SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.18 OF 2004

BETWEEN:

MARLON ANTOINE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Adrian Saunders	Chief Justice [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Madame Suzie d'Auvergne	Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams for the Appellant
Mr. Colin Williams, Director of Public Prosecutions and Ms. Sandra Robertson for the Respondent.

2004: September 20;
September 24.

JUDGMENT

[1] ALLEYNE, J.A.: The Appellant Marlon Antoine, who is 18 years old, was convicted after a trial before a Judge and jury, of the offence of buggery against a 7 year old girl. He was sentenced to five years imprisonment. He has appealed against his conviction and sentence.

The admissible evidence

[2] The admissible evidence which was given at trial on the issue comes from Dr. Rosemary Boyle, the virtual complainant herself, her mother Abygail Edwards,

Police officer Nicola Browne, the Appellant himself, and his witness Samantha Young.

[3] The virtual complainant, call her A, said that on 30th June 2003 she was at her grandmother's home with one Samantha. From there she went to the home of her aunt where she met the Appellant, who she knows as Hanni. Her aunt sent her away with her brother, and the Appellant took her and her brother to his house. She said she, her brother and two friends were playing in the living room, when the Appellant pulled her in the bedroom. After, her cousin, one of the children, came and saw her lying down on the bed. The Appellant gave the cousin a magazine and sent him out, telling him that his mother called him to go to town. After that, the Appellant raised up her dress, pulled down her underwear, pulled down his pants and underwear, and pushed his penis in her vagina. He then turned her round and pushed his penis in her bottom (anus). She then took her clothes and went to bathe, after which Samantha sent her to sleep. Thereafter, her mother questioned her, examined her, took her to the Police station and to the doctor, who examined her in her private parts.

[4] Dr. Rosemary Boyle's evidence was to the effect that she saw A professionally on 5th July 2003. She had copious foul-smelling yellow discharge, and she was tender and swollen in the genital area. The anal area looked normal. The patient was admitted to hospital, and initial swabs for culture for a sexually transmitted disease screening was done. The vaginal swab came back about three days later with a full bout of gonorrhea, for which she was treated. The social worker was summoned to investigate. This witness said that gonorrhea is a sexually transmitted disease transmitted by sexual contact, in the sense that the genitalia must come into contact, not necessarily penetration. Infection can cause tenderness and swelling in the genital area, and would account for the swelling and discharge that were observed. There were no injuries found, but if the patient had been injured in the anal orifice some 5 to 6 days earlier, those injuries would

not still be visible. Typically such injuries, especially if superficial, heal within 2 to 3 days.

[5] Abygale Edwards, mother of the virtual complainant A, said that on 1st July 2003 she had left A at home with her 2 year old son and Abygale's sister-in-law. On that same day she noticed her daughter scratching her bottom, and she questioned her. She turned her daughter around and pulled her undies down, and observed that the bottom was 'burst, bruised'. She later took A to the police station in Calliaqua where she made a report. The police took her and the child to one Dr. Varunny, the district doctor. Three days later, on observing 'stuff' coming from the child's vagina, she took her to Dr. Boyle.

[6] P.C. 712 Nicola Browne is stationed at Calliaqua Police Station. On 1st July 2003 at about 2.30 p.m. she received a report from Abygale Edwards. She recorded a statement . On the 2nd July she took A to Dr. Varunny, the District Medical Officer, at the Sion Hill clinic. Dr. Varunny medically examined the child. Later that day she went to the Appellant's home along with A. She examined a bed in that home, and nothing unusual was seen. On 16th July she saw the Appellant at the police station. She informed him of a report, cautioned and interviewed him. He made no statement. She arrested and charged the accused for the offence of buggery. She produced a birth certificate showing the date of birth of A as 8th August 1996, so that A would have been almost 7 years old on 1st July 2003.

[7] That was the case for the prosecution. The learned trial Judge rightly held that there was a case to answer on both counts of the indictment; buggery, and indecent assault allegedly committed against the child A on 30th June 2003.

[8] The Appellant, who was not represented by Counsel at the trial, elected to give evidence on oath. He said that on 30th June he was by A's grandmother, along with A and one Samantha, another child. A left, and the Appellant and Samantha were speaking. Samantha told the Appellant that if he is going down the road, he

must call A for her, Samantha. He did indeed call A for Samantha, and then went down the road. Eventually he went to his home and was reading a magazine, when A turned up and requested to stay there until Samantha finished cleaning up by her grandmother. She also asked to see the magazine, which he said he gave her and went into his bedroom to fold his clothes. A and her brother came into the bedroom and were playing. The Appellant's sister-in-law came to the house, found the bedroom door locked, shook it and asked what A was doing in the bedroom with the door locked. Appellant told her that it is not he, but A, who locked the door. He told A to open the door. A and her brother then went out to play with two other children.

[9] According to the Appellant, A's cousin, Dylan, came at that time, and A was reading the magazine. Dylan wanted to read it, but a would not give it up. He demanded that she give Dylan the magazine. There resulted a disagreement between them, and A again locked the door. He demanded that she open it. The Appellant's sister-in-law told A to come and stay with her children. Samantha told A to come round because she was making too much trouble round there. The Appellant said he went to the beach and then to town, and on the Tuesday morning he heard 'them' outside cursing, 'saying that I go on her daughter and give her daughter gonorrhea. He says Samantha told him she heard A's mother ask A why she was scratching her bottom, and A 'tell she nothing, and her mother ask how she mean nothing, and she ask she what happen to she and she say it is the same thing from Rocky. She tell A it can't be the same thing from Rocky because Rocky thing done since January.' The Appellant is not Rocky.

[10] In cross-examination, the Appellant said he knows A very well, since she was a baby. He agreed that she was in his bedroom on 30th June, and that the door was locked, but he insists that he did not lock it. He also reiterates that he was not alone in the bedroom with A, but that her brother was also there. He also said that his own elder brother Michael was there on the day when the children were in the house. He said the child Dylan was not there when A was in the room, but came

by later. He did not lock Dylan out, and did not give him the magazine and tell him to go out. He said that he did not chase A out of the bedroom because she and her brother were playing and she was not interfering with him. He asserted that he never had gonorrhea. He denied any improper contact with A. It is of interest to note that the police never apparently sought to have him tested for gonorrhea.

[11] The Appellant called the witness Samantha Young in support of his case. Some of her evidence contradicts, in some minor details, the evidence of the Appellant, but none of the admissible evidence given by this witness in any way implicates the Appellant in the commission of the crime charged.

[12] Undoubtedly, on this evidence it was open to the jury to return a verdict of guilty against the Appellant. However, in the course of the trial a significant amount of inadmissible evidence was admitted, and the jury was directed in such a way that they would have been led to believe that they should take that evidence into account in considering their verdict. Much of that inadmissible evidence, which was wrongly admitted, was prejudicial to the Appellant, and could well have, indeed probably did, play some part in leading them to the verdict at which they arrived.

[13] Dr. Boyle was permitted to give evidence of a conversation between herself and A's mother concerning the alleged sexual molestation. Dr. Boyle spoke of a 'history of molestation', and said that the gynaecology team 'agreed that there were suspicious signs of sexual molestation'. This evidence is clearly hearsay and inadmissible. It is equally clearly prejudicial, but coming from a professional, and relating the alleged opinion of a professional team, it could have had a powerful influence on the thinking of the jury.

[14] The virtual complainant, A, was permitted to give evidence of what she had allegedly told her mother concerning the incident, implicating the Appellant, not on the day of the alleged incident, but the following day. It is evident also, from her evidence and more so from the evidence of her mother, that this 'complaint' was neither spontaneous nor voluntary, but was extracted by threats, intimidation and persistent questioning of a leading and inducing nature, from an unwilling child.[1] This evidence was clearly not admissible as a recent complaint, but was highly prejudicial. This inadmissible evidence from the child was repeated, expanded and amplified by equally inadmissible evidence from her mother, Abygale Edwards

[15] A written medical report prepared by Dr. Varunny was admitted into evidence without Dr. Varunny being called to give evidence or offered for cross-examination by the accused. The learned Director of Public Prosecutions, Counsel for the Appellant, submitted before this Court that this is permitted by section 22 of the Evidence Act CAP. 158. This statutory exception to the general rule itself recognises the right of accused persons to test the evidence tendered against them by cross-examination of the witnesses. It seems to me that if the Appellant had been represented by Counsel at his trial, and no request had been made of the Court for the presence of the witness for cross-examination, complaint could hardly be made on appeal concerning the admission of the evidence. However where, as here, the accused is unrepresented, is not a lawyer, and is not a person of education or great sophistication, it would be the duty of the trial Judge, and of prosecuting Counsel, at the very least to advise him of his right to require the attendance of the doctor for cross-examination. This they failed to do, and it is my view that this created an element of unfairness and possible prejudice against the Appellant. I note in this regard that the learned trial Judge, in his direction to the jury, categorised this particular evidence as 'very, very important for your consideration'.

[1] R v Rush (1896) 60 J.P. 777
R v Lillyman [1896] 2 QB 167
R v Osborne [1905] 1 KB 551

[16] Most of the evidence of Samantha Young is inadmissible hearsay, and some of this inadmissible hearsay, the evidence of the alleged 'recent complaint' to the virtual complainant's mother, reported by this witness, is also prejudicial. Admittedly this evidence was given by a witness called by the Appellant, and arose in her evidence-in-chief as well as in cross-examination. However, the accused in a criminal case is as much bound by the rules of evidence as is the prosecution, and inadmissible hearsay evidence is no less inadmissible because it is tendered by or on behalf of the accused person. The issue is aggravated by the fact, once again, that the accused was unrepresented, and was entitled to the assistance and protection against his own ignorance by both the learned trial Judge and the learned Counsel for the prosecution. A criminal trial is not a contest, and fairness of proceedings is a paramount standard.

[17] In his direction to the jury on the medical report of Dr. Varunny, the learned trial Judge said that 'All the medical report tells you is that somebody did interfere with her (the virtual complainant's) anus. But what you have to decide is whether it was the accused who interfered with her anus.' In reality, however, while it is a possible inference from the medical report that somebody interfered with the child's anus, it is not the only or inevitable inference, nor is the medical report to be treated as gospel, as the learned trial Judge appears to do. It is no more than evidence in the case, to be considered, like all the other evidence, by the jury.

[18] The learned trial Judge treated the evidence of Dr. Boyle with equal uncritical acceptance, and invited, nay directed, the jury to accept an inference which he says, wrongly, was drawn by the doctor, but which is only one possible inference that the doctor hinted at, by reference, I may add, to inadmissible evidence of the opinion of others. The learned trial Judge in that regard said 'But what she saw were other pieces of medical situations that will show you that satisfy her *and* should also satisfy you or should satisfy you that somebody had interfered with A.'

[19] All that Dr. Boyle said is that the gynaecological team 'agreed that there were suspicious signs of sexual molestation.' The presence of suspicious signs of something is not, as the learned trial Judge directed, evidence that the doctor was satisfied that that thing had happened, far less evidence that 'should satisfy' the jury that that thing had happened.

[20] In reference to the finding that A was infected with gonorrhoea, the learned trial Judge recalled to the jury the evidence of the virtual complainant of what she alleged the Appellant did to her, and concluded 'So you have the benefit of these two medical reports to assist you in assessing A's evidence as to whether you want to believe her, when she says this accused did these things to her.' This may well have been understood by the jury as suggesting that the presence of gonorrhoea in A implicates the Appellant in the commission of the offence. On the contrary, there is no evidence that the Appellant was tested for gonorrhoea. The only evidence is that given by him, that he never had gonorrhea. It was the duty of the Judge to bring this to the attention of the jury, and perhaps to query why the police never sought to have him tested for this condition.

[21] The learned trial Judge treated the evidence of the conversation between Abygale Edwards and A as to what allegedly happened as 'recent complaint' and thus an exception to the hearsay rule. I have indicated in paragraph 14, and by reference to relevant authority, that this evidence was not admissible as 'recent complaint'. The learned trial Judge laid great emphasis on this inadmissible evidence and invited the jury to take it into account in arriving at a verdict. This misdirection, stemming from and aggravating the original error in admitting the evidence, would inevitably have had a serious prejudicial effect on the Appellant.

[22] In all the circumstances, and given the extent to which inadmissible evidence was admitted and relied on in the summing up in this case, we feel we have no alternative but to allow the appeal, to quash the conviction and to set aside the

sentence. However, we are also of the view that in this case there should be a retrial, and we so order.

Brian Alleyne, SC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Suzie d'Auvergne
Justice of Appeal [Ag.]