The Court of Appeal for Bermuda

CRIMINAL APPEAL No 18 of 2015

Between:

AB

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Ms. Elizabeth Christopher, Christopher's, for the Appellant
Mr. Loxley Ricketts and Ms. Karen King, Department of Public Prosecutions, for the Respondent

Date of Hearing: **21 November 2016**

Date of Judgment: **16 January 2017**

JUDGMENT

Sexual offences – admissibility of out of Court complaints – Crown's failure to produce witness - relevance

Baker, President

1. On 10 November 2015 AB was convicted before Hellman J and a jury of two counts of Sexual Exploitation of a Young Person contrary to section 182B(1)(a) of the Criminal Code. He was acquitted of a third offence. He appeals against his conviction.

Facts

2. The facts can be shortly stated. The complainant is the daughter of the appellant. She was seven or eight years old at the time of the offences. She lived with the appellant, first at a house in Cherry Hill when she attended Paget Primary School and later at a home on Friswell's Hill when she attended Victor Scott School.

3. One day when no one was home the appellant told the complainant to lie down on the bed in his room. He removed her pants and had sexual intercourse with her. She started to bleed. She complained it hurt and he told her to be quiet and hit her on the left side of her forehead with a wooden stick. He continued to have sex with her. Her forehead swelled up.

4. He had sexual intercourse on a subsequent occasion, again in his bedroom when no one was home. This time he laid a towel on the bed and told her to lie on it. On this occasion she did not say anything but again began to bleed and the blood leaked on the towel. The appellant put the soiled towel with the dirty clothes.

5. There was a further count alleging that there were other occasions when sexual intercourse occurred in the complainant's bed but the jury acquitted the appellant on this count. The period covered by the indictment was 1 September 2011 to 31 March 2013. The complainant was born on 10 June 2004. So she was just seven or eight at the time.

6. The defence was that the complainant's evidence was a fabrication. The appellant who was of previous good character did not give evidence. However, CD was called by the defence. She was living with the appellant at the time.

7. Ms Christopher, who did not appear for the appellant in the court below, advances three grounds of appeal.

Evidence of complaints should not have been led

8. The complaint is that the prosecution led evidence of the recent complaints or consistent statements to E, (the complainant's brother), to CD, and the complainant's mother and uncle. Section 328 of the Criminal Code provides:

> "The rules relating to evidence of recent complaint are abrogated with regard to sexual offences."

That has been the law since 1993. At the same time s. 327 abolished the requirement of corroboration in sexual cases. The law in Bermuda has followed the law in Canada. The general rule is that evidence of a statement made by a witness on an earlier occasion and consistent with his or her evidence at the trial is not admissible in criminal proceedings. The exceptions are set out in *R v Ay* 1994 Can L11 8749 at para 42, a case in the British Columbia Court of Appeal. The six exceptions are:

(1) Where recent fabrications is alleged

(2) Where the previous consistent statement is admitted as part of the res gestae or part of the narrative.

(3) Recent complaints in sexual cases

(4) Statements on arrest

(5) Statements made on recovery of incriminatory articles.

(6) Statements made with regard to previous identification of an accused.

9. We are not concerned with (4) (5) or (6) in the present case. At para 45 Lambert J.A cited Finlayson JA in the earlier case of *R v F* (JE) (1993), 85 CCC (3d) 457, 26CR (4th) 220, 16 OR (3d) (CA):

> "To qualify as narrative, the witness must recount relevant and essential facts which describe and explain his or her experience as a victim of the crime alleged so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of the proper authorities. In all cases where evidence is admitted under the rubric of prior consistent statements, the trial judge is obliged to instruct the jury as to the limited value of the evidence. *The fact that the statements were made is admissible to assist the jury as to the sequence of event from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look at the content of the statements as proof that the crime was committed."*

10. Ms Christopher submits that the statements made by the complainant to other people should not have been admitted in evidence, although no submission was made the judge at the trial to exclude them, or indeed at a previous trial at which the jury was unable to agree. The complainant was asked whether she spoke to anyone about what had happened. She said she had spoken to her brother E, and to her Aunt F. She showed her brother the towel with blood on it which she got from the dirty clothes, and explained where the blood had come from. When Aunt F was reading her report card she told Aunt F she had to tell her something and started crying. She told her to call her brother, E, and then E told her what the complainant had told him. Aunt F then asked if she wanted her to talk to the appellant or someone else to talk to

him or to call the police. She also said her uncle told her mother and she told her mother when she raised the subject with her.

11. E gave evidence. At the time he gave evidence he was 13 and living with his mother. He had previously lived with his father at Friswells Lane but moved to live with his mother when the allegation of sexual assault arose. E said the subject was raised when he and the complainant were walking home from school one day. He told her that he did not believe her and she showed him the towel from the dirty clothes hamper when they got home. Later when sorting out the laundry he noticed the same red brown marks on the complainant's underwear that he had seen on the towel. On one occasion when he returned from football training E noticed a big bump on the complainant's head. She had ice on it. The first time he asked her about it the appellant was present and she said she had bumped her head on the bathroom wall. Later that night when the appellant was not present she told him that he had hit her.

12. The complainant's mother gave evidence that during the mid-term break in 2013 she questioned the complainant as to why she had been crying and when she told her, her mother called the appellant and said: "I'm going to fucking kill you because you touched my daughter." The appellant replied that he did not know what she was talking about and hung up.

13. CD was called by the appellant. Her evidence differed from that of the victim and E. Her evidence was that the first time she knew of the allegations was when the mother spoke to her on the telephone at the end of the mid-term break. Nothing had been previously said to her by the complainant. There was therefore an issue at the trial when CD was told and what she did. Ms Christopher also makes the point that there was no timeline or precision as to the dates on which the alleged offences occurred and the various conversation thereafter. CD's evidence also figures in relation to ground 8 to which I shall come to in a moment.

14. Ms. Christopher's complaint about the admission of the complainant's previous statements to others is first that they should not have been admitted in evidence at all, and second that having been admitted they should not have included the detail that they did. The judge dealt with it in this way in his summation (p.20):

> "Now, the fact that (the complainant) if you accept that (the complainant) did speak to more than one person about what happened, and that is contested because the defence, say she didn't, what is the relevance of that?
>
> The fact, if you accept it as fact, and it's disputed, that she told people about the incident, doesn't make it any more or less likely to be true. It's not evidence that you can rely on as supporting her account. What, then, is its relevance?
>
> Well, first, its relevance is that it describes the – it's part of the narrative of events, to help you understand how it is that this matter ended up in court.
>
> Second, if you accept that (the complainant) first told (E) and her Aunt (F), that allows you to date when she first told someone, because she says she first told them before she told her mother (name omitted), and she told her mother, I'll go on to remind you, on the occasion when there was what I'll call "the incident about the iPad"—sorry iPod. And the defence say the iPod is very important because (the complainant) was telling lies to get out of trouble. But if she had first brought the allegations to light before the incident with the iPod you may find that relevant in deciding how important the iPod was as a motivating factor for the allegations.

> Of course the defence would say, no doubt, if you do accept … and they say you shouldn't … that she first told (E) and Aunt (F), then when she was…. she told her mother, she was simply recycling old lies. It is a matter for you what you make of that."

15. Mr Ricketts, who appeared for the respondent both before us and in the court below, submitted that the evidence of the complainant's complaints was properly admitted both as part of the narrative and to rebut an allegation of fabrication. As to the former, he submitted that each instance of complaint led to a portion of the narrative that led to the next action in the story. The complainant told her brother and he was shown the towel and the pants; she told Aunt F and this led to confrontation; she told her mother which led to the call to Aunt F.

16. Mr Ricketts referred us to Martin's Annual Criminal Code 2010 at p. 582:

> "The statements of children who have allegedly been sexually assaulted may properly be admitted as part of the narrative in the sense that the statement addresses the story from offence to prosecution or explains why so little was done to terminate the abuse or bring the perpetrator to justice. It is part of the narrative of a complainant's testimony when she recounts the assaults, how they came to be terminated or how the matter came to the attention of the police. This part of the narrative provides chronological cohesion and eliminates gaps which would divert the mind of the listener from the central issue. It may be supportive of the central allegation in the sense of erecting a logical framework for its presentation but it cannot be used and the jury must be warned of this as confirmations : *R v F* (JE) 1993, 85 CCC (3d) 457, 26 CR (4th) 220 (Ont. CA)" Mr

> Ricketts also referred us to the lengthy judgment of Finlayson J.A in that case (*R v Fair*) and in the particular page 23 which is the passage to which Martin's Criminal Code refers.

17. In my judgment the complainant's complaints were properly admitted as part of the narrative. Turning to the second limb of Ms. Christopher's complaint, Mr. Ricketts' response is that when evidence was led in chief the Crown did not trespass into unpermitted detail. The detail was only brought out in cross-examination. I have read carefully the transcript of the evidence of the complainant and am satisfied that this is so. For example she was asked in cross-examination whether she told her brother that her father had hit her with a stick. The details of the complainant's account were explored in some detail in cross-examination (see e.g. E's evidence pp 50/51) in order to show inconsistencies in the complainant's account and the judge referred to this in his summing up (see pp 39/40).

18. The second ground for admitting previous complaints was to rebut fabrication. In this regard there was evidence that the complainant had taken an iPod from her father's house with her to her mother's and had lost it, and that this may have motivated her complaint. Ms. Christopher submitted that this was only raised in cross-examination after the evidence of the complainant had been led in chief. The answer to this is that there had been an earlier trial at which the jury was unable to agree. The iPod was in issue then and the Crown was seeking to rebut this allegation. Of more force in my view is the point that there was no clear evidence of when the incident with the iPod occurred. However, it is unnecessary to explore this further as the evidence was properly admitted as part of the narrative.

19. Allegations were made on behalf of the appellant that Mr. Holder, who represented him at the trial, and indeed at the earlier trial, was inexperienced and incompetent. He gave evidence before us and said he did not consider

objecting to the complainant's evidence of complaints. Since the evidence was admissible he cannot be criticised for not taking the point.

20. Ms. Christopher next criticises the judge's summation, submitting that the judge erred in directing the jury as to the use that could be made of the victim's previous consistent complaint. She referred us to *R v Louie* 2014 SKCA 107 para 12.

> "However, it is not the admissibility of the statement but rather its use which is in issue. The prior consistent statement may be used in assessing the truthfulness and credibility of the witness but it cannot be used to corroborate the allegation that an offence was in fact committed. A prior consistent statement which is admitted under one of the exceptions is not admissible for the truth of its contents. The fact the complainant stated in the past that a crime has been committed does not prove that a crime has, in fact, been committed. (See *R v Bisson*, 2010 ONCA 556 (Can LII) 258 CCC (3rd 338).

21. The judge gave an appropriate direction at p. 20. But it is what he went on to say at p.33 that gives rise to this complaint. When he had completed summarising the evidence of the complainant he went on:

> "When you're considering whether or not you're sure that it is true, one of the things you'll look for is whether there is anything, any evidence to corroborate what she said; that is evidence which is independent of her and which, if you accept it, is capable of supporting the truth of what she said in any particular respect. And bear that in mind when we come to consider (E's) evidence, which is what I am going to remind you about next."

It is submitted that this could be interpreted by the jury as meaning that what she said to E supported the credibility of her allegations. But it is necessary to look at what the judge went on the say very shortly afterwards at p.35.

> "(E) said the (complainant) showed her [sic] a towel. That was when they got home and he told her that he didn't … and when he told her that he didn't believe her. The towel came from the hamper of dirty laundry. There were red and orangey marks on it and brown marks. The orange marks looked like dried blood and the brown looked like dirt. The orange marks also smelled like blood.
>
> If you accept that that evidence is true, then that would support (the complainant's) account that she bled onto a towel. You would then have to ask yourself whether there might be another innocent explanation for the bleeding"

22. In my judgment the judge was there inviting the jury to consider evidence that might corroborate the complainant's account, i.e. showing the blood-stained towel, and this ties in with his opening words in the previous passage of looking for evidence to corroborate what she had said. I do not regard this as improper use of the previous complaint as described in *Louie*, and I am satisfied that on examination, there is nothing in this ground of appeal.

Failure to call GH

23. This ground of appeal alleges:

> "The trial of this matter was unfair as the prosecution failed to call the witness (GH) who was called during the first trial of this matter, and between her evidence there and her statement to the police provides an alternative explanation for staining of the underpants/towel. This issue is particularly important as no medical

> evidence was led as to the significance of what was allegedly observed by the other witnesses. Furthermore, the appellant should through cross-examination of her have had the opportunity to show contamination of the child witness."

24. GH made a statement to the police in July 2014. She is the godmother of the complainant. She had an active relationship with her when she was in her mother's care, but not when she was in her father's care. At the end of February or beginning of March 2013, over a three week timescale, she had reason to inspect the complainant's pants and vaginal area. She thought she may have started her period. She also thought there was a yeast infection. The statement also contains hearsay evidence that the complainant's mother told her that the appellant had interfered with the complainant. It also contained a good deal of other hearsay evidence including Ms. H's efforts to get members of the family to press charges against the appellant. For six months between June and December 2013 she had no contact with the family. Thereafter, she did not touch on the subject with the complainant until the day before the complainant made her police statement. She also says that, as of 11 July 2014, the complainant had not started her periods. Finally in the statement she said that on an occasion some time after the complainant's interview with the police, but she couldn't remember when, she played a song in the victim's presence. "Daddy don't touch me there."

25. GH was called by the Crown in the first trial. She was not called in the re-trial; initially defence counsel was told that travel arrangements had to be finalised and then he was told there were health issues. He finally learned she was not coming at the end of the prosecution case.

26. The law is set out in *R v Russell-Jones* [1995] 1 Cr App R 538. In summary: (1) Witnesses who are on the back of the indictment or, as in this case, had been called at an earlier trial, ought to be at court if the defence want those witnesses to attend. (2) The prosecutor has a discretion whether or not to call them to testify, depending on the particular circumstances of the case. (3) The discretion is not unfettered, and must be exercised in the interests of justice (4) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case, although normally all such witnesses should be called or offered to be called. (5) The prosecutor is the primary judge of whether or not a witness to the material events is credible or unworthy of belief. Thus a prosecutor will not be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies.

27. Mr. Holder's position at the trial was that he was expecting Ms. H to give evidence and only learned at a late stage that she would not be attending. He anticipated cross-examining her as he had done at the first trial. He took no steps to press for her attendance or suggest to the judge that she was an important witness. Mr. Ricketts submitted to us that she was not important to the unfolding of the narrative; other witnesses spoke of facts that she observed. She was not necessary to prove primary facts. Furthermore, much of her witness statement was hearsay. Mr. Holder, he said, could get what he wanted from other witnesses.

28. Had Mr. Holder said that he wished Ms. H to attend, which he did not, the prosecution would have been obliged to bring her to court, assuming she was fit to come or not abroad. Had it been impractical to get her to court the judge would have had to decide whether to adjourn the trial or go on without her. As her evidence was peripheral, it seems to me

virtually inevitable that the trial would have gone on without her. In the absence of an opportunity to cross-examine her I cannot see that the defence would have wished for her statement (edited to omit hearsay) to be read. That Mr. Holder did not raise with the judge the issue of her absence may have been from his inexperience, but it seems to me that there were risks in having her give evidence as well as any benefits to the defence that may have been gained from cross-examination. She was obviously hostile to the appellant in cross-examination at the first trial. She said she had told the appellant when he was off the island that he could safely come back because the complainant's mother was not pressing charges. This was untrue because she knew she was pressing charges and that the police wanted to see him. She said he would not have returned had she told him the truth.

29. When Mr. Holder gave evidence to us, it appeared that he was not aware of, or did not appreciate, the options open to him when he was told that Ms. H would not be giving evidence. Other more experienced advocates might well have decided that taking no action, which was the course followed by Mr. Holder, was, on reflection, the appropriate one. In my view, the absence of Ms. H does not prejudice the safety of the conviction.

Failure to put the discharge summary before the Court

30. This ground of appeal alleges:

> "Counsel for the appellant erred in failing to put before the court the discharge summary referred to by the witness (CD) in evidence which tends to show that (the complainant) had an infection not necessarily consistent with sex, but explanatory of symptoms that the witnesses were describing. In the absence of same the witness (CD) was discredited, leaving intact the

> evidence of (the complainant) that Ms. D knew that the appellant was interfering with (the complainant)."

The document in question is dated 27 February 2012 and indicates on its face that the complainant attended the Lamb Foggo Urgent Care Centre on that date, that she was attended by John Prinsloo complaining of vaginal discharge and that candida vulvoganitis was diagnosed for which she was prescribed cream to apply to the affected area twice a day. The document was in the defence possession during the first trial but, according to Mr. Holder, he missed the opportunity to introduce it into evidence in the first trial and overlooked it during the second trial too.

31. The complainant was not asked anything about this in her evidence, although she did say Aunt F took her to the doctor after she told her what the appellant been doing to her, before she told her mother. However, CD was asked. Although, she gave no date or approximate date, she said she took the victim to the Urgent Care Centre in Southside because her private parts were itching. A doctor, examined her, said she had a fungal infection and gave her cream to apply. The problem cleared up within a week. In cross-examination she was given a discharge paper. She agreed she had asked the doctor whether it looked as if the complainant had been interfered with but denied she knew what was happening to her. She said she told the complainant's mother about the visit to the doctor, but that was not until long after the allegations had been made. She was further cross-examined about where the discharge sheet was and whether she had promised to show it to the victim's mother. She replied she had made no such promise and did not know where the discharge sheet was. She said it did not alarm her that the complainant had had a fungal infection; it was treated and that was it.

32. Why the discharge document was not put to her in re-examination is unclear. Had it been it might have supported the credibility of Ms. D by showing that the complainant was indeed taken to the Urgent Care Centre, but it would also have shown that this was in February 2012, a year before the complaint was made to E when he was shown the soiled towel/underpants. It was not, as Mr. Ricketts pointed out, a medical report and would not have assisted about any conversation between Ms. D and the doctor. GH would not have helped directly about the visit to the Urgent Care Centre because her evidence about washing appropriately and the discharge in her pants related to a year later.

33. It is true that the complainant's mother said in her evidence that she pressed CD for the documentation relating to her having taken the victim to the doctor and did not receive it but it seems clear from Ms. D's evidence that this was in 2013 and not the visit to the Urgent Care Centre on 27 February 2012.

34. In my judgment, introduction of the discharge document would have done little to advance the defence case. Poor personal hygiene on the part of the victim was plainly before the jury. The judge referred to it at page 47 of his summation and that it was a possible explanation for the brown stains on her pants. The discharge document is in my judgment some distance removed from the primary facts of the case. Whilst it was probably an error on the part of Mr. Holder not to have sought to introduce it, I cannot see that its absence threatens the safety of the conviction.

Conclusion

35. The case against the appellant turned ultimately on the evidence of the complainant. It was, however, corroborated by the marks on the towel

and the pants and the bruise on the complainant's forehead that E observed. The complainant's evidence was unchallenged by the appellant. He was of course entitled not to give evidence, and the fact that he chose not to cannot be held against him. On the other hand the result is that there was nothing from him to refute or deny what the complainant said. In my judgment the conviction is safe and I would dismiss the appeal.

Signed

Baker, P

Signed

Bell JA

Signed

Bernard, JA