IN THE EASTERN CARIBBEAN SUPREME COURT

THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

(CRIMINAL)

A.D. 2013

CLAIM NO: SKBHCR2013/0035

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

ERNELL NISBETT

Appearances:

Mr Travers Sinanan, the Director of Public Prosecutions, and Mr O'Neil Simpson for the Crown;
Mr Chesley Hamilton for the Accused

2013: October 2;
November 11

Judgment

Admissibility of a Recent Complaint

[1] RAMDHANI J (AG.): During the trial Mr. Chesley Hamilton, Counsel for the accused, made an objection to the admission of evidence of a 'recent complaint' made by the alleged victim, a police officer, to her friend of some 20 years who also happened to be a police officer. The court overruled this objection and the evidence was admitted. It was indicated at the time that the court would deliver a written decision of its oral ruling. This is that written decision.

Brief Background

[2] In this case the accused is charged on an indictment containing eight counts, two counts of rape, five counts of indecent assault and one count of battery on his common law partner who at the time of the incidents was a police officer for about two years. At the beginning of the trial the virtual complainant was the first witness called for the prosecution and in giving her evidence she attempted to give evidence of a recent complaint allegedly made shortly after the sexual assaults.

[3] In her testimony, she stated that the incident occurred between 11:45 p.m. on the 9th March 2012 and 1:54 a.m. on the 10th March 2012. She said that after the incidents, the accused fell asleep and she woke her 15 years old daughter and together they packed their belongings. She called a male friend, and at about 4:00 a.m. that morning he arrived and she and her daughter left with him to her former home on Bay Road, Irish Town. She said that just after 7:00 a.m. that same morning, she began to text a friend by way of blackberry messenger (BBM). She was about to give evidence as to what she told her friend, when Mr. Hamilton objected to this aspect of her evidence being admitted at the trial.

The Objections

[4] In the absence of the jury, Mr. Hamilton framed his objections in the following manner:

1. That the evidence was hearsay, and it did not fall within the known exceptions;
2. That alternative if it was being sought to be tendered as evidence of a 'Recent complaint' it fell woefully short of the requirements to be met. Primarily, he submitted that:
    (a) this was not evidence of an oral conversation, this was text message, and the text should be produced to make this evidence admissible;

(b) that this was further compounded by the fact that the evidence given before the magistrate's court revealed that the evidence had been 'prompted' from the VC by the person who she had started to text; when that person asked her what had happened, and she only revealed what had happened half way through the conversation.

[5] Mr. Hamilton developed his arguments in more detail by saying that the virtual complainant was a police officer and the person to whom she was complaining was also a police officer. That these two persons later go on to be the only officers heading the Federation's Special Victims Unit (SVU), a department of the police force which is charged with investigating sexual offences. These are persons who ought to know the value and importance of such evidence and they should take every effort to preserve the text messages. There should have been a real record kept he argues; there is not even a written statement. The cell phones of these two witnesses he points out, having regard to the deposition evidence, either 'crashed' or was destroyed before any text messages could be recovered. A person's recollection of text messages, or the self serving and brief record in the recipient's pocket book ought not to be admitted into evidence as evidence of a recent complaint.

[6] Mr. O'Neil Simpson, Crown Counsel responded on behalf of the prosecution, and asked the court to reject Mr. Hamilton's submissions on a number of grounds.

[7] He submitted that this evidence was admissible as a 'recent complaint' regardless of the absence of the actual transcripts. The court ruled that it was evidence of a recent complaint. This would be discussed in more detail shortly.

[8] He attempted to fortify this submission by going on what seemed to be an excursion into the Evidence Act Chapter 5 Division 1 General Provisions. He submitted that it was also admissible under section 28 of the Evidence Act, which allowed evidence to be led in 'narrative form', which meant according to him that a

witness could be allowed to 'narrate' whatever she said to anyone, or whatever someone said to him. Thus, he argued that the VC could 'narrate' what she had said to her friend by way of the 'recent complaint'. The court found no merit in this submission. This section only relates to the mode in which a witness may give his or her evidence, that is, in 'story form', narrating it as it were, and cannot mean that anything told to anyone out of court can be 'narrated' in court.

[9] He also submitted that it could also be admitted under section 57(1) of the Evidence Act as a document that is made as part of a business record. He offers that the police pocket book is a business record, and anything recorded there during investigations becomes part of a business record and so admissible under the section. This was also of no merit, and this can be seen from examining the example of a confession of an accused recorded in the pocket book. Surely, Mr. Simpson is not saying that all the rules relating to the admissibility of confession evidence goes out the door. For the same reason his last submission also fails, which was that it should also be admitted as a public document under section 136 of the Evidence Act.

[10] I will now go on to set out the law and reasons why this evidence is admissible as a 'recent complaint'.

The Law and Analysis

[11] Evidence of a 'recent complaint' does not fall into any of the hearsay categories.[1] Hearsay evidence is evidence that is tendered to prove the truth of its contents. Such evidence is not admissible into evidence unless, it falls within one of the established exceptions to the rule. Mr. Hamilton's first objection is therefore overruled.

---

[1] Very often evidence of a recent complaint is erroneously considered to be an exception to the rule against hearsay – see the judgment of De la Bastide in Julien (Dion) v The State [1996] 50 WIR 481 at 483.

[12] Not falling within the hearsay rules, different principles have grown up in the common law to govern the issues in this area. At common law as a general rule, no witness should be asked, or be allowed to narrate that he or she has made a previous statement, which is consistent with his present testimony. If that statement is in writing, the witness should not be allowed to refer to it, except possibly to refresh his memory.[2] This, in essence, is the common law against self-serving statements. There are however, two exceptions to this rule. The first is that a witness is allowed to prove a previous consistent statement made out of court to rebut an allegation of recent fabrication. The second is in sexual cases, where the virtual complainant is allowed to give evidence that shortly after the alleged offence she complained to someone. Under the exceptions both the details and very words spoken are admissible.

[13] None of the 'out of court' statements that are admitted as an exception to this rule is admissible to prove that the out of court statement was true. So, it is not to be admitted under any of the other grounds that Mr. Simpson has relied on, because under any of those grounds it would have been admitted to prove the truth of the contents. Evidence of a recent complaint simply goes to show the witness' consistency. With regards to the 'recent complaint' the position is best stated in R v Lillyman[3]:

> "It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains."

---

[2] Sheldon Thomas v R, Grenada Criminal Appeal No. 11 of 2002

[3] [1896] 2QB 167 at 170

[14] For evidence of the recent complaint to be admissible, it must be shown that the witness complained to someone at the first reasonable opportunity after the alleged offence. Additionally, the person to whom the complaint was made must give evidence of that complaint, which should generally be within the same terms as the evidence of the complainant's evidence.[4]

[15] With regards to what is to be considered the 'first reasonable opportunity', this is usually to be determined having regard to all the circumstances surrounding the making of the complaint. Circumstances that are relevant include the age and personality of the complainant, and the relationship between her and the person she complained to. If she had opportunity to complain to others but did not, again her relationship with those other persons must be considered.[5] Some persons will complain to relatives and or to their parents. Others choose instead to complain to their friends or on occasions even to acquaintances.[6] In R v Cummings[7], the complainant alleged that she had been raped during an evening by Cummings. In the course of giving the judgment of the Court of Criminal Appeal Lord Goddard CJ said at p. 552:

> "Who is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered, and he has to give a decision there and then whether it is admissible or not. It must, therefore, be a matter for him to decide and a matter for his discretion if he applies the right principle. There is no question here that Hallett J did apply the right principle. Whether it was reasonable to expect the prosecutrix to complain the moment she got back to the Camp to a man she hardly knew, or whether it was more reasonable that she should wait till the morning and complain to Mrs Watson, her friend, were matters that the learned judge had to take into account. He did take them into account, and he come to the conclusion that in the circumstances the complaint next morning was in reasonable time. If a judge has such facts before him, applies the right principle, and directs his mind to the right question, which is whether or not the prosecutrix did what was reasonable, this Court cannot interfere."

---

[4] Sheldon Thomas v R, Grenada Criminal Appeal No. 11 of 2002
[5] Valentine v R [1996] 2 Cr App. R 213
[6] Osborne v R [1905] 1 K.B. 551
[7] [1948] 1 All ER 551

[16] It is to be noted that a complaint will not be inadmissible because there has been a previous complaint, provided that the complaint which is being sought to be admitted 'can be fairly said to have been made as speedily as could reasonably be expected'[8].

[17] With regard to the first point being raised by Mr. Hamilton, he states that a complaint should not be allowed if it is by text messages, especially where there has been no "print-out" of those texts, and from the depositions it is expected that both the alleged victim and the persons to whom she complained would be saying that their phones were destroyed and the texts were never recovered.

[18] There is no rule of law which states that a complaint cannot be made by text messages. No one could be heard to say that a victim cannot make a complaint by a simple telephone call; that's what 911 calls are all about. It must have been simply logical for the court to allow complaints by telephones to be admitted into evidence that this technology became available in the world. The law is about life and logic, and the courts have to apply common sense and keep pace with technology. There should be no reason why both the alleged victim and the receiver of the complaint should not be allowed to speak to the text messages which was the medium of the complaint.

[19] I should say that I understand Mr. Hamilton's concern about the destruction of both phones, and the underlying fact that both the victim and the person she complained to are police officers. In fact, I view it as relevant that both of them would shortly after this incident go on to become the only officers heading up the Royal St. Kitts and Nevis Police Force's Special Victims Unit (SVU), a unit tasked with investigating sexual offences. I note from the cross examination on the depositions that it has been part of the defense case that this alleged victim and her police friend essentially may have concocted this complaint. That may be so

---

[8] Valentine v R [1996] 2 Cr App.

but that is a matter for the jury. I would simply have to give careful directions on how they should treat with this aspect of the evidence.

[20] The second ground for the objection as raised by Mr. Hamilton, is that this was not a voluntary complaint. Therefore, it should not be allowed. It is true that it is a perquisite for the admission of this type of evidence that it be shown not to be as a result of any threats, force or intimidation, in other words the complaint must be voluntary and not be extracted from the victim by possibly persistent questioning of a leading and inducing nature.[9] Ridley J in *Osborne* pointed out that evidence of recent complaint is admissible:

> "…only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of…"

[21] The court is unable to agree with Mr. Hamilton's contention that this complaint was not the voluntary statement expression of the complainant but it was induced. The evidence in this case is that the complainant in sending text messages on her Blackberry cell-phone began first by sending crying faces. She states that her friend then asked her what had happened. She told her that she was beaten by the accused and sexually assaulted. It would have been perfectly natural for anyone receiving crying faces on their phone to ask what was wrong. There was nothing suggestive or leading about that enquiry. In R v Evan[10], a case of indecent assault, the victim had returned home in a drunken and disheveled state. She was then questioned by her sister and made a complaint against Evans. A few minutes later, her mother questioned her and she made another complaint. Both complaints were admitted and the Court of Appeal stated that it was quite natural for the sister to question the victim having regard to her condition.

---

[9] Marlon Antoine v R, St. Vincent and the Grenadines Criminal Appeal No. 18 of 2004
[10] [1925] Cr App. R. 123

[22] There is no issue of any suggestibility on the part of the complainant[11]. She is a police officer and quite apart from that she was the one who, hours after the alleged offences, initiated the text conversation with 'crying faces'.

[23] For these reasons I am satisfied that the prosecution has presented sufficient evidence to meet the threshold for this evidence to be admitted. Accordingly, the objection is overruled. The evidence of the recent complaint shall be admitted into evidence. The court is minded of the careful directions which would have to be given to the jury having regard to the apparent destruction of both cell phones by witnesses who are police officers.

Darshan Ramdhani
Resident Judge (Ag.)

[11] See R v NK [1999] Crim. L.R. 980 Court of Appeal