

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr.A. No. 26 of 2001

BETWEEN

EARLE CHARLES

APPELLANT

AND

THE STATE

RESPONDENT

**Panel: R. Hamel-Smith, J.A.
L. Jones, J.A.
A. Lucky, J.A.**

Appearances

**Mrs. P. Elder for the Appellant
Miss J. Charles for the Respondent**

Date: January 17, 2003

JUDGMENT

R. Hamel-Smith, J.A.

1. The appellant was charged for rape of his daughter, PF on April 6, 1997 at New Grange Tobago. He was found guilty and sentenced to 12 years imprisonment.
2. The case for the prosecution was that PF who was 17 years old at the time lived at the home of the appellant and her stepmother. On the day in question, the stepmother left for church and PF was in her bedroom ironing a blouse to wear to church. She was clad in a bra and panty only. The appellant entered the room and PF immediately pulled a towel around herself. He sat on her bed and then asked her to “*give daddy a kiss*”. He tried to put his tongue into her mouth but she pushed him off. He then told her that he was her father and that he was entitled to get a “*piece*” before anybody else. He pulled her into his bedroom, pushed her on the bed and pulled out a condom. He enquired of her whether she knew the purpose of the condom. She did not. He said he would show her. He put it on and proceeded to have sexual intercourse with her. Upon withdrawal, he realised that the condom had come off during intercourse. PF went into the bathroom and removed it from her vagina.
3. She was a student at the time and on the following day she spoke to John Arnold, a teacher at her school but it was not until April 24 that a report was made to the police. Dr. Melville examined her shortly after that report was made and his examination revealed increased redness and bleeding from a lesion. There were no bruises but her hymen was not intact. At the trial, the doctor could not say precisely when the entry was made but he estimated that it was about two weeks prior to his examination. That would have put the entry quite close to the alleged date of intercourse.
4. The case for the appellant was a complete denial. He did not challenge the act of rape but claimed that he was elsewhere at the time. He called one witness who said that on the day in question he was at his garage repairing his vehicle. The appellant said that he had left home on the Saturday evening and had returned home on Sunday evening at 6.30. His witness said that the appellant was at his garage from 7.30 am to 8.00pm on the Sunday *rubbing down* his vehicle and painting it.
5. The main issue in the case was whether the victim was telling the truth when she said that the appellant was the one who had raped her on the day in question. It was a matter of credibility. No issue was raised with respect to the act of rape itself. The case for the defence was one of fabrication. It was suggested to the victim in cross-examination that she was having a relationship with her teacher, Arnold, and that her

stepmother had admonished her in the appellant's presence on one occasion. The clear inference from this line of cross-examination was that the appellant and his wife did not approve of the relationship and this confrontation provoked the victim into fabricating the case against the appellant.

6. At the end of the day the case turned on whether the jury accepted the appellant's alibi or rejected it. If they accepted it then that was the end of the matter. If they rejected it, then it was open to the jury to believe what the victim had said and find the appellant guilty. From the verdict it is clear that they did not believe that she had fabricated the case against her father and that he was indeed at home at the material time.

7. Given the issue in the case, apart from the general directions including those on the onus and burden of proof, the trial judge had to direct the jury on the question of alibi and, since the appellant raised the issue of good character, on that issue also.

8. The appellant raised several grounds of appeal. In ground 1, the appellant complained that it was improper and prejudicial for the trial judge to direct the jury on the absence of motive as to why the victim would lie on the appellant. The direction created the risk, counsel submitted, of reversing the onus of proof and deflecting the jury's consideration from the issue of credibility. Counsel relied on the authority of *Palmer v R* vol. 72 ALJR 254; (1998) Vol.1 193 CLR 1.

9. The facts in *Palmer* are different from those in the instant appeal. There, the issue was whether it was permissible for the prosecution to put certain questions to the accused to show that the accused could not prove any ground for imputing to a complainant a motive to lie. Counsel for the accused had put to the victim in *Palmer* that the charge was *some sort of pay back on him for some indiscretion he did not even know about*. In other words, he was suggesting some sort of motive on her part. She simply answered that she was not lying. In cross-examination of the appellant, the prosecution referred to the above line of cross-examination, suggested to him that the incident occurred exactly in the way the victim had testified and concluded by putting to the accused that *'as you sit there today, you can't think of any reason or anything you have done to her...as to why she would make this up?'* The accused replied in the negative.

10. The High Court expressed the view that it was one thing to permit cross-examination of a complainant in order to elicit a motive to lie but that it was another thing to permit cross-examination of an accused to show that he could not prove any ground for imputing a motive to lie to the complainant. In summary, the court expressed the view that the latter knows whether she has a motive to lie or not and there is nothing objectionable in probing to elicit evidence of such motive to impeach her credibility. The same cannot be said of the accused. The fact that he has no knowledge of any fact from which a motive of the kind imputed to the complainant might be inferred is irrelevant. That lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie. The Court held that if it were permissible generally to cross-examine an accused in that way, especially in cases where it is *oath*

against oath, it would be to invite the jury to accept the complainant's evidence unless some positive answer to that question is given by the accused.

11. In the instant appeal, the complaint is aimed at the directions given by the trial judge when he told the jury to "*ask yourselves in a case like this, has any reason been advanced as to why this 17 year old girl would set up her father?*" Such a direction, she contended, had the effect of reversing the onus of proof onto the accused in that if no reason were advanced the evidence of the victim should be accepted.

12. We agree with what has been said in *Palmer*. An accused has nothing to prove and is entitled when cross-examining the virtual complainant to test her credibility by probing to see whether she had any motive for her accusation. He may or he may not be successful but he is not required to lead evidence to support his suggestions. If he does not, he runs the risk that since the suggestions made to the complainant are not *evidence* the jury will ignore them. On the other hand, a trial judge is entitled to warn the jury that the suggestions are mere allegations and serve no useful purpose. And in that context he is entitled to direct the jury that there must be *evidence* of motive if they are to consider that issue. Accordingly, the direction complained of in the instant appeal cannot be taken in isolation. It must be looked at in its context. The trial judge was in the course of dealing with the evidence of the victim and in particular her cross-examination. He reminded the jury that the case for the prosecution depended on the testimony of the victim and they had to be sure that she was speaking the truth. It was a short trial and the jury would have had all the evidence clearly in mind. He reminded them that a lot had been said about the events after the alleged commission of the offence on April 6 but explained to them that victims of rape would necessarily react differently e.g. as to whom and when they report the offence. He reminded them that the victim was a mere 17 years of age and they were not to speculate on why she did not report it e.g. to the principal or vice principal. The fact was, he told them, that she reported it to Arnold, her choir teacher. He urged them also not to speculate why Arnold did not immediately report it to the police. The fact was, he reminded them, that it was reported on April 24 which was not challenged and that was the *evidence* they had to consider.

13. The trial judge then turned to the cross-examination of the victim and reminded the jury that it was suggested to her as a possible motive that she was having a relationship with Arnold. The victim rejected that suggestion and the judge directed the jury that there was no *evidence* to the effect that she was having such a relationship. He warned them that suggestions and innuendos did not constitute *evidence* in the case. He then directed them that since the suggestion was that she had some motive to set up her father, they should, in assessing the *evidence*, look to see if they could find any reason from the *evidence* as to why the victim would set up her father.

14. It was, in our view, given the way in which the appellant conducted his defence, a legitimate question for the jury to consider. The appellant did not simply rely on his alibi. It was plain that he was suggesting that her motive was to set him up because of his (and her stepmother's) objection to her relationship with Arnold. The appellant had given evidence at the trial but refrained from touching that issue altogether. Arnold was also

called on behalf of the prosecution but no attempt was made to suggest to him that he was having a relationship with her. The attack therefore was to discredit the victim with wild suggestions that had no foundation at all and the trial judge was entitled to direct the jury not to speculate but to consider the *evidence* in the case only to determine if there was credible *evidence* on motive that would undermine her evidence. He reminded them that the suggestions were not *evidence*. We think that in a case of this nature it is quite in order for a jury to consider the question of motive to test the victim's veracity as long as the trial judge does not lead them to believe that there is any onus on the accused to prove motive.

15. We are satisfied that taken in its proper context, no question of reversing the onus of proof arises, as contended for by counsel. The trial judge had made it quite clear that there was no onus on the appellant to prove anything. In our view, where an accused attempts to discredit a witness by making unfounded allegations that are denied, the jury must be cautioned that for the purpose of marshalling and finding the facts, allegations per se are not *evidence* and, accordingly, in the instant appeal, before making a finding of fact on motive it had to be satisfied that there was clear *evidence, and not mere suggestions*, to support the finding. On the other hand, had the appellant produced *evidence* of motive the trial judge would have been obliged to direct the jury to consider that evidence in assessing the victim's credibility. It would not have been a question of reversing the onus in those circumstances but simply that the appellant was entitled to test her credibility by such evidence. Equally so, when the appellant made allegations of motive, the trial judge had to warn the jury that before considering any question of motive there had to be *evidence* and not simply allegations. We would dismiss this ground of appeal.

16. In ground 2 counsel for the appellant contended that the directions on alibi were deficient in that they failed to inform the jury that if they rejected the alibi they still had to consider the possibility that the appellant had not committed the offence but had produced a false alibi simply to strengthen his case. She contended that the trial judge had to warn the jury that an accused may for varying reasons that he may not wish to disclose put forward a false alibi and he was not to be convicted for lying, if they found that he was.

17. There has been no complaint about the directions that were in fact given by the trial judge. They were fair and adequate in our view. The direction contended for by counsel is one that is usually given when the issue of identification arises and the prosecution seeks to use the lie in support of identification. In those circumstances, the jury must be warned that (i) the lies must be deliberate and relate to a material issue and (ii) they must be satisfied that there is no innocent motive for the lie, and the trial judge must direct the jury that people sometimes tell lies, e.g. in an attempt to bolster a good cause, or out of shame, or out of a wish to conceal disgraceful behaviour.

18. In the instant appeal, the appellant claimed that he was at the garage repairing his car and he called the repairer to support his story. There were no lies, proved or otherwise coming from the defence, upon which the prosecution relied to prove its case. The issue

was simply one of credibility and there could be no danger of the jury using the rejected alibi to support evidence of guilt as opposed to merely reflecting on the appellant's credibility. In those circumstances, there was no need for the directions contended for by counsel and we would dismiss this ground of appeal.

19. In the third ground of appeal counsel contended that the trial judge should have directed the jury on the evidential significance of the delay in making the report to the police. The offence was alleged to have occurred on April 6 and the report to the police was made on April 24. Delay in making a report in cases of this nature is generally relevant to both the credibility of the victim and the reliability of the evidence and is a factor for the jury's consideration in assessing the truthfulness of the victim's account of what happened. But it is not in every case that a direction on delay is necessary. In the instant appeal, the victim was 17 years old at the time and attending school. She did not live with her mother who in fact resided in Trinidad at the time. She reported it to her choir teacher (Arnold) the very next day. This could not be considered delay of any significance.

20. It is true that the report to the police was made on April 24 but that was not the fault of the victim in any way. It is quite apparent that the teacher waited until the mother arrived in Tobago before making a final decision to report it to the police. Given the relationship between the victim and the accused, some delay in taking positive steps to report the offence would be inevitable and should not reflect on the victim's credibility in any material way. The trial judge drew the jury's attention to the delay in making the report to the police and directed the jury to consider the issue in assessing the evidence of the victim. Looking at the summing up as a whole we see no merit in this ground.

21. In ground 4, counsel submitted that the trial judge failed to direct the jury on the requisite mental element of rape and was dismissive on the issue of consent since he considered the defence was a denial that intercourse had taken place. The trial judge directed the jury that rape required the insertion of the penis into the woman's vagina and the slightest degree of penetration was sufficient. He did not expressly tell them that it had to be without the victim's consent but reminded them the victim had said that she did not consent. He did not consider consent an issue in the case because the defence of the accused was that *he was not there*. As he put it, *'this is not a case where sexual intercourse has been admitted and the issue is consent. This is a case in which the accused is saying ...I know nothing about that, I was elsewhere.'* We are of the view that the directions given were adequate and the jury could have been in no doubt what the issue for determination was in this case. While the victim did not expressly say *"I did not consent"* her description of her reaction during the ordeal clearly reflected someone who was not consenting to the act in any way. The issue was not whether she consented but whether the person who raped her was in fact the appellant. To tell the jury that consent was an essential element and that they had to be satisfied that there was none would serve no useful purpose given the appellant's defence of alibi. The directions were therefore adequate in the circumstances and no miscarriage of justice would have occurred.

22. Counsel then submitted that the jury should have been directed on the evidential value of the appellant's oral statement to the police when confronted with the allegation. It was evidence of his reaction and consistent with what he had said at the trial. She relied on *McCarthy v R* (1980) 71 Cr. App. R 142 at 145 for her submission that such a direction was required. We do not think that the authority referred to supports her submission. One must read the facts in *McCarthy* to determine the reason why in the context of that case the initial statement to the police was relevant to the genuineness of the defence of alibi. The accused did not testify at his trial but the witness statements taken by the two police officers contained information as to where the accused, shortly after the offence, said he was at the relevant time. It was the unusual practice of the particular trial judge to exclude as part of the prosecution case what he considered self-serving statements by an accused to the police. Accordingly, the witness statements were not adduced in to evidence notwithstanding the request of counsel for the accused that they be admitted. The first contained a detailed account of the whereabouts of the accused at the material time and had been made within three days of the burglary. Counsel expressed the view that it was something the jury could properly take into account in assessing the genuineness of the alibi. Counsel for the accused then tried to cross-examine the police officer about the appellant's reaction when interviewed by the police but the trial judge did not allow him to do so. All he was able to get out of that witness was the fact that he had been interviewed and said he was not guilty. In the course of their deliberations the jury returned to Court and requested to know, inter alia, whether it was ever revealed where the accused was on the night in question. The trial judge had to tell them that there was no *evidence* before them as to where the accused was that night. While it was true that there was no evidence before them, there was material that could have been put before them but for the judge's ruling on the admissibility of the witness statements. If he had admitted them he would have been bound to tell the jury that there was no evidence to support where the accused said he was but he had revealed where he claimed he had been. The Court of Appeal found that the trial judge was wrong not to allow the witness statements into evidence but since the case against the accused was a strong one, it applied the proviso and dismissed the appeal.

23. In the instant appeal, the facts are completely different. The trial judge did remind the jury of the appellant's initial reaction when confronted by the police and directed them to take that into account in assessing his alibi. The jury had heard the alibi evidence and the evidence of the police officer as to what the appellant had told him when he arrested him and they had to assess it in determining its genuineness. While the initial reaction is something the jury will take into account, we do not consider that the trial judge had to give any particular direction in that regard. In this case, there was a time lapse of some 18 days between the commission of the offence and the report to the police. Tobago is a comparatively small society where news travels quickly. By the time the police received the report when the mother arrived from Trinidad, the appellant would have been well aware that something was amiss. And while his initial response was consistent with his alibi in court it is quite possible that he had sufficient time to manufacture the alibi. It would have been self-serving to a great extent. It was entirely a matter for the jury to assess and since all the evidence was before them, the difficulty that

presented itself in *Mc Carthy* was non-existent. We are of the view that the directions given were adequate in the circumstances and would reject this ground of appeal.

24. Grounds 6 and 7 were taken together and complained that the summation was unbalanced. It referred to some issues arising out of the grounds argued and to errors in the judge's recall of the direct evidence which were, in our view, peripheral matters not affecting the issues in any substantial way. We saw no merit in these grounds as they seemed to rehash grounds already argued. We would dismiss these grounds.

25. In Ground 8 of the supplemental grounds of appeal the complaint was that the directions on good character were inadequate and failed to impress on the jury the importance of the issue. Counsel submitted that credibility was crucial to the defence and required an adequate direction on good character. The trial judge directed the jury that the accused had raised the issue of good character. And he explained the effect of good character. He said that :-

"...where a person says that he has never been convicted of any offence he is bringing his good character into focus. How do you, as jurors, treat with that evidence, what we call good character evidence? In two ways.... . Whenever a person speaks of his good character he is asking you to take two factors into consideration. The first is whether he, being a person of good character, would commit this type of offence. And, secondly, would a person of good character tell a lie? It is not an insurance against guilt. It does not mean because you have hitherto had a good character, you can't commit an offence. There is always a first time. But in assessing his evidence, you must bear that in mind.

26. Counsel submitted that the directions were meaningless because even a person of good character sometimes tells lies. It was whether such a person, in light of his good character, is truthful in his evidence; in other words, is his evidence worthy of belief? The directions were not as elegantly put as they should have been but it is important to note that both aspects of the good character direction, propensity and credibility, were put before the jury. There is no complaint as regards the propensity aspect of the directions. It is confined to the credibility aspect. Earlier in his summation, he had warned them that the case turned on the credibility of the witnesses and it was for the jury to determine whether the victim was in fact telling the truth. He explained to the jury the purpose of raising the question of good character viz., that the appellant, by giving evidence of his good character, was asking them to accept him as a credible person. He did not put it quite so eloquently but by posing the question- would such a person tell a lie- the jury would have understood the effect of his directions. He was inviting them to assess the truthfulness of the appellant's evidence based on his good character. We would remind judges that while no set formula is necessary and a judge is entitled to tailor his directions to suit the particular case, care must be taken to insure that the two aspects in which good

character might be relevant is understood by the jury. We think that while the directions could have been more explicit, the complaint standing alone would not be sufficient to justify a quashing of the conviction and if it were necessary we would apply the proviso.

27. Grounds 9 and 10 raised the issue of *recent complaint*. It was counsel's submission that the common law rule of *recent complaint* had been abolished by reason of section 31 of the Sexual Offences Act of 1986. Although, she argued, section 31 was later repealed by section 18 of the Sexual Offences Amendment Act #31 of 2000, that repeal did not have the effect of re-introducing the common law rule. In fact, she submitted, section 27(1) (a) of the Interpretation Act Ch 3:01 expressly prevents any such revival unless a contrary intention appears. We need not decide whether *recent complaint* was re-introduced or not since we do not accept that it arose on the evidence at all. We shall leave that issue for fuller consideration when it arises in a more appropriate case.

28. *Recent complaint* is an exception to the hearsay rule that a witness is not allowed *in-chief* to be asked if she had formerly made a statement consistent with her present testimony. Accordingly, proof of complaints in sexual cases is permissible, i.e. if a complaint was made at the first reasonable opportunity after the offence it might be proved in evidence to show the complainant's consistency and to negative consent. It is necessary however in order to rely on such evidence that the complainant testify as to the making of the complaint and the terms must be proved by the persons to whom it was made. If those persons do not testify, the complainant's own evidence that she made a complaint cannot assist her in either proving her consistency or negating consent (see *White v R*. [1999] 1Cr. App.R 153).

29 In *White*, the Privy Council held that while the mere mention that the complainant spoke to someone after the incident would not generally be inadmissible, it was important to avoid infringement of the rule against self-consistent statements by conveying indirectly to the jury that she had given a previous account of the incident in similar terms with the view to inviting the jury to infer, not merely that her subsequent conduct was not inconsistent with her complaint, but that her credibility was actually supported by the fact that she had told the same story shortly after the incident. The victim was permitted to testify to the fact that shortly after the incident she had told five people *what had happened*. Their Lordships held that by permitting her to say that, the inference the jury were bound to draw was that she had made statements in terms substantially the same as her evidence. The jury had been told that they could convict even without corroboration if they believed the complainant's evidence. They were then directed that the complainant's own evidence that she had made several reports to certain persons, though not corroboration, could be used to show consistency and negative consent.

30. That was a grave misdirection because the recipients of the complaint had not testified. It resulted in a *significant risk that that they considered themselves entitled to regard the evidence of the complainant as confirming her credibility*. Their Lordships held that the trial judge should have warned the jury that her evidence for that purpose was of *no value whatever*. Accordingly, their Lordships found that the admission of that

evidence *without a clear direction must have been damaging to the appellant's prospects at his trial.*

31. In the instant appeal, the victim, in-chief, simply said that she *spoke to Arnold* the following day. She gave no details of her conversation. Her cross-examination centred around her speaking to Arnold in preference to other persons such as her principal or some other female teacher for the purpose of attempting to show that she was having a relationship with Arnold. She admitted in cross-examination that she spoke to Arnold about the incident but, again, in the same context. Arnold testified and confirmed that the victim had spoken to him the following day. He said in cross-examination that the matter *was grave*. At no time did he give details of what he had been told.

32. It could not therefore be said that the evidence constituted *recent complaint* that could be used for the aforesaid purpose. The prosecution led no evidence of the details of the complaint. By saying that she spoke to Arnold it may have been possible to infer that she had given him details of the incident, the prosecution did not rely on that evidence to show consistency or to negative consent. In fact, consent was not a live issue at the trial. Her speaking to Arnold was simply part of the narrative and admissible and it cannot be justifiably said that there was a significant risk similar to what had occurred in *White*. Accordingly, it was not necessary for the trial judge to give any directions on the effect of such evidence. We would reject this ground of appeal.

33. Ground 4 complained that the trial judge failed to direct the jury that if two inferences of equal weight were capable of being drawn from the evidence they had to adopt the one favourable to the accused. The trial judge did neglect to give that added direction but we do not think that it caused any prejudice to the appellant. The issues were clear – the case turned on credibility and the version of events were so diametrically opposed that there was little or no evidence from which one could truly draw two equal inferences. Counsel could refer to no material ones in particular. The outcome of the trial turned on the jury either accepting or rejecting the evidence of the victim. We would dismiss this ground.

34. The final ground was directed at certain errors made by the trial judge in his reference to the evidence. The references were to minor bits of evidence e.g. the issue of consent and the length of time the appellant was on top of the victim. While the judge may not have reported it as accurately as one would have wished, the effect of what he recited did not detract from the issues that the jury had to resolve. There was no prejudice to the accused and we would dismiss this ground also.

35. Accordingly, we would refuse leave to appeal and confirm the conviction and sentence. We had hoped to deliver this judgment before the Court vacation in December 2002, but it was not possible. In the circumstances, we shall order that the sentence begin to run from the date of hearing of the appeal, that is December 12, 2002.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

A. Lucky
Justice of Appeal