SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCR 2009/ 0010

BETWEEN:

THE QUEEN

And

SAMUEL WILLIAMS

Appearances:

Mr. H. Joseph for the Defendant
Ms. Tina Mensah for the Crown

2009: July 27 and 30

RULING

[1] BENJAMIN, J: The defendant has been indicted for the offence of unlawful sexual intercourse contrary to section 126(1) of the Criminal Code of St. Lucia, 2004. The Indictment was laid on April 16, 2009 and alleges that the Defendant on February 11,

2007 at Denierre Riviere in the quarter of Dennery had sexual intercourse with the complainant aged 11 years.

[2] Preliminary to the trial of that matter, the Defendant applied to the Court for the proceedings to be stayed for abuse of process. The Defendant seeks a stay without consideration of the evidence on the ground that the Defendant would be unable to examine evidence and question the prosecution witnesses.

[3] The following matters are not in dispute. Samples which included vaginal swaps of a whitish-yellowish fluid which the doctor considered might be semen and oral swabs were taken from the virtual complainant on February 11, 2007 the date of the alleged offence. Subsequently, samples in the form of oral swabs were taken from the Defendant voluntarily sometime between the date he was charged – February 14, 2007 and February 6, 2008.

[4] In the course of the preliminary inquiry, the deposition of examining doctor was recorded. The said doctor deposed as follows:

> "On examination of (the Virtual Complainant) I found that the labia minora had some bruising and also swelling to the introitus. There were (sic) two separate tears to the hymen. On was at 6:00 o'clock and the other at 3:00 o'clock. There was also some serosangious fluid in the vagina. This is secretion from the tears which would indicate that the wound was only a couple of hours old.

"The injuries to the labia minora could be as recent as two to six hours. The cuts to the hymen could have occurred with the same time period. I did examine the vagina. The presence of the hymen intact would indicate the individual has had sexual relation – sexual intercourse.

In the case of (the Virtual Complainant) the hymen was torn.

Forceful entry could have caused the tear to the hymen.

Also on examination I found some whitish-yellowish fluid. I did collect samples of this fluid. I thought it was competent because the secretion could have been semen."'

By a notice filed on May 13, 2009, the Prosecution indicated its intention to apply to the Court pursuant to section 894 (1) (c), (e) and (f) of the Criminal Code of St. Lucia 2004 to have the deposition of the doctor read, as he is absent from the State.

[5] The Prosecution has categorically informed the Court that the vaginal swabs were subjected to forensic analysis and the results have been disclosed upon the Defence. Learned Counsel for the Defendant acknowledged receipt of a report by Fernanda Henry, which report concluded that spermtazoa were identified. The oral swabs did not reveal the presence of any seminal plasma. To date, the oral swabs taken from the Defendant have not been tested or in any way used for comparison with the swabs taken from the virtual complainant. More specifically, no DNA profile was extracted from any of the samples to ascertain whether there was any match.

[6] Learned Crown Counsel has asserted that the samples have been preserved and are available for further testing. The clear position of the Prosecution was that no

further testing was contemplated as there existed in St. Lucia no forensic capability to embark upon DNA testing.

[7] The Defendant pointed to the statement made under caution on February 14, 2007 as indicative of his defence that he did not interfere with the virtual complainant and that she ought to be examined by a medical doctor.

[8] AG's Reference No. 2 of 2001 [2003] UKHL 68, Lord Bingham states (at para. 13):-

> "It is accepted as 'axiomatic' that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all: R. v. Horseferry Road Magistrates Court, exp. Bennet [1994] 1 A. C. 42 at p. 68."

His Lordship went to prescribe that where a fair trial cannot be held, the Court must stay the proceedings.

[9] The trial judge is clothed with a discretionary power to stay proceedings on the basis of an abuse of process. This power would not be appropriately exercised where the perceived unfairness can be cured within the trial process (A-G. Ref. (No 1 of 1990) [1992] 1 Q.B. 630")

[10] Starkly put, the Crown acknowledged having taken the samples and have categorically asserted that there is no intention to conduct any further testing. However, the existence of the samples for testing has been assured and the said

samples are available to the Defence. As an apparent further concession, the Crown stated that at trial the samples taken from the defendant will not be referred to.

[11] In R. v. Feltham Magistrate's Court. Exp. Mohamed Rafiq Ebrahin and the Director of Public Prosecution [2001] 2 Court of Appeal. R. 23, the Court considered the impact of the absence of a video-tape of what occurred at the incident in question. The said video-tape had been erased routinely. The Court held that this was not an absolute bar to the trial proceeding and did not automatically result in the trial being unfair.

[12] The task of the Defence in seeking a stay of proceedings was set out by Lord Lane, CJ in A-G.'s Ref (No. 1 of 1990) (supra, at p. 644 A-B. when he iterated that there should be no stay imposed "unless the defence shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court."

[13] In Feltham's case, Brooke, LJ. had this to say:

> "It must be remembered that it is common place in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which

might otherwise have been available was not before the court through no fault of his. Often the absence of a video film, fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

[14] In the case at bar, the Crown seeks to rely upon the viva voce evidence of the virtual complainant who is a minor as well as the medical testimony of the doctor who examined her soon after the report was made. Also, the Crown will seek to tender evidence of the result of the forensic examination of the vaginal swabs. The testimony of the virtual complainant will most likely attract warnings as to the absence of corroboration and the impact thereof, since the virtual complainant is both a child and a female complainant. The medical and forensic evidence though not capable of amounting to corroboration are admissible and can be applied in support of the credibility of the virtual complainant. There is also the overriding power of the trial judge under Section 115 of the Evidence Act, 2002 to exclude such evidence that is more prejudicial in its effect than probative in its value.

[15] The Court deliberately has stopped short of making any order for the comparative testing to be done. This restraint is based on the unchallenged representation that such DNA testing facilities are not available within the jurisdiction.

[16] The defendant is entitled to a fair trial according to law and this Court can discern no unfairness being visited upon the defendant at his trial by the absence of the testing referred to. The safeguards extant in the trial process are, to my mind,

adequate to address any potential imbalance of unfairness as between the defendant and the prosecution.

[17] In the premises, the application to stay the proceedings is denied.

KENNETH A. BENJAMIN
HIGH COURT JUDGE