

GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 8 of 1985

BETWEEN:

CECIL OGILVIE - Appellant  
and  
THE QUEEN - Respondent

Before: The Honourable Mr. Justice Haynes - President  
The Honourable Sir Neville Peterkin  
The Honourable Mr. Justice Liverpool

Appearances: A. Sylvester for Appellant  
Doodnath Singh for Respondent

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1986: July, 22, 25.

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JUDGMENT

PETERKIN, J.A. delivered the Judgment of the Court:

At the conclusion of this matter the Court indicated that the appeal would be allowed, and that the reasons for so doing would be later submitted. We do so now.

The Appellant was convicted on 15th October, 1985, on two charges of Burglary and Rape, and sentenced to 10 years and 7 years respectively. He has appealed against both convictions and sentences.

Briefly, the facts and circumstances<sup>are</sup> that during one Tuesday night in September of 1983, according to the Complainant whose boy firend was away in Trinidad at the time, she was alone in her house at Happy Hill along with her 9 month old baby and a two year old child. She alleges that the Appellant, after shouting and pounding at her door, eventually burst it open and came inside. She stated in evidence that he wrestled with her, struck her, tore off her dress and panty, inserted his penis into her vagina, and had intercourse with her. Her evidence in part reads:

"After I heard the pounding on the door I got up and sat down on the bed to listen. I heard the accused say "open the fucking door! open the mother cunt door! I still did not answer. I started to get frightened. He shouted "Before I shove the fucking house in the ravine." There is a ravine about like from here to where the officer is from my

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house (20 feet). When he said that I got frightened and I started to bawl.

The accused then burst open the front door and came inside. The bolt to the door "run off". I had a small kerosend bedroom lamp which enabled me to see his face.

When he came up to me he was touching my breast. I boxed away his hands and started to bawl. He boxed me very hard in my face and said "hush your fucking mouth."

Soon after that my little baby got up and she started to cry. I picked her up and the accused started to wrestle with me.

While he wrestling with me I was on the bed still when I picked up the child. He then said "Oh you pick up the child is on the floor I want you."

We then both start wrestling together until he get me on the floor. While on the floor he held my throat with one hand and he was trying to take off my clothes with the other hand. I had on a silky dress and a panty.

While we were wrestling the baby got off on the bed and me and he on the floor. The other two (2) years old child was sleeping on the bed.

He tore my dress off like this (witness demonstrates how). He tear off the panty on me too. He was trying to get his penis in my vagina.

I saw his penis it was standing out straight. While he had me on the floor he pulled off his pants. I did not agree for him to do that.

When I was on the bed he said "I want to fuck you." I tell him "No." He tried a good time before he eventually get his penis in my vagina because we were wrestling."

And again:

"Soon after he got up from my mouth and get back on me. He started to have sex with me again. I still did not agree. I started to bawl again and he started to cuff me up all in my belly and all in my side."

And yet again:

"When he left I waited until outside get bright and I went and told the neighbour. The neighbour house is like from here to the garage (100 feet). I then went to another house where a man lived and I went to the St. George's Police Station by the Esplanade. It was the same morning. I met a man. A policewoman then brought me to the doctor at the health centre."

The Defence was one of consent. When formally charged and cautioned the Appellant replied that he had a lot to say. He said it all in an  
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unsworn statement from the Dock. He said in part:

"On September 6th, 1983 I met Joyce Dick at the Moliniere water pipe. That was around 5.30 in the afternoon. We spoke with one another and as a result of that she gave me consent to come at her home that night.

I went by her around 10.30 that said night. On reaching her home where there is other houses around, I casual knocked the door. She answered "Who is that?" I said it was me "Myah" -that's a false name they call me, Sir. She said "Come in, the door is not locked." I pushed the door, I went in.

Reaching inside I saw her sitting on the bed. She asked me how I come so early. I said, "Well is a long time we haven't been together". She turned and told me she would not like me to sleep because she and Joseph Goddard adopted mother, they had a quarrel the previous day which was the Monday, and she would not like her to know that she bring in men in her adopted son house, and she would also not like the neighbours to see me coming from there in the morning.

My reply to her was "No one wouldn't have the cause to see me coming from your home. I said to her "We spoke already by the pipe, you know what ah come for". At that time she had two children on the bed.

She then said we can't do anything on the bed, we will have to do it on the floor. She then got up and said "My boyfriend got a piece of matting from Holiday Inn, I will spread it on the floor." She then go under the bed, pull out the matting, went into the hall section, open it on the floor and told me to come - "You will have sex here but ah don't want you to stay too long." She took off her clothes. At that time she was wearing a silky nightie, she took off her pantie, I took of my pants along with my underwear. She lay down on the matting on the floor. I then went on top of her and we had sex."

And again:

"She came back and lie down by me on the floor. We talked for a considerable amount of time, and then I dropped asleep. I felt somebody shaking me in my sleep, when I catch myself I saw it was her. She said "Myah is time to go." We start talking again, then I dropped asleep and she dropped asleep also because when I woke up I saw she was sleeping. I shook her and said I was going. She asked me the time. I said it was 5.25. As I walked and stepped out the house she push the door."

Apart from the formalevidence of Cpl. Bridgeman and Sgt. Ramdeen there is no other evidence. The Record contains no medical testimony of anynature. Apparently the Doctor had left the State even before the

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Preliminary hearing, and so there was nothing to support the Complainant's story that she had been beaten.

But that is not all by any means. There are, in our view, other unsatisfactory features to be accounted for. The Complainant alleges that the Appellant had not only "burst" open her door, but had also torn off her dress and panty. When cross-examined, Sgt. Ramdeen had this to say:

"I did not see a door bursted in Joyce Dick's house. I inspected the front door of Joyce Dick's house. Joyce Dick did not give me any clothes, dress or panty."

But perhaps what is strangest of all is that not a single witness has been called to say that he or she had heard anything untoward that night, nor is there anything in the evidence in the nature of a Recent Complaint having been made to anyone by the Complainant such as would tend to show the consistency of her evidence.

We have given earnest thought to this case. We wish to say that we find no fault with the Judge's summing-up, but are of the view that in all the circumstances we should apply the words of Widgery L.J. in the case of *REGina v Cooper*, (1968) 1 Q.B., 267, at page 271:-

"However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that 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. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

We too feel a lurking doubt in our minds, and after due consideration we have decided we do not regard this verdict as safe. Accordingly, we shall allow the appeal and quash the convictions. The sentences are set aside, and the Appellant is discharged.

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N. PETERKIN,  
Justice of Appeal

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J. HAYNES  
President

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N. LIVERPOOL  
Justice of Appeal