

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

ANTIGUA AND BARBUDA

ANUHCRA2019/0004

BETWEEN:

LEON RILEY

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St. C. Farara
The Hon. Mr. Dexter Theodore

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Lawrence Daniels for the Appellant
Mr. Anthony Armstrong for the Respondent

2021: February 9;
November 8.

Criminal appeal — Appeal against conviction and sentence — Lucas direction — Whether learned judge erred in failing to give a Lucas direction in relation to lies by accused relied upon by prosecution — Good character — Whether failure of counsel in court below to raise issue of good character renders conviction unsafe — DNA Evidence — Whether learned judge erred in failing to direct jury on lack of DNA evidence — Whether conviction unsafe and unsupported by evidence — Whether learned judge erred in permitting evidence of recent complaints made by virtual complainant — Section 28 Sexual Offences Act — Whether evidence of recent complaint in sexual case is inadmissible in trial for rape — Whether learned judge was required to give special direction to jury to disregard evidence of recent complaints — Section 40 of The Eastern Caribbean Supreme Court Act — Whether section 40 proviso to be applied — Whether the jury if they had been properly directed would inevitably have come to the same conclusion upon a review of all the evidence — Retrial -Whether a retrial should be ordered in the circumstances

This is an appeal by Leon Riley (“the appellant”) against his convictions of serious indecency and rape and the sentences imposed of 5 years and 15 years, respectively, which run concurrently.

The prosecution’s case was that in April 2016, a 15-year-old schoolgirl (“the VC”) visited an internet café partly owned by the appellant, to print a school-based assignment. The VC told the appellant that she didn’t have the assignment on her flash drive, and he offered to drive her to her home to retrieve it from her computer. The VC testified that on the way back to the internet café, the appellant drove to a bushy and deserted area where he forced her to perform fellatio on him, after which he, put on a condom and raped her. When he was finished, he threw the condom out the car window and drove the VC back to the internet café where she printed her assignment and thereafter left for school.

When she got to the school, the VC told her friend what had happened. The VC’s friend subsequently telephoned the VC’s father and accompanied the VC to her father’s place of employment. The VC’s father later informed her mother of what transpired. The VC’s mother, in her evidence, confirmed that the VC came home in the company of the appellant, whom she knew. She also testified that after visiting the police station and the health centre with the VC, she went to the scene of the incident, where she saw what appeared to be a freshly used condom and pointed it out to the police. The prosecution also led evidence of an officer who had recorded a statement under caution from the appellant, in which he admitted that the VC had come to his internet café and that he had driven her home and back to the internet café. The officer also testified that DNA samples had been taken from the appellant, however, no forensic analysis had taken place due to “financial problems”.

In relation to the appellant, there was no evidence led at trial in support of his case. However, his statement under caution and a recorded interview that he gave to the police were adduced into evidence. The appellant denied committing the offences and stated that he did not know the VC or her mother by name. He, however, later admitted that he had known both of them for about a year.

A jury convicted the appellant of the above indictments, and he was later sentenced. The appellant being dissatisfied with his conviction and sentence appealed on several grounds. The appeal raises the following issues for determination: (i) whether the learned trial judge failed to give any or any proper Lucas direction on the issue of lies; (ii) whether the judge ought to have directed the jury that if they are dissatisfied with the Crown’s failure to adduce any forensic evidence, they would have been entitled to acquit the appellant if they were in any doubt that he committed the offence; (iii) whether inadmissible evidence of recent complaint had been adduced and whether the learned judge had failed to warn the jury to disregard all such evidence; (iv) whether the proviso under section 40 of the Eastern Caribbean Supreme Court Act (“Supreme Court Act”) should be applied; and (v) whether a retrial should be ordered in the circumstances.

Held: allowing the appeal; quashing the conviction and sentence; and remitting the matter to the High Court for trial before a different judge, that:

1. A Lucas direction is not required to be given where there is the danger that giving the Lucas direction might only serve to elevate the importance of a lie, or potential lie, especially about a collateral fact, in the mind of the jury. The difference between the accounts of the appellant and the VC's mother was rather slight and had a Lucas direction been given, it may have served to elevate, to the appellant's prejudice, an otherwise potentially trifling issue of memory to a position of prominence in the jury's deliberations. Therefore, the learned judge did not err by not giving a Lucas direction on the issue of lies of this case.

Attorney General v Michael Spicer et al Criminal Appeal No. 6 of 2001 (delivered 14th January 2002, unreported) considered; **Regina v Burge and Pegg** [1996] 1 Cr. App 163 considered; **Bhagchandka v The Queen** [2016] EWCA Crim 700 applied.

2. No forensic evidence was tested and accordingly none was presented in court. As such, it was not necessary for any special direction to have been given about the failure of the prosecution to adduce forensic evidence, although certain samples had been collected for DNA analysis. The general direction which the court gave to the jury that, if there was any doubt of the appellant's guilt they should acquit, was enough guidance in the circumstances of this case. Therefore, the learned judge did not err in this regard.

Carlton Junior Hall v The Queen CCJ Appeal No. BCCR2019/001 considered; **R v Chance** [1988] 3 All ER 225 applied.

3. Section 28 of the **Sexual Offences Act** abolished all of the common law rules relating to evidence of recent complaint in sexual offence cases. Therefore, it was incumbent upon the learned trial judge to direct the jury to completely disregard the VC's evidence of recent complaints. However, a review of the summing-up given by the learned judge to the jury reveals that the learned judge did not give any direction to the jury on the law of recent complaints or previous self-serving statements or any directions as to how to use such evidence. Accordingly, the judge's failure to direct the jury in this regard was a fatal flaw.

Sexual Offences Act No. 9 of 1995 of the Revised Laws of Antigua and Barbuda applied; **The Queen v Lillyman** [1896] 2 Q.B. 167 considered; **White v The Queen** [1998] UKPC 38 applied; **Sheldon Thomas v The Queen** Criminal Appeal No. 11 of 2002 (delivered 20th October 2003, unreported) considered; **David Jobe v The Queen** Criminal Appeal No. 23 of 2003 (delivered 20th September 2004, unreported) considered; **Diaz v The State** [1990] LRC (Crim) 317 considered.

4. The test to determine whether the proviso within section 40 of the Supreme Court Act should be applied, is whether, if the jury had been properly directed,

they would inevitably have come to the same conclusion upon a review of all the evidence. Upon considering the judge's summing-up, it cannot be concluded that a reasonable jury, properly directed and confronted with this evidence would, inexorably have convicted the appellant of the charges against him. That being the position, the proviso cannot be applied and the appeal must be allowed and the convictions for rape and serious indecency quashed.

The Eastern Caribbean Supreme Court Act, Cap. 143 of the Revised Laws of Antigua and Barbuda applied; **Giselle Stafford and another v The State** [1999] 1 WLR 2026 applied.

5. The Court has the power to order a retrial if it is in the interest of the public, the VC, and the appellant that the question of guilt be determined finally by the verdict of a jury, and is not left as something which must remain undecided by reason of a defect in legal machinery. To determine whether or not the proper course is to order a re-trial, this Court considered several non-exhaustive factors which include: (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; and (f) the strength of the case presented by the prosecution. The court was also of the view that, the decision requires the exercise of the collective sense of justice and common sense of the judges, who are familiar with local conditions. Applying the factors above, it is in the interest of justice that the question of the appellant's guilt be determined by the verdict of a jury. It is therefore appropriate in the circumstances for this Court to order a retrial.

Reid v R [1978] 27 WIR 254 applied; **Au Pui-Kuen v A-G of Hong Kong** [1979] 1 All ER 769 applied; **Ng Yuk Kin v Regina** (1955) 39 HKLR 49 applied.

JUDGMENT

- [1] **THEODORE JA [AG.]:** The appellant, who was 36 years old on the date of the commission of the offences, was convicted on 12th February 2019 on both counts of an indictment against him of serious indecency and rape of 15-year-old (hereafter referred to as “the virtual complainant”).¹ He was sentenced on 15th April 2019 to terms of imprisonment of 5 years and 15 years, respectively, to run concurrently. He appealed against his conviction and sentence.

¹ Any reference to the virtual complainant, family members and friends have been anonymised in this judgment.

The prosecution evidence at the trial

- [2] The principal witness for the prosecution was the virtual complainant. At the time of the incident the virtual complainant was a 15-year-old schoolgirl, and the appellant was the part-owner and operator of an internet café to which the virtual complainant had gone on the morning of 12th April 2016 to print a school-based assignment. When the virtual complainant realised that the assignment was not on the flash drive that she had brought with her, she mentioned this to the appellant who offered to drive her to her home to retrieve the assignment from her computer. The virtual complainant testified that on the way back from her home, the appellant drove to a bushy and deserted area where he climbed into the back seat where she was sitting. He then forced her to perform fellatio on him. After a while he stopped, put on a pink condom and raped her, despite her attempts to push him off and her cries to him to stop. When he was finished, he threw the condom out the car window. The appellant then drove the virtual complainant back to the internet café where her assignment was printed and the appellant then drove her back to school.
- [3] The evidence of KJ, the virtual complainant's friend, was that he met the virtual complainant at school and she told him something. Portions of the evidence were not captured in the record but it appears from the closing speech of the prosecution that the virtual complainant typed what happened on a phone and showed it to KJ. KJ testified that he telephoned the virtual complainant's father and had a conversation with him. KJ further said that he then accompanied the virtual complainant to the bank where her father worked, where they all spoke.
- [4] The virtual complainant's mother, SM, confirmed that the virtual complainant came home on the morning in question in the company of the appellant. She said that she knew the appellant, having first met him some years earlier when he gave her a ride. She said that she received a telephone call at about 6:00 p.m. from the virtual complainant's father, GJ, on the evening of the alleged rape. She then went to the

bank where he worked and met the virtual complainant there with her father. There according to SM, "They told me what had happened". She said that they then went with the virtual complainant to the police station and later the health centre. SM also said that she later went to the scene of the incident with the police, where she saw what appeared to be a freshly used condom and she pointed it out to the police.

- [5] Corporal 358 Benta confirmed that he was present when SM pointed out a pink condom which Police Constable ("PC") 646 Kara Forde-Roberts placed in an exhibit bag. He also said that the following day he returned to the scene with other officers and one of them found a condom wrapper bearing the brand name "Slam".

- [6] PC 646 Roberts was one of the officers on duty on 12th April 2016 when the virtual complainant and her parents came to the Gray's Farm Police Station. She recorded a statement under caution from the appellant, in which he admitted that the virtual complainant had come to his internet café and that he had driven her home and back to the internet café where she printed her assignment and then left the store. He agreed to give DNA samples and his left and right cheeks were swabbed by the police. PC 646 Roberts stated that neither the rape kit nor the pink condom had been sent off for forensic analysis due to 'financial problems.'

- [7] On 14th April 2016 the appellant gave an interview to the police, which was recorded. In that interview, he said that he did not know the virtual complainant or her mother by name but stated that if he saw them 'maybe I will.' He later said that he had known both of them for about a year. He denied that he had committed the offences or that he had driven the virtual complainant to any secluded area.

- [8] The doctor who examined the virtual complainant on 12th April 2016 testified next. He stated that her hymen was not intact. He found no lacerations, abrasions, secretions, blood or semen when he examined the virtual complainant.

- [9] In cross-examination the doctor said that the mere fact that he did not find anything specific did not mean that sex had not taken place.

The defence case

- [10] The appellant did not lead any evidence at trial. However, his statement under caution and the recorded interview that he gave to the police were adduced into evidence.

The grounds of appeal

- [11] Although he filed twelve grounds of appeal, the appellant's grounds of appeal against conviction may be summarised as being, in the main, challenges to the learned trial judge's directions, or lack thereof, on the issues of recent complaints and lies. Another ground of appeal was that the conviction was unsafe because counsel at the trial failed to raise the good character of the appellant. The appellant also criticised the failure of the learned trial judge 'to direct the jury that if they were dissatisfied with the Crown's failure to adduce any forensic evidence that they would be entitled to acquit the appellant if they were in any doubt that he had committed the offence'. The appellant challenged his sentence as being excessive having regard to his age and previous good character. In his oral argument, the appellant abandoned the ground that failure of counsel in the court below to raise the issue of the appellant's good character, rendered the conviction unsafe.

Whether the learned trial judge failed to give any or any proper Lucas direction on the issue of lies

- [12] Mr. Lawrence Daniels, counsel for the appellant submitted that the prosecution's closing speech contained references to the appellant having lied about the length of time that he had known the virtual complainant before 12th April 2016. In his recorded police interview, the appellant admitted to having known her and her mother for about a year, while the mother suggested that she had met him a few years earlier when the virtual complainant was attending primary school. The prosecutor said, "And we are

to believe this man when he tells us he didn't commit these offences. And he can't even tell the truth about how long he had known the people."

[13] Mr. Daniels relied on **Attorney General v Michael Spicer et al**² in which this Court, citing the English case of **Regina v Burge and Pegg**³ described the circumstances in which a Lucas direction would be required. The circumstances which are relevant to the case at bar are the following:

"3. Where the prosecution seeks (sic) to show that something said, either in or out of court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.

4. Where, although the prosecution has (sic) not adopted the approach in category three above, the judge reasonably envisages that there is a real danger that the jury may do so."⁴

[14] Mr. Anthony Armstrong for the respondent, countered that in her closing speech the prosecutor had sought to impugn the credibility of the appellant rather than to rely on the lie as evidence of his guilt.

[15] I agree. The prosecutor was not saying that the lie proved that the appellant had raped the virtual complainant but rather that the appellant having lied about one thing why should he be believed about another.

[16] But that is not dispositive of this ground. The Lucas direction would still have been required had the learned judge reasonably anticipated that there was the danger that the jury might have relied on the lie as evidence of the guilt of the accused.

[17] In **Bhagchandka v The Queen**,⁵ the English Court of Appeal cautioned that notwithstanding the fact that evidence can be found of a lie, or potential lie, told during the trial about a matter, especially about a collateral fact, a Lucas direction

² Criminal Appeal No. 6 of 2001 (delivered 14th January 2002, unreported).

³ [1996] 1 Cr. App 163.

⁴ Ibid at 173D.

⁵ [2016] EWCA Crim 700.

would not be required where there was the danger that giving the Lucas direction might only serve to elevate the importance of the matter in the mind of the jury.

[18] In the case at bar, the appellant's supposed lie concerned the collateral issue of the appellant's familiarity with the virtual complainant and her mother. What was more, the difference between the version of the virtual complainant's mother (that they had met a few years earlier) and the appellant's account (that they had met about a year earlier) was rather slight.

[19] So much so, that I do not believe that in all the circumstances there was a real danger that the jury might have relied on the seeming variance between the versions of the appellant and the mother of the virtual complainant as evidence of guilt. Moreover, I tend to the view that, giving the Lucas direction might indeed have served to elevate, to the appellant's prejudice, an otherwise potentially trifling issue of memory to a position of prominence in the jury's deliberations, that it may not have deserved.

[20] Therefore, this ground fails.

Whether the judge ought to have directed the jury that if they are dissatisfied with the Crown's failure to adduce any forensic evidence, they would have been entitled to acquit the appellant if they were in any doubt that he committed the offence

[21] Learned counsel for the appellant relied on the case of **Carlton Junior Hall v The Queen**⁶ where the Caribbean Court of Justice decried the minimalist nature of the investigation and urged that in criminal cases greater effort should be made to acquire, process and present DNA evidence.

⁶ CCJ Appeal No. BBCR2019/001.

- [22] Learned counsel for the respondent submitted that with or without DNA as long as there was sufficient evidence to establish that the offences have been proven, the jury could have rightly convicted the appellant.
- [23] He submitted forcefully that it was the obligation of the Crown to endeavour to prove every element of its case such that the jury may be satisfied, to the point where they were sure, that the accused is guilty.
- [24] Learned counsel for the respondent further submitted that the remarks in **Carlton Junior Hall** were obiter dicta. He reminded the Court that there had not in fact been any DNA evidence presented at the trial. The only evidence that was led was that certain DNA samples were taken and a condom and a condom wrapper were found. Nothing was tested and no test results were presented to the court. In the circumstances, there was no obligation on the learned judge to give any direction about the absence of such tests.
- [25] In reply, Mr. Daniels submitted that the direction that was in fact given by the learned judge was that the jury should only consider the evidence that was given in the case. Since evidence was led that swabs of the appellant's left and right cheeks were taken by the police for DNA analysis, this, learned counsel submitted, coupled with the direction to consider the evidence given, may have led the jury to consider that they were entitled to put that evidence to some use, including a use that was adverse to the appellant.
- [26] In **R v Chance**⁷ Roch J said:
- "The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant."⁸

⁷ [1988] 3 All ER 225.

⁸ Ibid at 231.

[27] In my view, since in the case at bar no forensic evidence was actually tested and accordingly none was presented in court, it was not necessary for any special direction to have been given about the failure of the prosecution to adduce forensic evidence, although certain samples had been collected for DNA analysis. The general direction which the court gave to the jury that if there was any doubt of the appellant's guilt they should acquit, was enough guidance in the circumstances of this case. The prosecution in its closing speech made it clear that there was no DNA evidence and the prosecution was not relying on any. I accept the submission of learned counsel for the respondent that the absence of DNA does not affect the validity of the conviction.

[28] Accordingly, this ground also fails.

Whether inadmissible evidence of recent complaint had been adduced and whether the learned judge had failed to warn the jury to disregard all such evidence

[29] Section 28 of the **Sexual Offences Act**,⁹ abolished, in Antigua and Barbuda, all of the common law rules relating to evidence of recent complaint in sexual offence cases.

[30] The rule regarding recent complaints was an exception to the common law rule against proof of previous self-consistent statements. In **The Queen v Lillyman**¹⁰ Hawkins J explained that evidence of recent complaint was not admissible as proof of the matter complained of, but was admissible firstly, as showing the complainant's consistency and secondly, as negating her consent to the sexual act.

[31] The effect of the abolition of the rule against recent complaints was that recent self-consistent statements became inadmissible in Antigua and Barbuda in cases involving both sexual, as well as, non-sexual offences.

⁹ No. 9 of 1995 of the Revised Laws of Antigua and Barbuda.

¹⁰ [1896] 2 Q.B. 167.

[32] The following articulation of the rule against previous self-consistent statements taken from Cross & Tapper on Evidence was cited with approval by the Privy Council in **White v The Queen**:¹¹

“The general rule at common law is that a witness may not be asked in-chief whether he has formerly made a statement consistent with his present testimony. He cannot narrate such a statement if it was oral or refer to it if it was in writing (save for the purpose of refreshing his memory) and other witnesses may not be able to prove it.”¹²

[33] In her examination-in-chief the virtual complainant had testified the following:

“After class was finished, I had, I had to finish class (indiscernible). I don’t know (indiscernible) about two something. So, when I got there (indiscernible) and I told her that (indiscernible). So when (indiscernible) told them what happened (indiscernible) I came home, he told me let’s go and then we went down to the (indiscernible). (indiscernible) came and we went (indiscernible) well they asked him what happened to me. Then we went (indiscernible) police station. And I spoke to officer (indiscernible). I gave my statement.”

[34] Mr. Daniels submitted that those complaints by the virtual complainant were not only wrongfully adduced into evidence, but also relied on, in the prosecution’s closing speech. Learned counsel posited that in those circumstances, it had been incumbent upon the learned trial judge to have directed the jury to disregard that evidence.

[35] On the other hand, Mr. Armstrong, submitted that under the previously existing rule regarding recent complaints the fact that a complaint was made shortly after the incident along with the particulars of the complaint were admissible, not as evidence of the facts complained of, but as evidence of the virtual complainant’s consistency and as tending to negative her consent. He argued that, because the particulars of the complaints had not been adduced into evidence in the case at bar, the existing rule against recent complaints was not violated.

¹¹ [1998] UKPC 38.

¹² Ibid at para. 11.

- [36] Mr. Armstrong also sought to distinguish **White v The Queen** because in that case, unlike the case at bar, the virtual complainant had led evidence to the effect that she had reported the incident to 5 people who were not called to testify. That he said was what was referred to as breaching the spirit of the rule in **White v The Queen**. Mr. Armstrong argued that in the case at bar, not only did the persons to whom the virtual complainant complained give evidence, but that the evidence given by the virtual complainant about her conversations with those witnesses was harmless, in that she had said nothing more than that she spoke with KJ, her father and mother.
- [37] Mr. Armstrong pointed the court to a passage in **White v The Queen** where Lord Hoffman said that the Board was by no means suggesting that it was inadmissible for a virtual complainant to merely mention that she spoke with someone who was not available to testify.
- [38] In **White v The Queen**, the Court of Appeal of Jamaica was of the view that it was not an infringement of the rule against self-consistent statements when the complainant did not relate what she actually said in her complaints but merely stated in court that she had told the recipients of her complaints “what had happened”. Learned counsel for the respondent, for his part, submitted that in that scenario there would be no words against which to test her consistency, so it would not have been open to the jury to draw an inference of the virtual complainant’s consistency.
- [39] This was the very notion rejected by the Privy Council in the following passage by Lord Hoffman:
- “In the absence of a ruling by the judge that the questions could be asked because of an imputation of recent invention, she should not have been allowed to say that she had told five people, “what had happened”. The inference which the jury were bound to draw was that she had made statements in terms substantially the same as her evidence to the court.”¹³

¹³ Supra n.10 at para 19.

[40] I pause here to note that the first statement by the virtual complainant that she told her parents what happened was made in her examination-in-chief and logically could not have been made in answer to any suggestion of recent invention, as she was the first witness for the prosecution.

[41] Lord Hoffman went on to say:

“While therefore their Lordships do not go so far as to say that the evidence of the fact that the statements were made were inadmissible, they consider that the admission of that evidence made it necessary for the judge to give the jury a careful direction about the limited value which could be attached to it.”¹⁴

[42] In **Sheldon Thomas v The Queen**¹⁵ the complainant had merely testified that, “I told my mother what happened”.

[43] In **Sheldon Thomas v The Queen**, Byron CJ (as he then was) referred to **White v The Queen** and expatiated:

“[14] ...The suggestion that evidence of a recent complaint in that form is innocuous because it was not a repetition of the actual words used, and as such would have no evidential value was rejected by Lord Hoffman. The reason is clear. The jury would be bound to infer that the statement made to her mother was in substantially the same form as her evidence in court...”

[15] These propositions do not necessarily make the evidence inadmissible. The complainant in giving a coherent account of her behaviour after the incident had to describe what happened when she returned to her home. It is important however that the rule against previous consistent statements not be infringed by inviting the jury to infer consistency and that her credibility was supported by the fact that she had told the same story soon after the incident. These considerations impose duties on the judge to give careful directions to the jury on the limited value that could be attached to the evidence adduced in this manner.”

[44] In **David Jobe v The Queen**¹⁶ Saunders CJ [Ag.] (as he then was) also explained that if that evidence had been inadvertently let in, it was the duty of the trial judge to

¹⁴ Supra n. 10 at para 22.

¹⁵ Criminal Appeal No. 11 of 2002 (delivered 20th October 2003, unreported).

¹⁶ Criminal Appeal No. 23 of 2003 (delivered 20th September 2004, unreported).

give the jury very clear instructions on why it should be disregarded and not considered as part of the evidence of the case.

[45] **White v The Queen, Sheldon Thomas v The Queen and David Jobe v The Queen** were all decided in jurisdictions where the principle of recent complaints applied. Hence, Byron CJ's remark that the evidence of recent complaint was not necessarily inadmissible. On the other hand, in Antigua and Barbuda, with the advent of the abolition of the rules relating to evidence of recent complaint in sexual offence cases such evidence became inadmissible and should have been excluded in the first place.

[46] Although the point was not taken before us in this appeal, in **Diaz v The State**,¹⁷ which was a case decided in The Republic of Trinidad & Tobago after the common law rule of recent complaints had been abolished there, the Court of Appeal did not consider it of any moment that the defence, as here, had not objected to the admission of the evidence of the complaints.

[47] It becomes critical at this juncture to review the summing-up given to the jury in the case at bar to ascertain the directions given in relation to recent complaints.

[48] The quality of the transcript leaves much to be desired. It is so littered with the word "indiscernible" as to make it quite difficult to follow much of what the learned judge actually said to the jury in his summing-up.

[49] In those parts that permitted a coherent analysis, the learned judge did not give any direction to the jury on the law of recent complaints or previous self-serving statements or any directions as to how to use such evidence. In fact, the learned judge did not appear to address the evidence of the complaints at all. Certainly, neither counsel at the hearing of the appeal suggested that the learned judge had alluded to this aspect of the virtual complainant's evidence in his summing up.

¹⁷ [1990] LRC (Crim) 317.

Indeed, it was Mr. Armstrong's submission that for the learned judge to have given a direction on recent complaints would have been to give the evidence complained of by the appellant a significance it did not deserve.

- [50] I do not agree. It had been incumbent upon the learned trial judge to direct the jury to completely disregard the virtual complainant's evidence of recent complaints. The fact that the learned judge did not do so was a serious failing on his part in relation to a very important aspect of the trial.

The Section 40 proviso

- [51] Section 40 of **The Eastern Caribbean Supreme Court Act** ("Supreme Court Act")¹⁸ of Antigua and Barbuda provides as follows:

"40. (1) The Court of Appeal on any such appeal against conviction shall subject as 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:

Provided that 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.

(2) Subject to the provisions of this Act the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial..."

- [52] In the circumstances, this Court must decide whether the proviso under section 40 of the **Supreme Court Act** should, or should not, be applied.

¹⁸ Cap. 143 of the Revised Laws of Antigua and Barbuda.

- [53] The test to determine whether the proviso should be applied, or not, was laid down by Lord Hope who delivered the judgment of the Privy Council in the case of **Giselle Stafford and another v The State**.¹⁹ It is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence. Put differently, the question to be decided is whether no reasonable jury after a proper summing up could have failed to convict the accused on the remainder of the admissible evidence.
- [54] So, the question that I must seek to answer is whether the jury, had they been given the appropriate directions on recent complaints, would undoubtedly have convicted the appellant of rape and serious indecency upon their consideration of the admissible evidence.
- [55] The appellant had the opportunity to commit the crimes, since it was not in dispute that the virtual complainant was alone with him in his vehicle. It was also potentially damaging that a pink condom was found in the area where the virtual complainant said he had discarded the pink condom he had used while raping her. The potency of that evidence was diminished somewhat by the evidence of the police that the area was littered with garbage.
- [56] The potentially exculpatory evidence was that the doctor found no lacerations, abrasions, secretions, blood or semen when he examined the virtual complainant on the day of her complaint. Of course, the evidence of the absence of semen is not as strong as it might otherwise have been, given the allegation that a condom had been used. After the alleged attack the virtual complainant went with or allowed herself to be driven back by the appellant in his vehicle, to the appellant's internet café, which she also entered, got her assignment copied and was driven back to school by him. For his part, the appellant denied the assault and agreed to, and did, donate samples of his DNA to the police.

¹⁹ [1999] 1WLR 2026.

[57] I find myself unable to conclude that a reasonable jury, properly directed, confronted with this evidence would, inexorably have convicted the appellant of the charges against him. That being the position, the proviso cannot be applied and I must allow the appeal and quash the convictions for rape and serious indecency.

Should a retrial be ordered

[58] This is not, however, entirely dispositive of the appeal. It must now be determined whether or not the proper course is to order a re-trial. In **Reid v R**²⁰ Lord Diplock set out the test for determining whether to order a retrial in the following terms:

“(ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury.

(iii) It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case.

(iv) Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, *prima facie* the more appropriate course is to apply the proviso and dismiss the appeal.

(v) Among the factors to be considered in determining whether or not to order a new trial are: (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive.”

Seriousness and prevalence of the offences

[59] The charges against the appellant are serious and regrettably quite prevalent in our region. The fact that the virtual complainant was a minor adds to the gravity of the offences.

²⁰ [1978] 27 WIR 254.

Time and expense involved in a fresh hearing

- [60] The offences were committed on 12th April 2016. The appellant was convicted on 12th February 2019 and was sentenced on 15th April 2019. The matter will need to be retried before a jury and will entail unwelcomed expenditure for an already overburdened judicial system.

Ordeal suffered by an accused person on trial

- [61] There is no doubt that the appellant would have endured some degree of worry and anxiety during the three years that would have passed between the day that he was arrested and the date of his conviction.

The length of time that will have elapsed between the offence and the new trial

- [62] If a new trial is ordered it will take place over 6 years since the date of the commission of the alleged offence.

Whether the evidence which tended to support the defence on the first trial would be available at the new trial

- [63] There appears to be no doubt that the evidence which supports the appellant's case will continue to be available if a new trial is ordered.

The strength of the case presented by the prosecution

- [64] The case presented by the prosecution was to a marked degree dependent upon the word of the virtual complainant, although forensic evidence, including the appellant's DNA was collected by the police, but not submitted for testing.
- [65] The prosecution's case was not overwhelming but convincing enough to persuade a jury of the appellant's guilt.

- [66] The Privy Council in **Au Pui-Kuen v A-G of Hong Kong**²¹ identified another factor to be considered when trying to determine whether to order a new trial: a new trial should not be ordered if the effect would be to give the prosecution time to strengthen its case.
- [67] It is possible that a retrial would give the Crown a further opportunity to test the DNA samples in their position. However, this might also have the effect of destroying their case if the DNA result excludes the appellant. In any event, the fact is that even without any forensic evidence, the prosecution had managed to lead sufficient evidence to secure a conviction, so it cannot be said with any certainty that a retrial will play unfairly into the hands of the prosecution.
- [68] In **Che Gregory Spencer v The Director of Public Prosecutions**²² this Court explained some of the factors to be considered when determining whether to grant a retrial which were: fairness to the accused, the seriousness of the crime, whether ordering a retrial would be in the interest of justice and would serve the public interest.
- [69] I also bear in mind the warning of Lord Diplock in **Reid v R** that the Board would be loath to enumerate all the factors to be considered in determining whether to order a new trial and would leave it to the judges of the Court of Appeal to recognise the factors that are relevant to any particular case and the comparative weight to be attached to them. In the final analysis, Lord Diplock concluded, the decision required the exercise of the collective sense of justice and common sense of the judges of the Court of Appeal who are familiar with local conditions.
- [70] The offences for which the appellant was convicted are serious ones and undoubtedly the virtual complainant and her family would not relish the thought of going through a trial again. However, it would not be fair to the appellant to allow

²¹ [1979] 1 All ER 769.

²² SKBHCRA2009/013A (delivered 10th February 2014).

his conviction to stand. There can be no question that the evidence of recent complaint would have been prejudicial to him. It is also in the interest of the community at large that there is confidence in the ability of the machinery of justice to deliver a fair trial to those who appear before the courts.

[71] It is this latter factor which I consider the most compelling reason to order a new trial. In **Reid v R** Lord Diplock cited with approval the following statement of the law made in **Ng Yuk Kin v Regina**²³ which stated:

“It is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery”.²⁴

Conclusion

[72] The justice of the case requires therefore that the appeal be allowed, that the conviction and sentence be quashed and the matter remitted to the High Court for trial before a different judge. I so order.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gerald St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar

²³ (1955) 39 HKLR 49.

²⁴ Ibid at 60.