

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

SAINT LUCIA

SLUHCRA2020/0002

BETWEEN:

BARY MC MILAN HUNTE

Appellant

and

THE KING

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward,
The Hon. Mr. Reginald Armour

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

Appearances:

Mr. David R. Francis for the Appellant
Mr. Daasrean Greene, Director of Public Prosecutions, for the Respondent

2025: May 22;
October 29.

Criminal appeal – Appeal against conviction and sentence – Section 132 and 133 of the Criminal Code of Saint Lucia - Buggery – Gross Indecency – Directions to Jury – Section 136 of the Evidence Act of Saint Lucia – Unreliability warning – Whether the judge failed to give a proper unreliability warning as required by section 136(1)(e) and (2) of the Evidence Act – Good Character Direction – Whether the judge erred in failing to give a good character direction – Recent complaint – Whether the learned judge failed to direct the jury on how to treat with the evidence of the Virtual Complainant that he told his mother what happened in circumstances where there was no admissible evidence of recent complaint – Whether the conviction unsafe – Application of the proviso

The appellant, a police officer, was convicted before a judge and jury on one count of buggery (contrary to section 133(1)(a) and one count of gross indecency (contrary to section 132(1)) of the Criminal Code of Saint Lucia) against a 14-year-old boy, (the Virtual Complainant or VC) in 2008. He was sentenced to concurrent terms of 18 years and 4 years imprisonment, respectively. The VC's testimony detailed a violent and prolonged episode of anal penetration with what he described as the appellant's "gigantic" and "extremely huge"

erect penis, so much so that he bled. The medical examination conducted shortly after the incident, however, revealed no abrasions, lacerations, redness, or other evidence of injury in the perianal region. The Crown's case relied primarily on the VC's evidence, supported by forensic evidence of spermatozoa detected on an anal smear. The appellant denied all sexual activity, claiming the VC made advances toward him which he rebuffed. The appellant appealed against both conviction and sentence.

At the hearing, the appellant was granted leave to amend his Notice of Appeal to argue 4 grounds of appeal against conviction: (1) the trial judge failed to give a proper unreliability warning as required by section 136(1)(e) and (2) of the **Evidence Act**; (2) the learned judge erred in failing to give a good character direction; (3) the learned judge failed to direct the jury on how to treat with the "evidence of recent complaint"; and (4) that the numerous errors by the judge render the conviction unsafe. The grounds of appeal against sentence were that the court failed to give adequate or any consideration to the issue of delay and failed to consider it as a mitigating factor necessitating a discount. Secondly, the judge gave no consideration to the appellant's prospects of rehabilitation.

Held: allowing the appeal, quashing the conviction and setting aside the sentence, that:

1. Section 136 of the **Evidence Act** prescribes that unless there are good reasons for not doing so, a judge presiding over a jury trial shall give an unreliability warning. The focus of section 136(1)(e) is the evidence of the victim of the sexual offence and it is to his or her evidence that the warning is directed. First, the judge must direct the jury that the evidence may be unreliable. Secondly, the judge must identify the tangible factors or features of the evidence that may cause it to be unreliable and explain why and thirdly, the judge must warn the jury to exercise caution in approaching two aspects of their task: (i) whether to accept the victim's evidence at all and (ii) in deciding what weight to attach to it.
2. The section 136(2) warning contemplates that a searching light will be trained on the evidence of the VC after the jury has been told that his evidence may be unreliable. This did not happen in this case. First, the judge gave no clear warning that the VC's evidence may be unreliable. Secondly, the judge was required to, but did not, identify those matters that might have caused the VC's evidence to be unreliable. The most glaring feature of the evidence that potentially made the VC's evidence unreliable was the medical evidence which recorded an absence of any injury, lacerations or abrasions to the VC's anus. The judge failed to specifically draw the medical evidence to the jury's attention and to explain to them that it could potentially make the VC's evidence unreliable as it could possibly be seen as inconsistent with his detailed account of a violent and prolonged sexual assault. The learned judge was further required to warn the jury that there was a need for caution in accepting or assigning weight to the evidence of the VC as a result of the matters that made his evidence unreliable and explain why. Although the failure to give the unreliability warning does not ineluctably lead to the quashing of a conviction, in this case, there is no other evidence implicating the appellant. In a case where it was the VC's words against the appellant, the need for a full and adequate unreliability warning is brought into high relief. The learned judge therefore erred in failing to

properly and adequately discharge her duty to give the unreliability warning, and this error is fatal to the conviction.

Section 136 of the **Evidence Act Chap. 4.15 of the Revised Laws of Saint Lucia** applied; **Edwards and Haynes v The Queen** [2017] CCJ 10 (AJ) applied; **Mitchel Joseph v The Queen** SLUHCRA2011/0001 (delivered 8th July 2013, unreported) distinguished; **Derek Cort v The Queen** BVIHCRA2010/0004 (delivered 19th December 2013, unreported) distinguished.

3. Where a person has no convictions of any relevance or significance, he is regarded as being of good character and is entitled to the benefit of a good character direction and the judge must give one as a matter of course and not discretion when summing up to the jury. The judge must explain the relevance of a defendant's good character to the issues in the case. The standard good character direction consists of two limbs: credibility and propensity. The credibility direction instructs that a person of good character is more likely to be truthful than one of bad character. This limb is given where the accused gives evidence or when he relies upon an account given in an interview. The propensity direction tells the jury that he is less likely to commit a crime, especially one of the nature with which he is charged. This limb of the good character direction is given whether or not the accused has given evidence or an account in an interview. Given that credibility was the central issue in the case, the complete absence of the good character direction was a material irregularity that affected the fairness of the trial and renders the conviction unsafe.

Teeluck and John v The State (Trinidad and Tobago) [2005] UKPC 14 applied; **France and Vassell v The Queen** [2012] UKPC 28 applied; **Jagdeo Singh v The State** [2005] UKPC 35 applied.

4. At common law, there is a general prohibition against a witness being asked in evidence-in-chief whether he or she has previously made a statement consistent with their present testimony, and the witness may not recite that previous statement and no witness may testify about it either. This is sometimes described as the rule against proof of previous self-consistent statements. To this rule there are two exceptions. One exception concerns sexual offence cases where the VC makes a complaint at the first reasonable opportunity after the offence. In such circumstances, evidence of that complaint can be given to show the VC's consistency and to negative consent. However, for there to be evidence of recent complaint, the complainant must testify about making the complaint and the person to whom the complaint was made must give evidence of what was said to them by the VC.
5. In this case, the VC testified that when he got home, he told his mother what happened. There was no evidence before the jury which could be regarded as recent complaint because, as is common ground and as the judge correctly ruled, the VC's mother did not give evidence of what the VC had told her. In those circumstances, the judge was obliged to direct the jury to disregard the VC's evidence in this regard and the failure to do so was a serious misdirection.

Sheldon Thomas v The Queen Criminal Appeal No. 11 of 2002 (delivered 20th October 2003, unreported) followed; **Kory White v The Queen** (1997) 53 WIR 293 applied; **David Jobe v The Queen** Criminal Appeal No. 23 of 2003 (delivered 20th September 2004, unreported) followed.

6. Section 35 of the Supreme Court Act identifies three grounds on which the Court of Appeal may allow an appeal and overturn a conviction. The proviso permits the Court of Appeal, notwithstanding the existence of any such ground, to uphold the conviction if it is satisfied that there has been no miscarriage of justice. The question is whether the jury would inevitably have returned the same verdict had they been properly directed or the irregularity had not occurred; or more appropriately, whether the appellate court is satisfied that the jury would have returned the same verdict had the direction been given. If the court is so satisfied, the verdict will stand; where the court entertains reasonable doubt that the same verdict would have been returned, the fairness of the trial is brought into question and conviction is unsafe and should be set aside. In this case, the three misdirections identified in this judgment all impacted in a significant way the critical issue of the VC's credibility. Considering the evidence as a whole, and given the absence of these three important directions, there is a reasonable doubt that the jury would have returned the same verdict had the judge properly directed them on each of these matters. The deficiencies in the summing up make it impossible to say that no miscarriage of justice has occurred. This is therefore not an appropriate case for the application of the proviso.

Section 35 of the **Eastern Caribbean Supreme Court Act Chap 2:01** applied; **Carlton Junior Hall v The Queen** applied; **Stafford & Carter v The State** applied.

7. Considering the serious misdirections, the fact that the prosecution's case cannot be described as overwhelming, the passage of 17 years since the alleged incident in 2008, and the substantial time already served by the appellant, a retrial is deemed inappropriate.

Reid v R (1978) 27 WIR 254, PC applied.

JUDGMENT

- [1] **WARD JA:** On 29th February 2008, a 14-year-old boy reported to police that the appellant, Bary Hunte, a police officer, had lured him to a house where he buggered and performed acts of gross indecency on him. The appellant was charged with one

count of buggery contrary to section 133(1)(a) of the **Criminal Code** of Saint Lucia¹, and one count of gross indecency contrary to section 132(1) of the said Criminal Code. At trial, he was convicted of both counts before a judge and jury. The judge sentenced him to eighteen years imprisonment on the count of buggery and 4 years imprisonment on the count of gross indecency, both sentences to run concurrently. He appeals against both conviction and sentence.

The prosecution's case

- [2] The summary that follows contains some fairly graphic details. As will become apparent later in this judgment these details are central to one of the main issues arising on the appeal. In 2008, the Virtual Complainant ("the VC") was 14 years old. He knew the appellant, through his mother and because the appellant used to visit his school (Bocage Secondary) to teach the D.A.R.E. (Drug Abuse Resistance and Education) program. On 29th February, **2008** the VC's mother took him to the Marchand Police Station in connection with an unrelated matter. There, the appellant instructed the mother to leave the VC so he could receive counseling from other officers. Later that day, the appellant allegedly asked the VC to follow him, telling him he would be taking him to see the two officers. Instead, he led him to his (the appellant's) mother's house at Cedars Road. The appellant invited the VC into the house. Upon entering, the appellant asked him to sit on a chair at the dining table. The VC testified that when he sat down, he was "shaky" because he was wondering, "what am I doing there?". After he sat down, the appellant went into the kitchen. Upon his return he asked the VC if he was afraid of him. The VC told him no. The appellant then sat on a sofa opposite the VC and started to talk to him about sex. Specifically, he asked the VC if he had ever taken a big "cock". The VC told him no. He got up from the sofa and sat next to the VC on the dining chair. He unbuttoned the VC's pants and started fondling the VC's penis. He then rose and stood in front of the VC, unfastened his pants, removed his underwear and asked the VC to suck his penis. The VC refused to do so, and for that the appellant slapped him. The VC therefore complied. After a while the appellant instructed him to stand.

¹ Chap 3.01 of the Revised Laws of Saint Lucia.

He kissed the VC and took him to the bedroom. There he undressed the VC and placed him on the bed. He then applied grease to the VC's anus, applied cream to his own penis, placed the VC's two legs on his shoulder and inserted his erect penis, which the VC described as "very gigantic in size and long." The VC testified that the appellant had to make several attempts to penetrate his anus because it was tight and the appellant's penis was "extremely huge". The appellant eventually inserted his penis and had sex with the VC for between 15 to 20 minutes initially. The appellant then turned the VC onto his side, re-inserted his penis into his anus and continued to have sex with him for a while longer. He then placed the VC on his knees and penetrated his anus from behind and continued to have sex with him. The VC testified that intercourse in this position lasted a little longer than in the other two positions. The VC further testified that the appellant had discharged spermatozoa in his anus because when the appellant withdrew his penis he looked back and observed sperm on the back of his right leg. The appellant wiped it off with a piece of tissue and used the same tissue to wipe his penis. The appellant then told the VC to go "wash out the evidence". Using an outdoor shower, the VC opened the tap to feign that he was showering but he did not in fact do so. He then went back into the house and got dressed and went home.

- [3] The VC testified under cross-examination that after the incident he observed blood on the bedsheet. He said he would not have known if blood was coming from any part of his body when he pretended to shower because he was in pain. He also testified that after returning home, when he eased his bowels and wiped himself, he noticed blood. He had a conversation with his mother, and she took him to the police station where he made a report and gave a statement.
- [4] He was medically examined by Dr. Kimberly Johnny, who examined and took swabs of his mouth, anus and other bodily samples. The Crown's case relied on forensic evidence which established that an anal smear taken from the VC's anus and later tested by a Forensic Analyst, which revealed the presence of spermatozoa.

The appellant's case

- [5] The appellant opted to give evidence in his defence. He denied having any form of sexual intercourse or activity with the VC on the day in question. According to him, on the day the VC visited the Police Station with his mother, he asked him to wait to be interviewed by two social workers. He had difficulty contacting either social worker and proceeded to conduct an interview with someone else in the interim. After the interview, he tried again to contact the two social workers. At about 3 p.m., after failing to reach any of the two, he informed the VC that he could leave. The VC told him that he would be waiting for him when he left. He cleared his desk and then left the station together with the VC and the station's cleaner. When he got to the Entrepot Secondary School, he realized that the VC was still behind him. The VC told him that he wanted to talk to him about certain things. He told the VC that he was heading to his mother's place for lunch. The VC walked with him to his mother's home. On arrival there the appellant told the VC that he was going inside and bid him goodbye. As he entered the house and turned around, he saw the VC standing in the yard. He asked him what else he needed, and the VC said that there were some things that he really needed to discuss with him. The appellant therefore invited the VC into the house. The VC sat at one end of the dining table while he proceeded to open the back door to the house, which formed part of the same living room. He saw his mother's neighbours outside and called out to them, to let them know that it was he, and not his mother, that was in the house. He returned to the dining table and sat opposite the VC. They started to converse but based on what the VC told him he determined that the VC would need to attend the police station on the following Monday to make a report. The VC said okay and proceeded through the kitchen (which leads to the front door) so the appellant thought the VC was leaving. He therefore proceeded to his mother's bedroom. He started unbuckling his belt when he heard a sound behind him. He turned around and saw the VC. He said the VC made "certain remarks" to him that made him really upset. He asked him to leave and then ushered him out. The VC was visibly angry at him. At the kitchen door, the VC put his hand around the appellant's neck and tried to kiss him. The appellant pushed him off and slapped him. The VC became very angry and stormed

off swearing at him. When he got closer to the road, he turned around and told the appellant that he would see what would happen to him. The appellant said he went back into the kitchen and proceeded to clean up the kitchen. Shortly after he was visited by a friend, Kirby Dupres, whom he had asked to drop off something for him. He said that account was basically his encounter with the VC.

The appeal

- [6] At the hearing of the appeal, the appellant was given leave to amend his Notice of Appeal filed on 13th March 2020 to argue four grounds of appeal against conviction. Ground 1 is that the trial judge failed to give a proper reliability warning as required by section 136(1) (e) of the **Evidence Act**². Ground 2 is that the judge erred in failing to give a good character direction. Ground 3 is that that the judge failed to direct the jury on how to treat with the evidence of recent complaint. Ground 4 is that the numerous errors by the judge render the conviction unsafe. The grounds of appeal against sentence are that the court failed to give adequate or any consideration to the issue of delay and failed to consider it as a mitigating factor necessitating a discount. Secondly, the judge gave no consideration to the appellant's prospects of rehabilitation.

The appellant's submissions - ground 1

- [7] In relation to ground 1, learned counsel for the appellant, Mr. David Francis, submitted that while the judge had given a warning to the jury about the need for caution in a case of this nature as reflected at page 19 of the transcript³, that warning failed to comply with the requirements of section 136(2) of the **Evidence Act**. While acknowledging that the judge has a discretion whether to not to give what he styled a "corroboration" warning in relation to the treatment of the evidence given by the victim of a sexual offence, Mr. Francis submitted that having exercised her discretion to give this warning, the learned trial judge was under a duty to ensure that the warning was in conformity with subsection (2) of Section 136 of the **Evidence Act**.

² Chap. 4.15 of the Revised Laws of Saint Lucia.

³ Vol 2, ROA, 357, lines 5 -13.

[8] Mr. Francis submitted that the warning was non-compliant because, in addition to the matters prescribed at sections Section 136 (2) (a) to (c), it was “incumbent” on the Court to: (i) explain what corroboration evidence was; (ii) to direct the jury that it is dangerous to convict on the uncorroborated evidence of the complainant alone; and (iii) tell the jury which evidence if accepted would amount to evidence of corroboration. Mr. Francis asserted that the Privy Council judgment in **The Queen v Rennie Gilbert**⁴ was authority for this proposition, citing in particular the observations of Lord Hobhouse of Woodborough, who, in reference to the common law rule of practice to give a corroboration warning, stated:

“The rule in question is a special rule requiring the judge to give the jury a specific direction and warning in respect of the evidence of the complainant in a sexual offence case, that is to say, the evidence of the person who says that he or she has been the victim of a sexual offence. It does not apply to the evidence of any other person, only to the evidence of the victim. It potentially applies to male as well as female victims. Its effect is that in any sexual case the jury must be directed that it is dangerous to convict the defendant upon the uncorroborated evidence of the complainant alone; the judge must tell the jury which evidence would, if they accept it, be capable of amounting to corroborating evidence; but he can go on to tell them that they can convict on uncorroborated evidence if, having paid due heed to the warning, they are nevertheless convinced of the defendant's guilt. The trial judge is also required to explain to the jury why the warning is necessary.”

[9] Mr. Francis also placed reliance on the judgment of this Court in **R v Gerard Joseph**⁵ and **Kyon Fredrick v R**⁶ in which section 136 of the **Evidence Act** fell for consideration. It was submitted that, in line with these authorities, the learned trial judge was under a duty when giving the warning to assist the jury in its analysis of the evidence and particularly the weight to be attributed to it. However, the learned trial judge gave no real assistance to the jury and failed to give any reason for failing to comply with section 136 (2), thus leading to the inference that there is no proper basis for such failure.

⁴ [2002] UKPC 17.

⁵ Saint Lucia Criminal Appeal No. 2 of 2006.

⁶ Saint Lucia Criminal Appeal No. 8 of 2006.

- [10] Mr. Francis further submitted that such a warning as the judge gave was inadequate and ineffective insofar as it failed to highlight the evidence which the jury could rely on to come to the conclusion that the testimony of the virtual complainant was unreliable. Mr. Francis identified the following: (i) an inconsistency between the VC's evidence and his witness statement in relation to the time he got home after the incident; (ii) an inconsistency between the VC's evidence and his witness statement previous in relation to how the appellant was dressed when he entered the bedroom; (iii) the possible grudge or ill will the VC harboured towards the appellant after his sexual advances to the appellant were rebuffed; and (iv) the medical evidence which did not support the VC's account of a violent penetration, bruising or bleeding.
- [11] It is said that while the judge may have pointed out some of these discrepancies, she failed to assist the jury with any analysis and did not connect or relate them to the unreliability of the evidence at the time she gave the warning about the need for caution.
- [12] Given that the prosecution's case rested solely on the evidence of the VC, strict compliance with the requirements of section 136 was absolutely necessary to ensure that justice was done. It was submitted that a finding that the jury was not properly guided in this regard, necessarily means the conviction should be set aside on the basis that there has been a material irregularity in the course of the trial. It was Mr. Francis' submission that had the jury received a proper direction and guidance, it is possible that they may have ascribed less weight to the evidence of the virtual complainant and would have come to a different verdict.

The respondent's submissions – ground 1

- [13] On behalf of the respondent, the learned Director of Public Prosecutions, Mr. Greene, submitted that when the summation is examined as a whole, as opposed to the appellant's isolation of a limited part of the summation, it is apparent that the learned trial judge adequately addressed the requirements of section 136(2)

in her summation to the jury. Emphasizing that compliance with section 136 does not require that any particular form of words be used. Mr. Greene cited passages from the summation which he submitted effectively and adequately addressed the requirements of section 136. In particular, he cited the following directions:

“It is a matter for you to assess the evidence and come to a conclusion as to whether you accept or reject the evidence and come to a conclusion as to whether the witnesses are lying or not, whether either is telling you the truth or not, it is a matter for you whether you think on assessing the evidence whether they were truthful witnesses or not...[and having identified discrepancies in the evidence of both the VC and the appellant, the judge continued]...

“You may find these discrepancies in the evidence of [the complainant and his mother] are minor, or the evidence of the defendant -- the discrepancies in the evidence of the defendant. If you do, you can ignore them; if you find them important you must assess the whole of evidence (sic) of that witness and ask yourself is this honestly attempting to remember what has happened and to relate it or are they trying to be clever and trying to deceive you. If you find it is an innocent discrepancy, then you are entitled to ignore it. If not, you can then discard the evidence of that person or persons as deemed unreliable if you choose to do so...”

- [14] Mr. Greene submitted that these directions were buttressed by the judge’s further directions at page 19 of the transcript where she told the jury:

“You must also bear in mind that in all these cases of a sexual nature the law requires that you should approach your verdict with caution. These allegations are often made, but are equally often difficult to refuse (sic) or to reject or to prove otherwise. So, that the Court enjoins a jury in cases of a sexual nature to approach the verdict (sic) with caution. I must tell you that in this matter it is the word of the Virtual Complainant, [name redacted], against the Defendant, whose defence is that he did not do these things. The incident did not happen according to him and could not have happened, because when - - well, his evidence is that when [the VC] did enter his home, he did not do the things that [the VC] said he did to him.”

- [15] In this direction, submitted Mr. Greene, the trial judge “emphatically directed the jury that the law requires them to approach their verdict with caution in respect of cases of a sexual nature.” As such, he submitted that ground 1 is without merit.

[16] In the alternative, relying on **Mitchel Joseph v The Queen**⁷ and **Andrew Milton and Dennis Campbell v R**⁸, Mr. Greene offered that should this court find that the judge's unreliability warning was inadequate, this should not automatically lead to the conclusion that the conviction is unsafe. The Court must consider all the circumstances of the case, including the nature of the evidence in question, the strength of the evidence against the appellant and whether the VC's evidence was supported by other evidence in the case. In this regard, Mr. Greene asserted that there was expert evidence from forensic scientist, Louis Murray, which supported the evidence of the VC, in that, spermatozoa were detected on the anal smear taken from the VC.

[17] By way of response to the appellant's submission that the judge erred in not giving the corroboration warning, Mr. Greene submitted that the corroboration warning must not be conflated with the unreliability warning under section 136, bearing in mind that the common law practice of requiring a corroboration warning was statutorily abrogated by section 135 of the **Evidence Act**. Thus, the judge was not obligated to give a corroboration warning.

Discussion – ground 1

[18] It is agreed on both sides that this was a case where a warning under section 136(1)(e) of the **Evidence Act** was appropriate and that the judge gave some form of warning. What is contested is the adequacy of that warning: was it compliant with the requirements of section 136(2)? If it was inadequate and non-compliant, then the issue is whether that renders the conviction unsafe.

[19] Before addressing the requirements of section 136(2), however, it is important to address Mr. Francis' seeming conflation of the requirement under this section with the common law corroboration warning. He attributed this to the case of **Kyon Frederick v The Queen**⁹ in which the Court of Appeal of its own motion drew

⁷ SLUHCRA2011/0001 (delivered 8th July 2013, unreported).

⁸ BVIHCRA2009/0006 & 0007 (delivered 12th November 2012, unreported).

⁹ HCRA2006/0008 (delivered 25th March 2009, unreported).

counsel's attention to and examined section 136(2). It should be noted that the actual ground of appeal relating to corroboration as stated by the Court was '*a failure to give proper explanation and warning on corroboration required by section 15 of the Evidence Act, No. 5 of 2002.*'¹⁰ Section 15 relates to the evidence of children and section 15(4) provides that where evidence of a child is admitted pursuant to sub sections (2) and (3) a person may be convicted on that evidence but the court may warn the jury of the danger of acting on such evidence unless they find that the evidence is corroborated in some material particular by other evidence implicating that person.

[20] The appellant Kyon Frederick did not complain of a failure to give a section 136(2) warning. However, the Court's stated reason for drawing attention to section 136(2) was that '*this too concerns corroboration*'.¹¹

[21] Contrary to Mr. Francis's submissions, the unreliability warning is not to be conflated with the traditional corroboration warning. Subject to section 15 of the **Evidence Act**, the mandatory requirement to give the corroboration warning has been abrogated by section 135 of the **Evidence Act**, which provides:

"135. Corroboration requirements abolished.

- (1) Subject to section 15 and to subsection (2) it is not necessary that evidence on which a party relies be corroborated.
- (2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a like or related offence.
- (3) Despite any rule, whether of law or of practice, to the contrary, but subject to the other provisions of this Act and the Criminal Code, Chapter 2, Part 1, where there is a jury, it is not necessary that the judge –
 - (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or like effect; or

¹⁰ At paragraph [3](e).

¹¹ At paragraph [31].

(b) give a direction relating to the absence of corroboration.”

[22] There can be no doubt that in Saint Lucia the common law requirement to give the corroboration warning has been abrogated by section 135 of the **Evidence Act**. I note that in **Kyon Frederick** no mention is made of section 135 and it is unclear whether it was brought to the Court’s attention.

[23] Furthermore, Mr. Francis’ reliance on **The Queen v Rennie Gilbert** in support of his contention that the learned judge erred in failing to give a corroboration warning is misplaced and the passage on which he relies, which I have quoted at paragraph [8] above, is taken out of context. That case involved the evidence of the victim of a sexual offence. The judge had failed to warn the jury that it was dangerous to convict on the uncorroborated evidence of the complainant, who was the sole identifying witness. The defendant was convicted of attempted rape. The Court of Appeal allowed his appeal and quashed his conviction, holding that, unless abrogated by statute, the law of Grenada required a corroboration direction and warning to be given in all sexual offence cases and that, since the nature of the evidence left a lurking doubt as to the safety of the conviction, it would not be appropriate to consider the application of the proviso.

[24] The Crown appealed to the Privy Council challenging the Court’s finding that the common law corroboration rule was still to be regarded as part of the law of Grenada. They argued that the English law abrogating the common law rule requiring a corroboration warning was applicable in Grenada by virtue of section 167 of Grenada’s Evidence Act.

[25] Although rejecting this latter argument, the Board nonetheless allowed the Crown’s appeal. The Board held that the requirement in a sexual offence case, to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant as to whether the offence had been committed and also whether the person charged had committed it, was merely a rule of practice relating to the way the judge should

direct the jury; that, as a rule of practice, it was always liable to be reassessed in the light of further experience or research and reformulated in order to better perform its function; that, although the purpose for which the rule existed was to give juries the appropriate directions to assist them to arrive at a safe verdict as part of a fair trial, since the mandatory requirement that such a warning be given in all cases had not been conducive to achieving that result but rather had led to inappropriate and indiscriminate directions being given which confused juries, created unfairness as between the prosecution and the defence and undermined the safety of the juries' verdicts, it should no longer apply in Grenada; that in sexual offence cases the judge would have a discretion whether to give any corroboration warning with regard to the complainant's evidence and, if so, in what terms, depending on the circumstances of the case, the issues raised and the content and quality of that evidence; and that, although only in clear and exceptional cases would an appellate court be justified in interfering with such exercise of discretion by the judge.

[26] Lord Hobhouse's observations are found at paragraph 8 of the judgment and comes under the caption, "Sexual Offences: Corroboration". The "rule in question" of which he speaks in the opening sentence of that paragraph is the common law requirement to give the corroboration warning. In that passage Lord Hobhouse was merely describing the obligation of the trial judge to give the corroboration warning and the terms of that warning under the common law as part of his review of the evolution of the common law before **R v Makanjuola**¹². He was not saying that the trial judge must give those directions, and the passage certainly cannot be read as authority for the proposition that a judge directing a jury in Saint Lucia in accordance with section 136 must employ the language of the common law corroboration warning. It would be absurd that the requirement to so direct the jury is abolished by section 135 but reintroduced in section 136.

[27] Indeed, later at paragraph 13 Lord Hobhouse cited approvingly the dicta of Lord Taylor in **R v Makanjuola** and summarised the current state of the law in

¹² [1995] 1 WLR 1348.

relation to the corroboration warning at paragraph 24. He stated, “The question whether to give a corroboration warning in sexual cases is a matter for the discretion of the trial judge. It will only be in clear and exceptional cases that an appellate court will feel justified in interfering with the trial judges’ exercise of his discretion.”

- [28] It follows that in light of the clear language of section 135 of the **Evidence Act** abolishing the requirement to give a corroboration warning, I reject the appellant’s argument that the judge was mandated to explain to the jury what corroboration evidence was and to direct the jury that it is dangerous to convict on the uncorroborated evidence of the complainant alone. This was a matter within the judge’s discretion.

The judge’s directions - unreliability warning

- [29] I will now proceed to analyse the provisions stipulated under section 136 of the **Evidence Act**. To frame the discussion and analysis of this ground of appeal it is necessary to set out the material parts of section 136 of the **Evidence Act**:

“136. (1) This section applies in relation to the following kinds of evidence-

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) in the case of a prosecution for 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.” (emphasis added)

- [30] By section 136, unless there are good reasons for not doing so, a judge presiding over a jury trial for the prosecution of a sexual offence shall give an unreliability warning in terms of section 136(2). It is settled that properly construed, the statutory requirement to give the unreliability warning is not mandatory¹³.
- [31] More importantly, the focus of section 136(1)(e) is the evidence of the *victim* of the sexual offence. It is to his or her evidence that the warning is directed. There are three essential elements to such a warning. First, the judge must direct the jury that the evidence may be unreliable. Secondly, the judge must go further and specifically identify tangible factors or features of the evidence that may cause it to be unreliable and explain why. This calls for proper analysis of the evidence in the case. Thirdly, the judge must warn the jury to exercise caution in approaching two aspects of their task: (a) in deciding whether to accept the victim's evidence at all and; (b) in deciding what weight to attach to it. Provided the judge communicates each of these matters clearly to the jury, he or she need not use any particular form of words.
- [32] The Caribbean Court of Justice in **Edwards and Haynes v The Queen**¹⁴ has furnished very clear guidance as to what the contents of an adequate unreliability warning should look like. In that case the appellants were charged with murder and the case against each of them depended solely on an alleged oral confession said to be made voluntarily during an interview by police officers at which only police officers were present. The provision under consideration was section 137 of the Barbados Evidence Act, which provided:
- “137. (1) This section applies in relation to the following kinds of evidence:
 (a) ...
 (d) in criminal proceedings, ...
 (i) ...; or
 (ii) oral evidence of official questioning of a defendant,
 where the questioning is recorded in writing that has not
 been signed or otherwise acknowledged in writing by the
 defendant;

¹³ See **Gerald Joseph v The Queen** Criminal Appeal No.2 of 2006 (delivered 15th January 2007, unreported) and **Kyon Frederick v The Queen**.

¹⁴ [2017] CCJ 10 (AJ).

(e) in the case of a prosecution for an offence of a sexual nature, evidence given by a victim of the alleged offence;...

(2) Where there is a jury and a party so requests, 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."

[33] As is apparent, this section is in almost identical terms as section 136, save that in Barbados the requirement to give the warning arises where a party requests the judge to give it. While the case at bar fell within section 137(1)(d)(ii) relating to the evidence given by the alleged victim in a prosecution of an offence of a sexual nature, the guidance derived from **Edwards and Haynes v The Queen** is entirely applicable.

[34] In his concurring judgment Saunders P identified the judge's duties and commented on the common failings of trial judges in directing juries in accordance with the provisions. The learned President stated:

"[50] Section 137 states that the judge, in his summation, has to do three things. Firstly, the judge must warn the jury that such evidence may be unreliable. Secondly, the judge is obliged to inform the jury of matters that may cause the evidence to be unreliable. Thirdly, the judge must warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. Trial judges usually comply with the first and third requirements. But some tend to fall short in relation to the second, perhaps because the full breadth of its scope is misunderstood. Interestingly, while all three requirements are important, the second is probably the most critical. Why? Because it obliges the judge to provide the jury with the essential rationale for the first and third."

[51] Reputable studies have been done to demonstrate that the normal human response to a request generates significantly greater compliance if a reason is given for the request. It is not enough to tell jurors that an unacknowledged oral confession is potentially unreliable, or that jurors must exercise caution when treating with such confessions. Even when one warns at length about the unreliability and need for caution, these admonitions will have less than their intended effect if the jury are not given in full the reasons why the confession may be unreliable. To inform the jury that they must exercise caution because the oral statements may be unreliable does not give jurors enough assistance. What really helps is to tell the jury about the matters that underpin the potential unreliability and need for caution.

[52] Why is such evidence potentially unreliable? Why should the jury exercise caution when treating with this evidence? What are these "matters" that the second requirement references? Each case will produce its own peculiar set of matters to which the trial judge must be alert. These matters are infinite and so it would be futile to attempt to catalogue them here. But there are some that are likely to be constant." (Emphasis added)

[35] In summary, and applied to this case, the judge was required to warn the jury that the evidence of the VC may be unreliable. Secondly, the judge was required to go further and specifically identify tangible factors or features of the evidence that may cause it to be reliable, explaining why this may be so. The judge was also required to explain why there was a need for caution in accepting and assigning weight to the evidence. The effective discharge of the judge's duty to direct the jury in accordance with section 136(2) called for proper and detailed analysis of the evidence in the case, as opposed to mere recital of it.

[36] To assess whether the learned trial judge's warning to the jury about the evidence of the VC was compliant with section 136(2), a closer scrutiny of the summing up is required. The first direction the judge gave the jury in relation to how to approach the evidence of the VC is at page 19 of the summation.¹⁵ There the judge directed the jury in the following terms:

"You must also bear in mind that in all these cases of a sexual nature the law requires that you should approach your verdict with caution". These allegations are often made, but are equally often difficult to refuse (sic) or

¹⁵ Record of Appeal Vol. 2, Electronic Page 357.

to reject or to prove otherwise. So, that the Court enjoins a jury in cases of a sexual nature to approach the verdict with caution. I must tell you that in this matter it is the word of [the Virtual Complainant] against the Defendant, whose defence is that he did not do these things.”

[37] In this passage, the judge warned the jury to exercise caution because this was a case of a sexual nature. She explained the rationale for caution as being that such allegations are made often but can be difficult to refute. Additionally, she emphasised that the case essentially came down to the testimony of the VC versus the appellant’s denial.

[38] This direction may have been sufficient to fulfil the requirements of the third limb or element of the unreliability warning which is to explain why the need for caution. Nonetheless, the judge was also required to direct the jury that the evidence may be unreliable. This is clearly a separate and distinct requirement from advising caution. More critically, the judge was required to carefully traverse with the jury those features of the evidence that might have made it unreliable.

[39] The learned DPP sought to argue that the judge discharged this latter duty when the above quoted directions are taken together with her earlier directions to the jury which were in the following terms:

“It is a matter for you to assess the evidence and come to a conclusion as to whether you accept or reject the evidence and come to a conclusion as to whether the witnesses are lying or not whether either is telling you the truth or not it is a matter for you whether you think on assessing the evidence whether they were truthful witnesses or not...[and having identified discrepancies in the evidence of the VC and the appellant, the judge continued]...

“You may find these discrepancies in the evidence of [the complainant and his mother] are minor, or the evidence of the defendant -- the discrepancies in the evidence of the defendant. If you do, you can ignore them; if you find them important you must assess the whole of evidence (sic) of that witness and ask yourself is this honestly attempting to remember what has happened and to relate it or are they trying to be clever and trying to deceive you. If you find it is an innocent discrepancy, then you are entitled to ignore it. If not, you can then discard the evidence of that person or persons as deemed unreliable if you choose to do so...”

- [40] With respect, I am unable to agree. These directions were given as part of the judge's general directions to the jury on how to deal with inconsistencies that might emerge in the case, whether in the evidence of the VC or in the evidence of the appellant, in order to form a view about either's credibility. This is the standard direction given in every case, regardless of section 136(2).
- [41] The section 136(2) warning contemplates that a searching light will be trained on the evidence of the VC after the jury has been told that his evidence may be unreliable. This did not happen here. First, the judge gave no clear warning that the VC's evidence may be unreliable. Secondly, the judge was required to, but did not, identify those matters that might have caused the VC's evidence to be unreliable. True it is that the judge drew attention to inconsistencies between his evidence and his witness statements, and I say straight away that had these minor inconsistencies stood alone, I would have had no hesitation in dismissing this ground of appeal. However, in this case, the most glaring feature of the evidence that potentially made the VC's evidence unreliable was the medical evidence of Dr. Johnny and to some extent the forensic evidence.
- [42] Dr. Johnny's deposition taken at the Magistrate's Court was read into evidence at trial. According to her evidence at about 6:10 p.m. on 29th February 2008, she was on duty at the emergency room of the Victoria Hospital when she had cause to examine the VC. He was conscious and alert and provided the history. There were no bodily surface injuries when she examined him. When she examined the rectum, she observed only dry brown secretions. She testified that those were the only "positive findings". After completing her visual examination of the VC, Dr. Johnny took four swabs, and one oral smear from the mouth. She also took a swab of the dry body fluids from the rectum, also called the perianal region. In all she took four anal swabs, one anal smear, two saliva swabs, pubic hair strands, head hair combings and pearled hair strands, and a blood sample. The VC's t-shirt and shorts were also retained as evidence. She sealed the samples in a box, referred to as the

sexual assault evidence kit, and handed them over to the Investigating Officer, Corporal Joseph.

[43] Under cross-examination by defence counsel, Mr. Richelieu, Dr. Johnny agreed that there were no abrasions, lacerations or redness noted in the perianal region and no other evidence of injury. She further agreed that there was no evidence of semen in the perianal region.

[44] Plainly, Dr. Johnny's examination of the VC on the day of the alleged incident revealed no injuries. This has to be set against the detailed evidence given by the VC about the forceful and prolonged anal penetration to which he had been subjected and which produced bleeding, pain and discomfort to his anus. He gave an account of the appellant penetrating him with a "gigantic" and "extremely huge" erect penis in three different positions with the first such assault lasting between 15 and 20 minutes, and the subsequent two episodes lasting a little longer. The VC reported that he bled as he had observed blood on the bedsheet and later at home after he wiped himself. One would have thought that this apparent or seeming oddity of a lack of bruising or injury required some explanation, or at least exploration with Dr. Johnson. The responsibility for that and the omission to do so lay squarely with the prosecution. Even when defence counsel elicited from the doctor that she had observed no injuries or bruising when she examined the VC's anus, the prosecution did not re-examine her to explore what might account for that. The only question the prosecutor posed to Dr. Johnny in re-examination was whether there is a difference between semen and spermatozoa. Her answer was *"No, there isn't. Is there a difference between semen and spermatozoa? Well, the spermatozoa is contained in the semen."*

[45] Furthermore, the evidence of the outcome of forensic testing was also relevant. Forensic Scientist, Mr. Louis Murray testified that blood was not detected on the extract of any of the anal swabs taken from the VC. No spermatozoa were detected on the anal swabs or the oral swabs. Spermatozoa were observed on the anal

smear at one plus, with one plus being the lowest rating of quantity or levels of spermatozoa on a scale of one plus to four plus. No seminal plasma was detected on either anal swab or anal slide. Mr. Murray explained that an anal swab is a cotton tip swab which is inserted in the anus in an attempt to collect any material that might be present in the anus; while an anal smear is produced by the examiner immediately smearing or rolling the swab over a glass slide thereby transferring the material from the swab to the slide. Mr. Murray explained that spermatozoa is easier to recover from a smear than a swab. Nothing of any evidential value, and in particular, no blood or traces of seminal fluid or spermatozoa was found on other items submitted for analysis, including three bedsheets and two pillow cases taken from the house where the incident allegedly occurred, nor on the short pants and t-shirt of the VC. Of course, the presence of spermatozoa on the anal smear does not implicate the appellant and the only direction that the judge gave in relation to this evidence was that discharge of spermatozoa was not necessary to establish the offence as buggery as the slightest penetration would suffice.

- [46] Whatever the failing of the prosecution in addressing the medical evidence, it was incumbent on the trial judge to specifically draw the medical evidence to the jury's attention as being evidence that could potentially make the VC's evidence unreliable as it could possibly be seen as inconsistent with his account of a forceful and lengthy episodes of penetration.
- [47] The judge was further required to warn the jury that there was a need for caution in accepting or assigning weight to the evidence of the VC as a result of the matters that made his evidence unreliable and explain why. This was not done as there was no analysis of the medical evidence and its potential impact on the reliability of the evidence of the VC, or indeed of the forensic evidence.
- [48] It is settled that a failure to give the unreliability warning does not ineluctably lead to the quashing of a conviction. The conviction may yet be salvaged where, for example, there is other evidence to support the evidence of the witness in respect

of whom the warning is required to be given or where the evidence against the appellant is compelling. **Mitchel Joseph v The Queen** was such a case. There, one plank of the Crown's case consisted of admissions or confessions allegedly made by the appellant, thus triggering the need for the unreliability warning. However, the case did not depend solely on the admission or confession of the appellant. The Court of Appeal found that independent of that evidence, 'the prosecution's case was most compelling. It is seen in the cogent eyewitness account of Police Officers Labadie and Phillip in addition to the ballistic evidence matching the bullets recovered from the deceased's body to the firearm recovered from the appellant.' (At paragraph 31). The Court held:

"From the evidence, the jury would have been in no doubt that the appellant shot and killed Remy. Given the strength of the case, the jury would inevitably have arrived at the same verdict even if a section 136 warning had been given. In the circumstances, the failure to give a section 136 warning did not result in a miscarriage of justice."

- [49] **Derek Cort v The Queen**¹⁶, on which the respondent relies, is also distinguishable. The relevant facts are that on the night of 6th August 2008, the virtual complainant entered her apartment and was accosted by the appellant, who had earlier broken in and was lying in wait for her. He was armed with a knife. He assaulted her, then raped and buggered her repeatedly. Although it was the VC's word against the appellant that he had raped her, there was evidence from two other witnesses which served to negate his alibi that he was at home at the material time. In one case, the witness placed him at the VC's house as she testified that she saw him break into the house and tip toe into the apartment. He stayed for about two minutes, came out of the apartment closing the window louvers halfway and then left looking angry. The appellant did this twice in the space of 15 minutes. The other witness testified that he saw the appellant walking in the direction of the VC's house. Collectively, this evidence tended to negate the appellant's alibi that he remained in his house all evening and to support the VC's evidence that the appellant had gained access to her apartment and had lain in wait for her. Additionally, although Dr. Trotman-

¹⁶ BVIHCRA2010/0004 (delivered 19th December 2013, unreported).

Hastings' examination of the VC's genitalia revealed that there were no bruises or lacerations, she however noted that the time gap between the incident and her examination was sufficient to allow any bruises which may have existed to heal. Further, Dr. Trotman-Hastings noted that if the vaginal tissues or the anus are sufficiently lubricated there would be no bruising irrespective of whether the intercourse was consensual or not. She also noted that a rape victim does not always sustain injuries to the vaginal area. Notably, the appellant did not testify at the trial. In summary, there was circumstantial evidence supporting VC's account and negating his alibi and there was medical evidence accounting for the absence of bruises or lacerations to the VC's genitalia. In these circumstances, the Court of Appeal described the evidence against the appellant as compelling.

[50] In this case, apart from the VC's evidence, there is no other evidence implicating the appellant and no expert evidence accounting for the absence of bruising, laceration or injury to the VC's anus. In a case where it was the VC's words against the appellant, the need for a full and adequate unreliability warning is brought into high relief.

[51] For the reasons discussed above, I am driven to the conclusion that the judge erred in failing to properly and adequately discharge her duty to give the unreliability warning in accordance with the requirements of section 136(2), and that this error was fatal. This ground is a sufficient basis on its own to allow the appeal. Nonetheless, I will go on to consider the other grounds of appeal.

Ground 2 – Failure to give a good character direction

[52] Ground 2 is very simply that the judge erred in failing to give a good character direction where evidence of the appellant's good character was led.

[53] Mr. Francis submitted that the appellant's good character having been distinctly raised, the judge was under a duty to give him a good character direction. The appellant would have benefitted from both limbs of the good character direction as

both credibility and the unlikelihood of the appellant having committed the offence charged (propensity) were central issues in the case. The failure of the Judge to guide the jury on the issue of the appellant's character may have resulted in a miscarriage of justice because the evidence which convicted the appellant and that which would have exonerated him were both based on credibility. Similar to the facts in **Troy Simon v The Queen**¹⁷, the appellant maintained his innocence throughout. The case turned primarily on the credibility of the appellant and the virtual complainant. It is impossible to say how the good character direction would have affected the jury. The appellant submitted that had the jury received a proper good character direction they may have properly placed more reliance on the testimony of the appellant and come to a different verdict. It cannot be said in the circumstances that the jury would have inevitably come to the same conclusion, and the conviction ought to be quashed.

- [54] Mr. Green conceded that the judge ought to have given a good character direction but contended that in the circumstances of this case this error ought not to vitiate the conviction. Relying on **Derek Cort v The Queen**, Mr. Greene asserted confidently that a good character direction would have made no difference because the evidence against the appellant was overwhelming by reference to the VC's evidence, supported by the evidence of the presence of spermatozoa on the anal smear. Mr. Greene also pointed to several inconsistencies that emerged when the appellant testified which he suggested must have led the jury to reject the appellant's account.

Discussion

- [55] Where a person has no convictions of any relevance or significance, he is regarded as being of good character and is entitled to the benefit of a good character direction and the judge must give one as a matter of course and not discretion when summing up to the jury. The judge must explain the relevance of a defendant's good character to the issues in the case. The standard good character direction consists of two

¹⁷ Criminal Appeal No. 16 of 2003 (22nd May 2006).

limbs: credibility and propensity. The credibility direction instructs that a person of good character is more likely to be truthful than one of bad character. This limb is given where the accused gives evidence or when he relies upon an account given in an interview. The propensity direction tells the jury that he is less likely to commit a crime, especially one of the nature with which he is charged. This limb of the good character direction is given whether or not the accused has given evidence or an account in an interview.

[56] A good character direction is always of particular relevance where credibility is the central issue in the case: **Sealey and Headley v The State**¹⁸. Indeed, in **Teeluck and John v The State** a good character direction was regarded as ‘essential for a fair trial, certainly where the credibility of the defendant is a central issue’. (at para [37])

[57] The defendant’s good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: **Barrow v The State**.¹⁹

[58] The failure to give a good character direction is not always fatal to the conviction. As the cases show, much depends on the nature of the issues, the quality of the evidence and the availability of other evidence. Of course, each case must be determined on its own facts when determining the consequences of failure to give the good character directions, and as the authorities show, cases have fallen on both sides of the rail.²⁰ The Board recognised this in **France and Vassell v The Queen** and commented as follows:

“[T]here would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. Jagdeo Singh and Teeluck were obvious

¹⁸ [2002] UKPC 52, para 34.

¹⁹ [1998] UKPC 16.

²⁰ See *Arthurton v The Queen*, Privy Council Appeal No. 67 of 2003; *Sherfield Bowen v The Queen*, Antigua and Barbuda Criminal Appeal No. 4 of 2005; *Troy Simon v The Queen*, *Derek Cort v The Queen*; *Theresa Justin v The Queen*, Saint Lucia Criminal Appeal No. 5 of 2008; *Carlton Junior Hall v The Queen*, [2020] CCJ1 (AJ).

examples. But it recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."

[59] And in **Jagdeo Singh v The State**²¹, the Board emphasised:

"The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a 'good character' direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated." (P. 435, h)

[60] In this case, as properly conceded by the prosecution, defence counsel distinctly raised the appellant's good character when he elicited in examination in chief that the appellant had never previously been charged with any criminal offence and led evidence of the appellant's commendable record of involvement in community activities. This being a case where credibility was the central issue, a good character direction was highly relevant. Both the credibility and propensity limbs were required to be given as the appellant had given evidence in the trial. The judge gave neither. Ironically, when sentencing the appellant, the judge gave credit for his good character. However, the issue which arises here is whether the jury would have reached the same verdict had the judge directed the jury on the appellant's good character, or, otherwise put, whether the lack of a good character direction has affected the fairness of the trial and the safety of the appellant's conviction.

[61] In my view, it cannot confidently be said that, had the jury been properly directed on the appellant's credibility, the jury would inevitably or without doubt have convicted. On any view, credibility was the central issue in the case. The credibility limb of the

²¹ [2005] UKPC 35.

good character direction would have been of crucial importance since the jury had to decide whether they believed the VC's account of what happened at the house or whether they believed the appellant's version.

[62] Mr. Greene argued that by its verdict, the jury obviously rejected the appellant's account and believed the VC. While that may be true, in matters of this kind that is always the case: the matter gets to the Court of Appeal because the jury convicted the defendant and must therefore have believed the prosecution's case and was sure of the guilt of the accused. But this in itself is no answer to the question with which we are concerned, because the jury arrived at their verdict without the benefit of a crucial direction in law. The question is whether that omission affected the fairness of the trial and the safety of the conviction.

[63] The jury had to decide whether the VC was to be believed. The appellant's good character was relevant to that assessment and entitled him to the credibility limb of the direction in relation to his evidence that he did not have sexual intercourse with the VC. He should also have had the benefit of the propensity direction, with the jury being told that his good character was relevant in assessing the likelihood that he would have offended in the way alleged.

[64] There was no supporting evidence for the VC's evidence and, compounding matters, the judge failed to give any proper unreliability warning as required by section 136(2) of the **Evidence Act** when there were features of the evidence that potentially rendered the VC's evidence unreliable. In my view this case falls on the side of the line where the absence of a good character direction affected the fairness of the trial and renders the conviction unsafe, as it is not possible to say how such a direction would have influenced the jury. Accordingly, I would allow the appeal on this ground also.

Ground 3 – recent complaint

- [65] Ground 3 is that the judge failed to direct the jury on how to treat with the evidence of recent complaint. More particularly, the appellant complains that the Judge failed to direct the jury with respect to the value of the evidence given by the VC that when he got home he told his mother what happened. He provided no details of what he told his mother, and she gave no details of any words spoken to her by the VC when she gave evidence.
- [66] It was submitted that although the judge correctly ruled that there was no evidence of recent complaint, the judge should have, but failed to direct the jury to disregard that aspect of the VC's evidence or instruct them as to the weight and use to be made of the evidence since the jury may have come to the conclusion that the evidence could go toward the credibility of the VC or the consistency in his account and they may have ascribed undue weight to it. The jury would infer that when the VC said he told his mother what happened, he in fact made a statement which was substantially the same as his evidence to the court. The appellant submitted that the judge's failure to guard against this risk with appropriate directions to the jury was a serious misdirection. The appellant grounded his submissions in the authorities of **Kory White v The Queen**²² and **Sheldon Thomas v The Queen**²³
- [67] The respondent does not dispute that no evidence was led of what the VC said to his mother and that when she testified, she gave no evidence of what he told her. Mr. Greene further accepted that in these circumstances there was no evidence of recent complaint before the jury as the judge had ruled. However, the respondent's written submission posited that 'the fact that the learned judge did not direct the jury to disregard the part of his testimony that he told her what Barry Hunte did does not amount to a material or serious misdirection which renders the appellant's conviction unsafe.' During oral submissions, however, the learned DPP conceded

²² (1997) 53 WIR 293.

²³ Criminal Appeal No. 11 of 2002 (delivered 20th October 2003, unreported).

that the authorities regard such an omission as a significant error. For the reasons that follow, he was right to do so.

Discussion

- [68] At common law, there is a general prohibition against a witness being asked in evidence-in-chief whether he or she has previously made a statement consistent with their present testimony, and the witness may not recite that previous statement and no witness may testify about it either. This is sometimes described as the rule against proof of previous self-consistent statements. To this rule there are two exceptions. Only the first is relevant for present purposes.
- [69] In a sexual offence case if the VC makes a complaint at the first reasonable opportunity after the offence, evidence of that complaint can be given. Its purpose is to show the VC's consistency and to negative consent. However, for there to be evidence of recent complaint, the complainant must testify about making the complaint and the person to whom the complaint was made must give evidence of what was said to them by the VC. If only the VC testifies—without the recipient of the complaint giving evidence of the details of the — the evidence does not support the VC's consistency or truthfulness.
- [70] In this case, the VC testified in examination-in-chief that when he got home, he told his mother what happened. There was no evidence before the jury which could be regarded as recent complaint because, as is common ground and as the judge correctly ruled, the VC's mother did not give evidence of what the VC had told her. The appellant's complaint is that the jury having already heard the VC say that he told his mother what happened, the judge left this evidence to the jury without any directions as to how to treat it and compounded matters by drawing attention to it during her summation.
- [71] A similar problem confronted the court in **Kory White v The Queen**. The appellant was convicted of rape and attempted buggery. The prosecution's case depended

solely on the uncorroborated evidence of the VC. In that case evidence was elicited from the VC that shortly after the incident she had told various persons “what happened”. However, none of those persons to whom the VC had allegedly told “what happened” was called as a witness. The judge had directed the jury that the VC’s evidence that she had told five persons what had happened did not amount to corroboration but that even without corroboration they could convict if they believed the VC’s evidence. However, she had given them no directions regarding what use could be made of the complaints. The principal ground of appeal before the Board was that the judge did not give the jury adequate directions about how they should treat the complainant’s evidence that she had made several statements shortly after the incident to various people, telling them what had happened.

- [72] The Board held that the VC should not have been allowed to give evidence that she had told five people “what had happened” because ‘the inference that the jury were bound to draw was that she had made statements in terms substantially the same as her evidence to the court.’ While the Board said it would not go so far as to say that the evidence of the fact that statements were made was 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. Their Lordships concluded:

“As the jury had been told that, even without corroboration, they could convict if they believed the complainant’s evidence, there must have been a significant risk that they considered themselves entitled to regard the evidence of complaint as confirming her credibility. To leave it open to the jury to take such a view was a misdirection. It was in their Lordships’ view incumbent upon the judge to give the jury clear instructions that the complainant’s own evidence was for this purpose of no value whatever.” (p. 320, g-h.)

- [73] The Board concluded that it was not possible to apply the proviso because the case turned entirely upon the complainant’s credibility.
- [74] Closer home, the issue arose again in **Sheldon Thomas v The Queen**. The appellant was convicted of rape. The VC testified that as soon as she got home

she told her mother “what had happened”. The prosecution did not call any of these people as witnesses. One of the grounds of appeal fed by the admission of that evidence was that the judge had made fatal misdirections on the law relating to recent complaint. Applying the case of **Kory White**, the Court allowed the appeal holding:

“[14] On this analysis of the law, it is clear that the learned trial Judge made a grave error in describing the testimony as a recent complaint because no evidence was adduced from the person to whom the complaint was made. In this case, just as in **Kory White**, the complainant in describing the complaint merely said “I told my mother what happened”. 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 terms as her evidence in court. The judicial reasoning on this is longstanding, and in particular in the context of attempts to evade the rule against hearsay evidence. 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 upon returning to her home. It is important, however, that the spirit of 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.”

- [75] These authorities furnish the answer to the present issue in relation to the judge’s failure to direct on how to treat with the VC’s evidence that he had told his mother what happened. The judge was obliged to clearly instruct the jury that the VC’s evidence in that regard was of no value whatever. As Saunders CJ [Ag.] held in **David Jobe v The Queen**²⁴

“What should have happened in this case is that the trial Judge should not have permitted to be introduced as evidence the alleged complaint of the virtual complainant. And if that evidence had been inadvertently let in, it was the duty of the trial Judge to give the jury very clear instructions on why it should be disregarded and not considered as part of the evidence of the case. The learned trial Judge here did not, in my view, eliminate the risk that the jury might consider themselves entitled to regard the evidence of

²⁴ Criminal Appeal No. 23 of 2003 (delivered 20th September 2004, unreported).

the complaint as confirming the credibility of the virtual complainant. See *White v The Queen* .”

[76] The trial judge’s failure to give any such directions in this case, and instead highlighting it in her summation, left open the real risk that the jury were bound to infer that the VC had related to his mother substantially the same details as he had given in evidence, thereby investing the VC’s self-consistent statement with the quality of support for his evidence and bolstering his credibility, when in fact it held no such properties. This is very significant because this case turned entirely on the evidence of the VC and so his credibility was of crucial importance.

[77] I am of the view that the circumstances of this case warrant the same outcome as in **Kory White, Sheldon Thomas and David Jobe**. The judge’s failure to direct the jury to disregard this part of the VC’s evidence was a serious omission which renders the appellant’s conviction unsafe.

The proviso

[78] The learned DPP invited this Court to apply the proviso because, as it is put in the respondent’s written submissions, ‘having due regard to the trial judge’s summation as a whole, the respondent finds no significant errors, omissions or misdirections, sufficient enough to render the appellant’s conviction unsafe.’ In oral submissions, however, Mr. Greene was prepared to concede that when one factors in the absence of a good character direction, the case for the application of the proviso becomes weak. Nonetheless, he submitted that the proviso should still be applied because the evidence of the VC was strong and there were serious discrepancies in the evidence of the appellant.

[79] For his part, the appellant submitted that the cumulative effect of the errors on the part of the trial judge has rendered the verdict in his trial unsafe and/or unsatisfactory. The failure to guide the jury on three (3) separate occasions, on the issue of the appellant’s credibility stripped him of the protection available to him in

law and constituted a material irregularity within the meaning of Section 35 of the **Supreme Courts Act**²⁵.

Discussion

[80] Section 35 of the Eastern Caribbean Supreme Court Act provides:

“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 trial, and in any other case shall dismiss the appeal.

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.”

[81] Section 35 identifies the three grounds on which the Court of Appeal may allow an appeal and overturn a conviction. The proviso permits the Court of Appeal, notwithstanding the existence of any such ground, to uphold the conviction if it is satisfied that there has been no miscarriage of justice. An invitation to, or consideration whether to apply the proviso propels consideration of the question whether the jury would inevitably have returned the same verdict had they been properly directed or the irregularity had not occurred. This has been consistently recognized as the applicable test the Court applies when considering the application of the proviso.²⁶

[82] In **Carlton Junior Hall v The Queen**²⁷, Anderson J, provides a practical and insightful articulation of the true nature of the inquiry the court should undertake when considering whether to overturn a conviction. Recognising that the word “inevitably” can cause difficulty if not understood in proper context, he opined that inevitably does not connote absolute certainty, and posited the following:

²⁵ Chap. 2:01 of the Revised Laws of Saint Lucia.

²⁶ See *Derek Cort v The Queen*.

²⁷ [2020] CCJ 1(AJ).

“Rather, the appropriate question is whether the appellate court is satisfied that the jury would have returned the same verdict had the direction been given. If the court is so satisfied, the verdict will stand; where the court entertains reasonable doubt that the same verdict would have been returned the fairness of the trial is brought into question and conviction is unsafe and should be set aside.”

[83] I respectfully adopt this formulation as the question this Court must confront in determining whether, despite deficiencies in the summation, no miscarriage of justice has occurred. This calls for an assessment of the whole of the evidence which was before the jury to form a view on what verdict the jury would likely have returned had they been properly directed. Anderson J expressed this principle in the following terms:

“Specifically, it is permissible to compare the relative strengths and weaknesses of the case put forward by the prosecution and the defence to get a sense of the approach likely to have been taken by the jury had the appropriate direction been given.”

[84] I note, however, that in **Stafford & Carter v The State**²⁸, while the Privy Council stated that the question they asked themselves was “whether, if the jury had received the appropriate directions, they would without doubt have convicted the defendants of murder on the whole of the admissible evidence” they stated that they omitted from that consideration the evidence given by the defendants from the witness box because “*it is clear from the Jury’s verdict that they did not believe that evidence*”. They explained why:

“What is required is a fair evaluation of the evidence on both sides. But the jury’s verdict may show that they must have rejected the defendant’s evidence. In such a case his version may properly left out of account. The application of the proviso will then depend upon the strength of the evidence against the defendant in the prosecution case.” (at p. 423, d – f.)”

[85] Applied to this case, the jury by its verdict must have rejected the appellant’s version. The only evidence for the defence that may be considered is that of the witness called by the appellant. His evidence added little to the case because on the appellant’s own account, that witness arrived at the house after the VC had

²⁸ (1998) 53 WIR, 417.

departed. He therefore could not speak to what happened during the time that the VC was admittedly at the house.

- [86] This leaves for consideration the evidence of the prosecution, which is set out in some detail earlier in this judgment. While the VC's evidence was by no means shaken in cross-examination, his evidence was unsupported by any other evidence, and I have highlighted aspects of the medical and forensic evidence which had the potential to render important parts of his evidence unreliable and probably call into question his credibility. His evidence cannot therefore be described as overwhelming or compelling.
- [87] In my view, the three misdirections identified in this judgment all impacted in a significant way the critical issue of the VC's credibility. The failure to give an adequate and proper unreliability warning, the failure to give the good character direction and the failure to direct the jury to disregard the VC's evidence that he had told his mother what happened were all failures that carried the risk that the VC's credibility was unduly enhanced. As Saunders put it in **Edwards & Haynes v The Queen**, it was the judge's duty was to "level the scales in the credibility contest with which the jury was faced," rather than assume the scales were even and that the jury's task was merely to decide whom to believe. Considering the evidence as a whole, and given the absence of these three important directions, I entertain a reasonable doubt that the jury would have returned the same verdict had the judge properly directed them on each of these matters. In my view, the deficiencies in the summing up make it impossible to say that no miscarriage of justice has occurred and I therefore do not consider that this is an appropriate case for the application of the proviso.
- [88] In summary, I would allow the appeal because the trial judge failed to give the unreliability warning in accordance with section 136(2) of the **Evidence Act**, failed to give a good character direction, and failed to direct the jury to disregard the VC's

evidence that he told his mother what happened. I would therefore quash the conviction and set aside the sentence.

Consideration of a retrial

[89] I have carefully considered the consequences of overturning the conviction, and, in particular, whether a retrial should be ordered. There are settled common, but non-exhaustive, factors that inform such a decision, drawn primarily from **Reid v R**²⁹. These factors have been adopted and consistently applied by this Court. They include the seriousness and prevalence of the offence with which the appellant is charged; the cost and time implications likely to be occasioned; the length of time that will have elapsed between the offence and the new trial; the strength of the prosecution's case and the availability of witnesses on both sides.

[90] At the forefront of my mind is the salutary principle that those guilty of serious crimes should be brought to justice and not escape due to a technical blunder by the judge. The question of guilt should be determined finally by a jury's verdict and not left in abeyance because of a technical legal defect in the course of the trial. This is important to preserve public confidence in the administration of justice and may sometimes be the most compelling reason to order a new trial.

[91] In this case, however, the prosecution's case cannot be described as overwhelming or compelling. Further, as at the date of this judgment, 17 years have passed since the date of the alleged incident in 2008. Given the backlog of criminal cases in Saint Lucia, there is no certainty that an early trial date can be secured, as cases where the defendants are in custody may also have to share priority. Furthermore, the appellant was sentenced to a total of 18 years imprisonment on 26th February 2019. We were advised that with remission, he could be expected to serve 12 years, of which he has already served more than 6 years. This was an important consideration in the Privy Council's decision not to order a retrial in **Jagdeo Singh v The State**.

²⁹ (1978) 27 WIR 254, PC.

[92] At the hearing, although the learned DPP initially indicated that a retrial would be sought, he eventually told this Court that he felt some reluctance in saying that a retrial would be in order.

[93] For the reasons expressed above, I consider that a retrial would be inappropriate.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Reginald Amour
Justice of Appeal [Ag.]

By the Court

Chief Registrar