

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2017/0014

REGINA

V

FRANKLYN PERKINS

APPEARANCES

Mr Kenroy Hyman and Ms Korah Galloway for the Crown.

Mr David Brandt for the defendant.

2017: DECEMBER 01

RULINGS

On admissibility issues in a trial on indecent assault

- 1 **Morley J:** This case is an allegation of indecent assault. Application has been made by the defence concerning three features of evidence. I have already orally indicated my decision on 28.11.17 and have promised written reasons, which these are.
- 2 The defence want the Crown to be required to call the defendant's wife, exclusion of the detail of the recent complaint, and no reference to the complainant's demeanor.

- 3 Dr Perkins, 67, is accused of indecent assault on a patient, LD¹, aged 19. During a routine examination on 23.02.17 for a medical certificate to secure a work permit, it is said he asked to hug LD, and then he felt up her bottom, breasts, thighs, kissed her neck, and sniffed at her breasts, placing his head on her chest. LD did nothing in response, at one point closing her eyes hoping the groping would stop. Dr Perkins says there was nothing more than a consensual hug, which she had offered. When she left, she immediately gave a detailed description of what happened to her boyfriend, and her demeanor was observed on her return to work to be upset.

Cynthia Perkins

- 4 Dr Perkin's wife, Cynthia Perkins, is his secretary. As part of a through investigation she gave a statement, dated 27.02.17. In it, she said that in reception, before and after LD's appointment, there were other patients present, denied by LD and her boyfriend Brandon Chambers (who had accompanied her and waited). Cynthia had been a witness named on the back of the indictment, and the Crown has given her away, as she is inconsistent with its case, and on reflection, ought not to have been a Crown witness, being therefore required to give evidence in its case against a spouse. The defence want to compel the Crown to call her, so they can cross-examine her, as a witness of truth offered by the Crown, to offer points of detail at odds with LD, and to extract no doubt a glowing testimonial of her husband.
- 5 In **R v Olivia 1965 1WLR 1028**, Lord Parker CJ considered the duty of the Crown to call a witness named on the back of the indictment. He opined that the Crown had a discretion which it must exercise in a manner which would further the interests of justice and be fair to the defence, and in so doing had to call all witnesses whose evidence was capable of belief even if their evidence is inconsistent with the case the Crown seeks to prove. If the judge considers that the prosecution had exercised its discretion for 'oblique motives', s/he has the ultimate sanction of calling the witness herself.
- 6 In this case, I do not consider there are oblique motives nor it unreasonable not to require the spouse as part of the Crown case. I can also see why the Crown would say on its case

¹ LD is not named in this written ruling, to be published, as to do so would breach her right to anonymity as a complainant in a sexual offence.

analysis that Cynthia is not credible on there being others seemingly in reception, and so cannot be presented on its case as entirely a witness of truth. Not all witnesses gathered in a thorough investigation must be called, and it will happen from time to time that as a case proceeds to trial the Crown will review on whom it will rely. The Court expects however that all statements will be disclosed (subject to established exceptions). Balancing the interests of justice, I consider there is no unfairness to the defence in Cynthia not being a Crown witness because the defence can still call Cynthia in support, if it considers her evidence important, and indeed did subsequent to my oral decision. I therefore rule that the Crown is not required to call her as part of its case and has acted correctly within its discretion.

Recent Complaint

- 7 Leaving the surgery, LD said to her boyfriend that the doctor had touched her up, and in the car before driving gave the detail of what happened. Her complaint was 'recent', indeed immediate, and is admissible from her boyfriend, as an exception to the rule against hearsay.
- 8 This exception is articulated in **Archbold 2004² para 8-103**. In **R v Lillyman 1896 2QB 167**, it was held that the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may so far as they relate to the charge against the defendant be given in evidence by the prosecution, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as tending to negative consent. The mere complaint is not evidence of the facts complained of.
- 9 The defence had asked for the details of the complaint to be excluded, as creating a risk that repeating her testimony through her boyfriend will be thought by the jury to be evidence of the truth of what was said. However, the jury will receive a direction on how a record of what was said does not make it true, and that the relevance of the details is merely to show consistency,

² In 2003, in the UK the then new *Sexual Offences Act* was there introduced to England and Wales (EW), creating a divergence in the applicability of sexual offence law between EW and Montserrat. Therefore, the old EW law is often referenced in argument, and therefore to Archbold 2004 as it was the last year the law on sexual offences was consistent.

and to tend to negate consent. Because the whole point of recent complaint evidence is to put in the details for consistency, the defence application to exclude is refused.

Demeanour

- 10 On returning to the office, unlike how LD had been fine going to the medical appointment, LD's co-worker Sharmen Williams observed, as per her statement of 01.03.17, that LD 'didn't not look very happy, she looked very sad'. In **Archbold 2004**, at para 20-32, it is said that general evidence of the demeanour of the victim of an alleged offence after the occasion of the alleged offence is inadmissible for the purpose of supporting the veracity of his or her account. Such evidence should only be admitted where there was some concrete basis for regarding the demeanour as confirming or disproving that sexual abuse had occurred. In this case, there is a concrete basis, namely there was a recent complaint, so that the evidence of demeanour was consistent with it, and is admissible as tending to prove at least something had happened, though does not prove exactly what. It will be for the jury to determine what that something was. The evidence of demeanour is admissible, (and I note that since my oral ruling, the evidence at trial of Ms Williams was that LD seemed 'perturbed and nervous').

The Hon. Mr. Justice Iain Morley QC

High Court Judge

1 December 2017