BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 57 of 2001

BETWEEN:

KEVIN DALE DECOURCEY PARRIS

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Hon. Colin Williams and the Hon. Frederick Waterman,Justices of Appeal, and the Hon. Peter Williams, Justice of Appeal (Acting).

2002: July 26 and October 16.

Mr. Andrew Pilgrim and Mrs. Peta-GayLee-Brace for the Appellant.

Mr. Eli Edwardsfor the Respondent.

PETER WILLIAMS, J.A. (Acting)

JUDGMENT

Introduction

[1] Kevin Parris, the appellant, wasconvicted by a majority verdict of seven to two of serious indecency undersection 12(2) of the Sexual Offences Act, Cap. 154 on October 17, 2001. Inniss J. sentencedhim on December 10, 2001 to threeyears' imprisonment. His appeal isagainst conviction and sentence.

TheFacts

[2] The alleged offence occurred on November 29, 1997. At the time, the appellant was twenty yearsold and the complainant, thirteen years old. The complainant was a pupil at a secondary school and a member of thehousehold in which the appellant lived. According to the complainant, on the night in question, she was at homealone watching television in her nightdress when the appellant returned afterbeing out with his girlfriend. He placedon [1] the complainant's lap a gun, which she thought was awater gun, but realised that it was not when heshowed her the bullets. He then carriedthe gun back into his bedroom, where he took off his clothes and changed intoshort pants.

[3] The appellant told the complainant thathe wanted "some sex". Hepushed her into his bedroom and onto his bed. He removed his pants and tried to push his penis into her vagina. He stopped, went to a drawer, took out ayellow container and rubbed something on his penis. He inserted his penis into the complainant'svagina, started to make movements, then stopped and went to the bathroom. The complainant alleged that she was scaredand attempted to leave the bedroom, but she was again pushed onto the bed andthe appellant for the second time inserted his penis into her vagina.

[4] The complainant did not report theincident to her father or anyone else living in the house or to her mother, wholived elsewhere. She did, however, relate what happened to her girlfriend,S.B., three days later, on the first day that she returned to school after theholiday weekend. In February 1998, shetold another female student, T.P., about the incident and this led her to speakto her teacher on March 4, 1998. The teacher in turnreported the matter to the complainant's mother on that day and a complaint wasmade to the police.

[5] The appellant denied any knowledge ofthe alleged offence. Further, he stated, that on November 30, 1997,Independence Day, the day after the incident, he invited the complainant to hispicnic at River Bay and sheaccepted the invitation and attended.

TheGrounds of Appeal

[6] It has been argued on behalf of the appellantas the main ground of appeal, that the Judge erred when he told the jury thatthe case was one in

which they had to decide whether they believed thecomplainant or appellant and directed them to determine the appellant's guiltbased on the credibility of the [2] complainant. Mr. Pilgrim, who appeared for the appellantat the trial, submitted that this direction had the effect of replacing thecriminal standard of "proof beyond reasonable doubt" with the civilstandard of "proof on a balance of probabilities" and thereforeconstituted a serious misdirection.

[7] The Judge told the jury (p. 82):

"Thisis a case…where you have basically to decide whom do you believe. Do you believe the accused or do you believethe virtual complainant?".

He later directed them (p. 83):

"Yousaw the complainant give evidence, you saw the accused man give evidence it isa matter for you as finders of fact to determine which one you will believe andwhich one you will not believe".

[8] Mr.Edwards, who did not appear as counsel for the prosecution at the trial, citedto us the case of R v Burton [1922]17 Cr.App.R. 5 CCA. As Lord Hewart, C.J. pointed out, "youmay believe every word for the prosecution and yet (the) appellant may not beguilty". The case notes that,"a statement to a jury, that it is for them todecide 'which side' they believe should be accompanied by a careful directionon the particular facts of the case". In Burton (supra), there was no direction on animportant fact and on the onus of proof.

[9] However,in this case, at the beginning and at the end of the summation, the judge madeit clear to the jury that they must feel sure on the "totality of theevidence" of the guilt of the accused and if they were in doubt as towhether the appellant did commit the act of serious indecency, they should findhim not guilty. Inevitably, the guilt ofan accused in most sexual offence cases, is determined by the credibility ofthe complainant in light of the defence of theaccused within the context of the burden of proof being on the prosecution toprove beyond reasonable doubt the commission of the act complained of and [3] the necessary ingredients of the offence. In light of the careful and full directionsthat the judge gave to the jury, there is no merit in this ground of appeal.

[10] The second ground of appeal was that theJudge failed to direct the jury on how to treat the evidence of the doctor andto distinguish rape from serious indecency. The doctor examined the complainant on March 14, 1998, three and a half months after thealleged offence. The evidence of thedoctor was that the complainant's hymen was not intact and the vaginal orificewas small, approximately 1 centimetre indiameter. He was of the opinion thatpenetration "would be possible". The Judge repeated the doctor's evidence to the jury.

[11] The judge explained the charge of seriousindecency to the jury. The appellant wasevidently originally charged with rape and there was evidence that thecomplainant reported to S.B. that she had been raped. However, the Judge did warn the jury that itwas no part of their business to "get involved with the question ofrape". In view of the emphasisplaced on this ground of appeal, we set out Section 12 of the Sexual Offences Act,Cap. 154.

"12. (1) A person whocommits an act of serious indecency on or towards another or incites another tocommit that act with the person or with another person is guilty of an offenceand, if committed on or towards a person 16 years of age or more or if theperson incited is of 16 years of age or more, is liable on conviction toimprisonment for a term of 10 years.

(2) A person who commits an act of seriousindecency with or towards a child under the age of 16 or incites the childunder that age to such an act with him or another is guilty of an offence andis liable on conviction to imprisonment for a term of 15 years.

(3) An act of 'serious indecency' is an act,whether natural or unnatural by a person involving the use of the genital organsfor the [4] purpose of arousing or gratifyingsexual desire."

It seems to us that the fact thatthe complainant was not examined by the doctor until three and a half monthsafter the incident may have dictated the charge of serious indecency being substitutedfor that of rape. In any event, if theappellant had been charged with rape and the jury were satisfied that theappellant was guilty of the lesser offence, they could have found him guilty ofthe lesser offence: section 36 of theAct.

[12] The jury would therefore have had nodifficulty in understanding the evidence of the doctor or the differencebetween rape and serious indecency. Theappellant would not have been prejudiced in the circumstances of his beingcharged with the lesser offence and the judge's directions being limited tothat offence. This ground of appeal istherefore also rejected.

RecentComplaint

[13] An issue not raised as a ground of appeal,but by this Court in the course of Mr. Pilgrim's submissions, concerns the Judge'sdirection to the jury on the report made by the complainant to herteacher. As we regard this as animportant issue determinative of the appeal, we set out the sequence of eventsfrom the record of the trial.

[14] In the prosecution's opening address tothe jury on the first day of the trial, counsel stated that a few months afterthe incident, the complainant "confided in a friend of hers about what theaccused man had done to her and she also told a friend by the name of S.W. andthey subsequently spoke to her teacher at the school who subsequently spoke to(the complainant's) mother and told her of the incident which was reported tohim by the complainant and a report was made to the police station about thatmatter and investigations began". Counsel for the prosecution should not have presented the evidence ofthe teacher and S.W. as evidence of recent complaints. The depositions of the preliminary inquirywould have disclosed the dates on which the complaints [5] had been made and it should therefore have been recognizedthat the evidence was inadmissible as that of recent complaints.

[15] Recent complaints in sexual cases areadmissible according to the principles laid down in R v. Lillyman [1896] 2 Q.B. 167 CCRas follows:

"Upon the trial of anindictment for rape, or other kindred offences againstwomen or girls, the fact that a complaint was made by the prosecutrixshortly after the alleged occurrence, and the particulars of such complaint, may, so far as theyrelate to the charge against the prisoner, be given in evidence on the part ofthe prosecution, not as being evidence of the facts complained of, but asevidence of the consistency of theconduct of the prosecutrix with the story told by herin the witness-box, and as negativing consent on herpart".

In R v. Osbourne [1905] 1 K.B. 551 at561, the Court of Crown Cases Reserved stressed, "the great importanceof carefully observing the proper limits within which such evidence should begiven…It applies only where there is a complaint…made at the first opportunityafter the offence which reasonably offers itself". Lord Goddard, C.J. stated in R v. Cummings [1948] 1 All ER 551CCA, that it was for the judge to decide "whether the complaint ismade as speedily as could reasonably be expected…There is no one else who candecide it. The evidence is tendered, andhe has to give a decision there and then whether it is admissible or not".

[16] The evidence given on the first day of thetrial of recent complaint was that of S.B. It should be mentioned that the complainant did not give evidence of theparticulars of the complaint she made to S.B. and that S.B.'sevidence of what she had been told by the complainant differed in materialrespects from the evidence of the complainant herself. The judge properly warned the jury (p. 82)that the evidence of S.B. did not amount to corroboration and was "not tobe taken as proof of the offence or as proof that the offence did take placebut only as evidence to show the consistency of (the complainant's)story".[6]

[17] On the second day of the trial, Mr.Pilgrim, who appeared for the appellant, objected to the evidence of theteacher (and S.W.) being given, on the ground that it was not of a recentcomplaint. There then followed lengthy legalargument in the absence of the jury as to the admissibility of the teacher'sevidence. The Judge ruled, in our viewcorrectly, that the complaint made to the teacher did not constitute a recentcomplaint and that evidence of the same was not admissible. However, counsel for the prosecution pointedout that the jury had already heard evidence from the complainant of her reportto the teacher and of the subsequent visit to the home of the complainant'smother. Mr. Pilgrim queried the purposeof the teacher giving evidence. Prosecuting counsel then agreed to "limit" the evidence of theteacher and S.W.

[18] The teacher gave evidence merely statingthat he was a teacher of the complainant and in cross-examination he confirmedthat he had given the police a written statement signed on October 16, 1998. S.W. also gave evidence confirming that shewas a school friend of the complainant and that she had given the police awritten statement signed on April 13, 1998. It follows that theevidence of the teacher and S.W. was of no probative value. There is yetanother twist to this matter: as statedabove, the complainant made the second complaint to T.P. and never gaveevidence of making any complaint to S.W., but it was S.W. who gave evidence,albeit not of a complaint, and it was S.W. to whom the jury had been told inthe opening address that a complaint had been made.

[19] In dealing with the evidence of recentcomplaint, the Judge directed the jury in relation to the complaints to S.B.and to the teacher as follows (p. 87 and 88):

"She spoke to afriend at school…Her evidence was allowed to go in that the complaint to S.B.was a recent complaint. A recentcomplaint that while the virtual complainant may tell someone as soon aspossible after the incident that there are circumstances where she may not tell[7] some person immediately after but if it is recent,within a reasonable time that would still count as a recent complaint. She said she did not tell her father orKevin's mother or her mother at the time because she was afraid but withinthree days according to her she spoke to her friend… Sometime thereafter shethen went to her form teacher…who came to court yesterday I think it was andshe told her form teacher that Kevin had interfered with her. She did not give her form teacher any detailof what happened but she gave the detail to her friend according to her. According to her she said I told hereverything that happened, meaning she told her friend everything thathappened".

[20] In the unfortunate circumstances of noobjection having been taken to the evidence being given of the complaint madeto the teacher and S.W. until the second day of the trial, we have consideredwhat would have been an appropriate form of direction to the jury. The jury should have been directed that therewas no evidence from the teacher himself of a complaint made to him, and thatthe evidence by the complainant of her report to the teacher did not constituteevidence of a recent complaint and should have been ignored. Further, it should also have been pointed outto the jury that while the complainant gave evidence of making a complaint toT.P., she was never called as a witness. In White (Kory)v. R (1998) 53 WIR 293, the Judicial Committee of the Privy Council insimilar circumstances stated that it was necessary for the trial judge to givethe jury a careful direction about the limited value which could be attached tothe complainant's evidence in circumstances where she gave evidence ofreporting the incident to third parties, but they were not called aswitnesses. It was therefore necessary inthis case, for the judge to have made it clear to the jury that the evidence ofthe complaint made to T.P. was of no evidential value in showing theconsistency of the complainant and that what they had heard in the openingaddress for the prosecution was not evidence against the appellant as therewas, in fact, no evidence given by the teacher or S.W. (or T.P.) of any [8] complaint made to them.

[21] It is necessary for the trial judge togive the jury a careful and clear direction on complaints in sexual cases,based on the nature of the evidence presented and the information disclosed ofthe complaints. It is especially importantthat the jury be directed on the evidential value, if any, of what they mayhave heard in circumstances, for example, where the complainant gives evidenceof making a complaint, but the recipient of the complaint is not called as awitness; where the complainant gives evidence of making a complaint and therecipient of the complaint is called as a witness, but gives no evidence of thecomplaint or where the recipient of a complaint gives evidence and makes noreference to the complaint, but the jury is aware that a complaint was made tothe recipient. Similarly, an appropriate warning should be given to the jury incircumstances, for example, where the opening statement of prosecuting counselrefers to a complaint, but objection is subsequently successfully taken to theadmissibility of evidence of the complaint: the jury should be told that theopening statement is not evidence against the accused.

[22] We are of the view that the evidence givenby the complainant of her report made to the teacher and the subsequent visitby both of them to the home of the complainant's mother, could have had adecisive influence on the jury's decision, especially in circumstances where nocomplaint was made to the complainant's mother or father. It is impossible to say that, properlydirected on the evidence of the complaints, the jurywould inevitably have arrived at the same verdict. It follows that in such circumstances theproviso could not be applied.

NoRetrial

[23] Four years have elapsed since the allegedoffence on November 29, 1997 and the appellant was remanded in custody when he wasconvicted on October 17, 2001. We adopt thewords of Lord Diplock in the Privy Council case of [9] Reid v. TheQueen [1980]A.C. 343 at 349 and 350, when he set out the factors to be taken intoconsideration in ordering a new trial and stated, "It is not in theinterests of justice as administered under the common law system of criminalprocedure that the prosecution should be given another chance to cureevidential deficiencies in its case against the defendant". Similarly, in this case, the interests ofjustice do not call for a retrial.

Conclusion

[24] We are ever mindful of our responsibilityin a criminal case, to arrive at a just decision to the appellant as well as tothe person who suffered the crime and to take account of the legitimate concernof the public with the proper administration of justice. The circumstances of this case require thatwe allow the appeal, quash the conviction and set aside the sentence. [10]

Justice ofAppeal

Justice of Appeal Justice of Appeal (Acting)