

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.23 OF 2003

BETWEEN:

DAVID JOBE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Adrian D. Saunders

Chief Justice [Ag.]

The Hon. Mr. Brian Alleyne, SC

Justice of Appeal

The Hon. Mr. Albert Redhead

Justice of Appeal [Ag.]

Appearances:

Mr. Ronald Marks for the Appellant

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

2004: June 22;
September 20.

JUDGMENT

[1] **SAUNDERS, C.J. [AG.]:** David Jobe was charged with three counts of incest. By a majority verdict, seven to two, he was convicted on two of the counts. He was acquitted of the remaining one because the jurors were split, six to three, on that count. Jobe was sentenced to a term of imprisonment of eight years. He has appealed both his conviction and his sentence.

[2] The only evidence of the prosecution was the uncorroborated testimony of the victim. She testified that she had been brought up in a succession of households of various aunts. She had last seen her mother in 1997 just before the latter had returned to the United States. In about December, 2001 she was living with her father, the accused, at Glenside. She said that she slept in her father's bedroom

there and that her father normally slept in the sitting room. She described a rape by her father during which she said she was crying. She said he told her not to make any noise or else he would kill her. She said he slapped her, had sexual intercourse with her and then went back outside on the chair. Throughout her ordeal, according to her, her father's mother, his sister and her three cousins were all in the same home.

[3] The victim further testified that some time in January, 2002 during a school week, again while her grandmother, aunt and cousins were in the house watching television, her father again had sex with her. She said that on this second occasion, he threatened her with something like a fish bone which he held to her throat. He also slapped her in her face, tied something that looked like cable wire around her neck and hit her with a broom stick.

[4] Some time after these two incidents, the victim moved to a two bedroom house at Diamonds with her father. Her father's girlfriend also lived in that house. The victim stated that at this house, she normally would sleep in the sitting room. One night, she said, her father and his girlfriend were fighting. Her father later called her into his bedroom and once more had sex with her. She said that he slapped her and that he again held the fishbone to her throat. She said that her father's girlfriend in the other room, aware of what had happened, confronted her father, asking him if she – the girlfriend – was not enough.

[5] The victim said that on all three occasions she reported the incidents to her teacher and that the teacher had a Social Welfare Officer visit her. The victim later reported the matter to the Mesopotamia Police as "they were not doing anything". The police then charged the accused with the three counts of incest.

[6] The teacher to whom the alleged reports were made gave evidence. She confirmed that she was indeed the victim's teacher during the 2001-2002 school year. She recalled having a conversation with the victim in the latter part of

February, 2002 in relation to the late payment of school fees. She said the victim explained to her "that her father said if she did not have sex with him – no school fees". She denied that the victim had ever reported any incident of sexual intercourse.

[7] That was the essence of the evidence of the Prosecution. The accused gave evidence on oath. He denied the accusation and stated that his daughter was lying on him because he was strict with her and he disapproved of a relationship she had with a certain young man. He spoke of an incident when, he said, his daughter, then 15 years old, was missing from the house at 1:00 a.m. He said he went outside and saw her return home at about 2:00 a.m. accompanied by a young man. He also claimed that when she was 14 years old, she had reported that a boyfriend of one of her aunts had had sex with her. The victim herself had testified that the aunt's boyfriend had attempted to have sex with her. The accused said that he didn't pay his daughter's school fees because these were paid for by her mother in the USA. The evidence of the accused was supported by his mother and by his girlfriend.

[8] In summing up to the jury the trial Judge addressed the issue of recent complaint. The Judge directed the jury along the following lines:

"Then there is also the issue of recent complaint. The virtual complainant tells us that she reported to her teacher each time the father interfered with her. She mentioned the name of the teacher as Mrs. Dowers. Mrs. Dowers gave evidence here. She said sometime in February she approached the virtual complainant and asked her about late payment of school fees. The virtual complainant told her, "My father says he would only pay her school fees if I have sex with him." She said this was sometime in February 2002. Nothing was said to her after the 18th December and nothing was said to her after the third act at sexual intercourse at Diamonds, i.e between 31st May and 1st July. She never received any such report. This is what you call the evidence of a recent complaint.

You see in sexual offence cases there is usually what is called the evidence of recent complaint where soon after the act or soon after the offence is committed the victim complains to somebody in a position of trust or somebody close to her, immediately after or reasonably after the

act she complains. That complaint does not necessarily go towards to the truth of what the virtual complainant it goes towards the consistency of her story so that if the virtual complainant made a complaint to somebody in this case for instance, it does not necessarily mean that what she is saying is true, but that evidence taken together with other evidence can go towards showing the consistency of her story which can assist you having considered all the evidence in deciding whether to believe her or not. I hope you get what I am saying so that the absence of a recent complaint does not necessarily mean that what she is saying to us here in this trial did not happen. The absence of it does not mean it did not happen because the presence of a recent complaint only goes towards consistency.

But the absence of it also should pose certain questions in your minds. How come she did not report to anybody? She said she told her teacher. The teacher said all she said was in connection with school fees and her father wanting sex with her before he paid her school fees. That area should make you want to ask yourselves whether to believe her story when she says she reported to the teacher each time the sex took place. So it goes toward her credibility – the absence of it – having said that she did make a report and having heard the evidence from the teacher that she didn't actually make any report but she just mentioned something about sex in connection with school fees – that does not go towards her credibility. That is a matter for you to decide but I have to warn you that the absence of making any complaint does not necessarily mean that what she is telling us in court did not happen.

Here is a fourteen, fifteen year old girl who has had a history of moving from one home to the other since she was born, obviously she had not developed any relationship of trust with any of her relatives. She now finds herself living with her father for the first time in her life. These things happen. She alleges that these sexual acts from the father happened to her – who does she go to? You have to ask yourselves whether she could have reported to her grandmother or her father's brother or her father's sisters or whoever else lived in the house. Was it possible for her to have made that report considering the history of her life up to that point? You have to ask yourselves again, was it possible for her to having received this treatment from her father to have gone to the father's mother to make a report or the father's brother or the father's sister, bearing in mind that she made a report concerning her aunt's boyfriend at one time and there was a lot of confusion. You have to ask yourselves these questions to satisfy yourselves on the whole question of recent complaint. Was it possible for her to have reported to anybody in these circumstances? You need to satisfy yourselves that look she could have not have made a report to those in the home because that is the home where this man lived.

Then you have to ask yourselves, why didn't she tell her teacher? You have to also ask yourselves whether she trusted her teacher, whether she was close to her teacher, you have to ask yourselves that. There is no evidence led as to what relationship she had with her teacher except for the fact that she was her form teacher. Sometimes you have a teacher who you are frightened of just by the look of the teacher's face. There are a lot of teachers who wield their cane very, very hard so you might see a teacher and say uh ah I ain't interfering with she you know. Did she have that relationship of trust with her teacher to make her go confidently to the teacher and say, "Teacher, blah blah blah blah happened. Accused did this and this and this and that." But the fact remains is that she gave evidence that she told her teacher. Her teacher has come here and says, "I never received any such report. The only report I received was the one in February 2002 after I asked her about the late payment of her school fees."

So you have to look at that area very, very carefully bearing in mind the situation of the virtual complainant fourteen, fifteen year old girl living in that house for the first time with her father and other relatives who she has just come to know. She has had the experience of living with various aunts, tossed from one aunt to another and at the home of one particular aunt some sexual advance was made towards her by the aunt's boyfriend and it led to a lot of confusion. The defence is saying sex actually took place at the aunt's home. Prosecution was saying an attempt was made and because of that she left that home. Now, decide for yourselves which version to believe. For example, if you believe the Prosecution's version, then you have to ask yourselves in that situation could she have made a report to her father's relatives – people she has just moved into, to stay with. If you believe the Defence's version that sex actually took place it does that necessarily make her story incredible even if sex took place at her aunt's home? Does that make this particular set of sexual acts against her incredible?

So you have to consider the evidence of the virtual complainant very, very carefully. Satisfy yourselves beyond all reasonable doubt pertaining to her story because there is nothing else supporting it."

- [9] Towards the end of the summation, the Judge told the jury, "I told you I would not be long and I have kept my promise. I will leave you now to deliberate and your verdict should be unanimous on each count...". The record indicates that the jury retired at 1:45 p.m. and returned and delivered a majority verdict at 3:48 p.m.

[10] On appeal, the Appellant had two complaints about his trial. Firstly, he took issue with the Judge's directions, quoted above, on the issue of recent complaint. Secondly, he pointed to the fact that no majority direction was given to the jury and that, especially in the context of three charges to consider, the jury were not given sufficient time to deliberate upon their verdict.

Recent complaint

[11] In *Thomas v The Queen*¹ Byron, CJ addressed the issue of recent complaint in the following terms:

"The general rule at common law is that a witness may not be asked in-chief whether he or she has formerly made a statement consistent with their present testimony. The witness cannot narrate such a statement if it was oral or refer to it if it was in writing (save for the purpose of refreshing his memory), and other witnesses may not be called to prove it. This rule is subject to two well-known common law exceptions. The first exception is that in sexual cases a complaint made at the first reasonable opportunity after the offence may be proved to show the complainant's consistency and to negative consent. But for this purpose it is necessary not only for the complainant to testify as to making the complaint but its terms should be proved by the person to whom it was made...."

[12] In the passage of the summing up quoted above at paragraph 8, the learned trial Judge appeared to be struggling to find the most appropriate manner of treating an alleged complaint which was not proven by the person to whom it was supposedly made. The Judge at one time indicated to the jury that "if the virtual complainant made a complaint to somebody in this case for instance...that evidence taken together with other evidence can go towards showing the consistency of her story which can assist you, having considered all the evidence, in deciding whether to believe her or not". That was a most unfortunate direction to the jury because in truth, the circumstances here did not amount in law to a recent complaint as the evidence adduced by the alleged recipient of the complaint was contrary to the terms of the alleged complaint.

¹ Grenada Criminal Appeal No. 11 of 2002

- [13] It is doubtful whether the prejudice thereby caused by this direction was entirely removed by the following passage where the Judge suggests that the conflict between the alleged report of the victim and the teacher's evidence "should make you want to ask yourselves whether to believe her [i.e. the virtual complainant's] story... it goes towards her credibility – the absence of it..." I say this because the Judge then instructed the jury that it was a matter for them, the jury, to decide.
- [14] What should have happened in this case is that the trial Judge should not have permitted to be introduced as evidence the alleged complaint of the virtual complainant. And if that evidence had been inadvertently let in, it was the duty of the trial Judge to give the jury very clear instructions on why it should be disregarded and not considered as part of the evidence of the case. The learned trial Judge here did not, in my view, eliminate the risk that the jury might consider themselves entitled to regard the evidence of the complaint as confirming the credibility of the virtual complainant. See **White v The Queen**².
- [15] In **Wright v The Queen**³ there was a similar conflict between the terms of a sexual complaint as given by a very young child and the report given in evidence by the alleged recipient of the complaint, the child's mother. Ognall, J. stated there⁴ 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".

The majority verdicts

- [16] Section 13 of the Jury Act⁵ states that the verdict of the jury "shall be unanimous if delivered within two hours of its consideration, but if delivered more than two hours

² (1999) 1 Cr. App. R. 153

³ (1990) 90 Cr. App. R. 91

⁴ At page 96

⁵ Cap 21 of the Revised Edition of the Laws of Saint Vincent and the Grenadines 1990

after its consideration the verdict of seven jurors shall be received as the verdict in the cause”.

- [17] This Court will take judicial notice of the fact that presently, the room used by the jury to deliberate is some distance away from where the jury sits in the Court room and that it would take at least two minutes to get from the Court room to the jury room. The times in question here, 1:45 p.m. and 3:48 p.m., do not purport accurately to reflect the actual length of time of deliberation of the jury. What those times show are the time the jurors departed the Court room and the time they actually returned to the Court room. It can hardly be said therefore that the jury here *considered* their verdict for more than two hours. In light of the mandatory provisions of section 13 of the Jury Act, that circumstance is fatal to the conviction.
- [18] The Court's attention has been drawn to a 1970 English Practice Direction⁶ that sought to address the issues that arose in that country with respect to a comparable section of the law. Presumably, for the avoidance of precisely the same kind of difficulties that this case demonstrates, the then Chief Justice of England, Parker, LJ, directed that any verdict of a majority of a jury shall not be accepted until two hours and ten minutes have elapsed between the time that the last member of the jury has left the jury box to go to the jury room and the time when there is put to the jury the questions as to their verdict. It seems to me that Judges in this jurisdiction would do well to adopt a similar procedure.

⁶ (1970) 1 W.L.R. 916

[19] In all the circumstances I would allow the appeal and quash the conviction and sentence.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

[Sgd.]
Albert Redhead
Justice of Appeal [Ag.]