SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 2 OF 2006

BETWEEN:

GERALD JOSEPH

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Shawn Innocent for the Appellant
Mrs. Victoria Charles-Clarke, Director of Public Prosecutions, for the Respondent

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2006: October 17
2007: January 15

JUDGMENT

[1] RAWLINS, J.A.: The appellant, Mr. Joseph, was convicted for committing an act of indecency upon a female aged 12 years old, contrary to section 112A of the Criminal Code 1992. He was sentenced to serve 5 years in prison. He appealed on what, in effect, are 6 substantial grounds. He also appealed against the sentence.

[2] The grounds of appeal are, first, that Joseph was deprived of an opportunity to be represented by Counsel and therefore did not have a fair trial guaranteed by section 8 of the Constitution of St. Lucia. The second ground was that the verdict was unsafe and unsatisfactory having regard to all of the circumstances of the case. The third ground was that the learned trial judge erred in that he failed to

direct the jury on the identification evidence in accordance with section 102 of the Evidence Act 2002.[1] In the fourth place Joseph appealed on the ground that the learned trial judge failed or failed adequately to give the necessary warnings to the jury which section 136 of the St. Lucia Evidence Act requires. The fifth ground was that the trial judge failed to give any warning to the jury in relation to recent complaint. The sixth ground was that the trial judge erred in that he failed to give a good character direction to the jury. The seventh ground appeals against the sentence on the ground that it was excessive.

[3] The issues which these grounds of appeal raise require the facts of the case to be set out in some detail.

The Facts

[4] The virtual complainant[2] was the main witness for the prosecution. Her mother and father, as well as a family friend, Ms. Danzie, also gave evidence. The medical evidence and the evidence of the investigating officer, WPC Nickson, were also presented. Joseph gave a statement under caution to the police. At the trial he opted to give evidence on oath on which he was cross-examined. In both instances he denied that he went to the home of the complainant on the night in question or that he committed the offence. He called no witnesses.

[5] The evidence of the complainant was that during the night of 6th January 2003 she awoke at about 10:00pm. She awoke because she was trying to turn and found it difficult to do so. When she awoke Joseph, who is her cousin, was lying on top of her. He immediately got up when she told him that she was going to tell her mother. She noticed that his green shorts were pulled down to his knees and his penis was exposed. She was able to see him clearly because there was a florescent light in the living room which brought light into the bedroom as well. The

[1] Hereinafter referred to as "the Evidence Act of St. Lucia" for ease of making the distinction between it and the Evidence Acts of other countries to which references will be made in this judgment.
[2] Hereinafter referred to as "the complainant".

light was about 12 feet away from her bed. Joseph left the bedroom. She followed him out into the living room. He threatened to kill her if she told her mother what happened. She was scared and told no one until some months later. He unlatched the front door and left the house.

[6] After Joseph left the complainant discovered that there was white stuff on the jeans top that she was wearing. The tights and panties that she had worn to bed had been removed. She subsequently discovered these items in a corner of the bedroom close to the bed on which she was sleeping. She went into her grandmother's bedroom and washed. Thereupon she felt a burning and discovered that there was a cut on her vagina. The following morning she saw a footprint of dried mud on the top of the stove in the kitchen. That area was accessible from outside of the house through a space between the balcony of the house and a partition.

[7] Joseph left St. Lucia in July 2003. On 24th August 2003 she (the complainant) called and spoke with Ms. Danzie by telephone. As a result, Ms. Danzie spoke with the complainant's parents who then took the complainant to Mr. Joseph's home where they spoke with his wife. Her mother and Ms. Danzie then took her to the Hospital and to the Police Station. Ms. Danzie confirmed these statements in her evidence. The evidence of the mother of the complainant was that Joseph called her from Canada on 26th August 2003 and admitted to her that he did interfere with the complainant but did not have sexual intercourse with her.

[8] Joseph returned to St. Lucia in December 2003. He was arrested shortly thereafter when the complainant pointed him out to the investigating Officer at Odsan near his home as the person who committed the act of indecency on her. He gave a statement under caution to WPC Nickson in which he denied that he committed the offence. The complainant was medically examined on the 25th August 2003, which was approximately 7 months after the incident.

[9] I shall first consider ground 1 of the appeal, which raises the issue of deprivation of the right to legal representation. At the hearing, Mr. Innocent, learned counsel for Joseph, indicated that ground 2 does not challenge the verdict of the jury on the factual merits. He said that it was really a ground which was meant to encompass ground 1 as well as grounds 3-6. According to Mr. Innocent, these grounds show compendiously, that there is a lurking doubt that the conviction was unsafe and unsatisfactory. I shall therefore consider grounds 3-6 in consecutive order after ground 1. Finally, grounds 2 and 7 will be considered, if necessary.

Deprivation of the right to legal representation

[10] Mr. Innocent submitted that the critical question which this ground of appeal raised was whether, having regard to the characteristics of Joseph, the complexity of the case and the fact that he was not represented by counsel throughout his trial, deprived Joseph of his right to a fair trial in accordance with section 8 of the Constitution.

[11] Section 8(2) of the Constitution of St. Lucia, which is identical to section 18(2) of the Constitution of Barbados and similar, *mutatis mutandis*, to section 20(5) and (6) of the Constitution of Jamaica, provides:

> "(2) Every person who is charged with a criminal offence – (a) shall be presumed to be innocent until he is proved or has pleaded guilty; (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offences charged; (c) shall be given adequate time and facilities for the preparation of his defence; (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice; (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial …"

[12] Mr. Innocent submitted that although section 8(2)(d) of the Constitution permitted Joseph to defend himself, Joseph was obviously ill-equipped to conduct his own defence to the charge which is very serious and which carries a very severe sentence on conviction. He said that it would have been totally unrealistic to have expected Joseph, who was illiterate and conversant only in kwéyòl, to have appreciated the nuances of a criminal trial that involved issues such as identification, credibility, good character and recent complaint. He submitted, further, that it was too much to expect a defendant in such circumstances to be aware of his right to have his good character put in evidence; his right to challenge the evidence of identification on a voir dire or even to challenge evidence of an alleged confession or admission made by him. These circumstances, Mr. Innocent said, rendered Joseph incapable of putting forward an adequate defence.

[13] Mr. Innocent also noted that the learned trial judge attempted to assist Joseph during the course of the trial, but thought that the assistance which he afforded was insufficient. He insisted that, in these circumstances, the lack of legal representation infringed Joseph's right to a fair trial guaranteed under section 8 of the Constitution. He referred to Hinds v Attorney General of Barbados and another[3] and Frank Robinson v The Queen.[4]

[14] I think that it would be instructive to consider the circumstances in Robinson and in Hinds in some detail.

Robinson

[15] In Robinson, the majority of the Privy Council held that the right to legal representation under section 20(6) of the constitution of Jamaica was not an absolute right. They also held that the appellant was not denied a fair trial

[3] [2002] 2 WLR 470.
[4] [1985] 1 A.C. 956.

because of the trial judge's refusal to adjourn the trial in order to permit him to obtain Counsel assigned by legal aid.

[16] The facts reveal that Robinson and a co-defendant, Gibson, were tried and convicted of murder. They were sentenced to death. The main prosecution witness had disappeared for some time. The case was adjourned on 19 occasions. A date for the trial was fixed on 6 of these occasions. Robinson was represented by counsel. They had consented in January 1981 to a definite trial date in March 1981. When the trial commenced in March 1981, the main prosecution witness was present. Robinson's counsel were absent. The trial commenced nevertheless.

[17] Robinson's counsel appeared on the second day of the trial. They informed the trial judge that they did not appear the day before because they were not fully paid. The trial judge refused their application for leave to withdraw from the case, but they withdrew anyway. The trial judge also refused their application for an adjournment in order to permit Robinson to obtain counsel assigned by legal aid. This was because the judge was concerned that the main prosecution witness might not have been available for an adjournment trial.

[18] Before the Privy Council, counsel for Robinson stated, *inter alia*, that the trial judge had dominated the proceedings. They said that the judge played the role of prosecutor, judge and defence counsel, while Robinson, who had clearly indicated that he wished to be represented by counsel, did not understand the trial process. Counsel for Robinson further noted that Robinson's own counsel for the trial had deserted him and the judge did not ask him whether he wished to defend himself. There was nothing to indicate that Robinson was sufficiently literate to conduct his own defence in a murder trial in which his life was at stake. He did not challenge the jurors. He did not know how to cross-examine. He did not cross-examine the main prosecution witness although the issue of identification was critical in the case. He did not cross-examine the police witness who interviewed him. The

purpose of cross-examination was not explained to him. Although other witnesses were available to give evidence on his behalf he only called his mother. The trial judge asked him to make a closing speech. It lasted for 3 minutes. Robinson's counsel admitted that the trial judge tried to assist Robinson. They insisted, however, that that assistance was insufficient in the circumstances of the case.[5]

[19] On the other hand, learned counsel for the Prosecution submitted that section 20(6)(c) of the constitution, which is similar to section 8(2)(c) of the constitution of St. Lucia, and which gives a person the right to represent himself, also protects a person's right to be represented by counsel if he wishes. Counsel outlined the circumstances in which the trial judge exercised his discretion to refuse to adjourn the trial in order to permit Robinson to obtain legal aid counsel. Counsel submitted that since the main prosecution witness knew Robinson for about 8 months, it was that witness' credibility, rather that the issue of identification, which was critical. Counsel further noted that the credibility of that witness was tested in cross-examination by counsel for the co-accused, Gibson. Counsel submitted that in the face of overwhelming evidence against Robinson, there was no miscarriage of justice and his right to a fair trial was not infringed.[6]

[20] The majority of the Privy Council found that the trial judge exercised his discretion properly, given the long history of delay. Additionally, they thought that since the absence of legal representation was caused by Robinson's counsel and by Robinson's own failure to properly retain counsel or to apply for legal aid in a timely manner, the decision by the trial judge to refuse the adjournment did not deprive him of his right to a fair trial. Accordingly they found that there was no miscarriage of justice. This, their Lordships said, was particularly because the evidence against Robinson was overwhelming.

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[5] See from page 957H to 959C of the judgment.
[6] See from page 959E to 960F of the judgment.

[21] The minority of the Privy Council dissented. Their dissent was on the ground that the refusal to adjourn infringed section 20(6)(c) of the Constitution because that refusal denied Robinson's right to opt to be defended by counsel rather than to defend himself.

Hinds

[22] In Hinds, the appellant was charged with unlawfully and maliciously setting fire to a house. This did not fall within the statutory provisions,[7] which gave indigent defendants in criminal cases an automatic right to legal aid. At the commencement of his trial, Hinds applied to the judge for a legal aid certificate under which he would have been entitled to free legal aid services. The judge refused the application and proceeded to conduct the trial. Hinds conducted his defence. He was convicted and sentenced to a term of imprisonment. He appealed. He was represented by counsel in the appeal proceedings. His appeal was dismissed.

[23] It is noteworthy that Hinds only applied to the High Court for redress under section 18(2)(d) of the Constitution of Barbados after the appeal was dismissed. He claimed that the denial of legal aid at his trial infringed his right to a fair hearing. The High Court dismissed his application on the ground that the Court of Appeal had previously considered that issue. On appeal, the Court of Appeal held that since Hinds had alternative means of redress, the proviso to section 24(2) of the constitution precluded the grant of constitutional relief to him. He appealed to the Privy Council.

[24] Before the Privy Council, counsel for Hinds set out the circumstances which, in their view, rendered the trial unfair because Hinds was unrepresented by counsel at his trial. They said that he was ill-equipped to conduct his own trial because he

[7] Paragraphs (a) to (f) Part 1 of schedule 1 to the Community Legal Services Act, Cap.112A of the Laws of Barbados, 1971-1997 Revised Edition.

left school at the age of 14; was a long term marijuana user; had a history of psychiatric illness; and, that new evidence indicated that he might have been in the throes of a delusional disorder when he set the house on fire. At the time of the crime Robinson had been living in a cave for a year. Counsel said that Hinds knew nothing about court procedures or legal principles and could not therefore have raised insanity as a defence. He could not have sought to exclude incriminating admissions. Counsel insisted that the trial judge did not consider the difficulty of the case for Hinds based on Hinds' own particular circumstances and characteristics.[8]

[25] In dismissing Hinds' appeal, the Privy Council stated that section 18(12) of the constitution conferred no right upon Hinds to be legally represented at the public's expense. Their Lordships also stated that, ordinarily, a claim for constitutional relief is not an alternative means of challenging a conviction. They held, however, that a person who complains that his right to a fair hearing was contravened by the denial of legal representation should pursue the matter as an appeal against conviction rather than as an application for constitutional redress.

[26] In my view, this latter decision does not mean that where an accused person was not represented by counsel at a trial the question whether his constitutional right to a fair trial was infringed could not be pursued on appeal. It means that after an appeal against conviction is dismissed, a convicted person who was represented by counsel at the appeal hearing cannot ordinarily then issue fresh proceedings in the High Court seeking constitutional relief on the ground that he was denied a fair trial because he had no legal representation at the trial. Their Lordships therefore stated that Hinds had an adequate opportunity to vindicate his constitutional right through the ordinary process of appeal because he was represented by counsel in that process.

[8] See paragraph 11 of the judgment.

The present case

[27] The record shows that Joseph was on bail. He was scheduled to appear in court on 19th September 2005. Through inadvertence, he went to the wrong court. He was then scheduled to return to court on 15th November 2005. The record does not reveal what transpired on that day. It shows that he appeared on 19th November 2005. The trial judge inquired whether he was represented by counsel. In response he said that he could not afford a lawyer. The legal aid system in St. Lucia only provides legal representation for persons who are charged with capital offences. Accordingly, the failure to obtain legal aid in a non-capital case is not a basis for an allegation that a trial is unfair.

[28] Joseph's trial commenced on 25th January 2006. The trial judge again inquired whether he was represented by counsel. He said that he was not. The judge also elicited from him that he was "not strong" either in English or in kwéyòl, but that he was more comfortable with kwéyòl. The Court thereupon provided an interpreter in keeping with its obligation under section 8(2)(f) of the Constitution. Joseph also informed the court that he would call no witnesses. The trial proceeded. He did not challenge any jury during the selection process, although the trial judge explained the process of objection to him. The judge also ensured that he had the papers that were required for the trial and provided assistance for him when she realized that he could not read very well.

[29] The trial judge assisted Joseph to cross-examine the complainant, extensively. She also assisted him to cross-examine her mother and father, as well as Ms. Danzie at some length. The trial judge was careful to ensure that the caution statement as well as Joseph's alleged admission to the mother of the complainant were only admitted into evidence after she was satisfied that all of the requirements of sections 53 and 70 of the Evidence Act 2002 were met.[9]

[9] See pages 63-69 of Tab E of the record.

[30] Joseph did not cross-examine WPC Nickson at any length, but the learned judge did this on his behalf. The judge also ensured that Joseph clearly understood the options that he had for presenting his defence and the consequences of his choice. When she thought that the interpreter had not properly explained these to Joseph, she solicited the assistance of a senior counsel. That counsel explained the 2 options that were open to Joseph in making his defence.[10] Joseph chose to give evidence on oath upon which he was cross-examined. The trial judge ensured that his cross-examination was fair. In his evidence in chief, Joseph denied that he committed the offence for which he was charged. The cross-examination did not shake that position or reveal any evidence that was new, startling or prejudicial to Joseph.

[31] During the cross-examination of the complainant, with the assistance of the learned judge, Joseph revealed 2 instances of inconsistencies in her evidence. One inconsistency came down to the question whether Joseph's penis was hard or not when the virtual complainant saw it. The other was concerned with whether Joseph left St. Lucia for Canada on 1st July 2003, as he insisted, or whether he left at the end of July 2003, as the complainant stated in her evidence. The learned trial judge confirmed for the benefit of the jury, by reference to his passport, that Joseph entered Canada on 1st July 2003.

[32] It is unfortunate that Joseph had to represent himself at his trial because he was impecunious. However, it was a choice which section 8(2)(d) of the Constitution permitted him to make. In any event, the trial judge went to great lengths to assist him throughout the trial. She assisted Joseph to cross-examine the virtual complainant and other witnesses extensively, which was not the case in Robinson. She ensured that due process was observed during the course of the presentation of the evidence.

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[10] Provided by sections 24(2) and (3) of the Evidence Act 2002, which permits an accused person either to give evidence upon oath, which could be subjected to cross-examination, or to remain silent. See pages 89-93 of the Record.

[33] In the summation, the learned trial judge asked the jury to consider whether any of the witnesses may have been motivated by malice or had any special interest to serve. She went further and suggested to them that they could have considered all of the witnesses, except WPC Nickson and the examining doctor, as persons who had interests to serve. The learned judge placed Joseph's defences - alibi and misidentification – before the jury. She explained the legal requirements and particularities of voice identification, as these related to the alleged admission by Joseph to the mother of the complainant.

[34] It is my view that in all of the circumstances, the trial proceedings in the present case reflects a process that was markedly more reflective of a fair trial than the proceedings in Robinson which was a case of greater complexity. The result is the appeal fails on this ground.

Identification directions

[35] This is ground 3 of the appeal. It complains that the trial judge erred because she failed to direct the jury properly on identification in accordance with section 102 of the Evidence Act 2002.

[36] Section 102 of the Evidence Act 2002 provides:

> "102(1) Where identification evidence has been admitted, the Judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.
>
> (2) In particular, the Judge shall warn the Jury that it should not find, on the basis of the identification evidence, that the defendant was a person by whom the relevant offence was committed unless -
>
> (a) there are, in relation to identification, special circumstances that tend to support the identification; or
>
> (b) there is substantial evidence, not being identification evidence, that tends to prove the guilt of the defendant and the jury accepts that evidence.
>
> (3) Special circumstances referred to in subsection (2) include –
>
> (a) the defendant being known to the person who made the identification; and

(b) the identification having been made on the basis of a characteristic that is unusual.

(4) Where -

(a) it is not reasonably open to find the defendant guilty except on the basis of identification evidence;

(b) there are no special circumstances of the kind mentioned in subsection (2)(a); and

(c) there is no evidence of the kind mentioned in subsection (2)(b);

the judge shall direct that the defendant be acquitted.

[37] The identical section in the Evidence Act of Barbados[11] was subjected to stringent assessment by Sir David Simmons, CJ, in the Director of Public Prosecution's Reference No. 1 of 2001.[12] This Reference was brought to the Barbados Court of Appeal for an opinion on 2 questions. The trial judge had withdrawn the case from the jury by virtue of section 102(4) of the Barbados Evidence Act because he thought that the evidence of identification was insufficient to permit the case to go to the. That evidence was given by the complainant and her sister. Neither of them knew the accused before the incident.

[38] The first question in the Reference was whether the trial judge erred when he withdrew the case from the jury. This is not itself a critical issue in the present case because the trial judge did not withdraw this case from the jury. Joseph does not assert that the judge should have withdrawn it. The second question was, in effect, assuming that the trial judge erred when he withdrew the case from the jury, did he also err by not giving them directions in accordance with section 102(2) of the Evidence Act of Barbados. The 2 questions provided an opportunity for the Court of Appeal of Barbados to assess identification directions which this subsection requires.

[39] In the Opinion, the Barbados Court of Appeal identified the critical issue to be whether the operation of section 102 totally excluded the guidelines for directions

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[11] Cap. 121 of the Laws of Barbados, 1971-1997 Revised Edition.

[12] Court of Appeal, Barbados, 26th February 2002. Hereinafter referred to either as "the DPP's Reference" or simply as "the Reference".

on identification which Lord Widgery CJ, gave in Turnbull.[13] Sir David Simmons, CJ, who delivered the judgment of the Court, noted that the Evidence Act did not codify the law of evidence. This, he said, was because the Act did not state that no reliance is to be placed upon any prior statute or decision of the court after the Act came into operation.[14] The Chief Justice also noted that section 102(1) enacted the Turnbull warning in language that was quite similar to that of Lord Widgery CJ.[15] In my view, these statements also reflect the basic status of the Evidence Act of St. Lucia and also of section 102 of the Act. It is also my view that the interpretation of the section and the reasoning for it are sound and worthy of adoption. I therefore hereby adopt them as the correct principles by which section 102 of the St. Lucia Evidence Act is to be construed.

[40] In the Reference, the Chief Justice stated that section 102 did not enact all of the principles of Turnbull. He noted, for example, that it does not require the trial judge to draw the attention of the jury to any material discrepancies between the description of the accused given to the police by the witness and the actual appearance of the accused. Neither does it require the judge to point out the specific weaknesses in the prosecution's evidence. The Chief Justice noted that section 102(3) goes further to enact that the judge should instruct the jury that they should not identify the accused as the person committing the offence unless 1 of the 2 factors stated in this subsection is present.[16]

[41] The Chief Justice further pointed out that the use of the word "includes" was critical because it was designed to permit enlargement. This, he said, signifies

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[13] See paragraph 30 of the judgment.

[14] See paragraphs 26, 27 and 31 of the judgment.

[15] See paragraph 27 of the judgment.

[16] The reproduction of the section in paragraph 36 of this judgment indicates that the first factor is that there must be "special circumstances" tending to support the identification. Alternatively, there must be "other substantial evidence, tending to prove the guilt of the accused". The words "special circumstances" are defined to include 2 compendious elements. One element is that the accused should be known to the identifier. The second is that the identification should have been made on the basis of an unusual characteristic. See paragraphs 31-33 of the judgment.

that a trial judge may take into consideration other elements that are not specifically stated in the provision.

[42] The Court found that the trial judge erred because he thought that section 102(3) constrained him to consider only the 2 matters for which the subsection states.[17] The Court stated that the judge was obliged to apply the Turnbull principles although the statute did not mention them. The Court opined that where section 102 is silent and a *Turnbull* principle exists it should be applied.[18] According to the Opinion, the trial judge should therefore have considered, for example, the circumstances under which the identification was made.[19] He should also have identified and dealt with any specific weakness which appeared in the identification evidence as he would have been required to do if the case had gone to the jury. The Court thought that there should have been a thorough examination of the evidence of the complainant and her sister in accordance with section 102 supplemented by the Turnbull guidelines.[20] In this regard, the Court stated that the evidence of the complainant's sister was strongly supportive of the complainant's evidence, which was capable of standing on its own because visual identification of one witness could support the evidence of visual identification of another. The Court therefore said that the case was one for the jury[21] because there was cogent, reliable and compelling identification evidence which should have been left for assessment provided that an adequate section 102(2) warning was given.[22]

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[17] The Chief Justice noted that the evidence in the case was that the assailant was not known and the characteristics mentioned by one witness were his "big eyes" and the hat which he wore and these were not unusual. The trial judge withdrew the case from the jury because of the absence of unusual characteristics and the witnesses did not know the assailant before the night of the incident.

[18] See paragraph 38 of the judgment.

[19] See paragraphs 36-37 of the judgment.

[20] At paragraph 39 of the judgment.

[21] Ibid.

[22] See paragraphs 41 and 42 of the judgment. In assessing the identification evidence in the light of the foregoing statements, the Court noted that there was the unshaken evidence of two witnesses attesting to having seen the assailant face to face for between 2 and 5 minutes, in an area lit by two street lights. The Court noted that each witness gave identical description of the clothes he was wearing. They came as close to him as 3 feet and nothing obstructed their view of him. Two days after the incident they saw the assailant again dressed in clothes similar to those he was wearing on the day of the incident. Both witnesses were able to impart a high degree of particularity in their description of the assailant.

Section 102(2) warning and the present case

[43] Unlike the case which was the basis of the Reference, the present case went to the jury and the trial judge gave some directions on identification. The question is whether those directions were adequate. The judge was required to give full Turnbull directions, which are in part subsumed under section 102(1) of the St. Lucia Evidence Act. Additionally, the trial judge was required to give the warnings which sections 102(2) and 102(3) of the St. Lucia Evidence Act mandate. These warnings are mandatory because the provisions of these subsections are stated in mandatory terms and they state no circumstances in which the warnings which they require may be omitted. Additionally, they were enacted for the benefit of defendants in criminal cases.

[44] The judge gave very adequate Turnbull directions to the jury.[23] However, no warnings were given in relation to the matters for which sections 102(2) and 102(3) provide. The learned trial judge erred by failing to give these directions. Accordingly, the appeal succeeds on this ground.

Section 136(2) Warnings

[45] Mr. Innocent complained that the learned trial judge failed to warn the jury on the matters stated in section 136(2) of the St. Lucia Evidence Act.

[46] Section 136 of the Evidence Act 2002 provides:

> "136(1) This section applies in relation to the following kinds of evidence -
> (a) … ;
> (b) identification evidence;
> (c) … ;
> (d) in criminal proceedings -
> (i) …;

[23] See Tab. F of the Record, from page 20 line 22 to page 26 line 14.

(ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;

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

(f) … .

(2) Where there is a jury the Judge shall, unless there are good reasons for not doing so -

(a) warn the jury that the evidence may be unreliable;

(b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) It is not necessary that a particular form of words be used in giving the warning or information.

(4) This section does not affect any other power of the Judge to give a warning to, or to inform, the jury.

[47] This section is identical to section 136 of the Barbados Evidence Act, which was given detailed consideration by the Barbados Court of Appeal in **Ian McClaren Gill v the Queen.**[24] In that case the appellant was convicted of rape. He appealed on the ground, *inter alia*, that the trial judge failed to give a section 136(2) warning to the jury. The issue arose in relation to oral evidence which the police gave of answers that he gave to questions that they asked him. Gill's responses tended to incriminate him and section 136(1)(d)(ii) of the Barbados Evidence Act and the same provision in the St. Lucia Evidence Act require a trial judge to give a section 136(2) warning.

[48] In the judgment, Sir David Simmons, CJ, traced the history of section 136 as a precursor to determining whether a section 136(2) warning is mandatory, and the consequence for failing to give the warning. He referred[25] to the opinion which the Court of Appeal had prior given on the subsection in the case **Jerome O'Neal Bovell v R.**[26]

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[24] Barbados Criminal Appeal No. 18 of 1998 (30th January 2003).

[25] At paragraph 68 of the judgment.

[26] Barbados Criminal Appeal No. 23 of 2000 (23rd April 2002)

[49] The trial judge did not give the section 136(2) warnings in **Bovell**. The Court of Appeal held that although the language of section 136(2) was mandatory, since it is not obligatory for a trial judge to give the warnings if he or she has good reasons for not giving it, the effect of failure to give the warning had to be evaluated in each case, having regard to the totality of the evidence.[27] From that perspective, the Court stated that a conviction will not be automatically quashed in every case in which the warning is not given. In **Bovell**, the Court of Appeal dismissed the appeal notwithstanding that the trial judge failed to give the warning. This was done because that Court found that there was ample other evidence which could have sustained the conviction.

[50] In **Gill**, the Court took the opportunity to review its decision in **Bovell**, in the light of recent decisions from Australian Courts on section 165 of the Evidence Act 1995 of Australia.[28] This section is similar to section 136 of the Barbados and St. Lucia Evidence Acts. One notable exception, however, is that the Australian Act makes the warnings mandatory only where a defendant makes a request for it to be given. This exception was omitted from the Barbados and St. Lucia statutes.

[51] In construing section 136, the Court of Appeal stated that section 136(2) of the Barbados Evidence Act seeks to make a rule of practice in all cases to which section 136(1) applies.[29] The Court stated, however,[30] that because the section allows a trial judge not to comply with the requirements to give the warnings where there are good reasons for not doing so, the Court was prepared to review and amend the earlier interpretation stated in **Bovell**, having had the benefit of further research. The Chief Justice said that the word "shall" is to be construed with reference to its context and does not always import an imperative duty to do a

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[27] See paragraph 47 of the judgment.
[28] See paragraphs 73-84 of the judgment.
[29] See paragraph 85 of the judgment.
[30] In paragraph 90.

prescribed act.[31] From this perspective he stated that a provision cannot really be mandatory if a court has discretion not to enforce it.

[52] Construing the words of section 136(2) in their context,[32] the Chief Justice stated as follows:[33]

> "[89] The existing language of the section does not produce a manifest absurdity. But the purport and intent of the section may be gleaned from its very words which are sufficiently elastic as to cause us to amend our earlier characterization ….. (92) We therefore hold that the requirement for a warning to be given under section 136 is not mandatory but discretionary."

In my view, this construction reflects sound reasoning and I adopt it as the correct interpretation of section 136 of the St. Lucia Evidence Act as well.

This case

[53] This is a case of an offence of a sexual nature and a case in which there was identification evidence. According to sections 136(i)(e) and 136(1)(b) of the Evidence Act of St. Lucia the trial judge should have given section 136(2) warnings unless there were good reasons for not doing so. However, the learned judge did not warn the jury of the aspects of the identification evidence that were unreliable. The trial judge did not inform the jury of the matters that may have caused it to be unreliable. The judge did not warn them of the need for caution in determining whether to accept the evidence and the weight to be given to the identification evidence and the evidence of the complainant. The trial judge could have referred, for example, to the length of time that elapsed between the commission of the offence and the making of any or any formal complaint to the authorities. The judge could have also pointed out to the jury whether there was any evidence other than that of the virtual complainant which tended to connect Joseph with the commission of the offence.

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[31] Ibid.

[32] In paragraphs 89-92 of the judgment.

[33] In paragraphs 89 and 92 of the judgment.

[54] Having accepted the construction the Reference, that section 136(2) directions are discretionary and not mandatory, the question is whether the failure to give the directions fatal in the present case.

The failure to give the section 136(2) warnings in this case

[55] The discretion which section 136(2) gives must be exercised judiciously. The learned trial judge did not state that there were good reasons for not giving the warnings and therefore provided no reasons for not giving them. By not adverting to this question, there was no exercise of the discretion at all. This failure, in my view, was fatal and the appeal should succeed on this ground.

[56] I think that the result would be the same even if I were to decide that this Court is in as good a position as the learned trial judge to exercise the discretion based on the circumstances of this case. This would require a review of the evidence in order to determine the strength of those aspects of it that tend to connect Joseph to the offence.

[57] The evidence of the complainant, including her evidence of identification was strong. However, the fact that the complainant failed to report the matter to anyone for many months after the incident tends to detract from the strength of the case. The case for the prosecution is that she was still labouring under the threat which Joseph made when she told him that she would have informed her mother that he had interfered with her. Joseph left the island for more than 1 month before she reported the matter to anyone. Additionally, there are 2 instances in which it was found at the trial that she had made inconsistent statements. These did not go to the essential elements of the offence.

[58] I think that in the circumstances, the strength of other evidence which tended to connect Joseph to the offence will be critical in determining whether this is a case

in which the warnings should have been given. The only such evidence was that which was given by the mother of the complainant of the telephone admission which Joseph made to her. It is significant evidence that is supportive of the evidence of the complainant and it presents a basis for conviction. However, I do not think that it is evidence that should have precluded the judge from giving the warnings under section 136(2). In my view, therefore, the appeal succeeds on this ground.

Recent Complaint

[59] Mr. Innocent's complaint on this ground was subsumed under 2 heads. The first was that the trial judge failed to give the jury any or any proper directions or warning on recent complaint in relation to the telephone conversation between the complainant and Ms. Danzie. The second was that she failed to give any or any proper warning on recent complaint in relation to the evidence of her mother with respect to the admission which Joseph allegedly made to her in a telephone conversation. Mr. Innocent said that while the judge dealt with this conversation in relation to its admissibility under section 53 of the St. Lucia Evidence Act she ignored the common law principles relating to recent complaint and did not give a direction on its probative value. In response, Mrs. Charles-Clarke submitted that the issue of recent complaint did not arise in the case because no evidence was led that brought it into consideration. I agree.

Conversation with Ms. Danzie

[60] In her evidence, the complainant said that she spoke with Mrs. Danzie by telephone some months after Joseph allegedly molested her. However, no evidence was led concerning what she said to Ms. Danzie. In her evidence Ms. Danzie confirmed that the complainant called and spoke to her by telephone, but she did not disclose the contents of that conversation.

[61] Mr. Innocent submitted that the trial judge dealt with this aspect of Ms. Danzie's evidence as being supportive of the virtual complainant's evidence. However, in my view, the learned trial judge correctly did not treat this as a specie of recent complaint. Secondly, the direction did not state that Ms. Danzie's evidence was supportive of the evidence of the complainant in any aspect other than that the 2 of them spoke by telephone.

The admission

[62] It is my view that in relation to the alleged admission by Joseph to the mother of the complainant, the trial judge correctly ensured that the necessary requirements were satisfied before that evidence was accepted. She also instructed the jury adequately, in my view, of the way in which they could view that statement. It was not necessary for her to give a recent complaint direction in relation to that statement because it was neither recent nor was it a complaint which the virtual complainant made to any one about the offence. Recent complaint was not an element of the prosecution's case.

[63] In the foregoing premises, the appeal fails on this ground.

Good character direction

[64] This is ground 5 of the appeal. In distilling the basic principles that relate to this issue in Troy Simon v The Queen,[34] I stated[35] that whether a trial judge is obliged to give a good character direction, will ordinarily be triggered after the defence raises the point "distinctly", establishing the absence of any prior criminal record by evidence or cross-examination. The rationale for this is that the good character of an accused is relevant to his credibility and to the likelihood that he would commit the offence in question. I also noted that the exception to this

[34] Grenada Criminal Appeal No. 16 of 2003, (22nd May 2006)
[35] At paragraph 4 of the judgment.

general rule is that even where the issue is not raised distinctly, the accused will be entitled to a good character direction in the rare cases in which the misbehaviour or ineptitude of defence counsel is so extreme that it constitutes a denial of due process to the accused. I further noted[36] that in Harry Wilson v The Queen,[37] after assessing the applicable statements that relate to the operation of this exception, and the judgment of the Judicial Committee in Sealey and Headley v The State,[38] in particular, Saunders, JA, as he then was, stated[39] that the critical question was whether it could be said that the jury would necessarily have reached the same verdict if they were given the good character direction.

[65] I note that in Mark Teeluck and another v The State,[40] the Privy Council stated, in proposition (v) of the principles that are material to this issue,[41] that if the issue of good character is not raised by the defence, there is no duty upon the trial judge to raise it or to give a good character direction. However, the defendants in Teeluck were represented by Counsel. There is nothing on the record to indicate that Joseph was aware that he could have raised his good character, distinctly, in a manner that could have afforded him the benefit of a good character direction. In these circumstances I think that there was an obligation upon the trial judge to raise this issue and to give the necessary direction. It is my view that she erred by not doing so.

[66] It was established that Joseph had no previous convictions. He has insisted that he did not commit the offence. The virtual complainant was adamant that he did. His conviction depended to a great extent on whether the jury believed his word against her word. Credibility was an important consideration. It appears from the record that this was an appropriate case for a good character direction. In my

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[36] At paragraph 5 of the judgment.
[37] St. Vincent and the Grenadines Criminal Appeal No. 15 of 2002 (22nd September 2003).
[38] [2002] UKPC 52.
[39] At paragraph 19 of the judgment.
[40] [2005] UKPC 14; Privy Council Appeal No. 36 of 2004 (23rd March 2005).
[41] Encapsulated in paragraph 33 of the judgment.

view, therefore, the appeal succeeds on this ground because the judge failed to raise the issue and to give the necessary direction.

Verdict unfair and unsatisfactory and Appeal against Sentence

[67] I have found that although the appeal in this case fails on grounds 1 and 5, but it succeeds on grounds 3, 4 and 6. Inasmuch as it would succeed on the latter 3 grounds, it would be redundant, in my view, to consider whether the verdict is unfair and unsatisfactory. This is ground 2 of the appeal. It is not necessary to consider the appeal against sentence, which is ground 1 of the appeal.

Order

[68] The appeal has succeeded because the trial judge failed to give the identification directions which section 102(2) of the St. Lucia Evidence Act mandate. It has also succeeded because the learned trial judge did not give the warnings which section 136(2) of the said Act require and because the judge failed to raise the issue of good character or give a good character direction. In my view it is not possible to tell how these directions would have influenced the verdict of the jury. In the premises, I would allow the appeal; quash the conviction; set aside the sentence and order a retrial of the case.

Hugh A. Rawlins
Justice of Appeal

I concur

Michael Gordon, QC
Justice of Appeal

I concur

Denys Barrow, SC
Justice of Appeal