IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CRIMINAL APPEAL NO. 13 OF 2004

BETWEEN

JOHN GARCIA LAMBEY	**APPELLANT**
v	
THE QUEEN	**RESPONDENT**

CRIMINAL APPEAL NO. 15 OF 2004

RUDOLPH SMITH	**APPELLANT**
v	
THE QUEEN	**RESPONDENT**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Appellants in person.
Mr. Kirk Anderson, Director of Public Prosecutions, for the Crown.

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4, 8, October 2004, 9 March 2005

CAREY JA

1. These two appeals were heard separately but as a similar point arises in both, it is convenient to deal with them together. Both appellants

were convicted before the same judge of rape (additionally, the appellant Smith was convicted of burglary). The question which arises, relates to the appropriateness of the trial judge's directions with respect to the distressed condition of the victim in each case, as amounting to corroboration. The matter is of some importance now that the mandatory rule for the warning in that regard has been abolished. (see Section 92(3) Evidence Act Cap. 95 Laws of Belize, Revised Edition, 2000.

2. **The Rudolph Smith case**

The facts in this case are regrettably all too familiar. The victim in this case whom we will refer to as Ms. X, was a student aged 15 years at the time of the offence. On 30 September 2002 she awoke at about 6.00 in the morning to find a hand covering her nose and being warned not to make any noise. Her assailant lifted her night-gown, removed her underwear, unzipped his pants, and was intimate with her. Thereafter he walked out. She estimated that this incident lasted half an hour. We would very much doubt the accuracy of that estimate given the circumstances. At the time of the assault her assailant, she said, was armed with a knife described by her as a "kitchen knife" which he placed against her neck to secure compliance.

3. After he left, she went weeping to her mother and after some prodding from her related that she had been raped by a man. Her "step-father" was called and she related the same story that she had been raped by a man. He wanted to know the identity of the person and she provided a description. Crown Counsel properly did not seek to lead any evidence

as to that description but the trial judge was insistent in requiring it. Later in this judgment, we propose to say something in that regard.

The young lady (Ms. X) and her mother were taken in a car driven by the mother's common-law husband in search of the "male person that was in the house" (the evidence of the victim). She pointed out "the man" as they were passing him on Dolphin and Cemetery Road. He was ordered into the car but declined to do so and left.

Evidence was led from the victim that some years prior to the incident she had seen her assailant in adjoining premises cutting a yard. He had spoken to her step-father who had referred to him as family. She had been asked to fetch her cousin some water to drink. On 1 October 2003 she attended an identification parade where she identified the appellant as her assailant. An odd facet of the identification emerged when the step-father gave evidence. He said, when he was driving in course of their search, it was the girl's mother who pointed him out and then her daughter agreed that he was the person. The evidence it must be said, was in conflict with the mother's: she said it was her daughter who had indicated the accused. Be that as it may, we would observe that this case could not at all events be properly regarded as a recognition case, recognition played no part in the identification process. Finally, to complete the evidence of this process, so far as the lighting was concerned, she said there was a "bit of light inside the room" but there was sunlight outside. She acknowledged that she was frightened – "I was so frightened to even look at him …".

4. The defence was alibi. At the material time he was by his niece Tricia Donald whom he called to confirm that fact. While he was on his way to work he was held by two men who tried to put him in a car. But when the grip on him was released, he took off.

The John Lambey case

5. The prosecution case in outline was as follows: on 19 July 2001 the virtual complainant (EE) who proved to be a difficult witness to examine said this appellant entered her house shortly after 1.00 a.m. and after removing her panties, was intimate with her. At the time he had a knife. There was a struggle but she was able to escape to a neighbour Corporal David Williams who lived a half mile away.

6. Cpl. Williams confirmed that at about 2.00 a.m. on 19 July 2001 he was awakened by knocks on his door. When he investigated the cause, it was EE whom he knew, in the company of her two children. She reported that she had been raped by the appellant whom he saw outside his house. There was a strong smell of alcohol on his breath. He arrested the appellant who ran off when he was told that the police vehicle would be coming.

7. When EE arrived at the house, she was crying.

8. The defence was a denial of the charge.

The point of substance

9. We can now return to the point of substance raised in these appeals. It is not doubted that the distressed condition or the emotional state of the victim of a sexual assault may in certain circumstances

constitute corroboration. The need for corroboration in this type of case was important because a judge was required to warn of the dangers of convicting on the uncorroborated evidence of the victim. In those circumstances, the judge had a duty to identify the facts which were capable of amounting to corroboration.

10. The legal position as respects the warning in the corroboration cases is the same in Belize as it is in England. In both countries the rule requiring the warning to a jury of the dangers of convicting on the uncorroborated evidence of the victim has been abolished and with that abolition it is no longer necessary to consider the extent to which such evidence was capable of amounting to corroboration. (Archbold Criminal Pleading Practice & Evidence 2002 ed. at para. 20 – 32) What has to be borne in mind is that the evidence of distressed condition remains admissible but a burden is cast upon a trial judge to direct the jury how such evidence is to be approached.

11. Corroboration is a term of art and in this connection means evidence that supports or tends to support the victim not only that the specific offence was committed but equally also, that the accused committed it. There are a great number of cases which make it clear that the jury should be warned that little weight should be attached to evidence of distressed condition especially where it is part and parcel of the complaint. The evidence will be more compelling or cogent if the circumstances are such that the victim is unaware that she is being observed. ***R. v. Knight*** 50 Cr. App. R. 122; ***R. v. Wilson*** 58 Cr. App. R.

304. The case of ***R. v. Kearst*** [1998] Crim. L. R. 748 is of interest as showing that evidence of the victim's demeanour shortly after or at any time of an allegation of rape could be admitted to show consistency with the description of the incident given by the victim, but it could not be regarded as confirming the victim's story from an independent source. To put it beyond doubt, it did not amount to corroboration.

12. In our view, the distressed condition of the victim ought not to be left to the jury as corroborative of the victim's story, unless it satisfies both limbs of the rule viz, it must confirm the offence and connect the accused with the crime. See ***R. v. Redpath*** [1962] 46 Cr. App. R. 319.

Application of law

13. Against this background we now wish to consider these appeals.

14. In Smith's case the trial judge characterized the fact that the complainant was crying as distressed condition. He then stated as follows at pages 109-110 of the record:

> "But listen to this carefully. If you are sure – first of all you must believe that Ms. Erskine was crying as how the Corporal said. If you have a doubt or you do not believe that she was crying don't accept what I am going to tell you. If you are sure that the distress condition was genuine and referable to the rape and not to the beating then it is open to you to accept the distress condition as corroborating her

> evidence that she had not consented to the intercourse. I break that down to you. First of all you must accept that she was crying. Secondly, that her crying was genuine not make up. Lot of people could cry you know. Easy. You hear about in the states they have a professional they pay them just to cry. No relative to the victim but they are use to that. They start to cry. So what I am saying here you must believe first that Ms. Erskine was crying and two her crying was genuine is not vague. You know, they make up so the police believe that she was indeed raped. If you accept that then you must say that is corroborating evidence to show that she did not give any consent."

15. It is plain from what we have stated in the paragraphs subsumed under the heading "Point of Substance", that these directions were regrettably incorrect. Corroboration as we have noted is a term of art. In that legal sense, it must satisfy two conditions. The fact of "crying" which the police officer observed did not satisfy that test. If the learned judge used the term corroborate in its purely grammatical sense to mean support, neither did that fact make the direction correct. See ***R. v. Kearst*** (supra). Seeing then, that this evidence did not amount to corroboration,

this distress which the judge identified, should not have been over-emphasized. At the very least, the jury should have been warned that little weight should have been accorded to it.

16. We cannot stress too much that all the authorities show that it is only in special circumstances that the appearance and emotional state of the victim in a sexual case is to be regarded as capable of affording corroboration of the evidence of the victim. ***R. v. Wilson*** (supra)

17. We conclude that the directions above amounted to a misdirection.

The Rudolph Smith case

18. The directions with respect to distressed condition appear at pages 160-162 of the record. The trial judge said this:

> "… it is for you to decide whether that crying was a distress condition because I'm going to direct you what that really means with respect to the evidence. So first of all you will have to accept – it's for you to accept whether she was crying as how she described it and how her mother describes it. So listen to this now. If you are sure that the distress condition of Patricia as observed by her mother Alberta Briceño was genuine and referable to the rape it was open for you to accept that the distress condition as corroborating her evidence that she did not consent to the sexual intercourse.

If you have doubt of the distress condition might be simulated you should attach no weight to it whatsoever. What this mean? If you accept as true that when Patricia came towards her mother she was holding her belly, she was crying so you may accept that is distress condition. But you must accept that she is not playing, that she is not feigning, that she is not making up. So if you accept that it was genuine then that is supporting evidence that she did not give consent for the sexual intercourse. But if you have doubt of the distress condition that you might say maybe she didn't feign maybe because her mother come out that's why she is crying then you cannot use that piece of crying, piece of evidence of her crying and holding her belly. So you are not to attach – you are to attach no weight to it whatsoever. So let me repeat. Distress condition only comes into to support that she did not give consent. You must accept or you ought to first of all accept that there was a distress condition. That it was not feigning. It is not something she pretended to

> do. That it was genuine then you can accept that as supporting evidence that she did not give consent to the person who had sex with her. But if you have a doubt of it don't bother to use that as evidence discard it because it won't be supporting because it will be feign. That means mek up you call it. So those are the elements and that's the evidence that I'd draw to you to your consideration."

19. The learned trial judge isolated the victim's "crying" at the time she was revealing the ordeal she had undergone to her mother as corroboration of lack of consent.

20. It is right to point out that the distressed condition of the victim is usually considered in the context of corroboration meaning evidence that tends to support the evidence of the victim that the specific sexual offence was committed and that the accused committed it. We note that the trial judge said on more than one occasion that such evidence was capable of supporting the victim's evidence that she did not give consent. It is also true that he was at pains to point out that the distressed condition must be referable to the offence. It would seem to us that he had in mind corroboration in its legal sense. To put the matter beyond a peradventure, the evidence of the victim's crying can be admitted to show consistency of conduct on the part of the victim but it cannot be regarded as confirming the victim's story from an independent source. See ***R. v. Kearst*** (supra)

21. We think therefore that the emphasis was all wrong. Now that there is no longer a mandatory warning, it is now entirely a matter for the judge's discretion whether a warning is necessary. A trial judge would be better advised to direct the jury that except in special circumstances which the judge should identify little weight should be given to it. The distressed condition of the victim without more does not call for over-emphasis.

Description

22. We had promised at paragraph 3 above to make some comments on evidence of description being adduced as part of the prosecution case.

This evidence cannot be adduced as part of the Crown's case. It is inadmissible as contrary to the hearsay rule. The witness needs only look at the accused in the dock and describe that person. On the other hand the defence is entitled to cross-examine as to credit and can therefore use the evidence of description given by the victim in her statement to show that the description does not tally with the person whom the jury can see in the dock. Thus the defence is entitled to use it as a test but the Crown would be attempting as well to have the witness corroborate herself which is impermissible.

23. In ***R. v. Wilbert Daley*** (unreported) C.A. 188/87 dated 13 July 1988) the Court of Appeal of Jamaica (Carey, Campbell and Downer, JJA) dealt with the question of evidence of description:

> "As to the absence of any description of the applicant, the witness was never asked by defence counsel to state the description he

> gave the police of the murderer. In evidence in chief, he said he knew the applicant by face not by name. Crown Counsel would be in breach of the hearsay rule to adduce any evidence of any description given by him to the police. We note that it is defence counsel who properly can ask this sort of question for its purpose is to test whether the description given by the witness to the police accords with the accused who is physically present in court for the jury's examination. "It is one of the factors which would assist the jury to determine the quality and cogency of the identification per Rowe, P., in ***R. v. Graham & Lewis*** (unreported) 26 June 1986.

24. In a later case from the same court, ***O'Neil Williams v. R*** (unreported) 20 November 1995, the court pointed out that "there is no burden on the prosecution to adduce evidence of the description of the assailant given to the police by a witness. … Lack of a description does not make the case against the accused weak but is a factor for the jury's consideration".

25. Finally, although the learned trial judge apparently relied on ***R. v. Turnbull and others*** [1976] 3 All E.R. 549 to support his advice to Crown Counsel that it was permissible to adduce evidence of description, we

cannot agree with that position. This case it is generally accepted, lays down guidelines for trial judges in summing up to a jury in cases where visual identification is the essential basis of the Crown's case. This case did not pretend to alter the rule of evidence in any way. It is to be remembered that among the judge's duties in summing-up in such cases was a requirement to point out the strengths and weaknesses of the prosecution case. Thus Lord Widgery said at page 552:

> "Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution has reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given."

We do not consider that this statement or any other passage in the case could be construed as sanctioning the leading of evidence by the prosecution of the description given by a victim in the absence of the accused.

Disposal

26. ***Smith's case***

For the reasons given, we allowed the appeal, quashed the conviction and set aside the sentence. We considered the prosecution case which depended on visual identification as poor. In those circumstances, we directed that a verdict and judgment of acquittal be entered.

27. ***Lambey's case***

For the reasons given, we allowed the appeal, quashed the conviction and set aside the sentence. Having regard to the facts in this case, we considered that justice would be served if we ordered a new trial. We ordered that a new trial be held at the next session of the Southern District.

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MOTTLEY P

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SOSA JA

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CAREY JA