JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 132/97

MOTION NO. 1/99

BEFORE: THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

R. v. GENE TAYLOR

Richard Small and Ms. Helga McIntyre for the applicant

Carrington Mahoney and Ms. Lorraine Smith for the Crown

January 26, 29 and March 1, 1999

PATTERSON, JA.:

The applicant, Gene Taylor, moved the court for conditional leave to appeal to Her Majesty in Council from a decision of this court, delivered on the 18th December, 1998, whereby the appeal of the applicant, from his conviction and sentence on the 25th September, 1997, of the offence of rape, was dismissed and the conviction and sentence affirmed. The ground of the application is stated thus:

> "...that the decision of this Honourable Court in the abovementioned matter involves a point of law of exceptional public importance and it is desirable in the public interest that the said point be submitted by way of a further appeal to Her Majesty in Council, pursuant to the provisions of Section 35 of the Judicature (Appellate Jurisdiction) Act."

Section 35 of the Judicature (Appellate Jurisdiction) Act ("the Act") provides that:

> "...a defendant may, with the leave of the court appeal to Her Majesty in Council from any decision of the court given by virtue of the provisions of Part IV, V or VI, where in the opinion of the court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

The point of law on which the applicant based his application is stated thus:

> "The questions in the proposed Appeal to Her Majesty in Council are as follows:
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> **(1)** Is a trial judge required to expressly direct the jury to disregard evidence of a purported complaint in a case of a sexual offence where there is no evidence from the recipient capable of establishing the admissibility of the complaint within the rule laid down in KORY WHITE v. THE QUEEN [1998] 3 W.L.R. 992?
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> **(2)** If the answer to the above question is no, what directions should be given in such circumstances?"

Mr. Small's submissions seem to be centred primarily on the opinion of their Lordships' Board in ***Kory White v. The Queen*** [1998] 3 W.L.R. 992. The main submissions are as follows:

> "Although the principal question posed in the **Kory White** appeal is answered by the Privy Council - namely that it is necessary that the recipient of a complaint must be called before that evidence can be admissible - there are a number of other important legal issues which are either not answered or, where the issue is dealt with, confusing or contradictory pronouncements have been made. These factors make it desirable that the Board should revisit the subject and clarify the law.
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> The two questions posed for certification in this application arise directly out of the circumstances of this case and also confront the confusing or unanswered issues that spring directly from the

> inadequacies of the Board's decision in **Kory White v The Queen**."

Turning to the instant case, counsel submitted that this court recognised one of those contradictory passages, and he referred to that part of the judgment of the court at pages 5 to 6 in support of his submissions. There the court pointed out dicta in two passages in the speech of Lord Hoffman, who delivered the opinion of their Lordships' Board, which appeared to be inconsistent. The court concluded, however, that the case of ***Kory White*** (supra) was decided on its own facts, and clearly distinguished that case from the instant one. The circumstances that existed in the ***Kory White*** case do not exist in the instant case. In the ***Kory White*** case, the complainant who alleged that she had been raped testified that she had spoken to a number of persons shortly after the incident, telling each person "what had happened". None of those persons was called as a witness.

Evidence of a recent complaint made in sexual cases may be admitted to show the complainant's consistency and to negative consent. But, as their Lordships pointed out in the ***Kory White*** case, "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." Their Lordships continued by saying:

> "If, as in this case, the recipients of the complaints do not give evidence, the complainant's own evidence that she made a complaint cannot assist in either proving her consistency or negativing consent."

Their Lordships' Board identified the principal ground of appeal to be "that the judge did not give the jury adequate directions about how they should treat the complainant's evidence that she had made several statements shortly after the

incident to various people, telling them what had happened." A submission was made that the evidence of the five complainants was inadmissible, but their Lordships declined to "go so far as to say that the evidence of the fact that statements were made was inadmissible", but 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." The judge did no such thing. On the contrary, he reminded the jury of the several complaints made by the complainant, and made comments which their Lordships considered "would have indicated to the jury that the evidence about the complaints were in some way a relevant circumstance to be taken into account in assessing the complainant's credibility upon which the whole prosecution case depended." Their Lordships concluded that:

> "As the jury had been told that even without corroboration they could convict if they believed the complainant's evidence, there must have been a significant risk that they considered themselves entitled to regard the evidence of complaint as confirming her credibility. To leave it open to the jury to take such a view was a misdirection."

Their Lordships expressed the view that in the circumstances of that case, "it was incumbent upon the judge to give the jury clear instructions that the complainant's own evidence was for this purpose of no value whatsoever."

We have pointed out what we consider to be the rationale for the conclusion of their Lordships' Board in the ***Kory White*** case, and the directions that the judge should have given to the jury in the peculiar circumstances of that case. In the instant case, however, as we have said before, these circumstances do not exist. It is a fact that the complainant alleged that she had been raped by the applicant, and

testified that she told her father "what happen at Taylor's house." Her father was called to prove what the complainant had told her, but the learned trial judge did not allow the evidence on the ground that the complainant had not given evidence of what she said to him. In effect, the judge's ruling rendered the complainant's evidence of her complaint to her father of no evidential value, as a recent complaint in a sexual case, although it was not inadmissible evidence. The court alluded to the fact that "there was nothing said by the learned trial judge in his directions to the jury which could have given them any impression that the evidence of the young girl that she told her father what happened could, in any way, be used in assessing her credibility. In fact, the learned judge directed the jury as if there was no evidence of recent complaint in the case, and treated it merely as a part of the narrative."

If the proposed questions arise directly out of the circumstances of this case, then the principles by which the court should be guided in deciding whether leave ought to be granted have been settled by the court. In ***Director of Public Prosecutions v. Frank Gordon and others*** [1976] 15 J.L.R. 77 (at page 78 I), the court said:

> "We do not think that the considerations that should guide this court in granting or refusing leave to appeal in applications of this nature should be any different from those adopted by the Board of Her Majesty's Privy Council in ***Ibrahim v. R.***, the judgment of LORD SUMNER ([1914] A.C. at pp. 614-615):
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> > 'Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists ..., nor unless "by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done" ... The Board cannot give leave to appeal where

> the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. ... There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future'."

In our opinion, the decision of the court in the instant case does not involve nor does it give rise to a point of law of exceptional public importance nor is it desirable in the public interest that a further appeal should be brought. It seems that the principles governing the procedure to be adopted in admitting evidence of a recent complaint in sexual cases, and the way that the trial judge should treat such evidence are quite settled. The guidelines are clear and unambiguous, and trial judges ought not to fall in error in directing the jury in circumstances such as those that exist in the instant case. Even in cases where it can properly be established that the trial judge misdirected the jury that would not be a sufficient ground for the court to grant leave to appeal to Her Majesty in Council. (Ex parte MacRea [1893] A.C. 346).

In our judgment, this application fall short of fulfilling the stringent requirements for the grant of leave laid down by section 35 of the Act, and it is accordingly refused.