

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS
Plaintiff)
Vs.)
FRANCISCO R. OGANDO ABREU
Defendant)

CASE NO. ST-09-CR-0000291

ACTION FOR: 14 V.I.C. 1081

**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

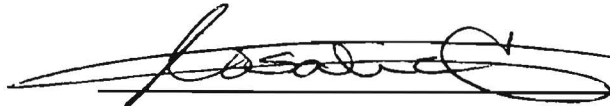
TO: PUBLIC DEFENDER SAMUEL L. JOSEPH
ESZART A. WYNTER, SR. ESQ.
ASSISTANT ATTORNEY GENERAL JUDY GOMEZ
JUDGES & MAGISTRATES, SUPERIOR COURT
ORDER BOOK

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Please take notice that on October 29, 2010 a(n) MEMORANDUM OPINION
AND ORDER dated October 29, 2010 was entered by the Clerk in the
above-entitled matter.

Dated: October 29, 2010

Venetia H. Velazquez, Esq.
CLERK OF THE SUPERIOR COURT



ROSEALIE GRIFFITH
COURT CLERK SUPERVISOR

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CASE NO. ST-09-CR-F291
v.	)	ST-09-CR-F292
	)	
FRANCISCO R. ABREU and	)	JURY TRIAL DEMANDED
WELVIN C. GUERRERO,	)	
	)	
Defendants.	)	
_____	)	

JUDY M. GOMEZ, ESQ.

Assistant Attorney General
U.S. Virgin Islands Department of Justice
34-38 Kronprindsens Gade
GERS Bldg., 2nd Floor
St. Thomas, VI 00802
Attorney for Plaintiff

SAMUEL L. JOSEPH, ESQ.

Territorial Public Defender
P.O. Box 6040
St. Thomas, VI 00801
Attorney for Defendant Abreu

ESZART A. WYNTER, SR., ESQ.

Law Offices of Eszart A. Wynter, Sr., P.C.
P.O. Box 1847
Frederiksted, St. Croix, VI 00841-1847
Attorney for Defendant Guerrero

CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: October 29, 2010)

I. Introduction.

This matter grows out of charges of rape, false imprisonment, grand larceny, and conspiracy against Defendants Francisco R. Abreu ("Defendant Abreu") and Welvin C. Guerrero ("Defendant Guerrero") based on an incident alleged to have occurred on June 17, 2009. Presently, pending before the Court are three motions, specifically: 1) the "Motion in Limine to Allow 'Excited Utterance' Testimony Under F.R.E. 803(2) or in the Alternative First or Prompt Complaint of Rape" ("People's FRE 803 Motion") filed by the People of the Virgin Islands (the

“People”); 2) the “Motion to Reconsider Probable Cause Hearing and Motion to Dismiss” filed by Defendant Guerrero (“Guerrero Motion to Dismiss”); and 3) the “People’s Motion in Limine to Preclude the Defendant’s Use of the Victim’s Past Sexual Acts Pursuant to Federal Rule of Evidence 412” (“People’s FRE 412 Motion”). The Court disposes of each of these motions below *seriatim*.

II. Motion in Limine to Allow ‘Excited Utterance’ Testimony Under F.R.E. 803(2) or in the Alternative First or Prompt Complaint of Rape.

By the People’s FRE 803 Motion, the People seek a ruling that the statements of three persons who spoke with the victim shortly after the alleged incident are admissible. Because certain statements of the victim, which the People assert will be repeated by the three witnesses, were made in close temporal proximity to the alleged rape, the People argue that they are admissible under the excited utterance exception to the hearsay rule. *See, Fed. R. Evid.* 803(2).¹ Alternatively, the People posit that the statements of these witnesses are admissible under the first complaint doctrine.

Defendant Guerrero filed an opposition to the People’s FRE 803 Motion, in which Defendant Francisco R. Abreu joins, focusing on the excited utterance portion of said motion. Messrs. Guerrero and Abreu take the position that the Court is not in a position to make a proper ruling on the admissibility of the statements at this time because the present underlying record is insufficient to sustain a decision one way or the other.

In order to establish that the statements at issue fall within the excited utterance exception to the hearsay rule under *Fed. R. Evid.* 803(2), the People must establish “1) a startling occasion; 2) a statement made relating to the circumstances of the startling occasion; 3) a declarant who

¹ The Federal Rules of Evidence apply to proceedings in this Court pursuant to Section 15(b) of Act No. 7161 (Bill No. 28-0180).

appears to have had the opportunity to personally observe the event; and 4) a statement made before there has been time to reflect and fabricate.” *Suarez v. Gov’t of the Virgin Islands*, 48 V.I. 492, 501 (D.V.I. App. Div. 2006), *aff’d in part and vacated in part*, 242 F.App’x 845 (3rd Cir. 2007) (citations omitted); *Gov’t of the Virgin Islands v. Thompson*, 46 V.I. 131, 141 (Super. Ct. 2005) (citations omitted). The record before the Court indicates that, subsequent to the filing of the Information in this case, the victim gave a statement that is very different than what she reported as reflected in the Affidavit attached to the Information.² Thus, the occurrence of the ~~alleged rape, which is the asserted startling occasion, is in dispute.~~ This undermines the People’s ability to meet the first three prongs of the test. Moreover, even if the occurrence of the alleged rape was not in dispute, the present record does not indicate at what time the incident took place. Therefore, the People also cannot establish the final factor set forth in *Suarez* on the existing record at this time. The Court is not suggesting that the People cannot raise this issue again at trial if the proper foundation is laid; only that the relief cannot be granted on the existing record.

Alternatively, the People ask this Court to admit the testimony of the three witnesses under the “first complaint doctrine”.³ The purpose of the first complaint doctrine “is to refute any false inference that silence is evidence of a lack of credibility on the part of [sexual assault] complainants.” *Commonwealth v. Thibeault*, 931 N.E. 2d 1008, 1001 (Mass. App. Ct. 2010).

² Exhibits 1 and 2 appended to Defendant Welvin C. Guerrero Motion to Reconsider Probable Cause Hearing and Motion to Dismiss. Exhibit 1 is a Spanish version of this second statement, while Exhibit 2 is in English.

³ This Court has not found any case law or statutes in the Virgin Islands specifically adopting this doctrine. However, the principle is grounded in the common law. See, Joseph Gilsinger, Annotation, *Application of Common-Law “Fresh Complaint” Doctrine as to Admissibility of Alleged Victim’s Disclosure of Sexual Offense – Post-1950 Cases*, 39 A.L.R. 6th 257 (2008). This doctrine is also known as the “recent complaint doctrine”, “prompt complaint doctrine”, “fresh complaint doctrine”, “early complaint doctrine”, “corroborative complaint doctrine”, “bare fact of complaint doctrine”, and “constancy of accusation doctrine”. *Id.* at 277 n. 2. Therefore, being a creature of the common law “...as generally understood and applied in the United States...”, the first complaint doctrine is applicable in the Virgin Islands pursuant to 1 V.I.C. § 4.

The Court also is unable to grant the People's request to admit the statements of the three witnesses pursuant to the first complaint doctrine at this juncture for two reasons.

First, the doctrine generally only allows for the admission of the testimony of the first witness to whom a rape victim complains, and not to subsequent persons who also may hear those complaints. *Commonwealth v. Arana*, 901 N.E.2d 99, 106 (Mass. 2009); *Vandiver v. State*, 726 P.2d 195, 198 (Alaska Ct. App. 1986). Thus, the statements of the second and third witnesses cannot be admitted under this doctrine at this preliminary stage or at trial. Second, under the first complaint doctrine, the statements reiterating the victim's initial complaint of rape to another is only admissible to corroborate the victim's testimony that the rape occurred. *Terry v. Commonwealth*, 484 S.E.2d 614, 616-617 (Va. Ct. App. 1997).

In this matter, the victim, subsequent to the initiation of this case, made another statement which belies any claim of rape. At this point, it is unclear what the alleged victim's testimony at trial will be regarding the alleged rape. It would be improper for the Court to admit *in limine* corroborative evidence when the primary evidence itself is in dispute. Once again, it may be that the first complaint doctrine may come into play at trial, but that determination cannot be made at this juncture. For the foregoing reasons, the People's FRE 803 Motion will be denied without prejudice.

III. Defendant Guerrero's Motion to Reconsider Probable Cause Hearing and Motion to Dismiss.

In Guerrero's Motion to Dismiss, the movant asserts that the victim's initial report to the Virgin Islands Police Department ("VIPD") was false. In support of this contention, Defendant Guerrero attached to the motion copies of two notarized statements, one in English and one in Spanish, allegedly executed by the victim. The statements indicate that there was an agreement between her and the Defendants, and the Defendants did not fulfill their obligations thereunder.

The victim further states that “Also I don’t have any interest to continue with this case.”⁴ Defendant Guerrero requests a hearing to determine whether the victim and her boyfriend are trying to use this process to enforce an illegal agreement. Therefore, he requests that this Court re-determine whether probable cause exists and dismiss the matter if no probable cause is shown.

The People have filed an opposition to Guerrero’s Motion to Dismiss. Essentially, the People argue that Defendant Guerrero’s motion is ill-advised because there was sufficient evidence to support this Court’s initial finding of probable cause. The People further posit that ~~the Defendant is improperly challenging the evidence which may be offered in support of the~~ elements of the rape charge. It is their position that such challenges should be made at the trial of this cause.

In the Virgin Islands, criminal actions are instituted by way of an information, as opposed to the grand jury indictment process. 5 V.I.C. § 3581(a).⁵ “It is settled that this information is the ‘full equivalent’ of an indictment, and for all purposes.” *Ballentine v. Hendricks*, 9 V.I. 268, 274-275, 351 F. Supp. 208, 212 (D.V.I. 1972) (citing *Rivera v. Gov’t of the Virgin Islands*, 375 F.2d 988, 990 (3rd Cir. 1967)). In addition, “One function served by an indictment is that it establishes probable cause and cuts off any right to a separate hearing directed to that issue.” *Id.* Therefore, once the People filed the Information in this case, Defendant Guerrero no longer had any right to any probable cause hearing, much less a second hearing on the matter.

In addition, to the extent the victim claims that there was some form of an agreement between the parties, it appears that Defendant Guerrero may have some evidence of consent which is a defense to the crime of first degree rape. *Gov’t of the Virgin Islands v. Joyce*, 210

⁴ Exhibit 2 to Guerrero Motion to Dismiss.

⁵ Although 5 V.I.C. § 3581(a) refers to the “district court” it is well-established that once subject matter in civil and criminal matters was vested in this Court, references in the Virgin Islands Code to the “District Court” were impliedly amended to now refer to Superior Court. See, *Berne v. Boschulte*, 39 V.I. 217, 6 F. Supp. 2d 443 (D.V.I. 1998).

F.App'x 208, 209 (3rd Cir. 2006). As an information and an indictment are the same in the Virgin Islands for all purposes, like an indictment, an information cannot be challenged pre-trial based on allegations of "inadequate or incompetent evidence." *See, United States v. Calandra*, 414 U.S. 338, 346 (1974). Therefore, to the extent that Defendant Guerrero requests the dismissal of this case based on the documents he has provided and an alleged lack of probable cause, the Court will deny his motion.

IV. People's Motion in Limine to Preclude the Defendant's Use of the Victim's Past Sexual Acts Pursuant to Federal Rule of Evidence 412.

In Guerrero's Motion to Dismiss, he also refers to the boyfriend of the victim as her "pimp", and requests a hearing to further flesh this matter out. The Court will treat this portion of Defendant Guerrero's motion as one *in limine* seeking the admission of evidence pursuant to Fed. R. Evid. 412. Defendant Guerrero's request apparently caused the prosecution to file the People's FRE 412 motion, which the Court will treat as the People's opposition thereto. In this motion, the People request that this Court exclude any evidence of the victim's past sexual behavior as it is an attempt "to smear the victim with allegations accusing her of being sexually promiscuous."⁶ Neither Defendant has filed a response to the People's FRE 412 Motion.

Fed. R. Evid. 412(a) provides that, in most instances, in cases involving sexual misconduct, evidence of a victim's sexual behavior or predisposition is inadmissible at trial. However, there are exceptions to this general proposition. Specifically, Fed. R. Evid. 412(b) provides

"(b) Exceptions.--

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

⁶ People's FRE 412 motion at p. 2.

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.”

In this matter, it appears that Defendant Guerrero is premising his defense, in whole or in part, on an alleged agreement between the parties which may be probative on the issue of consent. It has been recognized that the blanket exclusion of Fed. R. Evid. 412 may at times have to give way to the constitutional right of a defendant to confront the witnesses against him when defending against criminal charges. *See generally*, 2 Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, *Federal Rules of Evidence Manual* § 412.02[3] (9th ed. 2006). Therefore, Rule 412 gives trial courts a directive to have an *in camera* hearing to determine whether evidence of the alleged victim’s sexual propensities or behavior should be admitted in a particular case. Fed. R. Evid. 412(c). Hence, the Court will defer its decision on the admissibility of these issues at this time and hold the requisite hearing. As this matter is set for a pretrial conference and jury selection on the morning of November 5, 2010, and all needed witnesses should be present for the jury selection, the Court will convene the Rule 412(c) hearing after the jury has been selected.

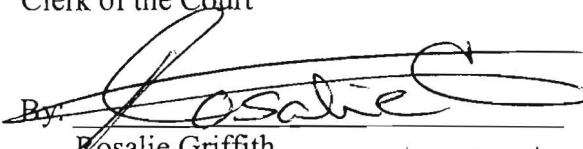
People of the Virgin Islands v. Francisco R. Abreu and Welvin C. Guerrero
Case Nos. ST-09-CR-F291 and ST-09-CR-F292
Memorandum Opinion

V. Conclusion.

An appropriate order will be entered disposing of all of these motions in accordance with the rationale set forth above.

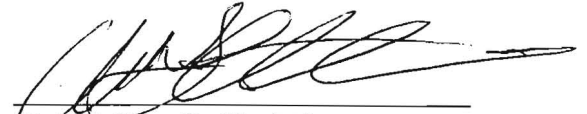
Dated: October 29, 2010

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 

Rosalie Griffith

Court Clerk Supervisor 10/29/10

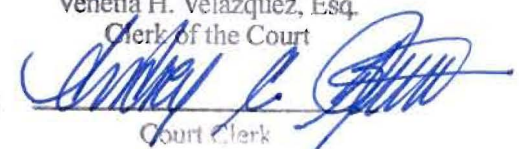


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 11/3/10

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 

Court Clerk

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
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Plaintiff,	)	CASE NO. ST-09-CR-F291
v.	)	ST-09-CR-F292
	)	
FRANCISCO R. ABREU and	)	JURY TRIAL DEMANDED
WELVIN C. GUERRERO,	)	
	)	
Defendants.	)	
_____	)	

JUDY M. GOMEZ, ESQ.

Assistant Attorney General
U.S. Virgin Islands Department of Justice
34-38 Kronprindsens Gade
GERS Bldg., 2nd Floor
St. Thomas, VI 00802
Attorney for Plaintiff

SAMUEL L. JOSEPH, ESQ.

Territorial Public Defender
P.O. Box 6040
St. Thomas, VI 00801
Attorney for Defendant Abreu

ESZART A. WYNTER, SR., ESQ.

Law Offices of Eszart A. Wynter, Sr., P.C.
P.O. Box 1847
Frederiksted, St. Croix, VI 00841-1847
Attorney for Defendant Guerrero

CHRISTIAN, ADAM G., Judge

ORDER

THIS MATTER is before the Court on: 1) the “Motion in Limine to Allow ‘Excited Utterance’ Testimony Under F.R.E. 803(2) or in the Alternative First or Prompt Complaint of Rape” filed by the People of the Virgin Islands (the “People”); 2) the “Motion to Reconsider Probable Cause Hearing and Motion to Dismiss” filed by Defendant Welvin C. Guerrero (“Defendant Guerrero”); and 3) the “People’s Motion in Limine to Preclude the Defendant’s Use of the Victim’s Past Sexual Acts Pursuant to Federal Rule of Evidence 412”. The Court having entered a Memorandum Opinion of even date, and in accordance with the same, it is hereby

ORDERED that the People's Motion in Limine to Allow 'Excited Utterance' Testimony Under F.R.E. 803(2) or in the Alternative First or Prompt Complaint of Rape is **DENIED** without prejudice to their right to raise the issues contained therein at the trial of this case; and it is further

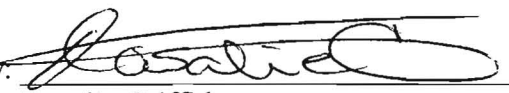
ORDERED that Defendant Guerrero's Motion to Reconsider Probable Cause Hearing and Motion to Dismiss is **DENIED IN PART**, to the extent that he seeks a new probable cause hearing and dismissal of this action; and it is further

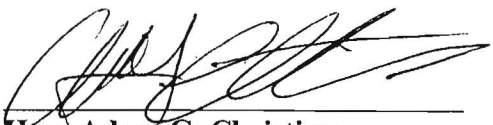
ORDERED that the Court's determinations of Defendant Guerrero's Motion to Reconsider Probable Cause Hearing and Motion to Dismiss, to the extent that it constitutes a motion for the admission of the sexual behavior or predisposition pursuant to Fed. R. Evid. 412, and the People's Motion in Limine to Preclude the Defendant's Use of the Victim's Past Sexual Acts Pursuant to Federal Rule of Evidence 412 are **DEFERRED**, and an *in camera* hearing on said motions shall be held in **Courtroom No. II, Alexander A. Farrelly Justice Center, St. Thomas, U.S. Virgin Islands on Friday, November 5, 2010, immediately following the jury selection and joint final pretrial conference previously set by this Court**; and it is further

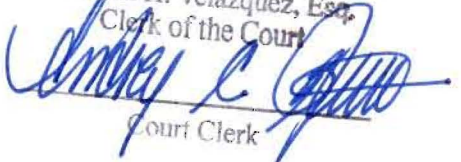
ORDERED that copies of this Order shall be served on Defendants Francisco R. Abreu and Welvin C. Guerrero and also directed to all counsel of record.

Dated: October 29, 2010

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Rosalie Griffith
Court Clerk Supervisor 10/29/10


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY
Date: 11/3/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: 
Court Clerk