COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 2 OF 2003

BETWEEN:

STEPHEN TREVOR KURT JAMES

Appellant

and

THE STATE

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian Saunders — Justice of Appeal
The Hon Mr. Michael Gordon QC — Justice of Appeal [Ag]

Appearances:

The Appellant in person
Ms. Wynette Adrian Roberts Director of Public Prosecutions [Ag]

2003: November 11; 12;
2004: February 16.

JUDGMENT

[1] GORDON, J.A. [AG.] On 3rd February 2003, the Appellant was convicted of Rape at the Criminal Assizes and sentenced to 12 years in prison.

[2] By Notice of Appeal filed at the Registrar General's Office and dated [sic] "05 Jan 2003" the Appellant appealed to this Court against both conviction and sentence.

[3] The Prosecution's case was that on Monday 18th December 2000 at about 5.30 p.m. the Virtual Complainant, a Ms. Farika Frederick, went to the Graphics Music Store to deliver some computer books to Steve La Ronde (hereafter referred to as

"Steve"). Whilst she was at the shop speaking to Steve, who was a good friend of both the Virtual Complainant and of her father, the Appellant entered and had a conversation with Steve. During this latter conversation the Virtual Complainant was looking at both Steve and the Appellant.

[4] The Virtual Complainant testified that during that period of observation she saw the Appellant's face, the clothes he was wearing and a "big silver chain in his neck with a gun as a pendant", which she was able to describe in Court.

[5] After the Virtual Complainant left the music store she went to a friend's house (Nicky) where she arrived at about 6.00 pm. Nicky was there and the two of them (the Virtual Complainant and Nicky) sat on the verandah talking.

[6] At 6.30 pm the Virtual Complainant saw the Appellant whom she described as "the same person I saw in the shop earlier on. He was wearing the same white t-shirt with the same silver chain on his neck with the pendant, he had the same three quarter pants except he was on a bike".

[7] The time of 6.30 pm was relevant because it was the time that Steve was supposed to come and call on her. The Appellant called out to the Virtual Complainant that he had a message from Steve for her and she went down to the street to speak to him. She was very close to him when she spoke to him. She said it was at that time that she noticed that he had a scar on his face. The message was to pick up some CDs at a house opposite Pizza Palace. The Virtual Complainant went to Pizza Palace where she again saw the Appellant on his bicycle and he then told her that he did not have the CDs there and that she should come to Goodwill where he had them.

[8] After some hesitation the Virtual Complainant went toward Goodwill to an area called Pottersville where she saw the Appellant by a fence. She went up to him and asked for the message. The evidence of the Virtual Complainant is that she

walked right up to the Appellant to speak to him and she could see him clearly and that he was dressed in the same clothes. She asked where was the message but the Appellant did not reply. At this point the Virtual Complainant turned her back with the intention to leave when the Appellant grabbed her by the waist. Her evidence continues that when the Appellant grabbed her, he pushed her down on the ground, pulled down her pants and panties, forced her legs open, unzipped his pants and proceeded to put his penis in her vagina. During this period the Virtual Complainant said she was fighting the Appellant. She also screamed.

[9] The Virtual Complainant stated that she managed to slide out from under the Appellant. She got up and pulled up her pants and ran away. Her evidence is that the incident took place at 7.00 pm.

[10] Shortly after the incident, Steve called the Virtual Complainant on her cell phone and came to collect her. The Virtual Complainant then made a complaint to Steve. As a result they went to the Police Station and subsequently the Princess Margaret Hospital where the Virtual Complainant was medically examined.

[11] The medical examination by Dr. Irvin McIntyre revealed the following physical findings: abrasions to the left vaginal orifice, abrasions to both buttocks and a slight mucoid discharge from the Virtual Complainant's vagina. A vaginal swab was taken and sent to the Lab. The Doctor opined that the abrasions to the vaginal orifice could have been caused by "a cucumber, a carrot, a finger, penis"

[12] The defence raised at the trial was an alibi.

[13] At the hearing of the appeal the Appellant, in a well organized presentation, raised eight grounds of appeal against conviction and one against sentence. The grounds against conviction were:

[i] That the Learned Trial Judge failed to mention to the jury the importance of what was to be done with the clothing of the Virtual Complainant.

[ii] That the Learned Trial Judge failed to instruct the jury on the doctor's findings and on the duty of the Investigating Officer when given the information concerning the slimy discharge found in the Virtual Complainant's vagina.

[iii] The Learned Trial Judge failed to properly deal with the complaint by the Appellant about the two jurors speaking to the Virtual Complainant.

[iv] One of the jurors on the case was related to one of the prosecution witnesses.

[v] The Learned Trial Judge allowed inadmissible evidence to be given.

[vi] The Learned Trial Judge failed to point out to the jury several inconsistencies in the prosecution case.

[vii] The Learned Trial Judge seemed to be prosecuting the case, especially in his summation

[viii] Whether there is any lurking doubt in the Court's mind regarding the guilt of the Appellant

[14] Ground 1 evidence discloses that the clothes that the Virtual Complainant was wearing at the time of the incident and in which she presented for the medical examination were not taken from the Virtual Complainant at that time and given to the Investigating Officer for examination. Indeed, the evidence is that the Virtual Complainant went home in the clothes she was wearing at the time of the incident and on the following day handed them to the Investigating Officer. The Appellant referred to Taylor's Principles and Practice of Medical Jurisprudence 13th ed edited by A. Keith Mant at page 71 where it is stated that clothing must be removed and examined by the doctor carefully and given for subsequent laboratory examination. The Appellant argued that such analysis could have

determined whether the stains derived from the crime scene would have assisted in establishing the truthfulness of the Virtual Complainant. In response to the Court, the Appellant agreed that the jury would have had no difficulty in concluding that a sexual assault had taken place. In Taylor at page 72 it is further stated:

> "The lack of any damage to clothing is not consistent with a history of forceful removal, and this observation should be recorded in the examination notes"

[15] I am of the view that the investigation of this case did not meet the standard required of good forensic enquiry. An investigation should have two contradictory foci initially, namely the proof of innocence and the proof of guilt. Any investigation which focuses on the latter to the exclusion of the former does a violence to the rights and expectations of an accused person.

[16] Ground 2 Although there was evidence that a vaginal swab was sent to the lab for testing, there was absolutely no evidence of what results that testing produced, or even if it had been done at all. The Appellant complained that no body fluid of his was ever sought for the purposes of testing. His argument was that by virtue of this failure he was deprived of an opportunity to prove his innocence. This complaint is factually correct and to be regretted.

[17] Ground 3 The Appellant had complained during his trial that after a sitting of court, he had seen two jurors talking to the Virtual Complainant. He said that the judge's handling of his complaint was deficient and hence the judge's conclusion that in fact the incident had not happened was erroneous. The Appellant could not say however how the incident might have compromised the fairness of his trial.

[18] Ground 4 The Appellant stated that although he had challenged none of the empanelled jury, information had subsequently come to him that one of the jurors was related by marriage to one of the prosecution witnesses. This was a mere assertion by the Appellant and not supported by any affidavit or other evidence. In

any event, this circumstance by itself alone even if substantiated is insufficient to invalidate the fairness of the proceedings. In small communities it is to be expected that such relationships will occur.

[19] Ground 5 The Appellant complained that the learned Trial Judge permitted the inclusion of hearsay evidence. Though technically correct, this ground had no substance, dealing only with form.

[20] Ground 6 The Appellant stated that there were a number of inconsistencies in the evidence which he said were not dealt with by the Learned Trial Judge in his summing up. In fact the Appellant was able to point out only one inconsistency not dealt with by the Learned Trial Judge and it related to a very minor point. The Appellant made a general complaint that the Learned Trial Judge did not deal with the issue of inconsistencies as a whole in his summing up. This was not so as the Learned Trial Judge did in fact give general advice on inconsistencies which was wholly acceptable.

[21] Ground 7 The defence of the Appellant was an alibi. He was informed by W.P.C. Reynold that the Virtual Complainant had complained that she had been raped at 7.30 pm on the 18th December 2000. He claims that he had addressed his mind to that time and gave an alibi, that he was in a telephone booth with his aunt at that time. In fact as the evidence emerged the VIRTUAL COMPLAINANT stated that the offence had taken place at 7.00 pm. His complaint was that it was only at the trial that the time of 7.00 pm became a live issue, one that he had not addressed his mind to. He complained that the language of the Learned Trial Judge in his summing up ignored that fact and that the judge imposed his own analysis of the sequence and chronology on the jury. I find that the summing up of the Learned Trial Judge was perfectly fair in that he placed both the prosecution's case and the defence squarely before the jury.

[22] Ground 8 This was a catch-all ground, and it basically invited the Court, on the basis of the arguments urged by the Appellant, to find that there was a lurking doubt of his guilt. He urged that there was no corroborative evidence that tied him to the incident with the Virtual Complainant or to the crime scene. The Sexual Offences Act Section 28 specifically states that where an accused is charged with an offence under the Act (as in this case) corroboration is not required for a conviction. The Learned Trial Judge duly read out to the jury the direction suggested by the Act.

[23] Though well presented, the cumulative effect of the arguments of the Appellant were *de minimis*. I am satisfied that there was no material misdirection by the Learned Trial Judge. Even if there were, then the proviso would certainly be applied. In essence the jury found that a sexual encounter had taken place, that there had been penetration in that encounter, that the victim had at no time given permission for that encounter and that the victim was well able to recognize and identify the Appellant as the perpetrator. I find no reason to disturb the findings of the jury.

[24] Ground 9. In this ground the Appellant argued that assuming guilt, then the sentence of the Court was unreasonable and harsh. The appellant was sentenced to a term of imprisonment of 12 years. This was his first sexual offence. Every rape is a violent act with traumatic effect on the victim and must be punished accordingly. This rape was not accompanied by any special aggravating circumstances such as for example, the use of a weapon or the use of wanton physical violence other than that necessary to accomplish the criminal purpose. On the other hand the Appellant has six previous convictions, five of which involved violence. However, the last of those convictions related to a crime committed in 1995.

[25] Using the starting point of an eight year sentence as proposed by this Court in Winston Joseph v The Queen, Civil Appeal No. 4 of 2000 from St. Lucia and

evaluating the circumstances of the crime and of the victim and offender I would vary the sentence and order that the sentence be varied to a term of seven years imprisonment.

The Order of the Court is:

[26] Appeal against conviction dismissed. Sentence varied by reduction from 12 years to 7 years.

Michael Gordon Q.C.
Justice of Appeal [Ag.]

Adrian Saunders
I concur Justice of Appeal

Albert Redhead
I concur Justice of Appeal [Ag.]