GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 7 OF 2002

BETWEEN:

ANTHONY MOSES

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr.Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. A. Clouden for the Appellant
Mr. C. Nelson for the Respondent

2002: November, 27.
2003: January 28.

JUDGMENT

[1] REDHEAD J.A. The appellant was convicted for the rape of Antonia Simon and was sentenced to six [6] years imprisonment. He appeals to this court against his conviction and sentence.

[2] At the date of the incident the victim was about 17 years old. The virtual complainant and the appellant's daughter who was about eighteen years old at the time of the incident were good friends. The virtual complainant visited the appellant's home regularly. The virtual complainant 's mother also visited the appellant's home. So in a way it can be said that

the appellant was a family friend of the virtual complainant's family and both families lived neighbourly.

[3] On the day of the incident, 22nd day of July, 2001 Antonia Simon testified that she visited the home of the appellant. She said in her testimony that when she got to the house she knocked on the door, the appellant came out and asked her about a rag which he said was missing and he wanted to know about it. She said she told the appellant that she did not know about it but she would go and look for it. She said that she looked for the rag but did not find it.

[4] She told the judge and jury that she went upstairs and was sorting out some clothes to wash when the appellant came behind her and began to touch her breast. She said she told him do not touch her.

[5] The virtual complainant testified that he then held her squeezing her neck. He held on the bed, which was in the room. According to her he pressed down her knees, he then took off his pants and pushed his penis in her vagina and proceeded to have sexual intercourse with her for about ten minutes. When he was finished she put on her pants. The appellant put $15.00 in her pants waist. She ran downstairs "stuck" the $15.00 in the fence near to the appellant's yard and ran to her home.

[6] The virtual complainant testified that when she got home she was not felling "good" so she went and lay down. According to the virtual complainant her mother came into the room where she was lying down and asked her what happened but she did not tell her mother what happened until she went to the hospital.

[7] In cross-examination she said that she did not know how she got to the hospital because she had a black out that day. She woke up in the hospital. This witness testified under cross-examination said that before that day she never had a blackout.

Three grounds of appellant were argued on behalf of the appellant:

(1) The learned trial judge failed to give directions to the jury as to the prejudicial nature and non-disclosure by the prosecution of a vital piece of evidence namely the specimen sent to the lab.

(2) The learned trial judge wrongly admitted the evidence of Jocelyn Thomas when she said that after the doctor examined Antonia, he said to Antonia "tell you mother what happened to you" Antonia responded that Anthony Moses had sex with her.

(3) The learned trial judge failed to put the defence case in a balanced and fair manner and in certain instances effectively invited the jury to disbelieve the defence in a way in which the usual direction that the jury should ignore judicial comments if they disagree with them, is rendered nugatory.

[8] I now deal with ground 1-

Dr. Francis Martin testified that he examined the virtual complainant on 22nd July 2001. He said among other things:

> "Internal examination of the vagina……. revealed a whitish discharge in the vaginal vault. A sample was taken and sent to the lab for analysis."
>
> The doctor testified under cross-examination:
> "Women would normally give out discharge. This was one such discharge. I did not receive the specimen sent to the lab. I sent it to be tested. I have not seen the result."

[9] The doctor also said it is not very easy to distinguish between sperm and yeast infection in the vagina.

[10] The virtual complainant testified that after the appellant was finished having sexual intercourse with her and the record shows her as saying:

> "I saw all over my leg and on the bed" it is quite obvious that the sentence is incomplete. The learned trial judge in summing up to the jury referring to that aspect of the evidence said "she said after ten minutes of winding, he finished and she saw sperm on her leg and on the bed."

One has to assume that the judge was reading from his notes when he made that reference to the evidence. That being the case the conclusion is that the typist omitted the word "sperm" when typing the record.

[8] On the issue of disclosures I can do no better than to quote from the judgment of Singh J.A in:

Donnason Knights v The Queen (Criminal Appeal No. 8 of 1995 Grenada).

At page 3 of the judgment the learned Justice of Appeal said:

> "The law on the issue of "disclosure", is more or less settled the prosecution has a duty at common law to disclose to the defence, all relevant material, scientific or otherwise which tended to either weaken or strengthen the prosecution's case or to assist or strengthen the defence cases, whether or not the defence made a specific request for disclosure. This duty extends to and is also imposed on a forensic scientist who is an adviser to the prosecuting authority. "Relevant material" in this context, means some material which may have some bearing on the offence charged and the surrounding circumstances of the case and which material is known to the prosecution and/or the forensic scientist. The Court of Appeal of England in *R v Livingstone* [1993] CLR 597, says on this issue that "it was the duty of prosecution in all case where material, whether documentary [or] otherwise of relevance to the defence, came into their hands to make the defence a present of such material". It is also settled law, that failure to disclose what is known or possessed and which ought to have been disclosed is an irregularity in the course of the trial (see *R v Warde* [1992) 2 AER 577 and *R v Maguire* [1992] 2 AER 433."

[9] In the instant case there was nothing to disclose. The doctor's evidence is to the effect that the white discharge would either have been an yeast infection or sperm. He sent the swab which he took for testing but he did receive it back.

[10] The virtual complainant did not at anytime say that the appellant discharged inside of her. It cannot be said that there was evidence in favour of the defence which the prosecution failed to disclose.

[11] Moreover the doctor gave evidence at the preliminary inquiry. The defence knew that the result from the lab was not available. The defence could have made enquiries from the prosecution regarding the non-availability of the result of the test. If the defence had shown interest then in the result of the test that was done on the swab, the prosecution could have made enquiries from the lab technician who dealt with the swab and some information may have been obtained about the swab such as if a test was carried out on the swab.

[12] All we have from the evidence is a blank statement from the doctor that he sent the swab to the lab to be tested and he did not receive it back. Indeed if it was not returned to him he could not say much more. There was nothing in the possession of the prosecution to be ordered by the judge to be produced. Finally, it cannot be said that this evidence, it was not even evidence or material which could have benefited the defence or the non production of it favoured the prosecution.

[13] Mr. Clouden, learned Counsel, argued that it matters not whether defence knew of it and should have requested the material, the obligation is on the prosecution to disclose the material.

[14] I agree, but it must be relevant material which is in the possession of the prosecution and would be of assistance to the defence case.

[15] Mr. Clouden referred to:

R v Livingstone [1993] Crim.L.R. 397-

The appellant in that case was convicted of theft, the circumstances being that he had operated with a partner a financial management business including a building society agency. Customers of the building society had paid in cheques and cash totaling approximately £132,000, £8,000.00 of which never reached the building society but was spent by the appellant and his partner.

[16] The appellant's case was that, as between himself and the building society, he had not been required to pay the actual cash or cheques straight into the building society's bank account provided that he reimbursed the building society by writing appropriate cheques thereafter. The chief witness for, the prosecution who was an employee of the building society testified that the hard and fast rule was that all cheques had to be paid into the building society account, within at most, 48 hours. He added that there was a manual issued to all their agents by the building society, which though he could not quote from memory, he felt sure would bear him out. The issue therefore centered around the

question whether or not the appellant was entitled to intercept money paid by customers for the building society and also bore directly on his honesty when giving evidence, it being the prosecution case that when he said he was entitled to intercept incoming money, the appellant was lying. The case depended predominantly on the question of the appellant's honesty or otherwise.

[17] The document was of vital importance in my view to the defendant's case.

[18] The document was in the possession of prosecuting Counsel and while in prosecuting Counsel's possession junior defence saw and read it and concluded that the document bore out appellant's evidence. Defence Counsel requested a copy of the document and Prosecuting Counsel refused this request. The defence Counsel then made application to the trial judge. The prosecution resisted this application on the grounds (1) that it was not unused material within the terms of the Attorney General's guidelines and (2) the defense could have asked for it at anytime in the last few days, the document having been there on the bench. The trial judge accepted the prosecution submission and refused the defence application to produce the document.

[19] It was held by the Court of Criminal Appeal in England allowing the appeal and questioning the conviction, the document should have unquestionably have been given to the defence. The judge had been in error in failing to rule that it was disclosable but even more in error was the prosecution in not handing over the document to the defence as soon as it had come into their possession. It had been argued on behalf of the Crown that it was not the duty of the prosecution having got hold of the material document to place it in the hands of the defence if the defence knew of its existence and could have asked for it if they wished. It was emphasized that view was erroneous. It was the duty of the prosecution in all cases where, whether documentary or otherwise of relevance to the defence came into their hands to make the defence a present of such material.

[20] In the Livingstone case the material existed. It was in the hands of prosecuting Counsel. It was important to defence case. In the case at bar there is nothing to disclose. There is

no material in existence. The test of the swab, if in fact it was carried out, the result is unknown.

[21] Mr. Clouden also referred to, among others, Berry (Linton) v R 1992 41 W.I.R P244. The cases do not help Mr. Clouden's submission because his submission lacks the factual basis to maintain that submission.

[22] This ground of appeal is therefore dismissed.

[23] The complaint under ground 2 is that the evidence of Joycelyn Thomas should not have been admitted in evidence. Joycelyn Thomas testified before the jury on oath. She said that on Sunday 22nd July 2002 she left her home at about 7.35 am. with a plastic bag with clothes, bleach and a packet of breeze. She returned at about 8.00 am. This witness said:

> "When I saw her she came in the house. I find it was funny. She came and she was groaning…."

[24] She further said that she called her daughter, she did not respond. The daughter having not responded she began to 'make noise'. She called a neighbour, one Angela who came to her house, spoke to Angela. She then slapped her daughter on her cheek. Her daughter still did not respond. This witness said she threw water in the daughter's face but still there was no response.

[25] She then sought and obtained assistance and took her daughter to the hospital. At the hospital Joycelyn Thomas said she met a nurse and a doctor who examined and treated her daughter. This witness then said:

> "After he examined her the doctor spoke to Antonia, "tell your mother what happened to you". Antonia responds to me that Anthony Moses had sex with her."

[26] Mr. Clouden's submitted that the evidence could not qualify a recent complaint, since the doctor did not give evidence of the particulars of the complaint. What was said to the mother in the presence of the doctor and police was not voluntary. The complainant had an earlier opportunity to tell her mother what happened," if at all, when the complainant

returned home, she mentioned nothing to her mother notwithstanding that her mother made inquiries. Mr. Clouden referred in support of his submission to Albert Edward Wright and another v. R 1990 C.A.R. 91.

[27] At page 96 Ognall J said:

> "The first and primarily important point to note arising from the terms of the complaint is that none of that allegation formed any part of the child's evidence before the jury. We draw attention to this as the starting point, because it cannot be doubted as a matter of long established law that the whole and exclusive rationale for the introduction of a recent complaint in cases of alleged sexual crimes lies in its utility to the jury in determining whether or not the complainant has been consistent in the accounts she has given.
> For this purpose we refer to and agree with a passage set out in Archbold (42nd. Ed.) at para. 4-308 p 403, which reads: "The mere complaint is no evidence of the facts complained of and its admissibility depends on proof of the facts by sworn or other legalised testimony." It must, in our view follow that if the terms of the complaint are not ostensibly consistent with the terms of the testimony, the introduction of the complaint has no legitimate purpose within the context of the trial. It is for this reason that the courts have treated the matter in the past as summarised para 4-310 of Archbold (42nd ed.) which summary in that paragraph. We respectfully agree with and adopt."

[28] The case at bar does not suffer the defect as was the case in Wright.

[29] The virtual complainant in the instant case gave evidence of the occurrence of the incident, of what she told her mother.

[30] To be admissible the complaint must be made on the first opportunity which reasonably offers itself, and whether this is done is a matter for the court before which the complainant is offered in evidence to decide (Archbold 40th. Ed. para 523 and see R v Lee 1912 7 Cr App. R 91). The facts in this case are that the virtual complainant when she got home she met her mother at home. However she did not complaint to her mother she was feeling ill. Thereafter she passed out. She was taken to the hospital where she regained consciousness. The virtual complainant then made the complaint to her mother.

[31] The fact that the complaint was the result of a question asked of the virtual complainant does not make it inadmissible once it was her unassisted and unvarnished statement of what happened.

[32] In R v Norcott 1917 1KB 347 at page 350 Vicount Redding C.J. observed:

> "The court is concerned to see that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened. That she may have been persuaded to tell her unassisted and unvarnished story is no reason why the evidence of her having made the statement should be rejected."

[33] I, likewise can see no good reason why the unassisted and unvarnished evidence of the recent statement of the virtual complainant should be held inadmissible because it was prompted by the doctor's question.

[34] Finally I turn now to ground 3. The learned trial judge failed to put the defence in a balanced manner and in certain instances effectively invited the jury to disbelieve the defence in a way in which the usual direction that jury should ignore judicial comments if they disagree with them, is rendered nugatory.

[35] Complaint of Learned Counsel is to the effect that the learned trial judge made comments on the evidence at pages 15, 16 and 18 at line ten on each of the pages e.g. the learned trial judge said at page 18 line 10 "now if it is that she said she should have left for the weekend on the Thursday and came back on the Sunday and yet finds herself back at the house on the Saturday, what was the big fuss about the complainant having to pack to leave, if they themselves who were going away for the weekend were making spot visits back to the house. Was it that the complainant really told not to frequent the house or was it as business as usual? You must think about it, because Saranna Wise said she was not surprised to see Antonia there on the Saturday." The judge in my view is entitled to make comments on the evidence once his comments are fair and do not prejudice the trial in any way.

[36] The appellant's defence was a denial. The record reveals that the learned trial judge put the case fairly and in a balance manner in relation to the defence.

[37] This ground of appeal is dismissed.

[37] The appeal against sentence was not argued.

[38] The appeal is therefore dismissed. The conviction and sentence are affirmed.

Albert Redhead
Justice of Appeal

I concur

Sir Dennis Byron
Chief Justice

I Concur

Ephraim Georges
Justice of Appeal [Ag.]