 30 January 2014

PANTON P

[1] This applicant for leave to appeal was convicted by a jury in the Clarendon Circuit Court on 26 October 2010 of the offences of rape and indecent assault. On 4 November 2010, he was sentenced to 12 years imprisonment in respect of the offence of rape and on the indecent assault charge he was sentenced to two years imprisonment. The trial judge Paulette Williams J ordered that both sentences were to run concurrently.

[2] On 25 September 2012 a single judge of this court refused leave to appeal on the basis that the defence was one of denial and the learned trial judge had given

adequate directions to the jury on the issue of credibility. In addition, he said that the sentences could not be described as manifestly excessive.

[3] The 13 year old complainant was a regular visitor to the home of the applicant. On Monday 6 July 2010, she made one such visit which consumed a good portion of the day as well as the night. According to the complainant, she was watching television when the applicant interrupted her viewing by firstly fondling her private parts and making a comment about it, and later by lifting and placing her on a bed where he had sexual intercourse with her. Earlier, during her visit, there were other persons present on the premises despite her resistance. However, at the time of the incidents, there was no other person around. The applicant, according to the complainant, gave her $100.00 after the sexual act. She said she threw the money in his face. She made no immediate complaint to anyone.

[4] On 23 July 2010, while appearing sad and on the verge of tears, she was asked by an adult female (Miss J) if something was wrong. Thereupon, the complainant stated what had transpired between her and the applicant. The police were called in on 25 July 2010 and the applicant was arrested. Remarkably, the female arresting officer (Constable Saineya Pennant) told the judge and jury that she did not remember what the applicant said when she arrested him. Her reason for this lapse was that she was on leave at the time of the trial, and she had not checked her notebook before attending court to give evidence. Be it noted that the trial was taking place a mere three months after the arrest.

[5] The applicant gave evidence that the complainant was at his house watching the television on the day in question, but that his "wife" was also there doing her regular laundry. However, he did not tell the police of the presence of his wife on the premises. He denied doing the acts that the complainant gave evidence on. In fact, he said he was not in a good mood on the day in question, and did not even speak to the complainant at all. So silent was he towards her that he gave her a snack through a third party. He disputed lifting the complainant and placing her on a bed, pointing out that she was too stout for him to have done that. He also denied that the complainant threw money, he had offered her into his face. He called no witness.

[6] Mr William Hines, on behalf of the applicant, did not argue the original grounds of appeal. However, he sought and was granted leave to argue two supplemental grounds of appeal. They read as follows:

> "1. The learned trial judge erred in admitting evidence of [Miss J] (Transcript page 25 lines 16-25) which was inadmissible and in addition, having admitted such evidence, did not provide appropriate or adequate assistance to the jury in assessing the evidence.
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> 2. The learned trial judge erred in her summation by failing to advise the jury that the action of the complainant raised questions of the truth of her testimony, in that:
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> (i) by not telling anyone about the incident until a considerable length of time after she had the opportunity to do so, (Transcript page 20 lines 10-16)
> (ii) the complainant was not spontaneous (Transcript page 25 lines 20-23);

(iii) by not making an outcry when the act was supposed to be done (Transcript page 24 lines 7-10) and where it was likely she might have been heard by someone (Transcript page 19 lines 17-20).

This failure has denied the Appellant [sic] of a fair trial and thereby causing grave injustice to him"

[7] Mr Hines argued both grounds together. His main point was that the complaint made by the complainant to Miss J ought not to have been admitted in evidence as it was not "recent". However, having been admitted into evidence, the jury was not given adequate directions as to how to treat it.

[8] As regards the admission of the statement, Mr Hines submitted that there were two main reasons why it should not have been admitted:

I. it was made in response to a leading question from the adult; and

II. the time lapse between the incident and the statement was too long.

According to Mr Hines, the question posed to the complainant was intimidating in nature, and was put to her twice before there was a response. He referred to the case ***Rex v Osborne*** [1905] 1 KB 551 at 561 where Ridley J in giving the decision on a case submitted to the Court for the Consideration of Crown Cases Reserved, said:

"We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them

> restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent."

[9] Furthermore, Mr Hines contended, a lapse of more than two weeks before making the complaint was too long. He pointed to the fact that the complainant had had several opportunities to complain about the incident but had not done so. He referred to the complainant's father and the applicant's wife as persons to whom the complaint could have been made at an early stage, but the complainant chose not to do so. There was, he said, in the circumstances "a presumption of doubt" on which the learned judge ought to have instructed the jury so far as the complainant's credibility was concerned. He relied on the following passage in the Privy Council judgment ***White v R*** (1997) 53 WIR 311 at 319c:

> "While therefore their lordships do not go so far as to say that the evidence of the fact that statements were made was inadmissible, they consider that the admission of that evidence made it necessary for the judge to give the jury a careful direction about the limited value which could be attached to it."

[10] Mrs Christine Johnson Spence for the Crown submitted in response that the question, "what happened?" which was posed to the complainant was not a leading question. There was no suggestion that the questioner was intimating that the applicant had done something to the complainant. In the circumstances, said Mrs Johnson Spence, the complaint was a voluntary one which was properly left for the consideration of the jury. She referred to the judgment of this court in ***Peter Campbell v Regina*** (SCCA No 17/2006 – delivered 16 May 2008) para. 30 which reads:

> "We have examined a number of authorities on recent complaints and have extracted the following principles from the cases:
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> ...
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> (v) … Questions of a suggestive or leading character such as 'did so and so (naming accused) assault you' or 'did he do this and do that to you' will have that effect; but not natural questions put by a person in charge such as 'what is the matter' or 'why are you crying'. In each case the decision on the character of the question put as well as other circumstances, such as the relationship of the questioner to the complainant must be left to the discretion of the judge …"

Among the cases that the court had examined was the ***Osborne*** case referred to earlier by Mr Hines.

[11] As regards the passage of time between the incident and the making of the complaint by the complainant, Mrs Johnson Spence referred to the case ***Henry Hedges*** [1909] 3 Cr App R 262, where the complaint was made eight days after the incident. That was a case of incest where all the relevant parties lived in the same house where the crime had taken place. The English Court of Appeal ruled that the

evidence of the complaint was properly admitted and left for the consideration of the jury. Mrs Johnson Spence also referred to para 30 (ix) of the ***Peter Campbell*** judgment where the court quoted thus from ***Valentine*** [1996] 2 Cr App R 213 at 224:

> "account should be taken of the fact that victims both male and female often need time before they can bring themselves to tell what has been done to them. Whereas some victims find it impossible to complain to anyone other than a parent or member of their family, others may feel it quite impossible to tell their parents or family members."

[12] We have taken due note of Mr Hines' concern as regards the delay by the victim in the instant case to make her plight known to a third party. The cases to which we have been referred do not disclose the sort of rigidity in approach that Mr Hines would wish us to adopt. We favour the view that each case has to be determined by its own facts, and the trial court's exercise of its discretion in admitting the evidence ought not to be lightly interfered with. It is a matter of current history in the western world that many victims of sexual crimes have kept silent for many years before revealing the story of their pain. In many instances, notwithstanding the lapse of time, the perpetrators have acknowledged the truth of the allegations made against them.

[13] In the instant case, it is inaccurate to say that the complainant had been asked a leading or intimidating question, as submitted by Mr Hines. The evidence was that on 23 July 2010, the witness Miss J saw the complainant looking sad, as if she was about to cry. Miss J inquired of her what had happened; she did not respond immediately so

the question was repeated. At that point, the complainant told Miss J about something that had happened to her. Miss J called the complainant's father and brought him into the picture.

[14] We have given the submissions made due consideration. We bear in mind that this case depended solely on the view taken by the jury of the credibility of the witnesses, particularly the complainant. The learned judge cannot be faulted as regards the clarity of her instructions to the jury on the issue of credibility. For example, she said:

> "So you consider carefully all that was said, sift through the evidence presented to you and you have to try and decide. Do you believe [the complainant]? Because that, ultimately, is your decision, must be your decision in this case, whether you believe [her] account of what she said took place on the 6th of July this year." (page 5 lines 8-15)

The learned judge not only stressed the need for the jury to be convinced as to the truthfulness of the complainant, but she also addressed the tender age of the complainant and the fact that children do "make up stories". This is what she said:

> "The other need for caution in this case is the fact that [the complainant] is a young girl and it is true, they say, that young girls, young children, are easily influenced, they make up stories, so you have to approach her evidence bearing that in mind as well." (page 16 lines 8-13)

We have also noted that the learned judge, in directing the jury, laid stress on the fact that the complainant gave no reason for not making a hue and cry during or after the incident; and she reminded them that the defence had pointed out that the

complainant's mouth had not been covered and no weapon had been brought into play. The jury had the benefit of all those directions in arriving at its decision to convict the applicant.

[15] In the circumstances, we find that there is no merit in the grounds that have been argued. The application is accordingly refused and the sentences are to run from 4 November 2010.