

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

SAINT LUCIA

SLUHCRA2017/0012

BETWEEN:

Gael Dariah

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal [Ag.]

Appearances:

Mr. Alberton Richelieu and Mr. Leslie Mondesir for the Appellant

Mr. Bernick Faisal for the Respondent

2020: December 8;
2021: March 10.

Criminal appeal – Rape – Appeal against conviction and sentence – Section 136 of the Evidence Act – Unreliable evidence – Warning to jury in respect of potentially unreliable evidence – Recent complaint – Section 53 of the Evidence Act - Whether learned judge properly directed the jury in accordance with section 136(2) of the Evidence Act in relation to the evidence of the virtual complainant and the evidence of the virtual complainant's husband — Section 35(1) of the Eastern Caribbean Supreme Court Act – If the learned judge failed to warn the jury in accordance with section 136(2)(b) whether the learned judge's failure to state any reason for not giving the section 136(2) warning was fatal.

The appellant, Gael Dariah, was convicted unanimously of the offence of rape and sentenced to a term of fifteen years imprisonment. At the trial, the Crown's case was that the appellant, the virtual complainant ("V.C.") and her husband, on 3rd December 2010, spent the day together partaking in a barbeque and patronising a bar in Castries. In the evening, the V.C.'s husband left the bar to go to work,

leaving behind the V.C., the appellant and one of the V.C.'s friends at the bar. At about 7pm, they decided to leave the bar, with the appellant offering to drive the V.C. to her mother's home and the V.C. accepting. However, once inside the vehicle, the appellant decided to drive in the direction of another bar located at Marisule. There at the bar, after some insistence by the appellant, the V.C. agreed to accept a beer.

After some time, the appellant and the V.C. left the bar and the appellant drove towards Castries, stopping at Vigie beach. There the appellant tried to unbuckle the V.C.'s belt and take off her pants but she protested, and a struggle ensued between them. The appellant pulled her hair, hit her in her face several times and choked her while the V.C. was screaming and trying to push him away. The V.C. thinking that appellant had a gun in the vehicle became scared and stopped resisting the appellant. It was then that the appellant pulled down the V.C.'s pants and had sexual intercourse with her. After, the appellant drove the V.C. to the road leading to her mother's home and she left the vehicle. The V.C. had bruises on her chest and face and her neck and thumb were swollen. The V.C. told her mother what had occurred. Her husband arrived subsequently, and she told him that the appellant raped her. Shortly thereafter, the V.C. made a report of the incident at the police station and was taken to the hospital, where she was examined by a doctor and received treatment. At the trial, the said doctor testified of the injuries she saw on the V.C. and that the V.C. appeared to be emotionally distressed.

The appellant in his case, admitted that he had sexual intercourse with the V.C., but he contended that the sexual intercourse was consensual. The appellant testified that while at the bar at Marisule, two men from the area where the V.C. lived and who were known to the V.C.'s husband entered the bar. This caused the V.C. to become afraid, however, the appellant reassured her and spoke to the men and bought them some beers. He subsequently left with the V.C. and they went to the Vigie beach where they had consensual sexual intercourse. After the sexual intercourse, he drove the V.C. to the road by her mother's home and kissed her good night. The appellant denied hitting the V.C. at any time, testifying that he had no idea how she received her injuries.

The jury, accepting the evidence of the V.C., found the appellant guilty of the offence of rape. Dissatisfied with his conviction and sentence, the appellant has appealed to this Court. The main issues that arise to be determined are: (i) whether the learned judge properly directed the jury in accordance with section 136 (2)(b) of the Evidence Act, firstly, in relation to the evidence of the V.C. and secondly in relation to the evidence of the V.C.'s husband; and (ii) if the learned judge failed to warn the jury in accordance with section 136(2)(b) whether the learned judge's failure to state any reason for not giving the section 136(2) warning was fatal.

Held: dismissing the appeal and affirming the conviction, that:

1. The fact that evidence falls within the ambit of one of the subparagraphs in section 136(1) of the Evidence Act does not automatically require a judge to give the section 136 (2) warning about the potential unreliability of evidence. The judge is required to consider the evidence and use his discretion as to whether the warning is necessary. In doing so, the judge should hear submissions from both sides. If the judge determines that a warning is necessary, then the judge must give the jury all three limbs of the warning in section 136 (2). If the judge determines that a warning is not required, then the judge should give reasons for this decision.

Sections 136(1) and (2) of the **Evidence Act**, Cap 4.15 of the Revised Laws of Saint Lucia applied.

2. In the present case, the appellant's arguments that the fact that the V.C. may have been seen in the company of the appellant alone by persons who knew the V.C.'s husband and that because the V.C. was wearing jeans, the likelihood of non-consensual intercourse was highly unlikely, required the judge to give a warning in accordance with section 136(2)(b), cannot be sustained. In relation to the first argument, the V.C. and the appellant's evidence conflicted on this issue. However, a mere conflict in evidence would not be a matter which would cause the V.C.'s evidence to be unreliable and therefore engage section 136. In relation to the second argument, section 136 is only engaged when there is an evidential basis. The mere suggestion by counsel to a witness that it was difficult to have non-consensual sex in the type of car, is not a sufficient basis to engage the section 136 warning. The learned judge therefore did not err by not giving a section 136(2) warning.

Gerald Joseph v The Queen SLUHCRAP2006/0002 (delivered 15th January 2007, unreported) distinguished; **Kyon Frederick v The Queen** SLUHCRAP2006/0008 (delivered 25th March 2009, unreported) distinguished; **Vincent Leroy Edwards and Richard Orlando Haynes v the Queen** [2015] CCJ 17 (AJ) applied; **R v Stewart** [2001] NSWCCA 260 considered.

3. Section 53 of the Evidence Act allows evidence of recent complaint to be admissible. Therefore, the evidence of the V.C.'s husband that, upon arriving at the V.C.'s mother's home, he saw the V.C. and was told by her that the appellant raped her (recent complaint), was admissible evidence in accordance with section 53. This meant that the evidence would be of a kind that fell within the ambit of section 136 and therefore section 136(2) would apply. The learned judge gave a direction in relation to the recent complaint evidence, however, this was not in compliance with section 136(2). As indicated above,

section 136 is not a mandatory but discretionary provision. However, the learned judge should have given his reasons as to why no warning was necessary. In view of the strong case put forward by the prosecution and having found that in the circumstances of this case that there were good reasons for the learned judge to exercise his discretion and not give the section 136(2) warning, the failure to give reasons did not lead to a miscarriage of justice and therefore the proviso in section 35 (1) of the Eastern Caribbean Supreme Court Act should be applied. The learned judge's failure to give reasons for not giving a section 136(2) warning, is therefore not fatal.

Section 53 of the **Evidence Act**, Cap 4.15 of the Revised Laws of Saint Lucia applied; Section 35 (1) of the **Eastern Caribbean Supreme Court (Saint Lucia) Act**, Cap 2.01 of the Revised Laws of Saint Lucia considered; **Gerald Joseph v The Queen** SLUHCRA2006/0002 (delivered 15th January 2007, unreported) followed; **Kyon Frederick v The Queen** SLUHCRA2006/0008 (delivered 25th March 2009, unreported) followed; **Crossdale v R** [1995] UKPC 1 considered; **Stafford v The State** [1999] 1 WLR 2026 considered; **Michael Freemantle v The Queen** [1994] 1 WLR 1437 considered; **Stubbs v The Queen** [2020] UKPC 27 considered.

JUDGMENT

- [1] **THOM JA:** On 17th March 2017 following a trial before a judge and a jury, the appellant was convicted unanimously of the offence of rape. On 11th July 2017, he was sentenced to a term of fifteen years imprisonment.
- [2] At the trial, the Crown's case was that the appellant, the virtual complainant ("V.C.") and her husband lived in the same area in Saint Lucia. The appellant and the V.C.'s husband were friends. On 3rd December, 2010, at the suggestion of the appellant, a barbeque was held at the home of the V.C. and her husband. The appellant provided the chicken and some wine. The appellant, the V.C., the V.C.'s husband and another friend of the V.C.'s husband participated in the barbeque.
- [3] After a few hours had elapsed, the appellant invited the V.C. and her husband to have drinks at a bar in a neighbouring area. The appellant drove to the bar in his vehicle and they joined him a few minutes later. The appellant, the V.C. and her

husband drank some beers at the bar and the appellant then invited them to meet him at a bar in Castries, where a karaoke show was in progress. The bar was next to his girlfriend's place of employment. They went to the bar in Castries and the V.C.'s friend who I will refer to as Jay, subsequently joined them.

[4] At approximately 5:30pm, the V.C.'s husband left the bar to go to work. The V.C. and her friend Jay remained with the appellant. At about 7pm, they decided to leave the bar. The V.C. had planned to go to her mother's home and her husband would join her there after work, as was the practice. The appellant offered to drive the V.C. to her mother's home and the V.C. accepted. Before joining the appellant in his vehicle, the V.C. accompanied her friend Jay to a bus stop.

[5] However, once inside the vehicle, the appellant decided to drive in another direction, away from the V.C.'s mother's home. When the V.C. enquired of him where he was taking her, he told her she should relax, as they were going for a drink.

[6] On their way to the bar, the appellant stopped at a gas station where he had a drink with two men while the V.C. remained in the vehicle. The appellant then drove to a bar located at Marisule where, after some insistence by the appellant, the V.C. agreed to accept a beer.

[7] After some time, the appellant and the V.C. left the bar and the appellant drove towards Castries. The appellant drove to the Vigie beach and parked the vehicle. He asked the V.C. for a kiss, but she refused. He then tried to kiss her, and she tried to escape from the car, but he prevented her from doing so. The appellant then tried to unbuckle her belt and take off her pants, but she protested, and a struggle ensued between them. The appellant pulled her hair, hit her in her face several times and choked her while she was screaming and trying to push him away. The appellant then reached under the car seat and the V.C. thinking that he was grabbing a gun became scared. The appellant asked her if she wanted to

see “how bad he could be.” At that stage, while still crying she stopped resisting the appellant. The appellant pulled down her pants and had sexual intercourse with her. The sexual intercourse lasted for about five to ten minutes.

[8] The appellant then drove the V.C. to the road leading to her mother’s home. When she got out of the car, she saw her step-uncle who accompanied her to her mother’s home. The V.C. had bruises on her chest and face and her neck and thumb were swollen. The V.C. told her mother what had occurred. Her husband arrived subsequently, and she told him that ‘Zack’ raped her. Shortly thereafter, the V.C., accompanied by her husband, mother and step-father went to the police station where the V.C. made a report of the incident.¹ The V.C. was taken to the hospital where she was examined by Dr. Joseph-Vitalis and she received treatment.

[9] Dr. Joseph-Vitalis testified of the injuries she saw on the V.C. In addition to the injuries mentioned by the V.C., the doctor testified that she also saw abrasions and redness of the vaginal wall and cervix. The entrance to the vagina was bruised. There was also redness at the back of the shoulder. The doctor also testified that the V.C. appeared to be emotionally distressed.

The Appellant’s Case

[10] The appellant admitted that he had sexual intercourse with the V.C. but he contended that the sexual intercourse was consensual.

[11] The appellant also admitted that he and the V.C. went to the bar at Marisule where they drank beers. On their way to the bar, he stopped by a gas station where he had beers with his brother and a friend. The V.C. remained in the car and drank a beer. While they were at the bar at Marisule, two men from the area where the V.C. lived and who were known to the V.C.’s husband entered the bar. The V.C. became afraid. The appellant testified that he told her not to worry, and that he went and spoke to the men and bought them some beers. He subsequently left

¹ Record of Appeal filed on 19th November 2018 at pages 59-61.

with the V.C. and they went to the Vigie beach, where they kissed and had consensual sexual intercourse. The appellant denied hitting the V.C. at any time. After the sexual intercourse he drove the V.C. to the road by her mother's home and kissed her good night and she left. He then went to collect his girlfriend.

- [12] Under cross-examination, the appellant testified that he had no idea how the V.C. received the injuries she testified that she had, and the injuries the doctor testified that she saw on the V.C. He did not see the V.C. with any injuries and he did not cause her to get any injury.

The Appeal

- [13] In his notice of appeal, the appellant appealed against both his conviction and sentence. He outlined four grounds of appeal as follows:

- “1. The learned judge failed to adequately put the defense to the jury.
2. The learned judge failed to consider s.136 of the Evidence Act properly and properly relate the law to the facts of the case.
3. The learned judge failed to instruct the jury on the good character of the appellant.
4. The sentence is excessive.”

- [14] At the hearing, the appellant did not pursue grounds 3 and 4. Learned counsel for the appellant Mr. Richelieu, argued grounds 1 and 2 together.

- [15] Learned counsel contends that the learned judge did not properly direct the jury in accordance with section 136 of the Saint Lucia **Evidence Act**.² Firstly, in relation to the evidence of the V.C. and secondly in relation to the evidence of the V.C.'s husband.

Direction on V.C.'s Evidence

- [16] In relation to the V.C.'s evidence, learned counsel submitted that the sole issue before the jury being whether the sexual intercourse was without the consent of the V.C., the issue of reliability of the V.C.'s evidence was critical. It was therefore imperative that the learned judge comply fully with the provisions of section 136.

² Cap. 4.15, Revised Laws of Saint Lucia.

[17] Learned counsel submitted that the judge's direction fell short of what is required in section 136. He referred to the following aspects of the summation where the learned judge dealt with the issue of reliability:

"Let me tell you from the outset, you are obliged to follow and accept my directions to you on the law. I will tell you at a certain stage about the ingredients of the offence of rape. I will also tell you of the defense raised by the Defendant and that is one of consent.

...

It follows, therefore, that whatever I tell you about the law you are to accept it without question... You will do so having regard to the whole evidence and by forming your own judgment about witnesses and which evidence is reliable and which is not.

...

Members of the jury... (V.C.) is the only one (sic) who testified to an act of sexual intercourse taking place... testified on behalf of the Crown rather of an act of sexual intercourse taking place between her and the [Appellant]; she said it was without her consent. You must cautiously and carefully examine her evidence to determine if it is reliable. Now, as you may be aware allegations of rape can be easily concocted and they are difficult to defend. So, if you find her evidence not to be reliable, and no more than a tissue of lies, then you must reject it. If, however, having taken my warnings into consideration you are satisfied to the extent that you feel sure that her evidence is truthful and reliable then you may act upon it and give such weight as you think fit; it's a matter for you."³

[18] This direction learned counsel submitted, was woefully inadequate since the learned judge failed to warn the jury in accordance with section 136(2)(b) of the **Evidence Act**. The learned judge failed to identify the matters that may cause the V.C.'s evidence to be unreliable. Learned counsel relied on the decisions of this court in **Gerald Joseph v The Queen**⁴ and **Kyon Frederick v The Queen**⁵ and the decision of the Caribbean Court of Justice in **Vincent Leroy Edwards and Richard Orlando Haynes v the Queen**⁶ and decisions from the Australian New

³ Record of Appeal filed on 19th November 2018 at pages 338-339 and 350.

⁴ SLUHCRA2006/0002 (delivered 15th January 2007, unreported).

⁵ SLUHCRA2006/0008 (delivered 25th March 2009, unreported).

⁶ [2015] CCJ 17 (AJ).

South Wales courts including **R v Stewart**.⁷ Learned counsel conceded that the learned judge's direction in relation to sub-paragraphs (2)(a) and (c) of the **Evidence Act** were adequate.

- [19] Mr. Faisal for the Crown submitted that the learned judge complied fully with section 136 of the **Evidence Act**.⁸ The learned judge used words that the jury was likely to understand. Section 136(2)(b) did not put an obligation on the learned judge to point out to the jury what evidence the judge believed to be unreliable evidence, since a jury may not be of the same view. He contended, reliability being a question of fact, it is a matter for the jury to determine which evidence is reliable and which is not.
- [20] Learned counsel further submitted that the proper interpretation of section 136(2)(b) is that the judge is required to inform the jury of matters having regard to the circumstances of the case that would make the V.C.'s testimony unreliable. In other words, the learned judge is required to look at the surrounding circumstances of the case and determine whether any aspect of the case casts doubt on the reliability of the V.C.'s evidence. The matters referred to by the appellant are not matters which may cause the V.C.'s evidence to be unreliable.
- [21] The matter which could have made the V.C.'s evidence in this case to be unreliable was the fact that she was the only one who testified of the sexual intercourse between herself and the appellant and the learned judge did so when he directed the jury that: "(V.C.) is the only one who has testified on behalf of the Crown to an act of sexual intercourse taking place between her and the defendant...you must cautiously and carefully examine her evidence to determine if it is reliable."⁹

Discussion – Direction on V.C.'s Evidence

⁷ [2001] NSWCCA 260.

⁸ See paragraph 22 below.

⁹ Supra n. 2.

[22] The relevant part of section 136 of the **Evidence Act** reads as follows:

- “(1) This section applies in relation to the following kinds of evidence -
 - (a) evidence in relation to which Division 1 or 3 of Part 4 applies;
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) in the case of a prosecution for an offence of a sexual nature, evidence given by a victim of the alleged offence;
 - (f) ...
- (2) Where there is a jury the Judge shall, unless there are good reasons for not doing so -
 - (a) warn the jury that the evidence may be unreliable;
 - (b) inform the jury of matters that may cause it to be unreliable; and
 - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
- (3) It is not necessary that a particular form of words be used in giving the warning or information.
- (4) This section does not affect any other power of the Judge to give a warning to, or to inform the jury.”

[23] Section 136 of the Saint Lucia Evidence Act is identical to section 137 of the Barbados Evidence Act.¹⁰ Both provisions have been drafted in similar terms to section 165 of the Australian Evidence Act.¹¹

[24] Section 136 is based on the common law requirement that the trial judge is required to give a warning to the jury in respect of potentially unreliable evidence. Over the years the common law established certain categories of evidence, such as evidence of an accomplice, child of young age, the complainant in a sexual offence case etc., where judges are required to warn the jury about the potential unreliability of the evidence, the reason why the evidence might be unreliable and the way such evidence should be considered, being, usually with caution.

[25] The common law also recognised that in some instances there may be potentially unreliable evidence which did not fall within the established categories and yet a

¹⁰ Laws of Barbados Cap 121.

¹¹ Act 25 of 1995.

warning to the jury would be required to maintain the fairness of the trial such as evidence of a witness with an interest to serve. Section 136 embodies those common law principles. Section 136(4) of the **Evidence Act** recognises that a trial judge has power to inform the jury or to give warning in respect of the evidence in the trial in addition to the categories of evidence identified in subsection (1).

[26] The fact that evidence comes within one of the sub-paragraphs in section 136(1) does not automatically give rise to the requirement for the judge to give the warning in accordance with section 136(2). The section is not mandatory but discretionary. This was recognised in both **Gerald Joseph v The Queen** and **Kyon Frederick v The Queen**. The judge is required to consider the evidence and decide whether the warning is necessary. In considering the matter, the judge should hear submissions from both sides. If the judge determines that it is necessary to give a warning, then the judge must give the jury all three limbs of the warning. This was emphasised by Saunders P in **Edwards and Haynes v The Queen**, where recently the Caribbean Court of Justice considered the application of section 137 of the Barbados Evidence Act. The CCJ held that if the judge determines that a warning is not required, then the judge should give reasons for his/her decision. The reasons could be briefly outlined.

[27] In support of his submission that the learned judge failed to give the warning required in section 136(2)(b), Mr. Richelieu identified the following as matters which the learned judge was required to inform the jury that may have caused the V.C.'s evidence to be unreliable:

- (1) The fact that the V.C. may have been seen in the company of the appellant alone, [by persons] who knew the V.C.'s husband.
- (2) The fact that the V.C. acknowledged that after the beers she was not drunk but lightheaded.
- (3) The fact that because the V.C. was wearing jeans, the likelihood of non-consensual intercourse was highly unlikely.

[28] In relation to the first contention, it is necessary to review the evidence as it relates to this.

[29] Under cross examination, the V.C. testified that when the appellant took her to the bar at Marisule, while she was there in the company of the appellant, two young men from the area where she and her husband resided entered the bar. It was suggested to the V.C. on more than one occasion that, she was worried that the young men would report to her husband that she was at the bar with the appellant. The V.C. repeatedly denied this and testified that she was worried about getting to her mother's home. This evidence must also be taken in the circumstances of this case where the V.C.'s husband left her alone with the appellant at their home when the V.C.'s husband and his friend went to purchase more wine for the barbeque. The V.C.'s husband again left her with the appellant at a bar in Castries, albeit her friend was there also. The appellant in his testimony stated that the V.C. was concerned when she saw the two men and she told him that they were good friends of her husband and that she did not wish to stay at the bar; she wanted to go to some other place. The jury heard her testimony that she was not worried about the young men's presence at the bar and they heard the evidence of the appellant that she was worried. The V.C. and the appellant's evidence conflicted on this issue. It is quite common for the evidence of the prosecution and the evidence of an accused person in cases of sexual offences to be inconsistent. A mere conflict of evidence between the V.C. and the appellant would not be a matter which may cause the V.C.'s evidence to be unreliable and therefore engage the provisions of section 136. In my view, this is not the sort of matter that is contemplated in section 136(2)(b) that the learned judge is required to inform the jury may cause the V.C.'s evidence to be unreliable. The section relates to matters which have the potential to make the evidence unreliable. What amounts to such a matter will depend on the circumstances of the case.

[30] In relation to the second matter, learned counsel did not pursue this matter at the hearing, in my view rightly so, since it had no merit.

[31] In relation to the third matter, the evidence of the V.C. is that the sexual intercourse was non-consensual. The V.C gave evidence that she was resisting the appellant. However, after she thought he had a gun when he reached under the seat of the car, she stopped resisting and the appellant unbuckled her pants, pulled it down and had sexual intercourse with her. The appellant's evidence on the other hand is that consensual intercourse occurred in the car. There was also no evidence from either the V.C. or the appellant that there was any difficulty in him having sexual intercourse with her in the car because of the size of the car. For section 136 to be engaged there must be an evidential basis. The mere suggestion by counsel to a witness that it was difficult to have non-consensual sex in the type of car that sexual intercourse occurred is not a sufficient basis to engage the section 136 warning.

Recent Complaint

[32] In relation to the evidence of the V.C.'s husband, learned counsel Mr. Richelieu, submitted that the evidence of what the V.C. told her husband being, "Zack raped me", which was hearsay evidence, was admitted as evidence of recent complaint not to show consistency as was the situation at common law, but under the **Evidence Act** as evidence of the truth. The learned judge was therefore required to direct the jury that the evidence was admitted as evidence of the truth and to give them the warning in accordance with section 136. Learned counsel relied on the following paragraphs in the decision of the New South Wales Court of Appeal in **R v TJF**:¹²

"55. By its very nature, evidence of complaint being hearsay evidence, may be unreliable for a few reasons expressed in the report of the Australian Law Reform Commission which led to the enactment of the Evidence Act 1995. These reasons are identified in Uniform Evidence Law by Odgers, 4th ed. at p.413 and many be restated as follows:

- (a) The potential compounding of weakness of perception, memory, narration skills and sincerity when evidence of the fact is given second hand.

¹² [2001] NSWCCA 127 at para 55.

- (b) The statement to the witness is not testable by cross-examination.
- (c) The statement made to the witness not being made in a court environment and thus potentially more susceptible to pressures which might result in a false account.
- (d) The statement made to the witness not being made on oath or affirmation in the solemn, context of proceedings in court.”

[33] In that case, the court stated that (a) applied, but not exclusively by reason of delay in complaint (as the appellant’s counsel said it did). Consideration (b) did not apply because the complainants were called as witnesses and were accordingly available for cross-examination on what they allegedly told others. Consideration (c) applied but not exclusively, because of the circumstances in which the complaint by one of the victims was made (as counsel for the appellant said it did). Consideration (d) applied to the evidence of complaint in the circumstances of this case.

[34] Mr. Richelieu submitted that the learned judge was required to give similar considerations in giving the section 136 warning which he failed to do. Mr. Richelieu however, acknowledged that section 136 does give the judge a discretion whether to give the warning, but he argued that where the judge decides not to give the warning, then the judge is required to give his reasons for not doing so. Learned counsel relied on the case of **Kyon Fredrick v The Queen**. Learned counsel submitted further, that the error of not giving the warning and the learned judge having failed to give any reasons for not giving the warning meant that the appellant’s defence was not properly put to the jury and his trial was therefore unfair. He contended that, the trial being unfair, this Court should allow his appeal.

[35] Mr. Faisal in response submitted that the cases of **R v Ashraf A**¹³ and **R v H**¹⁴ would be instructive on this point. In **R v Ashraf A**, the UK Court of Appeal held

¹³ [2011] EWCA Crim 1517.

¹⁴ [2011] EWCA Crim 2344.

that 'the risk to be guarded against is the risk that the jury may think, wrongly, that evidence from a witness to whom complaints were made by the complainant is independent evidence of the events described by the complainant.' In **R v Ashraf A** Pill LJ continues:

"[I]ts relevance is to assist the jury in their assessment of whether the complainant's evidence is credible and reliable. If no complaint is made for a substantial time after the events complained of, that may cause a jury, depending on how they regard it, to doubt the truthfulness of the complainant's account of events. A timely and cogent complaint, on the other hand, may assist the jury in concluding that her account is accurate. It all depends on the circumstances and how the jury regard them."

[36] In **R v H**, the defendant was charged with various counts of sexual abuse against his three stepsons. At the trial, the virtual complainants each gave evidence of the abuse, in addition to their mother who gave evidence that they had complained to her about the abuse. In his summing up, the judge did not direct the jury that the evidence of the recent complaint to the mother was not independent evidence. However, he stated that there were 'no independent witnesses'. He gave a clear direction as to difficulties that historic abuse might present for a defendant and warned the jury of a danger of real prejudice to a defendant. The defendant was convicted and was sentenced to a total of 15 years' imprisonment. However, he appealed against conviction submitting that the judge had misdirected the jury in failing to tell them that the brothers' complaint to their mother was not independent evidence. The appeal was dismissed with the UK Court of Appeal finding that the judge's directions had been fair, helpful and to the point. Although his direction was not expressly stated in the context of the evidence about the complaints of the brothers to their mother, it had followed, consistently with the whole of his summing up, that what mattered for the purpose of proving the case was the complainants' evidence, for 'there are no independent witnesses'. That came close to a direction that evidence of complaints was not independent evidence.

[37] Mr. Faisal submitted that having regard to the learning in **R v Ashraf A** and **R v H** the following direction given by the learned judge was indeed adequate:

“Now members of the Jury, you have heard the witnesses say that... V.C. told him that she was raped, now that is evidence which is allowed to show that a recent complaint was made. It just goes to show consistency in the complainant’s report. It does not amount to corroboration or support for her story. So, that is all you must treat it as... She said it and it could only be used to show that she was consistent in what she was saying and as I said it does not amount to corroboration. That’s a matter for you.”

- [38] Mr. Faisal further submitted that having regard to the circumstances of the case, there was no other matter which the learned judge was required to inform the jury of that may cause the evidence to be unreliable.

Discussion – Recent Complaint

- [39] Section 136 (1) (a) applies to evidence which falls within the ambit of Division 1 or 3 of Part 4 of the **Evidence Act**.

- [40] Evidence of recent complaint is included in section 53 (2) of Division 1 in Part 4. Section 53 reads:

“53. EXCEPTION: CRIMINAL PROCEEDINGS WHERE MAKER AVAILABLE

- (1) Where the conditions specified in subsection (2) exist then, in criminal proceedings, if the person who made a previous representation is available to give evidence about an asserted fact, the hearsay rule does not apply in relation to evidence of the previous representation that is given by-
 - (a) that person; or
 - (b) a person who saw, heard, or otherwise perceived the representation being made.
- (2) The conditions referred to in subsection (1) are-
 - (a) that at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; and
 - (b) that the person who made the representation has been or is to be called to give evidence in the criminal proceedings.”

- [41] The above provisions allow a person to give what would otherwise have been excluded as hearsay evidence.

[42] The evidence of the V.C.'s husband that when he went to the V.C.'s mother home and he saw the V.C. she told him "Zack raped me" was admissible evidence in accordance with section 53 since the representation was made the same evening that the incident occurred and the V.C. who made the representation was called as a witness in the proceedings. The evidence would therefore be of a kind which fell within the ambit of section 136. Therefore subsection (2) would apply to the evidence of recent complaint given by the witness. In such a case, the learned judge would be required to exercise his discretion whether to give the warning in relation to the evidence. If the learned judge determined it was not necessary to give the warning, then he should have stated his reasons as to why no warning was necessary.

[43] In this case the witness who gave evidence of recent complaint was the V.C.'s husband. The learned judge gave the jury the following direction in relation to the evidence:

"Now members of the jury, you heard the witness say that... (V.C.) told him that she was raped, now that is hearsay evidence which can show that a recent complaint was made. It just goes to show consistency in the complainant's report. It does not amount to corroboration. That's a matter for you."

[44] In my view, this direction is not in compliance with section 136(2). Where the warning is necessary, the judge is required to direct the jury on all three limbs. As indicated earlier, section 136 is not a mandatory but discretionary provision. Even though the evidence falls within the kind of evidence outlined in section 136(2) the learned judge is not mandated to give the warning. This is one of these situations where although the evidence of the V.C.'s husband fell within section 136(1)(a), having regard to the circumstances of the case there was good reason for the warning not to be given.

[45] There were no matters that might cause the evidence of the V.C.'s husband to be unreliable. There was no contradiction between the evidence of the V.C. and the

V.C.'s husband. Further, the complaint was made the same evening. The evidence of the V.C.'s husband was not challenged. There was simply no cross-examination. In the circumstances, there was no need for the warning to be given. However, the learned judge should have given his reason why no warning was necessary.

- [46] The question which arises is whether the failure to state any reason for not giving the warning in accordance with section 136(2) was fatal. Learned counsel Mr. Richelieu submitted that it was fatal, and the Court should not seek to apply the proviso in Section 35(1) of the **Eastern Caribbean Supreme Court (Saint Lucia) Act**.¹⁵ He referred the court to the dictum of Lord Steyn in **Crossdale v R**¹⁶ at paragraph 33:

“Their Lordship have been greatly troubled by the correct disposal of this appeal. The Prosecution’s case based on the recognition evidence of witnesses was very strong, and Crossdale explanation was transparently weak. On the other hand, even a defendant against whom the cards are stacked is entitled to have his case fails presented to the jury.”

- [47] Mr. Richelieu referred to the cases **Gerald Joseph** and **Kyon Fredrick** and pointed out that in both cases where no warning was given and no reasons for not doing so were given, the appeals were allowed. Mr. Richelieu urged us to do likewise in this case and not apply the proviso.
- [48] Mr. Faisal in response urged the Court to apply the proviso if the Court was of the view that the learned judge’s direction was not in compliance with section 136(2) and he erred in failing to give reasons for not doing so. Mr. Faisal relied on the Australian cases of **Festa v The Queen**¹⁷ and **Domican v The Queen**.¹⁸

- [49] Section 35 (1) of the **Eastern Caribbean Supreme Court (Saint Lucia) Act** states:

¹⁵ Cap. 2.01, Revised Laws of Saint Lucia.

¹⁶ [1995] UKPC 1.

¹⁷[2001] HCA 72.

¹⁸ [1992] HCA 13.

“Provided that the Court of Appeal may notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.”

[50] The UK proviso is in the same terms as section 35(1). The UK provision was considered in **Stafford v The State**¹⁹ where Lord Hope succinctly outlined the principles governing the application of the proviso as follows:

“The test which must be applied to the application of the proviso 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; see Woolmington v Director of Public Prosecutions... Viscount Simon LC said that the provision assumed: “a situation where a reasonable jury after being properly directed, would, on the evidence properly admissible, without doubt convict.” As he explained later... where the verdict is entitized on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury after a proper summing up; could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its’ inadmissibility. Where the verdict is criticized on the ground of a misdirection such as that in the present case, and no question has been admissible evidence, the application of the proviso will depend upon on examination of the whole of the facts, which were before the jury in the evidence.”²⁰

[51] This approach was applied in **Michael Freemantle v The Queen**²¹ an appeal from the Court of Appeal of Jamaica where the Privy Council (“P.C”) found that having regard to the strength of the prosecution’s case, the misdirection did not result in a miscarriage of justice and applied the proviso and dismissed the appeal. The P.C. also applied this approach in **Stubbs v The Queen**²² on appeal from the Court of Appeal of the Bahamas. The P.C. declined to apply the proviso where the misdirection related to the central issue in the case was whether the appellant acted in self-defense. Their Lordships stated that they could not be sure that no miscarriage of justice had occurred since there could have been a different outcome even if improbable, had the learned judge give the proper direction.

¹⁹ [1999] 1 WLR 2026.

²⁰ Ibid at 2029.

²¹ [1994] 1 WLR 1437.

²² [2020] UKPC 27.

[52] In considering whether the proviso should be applied, the court is required to look at the admissible evidence that was led and determine whether if the jury were properly directed the jury would inevitably have come to the same conclusion. Applying this approach, I have no doubt that the proviso should be applied. The prosecution presented a formidable case against the appellant. None of the witnesses were contradicted under cross-examination. The defence was consent. This had to be viewed in the light of the several injuries on the body of the V.C. which was seen by the uncle immediately after the V.C. exited the appellant's car. The doctor who examined the V.C. later that evening also testified of the several injuries seen on her body. The appellant when cross-examined on this issue simply stated he did not know how the V.C. received those injuries. In view of the very strong case put forward by the prosecution and having found that in the circumstances of this case there were good reasons for the learned judge to exercise his discretion and not give the section 136(2) warning, the failure of the judge to state the reasons for not giving the warning did not lead to a miscarriage of justice. The fairness of the trial of the appellant was not in any way affected. The error in this case was not a misdirection but rather a failure to give reasons as to why a direction was not given in accordance with section 136. This case is distinguishable from **Gerald Joseph** and **Kyon Fredrick**. In both **Joseph and Fredrick**, the circumstances of those cases required the learned judge to give the section 136(2) warning. The failure to do so amounted to a misdirection. The evidence of the prosecution was weak and the Court therefore could not be sure that if properly directed the jury would inevitably have returned the same verdict.

[53] In conclusion, for the reasons stated above the appeal against conviction is dismissed. The conviction of the appellant is affirmed.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Margaret Price-Findlay
Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]