



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL DIVISION

3 INDICTMENT No. 57/21 & 58/21

4
5 THE QUEEN

6
7
8 -v-

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11 (1) ANTONIO MARSHALL
12 (2) ERICKA LYNCH

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16 **Appearances:** Mrs. Medi Tomos for the Crown
17 Mr. Richard Barton for Defendant #1
18 Mr. Keith Myers for Defendant #2
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20 **Before:** Hon. Mrs. Justice Marlene Carter (Actg.)
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23 **Date of Hearings:** 16 March and 3 May 2022
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25 **Ruling Delivered:** 4 May 2022
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27
28 HEADNOTE

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30 *Criminal Law – Trial - Assault by Penetration, Indecent Assault –*
31 *Cross-examination of Complainant not complete - Exercise of Court’s discretion for trial to*
32 *proceed*

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35 RULING

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37 PREAMBLE

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39 1. Section 31 of the *Criminal Procedure Code (2014 Revision)* deals with the “Anonymity of
40 complainants in rape etc. cases and states:

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42 “31. (1) *After a person is accused of a rape [etc.] offence, no matter likely to*
43 *lead members of the public to identify a woman as the woman against*
44 *whom the offence is alleged to have been committed shall be*
45 *published in a written publication available to the public or be*
46 *broadcast, except as authorised by a direction of the court.*

47 2. I will therefore refer to the complainant as “the Complainant” or “Ms. X” to protect her identity.
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1 3. The defendants are charged on an indictment with two counts alleging, Assault by Penetration
2 and Indecent Assault.

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5 **Circumstances giving rise to the Application.**

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7 4. The Complainant was the first witness called by the Crown at trial. The Complainant completed
8 her evidence-in-chief and was cross-examined by Counsel for Defendant #1. On 14 March
9 2022, Counsel for Defendant #2 commenced cross-examination of the Complainant. On the 15
10 March 2022 at 10:00 am the trial continued with the cross-examination of the Complainant.
11 Counsel for Defendant #2 had previously indicated to the court that he estimated that his cross-
12 examination would be completed within two hours that morning.

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14 5. The court took the morning break at 11:05 am. During the break the court was informed of an
15 issue relating to a juror related to COVID-19. The juror was required to take a PCR test and as
16 a result the jury was released to the next morning when it was anticipated that the result of the
17 PCR test would be before the court.

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19 6. At this point the Complainant was informed by the Court that she was to return on 16 March
20 for cross-examination to be completed. However, Ms. X did not return to court on 16 March.

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22 7. The Crown's application is for the trial to proceed without the cross-examination of the
23 Complainant being completed. The basis of the application is the medical report of a Doctor
24 who examined the Complainant after court was adjourned on 15 March.

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26 8. The doctor's report confirms that the Complainant was seen by him on the afternoon of 15
27 March 2022. It is not necessary here to relate the full contents of the report except to state the
28 doctor's conclusion upon examination of the Complainant:

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30 *"She is currently not capable of providing any further testimony. She has*
31 *apparently previously provided statements, and has been questioned*
32 *extensively in regards to this case. It is possible that if she is given the*
33 *opportunity to recover in a stress-free environment that she may be able to*
34 *resume responding to questioning, however this cannot be guaranteed.*

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37 *It is my assessment that [Ms X] is not capable of proceeding further until she*
38 *has had adequate opportunity to recover. This possibly will also entail*
39 *further therapeutic intervention."*

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1 9. Crown Counsel submits that the Complainant is no longer fit to continue with her evidence.
2 Counsel submits that the trial can proceed and asks the court to exercise its discretion to enable
3 the prosecution to proceed with its case against the defendants. Counsel submitted:

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“7. *Where a witness becomes so distressed that it is not possible to complete cross-examination that does not mean that the trial must be stopped. The question will be whether the examination of the witness had been sufficient to allow the jury properly to assess the issues in dispute. Appropriate explanations to the jury will also be necessary.*”

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10. Counsel for the Crown argued that the cross-examination on behalf of Defendant #1 had concluded and that of Defendant #2, though not concluded, had been extensive and had covered the incident itself. Counsel submitted that there was sufficient cross-examination to enable the jury to access the main issue of consent, as it had been repeatedly put to the Complainant that she consented, which she denied, that the defendants’ case had been put to the Complainant from beginning to end, and that with appropriate warnings and directions from the court the trial could continue in fairness to all parties.

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11. Counsel for the Defendant #1 in response related his concerns about areas of the Complainant’s testimony that were now before the jury and which the defence will now not have the opportunity to challenge. He referred to the areas outlined in written submissions for Defendant #2 which he adopted. Counsel submitted that the court should be mindful of the effect on the fairness of the trial with regard to Defendant #1 of these matters not being “challenged”.

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12. Counsel for Defendant #2 submitted that when faced with the instant issue there were four avenues for redress. The first lay with the Crown in the exercise of its prosecutorial discretion whether to proceed, the second option lay with the court to discharge the jury and order a retrial of the matter.

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13. The third option was for the court to order a stay of the proceedings as an abuse of process.

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14. The fourth for the court to accede to the prosecution application and for the trial to continue.

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15. I have considered the authorities that counsel has submitted.

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16. The Court was referred to the case of *Stretton and McCallion (1988) 86 Cr App R 7 CA* where early in its judgment the Court of Appeal remarked:



1 “The main point which arises in this case in the experience of this Court, and
2 according to the researches of counsel, is unprecedented.”
3

4 17. The Court of Appeal went on to hold that where a witness became incapable through illness of
5 giving further evidence having given evidence in-chief and having been cross-examined for
6 some hours, that a judge has a discretion to allow the trial to continue on the basis of the
7 evidence given.

8
9 18. In *Stretton*, an epileptic and mentally handicapped woman had been unable to continue with
10 her evidence after a substantial period of cross-examination. In that trial, HH Judge Gower QC
11 allowed the trial to continue but invited the jury to acquit if they were not sure that the cross-
12 examination had sufficiently probed and tested the complainant so as to enable the jury to judge
13 fairly her credibility. The Judge gave the following direction:

14 *“If you feel that [defence counsel] was deprived of the opportunity, and that*
15 *means that his clients were, of properly testing and probing her evidence, why*
16 *then my advice to you would be that you should acquit both these defendants*
17 *because unless you feel sure that you as the jury are in a position to make a*
18 *proper assessment as to her credibility, this case does not get off the ground*
19 *and I am sure you realise that.”*
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22 19. The Court was also referred to *PM v The Queen [2008] EWCA Crim 2787*, in which the Court
23 considered the circumstances before the court in *R v Lawless and Basford [1994] 98 Cr. App.*
24 *R. 342* and in *Stretton and McCallion* and concluded:

25 *“[15] The essential principle is that a defendant must be given an adequate and*
26 *proper opportunity to challenge and contest the evidence on which the*
27 *allegation and conviction are based. In Lawless and Basford the defence were*
28 *deprived of that opportunity because the only means by which they could*
29 *challenge the accomplice’s evidence were cross-examination and their own*
30 *evidence of denial. By way of contrast, in Stratton and McCallion, the*
31 *defendants did have a fair opportunity to challenge the complainant’s evidence*
32 *and the trial remained fair, despite the fact that the cross-examination was*
33 *curtailed when considered in the context of the directions given to the jury.”*
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1 20. The Court Appeal in *PM v The Queen* concluded that the trial judge's ruling to continue where
2 a complainant could not proceed after a very short passage of cross-examination did not render
3 the trial unfair or the verdicts unsafe.

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5 21. The court noted that, "*as a bare minimum the jury should have been warned to be cautious*
6 *about acting on the basis of her evidence when they have been deprived of the opportunity of*
7 *seeing the consequences, both to the witness herself, and to her evidence, of the test of rigorous*
8 *cross-examination.*"

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10 22. While noting the direction of the trial judge to the jury in *Stretton* the Court remarked:

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12 *"We do not suggest that the precise terms of that direction is of universal*
13 *application. But the virtue of a direction with a similar thrust is that it warns*
14 *the jury that it should not act upon evidence which the defence has been unable*
15 *properly to challenge. But we add this word of caution. In many cases it ought*
16 *to be clear to the judge whether the defence had been deprived of a fair*
17 *opportunity to challenge a witness's evidence. If the judge comes to the*
18 *conclusion that the witness has been deprived of that opportunity, then the jury*
19 *should either be directed to ignore that evidence or if it is crucial to the case,*
20 *discharged. Save in cases similar to that of Stretton and McCallion where the*
21 *cross-examination was almost complete, the likely conclusion will be that*
22 *which was reached in Lawless and Basford namely, that the judge should have*
23 *discharged the jury."*

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25 23. I bear these observations in mind.

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27 24. That the court has a discretion in the circumstance where a witness' cross- examination has not
28 been completed, to allow a trial to continue is not in doubt. The particular circumstances of
29 each case must be considered. The length and extent of any cross-examination that did take
30 place is a factor to be considered and balanced against the defendant's inability to challenge the
31 Complainant on aspects of the prosecution's evidence which the defence submit are relevant
32 and essential. The Complainant in the instant case was cross-examined over various days.

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34 25. Another factor to be taken account by this court in the exercise of its discretion is whether the
35 court could adequately direct the jury as to how the jury was to approach and consider any
36 matter upon which the Complainant was not questioned in cross-examination, but which the
37 defence may raise for their consideration.

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1 26. The court must be sure that it can ensure the defendant's right to a fair trial in all the
2 circumstances.

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4 27. I am satisfied that the defendants have had a fair opportunity to challenge this Complainant's
5 evidence. There has been up to the point that the cross-examination stopped on the 15 March
6 sufficient examination of this witness to enable the jury to properly assess the main issues in
7 dispute between the prosecution and the defence. While the cross examination by counsel for
8 Defendant #2 was curtailed, counsel is able to provide the court with specific areas that he
9 would have explored with the Complainant had he been able to complete his cross-examination.
10 This will assist the court to give directions to the jury at the appropriate time to seek to further
11 ensure the fairness of the trial.

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13 28. Counsel for the Defence has stated that there could be room for exploration between Crown
14 and Defence of appropriate admissions on potential inconsistencies in the areas identified by
15 the Counsel for Defendant #2 at paragraph 43 of his written submissions. The court invites
16 counsel to meet and consider these.

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18 29. Upon the jury's return I will advise them as follows:

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20 *"When the matter was adjourned on the 15th of March last Tuesday Ms [X] was*
21 *being cross-examined. That cross-examination will not continue today and*
22 *Ms. [X] will not return to be cross-examined in this case. I direct you that*
23 *you are not to speculate about why the cross-examination of Ms. [X] will not*
24 *continue. You are not to use the fact that she will not continue her cross-*
25 *examination in any manner that is adverse to the defendants in this case.*
26 *Remember you are to determine this matter only on the evidence that is*
27 *presented to you in court. You will take my direction on this point. You will*
28 *receive further directions in due course."*

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30 **Renewed Application**

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32 30. In the instant case this court is in no doubt as to the importance of the Complainant's evidence
33 on the prosecution's case. It is accepted that the very fact that the cross-examination of the
34 Complainant was not completed could lead to some prejudice to the defendants. This court has
35 carefully considered these factors however for the reasons given earlier in the trial has
36 concluded that any such prejudice could be overcome by giving the jury an appropriate
37 direction.

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- 1 31. As I said then
2 “*Counsel is able to provide the court with specific areas that he would have*
3 *explored with the Complainant had he been able to complete his cross-*
4 *examination. This will assist the court to give directions to the jury at the*
5 *appropriate time to seek to further ensure the fairness of the trial.*”
6
- 7 32. I further invited counsel to explore with the Crown whether appropriate admissions on potential
8 inconsistencies in the areas identified by the defence at paragraph 43 of written submissions
9 could be agreed.
- 10
- 11 33. On the facts of the instant case this court has in mind that a direction may need to be given to
12 the jury surrounding the fact that if they do not believe the Complainant then their verdict
13 should be not guilty since it is only the Complainant’s evidence which goes to the central issue
14 in the trial of consent.
- 15
- 16 34. The authorities submitted to the court relating to cases where a witness may not have completed
17 his evidence, point to there being scope for the court to also give a further direction as was
18 given in *Stretton*, in effect directing the jury to acquit both defendants if they were not sure that
19 the cross-examination of the Complainant by the defendants’ counsel had sufficiently probed
20 and tested the complainant’s evidence so as to enable them to fairly judge her credibility.
- 21
- 22 35. Counsel for Defendant #2 has now, in essence, renewed his earlier application that the court
23 should not proceed further and to discharge the jury and invites this court to reconsider its ruling
24 on that earlier application.
- 25
- 26 36. Counsel rested his further submission on *Lawless*, a case which this court did consider in
27 reaching its earlier decision to continue with the trial. Counsel submits as was submitted in
28 *Lawless* that “*no direction to the jury was capable of curing the prejudice to these defendants*
29 *in not being able through their counsel to complete the cross examination of the complainant.*”
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- 32 37. In *Lawless*, the court was faced with accomplice evidence which had been given in evidence-
33 in-chief and but which the appellants were unable to challenge due to the inability of the
34 accomplice to be cross-examined due to illness. The witness/accomplice was not cross-
35 examined at all in that case. The witness’s evidence was crucial to the prosecution’s case in
36 establishing the element of corruption.
- 37
- 38 38. In that case the court carefully considered *Stretton and McCallioll* and *Wyatt [1990]*
39 **Crim.L.R.343**. The court noted that in *Stretton*:
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1 “Counsel [who represented both defendants] had virtually finished cross-
2 examining [the complainant] on all the matters with which one of them was
3 concerned and save in a most general way had not started to cross-examine
4 her upon the specific matters involving the other defendant.
5

6 There was other evidence, provided in large part by the defendants themselves,
7 confirming much of the complainant's account of the incident in question save
8 on the issue of consent.
9

10 The problem had thus arisen at a later stage of the witness's evidence in that
11 case than in this.”
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13 39. The judge allowed the trial to continue and to deal with the issue by means of a direction which
14 invited the jury to acquit both defendants if they were not sure that the cross-examination of
15 her by the defendants' counsel had sufficiently probed and tested the complainant's evidence so
16 as to enable them to judge fairly her credibility.
17

18 40. In this case, the cross-examination of the Complainant was over a number of hours, counsel for
19 Defendant #1 had completed his cross examination. Counsel for Defendant #1 had indicated
20 that in some respects the cross examination by counsel for Defendant #2 would complement
21 his cross examination and that there were several areas that he did not explore directly with the
22 Complainant as he was aware that counsel for Defendant #2 would do so in depth. Counsel for
23 Defendant #2 had indicated to this court that he would require 2 hours to complete his cross
24 examination. The court is mindful that this indication was but an estimate given to a query
25 raised by the court to assist the court, and the court does not consider that this time indication
26 was binding on counsel for Defendant #2. The cross-examination stopped after 1 hour.
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28 41. It does appear to this court that cross-examination in this case extended somewhat beyond that
29 in *Stretton*.
30

31 42. Further, as in *Stretton*, the issue in the instant case is consent. The defendants have not disputed
32 that there was sexual activity between the Complainant and the defendants. They do dispute
33 the Complainant's evidence that she did not consent to that sexual activity. In the instant case
34 there is no requirement for this court to give a direction on the need for corroboration.
35

36 43. In considering *Wyatt*, the court noted that in that case a child complainant of indecent assault
37 gave evidence in chief and was cross-examined on it for about 15 to 20 minutes before
38 becoming too distressed to continue. There was strong corroborative evidence of her complaint.
39 The judge does not appear to have given the jury a warning of the sort given by the judge in



1 *Strellon and McCallion: but he did direct them fairly on the evidence of the girl and left it to*
2 *them to determine her credibility. The conviction was upheld.*

3
4 44. In *Lawless* the court doubted whether any direction, however strongly expressed, could have
5 overcome *the powerful prejudice of Davison's damning evidence going wholly unchallenged*
6 *and untested by cross-examination. For the reasons given by the appellants' counsel, he was*
7 *the central figure in the inter-related offences of corruption, deception and fraud with which*
8 *the appellants were charged. His was the only direct evidence of corruption which, if accepted*
9 *by the jury, gave meaning to the prosecution case against each of them on their involvement*
10 *with Davison in deceiving and defrauding their employer.*

11
12 45. *Lawless* is a case which is a long way from the instant case. If this were a case as in *Lawless*
13 where the complainant's evidence had been wholly unchallenged and untested by cross
14 examination she being the central figure in the prosecution's case against these defendants the
15 court may well have exercised its discretion in another way. This is not however the case.

16
17 46. In *Lawless*, the court was also faced with a deficiency in the direction regarding the lack of
18 cross-examination. The court found that the judge's direction that the the jury were "*to assume*
19 *that cross-examination would have "weakened or destroyed" Davison's evidence, meant that*
20 *"their only proper course would have been to assume that it would have been destroyed. That*
21 *being so, the Judge should have directed the Jury to ignore his evidence altogether. In our view,*
22 *that would have been the nearest he could have got by way of direction to overcoming the*
23 *substantial prejudice to the appellants resulting from the untested evidence of Davison."*

24
25 47. In *Lawless* apart from the matter of the lack of cross-examination itself, the court found that
26 the judge's direction on corroboration of the accomplice's unchallenged and untested evidence,
27 was deficient. He did not direct them positively or fully on corroboration. The issues of fact in
28 the case to which it related, or to the evidence, if any, capable of amounting to corroboration
29 on those issues. This was a material irregularity.

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31 48. I am satisfied that the case against these Defendants should continue. After considering
32 *Lawless* again, this still remains the court's view. The further application to the court by
33 counsel for the Defendant #2 is denied.

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38 **Hon Justice Marlene Carter**
39 **Acting Judge of the Grand Court**

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