Neutral Citation Number: [1998] EWCA Crim 904

Case No: 9707758/W3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Date: Friday 13th March 1998

B E F O R E :

LORD JUSTICE BUXTON

MR JUSTICE ROUGIER

THE COMMON SERJEANT
HIS HONOUR JUDGE DENISON QC
(Acting as a Judge of the Court of Appeal Criminal Division)

- - - - - - - - - - - -

R E G I N A

- v -

Dr I

- - - - - - - - - - - -

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
180 Fleet Street, London EC4A 2HD
Tel No: 0171 421 4040 Fax No: 0171 831 8838
(Official Shorthand Writers to the Court)

- - - - - - - - - - - -

MR FORTUNE appeared on behalf of the Appellant
MR R DAVIES appeared on behalf of the Crown

- - - - - - - - - - - -

JUDGMENT

LORD JUSTICE BUXTON: Dr I was indicted on four counts of indecent assault, in three cases the assault alleged being on female patients in the course of his work as a GP, and a fourth alleged assault taking place on a female carer to a patient. He was convicted on three of those counts, as follows. In respect of count one it was alleged that on 16th January 1996 he had had a house call to a patient whose husband had gone into hospital. The appellant allegedly put his arms round the patient, kissed her on the lips and felt her breasts. In respect of count three, on 18th August 1993 a second patient had attended the appellant's surgery for an appointment. He had asked her intimate questions about her sex life and had kissed her more than once. On count four it was alleged that a third patient had consulted the appellant some time in September 1995. He had asked about the effects of a drug she was taking and then asked her whether she would like to have fun. He then put his arms around her and kissed her more than once on the cheek and lips.

In respect of two of those counts, counts 1 and 3, the prosecution adduced evidence of complaints made by the ladies concerned to the police or to friends or relatives at or near the time of the alleged assaults. No such complaint was made by the alleged victim in count 4, on which the accused was also convicted. Nor was any such complaint made by the alleged victim on count 2, where the accused was acquitted. The prosecution adduced this evidence, both of the fact of the complaint and of the distress of the victims when making the complaint, to demonstrate consistency on the part of the complainant, in that the complaint had been in broadly the same terms as the evidence that she subsequently gave in court.

We are told that before speeches, and very usefully and properly, in accordance with the practice repeatedly urged by this court, counsel discussed with the judge any particular directions that he should give to the jury. It was apparently agreed that he should remind the jury of the particular, and limited, nature and effect of the complaint evidence. In the event, however, no such direction was given. At the end of the summing-up neither counsel reminded the judge of that omission. Mr Fortune, for the defendant, told us that in such circumstances defence counsel hesitated to

intervene because they might thereby deprive their client of a good ground of appeal were he to be convicted. We recognise that that view has some support from dicta in this court, in particular in *Cocks* 63 Cr App R 79, and we do not think that this is the case in which to pursue that issue. We should not be taken as thinking that the matter is decided with certainty in either direction. Mr Davies for the prosecution frankly agreed that if he had had the issues that have arisen in this appeal as clearly in mind as they now are he would indeed have intervened. The exact nature of the point may not have been clearly apparent because, we understand, the discussion before the judge had focused on the effect on complaint evidence of the abolition of the corroboration rules and the subsequent guidance given in that connection by this court in *Makuanjola* [1995] 2 Cr App R 469. As we shall demonstrate, that was a mistaken basis on which to approach the matter.

Since the issue in this appeal concerns the effect of a failure to direct the jury as to the status of complaint evidence, we have thought it necessary to consider first what the status of such evidence in fact is. Before that, however, we summarise the effect of the evidence, drawing on the account given by the judge in his summing-up, which has not been criticised.

In relation to count 1 the complainant, S, almost immediately Dr I had left her house telephoned her daughter, who lived some distance away, and also a friend, Miss SD. The latter came round immediately. On the following day S went to complain at the police station.

Evidence was given both by SD and by the police. SD described S's account of what had occurred with Dr I, and her general state of distress, in some detail. That is to be found at page 11B of the summing-up and following. Miss SD in summary said that S:

> "... told me he tried to give her a kiss and put his hand up her jumper."

She related details of what S had said in respect of the assault, giving an account that broadly was

given in evidence.

A woman police constable gave evidence of the visit to the police station on the next day. The judge described this as follows at page 13A of the summing-up:

> "At 11 o'clock on the following morning, 17th January, S and her daughter went to the police station where they saw WPC Butler. A complaint was made and the details are the same as S recounted to you and recounted to SD. S did not know what to do and she was told to go away and to talk it over with her husband."

As we have said, the judge in his summing-up merely gave an account of those complaints, reminding the jury of a respect in which the defence had said that they were unreliable, but without giving any further guidance either then or generally about the status of that evidence.

In respect of count 3 the complainant W went with a friend to the police station shortly after the alleged assault at Dr I's surgery. The woman police constable concerned with dealing with this complaint equally gave evidence at the trial, which was described by the learned judge as follows at page 18H:

> "On 18th August 1993 W and a friend went to the police station and they were asking for advice regarding what had happened to W in the doctor's surgery. She and her friend saw PC Sandha ... and she told the officer what had happened in the doctor's surgery and it was explained to her what would happen if she made a formal complaint. She was told that it was her word against his and she said that she had brothers who were patients of the doctor who would be angry, so she decided not to make a formal complaint, but the officer did

> make a note of what she had been told."

The lady who accompanied her there, who in fact is now her sister-in-law, also gave evidence at the trial. The judge said this about that at page 21, letter E:

> "Her sister-in-law as she now is ... recounted to you how W came to her house in that summer of 1993, crying and upset and telling her that she had just been to the doctors and that he had touched her or tried to touch her and so it was her sister-in-law ... who accompanied her to Fleetwood police station on the same day as the alleged assault ..."

Here again there is no mention in the summing-up of the particular status of the sister-in-law's evidence.

That evidence of recent complaint in a sexual case is admissible at all, as it undoubtedly is, is anomalous in two respects. First, self-serving statements are usually inadmissible, both in the criminal and the civil jurisdiction. The reason for that exclusionary rule was stated by Lord Radcliffe in *Fox v GMC* [1960] 1 WLR 1017 at 1024:

> "All trials, civil and criminal, must be conducted with an effort to concentrate evidence upon what is capable of being cogent and, as was remarked by Humphreys J in *R v Roberts* 28 Cr App R 102, it does not help to support the evidence of a witness who is the accused person, to know that he has frequently told other persons before the trial what his defence is. Evidence to that effect is therefore in a proper sense immaterial."

Judged by that test, the evidence of the victim in a sexual case does not differ logically from that of

any other witness. It is therefore not surprising to find that the origins of the rule permitting the evidence of a complaint by such a victim reveal the second anomaly, since the assumptions that originally justified the rule no longer obtain.

In *Osborne* [1905] 1 KB 560 the Court for Crown Cases Reserved cited the judgment of Holmes J in *Commonwealth v Cleary* [1898] 172 Mass 175:

> "The rule that in trials for rape the government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal -Glanville, xiv. 6; Bracton, fol. 147a; Fleta, 1, c.25, para 14; ST. 4 Edw. 1, ST.2. Appeals became obsolete and left rape to be dealt with by indictment before the development of the modern law of evidence."

However, a rule that had its origins in suspicion of the veracity of any charge of rape not backed by instant complaint, a suspicion amply set out in the old authorities cited by Holmes J, has been transformed, with the disappearance of that suspicion at least in its institutionalised forms, from a rule requiring evidence of complaint into a rule anomalously permitting evidence of complaint in this limited class of case. Nor, as our present case demonstrates, is the rule limited, as from its origins might have been expected, to cases where consent is in issue. That was the point of law argued in *Osborne*, the Court for Crown Cases Reserved holding, [1905] 1 KB at p 558:

> "It appears to us that in accordance with principle, such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix."

Thus, as the Court for Crown Cases Reserved had said in *Lillyman* [1896] 2 QB at page 171:

> "It is too late, therefore, now to make serious objection to the admissibility of evidence of

> the fact that a complaint was made, provided it was made as speedily after the acts complained of as could be reasonably expected."

Given the origins of this rule, it is hardly surprising that some difficulty has been experienced in determining what this evidence proves once it is admitted. The case must be distinguished from the issue that arises in relation to accusations of recent fabrication, even though the same evidence is often admitted under that head as under the head of complaint in a sexual case. In the case of recent fabrication, applicable whatever the nature of the alleged offence, the *fact* of the complaint rebuts the claim that the allegation made in the witness box was only invented at some date after the complaint was made. But in a sexual case the complaint is admissible as part of the original prosecution case, whatever allegations are or are not made by the defence. Its *content*, as opposed to its existence, must therefore have some evidential value. That value is as stated by Lord Goddard CJ in *Wallwork* [1958] 42 Cr App R 153 at p 161. The evidence:

> "... may be given only for a particular purpose, not as evidence of the fact complained of ... [but] for the purpose of showing consistency in her conduct and consistency with the evidence she has given in the witness box."

Thus, as the Judicial Studies Board standard direction puts it, the evidence:

> "... may possibly help you to decide whether she has told you the truth. It cannot be independent confirmation of X's evidence since it does not come from a source independent of her".

That in our view is the direction that judges ought to give. It conveys as well as anything the peculiar nature of evidence of a complaint: that it has more significance than merely as evidence of the fact of the complaint having been made, whilst at the same time emphasising that it is not

evidence of the facts complained of. We add that on occasion judges may think also it appropriate to remind the jury that a person fabricating an allegation may support it by an equally false complaint.

The law is the same in respect of reports of the complainant's distress when making the complaint, which were equally relied on by the prosecution in our case. Before the abolition of the old corroboration rules by section 32(1) of the Criminal Justice and Public Order Act 1994 it was necessary to warn the jury that a complaint could not be corroboration in the technical sense, because it did not come from a source independent of the witness: see for instance *Christie* [1914] AC 545. Distress accompanying the making of the complaint fell into the same category, as being part and parcel of the complaint: *Redpath* [1962] 46 Cr App R 319 at page 322. We equally do not think that the distress relied on in this case, which all occurred at the time of the making of the alleged victims' complaints, had any status separate from the complaints. It was thus to be treated as those complaints were.

As we have said, we have been told that discussion of the correct way to direct the jury in respect of the complaint and distress evidence focussed on whether any change had occurred in the light of section 32 of the 1994 Act, as expounded by this court in *Makanjuola* [1995] 2 Cr App R 469. If that was indeed so, it was a misconception. The judge's obligations in respect of complaint evidence cannot have been affected by section 32 or by any guidance given as to the effect of that section, since complaint evidence was never, for the reasons that we have indicated, corroborative.

Those obligations have always been recognised as being to point out to the jury the exceptional, and limited nature of complaint evidence. In *Wallwork*, already cited, Lord Goddard treated it as clear that the judge, having admitted such evidence, should tell the jury that it was not evidence of the facts complained of. And in *Wright and Ormerod* [1990] 90 Cr App R 91 at page 97 this court said that:

> "The learned judge did tell that jury that they could take the complaint ... 'into account'. But he never suggested to the jury with any sufficient clarity, in our view, in what way they could take it into account. We are bound to observe that failure constituted a serious and mischievous omission."

In our case the judge did not specifically suggest to the jury that they could act on the complaint evidence. But, as Rougier J pointed out during argument, they were told, as all juries are, to decide the case on all the evidence. The complaint evidence was put before them on the same footing as any other part of the evidence.

It is a matter of law, not of judgement or discretion, that complaint evidence has only the limited effect set out above. In those circumstances it is in our view essential that the jury should be told by the judge of the very limited effect that they are permitted to give to it. Without such a direction, there is every danger of the jury thinking, as on one view might be a commonsense reaction, that such evidence is indeed further evidence of the truth of the complaints, rather than being of, limited, assistance in assessing the veracity of the complainer. Certainly, there is no reason at all to think that the jury, without direction on the point, will realise for themselves that evidence that they have heard, no differently from other evidence, has this odd and difficult status. Particularly in a case such as the present, which turned on word against word, it is difficult to feel confident in the safety of a conviction when the true legal status of part of the evidence has not been made clear to the jury.

That was a conclusion against which counsel for the respondent did not feel able to contend with any great force. He did however urge that these considerations could not apply to the conviction on count four, where no complaint evidence was given. He added that the jury had discriminated between the different counts, as was additionally shown by the fact that they acquitted on count two.

We see the logic of that contention, in the context of a case where the jury were properly directed to consider each count separately, but we do not feel able to act on it. The evidence on count two was significantly different from that available on the other counts, so we cannot draw any general conclusions from that acquittal; and the error on counts one and three opened up potential dangers in respect of the jury's proper consideration of the credibility of Dr I on those counts to the extent of making it impossible for us to conclude with confidence that their view of him gained from the evidence on those counts did not affect their judgement in respect of count four.

As we indicated at the hearing of the appeals, we therefore allow the appeals and quash all of the convictions. We do not consider this is an appropriate case in which to order a retrial.

LORD JUSTICE BUXTON: Are there any applications?

MR FORTUNE: My Lord, no.