

**Republic v Brioche
(1997) SLR 72**

Karen DOMINGUE for the Republic
Jacques HODOUL for the Accused

Judgment delivered on 24 October 1997 by:

ALLEEAR CJ: Willy Brioche, the accused, is charged with the offence of sexual interference with a child contrary to and punishable under section 135(l) of the Penal Code, as amended by the Penal Code (Amendment) Act No 15 of 1996.

The particulars of offence are that Willy Brioche on 28 August 1996 at Grand Anse, Praslin, committed an act of indecency towards A, a girl under the age of fifteen years.

On 30 August 1996 at around 1430 hours, SI Marie May Bacco was on duty at Grand Anse Praslin police station when one B called at the station with her daughter A. On behalf of her daughter A, aged 9 years, B made a report to SI Bacco. Following the said report SI Bacco recorded a statement from A in the presence of her mother.

At 1500 hours SI Bacco, accompanied by B and A, went to a location where A alleged the incident giving rise to the present case had occurred.

On 2 September 1996 Inspector Sylvia Chetty, who was accompanied by SI Bacco and A proceeded to the location of the alleged offence. A pointed out several spots to Inspector Sylvia Chetty who took photographs of same.

On 4 September SI Bacco took A who was accompanied by her mother, to the Grand Anse Clinic for medical examination by a gynaecologist.

On 5 September 1996 shortly after noon SI Bacco, who was in the company of Corporal Dogley, arrested the accused at his work place at Praslin Beach Hotel. The accused was taken to Grand Anse Police station where he was detained overnight.

On the 6 September 1996, when SI Bacco resumed duty at 8 in the morning she saw the accused in his cell. She gave him a lemonade and asked him how he was and whether he had slept well. The accused replied that he had slept well and that he was all right. Around 11 am the accused was taken out of cell and was interviewed by Lance Corporal Freminot. SI Bacco was present during the interview. The accused was cautioned and he voluntarily gave a statement which started at 11.28 am and ended at 11.50 am.

According to SI Bacco, the accused recounted in a story form how the alleged incident had occurred. The statement was read over to the accused person after it had been

recorded. The accused was asked to make any addition, alteration or correction. He made none. He affixed his thumb print at the end of the statement.

SI Bacco admitted in cross-examination that the father of her concubin is the brother of B's mother. She added that she had been posted to Praslin since September 1995 and had known B one year prior to the alleged incident. This witness stated that it was not within her knowledge whether or not the accused had had an affair with B. She was also unable to say whether or not B was on good terms with the accused. She confirmed that B had written three letters to the Commissioner of Police to inquire about the progress of the investigation of the case. She was not aware if the National Council for Children had been contacted by B on two occasions. She admitted that she had instructed SI Sylvia Chetty on 2 October 1996, to take photographs of the alleged scene of offence. She stated that the first time she saw A was on 30 August 1996 at Grand Anse Police Station.

A, who turned 9 years old on 23 October 1996, deposed that she lives at Grand Anse, Praslin with her mother, grandmother, brothers and sisters. She is in P4 attending primary school at Grand Anse, Praslin. She told the Court that she knew the accused who used to come to the house of her grandfather during the lifetime of the latter.

This witness testified that although her mother, grandmother and herself were in good terms with the accused prior to the alleged incident they are no longer so as "the latter has done these wrong things to me." She recalled the day of the incident. She had gone to buy fish by the seaside. On her way home, the accused called her and asked her to accompany him to the market. The accused asked her to walk in front of him. When she returned home her grandmother asked her to take the empty pig food container to the house of Georgina Esther. On her way home from Georgina Esther's house she saw the accused again. The latter called her and asked her to help him look for his R25 note which he had lost on his way. She agreed to help the accused to search for the lost note. At the same moment they saw a man coming in their direction. The accused asked her to hide amongst some undergrowth. After the man had passed them they continued looking for the lost note. Whilst she was thus engaged she said the accused touched her shoulder. Then he put his hand in her panty and ran his hand in her vagina. He inserted his finger inside it. She said she told the accused that she was leaving and he did not want her to go. He pulled her backwards and they continued searching for the lost note. Moments later she found the missing note. While she was handing it over to the accused she saw her mother approaching. The accused asked her to hide. She did not hide but went straight to her mother. She said her mother swore at the accused before taking her home.

When they reached home she said she did not talk to her mother. The following night, however she recounted the alleged incident to her mother. Her mother was very angry. The next morning her mother took her to the Grand Anse Police Station where she related to SI Bacco what had happened to her. The latter recorded a statement from her. A few days later her mother took her to hospital to be examined.

A stated that what she told the Court had actually taken place. Before the incident she said the accused was on good terms with her mother. He used to come to her mother's house. On the day of the incident she was wearing a dress and shorts underneath it. The accused did not remove her clothes. She added that whilst the accused was touching her private part she was frightened. On the night of the incident she said she felt "ashamed". She could not finish her dinner. She did not report the incident to her mother because she was frightened that she would be beaten up.

In cross-examination this witness agreed that she had spoken about the incident to her mother on several occasions prior to coming to court. Her mother told her to speak the truth and relate to the Court what the accused had done to her. She denied that her mother had coached her.

B, the complainant's mother, a tour guide representative deposed that she has known the Accused for about four to five years. She denied that she had ever been in concubinage with the accused but she stated that she and the accused were friends. She explained that she fell out with the accused because the latter was pestering her for sexual favours. She had told the accused point blank that she was not interested in having sexual intercourse with him.

This witness stated that on the evening of 28 August 1996 she returned home from work at around 6.30 pm. She saw her other three children but A was not at home. She enquired from her mother about the whereabouts of A. Her mother told her that she has sent A to take the empty pig food container to the house of C. As it was getting dark B went out to C's house to look for her daughter. A was not there. B went to the shop. From the shop she went on the road looking for A. She came across D. She asked the latter whether he had seen A. The latter replied in the negative. She went on looking for A and as she did so she called out "A, A" aloud. She eventually saw A standing in front of the accused in a small foot path. She asked A what she was doing with the accused. A did not reply. The accused came towards her and spoke to her saying, "even if we are no longer in good terms do not beat A. I had lost my R25 note and I asked A to help me look for it."

B said that after hearing the accused's statement she was still angry with him for having asked her daughter at such a late hour to look for his missing money. She and A went home. Whilst A was having her dinner she noticed that she was not her usual self.

The following evening when she had calmed down she asked A again whether in truth she was only looking for the missing note for the accused. At that moment she said A broke into tears and recounted to her what the accused had done to her.

The next morning she contacted SI Bacco at Grand Anse Police Station. At the station A gave a statement to SI Bacco. On the same day SI Bacco took A and B to the scene of the alleged incident. There A pointed out the places where the incident was alleged to have taken place.

Five days after the incident she went back to the police station after A had complained to her that her vagina was painful. SI Bacco arranged for A to be medically examined at the Grand Anse Clinic by Dr Sankoro. The latter declined to examine A but referred her to Victoria Hospital to be examined by a gynaecologist. Later same day a lady doctor examined A in Victoria Hospital. She said the gynaecologist in Victoria Hospital said that there was nothing wrong with her daughter.

B admitted that on at least two occasions she had spoken about the incident to her daughter. She denied that she was determined to see the accused convicted and be jailed. What she wanted she said was to see that justice was done.

B admitted that she had approached F to ask him to correct some letters which she had written before sending them to the National Council for Children and the Commissioner of Police. She denied that after the doctor had said that there was nothing wrong with A she had said that she herself would damage A's vagina with her finger so as to ensure that the accused got convicted. She admitted that although her cousin is the boyfriend of SI Bacco, she did not take advantage of that relationship to ensure that the investigation against the accused was speeded up. She denied that she had coached A to tell lies to the Court or to mislead the Court.

D, a mason living in Grand Anse, Praslin testified that on the evening of the incident at about 6.40 pm he did not see the accused and A together but saw B opposite the Grand Anse Clinic. The latter asked him if he had seen A and he said no.

Sylvette Lemielle, a constable then stationed at Grand Anse Police Station, deposed that on 5 September 1996 when she resumed duty at 4 pm, she saw the accused who was being detained in a cell at the Grand Anse Police Station. She noticed that the accused looked normal. She did not see anybody in her presence assaulting the accused. She saw when PC Laundry brought a takeaway box and gave it to the accused. The next morning she came off duty at 8 am. Sylvette Lemielle was positive that the accused was not ill-treated in her presence.

Andre Freminot, a police officer, was stationed at Grand Anse Praslin on 6 September 1996. He was not on duty on the day the accused was arrested but worked on the next day from 8 am to 4 pm. He said at around 11.30 am he recorded a statement from the accused. The statement was witnessed by SI Bacco. The accused, he remarked, gave the statement voluntarily. The statement was given in Creole language in a story form. After the statement had been recorded it was read over to the accused and the accused was informed that he could make any addition or alteration to it. The accused made none. The accused affixed his right thumbprint at the end of the statement. Both he and SI Bacco signed the statement.

Police Officer Freminot denied that pressure was brought to bear upon the accused to make him give a statement.

Before the production of the statement in evidence, objection was raised by Mr. Hodoul in terms of article 18(4) of the Constitution. The contention of the defence was that the

accused had not been told by the arresting officer the reason for his arrest and about his right to silence and his right to be defended by a legal practitioner of his choice. A trial within a trial was held to determine the issue of whether there had been a contravention of article 18(4) of the Constitution.

Article 18(4) of the Constitution is couched in these terms:

A person who is arrested or detained shall be informed at the time of the arrest or detention or as soon as is reasonably practicable thereafter of his rights under clause (3).

Clause (3) states:

A person who is arrested or detained has a right to be informed at the time of arrest or detention or as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason for the arrest or detention, a right to remain silent, a right to be defended by a legal practitioner of the person's choice and, in the case of a minor, a right to communicate with the parent or guardian.

Andre Freminot was positive that at no time had the accused asked to contact a lawyer. He added that there were no physical marks on the body of the accused and the latter was made comfortable in his cell and he did not make any complaint to anyone. The accused, he said, was not beaten or threatened in any way. He was not promised anything. The accused gave his statement voluntarily.

SI Marie May Bacco confirmed that the accused was arrested on 5 September 1996 at Praslin Beach Hotel. At the time of his arrest, the accused was informed of the reason for his arrest. In fact SI Bacco said she herself told the accused of the allegation made against him. According to SI Bacco she also informed the accused of his right to be defended by counsel of his choice. Confronted by the allegation of B the accused replied that he too had heard about same. Before boarding the police vehicle, the accused was informed of his right of silence. SI Bacco recalled that when she had gone to arrest the accused Corporal Dogley was with her. After the accused was brought to Grand Anse Police Station and the formalities completed he was told he would be detained and was placed in a cell.

The accused was served lunch. Before SI Bacco went off duty at 4 pm she went to the accused's cell to see whether he was alright. The next morning, that is 6 September 1996 when she took up duty, SI Bacco said that she went to the accused's cell and asked him how he had slept. The accused replied he was okay. SI Bacco asked the accused whether he wanted tea. The accused said he wanted a soft drink, and one was bought for him. The accused did not make any complaint to SI Bacco nor did he ask for the services of counsel. The accused never asked her why he was being detained.

SI Bacco explained the formalities preceding the recording of the statement from the accused. She said the accused was taken to the interview room. The allegation of A was put to him again. The accused replied that he would give his version of the events, whereupon Corporal Andre Freminot cautioned him and the accused recounted his version of the events and Corporal Freminot recorded the statement.

SI Bacco was present throughout the recording of the statement in the CID office. SI Bacco saw no bruises or marks on the accused. After the statement was recorded it was read over to the accused. He was given the choice to add to, correct or alter it. The accused affixed his right thumb print as his signature. The statement was given voluntarily without promises, threats or inducement made to the accused according to SI Bacco. The accused was comfortable when he made the statement. He was normal; there was nothing wrong with him. SI Bacco maintained that she did inform the accused of his constitutional rights.

The accused testified on the voir dire. He said he was working as a gardener employed by Praslin Beach Hotel when he was arrested by SI Bacco. The accused stated that he was not informed of the reason for this arrest. He was simply arrested and taken to Grand Anse Police Station. He said when he reached the Grand Anse Police Station he was slapped three times on the back of his neck. He said he gave his statement voluntarily after Lance Corporal Freminot asked him whether he would like to make a statement. He also confirmed that after the statement was recorded it was read over to him and he was informed that he could make any alterations, additions or corrections to it. The accused denied that he was informed of his constitutional right upon arrest. The accused stated that he was not aware that B had made an allegation against him.

After the Court had heard evidence on the voir dire, the Court was satisfied beyond doubt that the accused was informed of his constitutional right and that he was not subjected to any ill-treatment by the police officers. The Court ruled that the statement was given voluntarily and admitted it in evidence.

The translated version of the accused's statement runs thus:

On Wednesday 28 August 1996, around 6.15 pm, I came from Theophane Jean Baptiste's to get a bottle of toddy. I drank the bottle of toddy at his place and afterwards I went down towards the beach and at that time there was a 25 rupee note in my pocket. When I arrived further down near one Charles I checked in my pocket and noticed that my money in my pocket was missing and so I started to look for it. When I arrived further down at a junction of a footpath I saw a small girl whom I know as A who is the daughter of B, and A, I know her very well and her family as well.

I am used to them and I also before used to play with B's children.

Sometimes I bring them for walks everywhere but lately I was not frequenting there because I am not on good terms with B. When I saw A I called her and I told her to come and help me to look for my money as I have 25 rupees which is lost and at that time it was around 6.30 pm and I

continued to look for my money until I reached near a clump of (vyeyfiy). Whilst we were looking for my money there, A and me, A picked up the money and gave it to me. After she had given me my money she asked me for a lemonade and I told her that I can't give her money as I am not on good terms with her mother. Just a few minutes after I saw her mother (I saw her mother) B coming and she said to A who at that time was standing near me, facing me "all this time you have gone to bring pig food? Where were you?" And so I replied by saying "excuse me I had lost my 25 rupees and I have asked A to give me a hand to look for it." B did not reply and she took her child and went to her place and I went towards the beach. Whilst I was looking for money together with A I did not see anybody passing by but I saw someone coming behind me and at that time we were near the clump of (vyeyfiy) and I told A to hide and I also hide in case people will see her with me and tell her mother. I did not notice if that person was Patrick Barbe but it was a tall person and whilst we were hiding A and me I did not see anybody pass by near us. I recalled A was wearing shorts but I do not know what she was wearing on top of her shorts if it was a T.Shirt or a dress. After I came out from hiding I hold A on her shoulder with my left hand and put my right hand and started to pass on her body going down towards her thigh and afterwards I took my right hand and put it inside A's panty and ran my hand on her vagina, caressing her vagina, and after I took out my hand, but I want to say that I did not put any finger inside A's vagina and if A said that I put my finger in her vagina it is not true.

I did not have any intention to do anything with A and A did not tell me anything when I was passing my hand on her. It was a bit dark at that time so I could not see A's face if she was shy or embarrassed. I want to state that on that day I did not meet A earlier because I was working.

When I was there with A I did not show any other money in my hand to A. I had only 25 rupees that I was looking for.

H RTP of Willy Brioche

In his statement the accused admitted that he had touched the vagina of the complainant by putting his right hand inside A's panty and caressing her vagina. He denied that he had inserted his finger inside A's vagina. He said at the time he was caressing and touching A's private part, it was dark and he could not see A's face to notice if she was embarrassed or not. A, he added, did not say anything to him.

In his unsworn statement to the court the accused simply stated that he had asked A to hide at the back of a tree because he was not on good terms with B.

The accused had previously indicated to the Court that he would be calling two witnesses from Praslin. They were never called because, in defence counsel's opinion, there was nothing material that they could say in the defence of the accused.

In this case the complainant, aged 9 years, gave unsworn evidence. She was allowed to do so after the Court, through questioning of her, was satisfied that she was of sufficient intelligence and could give a coherent version of the alleged incident. The Court further satisfied itself before relying on the evidence of the complainant that the latter was speaking the truth and had not been coached by her mother or anyone else and has not given a rehearsed version of the incident in Court.

Although corroboration is not required as a matter of law in cases of indecent assault, there can be no conviction of an accused solely on the unsworn evidence of the complainant unless that evidence is corroborated by some other material evidence in support thereof implicating the accused. In this case the accused himself in his voluntary statement which he had given to Lance Corporal Freminot at Grand Anse Police Station had admitted that he touched the body of A and that he had put his hand inside her panty and ran his hand on her vagina, caressing it. The accused denied inserting his finger inside A's vagina although A stated that he had done so.

The accused had contended that his constitutional rights provided for under article 18(4) had been contravened. On a *voire dire* held during the trial within a trial the Court satisfied itself beyond reasonable doubt that that was not the case. The Court was satisfied beyond reasonable doubt that the accused had been informed of the reason for his arrest, of his right of silence and of his right to retain counsel of his choice. The accused never challenged the voluntariness of his statement. It is on record that he stated that when the allegation was put to him at the police station the next day he agreed to give a statement and it was a voluntary one. Hence the unsworn evidence of the complainant is corroborated by the admission of the offence by the accused himself in his extrajudicial statement.

In court the accused did not allege that what he had stated in his statement was not true. He only clarified that he had asked the complainant to hide because he was no longer on good terms with the complainant's mother.

On the evidence led in support of the charge of indecent assault, I find the offence of sexual interference under section 135(1) of the Penal Code proved beyond reasonable doubt.

I accordingly find the accused guilty and convict him as charged.

Record: Criminal Side No 12 of 1997