ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.13 OF 1997

BETWEEN:

GLADSTONE GOODERIDGE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal

Appearances: Mr. Victor Cuffy for the Appellant
Mrs. Bollers for the Respondent

1997: December 10 ; 11;
1998: January 12.

Criminal Law – Conviction for indecent assault – Two years imprisonment - Appeal against conviction – Whether the evidence adduced was sufficient to substantiate the offence of indecent assault under the Code - Six year delay in bringing appellant to trial - Whether this amounted to a breach of section 8[1] of the Constitution, as not affording a "fair hearing within a reasonable time" - Barker v Wingo [1972] 407 US 514; Wright George v Spencer Civil Appeal No. 5 of 1978 [Antigua]; R v Miller [1983] Alberta Reports 380; Bell v DPP of Jamaica [1985] 2 AER 585 considered - Whether the delay is justifiable - Bell v DPP of Jamaica [supra] applied - Incidence of the burden of proof in that regard – Whether, and principles re. determining whether, any prejudice was suffered by appellant – R v Central Criminal Court ex. p Rondle [1992] 1 AER 370 referred to - Whether an adjournment ought to have been granted so that the appellant/ defendant may be accorded Counsel, once the

offence charged on the indictment was changed form rape to indecent assault - Whether the Court of Appeal is obliged to entertain argument on a point not taken in the court below - Wilmot v R [1934] 24 CAR 63 referred to –Responsibility of an accused for asserting his rights in a timely manner - Question of waiver – Barker v Wingo [supra] applied - Whether the proper procedure was followed in alleging contravention of the fundamental rights provisions – Section 16 of the Constitution. Appeal dismissed.

JUDGMENT

BYRON, C. J.

On the 5th of June l997 the appellant was convicted of indecent assault and sentenced to two years imprisonment after a trial before Cenac J and a Jury. He has appealed against his conviction.

The Grounds of appeal read:

1. That the evidence adduced at the trial does not prove or substantiate the offence of Indecent Assault under section 127 of the Criminal Code.

2. That having been charged with the crime of Rape on or about May 11th l991, the Defendant was being brought to trial at Assizes six years later in June l997 which is inconsistent with Section 8(1) of the Saint Vincent Constitution, l979 in that he was not "afforded a fair hearing within a reasonable time.

3. That having charge the office charge on the Indictment from "Rape" to "Indecent Assault" half way into the trial ought to have been at least adjourned so that the Defendant may be accorded Counsel in the circumstances, especially since comments were made by the trial judge that the defendant "seemed to be suffering from some sort of disability".

4. The verdict is unsafe and unsatisfactory.

The Background

On the 11th May l991 the virtual complainant was 6 years old. In her evidence, which was given before the court on 5th June l997, she said that the appellant took her in a banana field and gave her his penis to suck. She also said that the appellant did not do anything to her vagina that day. Nurse Gill-Fraser, attached to the Georgetown Health Center was on duty that day, after 6.00 pm, when she saw the appellant put his hand under the complainant's dress, take out his penis put her hand on it and put it in her mouth. She called out. He ran with the girl. She gave chase and eventually caught up with him. He struggled with her, and told the girl not to tell her name. The nurse prevailed, took the complainant to the Health Center and called the police. Shirley Hadley, who also worked at the Georgetown Health Centre, for 21 years, said that she was with Nurse Gill-Fraser and saw the incident, in similar

terms as the Nurse. She knew the appellant from since he was a little boy. She also knew the complainant and her mother Shirley Texeira. The complainant was examined by a Registered Medical Practitioner, and the medical certificate he issued showed lacerations to the vagina and the absence of the hymen. On the 12th May the appellant was arrested and charged with having sexual intercourse with a girl under the age of 13 years. He made no statement to the police when he was cautioned. At the trial the appellant, who was not represented by counsel, did not cross-examine any of the witnesses for the prosecution. When called upon to put his defence he elected to say nothing and he declined to address the jury when invited to do so by the Judge.

Grounds 1 & 4

Counsel for the appellant conceded that the evidence was sufficient to justify conviction for the offence of indecent assault. In my view there was no merit at all in the grounds of appeal, which impugned the factual basis for the verdict.

Ground 2

This ground too was entirely misconceived. The indictment was preferred on 16th April l997 for intercourse with a girl under the age of 13 years contrary to section 124 of the Criminal Code. The

complainant adduced no evidence of intercourse. The learned Judge directed the jury, in accordance with section 112 of the Criminal Code that they could not convict for rape but could consider whether the alternative offence of Indecent Assault under section 127 had been proved. They convicted for the Indecent Assault. Insanity was not raised in any way. I do not see any merit in this ground of appeal.

Ground 3

I must comment that the court found it entirely unsatisfactory that neither the appellant nor the respondent offered any assistance on this important issue. Counsel cited not one case to us. Our Constitutions expect the State to play an active role in ensuring that the fundamental freedoms of citizens are protected and the Crown must always be able to assist the court in dealing with constitutional issues when raised in criminal trials. Counsel for the appellant on the other hand has acquired some notoriety as a leader of the Human Rights Movement. In that capacity we were entitled to expect some assistance from him.

Point not taken in court below

The appellant was not represented by counsel in the court below. The point now being argued on his behalf had not been

taken before the learned trial Judge. It is clear however that in the interests of justice we must consider the points of law which if present in the minds of those in the court below could have been taken. This must however be subject to the limitation that the court is in possession of all the material necessary to dispose of the matter without injustice to either party, and without recourse to a further hearing below. I need only refer to Wilmot v R [1934] 24 Cr. App. R. 63, where the Lord Chief Justice Hewart at 68 quoted from Molloy [1921] 2 K.B. 364, at 369:

> "In these circumstances, although the point was not taken by the appellant at the trial, we must, now that the point is taken, decide it according to law, and in our opinion the appeal must be allowed and the conviction quashed".

and he went on to comment:

> "it is to be observed that the words are not "we may" but "we must", the matter is there stated as being a duty on this court in the interests of justice."

Lack of Evidence

The appellant did not come armed with any legal authorities or factual information to show whether the trial did not take place in a reasonable time. The information from the Bar Table was that the police statements showed that the appellant had been the common-law husband of the complainant's mother and had two children from that union, both younger than the complainant. The Government was making efforts to have all sexual matters tried before a Family

Court and there were administrative difficulties in setting up this court. The Preliminary Inquiry was held over five days between the 22nd October and 29th November l996.

The Constitutional Right

Section 8[1] of the Constitution states that:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The right to a trial without unreasonable delay is recognised as an amorphous and vague concept incapable of precise definition. It also involves the severe remedy of dismissal of the indictment when the right has been infringed, leading to the serious consequence of a defendant who may be guilty of serious crime going free without having been tried. The right to a speedy trial promotes both the interests of the individual and of society, though these interests may be in opposition to each other, as in the tactical use of delay by the defence. There has been an abundance of legal writing and judicial authority on this subject. I will make brief reference to some of the leading authorities. In her treatise "Fundamental Rights in Commonwealth Caribbean" Margaret Demerieux gives a very well researched and enlightened treatment of the right to a trial within a reasonable time as one of the

guaranteed protections in the Commonweath Caribbean Constitutions. Barker v Wingo [1972] 407 US 514 is a leading case, of persuasive not binding authority in our courts, on the sixth amendment to the United States Constitution which provides the right to a speedy and public trial by an impartial jury in all criminal trials. In that case the U.S. Supreme Court did not find that the petitioner's rights were infringed. He had been brought to trial for murder more than five years after arrest, and was tried and convicted. The prosecution had obtained numerous continuances, for various reasons including trying accomplices so that their testimony could be available. Some delay was caused by illness of a key prosecution witness. An important factor in that case was the failure of the petitioner to object to the continuances in circumstances where the court concluded that he had waived his right to a speedy trial.

In our jurisdiction there was the Antiguan case of Wright George v Spencer, Antigua Civil Appeal No. 5 of l978 a judgment delivered by Berridge J.A. which decided that there was no breach of the constitutional right to a fair trial within a reasonable time in the circumstances of that case. Spencer had been arrested and charged with receiving stolen goods between 25th March and 6th April l976. He was released on bail and nothing was heard of the matter until 20th November l977 when he was told to appear for

Preliminary Inquiry on 22nd November l977. In accordance with the provisions of the Antigua Constitution the learned Magistrate acceded to his Counsel's request to state a case to the High Court for determination whether his constitution rights had been violated. In that case the delay was nineteen months and was caused by the absence from the State of a vital prosecution witness.

There is the Canadian Case of R v Miller [1983] Alberta Reports 380. The accused person was to be tried 17 months after a charge for trafficking in narcotic was laid, the delay being caused by a backlog of cases in the courts. The accused was not in custody and did not complain of the delay. The court held that his right to be tried within a reasonable time had not be denied.

The leading Caribbean case on the subject is Bell v D.P.P of Jamaica [1985] 2 All E.R. 585. Bell had been arrested in May l977 and convicted in October of that year. In March l979 the Court of Appeal allowed his appeal and ordered a retrial. After various adjournments and delays he was discharged on 10th November 1981, the prosecution offering no evidence as their witnesses were unavailable. In February 1982 he was rearrested and, despite objections from his attorney, was ordered to be retried on 11th May l982. The matter reached the Privy Council where it was held that the delay had infringed his constitutional right to a hearing without unreasonable delay. In delivering the judgment of the Privy Council Lord Templeman referred with approval to the case of Barker v

Wingo [supra] on the sixth amendment to the United States Constitution which provides the right to a speedy and public trial, by an impartial jury in all criminal trials.

In these cases the factors that have been considered, to determine whether the constitutional right has been contravened, are [i] the length of the delay [ii] the reason given to justify the delay, [iii] the responsibility of the accused for asserting his rights, [iv] the prejudice to the accused, and [as explained in R v Miller, supra] the nature of the charges, e.g. existence of limitation periods.

The Length of the Delay

In this case no discussion on the length of the delay is required because in my view, the delay of six years between the appellant's arrest and his trial was inordinately long, and in the majority of cases would be presumptively prejudicial.

The Reasons given to justify the Delay

I can do no better than to rely on the extract from Barker's case quoted in Bell v D.P.P. of Jamaica [supra] at 590:

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

In this case the issue of the reasons is necessarily tied up with the procedural question because neither side has adduced any evidence. This raises the question of the incidence of the burden of proof. The law seems to be that the burden to show the unreasonableness of the delay is primarily on the person who alleges contravention of his rights, although in some cases the extent of the delay may be sufficient to discharge that burden at least prima facie. In this case, however, despite the length of the delay, there is a special factor, which we feel the court must consider to determine whether that burden has been discharged. The complainant was a girl child. She was six years old. Her mother was the common-law wife of the appellant. St. Vincent and the Grenadines is a member of the Convention of the Elimination of Discrimination against Women. The international norms therefore that are applicable in this society include the duty of the State to protect the interests of the girl child against domestic violence and sexual abuse. The society and the complainant had an important interest in the prosecution of this case.

In some cases the prosecution of a sexual crime against a very young person is affected by the rules which prohibited very young people from giving evidence on oath, and the rules requiring corroboration of their testimony. In this case the prosecution would not have been hampered by these rules because of the evidence of Nurse Gill-Fraser and Ms. Hadley and the medical practitioner who

has examined the complainant. On the other hand the testimony of the complainant at the trial that the accused did not do anything to her vagina was a suspicious circumstance given the fact that a charge for rape had been preferred after she had testified at the Preliminary Inquiry, particularly when coupled with the unexplained fact that her mother did not give evidence nor did any member of her family. It is obvious that the delay was more beneficial to the appellant than to the prosecution. There was no evidence that the appellant had engineered the delay, but the circumstance that the victim of the sexual abuse was a weaker member of the family precludes the presumption that the delay was unreasonable. I conclude, therefore, that the appellant has not discharged his burden of proof in this area of the unreasonableness of the delay.

The responsibility of the accused for asserting his rights

In Barker's case the principle was put "whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and, most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain". In the case the failure of an accused person to assert his rights under this constitutional guarantee is considered equivalent to a waiver of his

right. In this case the appellant did not complain at all until after the trial. This was one of the deciding factor in Barker's case. The first time the issue is raised is on appeal after conviction. No explanation has been offered for this. This is a clear case where the appellant did not assert his rights in any way, and a court would be entitled to conclude that he waived them.

The prejudice to the accused

Three main interests have been identified [i] to prevent oppressive pretrial detention [ii] to minimise anxiety and concern of the accused [iii] to limit the possibility that the defence will be impaired. In this case none of these was relevant. There was no allegation that the appellant suffered any prejudice. The fact that the appellant had been on bail, that the trial actually took place and he did not raise any defence on the facts is a strong indication that he suffered no prejudice. In R v Central Criminal Court ex parte Rondle [1992] 1 All E.R. 370 Watkin L.J. expressed the opinion with which I agree "it is maintained that it is irrelevant that courts may suspect that the applicants have no good defence. There is a significant difference, in our judgment, between a case where guilt is squarely an issue and one in which it is suspected that it is not, or may not be". In this case the evidence has already been adduced and the crime proven beyond a reasonable doubt.

The nature of the charges in particular the existence of limitation periods. This is not relevant to this case.

Procedure

Section 16 of the St. Vincent and the Grenadines Constitution states:

> "16[1] If any person alleges that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him [or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person], then, without prejudice to any other action with respect to the same matter that is lawfully available, that person [or that other person] may apply to the High Court for redress.
>
> [3] If in any proceedings in any court [other than the Court of Appeal or the High Court or a court-martial] any question arises as to the contravention of any of the provisions of sections 2 to 15 [inclusive] of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

The Constitution clearly envisages that allegations of contravention of its fundamental rights and provisions should be the subject of application to the High Court for redress, in proceedings where evidence is adduced. Section 16[3] shows that it is only in courts other than the Court of Appeal, High Court, and Courts Martial, that provision exists for dealing with questions of such contravention when they arise during proceedings. In accordance with section 16[6] there are rules with respect to the practice and procedure under this section, and several matters, brought in

compliance with the rules, have already been considered by this court.

It is entirely inappropriate for the issue to be raised for the first time as a ground of appeal. In fact, this is reason enough to refuse to entertain the argument. The failure to utilise the proper procedure has resulted, not in a mere procedural irregularity, but in the inability to examine the evidential basis of important factors.

Conclusion

For the various reasons given the constitutional ground fails, both on procedural grounds and on the merits so far as they can be assessed.

I would therefore dismiss the appeal and confirm the conviction and sentence.

DENNIS BYRON
Chief Justice [Ag]

I Concur.

SATROHAN SINGH
Justice of Appeal

I Concur.

ALBERT REDHEAD
Justice of Appeal