[2023] JMCA Crim 54

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00054

CARL ANDERSON v R

Keith Bishop and Janoi Pinnock for the appellant

Mrs Kimberley Dell-Williams, Mrs Christina Porter and Miss Katrina Watson for the Crown

21, 22 June and 24 November 2023

Criminal Law - Leave to appeal conviction and sentence - sexual offences – whether the learned trial judge properly directed the jury in respect of the expert evidence – virtual complainant almost 15 years at time of trial but possibly had some learning challenges - whether a corroboration warning necessary – Section 26(1) and (2) of the Sexual Offences Act.

P WILLIAMS JA

[1] On 27 March 2019, after a trial in the Home Circuit Court held in the parish of Kingston, before a judge of the Supreme Court ('the learned trial judge') and a jury, Carl Anderson ('the appellant') was convicted on an indictment containing two counts. The first count was for the offence of grievous sexual assault. The particulars of the offence were that on a day unknown between 1 September 2012 and 30 June 2014, in the parish of Saint Andrew, he placed his penis into the mouth of RD ('the complainant'), being a person under the age of 16 years. The second count was for buggery and the particulars of the offence were that on a day unknown between 1 September 2012 and 30 June 2014, in the parish of Saint Andrew, he committed buggery on the complainant.

[2] On 5 June 2019, he was sentenced to 10 years' imprisonment at hard labour for the offence of grievous sexual assault and five years' imprisonment at hard labour for the offence of buggery. The learned trial judge ordered that the sentences were to run concurrently.

[3] The appellant made an application for leave to appeal his conviction and sentence. On 23 July 2021, a single judge of this court considered his application on the transcript of the learned trial judge's summation and granted leave to appeal the conviction. She then went on to note that there was no holding ground in respect of sentence on the form B1 but observed that the sentence imposed by the learned trial judge for the offence of grievous sexual assault was below the statutory mandatory minimum of 15 years' imprisonment. She further noted that there was no stipulation made as to the time the appellant should serve before becoming eligible for parole. In any event, there was no complaint that this sentence was manifestly excessive. She recognised that the sentence could not be further reduced and if the sentence were to be increased, the proper procedure would have to be adopted as discussed in the case of **Linford McIntosh v R** [2015] JMCA Crim 26. She also found that the sentence of five years' imprisonment for buggery could not be said to be manifestly excessive as that term was within the normal range of sentences of this kind. Her ultimate ruling was that leave to appeal was granted.

[4] On 16 June 2022, the Crown filed a notice of application for court orders to increase the sentence of the appellant. In the application, the Crown sought the following orders pursuant to section 14(3) of the Judicature (Appellate Jurisdiction) Act:

> "1. The sentence of 10 years imprisonment on Count 1 of the Indictment, charging the Appellant with Grievous Sexual Assault, be increased to a sentence that this honourable court deems fit;
>
> 2. [sic] a period of not less than ten (10) years be served by the Appellant before becoming eligible for parole;
>
> 3. The application be heard at the hearing of the appeal."

The case for the Crown

[5] TM, the mother of the complainant, testified that he was born on 31 March 2004. This meant that at the incident for which the appellant was charged, the complainant was between eight and 11 years of age. This further meant that at the time of trial, he was 10 days short of his 15th birthday. Given the nature of the complaint in this appeal, his evidence will be rehearsed largely in the manner and sequence in which it was given.

[6] The complainant began his testimony by indicating that he was unable to spell his last name although he was then a student at Tivoli High School. He lived with his mother and sister in Greenwich Farm in Kingston. He did not know his mother's last name.

[7] Initially, the complainant stated that he did not know why he was there in court and he did not know if anything had happened to cause him to be there. Eventually, the following exchange took place between Crown Counsel Mrs Kimberley Dell-Williams ('Mrs Dell-Williams') and the complainant:

> "Q You have something to tell us today?
>
> A No, miss.
>
> Q You know why?
>
> A Yes, miss.
>
> Q So you have something to tell us?
>
> A Yes, miss.
>
> Q. What you have to tell us?
>
> A Tell us?
>
> Q Fi tell wi. Tell us what you have to tell mi.
>
> HER LADYSHIP: What you just said? You can say it again for me, please? You said something a little while ago but I didn't hear. Like you said 'mi get something', but I didn't hear everything you said.
>
> THE WITNESS: Miss, I get rape."

[8] The complainant said it was Carl who raped him. Carl lived at Sixth Street bottom but he did not know how long he had known Carl and he did not know Carl's last name. When asked for a second time how long he had known Carl he said one week. When pressed as to why he said Carl had raped him, the complainant said "[h]im fuck me". He said Carl locked the door and drew the curtain, told him to draw down his pants and then "shub him hood inna [his] batty" which caused bleeding from "[his] batty".

[9] The complainant when asked to explain how he knew it was bleeding responded "[t]ake up the box". The complainant went on to explain that Carl took up his own clothes box and threw it over the ackee tree and that the clothes box must have contained his clothes. When asked how he knew it was Carl's clothes in the box, the complainant responded that he "did a pick guinep…inna Carl yard" when Carl called him. When Carl called him, Carl asked him to buy bread and butter. After that, Carl told him to "suck [Carl's] hood". When asked what Carl did after that, the complainant responded that Carl then told him not to tell anyone. He said that he did not know what Carl meant when he told him to "suck his hood". He said it was "that alone" he did. He was pressed further and the following exchange took place:

> "Q What 'that alone' mean? What you mean? What happened? Him tell you say fi suck him hood. Did you do what him tell you fi do?
>
> A Yes, miss.
>
> Q What you do?
>
> A Mi never do nutten more.
>
> Q Now, look here … You say you do what him tell you fi do. From how me understand weh you a tell me now, him tell yuh fi suck him hood?
>
> A Yes.
>
> Q So what you do, because you say you do what him tell you fi do. So what you do?
>
> A That alone.

Q What you mean when you said that alone? Mi nuh understand.

A Yes, miss."

He, however, at this time testified that he did not know which part of the body was called "hood" and was unable to show where on the body it was.

[10] The complainant was then asked if he saw the person he called Carl there in court. He responded no. The question was repeated with the same response. The following exchange eventually took place:

" Q You understand what I am asking you now?

A Mm-hmm.

Q Look at me so me can see that you hearing me, right?

A Mm-hmm

Q All right. Look around and tell me if the person you call Carl, you see him. Look around. Take your time. Look around.

A See him there. (Indicating)

Q Where him is?

A Back a yuh."

Thus the complainant identified the appellant as Carl.

[11] He was asked which part of the appellant he was looking at to know that it was the appellant who told him to suck his "hood". The complainant responded that he did not remember and went on to say that the appellant covered his face with a pillow. At that time, the complainant was lying on the bed in his underpants only and the appellant was also in his underpants.

[12] The complainant testified that he was attending Saint Andrew Primary at the time the incident took place. Initially, he could not remember the name of his teacher at that time. The principal he knew as Sir Thomas. He was asked directly if he had a woman teacher at the time and he acknowledged this to be so. He was then asked another two

times if he remembered the name of that woman and he indicated he did not. He was in class 2b at the time but he did not remember who taught him while he was in that class.

[13] The complainant was further questioned about his reference to "hood". He did not know what people used a "hood" to do and initially said he could not remember where the "hood" was. The complainant was then invited to demonstrate where on his body he referred to as "batty" and he did so by touching his bottom. When he was again asked where his "hood" was he said "in a [his] pants front" and eventually indicated it was where his pants zipper was. He maintained that he did not have any other name for it and did not know other names that it was called. When invited to show the parts of his body that he was referring to, his response was to volunteer the information that he did not go to church.

[14] In further describing what the appellant had done, the complainant said he was lying on his belly on the bed and the appellant was behind him lying on his back. He bawled out for somebody to come over and kick off the door. Someone he knew as Fletcher, who lived in another yard nearby, kicked off the door. At that time the appellant was in the house on the bed and the complainant said he was under the bed. The complainant said nothing else happened after Fletcher kicked off the door.

[15] The complainant was once again asked about the appellant telling him to suck the appellant's "hood" and asked what he understood that to mean. He responded, "seh mi nuf fi tell nuhbaddy". He explained that when he said he did what the appellant told him to do he meant that the appellant had told him to buy bread and butter. He was asked to describe what he did when the appellant had told him to suck the appellant's "hood". He responded that he did not do anything more but said he told him yes. When asked why he told him yes, he said he told the appellant no but was forced. He was forced to use his mouth to do so. He said he knew the appellant forced him because the appellant had "tied [his] hand and foot". The complainant when asked as to how he knew that it was the appellant's "hood" he was sucking responded "that alone me know."

[16] Mrs Dell Williams re-visited the issue of the name of the complainant's teacher in the following exchange:

> "Q …At St. Andrew Primary…, you know a teacher, Miss Williams? When you use to …
>
> A Yes, miss.
>
> Q Miss Williams ever teach you
>
> A Yes, miss
>
> Q Now, you remember what Miss Williams use to teach you?
>
> A No, miss."

[17] The proceedings for that day came to an end shortly thereafter and upon resumption the following day the complainant was asked if the two things he said the appellant did to him happened on the same day. He agreed that they had. He was again questioned about his teacher at the time the incident took place in the following exchange:

> "Q Now, you remember which school you was going when this happen, when him tell you to …
>
> A St. Andrew Primary.
>
> Q You remember who was your teacher when these things happened to you?
>
> A Miss Williams."

The difficulty he had the previous day remembering the name of his teacher without the prompting of Mrs Dell-Williams no longer existed.

[18] The complainant was asked how he knew his "batty was bleeding" and he said he did not remember. He was asked the question two more times but he did not answer. He was questioned as to how the appellant got his hood into his mouth and he did not provide an answer.

[19] Under cross-examination, the complainant said it was "early day" when he was picking guinep and the appellant called him into the house. He agreed that the guinep tree was not in fact in the appellant's house and that he was with his two brothers at the time. They were playing football in the middle of the road when he was on the appellant's wall picking the guineps. However, when he later left the appellant's house his brothers were no longer there. He agreed that other persons lived at the same house as the appellant, one of whom he knew was the appellant's girlfriend.

[20] Upon being confronted as to whether when giving his statement to the police he had told the police about the appellant tying him up and Fletcher kicking down the door and coming into the appellant's house, the complainant admitted that he had not.

[21] The following exchange took place between the complainant and counsel appearing for the appellant, Mr Shane Williams ('Mr Williams'):

> "Q … I am going to suggest something to you …, that the reason why you never tell police about the tying up and Fletcher is because nothing like that never happen. Am I right, or am I wrong?
>
> A You are right.
>
> HER LADYSHIP: The reason - - ask him again.
>
> MR. S WILLIAMS: I'll ask him again. I'll rephrase it.
>
> HER LADYSHIP: The reason you never tell the police about the tying up and Fletcher is because there was no tying up?
>
> THE WITNESS: No, sir.
>
> HER LADYSHIP: And Fletcher never kick off any door, that is true?
>
> THE WITNESS: No.
>
> HER LADYSHIP: What you mean no?
>
> MR. S. WILLIAMS: I'll rephrase it and break it down a little.

HER LADYSHIP: Yes, break it up for him because - - you understand.

MR. S. WILLIAMS: Yes, my Lady. I'll break it down.

BY MR. S. WILLIAMS:

Q All right…, mi nuh waan confuse you. So me ah goh take - - I am saying to you the tie up thing never happen at all. Did it happen?

A No, sir.

Q Did the tying up happen?

A No, sir.

Q So, let me ask you …, when you told my friend earlier, this lovely lady, when you told her that [the appellant] tie yuh hand dem, is make you make it up?

A No, sir.

Q Now…, let me ask you this. Do you know what a lie is?

A No.

…

Q All right, … Let us go then to the Fletcher kicking down the door. All right, I am going to suggest to you,…, that nothing like that never happen. Fletcher never come in and kick down no door at all.

A No, sir.

Q Let me ask you clearly… Did Fletcher kick in the door and come in there?

A No, sir."

[22] The complainant maintained that the appellant had told him to suck his "hood" and that the appellant had put his "hood" in his "batty". He said he did not know what was meant by "make up story". He, however, denied the suggestions that these things he said the appellant had done were not true.

[23] Under re-examination, the complainant was asked again if he knew what a lie was, and he maintained that he did not. He did not know what it meant to say "it nuh go so". He repeated that he had not told the police that the appellant had tied him up and although he admitted having said that happened in his answers during examination-in-chief, he was unable to give a reason for having done so. He could not remember why he had said that the appellant had forced him. When asked if there was a reason he had said that Fletcher kicked off the door he responded that there was none. He admitted that when he had said that had happened it was not the truth.

[24] The mother of the complainant TM, apart from testifying as to his date of birth, was also asked about the name of the teachers who had taught her son while he attended Saint Andrew Primary School. She, however, was unable to recall the names. She knew of someone named Carl who lived in her community of Greenwich Farm, on Sixth Street, but could not remember his last name. She identified the appellant as the person she knew as Carl. She said that she took her son to the Rape Unit at the Centre for Investigation of Sexual Offences and Child Abuse ('CISOCA') and spoke to a policewoman there.

[25] Under cross-examination, she testified that the appellant did security guard work and usually went to work in the evenings and returned home in the early mornings. She acknowledged that when she took her son to CISOCA, he was examined by a doctor.

[26] The next witness called by the Crown was Miss Daynia McLean ('Miss McLean') who knew both the complainant and his mother as she once lived in the same community of Greenwich Farm. On 10 October 2015, she said she accompanied the complainant to the Child Development Agency ('CDA').

[27] The next witness for the Crown was Mr Omar Thomas who testified that he worked at Saint Andrew Primary School from 2008 as a guidance counsellor. He met the complainant there in 2010. His perception of the complainant was that he was a child who was neglected by his parents and was crying out for help. He described the

complainant as a slow student who may have had some learning challenges but at the time they were not equipped to diagnose him. Mr Thomas acknowledged that Miss Michelle Williams was a co-worker at the school who was a literacy specialist. The complainant was in her class for about two years from September 2012 to June 2014.

[28] The final witness for the Crown was Constable Stacy-Ann Williamson ('Constable Williamson'). On 10 October 2015, she was stationed at CISOCA. On that day she was on duty when the complainant was taken there by his mother and Miss McLean. After recording a statement from the complainant, he was examined by Dr Michael Irvin ('Dr Irvin') who subsequently issued a medical certificate.

[29] On 14 October 2015, acting on information received, Constable Williamson went to the Hunts Bay Police Station where she saw and spoke with the appellant. He said nothing when cautioned. He was subsequently placed on a video identification parade and was identified by the complainant. He was then arrested and charged.

[30] The agreed facts concerning the identification parade were read into evidence. It confirmed that the complainant had indeed pointed out the appellant on a video identification parade.

[31] Before closing the case for the Crown, Mrs Dell-Williams sought and was granted permission for the indictment to be amended. The indictment originally read the offences were committed "between the 1st day of October 2012 and the 30th day of June 2014". The amendment was for the month of October to be replaced by September in both counts.

The case for the appellant

[32] In an unsworn statement from the dock, the appellant denied touching the complainant inappropriately. He stated that he worked as a security guard from 1992 when he had graduated from high school. Since 2012, he worked on the night shift from 6:00 pm to 6:00 am. He knew the complainant and his brothers and the complainant was

always picking guinep and playing football in front of his home. The appellant said that the complainant was telling lies on him.

[33] The only witness called on the case for the defence was Dr Irvin who, after giving details of his training and experience, testified that he was a District Medical Officer and was on duty at CISOCA on 10 October 2015. He recalled examining the complainant on that day. His specific examination of the anus revealed that the anal tone was normal and there was no anal dilation or funnelling. There was slight farrowing. He saw no bruises, lacerations, or scars. He concluded that what he examined was an intact anus. When asked if what he saw would have been typical of a 10-year-old boy who said he had anal penetration, the doctor responded that it was not. He went on to explain that what he found would not be in keeping with bleeding in a 10-year-old boy after being penetrated.

[34] Under cross-examination, Dr Irvin agreed that a person could be penetrated in their anus and still have a normal anal tone. He explained that the presence of signs of funnelling in the anus was usually a feature of chronic anal activity. Regular anal sex would be considered chronic. The signs of farrowing that he saw could have been caused by constipation as well as penetration with the penis. Dr Irvin stated that a bruise would usually resolve after three weeks and accepted that although when he saw the complainant on 10 October 2015, he saw no bruises he was unable to say if there were ever any bruises to his anus. He further explained that a laceration to the anus would heal within three weeks and accepted that if penetration had taken place before the three weeks he would not be able to see a laceration. He also accepted that there would not always be a scar left after a penis had penetrated the anus. If the penetration had taken place in 2012, 2013, 2014, or six months before the examination was done, Dr Irvin said he would not have been able to see bruising of the anus.

[35] Dr Irvin agreed that although he had seen no bruising, laceration, or scars on the anus of the complainant he was unable to say it had never been penetrated by a penis. He could not say absolutely that there had never been any penetration from the

examination of the complainant on 10 October 2015. Dr Irvin ultimately explained that his observation was based upon likelihood or probability, he had nothing to suggest that something happened or did not happen.

[36] When re-examined Dr Irvin stated that the probability he had come up with was that it was "unlikely that penetration had occurred".

The appeal

[37] At the hearing of the appeal, on 21 June 2023, there being no objection from the Crown, Mr Keith Bishop ('Mr Bishop') on behalf of the appellant was permitted to abandon the original grounds of appeal filed by the appellant and argue instead supplementary grounds set out in the skeleton submissions filed on 18 March 2022. These grounds were set out as follows:

> "**1. Expert Evidence**
>
> a. The learned judge failed to direct the jury as to how to treat expert evidence and what weight, if any should be given to the expert evidence;
>
> **2. Caution on uncorroborated evidence**
>
> b. The learned judge ought to have given a caution to the jury with respect to the fact that the complainant was [sic] slow learner and also a child below the age of 14 years before convicting." (Emphasis as seen in the original).

[38] Before commencing the appeal, we heard and considered submissions from Mr Bishop and Mrs Christina Porter ('Mrs Porter'), who appeared on behalf of the Crown, in relation to the Crown's application for the appellant's sentence to be increased (see para. [4] above). We were satisfied that for such a novel application to be entertained the application for leave to appeal sentence should have been a live issue. We were not so satisfied and the application was refused.

Ground 1

The submissions

[39] Mr Bishop identified the issue to be considered in this ground as whether or not the learned trial judge should have directed the jury on the expert evidence given in court which would have better assisted them with the medical evidence. He relied on the written submissions in which the sections of the summation by the learned trial judge on the issue were set out. It was contended that there had been no direction given to the jury about the evidence of Dr Irvin, who was an expert witness. It was submitted that the learned trial judge failed to properly direct the jury with respect to expert evidence. Reference was made to **Davie v Magistrates of Edinburg** 1953 SC 34 and **R v Kai-Whitewind** [2005] EWCA Crim 1092 in support of the submissions.

[40] In response, Mrs Porter countered that the learned trial judge gave comprehensive directions to the jury on the evidence generally. She noted that the learned trial judge recounted the evidence of Dr Irvin extensively and appropriately highlighted his expertise and qualifications as well as the limitations of the evidence. Mrs Porter submitted that the doctor had given an opinion based on his findings which may have conflicted with the evidence of the complainant, which meant that it was a matter of credibility for the jury to resolve. She contended that the doctor had not arrived at a conclusion that went to the heart of the matter since he was unable to say definitely that penetration had not taken place.

[41] Mrs Porter noted that the Supreme Court of Judicature of Jamaica Criminal Bench Book, 2017 ('the Bench Book') provides that the direction on expert evidence should begin by identifying the expert and the issues on which they have given evidence and also states that the jury should be directed to weigh up what evidence they accept and what they do not. Further, a judge was required to direct the jury on what consideration must be given on the qualification, practical experience, methodology used, and the impression made by the expert when giving evidence. It was submitted that the learned trial judge highlighted the qualifications of Dr Irvin, pointed out that he regularly conducted these

types of examinations, and repeatedly averred throughout the summation that it was for the jury to decide what they accept. Further, she indicated to the jury that their verdict must be based on the evidence as a whole. Thus, it was submitted, the summation was in keeping with the spirit of the standard direction recommended in the Bench Book and there could be no miscarriage of justice. Reference was made to **Trevor Whyte, Nigel Calder and Allan Beecher v R** [2017] JMCA Crim 13.

[42] Mrs Porter submitted that, in any event, the manner in which the summation was done could not properly be said to have affected the verdict. She contended that the main issue was that of credibility and although the evidence of the doctor could in the circumstances of this case only affect this issue, the doctor could not say whether or not the complainant had been buggered. Reference was made to **Joel Henry v R** [2018] JMCA Crim 32, **Tino Jackson v R** [2016] JMCA Crim 13, **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, and **R v Leonard Fletcher** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 20/1996, judgment delivered 25 November 1996.

Discussion and disposal

[43] It is useful to start this discussion with a consideration of the nature of expert evidence in criminal trials. The guidance given in the legal summary on the topic in the Bench Book is sufficient where at pages 124 -125, paras. 4 and 5 the following is stated:

> "4. Expert evidence is admitted only on matters that lie beyond the common experience and understanding of the jury: *Turner* [1981] QB 834. The purpose of the expert's opinion evidence is to provide the jury with evidence of findings and the conclusions that may be drawn from those findings. Particular care is needed to avoid expert opinion as to credibility, reliability or truthfulness of a witness or confession: *Pora v The Queen* [2015] UKPC 9. Lord Kerr explained "It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues...

5. Unlike lay witnesses, experts may give evidence of opinion. Where the expert has given evidence of opinion, the jury remain the ultimate arbiter of the matters about which the expert has testified. The jury is not bound to accept the expert's opinion if there is a proper basis for rejecting it. But 'where there simply is no rational or proper basis for departing from the uncontradicted and unchallenged expert evidence, juries may not do so': see *Brennan* [2009] EWCA Crim 2553. The jury must be warned not to substitute their own opinions for those of the experts e.g. by undertaking their own examination of handwriting or a fingerprint. A jury is entitled to rely on an expert opinion which falls short of scientific certainty: *Gian* [2009] EWCA Crim 2553."

[44] This court in **Ann-Marie Williams v R** [2020] JMCA Crim 40, considered the law on the issue of the adequacy of directions on expert evidence. Phillips JA, delivering the judgment on behalf of the court, had this to say at paras. [58] and [59]:

> "[58] …The learned authors of Blackstone's Criminal Practice, 2020, at paragraph F11.41, made it clear, in reliance on Lord Taylor's CJ dictum in **R v Stockwell** (1993) 97 Cr App R 260, that '[w]hen expert evidence is given on an ultimate issue, it should be made clear to the jury that they are not bound by the opinion, and that the issue is for them to decide'. That principle was applied in another English Court of Appeal decision in **R v Fitzpatrick** [1999] Crim LR 832, where the court also stated that there is no requirement that such a warning be conveyed in any particular way. Indeed, the court said:
>
> > 'We have been referred to the decision of this court in R *v Stockwell* (1993) 97 Cr App Rep 260 and to the observations at the end of the judgment in that case, to the effect that it is important that the judge should make clear to the jury that they are not bound by the expert's opinion and the issue is for them to decide. We agree. Of course, it is important that the jury knows it is not obliged to accept any evidence. It does not follow that this principle should be elevated into an inflexible requirement that that should be made clear to them in any particular way.'
>
> [59] The learned authors of Blackstone's also state that:
>
> > 'In deciding what weight, if any, to attach to the evidence of an expert, the jury are entitled

> to take into account his qualifications and experience, his credibility, and the extent to which his evidence is based on assumed facts which are or are not established.'"

[45] In summation, the learned trial judge first referred to the doctor when giving directions to the jury about their function as judges of facts. She said the following:

> "You should consider how the witnesses stood up when tested by cross-examination. Examine their demeanor, their body language in the witness box. So it is not just what the person says, but how they say it and their reaction and expression that would assist you in arriving at the truth.
>
> So, for example, look at [the complainant] and see if you can tell when he was confused, or when he was clear; when he understood what is being asked, or when he was [sic] seemed to contradict himself and similarly, you can look at the doctor and assess that. You can look at the mother. You can look at the other witnesses and make sure that you are able to see and figure out their body language."

[46] She also commented on the doctor's evidence when she gave directions relating to the purpose of cross-examination. She had this to say:

> "So you would have heard certain suggestions being put to the complainant and it was by the accused lawyer and this is how each side put their respective version of the facts to the other side, or you would have heard that when the accused called the doctor, the Crown put their side and their version and got certain answers from that side. Any suggestion made is not evidence that you can act on unless the witness agrees with it or admit [sic] to it. Bear this in mind as you assess the evidence."

[47] The learned trial judge later mentioned the doctor after rehearsing the appellant's statement from the dock. She went on to say:

> "He also called one witness who gave evidence and you are reminded that you have to judge that evidence by precisely the same fair standard as you would apply to any other evidence that was given in this case.

> The witness he called was Dr Michael Irvin, and this is where you got a proper biology lesson, Human and Social Biology lesson. I got a little too because I learned something about furrowing and funneling [sic], and I saw you listening intently.
>
> He said he has been a doctor since 1988 and you saw him; older man. He has been doing what he is doing for a long time and he is employed to the government at Kingston and St Andrew District as a Medical officer since 2008. He is in charge of the health center and is on duty and on call to CISOCA. He was alerted of a case of sexual assault for child abuse- possible case- so he went to Ripon Road…
>
> He did examination. He said he examined thousands of persons when they call him since 2008…"

[48] After largely repeating the evidence Dr Irvin had given, the learned trial judge said:

> "The doctor's statement and the evidence given by this witness is what we call the defence's case and that may convince you of the [appellant's] innocence or leave you in a state of reasonable doubt and if both of these instances apply to you [sic] you will have to acquit him, that is you find not guilty or maybe what you have heard even strengthens the crown's case, there is, however, no burden on the [appellant] to convince you of the truth of his defence but if you believe the [appellant] or after hearing his case left in a state of reasonable doubt as to whether you believe him then he is entitled to be acquitted of all the charges…"

[49] At no point in the summation did the learned trial judge identify Dr Irvin as being an expert witness. Although he had testified in the case for the appellant he still was to be treated as one whose special knowledge and experience in such matters could be of assistance to the court and whose primary function was to assist the jury in arriving at a verdict (see **R v Leonard Fletcher**). The learned trial judge did not explain to the jury the basis on which the doctor was permitted to give his evidence which included his opinion based on his findings. She did not invite the jury to have regard to the opinions expressed by the doctor when coming to conclusions about the issue about which he testified. Further, the jury was not specifically invited to consider what weight to attach to Dr Irvin's evidence and that his credibility was but one factor they could take into

account. However, ultimately the jury would have to be told that they were not bound by the doctor's opinion and the issue remained one for them to decide based on all the evidence they accepted.

[50] There is, therefore, merit to the complaint in this ground of appeal. The fact is that although Dr Irvin opined that it was unlikely for penetration to have taken place, he also admitted that given the time that elapsed between the time the penetration was alleged to have occurred and the examination, there was nothing to suggest concretely that something happened or did not happen. The equivocal nature of his evidence meant that it could have assisted either the case for the appellant or that for the Crown. In the circumstances, the learned trial judge's failure to give the required appropriate directions was not fatal and in and of itself did not result in a miscarriage of justice.

Ground 2

The submissions

[51] The issue identified in this ground was "whether or not the learned trial judge failed to exercise her discretion to give a warning to the jury in light of the young age of the complainant at the time of the assault and also at the time of giving evidence, the mental state of the young person in that he was described as a slow learner, major inconsistencies, inherent contradictions, admitted lies, along with the opinion and findings of the doctor".

[52] Mr Bishop highlighted the evidence from Mr Thomas which established that the complainant was perceived as being a slow learner with possibly undiagnosed learning challenges. Counsel also noted that the complainant had admitted under cross-examination that aspects of his evidence-in-chief concerning how the incident had occurred, were not the truth.

[53] Mr Bishop acknowledged that, in light of recent legislations, the Sexual Offences Act ('the Act') and the Evidence (Amendment) Act, 2015 ('the Evidence Act'), judges are not mandated to slavishly follow the original common law position regarding

corroboration warning in cases involving sexual offences. He submitted that guidance as to whether a judge ought to give a warning can be gleaned from **R v Makanjuola; R v Easton** [1995] 2 All ER 730 ('**Makanjuola**'). Further, Mr Bishop acknowledged that, in light of this guidance, the discretion as to whether or not to give the warning is that of the judge who would have seen and heard the witnesses. He contended that in this case the complainant was proven to be unreliable and an admitted liar. He noted that the learned trial judge treated the lies as inconsistencies, which he opined was wrong. Mr Bishop submitted that in the circumstances, the learned trial judge should have given a strong warning but absolutely no warning was given.

[54] In response, Mrs Porter conceded that the learned trial judge did not give a corroboration warning, which at the time of trial was not a legal requirement. Mrs Porter agreed that the legislation to which Mr Bishop referred makes it clear that a corroboration warning is no longer necessary and is purely discretionary. She invited the court to act as per the dictum in **Makanjuola** and decline to interfere with a trial judge's exercise of his discretion unless it was unreasonable.

[55] Mrs Porter submitted that there is no evidential basis to say that the complainant was inherently unreliable as there was no medical evidence that he was a slow learner, and even if that was so there was no special legal provision in that regard. She contended that whilst the learned trial judge could have exercised her discretion she was well within the law not to do so. Counsel pointed to areas in the summation where the learned trial judge highlighted to the jury the need to consider the complainant's level of intelligence and reminded the jury that it was a matter for them to determine whether the complainant was speaking the truth. She concluded that, in any event, the learned trial judge's exercise of her discretion, not to give a corroboration warning, did not deprive the appellant of the opportunity of a proper consideration of the evidence by the jury. Reference was made to **Tajae Campbell v R** [2022] JMCA 71, **Joel Henry v R** [2018] JMCA Crim 32 and **Delroy Bent v R** [2015] JMCA Crim 28.

Discussion and disposal

[56] Mrs Porter correctly indicated that, at the time of the trial, the complainant was approaching his 15th birthday, and therefore the provisions of the Evidence Act which defines a child as a person who is under the age of 14 years were not relevant on the issue of a corroboration warning. The applicable legislation for consideration was the Act which abolished the mandatory requirement for judges to give a corroboration warning in case of a complainant in a sexual case. Section 26 of the Act provides:

> "26. – (1) Subject to subsection (2), where a person is tried for the offence of rape or any other sexual offence under this Act, it shall not be necessary for the trial judge to give a warning to the jury as to the danger of conviction the accused in the absence of corroboration of the complainant's evidence.
>
> (2) Notwithstanding the provisions of subsection (1), the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining –
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> (a) whether to accept the complainant's uncorroborated evidence; and
>
> (b) the weight to be given such evidence."

[57] In **Mervin Jarrett v R** [2017] JMCA Crim 18, Morrison P noted that "[t]hese provisions reflect the position to which the common law had already come, as demonstrated by the decision of the Privy Council in **R v Gilbert** [2002] UKPC 17 (applying **R v Makanjuola**; **R v Easton** [1995] 1 WLR 1348), which confirmed that the question whether to give a corroboration warning in sexual cases was a matter for the discretion of the trial judge".

[58] In **Makanjuola** the Court of Appeal acknowledged and responded to an invitation to "give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done" (see page 732). Lord Taylor CJ, at page 733, in summarising that guidance, said the following:

"To summarise:

(1) Section 32(1) [of the Criminal Justice and Public Order Act, 1994 [similar, in the context of this case to the Act] abrogates the requirement to give a corroboration warning in respect of an alleged accomplice or a complainant of a sexual offence simply because a witness falls into one of those categories.

(2) It is a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

(4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the questions be resolved by discussion with counsel in the absence of the jury before the final speeches.

(5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(7) It follows that we emphatically disagree with the tentative submission made by the editors of [*Archbold, Criminal Pleading Evidence and Practice* (1995) vol 1,] at para 16-36 quoted above. Attempts to re-impose the straightjacket of the old corroboration rules are strongly to be deprecated.

> (8) Finally, this court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that is unreasonable in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223)."

[59] The approach of this court to review a trial judge's exercise of his discretion in matters such as this was succinctly re-stated by Morrison P in **Mervin Jarrett v R**, at para. [19], in the following terms:

> "[19] The question of whether or not to give a corroboration warning in respect of the evidence of the complainant in this case was therefore entirely a matter for the discretion of the judge. Accordingly, on the basis of standard appellate court doctrine governing review of the exercise of a judicial discretion, this court will be loath to interfere unless it can be shown that the judge exercised it on an erroneous basis or principle (as to which see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1) …" (Emphasis as seen in the original)

[60] In this case, the learned trial judge took the view that there was no need to give the jury any warning in respect of the evidence of the complainant. She was in the position of actually seeing the complainant and making the assessment of him which could have assisted her determination as to whether a warning was necessary. A detailed reading of the transcript revealed that the complainant did not give his evidence in a structured manner. He used only the terms "hood" and "batty" in relating what had happened to him despite the several efforts of the Crown Counsel to get a clearer explanation of which body parts he was referring to. He volunteered that he did not go to church and said he did not know what a lie was against the fact that he had given sworn testimony. There were numerous occasions when Crown Counsel, the defence counsel, and the learned trial judge herself called on him to answer the questions he was asked, to stop being distracted, and to pay attention. At one point he seemed to have even placed the microphone in his mouth and the learned trial judge was compelled to intervene warning him of the possibility of germs. Mr Thomas, who was the guidance counsellor, formed the opinion that he was a slow learner with a possible mental challenge which was undiagnosed because of the school's inability to do the necessary

assessment. It is noted that the complainant spent two years in the class of a teacher who was a literacy specialist.

[61] The learned trial judge gave the usual directions as to how to assess the credibility of the witnesses. She invited them to consider the complainant's "ability to put into words accurately what he said happened" and in their assessment of him to bear in mind his powers of observation and recall. General directions as to how the witnesses stood up when tested by cross-examination were followed by these statements:

> "So, for example, look at [the complainant] and see if you can tell when he was confused, or when he was clear; when he understood what is being asked, or when he seemed to contradict himself and similarly, you can look at the doctor and assess that. You can look at the mother. You can look at any of the other witnesses and make sure that you are able to see and figure out their body language.
>
> When, for example, [the complainant] was answering questions, you remember how he looked when he answered. At some point he held down his head and figit [sic]. At various points in the evidence he seemed distracted. There were details he could not remember, so much so that he had to be asked the same thing more than one time. Was it that he was being affected and uncomfortable about what he was telling you, or was his reaction an inability to remember details, based on his disability, or lack of capacity to express himself.
>
> He has been described as a slow learner with challenges by his former guidance counselor [sic]; or was he just pretending and avoiding, or making up lies. How did he impress you? What did you pick up about his abilities and his mental capacity? Is he speaking the truth or not? These are matters you will have to assess as you consider his whole body language and determine what you make of his evidence. These are matters for you as judges of the facts."

[62] In relation to Mr Thomas' assessment of the complainant, the learned trial judge had this to say:

> "…Said he was a slow student with learning challenges but at this time was not diagnosed, so there was no specific diagnosis because they were not equip [sic] to do so. So, you have to assess how - - whether you believe him on that because even though you not [sic] medical doctor you just look at somebody and do your own layman

> diagnosis if that is something that you feel in your experience you are able to do. You walk around Jamaica you recognize who they call slower learners and those things.

[63] The learned trial judge demonstrated an awareness of the deficiencies in the quality of the complainant's evidence. She was content to deal with his manner of referring to the parts of the body as "his thing" and commented that "we are Jamaicans and you have to consider if he knows what he means". She gave unexceptional directions on the burden and standard of proof with the proper caution that the jury had to be satisfied with what the complainant said happened so that they feel sure beyond a reasonable doubt that he was speaking the truth.

[64] A significant feature of the complainant's evidence was his admission to having said things in his evidence-in-chief that were not the truth. The learned trial judge was content to deal with the matter of him saying he was tied up as an inconsistency and said the following:

> "So, you remember that when [the complainant] gave evidence before you he told you that when the [appellant] called him into his house and was doing things to him he tied up his hands and feet. However, in cross-examination he agreed that this did not happen. This is an example of an inconsistency and it must be looked at by you and you have to decide the issue by looking at the witness and what they say happen. The crown is suggesting either that he was confused or that was his way of expressing himself similar to when somebody says you give them no choice and you tie up them hand and foot, you know, the Jamaican expression. The defence lawyer is saying that he was just making up things and that's why he say [sic] that. I leave it to you to settle that among yourselves the position on what you believe bearing in mind what I told you about how to assess a witness."

[65] The fact is that the complainant admitted that he had never told the police about the appellant tying him up because that did not take place. He was asked specifically whether "the tying up happen" and he responded no. Yet he also said he did not make it up and that he did not know what a lie was. In re-examination, despite the efforts of Mrs Dell-Williams to get an explanation for why he had said that the appellant had tied him

up, he could offer none. Thus this was an admitted lie told on oath and not an inconsistency.

[66] The other area the complainant had admitted to not speaking the truth was in relation to his evidence that someone named Fletcher had kicked off the door. In rehearsing his evidence, the learned trial judge recounted what he had said. She stopped short of pointing to the fact that once again the complainant admitted that an act he described under oath had taken place, had never happened. Again, he was unable to provide any explanation for having volunteered this account for the first time in his examination-in-chief and then admitting it was not the truth. The learned trial judge failed to identify this variation in the complainant's evidence for what it appeared to be in all the circumstances, namely, a lie.

[67] In **Makanjuola**, the observation was made that where the witness has been shown to be unreliable, the trial judge may consider it necessary to urge caution and in a more extreme case, if the witness is shown to have lied a stronger warning may be thought appropriate and the judge may suggest that it would be wise to look for some supporting material before acting on the impugned witness' evidence.

[68] There can be no dispute that the learned trial judge quite properly identified the central issue in this case to be that of credibility. She gave the usual unexceptional directions to the jury to determine whether they believed the complainant based on their assessment of him. She failed to acknowledge that his admission of lying impugned his reliability to such an extent that it provided an evidential basis for a corroboration warning. The cumulative effect of the recognised deficiencies in the quality and content of the complainant's evidence together with the admitted lies were such that the jury ought to have been invited to exercise caution in determining whether to accept the complainant's evidence and the weight to attach to it.

[69] In the absence of such a warning, it cannot be said that the appellant received a fair trial and thus his conviction is rendered unsafe. In the circumstances it is difficult to

say that had the jury been properly directed, they would inevitably have convicted the appellant. For these reasons, ground 2 succeeds.

Whether a new trial should be ordered

[70] The fact that this appeal succeeds because of the failures of the learned trial judge requires a consideration of whether or not to order a retrial. Such a consideration is pursuant to section 14(2) of the Judicature (Appellate Jurisdiction) Act which provides the following:

> "Subject to the provisions of this Act, the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[71] In **Dennis Reid v R** (1978) 27 WIR 254, the Privy Council gave guidance, at the invitation of this court, on factors that should assist in determining whether to order a new trial where the interests of justice so require. For the purposes of this appeal, the succinct statement of the guidance captured at para. (v) of the headnote is sufficient. It reads as follows:

> "(v) Among the factors to be considered in determining whether or not to order a new trial are: (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing, (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it so that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

[72] It is indisputable that sexual offences against the young and vulnerable in our society is prevalent. One overriding factor in this matter is the fact that the strength of the case presented by the prosecution was undermined by the obvious difficulties in eliciting evidence from the complainant. In these circumstances it would not be in the interests of justice to order a new trial.

Conclusion

[73] The learned trial judge erred in her treatment of the expert witness. Although the learned trial judge had a discretion whether to give a corroboration warning, the circumstances of this case required that the jury be warned to exercise caution in respect of the complainant's evidence. Accordingly, the appeal should be allowed. The order of the court is as follows:

(1) The appeal against the convictions is allowed.

(2) The convictions are quashed, sentences set aside, and a judgment and verdict of acquittal entered instead.