**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cr. App. No. T 10 of 2015**

**Between**

**CLINT MELVILLE**

**Appellant**

**AND**

**THE STATE**

**Respondent**

**PANEL:**

P. Weekes, JA

A. Yorke – Soo Hon, JA

M. Mohammed JA

**APPEARANCES:**

Mr. P. Godson-Phillip and Mr. D. Khan instructed by Ms. U. Nathai-Lutchman for the appellant

Mr. T. Sinanan for the respondent

**DATE OF DELIVERY: 9th June 2016**

## JUDGMENT

**Delivered by A. Yorke Soo Hon J.A.**

### Introduction

1. In March 2015 the appellant Clint Melville was convicted for the offence of sexual intercourse with a minor and subsequently sentenced to a term of fifteen years with hard labour.

### Case for the Prosecution

2. At the trial, the virtual complainant S A aged twelve, gave evidence that on February 23rd 2008, she met the appellant aged forty, whom she had known before for about five months, at her grandmother's house where he was doing some masonry work. The virtual complainant lived with her mother in a separate house, on the same compound as her grandmother in Carnbee, Tobago.

3. On the day in question, the appellant sent the virtual complainant and her sister to the supermarket to purchase some items for him. Upon their return, the virtual complainant's sister left and the virtual complainant remained chatting with the appellant .They talked about a range of topics including sports when the appellant asked her if she ever had sex before, to which she responded "Yes" and a discussion followed. She then went over to her mother's house to watch television.

4. Shortly afterwards, she came outside and the appellant asked her to meet him under her uncle's house, also on the same compound, in ten minutes. The virtual complainant did as she was told. When she arrived the appellant pulled down his pants and his underwear and then pulled down the virtual complainant's pants and underwear, put on a condom and proceeded to have sexual intercourse with her. She told him to stop but he did not. The appellant then attempted to have sex with her a second time but she told him that it hurt and asked him to put her down which he eventually did. She then pulled up her underwear and pants. The appellant asked her to do it again but she refused. He then gave her his phone number and she returned to her mother's house.

5. The appellant subsequently went to his car which was parked in the yard. There he met the virtual complainant's brother, Savion, and they began talking about sports. They were joined by the virtual complainant who told the appellant that she had won a gold medal for shot-put. The appellant gave her twenty dollars and told her to use it to build back her energy. The virtual complainant went home and waited for her mother to return from work and when her mother arrived, she told her what had happened. The virtual complainant and her mother made a report at the Old Grange Police Station and the virtual complainant was taken to the Scarborough General Hospital where she was medically examined.

6. On April 16th 2008, the appellant was arrested and taken to the Scarborough Police station where Ag. Sgt. Piggott met and spoke with him. She cautioned him, and informed him of his rights to which the appellant replied "Officer, to tell you the truth, I had no contact with her. I had no plans whatsoever. I did not rape that girl". He was subsequently charged for the offence.

**Case for the Defence**

7. The appellant did not give evidence nor call witnesses. However, the tenor of his defence emerging during cross – examination was a denial of the allegations put forward by the prosecution.

**Ground 1 – The trial judge failed to direct the jury to take the appellant's good character into account when assessing his credibility in relation to his exculpatory statement and further erred in giving a Lucas direction regarding the exculpatory statement which resulted in prejudice to the appellant;**

8. Counsel complained that although the judge gave the standard good character direction concerning both credibility and propensity, he failed to specifically link the credibility limb to the exculpatory statement given by the appellant to the police. He also complained that the judge was wrong to give a *Lucas* direction since the jury might conclude that the appellant had lied when he said he did not make the oral statement to Sgt. Piggott. Such a direction had the effect of implanting in the minds of the jury that their rejection of the suggestions made by the defence under cross examination was equivalent to the fact that the appellant had lied.

9. Counsel for the respondent submitted that the learned judge gave the full good character direction in relation to propensity and credibility which was specifically referenced to the defence of fabrication as implied by the appellant. He specifically directed the jury how to approach the question of the appellant's good character in relation to the evidence and how it was to be viewed when considering his defence which alleged complete fabrication on the part of the virtual complainant.

10. Counsel submitted further that the judge also directed the jury on how they should deal with the issue of lies if they believed the appellant was lying about not making the pre-trial statement to Sgt. Piggott. These directions were clear focused and unambiguous and no prejudice occurred to the appellant.

**Credibility in relation to Exculpatory Statement**

11. Once the absence of previous convictions is established, the trial judge is under a duty to direct the jury as to its relevance. The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements: **R v Hunter and Ors [2015] EWCA Crim 631.** In **R v Vye [1993] 3 All ER 241** which was subsequently endorsed in **Hunter (supra)** Lord Taylor in delivering the judgment of the court said:

> *"In our judgment, **when the defendant has not given evidence at trial but relies on exculpatory statements made to the police or others, the judge should direct the jury to have regard to the defendant's good character when considering the credibility of those statements.** He will, of course, be entitled to make observations about the way the jury should approach such exculpatory statements in contrast to evidence given on oath (see R v Duncan (1981) 73 Cr App R 359), but when the jury is considering the truthfulness of any such statements, it would be logical for them to take good character into account, just as they would in regard to a defendant's evidence.*

*Clearly, if a defendant of good character does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a first limb direction is not required."* (Emphasis ours)

12. In this case the trial judge directed the jury to take the appellant's good character into account when assessing his credibility as follows:

    *"Clint Melville, has presented evidence for your consideration that this charge is a fabrication, that it never happened; that is his defence. He has, through cross examination by his counsel, placed for your consideration that S A has fabricated the events of the 23rd of February 2008, as she gave them. He is saying that she made it all up. His good character or the fact that he has no previous convictions or pending cases must be seen as a positive feature which you should take into account when considering whether you accept what he has asked you to bear in mind and consider it."*[1]

13. This direction did not specifically refer to the appellant's exculpatory statement. In assessing whether they accepted the statement the jury was required to consider the truth of its contents and therefore the defendant's credibility relative to the statement was a relevant consideration for them. The judge ought to have specifically linked the appellant's good character to his credibility in relation to the statement.

14. While we agree with the respondent's submission that the appellant was entitled to a full good character direction, we do not agree that that was all that was required in this case. The judge's direction instructed the jury to take the appellant's credibility into account in assessing whether they accepted his defence of fabrication as put through cross examination only. This deprived the appellant of having his good character taken into account on the jury's assessment of the credibility of the pre - trial exculpatory statement which was the only real evidence in support of his case and which had remained consistent with the defence he had presented at trial even seven years after it was recorded.

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[1] Summation Pg 14 Lns 19 - 30

15. We therefore find merit in the appellant's submissions on this ground.

**Lucas Direction**

16. The purpose of a *Lucas* direction is to ensure that the jury does not engage in an incorrect line of reasoning:

    > *"20. ...to assume that lying demonstrates, and is consistent only with, a desire to conceal guilt, or, putting it another way, to jump from the conclusion that the defendant has lied to the further conclusion that he must therefore be guilty…"*[2]

    In this case, the lie attributed to the appellant was that he was being untruthful when he denied Ag. Sgt. Piggot's assertion that he, the appellant, had given a pre-trial statement. That denial was put through cross examination. The judge directed the jury that if they accepted the prosecution's evidence it meant that the accused had lied by his denial but that did not mean they could simply convict him since a lie could be motivated by reasons other than guilt. The judge made a fundamental error when he fell into the very trap which he warned the jury about when he told them that what is put is not evidence. Therefore an accused, by having something put to the opposing witness on his behalf, cannot be taken to have lied because the witness rejects it.

17. We agree with Counsel's submission that a Lucas direction had no place in this trial. A *Lucas* direction is given where lies are relied on by the prosecution as supportive of guilt and the following conditions exist:

    a. The lie was deliberate;
    b. The lie relates to a material issue;
    c. The motive for the lie was a realization of guilt and a fear of the truth; and
    d. The statement has been clearly shown to be a lie by admission or by evidence from an independent witness.

    None of these circumstances existed in the instant case and therefore a Lucas direction ought not to have been given at all. The judge having given the direction, improperly opened the door for them to find that either 1) the appellant had lied but for an innocent

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[2] Middleton [2001] Crim LR 251 (CA) Judge LJ

reason, in which case they were directed to pay no attention to lie, or that 2) he had lied and there was no innocent explanation for it, in which case they were bound to follow the rest of the direction and use the appellant's denial of making the statement as proof of guilt. Either conclusion would have been entirely inappropriate since nothing in the evidence gave rise to the question whether the appellant had 'lied' at all in *Lucas* terms. This direction therefore created a risk of prejudice to the appellant. Accordingly, we find merit in these grounds.

**Ground 2 – The learned trial judge erred by failing to comply with the proper procedural requirement of taking majority verdicts**

18. Counsel for the appellant submitted that the trial judge erred in recalling the jury before the expiration of the statutory four hour period. He further submitted that the trial judge ought to have sent the jury back to deliberate further in order to ascertain whether it was possible for them to reach a unanimous verdict. Additionally, he submitted that the judge erred procedurally by failing to receive and enter the majority verdict before the jury were asked what was the position of the majority.

19. Counsel for the respondent submitted that a trial judge has a discretion with respect to receiving and entering the majority verdict of a jury. In this case, it can be inferred that the trial judge saw no useful purpose in extending the time for deliberation and exercised his discretion to receive the majority verdict. This was procedurally correct and did not prejudice the appellant.

20. Section **28 of the Jury Act Chapter 6:53** as amended states:

> *(1) Except in trials for murder or treason, when a jury have been charged and have retired, if at the end of* <u>*three hours*</u> *after such retirement the foreman of the jury states to the Judge that seven of the jury are agreed upon a verdict, the verdict of such seven may, at the discretion of the Judge, be received and entered, and if seven are not so agreed, or if the Judge does not think fit to accept the verdict of seven, then the jury may be further directed to retire. However, when the array comprises only eight jurors as contemplated by section 19(3), the verdict of six jurors may, at the discretion of the Judge, be received and entered.*

...

*(3) The Judge may, on being satisfied that there is no reasonable probability that the jury will arrive at a verdict, discharge the jury at any time after the expiration of four hours from the moment of their first retirement."*

21. In this case the jury deliberated for three hours. When they were recalled the foreman indicated that they were divided 8 to 1. The statutory time limit for the acceptance of a majority verdict is three hours. When this time has elapsed the judge may, in his discretion, send the jury to deliberate further. Upon the expiration of four hours, the judge may discharge the jury if he is of the view that the jury will not arrive at a verdict by majority or unanimity.

22. The judge was entitled to accept the majority verdict of the eight when the jurors returned. Counsel for the appellant conceded that it was in the judge's discretion to further retire the jury. In this case however, the judge chose not to do so and no complaint can be made of that decision. The procedure for accepting the majority verdict was triggered after the expiration of three hours when the trial judge enquired how they were divided and the foreman replied "8 to 1". The clerk's subsequent enquiry into the majority's view to guilt formed part and parcel of the process and was contemporaneous with the judge's receipt and recording of the majority verdict. In our view, that procedure did not violate the statutory requirements nor cause the appellant to suffer prejudice or unfairness.

23. The complaint of counsel for the appellant that the judge should have ascertained the position of the majority before receiving and entering a majority verdict is entirely untenable. It would leave the judge open to an accusation that he disagreed with the majority position, if having heard it, he sent them back to deliberate further. Since a majority verdict is open to both a guilty and not guilty finding, then, wherever the majority may lie, the judge must accept that position once he accepts the majority verdict. We accordingly dismiss this ground.

**Ground 3 – The judge erroneously stated that the medical evidence showed that sexual intercourse or a firm object was in the virtual complainant's vagina hours before the examination**

24. Counsel for the appellant submitted that the medical report stating that there was evidence of sexual intercourse or of a firm object in the virtual complainant's vagina did not advance any opinion as to how recently the intercourse took place. Therefore, the judge erred when he stated that the report spoke to the virtual complainant having intercourse hours before she was examined. This error was compounded when the judge failed to deal with the virtual complainant's testimony that she had been sexually active previously. That evidence was never explored and the jury were directed not to speculate about it. Counsel submitted that the medical evidence was not helpful as to whether this previous sexual activity may have been the source of the report's findings and not necessarily attributed to the appellant.

25. Counsel for the respondent submitted that the judge was merely referencing the timeline between the examination of the virtual complainant and the time of the incident. Given that the virtual complainant was examined on the same day of the incident, the judge's remarks, although superfluous, were designed to put in focus, the time when both incidents happened in order to assist the jury. This, he submitted, was in no way unfair or prejudicial to the appellant's case.

26. The impugned passage of the Judge's summation is as follows:

> *"I must also warn you that the findings contained in the medical report and the certificate of analysis do not point or support the guilt or innocence of the accused, Clint Melville, on the charge for which he is before this court. The Medical report, if you accept the findings of Dr. Telfer, speak to having had sexual intercourse or having had a firm object in her vagina hours before the examination on the 23rd February, 2008; that is what it speaks to.*
>
> *…*

> *If you accept the expert evidence, as contained in the medical report of Dr. Telfer, and in the certificate of analysis signed by Mandisa Joseph, you must consider its contents in your assessment of the evidence of S A. You will consider the weight you give such expert evidence when assessing the evidence of S A, bearing in mind that the medical examination was conducted hours after the alleged incident and bearing in mind her evidence that the accused used a condom."*[3]

The judge was wrong to tell the jury that the medical report certified that the insertion into the vagina happened hours before the virtual complainant was examined. The medical report did not in fact put a time at which intercourse may have taken place. The error may have incorrectly led the jury to believe that it was proof of recent insertion of some object into the virtual complainant's vagina. However, the judge did specifically warn the jury that the medical report did not point to or support the guilt or innocence of the appellant. In fact it was neutral on this issue.

27. Since the exculpatory statement was capable of being interpreted to mean that no sexual intercourse had taken place as well as that the appellant did not have sexual intercourse with her, the danger was that the jury might have been misdirected into accepting that there was an insertion into the virtual complainant's vagina whether hours before or shortly before her complaint. The medical report does not bear this out as it gives no timeline. This by itself may not have been fatal to the appellant's conviction but when put together with the other shortcomings noted in respect of the good character direction we cannot comfortably feel that the direction caused no prejudice to the appellant.

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[3] Summation Pg 23 Lns 20 – 29; 39 - 48

**Disposition**

28. For the reasons set out above, we allow the appeal and quash the appellant's conviction and sentence. In the circumstances of this case, and having regard to the principles set out in **Reid v R (1978) 27 WIR 254** we think it is appropriate to order a retrial, and so do.

**Dated: 9th June 2016**

P. Weekes

Justice of Appeal

A. Yorke - Soo Hon

Justice of Appeal

M. Mohammed

Justice of Appeal