CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2012/0034

BETWEEN:

THE ATTORNEY GENERAL OF SAINT LUCIA

Appellant

and

KAIM SEXIUS

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal

Appearances:

Mr. Deale Lee, Senior Crown Counsel, for the Appellant[1]
Mr. Andie George, with him, Mr. Ermin Moise, for the Respondent

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2013: December 17;
2014: October 27.

Civil appeal – Defendant's right to pre-trial silence – Disclosure – Adverse inferences – Constitutionality of ss. 909 and 912(1) of Criminal Code and rule 11.1(3)(c) of Criminal Procedure Rules – Defence statement to be given to prosecutor prior to commencement of trial pursuant to s. 909 of Criminal Code – Possibility of adverse inferences being drawn pursuant to s. 912(1) of Criminal Code if defendant fails to provide defence statement – Whether fundamental rights of defendant provided by s. 8 of Constitution violated by ss. 909 and 912(1) of Criminal Code and rule 11.1(3)(c) of Criminal Procedure Rules – Whether learned judge erred in concluding that ss. 909 and 912(1) of Criminal Code together with rule 11.1(3)(c) of Criminal Procedure Rules were incompatible with section 8(1) of Constitution – Whether learned judge erred in not exercising her discretion to sever offending aspects of ss. 909 and 912(1) of Criminal Code and rule 11.1(3)(c) of Criminal Procedure Rules

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[1] Mr. Raulston Glasgow, Solicitor General, Mr. Deale Lee and Ms. Cagina Foster-Lubrin, Crown Counsel, all contributed to the written submissions.

The respondent had been charged with attempted murder. At a case management hearing in preparation for trial, the trial judge ordered the respondent to file and serve a defence statement on the Office of the Director of Public Prosecutions pursuant to section 909 of the Criminal Code[2] and rule 11.1(3)(c) of the Criminal Procedure Rules.[3] The respondent did not comply with this order. At a further case management hearing, the learned judge reiterated his order concerning the defence statement, making clear to the respondent that should he fail to file this statement, then adverse inferences may be drawn by the court in accordance with section 912(1) of the Criminal Code.

The respondent subsequently filed a constitutional motion, challenging the constitutionality of sections 909 and 912(1) of the Criminal Code. He sought various declarations and orders, which included: a declaration that section 909 was unconstitutional and infringed his rights under sections 8(1) and 8(7) of the Constitution; a declaration that he ought not to be mandated to file a defence statement in keeping with his constitutional right to silence; a declaration that the defence statements required by rule 11.1(3)(c) of the Criminal Procedure Rules are not mandatory; an order that the order of the learned trial judge be stayed pending final determination of the matter.

The constitutional matter came before another judge who upheld the respondent's contentions that sections 909 and 912(1) of the Criminal Code individually, and rule 11.1(3)(c) of the Criminal Procedure Rules were incompatible with section 8(1) of the Constitution which provided for the right to a fair trial and with section 8(2)(a) of the Constitution which mandates that an accused person is presumed innocent. The judge accordingly declared sections 909 and 912(1) of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules null and void.

The appellant appealed the learned judge's decision on the basis that she erred in her application and conclusions of law. The appellant contended, inter alia, that the learned judge erred in law by failing to consider that a fair trial is one that is fair to both the accused and the virtual complainant, and that the purpose of the defence statement required by section 909 of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules is to make the prosecution of criminal matters fairer by reducing the instances of trial by ambush which provides an unfair advantage to the accused. The appellant further contended that the learned judge erred in finding that the inference that may be drawn under section 912 breached an accused's right to silence at trial provided by section 8(7) of the Constitution. In so doing, she failed to consider that an inference could be drawn only in appropriate circumstances, and that the inference to be drawn and the weight to be given to it are subject to the control of the trial judge who would be obliged to direct the jury appropriately.

[2] Cap. 3.01, Revised Laws of Saint Lucia 2008.
[3] Cap. 3.01, Revised Laws of Saint Lucia 2008.

Held: allowing the appeal and ordering that each party bear his own costs, that:

1. The sections of the Criminal Code impugned by the trial judge in no way undermine the fundamental right in securing a just determination of criminal proceedings. The requirement for defence disclosure of the issues in dispute at the pre-trial stage is consistent with the right to a fair trial and therefore, is not incompatible with section 8 of the Constitution. It serves primarily to identify and narrow the issues as part of the disclosure process which should ultimately lead to efficiency in the trial process. It does not violate the presumption of innocence since it does nothing to alter the burden of proof in a criminal case, which remains on the prosecution. It in no way detracts from an accused to remain silent, if he so desires. Requiring the accused to state how much of the prosecution's case he disputes does not amount to indirectly forcing him/her to incriminate himself. The learned judge accordingly erred in concluding that sections 909 and 912(1) of the Criminal Code, together with rule 11.1(3)(c) of the Criminal Procedure Rules are incompatible with section 8(1) of the Constitution.

   John Murray v United Kingdom (App. No. 18731/91) [1996] 22 EHRR 29 applied; Regina v John Vincent Gleeson [2003] EWCA Crim 3357 applied; Regina v Gavin Rochford [2010] EWCA Crim 1928 applied; John Barclay and Others v Her Majesty's Advocate [2012] HCJAC 47 applied; Regina v Daha Essa [2009] EWCA Crim 43 applied; Regina (Sullivan) v Crown Court at Maidstone [2002] 1 WLR 2747 applied.

2. The legislature has provided numerous safeguards to ensure that the accused receives a fair trial. In relation to the drawing of adverse inferences, the trial judge has total control over this aspect of the trial. There are a number of critical directions that any judge in a criminal trial must give to the jury to ensure that the trial is fair. The trial judge has the discretion to determine whether leave should be granted to the prosecution to make adverse comments on the accused's failure to provide a defence statement. In particular, a major safeguard is provided by section 912(2) of the Criminal Code itself, which states that a person shall not be convicted of an offence solely on an adverse inference that is drawn under section 912(1).

   John Murray v United Kingdom (App. No. 18731/91) [1996] 22 EHRR 29 applied; Regina v Daha Essa [2009] EWCA Crim 43 applied.

3. In Saint Lucia, the pre-trial right to silence is a common law right which is encapsulated in the fair trial provisions of the Constitution rather than a standalone constitutional right, as is the case in some other jurisdictions.

   S v Thebus and Another 2003 (6) SA 505 (CC) distinguished.

JUDGMENT

[1] BLENMAN JA: The Criminal Code[4] was amended so as to include section 909 which makes provision for an accused person to give the prosecution a defence statement. The amendment also included section 912 which enables the court or, with the leave of the court, any other party, to make such comment as appears appropriate, or the court or jury may draw such inferences as appear proper where the accused person has failed to give a defence statement.

[2] This appeal raises the important question of the constitutionality of sections 909 and 912(1) of the Criminal Code. It also seeks to have a determination made as to whether rule 11.1(3)(c) of the Criminal Procedure Rules[5] is mandatory and therefore unconstitutional. In addition, it raises the important question of whether the pre-trial right to silence is a fundamental right that is protected by section 8 of the Constitution of Saint Lucia[6] ("the Constitution").

[3] I will now briefly refer to the relevant background.

Background

[4] Mr. Kaim Sexius was charged with the attempted murder of Mr. Janick Henry. Sufficiency hearings and case management conferences were conducted in the case on 26th February 2010, 12th April 2010 and 20th September 2010.

[5] During the case management hearing of 12th April 2010, the learned trial judge, Mr. Justice Kenneth Benjamin, acting pursuant to section 909 of the Criminal Code, ordered Mr. Sexius to file and serve a defence statement on the office of the Director of Public Prosecutions. Mr. Sexius did not comply with the court's order. On 20th September 2010, at a further case management hearing, the learned judge reiterated his order that Mr. Sexius should file a defence statement

[4] Cap. 3.01, Revised Laws of Saint Lucia 2008.
[5] Cap. 3.01, Revised Laws of Saint Lucia 2008.
[6] Cap. 1.01, Revised Laws of Saint Lucia 2008.

and serve it on the office of the Director of Public Prosecutions. The judge also intimated to Mr. Sexius that should he fail to file the defence statement adverse inferences may be drawn by the court in accordance with section 912(1) of the Criminal Code

[6] On or about 8th October 2010, Mr. Sexius filed a constitutional motion in which he challenged the constitutionality of sections 909 and 912(1) of the Criminal Code. He sought the following declarations and orders:

(a) A declaration that section 909 of the Criminal Code is unconstitutional and infringes his rights under sections 8(1) and 8(7) of the Constitution;

(b) A declaration that he ought not to be mandated to file a defence statement in keeping with his constitutional right to silence;

(c) A declaration that the defence statements required by rule 11.1(3)(c) of the Criminal Procedure Rules are not mandatory;

(d) A declaration that the drawing of any adverse inferences with or without the leave of the court pursuant to section 912(1) of the Criminal Code by any party to criminal proceedings as a result of failing to file and serve a defence statement is incompatible with the protection afforded to him under the Constitution;

(e) A declaration that the disclosure obligations placed on the prosecution ought not to be subject to him making a defence statement;

(f) A declaration that he ought not to be obliged to make a defence statement pursuant to section 909 of the Criminal Code;

(g) An order that the order made by the Honourable Justice Kenneth Benjamin for him to file and serve a defence statement in Case No. 646 of 2009 be stayed until final determination of this matter;

(h) Any further order or declaration which the court deems fit;

(i) That the defendant bears the cost of this claim.

[7] The constitutional motion was heard by another judge who upheld the contentions of Mr. Sexius that sections 909 and 912(1) of the Criminal Code individually and, also, rule 11.1(3)(c) of the Criminal Procedure Rules are incompatible with section 8(1) of the Constitution which provided for the right to a fair trial and section 8(2)(a) of the Constitution which mandates that an accused person is presumed innocent. As a consequence of these incompatibilities the learned judge declared that sections 909 and 912(1) of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules were null and void. Costs were ordered to be agreed on or before 30th October 2012 and thereafter to be referred to the court within 30 days for decision.

[8] The Attorney General of Saint Lucia, being dissatisfied with the judgment, has appealed on the basis that the learned judge erred in her application and conclusions of law. Towards this end, the Attorney General has filed the following five grounds of appeal in the challenge of the judgment, namely:

(1) The learned trial judge erred in law in that she failed to recognise that the pre-trial right to silence is not a fundamental right enshrined under section 8 of the Constitution and is therefore subject to amendment or abrogation by legislation.

(2) The learned trial judge erred in law by misdirecting herself or failing to consider:

(a) That a fair trial is a trial that is fair to both the accused and the virtual complainant.

(b) That the purpose of the defence statement required by section 909 of the Criminal Code and rule 11.1(3)(c) of the Criminal

Procedure Rules is to make the prosecution of criminal matters fairer by reducing the instances of trial by ambush which provides an unfair advantage to the accused.

(3) The learned trial judge erred in law and misdirected herself in finding that the inference that may be drawn under section 912 of the Criminal Code breached an accused's right to silence at trial pursuant to section 8(7) of the Constitution. In so doing, the learned judge failed to consider:

(a) That an inference could only be drawn in appropriate circumstances i.e. where the accused had sought to raise a defence at trial and not where the accused had been silent.

(b) That the inference drawn and the weight to be given to it are subject to the control of the trial judge who would be obliged to direct the jury appropriately.

(4) The learned trial judge erred in law in not considering or failing to adequately consider the highly persuasive authority of Regina v Daha Essa[7] which established the compatibility of the drawing of adverse inferences against a defendant who failed to give a defence statement with the right to a fair trial.

(5) The learned trial judge erred in law in that she failed to exercise her discretion properly or at all to sever parts of sections 909 and 912 of the Criminal Code so as to render the remaining provisions and rule 11.1(3)(c) constitutionally permissible.

[9] In view of the fact that the appeal deals only with issues of law, with the consent of the parties, the appeal proceeded by way of a summary appeal pursuant to rule 62.6(1) of the Civil Procedure Rules 2000 ("CPR 2000").

[7] [2009] EWCA Crim 43.

I will now briefly refer to the relevant Statutory Framework.

[10] Section 1 of the Constitution provides as follows:

> "Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely–
>
> (a) life, liberty, security of the person, equality before the law and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association;
> (c) protection for his or her family life, his or her personal privacy, the privacy of his or her home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

[11] Section 8(1) of the Constitution stipulates:

> "(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[12] Section 8(2)(a) of the Constitution states:

> "8(2) Every person who is charged with a criminal offence–
> (a) shall be presumed to be innocent until he or she is proved or has pleaded guilty;"

[13] Section 8(7) of the Constitution states:

> "(7) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial."

[14] Section 16(1) of the Constitution states:

> "(1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained,

if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

[15] Section 120 of the Constitution states:

> "This Constitution is the supreme law of Saint Lucia and, subject to the provisions of section 41, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

[16] Section 909 of the Criminal Code states:

> "(1) Subject to any guidelines as the Director of Public Prosecutions may from time to time issue, at the trial of an accused for an offence, the accused shall, where the prosecutor has complied with section 908 give a defence statement to the prosecutor; and to the Court.
>
> (2) For the purposes of this section a defence statement is a written statement–
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> (a) setting out in general terms the nature of the accused's defence;
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> (b) indicating the matters on which he or she takes issue with the prosecution; and
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> (c) setting out in the case of each such matter, the reason why he or she takes issue with the prosecution.
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> (3) If the defence statement discloses a special defence, the accused must give particulars of the defence in the statement, including–
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> (a) the name and address of any witness the accused believes is able to give evidence in support of the special defence if the name and address are known to the accused when the statement is given;
>
> (b) any information in the accused's possession which might be of material assistance in finding any such witness, if his or her name and address are not given.
>
> (4) The defence shall make a defence statement as soon as is practicable after the prosecution complies or purports to comply with section 908 or section 913 as the case maybe [sic]."

[17] Section 912 of the Criminal Code states:

> "(1) Where the defence–
> (a) fails to give a defence under section [909];
> (b) gives a defence after undue delay following the disclosure by the prosecution;
> (c) sets out inconsistent defences in a defence statement given under section 909;
> (d) at his or her trial puts forward a defence which is different from any defence set out in a defence statement given under section 909;
> (e) at his or her trial, adduces evidence in support of a special defence without having given particulars of the defence in a statement given under section 909;
> (f) at his or her trial, calls a witness in support of a special defence without having complied with section 909(3),
> the Court or, with the leave of the Court, any other party, may make such comment as appears appropriate or the Court or jury may draw such inferences as appear proper in deciding whether the accused committed the offence concerned.
>
> (2) A person shall not be convicted of an offence solely on an inference drawn under subsection (1)."

[18] I will now address the grounds of appeal which I have conveniently crystalised as follows:

1. (a) Whether the pre-trial right to silence is a constitutional right.
   (b) If so, whether the learned trial judge erred in concluding that sections 909 and 912(1) of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules violated the constitutional right to silence.

2. Whether the learned trial judge erred in concluding that sections 909 and 912(1) of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules were incompatible with article 8(1) of the Constitution.

3. Whether, in the circumstances, the learned trial judge erred in not exercising her discretion to sever the offending aspects of sections 909

and 912(1) of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules.

Ground 1

Whether the pre-trial right to silence is a constitutional right. If so, whether the learned trial judge erred in concluding that sections 909 and 912(1) of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules violated the constitutional right to silence.

Appellant's Submissions

[19] Learned Senior Crown Counsel, Mr. Deale Lee, submitted that the learned trial judge erred in holding that the 'right' to pre-trial silence is a fundamental right and therefore accorded it undue constitutional protection especially in the face of the criminal procedure reforms intended by sections 909 and 912(1) of the Criminal Code. The 'right to pre-trial silence' is one of six rights to silence which exist at common law.[8] These rights predated the creation of the Constitution and it must be presumed that the framers of the Constitution were well aware that they constituted independent rights. The right to pre-trial silence (and right to silence on arrest and charge) is contained in ordinary statute and is therefore liable to amendment or abrogation and subject to its effect on a fair trial, abolition. To this end, Senior Crown Counsel, Mr. Lee, referred the Court to section 584(2)(a) of the Criminal Code.

[20] Mr. Lee posited that the European Court of Human Rights, in John Murray v United Kingdom (App. No. 18731/91),[9] was called upon to adjudicate on the compatibility of drawing an adverse inference based on the silence of an accused with his right to a fair trial under Article 6 of the European Convention on Human Rights ("the European Convention"). The Court noted that the common law rights to silence, including a pre-trial right to silence, formed part of the right to a fair trial, however, these rights were not absolute. In the circumstances of that case they

[8] See Regina v Director of Serious Fraud Office, Ex parte Smith [1993] AC 1 per Lord Mustill.
[9] [1996] 22 EHRR 29.

found that the drawing of an adverse inference did not violate the right to a fair trial.

[21] Learned Senior Crown Counsel, Mr. Lee, submitted that in Saint Lucia, the question of a pre-trial right to silence must be addressed in the context of the right to a fair trial. The focus of the court's consideration therefore has to be on the process surrounding the provision of the defence statement, its use and whether sufficient judicial safeguards exist to ensure that the accused in a criminal matter receives a fair trial. He argued that the judicial system in Saint Lucia is adversarial in nature; each party is entitled to challenge and contest the contentions of the other. In this adversarial system the fact that the prosecution has advance notice of the accused's defence does not automatically render the process unfair, particularly since the burden of proof remains on the prosecution. The role of the judge in the process must also be borne in mind, as the judicial officer is the one who will determine the sufficiency of the disclosure by the accused, whether comment can be made on the defence statement and whether adverse inferences can be drawn. The trial judge's function is to ensure the fairness of the defence disclosure process and by extension, its constitutionality.

[22] Mr. Lee submitted that the right to silence on arrest is to guard the accused from self-incrimination in the midst of the investigation and under the pressure of questioning and detention. The right to silence at trial exists to preserve the presumption of innocence and ensure that the burden of proof remains on the prosecution. It also protects the accused from self-incrimination during the pressures of trial. Disclosure of an intended defence however is a more dispassionate exercise and takes place after the accused would have determined how to conduct his defence. Contrary to the position taken by the trial judge and Mr. Sexius, there is nothing in section 909 of the Criminal Code prohibiting the accused from indicating that his defence will be that the prosecution has failed to discharge its burden of proof or that he intends to invoke his constitutional right to remain silent at trial; the accused is not forced to make any admissions. As the

court in Johnny Williams v State of Florida[10] noted, the effect of pre-trial defence disclosure is merely to accelerate the timing of disclosure where the accused has already decided to break his silence.

[23] Mr. Lee said that it also bears noting that Mr. Sexius treats the defence statement as evidence rather than as a pleading (which is what it is); Mr. Sexius, without more, concludes that the involvement of the accused in the process of identifying the issues to be addressed at trial must of necessity involve admissions and therefore the incrimination of the accused. This position again ignores the role of the judge in forestalling any undue prejudice to the accused and ignores the actual provisions of section 909.

Respondent's Submissions

[24] Learned counsel, Mr. Andie George, submitted that an accused's right to silence exists primarily at 2 stages. These include the pre-trial stage and finally the trial stage. The right of an accused person to remain silent prior to court proceedings exists at common law. Mr. George stated that in so far as it relates to the right of an accused person to remain silent at the point of arrest and questioning, that right has been codified by the Criminal Code. The rights of the accused at this stage are outlined generally in section 584(2) of the Criminal Code which states as follows:

> "(2) If a person arrested is to be questioned, he or she shall be informed—
> (a) that the person has the right to remain silent, without such silence being a consideration in the determination of guilt or innocence; and
> (b) of their rights under section 589; and
> (c) that the person has a right to be questioned in the presence of a lawyer unless the person voluntarily waives the right to counsel;
> …"

[10] 399 US 78; 90 S.Ct 1893, 26 L.Ed.2d 446 (1970).

On a close examination of the relevant sections of the Criminal Code, it is obvious that the rights contained in section 584 are not the rights which are affected by the provisions of sections 909 and 912 of the Criminal Code. This right to silence referred to in section 584 of the Criminal Code is limited to circumstances were an accused is arrested and/or questioned for an offence. Sections 909 and 912 do not address this right in any way.

[25] Mr. George, however, advocated that the right to silence at the stage of arrest and questioning by the police is also linked to the accused's right to a fair hearing as well as his privilege against self-incrimination, separate and apart from the distinct right created or defined by section 584 of the Criminal Code. He also referred the Court to John Murray v United Kingdom (App. No. 18731/91) which (as mentioned above in paragraph 20) concerned the compatibility with Article 6 of the European Convention and a rule which permitted a trial court to draw adverse inferences from a failure of a defendant to answer police questions before trial and to give evidence at trial. The Court held at paragraph 45 of its judgment that:

> "Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 … By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6."

[26] Mr. George reminded the Court that the right to a fair hearing in Saint Lucia is found in section 8(1) of the Constitution. Further, section 8(7) of the Constitution states that '[a] person who is tried for a criminal offence shall not be compelled to give evidence at the trial' The latter provision encompasses an accused's right against self-incrimination by ensuring that there is no improper compulsion forcing him to break his silence. Learned counsel, Mr. George, therefore argued that the appellant is incorrect in arguing that the pre-trial right to silence as contained in

section 584 of the Criminal Code is a mere statutory right subject to amendment or abrogation by legislation. This right, though contained in the Criminal Code, is enshrined in the Constitution as it relates directly to the accused's right to a fair hearing and the right not to be compelled to give evidence at his trial. If the police are capable of forcing an accused to speak at the point of questioning then this results in compelling him to give evidence which is available to be used at his trial. As such, these rights cannot be merely amended or abrogated in the manner proposed by the appellant. Mr. George maintained that the accused in a criminal trial also has a right to silence during the course of his trial as confirmed by sections 8(1) and (7) of the Constitution. Further to this, under section 8(2) of the Constitution the accused is also deemed to be innocent until proven guilty. Mr. George therefore contended that sections 909 and 912(1) of the Criminal Code have infringed the right to silence. To further support his proposition, learned counsel referred to the dicta of Moseneke J in the South African case of S v Thebus and Another[11] where Moseneke J stated that the right to remain silent before and during trial and to be presumed innocent are important interrelated rights aimed ultimately at protecting the fundamental freedom and dignity of an accused person. Moseneke J went on to state that 'an obligation on an accused to break his or her silence or to disclose a defence before trial would be invasive of the constitutional right to silence'.[12]

[27] Mr. George pointed out that an assessment of rule 11.1(3)(c) of the Criminal Procedure Rules reveals that the obligation of the accused to file and serve a defence statement takes place at the case management stage prior to the commencement of the trial. He reminded the Court of rule 11.1(3)(c) of the Criminal Procedure Rules which states that:

> "(3) At the case management conference, the judge shall make an order scheduling further events in the case, including:
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> …

[11] 2003 (6) SA 505 (CC).
[12] para. 58.

(c) the date by which the defendant must give the defence statements required by law;"

Mr. George submitted therefore that the only defence statement which is required by law is one which ought to be given at the trial as outlined in section 909(1) of the Criminal Code. However, rule 11.1(3)(c) seeks to give the power to the court at the case management stage, that is, prior to trial, to make an order for disclosure by the defence.

[28] Learned counsel, Mr. George, argued that the basis for disclosing the defence statement prior to the trial can only be for the assistance of the prosecution or the defence during the course of the trial. As such, the disclosure of the defence statement is an obligation forced upon the accused to make a statement which can be used for or against him during the course of the trial. This, he submitted, amounts to compelling the accused to give evidence either before or at his trial and is a direct infringement of section 8(7) of the Constitution. If the appellant is correct, it appears that the right to silence is granted during the police investigative stage and at the time of the actual trial but somewhere in between the court is empowered to take away that right as a result of an order during the case management stage mandating that the accused give a defence statement. This, Mr. George posited, makes a mockery of the intent and purpose of the fundamental and enshrined principles inherent in the right to silence.

[29] Mr. George contended that the trial judge was correct in her findings at paragraph 57 of her judgment when she opined:

> "There can be no doubt that the right to silence at arrest (section 584(2) of the Criminal Code) and the right not to be compelled to give evidence at his own trial (section 8(7) of the Constitution) are linked as both seek to protect the Claimant against self-incrimination."

[30] Learned counsel, Mr. George, argued further that it would serve no useful purpose to enshrine a right against the compulsion of the accused to give evidence at his trial and then undermine that right by compelling him to provide any statement or

such a detailed statement prior to the trial which can then be used against him during the course of the trial. Mr. George therefore submitted that sections 909 and 912(1) of the Criminal Code along with rule 11.1(3)(c) clearly infringe the right of the respondent under section 8(7) of the Constitution. In so far as that is the case, he submitted that the learned judge was correct when she found that a pre-trial right to silence was a fundamental right enshrined in section 8 of the Constitution of Saint Lucia.

Discussion and Analysis

[31] At the outset, it is important to reiterate that the gravamen of this appeal lies in the issue of whether or not the disclosure provisions as stated in section 909 of the Criminal Code violate the fundamental rights of an accused person as provided by section 8(1) of the Constitution. Also it brings into question the constitutionality of sections 912(1) of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules vis a vis section 8(7) of the Constitution.

[32] Even though section 909(1) of the Criminal Code refers to 'at the trial' it is clear that the stage at which disclosure provisions apply (as provided in section 909) is before the trial. It is at the case management stage of the trial and this is after the sufficiency hearings would have been completed. The learned judge correctly characterised the disclosure process as being part of the pre-trial stage. The concept of the pre-trial stage which crept into the trial below is a discrete stage of the trial process that has been recognised by the legislature even though in the Criminal Code the word pre-trial was not used. It must be borne in mind that when the Constitution was enacted there was no requirement for an accused person to provide a defence statement. In fact, the reforms to the Criminal Code had not been implemented and perhaps not even contemplated. Neither was the notion of the accused providing any information apart from special defences known to law. This is an entirely new regime which replaces the need to have preliminary enquiries et cetera and to modernise the criminal process.

[33] In addition, there was no case management of criminal cases as we now know it and therefore there was no holding of a case management conference as stipulated by rule 11.1(1) of the Criminal Procedure Rules. Indeed, the Criminal Procedure Rules, by virtue of section 11.1(1) empowers the judge to make case management orders after the accused person has pleaded to the charge on which he is to be tried. This reinforces the fact that it is a critical part of the pre-trial process and is plainly no more than the trial judge seeking to narrow the issues before the actual trial begins.

[34] It is common ground that the Constitution clearly indicates at section 8(7) that a person who is to be tried for a criminal offence shall not be compelled to give evidence at the trial. This is a fundamental right. Equally, section 120 of the Constitution stipulates that the Constitution is the supreme law of Saint Lucia, and subject to the provisions of section 41 of the Constitution, if any other law is inconsistent with the Constitution, that law will be void to the extent of its inconsistency.[13] There is nothing in the Constitution which indicates that the right to silence is a fundamental right. The right to silence as a general rule is a common law right.[14] However, it is accepted that the right of an accused person to remain silent on arrest and on being charged are not constitutional rights and neither are they fundamental rights. One thing is clear, the accused's right to remain silent at trial is not a standalone fundamental right.[15] It does not appear that the trial judge made any such pronouncement in her judgment even though she discussed several cases on the right to silence. Further, it does not appear that the trial judge held that the ability to draw adverse inferences breached the accused's constitutional right to silence. Despite a careful perusal of the judgment it is clear that the trial judge made no such finding, namely that there was a

[13] See Moses Hinds and Others v The Queen [1977] AC 195; (1975) 24 WIR 326; and Fisher v Minister of Public Safety and Immigration and Others (1997) 52 WIR 1.
[14] See Regina v Director of Serious Office, Ex parte Smith [1993] AC 1.
[15] See section 8(1) of the Constitution.

violation of the accused's fundamental right to silence. Rather the right to silence point was treated as an aspect of a fair trial. Accordingly, I would dismiss this ground of appeal.

[35] It is noteworthy that the learned trial judge did not invalidate the sections of the Criminal Code on the basis that they violated the right to silence but rather on the basis that they offended the fair trial provisions of the Constitution. Accordingly, that submission by both learned counsel is plainly incorrect. The learned trial judge had this to say at paragraph 62 of the judgment:

> "The threat of self incrimination is indeed a very real one and for these reasons the Court believes the Claimant's right to a fair hearing as provided for at section 8(1) of the Constitution and to be presumed innocent as per section 8(2)(a) would be breached if he was to prepare a defence statement pursuant to section 909 of the Criminal Code and or upon failure to do so then pursuant to section 912 be subjected to the pain of comments or inferences being drawn from his silence and which silence could ably assist the Prosecutor without him necessarily having proved his case beyond a reasonable doubt."

[36] Also, I am unable to find any statement in the judgment which indicates that the learned trial judge held that the inferences that may be drawn pursuant to section 912(1) breached an accused's right to silence as provided by section 8(7) of the Constitution. In so far as this was also a ground of appeal, it would, in my view, also fail.

[37] I now turn to address ground 2.

Whether the learned trial judge erred in concluding that sections 909 and 912(1) of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules were incompatible with section 8(1) of the Constitution.

Appellant's Submissions

[38] Learned Senior Crown Counsel, Mr. Lee, reiterated that if the Court accepts that the pre-trial right to silence is not a fundamental right but rather receives constitutional protection to the extent that it safeguards an accused's right to a fair

trial, then limitations on this 'right' are not automatically repugnant to the Constitution. He referred the Court to the judgment of the Caribbean Court of Justice in Frank Errol Gibson v The Attorney General[16] where the court quoted McLachlin CJ in the Canadian case of R v Harrer:[17]

> "At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community … A fair trial is one that satisfies the public interest in getting at the truth …"

[39] Learned Senior Crown Counsel submitted that the learned trial judge was of the opinion that there was a high risk of self-incrimination, and that consequently rendered the provisions requiring the preparation of defence statements unconstitutional. This position however fails to recognise that whether a trial is fair is a matter to be determined in each case. This can be seen in the enunciation of Lord Mustill where, in examining the operation of the immunity against self-incrimination in Regina v Director of Serious Office, Ex parte Smith,[18] he noted the privilege against self-incrimination as 'deep rooted in English law … Nevertheless it is clear that statutory interference with the right is almost as old as the right itself.'[19] For example the requirement of notice of alibi has been a long standing exception to the 'right' to pre-trial silence.

[40] Also, the US Supreme Court in Johnny Williams v State of Florida, in addition to finding that the privilege against self-incrimination is not violated by the requirement that an accused give notice of an alibi and disclose his alibi witnesses, noted that this rule only compelled the petitioner to accelerate the timing of his disclosure. The court went on to state that there was nothing in the fifth amendment privilege which entitles an accused as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense. Mr. Lee stated that where an accused intends to put forward a positive

[16] [2010] CCJ 3 (AJ) at para. 38.
[17] [1995] 3 SCR 562 at para. 45.
[18] [1993] AC 1.
[19] At p. 40.

defence it cannot be argued that requiring him to disclose this defence before trial is unfair to him. As noted by the Court in Johnny Williams v State of Florida, even where the accused did not intend to put forward a positive defence the provision of a defence statement need not render the trial unfair; for example the claimant is entitled to state that his defence is that the prosecution has failed to make out the elements of the relevant offence.

[41] Mr. Lee also referred the Court to the case of Regina v Daha Essa[20] where the United Kingdom Court of Appeal heard a challenge to section 11 of the Criminal Procedure and Investigations Act 1996 ("CPIA") (which is identical to section 912(1) of the Criminal Code) on the basis that it infringed the applicant's right to a fair trial under Article 6 of the European Convention. The Court of Appeal in that case found that the section was compatible with the right to a fair trial because it was subject to judicial control. Mr. Lee urged the Court to accept and apply the principles that were stated in Daha Essa. In this regard, he referred the Court to Halsbury's Laws of England[21] which states:

> "the United Kingdom is bound by membership of the European Community and the obligations imposed by ratification of the European Convention on Human Rights, and the other international human rights codes to which the United Kingdom is party".

The decision in Daha Essa represents a consideration of the compatibility of a regime identical to section 912(1) of the Criminal Code and the right to a fair hearing as provided by the European Convention. Senior Crown Counsel submitted that the trial judge should not have, without more, declined to follow this highly persuasive authority. Mr. Lee also complained about the learned trial judge's over reliance on South African cases.

[42] Mr. Lee was adamant that the aim of creating defence disclosure is to make the trial process more efficient. Defence disclosure would enable the parties and the

[20] [2009] EWCA Crim 43.
[21] (4th edn. reissue, 1996) vol. 8(2), para. 2.

court to be better able to identify the matters in issue and therefore more expeditiously deal with issues in the case. The society as a whole has an interest in having criminal matters dealt with more efficiently – it strengthens the confidence and faith of the general populace in the proper functioning of the criminal justice system and by extension, the rule of law. Mr. Lee emphasised that the disclosure requirement as noted by the court in Frank Errol Gibson v The Attorney General would have the effect of removing trial by ambush.[22] It is also well established that the fairness of a trial relates to the procedure adopted during the trial and not the result of the trial i.e. the guilt or innocence of the accused. Where the provision of a defence statement in a particular trial would result in an unfair result it would be incumbent on the court in the particular instance to provide the accused with his constitutional protection.

[43] Mr. Lee further submitted that the learned trial judge erred in law and misdirected herself in finding that the inference that may be drawn under section 912(1) of the Criminal Code breached an accused's right to silence at trial as provided by section 8(7) of the Constitution. An inference is simply a logical conclusion drawn from facts or evidence. As the arbiters of fact in criminal matters, the jury is entitled to draw inferences based on the evidence before them. However the appropriateness of the inference and the weight to be given to it is subject to the control and directions of the judge. Importantly, adverse inferences may only be drawn with the leave of the court. There are some clear occasions where it would not be proper to draw an adverse inference e.g. against an accused who has remained silent at trial – drawing an inference in such a case would violate the accused's right to remain silent at trial. If a trial judge allowed comment in such a situation it would give rise to an appeal as the judge would have failed to exercise his or her discretion judicially. Otherwise, the accused's conduct of his defence is clearly a factor which the jury is entitled to consider in determining the accused's credibility where he has put forward a defence. In any event, section 912(2) of the

[22] See also Hilroy Humphreys v The Attorney General of Antigua and Barbuda [2008] UKPC 61.

Criminal Code stipulates that an accused cannot be convicted solely on an adverse inference. The judge is therefore entrusted with the responsibility of ensuring that the accused is not unfairly prejudiced by the making of comments or the drawing of an adverse inference in relation to his defence statement. The prosecution still has the burden on proof and must discharge its duty of proving the guilt of the accused.

[44] Finally, Mr. Lee stated that sections 909 and 912(1) of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules do not undermine section 8(1) of the Constitution and the trial judge erred in so concluding.

Respondent's Submissions

[45] Learned counsel, Mr. George, submitted that while it is not doubted that the virtual complainant and the public at large have an interest in the proper prosecution of criminal offences, the section upon which Mr. Sexius relies outlines the constitutional rights of an individual who has been arrested and charged for an offence. The right to a fair trial within a reasonable time is outlined in section 8(1) of the Constitution. This right relates specifically to the rights of the accused for he is the only one charged with an offence. Mr. George submitted that this constitutional right does not extend to the virtual complainant and the public at large.

[46] Mr. George argued that Daha Essa is distinguishable from the appeal at bar on the basis that the United Kingdom does not have a written constitution whereas Saint Lucia has a written constitution. Article 6 of the European Convention enshrines the right to a fair hearing; this was brought into force by ordinary legislation in the United Kingdom. However, the requirements for altering entrenched provisions of the Saint Lucia Constitution[23] ensure that the rights of the accused in cases like the present one are not eroded by a simple Act of parliament

[23] Sections 41(2) and (11) of the Constitution clearly outline the manner in which such rights can be altered.

or the passage of criminal procedure rules. The framers of the Constitution were careful to include in section 8(7) a fundamental right for an accused person not to be compelled to give evidence against himself. Sections 909 and 912(1) of the Criminal Code have infringed that right as the wording of section 912(1) creates the avenue for the defence statement, if present, to be introduced into evidence even where the accused fails to testify and seeks to exercise his right to remain silent. In such a circumstance, it is clear that the accused's own words may be used against him to secure a conviction where he chooses not to testify. Counsel contends that this clearly undermines his fundamental constitutional right to innocence until proven guilty, not by himself, but by the prosecution. It further infringes his constitutional right against self-incrimination. Learned counsel, Mr. George, proffered that these rights are merely common law rights in the United Kingdom, unlike the Saint Lucian Constitution where they are entrenched fundamental rights.

[47] Nevertheless, Mr. George sought to place reliance on paragraph 45 of John Murray v United Kingdom which concerned the compatibility with Article 6 of the European Convention:

> "Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 ... By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6."

[48] He also referred the Court to the South African case of S v Thebus and Another in which the learned judge noted that the objective of the right to silence was to secure a fair trial. Mr. George posited that in Saint Lucia the right to remain silent is therefore inherent in the constitutional right of the accused to a fair hearing and is therefore protected under section 8(1) of the Constitution. The trial judge at paragraph 51 of her judgment accepted this submission where she states that '[a]s

the Court understands the authorities, the right to a fair hearing can capture all and anything that would in the eyes of the Court endanger the Claimant's right to a fair hearing at his trial'. Mr. George submitted that by forcing the accused to make and serve a statement, which in effect has the potential of self-incrimination, is an infringement of his right to a fair trial.

[49] Learned counsel, Mr. George, sought to distinguish the case of Johnny Williams v State of Florida from the appeal at bar and said that an accused who is required to provide an alibi defence is in an entirely different position as an accused in that case would have voluntarily waived his right to silence which would in turn have made it mandatory for him to give notice of that intention as well as indicate the persons who he intends to call as witnesses. Further to this, the submission on behalf of the Attorney General that the accused is entitled to state that his defence is that the prosecution has failed to make out the elements of the relevant offence is an incorrect one as what is mandated by the defence statement is in fact very detailed. The accused is obligated to state what issues he takes with the prosecution case and the reasons for taking issue with each particular point. Mr. George contended that sections 912(1)(a) and (c) indicates that adverse inferences can be drawn where the accused fails to give a defence and if the accused sets out inconsistent defences in his defence statement. This clearly points towards the prospect of guilt by silence or self-incrimination. Further, there is nothing in section 912 which indicates that inferences are not to be drawn where the accused remains silent during his trial. He argued that the learned trial judge was correct in her analysis when she found that section 912 envisages a scenario where even though the accused remains silent at the trial, his defence statement can still be used against him.

[50] Mr. George maintained therefore that section 912(1) is an infringement of an accused's right to remain silent in so far as it operates as a form of compulsion to break his silence. On the basis of the foregoing, counsel submitted that the learned trial judge was correct in deciding that section 912 breached the accused's

constitutional rights under sections 8(1), 8(2)(a) and 8(7) of the Constitution. He therefore urged the Court to dismiss the appeal.

Discussion and Analysis

[51] Before an in-depth analysis is undertaken it is important to remember that all of the provisions that have been impugned by the trial judge as violating the fair trial provisions of the Constitution are disclosure provisions.

[52] It is clear that the court and learned counsel for the respondent misapprehended the true nature of the defence statement which section 909 mandates an accused to provide. They seemed to have proceeded from the basis of the general position that the accused is required to provide the evidence upon which he relies in prosecuting his defence. This is far from correct for reasons which will become clearer shortly.

[53] Also, I am unable to agree with the learned trial judge where she stated at paragraph 58 of the judgment that:

> "A truthful defence statement could therefore contain both admissions and denials. By having to set out the contentious issues there is in effect by the defence statement a burden or duty on the Claimant to show why he is not guilty. This in the Court's view immediately eases on the burden on the prosecution".

The learned trial judge took the position that to require an accused to provide a defence statement amounts at the very least to a threat of self-incrimination. More critically, the judge took the view that requiring the accused to provide a defence statement violated his/her right to a fair hearing as provided by section 8(1) of the Constitution and the right to be presumed innocent as provided by section 8(2)(a) of the Constitution. I am not of this view.

[54] The achievement of fairness in a trial on indictment rests on the correct and conscientious performance of their roles by the judges, prosecuting counsel, defending counsel and jury. Even though the institutions and procedures

established to ensure that a criminal trial is fair vary almost infinitely from one jurisdiction to another, the task of the judge to ensure that the trial is conducted in a fair and even-handed way is always preserved.

[55] It has long been accepted that in order to determine whether or not a trial is fair an assessment has to be made of the entire trial process leading to the conclusion of the trial. It will not suffice to compartmentalise discrete aspects of the procedure and then seek to test them for legality or lawfulness on the basis of their fairness or otherwise.

[56] Defence disclosure (a) assists in the management of the trial by helping to identify the issues in dispute early; (b) provides information that the prosecution needs to identify any material that should be disclosed; (c) prompts reasonable lines of enquiry whether they point to or away from the accused; (d) can lead to prosecution discontinuances; and (e) prevents delay and leads to efficiency. Indeed, Kennedy LJ expressed the view in Regina (Sullivan) v Crown Court at Maidstone[24] that the two reasons for the defence statement are firstly 'to prevent ambushes and give prosecutors a proper opportunity to respond to lines of defence' and, secondly, 'to facilitate relevant but not burdensome disclosure of documents'.[25]

[57] I come now to the issue of constitutionality of the provisions.

[58] It has long been recognised that the European Convention is the model upon which most of the Westminster Constitutions in the Caribbean are built. Saint Lucia is no different. In fact, section 8 of the Constitution is very similar in wording to Article 6 of the European Convention which is a provision that protects the right to a fair trial. Article 6(1) of the European Convention states, '… everyone is entitled to a fair … hearing …' While the focus of Article 6 of the European

[24] [2002] 1 WLR 2747.
[25] para. 12.

Convention is on the right of a criminal defendant to a fair trial, it is a right to be exercised within the framework of the administration of the criminal law. Lord Steyn pointed this out in Attorney General's Reference (No 3 of 1999):[26]

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

In Saint Lucia, this is the same for the accused's right to a fair trial as provided by section 8 of the Constitution.

[59] It is noteworthy that in the CPIA there are similar provisions to section 909 and 912(1) of the Criminal Code and these withstood challenges to their validity when tested against the European Convention in relation to its fair trial provision. By virtue of section 5(5) of the CPIA where an accused has been committed for trial he 'must give a defence statement to the court and the prosecutor'. By virtue of section 6A a defence statement is a written statement (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely; (b) indicating the matters of fact on which he takes issue with the prosecution; (c) setting out, in the case of each such matter, which he takes issue with the prosecution; (d) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence; and (e) indicating any point of law including any point as to the admissibility of evidence or abuse of process which he wishes to take, and any authority on which he intends to rely for that purpose.

[60] Section 11 of the CPIA provides for the consequences of failure to comply with the plain obligation created by section 5. Section 11(2) contains the triggers for the sanction. They are as follows:

(a) Where the accused fails to give an initial defence statement;

[26] [2001] 2 AC 91, 118.

(b) Where the accused gives an initial defence statement but does so after the end of the period which, by virtue of section 12, is the relevant period for section 5;

(c) Where the accused is required by section 6B to give either an updated defence statement or a statement of the kind mentioned in subsection (4) of that section but fails to do so;

(d) Where the accused gives an updated defence statement or a statement of the kind mentioned in section 6B(4) but does so after the end of the period which, by virtue of section 12, is the relevant period for section 6B;

(e) sets out inconsistent defences in his defence statement; or

(f) where the accused at his trial–

i. puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement,

ii. relies on a matter which, in breach of the requirements imposed by or under section 6A, was not mentioned in his defence statement,

iii. adduces evidence in support of an alibi without having given particulars of the alibi in his defence statement, or

iv. calls a witness to give evidence in support of an alibi without having complied with section 6A(2)(a) or (b) as regards the witness in his defence statement.

[61] Section 11(5) provides for adverse comments to be drawn.[27]

[62] As indicated earlier, the issue of whether the prosecution can draw adverse inferences against an accused person who fails to provide a defence statement received judicial consideration from no less a body than the European Court of Human Rights in John Murray v United Kingdom. While the decisions of the

[27] See Regina v Gavin Rochford [2010] EWCA Crim 1928, judgment of The Vice President (Lord Justice Hughes).

European Courts are not binding upon this Court, it has long been held that these decisions are highly persuasive in the Caribbean in general and in the Eastern Caribbean in particular.[28] Indeed, our courts have long held the Strasbourg jurisprudence to be highly persuasive and, in cases where the legislation is similar to those under consideration, the Court of Appeal in the Eastern Caribbean has very consistently applied the principles that were enunciated in the European Court. There is no good reason to do otherwise in the appeal at bar.

[63] The European Court of Human Rights has long determined that the question whether the accused has received a fair trial is to be answered, not by examining the discrete stages of the process, but by considering the whole of the case from pre-trial through to appeal.

[64] The South African case[29] upon which the trial judge appeared to have relied did not seem to address the fact that in providing a defence statement it is not intended that the accused should have to provide every last detail of the defence. What is required is for the accused to provide in general terms the nature of the defence. There is no need for the accused to disclose the evidence upon which he relies. There are several cases from England and Wales which have addressed the fair trial issue and in so doing they have considered legislation which is in pari materia with sections 909 and 912(1) of the Criminal Code. South Africa does not appear to have a comprehensive code as is the case with the legislative scheme as provided in the Criminal Code in Saint Lucia.

Answering the fair trial issue

[65] An examination of John Murray v United Kingdom confirms that the limits of the duty have proven that it is in compliance with all human rights principles in question. Very shortly, I will treat with John Murray v United Kingdom in greater

[28] Capital Bank International Limited v Eastern Caribbean Central Bank et al (GDAHCVAP2002/13 and GDAHCVAP2002/0014 (delivered 10th March 2003, unreported)).
[29] S v Thebus and Another 2003 (6) SA 505 (CC).

detail. In Regina v John Vincent Gleeson[30] it was held that there is a duty upon practitioners to identify the real issues in a case at an early stage. It was further held that to do so does not offend the right to silence nor the privilege against self-incrimination. In Regina v Gavin Rochford,[31] at paragraph 21 of the judgment, it was made clear that compliance with the requirement for a defence statement under section 6A of the CPIA does not violate the right not to incriminate oneself. That is a fundamental right (provided by the European Convention which has not been taken away by section 6A).

[66] I find very instructive the pronouncements of Auld LJ in Chapter 10 of his Review of the Criminal Courts of England and Wales (October 2001) ("Review"):

> "To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles."

[67] Also of importance is the Scottish case of John Barclay and Others v Her Majesty's Advocate[32] in which it was argued that it was a breach of an accused's convention rights to compel him to give details of his defence to the Crown. The convention entitled an accused to remain silent. The Lord Justice General (Hamilton), at paragraph 18, stated:

> "This submission proceeds, in our view, on the false premise that the content of a defence statement is available as evidence against the accused. It clearly is not. … the requirement to lodge a defence statement is a procedural step designed to ensure that the Crown's

[30] [2003] EWCA Crim 3357.
[31] [2010] EWCA Crim 1928.
[32] [2012] HCJAC 47.

> obligation of disclosure is appropriately directed to such defence, positive or negative, as the accused may adopt at his trial."

In a word it was held that the requirement that an accused provides a defence statement is compliant with Article 6 of the European Convention.

[68] Lord Hope of Craighead pointed out in Montgomery v HM Advocate and Another:[33]

> "… the rule of law lies at the heart of the Convention. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice. The approach which the Strasbourg court has taken to the question whether there are sufficient safeguards recognises this fact."

[69] Learned Senior Crown Counsel, Mr. Lee, complained that the trial judge was wrong not to have considered and applied the highly persuasive decision of Daha Essa. In Daha Essa, the appellant appealed against his conviction for robbery. The issues raised on appeal concerned directions that were given by the judge on two topics including the absence of any defence statement as required by sections 5(5) and 11 of the CPIA. In that case, the defence failed to provide a defence statement and the Crown cross-examined the accused briefly on it. The judge explained to the jury that under the statute the Crown was entitled to comment on the lack of a defence statement. The accused was convicted and appealed his conviction on several grounds including that section 11(5) of the CPIA is incompatible with the right to a fair trial that was enshrined in Article 6 of the European Convention. Hughes LJ at paragraph 23 of the judgment made this very important pronouncement:

> "Certain it is that the right to silence is part of the right to a fair trial, as it is certain, even more importantly but distinctly, that the right not to incriminate oneself is. Those two rights are different. However, for the same reasons as section 34 is compatible with the European Convention, so is section 11(5) which entitles comment by the Crown on the absence of a defence statement. … the use which can be made of section 11(5) is not without judicial control. … That does not prevent the judge from interfering and stopping the cross-examination if it is unfair … . If the

[33] [2003] 1 AC 641 at 673.

> cross-examination was unfair it is open to the judge to tell the [jury] to disregard it. In those circumstances, there is no doubt that section 11(5) is perfectly compatible with the Convention."

Daha Essa was decided in a manner that is consistent with John Murray v United Kingdom. I accept the very helpful pronouncements of Hughes LJ and apply them to the appeal at bar.

[70] There is much merit in Mr. Lee's complaint that the learned trial judge ought to have paid some regard to Regina v Daha Essa if for no other reason on the basis of comity and, importantly Hughes LJ had to review section 5(5) and section 11 of the CPIA which are similar to sections 909 and 912(1) of the Criminal Code and held both sections to be compatible with Article 6 of the European Convention.

[71] Mr. Sexius had referred the trial judge to a number of authorities from Canada and South Africa and the United Kingdom in which the judges there had made a number of pronouncements.[34] The trial judge seemed to have found those authorities persuasive and relied on several dicta from those authorities in support of her conclusion. This was so even though as I have already indicated she had before her authorities from the United Kingdom which happen to have the same legislative framework as the Criminal Code which the learned trial judge did not appear to find useful. Also, it does not appear that the points of difference between the South African Constitution and the Saint Lucia Constitution in relation to the right of silence before trial attracted the attention of the judge.

[72] The learned trial judge appeared to have found the pronouncements by Sopinka J in R v Noble[35] very instructive.[36] In so far as the legislative framework in Canada

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[34] R v Noble [1997] 1 SCR 874; S v Thebus and Another 2003 (6) SA 505 (CC).
[35] [1997] 1 SCR 874.
[36] Sopinka J at paragraph 75 of the judgment said, "The right to silence is based on society's distaste for compelling a person to incriminate him- or herself with his or her own words. Following this reasoning, in my view the use of silence to help establish guilt beyond a reasonable doubt is contrary to the rationale behind the right to silence. Just as a person's words should not be conscripted and used against him or her by the state, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief

is very different from that of the Criminal Code it may well be that learned counsel on both sides did not bring the differences to the attention of the trial judge. Also, and of great importance, R v Noble predated John Murray v United Kingdom and Daha Essa. There is no apparent reason why such great reliance seemed to have been placed on R v Noble whereas John Murray v United Kingdom together with Daha Essa were only mentioned en passant.

[73] The reasons are not clear as to why the learned trial judge seemed to have relied on the decisions from Canada and South Africa, both of which have very different legislative framework from Saint Lucia, instead of applying the highly persuasive enunciations from the European Court of Human Rights and the Court of Appeal in England which has an almost identical legislative framework to the amendments in the Criminal Code.

[74] I propose now to treat with John Murray v United Kingdom in some more detail for the sake of completeness.

[75] In John Murray v United Kingdom, the applicant was arrested and questioned for an offence of aiding and abetting and false imprisonment. At his trial he refused to answer questions. The Northern Ireland Order enabled adverse inferences to be drawn if an accused refused to answer questions during police questioning and refused to answer questions during a trial. The judge, exercising his discretion under the Order, drew adverse inferences from the fact that the applicant had failed to offer an explanation for his presence at the house and had remained silent at his trial. He was convicted by the judge and sentence. His appeal against his conviction was dismissed by the Court of Appeal. He appealed further to the European Court of Human Rights which held that the right to remain silent and the privilege against self-incrimination are at the heart of the notion of a

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in guilt beyond a reasonable doubt. To use silence in this manner is to treat it as communicative evidence of guilt. To illustrate this point, suppose an accused did commit the offence for which he was charged. If he testifies and is truthful, he will be found guilty as the result of what he said. If he does not testify and is found guilty in part because of his silence, he is found guilty because of what he did not say."

fair trial under Article 6 of the European Convention. These immunities contribute to avoiding miscarriages of justice. Critically, the European Court of Human Rights held that whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in all of the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. Further, the Court recognised that in that case there were a number of safeguards which served to ensure that the applicant's right under Article 6 was respected. The safeguards included lack of punishment for failure to give evidence (this did not amount to a criminal offence or contempt of court). He remained a non-compellable witness. As had been stressed in national courts, silence alone cannot amount to an indication of guilt.

[76] The Court in John Murray v United Kingdom also noted that the legislature had quite properly limited the extent to which reliance could be placed on the inferences. Firstly, it was held that the prosecution must have established a prima facie case against the applicant which requires him to prove an answer. The national court cannot conclude that he is guilty because he refuses to answer. It is only if the evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give, that a failure to give an explanation 'may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty'. Conversely, if the case presented by the prosecution has so little evidential value that it calls for no answer, a failure to provide one cannot justify an inference of guilt. In sum, it is only common sense inferences which the judge considers proper to be drawn. The court held that having regard to the weight of the evidence against the applicant, the drawing of inferences from his refusal to provide an explanation for his presence at the house was a matter of common sense and could not be regarded as unfair or unreasonable in the circumstances. The courts in a considerable number of

countries where evidence is freely assessed may have regard to all relevant circumstances when evaluating the evidence in the case. It could not be said, against this background, that the drawing of reasonable inferences had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence. Accordingly there had been no violation of Articles 6(1) and (2) of the European Convention.

[77] Analogously and in relation to the appeal at bar, it should be noted that in Saint Lucia, at the sufficiency hearing, it is open to the accused to file witness statements of any persons he wishes to call as witnesses and this is so irrespective of whether he intends to give evidence in the case. Also it is open to his counsel to make submissions to the judge as to whether or not a prima facie case has been made out.

[78] It is the law that, although not specifically mentioned in the Constitution, the right to silence and the privilege against self-incrimination are cognisable under the fair trial provision in section 8(1) of the Constitution. The attack on the constitutionality of the provisions of the Criminal Code is no different from the challenge that was launched on the validity of the provisions of the orders in the John Murray v United Kingdom case. In the appeal at bar and in John Murray v United Kingdom the challenge was whether the compulsion imposed on the accused to provide a defence statement or the pain of adverse inferences being drawn for failure to do so amount to a breach of the right to a fair trial. In John Murray v United Kingdom if the provisions of the order were found to be inconsistent with Article 6 of the European Convention they would have been struck down to the extent of their incompatibility. Similarly, in the appeal at bar once the trial judge had found that the relevant provisions of the Criminal Code were inconsistent with section 8 of the Constitution, they were vulnerable to being struck down by the court (as the learned trial judge did).

[79] I am unable to agree with learned counsel, Mr. George, when he submitted that the facts in the decision in John Murray v United Kingdom are clearly distinguishable from the appeal at bar and more critically that that decision should be confined to its own facts. This is not to negate the fact that the European Court of Human Rights in rendering its decision confined its decision to the facts of the case and refused to address any academic points. In that case the European Court of Human Rights quite pellucidly indicated that what was in issue was not whether the drawing of adverse inferences was incompatible with the right to a fair trial but rather whether based on the particular facts of that case, Articles 4 and 6 of the Order which enabled adverse inferences to be drawn in criminal proceedings where the accused refused to testify rendered the trial unfair. The Court agreed with the government that where a formidable case had been made out against the accused which deeply implicated him in the crime and called for an answer, the drawing of adverse inferences where he refused to prove an answer had been quite natural and in accordance with common sense. In so doing, the European Court of Human Rights examined the specific facts of the case including that the prosecution had established a very strong case against the accused which required an answer by the accused which he ought to be in a position to give; that a failure to give any explanation may as a matter of common sense allow adverse inferences to be drawn against him. The Court also indicated that there were several safeguards provided in Northern Ireland so as to ensure the fair trial of the accused. In conclusion, the European Human Rights Court was clear at page 16 of the judgment in stating that the drawing of inference under the Order in addition to the provision of specific safeguards constitutes a 'formalised system which aims at allowing common sense implications to play an open role in the assessment of evidence'.

[80] There are several similarities between the facts of John Murray v United Kingdom particularly in relation to the safeguards and those in the appeal at bar. In this appeal, it is noteworthy that by the time the criminal process would have

reached the stage at which the accused was required to provide a defence statement, the sufficiency hearing would have been completed by the trial judge. At that stage the judge would have examined the witness statements that were provided by the prosecution and determined that a prima facie case had been made out by the prosecution.[37] This is similar to one of the safeguards that was found to exist in John Murray v United Kingdom.

[81] Also, in relation to the drawing of adverse inferences, the trial judge has total control over this aspect of the trial. There are a number of critical directions that any judge in a criminal trial must give to the jury as to ensure that the accused receives a fair trial. There is no difference, in my view, between a trial by a judge alone as distinct from a trial by a judge and jury. In either case, the judge has the duty to ensure that the accused receives a fair trial. Public interest demands that trials be fair. The trial judge has the discretion to determine whether leave should be granted to the prosecution to make adverse comments on the accused's failure to provide a defence statement.[38] This is yet another safeguard that the legislature has provided to ensure that the accused is provided with a fair trial.

[82] If any further guidance is needed it can be obtained from R v Cowan and Others[39] in which the Court of Appeal stated some of the principles that are to be included in the direction to the jury in situations where an adverse inference may be drawn. These include the principles that the burden of proof rests on the prosecution throughout; that the jury must be satisfied in its own mind that the prosecution has established a case to answer before an inference can be drawn; and that an adverse inference cannot prove guilt by itself. It also confirmed that the court (and jury) must consider any explanation put forward by the accused for his silence and only draw inferences if that explanation is rejected.

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[37] See sections 797 and 798 and 801 of the Criminal Code.
[38] See section 912 of the Criminal Code.
[39] [1996] 1 Cr App R 1 (CA).

[83] Very critically, another major safeguard that is provided by the Criminal Code is found in section 912(2). It states, as indicated earlier, quite clearly that a person shall not be convicted of an offence solely on an adverse inference that is drawn under section 912(1).

[84] While there is no gainsaying that section 8 of the Constitution is an entrenched provision whereas Article 6 of the Human Rights Convention is not, I will reiterate that it has long been accepted by the courts in the Commonwealth Caribbean that the Strasbourg jurisprudence (from the European Court of Human Rights) that address similar provisions which exist in our written constitutions are very highly persuasive. In fact, in several cases, the judicial principles enunciated by the European Court of Human Rights have been strictly applied and followed.[40]

[85] It is clear that both the trial judge and learned counsel on both sides sought to test the constitutionality of the specific disclosure procedures as a discrete aspect of the criminal process. This approach seems to run counter to the established approach which recognises that the entire trial process has to be tested for fairness.

[86] It is clear that the pre-trial right to silence, like the presumption of innocence, is firmly rooted in the common law of Saint Lucia. These rights are inextricably linked to the common law right not to be compelled to give evidence. In Saint Lucia, the Constitution has also provided for the presumption of innocence and the right not to be compelled to give evidence at his own trial. The pre-trial right to silence is not a standalone constitutional right in Saint Lucia unlike South Africa where the Constitution has clearly stated that the pre-trial right to silence is a fundamental right. In S v Thebus and Another at paragraph 58 the court held that, 'It is well established that it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person'. This view is based on the

[40] Capital Bank International Limited v Eastern Caribbean Central Bank et al (GDAHCVAP2002/13 and GDAHCVAP2002/0014 (delivered 10th March 2003, unreported)).

clear constitutional right in South Africa to a pre-trial right to silence. There is no analogous provision in the Saint Lucia Constitution.

[87] As alluded to earlier, learned Senior Crown Counsel, Mr. Lee, was correct in stating that the right to silence is not a standalone right that is provided by the Constitution but it is encapsulated in the fair trial provisions of the Constitution.[41] In section 8(2)(a) of the Constitution it is clearly stated that 'every person who is charged with a criminal offence shall be presumed to be innocent until he or she is proved or has pleaded guilty'. This is a fundamental right. The learned trial judge correctly concluded that the right to a fair trial includes the presumption of innocence, the right against self-incrimination and the right not to be compelled to give evidence. The trial judge impugned sections 909 and 912 of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules on the basis that they were incompatible with the constitutional right to a fair trial which is an aspect of the accused's fundamental right.

[88] Mr. Lee was correct in stating that the purpose of the defence statement is to prevent trial by ambush defences. I have no doubt that the requirement of the accused to provide a defence statement in no way undermines the cardinal principles of criminal law or constitutional rights. Indeed, the burden of proof remains on the prosecution who must prove the accused's guilt beyond reasonable doubt and there is no obligation on the accused to assist. The accused's privilege against self-incrimination remains intact. The prosecution is required to prove each element of the offence beyond a reasonable doubt. Neither does the privilege against self-incrimination, nor the burden of proof nor the presumption of innocence or the right to a fair trial under section 8(1) of the Constitution include a right of the defence to ambush the prosecution.

[41] See section 8(1) of the Constitution.

[89] Turning to section 912(2) of the Criminal Code as it relates to the drawing of adverse comment, this does not take away from the judge's power to intervene and stop unfair comment or direct the jury to attach very little weight to unfair comment. In any event the drawing of adverse inferences is merely permissive and not mandatory. I agree with Mr. Lee that the learned trial judge ought to have paid more regard to Regina v Daha Essa and not merely mentioned it in passing. The decision in Regina v Daha Essa turned on the issue of whether the drawing of adverse inferences based on the failure of the accused to prove a defence statement was compatible with Article 6 of the European Convention. This Article, as stated earlier, is very similar to section 8 of the Constitution. There could be no point of departure or distinction between Regina v Daha Essa and the facts of the appeal at bar. Absolutely nothing turns on the fact that in Saint Lucia, the Constitution is written and the United Kingdom has an unwritten constitution. The simple reason is that section 909 of the Criminal Code does not in any way alter section 8(1) of the Constitution. There is no discord.

[90] Every accused person has a right to a fair trial; a right long embodied in the common law and guaranteed under section 8 of the Constitution and Article 6 of the European Convention. In my view, fair disclosure by an accused is an inseparable part of a fair trial. The Criminal Code provides a system of mutual disclosure between prosecution and defence. It should be emphasised that the defence is only required to provide disclosure after the prosecution would have done so.

[91] Rule 11.1(3)(c) of the Criminal Procedure Rules is merely procedural in nature and complements sections 909 and 912(1) of the Criminal Code. It does not violate the fair trial provisions of the Constitution. A close examination of sections 909 and 912(1) of the Criminal Code when read together with rule 11.1(3)(c) of the Criminal Procedure Rules reveals that the legislature has quite wisely struck the correct balance between sanctioning the need to provide a defence statement and fair issues resolving. The sections of the Criminal Code which the trial judge

impugned in no way undermine the fundamental right in securing a just determination of criminal proceedings. In a word, the requirement for defence disclosure of the issues in dispute at the pre-trial stage is consistent with the right to a fair trial. It serves primarily to identify and narrow the issues as part of the disclosure process which should ultimately lead to efficiency in the trial process. It is open to an accused in his defence statement to indicate for example that he maintains his right to remain silent; or that the Crown has not established the elements of the offence beyond a reasonable doubt; or that his defence is one of self-defence or accident or consent or provocation without having to disclose his evidence. It is clear to me that the requirement of defence disclosure is not incompatible with section 8 of the Constitution. It does not violate the presumption of innocence since it does nothing to alter the burden of proof in a criminal case. The prosecution will still have to prove the accused's guilt beyond a reasonable doubt. Accordingly, I do not agree with the learned trial judge when she opined that requiring the accused to state how much of the prosecution's case he disputes is indirectly forcing him to incriminate himself.

[92] For the above reasons, the trial judge erred in concluding that sections 909 and 912 of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules are incompatible with section 8(1) of the Constitution. I would therefore allow the appeal on this ground and set aside the trial judge's order.

[93] In so far as the conclusion in relation to ground number 2 would be dispositive of this appeal it is unnecessary to address ground number 3 of the appeal.

[94] I now turn to address the issue of costs.

Costs

[95] As a general rule costs follow the event. However, given the totality of the circumstances and the fact that I am not of the view that Mr. Sexius acted

unreasonably in bringing this claim, the appropriate order is that each party shall bear his own costs.[42]

Conclusion

[96] In the premises, I would allow this appeal on the basis that the learned trial judge erred in concluding that sections 909 and 912 of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules are incompatible with section 8(1) of the Constitution. To the contrary, the impugned sections of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules comport with the fair trial provisions of the Constitution and are valid.

[97] Each party is ordered to bear his own costs.

[98] I gratefully acknowledge the assistance of learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

[42] See rule 56.13(6) of CPR 2000.