

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCRAP2016/0006

BETWEEN:

MATHIS ALSON WOODMAN

Appellant

and

THE STATE

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Sydney Bennett, QC

Justice of Appeal [Ag.]

Appearances:

Mrs. Zena Moore-Dyer with Mrs. Gina Dyer-Munro for the Appellant

Ms. Sherma Dalrymple, Director of Public Prosecutions [Ag.] with Ms. Daina
Matthew State Attorney for the Respondent

2022: April 25;
July 4.

Criminal appeal – Rape – Incest – Indecent assault – Appeal against conviction – Whether conviction unsafe or unsatisfactory – Multiplicity of charges – Whether the indictment, conviction and sentences are erroneous in law where the offences all arise out of the same facts and circumstances – Alternative offence – Whether judge erred in law or failed to direct the jury with regard to the ingredients of the charges – Recent complaint – Whether judge misdirected the jury and/or failed to adequately direct the jury on the law and application of evidence on recent complaint – Corroboration – Abuse of process – Consent – Section 12 of the Sexual Offences Act – Whether a Lucas direction was necessary – Application of the proviso – Whether the jury, if they had been properly directed, would inevitably have come to the same conclusion upon a review of all the evidence – Section 28 of the Sexual Offences Act

The appellant, Mathis Alson Woodman, was found guilty of rape, incest and indecent assault, and sentenced to concurrent prison terms of 15, 7 and 2 years respectively. At the trial, the appellant denied having sex with his sister. The prosecution's case was that on 4th November 2015, the virtual complainant, who is the appellant's paternal half-sister, accompanied him to the annual Independence Street jump up in Roseau. Whilst there, he bought her a gin and orange juice drink at a bar, which she drank. Sometime after, they proceeded to Louisville, where they lived; stopping at another bar along the way, where she had another gin and orange juice drink.

On the way home, the appellant passed the first entrance to their home and took her by a river where he proceeded to remove her clothes and have sexual intercourse with her against her will. While having sex with her, the appellant said he knew it would be sweet. When he was through, he said: 'What happens by the river, stays by the river,' and 'he hoped he did not see a van of cops in front of his door in the morning.' After that, they drove home and she went to bed. The next morning the virtual complainant went to work and did not tell anyone about the incident; still being in shock and embarrassed. In the evening she went to bed feeling overwhelmed and entertained suicidal thoughts. Thereafter, she changed her WhatsApp display picture to a hangman's noose. The next day her brother Travis called her via WhatsApp, and she told him what had transpired; that the appellant had raped her. She subsequently told her mother. The matter was reported to the police, leading to the arrest, charge, prosecution and conviction of the appellant.

The appellant has appealed against his conviction on several grounds. The Director of Public Prosecutions conceded the appeal with respect to indecent assault as it was an alternative charge to rape, and a conviction ought not to have been entered in respect thereof. The appeal accordingly concerned the conviction for incest and rape. The issues which arose for the Court's determination were: (1) whether the indictment, convictions and sentences were erroneous in law as the charges and convictions for incest, rape and indecent assault arose out of the same facts and circumstances and as a result the appellant was deprived of a fair trial and a fair chance of complete acquittal; (2) whether the learned judge misdirected the jury and or failed to adequately direct the jury on the law and the application of the evidence as it relates to recent complaint; (3) whether the learned judge failed to direct the jury on the issue of corroboration as it related to the matter; (4) whether the learned judge erred in not giving a Lucas direction; and (5) the application of the proviso pursuant to section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act**.

Held: Allowing the appeal against the conviction for indecent assault and dismissing the appeal against the convictions for rape and incest and affirming the sentences, that:

1. Although both rape and incest require proof of sexual intercourse, the essence of the two offences differ. An essential element of the offence of rape is the absence of consent. For the offence of Incest, sexual contact and knowledge on the part of the accused person that the other party cannot consent to sexual intercourse because they are related to them by blood, meaning they are either a parent, child, brother, sister, grandparent, grandchild, uncle, niece, aunt or nephew. Therefore, the offences of rape and incest are distinct, and the commission of incest does not

in law, constitute commission of the offence of rape. The Director of Public Prosecutions is empowered to charge either incest or rape or both incest and rape. The appellant's contention that charging both incest and rape resulted in an abuse of process, deprivation of a fair trial, a loss of the chance of a complete acquittal, and vitiated the convictions, was flawed. The learned Director of Public Prosecutions' decision to charge both incest and rape was not plainly wrong such that the convictions should be invalidated.

Sections 3 and 6 of the **Sexual Offences Act**, Chap 10:36, Revised Laws of Dominica 2017 applied; **Commissioner of Police v Stephen Alleyne** [2022] CCJ 2 (AJ) BB applied.

2. It is the duty of the judge to impress upon the jury in every case where the evidence of a recent complaint is given, that they are not entitled to make use of the complaint as any evidence of the facts in reference to which it was made. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told in the witness box. Additionally, evidence of recent complaint is admissible only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and when it is made at the first opportunity which reasonably offers itself. In this case, there was no persistent questioning, and a review of the learned judge's summation reveals that the learned judge gave adequate directions on the issue. The learned judge directed the jury that the complaint went to the consistency of the account given by the virtual complainant and invited the jury to look at all the circumstances, including the reasons the virtual complainant gave for not having complained at the time she said the incident occurred. The evidence of recent complaint was properly received, and the judge gave adequate directions on the issue.

Kilby v R [1973] HCA 30 applied; **R v Lillyman** [1896] 2 QBD 167 considered; **R v Osborne** [1905] 1 KB 551 considered; **White v The Queen** [1998] UKPC 38 considered.

3. Corroboration is not required for a conviction where a person is charged with a sexual offence under the laws of the Commonwealth of Dominica. Further, the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. The judge has a discretion however, under section 28 of the **Sexual Offences Act** to direct the jury that if they believe the testimony given by one witness, it is sufficient for the proof of any fact but before finding any fact to be proved solely by the testimony of a single witness, they should carefully review all the testimony upon which the proof of the fact depends. Whilst the learned judge did not give the direction as stated by section 28 at the trial, an appellate court should not lightly interfere with the exercise of a discretion entrusted to the first instance judge. The virtual complainant gave very detailed and compelling evidence that the appellant had sexual intercourse with her by the river and she did not consent. The facts were not complicated. The appellant denied having sex with her and denied being by the river. Given the facts of the case, the learned judge clearly

felt that there was no need to give the direction. It cannot be said that the judge was plainly wrong in the exercise of his discretion in not giving this direction.

Section 28 of the **Sexual Offences Act** Chap 10:36, Revised Laws of Dominica 2017 applied.

4. A lies direction given to the jury is not appropriate in every case and it is plainly within the discretion of the trial judge. The learned judge directed on the core of the Lucas direction, and the directions were adequate to convey to the jury that if they found that the appellant lied, that by itself does not prove guilt and he must not be convicted simply because he lied about the pending case.

R v Lucas [1981] 3 WLR 120 applied; **R v Burge and Pegg** [1996] 1 Cr. App. Rep 163 applied; **Rahming v The Queen** [2002] UKPC 23 applied, **R v Wainwright** [2021] EWCA Crim 122 applied.

5. The test for whether a miscarriage of justice has occurred is not simply whether the appellate court is itself persuaded of guilt. The test is whether the appellate court is satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred. The more minor the error, the easier it is likely to be for the appellate court to address and answer the question of whether any jury must inevitably have convicted, if the error had not occurred. Upon examination of the facts, it is clear that the jury assessed the reliability and credibility of the virtual complainant set against the appellant's own account and denial of intercourse. There was no miscarriage of justice, and this is an appropriate case to apply the proviso.

Section 38 (1) of the **Eastern Caribbean Supreme Court (Dominica) Act** Chap 4:02, Revised Laws of Dominica 2017 applied; **Cassell and another v R** [2016] UKPC 19 applied.

JUDGMENT

- [1] **BAPTISTE JA:** A picture of a hangman's noose on her WhatsApp profile, alerted an attentive brother (Travis) to the possibility that something was wrong. He was right. He inquired and she informed him that she had been raped! Raped by a Woodman. Down by the river. Not only had she been raped, but the sexual intercourse was effectuated by a person falling within the prohibited degree of consanguinity. Her brother! Her father's son!

- [2] After a trial before a judge and jury, Mathis Alson Woodman ("the appellant") was found guilty of rape, incest and indecent assault and sentenced to concurrent prison terms of 15, 7 and 2 years respectively. His defence throughout was that he never had sex with his sister. Woodman advanced several grounds of appeal against conviction and sentence. The Director of Public Prosecutions properly conceded the appeal with respect to indecent assault as it was an alternative charge to rape, and a conviction ought not to have been entered in respect thereof. This appeal is accordingly concerned with the conviction for incest and rape. Before delving into the grounds of appeal, I will encapsulate the facts relative to this matter.
- [3] On 4th November 2015, the virtual complainant came home from work between 7:30 p.m. and 8 p.m. There was the annual independence street jump up in Roseau. The appellant asked her to go with him. They went and remained for some time. He bought her a drink, gin and orange juice, at a bar, which she drank, and they proceeded back to Louisville where they lived; stopping at another bar along the way, where she had another gin and orange juice.
- [4] The appellant passed the first entrance to their home and said he was going to the river to smoke a joint; it was about 11 pm. While conversing with the appellant, the virtual complainant started feeling hot and cold and so informed him, to which he replied, maybe she was tipsy. She said maybe she was and described tipsy as feeling a bit relaxed. The appellant asked her if she would not be able to remember that. She asked him what she would not remember.
- [5] The appellant then held her behind her neck and started kissing her. She shoved him and said this does not make any sense. He told her in a way yes, in a way no. Just put down the Woodman and leave the Roberts. Her mother's maiden name is Roberts. He shoved her to the ground, reached under her dress and removed her panty. She was struggling to get him off her but was unable to so do. He started having sex with her by putting his penis in her vagina. He put her panty in his pocket. While having sex with her the appellant said he knew it would be sweet. When he

was through, he said: 'What happens by the river, stays by the river,' and 'he hoped he did not see a van of cops in front of his door in the morning.' After that, they drove home, and she went to bed.

[6] The next morning, the virtual complainant took a shower and felt her back and vagina burning. She went to work. Thereafter, she collected her daughter from Travis' home but did not say anything about the incident to anybody; still being in shock and embarrassed. Her mother came by Travis and after a while, they went home. She went to bed feeling overwhelmed and entertaining suicidal thoughts; she felt like taking her life and changed her WhatsApp display picture to a hangman's noose. The next day Travis called her via WhatsApp, and she told him what had transpired. She told him that the appellant had raped her. She also told her mother that the appellant had raped her. The matter was reported to the police, leading to the arrest, charge, prosecution and conviction of the appellant.

[7] The grounds of appeal now fall for consideration. Several grounds of appeal were filed, but learned counsel for the appellant, Mrs. Zena Moore-Dyer, argued grounds 1, 7 and 9 of the notice of appeal filed on 12th May 2021. Ground 1 states that the indictment, convictions and sentences are erroneous in law as the appellant was charged and convicted for incest, rape and indecent assault arising out of the same facts and circumstances; thus, he was deprived of a fair trial and a fair chance of complete acquittal.

[8] Mrs. Dyer submits that it is an abuse of process for the appellant to be convicted on all three offences as they arose out of the same circumstances. Mrs. Dyer contends that the charge of indecent assault and rape can be said to have merged with the act of incest amounting to one and the same incident. Further, the convictions of indecent assault and rape ought to be set aside, since, on a charge of incest, the fact that there was no consent would be an aggravating circumstance in relation to sentencing for incest.

[9] In support of her arguments, learned counsel relied on the cases of **R v Harris (John)**,¹ **Derek Cort v The Queen**,² and **Commissioner of Police and Stephen Alleyne**.³ Mrs. Dyer submits that on the authority of **Stephen Alleyne**, the prosecutor could choose rape or incest. The principle that a person cannot be convicted twice for the same offence was breached by charging both. The appellant cannot be convicted of both offences where the facts and circumstances are the same. The two offences are merged in one. Rape should not be charged in the circumstances.

[10] In **R v Harris (John)**, Harris was convicted of buggery and indecent assault in relation to the same complainant arising out of the same incident. The court expressed the undesirability that one and the same incident should be made the subject matter of distinct charges so that it may appear thereafter to those unfamiliar with the circumstances that two entirely separate offences were committed. The court went on to say that: '[w]ere this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue.' The court ordered the conviction of indecent assault quashed.

[11] In **Commissioner of Police and Stephen Alleyne**, it was stated at paragraphs 11 and 12 that:

"There is cogent confirmation in the Act itself that the law recognizes the distinction between consent in fact and consent in law. Section 6(1) of the Act creates the offence of incest; a person cannot effectively consent to sexual intercourse with a person who is by blood relationship his or her parent, child, brother, sister, grandparent, grandchild, uncle, niece, aunt or nephew. The nullification of consent to the prohibited act is done by providing in s 6(2) of the Act that "it is immaterial that the sexual intercourse referred to in sub-s (1) occurred with the consent of the other person." There could hardly be a clearer demonstration of the recognition that the law gives to the distinction between consent in fact and consent in law.

In a hypothetical incest case, it must certainly matter that the victim did not consent to sexual intercourse and the perpetrator persisted despite the lack

¹ [1969] 1 WLR 745.

² BVIHCRA2010/0004 (delivered 19th December 2013, unreported).

³ [2022] CCJ 2 (AJ) BB.

of consent. The law recognizes that a victim may consent in fact while treating that consent as immaterial to the commission of the offence. Therefore, in a case where there was no consent in fact the prosecutor could charge either the predicate sexual offence of incest or the offence rape; the possibility of charging the predicate offence does not prevent charging rape. In a case where there has been no consent, a prosecutor may choose to charge rape because it will attract a more severe sentence and that outcome may be appropriate on the facts of a particular case.”

[12] Ms. Sherma Dalrymple, the learned acting Director of Public Prosecutions, submits that the offences of rape and incest were proper in law and an individual can properly be charged for these offences on the same indictment although the offences stem from the same facts. Further, charging rape and incest from the same facts, is recognised by **Stephen Alleyne**. Ms. Dalrymple points out that the two offences are different, and rape is not an alternative to incest and relies on section 12 of the **Sexual Offences Act**.⁴

[13] A good starting point for the court’s consideration of Ground 1 is an examination of sections 3(1) and 6(1) and (2) of the **Sexual Offences Act**, the Act under which the charges were laid. Section 3(1) states: Any person who has sexual intercourse with another –

- a) without the consent of the other person; or
- b) without believing that the other person consents to such intercourse or is reckless as to whether the other person consents or not, is guilty of the offence of rape and liable on conviction to imprisonment for twenty – five years.

[14] The offence of incest is dealt with in section 6 of the **Sexual Offences Act**. Section 6(1) provides that the offence of incest is sexual intercourse or sexual connection between –

- a) parent and child;
- b) brother and sister, whether of the whole blood or the half blood, and whether the relationship is traced through lawful wedlock or not;

⁴ Chap 10:36, Revised Laws of Dominica 2017.

- c) uncle and niece or aunt and nephew, as the case may be or;
- d) grandparent and grandchild.

Section 6(2) ordains that it is immaterial that the sexual intercourse occurred with the consent of the other person.

[15] It is seen from an examination of sections 3 and 6 of the **Sexual Offences Act**, that while both rape and incest require proof of sexual intercourse, the gist of the two offences are different. An essential element of the offence of rape is the absence of consent. The two constituent elements of the offence of incest are: (1) sexual intercourse; and (2) knowledge on the part of the person charged that the other party falls within the terms of section 6(1). With incest, sexual intercourse must be proved but not the absence of consent, as it is immaterial that the intercourse occurred with the consent of the persons stated in section 6(1). Therefore, the offences of rape and incest are distinct. The commission of incest does not in law, constitute the commission of the offence of rape.

[16] Flowing from the above, and after examining the facts and circumstances, the Director of Public Prosecutions is empowered to charge either incest or rape or both incest and rape. Mrs. Dyer's contentions that charging both incest and rape resulted in an abuse of process, deprivation of a fair trial, a loss of the chance of a complete acquittal, and vitiated the convictions, are not well-founded. A conviction founded upon charging both incest and rape, cannot by itself result in such dire consequences. There is nothing in this case which can be said to lead to the dire consequences urged upon the court by Mrs. Dyer.

[17] I note that, unsurprisingly, there was no application to stay the proceedings below on the ground of abuse of process. It could not have been argued that it was impossible to give the appellant a fair trial or that trying the appellant would be

offensive to the court's sense of justice and propriety or would undermine public confidence in the integrity of the criminal justice system and bring it into disrepute⁵.

- [18] Further, the case of **Stephen Alleyne** does not support the contention that both rape and incest should not or cannot be charged from facts arising out of the same incident. On the contrary, the case recognises the existence of the power to charge both. Further, I see no basis for this court to interfere with the discretion of the learned Director of Public Prosecutions to charge incest and rape. It cannot be successfully advanced that the exercise of the discretion was plainly wrong or that the convictions should be vitiated. This ground accordingly fails for all the reasons indicated.
- [19] Ground 7 deals with the issue of recent complaint. The allegation here is that the learned judge misdirected the jury and or failed to adequately direct the jury on the law and the application of the evidence as it relates to recent complaint, and as such the appellant was deprived of a fair chance of acquittal.
- [20] Mrs. Dyer submitted that the evidence was not in keeping with the principle of recent complaint, the principle of recent complaint was not considered by the judge, the jury was not directed on the law, and the directions on recent complaint were not adequate. Learned counsel referred to the learned judge's direction and argued that in order for the recent complaint to be admissible, it must be voluntarily coming from the complainant. Counsel however contended that the complaint was not voluntary, and several questions were put to the virtual complaint by Travis and her mother; but for those questions, she would not have complained of the incident. The thrust of Mrs. Dyer's contention is that several questions were put to the virtual complainant and the line of questioning indicates that the complaint was not voluntary.

⁵ See R v Maxwell [2010] UKSC 48, Per Lord Dyson at para 13.

[21] Ms. Dalrymple posited that there is nothing to say that the complaint was not voluntary. The fact that two witnesses – Travis and the virtual complainant’s mother – posed questions to the virtual complainant did not automatically render the complaint inadmissible. Travis made inquiries of the virtual complainant after noticing that she posted a picture of a hangman’s noose on WhatsApp. It was during these inquiries via WhatsApp that the virtual complainant opened up and told him of the incident. The virtual complainant voluntarily started a conversation with her mother, the starting point being whether the appellant had told her anything. Her mother replied in the negative and asked, ‘what happened?’ ‘What is she talking about?’ She said, ‘Mommy, I don’t know how to tell it to you.’ Her mother asked her ‘what it is?’ She took a deep breath and told her mother what happened. She said ‘Mommy, I was raped.’ Her mother asked by whom? She told her mother it was by Alson. Thereafter she told her mother of the incident between the appellant and herself.

[22] Ms. Dalrymple submits that on both occasions the complaint was given freely. There was no persistent questioning. The evidence of recent complaint was properly admitted by the court and the directions on recent complaint were adequate and proper. The judge directed that the complaint went to the consistency of the account given by the virtual complainant.

[23] In **R v Lillyman**⁶, at page 170, Hawkins J referred to the principles upon which evidence of recent complaint can be admitted, and stated that:

“It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains.”

⁶ [1896] 2 QB 167.

[24] It is the duty of the judge to impress upon the jury in every case where the evidence of a recent complaint is given, that they are not entitled to make use of the complaint as any evidence of the facts in reference to which it was made.

[25] In **R v Osborne**,⁷ Ridley J stated that evidence of recent complaint is admissible only where there is a complaint not elicited by questions of a leading and inducing or intimidating character; and only when it is made at the first opportunity which reasonably offers itself. The judge must be careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent.

[26] In **Spooner v R**,⁸ Lord Justice Thomas explained at paragraph 17 that:

“...the principle on which the evidence [of recent complaint] is admitted is to support and enhance the credibility of the complainant; the jury can, in making their assessment of the truth of the evidence given by the complainant in the witness box, take into account evidence as to consistency between that evidence and evidence of her contemporaneous conduct and her contemporaneous complaint; it can be a powerful aid to the credit of the complainant.”

If the evidence of the complaint is wholly inconsistent with the evidence given in the witness box by the complainant, the prosecution cannot adduce it under the principle of recent complaint.⁹

[27] At paragraph 29 Thomas LJ further stated:

“If the evidence is admissible...then it is for the jury, properly directed, to consider the whole of the circumstances relating to the contemporaneous complaint in determining whether the evidence of the complaint, on their view of the witness giving that evidence, supports the complainant's evidence and what weight they consider should be attached to it in their assessment of the credit of the complainant.”¹⁰

⁷ [1905] 1 KB 551 at page 556.

⁸ [2004] EWCA Crim 1320.

⁹ Ibid at para 18.

¹⁰ Ibid.

[28] In **White v The Queen**,¹¹ Lord Hoffman stated at paragraph 12:

“If a complaint is made at the first reasonable opportunity after the offence, it may be proved in evidence to show the complainant’s consistency and to negative consent. But for this purpose, it is necessary not only that the complainant should testify to the making of the complaint but also that its terms should be proved by the person to whom it was made. If, as in this case, the recipients of the complaints do not give evidence, the complainant’s own evidence that she made a complaint cannot assist in either proving her consistency or negating consent.”

[29] In **Kilby v R**,¹² Barwick CJ closely analysed **R v Lillyman** and **R v Osborne**. After quoting the passage from Hawkins J as to the principles upon which evidence of recent complaint is admitted, he explained at paragraph 19 that:

“Here the emphasis is that the complaint is not probative but only an aid to the credibility of the prosecutrix. When it is said that the complaint can be used “as being inconsistent with her consent to that of which she complains” the Court, in my opinion, is but stating the obverse of the statement that the complaint tends to show consistency in the evidence of the prosecutrix which, whether consent be an issue in the trial or not, must in the nature of things be an account of an occurrence taking place without her consent.”

[30] At paragraph 22 of **Kilby**, Barwick CJ expressed the opinion that nothing in **Lillyman** lends any support to the proposition that evidence of the making of the complaint is evidence of any fact other than the making of the complaint itself and of the terms in which it is claimed to have been made. Barwick CJ further opined that:

“When Hawkins J... spoke of the evidence of a complaint as being inconsistent with consent, he was not, in my opinion, intending to place its admissibility upon a second and different ground from that of its tendency to show consistency in the conduct of the prosecutrix. He was merely indicating the extent of its effect on the credit of the prosecutrix.”

[31] Barwick CJ acknowledged that Ridley J in **R v Osborne** treated the evidence of proximate complaint as admissible on two grounds, founding himself on Lillyman’s case. He however noted that Ridley J did not intend to depart from the decision or enlarge its reasoning. He went on to say: ‘But as I have indicated, Lillyman’s case

¹¹ [1998] UKPC 38.

¹² [1973] HCA 30.

does not really warrant the conclusion that there are two distinct grounds of admissibility of evidence of proximate complaint.’ At paragraph 30, Barwick CJ stated

“The admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of [the] statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence.”

[32] I now directly address the complaint that the recent complaint was not voluntary, or, but for the questions put to the virtual complainant by her mother and Travis, the complaint would not have been made. It is clear that Travis simply made inquiries of the virtual complainant concerning the picture she had posted, and it was during these inquiries that she opened up and told him what happened. Further, the virtual complainant voluntarily started a conversation with her mother, the starting point being whether the appellant had told her anything. The virtual complainant then told her mother what happened between the appellant and herself; that the appellant had raped her. There is nothing to say that the complaint was not voluntary or was given as a result of leading questions.

[33] Although the complaint was made two days after the incident, the virtual complainant explained why it was not made earlier. In deciding whether a complaint is made at the first opportunity that reasonably presents itself, the impact of the outrage of the virtual complainant is certainly a factor of significance. She explained how she felt because of the incident: shocked, dirty, betrayed, embarrassed and suicidal. The fact that it involved a close family member, in this case, her brother, also must be considered. In my judgment, the evidence did not infringe any of the principles of recent complaint which would lead to its inadmissibility.

[34] With respect to the judge’s directions, the learned judge directed the jury that the complaint went to the consistency of the account given by the virtual complainant.

The learned judge directed the jury that they heard the evidence of Travis and the virtual complainant's mother, to the effect that the virtual complainant made a complaint two days after the alleged incident; although she saw her mother the same night and Travis the following day. The judge invited the jury to look at all the circumstances, including the reasons the virtual complainant gave for not having complained at the time she said the incident occurred. The appellant was her half-brother, closest to her; she was in shock and embarrassed, and she felt dirty, betrayed and hurt.

[35] The judge also directed the jury that they may find that what Travis and the virtual complainant's mother told them is consistent with the virtual complainant's account of how the incident occurred. The judge directed that the mere fact that a person gives a consistent account does not necessarily mean that the account must be true. The learned judge directed the jury that the virtual complainant's mother's account of what the virtual complainant told her is important as it goes to consistency with the account given by the virtual complaint as to what transpired. In my judgment the evidence of recent complaint was properly received, and the learned judge gave adequate directions on the issue. This ground of appeal accordingly fails.

[36] Ground 9 alleges that the learned judge failed to direct the jury on the issue of corroboration as it related to the matter. Mrs. Dyer submitted that the learned judge did not warn the jury as to the uncorroborated evidence of the virtual complainant but invited them to accept the evidence of Dr. Lenora Fevrier-Drigo to establish that the appellant had sexual intercourse with the virtual complainant.

[37] Mrs. Dyer argues that the learned judge led the jury to believe that unprotected sex supported the case for the prosecution. This, counsel asserts, makes the conviction unsafe as the judge is saying that this was corroborative of the complainant's evidence. Mrs. Dyer contends that the learned judge tried to impress on the jury that the sexually transmitted disease occurred as a result of sexual intercourse with

the appellant. Learned counsel posits that the judge told the jury that if they believe there was a sexually transmitted disease, and given the time frame, if they believe the virtual complainant, it was a result of the sexual intercourse with her. Learned counsel submits that the learned judge related the sexually transmitted disease to the present case as supporting the act of sexual intercourse and to show that the virtual complainant was truthful when she suggested that it arose out of sex with the appellant.

[38] Mrs. Dyer further asserts that the sexually transmitted disease could not be relied on as evidence of sexual intercourse with the appellant and the learned judge wrongly invited the jury to consider whether it is possible that the virtual complainant contracted the sexually transmitted disease as a result of sexual intercourse with the appellant. Mrs. Dyer submits that the direction to the jury was deficient, and the convictions and sentences should be set aside.

[39] Ms. Dalrymple points out that a direction on corroboration is not required under the law of the Commonwealth of Dominica. Further, counsel asserts that the learned judge did not say that the medical evidence of Dr. Drigo was corroboration. There was no attempt to relate the sexually transmitted disease to the appellant.

[40] In considering the issue of corroboration, I note that under the law of the Commonwealth of Dominica, corroboration is not required for a conviction where a person is charged with a sexual offence. Further, the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. The judge, however, has a discretion to direct the jury that if they believe the testimony given by one witness, it is sufficient for the proof of any fact. The jury should however carefully review all the testimony upon which proof of the facts depends before finding any fact proved solely by the testimony of one witness.

[41] Authority for the aforementioned is section 28 of the **Sexual Offences Act**, which states:

“Subject to section 32, where an accused is charged with an offence under this Act, corroboration is not required for a conviction and the Judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration, but may direct the jury as follows:

Testimony which you believe, given by one witness, is sufficient for the proof of any fact. However, before finding any fact to be proved solely by the testimony of a single witness, you should carefully review all the testimony upon which the proof of the fact depends.”

[42] Ms. Dalrymple acknowledges that the learned trial judge did not give the direction as stated by section 28 of the **Sexual Offences Act** but points out that the section confers a discretion on the judge whether to do so. Learned counsel submits that the appellant ought to have shown grounds upon which the Court ought to have exercised a discretion in giving the direction as stated in section 28.

[43] In my judgment, based on section 28, once the jury accepted the evidence of the virtual complainant and found as a fact that the appellant had sexual intercourse with her without her consent, and that the appellant was her brother, there being no issue that he knew that she was his sister, they were entitled to convict him, on her testimony, of the offences of rape and incest. With respect to the discretion conferred by section 28, an appellate court is enjoined not to lightly interfere with the exercise of a discretion entrusted to the first instance judge. The virtual complainant gave very detailed and compelling evidence that the appellant had sexual intercourse with her by the river and she did not consent. The facts were not complicated. The appellant denied having sex with her and denied being by the river. Given the facts of the case, the learned judge clearly felt that there was no need to give the direction. It cannot be said that the judge was plainly wrong in the exercise of his discretion in not giving the direction.

[44] The judge’s treatment of the sexually transmitted disease falls to be considered. On 13th November 2015, the virtual complainant went to the Health Centre and was attended to by Dr. Drigo who opined that she was suffering from a sexually transmitted infection or disease. The learned judge directed the jury that the

prosecution was asking them to draw the inference that because the doctor found that the virtual complainant was suffering from a sexually transmitted disease and given the time range, it is possible that, if they believe the virtual complainant, she contracted the sexually transmitted disease as a result of the sexual intercourse with the appellant. Further, it was a matter for them if they accepted the doctor's opinion and if they believed the virtual complainant's evidence.

[45] Here, the learned judge was not trying to impress upon the jury that the sexually transmitted disease occurred as a result of the sexual intercourse; rather she was putting to the jury the inference the prosecution was asking them to draw. Importantly, the learned judge directed the jury that if there are two common sense conclusions which can favour either the prosecution or the accused, they are bound to draw the inference or conclusion which favours the accused. The judge went on to direct that if the jury accepts certain evidence as being true and reliable and finds that it leads to one common sense conclusion or inference, even though it may not be in favour of the accused, they are free to draw that conclusion. The learned judge then directed the jury that if they accept that the white sexual discharge was not a sexually transmitted disease, then they are free to draw the inference that the virtual complainant did not contract that white vaginal discharge as a result of sexual intercourse.

[46] The jury as finders of fact are entitled to draw inferences with respect to other facts and can rely upon these inferences in deciding whether or not an accused is guilty. If there are two or more inferences to be drawn in relation to a given fact, the jury must draw the inference which most favours the accused. The learned judge's direction on inferences was unremarkable. The learned judge also reminded the jury that the appellant denied that he had sexual intercourse with the virtual complainant. Further, the judge directed that if the jury believed that the appellant did not have sexual intercourse with the virtual complainant, then he is not guilty of rape or incest or if they are in reasonable doubt about it, he is not guilty. In the

premises, there is no merit in the appellant's complaint, and Ground 9 is not sustainable.

[47] Mrs. Dyer also submits that the learned judge misdirected the jury on the charge of rape, therefore, depriving the appellant of a fair chance of acquittal. The prosecution's case was that there was no consent pursuant to section 3(1)(a) of the **Sexual Offences Act**. The appellant's case was that he did not have sexual intercourse with the virtual complainant. Mrs. Dyer submits that the learned judge misdirected the jury by erroneously introducing concepts such as reasonable belief in consent, and recklessness as to whether the virtual complainant consented or not. Learned counsel states that this was not the prosecution's case.

[48] To my mind, it is not disputed that the charge of rape was brought pursuant to section 3(1)(a) of the **Sexual Offences Act** which states: 'Any person who has sexual intercourse with another without the consent of the other person is guilty of rape.' Ms. Dalrymple posits that the prosecution's case was that there was no consent and although the judge also went to section 3(1)(b), that was not the case for the prosecution. Section 3(1)(b) speaks to 'or without believing that the other person consents to such intercourse or is reckless as to whether the other person consents or not, is guilty of rape.' Learned counsel submits, however, that the learned judge properly directed on section 3(1)(a).

[49] While the judge properly directed on section 3(1)(a), the question to my mind is whether the directions the learned judge gave encompassing section 3(1)(b) vitiates the conviction for the offence of rape. The judge directed that for the purpose of this case rape is having sexual intercourse without the person's consent. In this case, the prosecution must prove that the act of sexual intercourse took place; that the appellant inserted his penis into the vagina of the virtual complainant and at the time he did so, she did not consent to having sexual intercourse with him. The judge further directed the jury that before they can convict, they must be sure that the virtual complainant did not consent. In my view, this direction is unexceptional for

the charge under section 3(1)(a). There was no need for the judge to have gone further into honest belief as to consent or recklessness as to whether or not the virtual complainant was consenting.

[50] The learned judge also directed the jury that if they believed the virtual complainant that the appellant had sexual intercourse with her, without her consent, they can find him guilty of rape; or if they believed that he had an honest belief that she was consenting or he was reckless as to whether or not she was consenting, they can find him guilty of rape. If they believed that he had an honest belief that she was consenting, then find him not guilty. If they had any doubt in their mind that sexual intercourse took place, then find him not guilty. If they found that he was reckless as to whether or not she was consenting and they found that that belief was reasonable, then find him not guilty. If they found that his belief was unreasonable, find him guilty of rape.

[51] In light of the appellant's defence that he did not have sexual intercourse with the virtual complainant, issues such as honest or reasonable belief in consent or recklessness as to whether or not the virtual complainant consented were simply not engaged. I am of the view, however, that the learned judge's directions encompassing such issues, though unnecessary, did not deprive the appellant of a fair chance of acquittal. It could not have been lost upon the jury that the appellant's defence was that he did not have sexual intercourse with the virtual complainant. The learned judge reminded the jury of that. By their unanimous verdict of guilt, the jury clearly accepted the compelling evidence of the virtual complainant and found as a fact that the appellant forcibly had sexual intercourse with her, without her consent, in the circumstances she described down by the river. What is also clear, is that, importantly, the learned judge gave a proper direction to the jury in respect of the charge of rape under section 3(1)(a).

[52] Mrs. Dyer asserts that the learned judge fundamentally misdirected the jury on the issue of alcohol, and alcohol nullifying consent. Mrs. Dyer posits that this was not

the prosecution's case. The prosecution's case was that there was no consent because the appellant used force. The learned judge invited the jury to consider whether the appellant used force or administered alcohol to the virtual complainant to stupefy her. Learned counsel submits that the virtual complainant was not stupefied. Mrs. Dyer submits that with the misdirection on rape, the appeal ought to be allowed.

[53] Ms. Dalrymple states that the learned judge misdirected the jury when she spoke of alcohol, as that was not the State's case. Ms. Dalrymple submits that that does not render the conviction unsafe. The evidence was overwhelming against the appellant. The proviso should be applied with respect to that issue.

[54] The impugned direction states:

- (i) "In considering the issue of consent in this case, you must decide, you must consider whether the accused used force upon [the virtual complainant] to cause her to submit to having sexual intercourse with him or whether he administered anything to the virtual complaint in this case. In this case you might find that alcohol was used or caused her to take the same with intent to stupefy or overpower or intimidate her in anyway. It is a matter for you, Members of the Jury. The accused said he bought drinks for her. [The virtual complainant] said she requested a drink when they got to Johnny's Bar and the accused subsequently bought her another drink and gave her his drink to consume.
- (ii) If you find any of these circumstances existed and that sexual intercourse took place under any of these circumstances, it is open to you to find that the virtual complainant did not consent to having sexual intercourse with the accused. So, you will have to look at the evidence of [the virtual complainant] very closely. You must be sure that she did not consent to this act of sexual intercourse and that the accused knew that she was not consenting or was reckless or he couldn't care less as to whether or not she consented. If you are in doubt as to whether he honestly believed she was consenting, then you must give him the benefit of the doubt and find him not guilty of rape. And if you believe the accused when he said he never had sexual intercourse with [the virtual complaint] you must also find him not guilty of rape. And if you believe the accused when he said that he never had sexual intercourse with [the virtual complaint, you must also find him not guilty of Rape."¹³

¹³ Transcript of Proceedings pp 718-719.

- [55] The prosecution's case had nothing to do with the use of alcohol to nullify consent. It is clear that the learned judge introduced a matter extraneous to the prosecution's case. The judge highlighted the evidence with respect to the consumption of alcohol and directed the jury to find that the virtual complainant voluntarily consumed alcohol that night.
- [56] I note that the learned judge invited the jury to look closely at the evidence of the virtual complainant. The jury, having looked closely at that evidence, would no doubt have concluded that the virtual complainant maintained complete control of her faculties and had full recollection of what was happening. Her evidence with respect to what the appellant said and did to her down by the river; and how he forcibly had sexual intercourse with her, was clear, convincing, precise, and remained unshaken. However, it is noted that in 'a misdirection in law which was not in reality in relation to a true (or real) issue in the trial does not thereby (and certainly does not necessarily) render a conviction unsafe.'¹⁴ Later in the judgment, I will consider Ms. Dalrymple's invitation to apply the proviso, pursuant to section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act**.¹⁵
- [57] Another complaint of the appellant relates to the issue of lies and the absence of a Lucas direction. Mrs. Dyer submits that the learned judge erred in not giving a Lucas direction and contends that the learned judge referred to the appellant's statement that there was a pending court case relating to his father's property, as lies. Learned counsel submits that the judge invited the jury to find that the by so lying it supported the State's case. It was never considered an inconsistency and the judge did not address the issue of motive.
- [58] Ms. Dalrymple argues that there was no dispute regarding the settlement of the property at the time of the incident as the court had ordered the property to be divided 60 percent to the virtual complainant's (and appellant's) father and 40

¹⁴ R v McLeod and others [2017] EWCA Crim 800.

¹⁵ Chap 4:02, Revised Laws of Dominica 2017.

percent to her mother. Counsel submits that the motive advanced by the appellant for the virtual complainant making the complaints against him was shot down by the prosecution. Ms. Dalrymple submits that based on the evidence led it was not necessary to give a Lucas direction; further, the learned judge directed on inconsistencies.

[59] I now consider the law with respect to a Lucas direction. In **R v Lucas**¹⁶ Lord Lane, CJ set out four conditions for a lie told in or out of court to amount to corroboration:

“[It] must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.”

The third of the four conditions forms the basis of what is now known as the Lucas direction in respect of lies told more generally.¹⁷

[60] When is a Lucas direction necessary? A Lucas direction is required where the prosecution relies upon lies told by a defendant or might be used by the jury as supportive of the evidence said to establish the defendant’s guilt.

[61] A Lucas direction is not required in every case where a jury may conclude that the defendant has told lies. As explained in **R v Burge and Pegg**¹⁸ ‘the warning is only required if there is a danger that they [i.e. the jury] may regard that conclusion as probative of his guilt of the offence which they are considering.’

[62] In **R v Murray**¹⁹ the court said at paragraph 12:

“However, a Lucas direction is unnecessary where there is no risk that the jury may follow the prohibited line of reasoning that a defendant’s lie(s)

¹⁶ [1981] 3 WLR 120 at 123.

¹⁷ See *Murray v The Queen* [2016] EWCA Crim 1051 at para 9.

¹⁸ [1996] 1 Cr. App. Rep 163.

¹⁹ [2016] EWCA Crim 1051 at para 12.

necessarily demonstrated his guilt. This would generally be the case for example in relation to lies told by a defendant in evidence because the position would be covered by the general directions on the burden and standard of proof, a Lucas direction is unnecessary”.

[63] In **Rahming v The Queen**,²⁰ the Privy Council considered the submission that the judge should have given a Lucas direction, the point being that the appellant had given conflicting explanations for his injuries. The prosecution’s case was that none of the explanations were correct and that he had been injured by ‘Theresa’ as she attempted to defend herself. The Privy Council said at paragraph 12:

“The judgment [**R v Burge and Pegg**] emphasises that a Lucas direction is not always required even though it is the prosecution[’s] case that the defendant had lied. “How far a direction is necessary will depend upon the circumstances”(p. 172). “Our view is that the direction on lies approved in [**R v Goodway** [1993] 4 All ER 894] comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused: in effect, using it as an implied admission of guilt (ib). If a Lucas direction is given where there is no need for such a direction (as in the normal case where there is a direct conflict of evidence), it will add complexity and do more harm than good” (p.173). In the present case, the judge was entitled to take the view that a Lucas direction was not appropriate or required.”

[64] A lies direction given to the jury is not appropriate in every case and it is plainly within the discretion of the trial judge.²¹ In **R v Dehar**,²² the court said: ‘How far a direction is necessary will depend upon circumstances. There may be cases ... where the rejection of the explanation given by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic.’

[65] In **R v Williams**,²³ the court said at paragraph 14 that a Lucas ‘direction is undoubtedly required where a defendant has admitted lying and the jury may regard that lie as probative of guilt’. The court opined that:

“...whether the lies are admitted is not the issue. The question to be considered is whether something said which the jury are sure was a lie may

²⁰ [2002] UKPC 23.

²¹ See **R v JWW** [2019] EWCA Crim 1273 at para 18.

²² [1969] NZLR 763.

²³ [2018] EWCA Crim 1986.

be explained by something other than the appellant's guilt... There are a range of such lies, proof of which does not lead inevitably to the guilt of the defendant. In such cases a Lucas direction is usually necessary."

[66] In **R v Wainwright**²⁴ at paragraph 22 the court explained that:

"A full direction in accordance with Lucas is usually given by the judge whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility. This direction is to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant (but cannot of itself prove guilt) if the jury are satisfied that the lie was deliberate, it related to a material issue and the motive for the lie must be a realisation of guilt and fear for the truth. The jury need to be directed that there may be reasons for the lies which are not connected with guilt of the offences charged. In this context, the jury should, in appropriate cases, be reminded that people sometimes lie for, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Put in summary form only, a Lucas direction is usually not necessary if there is no distinction between the issue of guilt and the issue of lies. But is necessary when on some collateral matter, and due to some change in evidence or account by the defendant, there is scope for drawing an inference of guilt from the fact that the defendant told lies (see **R v Wilsher** [2021] EWCA Crim 121 at [57].)"

[67] An examination of the judge's summation puts it beyond dubiety or incertitude that the learned judge gave a Lucas direction. The judge directed the jury that if they believed the appellant that there was a pending court case involving his father's estate and that is why the virtual complainant made the allegations against him, and they are sure and accept what he said, it was open to them to conclude that is why she made the allegation against him. The learned judge then directed that if the jury were sure that there was no such pending case, and believed that he was lying, then they must consider why he was telling a lie. The learned judge further directed:

"In considering this question, you must bear in mind that an accused who tells a lie is not necessarily guilty. In other words, if you think that he is lying about the pending case, you should not use that to say well, because he is lying about the pending case, he is guilty. Sometimes an accused who is not guilty will tell a lie for some other reason."²⁵

²⁴ [2021] EWCA Crim 122.

²⁵ p 712 of the transcript of trial proceedings.

The learned judge went on to say that given ‘the prosecution is saying that there was a court order for separation of his father’s property, with 60% to his father and 40% to the virtual complainant’s mother, the appellant lied when he said that is a pending case for his father’s property’.

[68] In her summation, the learned judge directed the jury to consider whether the appellant lied or may have lied about the pending matter and if they found he lied to cover up his wrongdoing, they may use it to support the prosecution’s assertion, but he must not be convicted simply because they believe that he lied about the pending case. The fact that he lied does not on its own prove that he is guilty. The learned judge further directed that the jury must fall back on the prosecution’s case and decide whether or not they believed the virtual complainant’s story that the appellant had sexual intercourse with her, without her consent.

[69] In paragraph 33 of **Wainwright**, the court explained that:

“For lies that may support the prosecution case, it is necessary to direct that there may be reasons for the lies which are not connected with the guilt of the offences charged. In this regard, in *Lucas*, Lord Lane C.J. observed at page 724 that “The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family”. Although setting out these three distinct potential explanations for the lie or lies is often a useful way of illustrating why a lie may not be supportive of guilt, a formula of this kind, as Lord Lane stated, should (only) be used in “appropriate cases”. The examples given in *Lucas* are not a magic formula that must be deployed in every case regardless of the circumstances, and sometimes referring to them may be misleading. For instance, shame may be an irrelevant consideration, or the accused may not have any relevant family connections.”

[70] In my judgment, the learned judge directed on the core of the *Lucas* direction, and the directions were adequate to bring home to the jury that if they found that the appellant lied, that by itself does not prove guilt and he must not be convicted simply because he lied about the pending case to cover up his wrongdoing. There may be an innocent reason for the lie.

[71] Later in the summation, the learned judge stated that the appellant agreed that there was a division of property before his father died and there was a court order to that effect. The appellant said that prior to 4th November, 2015, there was no court matter going on between himself, Travis, the virtual complainant, and her mother. However, later, he did insist that there was a court matter and that there was a dispute about the settlement of the property. The learned judge explained to the jury that:

“What he is trying to say is that because there was this issue with the property, the settlement of the property and he had asked [the virtual complainant] and her mother to leave the house, that is why [the virtual complainant] made up this allegation against him. It is a matter for you whether or not you believe him.”²⁶

The issue of an ulterior motive on the part of the virtual complainant is also being raised here. The issue having been raised; it would have been useful for the learned judge to instruct the jury that if they found that the virtual complainant had an ulterior motive in making the complaint, they should treat her evidence with caution. I am of the view however, that the absence of that direction was not fatal, having regard to the evidence.

[72] The application of the proviso falls to be considered. The proviso is provided for in section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act**. It provides that:

“The Court of Appeal on any such appeal against conviction shall, subject to hereinafter provided, allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal. However, the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.”

²⁶ p 770 of the transcript of trial proceedings.

- [73] The relevant test for the application of the proviso is set out in **Cassell and another v R** ²⁷ at paragraphs 38 and 30. The test for whether a miscarriage of justice has actually occurred is not simply whether the appellate court is itself persuaded of guilt. That would be to substitute trial by appellate judges for trial by jury. That the appellate court is satisfied of guilt is certainly necessary but is not by itself sufficient. The test is normally whether the appellate court is, further, satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred.²⁸ The more minor the error, the easier it is likely to be for the appellate court to address and answer the question whether any jury must inevitably have convicted if the error had not occurred. Conversely, the more extensive the errors at the trial, the more difficult it is likely to be for the appellate court to conclude that any jury must have convicted.
- [74] The application of the proviso comes into play in the context of the judge's directions on rape, encompassing section 3(1)(b) of the **Sexual Offences Act**, and the judge's direction on alcohol. I adverted to both matters earlier in the judgment. Ms. Dalrymple admits that there was a misdirection on rape as the prosecution's case had nothing to do with drunkenness. Learned counsel submits that the direction on section 3(1)(a) was properly given. The evidence in respect of section 3(1)(a) was overwhelming, clear and unambiguous, and a jury properly directed would properly return a verdict of guilty of rape and incest.
- [75] Mrs. Dyer submits that the proviso should not be applied and that the case before the court consists of serious misdirections. She argued that issues were raised which would have confused the jury's minds. The case is not strong. It is the word of the prosecution against the defence. The use of alcohol was not the case for the prosecution; it arose for the first time in the judge's summation.

²⁷ [2016] UKPC 19.

²⁸ See *Lundy v The Queen* [2013] UKPC 28.

[76] By their unanimous verdict of guilty of incest, the jury was sure that the appellant had sexual intercourse with his sister; by their unanimous verdict of rape, they were sure that he had sexual intercourse with his sister, and she did not consent to it. The jury would have assessed the reliability and credibility of the virtual complainant set against the appellant's own account and denial of intercourse. The case against the appellant was not a complicated one. The jury clearly accepted the virtual complainant's evidence, as they were entitled to do, and rejected that of the appellant and felt sure of his guilt.

[77] I am satisfied that there was no miscarriage of justice, and I am further satisfied that any jury acting properly must inevitably have convicted the appellant and returned the same guilty verdicts if the flaws in the proceedings had not occurred.

[78] The respondent having conceded the appeal with respect to indecent assault that appeal is allowed. The appeal against the conviction for incest and rape is dismissed and sentences affirmed.

I concur
Gertel Thom
Justice of Appeal

I concur
Sydney Bennett
Justice of Appeal [Ag.]

By the Court

Chief Registrar