SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.12 OF 2003

BETWEEN:

KEN BAKER

Appellant

and

THE QUEEN Respondent

Before:

The Hon. Sir Dennis Byron Chief Justice
The Hon. Mr. Adrian Saunders Justice of Appeal
The Hon. Mr. Michael Gordon, QC Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams for the Appellant
Mr. Colin Williams DPP [Ag.] with Ms. Sandra Robertson for the Respondent

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2003: November 26;
2004: September 20.

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JUDGMENT

[1] GORDON, J.A. [AG.]: The Appellant, Ken Baker, was convicted on the 23rd June 2003 of the rape of Kelly Ann Alexis, contrary to Section 123 (1) of the Criminal Code of Saint Vincent and the Grenadines, Revised Edition 1990, and was sentenced to 12 years imprisonment.

[2] On the 26th November 2003 when the appeal came before us, the appeal was allowed and conviction and sentence set aside. We said that written reasons would follow.

[3] Briefly the allegations of the prosecution were that in the afternoon of the 17th June 2001 the Virtual Complainant went to the house of her aunt, who was the wife of the Appellant, at Plan in Saint Vincent and the Grenadines and whilst there, in the

absence of the aunt, the Appellant had sexual intercourse with her without her consent.

[4] Counsel for the Appellant raised four substantive arguments during his presentation. Firstly, that there was no direct evidence at the trial that the Virtual Complainant did not consent to sexual intercourse nor that the Appellant knew that the Virtual Complainant did not consent.

[5] The evidence of the Virtual Complainant was that the Appellant "threw me on the bed and came on top of me. He pulled down my panty and put his penis in my vagina. I was pushing him but his weight lay on me. He told me not to say anything" (my emphasis)

[6] It is my view that a jury could properly come to a conclusion, if they believed that piece of evidence, that there was neither consent by the Virtual Complainant nor a belief in consent by the Appellant. I find this point of little merit.

[7] Secondly, learned Counsel for the Appellant pointed to two statements in the summing up by the learned trial Judge which he felt were material misdirections. They were: "so that whoever raped Kelly Ann Alexis that they did not have to fully penetrate her and complete the whole sexual act by the emission of seamen (sic)" and "Kelly Ann Alexis has told us in this Court that she struggled with the accused, she did not like what the accused was doing"

[8] With respect to the first quotation in paragraph [7], I would regard this as a serious misdirection. The function of a jury in a trial for rape is two-fold; to determine whether a rape has been committed, and, if they so determine, then to decide whether the accused was the perpetrator of that rape. By that statement the learned trial Judge removed the first question from the consideration of the jury and usurped their function.

[9] With respect to the second quotation in paragraph [7] it is a fact that nowhere in the record does any evidence appear of either a struggle by the Virtual Complainant nor an expression of distaste for what she alleged was happening. Again, I find this to be a significant misdirection by the learned trial Judge.

[10] The third ground raised by Counsel for the Appellant was that the learned trial Judge allowed evidence of alleged admissions by the Appellant. The evidence of admissions largely surrounds the alleged attempt by the Appellant to purchase silence of the Virtual Complainant and her mother for the sum of $50,000.00. Both the mother and the grandmother of the Virtual Complainant led evidence of this. The Appellant at the trial denied that such a conversation had ever taken place.

[11] The practice regarding admissions is succinctly stated in R. v Norton, 5 Cr. App. R. 65 (at pages 75-76 as follows:

> "When [the statement is] admitted, [the jury should be directed] that if they come to the conclusion that the [defendant] had acknowledged the truth of the whole or any part of the facts stated, they might take the statement, or so much of it, as was acknowledged to be true (but no more), into consideration as evidence in the case generally, not because the statement, standing alone, afforded any evidence of the matter contained in it, but solely because of the [defendant's] acknowledgement of its truth; but [they should also be told that] unless they found as a fact that there was such acknowledgement, they ought to disregard the statement altogether."

[12] The learned trial Judge alluded to the alleged admissions of the Appellant made to the Virtual Complainant's mother and grandmother some half a dozen times, but nowhere does he warn the jury that unless the accused admits making the admission they are to disregard it. The essential point to be understood here is that the admission by itself is not the evidence, but rather the combination of the admission and the acknowledgement of it by the accused. Indeed, in this case the Appellant denied that he ever made an offer to settle. Rather, he stated that the offer originated with the mother of the Virtual Complainant. I find this to be a serious misdirection. The Criminal Law jealously guards the protection of an accused person from false accusation by circumscribing the circumstances in

which evidence of self-incrimination may be given in a trial. In this case, even if the evidence of admissions was admitted, and given that the Appellant was carrying his own defence, it is my view that it should not have been, then there was a duty on the learned trial Judge to direct the jury to disregard such evidence. Rather than do that he invited the jury to regard the admissions as supporting evidence on its own "because its coming from an independent source"

[13] The fourth ground of appeal raised by Counsel for the Appellant was that at the trial the Appellant sought to introduce the evidence of his wife, Ann Baker and that the learned trial Judge refused to allow such evidence on the grounds that Mrs. Baker had been in Court throughout the prosecution's case. In Moore v Lambeth County Court Registrar [1969] 1 W.L.R. 141 Edmund Davies L.J. stated that whilst a Judge might express displeasure at a witness remaining in Court until it is his turn to give evidence, he nevertheless had no right to refuse to hear the evidence of such a witness. The proper course of the learned trial Judge would have been to hear the evidence and, in his summing up to the jury, express his thoughts on the weight to be given to such evidence in those circumstances.

[14] It is unnecessary to determine whether any one of the above misdirections by itself would have resulted in the allowing of this appeal. Suffice it to say that the cumulative effect is such that this Court can feel no confidence that a jury properly directed would inevitably have come to the same conclusion.

[15] In the event the Court allowed the appeal and quashed the conviction.

[16] There is one other matter that I would comment on, and that is the absence of medical testimony. Rape, by its very nature, most often rests on the uncorroborated evidence of a complainant. It therefore is incumbent upon the prosecution to proffer all evidence available, whether circumstantial or direct and whether the same be helpful to the prosecution or to the defence. Although there was reference to a medical report, such a report did not form part of the appeal

record. Certainly there was no reference in the record of appeal to any reason why the doctor who examined the Virtual Complainant did not appear to give evidence. I believe that as a matter of good practice the medical examiner should give oral evidence in rape and other similar cases, or a good reason given for his or her absence.

Michael Gordon, QC
Justice of Appeal [Ag.]

[Sgd.]
I concur.
Sir Dennis Byron
Chief Justice

I concur.
Adrian Saunders
Justice of Appeal