

BARBADOS:

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Criminal Appeal No 42 of 1997

BETWEEN:

ANTOINE PAYNE

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Honourable Mr. Justice Errol Chase, Chief Justice (ag.), The Honourable Mr. Justice George Moe, Justice of Appeal and The Honourable Mr. Justice Frederick Waterman, Justice of Appeal. (ag.),

1999: December, 17th.

2001: September, 10th.

Mrs Sally Comissiong for Appellant.

Mr. D. Saddler for Respondent.

DECISION

The appellant was convicted on November 27, 1997 on an indictment charging him with having unlawful sexual intercourse with a girl under the age of fourteen years, contrary to section 4(1) of the Sexual Offences Act, Cap 154. He was sentenced to 5 years imprisonment on December 11, 1997.

The Crown's case against the appellant was that at about 4 p.m. on July 13, 1995, the complainant was at her aunt's house at No. 6H Wotton Terrace, Christ Church, situated next door to where the appellant was at house No 6G. He shouted at her and told her to come to him. She refused to go. As she was leaving her aunt's house, the appellant held her by the hand and pulled her into the house at No. 6G, and despite her objections, he dragged her up the stairs into a bedroom and had sexual intercourse with her.

The complainant had known the appellant for about 7 months before the day of the encounter. Later that day, the matter was reported to the police.

Rommell Holder, aged 13, testified that he saw the appellant pulling the complainant into the house and taking her upstairs into a bedroom while she was struggling to get away. He later saw the complainant crying while the appellant was in the bedroom with her.

Steven Chase testified to the effect that the appellant was his friend and that he had known him as Lammy for about 2 years. At about 4 p.m. on July 13, 1995, he was at Wotton Terrace at another friend's house. His friend was standing at the top of the stairs and he beckoned him to come up quietly. His friend took him to a bedroom door which was not fully closed and pointed towards the inside. He saw the appellant lying on the complainant and she was telling the appellant to get up, which he did. Shortly after, he and his friend entered the bedroom and he saw another person having sexual intercourse with the complainant, when that person was finished, the appellant then went and had sexual intercourse with the complainant.

Steven Chase further testified that at some stage he went and sat next to the complainant on the bed close to her feet.

David Kirton, father of the complainant, testified that on July 13, 1995, he went to Wotton Housing Area to speak to his son. While there he saw the complainant's aunt who spoke to him and he then went over to the house at Block No 6G. After calling for his daughter several times, he heard her saying: "Open this door for me and let me get out of in here". When the door was opened he saw his daughter standing in the doorway crying. He asked her what had happened and she told him that Lammy had "interfered" with her. After that, he took her to Oistins Police Station where he made a complaint.

On July 14, 1995 he accompanied his daughter to Oistins Police Station to attend an identification parade and was present when she identified the appellant to the police by touching him.

Sergeant Patrick Barrow gave evidence to the effect that when he interviewed the appellant in connection with the report made to the police station the appellant said "I had sex wid she but I ain't rape she," and that during the interview, the appellant gave a written statement that included the following:

"Yesterday afternoon I ... did talking wid a girl by the name of S ... de girl left ... and when she come back she went and sit down in she door ... I then said "S come nuh" and she come and me and she talk and she went and sit back down. I call she again and she come and I tell she come inside ... Me and she then start to make sport by Miss D's door, and I pull she in and shut the door ... I did giving S nuff talk so I tell she to go upstairs in the back room and one thing lead to another and we had sex ..."

The forensic evidence disclosed that there was seminal fluid on the complainant's underwear and that the smears taken from her were positive for human spermatozoa.

At the close of the prosecution's case, the appellant made an unsworn statement the gist of which was that on July 14, 1995, the police came to talk to him about an incident at Wotton. They started to beat and treat me badly before taking him to the police station. They never told him about his rights, but that he had to give them a written statement about the incident. The beatings were severe; they caused him pain, made him cry and he had to sign his name to a statement. He never held sex with the girl.

The grounds filed in support of the appeal are:

1. conviction is unsafe and unsatisfactory
2. the trial Judge erred in law by failing to exercise his discretion in favour of the appellant by not, excluding the written and oral statements of the appellant and therefore withdraw them from consideration of the jury.
3. Sentence is excessive in the circumstances.

Ground 2

The contention in support of this ground is that the appellant was charged on the basis of a complaint made by David Kirton, father of the complainant, to the police to the effect that the appellant had interfered with her.

The trial Judge's directions in respect of "recent complaint" appear at p.8 of the record in these terms:

... in this case, you may well feel that there is no direct evidence of recent complaint. S said that she told her father that the boys interfered with her and the father repeated this. The word interfere can mean anything. However, I must tell you that the absence of recent complaint is not fatal to the case. Section 29 of the Sexual Offences Act Cap. 154 provides as follows:

"Where on a trial of an accused person for a sexual offence, evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission of the alleged offence by the person upon whom the offence is alleged to have been committed, or to suggest delay by that person in making any such complaint, then the Judge shall give a warning to the Jury to the effect that an absence of complaint or a delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and inform the jury that there may be good reasons why a victim of sexual assault may hesitate in making a complaint about the assault.

Chief Justice

Justice of Appeal Justice of Appeal.