

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 5 OF 1991

BETWEEN:

ST. CLAIR SIMON

Appellant

and

THE QUEEN

Respondent

Before: The Honourable Mr. Justice Byron - President
The Honourable Dr. Nicholas Liverpool - Justice of Appeal
The Honourable Mr. Justice Singh - Justice of Appeal

Appearances: Mr. K. Foster and Mr. V. Bird for the Appellant
Mr. Maurice James D.P.P. (Ag.) for the Respondent

1992: November 26th

JUDGMENT

BYRON, J.A.

The appellant was convicted on the 12th day of June 1991 on two counts of rape, and assault occasioning actual bodily harm after a trial before Redhead J. and a jury.

The main grounds argued on this appeal were that the judge failed to give any adequate and sufficient warning to the jury that it was dangerous to convict on the uncorroborated testimony of the complainant because she was a child of tender years, and that the appellant was prejudiced by the judge's failure to direct the jury to consider the complainant's admissions about herself in determining her credit worthiness.

It was the prosecution's case that the complainant was the 13 year old daughter of the appellant. For most of her life she had lived with her grandmother and went to live with her father a few months before the alleged incident. Her father and mother do not live together. She complained that the appellant had sexual intercourse with her without her consent on the evening of the 9th November 1990 and again on the afternoon on the 10th November 1990. The appellant denied the allegations and insisted from the very beginning that the story was a complete fabrication.

The appellant sought to show at the trial that the evidence given by the complainant was completely unreliable, and pointed to several issues in the trial to make that point.

The complainant had said that she bathed after each of the two alleged incidents of intercourse with the appellant and she saw something white coming from her vagina. She said that these were the only occasions on which he had ever made any sexual advances on her. The medical evidence was that on her examination made 1.30 p.m. on 12th November 1990, there was no external vaginal injury, no obvious presence of semen, no contact by men and no evidence of recent rupture. The doctor concluded that it was likely that she had previous sexual intercourse from her accommodation of his two-finger examination.

But in her testimony, the complainant admitted that she had had boyfriends. The appellant contended that the medical evidence when coupled with these, and other factors, was incapable of supporting the proposition that the complainant had sexual intercourse with him at the times she alleged or at all.

The complainant admitted that her father was strict and insisted on her returning home immediately from school, doing her homework, not going to parties, that he complained of her seeing her boyfriends, that he has beaten her by way of correction and imposed other forms of punishment, such as restricted viewing of the television, and withdrawal of reading material except school work and the bible.

The appellant contended that these were reasons why she wished to escape from his parental care and her evidence should be regarded as a fabrication to achieve that objective. She also admitted that she has run away from home before.

In her account of the events of 9th and 10th November she also stated that on the 10th November 1990 after the first assault, she went out to the shop to buy foodstuffs, and walked by the police station but that she did not make any complaint then, because she was afraid. This of course raised the question of her consistency as to whether any incident took place on the 9th November as she alleged.

It was admitted that on the evening of 9th November the complainant came home from school late, and when her father berated her she gave him the explanation that she had been in detention. He did not believe her and the incident that ensued involved, beating her, imposing further punishment including not being able to watch television. Searches through her school bag revealed extra clothing and some love letters written to boyfriends, and a letter written by the complainant to her mother stating her intention to run away from her father's home.

The appellant called the headmistress of the school as a witness and her evidence was that although the complainant was listed for detention she did not attend the detention. It was the complainant's story that after this incident the rape occurred. On the other hand the appellant urged that this proved her to be untruthful and was strongly supportive of his contention that the word of the complainant could not be relied on, and her whole story was fabricated to help her get away from him.

The appellant complained that his defence was based on showing that the complainant was not a witness whose evidence could be relied on and that it was incumbent on the judge to have given the jury directions on the issue of her credibility in relation to her testimony on these circumstances. The judge had told the jury: -

"The fact that Cyrilla Simon ran away from her father's home has nothing to do with this case. The fact that she ran away from her mother's home has nothing to do with this case. The fact that she was writing love letters to boys has nothing to do with this case. If you find that she had more than one boyfriend it has nothing to do with this case. Most of these things she admitted she admitted in cross-examination. Even if you find that she is precocious, that is not the issue. Even if you find that she is a loose little girl that is not the issue. What is the issue? Whether her father had sexual intercourse with her on the evening of 9th -10th November, 1990 and he did so without her consent. That is the issue."

It was true that if the jury believed that the appellant had sexual intercourse with the complainant without her consent, the offence was committed, and her antecedent character was irrelevant to the issue of the appellant's guilt or innocence. These directions however, could have caused the jury to conclude that they were not to take the issue of her character into account in determining whether or not she was a witness of the truth. It was important for the learned trial judge to have invited the jury to take those factors into account in deciding whether to believe her when she said that the appellant had sexual intercourse with her.

The learned trial judge quite correctly told the jury that there was no corroboration in this case, and that it was therefore dangerous to convict on the uncorroborated testimony of the complainant but that if they came to the conclusion that she was without doubt speaking the truth the fact that there was no corroboration does not matter and they were entitled to convict on her evidence alone.

Whenever a judge is required to give such a warning he must indicate to the jury the reasons for the warning. As Lord Ackner said in **R v SPENCER** [1987] A.C. 128 @ 140: -

"The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance."

In this case one of the reasons why it was dangerous so to act was the tender age of the complainant.

In the **STATE v KELLMAN** [1975] 26 W.I.R. 438: Haynes J.A. stated that: -

"In sexual cases it has been recognised that danger exists that a false accusation could be made from a variety of causes such as sexual neurosis, jealousy, fantasy, spite etc., whilst the very young could be not only unreliable or inaccurate, both prone to be over imaginative or susceptible to the influence of third persons."

And he went on to state the principle thus: -

"It was obligatory on the trial judge as a matter of law to warn the jury in terms, or effect, that in the eye of the law it was dangerous or unsafe to convict on either count on the uncorroborated evidence of Carol or Barbara for two reasons: firstly, because the charges were sexual offences; and, secondly, as each girl was regarded by the common law as a child 'of tender years'."

In the same case Luckhoo J.A. stated at p. 453: -

"In law, a warning of the danger of acting on the uncorroborated evidence of children is just as necessary to be specifically stated as it is likewise to say that in all charges of sexual offences it is not safe to convict on the uncorroborated testimony of the complainant, but that they may do so if satisfied of its truth."

In this case the learned trial judge omitted to draw to the attention of the jury the special need for care when assessing the evidence of the complainant because of her tender age. Counsel for the appellant relied on the recent case of **NELSON ABRAHAM v THE QUEEN** (St. Lucia Criminal Appeal No. 4 of 1991) where this Court ruled that such an omission constituted a serious error. The learned D.P.P. conceded that this was a fatal omission. In the

absence of corroboration the jury were left to determine the case purely on the allegations of the complainant and the denial of the appellant. Of course there were the issues raised by the appellant to cast doubt on ~~her~~ credit worthiness, but these the judge, in effect, told the jury not to consider. Although the jury could properly have convicted if they believed the complainant it was important for their attention to have been focussed on the fact that her testimony bore the double hazard of being that of a complaint in a sexual case and that of a child of tender years.

In such a case it is "obligatory" for the trial judge to warn the jury that it was unsafe to convict for those two reasons and this he failed to do. In the circumstances we could not allow the conviction the stand.

For the reasons above-stated I would order that this appeal be allowed, that the conviction be quashed and the sentence set aside.

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C. M. D. BYRON
Justice of Appeal

I concur.

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DR. NICHOLAS LIVERPOOL
Justice of Appeal

I concur.

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SATROHAN SINGH
Justice of Appeal