CUMBO and others v THE QUEEN

Court of Appeal
Forbes, P., Bourke and Hogan, J J.A.
3, 4, 5 May 1977.

Crime — rape — honest belief — when need to disprove.
Crime — aiding and abetting — evidence of intention to encourage.
Evidence — credibility of witnesses — no distinction between prosecution and defence witnesses.
Evidence — character of complainant — admissibility of evidence to show promiscuity.
Evidence — complaint — whether made sufficiently early.
Evidence — corroboration — distress as.
Evidence — credit — cross-examination as to, cannot be contradicted.

The six appellants were convicted on a number of counts of rape and indecent assault on a young woman. The direct evidence was entirely that of the complainant, but most of the facts were not in dispute. The defence was that the complainant was a willing and, indeed, eager participant in an orgy. There was evidence that after the happenings, the complainant was in a state of very great distress.

Held: (i) In cases of rape, where the defence is one of willing participation, it is not necessary for the prosecution to disprove any honest belief in consent. *D.P.P. v Morgan,* [1975] 2 All E.R. 347 considered.

(ii) Where there is agreement to join in concerted action, the very agreement reveals the intention to encourage sufficient to establish aiding and abetting. *R. v Clarkson,* [1971] 3 All E.R. 344 considered.

(iii) In considering the veracity of a witness, it is immaterial whether he is a witness for prosecution or defence: it is only when the jury consider the issues raised by the whole case that the burden and standard of proof have to be considered.

(iv) Evidence of individual acts of indecency or sexual intercourse (other than with the accused) is not admissible to indicate that the complainant was more likely to have consented. *Krausz* 57 Cr. App. R. 466 considered.

(v) It is for the trial court to decide in all the circumstances whether a complaint was made as speedily as could reasonably be expected. *R. v Cummings,* [1948] 1 All E.R. 551 followed.

(vi) There is no rule of law that requires a judge to tell the jury in all cases that distress can afford corroboration only "in exceptional circumstances." It is for the jury to decide whether the distress was genuine and how it was caused.

(vii) Where a witness has denied an allegation going only to credit, the jury may not be invited to infer from other evidence that the denial was untrue.

Per curiam. Where there is an issue as to honest belief, it is not necessary for the jury to find that there were reasonable grounds for the belief, although the presence or absence of reasonable grounds might well be a cogent factor in determining whether in fact there was such a belief.

Cases referred to in judgment.

D.P.P. v Morgan, [1975] 2 All E.R. 347.
R. v Clarkson, [1971] 3 All E.R. 344.
R. v Coney, (1882) 8 Q.B.D. 534.
Krausz, (1973) 57 Cr. App. R. 466.
Bashir, (1970) 54 Cr. App. R. 1.
Greenberg, (1923) 17 Cr. App. R. 107.
R. v Cummings, [1948] 1 All E.R. 551.
Redpath, (1962) 46 Cr. App. R. 319.
Knight, (1966) 50 Cr. App. R. 122.
Wilson, (1973) 58 Cr. App. R. 304.
Holmes, (1871) 12 Cox 137.
R. v Cargill, [1913] 2 K.B. 271.

Appeal

The appellants were convicted in the Supreme Court on counts of rape and indecent assault. They were sentenced to terms of imprisonment varying from two to six years. They appealed against conviction and sentence.

E. Myers Q.C. and A.V. Stagnetto for Suetta.

F. Ashe Lincoln Q.C. and E. Ellul for Serra.

Sir Joshua Hassan Q.C. and A. Provasoli for Cumbo, Cardona, Alecio and Moreno.

The Attorney General (J.K. Havers Q.C.) and E. Thistlethwaite for the Crown.

9 June 1977: The following judgment was read—

This is an appeal against convictions for offences of rape and indecent assault on the person of Suzanne Michelle Berger. There is also an appeal against the sentences of imprisonment on the grounds that they are excessive and wrong in principle.

(After detailing the charges)

The case was one in which there were two stories each wholly at variance with the other. That of the complainant went to coercion by these six young men and submission induced by threat of violence that put her in terror for her safety; and the other, as put forward by the appellants, going to active participation in a sexual orgy which, indeed, she had initiated. The recurring suggestion put to the complainant over days of cross-examination, sometimes of a hectoring and repetitive character that, to state it mildly, strained latitude to an unusual degree, even in a matter such as this, was that she had a depraved nature, was loose in morals, habitually given to drink and drugs and influenced by them in her behaviour on this occasion to the extent of co-operating in and inviting her own debauching by this group of men.

It is evident that, at least in substance, the jury chose to accept and act upon the version put forward by Miss Berger in her sworn testimony. She candidly admitted some previous experience of sex but stoutly denied being the possessor of the character sought to be attributed to her during the prolonged ordeal to which she was subjected at the hands of cross-examining counsel.

(After reciting the facts, the judgment continues)

All the appellants have appealed against their conviction on grounds addressed almost exclusively to alleged misdirections to the jury by the learned trial judge, the Chief Justice, during the course of the evidence or in his summation.

Early in the latter the Chief Justice dealt briefly with the matter of consent in relation to rape, saying that the prosecution must prove an actual lack of consent and an intention on the part of the accused to have intercourse without consent or regardless of whether the woman consented or not.

It has been submitted that this was an insufficient direction and, in the forefront of their complaints, counsel for all the appellants have put the contention, numbered 1(a) in the grounds of appeal, that the Chief Justice misunderstood the decision of the House of Lords in *Director of Public Prosecutions v Morgan* [1], when he held that it applied only to cases where there was some outward opposition which the accused thought covered a

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[1] [1975] 2 All E.R. 347.

real consent. This error, it is said, led the Chief Justice to withdraw, quite wrongly, from the jury the question whether in the instant case the appellants had an honest belief that the complainant was consenting to their alleged unlawful acts.

The Attorney General maintained that the Chief Justice was right in holding that the decision in *Morgan's* case did not lay down principles of general application and should be confined to cases of virtually identical or very similar facts.

Whilst we think well founded the Attorney General's further contention that honest belief in consent is not an issue in every case of rape, it appears to us that *Morgan* is authority for a general principle that where there is an issue as to honest belief then it is not necessary for a jury to find that there were reasonable grounds for that belief, though the presence or absence of reasonable grounds might well be a cogent factor in determining whether in fact there was such a belief.

This general principle does, we think, emerge from the speeches of the majority of the law Lords but there was no majority for the proposition put before us on behalf of the appellants and argued very persuasively by Mr. Myers that, in every case of rape, a jury must be told that it was for the prosecution not only to prove

(a) connection to the extent of penetration and

(b) a present intention that the connection should be non-consensual.

but also to disprove

(c) any honest belief in consent.

Moreover, said Mr. Myers, whilst the jury in the present case might, on the evidence, have rejected any honest belief in consent, they were never given the chance to consider the point, which was specifically taken from them by the Chief Justice who said, dogmatically but wrongly, that it was a matter of "black and white" with "no room for compromise".

Though persuasively argued this submission is, we think, in conflict with the view expressed by Lord Hailsham when he said, with reference to the incompatible stories put forward by the prosecution and the defence in *Morgan,* (supra at 355):—

> ".....in my opinion it would have been quite sufficient for the judge, after suitable warnings about the burden of proof, corroboration, separate verdicts and the admissibility of the statements only against the makers, to tell the jury that they must really choose between the two versions, the one of a violent and unmistakeable rape of a singularly unpleasant kind, and the other of active co-operation in a sexual orgy, always remembering that if in reasonable doubt as to which was true they must give the appellants the benefit of it. In spite of the valiant attempt of counsel to suggest some way in which the stories could be taken apart in sections and give rise in some way to a situation which might conceivably have been acceptable to a reasonable jury in which, while

> the victim was found not to have consented, the appellants or any of them could conceivably either reasonably or unreasonably have thought she did consent, I am utterly unable to see any conceivable half-way house. The very material which could have introduced doubt into matter of consent goes equally to belief and vice versa."

In their incompatibility the stories told in *Morgan* and in the present case had much in common. In *Morgan* it was alleged that a Senior N.C.O. in the R.A.F. suggested that three young airmen who had been drinking should return to his house and have intercourse with his wife, who, because she was "kinky", might at first resist but this was only to enjoy it the more. The wife narrated how she had been dragged, resisting, from the room where she was sleeping with her children and violated, through the use of force or fear, in an adjoining room by each of the airmen. They gave evidence that although there had been some degree of struggle in the wife's bedroom there was none in the adjoining room where she not only consented but actively co-operated and enjoyed what was being done.

In those circumstances Lord Hailsham saw no room for that middle ground which it had been urged the Chief Justice should have left to the jury in the instant case. Lord Hailsham was content to rest his view on the conclusion that (at p. 362):—

> "the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no. A failure to prove this involves an acquittal because the intent, an essential ingredient, is lacking. It matters not why it is lacking if only it is not there, and in particular it matters not that the intention is lacking only because of a belief not based on reasonable grounds."

Amongst the majo[illegible] ree, Lord Cross of Chelsea clearly repudiated the [illegible] ground when he said (at p. 353) that the elief (if any) in consent must be based on v academic interest and "was of no practical the accused in the *Morgan* case had chosen, the truth of Mrs. Morgan's evidence and to first manifested some unwillingness she h and that the only real issue was whether rape or a sexual orgy.

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[1] [1975] 2 All E.R. 347.

It was even more diametrically opposed to that of the complainant since all the accused alleged not only that she consented and enjoyed the consequent sexual relations but that she actually initiated the whole thing by fondling Suetta. As Lord Cross said (p. 353), a jury which thought that eminently reasonable grounds for belief in consent put forward by the accused were in fact never entertained by them at all could not conceivably hold, in the same breath, that the accused had an honest belief in consent based on different and unreasonable grounds. Whilst, as Lord Hailsham said, the very material which would have gone to belief would equally have introduced doubt into the matter of consent.

Consequently it seems to us that the Chief Justice, having directed the jury in the manner contemplated as sufficient by Lord Hailsham, was fully justified in not going on to give a direction on matters which, in the circumstances of this particular case, could only have been of academic interest.

Some critical reference was made to the inclusion of the words "regardless of whether the woman consented or not" in the Chief Justice's definition of the intention required but they appear to be fully justified by the speeches in *Morgan* (Lord Cross at pp. 352, 353, Lord Hailsham at p. 362 and Lord Simon at p. 362) which purported to declare the then existing law. This would be applicable to the present case as the U.K. Sexual Offences Act 1976 does not apply.

That disposes of the first ground of appeal in so far as it was argued on behalf of all the appellants but Mr. Ashe Lincoln made the further point, on behalf of the appellant Serra, that, as the latter was not shown to have been present when the alleged statements were made, in the Magazine, about "screwing" or raping the complainant — he being engaged in driving Pratts back to the town at that time — there was a more compelling necessity in his case to leave to the jury the issue of belief: since, it was possible, on the girl's story, that if he returned to the scene when her resistance had collapsed and she accepted the inevitable, seeking only to secure her own safety and some privacy, he had more reason than the rest for an honest belief in consent.

The Crown conceded that the evidence did not establish that Serra was present when the statements about "screwing" etc. were made but contended there was ample evidence to show that what was said and done after his return must have brought home to him that she was not consenting and that the group of which he was part had overborne her resistance.

In the circumstances it might well have been more helpful to the jury if the Chief Justice had analysed separately, at least in respect of this accused, the evidence which specifically implicated him as an individual, nevertheless we think there is merit in the contention that if the complainant's story was to be believed — and clearly the jury did believe it — no room was left for a mistake of this kind. The atmosphere which had built up must have been unmistakeable to anybody participating in the events as closely as Serra did and over as lengthy a period of time. His account of his action in pushing

her against the back of a car and ordering to take off her clothes do not suggest a belief in consent and the words she said she kept saying later, whilst he was having intercourse, "Please don't hurt me. Please don't kill me. Are the others going to kill me?" could not have left him with an illusion that she was consenting as distinct from submitting.

But, quite apart from all this, the argument founders on the fact that Serra no less than the others committed himself completely to a story diametrically opposed to that of the complainant, alleging all the outward appearance of consent and co-operation by her. In his case no less than in the others did this commitment to a head-on conflict remove any possibility of finding what Lord Hailsham described as a "half-way house".

For these reasons we think the ground of appeal numbered 1(a) must fail but, had we thought otherwise, we would have felt no less impelled than the House of Lords in *Morgan's* case to apply the proviso.

The next complaint, numbered 1(b) in the Memorandum of Appeal, refers to error in the Chief Justice's direction on aiding and abetting.

Sir Joshua Hassan, who led on this point, did not quarrel with the Chief Justice's early general statement that mere watching was insufficient but that encouragement could amount to aiding and abetting. Later, when dealing with the matter in more detail, the Chief Justice, according to Sir Joshua, dealt too cursorily with an important aspect by referring tersely to the accused "all acting in concert together" and completely failed to bring home to the jury that there must be not only actual encouragement but an intention to encourage.

Support for this argument was sought mainly from *R. v Clarkson*[1] where the accused were present at a multiple rape and their presence was not accidental but they had not done any physical act or uttered any word which involved direct physical participation or verbal encouragement.

Megaw, L.J., delivering the judgment of the Court Martial Appeal Court, quoted from the judgment of Hawkins J. in *R. v Coney*[2] at p. 557 where he said:—

> "In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, on non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder."

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1 [1971] 3 All E.R. 344.

2 (1882) 8 Q.B.D. 534

Megaw, L.J. went on to say (p. 347):—

> "It is not enough, then, that the presence of the accused has, in fact, given encouragement. It must be proved that the accused intended to give encouragement: that he *wilfully* encouraged.

Later he added (p. 348):—

> "....mere intention is not in itself enough. There must be an intention to encourage; and there must also be encouragement in fact...."

Applying these principles, certain of the convictions were quashed because the direction of the Judge Advocate did not give to the court a sufficiently clear conception of the principles involved: "the necessity for the prosecution to establish where the evidence is of non-accidental presence without firm agreement or positive physical act of participation in the actual commission of the crime, the elements of intention to encourage or of actual encouragement having taken place".

One might perhaps have expected to see the word "and" rather than "or" in the last passage, but within the context the intention is clear enough and the earlier reference to firm agreement points to an aspect particularly appropriate in the instant case.

Where there is agreement to join in concerted action, the very agreement provides both the actual encouragement and reveals the intention to encourage. One would not need to seek further evidence of such intention.

It was conceded by the Attorney General that the Chief Justice made no specific mention of intention but it was not necessary to do so where the case put forward was that of agreement leading to concerted action and this is what the prosecution alleged here. It would no doubt have been better if the Chief Justice had put in the form of a question the reference to acting in concert but, taking his summation as a whole and more particularly his opening and general direction that the jury should determine the facts, they should have been in no doubt that he was inviting them to hold that the accused were acting in concert and that, from such a finding, conclusions as to aiding and abetting could properly be drawn.

Viewed in this way we see nothing wrong with the direction but, again, had we come to the opposite conclusion we would have thought the evidence on this aspect so convincing as to preclude the possibility of injustice.

The next ground advanced for the appellants, numbered 1(c) in the memorandum of appeal, claimed that the Chief Justice misdirected the jury on the burden of proof.

Sir Joshua opened this ground with a brief reference to the Chief Justice's direction to the jury, when dealing with the complainant's life in Gibraltar as it affected her credibility that "you have to decide in the end which you believe to be true". The main thrust of the complaint was directed, however, at the passage where the Chief Justice said:—

> "The evidence of lack of consent is, of course, almost entirely that of the complainant herself. You've heard her on this and it is for you to decide whether she was telling the truth or whether the defendants were telling the truth. There is such a clear conflict here that there can be no compromise. One or the other is the truth and the other is a lie".

This, said Sir Joshua, was to treat the evidence of the prosecution and defence on the same basis and clouded the difference between them in regard to both the burden and standard of proof. The two should never be equated in this way, he said, and the jury should be reminded every time of the higher burden resting on the prosecution so that, if there was, on balance, little or nothing to choose between the two, preference would be given to the evidence of the defence.

The Attorney General countered by saying it was wrong to direct a jury that it was more difficult to find truth in the evidence of a prosecution witness. Each witness, said the Attorney, must be considered and weighed on his or her merits; it was only when the jury came to consider the issues raised by the whole case that they must satisfy themselves that the prosecution had discharged the burden of proving beyond doubt the guilt of the accused. In this respect, he said, the direction of the Chief Justice was entirely satisfactory when, after an earlier admonition, he told the jury that even if the evidence of the defence had raised no doubt in their minds and had been rejected by them they must still, in the last resort, analyse the complainant's evidence carefully and decide whether it was so reliable that they could place complete confidence in it.

This was, we believe, the correct approach to the burden resting on the prosecution. What the Chief Justice said was sufficient to bring home to the jury the differing burdens resting on the prosecution and defence respectively and it would, we think, have been neither necessary nor appropriate to direct the jury that the prosecution evidence should, merely because it was prosecution evidence, be given less credence than that of the defence.

That disposes of the grounds numbered 1(a) (b) and (c) in the memorandum of appeal.

The ground numbered 2 in the memorandum was argued mainly by Mr. Ashe Lincoln, though adopted by all counsel, stated the Chief Justice wrongly excluded evidence which would have shown that the complainant was more likely to have consented.

The evidence in question was said to relate to one act of gross indecency and to another occasion when the complainant was alleged to have had sexual intercourse with three men as part of a single transaction which also included other acts of indecency.

It was submitted that changing standards had brought evidence of this type into the admissible catagory: reliance being placed mainly on the case of *Krausz* [1] although reference was also made to *Reg. v Bashir* [2] where, at

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[1] (1973) 57 Cr. App. R. 466. [2] (1970) 54 Cr. App. R. 1.

Leeds Assizes, Veale, J., allowed a witness to give his reasons for thinking the complainant was a prostitute. In his ruling on the matter the Chief Justice may, we think, have slightly misunderstood the effect of *Bashir's* case but that is not material to the point here in issue which turns essentially on what was said by the English Court of Appeal in *Krausz*.

The headnote to that case says, following *Bashir*, that on a charge of rape a witness called by the defence to prove that the prosecutrix was a prostitute is entitled to give in his evidence in chief reasons for saying that she is a prostitute beyond the mere fact of having himself had sexual intercourse with her.

Stephenson, L.J., delivering the judgment of the Court of Criminal Appeal, said that, in the case of *Greenberg* [1], evidence had been admitted to show that the prosecutrix was a prostitute "or at least of notoriously immoral character and reputation". He continued:—

> "In an age of changing standards of sexual morality it may be harder to say where promiscuity ends and prostitution begins, and it may be unnecessary to decide on which side of the dividing line the particular conduct falls which a man charged with rape may wish to prove. Evidence which proves that a woman is in the habit of submitting her body to different men without discrimination, whether for pay or not, would seem to be admissible. However that may be, the evidence here excluded went near enough to proving prostitution in its accepted sense to justify its admission even on the old authorities."

In his ruling on the point the Chief Justice treated the passage in that extract which purported to go beyond the older authorities as obiter and in that we think he was right. The inordinate length of the present case is itself a warning of the dangers inherent in allowing the pursuit of tangential issues. We see no justification, so far as Gibraltar is concerned, for holding that changing standards would warrant a departure from, or extension of, the older authorities.

Moreover, even had we thought otherwise, we would have been disposed to entertain the Attorney General's argument that the evidence appeared insufficient to prove a habit.

This ground of appeal cannot be sustained.

The remaining points taken before us were less clearly linked to any of the stated grounds of appeal and they do not all call for treatment in detail.

There was a minor lapse when early in the summation, the Chief Justice referred to the "commission of the offence" being admitted. No doubt he intended to refer to the commission of the act. This appears clearly from the context, particularly the latter part of it, and we do not think the lapse could have materially affected the jury.

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[1] (1923) 17 Cr. App. R. 107.

More weight was placed on the contention that the Chief Justice should not have admitted the terms of the complaints made to Corporal Dimmick and W.P.C. Hill because these complaints were not made at the first opportunity after the offence but anything up to an hour later.

The Chief Justice's first ruling on the point dealt only with the complaints to these two witnesses. Later the Chief Justice referred also to a statement to Inspector Rodriguez but the addition was not important as the Inspector does not appear to have been asked for testimony in this regard. The argument was that there had been an earlier opportunity when the complainant approached the taximan and the ensuing scene attracted the presence of the Police Inspector and Sergeant Porro or, at least, that instead of getting the taxi to take her to the flat the complainant could have gone to the police station which was close by.

The complainant maintained that she had complained to the taximan but that she was hysterical and did not get through or received little understanding. When the police landrover appeared and a police officer came over she was frightened, partly because of the gesture made by Moreno, and she asked the taximan to say nothing to the police and that it was only later when she was in her own flat that she really began to unburden herself, first to her fellow lodger Dimmick and then to the woman police constable and the Inspector.

The taximan seems to have earned the Chief Justice's comment of being something less than candid, possibly through a reluctance to get involved, but he was very articulate about her hysterical condition and his inability to understand what she was trying to tell him because she was "screaming" and "shouting".

The evidence pointed to her being in great distress and probably in a state of shock at the time. It could well have been that she did complain to Lombard who failed fully to grasp what she was saying. Her reluctance to speak to the police officer in the street was entirely understandable. It would be unrealistic to hold that the complaints to Dimmick and W.P.C. Hill came too late to be admissible. See *R. v Cummings* [1] where the victim waited until the following morning before making her complaint and the English Court of Criminal Appeal said it was for the trial judge to decide whether the complaint was made as speedily as could reasonably be expected and, as the judge had applied the right principle, i.e. that there must be an early complaint, the appellate court would not interfere.

Sir Joshua Hassan took the lead in the allied argument that the Chief Justice did not properly direct the jury as to the significance of the distress displayed by the complainant after the alleged rapes and its availability as corroboration.

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[1] [1948] 1 All E.R. 551.

Basing himself on the decisions in *Redpath*[1], *Knight*[2], and *Wilson*[3], more particularly the last two named, he argued that the Chief Justice should have guarded against the distress being over-emphasised and thus should have warned the jury of the danger of the apparent distress being simulated, possibly as part and parcel of the complaint being made, and should then have told them that "except in exceptional circumstances little weight ought to be given to that evidence."

The last mentioned phrase comes from the judgment of the English Court of Criminal Appeal in *Wilson's* case, when Edmund Davies L.J. went on to refer to the need for vigilance because distress might arise from a multiplicity of causes and, as in the case then before the court, might not spring, despite the complainant's assertion, from anything the accused man did or said, but from other and dissociated causes.

If it were correct to say that distress could only be treated as corroborative in "exceptional cases" we would have no hesitation in saying that the distress described in this case would appear to have come well within the category. In its intensity, extent and persistence it appears to have been unusual, to say the least, and capable of carrying a very high degree of conviction.

But, whilst fully subscribing to the need in certain cases to warn the jury of the danger of treating as genuine distress which has only been simulated or of thinking it was caused by the accused when it could be due to other causes, we believe the true rule to be that genuine distress caused by conduct of an accused can amount to corroboration and that it is for the jury to decide whether it is genuine and how it has been caused. We are not disposed to think there is any rule of law or practice binding on the courts of Gibraltar which would require a judge to tell a jury in all cases where distress is said to afford corroboration that only "in exceptional circumstances" should they so regard it.

The observations in *Knight* (supra) and *Wilson* (supra) must be seen in the context of the cases where they were made and indeed it may well be open to question whether the reference to exceptional circumstances was particularly apt or well adapted to alert the jury to the special dangers which the judges had in mind. When necessary, as in dealing with distress displayed by young children or by a daughter in making a complaint to her mother, this could, we think, be equally well if not better done by other language.

So far as the present case is concerned the evidence of distress was so cogent, convincing and patently authentic that the danger of simulation was minimal and the connection of the accused with the distress could hardly be questioned. In these circumstances the dangers envisaged in *Knight* and

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1 (1962) 46 Cr. App. R. 319.
2 (1966) 50 Cr. App. R. 122.
3 (1973) 58 Cr. App. R. 304.

Wilson scarcely arose, nevertheless the Chief Justice did tell the jury to approach with care distress associated with complaints because of the possibility that it might be due to putting on an act. In going on to suggest to the jury that they might well feel that the extent of the distress shown in the instant case precluded the possibility of simulation he did no more than was justified by the nature of the evidence.

This ground of complaint cannot be sustained.

Complaint has also been made that the Chief Justice erred in telling the jury they were bound by the answer of the complainant when she denied sexual intercourse with men other than the accused.

Mr. Ashe Lincoln, who took the principal part in this argument said that it was correct to say that counsel was so bound but not the jury which could never be bound in this fashion. The argument was substantially primae impressionae and no authorities were quoted. Mr. Myers developed it however by submitting that the form of the answer itself or other evidence of the witness could leave room for a declaration by the jury that either there was not a clear denial or the denial was not true.

The form in which the rule is normally expressed does not imply that it is limited in the way suggested. In the leading case of *Holmes*[1], the court apparently regarded the evidence as conclusive (see Roscoe's Criminal Evidence 16th Ed. p. 883), whilst Channell, J., giving the judgment of the Court of Criminal Appeal in *R. v Cargill*[2], said:—

> "…..matters which only go to the credit and which are deemed to be relevant solely because they go to the credibility of the witness cannot be contradicted by further evidence."

Archbold's Criminal Pleadings etc. (39th Ed. para. 533), referring to this amongst other cases, says:—

> "Generally, evidence is not admissible to contradict answers given on cross-examination as to credit."

Whilst we would readily endorse Mr. Myers' argument that it is open to either side to say that the answer did not amount to a denial we would not endorse the further contention that one can also invite the jury to infer from other evidence that the answer is untrue. If we understood Mr. Myers' contention correctly he suggested that a distinction might properly be drawn, for this purpose, between evidence extracted from the witness whose evidence it was sought to disparage and evidence derived from another source.

To draw any such distinction would not only appear to conflict with the terms of the rule as stated in the formulation just mentioned but would tend to negate the basic purpose underlying the rule and the principle it embodies.

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1 (1871) 12 Cox 137. 2 [1913] 2 K.B. 271, at p. 274.

The purpose of the rule is, plainly, to preclude the matter from being placed in contention for decision by the jury as an issue and this leaves no room for raising it as a sort of half-issue to be determined on truncated testimony.

Consequently we see no reason to differ from the Chief Justice's direction on this point.

Questions were raised on both sides about statements made by the accused or some of them to the police but it is unnecessary to pursue these, as the Chief Justice advised the jury to attach no weight to the contents of the statements.

We think it also unnecessary to deal specifically with any of the other points put to us and we would merely add that we think the Chief Justice's comments on the evidence were entirely appropriate to the functions of a trial judge.

We find no merit in the grounds of appeal advanced on behalf of the appellants and their appeals against conviction are dismissed.

As regards sentence, it was argued that the sentences were manifestly excessive; that the learned Chief Justice had erred in principle in that he had adopted a "totting-up" procedure, making the sentences on some counts concurrent and on some consecutive; that the whole affair was to be regarded as one transaction; and that, in the case of Suetta, there was an unjustified disparity between his total sentence and that of some of the other appellants, in particular Moreno who, on the complainant's story, was the one principally to blame.

While we cannot say that the total sentences were manifestly excessive, we think that there is some force in the other arguments. On the complainant's evidence, which was clearly accepted by the jury, the principal responsibility rested with Moreno, who, though he did not himself have intercourse with the complainant, was the ringleader and largely in control of proceedings. It was also he who made the veiled threat of force by producing the knife. In the circumstances, we do not think that the other appellants should suffer more severe punishment than Moreno. We agree also that although the victim's ordeal was long drawn out the whole affair can, for the purposes of ensuring a proper balance in the sentences, be properly regarded as one transaction.

(The court varied the sentences, making all sentences on each accused concurrent and reducing the aggregate sentence in one case from five to four years and in another from six to four years.)