GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.4 OF 2004

BETWEEN:

MICHAEL JEFFREY

Appellant

and

THE QUEEN

Respondent

Before:

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

Appearances:

Mr. Anslem Clouden for the Appellant
Mr. Christopher Nelson, DPP with Mr. Darshan Ramdhanny and Ms. Dionne Lawrence for the Crown

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2005: June 28; 29;
October 10.

JUDGMENT

[1] BARROW, J.A. [AG.]: The appellant was convicted of carnal knowledge[1] and of indecent assault[2], respectively, of two sisters. The alleged offences occurred on successive days, 26th and 27th October 2001. One sister was 9 years old at the time of the alleged event and the other sister was then 7 years old. It was over two years later that the trial occurred and they both gave sworn testimony.

[2] On Sunday 28th October 2001 an adult sister, N, came upon the children speaking, at home. They abruptly ceased the conversation when N drew near. N found their

1 Contrary to section 178 of the Criminal Code, Cap. 1 of the Continuous Revised Laws of Grenada.

2 Contrary to section 176(f) of the Criminal Code.

behaviour strange, especially in light of the nine year olds complaining, fretting and crying the previous day. She questioned them. The seven year old spoke up first; she told N that 'whenever they go by Rastaman [the appellant] he does wine and jook on them'. The nine year old said the same thing. N questioned them further, and then she telephoned her mother, who promptly came home. The mother questioned the children. After that the mother took the two children to Rastaman's home and confronted him, explicitly, in the presence of his mother. The appellant asked the children's mother when that happened. When the appellant said nothing after the mother told him when it had happened, the nine year old told him "[d]on't pretend you don't know what you does do to us when we does come here". The appellant said nothing.

[3] Upon the commencement of the trial, before the first witness testified, counsel for the appellant, Mr. Clouden, applied for the appellant to be tried separately on each count. Counsel urged that it would unduly prejudice or embarrass the defence of the appellant to be tried on one indictment. Counsel accepted that the court had discretion but urged that a joint trial would be prejudicial.

[4] The response of the Director of Public Prosecutions was that the evidence given by each complainant provided support for the evidence of the other. The DPP argued that the evidence of each was of a strikingly similar nature.

[5] The ruling of the judge recognized that there were different complainants and different offences that were alleged to have occurred on different dates. However, the judge stated, it was permissible for the crown to join in the same indictment charges for more than one offence if they were founded on the same facts or formed or were a part of a series of offences of the same or a similar character. The judge found that the depositions revealed that both counts enjoyed a common factual background and referred to the guidance found in R v P.[3] The judge held that undoubtedly the court has a discretion whether or not to sever an indictment

3 [1991] 3 All E.R. 337

and order separate trials, as provided in section 139 of the Criminal Procedure Code, Cap. 2. The judge indicated that he had had the benefit of reading the lengthy treatment on the approach to severance in cases of alleged sexual misconduct contained in Archbold. He expressly recognized that the question of prejudice was paramount, having regard to the scandalous nature of such offences. He found that there was no suggestion that the evidence was mutually inadmissible. He found that the only basis of the objection to a joint trial was prejudice and embarrassment. The judge then exercised his discretion in favour of ordering a joint trial to proceed.

[6] On appeal it was urged that the judge erred when he declined to order separate trials. This ground had a number of aspects including the contention that there was prejudice in the strong likelihood of collusion or fabrication and that a jury hearing the evidence of two complainants would be 'necessarily and inexorably' prejudiced by evidence which "tantamounted (sic) to admission of evidence of previous bad character." This ground also complained that the judge failed to direct the jury that they should not consider the evidence given on the other count as probative of the guilt of the accused on a given count. The submission was that the evidence was so strikingly similar that it would have led the jury to conclude that the appellant had a propensity to commit sexual offences in a particular way and this resulted in prejudice to the appellant's right to a fair trial. Another aspect of the complaint was that the jury would have been incapable of performing the mental gymnastics of excluding the evidence on one complaint when the jury was considering the other complaint.

[7] This last aspect draws from what Lord Cross said, by the way, in DPP v Boardman[4] when dealing with the question whether the evidence of one complainant was admissible as corroborative of the evidence of another. He said:

> "if it is decided that the evidence is inadmissible and the accused is being charged in the same indictment with offences against the other men the charges relating to the other persons ought to be tried separately. If they

4 [1975] A.C. 421

> are tried together the judge will, of course, have to tell the jury that in considering whether the accused is guilty of the offence alleged against him by A they must put out of their mind the fact – which they know- that A and C are making similar allegations against him. But, as the Court of Criminal Appeal said in *Rex v Sims* [1946] K.B. 531,536, it is asking much of a jury to tell them to perform mental gymnastics of this sort. If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons."

Lord Cross, it may be reminded, was persuaded by the view of other members of the panel that there were sufficient features of striking similarity in the case, common to the stories told by the different complainants, to make their respective testimony admissible as similar fact evidence upon the charges other than the charge to which the testimony of each complainant related.

[8] The law has evolved significantly from the state in which it stood in Boardman. In R v. P,[5] the case referred to by the trial judge in his ruling in the instant case, the House of Lords decided that:

> "it is not appropriate to single out "striking similarity" as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another."'[6]

The test, according to Lord Mackay, was the extent of the relationship between the evidence of the different victims. His Lordship stated:

> "When a question of the kind raised in this case arises I consider that the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides enough support for the evidence of the second victim to make it just to admit it, notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include "striking similarity" in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means

5 [1991] 3 All ER 337.

6 Per Lord Mackay of Clashfern LC at 346.

> confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle."[7]

[9] In R v. Christou[8] the other members of the House of Lords concurred in the speech of Lord Taylor in which he reviewed the earlier authorities and concluded that there was no fetter on the discretion of the trial judge, even in sexual cases involving children, whether or not to order severance.[9] Lord Taylor concluded that the factors, which a judge should consider, when taking into account all the things he should, will vary from case to case but the essential criterion is the achievement of a fair resolution of the issues. He said:[10]

> "That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are: how discrete or interrelated are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families and on press publicity; and importantly, whether directions the judge can give the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully. Experience shows, as for example in *R v Blackstock* (1979) 70 Cr App R 34 and in the instant case, that juries, where counts are jointly tried, do follow the judge's directions and consider the counts separately."

[10] Lord Hope of Craighead expanded on the position in the law of Scotland, to which Lord Taylor had referred, under which:

> "the practice of trying all outstanding charges against the accused on a single indictment has been established for a long time. It is seen to be in the public interest as well as that of the accused, in order that justice may be done expeditiously."[11]

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[7] Per Lord Mackay at page 348

8 [1996] 2 All ER 927

9 p. 936 e.

10 p. 937 b.

[11] p.937

Lord Hope explained that in Scotland the judge exercises his discretion under the common law, whether to try charges separately, by applying the test whether there is a material risk of real prejudice to the accused if all the charges were to proceed together under the same indictment.

[11] In the instant case the existence of the discretion was conceded at first instance and it has not been challenged before us. There was no suggestion that the judge failed to consider any factor relevant to the exercise of his discretion or that he considered any irrelevant factor. The challenge, rather, is to the safety of the result that was produced, as the argument suggested, by the prejudice to the minds of the jurors of knowing of the other charge when considering one charge. That challenge premised but did not articulate that the evidence of one sister was inadmissible on the complaint of the other sister. It was a false premise: that was not the situation, as the judge expressly recognized. Counsel did not venture such a stance before the judge: counsel's objection to a joint trial was only on the basis of prejudice and embarrassment, not the reception of inadmissible evidence.

[12] The decision in R v Christou clearly confirms[12] that even when the evidence of separate complainants is mutually inadmissible the judge may nonetheless refuse to order separate trials. There was strong justification for the judge in the instant case to refuse to order separate trials having decided that the evidence of the two sisters was not mutually inadmissible.[13] More than being 'not mutually inadmissible,' on the very submission of counsel for the appellant:

> "the evidence of both complainants was so strikingly similar, on both counts 1 and 2 to wit: the accused sucking the tongue and vagina of both Complainants. The accused (sic) evidence showed that he had a propensity to commit sexual offence in a particular manner which could only have resulted in prejudice to the accused right to a fair trial."

12 [1996] 2 All ER 927 at 935 a. The point had been decided in R v Flack [1969] 2 All ER 784 at 787-788 where the evidence of each of three sisters who had been sexually abused fell into water-tight compartments and the Court of Appeal held that it was within the discretion of the trial judge, even in that situation, to order that the counts could properly be tried together and that the court would not interfere unless satisfied that there were no reasonable grounds upon which the judge's decision could be supported, or that it may have caused a miscarriage of justice.

13 As the DPP noted on this appeal the evidence of all four other prosecution witnesses was common to both charges and admissible on both charges.

Therefore, even if the DPP v Boardman requirement of striking similarity had remained the law the evidence of one sister would still have been admissible, as similar fact evidence, on the count relating to the offence against the other sister. It was a compelling case for ordering a joint trial to proceed.

[13] The admissibility of the evidence of each complainant on the count relating to the other complainant meant there was no need for the judge to do more than direct the jury to consider each count separately and that they could return a verdict on each count that was different. There was no need to direct the jury that the evidence of one child was to be ignored when considering the count in relation to the other child. Because the evidence of one child was admissible and probative on the jury's deliberation on the count in relation to the other child no need arose, therefore, to require the jury to perform the mental gymnastics to which Mr. Clouden referred.

[14] Two other aspects of the complaint against the ordering of a joint trial remain to consider. Firstly, there was the contention that there was a strong danger of collusion or fabrication of the evidence of the children and that the judge should have considered and used that risk to order separate trials. As a matter of logic, the trial having concluded and that danger not having materialized - there was no suggestion from counsel that it did - that contention can have no life on appeal.

[15] The second contention was that when the jury were considering one charge the evidence of the other charge prejudiced the jury into thinking that the appellant was a person of previous bad character. The prejudice that is incidental to a joint trial is that the jury may use the fact of multiple charges or inadmissible evidence to conclude that the accused is the sort of person who would be likely to have committed the offence in question.[14] Where the probative value of the evidence of the accused having committed other offences outweighs the prejudicial effect,

14 Per Lord Cross in DPP v Boardman [1975] A.C. 421 at 456 G.

such evidence is admissible. Since that was the situation in the instant case this contention also fails.

[16] Accordingly, I would reject the ground of appeal that complains that the trial judge erred in refusing to order separate trials of the two counts in the indictment. I turn to the second ground of appeal, that the trial judge erred in wrongly allowing the prosecution to rely on a conversation between the two children as evidence of a recent complaint in a sexual case.

[17] The premise of this ground is false because the recent complaints on which the judge directed the jury were the complaints that the children made, in the presence of each other, to N, the elder sister; not what each child told the other. N gave evidence of the fact that the children told her what had happened. The judge gave an appropriate direction on the use to which such complaints may be put in language similar to the standard direction that counsel ascribed to the case of White v R.[15] I find no merit in this ground of appeal.

[18] The remaining ground that the appellant argued was that the corroboration direction of the judge departed from the direction found to be appropriate in R v. Gilbert (Rennie).[16] Counsel did not pursue this ground when his attention was drawn to the clear direction of the judge to the jury that there was no evidence in this case capable of amounting to corroboration. Not only did the judge direct the jury that there was no corroborative evidence; he pointed the jury to evidence that they may have been tempted to use as corroboration and told them why such evidence could not amount to corroboration.

[19] Counsel did not proceed with the ground that the sentence was excessive but acknowledged the sustainability of concurrent sentences of 5 years and 8 years' imprisonment for indecent assault and carnal knowledge respectively, given the

15 [1999] 1 Crim App R 153

16 [2002] UKPC 17, [2002] 2 WLR 1498.

prevalence of sexual offences in Grenada.[17] The very young ages of the victims (7 and 9 years old) were a serious aggravating factor and made the sentences appropriate in the public interest, especially in view of the age of the appellant, who was 52 years old at the time.[18]

[20] I would dismiss the appeal against conviction and sentence.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Suzie d'Auvergne
Justice of Appeal [Ag.]

[17] Counsel accepted the accuracy of the information given by the prosecution on the prevalence of sexual offences in Grenada: of the 9 criminal appeals on the list at this sitting 2 were for rape and 3 were for sexual offences involving minors. Of the 102 cases listed for the current assizes, 51 were for sexual offences.

[18] In Devon Mitchell v R, Grenada Criminal Appeal No. 10 of 2003 (unreported) it was decided that, in Grenada, a sentence of 8 years' imprisonment for carnal knowledge of an 11 year old was appropriate, where the offender was 28 years old at the time of the offence. The younger the victim the more aggravated is the offence and therefore the more severe should be the sentence.