SAINT LUCIA

IN THE COURT OF APPEAL

HCRAP2006/008

BETWEEN:

KYON FREDERICK

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Hugh A.Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Rita Joseph-Olivetti	Justice of Appeal [Ag]

Appearances:

Alfred Alcide for the Appellant
Ms. Victoria Charles-Clarke, Director of Public Prosecutions and Ms. Janine Samuel-Kisner for the Crown

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2009: February 11;
March 25.

Criminal Appeal - Unlawful Carnal Knowledge - Section 216(i) of the Criminal Code 1992 - Appeal against conviction – whether unsafe or unsatisfactory – whether the verdict is against the weight of the evidence – whether the direction on truthfulness of witnesses is adequate – whether lies go to the evidence of guilt as opposed to credibility - whether a Lucas direction was necessary - whether judge obliged to give a corroboration warning under section 15 (4) of the Evidence Act 2002 – whether a corroboration warning under section 136 of the Evidence Act was called for in relation to the alleged victim's evidence – victim's evidence unreliable - whether judge obliged to give reasons for not giving the warning under section 136 – effect of judge's failure to give this warning and to articulate reasons for not doing so - whether judge's direction on the accused's right to remain silent when questioned by the police and his adverse comments on the accused's failure to give an explanation to the Police had the effect of nullifying the right - effect of failure to give a direction on expert evidence - whether such failures are fatal to conviction – whether proviso should be applied - whether re-trial should be ordered

The appellant was convicted of unlawful carnal knowledge on 30th June 2006, and sentenced to 5 years imprisonment. He appealed against his conviction on the ground that it was unsafe and unsatisfactory having regard to the failure of the trial judge to give an adequate direction on truthfulness of a witness and corroboration of the virtual complainant's evidence. The appellant contended further, that the trial judge should have had regard to the weight of the evidence and should have given a proper direction on the burden and standard of proof. The prosecution's case was that on the 25th August 2004, the appellant and co-accused forced the virtual complainant into a car and took her to a lonely field, held her against a tree and both raped her. The appellant denied raping the virtual complainant, indicating that he never had sex with the virtual complainant.

Held: allowing the appeal, quashing the conviction.

1. In a case involving an offence of a sexual nature, the judge has a discretion whether or not to give a corroboration warning and specific directions in relation to the victim's evidence in accordance with section 136 of the Evidence Act 2002. The judge was however obliged to articulate reasons if he determined that the corroboration warning and specific directions were not necessary. Therefore his failure so to do, coupled with an absence of reasons renders the verdict unsafe and unsatisfactory.

2. The admission of improper identification evidence, the omission to give a direction on expert witnesses, and suggestions by the Prosecution in cross-examination that threats were made to the defence witnesses in the absence of the Prosecution adducing any evidence to establish that those threats were made, render the trial unfair and the resulting verdict unsafe and unsatisfactory.

3. The duty to give the jury a corroboration warning under section 15(4) of the Evidence Act, only arises where a child of 12 and over has been examined as to his or her competence and is allowed to give evidence. The judge did not admit the victim's evidence under section 15(2) of the Evidence Act, and therefore there was no need for a corroboration warning under section 15(4) of the Act.

4. The comments made by the judge in his direction on the accused's right to silence might have nullified this right and may have had the effect of shifting the burden of proof from the Prosecution to the appellant in the jury's mind.

5. Having regard to the date of the alleged offence, the quality of the Prosecution's evidence and the time already spent in custody by the appellant, it is not in the public interest to order a re-trial.

JUDGMENT

[1] JOSEPH-OLIVETTI, JA [AG.]: A young girl alleged that on the night of 25th August 2004, whilst walking on the streets of Faux-A-Chaux, Saint Lucia, she was forced into a car by two men, taken to a lonely site and raped. The appellant, Mr. Kyon Frederick and his co-accused, Mr. Terrel James, were charged with the offence of having unlawful carnal knowledge of a female aged 14 contrary to section 216 (1) of the Criminal Code of St. Lucia 1992, and with indecent assault contrary to section 112 (1) (b). They were both convicted before Redhead J, [Ag.] and a jury on 30th June 2006. Mr. Frederick was sentenced to 5 years imprisonment. His co-accused was given a like term of imprisonment, but I am not directly concerned with him here. Mr. Frederick initially appealed both against his conviction and sentence but at the start of the hearing he withdrew his appeal against sentence.

Grounds of Appeal

[2] The appellant filed 2 grounds of appeal but was allowed to amend same at the hearing by adding further grounds as he had retained counsel at very short notice.

[3] The grounds in essence as expressed by learned counsel, Mr. Alcide, are as follows:-

(a) The verdict is unsafe and unsatisfactory
(b) The verdict is against the weight of the evidence
(c) Inadequate direction on truthfulness of witnesses
(d) Trial was unfair in that the learned trial judge allowed the prosecution to ask leading questions and gave no assistance to the jury to deal with evidence so elicited.
(e) Failure to give proper explanation and warning on corroboration as required by section 15 of the Evidence Act, No. 5 of 2002
(f) Misdirection on the burden and standard of proof.

Background Facts

[4] The Crown's case, as is the norm in cases of this nature, rested solely on the evidence of the victim. She was aged 14 at the time of the incident, and 17 at trial.

Her evidence was to the effect that she was walking home from a party on Wednesday, 25th August 2004, at about 10:30 p.m. Her friend Ian was walking some way behind her. When she arrived in the vicinity of her uncle's shop, close to her home, the appellant and his co-accused, both of whom she knew by sight (they lived in her neighbourhood), drove up in a car ("burning tires" as she put it). The appellant who was the driver came out, asked her to go with him; she refused. He then forced her into the car, drove her to a lonely field in Vigie, Castries, held her against a tree and they both raped her. The appellant took away with him her panties, saying that he always kept the underwear of girls he had had sex with. The appellant then drove her back to Castries. She walked home getting there around 4:00 a.m. Her grandmother let her in but she said nothing to her because she was afraid of her reaction. On 27th August 2004, she told the former girlfriend of the co-accused of her ordeal, then she called her young boy cousin, (15 years at the time) who accompanied her to the Police Station where she made a report. She was later examined by Dr. Marius.

[5] The other witnesses for the Prosecution were the girl's grandmother, Dr. Marius and the two investigating police officers. Officer Nickson arrested the appellant on 9th September 2004, and she was assisted by WPC Alcindor, who confirmed that the appellant gave a written statement to the effect that he had nothing to say.

[6] Dr. Marius' testimony was to the effect that the girl was not a virgin and that he had not seen any signs of trauma of her genital area or evidence of other injuries on her. The gist of the evidence of the victim's grandmother was to the effect that she was worried about the girl when she did not return home. Accordingly, she had slept fitfully and finally let her in at about 4:00 a.m. She did not question her. She said that the victim looked sad but on cross-examination, admitted reluctantly that in her statement to the Police, she had said that she had not seen the girl's face. She also said she did not hear the sound of burning tires that night.

[7] It is noted that neither of the investigating officers searched the appellant's home for the girl's underwear. Indeed, Officer Nickson thought it was not appropriate to

do so. Officer Nickson, in addition, testified that the victim identified the appellant when he was in Police custody as Kyon who had sex with her at Vigie.[1] Officer Nickson also gave similar evidence in relation to the co-accused.

[8] The appellant was unrepresented at trial which had been adjourned from an earlier date. It appears that his lawyer was given leave to withdraw on the very day of the trial as the appellant had apparently failed to meet the conditions for representation.[2] The appellant, nonetheless, made brave attempts to cross-examine the witnesses. He also called three witnesses and testified himself. His co-accused was also unrepresented. He opted to remain silent and called the same three witnesses.

[9] The gravamen of the appellant's defence was a denial - he had not abducted and raped the girl. He however, admitted that although he was not at the party that night, he, at one Randall's request, drove Randall whom he described as "the girl's man" to Vigie and left them there. He was accompanied by one Shawn. Later he returned with Shawn, picked up the girl and Randall and returned all three to Faux-A-Chaux. Randall lived with him at the time and came to him at his home which was in the vicinity to make his request. Notably, he was mercilessly taxed in cross-examination as to why if he had not raped the girl as alleged, he had never gone to the Police.

[10] His three witnesses were Gregory Alcide, Shawn Joseph and Ian Joseph. He being the second named defendant was only allowed to examine them after he had given evidence and after they had testified on behalf of his co-accused.

[11] Gregory Alcide's evidence supported the appellant's evidence that the appellant was not at his party that night and he had not seen him in the area. Mr. Alcide testified that he knew the victim, he had not invited her to his party and she was not there and that whilst sitting on a bridge outside his home he had seen the

[1] See Record of Appeal, Tab B p. 106 lines 4-11
[2] See Record of Appeal, Tab B p.5 lines 17-25; p.6 lines 1-14.

victim on the road with two guys, Ian and Shawn and she left in a car with them and somebody followed them on foot.

[12] The gist of Shawn Joseph's entire testimony, (on behalf of both accused) was that he had accompanied the appellant in the appellant's car to drop off the victim and Randall at a beach in Vigie, and that they left the two there, returned later for them and dropped them off at Faux-A-Chaux.

[13] In cross examination, the prosecution suggested to Shawn, that he only gave that evidence as he had been struck on the back of the head ("given a kalout") by the co-accused. This blow, it was suggested, was dealt to him when the co-accused was released on bail and he had asked the co-accused why he had to do that to the girl. He denied that suggestion. No prosecution witness testified to having witnessed such a scene[3].

[14] It is noted, that the judge, in the absence of the jury and after Shawn had given evidence for the co-accused, but before he took the stand on behalf of the appellant, castigated Shawn and indicated that he ought to be charged as an accomplice as he knew the girl was a school girl and why the men were taking her to Vigie. In my judgment, this ought to have been left at the close of the trial, as Shawn could have been intimidated by this, that is, the trial judge clearly not believing him. This could have affected his later evidence given on behalf of the appellant, thus raising the spectre that the trial was unfair.

[15] Ian Joseph testified that he was at the party, but that he had not seen the appellant there. When he left the party he was walking. He saw the victim walking ahead of him and he saw Randall speaking with the victim near a white car. He had heard no burning tires that night and he had not seen anyone struggling with the victim or threatening her in any improper fashion.

[16] In cross examination, it was suggested to him, as it was when he testified on behalf of the co-accused, that he had been told by both the appellant and the co-

[3] See Record of Appeal, Tab C p. 84-85

accused that if he came to court and gave evidence against them they would break both his legs. He denied that suggestion[4]. (From the tenor of the questions in cross-examination it appears that this complaint was made by the victim herself but she did not give evidence about this in chief thus giving the appellant no opportunity to cross-examine her. The Prosecution sought to bring her back but the court refused to allow her to be recalled).

[17] I now turn to consider the grounds of appeal dealing with the specific rather than the general grounds first.

Inadequate direction on truthfulness of witnesses

[18] Counsel submitted that the learned trial judge's direction on truthfulness of witnesses was inadequate, as he had not explained to the jury that people could tell lies for various reasons and that did not necessarily mean that their version should be rejected entirely and that lies do not amount to guilt.

[19] The learned trial judge said:

> "If you find that a witness was truthful but mistaken, you may accept that part of his or her testimony which you find to be truthful and reject the rest. However, if you find that a witness told you nothing but lies, then of course, you will reject the whole testimony of that witness, because truth is not divisible"[5].

[20] This is an oft used formulation and was given in the context of general directions on how the jury should go about their task of fact finding. The judge was specifically giving directions to assist the jury in determining the veracity of the witnesses. In my view, there was nothing amiss with this direction. What I understand counsel's real grievance to be here is that a Lucas direction was called for and not given. However, a Lucas direction is only required when the defence relies on an alibi or where the prosecution relies on specific lies told by the defendant as a vital part of its case. The Lucas direction is not appropriate when

[4] See Record of Appeal, Tab C p. 68
[5] See Record of Appeal, Tab D p. 10 lines 7-10

all the jury is being asked to do as they were in this case, is their usual task of ascertaining whether a witness is speaking the truth or not.

[21] The law is elucidated in Archbold[6]. In R v Goodway[7] it was held that whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a judge should give a full direction in accordance with R v Lucas (R)[8] to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury is satisfied that (a) the lie was deliberate, (b) it relates to a material issue, and (c) there is no innocent explanation for it. The jury should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour. A similar direction as to false alibis should routinely be given: R v Lesley[9] and R v Drake[10], see also R v Duncan[11] and R v Pemberton[12].

[22] Archbold[13] explains further:

> "In the light of the number of appeals on this point that followed *Goodway* …the Court of Appeal gave the following further guidance in *R. v. Burge and Pegg [1996] 1 Cr.App.R.163.*. A *Lucas* direction is not required in every case where a defendant gives evidence, even if he gives evidence on a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. It is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering. (Emphasis mine.) How far a direction is necessary will depend on the circumstances. The direction will usually be required (a) where the defence has raised an alibi; or (b) where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that evidence draws attention to lies told, or allegedly told, by the defendant; or (c) where the prosecution seek to show that something said, either in or out of court, in relation to a separate or distinct

[6] 2007 4th Edition para. 4-402
[7] 98 Cr. App. R. 11 CA
[8] [1981] Q.B. 720, 73 Cr. App. R. 159, CA
[9] [1996] 1 Cr. App. R. 39, CA
[10] [1996] Crim. L.R. 109, CA
[11] The Times, July 24, 1992, CA
[12] 99 Cr.App.R. 228, CA
[13] 2007 4th Edition para.4-402

issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved; or (d) where, although the prosecution has not adopted the approach in (c) above, the judge reasonably envisages that there is a real danger that the jury may do so. It will often be wise for the judge, particularly in relation to the last category, to canvass the matter with counsel before speeches and summing up".

[23] Here, the appellant did not rely on an alibi and the Prosecution did not rely on any specific lies told by the appellant to the Police or when giving evidence, as part of its case. The appellant gave one version of the events which took place that night and the victim another. All the jury was asked to do was to determine who was telling the truth, that is, to choose between the version of events as given by the Prosecution and that put forward by the appellant and his witnesses. It was a question of ascertaining credibility. Accordingly, a Lucas direction was not appropriate and in fact would only have served to confuse the jury. It follows that the judge's direction was adequate and that this ground cannot be sustained.

Failure to give corroboration warning under section 15 (4) Evidence Act 2002

[24] Mr. Alcide submitted that having regard to the age of the victim when she testified, the judge was obliged to give the warning about acting on uncorroborated evidence of a child as mandated by section 15 (4) of the Evidence Act 2002 and he failed to do so.

[25] Section 15 merits being quoted in extenso as follows:

> "15.-(1) Where a child who is twelve years of age or more is presented as a witness in proceedings, the court shall presume that the child is competent to give evidence and no inquiry into the competence of the child is required unless the judge has reason to believe that the child is unable to understand questions or provide intelligible answers.
>
> (2) In determining the competence of a child pursuant to subsection (1), the court shall consider whether –
>
> (a) the child is possessed of sufficient intelligence to justify the reception of his or her evidence; and

(b) the child is competent to know the nature and consequences of giving false evidence and to know that it is wrong,;

and if the court so finds, it shall permit the child to give evidence upon swearing an oath or making an affirmation in accordance with the Oaths and Affirmations Ordinance Cap. 119.

(3) Where a child who is less than twelve years of age is presented as a witness in proceedings, the court shall conduct an inquiry to determine if, in its opinion, the child is possessed of sufficient intelligence to justify the reception of his or her evidence, and understands that he or she should tell the truth and, where the court so finds, it shall permit the child to give evidence upon stating:

"I promise to tell the truth".

(4) A person charged with an offence may be convicted upon evidence admitted under subsection (2) but, in a trial by jury of a person so charged, the court shall warn the jury of the danger of acting on such evidence unless they find that the evidence is corroborated in some material particular by, other evidence implicating that person".

[27] As can be seen, the whole section is concerned with the evidence of children, and in my opinion, seeks to clarify and to some extent reiterate the common law and practice relating to the admission of the evidence of children.

[28] The section draws a distinction between children of 12 and above and children under the age of 12. Normally, when a child, is presented to give evidence, one is always concerned as to whether the child understands the nature of the proceedings and the obligation to tell the truth. Here, the Act provides that in the case of a child 12 years and over, that he or she is presumed to be competent unless the judge has reason to think otherwise. If the judge harbours any doubts he or she may embark on an examination of the child to determine competence in accordance with sub-section (2). And, if the court is satisfied that the child is competent, then the court will allow the child to give evidence on oath or affirmation. In that event, that is, when the judge examines a child of the age of 12 and over, and allows the child to give evidence, he must give the warning provided for in sub-section (4). The warning is not called for when a child 12 years and over has not been examined to determine his or her competence.

[29] On the other hand, a child under the age of 12 must be examined and if deemed competent, allowed to give unsworn testimony. However, curiously the section is silent as to the effect of such evidence and does not stipulate for a corroboration warning. Presumably, the common law position would apply.

[30] Clearly then, the duty to warn the jury only arises where a child of 12 and over has been examined as to his or her competence and allowed to give evidence. Here, this scenario does not arise. The judge did not admit the victim's evidence pursuant to an examination as to her competence under sub-section (2) and therefore, there was no need for a corroboration warning under sub-section (4). This ground therefore must also fail.

Corroboration warning under section 136 of the Evidence Act.

[31] During the course of the proceedings, in the interest of justice, the court drew counsel's attention to section 136 of the Act as this too concerns corroboration. This section provides as follows:

> "136- (1) This section applies in relation to the following kinds of evidence-
> (a) …
> (b) …
> (c) …
> (d) …
> (e) in the case of a prosecution for offence of a sexual nature, evidence given by a victim of the alleged offence; (Emphasis mine)
> (f) …
>
> (2) Where there is a jury the Judge shall, unless there are good reasons for not doing so – (Emphasis mine)
>
> (a) warn the jury that 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."

[32] From the foregoing, it can be discerned that section 136 casts a duty on the judge to give a warning to the jury about the dangers of acting on uncorroborated evidence of a victim in the prosecution of offences of a sexual nature. Mr. Alcide submitted that having regard to the nature of the case, such a warning was called for and that the judge's treatment of the victim's evidence fell short of his statutory obligations. The Director of Public Prosecutions was hard put to answer whether the judge had complied with the section and contended instead that in any event the court should apply the proviso if it was of the view that the directions were wanting in this respect.

First, one needs to consider specifically what the section requires of a trial judge. Fortuitously, this section was considered by the Court of Appeal in R v Gerald Joseph[14]. In that case, one of the grounds of appeal was that the learned trial judge failed or failed adequately to give the necessary warnings to the jury required by section 136 of the Evidence Act.

[33] The court held, after examining the history of the provision and Ian McClaren Gill v The Queen[15] from the Court of Appeal of Barbados, which dealt with an identical section (section 136 of the Evidence Act of Barbados), that the section gives the court a discretion whether to give the warning or not. If the court has good reason not to give the warning, then it is not obliged to do so. However, if the warning is not given and the court articulates no reasons for not giving the warning, it is to be presumed that the court has no good reason.

[14]Saint Lucia Criminal Appeal No.2 of 2006
[15] Barbados Criminal Appeal No. 18 of 1998 (30th January 2003).

[34] Rawlins JA (as he then was) who delivered the judgment of the court in R. v Gerald Joseph said:

> "Construing the words of section 136(2) in their context, the Chief Justice stated as follows:
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> [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."[16]

[35] Gerald Joseph is still good law. The case at bar is a prosecution of a sexual offence and the judge had a discretion as to whether to give the warning or not. If however, he determined not to give the warning, then he was obliged to give his reasons for not doing so and if he gave no reasons, then he will be presumed not to have any good reason and therefore, would have failed to carry out his duty under section 136.

[36] I have considered the directions relating to the victim's evidence.[17] The judge in effect told the jury what corroboration is in law and the danger of convicting on uncorroborated evidence. However, he failed to inform the jury of matters that may have caused her evidence to be unreliable and he failed to direct the jury as to the weight to be given to it if they accepted her evidence. The judge simply recited the evidence and asked the jury to analyse it themselves. In my view, the section required him to assist the jury in doing that very task; analyzing the evidence. Clearly, he failed to do that and he gave no reasons for not complying with the section. Therefore, it can be presumed that he had no proper basis for failing to comply with the section. Indeed, on consideration of the evidence as a whole, I can find no good reason for not giving the warning and directions. If

[16] Supra, para 52
[17] See Record of Appeal, Tab D, p. 12-19

anything, this is a case which cries aloud for full adherence to the section. What then is the effect of this failure? To my mind, this was a grave error on law as it concerned the weight to be given to the only evidence adduced by the Prosecution to show that the appellant had committed the offence. In other words, it concerns the very foundation of the Prosecution's case. Apart from the alleged victim, there was no other witness to connect the appellant to the crime or indeed to establish that the offence took place. We have only the alleged victim's evidence. Is this error such as can be cured by the application of the proviso to section 35 (1) of the Eastern Caribbean Supreme Court (Saint Lucia) Act[18] as contended by the Director of Public Prosecutions? The proviso states:-

> "35-(1) The Court of Appeal on any such appeal against conviction shall, subject as hereinafter provided, allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that there was a material irregularity in the course of trial, and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

[37] The proviso has been held to apply where it can be said that the evidence is so overwhelming that had the jury been properly directed, the jury would have inevitably returned a conviction.[19]

[38] I have had regard to the case advanced by the Prosecution. There was no corroboration of the victim's evidence and when one considers her version of events, I cannot say as a matter of any certainty that the verdict would have been the same had the judge warned the jury that her evidence may be unreliable, informed the jury of matters that may have caused it to be unreliable, and warned the jury of the need for caution in determining whether to accept the evidence and

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[18] Cap. 2.01, Revised Laws of Saint Lucia 2001

[19] See Barrow JA in Kent Calderon v The Queen, Saint Lucia Criminal Appeal No. 9 of 2006; Derek Desir v The Queen, Saint Lucia Criminal Appeal No. 10 of 2006

the weight to be given to it. Certain matters, for example, the period of time that elapsed (approximately six hours) between the alleged abduction and when she returned home, bears examining considering the victim's allegations of what actually happened at Vigie and the inference that can reasonably be drawn of the period of time spent there, her uncertainty about which of the defendants assaulted her first, the fact that there was no sign of any trauma on any part of her body, this after having two prolonged bouts of forced sexual intercourse against a tree. In addition, it appears that she barely knew the men although they both lived in her neighbourhood and there was no proper identification evidence. The scenario also raises the question why would men known to her abduct and rape her without any attempt at concealing their identities. Interestingly, the only adult she made complaint to before going to the Police according to her appears to have been the former girlfriend of the co–accused who did not testify.

[39] I also take into consideration that the appellant was unrepresented and obviously did not have the necessary skill and knowledge to properly cross-examine the Prosecution's witnesses. Therefore, the court as a matter of practice, should have sought to give him such assistance in conducting his defence as might have seen appropriate.[20] Archbold states:

> "The judge should endeavour to assist an unrepresented defendant in the conduct of his defence, in particular when he is examining or cross-examining witnesses, or giving evidence himself. But there is a duty to restrain unnecessary cross-examination: see R. v. Brown (Milton) [1998] 2 Cr.App.R. 364, CA,"[21]

Thus, the fact that he was unrepresented casts a greater burden on the judge to ensure that he had a fair trial and I am not sure when the trial is viewed in the round that this can be said. For example, I have already adverted to the improper evidence of identification which was adduced by the Prosecution, the prejudicial effect of which far outweighed any probative value and ought not to have been allowed and the tenor of the cross-examination by the Prosecution about threats to witnesses when no foundation had been laid. That too, was more prejudicial than

[20] Blackstone's Criminal Practice 2009, para. D16.17, p. 1744
[21] Archbold 2007, para. 4-309

probative and ought not to have been admitted. Further, I am concerned that the judge's direction on an accused's right to silence when confronted by the Police, might have been undermined by the judge's direction. The judge said:

> "…When he is cautioned he is not obliged to say anything, but his story to you is that … When the police officer told him of the complaint made against him, would you as reasonable men and women…would have expect him to say to the officer, well, it's not me, I did not have sex with her, but I drop Rondell and her at Vigie. He did not say that, according to the officer. So you would use all of these things in determining the truthfulness of the child's story…"[22]

[40] In my judgment, this direction had the effect of nullifying the appellant's right to remain silent and would have indirectly or perhaps directly bolstered the Prosecution's case, bearing in mind the repeated suggestions made to the appellant and his witnesses by the learned Prosecutor as to why they had not gone to the Police. The combined effect of these statements would have had the effect of shifting the burden of proof from the Prosecution to the appellant in the jury's mind; in other words, he was being called upon to prove his innocence when the law presumes that he is innocent.

[41] Furthermore, on careful perusal of the summing up it appears that the judge did not direct the jury on the expert evidence of the doctor as he failed to give the usual direction relating to expert evidence.[23]

Conclusion

[42] On the whole, I am satisfied that the failure to comply fully with section 136 of the Evidence Act coupled with the several other matters raised herein renders the verdict unsafe and unsatisfactory and that this is not an appropriate case to apply the proviso. Accordingly, I would allow the appeal and quash the conviction. This conclusion makes it unnecessary for me to consider the other grounds of appeal raised and accordingly, I do not propose to enter into discussion of those issues.

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[22] Record of Appeal, Tab D, p. 23, lines 22-25; p. 24, lines 1-4. See also p. 25, lines 10-19
[23] Record of Appeal, Tab D, p. 25, lines 20-24

[43] I have considered the question of a re-trial. The court has power to order a re-trial on quashing a conviction where the interests of justice so require[24]. Archbold explains the principles which inform this discretion thus:-

> "The decision whether to order a retrial requires an exercise of judgment, involving consideration of the public interest and the legitimate interests of the defendant. The former was generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution could be conducted without unfairness to, or oppression of, the defendant. The legitimate interests of the defendant would call for consideration of the time which had passed since the alleged offence and any penalty already paid: *R. v. Graham; R. v. Kansal; R. v. Ali (Sajid); R. v. Marsh and ors* [1997] 1 Cr.App.R. 302,CA. As to time since the offence, see also *R. v. Saunders*, 58 Cr.App.R. 248 (retrial not ordered having regard to delay of three-and-a-half years and fact that appellant had been in prison for a number of years), and *R. v. Grafton and Grafton*, The Times, March 6, 1992 (retrials ordered in respect of serious offences after similar lapse of time, the court pointing out that since 1973 it had become much more common for trials to take longer to come to court)".[25]

[44] To my mind, these principles are equally applicable in this jurisdiction. The offence allegedly took place on 25th August 2004. In June 2006, on conviction, the accused was given a five year term which translates to a real term of approximately 3 years 4 months. He has spent to date about 2 years, 9 months in prison and if there is a re-trial he might have great difficulty in getting his witnesses to testify especially in the light of the judge's castigation of one of his witnesses. In addition, and most significantly in my view, the Prosecution's case is not a strong one resting as it does on the uncorroborated evidence of the alleged victim which evidence in itself may be regarded as unreliable. Taking all these circumstances into account, in my view it is not in the interests of justice to order a re-trial.

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[24] Section 35 (2) Eastern Caribbean Supreme Court (Saint Lucia) Act, Cap. 2.01, Revised Laws of Saint Lucia 2001

[25] Archbold 2007, para. 7-112

[45] I had said that I was not directly concerned with the co-accused here. However, the conclusion reached might have serious ramifications for him. Unfortunately, this court is a creature of statute and as he is not before the court, the court cannot extend to him the benefit of this judgment. He too was unrepresented.

Rita Joseph-Olivetti
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal