

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCRAP2021/0002

BETWEEN:

[1] ATIBON CAMPBELL
[2] MARLON CHANCE

Appellants

and

THE KING

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mde. Vicki-Ann Ellis

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Jomo Thomas for the Appellants
Ms. Allana Cumberbatch for the Respondent

2023: January 23;
May 10.

Criminal appeal – Appeals against conviction and sentence – Voir dire – Whether learned judge erred in law when he allowed into evidence the video statement of appellant as it was obtained through oppression - Admissibility of confessions – Test of voluntariness – Discretion to exclude a confession which is not made voluntarily – Right to consult an attorney – Whether there was a breach of the provisions of section 3 (2) of the Constitution or paragraph c of the Judges’ Rules – Credibility – Whether prosecution’s evidence was tenuous – Uncorroborated evidence – Whether the learned trial judge erred in law when he failed to stop the trial when the main prosecution witness admitted

during cross-examination that the prosecution threatened him with jail time if he did not testify as they instructed

The appellants Atibon Campbell ("Atibon") and Marlon Chance ("Marlon") were convicted of two counts of each of the offences of aggravated burglary, indecent assault and possession of a firearm to aid in the commission of an offence.

In March 2017, two female medical students were robbed at gunpoint in their apartment. They were also indecently assaulted. In the court below, the Crown's case was that four men entered the apartment, with two of the men masked and armed with guns. The men stole several items and money and two of the men indecently assaulted the students by forcing them at gunpoint to perform oral sex on them. None of the men were known to the students and with their faces being covered with masks, the women were unable to identify them. Following investigations and searches by the police, Atibon and Marlon and four other young men were arrested. The Crown relied on the testimonial evidence of Zario Charles ("Zario") one of the persons arrested by the Police, that Atibon and Marlon were among the men who entered the students' apartment and stole several items from them and that Atibon and Marlon sexually assaulted the two students. In its case against Atibon, the Crown also relied on a recorded video interview of Atibon with the Police in which he acknowledged that he went to the apartment with Marlon, Osbourne, Zario and others. However, he denied stealing anything from the students' apartment or sexually assaulting either of the students, stating that he was the lookout man. Marlon also participated in a recorded interview with the police. He did not answer any questions related to the incident.

Atibon challenged the admissibility of the video recording on the basis that he was beaten by police officers before participating in the interview. A *voir dire* was conducted. Several police officers testified and a Justice of the Peace who witnessed the interview denied any violence or that Atibon made any complaints of violence against him. Atibon gave evidence and called his mother as a witness. Who testified that she saw blood on an old wound on his face and that his face was swollen. The learned judge having heard evidence from both sides, the video was admitted into evidence and shown to the jury.

Atibon and Marlon have appealed their convictions and sentences on this basis, asking this Court to determine whether the learned judge erred in law when he allowed into evidence the video statement of Atibon as it was illegally and unfairly obtained through oppression and whether the learned trial judge further erred in law when he failed to stop the trial when the main prosecution witness admitted during cross-examination that the prosecution threatened him with jail time if he did not testify as they instructed.

Held: dismissing the appeal; and affirming the convictions and sentences of the appellants; that:

1. In Saint Vincent and the Grenadines, the law governing the admissibility of confessions is the common law and its test is the test of voluntariness. A judge has a discretion to exclude a confession which is not made voluntarily and where even though made voluntarily, was made in unfair circumstances. In this case the learned judge not only had the advantage of seeing and hearing all of the witnesses in this case, but he also had the opportunity to view the video

recording of the interview and see the injuries, in particular the injury to the forehead, which was reasonable to presume would have been visible in the video. However, no such injury was visible in the video recording. There was cogent evidence on which the learned judge could find that the statement was voluntary.

Thompson v The Queen Privy Council Appeal No. 37 of 1997 applied; **Wong Kam-Ming v The Queen** 1980 (AC 247) applied.

2. There was no breach of the provisions of section 3 (2) of the Constitution or paragraph c of the Judges' Rules which mirrors section 3(2). Even if the conduct alleged amounted to a breach, such breach would not automatically lead to the exclusion of the evidence. The judge would still be required to look at all of the surrounding circumstances and determine whether it was voluntary and whether it was fair to admit the interview into evidence. In this case, when all of the circumstances in which the interview was conducted are taken together, it cannot be said that the learned judge erred in the exercise of his discretion in admitting the interview into evidence.

Section 3 (2) of the **Constitution of Saint Vincent and the Grenadines** 1979, No, 916 applied; **Shabadine Peart v the Queen** 2006 UKPC 5 applied; **The Judges Rules** applied.

3. Questions of credibility and reliability are questions for a jury to decide. A trial judge would not stop the trial of an accused person on the basis of credibility and reliability of the evidence unless the judge finds that an accused has no case to answer. However, the court will stop the trial where the prosecution's evidence is so tenuous that even if taken at its highest, a jury properly directed could not properly convict on it. The evidence on record shows that while Zario was beaten and threatened by the police his testimony was true. In those circumstances, the issue was not whether his evidence was admissible but whether he was a credible witness and whether his testimony was reliable. Zario's testimony when considered in its entirety cannot be said to be riddled with inconsistencies and it cannot be said to be tenuous. In view of the evidence led at the trial, the learned judge's decision to permit the trial to continue cannot be impugned.

R v Galbraith (1981) 73 Cr. App.R. 124 (CA) applied.

4. Historically, at common law the judge had to warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice who was a prosecution witness. However, the approach taken by the court where an accomplice testifies on behalf of the prosecution differs today, as it is now a matter of the discretion of the trial judge whether a warning is given. This will depend on the circumstances of the case. The trial judge also has a discretion to determine the strength of the warning, dependent on the circumstances of the case. During the summation of this case, the learned judge did not give an

accomplice warning in relation to Zario's evidence. However, at the end of the summation, at the request of the prosecution and with the concurrence of counsel for the appellants, that an accomplice direction should be given, the learned judge directed the jury. The direction when considered in its entirety, although very brief, conveyed to the jury the need for them to have caution when examining Zario's evidence. The Learned judge also directed the jury on why they had to be cautious and why Zario's testimony may not be reliable. The learned judge therefore did not err in the exercise of his discretion and there is no basis to interfere with the learned judge's exercise of discretion.

Davies v Director of Public Prosecutions 1954 AC 378 applied; **The Queen v Makanjuola** 1955 2Cr.App.469 applied.

JUDGMENT

- [1] **THOM JA:** The appellants Atibon Campbell ("Atibon") and Marlon Chance ("Marlon") were convicted of two counts of each of the offences of aggravated burglary, indecent assault and possession of a firearm to aid in the commission of an offence.
- [2] Atibon was sentenced to seventeen years imprisonment for each count of aggravated burglary, eighteen months for each count of indecent assault and fifteen years for each count of firearm possession, all sentences to run concurrently.
- [3] Marlon received the same sentence, save for the offences of aggravated burglary for which he was sentenced to sixteen years imprisonment.

Background

- [4] On the evening of 1st March 2017, two female medical students who resided at an apartment in Cane Hall were robbed at gunpoint of several items including cellular phones, laptops, money and several items of food. They were also indecently assaulted.

Case for the Crown

- [5] The case for the Crown was that on the evening of March 1st 2017, sometime after 9pm, the students were in their apartment, having returned earlier from a grocery store. The sliding door to their apartment was slightly opened but the grilled door which was a further security to the sliding door, was locked with padlocks. The students suddenly heard a sound, and four men entered the apartment. Two of the men were armed with guns, their faces were covered with masks. The men stole several items and money and two of the men indecently assaulted the students by forcing them at gunpoint to perform oral sex on them. The men locked the women in a bedroom and escaped.
- [6] None of the men were known to the students, their faces being covered with masks, the women were unable to identify them.
- [7] Following investigations by the police, Atibon who was 17 years old and Marlon 16 years old and four other young men were arrested after a search at their homes, where several items stolen from the students were recovered. Nothing was recovered from the home of Atibon. Subsequently, a phone was recovered from the girlfriend of Atibon.
- [8] The case for the Crown rested largely on the evidence of Zario Charles ("Zario") one of the persons arrested after the Police conducted a search at his home and found several of the items stolen from the students, including a laptop, at his home. He was not charged with any offence. At the time of the incident, he was 16 years old. He testified that himself, Atibon, Marlon, and Osbourne Rogers (now deceased) and two other men went to Ricks' Apartment. Atibon and Marlon were among the men who entered the students' apartment and stole several items from them. He further testified that Atibon and Marlon sexually assaulted the two students.
- [9] In their case against Atibon, the Crown also relied on a recorded video interview of Atibon with the Police in which he acknowledged that he went to the apartment in

Cane Hall with Marlon, Osbourne, Zario and others. However, he denied stealing anything from the students' apartment or sexually assaulting either of the students. He stated he was the lookout man. When the men came out of the building with the items, at their request, he assisted with carrying some bags. He was given a phone, some eggs and \$10.00.

[10] At the trial, Atibon challenged the admissibility of the video recording on the basis that he was beaten by police officers before participating in the interview. A *voir dire* was conducted. Several police officers testified denying any violence against Atibon. Mr. Marcellus Constance, Justice of the Peace (or "JP"), who is also a local Pastor who witnessed the interview, also testified that he saw no injury on Atibon and denied that Atibon made any complaints of violence to him. Atibon gave evidence and called his mother as a witness. In his testimony, Atibon outlined the severe violence that he claimed was meted out to him by several police officers. He testified further that as a result of this violent treatment by the police, he participated in the interview. His mother, Avon Campbell, testified that she saw blood on an old wound on his face and his face was swollen.

[11] Having heard evidence from both sides, the video was admitted into evidence and shown to the jury.

[12] The learned judge in finding that the recording was admissible stated;

"... I've considered the evidence led on the voir dire, and I conclude that it would be fair to allow the DVD to be played to the Jury. They will see it. I will also when I sum up, tell them or remind them of the things that you have said, why they should not believe what is on the DVD, but I'll give them the opportunity to see it."¹

[13] Marlon also participated in a recorded interview with the police. He did not answer any questions related to the incident. He indicated he had a lawyer and exercised his right to have his lawyer Mr. Thomas present.

¹ Page 18 of the transcript.

Case for the Defense

- [14] Atibon gave sworn testimony in which he repeated that he was beaten by police officers prior to the interview. He denied he committed any offence. He testified further that he was afraid of his companions. They had stabbed him before and he did not want to lose his life, so he accompanied them to Ricks' Apartment. It was Osbourne and Marlon who sexually assaulted the students. When they came out with the bags with the stolen items, they requested him to assist in carrying some of the stolen items. He was given a phone, some eggs and \$10.00.
- [15] Marlon elected to remain silent; based on the questions of counsel during cross-examination his defense was a simple denial.

The Appeal

- [16] Atibon and Marlon appealed their convictions and sentences on eleven grounds.
- [17] Mr. Thomas, who represents both Atibon and Marlon at the hearing, made oral submissions only on grounds 5 and 6 and he relied on his written submissions in relation to all of the other grounds. No submissions, written or oral, were made in relation to the sentences. Having examined the written submissions from both sides and the record in relation to the other grounds there is some overlap with grounds 5 and 6. In my view, all of the other grounds are unmeritorious and Mr. Thomas was correct in not advancing oral arguments in relation to them.

Ground 5

The learned judge erred in law when he allowed into evidence the video statement of Atibon Campbell when it was clear that Mr. Campbell's statement was illegally and unfairly obtained through oppression after the first appellant invoked and asserted his right to legal counsel.

- [18] Mr. Thomas submits that the learned judge erred in admitting the video recorded interview into evidence since the Crown had failed to prove beyond a reasonable doubt that the interview was voluntary in that it was obtained without oppression and

in fair circumstances because (a) Atibon participated in the interview because he was beaten by several police officers; (b) Atibon who was 17 years old at the time, his request for access to legal advice was not facilitated by the police.

Oppression

- [19] Mr. Thomas submits that there was cogent evidence from Atibon and his mother of the violent treatment meted out to him by the police officers. Learned Counsel also relied on the evidence of Cpl. Noel where he testified that he had seen an injury on Atibon and Atibon had told him that the injury was as a result of police officers beating him. He submits that, in view of this evidence, the learned judge erred in finding that the interview was admissible.
- [20] Ms. Cumberbatch for the Crown in response submits that the judge had evidence from Mr. Marcellus Constance, who was a neutral party, that Atibon did not make any complaint to him on the day of the interview. In view of the evidence, the learned judge did not err in rejecting the evidence of Atibon. There was cogent evidence on which the learned judge could have found the interview to be admissible.

Discussion

- [21] In Saint Vincent and the Grenadines, the law governing the admissibility of confessions is the common law. Following the decision of the Privy Council in **Thompson v The Queen**² where the court found that sections 76 and 78 of the UK Police and Evidence Act and Code C were applicable to Saint Vincent and the Grenadines, the Parliament of Saint Vincent and the Grenadines enacted the Reception of Laws Amendment Act Number 9 of 2007 which amended the Act by inserting a new section 3A which reads as follows:

“3A. Non-application of PACE

- (1) Notwithstanding section 3, at the date of commencement of this section, the police and criminal evidence Act 1984 of the United Kingdom shall not apply to Saint Vincent and the Grenadines.

² Privy Council Appeal No. 37 of 1997.

- (2) Nothing in subsection 1 shall apply to any trial or preliminary inquiry which began before the coming into operation of that subsection.”

[22] At common law, the test for admissibility of a confession is the test of voluntariness. The rationale is that there is always a real risk that a confession that was made voluntarily might be unreliable. This is illustrated in **Wong Kam-Ming v The Queen**³ where Lord Hailsham stated:

“... any civilized system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements but also and perhaps mainly because in a civilized society, it is vital that persons in custody where charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions.”

[23] A judge has a discretion to exclude a confession which is not made voluntarily and where even though made voluntarily, was made in unfair circumstances.

[24] Mr. Thomas’ submissions relate to findings of facts made by the learned trial judge. This Court has stated repeatedly and has been reminded by the Privy Council on several occasions that an appellate court should be slow to interfere with findings of fact made by a trial judge, unless there was no evidential basis to support such findings or where the trial judge has not taken advantage of his position of seeing and hearing the witnesses and has reached a decision which no reasonable judge could have made or where the trial judge misinterpreted the evidence.

[25] In determining this issue, it is useful to provide a summary of the evidence that was before the learned judge. The Crown called several police officers, including Corporal Noel and Corporal Campbell who conducted the interview. They both denied that they beat, threatened or induced Atibon to give an interview. During cross-examination by Atibon, Corporal Noel admitted that Atibon had an injury and he further testified that Atibon told him the injury was as a result of being beaten by

³ 1980 (AC 247) at 261.

police officers. Corporal Noel could not recall where on Atibon's body he had seen the injury. He also could not recall if Atibon was taken for medical attention. Several other police officers testified producing records outlining the movement of Atibon while in custody. Inspector James, an acquaintance of Atibon's mother, also gave evidence and denied that she pulled out pubic hair from Atibon before the interview. The Crown also called Justice of the Peace Marcellus Constance, a local pastor who witnessed the interview and denied that Atibon made any complaints to him of police violence or that he had any conversation with Atibon.

[26] In his testimony, Atibon outlined in detail how he was beaten on several occasions, commencing shortly after his arrest on the evening of 2nd March 2017, while he was held at the Calliaqua Police Station. He was beaten every day while at Calliaqua Police Station. He screamed very loudly when he heard his mother's voice at the station. The police officers did not allow his mother to see him. He was further beaten and intimidated when he was taken to CID on 4th March. At CID he was beaten by the police officers. He resisted being taken to the interview room and he was further beaten with a piece of board on his back and on his head. He was kicked by police officers and as a result of the beating his forehead was injured. A wound on his forehead opened and was bleeding. He experienced severe headaches. He screamed very loudly. He complained to Mr. Constance JP when he saw him at CID shortly before the interview, but Mr. Constance simply brushed him off.

[27] Avon Campbell, his mother, testified that she went to Calliaqua Police Station every day after her son was arrested but she was not permitted to see him. On the Saturday she heard him screaming and he said Corporal Noel had beaten him. Ms. Avon Campbell admitted that she complained to Inspector James, with whom she had a friendly relationship, of Atibon's complaint that Cpl Noel had beaten him, and she was assured by Inspector James that no one had beaten him; she believed Inspector James. Ms. Avon Campbell further testified that on Monday 4th March when she visited CID to take clothes for Atibon to attend court, she saw blood on an old wound on his forehead and his face was swollen.

- [28] The burden was on the Crown to prove that the interview was voluntary.
- [29] The learned judge not only had the advantage of seeing and hearing all of the witnesses in this case, he also had the opportunity to view the video recording of the interview. The violence Atibon testified that was meted out to him by the police over a period of three days was severe. He referred to injuries on his hands and his forehead. The learned judge had evidence from the Police and the JP of no injury seen, and on the other hand evidence of injury from Atibon, his mother and Cpl Noel. The injuries, in particular the injury to the forehead, it is reasonable to presume would have been visible in the video. There is no such evidence on the record.
- [30] Mr. Thomas did not represent Atibon at the trial, however, learned counsel was permitted to cross-examine witnesses during the *voir dire*. There is no such evidence on the record from counsel in pointing to the injuries on the video. In view of the evidence before the learned judge, I am not persuaded by the submissions of Mr. Thomas that there is any basis to interfere with the findings of fact made by the learned judge. There was cogent evidence on which the learned judge could find that the statement was voluntary.
- [31] While it was not raised by Mr. Thomas, it is noted that towards the end of Atibon's testimony during the *voir dire*, the learned judge asked Atibon whether the statement was true. Atibon responded that it was true. This was a clear error on the part of the learned judge. It is well settled that the issue at the *voir dire* is solely admissibility of the statement. Whether the statement was true or false is not relevant. It was therefore improper for the learned judge to so inquire. Nonetheless, this irregularity in my view was not fatal. The *voir dire* was conducted in the absence of the jury. The question was not repeated before the jury. The error did not render the conviction unsafe. There was no miscarriage of justice.

Legal Advice

- [32] In relation to the inability to consult with an attorney, Mr. Thomas referred to section 3 (2) of the **Constitution**⁴ which reads:

“Any person who is arrested or detained shall with reasonable promptitude and in any case no later than twenty-four hours after such arrest or detention be informed in a language that he understands of the reasons for his arrest or detention and be afforded reasonable facilities for private communication and consultation with a legal practitioner of his own choice and in the case of a minor with his parents or guardian.”

- [33] Also Mr. Thomas referred to the Judges’ Rules which are still applicable in Saint Vincent and the Grenadines. He referred in particular to paragraph (c) that every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody, provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.

- [34] Mr. Thomas contends that when Atibon intimated to Corporal Noel that he would like to have an attorney, Corporal Noel, in accordance with the Judges’ Rules, should have stopped the interview and facilitate Atibon’s request to consult with an attorney.

- [35] Learned counsel submits further that the manner in which the interview was conducted was contrary to section 3 (2) of the **Constitution** and the Judges’ Rules. The circumstances in which the interview was conducted were unfair, thus even if the learned judge found the statement to be voluntary, he should have excluded it because the circumstances were unfair. He relied on the following dicta in the decision of the Privy Council in **Shabadine Peart v the Queen**⁵ paragraph 22:

“Their Lordships acknowledge the importance of the principle of voluntariness but are unable to accept that it is the only applicable criterion, as Mr. Guthrie attempted to argue. If it were the sole criterion, there would be no room for the operation of the principle whereby the judge may refuse

⁴ 1979, No. 916.

⁵ 2006 UKPC 5.

in the exercise of his discretion to allow the admission of evidence which is otherwise legally admissible as ex-hypothesi confessions made voluntarily must be. One need only point to the remark of Lord Diplock in **R v Sang** 1980 AC 402 at 436: "There is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair."

- [36] In relation to the issue of lack of consultation with an attorney, Ms. Cumberbatch submits that while Atibon initially requested to consult with an attorney, when further explanation of the process of the interview was given by Corporal Campbell, Atibon did not renew his request.

Discussion

- [37] The relevant portion of the interview states as follows:

"Cpl. Campbell: This interview s not being monitored by anyone. You understand the meaning of monitor?

Def: Yes please.

Cpl. Campbell: Tell me what it means by monitor.

Def: Somebody is watching on the outside.

Cpl. Campbell: Nobody is watching this interview. It is important that you understand that you have an independent right to legal advice.

Def: Excuse me?

Cpl. Campbell: It is important that you understand you have an independent right to legal advice. Independent legal advice meaning a lawyer or a Justice of Peace, and independent means nothing to do (sic) the police whether you communicate with a person by phone or in person or going to them. If you need any advice at any time during this interview can be delayed for you to seek any legal advice.

Def: Yes please.

Cpl. Campbell: Do you want legal advice.

Def: Yes please.

Cpl. Campbell: What is the reason for that?

Def: Beg you pardon? Me didn't hear.

Cpl. Campbell: Reason for legal advice.

Def: Like what that means.

Cpl. Campbell: Legal advice meaning that as to whatever will be said in this room here today, if you need any advice on how to go about doing this interview. If you change your mind during the course of the interview and you say you want to seek advice, I will stop the interview. You understand.

Def: Yes please.

Cpl. Campbell: If your legal advisor isn't present then the Justice of Peace can be present at an interview. So this is why the Justice of the Peace is here, in the event that you cannot afford to get legal advice, meaning a lawyer. You understand?

Def: Yes please. “

[38] Mr. Thomas contends that at the moment Atibon exercised his right to consult with an attorney the interview should have stopped. Proceeding with the interview without Atibon being able to consult with a lawyer jeopardized the fairness of the interview.

[39] I agree that the ideal situation was for Corporal Campbell to stop the interview and allow Atibon, who was 17 years old at the time, the opportunity to consult with an attorney.

[40] When the evidence of the *voir dire* in relation to Atibon's right to consult with an attorney is considered in the surrounding circumstances, it cannot be said that the police officers in any way prevented Atibon from communicating with an attorney of his choice. The record shows a discussion between Atibon and the police and Atibon indicating he understood. In my view there was no breach of the provisions of section 3 (2) of the Constitution or paragraph c of the Judges' Rules which mirrors section 3(2). Even if their conduct amounted to a breach, such breach would not automatically lead to the exclusion of the evidence. The judge would still be required to look at all of the surrounding circumstances and determine whether it was voluntary and whether it was fair to admit the interview into evidence.⁶

⁶ see paragraphs 26-27 **Shabago McPhee v The Queen** 2016 UKPC 29.

[41] In **Shabadine Peart v The Queen**, the Privy Council also pointed out that a breach of proper practice does not necessarily result in unfairness such as to justify exclusion, the court is required to consider all of the circumstances, including the gravity of the breach and the resulting consequences. Thus, although a statement may be made voluntarily if the circumstances in which it was made were unfair, the statement may be excluded from the evidence. At paragraph 24 the Court outlined four propositions in relation to the Judges Rules:

- “(i) The Judges’ Rules are administrated directives, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
- (ii) The judicial power is not limited or circumscribed by the Judges’ Rules. A court may allow a prisoner’s statement to be admitted notwithstanding a breach of the Judges’ Rules conversely the Court may refuse to admit it even if the terms of the Judges’ Rules have been followed.
- (iii) If a prisoner has been charged the Judges’ Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nonetheless admit a statement made in response to such questioning even if there are no exceptional circumstances. If it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner’s position after being charged and the pressure to speak the risk of self-incrimination or causing prejudice to his case militates against such a statement.
- (iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary it will not be admitted. If it is voluntary that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges Rules but the court may find that it would be unfair to do so even if the statement was voluntary.”

[42] In my view, when all of the circumstances in which the interview was conducted are taken together, it cannot be said that the learned judge erred in the exercise of his discretion in admitting the interview into evidence. Mr. Thomas has not

demonstrated in his submissions that the learned judge erred in the exercise of his discretion.

Ground Six

The learned trial judge erred in law when he failed to stop the trial when the main prosecution witness, a participant in the alleged crime but not charged, admitted during cross-examination that the prosecution threatened him with jail time if he did not testify as they instructed.

- [43] Mr. Thomas submits firstly, that the learned judge erred when he failed to stop the trial in relation to Marlon after Zario admitted that he was beaten and threatened by the police and secondly that the learned judge failed to give an adequate accomplice direction in relation to the evidence of Zario.

Reliability

- [44] In relation to the first issue, Mr. Thomas further submits that the learned judge also erred when he failed to adequately address the jury on the credibility and reliability of the testimony of Zario. Learned counsel contends that since Zario was in police custody for approximately 3-5 days before the statement was taken and Zario testified that he was beaten by the police prior to giving the statement and further that he was threatened by the police to testify in court he will have to serve time in prison, the learned judge should have excluded Zario's testimony. Further since Zario's testimony was the only evidence which implicated Marlon, the learned judge was also required to stop the trial in relation to Marlon.
- [45] This issue could be dealt with very briefly. Indeed, at the hearing counsel focused on the second issue. The short answer is that questions of credibility and reliability are questions for a jury to decide. A trial judge would not stop the trial of an accused person on the basis of credibility and reliability of the evidence unless the judge finds that an accused has no case to answer. As stated in **R v Galbraith**,⁷ the court will

⁷ (1981) 73 Cr.App.R. 124 (CA)

stop the trial where the prosecution's evidence is so tenuous that even if taken at its highest a jury properly directed could not properly convict on it.

[46] The evidence on the record shows that Zario testified that he was held in custody for four days prior to giving the statement. During the period he was held in custody he was beaten by the police and after he had given his statement, he was threatened that if he did not testify, he would go to prison. Zario also testified in answer to Mr. Thomas who was counsel for Marlon as follows:

“Q: And could you recall how many officers were in the group that beat you?

A: No please.

Q: But it was more than two officers who beat you right.

A: Yes please.

Q.: And when they were beating you, they were asking you to tell them what happened?

A: Yes please.

Q: And did they ever tell you what to say about any of the persons who were detained by the police including yourself?

A: No please.

:
:

Q: And I want to tell you if there's any safe place in Saint Vincent where you can be, I repeat, if there is any safe place in Saint Vincent where you can be it is a Court of law. You understand that?

A: Yes please.

Q: So, having sworn to tell the truth, the whole truth and nothing but the truth did any police officer tell you to say anything about any of the accused men?

A: No please.

Q: And do you recall telling the Chief Magistrate in that Court when the police told me at the station they would help me out, they told me things to say about Atibon. Remember saying that to the court?

A: No please.

:
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Q: Now in matters like these the Judge is much better able to tell you about the law. And I wouldn't presume, I wouldn't try to make that rule. But I want you to understand that you cannot be charged with crimes from hereon, on this matter. All right. You understand what I'm saying to you?

A: Yes please.
 Q: Could you tell the court the nature of the beating that you got from the police? What did they do to you?
 A: They beat me with all kinds of thing.
 Q: They do what?
 A: They kick and slap and all kinds of thing.
 Q: So all of you, so all of the arrested persons were beaten?
 A: Yes please.
 Q: And did this beating continue on the days when you were in police custody?
 A: No please.
 Q: How do you feel when you were being beaten and stamped on by the police?
 A: Bad.
 Q: Were you scared?
 A: Yeah.
 Q: Did you feel that they were going to injure you badly?
 A: Yes please.
 Q: So, it would be correct to say (sic) that you were prepared to tell them whether they wanted to hear so that the beating would stop?
 A: Yeah.
 Re: Exam
 Q: You said that you were willing to tell the police anything they wanted to hear. Did you tell them lies.
 A: No please.
 Q: And everything you told the court here today about the incidence is that a lie?
 A: No please."

[47] The above evidence of Zario shows that while he testified that he was beaten and threatened by the police he also testified that his testimony was true. In those circumstances, the issue was not whether his evidence was admissible but whether he was a credible witness and whether his testimony was reliable. His testimony when considered in its entirety cannot be said to be riddled with inconsistencies. It cannot be said to be tenuous. In view of the evidence led at the trial, the learned judge's decision to permit the trial to continue cannot be impugned.

Accomplice Direction

[48] In relation to the accomplice direction, Mr. Thomas submits and it is not disputed by the Crown, that the Crown's witness Zario was an accomplice and a witness with an interest to serve. The learned judge was therefore required to give the jury the

appropriate accomplice direction as outlined in **Andrew Milton v The Queen**⁸. The direction given by the learned judge was deficient, because the learned judge did not direct the jury that Zario had an interest to serve and explain what that meant.

- [49] Ms. Cumberbatch submits in response, that the accomplice direction was in keeping with the direction given in **Andrew Milton**. The learned judge warned the jury of Zario's possible motive, self-interest, and reliability. The only error in the learned judge's direction was his failure to warn the jury that it would be unsafe to convict the appellants on the uncorroborated evidence of Zario; but this error was not fatal as Zario's evidence was corroborated by the evidence of the students that there was a scar on the stomach of one of the men who sexually assaulted them. Also, the student's telephone was found in the possession of his girlfriend. In relation to Marlon, a laptop stolen from the students was found in his possession.

Discussion

- [50] The law has moved on from mandatory corroboration direction in relation to the evidence of an accomplice.
- [51] Historically, at common law the judge had to warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice who was a prosecution witness. The warning followed the guidance given by Lord Simons in **Davies v Director of Public Prosecutions**⁹ and included the following:
- (a) Warn the jury that it was dangerous to convict on the uncorroborated evidence, but that they could do so if satisfied of the truth of the evidence of the accomplice or complainant.
 - (b) An explanation of the meaning of corroboration.

⁸ Territory of the Virgin Islands HCRAP 2009/0006 (delivered 12th November 2012, unreported)

⁹ 1954 AC 378.

- (c) An indication of the evidence that was capable or not capable of corroborating the evidence of the accomplice.
- (d) It was for the jury to determine whether the evidence did indeed amount to corroboration.

[52] The approach taken by the court today where an accomplice testifies on behalf of the prosecution is outlined by Lord Taylor in **The Queen v Makanjuola**¹⁰ as follows:

“Whether, as a matter of his discretion a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witnesses’ evidence, the circumstances of the case and the issues raised. The judge would often consider that no special warning was required at all. Where however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge, might suggest it would be wise to look for some supporting material before acting on the impugned witnesses’ evidence.”

[53] It is now a matter of the discretion of the trial judge whether a warning is given. This will depend on the circumstances of the case. The trial judge also has a discretion to determine the strength of the warning. This too will depend on the circumstances of the case. No specific formula of words is required in giving the direction. This approach was adopted in **Pringle v The Queen**.¹¹

[54] During the summation the learned judge did not give an accomplice warning in relation to Zario’s evidence. However, at the end of the summation, at the request of the prosecution and with the concurrence of Mr. Thomas, that an accomplice direction should be given, the learned judge directed the jury as follows:

“Ladies and gentlemen of the jury, among the evidence that you have heard in this matter was the evidence from the witness Zario Charles. Now it is suggested Mr. Charles may have had an interest to serve in that he too might have been involved in the incident on the 1st March 2017 at Cane Hall which formed the basis of the charges that these two men now face. It is suggested that he might have had an interest to serve to protect himself

¹⁰ 1955 2 Cr App 469.

¹¹ [2003] UKPC 9.

and cast blame on others and that is why he has testified along the terms that he did. You should bear that possibility in mind when you are evaluating the evidence of Zario Charles.”¹²

[55] Undoubtedly the direction could have been better structured, but as the Privy Council stated in **Trimmingham v The Queen**,¹³ in most cases criticism could be made of the judge’s summing up that both content and language could have been clearer. The court is required to examine the direction to see if the learned judge covered the relevant issues.

[56] An examination of the judge’s direction although quite brief shows that he directed the jury why Zario would be regarded as a witness with an interest to serve. While the judge did not use the word reliable, he explained Zario having an interest in protecting himself and cast blame on others, maybe that is why he has testified as he did. The jury would have understood the judge to mean that Zario’s evidence may not be truthful because he was trying to protect himself and put the blame on Atibon and Marlon, so they had to bear that in mind in determining whether they believed his evidence. In my view when the direction is considered in its entirety, although very brief, it conveyed to the jury the need for them to have caution when examining Zario’s evidence. In any event failure to give the warning does not automatically result in an acquittal. Zario’s testimony was not shaken under cross-examination. He outlined in detail his own actions at Ricks’ Apartment and the actions of Atibon and Marlon. There were no significant inconsistencies between his testimony and the testimony of Atibon, save that Atibon in his testimony stated that he did not sexually assault either of the students, but rather it was Osbourne and Marlon, whereas Zario stated it was Atibon and Marlon. Further, a laptop stolen from one of the students was found in Marlon’s possession. Mr. Thomas has not demonstrated that the learned judge erred in the exercise of his discretion. I therefore find that there is no basis to interfere with the learned judge’s exercise of discretion.

¹² Page 56 of the transcript.

¹³ [2009] UKPC 25.

[57] In conclusion, for the reasons stated above, I find that none of the grounds advanced on behalf on the appellants have any merit. I will therefore dismiss the appeal. It is ordered that the appeal is dismissed, and the convictions and sentences are affirmed.

I concur.

Mario Michel
Chief Justice (Ag.)

I concur.

Vicki-Ann Ellis
Justice of Appeal



By the Court

Deputy Chief Registrar