

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCRAP 2007/012

BETWEEN:

OLIVE CLARKE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson Baptiste

Justice of Appeal

Appearances:

Appellant unrepresented and in person

Mr. Collin Williams, Director of Public Prosecutions with

Mr. Carl Williams and Ms. C. McDowell for the respondent

2010: May 31;
June 3.

ORAL JUDGMENT

[1] **EDWARDS, J.A.:** The appellant Mr. Olive Clarke was convicted for having sexual intercourse on 9th September 2005, with a girl under 13 years contrary to section 124 of the **Criminal Code** Chapter 124 of the **Laws of Saint Vincent and the Grenadines**. The virtual complainant ("the V/C") was 10 years old at the date of the offence. The appellant was unrepresented at his trial, and he was sentenced to 20 years imprisonment.

[2] The Notice of Appeal against conviction and sentence alleges:

“(1) The conviction is unsafe and cannot be supported by the evidence adduced.

(2) Sentence is harsh unreasonable due to circumstances of the case.”

[3] The prosecution's case was substantially proven by the V/C and her 11 year old cousin who were locked in the bedroom of 11 year old girl's mother along with the V/C by the appellant immediately before the sexual abuse of the V/C took place. These witnesses both testified that the appellant held down the V/C, took off her pants and panty, threw her down on the bed after dropping his pants to his knees, covered her mouth with his hands when she began screaming, had sexual intercourse with the V/C and told the two girls that if they talk he would shoot and/or kill the two of them because he had a gun. Both children said nothing to their parents after this incident. The appellant had been permitted by the mother of the V/C's 11 year old cousin to use her sewing machine to make a pants, and on the day of the incident, he was at the house sewing while the 2 children were in the bedroom where the sexual assault occurred, reading and doing school work.

[4] It was not until a little girl said something to the V/C's mother days later that the V/C's mother on 14th September 2005, along with the V/C made a report to P.C. Pilgrim at the police station. P.C. Pilgrim accompanied them to Dr. Edoka on 15th September 2005, and Dr. Edoka examined the V/C and recorded his findings on a prescribed medical injury form, and swore to its correctness before a Justice of the Peace. The appellant was apprehended on 16th September 2005, and upon being cautioned and interviewed, he gave an exculpatory written caution statement to P.C. Pilgrim in the presence of Justice of the Peace, Victor Warren on the same date. On 11th January 2006, P.C. Pilgrim charged him for the offence, and gave him a copy of the charge and the medical injury form.

[5] The appellant complains that he was unrepresented at the trial and could not defend himself as he did not know the law, and the trial judge did not give him the opportunity to retain a lawyer despite his request. The record shows that before the trial began the appellant did make such a request, while stating that he was about to be tried for a felony which is a serious charge and he needed a chance to

obtain all the money to retain a lawyer. The trial judge observed that the appellant "had all year to find a lawyer to represent him." The appellant told the judge that he was working and did not have all the money as yet. The learned judge told the appellant "Well, that's your problem," and thereafter proceeded to empanel the jury.

[6] The appellant who appears to be literate, ably cross-examined the V/C and her eye witness cousin with the assistance of the learned trial judge. By way of cross-examining Mr. Victor Warren the Justice of the Peace he contended that a sergeant of police had threatened him before he gave the written caution statement to P.C. Pilgrim. He also cross-examined the mothers of the children who testified as well. However, the appellant made no further allegations as to the voluntariness of this caution statement when P.C. Pilgrim was testifying, and the caution statement was admitted in evidence as an exhibit through P.C. Pilgrim. The appellant cross-examined P.C. Pilgrim and she was forced to explain that she did not charge him on the day she received the report because he was released so that she could do further investigations and the file had to go to the D.P.P. for advice so it took until January 2006 to arrest and charge the appellant on instructions from the D.P.P.

[7] The prosecution also tendered in evidence the medical injury form with Dr. Edoka's findings. However the findings were not read into the record of the proceedings; and the trial judge did not ask the appellant if he was objecting to the medical form being tendered before it was admitted into evidence. The only documentary exhibit on the record is the appellant's caution statement. We have not seen the medical form and the only indication of what Dr. Edoka's findings were is contained in the summation of the trial judge.

[8] The appellant apparently made a no case submission. The record is again deficient as the details of his no case submission are not disclosed. It is only recorded as follows:

"COURT: Accused found with a case to answer. Put on his defense.
Informed of his rights, accused elects to Remain Silent.

ACCUSED: I witnesses to call but they are not present here in Court.

COURT: Accused to be assisted in locating the three witnesses whom he has mentioned. Court adj to 1:30 p.m. for continuation. Jury admonished."

[9] One of the three witnesses of the appellant Mr. Philmore Jack alias "Mass Marble" attended later that day on the resumption of the court and gave evidence about fixing a sewing machine on an unknown day which was unrelated to the date and time of the sexual assault. Another witness was reportedly abroad picking apples and the other witness was notified to attend court but did not appear.

[10] Before Mr. Jack testified the appellant also raised his concern about the medical evidence. He told the judge:

"I seek for legal advice from the Bar Association and My Lordship the doctor in this case I did not heard the evidence of the doctor and My Lordship I am saying that I am a good reader..."

THE COURT: "I am not listening to that now"

ACCUSED: "Okay"

The appellant addressed the jury after Mr. Jack testified, but before he again said to the judge at page 85 of the record:

"My Lord the case is closed without the evidence of the doctor."

The judge told him:

"I will address the jury on that."

[11] In his closing address the appellant told the jury that it was so unfair of the Public Prosecutor because he did not get his legal advice within the time that he was seeking one and he was afraid and would like to get fair justice. The appellant continued: "If anything is to happen to me ...I will make this one, a case of a landmark in this country. That's all".

[12] The learned trial judge in his directions to the jury said at page 99 to 100 of the record:

“Dr. Emmanuel Edoka examined[d]...[V/C]. Edoka's findings were tender[ed] into evidence by the police officer because, apparently, Dr. Edoka is no longer in the island. So, the Prosecution were not able to call him as a witness. But the medical report which he compiled after he examined ...[V/C] is part of the Prosecution[s] case put in by the police officer. So, you will have a chance to look at it and see what the findings are. I cannot tell you what the findings are; the findings are there you read them for yourselves and decide what to make of those findings in relation to this case, alright.

Now, what I will tell you in that medical report there is a note that the hymen of the ...[V/C] was absent. You might want to say to yourselves maybe she was sexually active before - - before this incident or before this allegation. To me that is neither here nor there whether she was sexually active before this incident or before she made the allegation. What you are supposed to consider is whether you believe ...[V/C's] story that on this occasion 9th of September this accused had sex with her. That's all you have to consider and if you believe N... 's story because N... 's story is that while ...[V/C] was having... the accused was having sex with the ...[V/C] the accused had lock[ed] the door so, she was in the room trying to unlock the door to get out. And she saw Accused lying on ...[V/C] ...So, you have to take this whole case with extreme caution. But, if at the end of the day you believe what these two girls are telling you having regard for their demeanor in this box, the way they gave evidence. If you don't believe their story of course that is the end of the case, you have to find the accused not guilty.

So, even though the doctor did not give evidence, his report will be before you and you have to look at it, note its contents and decide whether it helps you in resolving this issue or it does not. That is a matter for you, if it does not you reject it, if it does you accept it.”

The Law

- [13] Section 8(2) of the **Saint Vincent Constitution Order 1979** is comparable to section 20(5) and (6) of the **Jamaica Constitution** and states that:

“Every person who is charged with a criminal offence (a) ...(b)... (c) shall be given adequate time and facilities for the preparation of his defence; (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice; (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution....”

[14] The Privy Council in **Frank Robinson v The Queen**¹ by a majority decision held that the right to legal representation under section 20(6) of the **Jamaica Constitution** was not an absolute right; and that the appellant who along with another co-accused was tried, convicted and sentenced to death for murder was not denied a fair trial because of the trial judge's refusal to adjourn the trial in order to permit the appellant to obtain counsel assigned by legal aid. The majority also found that the appellant had failed to retain counsel properly or to make a timely application for legal aid and that the judge's refusal to adjourn the trial to another date did not deprive the appellant of his right to a fair trial. The case had been adjourned on 19 occasions with a trial date fixed on 6 of these occasions when the appellant was represented by counsel. Despite the final trial date which the appellant's counsel had consented to, his counsel were absent. The trial judge had refused an application for an adjournment in order to allow the appellant to obtain counsel assigned by legal aid because of the probability that the main witness would not be available on a further adjournment. The trial judge who during the trial assisted the appellant somewhat, did not explain to him what cross-examination was and how to cross-examine. The appellant neither cross-examined the main prosecution witness despite the identification issue raised by this witness' testimony; nor the police witness who had interviewed him. Counsel for the prosecution submitted that since counsel for the co-accused had cross-examined the main witness whose credibility was tested by this cross-examination, there was no miscarriage of justice in the face of overwhelming evidence against the appellant. The majority of the Privy Council found that the evidence against the appellant was overwhelming.

[15] We were told by the learned Director of Public Prosecutions in the absence of documentary evidence on the record that the appellant had been previously arraigned at the beginning of the Assizes and upon his plea of not guilty, he was told that he would be notified by the police as to the date when his trial would commence. The practice is for the police to notify the accused persons on bail

¹ [1985] 1 A.C. 956

verbally before the trial date we were told. There was no evidence as to who notified the appellant, or when he was notified. Consequently, based on this unsatisfactory practice it cannot be said with any certainty that he had adequate notice before the date of trial that his trial would begin. We were also told that 15th June 2007, was the first and only trial date. The trial lasted 2 days.

[16] The learned trial judge obviously gave thought to the period of time that the appellant had to obtain the services of a lawyer. We do not know whether the “over one year” that the judge alluded to was calculated from the date of committal or the date of arraignment. The record does not show that the learned judge made any further enquiry as to when the appellant was notified that the trial would begin and we are of the view that such an enquiry should have been made, particularly where the appellant had explained that his delay was due to his partial impecuniosity and this was the first trial date. Section 187 of the **Criminal Procedures Act** Cap. 125 expressly states that the court may from time to time postpone or adjourn any trial if from the absence of witnesses or any other reasonable cause to be recorded in the proceedings, the court considers it necessary or advisable to postpone the commencement of the trial. The explanation given by the appellant on the record was a reasonable cause in our view for postponing the commencement of the trial, though the appellant may have had no absolute right to legal representation under the constitution on the authority of **Robinson**. The question arising from this is whether it can be said that there was a miscarriage of justice and his right to a fair trial was infringed.

[17] A thorough examination of the record shows that the trial judge though he could have been more helpful, did assist the appellant when he was cross-examining the witnesses and examining his witness. The judge asked him whether he wished to call witnesses in his defence after the appellant elected to remain silent, and he was allowed to address the jury. The judge would have had no difficulty in eliciting the nature of the defence since the appellant's caution statement was exculpatory as he stated that he was about 20 feet away from the children in the living room and he did not say anything to them or have anything to do with them. He said in

this statement that he packed up and left when the sewing machine started giving him trouble; and by his cross-examination of the V/C and her cousin, he suggested they were lying. The trial judge in his summation gave adequate directions to the jury concerning the appellant's defence, his caution statement, and his right to silence.

- [18] It is obvious however that the trial judge radically departed from the requirements of the law and practice in relation to Dr. Ekino's findings in the medical report form and misdirected the jury in his directions as to the weight to be given to this report. The medical report was clearly admissible under section 22(1) of the **Evidence Act** Cap. 158² which states:

“Subject to the provisions of subsection (2), any report, whether on a post-mortem examination or otherwise, of a medical practitioner registered or entitled to practice in Saint Vincent and the Grenadines, shall be admissible in criminal proceedings in any court or at an inquest without the practitioner being called to give evidence.”

Section 22(2) states that the provisions of section 21(2), (3) and (4) shall apply for the purpose of section 22 as they apply for the purpose of section 21.

- [19] The cumulative effect of section 21(2), (3) and (4) on section 22 is that even though a doctor's medical report is admissible, the prosecution or the accused can make a request for the doctor to attend and give evidence concerning his findings in the report; and the party making such a request should bear the cost and expenses to have the doctor attend Court and testify; but the Court can order that such costs and expenses must not be paid by an accused who requests that the doctor attend Court and testify where it is desirable to do so.³ Where the Court considers it desirable, the Court should call the doctor to give oral evidence concerning the findings in the doctor's report.⁴ Finally, where a doctor has been called by either the prosecutor, the accused or the Court to give evidence, and (it has been proven by evidence obviously) that that doctor is dead, or abroad; or where for any other reason a doctor who has been called to give evidence has not

² The Revised Laws of Saint Vincent and the Grenadines (1990)

³ Section 21(2)

⁴ Section 21(3)

attended and given evidence when called – that doctor's report may be admitted and the Court may take into account the fact that the doctor did not give evidence on oath, and that there was no opportunity to cross-examine the doctor when evaluating the doctor's medical report.⁵

[20] Lord Griffiths in **Scott and Walters v R**⁶ in relation to the deposition of an absent witness which is admitted as evidence, gave guidance as to what directions are mandatory. He said:

“It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explained in cross-examination.”

[21] In our view, this guidance from Lord Griffiths is more so applicable to an absent doctor's medical report, where we take into account the fact that the medical report may not in all cases have been sworn to by the doctor, who is the author of the report, unlike the deposition which was made on oath. This guidance will be even more relevant where there are medical terms, and scientific and technical matters and words in the medical report which must be explained only by a witness having the requisite medical skill and training.

[22] The purpose of the doctor's evidence as an expert, relates to the doctor's observations, examination, tests, and findings in relation to his patient/client, and the doctor's ability to assist the judge and jury in medical matters upon which they cannot be expected to form a view without the assistance of the doctor. In such circumstances a trial judge in the absence of the doctor's testimony, ought not to rely on his own opinion to interpret the findings of the doctor in a medical report for the benefit of the jury. The trial judge ought not to invite the jury to speculate as to

⁵ Section 22(4)

⁶ (1989) 37 WOR 330 at page 340

the significance of the doctor's findings in a medical report where the doctor has stated no opinion in that report.

- [23] We are of the view that the trial judge fell into error when he directed the jury to arrive at conclusions as to the probative value of the medical report by reading the findings for themselves and decide what to make of those findings in relation to this case. His directions to the jury invited the jury to speculate as to how the V/C lost her hymen in the absence of expert opinion testimony from a medical doctor as to how this could have happened. This misdirection left the jury unaware that since the doctor had given no opinion as to how the V/C lost her hymen, they were to disregard the medical report when deciding whether or not the appellant had sexual intercourse with the V/C.
- [24] Mr. Williams submitted that the prosecution was not relying on the medical report to prove its case, and having regard to the fact that the appellant had a fair trial although he was unrepresented, and the strength of the evidence that was before the jury, the proviso should be applied. Implicit in this submission is an acceptance, in our view, that the prejudicial effect of Dr. Ekino's medical report far outweighed its probative value. In such circumstances it ought to have been excluded once it was clear to the learned judge that no doctor was being called to explain the findings.
- [25] We are not convinced however, that because the appellant was unrepresented at his trial there was a miscarriage of justice, or that the admission into evidence of this medical report, and the misdirections of the trial judge materially compromised the fairness of the trial so as to cause the conviction to be quashed and a retrial ordered. In our view, this is not a case in which the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. On the strength of the evidence for the prosecution we entertain no lurking doubt.

- [26] Regarding the appellant's appeal against sentence, there is no evidence on the record which shows that there were mitigating factors which the trial judge should have taken into account. Despite the intemperate language of the trial judge who described the appellant as a jailbird among other things, it is obvious that based on the guidelines for sexual offences in **Winston Joseph, Benedict Charles, Gelnroy Sean Victor v The Queen**⁷ that the starting point as the notional sentence should be 10 years for him. The appellant locked his very young victim in a bedroom where he sexually assaulted her. The appellant also has a previous conviction on 25th March 2003, for buggery arising from sexually molesting a 10 year old child with special needs in 2001. The appellant who was 36 years old at the date of conviction has 4 other convictions for manslaughter (3.7.95); criminal assault (12.8.99); wounding (16.8.99); and possession of cannabis (19.2.2001). He has shown defiance and lacks remorse. All of these aggravating factors must serve to increase the notional sentence of 10 years. He is an obvious recidivist from whom the very young and vulnerable in the society need to be protected. In my view the sentence of 20 years should not be disturbed.
- [27] In the premise the appeal against conviction and sentence is dismissed and the conviction and sentence are affirmed.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal

⁷ Consolidated Criminal Appeals [St. Lucia Nos. 4, 8 and 7 of 2000 (unreported judgments)]