[2016] CCJ 1 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No BBCR2015/005
BB Criminal Appeal No 16 of 2012

BETWEEN

CLARENCE ELLOYD SEALY **APPELLANT**

AND

THE QUEEN **RESPONDENT**

Before the Honourables **Mr Justice Nelson**
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr Satcha S C S Kissoon and Mr Philip A McWatt for the Appellant

Mr Alliston Seale and Mr Lancelot Applewhaite for the Respondent

JUDGMENT
of the Honourable Mr Justice Nelson
and

JUDGMENT
of the Honourable Justices Saunders, Wit, Hayton and Anderson
Delivered by Mr Justice Saunders
and

JUDGMENT
of The Honourable Mr Justice Anderson

Delivered
on the 29th day of January, 2016

JUDGMENT OF THE HONOURABLE MR. JUSTICE ROLSTON NELSON

[1] On December 8, 2015 this Court convened a post-submissions hearing of this appeal for the sole purpose of ordering the release of the Appellant. The Court calculated that on the basis of the order of the Court of Appeal sentencing the Appellant on March 4, 2015 to five years' imprisonment for indecent assault the Appellant was due for release when the time spent on remand both prior and after conviction on September 27, 2011 was taken into account. We ordered the Appellant's release and further adjourned the appeal pending judgment. We now give our decision and reasons for judgment.

[2] During the course of the trial which commenced on the September 21, 2011, the main evidence in support of the prosecution's case was adduced from the minor virtual complainant then aged 10 and police officers, Sergeant Arthur Springer and Police Constable Christine Broomes.

[3] During the course of the evidence in chief of both Sergeant Springer and Constable Broomes, application was made by the prosecution for leave for the witnesses to refresh their memory and read aloud from their notebooks and leave was granted by the Court.

[4] The Appellant was duly convicted by a jury on the September 27, 2011 and after the court obtained a Pre-Sentencing Report, a Psychiatric Report and a Psychological Assessment he was sentenced to a term of six (6) years' imprisonment on September 12, 2012.

[5] The Appellant appealed against conviction to the Court of Appeal. The Court of Appeal held by a majority that a verdict of indecent assault should be substituted for the verdict of guilty of rape and that a sentence of 5 years' imprisonment should be substituted for the sentence of 6 years.

[6] The Appellant now appeals to the Caribbean Court of Justice against the decision of the Court of Appeal made on March 4, 2015 allowing the appeal against conviction for rape but substituting a verdict of indecent assault.

The appeal to this Court

[7] The issues before the Court are as follows:

(1) whether the Court of Appeal erred when it upheld the trial judge's grant of leave for police officers to refresh their memories and to read aloud from their official police notebooks unsigned statements allegedly made by the Appellant; and

(2) whether the Court of Appeal erred in its conclusion that the trial judge's warning concerning the evidence of the police officers was adequate and that a '*McKinney* warning' was unnecessary.

Submissions on behalf of the Appellant

[8] The Appellant challenged the Court of Appeal's conclusion that *Francis v The Queen*[1] settled the issue of whether a police officer may read into evidence unauthenticated oral statements attributed to an accused. He submitted that the question remained unsettled in Barbados.

[9] While he did not challenge the trial judge's ability to permit a witness to read aloud, the Appellant insisted that in the circumstances it was unfair for the judge to grant leave to the police officers to do so. The trial judge should have considered as a material issue the fact that the statements to be read aloud included unauthenticated statements attributed to the Appellant. The trial judge should have considered that section 30(3) of the Evidence Act ('the Act')[2] which empowered the trial judge to grant leave to a witness to read aloud should be read against the background of section 73 of the Act which prohibits the admission of documents containing unauthenticated statements into evidence as proof of their contents.

[10] The Appellant relied on section 145 of the Act which outlines considerations a trial judge should have when granting leave. He first contended that the list of considerations is not exhaustive so that an additional factor for consideration under section 145(2) ought to be whether a document being read by a witness

[1] [2009] CCJ 9 (AJ), (2009) 74 WIR 108.
[2] The Evidence Act 1994, Chapter 121 of the Laws of Barbados (Evidence Act).

would otherwise be inadmissible and whether or not there was an abuse of section 30 to avoid the consequences of section 73. Secondly, he turned to the considerations listed and highlighted those which concerned unfairness 'to a party' and the importance of the evidence in question. He submitted that in the circumstances unfairness arose where 'evidence of unsubstantiated documents' was admitted into evidence. He maintained that the trial judge should have considered whether the requests for the witnesses to read aloud were meant to circumvent the prohibition in section 73. In failing to appreciate the effect of section 73, the trial judge erred when she allowed the jury to be exposed to evidence which would have otherwise been inadmissible.

[11] In the alternative, the Appellant contended that the trial judge's warnings pursuant to section 137(2) were inadequate in that she failed to inform the jury of the matters that might cause the alleged oral admissions to be unreliable. The learned judge should have directed the jury along the lines of *McKinney v The Queen.*[3] While *McKinney* held that careful consideration should be given to a warning where a confessional statement allegedly made by the accused has been established as the only or only substantial basis for finding guilt, the Appellant submitted that the Act requires a *McKinney* warning whenever police officers' evidence is admitted.

[12] The Appellant submitted that the evidence of the police witnesses was unreliable so that a *McKinney* warning was particularly necessary in the present case since the only other evidence was that of the virtual complainant which was also unreliable and the alleged oral admissions which were read aloud were unauthenticated statements attributed to the Appellant.

Submissions on behalf of the Crown

[13] The Respondent contended that section 30 of the Act allows a witness to refresh his memory and section 73 of the Act did not operate to prevent a police witness from refreshing his memory from a document recording unsigned oral admissions of an accused. The Crown contended that the common law position

[3] (1991) HCA 6, [1990-1991] 171 CLR 468.

prior to the Evidence Act allowed for 'verballing' and the Act only sought to prescribe the circumstances under which 'verballing' was recorded by way of sections 72 and 73 with the introduction of video and audio taping of interviews. Section 73 was enacted to prevent the admissibility of evidence which did not comply with section 72. It could not have been Parliament's intention, it was argued, that oral admissions made by the defendant would be deemed inadmissible as a true record of exchanges between the accused and the police officer merely because the Appellant did not sign the document.

[14] Counsel for the Crown submitted that the trial judge gave consideration to section 145 when she granted permission to refresh memory. The trial judge properly exercised her discretion under section 30(3) in allowing Sergeant Springer to refresh his memory from his official police notebook and this grant of leave did not result in unfairness to the Appellant. Counsel for the Crown stated that section 137(1) anticipated a situation where evidence involved unauthenticated statements by the accused and provided safeguards for this situation in the form of a warning to the jury. If unauthenticated statements were inadmissible, then there would be no need to warn the jury of unreliability pursuant to section 137(1)(d) as the judge would exclude the statements. The Respondent also submitted that section 145(2)(b) referred to unfairness that may be meted out to 'a party', including the prosecution.

[15] The Crown contended that to impose on a trial judge the burden of giving a *McKinney* warning was unnecessary and would place police evidence in a special category of unreliability. A *McKinney* warning was only required in cases where the evidence against an accused was based wholly or substantially on the authenticated confessional statement. The Crown further argued that a judge was not required to use particular words in a warning to the jury in order to comply with section 137. In the circumstances the trial judge had given the appropriate warnings.

[16] Counsel concluded that the majority decision of the Court of Appeal was correct when it substituted a verdict of indecent assault. If the Court found

procedural irregularity, the application of the proviso would cure such irregularity thereby rendering the conviction safe.

The evidence

[17] In the present case, if no regard were paid to the oral admissions in the unsigned record of the interview with the accused, the only issue for the jury would be whether they believed the virtual complainant. There was no other sworn evidence apart from the evidence of other prosecution witnesses before the jury. The Appellant made two points in his defence in an unsworn statement from the dock: (1) he gave no statement to the police; (2) he did not interfere with the virtual complainant, then six-years old. Counsel for the defence in cross-examination made some suggestions as to fabricated verbals but no evidence was advanced in support of those suggestions.

[18] The evidence of the virtual complainant in this case was in effect unchallenged. The learned trial judge therefore instructed the jury:

> If you accept the evidence of [the virtual complainant] … as evidence of the truth then I will tell you that this is evidence of penile penetration, of sexual intercourse without consent within the meaning of the law.

[19] A summary of the prosecution evidence apart from the disputed oral admissions bears that out. The virtual complainant's mother testified that the Appellant was a neighbour and that on a date in August 2007 she had allowed the Appellant to take the victim to a shop to buy lunch. The virtual complainant said that the Appellant took her to his house, which she identified in the photographs taken by a police photographer. The Appellant locked the door behind her. She described the bedroom where she was, recalling pictures of naked women on the wall, and in particular, of a naked woman holding a cricket bat. The virtual complainant stated that the Appellant dropped his pants and took out some cream, which he put on his penis and his fingers. He placed his penis in her vagina but he achieved only partial penetration. He then effected digital penetration. She protested. He performed oral sex on her and sucked her breasts. In the course of a police search at the Appellant's house, the Appellant

handed over a tube of cream to the police and said, 'That is the cream I used to put on my penis and her vagina'. The tube of cream was tagged and initialled by the Appellant and the police officer, and put into evidence at the trial.

[20] There was therefore ample evidence on which the jury could convict the Appellant quite apart from the disputed oral admissions. Once the jury accepted the evidence of the victim, it is clear that they rejected the defence that the oral admissions were never made.

Refreshing memory in Barbados

[21] The law relating to refreshing memory in Barbados is now governed by section 30 of the Act and the previous common law where it has not been expressly or impliedly[4] changed. No longer is there the common law distinction between refreshing memory in the sense of giving oral evidence but consulting a document from time to time to supply gaps in one's memory and recitation of the contents of a document of which the witness no longer had any independent recall but vouched for the accuracy and contemporaneity of the document.

[22] Under the Act in both cases the witness may with leave recite the contents of the document: section 30(3). In both cases under the Act the document is not evidence.[5] This Court held in *Francis v The Queen:*

> The use of a document by a witness to refresh his memory is totally different from putting the document in evidence, and the two are governed by different rules. The prohibition of one does not imply a prohibition of the other.

[23] It is to be noted that under section 30 it is the spoken word that is evidence.[6] Under section 30 admissibility of the document used to refresh memory is irrelevant. Also section 30 leaves in-tact the common law position that a witness can refresh his memory even from an inadmissible document.[7] The new régime permits a witness to read aloud with leave the contents of a document he has used to refresh his memory. Accordingly the judge properly granted

[4] For example, the Act says nothing about the burden of proof. See also Evidence Act s 137(1)(d)(ii).
[5] *Francis* (n 1) [17].
[6] See *Francis* (n 1) [29].
[7] *Maugham v Hubbard* (1828) 108 ER 948 (KB); *Birchall v Bullough* [1896] 1 QB 325.

leave for the police officers to refresh their memories from the notebooks containing the unauthenticated oral admissions and to read aloud from their notebooks.

[24] Counsel for the Appellant invited this Court to hold that section 145 curtails the judge's discretion to permit reading aloud. He submitted that the trial judge should have exercised her discretion to exclude evidence of the oral admissions contained in the unsigned record of the police interview on the ground of unfairness pursuant to section 145. No contention was made by counsel that the oral admissions should be excluded or considered unreliable because of the circumstances in which they were made in view of sections 70, 71 and 77 of the Act.

[25] As regards unfairness, the Appellant suggested that reading aloud from an inadmissible unsigned record was unfair having regard to the prohibition in section 73. Section 73 provides:

> Where an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official, a document prepared by or on behalf of the official is not admissible in criminal proceedings to prove the contents of the question, representation or response unless the defendant has, by signing, initialling or otherwise marking the document, acknowledged that the document is a true record of the question, representation or response.

[26] Section 73 merely prevents the unsigned record of the interview being adduced into evidence, but not the oral admissions. It is manifest from the wording of the section that evidence of the oral admissions is not proscribed. Indeed section 137(1)(d)(ii) contemplates that when oral evidence of an unsigned or unacknowledged record of official questioning of an accused is admitted into evidence, the judge should warn the jury of the potential unreliability of such evidence. No warning pursuant to section 137(1)(d)(ii) would have been necessary if the oral admissions were inadmissible; they would simply have been excluded.

[27] In addition counsel for the Appellant could have compelled production of the document used to refresh memory (section 30(4) of the Act) and cross-examined the officers as to the circumstances of the making of the oral admissions and the reason why the Appellant did not authenticate the oral admissions. Instead the only challenge to the oral admissions was a suggestion of fabrication unsupported by any evidence.

[28] In *Francis* a similar point of unfairness was taken. De la Bastide P ruled as follows:

> Failure to have the record of an oral admission authenticated by the person who made the admission, was never a bar at common law to using that record to refresh the memory of the person who made it. It was never suggested that using the record for that purpose in such circumstances was unfair to the accused. There is nothing in the Act which suggests that the matter should be viewed differently now.[8]

[29] When the High Court of Australia excluded unsigned records of police interviews with the accused that were not adopted in writing, it treated the written record as inadmissible, but as Gleeson CJ, Hayne and Heydon JJ in the High Court of Australia stated correctly in *Kelly v The Queen*:[9]

> Where a written record of interview was neither signed nor otherwise adopted, it was held to be not itself admissible, though the officers who prepared it might refresh their memory from it.

This proposition applies with even greater force to section 30 which permits refreshing of memory from documents verified to be accurate at or near the event in question without reference to admissibility. On the other hand section 73 of the Act does not proscribe reliance on oral admissions but prohibits reliance on unsigned records of police interviews.

[30] There is no requirement that for every leave application there is an arduous working out and setting out by the judge of his or her thought processes. A bald incantation of regard to the section is not required.[10] On principle and on

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[8] *Francis* (n 1) [24].
[9] [2004] HCA 12, (2004) 218 CLR 216 [27]. Interestingly in *Kelly* the relevant Tasmanian legislation made evidence of any **confession** or **admission** on the trial of a serious offence inadmissible unless videotaped or a reasonable explanation was given or the interests of justice justified adducing such evidence.
[10] See *R v Reardon* (2002) 186 FLR 1, [2002] NSWCCA 203 [26]-[32] and *Francis* (n 1) [66].

authority, I reject the Appellant's submissions on sections 30, 73 and 145 of the Act.

The *McKinney* warning: section 137

[31] The Appellant submitted that since the oral admissions were disputed and made while in custody, a *McKinney* warning should have been given to the jury. In *McKinney v The Queen,*[11] the majority held that where a written record of a police interview was not signed the jury should be instructed to:

> … give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated.

[32] The High Court of Australia also emphasized that the jury should give careful scrutiny to such confession evidence and direct attention to the fact that police witnesses are often practised witnesses whose evidence is difficult to assess. Further, 'in the context of and as part of the warning, it will be proper for the trial judge to remind the jury, with appropriate comment, that persons who make confessions sometimes repudiate them.'[12]

[33] As regards the universal application of the *McKinney* warning set out in [31] and [32] above, Brennan J in *McKinney v The Queen*[13] said:

> This case comes on appeal from the Court of Criminal Appeal in New South Wales. If police confessions so generally give rise to judicial disquiet in New South Wales that a universal practice of warning is thought to be necessary (and I am not aware that there is material which would justify this Court in acting on that hypothesis), it is yet inappropriate to prescribe a practice derived from experience in New South Wales for application in all Australian jurisdictions. There is certainly no material which would establish general police malpractice of that kind throughout Australia.

[34] There is in the instant appeal a similar lack of material to establish that there exists in Barbados the kind of malpractice alleged to have existed in New South

[11] *McKinney* (1991) HCA 6 [19], [1990-1991] 171 CLR 468, 476 (Mason CJ, Deane, Gaudron and McHugh JJ).
[12] ibid.
[13] *McKinney* (1991) HCA 6 [8], [1990-1991] 171 CLR 468, 483 (Brennan J).

Wales. In the present case there was no evidential basis for suggesting that the evidence of the police witnesses was unreliable.

[35] In any event, it could not be suggested that the only or substantially the only evidence of the Appellant's guilt was the oral admissions contained in the police officers' notebooks[14]. On the facts of this case a *McKinney* type warning was not required to be given even if it applied in Barbados.

[36] In *Gill v R,*[15] a strong court of the Barbados Court of Appeal (Simmons CJ, Williams JA and Belgrave JA (Ag.)) shared the scepticism of the minority in *McKinney* (Brennan, Dawson and Toohey JJ) as to the mandatory nature of a warning, including a *McKinney* type warning. Simmons CJ said:

> Brennan J rejected the argument that there should be a general or prima facie rule of practice requiring trial judges to give a warning and he expounded his 3 reasons for rejection at pages 481-487. In particular, His Honour saw 'no underlying rationale for a universal practice requiring a warning in every case in which a police officer tenders uncorroborated confessional evidence which is challenged by the accused.' – p. 482. Indeed he saw the matter as one of basic principles. At p. 482 he said: - 'In every case where the prosecution case depends solely on a confessional statement that is uncorroborated and is challenged, a judge must direct the jury that they cannot convict unless they are satisfied beyond reasonable doubt that the confession was made and that it was true.[16]

[37] When *Gill* was decided in 2003 the Barbados Evidence Act did not have the words 'and a party so requests' which the Act was amended in 2007 to insert, to bring it in line with what the wording of the Australian Evidence Act 1995 (Cth) as it read in 2003. Simmons CJ, nonetheless, held that even on the 2003 wording of the Act the requirement for a warning to be given under what is now section 137 was not mandatory but discretionary.

[38] The Barbados Court of Appeal rejected an interpretation of section 137 (then section 136) which would 'elevate police evidence to a special category of

[14] See [19] and [2] of this judgment.
[15] BB 2003 CA 3, CARILAW, (30 January 2003).
[16] ibid [80].

unreliable evidence.'[17] Simmons CJ, Williams and Belgrave JJA concurring, ruled:

> Such a universal rule of practice relating to the manner in which a trial judge should sum up would imply that, regardless of the circumstances, evidence of a defendant's oral statements to a police officer must be regarded as being particularly suspect and as being particularly liable to fabrication. Such a conclusion would hardly conduce to the fairness of a trial.[18]

[39] Further, no particular form of words has to be used in giving the warning or information.[19] The form of warning must be tailored to the facts of the case, and the judge would only warn the jury of the danger of convicting the accused when the only or the only substantial basis for a guilty verdict is an admission or confession made to police officers. The Privy Council expressed similar views in *Benjamin and Ganga v The State*,[20] a Trinidad and Tobago case.

[40] In every case a trial judge must consider whether a warning should be given and in what terms. It is open to the judge after such consideration to give no warning in a particular case. As Simmons CJ stated:

> In the vast majority of criminal cases, issues touching and concerning the reliability of evidence are matters for a jury in its analysis and evaluation of the evidence in the case. That duty will best be discharged in cases of disputed confessional statements by the trial judge giving full directions on the burden and standard of proof and giving proper directions on the treatment of the evidence of the disputed statements and assisting the jury in their evaluation of the statements.[21]

[41] A set-piece *McKinney* direction was not required in the present case. The trial judge considered it appropriate to warn the jury to proceed with caution with respect to the unauthenticated oral admissions, and did so adequately.

Electronic recording

[42] Section 72 of the Act (as amended but not yet proclaimed) introduces mandatory electronic recording of police interviews. Section 73 makes a

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[17] *Gill* (n 18) [87].
[18] ibid.
[19] The Evidence Act (n 2), s 137(3).
[20] [2012] UKPC 8 [[26].
[21] *Gill* (n 18) [92] citing J.D. Heydon, *Cross on Evidence* (6th Australian edn, Butterworths 2000) [1454].

manual record of oral admissions in a police interview admissible only if acknowledged in writing by the suspect. The benefits of electronic recording are now well-known.

[43] In *R v Woods*[22] Nader J said:

> Electronic recording is the best safeguard for both police and suspect … tape recordings have been used with great benefit to the prosecution. They have prevented false accusations against [the] police … and… have operated powerfully to remove any unease from the jury's minds that there may have been some fabrication of evidence.

[44] However, it must be recognized that although the advent of electronic recording of formal interviews has eliminated complaints against the police about formal interviews, it has not stopped complaints being made as to treatment prior to or after the formal interviews. Nevertheless, it is hoped that section 72 would soon be proclaimed.

Conclusion

[45] The learned trial judge warned the jury to exercise caution in assessing the victim's evidence and even went as far as to ask the jury to look for corroboration of her story. It seems clear that quite apart from the Appellant's submissions on the law relating to refreshing memory, section 73 and section 137 of the Act being unsound, an examination of the facts does not reveal any unfairness in the way the judge exercised the large discretions as to exclusion or inclusion of evidence which the Act bestows on a trial judge.

[46] There are significant impediments on the ability of an appellate court to interfere with findings of fact[23] or the exercise of a discretion.[24] It is not enough to say that as an appellate judge one might have reached a different conclusion or exercised a discretion differently. The Appellant has not established any error of law by the trial judge in relation to the sections of the Act on which he relies.

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[22] (1991) 103 FLR 321, 323.
[23] *Benmax v Austin Motor Co. Ltd.* [1955] AC 370 (HL).
[24] *Shiloh Spinners Ltd. v Harding* [1973] AC 691, 727 (HL).

[47] Accordingly, the appeal is dismissed. The sentence of the Court of Appeal is affirmed but account must be taken of time spent on remand.

JUDGMENT OF THE HONOURABLE MR. JUSTICE ADRIAN SAUNDERS

Introduction

[48] Clarence Sealy was originally charged with and convicted by a jury of raping C, a young girl then only six years old. He appealed his conviction to the Court of Appeal. That court substituted his conviction for one of indecent assault. Sealy was dissatisfied with this decision. He has appealed to this Court. We agree that his appeal should be dismissed.

[49] To appreciate better the reasons for our decision, it is helpful to distinguish between two different bodies of evidence that were given against Sealy at the trial. Counsel, on his behalf, strenuously objected to the admission and treatment by the trial judge of the body of evidence that related exclusively to oral responses ('the verbals') which two police officers testified were given by Sealy when he was questioned at the police station at the time of his arrest. The verbals, taken as a whole, could possibly have been construed as a denial of rape, but there is no doubt that they contained convincing admissions of indecent sexual assault on the child. At the trial, Sealy's defence was that the verbals were concocted. Cross-examination was directed to that end and, in a very brief statement from the dock, Sealy denied making 'that statement'.

[50] Sealy's appeal is based almost entirely on the grounds that, in admitting and treating with the verbals, the trial judge contravened the Evidence Act ('the Act'),[25] and wrongly exercised her discretion and inadequately directed the jury as to how the verbals should be treated. Counsel had less complaint to make about the other body of evidence given at the trial, i.e. the evidence other than the verbals. This latter set of evidence consisted of sworn testimony from a range of witnesses including C, who was 10 years old at the time of the trial; M, the mother of the child; a medical doctor who examined C, and police

[25] The Evidence Act (n 2).

officers. It is useful, firstly, to outline what comprised this latter body of evidence as its admission was essentially unchallenged.

The Evidence admitted without complaint

[51] Sealy was a family friend who frequently visited M's house. In August 2007 when M was recovering from a medical procedure and C was at home with her, Sealy came by and offered to buy them lunch. M permitted C to accompany Sealy on this errand. Instead of going straight to the food shop, Sealy took the child to his house. This was the first time C had been inside that house. Sealy locked the door behind them and led her into a bedroom. In her testimony C described the house and the door to the bedroom. She stated that on the door there was a picture of a naked woman holding a cricket bat. As C sat on the side of the bed, Sealy made her undress and he took off his trousers. He lubricated his penis with a cream and, without her consent, he tried to have sex with her. It was only possible for the tip of his penis to enter her. She was in pain. Sealy desisted and instead inserted his fingers into her vagina. She begged him to stop. He held her mouth so that she could not scream. He engaged in oral sex with her and kissed her. During this time C heard her mother outside the house calling her name. C eventually put on her clothes and, as she was leaving the house with Sealy, he said to her that if she ever told anyone about what had happened they would not be friends anymore.

[52] M meanwhile had become worried at the length of time her young daughter was away with Sealy. She went in search of them. She approached Sealy's house, knocked on the door and called but received no response. She made inquiries of the neighbours and the place where the food should have been bought. As she was eventually returning to her home she saw the pair at a nearby rum shop. She remonstrated with the little girl about the length of time they had been away but, in Sealy's presence, the girl gave her mother a story about having to go to get drinks. The explanation appeared to have satisfied M.

[53] A few months later C confided to M's friend about what had transpired. The friend relayed the information to M. A report was made to the police and the

girl was carried to the doctor to be examined. The doctor found that her hymen was not intact. During the course of the medical examination the child reported that she had in the past also been improperly touched by another man. Counsel wished to pursue this matter further but was rightly prevented from so doing by the judge.

[54] In the course of their investigations, police officers went with Sealy to his home where Sealy handed over to them a tube of cream. Sergeant Springer attached a tape to the tube and Sealy acknowledged this piece of evidence by marking his initials on the tape. A police photographer also took a photograph of Sealy's bedroom door. Hanging on the door was a calendar, 'The Banks Calendar Girl' showing a photograph of a nude woman holding a cricket bat.

[55] Sealy's evidence consisted of two sentences made, unsworn, from the dock. He said he did not interfere with the child and, presumably with reference to the verbals, he denied giving the police 'that statement'.

The Verbals

[56] The day following the reports to the police by C and M, Sergeant Springer invited Sealy to the Police Station. At the Station the Sergeant told Sealy about the allegation of the rape of the child. Sealy was told that he had the right to consult with a lawyer if he so wished. Sergeant Springer and Constable Broomes testified that in their joint presence Sealy made a number of statements. As previously indicated, some of the statements amounted to incriminating admissions of sexual assault on C. To be precise, according to the officers, Sealy admitted that he had used the cream to lubricate both his penis and the girl's vagina and that he tried to have intercourse with her, but that he had failed because her vagina was 'too small'.

[57] Sealy's police interview was not sound recorded. Legislation to permit this has been enacted but the relevant provision has been suspended. The sergeant said that he recorded the interview in his official notebook. No evidence was given

that Sealy was ever asked to acknowledge what was there recorded, whether by signing or initialling the same. Nor did the police officer read back over to Sealy what was written down by him.

[58] At the trial, Sergeant Springer led evidence about his interview with Sealy but testified that he could not remember what he had recorded in his notebook. He requested permission to consult his notebook firstly to refresh his memory and also to read aloud what was in it. Counsel for Sealy did not object to the Sergeant refreshing his memory but strenuously objected to him being allowed to recite from it on the grounds that the notebook had not been disclosed and that to read aloud from it would be 'a breach of criminal procedure rules' and fundamentally unfair to the accused.

[59] After some discussion, regrettably held in the presence of the jury, the judge permitted the witness to read aloud what was recorded in the notebook. The judge reasoned that a sufficient foundation had been laid to support the officer's desire to refresh his memory. After giving this decision, and before Springer continued with his evidence, the judge advised that counsel be allowed to see the notebook.

[60] Sergeant Springer's evidence as to the verbals was supported by Constable Broomes. She too, it seems, had diligently and contemporaneously recorded in her notebook, word for word, the exact questions put to and the responses that were made by Sealy. She also asked for permission to refresh her memory from her notebook and also to be allowed to recite its contents. Counsel again objected to the latter request. The judge's decision was that 'my response remains the same which is at (sic) section 30 of the Evidence Act permits me to grant leave in these circumstances'. The judge then, for the first time, adverted aloud to section 145 of the Evidence Act and invited submissions, in accordance with that section, as to whether there were factors which the court should take into account in granting permission to read aloud in the circumstances. We pause here to observe that, if anything significant had turned on this, the damage would already have been done with Springer's evidence. At any rate, counsel

requested that, on this occasion, the jury be excused and, in the absence of the jury, the judge again heard submissions on whether the officer should be permitted to read the recorded verbals into evidence.

[61] The judge ultimately decided to grant leave for Constable Broomes to read aloud from her notebook on the premise that 'the proper foundation has been laid' in relation to refreshing memory and that the court had taken into account the matters referenced in section 145 of the Act. In the course of the exchanges, counsel and the judge alluded to the decision of this court in *Francis v The Queen*.[26]

The judge's summation

[62] It is necessary, as part of the background to this appeal, to refer to salient aspects of the judge's summation that bear on the grounds of appeal. Early in the summing-up the judge warned the jury that it was unsafe to convict in the absence of corroboration. She explained what amounted to corroboration and why the law seeks corroboration in cases of allegations of sexual assault. The judge then indicated to the jury that the verbals constituted corroboration of C's evidence. Given the effect of the last mentioned direction it was important that a strong warning be given in relation to the verbals. The attempt to do so was in the following terms:

> I must caution you, Madam Foreman and members of the jury, that when the police officers gave their evidence they did not give any evidence that the accused man was called upon to initial their notebooks to show that he did make the statements which they claimed that he made. It is a recommended practice, not a law, that officers should where possible invite accused persons to sign the statements attributed to them. I am required by section 137 of the Evidence Act of the Laws of Barbados to warn you that the oral statements attributed to the accused man by the police may be unreliable. Those statements have not been signed by the accused man or otherwise acknowledged in writing by him and they were not given on oath. Now, the reason for this is quite simple, Madam Foreman and members of the jury, if the police officer or a police officer gives you an opportunity to initial his notebook when you make a statement or in some other way to acknowledge that you read that statement, that is useful, members of

[26] *Francis* (n 1). .

> the jury. It is useful because it gives you the opportunity to see that the Police Officer did not write something -- did not write anything that the accused man did not say, that the police officer did not omit something that the accused man said or that the police officer did not misrepresent anything which he said. That does not mean, Madam Foreman and members of the jury, that because the accused man did not initial the notebooks that you must disregard the statements. Instead you must heed my warning to pay caution when you deal with the statements. If in spite of the fact that he did not initial those statements, you are satisfied that those police officers were not telling lies, well then you may rely on those statements having borne in mind the caution which I have given you. I am sure you will recall, members of the jury, that the accused man objected to some of the oral statements. Accused Sealy said from the dock in his unsworn statement: 'I ain't give the police that statement nor I ain't interfere with the little girl.' Now it was not one statement but several oral statements and when I reviewed the case for the Defence especially the cross-examination of Sergeant Springer and Officer Broomes, you will note that counsel for the Defence puts to these officers that accused Sealy did not make some of these statements. In particular, all those statements that implicated him in the crime alleged. It will be for you, Madam Foreman and members of the jury, to decide if you accept the accused man's words that he never made those statements. You have to ask yourselves whether you think that these Police Officers put those words in their notebooks just to incriminate accused Clarence Sealy. That, Madam Foreman and members of the jury, is a question of fact for you to determine. That is, if you think that the accused man made the statements which the police officers said he did, or if they deliberately fabricated evidence and told lies on him. And if you accept that he made these statements, if you accept that he made these statements you must exercise caution in determining the weight that you will attach to them. You have seen the manner in which the police officer Springer gave his evidence and it is for you to determine whether you consider him to be a witness on whose testimony you can safely rely in determining whether the oral statements were made in the circumstances attested to by that officer. The Prosecution urges you to find him to be a witness of the truth. While the Defence urges you to find him a liar. If you have any doubt whatsoever when considering the case against the accused that he made those oral statements, you will resolve those doubts in his favour and you will reject the oral statements.

[63] Later, when summarising the evidence given at the trial, the judge said:

> You will recall that I gave permission for the officer to refresh his memory and to read to you certain sections of his notebook where he recorded the several oral statements made to him by the accused. In reviewing them you must apply the direction I have given you on how

> to deal with oral statements, a two-step process: Were they made and if they were made, what do they mean?

[64] Later still, the judge stated:

> Officer Christine Broomes was the back-up officer who accompanied Sergeant Springer at all times and her evidence was corroboration of that given by Sergeant Springer. In particular officer Broomes corroborates the oral statements given to Sergeant Springer by accused Sealy.

[65] Finally, the judge directed the jury:

> … Madam Foreman and members of the jury, the issue that goes to the heart of this trial as it often does in trials of sexual offences, is credibility. The credibility of the virtual complainant …[C] and Officers Springer and Broomes must be assessed by you.

Counsel's submissions to the Court of Appeal

[66] The arguments before the Court of Appeal focussed on a) the judge's refusal to permit counsel to explore further with the doctor matters germane to C's sexual history; b) the admission and treatment of the verbals; c) the corroboration of C's evidence; and d) section 137 warnings. The first issue was rejected by the Court of Appeal and not pursued in the appeal before this Court.

[67] As to the verbals, counsel suggested, among other things, that the judge erred in failing to hold 'a *voir dire*' on his objection to the reading aloud of the verbals. On the issue of corroboration, counsel claimed that it was a mis-direction for the Judge to have instructed the jury that the verbals were capable of corroborating C's evidence because, according to the verbals, Sealy had denied raping C (since her vagina was too small) even as he admitted penetrating her with his fingers. In relation to section 137 of the Act, counsel submitted that the trial Judge's warnings were inadequate.

The judgment of the Court of Appeal

[68] Two substantive opinions were rendered in the Court of Appeal.[27] The majority took the view that this Court's decision in *Francis* had settled the issues of refreshing memory and reading aloud. In any event, the majority held that the trial judge had properly exercised her discretion to permit the verbals to be read aloud. The majority considered that fair treatment of the verbals was ultimately governed by assessments of credibility by the jury and, in this regard, jurors in Barbados today are highly literate, many being university graduates. It would be 'nonsensical', said the majority, for a police witness to be able to refresh his/her memory from a notebook and not be permitted to read aloud from it.

[69] The Court of Appeal majority did, however, find significant merit in counsel's complaint about the judge's direction that the verbals corroborated C's evidence. The majority claimed that this was a serious mis-direction because, according to them, the verbals amounted merely to an admission of indecent assault. In the circumstances, the majority allowed the ground of appeal that urged there was no corroboration of the child's evidence. As a consequence, the majority substituted the conviction of rape with a conviction for indecent assault and reduced the sentence imposed on Sealy from 6 to 5 years. On the section 137 issue, the majority rejected the notion that there was any deficiency in the warnings given to the jury by the trial judge.

[70] The Chief Justice, the other member of the appellate panel, gave a separate opinion. The Chief Justice stated that the trial judge undoubtedly had the discretion to give leave to read aloud the verbals, but this discretion ought to be rarely exercised, even given the safeguard of a section 137 warning to the jury. The Chief Justice felt, however, that Sealy had suffered no unfairness. The verbals were open to the interpretation that Sealy had attempted, by

[27] See Clarence Elloyd Sealy v The Queen (Court of Appeal of Barbados, 4 March 2015).

inserting the tip of his penis into the girl's vagina, to have sex with her but was unable to achieve full penetration because the girl's vaginal orifice could not accommodate his penis. It was open to the jury to conclude on this basis that what transpired satisfied the legal test of rape and the jury were right to take this view. In any event, the Chief Justice felt that this was a proper case for the application of the proviso.

[71] On the issue of the nature and extent of the warnings that were or should have been given by the trial judge to the jury, the Chief Justice agreed with the majority that the trial judge had adequately warned the jury about the risk of unreliability of the evidence led.

Discussion

Refreshing memory / Reading aloud note of confession

Ground One

[72] The grounds of appeal argued in this case require the judge's summation and her rulings to be measured against the provisions of the Act. To do justice to those grounds one must have regard to the anti-verballing scheme of the Act and construe the statute as a whole, interpreting and applying its various provisions in their context. It must also be borne in mind that the Act was passed in order '*to reform the law* relating to evidence in proceedings in courts …'[28] To this end, in several respects the Act applies standards that are more stringent than the common law, compels the judiciary to be guided by fresh approaches and requires the executive to make available to the police new technologies. The Act lays down rules of evidence to meet modern social standards and the citizenry's enhanced sense of what is fair. Some of the more important reforms of the Act seek to address issues that are pertinent to this case, namely, enhanced police procedures in the questioning of suspects, expanded judicial discretion in relation to the admissibility of

[28] See the Long Title to the Evidence Act (n 2) (emphasis added).

verbals and the placement of new obligations on trial judges regarding the treatment of verbals during the course of a trial.

[73] In his first ground of appeal to this Court counsel challenged the exercise of the judge's discretion to permit Sergeant Springer and Constable Broomes to read aloud the confessional statement that was recorded in their respective notebooks. Counsel cited sections 30, 73 and 145 of the Act as being relevant to this ground. It is necessary, however, to have regard also to other provisions of the Act given that the real nub of the complaint is whether the confession should have been placed before the jury.

[74] Section 30 of the Act is found in that part of the statute that deals with general provisions having to do with the manner of giving evidence. The section authorises the court to permit a witness to refresh his/her memory after taking into account certain matters. These matters include an assessment as to whether the witness will be able adequately to recall the fact(s) in question without referencing the document; the contemporaneity of the making of the document with the events recorded in it; and the satisfaction of the witness that what is recorded in the document is accurate. Section 30(3) authorises the court to go further and to give, to a witness who has previously been granted leave to refresh her/his memory, permission to read aloud from the document.

[75] Section 30 does not target confessions. It is a general provision regarding the refreshing of memory. As a matter of routine, it is invoked almost daily, with little difficulty or controversy. But although the section may on its face be applicable also to an oral confession made to a police officer, in considering the same in this context a judge *must* have regard to the other provisions of the Act that deal peculiarly with confessions. The application of a general provision in an Act may be conditioned or even overridden by a relevant specific provision. Section 30 should not be considered in isolation when the document from which memory is to be refreshed is an unacknowledged

confession. There is a world of difference, in practice and in application of the Act, between the police officer who seeks permission to refresh her memory about the measurements she took at the scene of a traffic accident, on the one hand, and the officer who wishes to refresh his memory from a note of an unacknowledged confession he says was given by a suspect during a formally structured interview at a police station and which confession was never read over to the suspect. Issues surrounding refreshing memory and reading aloud from a confession statement are inextricably linked to the admissibility into evidence of the confession and in treating with such admissibility one must be mindful of the impact of sections 71, 72 (if and when it comes into force), 73, 77, and 116.

[76] Sections 71, 72 and 73 are all part of a division of the Act that treats specifically with confessions/admissions. Section 71(2) prohibits the admission into evidence of a confession unless the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected. The court here is not concerned with whether the confession is or is not true or was or was not made by the accused. The focus of the inquiry is upon the impact of the circumstances in which the admission was made, that is, on the *reliability* of the admission.[29] When section 72 is in force, those circumstances would ordinarily include, in addition to the range of matters stipulated at section 71(4), whether the procedural safeguards contained in section 72 were followed.

[77] It is regrettable that more than twenty years after the passage of the Act section 72 has not yet been brought into force. Justice Anderson has commented on this in a separate concurring opinion with which this judgment is in full agreement. Suspension of the operation of section 72 cannot, however, alter the meaning of any of the other provisions of the Act and in particular sections 71, 73, 77 and 116. Logically, these sections cannot

[29] See *R v McLaughlan* [2008] ACTSC 49[58] (Refshauge J) citing *R v Esposito* (1998) 45 NSWLR 442,s 460.

mean one thing if section 72 is operational but mean something wholly different if section 72 has not been brought into force.

[78] Section 73, which is in force, deals with oral admissions made by a defendant to an investigating official in response to official questioning. That section is tailor-made for the circumstances that surround the verbals in this case. The section clearly renders the respective notebooks of Sgt Springer and Constable Broomes inadmissible in criminal proceedings to prove their contents, given that Sealy had not acknowledged the truth of the statements contained in them by signing, initialling or otherwise marking the notebook.

[79] Section 77 gives the court a broad discretion to exclude evidence of a confession where, having regard to the circumstances in which it was made, it would be unfair to an accused to use such evidence. This provision overlaps with and reinforces section 71. In applying section 77 courts are concerned with promoting evidentiary reliability, protecting the individual from undue state interference with his/her rights, deterring official misconduct and ensuring judicial legitimacy. In exercising its fairness discretion here the courts are unconcerned with the probative value of the admission.[30] These sections express the law's antipathy towards verballing. This is a modern trend that, among other things, promotes public confidence in the methods by which police officers receive confessions. Section 78 and Code C of the Police and Criminal Evidence Act of England ('PACE') is to similar effect. An illustration of how provisions analogous to sections 71 and 77 have been applied in those jurisdictions that are bound by PACE can be seen in the case of *The Queen v Williams*[31] where a trial judge had no hesitation excluding evidence of a confession in circumstances where there had been a breach of the relevant statutory provisions and practice codes.[32] The murder accused did not sign or otherwise authenticate the police officer's note of the confession, nor was the note read over to the suspect. Since there was little

[30] See *R v Em* [2003] NSWCCA 374[110].
[31] VC 2008 HC 11, Carilaw, (25 February 2008). See also R v Delaney (1988) 88 Cr App Rep 338.
[32] Police and Criminal Evidence Act 1984 (PACE), s 78 and Police Regulations s 86(7).

other evidence linking the accused with the shooting death of the Prime Minister's Press Secretary the case against him collapsed. The English case of *Regina v Keenan*[33] is to similar effect. In that case, the Court of Appeal reversed the judge's decision to admit a confession and quashed the conviction in circumstances where similar procedural safeguards had not been followed by the police.

[80] Section 77 is buttressed by section 116 which gives the court the discretion generally to exclude evidence obtained illegally or improperly. Section 116(2) addresses itself specifically to confessions made during or in consequence of questioning. Police improprieties surrounding the questioning and recording of admissions could cause evidence of an alleged confession, and evidence obtained in consequence of the confession, to be regarded as having been obtained improperly which in turn can affect its admissibility.

[81] Section 137 deals, in part, specifically with verbals, but it is not a provision to which one will have regard when deciding whether to admit a confession into evidence. The section is premised on the evidence having already been admitted. This section is discussed later when we look at the second ground of appeal that invokes it. Section 145 is, like section 30, of general application. It is contained in Part VI of the Act which addresses a range of miscellaneous matters. Some of these matters describe the powers of the court. Some of them condition or guide the exercise of discretion by the trial judge.

[82] Section 145 is triggered whenever the court is called upon, by virtue of *any* provision of the Act, to give its permission. Section 145(1) authorises permission to be given on such terms as the court thinks fit. Section 145(2) requires the court to take into account a variety of factors in determining, among other things, whether to give permission either to refresh memory or

[33] [1990] 2 QB 54. See also *R v Scott* [1991] Crim LR 56 and *R v Weerdesteyn* [1995] 1 Cr App R 405.

to read aloud. These factors include the nature of the proceedings,[34] the importance of the evidence in relation to which permission is requested[35] and the extent to which to give permission would be unfair to a party.[36] In all cases the court must take these factors into account as well as any other matters which may be relevant to the particular case.[37] Logically, where verbals are in issue, as in this case, it is well nigh impossible to apply section 145(2) to section 30 without simultaneously considering sections 71 and 77 which address frontally the issue of fairness. A failure by the judge expressly to refer to section 145 or to the enumerated factors does not, however, necessarily amount to an error,[38] especially where the factual matrix, or some comment by the judge, suggests either that the judge *must* have considered the section or where, even if the judge had not consciously factored the section, it is reasonable to assume that had the judge done so, the same ruling would inevitably have been given.

[83] In this connection, it is significant that the trial judge directed the jury that, 'It is a recommended practice, not a law, that officers should where possible invite accused persons to sign the statements attributed to them'. The message the jury may have received is that adherence to the 'recommended practice' was of lesser evidentiary value than compliance with the dictates of 'a law'; that a police officer could, at his option, invite or decline to invite accused persons to sign confessional statements attributed to them, and that the jury should draw no inferences adverse to the prosecution if the officer casually exercises the latter option as no 'law' was being broken. The terms of the Act flatly contradict any such message. Failure to adhere to the practice in question automatically renders the evidence potentially unreliable[39] and could trigger an obligation on the judge to warn the jury about this fact.[40] This direction would have undermined the force of that caution. At a wider

[34] The Evidence Act (n 2), s 145(2)(d)).
[35] The Evidence Act (n 2), s 145(2)(c).
[36] The Evidence Act (n 2), s 145(2)(b).
[37] See *Stanoevski v The Queen* [2001] HCA 4, (2001) 202 CLR 115 [41] (Guadron, Kirby and Callinan JJ).
[38] See *Reardon* (n 11) and also R v Mearns [2005] NSWCCA 396 [37].
[39] See the combined effect of the Evidence Act (n 2) ss 137(1)(d)(ii) and 137(2)(a).
[40] See The Evidence Act (n 2), s 137(2).

policy level, the direction diminishes and discourages a police practice that is obligatory under the Act. The direction is also significant because it provides a window into the likely state of mind of the judge when she was required to exercise her discretion to determine the applications to refresh memory and to read aloud. A judge who places a degraded value on the obligation on police officers to invite a suspect to sign a confessional statement attributed to the suspect (in the absence of sound recording) is more likely to proceed from an erroneous premise when considering the fairness element that permeates the previously mentioned provisions of the Act, including section 145(2). This will naturally affect negatively the manner in which the judge exercises the discretion vested in the court by those sections.

[84] The point is that when a police officer applies for permission to refresh his/her memory of an alleged confession that was, among other things, neither acknowledged nor read back over to an accused, the discretion to grant such permission ***must*** be linked to a consideration of sections 71, 77 and 116(2) and hence to a consideration of whether to exclude the evidence altogether;[41] unless of course a decision has already been consciously made on the latter issue. In determining whether to exclude the confession the trial judge will naturally consider, among a host of other issues, whether there is independent evidence (that is to say, from a source other than from a 'back-up' police officer) that supports or corroborates the verbals. The judge will also be interested in whether procedural safeguards laid down by Parliament have been adhered to and, if they have not been, what is the excuse given for the lapse. The circumstances in which the verbals were made, including whether (in the absence of sound recording when the same is permissible) they were read back to the suspect and he was invited to initial or sign them, are important factors in considering whether the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected. The Act does not encourage the use of

[41] See Stephen Odgers, Uniform Evidence Law, 9th edn, Thomson Reuters (2010) para 1.5.760.

oral admissions that are not sound recorded or acknowledged by the suspect or which are made in circumstances where their reliability is compromised, and the courts have no discretion to admit evidence whose reliability falls below the standards established by Parliament. The considerations that a trial judge might take into account in exercising her discretion to exclude verbals range from matters that impact on what is fair to the specific accused who has a right to a fair trial to those that relate to public policy generally.[42]

[85] The Court of Appeal majority regarded as 'nonsensical' the notion that the court may decline to permit a witness to read aloud from a document after permission had been given for the witness to refresh his memory from it.[43] With respect, this view is at odds with an appreciation of the plain meaning of section 145 and its interplay with section 30 in general. Especially when the document in question is an un-authenticated and disputed oral confession, the fact that leave is given to refresh memory from it will not automatically mean that permission must necessarily be given to recite its contents to the jury. Even after the judge is satisfied that the evidence should not be excluded, the judge still has to exercise the discretion that is vested in the court by section 145(2).

[86] In *Francis* the entire Bench recognised that in granting leave to refresh memory, a trial judge must first consider the matters set out in section 145 and consider the section afresh *again* if permission is requested to read aloud.[44] *Francis* did **not** decide, as the Court of Appeal majority erroneously suggested, whether it was ever proper to grant leave to a police officer to read aloud from an un-authenticated record of an oral admission. The *Francis* majority pointedly left that question unanswered for determination on some other occasion.[45] Counsel in this case states that the day has now arrived for the Court to address the issue but the question is too contextual for a

[42] See *Foster v R* [1993] HCA 80, (1993) 67 ALJR 550 [11] and the cases there cited.
[43] See [68] of this judgment.
[44] See *Francis* (n 1) [28].
[45] See *Francis* (n 1) [29].

categorical answer to be given to it in the abstract. It all depends upon the circumstances of the particular case.

[87] Assuming a decision has been made not to exclude the evidence altogether, there are, here as well, countless factors the judge may consider that are particularly relevant to a request to read aloud from a record of a disputed oral confession. Are the verbals of such a nature that it is really necessary to read aloud from the document if the memory of the witness has already been suitably revived, or is the witness seeking to engage in a subtle ploy unfairly to impress the jury by visibly reciting from a document that the law clearly deems to be inadmissible? When a police officer is able to give, flawlessly from memory, solid evidence on the witness stand of extensive details of his painstaking investigation of a crime, is it reasonable that the officer should experience an inexplicable and dramatic inability to recall brief but crucial admissions made by the accused on which the outcome of the case might well turn? Is there a reason why the officer didn't refresh his memory before taking the witness stand?

[88] In this case, Sealy's counsel should have communicated to the prosecution and the judge at the earliest possible stage that he intended to object to the verbals. Argument and discussion as to whether they should be excluded, or, if not excluded altogether, whether permission should be given, either to refresh memory or to read aloud from them, should have been undertaken and concluded in the absence of the jury. In a judiciary that practices modern case management, contentions about these issues, as with all matters where one anticipates the holding of a *voir dire*, would be resolved before the jury hears any evidence. It was therefore a mistake for the trial judge not to have excused the jury when it was apparent that there was objection to Sergeant Springer reading aloud from his notebook and counsel desired to address the court on the matter. Once it became clear that the verbals encompassed admissions, section 143(2) of the Act envisages that contending submissions

about their admissibility must be heard and determined in the absence of the jury.

[89] In relation to Sergeant Springer, the judge appeared either to have rolled the two separate requests (to refresh memory and to read aloud) into one or else to have considered it axiomatic that once the factual foundation was given for leave to refresh memory it necessarily followed that permission to read aloud would automatically be given; the view expressed by the Court of Appeal majority. As indicated above, our decision in *Francis* made it clear that the two applications are separate, distinct and it did not necessarily always follow that permission would be given to read aloud even if permission had been given to refresh memory from a document.

[90] In light of the above we conclude that the trial judge made errors of law in relation to the manner in which she approached the separate applications to refresh memory and to read aloud. These errors were of such a nature that if there was no independent evidence on which the conviction could rest, they would have been fatal to the conviction.

[91] In this case however, apart from the verbals, the jury also had before them the undisputed evidence that Sealy had been away with C for an inordinately long period of time. The child was able accurately to describe some features of the interior of the house when the evidence was that this was the only occasion on which she had ever been inside it. For example, she was able to recall the photograph on the bedroom door of the naked woman holding the cricket bat. No objection was made to the admission into evidence of the tube of cream C said Sealy used on his penis and on her vagina. Sealy actually acknowledged the existence of the lubricant, which he handed over to the police, by initialling the tape the police officer placed on the tube. And of course, there was all of C's evidence given on oath which was not at all countered by Sealy giving positive evidence to rebut it save for his bald statement, 'I ain't interfere with the little girl'. These were all powerful bits

of unchallenged evidence. In light of them, notwithstanding the inadequate treatment of the objections to the reading aloud of the verbals, the Chief Justice was right to note that the proviso should have been applied to save the rape conviction.

The sufficiency of the section 137 warnings

Ground Two

[92] The second ground of appeal challenges the adequacy of the warnings given by the trial judge relative to the verbals. The relevant portion of the summation is reproduced above at [62]. This ground brings section 137 of the Act into sharp focus. The section is central to criminal jury trials whenever, among other things, evidence is given of oral questioning that has elicited admissions.[46] When stated criteria are met and a party so requests, unless there are good reasons for not so doing, certain warnings *must* be given by the judge to the jury. Sealy's counsel did ask the judge to issue 'the warnings of section 137 of the Evidence Act' and, even if the content of any such warnings might not have been specified, no one disputes that the judge here was obliged to treat appropriately with that request.

[93] The case of *McKinney v R*[47] was discussed in the Court of Appeal in the context of this ground of appeal. *McKinney* was decided by the Australian High Court before the Evidence Act 1995[48] was enacted in that country. The facts in *McKinney* are not terribly important for the present purposes. What is of relevance is that the application of Australia's common law to those facts propelled a majority of Australia's highest court to adopt and advocate a principle previously mooted and articulated in dissent.[49] A narrow majority in *McKinney* decided to develop the common law to encompass *a rule of practice of general application*.

[46] The Evidence Act (n 2), s 137(1)(d)(ii).
[47] *McKinney* (n 3).
[48] The Evidence Act 1995 (Cth and NSW).
[49] See Carr v The Queen [1988] HCA 47; (1988) 165 CLR 314 (Deane J).

[94] The *McKinney* rule of practice was intended to 'operate to counter the relative disadvantage accruing to an accused person who is interviewed while in police custody at a place lacking sound recording facilities'.[50] The *McKinney* majority fashioned a particular type of warning for those occasions when it was said that such interviews yielded a disputed confessional statement that was admitted into evidence. The majority did not anticipate that the substance of the warning would vary significantly from case to case; nor the explanation advanced to the jury for the giving of the warning.[51] The rationale for the warning lay in the recognition that an accused person faced a '*heavy practical burden*'[52] in seeking to challenge such evidence. Any successful challenge to its admissibility required raising at least a reasonable doubt as to its truthfulness. It is impossible to raise such a doubt unless there is also a reasonable possibility that the evidence may have been fabricated or unfairly coloured. The real problem is that the ensuing contest between the prosecution's claim of police rectitude, on the one hand, and a defendant's allegation of police misconduct or inaccuracy, on the other, is not an evenly balanced one.[53] The onus on the defendant is extraordinarily high.

[95] In order to relieve accused persons of this 'heavy practical burden', or at least to compensate for its existence, it was decided that the unevenness should be laid bare. Juries should be informed that it is comparatively more difficult for accused persons to have evidence available to support their challenge to police evidence of disputed confessional statements than it is for that evidence to be fabricated.[54] The jury should accordingly be instructed that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst

[50] *McKinney* (1991) HCA 6 [13], [1990-1991] 171 CLR 468, 474 (Mason CJ, Deane, Gaudron and McHugh JJ).
[51] *McKinney* (1991) HCA 6 [18], [1990-1991] 171 CLR 468, 475 (Mason CJ, Deane, Gaudron and McHugh JJ).
[52] *McKinney* (1991) HCA 6 [19], [1990-1991] 171 CLR 468, 475 (Mason CJ, Deane, Gaudron and McHugh JJ) (emphasis added).
[53] ibid.
[54] ibid.

in police custody, the making of which is not reliably corroborated.[55] The jury should also be reminded that police witnesses are often practised witnesses.[56]

[96] The *McKinney* majority was not oblivious to the concern that a possible consequence of their judgment was the unfair stigmatisation of police officers as corrupt and as perjurers. In explaining their bold decision, they denied any suggestion that police evidence is inherently unreliable or that members of a police force should, as such, be put in some special category of unreliable witnesses.[57] They explained that the basis for the rule lay in the special position of vulnerability of an accused when the accused is involuntarily detained. Detention of this nature deprives the suspect of the possibility of any corroboration of a denial of the making of all or part of an alleged confessional statement.[58] The reasoning and rationale for the *McKinney* rule of practice were echoed in the English courts in *R v Hunt*[59] when interpreting PACE. In ruling that an Assistant Recorder had wrongly allowed certain verbals to be put into evidence, Steyn LJ noted:

> We must also recognize that an unseen and unsigned record of what was allegedly said placed a person in custody in an unfair disadvantage. There was in real life a practical burden on him to raise a reasonable doubt about what an experienced witness, the police officer, said, and often as not there was a supporting note made by the police officer. The potential scope for miscarriages of justice was manifest. The balance had to be redressed. That is the principle mischief which the anti-verballing provisions of Code C were designed to cure.

[97] The courts of Barbados are not obliged to follow the common law of Australia. What then does the establishment of the *McKinney* rule of practice have to do with Barbados whose police officers are for the most part, we believe, men and women of high integrity? There is a simple answer to that question. Not long after *McKinney* was decided, a new draft Evidence Bill

[55] ibid.
[56] ibid.
[57] *McKinney* (1991) HCA 6 [23], [1990-1991] 171 CLR 468, 478 (Mason CJ, Deane, Gaudron and McHugh JJ).
[58] ibid.
[59] [1992] Crim LR 582.

was published in Australia embracing and enshrining the majority view in *McKinney*. The nexus is that the Act that was passed in Barbados modelled itself upon this draft Evidence Bill introduced in Australia. As Chief Justice Simmons has properly noted, the Act substantially enacted the majority view in *McKinney*.[60] Section 137(1)(d)(ii) of the Act and section 165(1)(f) of the Evidence Act 1995 currently in force in New South Wales are equivalent in effect. They identify as a category of evidence that may be unreliable, 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.[61] The verbals in this case fall into this category.

[98] Section 137(2) of the Act is quite clear on the nature of the warning that a judge, in no particular form of words,[62] must give to the jury in relation to verbals that have been admitted into evidence, unless there are good reasons for not so doing. The judge is obliged to (a) warn the jury that the evidence may be unreliable; (b) inform the jury of the 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.

[99] On the basis of similar legislation, the Judicial Commission of New South Wales has published model jury instructions for the guidance of the trial judges of that Australian State. Those model directions are easily available[63] and trial judges in Barbados can derive tremendous benefit from them. A perusal of them will reveal that New South Wales has interpreted the equivalent of section 137 of the Act as requiring their judges, whenever the occasion arises, to give *McKinney* type directions. There is no reason why the Barbados judiciary ought not also to interpret their Act in similar fashion.

[60] See *Gill* (n 18) [68] and [82].
[61] See the Evidence Act, s 137(1)(d)(ii).
[62] See the Evidence Act, s 137(3).
[63] See www.judcom.nsw.gov.au/publications/benchbks/criminal/admissions_to_police.html (accessed 23rd December 2015).

[100] Returning to the summation in this case, the judge here did inform the jury that the verbals were unreliable and, subject to what has previously been said, she did caution the jury about how they should deal with them. If a full warning had been necessary in this case, however, the judge said little to lighten or compensate for that 'heavy practical burden' referred to above at [94] – [95]. Nor would the judge have fully instructed the jury about the underlying rationale for deeming the verbals potentially unreliable. These defaults would have stood out against a background where aspects of the judge's summation underscored classically the very mischief which the *McKinney* directions were intended to overcome. In the course of the summing-up, having indicated that the verbals may be unreliable, the judge repeatedly invited the jury to discover the truth through the prism of the adversarial system, that is, on the basis of an assessment respectively of the credibility of the police and that of Sealy. For example, the judge instructed the jury –

> You have seen the manner in which the police officer Springer gave his evidence and it is for you to determine whether you consider him to be a witness on whose testimony you can safely rely in determining whether the oral statements were made in the circumstances attested to by that officer. The Prosecution urges you to find him to be a witness of the truth. While the Defence urges you to find him a liar.

In other circumstances there might be nothing exceptional about that instruction. But the whole point about section 137(2) in this context is that, absent a direction along the *McKinney* lines, the credibility contest, here succinctly described and placed before the jury for adjudication, is played out on an uneven field, with playing conditions stacked in favour of the police officer and adverse to the accused.

[101] It is precisely for this reason that we consider that, in principle, whenever (a) there is disputed oral evidence of admissions resulting from official questioning of a defendant and (b) the admissions are recorded in writing that

has not been signed or otherwise acknowledged in writing by the defendant and (c) a party requests that a section 137 warning be given to the jury and (d) there are no good reasons for not giving the following warning, it is incumbent on the trial judge to direct the jury along these lines, namely: it is not unknown for guilty persons sometimes to make full admissions to the police and then have second thoughts and dishonestly deny having made them. It is also not unknown for police officers to manufacture or embellish evidence against a person whom they believe has committed an offence. It is for the jury to decide whether the alleged admissions were made, and if made, whether they are true and, if so, what weight, or significance, to put on them. It is for the prosecution to prove beyond reasonable doubt that the admissions were made and that they are true. In relation to the first issue, that is, whether the admissions were made, the evidence of the police must be approached with caution. This is because the circumstances in which it is alleged that the admissions were made may make the evidence unreliable. At this point the judge should remind the jury in detail what those circumstances were. These must include the circumstance that generally, in the absence of a sound recording or some person independent of the police present at the interview who can confirm that the admissions were made, it is easier for police officers to lead evidence of admissions that were not in fact made by the accused than it is for the accused to have evidence available to challenge what the police have said. On the other hand, the judge should also remind the jury of any evidence that corroborates the verbals and which therefore might suggest that they were made by the accused and are true. Where appropriate, the judge should also instruct the jury to take into account that police officers are generally experienced in giving evidence in court and it is not an easy task to decide whether a practised witness is telling the truth or not. If a witness appears to be confident and self-assured, it does not necessarily follow that the witness is giving honest evidence. The jury should be told that if they decide that the admissions were made, and that they were truthful, then they may take them into account in deciding whether the prosecution has proved the guilt of the accused beyond reasonable doubt.

[102] If there are good reasons to decline to give these expansive directions, for example where there is strong corroborative evidence of the making of the admissions from sources other than police officers, the judge should, when the request is made to issue the directions, outline in the absence of the jury what those good reasons are.[64] The Court of Appeal should review those reasons only on the grounds that they are perverse or irrational or illogical or if the accused has been unfairly prejudiced by the failure to give the above directions.

[103] This decision of ours reverses some aspects of the judgment of the Court of Appeal in *Gill*.[65] In that case the Court of Appeal expressed a preference for the minority position in *McKinney* and opted to disapprove the rule of practice favoured by the *McKinney* majority. With great respect, unless Parliament changes the law, the courts of Barbados must be faithful to a reasonable interpretation of the provisions of the Act. In expressing our position we are not so much adopting the views of any judge of Australia as we are complying with the specific provisions of current statute law of Barbados. Secondly, and even if this were a relevant concern in view of the plain words of the statute, we do not share the view that there are any significant additional burdens that trial judges will face from having to apply section 137 as it was intended to be applied by Parliament. It is really a straightforward matter of determining whether, if so requested, the circumstances of a particular case call for the expansive directions above. Each judge can and should be armed with model directions that cater for a section 137 warning. These model directions are easily available and can just as easily be moulded to suit each particular occasion. But even if the giving of these directions calls for a little more effort and advance preparation, no trial judge will cavil at shouldering this extra undertaking if to do so will result in the enhancement of the trial process. Lastly, we do not agree with the view that our suggested directions are unevenly weighted to the

[64] See *R v Beattie* (1996) 89 A Crim R, 40 NSWLR 155.
[65] *Gill* (n 18).

advantage of the Defence. As the majority in *McKinney* observed, and as we have also noted above, the directions are, in appropriate cases, necessary in order to level a playing field that is tilted against an accused. It is interesting to note that these directions are not materially different from those recommended by the Trinidad and Tobago Judicial Education Institute in their very helpful Criminal Bench Book 2015[66] and which are routinely utilised by the judges of that neighbouring CARICOM State.

[104] It is the duty of courts to promote 'The central thesis of the administration of criminal justice [which] is the entitlement of an accused person to a fair trial according to law.'[67] To this end, judges have always nurtured an abiding concern with pre-trial processes and have from time to time actively intervened to ensure their integrity, especially with respect to the detention and questioning of suspects. The *Judges' Rules* of 1912 and 1918 are famous instances of a demonstration with this concern. The directions suggested by us above must not only be seen in the same vein but they also give expression to the overall scheme of the Act. They are not intended to cast a slur on the competence or integrity of the members of the Royal Barbados Police Force. In the common law system we have inherited, for better or worse, it is juries who, invariably, assess facts and determine guilt when the most serious crimes are tried. Even when those jurors are university graduates, directions along the lines suggested minimise the risk of wrongful convictions and, in this area of the law, help to restore the balance in the credibility contest that inheres in our adversarial system of justice. The above directions should therefore constitute part and parcel of a section 137 warning whenever such a warning is warranted and requested by a party. We do not agree that it is necessary for a party, in requesting a section 137 warning, specifically to indicate which precise detail of these directions should be encompassed in

[66] *Criminal Bench Book 2015* (Judicial Education Institute of Trinidad and Tobago 2015), 210. Available online at <http://www.ttlawcourts.org/jeibooks/bookdetails.php?1> (accessed 23 December 2015).
[67] *McKinney* (1991) HCA 6 [23], [1990-1991] 171 CLR 468, 478 (Mason CJ, Deane, Gaudron and McHugh JJ). See also The Constitution of Barbados 1966, s 18.

the warning.[68] The courts are perfectly capable of tailoring the warning to suit the particular facts of each case.

[105] Despite all that we have said above, we do not believe that this was a case in which it was incumbent on the trial judge to give the detailed warnings we outlined above. We agree with Chief Justice Gibson that in this case the verbals were corroborated fully by C's testimony and the other corroborative evidence mentioned above at [44]. It was within the province of the judge and the jury to interpret the verbals in a manner that was entirely consistent with C's testimony that Sealy had penetrated her vagina with the tip of his penis. That act was sufficient to satisfy the legal definition of rape. The trial judge would have been entitled to find, if she had thought about it, that here there were good reasons to decline to give the expansive section 137 warning even if it was requested, as indeed it was. In this regard we endorse entirely the views of Chief Justice Simmons when he noted in *Gill* that 'the effect of a failure to give a warning has to be evaluated in each case, having regard to the totality of the evidence. It will not be automatic in every case that a failure to comply with subsection (2) [of section 137] will cause a conviction to be quashed.'[69] The second ground of appeal cannot succeed. Sealy was fortunate that the Court of Appeal reduced his conviction to one of indecent assault and lessened his sentence by a year.

Sentencing Issues

[106] Sealy was convicted of rape on 27th September 2011 and sentenced almost a year later on 12th September 2012. After a full sentencing hearing, the trial judge considered then that a fit sentence was a term of imprisonment for six years. Given the one year period of his imprisonment on remand between the dates of his conviction and sentence, and in accordance with this court's judgment in *Romeo Da Costa Hall*,[70] the judge ordered Sealy to serve five

[68] See *Beattie* (n 63).
[69] *Gill* (n 18) [70] citing *Bovell v the Queen* (Court of Appeal of Barbados, 23 April 2002) [47].
[70] [2011] CCJ 6 (AJ), (2011) 77 WIR 66.

years in prison from the date of his sentence. As noted above, the Court of Appeal majority, having convicted of a lesser offence, reduced the sentence to a period of imprisonment for 5 years. In so doing the majority did not specifically allude to the time Sealy had spent in prison before sentence, but there is no question that full credit had to be given for the year spent on post-conviction remand and that the effect of the one year reduction in his sentence meant that he would only spend four years in prison commencing 12th September 2012, that is, the date on which he was sentenced by the trial judge.

[107] Sealy's appeal to us was heard on 1st December 2015. He was at the time still incarcerated for the offence. It immediately struck the Court that he may in fact have already served his sentence. Accordingly, we made further inquiries as to whether the prison authorities ever had occasion to interfere with the remission which he, like all other convicted prisoners, should ordinarily enjoy and which, in the absence of misconduct while in prison, renders a prison year, effectively, nine calendar months. To this end, we re-convened the court on 8th December after the hearing of the appeal to have this matter clarified. We were informed then by prosecuting counsel that Sealy was not dis-entitled from full remission. The result of all this was that, if the method of calculation set out by the majority in *Romeo Da Costa Hall* were followed, as it should have been, Sealy should have completed his sentence some time in September 2015. In those circumstances the Court made an order for his immediate release.

JUDGMENT OF THE HONOURABLE MR JUSTICE WINSTON ANDERSON

[108] I agree with the judgment of the Court delivered by Justice Saunders and wish to add these further remarks.

[109] Science and technology have given society the most accurate and the most reliable means of discovering facts in and about our world. The judicial function is obliged to make use of these means, whenever reasonably

practicable, so as to ensure that findings of fact in the judicial process accord as closely as possible with reality. Where scientific and technological methods are reasonably available but not used, constitutional questions could arise concerning the integrity of the system of justice.

[110] In the present appeal, no one doubts that decisive advantages would have accrued to the criminal justice system had the police officers electronically recorded their interview with the appellant. It is unlikely that there would have been any dispute as to whether Mr Sealy had made incriminating admissions, and if he had made such, as to the tone and content of those admissions. In relation to what had been said, neither the professionalism of the police officers nor the truthfulness of Mr Sealy would have been called into question. Much learned disputations and parsing of statutory and case law would have been unnecessary. The divergence in judicial views around the applicability of the warning given in the Australian case of *McKinney v The Queen*[71] ('the *McKinney* warning') and around the collateral issues that could arise when the warning is considered applicable, would have been rendered moot. In short, had the interview been electronically recorded, this appeal, and one ventures to think, many others like it, would have been inconceivable insofar as it concerns the ancillary issue of whether it was permissible for a police officer to read aloud from his notebook, the admissions or confessions attributed to an accused.

[111] From the perspective of accuracy and reliability in the search for truth, the issue of whether an accused had acknowledged the contents of a police officer's notebook by 'signing, initialling or otherwise marking the document'[72] is hardly conclusive. Often, this issue merely shifts the debate from the whether it is permissible for the police officer to read aloud from an unauthenticated documentary record of a confession or admission, to a new debate of whether the signature, initial, or other marking of the document,

[71] *McKinney* (n 3).
[72] The Evidence Act (n 2), s 73.

was the voluntary act of the accused. An accused will often represent to the court that his signature, initial or mark was beaten out of him. It will be recalled that this was the allegation in *Francis v The Queen*,[73] a decision of this Court. An electronic recording of the interrogation tends to remove the argument about whether the accused was the voluntary author of his confession or incriminating admission.

[112] Why then was there no electronic audio recording of the interrogation in this case? The simple answer is that police officers in Barbados are not statutorily obliged to tape record their interviews with suspects. Section 72 of the Evidence Act provides that in criminal proceedings, a confession or admission made in the course of official questioning in circumstances where it was reasonably practicable to make sound recordings of the confession or admission, is not admissible into evidence unless recorded. For the purposes of the section, 'official questioning' means '…questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.'[74]

[113] The problem is that section 72 has not been proclaimed and is not yet in force. The police is therefore neither obliged nor have been equipped to undertake electronic recording of their interviews with suspects. In the Court of Appeal, Moore JA, with whom Mason JA agreed, emphasised the benefits which science and technology have brought to the advancement of justice; and suggested that in due course audio and video recording, like DNA fingerprinting, would take their place among the tools to authenticate or corroborate the oral evidence of witnesses. The Learned Justice of Appeal then reflected:

> In Barbados audio and video recording are not options for the police – they do not exist. No doubt were they available, they would be invaluable, whether to confirm suspicion and strengthen proof or to avert suspicion and defeat proof… In the absence of

[73] *Francis* (n 1) [6].
[74] Barbados Evidence Act (n 2) s 2.

> audio and video recording we must use the means of corroboration available to us…[75]

[114] It is conceded that there is presently no statutory obligation on the police to make sound recording of interviews with suspects. On the other hand, the widespread availability of the technology is evident; electronic recording of police interviews has been used in developed countries for decades. In the United Kingdom, section 60 (1) of the Police and Criminal Evidence Act 1984 provides, in part, that the Secretary of State shall issue a Code of Practice in connection with the tape recording of interviews of persons suspected of criminal offences, and shall make an order requiring the tape recording of interviews of suspects. In the United States, Alaska become the first state to mandate electronic recording of custodial interrogations. The 1985 case of *Stephan v The State*[76] held that the unexcused failure to record custodial interrogation violates the due process clause of the State constitution and that any statement made in an unrecorded interrogation was generally inadmissible. This was followed in the Minnesota case of *State v Scales,*[77] which allowed the exclusion of custodial interrogations which were not recorded. The judicial mandate has now been codified in a number of state statutes.[78] In Australia, section 281 of the New South Wales Criminal Procedure Act 1986 establishes the general rule that evidence of an admission is not admissible in court unless there is available to the court a tape recording made by an investigating official of the interview in the course of which the admission was made or the prosecution establishes that there was a reasonable excuse as to why the tape recording could not be made.

[115] Electronic recording is relatively inexpensive, provides high levels of integrity and security for the recording process, and is portable. Several Caribbean jurisdictions have implemented a system of sound recording of

[75] *Sealy* (n 30) [55] – [56].
[76] 711 P.2d 1156, 1158 (Alaska 1985).
[77] 518 N.W. 2d 587, 592 (Minn. 1994).
[78] For example: In Illinois, 725 ILCS 5/103-2.1, effective from July 18, 2005; In Nebraska, NEB. REV. STAT. § 29-4503(2) (2009).

police interrogations. In some jurisdictions, such as St. Kitts and Nevis,[79] and St. Vincent and the Grenadines,[80] electronic recording was mandated by legislation; in others, such as Antigua and Barbuda, (and occasionally Jamaica), the practice of sound recording of interviews has been adopted by the police without there being statutory obligation. Indeed, in the present appeal, Mr Applewhaite of the DDP's office indicated that the police occasionally recorded their interrogations with suspects for use, presumably, as evidence in criminal proceedings.

[116] The growing practice of electronic recording of police interviews is premised on several important advantages:[81] (1) reducing the risk of false confessions by eliminating abusive police interrogation practices; (2) improving the administration of justice by enabling factfinders to make accurate assessments of the voluntariness and trustworthiness of confession evidence; (3) facilitating transparency and improving the standards of police interrogations; and (4) bettering the relationship between police officers and the communities they serve.

[117] Electronic recording advances the continued improvement of the criminal justice system. As the House of Lords put it in *R v Forbes*,[82] in many criminal investigations and trials there is little or no doubt that a crime has been committed and the real issue concerns who committed it. With societal advancement, reliance is now placed on a wide range of scientific and technological means, including DNA samples and fingerprints to link the suspect or accused with the crime. Confessions and admissions, freely and voluntarily made, remain powerful evidence of guilt[83] but social science research,[84] as well as a growing number of DNA exonerations involving

[79] Evidence Act, 2011 (No. 30 of 2011).
[80] Interviewing of Suspects for Serious Crimes Act 2012 (Act No. 4 of 2012).
[81] Steven A. Drizin and Marissa J. Reich, 'Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions' (2004) 52 Drake L Review 619, 621.
[82] [2001] 1 AC 473.
[83] King v Warickshall (1783) 1 Leach 263; Hopt v Utah 110 U.S. 574 (1884).
[84] cf Drizin and Reich (n 81); Thomas P. Sullivan, 'Electronic Recording of Custodial Interrogations: Everybody Wins' (2005) 95 J Crim L & Criminology 1127.

defendants who confessed guilt while they were being interrogated,[85] suggest that the authenticity of many of these out of court confessions and admissions did not receive adequate judicial scrutiny. Electronic recordings provide the most reliable means of ascertaining the validity of the confession. The overall benefit that accrues to the judicial system as a whole was succinctly stated in the case of *United States v Lewis:*[86]

> Affording the Court the benefit of watching or listening to a videotaped or audiotaped statement is invaluable; indeed, a tape-recorded interrogation allows the Court to more accurately assess whether a statement was given knowingly, voluntarily, and intelligently.

[118] A consequence of not using the most reliable method of proof available to the State is that there must be a juridical prejudice against the State's taking advantage of a less reliable means of proving the same fact. In some cases, this is expressed in the form of a warning to the jury. So that the Supreme Judicial Court in *Commonwealth v Di Giambattista*,[87] held that if the prosecution introduces a confession or statement that the police obtained during an interrogation of a defendant who was either in custody or at a 'place of detention,' and the police did not electronically record the statement, the defendant is entitled to a cautionary jury instruction. Upon the defendant's request, the judge must instruct the jury that,

> the State's highest court has expressed a preference that such interrogations be recorded whenever practicable and . . . that, [in light of] the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care.

This jury instruction is required regardless of the reason that the police did not record the interrogation.

[119] To be more precise, the issue of the constitutional rights of the accused could become engaged in circumstances of the admission of unrecorded confessions or incriminating statements. Section 18 of the Barbados

[85] ibid.
[86] United States v Lewis, 355 F Supp 2d 870, 873 (E.D. Mich. 2005).
[87] 442 Mass. 423 (2004).

> Constitution guarantees to every person charged with a criminal offence '… a fair hearing within a reasonable time by an independent and impartial court established by law.' Section 18 goes on to outline several procedural protections that the criminal justice system provides – including the right to be present at his trial, the presumption of innocence, the right to remain silent, the right to be defended by a legal representative of his own choice, and the right to confront witnesses called against him, and the right to call witnesses on his own behalf. The common law has established that the guilt of the accused must be proved beyond a reasonable doubt. To similar effect, courts in the United States have recommended the use of electronic recording of interrogations and confessions to facilitate evaluating whether a confession violates the Fifth or Fourteenth Amendment of the US Constitution.[88]

[120] These constitutional guarantees and procedural protections could be undermined by accepting into evidence an unreliable confession or admission, when the means of significantly enhancing their availability exist but are not used. This is so whether the evidence comes in by documentary means or by the verbal testimony of police officers. We therefore look forward to the implementation of legislative provisions requiring electronic recording of police interviews with suspects. We note that this is an ongoing concern of the Barbados legislature.

[121] The continued failure to legislatively require electronic recording of police interviews with suspects raises, potentially, questions regarding the integrity of the criminal justice system and whether the constitutional rights of an accused are being scrupulously observed. It is time to replace the policeman's notebook with sound recording and, when reasonably practicable, video recording. As three distinguished commentators have said:

> Although our criminal justice system never will be infallible, we are obliged to embrace reforms that help bring the true perpetrators to

[88] United States v Thornton 177 F Supp 2d 625, 628 (E.D. Mich. 2001).

> justice and prevent the innocent from being convicted. This obligation is all the more pressing when a simple, proven reform is available. One reform that will prevent convictions based on false confessions is the electronic recording of stationhouse interrogations of felony suspects.[89]

Order of the Court

[117] The appeal is dismissed. The conviction of indecent assault and the sentence of five years imprisonment are upheld. The Court confirms its previous order releasing the Appellant from custody, he having already served his sentence.

/s/ R. Nelson
The Hon Mr Justice Nelson

/s/ A. Saunders
The Hon Mr Justice Saunders

/s/ J. Wit
The Hon Mr Justice Wit

/s/ D. Hayton
The Hon Mr Justice Hayton

/s/ W. Anderson
The Hon Mr Justice Anderson

[89] Thomas P. Sullivan, Andrew W. Vail, and Howard W. Anderson III, 'The Case for Recording Police Interrogations' (2008) 34 Litigation 30.