

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Criminal Appeal No. 16 of 2012**

**BETWEEN:**

**CLARENCE ELLOYD SEALY**

**Appellant**

**AND**

**THE QUEEN**

**Respondent**

**Before: The Hon. Sir Marston C.D. Gibson, K.A, Chief Justice, The Hon. Sherman R. Moore, CHB, and The Hon. Sandra P. Mason, Justices of Appeal.**

**2014: July 9**

**2015: March 4**

**Mr. Sacha Kissoon and Mr. Philip A. McWatt for the Appellant  
Mr. Lancelot Applewhaite for the Respondent.**

**DECISION**

**Introduction**

- [1] **MOORE JA:** On 27 September 2011 the appellant was convicted for the rape of **C**, a six year old female and on 11 September 2012 he was sentenced to six years imprisonment. He has now appealed against conviction and sentence.

***Background***

- [2] The appellant and **C**'s parents were neighbours. The appellant used to visit their home and drink with her father. Sometime between 1 and 31 August 2007 **C**'s mother, **M**, was at home recuperating from surgery. On one of those days the appellant offered to purchase a meal for **M** from the nearby "cookshop". **M** accepted the offer and consented to **C** accompanying the appellant. The appellant took **C** to his house where she alleged that he performed certain sexual acts upon her.
- [3] Meanwhile, **M** became concerned at the length of time the appellant and **C** were away and **M** went to the appellant's house in search of **C**. **M** called out

for C but C did not answer. The appellant and C were still in the appellant's house and C said that the appellant told her that if she told anyone he and she would no longer be friends. She also said that she was afraid.

- [4] Having had no reply from the appellant's house M returned to her house. She made enquiries of other neighbours but to no avail. She later found the appellant and C in a rum shop near her residence.
- [5] On a later date M, C and a friend of M went on a beach picnic. Whilst there C told M's friend about the incident at the appellant's house. The friend told M what C had said. The matter was reported to the police. The appellant was interviewed by the police and was later arrested and charged with the rape of C.

### ***The Appeal***

- [6] The appellant filed six grounds of appeal. Grounds 1 and 2 are as follows:

#### ***Ground 1***

"The Learned trial Judge erred in failing to hold a *voire dire* and therein consider any of the factors set out under Section 145 of the Evidence Act when dismissing defence counsel's objections to the prosecution's application that PC 1201 Springer being granted leave to read into evidence unauthenticated statements attributed to the accused which he recorded in his official notebook."

#### ***Ground 2***

"The Learned Trial Judge allowed a miscarriage of justice to occur when she permitted PC 1201 Springer and PC 1455 Broomes to read unauthenticated statements attributed to the Appellant into evidence in contravention of Section 73 of the Evidence Act; and/or in the alternative, in the event that this Honourable court finds that such a discretion was available to the learned trial judge, such discretion was exercised unreasonably in this case, as it in essence amounted to a circumvention of the protection afforded to the accused under Section 73 of the Evidence Act".

- [7] With regard to the contention on ground 1 that the trial judge failed to hold a *voir dire*, the appellant denied having made the oral statements attributed to him by the police. That being so it became a question of fact for the jury to decide. A *voir dire* was therefore not necessary.
- [8] Except for the contention mentioned in paragraph 7 above, the substance of those grounds was extensively canvassed before, and considered by, the **Caribbean Court of Justice (CCJ)** in **Julian Oscar Francis v. The Queen**

**CCJ Appeal No. Cr. 1 of 2008 (Francis).** After a full and exhaustive discussion of the issues the **CCJ** said at paragraph 32:

“In the result, the first ground of appeal which relates to the oral admission allegedly made by the appellant, fails.”

- [9] This Court is bound by decisions of the **CCJ** and no useful purpose would be served by our traversing settled principles. Notwithstanding that, we feel compelled to make a few observations.
- [10] In **Francis**, the **CCJ** left open the question whether permission for the witness to refresh his memory from his notebook includes permission to read aloud what is written therein.
- [11] The witness is allowed to refresh his memory from his notebook because he says that he cannot remember the exact words used by the accused. Whether he then closes his notebook and gives his evidence or reads aloud from his open notebook he must, if required, show his notebook to counsel. The notes must be exact and contemporaneous. It therefore seems to be a futile exercise in pedantry to restrict what is really one simple exercise of opening the notebook at the exact page and reading aloud the statement.
- [12] In this jurisdiction we have always treated the *ipsissima verba* attributed by the police to the accused/appellant to be of the utmost relevance in determining the veracity of the police witness - not only that he recorded the exact words said, but, also that he did so contemporaneously. It has therefore always been the practice in this jurisdiction for the police witness to be allowed by the court to read aloud from his notebook, the words he attributed to the accused/appellant, and, said to have been recorded by him, the policeman. The practice of refreshing memory is now enshrined in **section 30 (1) of the Evidence Act, Cap. 121 (Cap. 121)** without the abolition of the practice of reading aloud. Had Parliament intended to abolish this age old practice it would have been specifically done in **Cap. 121**. On the contrary, the right to read aloud has been preserved by **subsection (3)** of that section.
- [13] We recruit the human being, train him, call him “Policeman”, and clothe him with authority to protect society (including the miscreant, evil doer, he bent on mischief, the good, the bad and the ugly). With full knowledge that the policeman, being human, is subject to all human failings, we arm him with a notebook and pencil with which to record events, including the *ipsissima verba* of those other humans who communicate orally with him; and thereby make it possible for him to keep an accurate note of his daily activities. When he gives evidence before the court and relies on the contents of his notebook we say, “Mr. Policeman, you are a liar”. We test his veracity by appointing a jury to judge the truth or otherwise of his evidence. When the

jury uphold the veracity of the contents of the policeman's notebook we say, "The jury's verdict was perverse".

- [14] This predilection to keep the laws of evidence under the microscope of legal scrutiny is admirable testimony to our quest to ferret out the truth and keep the law of evidence relevant. It is not new. Writing on the question of the reform of the law of evidence in 1968 in the Second Edition of "An outline of the Law of Evidence", Rupert Cross and Nancy Wilkins said at page 11:

"Much of the law of evidence was brought into existence to meet the requirements of a past age. It was right that there should be rigid exclusionary rules when the parties were not allowed to testify and when almost every common law trial took place before an illiterate jury but it is not so clear that there is need for all the elaborate rules of evidence at the present day. This is what a Queen's Counsel has to say about the English law of evidence."

"Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders' debris." (See the Advocate's Devil by C.P. Harvey, Q.C. at page 79)."

- [15] The policeman gives his evidence on oath. His evidence in chief is then tested by cross-examination. On the other hand it is the rule, rather than the exception, (as in this case), for the accused to make an unsworn statement from the dock. That unsworn and untested statement is accorded the same status and fair treatment as is accorded to the sworn and tested evidence of the police witness. That is why there are checks and balances built into the system: trial by jury. In a criminal trial the witness is subject to the scrutiny of judge and jury who in turn are subject to a two tier appellate process. In Barbados today jurors are highly literate, many being university graduates. They are selected from among civil servants, bank officials and other lay professionals. Perfection awaits us in heaven; on this earth we must do the best we can.
- [16] In the final analysis, the law must be so applied as to ensure that the entire community is protected. We must, therefore, not be side tracked or derailed, or allow the trail of a red herring, however aromatic, to deflect us from the course of justice. We can put it no better than Lord Denning speaking on the standard of proof in **Miller v. Minister of Pensions [1947] 2 All ER 372**

when at page 373 he said, “The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice”.

- [17] I should have been surprised had Parliament abolished the right of the policeman to read aloud orals recorded in his notebook. In this jurisdiction that right seems as old as the policeman’s notebook itself. The purpose is to ascertain the accuracy of the recorded oral and not on the soundness of the policeman’s memory. It would therefore be pointless, even nonsensical – an exercise in futility - to say to the policeman, “You may open your notebook and refresh your memory then close your notebook and repeat accurately what is written there”: the more so since the accused or, if represented, his counsel is entitled to inspect the note. Clearly the futility of abolishing that right was not lost on Parliament.
- [18] On ground 2 counsel also contended that the trial judge exercised her discretion unreasonably when she allowed the police witnesses to refresh their memories and to read aloud from their notes.
- [19] The witness, may, with the leave of the court given on such terms as the court thinks fit:
- (a) refresh his memory in court; and,
  - (b) read aloud, as part of his evidence, so much of the document as relates to that fact.

A party who so requests is entitled to see the relevant part of the document used by the witness.

- [20] The court derives its authority from **sections 30 and 145 of the Evidence Act, Cap. 121 (Cap. 121)** which provide as follows:

“**30.** (1) A witness may not, in the course of giving evidence, use a document to try to refresh his memory about a fact without the leave of the court.

(2) The matters that the court shall take into account in determining whether to give leave include

- (a) whether the witness will be able to recall the fact adequately without using the document; and
- (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that

- (i) was written or made by the witness at a time when the events recorded in it were fresh in his memory, or
    - (ii) was, at such a time, found by the witness to be accurate.
  - (3) Where a witness has, while giving evidence, used a document to try to refresh his memory about a fact, the witness may, with the leave of the court, read aloud, as part of his evidence, so much of the document as relates to that fact.
  - (4) Where the court grants leave pursuant to subsection (1), the court shall, on the request of a party, give such directions as the court thinks fit to ensure that so much of the document as relates to the proceedings is produced to that party.
- 145.** (1) Where, by virtue of a provision of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) In determining whether to give the leave, permission or direction, the matters that the court shall take into account include
    - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing;
    - (b) the extent to which to do so would be unfair to a party or to a witness;
    - (c) the importance of the evidence in relation to which the leave or permission is sought;
    - (d) the nature of the proceeding; and

- (e) the powers, if any, of the court to adjourn the hearing or to make some other order or to give a direction in relation to the evidence.

[21] When Sergeant Arthur Springer and Constable Christine Broomes testified those sections were discussed by counsel and the court. During the course of P.C. Broomes' testimony the jury were withdrawn and legal argument ensued in their absence. At the conclusion of legal argument the judge said:

“But that doesn't take away from the effect of the decision, which is, that the court has – under section 30, the court has the authority to grant leave for an officer to read and there is nothing wrong with that. And in addition to which the court need only satisfy itself as to those matters outlined in section 145. And I having, in accordance with section 30 having satisfied myself that the proper foundation has been laid and having taken into account the matters adverted to in section 145 of the Evidence Act, it is my ruling and it will be my ruling when the jury returns that the officer may read the questions posed and answers given from her notebook, the proper foundation having been laid by counsel for the prosecution”.

[22] Mr. McWatt for the accused/appellant and Mr. Applewhaite for the Crown signalled their acceptance of the judge's exercise of discretion. The jury returned into court and the judge informed them that she had “granted leave pursuant to **section 30** and **145** of the **Evidence Act** for the officer to read the questions posed by Sergeant Springer and the answer given by accused Sealy”.

[23] The judge had earlier given leave pursuant to **section 30** of **Cap. 121** for Sergeant Springer to refresh his memory, and to read aloud from his notebook. On that occasion she said:

“Certainly it occurs to me, Mr. Applewhaite and Mr. McWatt that this procedure is quite acceptable under the laws of Barbados and under the Evidence Act, particularly section 32 which provides that the matters that the court may take into account and determine whether to give leave to refresh. And sections 33 which states that, “where a witness has while giving evidence used a document to refresh his memory about a fact, the witness may with the leave of the court read aloud as part of his evidence so much of the document as relates to that fact.”.

So under section 33 of the Evidence Act once the proper foundation has been laid, this court has the authority firstly, to give leave for the witness to refresh his memory and secondly for the witness to read aloud from the document that he seeks to refresh his memory from. So leave is granted, Counsel for the witness to read from the notebook.”

[24] It is trite law that this court will not interfere where the trial judge has exercised her discretion on correct principles. In the instant case the judge entertained legal argument from counsel before, in accordance with the relevant statutory provisions, exercising her discretion.

[25] In our opinion she did so on sound principles of law and we will not interfere.

[26] Ground 3 was abandoned.

***Ground 4***

[27] This ground alleged that: “The Learned trial judge erred in law when she prevented counsel for the defence from cross-examining Dr. Murray on a matter relevant to the Defence’s case having wrongfully construed the provisions of Section 26 of the Sexual Offences Act”.

[28] Counsel’s contention on this ground was that such cross-examination was relevant to the reason why the complainant’s hymen was not intact when Dr. Murray examined her. He submitted that the judge erred when she disallowed the cross-examination. In support of his submission counsel relied on **section 26 of the Sexual Offences Act, Cap. 154 (Cap. 154)** which provides as follows:

“**26.** (1) In proceedings in respect of an offence under this Act evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except

(a) where it is evidence

(i) of sexual experience or sexual activity or a lack of sexual experience or sexual activity taken part in or not taken part in by the complainant at or about the time of the commission of the alleged sexual offence, and



- (ii) of events which are alleged to form part of a connected set of circumstances in which the alleged sexual offence was committed;
- (b) where it is evidence relating to the sexual activity of the complainant with the accused where the sexual activity is reasonably contemporaneous with the date of the alleged crime;
- (c) where
  - (i) the accused person is alleged to have had sexual intercourse with the complainant and the accused person does not concede the sexual intercourse so alleged, and
  - (ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have had by the accused person;
- (d) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may be asked,

and it is material to a fact in issue in the case and its inflammatory or prejudicial nature does not outweigh its probative value”.

[29] There was no evidence before the court of trial that falls into paragraphs (a) (b), (c) or (d) of that section.

[30] In our opinion the issue was whether the appellant had ravished the complainant and not the reason for the absence of her hymen. An explanation of the possible causes of the loss of the complainant’s hymen would not have assisted the jury in answering the question whether the appellant had ravished her. A prostitute can be the victim of rape. In our opinion **section 26 of Cap. 154** was not relevant. The judge therefore acted quite properly in disallowing the cross-examination.

***Ground 5***

- [31] Counsel for the appellant submitted that the “Learned Trial Judge further erred when she directed the jury that the unauthenticated verbals attributed to the Appellant and recorded by the investigating officers was evidence which was capable of corroborating the case for the prosecution”.
- [32] Counsel contended that since the appellant is alleged to have said that he used his finger the judge erred when she directed the jury that the statement attributed to the appellant amounted to corroboration of the complainant’s testimony.
- [33] **Section 3(6) of Cap. 154** provides:  
     “rape” includes the introduction to any extent, in circumstances where the introduction of the penis of a person into the vagina of another would be rape,
- (a) ..., or
- (b) an object, not being part of the human body, manipulated by a person into the vagina or anus of another”.
- [34] Clearly a finger, being part of the human body, is excluded from paragraph (b). The appellant denied that he had sexual intercourse with C. He said that he put cream on his finger and then inserted his finger into her vagina.
- [35] The judge told the jury that the appellant’s oral statements corroborated certain aspects of C’s testimony. The judge listed those aspects as: “The appellant had carried C to his house, inserted his fingers into her vagina, sexually assaulted her, played with her vagina and identified the cream he used”. Therefore, C’s evidence that the appellant put the tip of his penis into her vagina was not corroborated by the statement attributed to him by the police.
- [36] We do not know what effect the judge’s direction on corroboration had on the minds of the jury. We do not know whether they (a) concluded that sexual assault is synonymous with rape, or (b) acted on the sworn but uncorroborated testimony of C that the appellant penetrated her with his penis or (c) acted on the appellant’s oral statement that he penetrated her with his finger, which statement corroborated C’s testimony that the appellant inserted his finger in her vagina.
- [37] Having identified those parts of the complainant’s evidence that were corroborated by the statements attributed to the appellant, the judge ought to have made it clear to the jury that the offence of rape had not been so corroborated. We feel that the judge’s failure to do so might have caused some confusion in the minds of the jury. We hold, therefore, that there is some merit in this submission.

- [38] Under **section 5** of the **Criminal Appeal Act Cap. 113A** this court may replace the verdict found by the jury with a verdict of guilty of another offence if (a) it was open to the jury on the indictment to have found the convicted man guilty of that other offence, and (b) the jury must have been satisfied of the fact which proved the convicted man guilty of the other offence.
- [39] The judge gave the jury a direction on the lesser offence of serious indecency. Age is not relevant to a charge of rape but age is relevant to a charge of serious indecency. Therefore serious indecency must be specifically charged in the indictment and the age of the complainant must be specifically stated therein. The indictment charged rape, and, quite properly did not disclose the age of the complainant. Age, however, is not relevant to a charge of indecent assault and therefore a verdict of guilty of indecent assault may be substituted for a verdict of guilty of rape.
- [40] By **section 36** of **Cap. 154** the jury could have, on the indictment, found the appellant guilty of the lesser offence of indecent assault because the greater offence of rape includes the lesser offence of indecent assault.
- [41] Support for the substitution of the lesser offence of indecent assault for the greater offence of rape may be found in **R. v. Hodgson and Others [1973] 2 All ER 552** and **Jippy Joel Doyle v. R. (2010) 79 WIR 59**.
- [42] The power to replace the verdict of the jury with a verdict of a lesser offence is discretionary (see **R. v. Peterson [1997] Crim. L R 339**). In the instant case the appellant would suffer no prejudice because the judge had given the jury a clear direction on that very point, albeit the offence of serious indecency, in which she explained the import of **section 36** of **Cap. 154**.

***Ground 6***

- [43] This ground is as follows:  
The Learned Trial Judge failed to give an adequate warning to the jury in accordance with Section 137 of the Evidence Act in the following respects, namely:
- (a) That she failed to warn the jury that the age of the virtual complainant may render her evidence unreliable; and
  - (b) in relation to the evidence of the unauthenticated verbals read into evidence by the police witnesses she failed to explain to the jury that:
    - (i) it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence able to support a challenge to police

evidence of confessional statements than it is for police evidence to be fabricated;

- (ii) that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth; and
- (iii) that persons who make confessions sometimes repudiate them and that it is a matter of fact for them to decide the reason why the confessions were repudiated”.

[44] Paragraph (a) of that ground is completely without merit, for, from page 158 line 19 to page 159 line 16 the judge gave the jury the following comprehensive direction:

“Now, Madam Foreman and members of the jury, your task will be to assess the evidence of this 10 year old child. A child’s perception of the passage of time is very likely to be different from that of an adult. When recounting events later, a child’s recall of when and in what order events occurred may not be accurate. Your task, members of the jury, is to judge whether the essential part of this witness’ evidence, that is, that accused Sealy, did the things that she related to you were truthfully given and if so, whether they are reliable. Errors and inconsistencies in detail and in the sequence of events may not in the case of a child be any indication of untruthfulness or unreliability on the essential matters. Those decisions are, however, for you to make having made allowance for the age and immaturity of the witness C you should act on her evidence only if you are sure it is right to do so. In this case the complainant C who made the complaint before you is 10 years of age now, 6 years of age when the allegation was made and you have to consider the possibility that having regard to her youth her evidence may be unreliable. You have to determine whether or not in the last resort you can accept her evidence as trustworthy and credible.”

[45] In respect of paragraph (a), counsel in his oral submissions also argued that the judge derailed her own warning when she directed the jury as follows:

“When confronted by the police, accused Clarence Sealy admitted his guilt in the answer to the questions posed to him

by Sergeant Springer. These are not responses that these police officers would concoct or fabricate”.

In fact, that was not the judge’s direction to the jury, that statement formed part of the case for the prosecution which began at line 1 of page 191 and ended at line 16 of page 192. The case for the defence commenced immediately thereafter at line 17. Unless the prosecution’s case is put in outrageous, extravagant or inappropriate language the judge should, as far as possible, be faithful to it and that is what she did.

[46] With regard to sub-paragraphs (b) (i) and (iii), the appellant was not without access to legal advice at his trial. He was ably represented by counsel and the only ‘challenge’ to the oral statements was a blanket denial. At the trial defence counsel never put any alternative suggestion to the police. The jury were left with the police evidence on the one hand and the appellant’s denial on other.

[47] On this ground, counsel for the appellant also relied on the Australian case of **McKinney v The Queen 171 CLR 468 (McKinney)**. The relevant facts are as follows:

“The uncontested evidence was that an armed man demanded money from one of the occupants, and, a little later another occupant was seriously injured when a single shot was fired from a gun. The prosecution case was that the applicants and a co-accused (who was acquitted of all charges were each guilty, on the basis of common purpose or joint enterprise, of breaking and entering, assault with intent to rob and assault occasioning grievous bodily harm.

The case against the applicants was substantially based on signed police records of interview. Each of the applicants signed a record of interview in which he stated that he, and he alone, had entered the premises at Dharruk and accidentally discharged the gun. The co-accused signed a record of interview in which he too confessed to having discharged the gun. That record of interview was the subject of a voir dire examination and was not admitted into evidence. However, it was elicited in cross-examination that a third person had signed a record of interview admitting responsibility for the events at Dharruk. In summing up the trial judge put the matter on the basis that “a third confession [was] made by a person whose identity does not emerge in the evidence.

The applicants and the co-accused were arrested in a dawn raid on Friday, 15 August 196. They were interviewed by different police officers, the interview with the applicant Judge commencing at about 1 p.m. on that day and the interview with the applicant McKinney commencing at 2.40 p.m. ...”

The applicants were directly linked to the events at Dharruk only by their records of interview. Apart from the applicants’ signatures, there was no independent evidence corroborating the making of those records or confirming their contents. The defence of each of the applicants was conducted on the basis that his record of interview was fabricated by the interviewing police officers and that he had signed the fabricated document only because his will was overborne. Each now seeks special leave to appeal on the ground that a warning should have been given as to the danger of convicting on the basis of those records of interview.”

[48] In that case the High Court of Australia held by a majority of 4 to 3:

“Whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated, the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone.

The basis of the rule lies in the special position of vulnerability of an accused to fabrication when involuntarily held in police custody in that the detention will have deprived the accused of the possibility of the corroboration of a denial of the making of all or part of an alleged confessional statement.”

[49] In **McKinney**, corroboration could have been effected by audio or video recording or by authentication by an independent witness. The police did not employ any of those means of corroboration.

[50] The facts of **McKinney** are completely different from the facts of the instant case. In this case (a) there is the evidence of **C** identifying the appellant as her attacker, and (b) there is evidence from two police witnesses who attributed incriminating oral statements to the appellant. In the circumstances the police witnesses corroborate each other. In addition, from page 169 line 19 to page 171 line 23, the judge gave the jury the following

warning in relation to **section 137 of Cap. 121** as to how they should consider those oral statements:

“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 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.”

[51] **Section 137** (formerly 136) of **Cap. 121** has received considerable attention in this Court, notably in **Jerome Bovell v R. Criminal Appeal No. 23 of 2000 (Jerome Bovell)** and **Ian Gill v R. Criminal Appeal No. 18 of 1998 (Ian Gill)**.

[52] In paragraph 47 of **Jerome Bovell**, this Court said:

“[47] Moreover, although the language of subsection (2) is mandatory, provision is made for exceptions to the general rule. If a Judge has “good reasons”, it is not obligatory upon him to follow the subsection to the letter. The latitude implicit in the subsection itself suggests to us 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) will cause a conviction to be quashed”; and

in paragraph 92 of **Ian Gill** this Court said:

“[92] We therefore hold that the requirement for a warning to be given under section 136 is not mandatory but discretionary. We are fortified in our view by the learning in *Cross on Evidence*, Sixth Australian Edition 2000, where the learned author states at paragraph [1454] that section 165 of the 1995 Act is not mandatory.

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.”

### ***Conclusion***

- [53] From earliest times man has endeavoured to establish and maintain order in society; and to deliver justice to the injured and aggrieved. In his effort to achieve those ends he has employed such scientific methods as are available at the given time. Over the centuries there have been many scientific developments that have brought benefits to the advancement of justice. No doubt, in the fullness of time audio and video recording, like finger printing and DNA, will take their place among tools to authenticate or corroborate the oral evidence of witnesses.
- [54] Faced with the certified question relating to the application of the relevant code of practice to the identification of suspects put by the Court of Appeal, the House of Lords, in **R v Forbes [2001] 1 AC 473** said at paragraph 5:
- “In many criminal investigations and trials there is little or no doubt that a crime has been committed and the issue (at both the investigatory and trial stages) is who committed it. In such cases reliance may be placed on a wide range of means, of which DNA samples and fingerprints are obvious examples, to link the suspect or defendant with the crime. Where such means are available they are invaluable, whether to confirm suspicion and strengthen proof or to avert suspicion and defeat proof. In many cases of this class, however, it is the evidence of eye-witnesses who saw (or claim to have seen) the criminal incident, or the events leading up to or following it, which relied on to connect the suspect or defendant with the commission of the offence. Such eye-witness, relying on what they seen, identify the suspect or defendant as the person responsible for the criminal conduct in question.”
- [55] In this case there were two police officers present at the interview with the appellant. Their evidence is corroborative one of the other. 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.
- [56] In the absence of audio and video recording we must use the means of corroboration available to us. That is what was done. This is a case in

which the evidence of C was relied on to connect the appellant with the commission of the offence. C knew the appellant - he was a family friend. On the day in question she had left her home in his care, with her mother's consent, to go to the "cookshop" to buy her mother a meal. These parts of the evidence have not been challenged.

- [57] This is a sad and unfortunate tale. The appellant is 53 years older than the complainant. He was a family friend and neighbour. He was a regular visitor to her home where he drank with her father. He betrayed the trust reposed in him by her parents. Psychiatric examination revealed that the appellant has met the diagnosis of alcohol induced dementia which will definitely deteriorate with further alcohol abuse. In the circumstances we consider that the appellant should suffer the maximum penalty of 5 years imprisonment for indecent assault.

### **Disposal**

- [58] The upshot of this appeal is that a verdict of guilty of indecent assault is substituted for the verdict of guilty of rape found by the jury. A sentence of 5 years imprisonment is substituted for the sentence of 6 years imprisonment imposed by the trial judge. It is also ordered that the appellant receive such medical and other treatment as is necessary to ensure his rehabilitation. The sentence will commence on the date that the original sentence was imposed.

## **Justice of Appeal**

### **MASON JA:**

- [59] I have had the benefit of reading the draft decisions of the Hon. Chief Justice and the Hon. Justice Moore and am generally in agreement that there is no merit in the various grounds of appeal. I however find favour with the determination of my brother Moore that the verdict of rape and the sentence of 6 years imprisonment should be set aside and a verdict of indecent assault and a sentence of 5 years imprisonment be substituted therefor. I also agree with his reasons for reaching that conclusion and consider that there is nothing that I can usefully add.

## **Justice of Appeal**

## GIBSON CJ:

[60] This is an appeal against conviction of the rape of a six year-old girl (“the VC” or “daughter”). The main issue of which the appeal turns concerns the refreshing of memory and the interrelationship between ss. 30, 73 and 145 of the *Evidence Act, Cap. 121* of the Laws of Barbados. Most of the issues raised by the appellant regarding the oral statements allegedly made to the investigating officers, with the exception of one issue expressly left open, were decided by the Caribbean Court of Justice (“CCJ”) in *Julian Oscar Francis v R* [2009] CCJ 9, 74 WIR 108 (see, *infra*, para. [31] *et seq*). The issue left open is whether, and in what circumstances, is it ever permissible under s. 30 to grant leave to a witness, while refreshing his or her memory, to read aloud from a document not admitted into evidence. I also examine the limitations to be placed on the admission of evidence of a rape complainant’s sexual experience and the procedural requirements for such evidence.

### **Factual and Procedural Background**

- [61] The main evidence in this case was adduced from the minor virtual complainant (“the VC”), whom this judgment will not identify by name<sup>1</sup>; by her mother and the two investigating police officers, Sergeant Arthur Springer (“Sgt. Springer”) and Police Officer Christine Broomes (“PC Broomes”).
- [62] Prior to being sworn, the VC, who was 10 years old at the time of trial (but six years old on the date of the alleged rape), was questioned by the trial judge to ascertain her understanding of the need to be truthful. She stated that she was in Class 4A at primary school, had come first in her class, and was about to sit the 11-Plus Examination. While she admittedly only went to church sometimes, she understood the difference between the truth and a lie, and the importance of telling the truth. She was sworn without objection.
- [63] The VC recalled that the incident occurred on a Saturday “because there was no school.” Her mother, AB, was not feeling well and the appellant, whom she called by his nickname “Mother Hen,” had offered to go and get some food for her mother and herself because her father was not at home. Her

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<sup>1</sup>I strongly deprecate the clearly indefensible practice of referring by name to virtual complainants in sexual offence cases in Court documents and proceedings. It is even less defensible where, as here, the virtual complainant (“the VC”) is a minor. Both in the trial transcript and in the skeleton arguments submitted by both sides, the minor VC is identified by name, her address is given, and even her school. In this judgment, she will be known only as “the VC” or “the daughter” where the context permits, and the initials AB will be used to identify her mother to avoid her identification by association. There will be no reference to her address or her school as these are entirely irrelevant.

- mother permitted her to go with the appellant. However, they did not go directly to the cookshop.
- [64] The VC testified that the appellant took her to his house and once inside, he locked the door and, she said, "I could not get away." He took her by a wall in the house on which there were pictures of naked women, and then took her inside his bedroom which, she recalled, had a calendar with another naked woman. There, he told her to take off her clothes. At first she refused, and they went into the kitchen but afterwards, she "went back in the bedroom and he made me take off my clothes so I had to do it."
- [65] While she was sitting naked on the bed, she stated that he dropped his pants and "put some kind of cream on his penis." The VC stated what happened next. "[H]e came on top of me and he tried to put his penis inside my vagina hole but only the tip went in and it hurt me. . . I was not feeling very well, my private parts started to hurt." She stated that the appellant then took his first two fingers and put them inside her vagina. She told him to take out his fingers because they were hurting. He also sucked her vagina and her breast. She had not asked the appellant to do any of those things to her.
- [66] The VC stated that while walking back to her mother's house, "[h]e told me that if I told anyone that me and he would not be friends anymore." She explained that her mother had asked her if anything happened and she recalled that the appellant "told me to tell [her mother] that the line was long so I told her that but then she tell me do not tell any lies, tell me the truth, he cannot hurt you so I told my mother what he did." This happened around about 3:00 or 4:00 p.m. They then sat down at the table and ate the food.
- [67] Later, they had gone to the beach with her mother's friend Pamela Small ("Pam") and she had told Pam "what he did to me." Thereafter, they went to District "A" Police Station. She did not recall that she had been examined by a doctor on the same day and stated that after they left the police station, they walked home.
- [68] On cross-examination, the VC stated that the Appellant had not taken her from her home directly to the food shop, and that she did go into his house. "It was only once that I went to this house and that was the day the incident happened but after that, I never ever went back to his house." She denied that anyone had shown her the photos of the appellant's home and bedroom before. She also recalled that when she told her mother of the incident, her mother "wanted to kill him." On the question being put to her that the incident never happened, the VC replied "Yes, it did, it did happen."
- [69] The VC was also certain that she had told her mother of the incident on the day it happened, and that her mother had responded that "she was not going to go to the police yet, she was going to call Pam and tell her what happened because Pam was her closest friend." Her mother called Pam the next day,

not the same evening, and told her “I have something to talk to you about, so meet me by the beach.” While at the beach, Pam had called her to the side and “she told me not to be scared tell her what happened so I told her.” The VC was sure that this all happened on the following day in August and, on re-examination, she reiterated that it was the day after the incident, and “actually the same month,” that they had gone to the beach with Pam.

- [70] The testimony of AB, mother of the VC, was largely similar to the VC’s. However, it was her position that her daughter had not told her of the incident on that day. On 16 October 2007, the VC was at home sick with the flu, and she, the VC and her friend Pam went to Folkestone Park. There, she recalled her daughter saying: “Auntie Pam, I have something to tell you”, and she and Pam went off and spoke. When they returned, AB observed that Pam was crying, and the three went to the police station where the VC told her what had happened. She made a report and her daughter was taken to a doctor’s office where she was examined in the presence of herself and a female police officer.
- [71] The two investigating officers were next to testify. Sgt. Arthur Springer, who was attached to the Criminal Investigations Department (“CID”) at the District “A” Complex, stated that, while on duty on 16 November 2007, he had spoken with AB in connection with a report which she had made to the District “A” Police Station. They had later gone to the appellant’s home and asked him to accompany them to District “A.” There, he told the appellant that he was there in connection with the rape of the VC as reported by her mother, and cautioned him. The appellant had made oral statements which Sgt. Springer recorded in his official notebook but he could not recall those notes from memory and he sought the court’s permission to refresh his memory from the notebook. There was no objection from defence counsel to his refreshing his memory.
- [72] Sgt. Springer then read aloud from his notebook that the appellant said: “I don’t want no lawyer now.” At that point, defence counsel, Mr. McWatt, objected to the Sergeant reading from the notebook stating: “I have no objection to him refreshing his memory, putting away the notebook and then giving his evidence.” However, the Sergeant stated that he could not tell what he had written without the aid of his notebook and again the Prosecutor sought the Court’s permission to permit the Sergeant to read from his notebook so much of the evidence as he could not remember. Mr. McWatt objected on the ground that the notebook was never disclosed, and that to read it and thus put it in evidence would be a violation of the ***Criminal Procedure Rules***, although he never cited any specific rule to the trial Judge. He added that he had not been able to take any instructions on what statements the Sergeant might have been reading from the notebook, had not

had any disclosure and that it was fundamentally unfair to allow him to do so. The trial judge then asked whether Mr. McWatt was present at the taking of the depositions where, of course, the contents of the books would have been disclosed. He answered “yes”.

- [73] The trial judge ruled that under s. 30(3) of the *Evidence Act* she had the authority both to permit the witness to refresh his memory about a fact *and* to read aloud from the document from which he sought to refresh his memory. She directed the prosecutor to allow defence counsel to see the notebook, and asked the prosecutor to “state clearly for the record, exactly what it is you wish the witness to read from his notebook” [Tr. 80]
- [74] Sgt. Springer testified that, in the presence of PC Christine Broomes, he told the appellant that he was investigating the report that he had raped the six year-old VC sometime between 1 and 31 August 2007. The appellant replied: “I did not have sex wid she. She pokey too small so I put some cream on my finger and push it in she pokey.” The Sergeant then told the appellant that he wished to put some questions to him about the offence and that he was not obliged to answer any of the questions but that if he did so, his answers would be put into writing and given in evidence. The appellant indicated that he understood.
- [75] The Sergeant asked the appellant 15 questions, eliciting 15 answers, which the Sergeant read aloud into the record as follows:

‘Question one: “Do you know [AB]?” He replied, “Yes.”

Question two: “Do you know her six year-old daughter, [the VC]?” He replied: “Yes.”

Question three: “How long have you known them?” He replied, “Nearly a year.”

Question four: “Do you frequent [AB’s] house?” He replied, “Yes, I does go there and me and she man does drink rum and when she cook, she does give me some.”

Question five: “Do you recall going to her house sometime in August 2007 and asked [the VC] if she would like something to eat?” He said, “Yes.”

Question six: “Do you recall [the VC] was there and asked her mother if she could go to the shop by you?” He replied, “She mother send she wid me.”

Question seven: “Do you recall what time of the day it was?” He replied, “It was about 11 a.m.”

Question eight: “Where did you take [the VC] after you left her mother’s house?” He replied, “I carry she by my house.”

Question nine: "Why did you carry her by your house?" He replied, "She always pulling at my penis and kissing me so I carry she there to talk to she."

Question ten: "What did you do to [the VC] while at your house?" He replied, "I tell she to sit down in the chair in the front house and I start to play with her vagina."

THE WITNESS: Question 11: When you say you play with her vagina what did you mean by that?"

He replied, "I mean I pull down she panty and I put some cream on my finger and push it in she vagina."

QUESTION 12: Did you lift up [the VC] and put her in your bedroom?"

He replied, "No."

QUESTION 13: Did you push your tongue in [VC's] mouth?"

He replied, "I kiss she 'pon she mouth but I didn't push my tongue in she mouth."

QUESTION 14: Did you kiss [VC] on her breast?"

He replied, "No."

QUESTION 15: Why did you sexually assault [the VC]?

He replied, "Because she always pulling at me."

I concluded the questions at this point.'

[Tr. 82-82]

- [76] Sgt. Springer testified that the appellant, in the presence of PC Broomes, pointed out the area in his home where he had put the VC to sit and he also handed over a tube of cream saying "This is the cream I used to put on my penis and her vagina." After taking possession of the cream and photographing certain areas in the house, they returned to District "A" where Sgt. Springer charged the appellant for the offence.
- [77] Under cross-examination, Sgt. Springer indicated that he was familiar with the procedures involved in taking statements from accused persons during the course of investigations. He agreed that it was the best practice to ask a person from whom a statement was taken to initial the statement, but he conceded that it had not been done in this case. He stated that he did not disregard procedures under the Laws of Barbados. "At that time it wasn't a practice, m'am, in 2007, but it is practiced now." Sgt. Springer answered "he did, m'am" to each of Mr. McWatt's 15 suggestions that the appellant had not made the statements to which he had testified. To the suggestion

- that he had failed to secure the appellant's initials because the statements were fabricated, Sgt. Springer answered, "Indeed not, m'am."
- [78] The testimony of PC Broomes largely mirrored Sgt. Springer's. She, too indicated that she could not adequately remember the questions and answers to testify to them without her notebook, and Mr. McWatt, while not objecting to her refreshing her memory, objected to her reading aloud from her notebook, as he did with regard to Sgt. Springer.
- [79] The trial Judge noted the objection for the record and indicated that her response remained the same, namely that s. 30 of the *Evidence Act* permitted her to grant leave in those circumstances. However, the Judge also invited Mr. McWatt to make a submission in accordance with s. 145 of the *Evidence Act* as to whether there were factors which the Court should consider in granting leave in these circumstances. The Judge excused the jury before permitting Mr. McWatt to expatiate on his submissions.
- [80] Mr. McWatt submitted that the evidence came down to the competing credibility of the accused and the VC, and that there was no independent confirmatory evidence of the incident in and of itself. He argued that when the witness is permitted to read aloud in front of a jury from a document that he or she purportedly made contemporaneously, it added an extra level of authenticity to which the jury may attach greater significance than they necessarily ought to have given. He thought that this would be "more prejudicial than probative of the matter."
- [81] The trial Judge observed that *Francis* confirmed that the Court had the authority to grant leave for an officer to read aloud after satisfying herself as to the matters outlined in s. 145. Having adverted to the conditions in s. 30 and the matters in s. 145, and having satisfied herself that the proper foundation had been laid, the trial Judge ruled that PC Broomes could read aloud from her notebook.
- [82] PC Broomes then read aloud the same 15 questions posed to the appellant by Sgt. Springer and the appellant's 15 responses. When asked on cross-examination whether her official notebook contained statements "that you alleged that the accused gave you," she replied that the statements were the questions and answers that Sgt. Springer had asked the appellant, and that she recorded in her notebook "the exact words that the accused said to Sergeant Springer."
- [83] At the conclusion of the Crown's case, the appellant called no witnesses. He elected to make an unsworn statement from the dock that "I ain't give the police that statement nor I ain't interfere with the little girl." [Tr. 123]. On 27 September 2011, the Appellant was convicted of rape and he was sentenced, on 12 September 2012, to a term of six years' imprisonment with a credit of 350 days spent in custody post-conviction. This appeal ensued.



- [84] It should be noted that the original Notice of Appeal was amended, and the Amended Grounds of Appeal were themselves amended with our leave. I rely on the re-amended grounds which are substantially the same as the amended grounds filed on June 10th 2014, save that the 6th ground introduces the s. 137 direction issue.

**Grounds 1 and 2 – The Voir Dire, Refreshing Memory and ss. 30, 73 and 145 of the Evidence Act**

- [85] Before this Court, counsel for the appellant indicated that grounds 1 and 2 were connected and argued them together. Ground 1 states that the learned trial Judge erred in failing to hold a *voir dire* and there to consider any of the factors set out under s. 145 of the *Evidence Act* when dismissing counsel's objections to the prosecution's application that Sgt. Springer be granted leave to read into evidence unauthenticated statements attributed to the appellant which the Sergeant recorded in his official notebook. Ground 2 contended that the learned trial Judge allowed a miscarriage of justice to occur when she permitted Sgt. Springer and PC Broomes to read unauthenticated statements attributed to the appellant into evidence in contravention of s. 73 of the *Evidence Act*. In the alternative, the ground also argued that, in the event that we found that the discretion to permit such procedure was available to the trial Judge, then such discretion was exercised unreasonably in this case as it, in essence, amounted to a circumvention of the protection afforded to the appellant under s. 73.
- [86] Elaborating on ground 1, the appellant's counsel argued that at no time did he challenge the authority of the trial Judge to permit the Sergeant to read from his official notebook, but rather he had submitted that it was unfair to allow him to do so. He added that at no time "did the Learned Trial Judge ever avert (sic) to any of the elements under Section 145 and specifically neglected to address her mind to **section 145(2)(b).**" The Appellant's counsel also argued that only when he raised the same objections in relation to the evidence of PC Broomes did the trial Judge "belatedly. . .in that instance avert (sic) to" s. 145 of the *Evidence Act*, and only then excused the jury in order to deal with counsel's objections.
- [87] Counsel referred us to the decision of the CCJ in *Francis v R*, *supra*, which the trial Judge cited in justification of her exercise of discretion to permit the reading aloud from the officer's notebook. He contended that the trial Judge misconstrued the effect of *Francis* in that the issue raised by defence counsel included a reference to s. 73 of the *Evidence Act* which she failed to consider in granting leave to read aloud. Citing the decision of the High Court of Australia in *Stanoevski v R*, (2001) 202 CLR 115, he argued that the Australian s. 192, the equivalent of s. 145(2), was not exhaustive of the matters to be taken into account and plainly, he contended, the weight of the

evidence sought to be adduced whether in cross-examination or otherwise was a matter of considerable relevance. He stressed that “when an accused gives oral statements which are not initialled, that type of evidence becomes very dangerous” when read aloud.

- [88] The Crown responded that s. 30 of the *Evidence Act* made provision for the granting of leave to a witness to refresh his or her memory and included those matters which the Court should take into account in making that determination. The Crown agreed that, in applying s. 30, the Court should also consider the requirements of s. 145, but noted that even if the trial judge had gone into the enquiry, there was nothing unfair to the appellant in the grant of leave to the witnesses to read aloud from their notebooks.

### **Ground 1 - The Voir Dire**

#### **Discussion**

- [89] The issue on this ground is whether the Judge erred in failing to hold a *voir dire*. It is not clear what, in this context, the appellant means by a *voir dire*. If he means the procedure during a trial in which the trial Judge hears evidence on, and determines, the admissibility of a confession or an admission alleged to have been made in circumstances affecting its reliability (see, *Evidence Act*, ss. 70, 71 and 77), then in light of the fact that the Crown was not seeking to have the police officer’s notes admitted into evidence, there was no need for a *voir dire*.

- [90] But there is another reason why the *voir dire* portion of the appellant’s argument must fail. In *Francis v R, de la Bastide, P* stated, while discussing the oral admission in a police notebook from which the officer was permitted to refresh his memory, that

[w]hen Sergeant Catwell reached this point in his evidence in chief, the trial judge quite properly asked the appellant whether he had any objection to Catwell giving the evidence which he was about to give, of the oral statements attributed to the appellant. The appellant replied that he was objecting because he did not make those statements. In light of that response, there was no need for a *voir dire* with respect to the oral statements. . .

([2009] CCJ 9, at para [9]).

- [91] The same is true here. It should be recalled that defence counsel objected to Sgt. Springer reading from his notebook but had “no objection to him refreshing his memory, putting away the notebook and then giving his evidence.” When queried by the trial Judge as to the basis for the objection, defence counsel replied that the notebook was never disclosed and that to permit it to be read to the jury would be “a breach of criminal procedure rules.” (*supra*, para 20). At no point did trial counsel question the circumstances in which the questioning took place and the answers to the questions elicited (see, ss. 70 and 71 of the *Evidence Act*; *cf.*, *Adjodha v The*

*State [1982] AC 204, 222, per Lord Bridge of Harwich*, citing with approval *The State v Gobin and Griffith (1976) 23 WIR 256*). Accordingly, there was no requirement for the trial Judge to hold a *voir dire*. I would also note that the discussion before the trial Judge regarding PC Broomes' being permitted to read from her notebook *did* take place in the absence of the jury, although this was not technically a *voir dire*. This portion of the argument lacks merit and therefore fails.

## **Grounds 1 and 2:**

### **A. Leave to Refresh Memory**

[92] I turn now to consider the much larger questions in grounds 1 and 2 of the appeal. I set out *in extenso* ss. 30 and 73 of the *Act*. **Section 30** of the *Evidence Act* provides:

30. (1) A witness may not, in the course of giving evidence, use a document to try to refresh his memory about a fact without the leave of the court.

(2) The matters that the court shall take into account in determining whether to give leave include

(a) whether the witness will be able to recall the fact adequately without using the document; and

(b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that

(i) was written or made by the witness at a time when the events recorded in it were fresh in his memory, or

(ii) was, at such a time, found by the witness to be accurate.

(3) Where a witness has, while giving evidence, used a document to try to refresh his memory about a fact, the witness may, *with the leave of the court, read aloud, as part of his evidence, so much of the document as relates to that fact.*

(4) Where the court grants leave pursuant to subsection (1), the court shall, on the request of a party, give such directions as the court thinks fit to ensure that so much of the document as relates to the proceedings is produced to that party.'

(Emphasis added)

[93] **Section 73(1)** of the *Evidence Act* provides that "[w]here 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.” **Subsection (2)** excludes sound recordings and transcript of sound recordings from the ambit of the section.

- [94] These provisions were analysed by the CCJ in *Francis* where this Court had dismissed an appeal against conviction of the theft of a motor-car and the subsequent sentence to six years’ imprisonment. *Francis* had been tried jointly with another man named Quimby, who had been charged with dishonestly receiving the motor-car knowing it to have been stolen. Quimby was also convicted and sentenced to seven years’ imprisonment. Importantly, neither *Francis* nor Quimby was represented by counsel at trial and “[*Francis*] conducted his own defence at the trial with such help as the presiding judge. . .was able to provide.” ([2009] CCJ 9, para [6]).
- [95] Central to *Francis* were self-incriminatory oral and written admissions of which testimony was given by one of the investigating police officers, Sgt. Frederick Catwell, who was permitted to refer to his notebook and to refresh his memory as to the confession statement. There was another police officer, PC Boyce, who was present both when the oral confession was allegedly made and when the written statement was taken from the appellant but PC Boyce was never called to testify. The appellant denied making the oral statement and alleged that he was forced to sign the written statement. As a result, a *voir dire* was held in which Sgt. Catwell testified and the appellant made an unsworn statement. The trial Judge admitted the statement into evidence.
- [96] Before the CCJ, *Francis* contended, as does the appellant here, that the effect of granting Sgt. Catwell leave to refresh his memory from his notebook, “was tantamount to admitting into evidence the contents of a document rendered inadmissible by s. 73(1) of the *Evidence Act* for lack of authentication by the appellant.” ([2009] CCJ 9, at para 7]). His second contention was, again like the instant appellant, that the trial Judge never considered, as he was required to do under s. 145 of the *Evidence Act*, whether it was fair to the appellant to grant leave to Sgt. Catwell to refresh his memory from his notebook and that, had the Judge done so, he would or ought to have concluded that the grant of such leave would have resulted in unfairness to *Francis*.
- [97] Examining s. 30(1) and (2) of the *Act*, the judgment of the majority (*de la Bastide, P., Nelson, Bernard and Hayton, JJ*) delivered by *de la Bastide, P* noted that the rules regarding the refreshing of memory were originally established at common law and had been incorporated into the *Act*, with some alterations. Whereas at common law, “a witness was *entitled*, subject

to the fulfilment of certain pre-conditions, to refresh his memory from a note or record made by him. . .[t]hat entitlement has been converted to a discretion given to the Court to grant leave to the witness to refresh his memory, this discretion to be exercised after taking into account a short but non-exhaustive list of specified matters.” (*ibid.* at para 10). The President then noted that “as **section 30(2)** itself makes clear, the matters to be taken into account in deciding whether to grant leave are not limited to those mentioned in that sub-section.”

- [98] Turning his attention to the argument that **s. 73(1)** of the *Act* precluded the grant of leave to refresh the memory from a document rendered inadmissible for failure to comply with the subsection, the President observed:

[17] In our view, the submission that the effect of section 73(1) is to preclude leave being given to refresh memory from an unauthenticated note of an oral admission, is clearly untenable. 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.

[18] The only sanction imposed by section 73(1) for failure of a police officer to get a suspect who has made an oral admission to authenticate the note which the policeman has made is to render the note inadmissible. Further, the absence (or presence) of authentication is not included by section 30(2) as one of the matters to be taken into account in determining whether leave should be given to a witness to refresh his memory.

- [99] The President noted that “the matter is put beyond doubt by **section 137** of the *Evidence Act* [which] requires a judge sitting with a jury to give the jury certain instructions whenever certain kinds of evidence are given.” One of those kinds of evidence, found in **s. 137(1)(ii)** is “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.”

- [100] Commenting on **s. 137, *de la Bastide, P*** stated:

One of the instructions which the judge is required to give to the jury in such a case is a warning that the evidence may be unreliable. Here we have a provision in the Act which contemplates that there may be oral evidence given of oral admissions of which an unauthenticated record has been made. The only way in which a judge and jury are likely to become aware of the existence of such a record, is as a result of it being used by a witness to refresh his memory, the record itself being inadmissible under section 73(1).

- [101] It is clear from the above discussion in *Francis* that grounds 1 and 2 lack merit to the extent that they are predicated on the officers’ refreshing of memory from what the appellant refers to as “unauthenticated verbals.” The

rule under the *Evidence Act* as determined in *Francis*, which has existed at common law since at least the 19<sup>th</sup> century, is that a witness may refresh his or her memory even from a document which itself cannot be admitted into evidence. “In many cases the document, to the accuracy of which the witness deposes, though remembering nothing about the matters to which it refers, would have been inadmissible in evidence and the Courts have been at pains to emphasise the fact that the evidence is oral, not documentary.” (*Cross on Evidence*, 9<sup>th</sup> Australian Edn, Heydon, para 17225, at p. 521; see also *Maugham v Hubbard* (1828) 2 B & C 14, 108 ER 948, per Lord Tenterden CJ at 15-16, 949; *Birchall v Bullough*, [1896]1 QB 325; *Archbold Criminal Pleading, Evidence and Practice* 2013, para 8-186 at p. 1349). For these reasons, the appellant’s contention that the refreshing of memory from an unauthenticated document is precluded by s. 73 must fail.

**B. Leave to Read Aloud from the Notebook**

[102] I find that there is, however, some merit in the appellant’s contentions regarding the “reading aloud” from the officers’ notebooks. In *Francis*, both the majority and concurring judgments sounded a loud note of caution concerning this practice, although the issue was not decided there since no evidence existed in *Francis* that this had occurred. It clearly occurred here and, I believe, that the trial Judge fell into error. As will soon appear, the Judge’s error was to treat the grant of leave to refresh memory and the grant of leave to read aloud as coterminous. They are not.

[103] In *Francis v R, de la Bastide, P*, referring to s. 30(3) of the *Act* observed:

It seems to us that in contrast to the case of a witness merely refreshing his memory from a document, *if a witness reads aloud as part of his evidence the contents of a document, that approximates much more closely to putting the document into evidence.* Nevertheless, reading a document aloud still differs from putting the document into evidence and is not subject to the s. 73 requirement of authentication. . . *The question therefore, is whether it is ever proper to grant leave to a witness to read aloud as part of his evidence from an unauthenticated record of an oral admission and if so, in what circumstances?* These questions were not canvassed before us and do not arise in this case. Accordingly, we leave the answers to them for another day. . . *We would urge trial judges, however, to recognise and maintain the distinction between the two procedures leave for which may be granted under sub-sections (1) and (3) respectively of section 30 i.e. the refreshing of a witness’ memory and the reading aloud by a witness of the contents of a document as part of his evidence. Judges should ensure that when leave to do the former is given, the witness does not by the way in which he gives his evidence end up doing the latter.*

(2009 CCJ, at paras 29-31; 74 WIR 108, paras 29-31 at p. 119; emphasis added).

[104] The distinction was even more starkly drawn in the concurring judgment of **Saunders, J:**

61. [C]ounsel for the Crown alluded to the difference between simply refreshing one's memory and/or reading aloud from a document on the one hand, and tendering the document into evidence on the other. The difference is of some significance. Indeed, s. 30 of the **Evidence Act** goes so far as to recognise a distinction between refreshing one's memory from a document and reading aloud from the very document. *The section requires the court to exercise its discretion to give leave to refresh memory separately from granting leave to read aloud from the document. Permission only to refresh memory does not extend to permission to read aloud from the document.*

62. One obvious difference between refreshing one's memory from a document and putting the very document into evidence is that in the former case, the document is used as a mere stimulus to revive one's present memory, while in the latter case, past recollection, as recorded in the document, is allowed to be adduced. At the trial in the instant case, no attempt was or could properly have been made to put into evidence the uninitialled page of the police officer's notebook. That page was clearly an inadmissible document. But it is useful to bear in mind that, *if and when a witness is permitted to read aloud from such a document, the impact on the jury is not very different from a situation where the inadmissible document itself is placed before the jury. Sections 73 and 145 (2) of the Evidence Act introduced safeguards for accused persons and measures to strengthen the integrity of the criminal procedural process. The question naturally arises as to whether these measures would not be diminished if under the umbrella of 'refreshing memory' a police officer is, willy-nilly, permitted to read verbatim to the jury from a document containing an admission in circumstances where the law specifically declares that document to be inadmissible.*

(74IR 108, 128; emphasis added)

[105] What can be inferred from both CCJ judgments is that the factual basis justifying the grant of leave to refresh memory from an inadmissible document must, perforce, be different from the factual basis for leave to read aloud from such a document. It is clear that there must be some added factor which requires, not only leave to use the document to trigger a past recollection recorded and not recalled, but that the recorded document be read aloud to the jury. As **Saunders, J** points out, the danger is that reading aloud will have the same impact on the jury as placing the document before the jury. It follows that there must be something extra which the trial Judge believes that the jury must hear and which cannot be cured by the mere refreshing of memory.

- [106] In my view, while **s. 30(3)** undoubtedly confers the discretion to give leave to read aloud from a document not admitted into evidence, as the CCJ recognised in *Francis*, it appears clear from the CCJ judgments that this discretion ought to be rarely exercised, even given the safeguard of the **s. 137** warning to the jury. In the ordinary case, it ought to suffice to ask the witness a question, have the witness look at the document briefly, put it face down, and then answer the question. Even where the document is of some length, and it is required that the witness state *verbatim* what he or she recorded so as to circumvent issues of credibility being raised, questions properly framed to break the recorded segment into smaller bits should suffice. This is not mere pedantry. The point is to avoid an inadmissible document being read aloud and thereby becoming a part of the record, in other words being admitted into evidence. The situation is obviously different where the document is admissible in evidence.
- [107] In my view, no basis was argued before the trial Judge, other than the existence of the discretion in **s. 30(3)** of the *Act*, which justified the grant of leave for Sgt. Springer and PC Broomes to read aloud from their notebooks. Even though the trial Judge quite properly considered the matters to be taken into account in **s. 30(2)** with regard to both officers, and the matters within **s. 145** as regards PC Broomes, there still was no separate explanation why, given the decision in *Francis*, reading aloud was necessary. When told that he was being investigated in connection with a rape, the appellant denied the charge. He was then asked 15 distinct questions and gave 15 distinct answers. Therefore, rather than the entire passage being read to the jury, what is now permissible after *Francis*, in my respectful view, is that each question should be separately asked, the memory refreshed as to each question and a separate answer given to each question.
- [108] For these reasons, I find that the appellant's arguments grounded on **s. 30(3)** have merit. However, the matter does not end there, for the further question must be asked whether the trial Judge erred as regards the considerations under **s. 145**, and whether there was some unfairness or indeed a miscarriage of justice in permitting the officers to read aloud from their notebooks.

**C. Refreshing Memory, Unfairness and s. 145**

- [109] The appellant contends that the trial Judge erred in failing to consider the provisions of **s. 145** of the *Evidence Act*. The section provides:
145. (1) Where, by virtue of a provision of this *Act*, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) In determining whether to give the leave, permission or direction, the matters that the court shall take into account include



- (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing,
- (b) the extent to which to do so would be unfair to a party or to a witness;
- (c) the importance of the evidence in relation to which the leave or permission is sought;
- (d) the nature of the proceeding; and
- (e) the powers, if any, of the court to adjourn the hearing or to make some other order or to give a direction in relation to the evidence.

He contends that the Judge did not refer to the section before granting leave to Sgt. Springer to read aloud from his notebook and only “belatedly” did so when considering the application for PC Broomes to be permitted to read aloud. He points to the possible unfairness in granting this permission.

[110] Discussion of this contention requires a close reading of both *Francis* and the High Court of Australia decision in *Stanoevski v R* [2001] 202 CLR 115, which was cited, but not discussed, in *Francis*. In *Francis, Saunders, J*, stated regarding s. 145 of the *Evidence Act*:

The Australian courts are unequivocal about the consequence of a failure to have regard to matters to the giving of leave, including matters identified by the provisions contained in section 145. Where there is a failure to have such regard, a wrong decision on a question of law would have been made. A Guilty verdict would not stand unless the prosecution can establish that the conviction has not resulted in a miscarriage of justice. In my opinion the courts of Barbados ought to abide by a similar standard. . .

In my judgment, it was a serious error on the part of the trial judge not to advert to section 145(2) when determining whether to grant leave to Sergeant Catwell to refresh his memory. There were circumstances here that rendered relevant some of the factors identified in section 145(2). For my part, this error would have been fatal to the conviction if the prosecution’s evidence had rested only on the alleged oral admissions.

*(2009) CCJ, at paras 67, 76; 74 WIR 108, 130, 132)*

[111] However, what judges are required to do to comply with the section has also been made unequivocally clear by the Australian courts. In *R v RTB*, [2002] NSWCCA 104, at para 89, cited by *Saunders, J* in *Francis*, it was opined that it is unnecessary for trial judges to refer to the section number. The New South Wales Court of Criminal Appeal observed that “[t]he terms of

the judgment may make it obvious that such matters have been taken into account. Even where a judgment is silent, it may be apparent that a particular matter was taken into account, either because of the argument which preceded judgment, or because the matter is so obvious as to not require statement.”

[112] In *R v Reardon, Michaels and Taylor*, [2002] NSWCCA 203, *Hodgson, JA* listed 24 items in the *New South Wales Evidence Act* which required the court’s exercise of discretion and noted at para 28 that “[a] requirement that there must be express reference to the s. 192 factors in all cases where s. 192 applies would be far-reaching indeed.” His Honour continued:

30. In my opinion, unless the contrary may be inferred from the circumstances or from what a judge does say, it should be assumed that a judge hearing a case will continually be having regard, in making such decisions as in the judge’s other acts and omissions during the course of the hearing, to:

- (a) the effect of the decision, act or omission on the length of the hearing, and how that in turn affects the legitimate interests of the parties and the efficient conduct of the court’s business;
- (b) the imperative to avoid unfairness to parties and witnesses;
- (c) the importance of any piece of evidence about which some discretion is to be exercised;
- (d) the nature of the proceedings themselves; and
- (e) the available alternatives, whether they be by way of orders or adjournments or otherwise;

that is, the matters referred to in s. 192(2).

31. These are all matters normally uppermost in a judge’s mind throughout the conduct of a first instance hearing, and it would be strange indeed there should be a legislative requirement that they be articulated on every occasion when there is leave or permission granted or a direction given under the *Evidence Act*. To require a bald incantation of regard to the section or to the items referred to would be to promote an empty formality; while to require reasoned discussion of each item on every occasion would be absurdly onerous and productive of delay and injustice.

[113] In light of the frequent references to *Stanoevski* as mandating precisely what *Hodgson, JA* inveighs against, it is essential to examine the decision. In *Stanoevski* the appellant, a practising solicitor, had been convicted of conspiring with two secretaries in her office to cheat and defraud an insurer of a sum of money. The evidence was that she had asked one secretary,

Ms. Wailes, to arrange for someone to take her car which was insured with the insurer so that the appellant could make a claim on her policy for the loss of the car. The secretary then asked another secretary in the office to take the car. Shortly thereafter, the appellant reported to the police that the car had been stolen but about a week later, the car was found and the conspiracy unmasked.

- [114] Both secretaries pleaded guilty to conspiracy to cheat and defraud, and were sentenced. The appellant did not plead guilty and was tried before a judge and jury. From the outset, it appeared that her character would loom large in her defence and her counsel had so informed the trial Judge. The Crown responded that it would be relying upon a report purporting to be the result of an investigation carried out by the Law Society of New South Wales of an allegation made by Ms. Wailes that the appellant had forged the signatures of a client on a document which was to be filed in court in unrelated Family Court proceedings. The appellant's counsel objected to the use of the report.
- [115] The trial Judge ruled that if the appellant testified and put her character in issue by adducing evidence of her good character, he would permit cross-examination of her based on the report. In argument, no reference was made by either counsel to **s. 192** of the *New South Wales Evidence Act 1995* (*verbatim* with **s. 145** of our *Evidence Act*), and the trial Judge never cited the section. The appellant elected to testify and swore that she had never been convicted of any offence. She had described the forgery allegations as “just blatant lies.” The Crown's response is captured in the joint judgment of *Gaudron, Kirby* and *Callinan, JJ* in the High Court of Australia, at para [13], p 120:

The cross-examination of the appellant at the trial occupies some 102 pages of transcript. Some fifteen or so pages of it are almost entirely taken up with matters contained in the report. By reason of the nature of the cross-examination parts of the contents of the report inevitably found their way into evidence. No thought seems to have been given to the consequence that the jury had placed before them secondary evidence of the contents of documents in circumstances in which the documents themselves were not admissible and which the jury would not see.

- [116] The Court of Criminal Appeal of New South Wales (*Gleeson, CJ* [as he then was, later Chief Justice of the High Court of Australia], *Ireland* and *Bruce, JJ*) dismissed the appeal. *Gleeson, CJ* opined that there had been no error in permitting the cross-examination about the possible forgery. None of their Honours' judgments in the Court of Criminal Appeal mentioned **s. 192**. In the High Court, *Gaudron, Kirby* and *Callinan, JJ* observed:

The cross-examination on the report raised a very grave possibility of unfairness to the appellant within the meaning of s 192(2)(b). By giving permission for that cross-examination to take place the trial judge was

allowing the undertaking of an extensive collateral inquiry by the prosecutor. The inquiry necessarily raised a contest of credibility between the appellant and her co-conspirator, Ms Wailes, on a matter on which the latter had not been cross-examined and upon which evidence neither in chief nor in cross-examination should have been led. The risk, in our opinion, indeed the certainty of unfairness was compounded by the repeated references to signatures and some of the contents of documents which could not be admitted into evidence, were rightly rejected by the trial judge and were not seen by the jury. . .

Section 192 is not exhaustive as to the matters to be taken into account. Plainly the weight to be accorded to the evidence sought to be adduced, whether in cross-examination or otherwise, is a matter of considerable relevance. The trial judge quoted the expert's opinion in the report but yet does not seem to have taken into account how little, if any value it had, that is to say, its feather weight.

*(202 CLR 115, paras 43-44, pp. 126-127)*

- [117] For several reasons, *Stanoevski* does not apply to the instant appeal. First, it is clear that the trial Judge in *Stanoevski* did not refer to s. 192 (our s. 145) at all and that the appellant there suffered the unfairness of having her character impugned by the contents of an inadmissible report. In the instant case, while the trial Judge did not cite s. 145 during the testimony of Sgt. Springer, it was the trial Judge, *not* Mr. McWatt, who had raised it before the testimony of PC Broomes and had asked both counsel to consider its relevance to the exercise of her discretion. Moreover, in *Stanoevski*, the appellant testified and had her credibility diminished by the unfair character evidence. In *Francis*, the appellant also opted to give sworn testimony. In this case, the appellant did not testify, preferring to make a one-sentence unsworn statement from the dock. He was therefore not subjected to cross-examination on the statements.
- [118] But there is a more critical reason why the appellant here suffered no unfairness and no miscarriage of justice. It emanates from a close examination of his statements to the investigating officers which were read aloud to the jury. In *Francis*, the statement made to Sgt. Catwell was an incriminatory admission as to the offence charged, namely the theft of a motor car. In the instant case, what the jury heard in the oral statements read aloud by the officers was not an admission to rape at all. The appellant denied the offence of rape stating that he did not have sex with the VC because her vagina was too small. Apart from his unsworn statement from the dock, this statement was, in a very palpable sense, the only real defence mounted in the appellant's favour, albeit not mounted by him. Had the jury believed the appellant's statements through the testimony of the officers, as

they were entitled to do, he would have been acquitted of rape but convicted of the lesser offence of indecent assault.

- [119] Accordingly, in my view there was no miscarriage of justice in the ruling of the trial Judge and the contention that she permitted some unfairness to occur during the trial by her failure to refer to s. 145 and by permitting the officers to read aloud from their notebooks is without merit and fails.

#### **Ground 4 – The Virtual Complainant’s Sexual Experience and the Examining Doctor’s Testimony**

- [120] The appellant contends that the trial Judge erred when she prevented his counsel from cross-examining Dr. Andrew Murray, who had physically examined the VC, as to a statement she had made during the examination. In that statement, she had named another man as having inappropriately touched her on a prior occasion. The appellant argued that it was the Judge who had raised s. 26 of the *Sexual Offences Act* which normally operates to limit the scope of defence counsel’s exploration of a complainant’s sexual experience.
- [121] He states that the doctor had observed that the VC’s hymen was not intact and that it was not improbable that the jury would draw the inference that the appellant was the cause. If, therefore, there was an alternative explanation, he was entitled to explore it. The appellant cites s. 26(1)(c) in support of his contention, arguing that the provision creates “an exception where the accused denies the sexual intercourse and there is evidence of an injury which may be attributable to the sexual intercourse alleged to be had with the accused.” He concludes that the trial judge wrongly construed the provision.
- [122] The Crown responds that s. 32 of the *Sexual Offences Act* makes any evidence under s. 26 inadmissible in the absence of a notice of an intention to adduce such evidence. Since no such notice was ever given, the prosecution submits that the evidence was inadmissible.

#### **The Testimony**

- [123] The evidence of the VC’s sexual experience was contained in the testimony of her mother AB and PC Priscilla Alfred. AB recalled that the doctor had asked her daughter if anyone else had touched her improperly, and that her daughter had replied “Yes, a man by the name of Cameron”, who “once resided at Sunflower Drive, Cane Garden, St. Thomas.” She had travelled to Sunflower Drive with PC Alfred to interview Cameron but, as far as she knew, no arrest was made.
- [124] PC Alfred also testified that she accompanied AB and the VC to Dr. Murray’s office for the examination of the VC. On completion of the examination, he wrote the results in the public medical journal which he handed to PC Alfred. It was during cross-examination that PC Alfred

- recalled taking the VC to a residence in St. Thomas in relation to another report which had been made. No charges ever arose from that report.
- [125] Dr Andrew Murray testified that he was a medical practitioner whose duties as the Public Medical Officer included examination of persons alleged to have been sexually assaulted. He recalled examining the VC on 16 November 2007 and making notes. Refreshing his memory from his notes with the trial Judge's leave, he stated that he examined VC in the company of PC Alfred and the VC's mother. On examining the vulva, he noted that the hymen was not intact but observed that there was no abnormality.
- [126] In cross-examination, Mr. McWatt asked the doctor "[i]n the course of your examination, did you ask [the VC] whether she had been touched inappropriately by anyone else before that day – before – not the accused?" Dr Murray answered "yes". But when Mr. McWatt asked the doctor "how did she respond", the prosecutor objected, and the Judge excused the jury to hear argument regarding "this line of cross-examination."
- [127] Mr. McWatt for the appellant argued that, the doctor having testified that the VC's hymen was not intact, if there was "evidence available that someone else had interfered with the girl prior to the alleged incident with [the appellant], then clearly that may go to an alternative explanation as to why the hymen was not intact and . . . is relevant to this case and the jury have a right to hear it." The trial Judge disagreed and asked Mr. McWatt if he had looked at s. 26 of the *Sexual Offences Act*, to which he candidly replied: "Not recently, my Lady. No." Nonetheless, Mr. McWatt insisted that he was entitled to explore the reason or possible reasons for the absence of a hymen but added that he was "not seeking to elicit" from the doctor "any past sexual experience from the VC."
- [128] The trial Judge ruled that the line of questioning which Mr. McWatt proposed to adopt was probative of nothing and would not be allowed. [Tr. 117-120]. On resumption of his testimony, Dr Murray agreed that it was possible that the hymen not being intact could have been caused by someone fingering the vaginal orifice but indicated that he had found no scientific evidence permitting him to say conclusively that the accused had sexual intercourse with the VC.

### **Discussion**

- [129] At issue here is whether the Judge was correct to preclude the questioning of the doctor regarding the infant VC's prior sexual experience. Indeed, I go further and ask whether the questions asked of, and the answers given by, the VC's mother and PC Alfred regarding statements about the VC's sexual history were themselves permissible. There is a narrow basis on which this issue may be determined in this case, namely s. 32 of the *Sexual Offences Act* which was not cited to the trial Judge and was only mentioned on appeal

by the prosecutor. However, I take the opportunity to examine s. 26 of the *Act* and the extent to which evidence of sexual experience was admissible at the trial of the appellant, after which I discuss s. 32 and other cognate provisions.

- [130] In *Belle v R*, (1997) 54 WIR 95, (1997) 33 Barb. L.R. 15, the appellant was convicted of rape and wounding. On appeal, he took issue with a portion of the summation in which the trial Judge noted that the “degrading suggestion” had been put to the VC in that case about her relationships with other men and the implication that she had been engaged in prostitution on the night in question. The trial Judge opined that “[a] complainant in a rape case should be able to give evidence in these Courts without being subjected to such degrading and prejudicial suggestions when there is not even the flimsiest support for them – quite the contrary.” (54 WIR 95, 105, 33 Barb. L. R. 15, 24).
- [131] In this Court, *Sir Denys Williams, CJ* agreed, expressing support for “judges when they seek to protect women and girls called to testify as complainants in sexual cases and attorneys-at-law must not ask them questions that tend to embarrass them or debase them unless it is really necessary as part of the defence as part of the defence of their clients.” (*ibid*). However, neither the trial Judge nor *Sir Denys* in this Court referred to the relevant sections of the *Sexual Offences Act*.
- [132] I believe that some of the valuable lessons taught, but not always learned, in other jurisdictions will assist in explaining the approach which I consider necessary in such cases in Barbados, and I now turn to a brief excursus on the UK and Commonwealth experience.

### **Sexual History Evidence: The Common Law Tradition and Legislation**

- [133] “At common law, evidence that the complainant had had other sexual relationships in the past was considered evidence which was relevant to her credibility, in other words, her sexual activity was regarded as an indication of a lack of truthfulness or reliability as a witness. She could therefore be cross-examined by the defence about any such relationships but her answers were final and evidence could not be led to contradict her.” (*Temkin, Sexual History and the Ravishment of Section 2*, [1993] *Crim.L.R.* 3; see, further, *Report of the Advisory Group on the Law of Rape*, Cmnd 6352 (1975), paras. 93-99, hereinafter “the Heilbron Committee” and “the Heilbron Report”; *Cross on Evidence*, 9<sup>th</sup> Australian Edn, para 19075, p. 643).
- [134] In 1975, a majority of the House of Lords in *DPP v Morgan* [1975] 2 All ER 347, held that if a man accused of rape honestly believed that the woman was consenting to intercourse, he should not be convicted, even where his belief was not based on reasonable grounds. The decision provoked a huge outcry in the UK and elsewhere with the decision being described by some

as a ‘rapist charter’ (see **Report of the New Zealand Criminal Law Reform Committee on The Decision in *DPP v Morgan*: Aspects of the Law of Rape**, May 1980, Wellington, New Zealand, at p. 1). In response, the Home Secretary set up an Advisory Committee in July 1975 under the chairmanship of **Mrs. Justice Rose Heilbron, DBE**, Justice of the High Court of England and Wales, to report on the law of rape. The Report was delivered in December 1975.

- [135] Among the several issues considered by the Heilbron Committee was the probative value of a complainant’s sexual history and the extent to which cross-examination on this should be curtailed. (see, **Rook and Ward, *Sexual Offences, Criminal Law Library – No. 8, paras. 2.63-2.75, pp. 60-68***). The Committee “recommended that some curtailment of unnecessary cross-examination of the complainant as to her sexual history was probably one of the most important and urgent reforms required.” (see, **Heilbron Report, *op cit*, para. 110; Rook and Ward, *op cit*, para 2.63, at p. 61**). The Committee concluded that “unless there are some restrictions, questioning can take place which does not advance the cause of justice but in effect puts the woman on trial. Such procedure often tends unjustly to stigmatise the woman. This may result in the jury feeling that she is the type of person who either should not be believed, or else deserves no protection from the law, or was likely to have consented anyway.” (**Heilbron Committee, *op cit*, para. 91**).

- [136] The Committee explained its conclusion thus:

‘Our own approach to the problem is to start by considering the extent to which the woman’s previous sexual history ought to be admitted into the trial, whether or not the accused has a record. In reassessing this problem, the Group has taken into account the widespread changes in society since the present practice came to be established. We have reached the conclusion that the previous sexual history of the alleged victim with third parties is of no significance as far as credibility is concerned and is only rarely likely to be relevant to issues directly before the jury. In contemporary society, sexual relationships outside marriage, both steady and of a more casual character, are fairly widespread, and it seems now to be agreed that a woman’s sexual experiences with partners of her own choice, are neither indicative of untruthfulness nor of a general willingness to consent. There exists, in our view, a gap between the assumptions underlying the law and those public views and attitudes which exist today which ought to influence today’s law.’

(**Heilbron Report, para [131]**).

- [137] The Committee recommended “direct regulation of the matter” (*ibid.* para 132). In response, the UK Parliament enacted **s. 2** of the ***Sexual Offences (Amendment) Act 1976***, which provided in **subsection (1)** that, other than



where there was a previous relationship with the defendant, “except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than the defendant.” **Subsection (2)** provided that the Judge shall not give such leave except on an application made in the absence of the jury, “and on such an application the Judge shall give leave if and only if he is satisfied that it would be *unfair to the defendant* to refuse to allow the evidence to be adduced or the question to be asked.” (Emphasis added).

- [138] While the recommendations of the **Heilbron Committee** and the language of the statute evinced the clear intention that such questioning were to have become a thing of the past in the UK, the reality could not have been more different. In a study of rape trials conducted at the Old Bailey called ***Rape on Trial*** published in 1987, Zsuzanna Adler revealed that evidence of a complainant’s sexual history was admitted into evidence in 96% of the cases. Adler’s study showed that women were still being systematically humiliated in court and found the experience extremely distressing.
- [139] Professor Jennifer Temkin in a 1993 article ***Sexual History Evidence – The Ravishment of Section 2***, see *supra* at para. 62, examines several decisions of the UK Court of Appeal which permit, in her words, the ‘dredging up’ of the complainant’s sexual history despite the presence of s. 2 of the **1976 Act**. (See [1993] **Crim.L.R 3, 6-17**). Prof. Temkin also pointed to a study done in Scotland which painted a devastating picture of rape trials revealing “the blatant mistreatment of victims by defence counsel and an acquiescent attitude on the part of prosecutors and judges.” (Temkin, ***Prosecuting and Defending Rape: Perspectives from the Bar***, Vol. 27, No. 2 Journal of Law and Society, 219, 220-221 [June 2000], citing G. Chambers and A. Millar, ***Prosecuting Sexual Assault*** [Scottish Office Central Research Unit, 1986]).
- [140] In ***Prosecuting and Defending Rape: Perspectives from the Bar***, Prof. Temkin conducted interviews between 1995 to 1997 of both prosecutors and defence attorneys, a majority of them women. The study was concerned with “barristers’ perceptions of the problems involved in prosecuting rape and the strategies deployed in defending them.” A case reported in Temkin’s study showed “the lengths to which barristers would go in exploring the complainant’s behaviour” and deserves a full quote:

The complainant, who was Afro/Caribbean, had been lured into saying that she was not an exhibitionist. The defence then produced a video of her dancing in a club. [The barrister] commented:

We had a video of her in a club dancing in a *very flamboyant and suggestive Afro-Caribbean way*. And you could see the jury, once I’d played the tape. . .

In this case, the video did not show behaviour on the occasion in question. Indeed, the complainant had jumped out of a first floor window to escape the defendant and had broken her ankle. The defendant was nevertheless acquitted.

(See, *Prosecuting and Defending Rape: Perspectives from the Bar*, at pp. 232-233; emphasis added).

- [141] To ease the plight of complainants in rape trials, particularly in light of the largely ineffectual nature of s. 2 of the *Sexual Offences (Amendment) Act*, the UK Parliament enacted s. 41 of the *Youth Justice and Criminal Evidence Act 1999* (“YJCEA”), which provides that on the trial of a person charged with a sexual offence, no evidence may be adduced or question asked in cross-examination *by or on behalf of an accused* about any sexual behaviour of the complainant except with the leave of the court. The section then goes on to outline circumstances in which the court may give leave on an application made *by or on behalf of an accused*.
- [142] Despite the enactment of s. 41 of the YJCEA, however, the authors of a 2006 Home Office Report entitled *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Liz Kelly, Jennifer Temkin and Sue Griffiths), expressed some diffidence about whether the section was being enforced by judges the way it was intended to be (*ibid.* pp. 59-60). See, further, Aileen McColgan, *Common Law and the Relevance of Sexual History Evidence*, Vol. 16, No. 2 Oxford Journal of Legal Studies 275, 275-277; *Archbold Criminal Pleading, Evidence and Practice 2013*, paras. 8-241 to 8-242, pp. 1367-1368).
- [143] The lessons from Australia, from which we derived our *Evidence Act*, are far more encouraging. *Cross on Evidence*, *supra*, notes at para 19080, pp 642-643 that “[t]he statutes in force in most jurisdictions vary greatly.” They generally prohibit evidence of a complainant’s ‘sexual activities’, ‘sexual activity’ ‘sexual experience’ or ‘sexual experiences.’ “The evident policy behind the statutes is the balancing of the harm to the complainant which the evidence may cause with the harm to the accused if deprived of a defence which is available to those charges with non-sexual offences.” (*Cross on Evidence*, para 19090, p. 645).
- [144] Section 26 of the *Sexual Offences Act*, like our *Evidence Act*, is derived from Australian legislation and is almost *verbatim* with s. 409B(3) of the *New South Wales Crimes Act 1900*, as amended in 1981. Section 409B(3) provides as follows:
  - (3) In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a

lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except –

(a) where it is evidence –

(i) of sexual experience or a lack of sexual experience of, or sexual or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and

(ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;

(b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed offence, being a relationship between the accused person and the complainant;

(c) where –

(i) the accused person is alleged to have had sexual intercourse, as defined in section 61A(1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

...

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of the admission.’

[145] During the second reading on 18 March 1981 in the Legislative Assembly of the Bill amending the *Crimes Act*, the Attorney-General of New South Wales explained the mischief at which the amendments were aimed.

‘The Government has deliberately opted for this course in view of the longstanding practice of the courts to allow wide ranging and really irrelevant cross examination as to prior sexual history. This legislation is intended to alter both the theoretical law and the actual practice of the courts as to the reception of evidence about prior sexual history. Let there be no doubt about that. Since these laws involved the rights of accused persons, the courts will probably be reluctant to interpret provisions as changing past practice unless the change is specifically mandated in the legislation, and accordingly the bill does so.’

(New South Wales Parliamentary Debates, Legislative Assembly, 18 March 1981, at 4763-4764, cited in *R v Beserick* 30 NSWLR 510, 518, per *Hunt, CJ* at CL).

### **Section 26 of the Sexual Offences Act**

[146] Section 26 of the *Sexual Offences Act* provides:

‘26. (1) In proceedings in respect of an offence under this *Act*, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except

(a) where it is evidence

(i) of sexual experience or sexual activity, or a lack of sexual experience or sexual activity taken part in or not taken part in by the complainant at or about the time of the commission of the alleged sexual offence;

(ii) of events which are alleged to form part of a connected set of circumstances in which the alleged sexual offence was committed;

(b) where it is evidence relating to the sexual activity of the complainant with the accused where the sexual activity is reasonably contemporaneous with the date of the alleged offence;

(c) where

(i) the accused person is alleged to have had sexual intercourse with the complainant and the accused person does not concede the sexual intercourse so alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person...’

[147] Since this section is Australian in origin and, as noted before, is almost *verbatim* with the s. 409B of the *New South Wales Crimes Act 1900*, as amended in 1981, it is sensible to look to the Australian courts for guidance as to their construction of the section. The “opening or exclusionary words” of the section provide peremptorily that “evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity *is inadmissible*” except in certain nominated situations. Unlike s. 41(1) and (2) of the UK *YJCEA* 1999 which prohibits evidence of

this type only when proffered “by or on behalf of an accused”, under **s. 26**, such evidence is inadmissible whether on behalf of the accused or the prosecution unless it falls within one of the nominated situations, and it is equally clear from the canonical language in the section that it is of no import whether the evidence emanates from the complainant or some other witness or source.

[148] The meaning of the words “discloses or implies” in **s. 409B(3)** (our **s. 26**) was discussed in *R v White*, **18 NSWLR 332**, an appeal against a conviction of rape. The complainant was ‘sunbaking’ on a beach when she was approached by the appellant whom she had met casually twice before. The complainant testified that after conversing for an hour or so, she invited the appellant back to a nearby house for coffee. She told him that she was staying at the house alone and, at some point in their conversation, he had made sexual advances to her and had sexual intercourse with her without her consent. At issue was the admissibility of a conversation between the appellant and the complainant while on the beach. At the committal proceedings, she testified that she had told him that she was sleeping alone because she did not have a current boyfriend. She explained that she recently broke up with her boyfriend after he had caught her in bed with another man described as a weightlifter or bodybuilder of whom she said that “she only wanted the other guy’s body” and that “he had no. . . brains at all” (*ibid.*, at **334-335**).

[149] The New South Wales Court of Criminal Appeal (*Gleeson, CJ*, as he then was, *Carruthers* and *Badgery-Parker, JJ*) affirmed the trial Judge’s refusal to permit either the cross-examination of the complainant as to this conversation or the reference by the appellant to this segment of the conversation in his unsworn statement. The Court observed, at p. 340:

In our view the case falls within the opening, or exclusionary words of s. 409B(3). The evidence in question disclosed that the complainant had taken part in certain sexual activity. The word ‘disclose’ means to make a statement which reveals or makes apparent some fact which was previously unknown to someone who hears or reads the statement. . . The evident purpose of the legislation is to limit the circumstances in which complainants in sexual assault cases will have to endure having what might otherwise be personal and sensitive matters made public knowledge by virtue of evidence given in court. The width of the expression ‘discloses or implies’ and the use of the phrase ‘has or may have had’ demonstrate that what attracts the *prima facie* exclusion is the information or imputation which the evidence conveys to someone who hears or reads it.

[150] In the case at bar, Dr. Murray was being asked in cross-examination to “disclose” the statements made by the VC concerning her prior sexual experience or sexual activity during his examination of her. The issue then

was whether the evidence was admissible under the nominated situations set out in **clause (c)(i) and (ii)**, that is, where the accused denies that sexual intercourse occurred *and* the sexual experience evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person. As is clear from *White v R* above, the section draws no distinction between evidence sought to be admitted as evidence in chief or in cross-examination. It is simply not admissible except as provided in the nominated situations.

- [151] The admissibility of the evidence of a professional arose in another New South Wales decision, *R v G*, 42 NWSLR 451. There, the appellant was convicted on two counts of having sexual intercourse with a child under the age of ten years, the charge being that he had placed his penis in the complainant's mouth on two occasions. At issue was the exclusion by the trial Judge of the evidence of a psychologist to whom the complainant's doctor had referred her for assessment. The appellant was the *de facto* husband of the complainant's mother. The evidence revealed that the assaults had occurred on one occasion when the mother went out to bingo and on another occasion when she went out to a restaurant for a "hens' night." There was also evidence that the appellant had threatened to kill the complainant if she told her mother of the incidents. The complainant and her mother were interviewed by the psychologist who had prepared a report of his conclusions and, because he was unavailable on the first trial day, the appellant had sought to have the matter adjourned to permit the psychologist to come in to testify on a later date. The question whether the matter should be adjourned turned on the admissibility of the psychologist's evidence.
- [152] The psychologist had obtained a history from the complainant's mother that the complainant had been very upset on her return from a visit to her natural father when she was three years old. He formed the conclusion that the complainant had indeed been assaulted, but not recently, and opined that the evidence of "significant behaviour disturbance and obvious signs of emotional disturbance" had appeared following the month in 1987 when she had visited her natural father, who had since died. His report noted that the sexual assault had been 'buried' in response to the trauma of it and that the trauma had been resurrected by both a lecture which the complainant had attended on "stranger danger" and the complainant's resentment of the appellant for his attempts at controlling her. The trial Judge denied the adjournment and ruled that, since the proposed evidence of the psychologist did not fall within the nominated exceptions in s. 409B(3)(a)(i) and (ii), it was inadmissible. The appellant was convicted and sentenced.
- [153] On appeal, the Court of Criminal Appeal (*Mason, P, Stein, JA* and *Sperling, J*) affirmed the trial judge's ruling. *Mason, P* observed at p 457-D

that “it is common ground between the parties that evidence that the complainant may have been sexually assaulted by her natural father provides no rational basis for concluding that she was not sexually assaulted by the appellant. The complainant may conceivably have been abused by both men.”

- [154] On further appeal, *sub nom HG v The Queen*, 197 CLR 414, the High Court of Australia, by majority, affirmed the decision of the New South Wales Court of Criminal Appeal. Five separate judgments were delivered and the issue of admissibility of the psychologist’s evidence divided the Court. The majority (*Gleeson, CJ, McHugh* and *Hayne JJ, Gaudron* and *Gummow, JJ* dissenting) held that it was clear that the reason for the application to have the psychologist’s evidence was his suggestion that the complainant was assaulted by her natural father and not by the appellant, her stepfather.

‘[T]he fact that the admissibility of [the psychologist’s] evidence was addressed by trial counsel, and the judge, in terms of s. 409B demonstrates that the crucial aspect of that evidence upon which the defence wished to rely was the identification of the complainant’s natural father as the real culprit. If counsel had wished to rely, alternatively, on only so much of [the psychologist’s] opinion as exonerated the appellant and said nothing about the father, (assuming there had been a cogent, severable, portion of it to that effect), then s. 409B would have had nothing to say to that question. Yet the problem was presented to, and dealt with by, the judge as one turning upon the meaning and effect of s. 409B.’

(*per Gleeson, CJ*, at *para 22, 423-424*).

- [155] The minority took the view that, while evidence that the complainant was assaulted by another person was inadmissible, evidence that the complainant had not been sexually assaulted by the accused was admissible. As *Gaudron, J* opined:

The exceptions to the general prohibition effected by s. 409B(3) are within a narrow compass. Moreover, they do not extend to evidence that the offence was or was not committed, that being evidence which, as already indicated, falls within the terms of the general prohibition in sub-s. (3). Clearly, for the sub-section to be given any sensible operation, it must be read down to enable that evidence to be led. When read down in that way, s. 409B(3) does not render inadmissible evidence that discloses or implies that a complainant was not sexually assaulted as alleged in the indictment. It follows that it does not exclude the opinion of [the psychologist] that the complainant was not sexually on the occasions alleged in the indictment.

(Para 69, 434-435)

- [156] When the learning above is applied to this case, it is clear that the trial Judge quite properly refused to permit the cross-examination of the doctor. The

only basis for which the appellant would have sought to cross-examine the doctor was to adduce evidence which would have “disclose[d] or implie[d]” that the VC has been subjected to a prior sexual assault by another man. It had nothing to do with the defence of consent or any other palpable defence in the case. Since, as *Mason, P* observed in *R v G*, that evidence may have inculpated the other man, but may not have exculpated the appellant since the VC may have been assaulted by both men, there was no basis for permitting the testimony.

- [157] Moreover, the argument posited before the trial Judge, and before us, was that the appellant was seeking to adduce evidence relating to an “injury” within s. 26 (1)(c)(ii). The argument is not compelling. The best response to that contention appears in the judgment of *Gleeson, CJ* in *HG v R*, where a similar argument was dismissed. “As to par (c), it was no part of the Crown’s case that the complainant suffered some form of injury, physical or psychological, which was attributable to the alleged offences committed by the appellant.” (*Ibid.*, at para [34], p. 426).
- [158] The same is true here. The doctor testified that his examination of the VC’s vulva revealed “no abnormality”, only the absence of a hymen. The doctor certainly did not mention the existence of any injury. The appellant’s attempt to transmogrify an absent hymen into an “injury” is fanciful at best, even in a child of the tender years of the VC. There was simply nothing on the record to indicate the presence of any injury, much less an “injury attributable to the sexual intercourse alleged to have been had with the accused person” within the meaning of the section. Accordingly, the trial Judge properly refused the appellant permission to cross-examine the doctor regarding the inappropriate touching of the VC by someone other than the appellant. Indeed, as I inferred above, and now hold, the questions of the mother and the police constable regarding the VC’s prior sexual experience of being inappropriately touched by a man were equally improper and ought not to have been permitted.
- [159] The appellant further contends that the term “sexual experiences” must relate to consensual sexual experience and that where the VC is a minor and cannot give consent in the normal course of events a member of the jury may expect that she would have her hymen intact. He argues that where the sexual experience is more aptly termed “sexual abuse”, then the possibility that this may have been caused by another is exculpatory evidence to which s. 26 does not apply. The argument lacks merit.
- [160] The same distinction between consensual and non-consensual sexual experience was argued before both the New South Wales Court of Criminal Appeal and the High Court of Australia in *R v G* and *HG v R*, *supra*. The discussion arose in an intriguing way. In a prior case, *R v PJE* (Court of



Criminal Appeal, 9 October 1995, unreported), also involving a sexual assault on a child, *Sperling, J* had observed that the phraseology of the statute “may be apt to apply only to prior sexual experience or activity which was consensual.” *Sperling, J* was also a member of the panel in the Court of Criminal Appeal which heard and decided *R v G*.

- [161] As to *Sperling, J*’s suggested dichotomy between consensual and non-consensual sexual activity, *Mason, P* had this to say in *R v G* (at 457-458):

What then of the second challenge, based on *Sperling, J*’s reservation in *R v PJE* that the sexual abuse of a child might not constitute ‘sexual experience’ or ‘sexual activity’ within s. 409B? His Honour suggested tentatively that the phraseology of s. 409B may be appropriate to apply only to prior sexual experience or activity which was consensual.

I do not share *Sperling, J*’s reservations. The terms ‘sexual experience’ and ‘sexual activity’ are not terms of art, and each appears to have been chosen because of their broad generality. The legislative purpose of s 409B is discussed at length in *R v M* (1993) A Crim R 549. *Allen, J* (with whom *Gleeson, CJ* and *Meagher, JA* agreed) referred (at 556) to the Premier’s and the Attorney-General’s Second Reading Speeches which expressed the aim of preventing the humiliating and irrelevant questioning of sexual assault victims. The aim was addressed by blanket prohibitions lifted only by the specific paragraphs of subs (3) and subs (5). I see no reason to exclude the victims of child sexual assault from legislation designed to prevent unnecessary humiliation, especially when it is recognised that that is not just an end in itself.

To limit s. 409B to consensual sexual activity would lead to a most invidious distinction in the case of child sexual assault victims. . .The protection of sexual assault victims from degrading and unnecessary confrontation in court is designed to encourage such persons to come forward, thereby promoting the effectiveness of laws punishing sexual assault. . .Indeed, the search for evidence of consent becomes grotesque in the case of a young child who is made to participate in sexual activity initiated by an adult which is in a parental relationship.

- [162] In a concurring judgment, *Sperling, J* resiled from his earlier reservation expressed in *R v PJE*. His Honour was “now satisfied, for the reasons stated by *Mason, P* in the present case, that such a qualification should not be read into the section. In particular, I do not think that the legislature can have intended, consistently with the objectives of the section, that there should be a forensic investigation as to whether a prior sexual episode was consensual, with all that such an investigation would involve.” (*ibid*, at 460-461).

- [163] The High Court of Australia also rejected the distinction in *HG v R*. Referring to the observations of *Mason, P* in the Court of Criminal Appeal, *Gleeson, CJ* noted:

Furthermore, in relation to adult complainants, evidence of prior non-consensual sexual experience or activity might, depending upon the circumstances, be just as humiliating as evidence of prior consensual activity. As the Premier said in Parliament when this legislation was introduced, “rape is an act of violence aimed at subjugation, debasement and humiliation.” Having regard to the legislative purpose of s 409B, it is impossible to accept that Parliament intended that only evidence of consensual experience would be excluded.

*(197 CLR 414, at para 31, p 425).*

- [164] *Gaudron, J*, who dissented on the issue of the admissibility of the psychologist’s evidence, nonetheless “agree[d] with the Chief Justice and with *Hayne, J*, for the reasons that they each give, that the arguments [that the general prohibition in **s. 409B(3)** is also to be read down to apply only to consensual sexual activity] must be rejected.” (*ibid.*, at para 30, p 435). *Hayne, J* stated:

‘The reach of the provision is broad. It is directed to evidence ‘which discloses or implies’ that the complainant ‘has or may have had sexual experience or a lack of sexual experience’. On its face, evidence that the complainant had been sexually assaulted by her natural father is evidence that discloses that she has or may have had sexual experience or has or may have taken part in sexual activity.

It was submitted, on the hearing of the appeal in this Court, that the expressions ‘sexual experience’ and ‘sexual activity’ should be confined to ‘consensual’ experiences and activity. Thus, so the argument proceeded, the complainant being incapable of consenting to the conduct that was alleged against her natural father, s. 409B did not apply.

There is no warrant for reading the provision as confined to consensual acts. Nothing in the language used suggests any intention other than to extend the reach of the provisions as broadly as possible. It was submitted that the provisions should be read in the manner suggested because the mischief to which s. 409B is directed is the prevention of distress, humiliation and embarrassment of complainants of sexual crime. Accepting that this is so, it by no means follows that a distinction between consensual and non-consensual sexual acts is warranted. Distress, humiliation and embarrassment are very likely present for any person required to describe, in a public forum, sexual activity in which they have engaged. There is no basis for suggesting that the distress, humiliation or embarrassment felt in having to describe these matters would be less if the activity occurred as a result of the unlawful conduct of another or others.’

*(197 CLR 414, paras 145-147, p. 456)*

- [165] This should be enough to dispose of the **s. 26** issue since the basis of the appellant’s argument before the Judge was that the VC may have been

assaulted by another, thus potentially explaining why her hymen was not intact, and that the jury were entitled to hear that evidence. They were not.

[166] But there are other sections in the *Sexual Offences Act* with procedural preconditions which must be complied with even before the admissibility of sexual experience evidence under s. 26 is broached. I refer to s. 32 of the *Act* which the prosecutor, Mr. Applewhaite, quite properly cited to us, but which was never cited to the trial Judge by either Mr. Applewhaite or Mr. McWatt. **Section 32** provides that “[n]o evidence is admissible under s. 26 unless (a) reasonable notice in writing has been given to the prosecution by or on behalf of the accused of his intention to adduce the evidence together with the particulars of the evidence sought to be adduced; and (b) a copy of the notice is filed with the clerk of the Court.” (Emphasis added). Since s. 26 also applies to cross-examination by an accused, compliance with the section was mandatory.

[167] Two other provisions may also be mentioned here which complete the picture in the procedural picture with regard to sexual history evidence. **Section 33** states, again peremptorily, that “[n]o evidence is admissible under **section 26**” unless the Court, after holding a hearing, in which the jury and members of the public are excluded, and in which the complainant is a competent but not a compellable witness, “is satisfied that the evidence is admissible and *that the requirements of section 32 are met.*” And s. 27 provides that where the trial Judge, after a hearing pursuant to s. 33, determines that the evidence should be admitted, she “*shall, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.*” (Emphasis added).

[168] In my view, a conjoint reading of ss. 27, 32 and 33 requires the following four procedural steps in sexual offence cases where an accused wishes to adduce evidence of the complainant’s sexual experience:

- (i) a reasonable notice in writing must be given to the prosecution of the accused’s intention to adduce sexual experience evidence, whether by calling witnesses or by cross-examining prosecution witnesses (s. 32);
- (ii) a copy of that written notice must be filed with the clerk of the court (s. 32);
- (iii) the trial judge must conduct a hearing in the absence of the jury, and must be satisfied that the evidence is admissible under s. 26 and that the two procedural requirements of s. 32 mentioned at (i) and (ii) above have been met (s. 33); and
- (iv) if the trial judge determines, after the hearing, that the evidence is admissible, then the judge must, *before* the sexual experience evidence is given, make a written record of the nature and scope

of the evidence and the reasons for admitting it. Those “reasons” should fall strictly within the language of the nominated exceptions in **s. 26 (s. 27)**.

- [169] Applied to this case, apart from the trial Judge’s hearing the argument in the absence of the jury as mandated by **s. 33**, there was no compliance with the mandatory prerequisites of **s. 32**. The appellant never filed any notice of his intention to adduce evidence from the VC or any of the witnesses by way of cross-examination of the alleged prior sexual experience of the VC’s being inappropriately touched. In my view, the absence of the **s. 32** notice was fatal to the appellant’s application to cross-examine the doctor as to what the VC had said about the prior inappropriate touching by someone other than the appellant. On these procedural grounds as well, the trial judge quite rightly refused the application to cross-examine Dr. Murray.
- [170] Again, I note that the questions asked, and the answers given on this topic by both the VC’s mother and PC Alfred were equally impermissible in the absence of the **s. 32** notice by the appellant to the prosecution, and the filing of that notice in the court, of his intention to adduce such evidence from those witnesses. For all these reasons, this ground must fail.

### **Ground 5 – Corroboration**

- [171] The appellant contends that the trial Judge erred when she directed the jury that the unauthenticated verbals attributed to him and recorded by the investigating officers was evidence capable of corroborating the case for the prosecution. He candidly concedes that the viability of this ground is dependent on the success of grounds 1 and 2 above. He refers to the portions of the transcript between page 155 line 23 and page 156 line 3 of the trial transcript.
- [172] The appellant’s candor is understandable. In the discussion above at paras [43] to [56], it was made clear that Sgt. Springer and PC Broomes were properly permitted pursuant to **s. 30(3)** of the *Evidence Act* to refresh their memory from their notebooks, even though the notebooks themselves were inadmissible in evidence as a result of the operation of **s. 73** of the *Evidence Act*. As *Cross on Evidence, supra*, states at para. [17245], p. 525, “[t]he contents of the document thus apparently come into evidence – not directly since the document is not marked as an exhibit and is not part of the evidence in its own right, but *as part of the witness’s oral evidence*.” (Emphasis supplied). Once this evidence is admitted and heard by the jury, it is admitted for all purposes, including for the purpose of corroborating other evidence in the case.
- [173] This ought to be enough to dispose of the appellant’s point on corroboration. However, the majority takes the view that, in her summation on corroboration, the trial judge misdirected the jury insofar as she suggested

that there was evidence which corroborated the offence of rape and, in their view, there was no such evidence. Since, they continue, the only corroborative evidence was that of an indecent assault by the use of the appellant's fingers, the conviction of rape should be set aside and in its place a conviction for indecent assault should be substituted. For several reasons, I disagree with that view.

- [174] Perhaps, the best place to begin is with the trial Judge's careful summation to the jury and it will help, I believe to begin at a point just before her remarks on corroboration itself. After explaining to the jury that "rape is committed where a person has sexual intercourse with another persons (*sic*) without her consent and knows that she does not consent to the intercourse or is reckless, that is, he does not care less whether she consents or not", and referring to **s. 23** of the *Sexual Offences Act* which defines "sexual intercourse", the learned trial judge continued:

So Madam Foreman and members of the jury, in sexual intercourse, the intercourse is deemed complete upon proof of penetration only or what is referred to as penile penetration, the penetration of the vagina by a male penis. Penetration of the woman's vagina or the female's vagina, in this case, by the man's penis is necessary to prove completion of sexual intercourse. The law is that even the slightest penetration is sufficient.

I will direct you Madam Foreman and your members, to the evidence that speaks directly to this legal ingredient of penetration. [The VC] gave this evidence in response to questioning from the Crown and it goes as follows:

'Q: After he put this cream on his penis, did he do anything else?

A: Yes, please.

Q: Tell us what he did?

A: He came on top of me and he tried to get his penis inside of my vagina hole but only the tip went in and it hurt me.'

Counsel for the prosecution said: 'I didn't hear that speak up', and she repeated it. She said: 'He tried to get his penis inside my vagina hole but it did not go in only the tip of it went in and it hurt me.'

If you accept the evidence of [the VC], Madam Foreman and members of the jury, 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.'

[Transcript, pp. 151 – 152].

- [175] Clearly, on this record there was evidence of the rape by the appellant of this minor child and a cursory look of her cross-examination by Mr. McWatt reveals that her story never changed. (See Transcript, pp. 62-68). On the

uncontradicted evidence of the minor VC, without more, the jury was entitled to convict the appellant of the crime of rape.

[176] Immediately thereafter, the trial judge dealt with corroboration. It is only fair to set out her summation, albeit lengthy, *in extenso*. Her Ladyship said:

Madam Foreman and your members, the allegation against the accused man being one of a sexual nature, I must warn you that it is unsafe to convict in the absence of corroboration. It is by no means unusual in cases of sexual misconduct that there is no corroboration. Sexual offences are not usually committed in the presence of others, so that usually the only evidence of the commission of the offence comes from the female herself who complains.

What then is corroboration? Corroboration is evidence of independent testimony which affects the accused by connecting him or tending to connect him with the crime. That is, corroboration is evidence that implicates the accused which confirms in some material particular not only that the crime was committed but also that the accused committed the crime. So that the three essential ingredients of corroboration or corroborative evidence is that it must be material, it must come from a source independent of the complainant and it must implicate the accused man.

The reason why in sexual offences cases one seeks corroboration, is that there is a possibility that the complainants in any sexual offence case for some reason or sometimes for no reason, could make up a story which is difficult to disprove and that is why the law in its wisdom has laid down that I warn you that it may be unsafe to convict the accused in the absence of corroboration. Now, however, having said that and if you bear that warning in mind and having looked at the facts, you come to the conclusion that this young girl is without doubt speaking the truth then the fact that there is no corroboration does not matter and you may act on her evidence alone. In other words, Madam Foreman and members of the jury, if after considering the circumstances of this case, having given full consideration to the warning that I have given you, you come to the conclusion that [the VC] is without doubt speaking the truth, then even if there is no corroboration, you will still be entitled to convict the accused on the uncorroborated evidence of this witness.

Madam Foreman and members of the jury, whether or not there is in fact corroboration is a question of fact for you the jury to determine. In this case, members of the jury, I must point out to you that there is evidence which is capable of corroboration. If you accept the evidence of Sergeant Springer and Constable Broomes that accused Sealy gave oral statements that I will review with you later in this summation, then I will tell you that as a matter of law this amounts to corroboration of certain aspects of the evidence of [the VC]. There is corroboration to Question 8 that he carried her to his house. There is corroboration that he inserted his fingers in her vagina in answer to Question 11. There is an admission at Question 15 that he ‘sexually assaulted [the VC]’ and it is for you members of the jury to determine what he meant by this. There is an admission that he played with

her vagina in answer to Question 10 and 11. *You must also determine what the accused meant when he said: 'This is the cream I use to put on my penis and her vagina,' and again you must determine what he meant when he said, 'I didn't have sex with she. She pokey was too small so I put cream on my finger and pushed in in she pokey.'* What reasonable inferences, if any, can you draw from these statements? These are matters for you, Madam Foreman and members of the jury. Only if you accept these words were spoken by accused Sealy can you find there was corroboration. Those words Madam Foreman and members of the jury, are capable of amounting to corroboration because they are material. They come from a source independent of the virtual complainant. . .and they implicate the accused man, Clarence Sealy, in the crime of rape, if you believe the statements given by him to the police.”

[Transcript, pp. 154-156; emphasis added].

- [177] The summation was exemplary. The *Evidence Act* in s. 136 (1) and (3) abolishes the requirement for corroboration and a corroboration warning, but the section is “subject to the other provisions of this *Act* and the *Sexual Offences Act*.” (s. 136 (3)). Section 28 of the *Sexual Offences Act* provides that “[s]ubject to section 31, where an accused is charged with an offence under this *Act*, no corroboration is required for a conviction but the Judge shall warn the jury that it may be unsafe to find the accused guilty in the absence of corroboration.” (Emphasis added). Section 31 relates to the receipt of the unsworn testimony of a VC who is a minor and provides that corroboration is required in such a case. Since in this case, the minor VC was sworn, s. 31 does not apply. There was a requirement only for a corroboration warning which the trial judge gave. Accordingly, since the *Sexual Offences Act* renders corroboration of rape entirely unnecessary, requiring only the warning, then the absence of corroboration cannot possibly justify reversal of the conviction.
- [178] Secondly, the trial judge rightly directed the jury that it was for them to determine what the appellant meant when he said that he did not have sex with the VC because her vagina was too small, and so he pushed his finger into her vagina. One interpretation of the appellant’s statement which the jury was entitled to adopt, and likely adopted, was that the statement meant that the appellant tried, but failed to achieve, full penile penetration of the VC. It must be recalled that the appellant, on handing over the tube of cream to the police, stated that, “this is *the cream which I used on my penis and her vagina.*” The majority judgment does not discuss or explain this fact which is clearly in the record. In my view, it was not plausible to conclude that the appellant placed cream on his penis *and* on the VC’s

vagina and then, ignoring his penis and not attempting intercourse, contented himself with assaulting her with his fingers. It is clear to me that the jury was entitled to, and obviously did, reject this interpretation of his statement.

- [179] Moreover, the jury must have asked the question, ‘how would the appellant have known that the VC’s vagina was too small’ if he had not attempted penetration? And if he used the cream to facilitate penile penetration but was partially successful since only the tip entered her, as she very clearly testified, that was all that was needed for the *actus reus* of sexual intercourse. Thus explained, the appellant’s statement *does, in fact*, corroborate the VC’s testimony even though there is no need for corroboration by virtue of the *Sexual Offences Act*. Hence, there was no error in the trial judge’s summation.
- [180] Finally, even assuming that the trial judge fell into error, in cases where there is overwhelming evidence of guilt and no miscarriage of justice has occurred, the proviso to the *Criminal Procedure Act* permits this Court to dismiss the appeal. In *Belle v R*, *supra*, this Court upheld the appellant’s contention that a corroboration warning was incomplete because the trial judge failed to explain the reason for the warning that it was unsafe to act on the uncorroborated evidence of a complainant in a sexual case (see, (1997) **54 WIR 95, 100-101**). *Sir Denys Williams, CJ*, however, discussed the question whether the proviso ought to be applied. His Lordship asked: “Supposing that the jury had been given the full direction on corroboration could they have come to any conclusion other than the one at which they arrived?” (*ibid.*, at 106). His Lordship noted that no objection had been taken to the admission of the complainant’s evidence and that she had been cross-examined about it and had repeated it in cross-examination. He therefore concluded that “this is a case in which the proviso can be applied.” (*ibid.*, at 107).
- [181] In my respectful view, the same conclusion applies here. This is an apt case for the application of the proviso. Even in the absence of corroboration, the infant VC’s testimony provides ample support for a verdict of guilty of rape. As noted above, the corroboration warning, the only thing now required in the laws of Barbados, was unexceptionable. Moreover, this Court cannot inexplicably reject, as it obviously does, the uncontradicted evidence of the minor VC that she was raped by the appellant while, equally inexplicably, crediting the appellant’s statement to the police that he only used his fingers, and while basing its ultimate conclusion on the absence of corroborative evidence. It bears repeating that the requirement for corroboration in sexual offences has been abolished in Barbados since 13 February 1992, the enactment date of the *Sexual Offences Act, Cap 154*.



- [182] For these reasons, I can find no basis in this record to justify setting aside the rape conviction and substituting a conviction of indecent assault in its place. I, therefore, dissent.

**Ground 6 – Inadequate Warning**

- [183] The appellant contends that the trial Judge failed to give an adequate warning to the jury in accordance with s. 137 of the *Evidence Act* in that, he claims, she (i) failed to warn the jury that the VC's age could render her evidence unreliable; (ii) failed to explain to the jury the difficulty of accused persons in police custody to support a challenge to police evidence of confessional statements, and that police witnesses are also practised witnesses; and (iii) failed to warn the jury that persons who make confession statements sometimes repudiate them and that it is a matter for the jury to determine why they repudiate them.
- [184] My analysis begins by taking the last contention first. There is no merit in the argument relating to the repudiation of confession statements. Apart from his statement mentioned above identifying the tube of cream which he used on himself and the VC, the appellant never made any statement *confessing* to the charge of rape and he never repudiated anything which he had said to the police officers. The first portion of his one-line unsworn statement from the dock simply was that "I ain't give the police that statement." It is therefore not clear why the trial Judge should have warned the jury about something which never occurred.
- [185] The other contentions fare no better. **Section 137** of the *Evidence Act* deals with warnings. **Section 137(2)** provides that "[w]here there is a jury and a party so requests, the Judge shall, unless there are good reasons for not doing so, (a) warn the jury that the evidence may be unreliable; (b) inform the jury of matters that may cause it to be unreliable; and (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it." **Subsection (3)** provides that "[i]t is not necessary that a particular form of words be used in giving the warning or information."
- [186] The transcript indicates that immediately following Mr. McWatt's closing address, the trial Judge gave both sides "the opportunity to indicate to the court those matters on which the jury should be addressed." (Transcript p. 146). Mr. McWatt requested only the warnings pursuant to s. 137 and the normal directions with regard to the burden of proof. When the trial Judge sought clarification as to what "special circumstances" would necessitate a further direction to the jury, Mr. McWatt replied simply: "Just the 137". (*Ibid*). There was no mention of police officers being practised witnesses or the difficult circumstances in which accused persons in custody find themselves.

[187] Moreover, as to the warning relating to the unreliability of the testimony of the minor VC and the police officers, the record indicates that the trial Judge dealt with these topics in her careful summation. Her Ladyship stated:

Now, Madam Foreman and members of the jury, your task will be to assess the evidence of this 10-year-old child. A child's perception of the passage of time is very likely to be different from that of an adult. When recounting events later, a child's recall of when and in what order events occurred may not be accurate. Your task, members of the jury, is to judge whether the essential part of this witness' evidence, that is, that accused Sealy did the things that she related to you were truthfully given and if so, whether they are reliable. Errors and inconsistencies in detail and in the sequence of events may not in the case of a child be any indication of untruthfulness or unreliability on the essential matters. Those decisions are, however, for you to make having made allowance for the age and immaturity of the witness (VC) you should act on her evidence only if you are sure it is right to do so. In this case the (VC) who made the complaint before you is 10 years of age now, 6 years of age when the allegation was made and you have to consider the possibility that having regard to her youth her evidence may be unreliable. You have to determine whether or not in the last resort you can accept her evidence as trustworthy and credible.

(Transcript, 158-159).

[188] As to the testimony of the police officers, the Judge stated:

I must caution you, Madam Foreman and members of the jury, that when the police officers gave their evidence they did not give 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 recommended, 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. . .

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 put 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 the 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 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.

(Transcript 169-172)

- [189] The above extracts from the trial record show, in my view, the thoroughness of the trial Judge's summation on the issues of the credibility of the VC's evidence and that of the Police Officers, and the warnings given. In light of the language of **s. 137(3)** that no particular form of words is necessary for the warning, I can see no inadequacy in the trial judge's warning. Accordingly, I reject this final ground as well.

### **Disposal**

- [190] For the reasons given above, the conviction and sentence should be affirmed, and the appeal dismissed in its entirety.

**Chief Justice**