[2014] JMCA Crim 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 53/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

ERRON HALL v R

Sean Kinghorn and Miss Danielle Archer for the appellant

Mrs Karen Seymour-Johnson for the Crown

25 September, 20 December 2013 and 17 October 2014

MORRISON JA

[1] The appellant was initially charged on an indictment containing a single count of carnal abuse. The particulars of the offence were that, on a day unknown between 1 and 31 October 2005 in the parish of Saint Catherine, he carnally knew and abused the complainant, a girl under the age of 12 years. At the conclusion of the evidence for the prosecution, the indictment was amended, pursuant to leave granted by the learned trial judge, to add a count of buggery. The particulars of this offence were that, on a day unknown between the same dates mentioned above, the appellant committed the unnatural crime of buggery against the complainant.

[2] On 20 April 2009, after a trial before G Smith J and a jury, the appellant was convicted on the first count, but was found not guilty on the second. On 7 May 2009, he was sentenced to 10 years' imprisonment at hard labour. This is an appeal, pursuant to leave granted by a single judge of this court on 9 November 2010, against both the conviction and sentence. On 20 December 2013, we dismissed the appeal, affirmed the conviction and sentence and ordered that the sentence be reckoned from 7 May 2009. These are the reasons which were promised for this decision.

[3] The complainant, upon whose evidence the case against the appellant was entirely based, was the daughter of the appellant's then common law wife ('Miss PG'). The complainant was born on 13 December 1993. As at the date of the alleged offence, therefore, she was 11 years old and, on 20 April 2009, which was the date on which she commenced giving evidence at the trial, she was 15 years old. The principal issue which arises on this appeal is whether the learned trial judge, having warned the jury on the dangers of acting on the uncorroborated evidence of a complainant in a sexual case, ought in addition to have given a separate warning on the dangers of acting on the uncorroborated evidence of a child.

[4] At the material time, the complainant lived in the parish of St Catherine, under the same roof with Miss PG, her older brother, Sheldon, her two younger siblings and the appellant. The appellant was the owner of the house in which they lived. The appellant and Miss PG were the parents of one of the four children, but the other three, including the complainant, were Miss PG's children by different fathers. The appellant was known to the complainant as 'Uncle Erron'.

[5] The complainant's evidence in chief was that, on a day in October 2005, at about midday, she was in bed beside her sleeping sister in the room which they shared at home. As she got up to go to the bathroom, the appellant came into the room, dressed in shorts only. He drew her to him, pulled down her shorts and panty and "shub" her onto her back on the bed. The appellant then took off his shorts and, standing in his underpants only, pulled out his penis. In answer to her question, "Uncle Erron, a weh you a duh?" the appellant responded, "Mi naah do nothing fi hurt you man." Then, the complainant testified, the appellant, who remained standing, "shub his penis in my vagina", assuring her that, "Mi nah shub it up, man. Mi just a rub it pon it." At this point, the complainant heard a knock on the door to the room, whereupon the appellant pulled up his shorts, while she came off the bed and pulled up her shorts and panty. It turned out that it was the complainant's younger brother at the door and, after letting him in, the appellant gave the complainant $100.00, telling her not to talk about what had happened in the room.

[6] These events left the complainant feeling "bad" and "scared". As a result, she left the room, "went round a back", and started to cry over what "Uncle Erron do to me in the room". While she was there, Sheldon came up to her and asked her why she was crying, to which she responded that, "Uncle Erron tek out his penis, and he put it in my vagina." Some weeks later, accompanied by Miss PG, the complainant went to the Linstead Police Station and made a report. And, after that, Miss PG and her children, including the complainant, ceased living with the appellant.

[7] The complainant was cross-examined at great length by counsel for the appellant. She agreed with the suggestion that, before the incident which she had described, she had heard the appellant tell Miss PG on more than one occasion that he wanted her to leave his house. She also agreed that on the day that she and Miss PG went to the police station to make a report, there had been an argument between Miss PG and the appellant, because he was again telling her to leave his house. Further, that this argument had resulted in a fight, during which both Miss PG and the appellant had thrown stones at each other. And further still, that it was after this incident that Miss PG took the complainant and her siblings to the police station and made a report against the appellant.

[8] During the course of this cross-examination, the complainant told the court that, in addition to having put his penis in her vagina on the day in question the appellant had, later the same day ("in the 3: 00 to 4: 00 o'clock region"), also put his penis in her bottom. While the first incident had taken place on the bed in the front room, the second had taken place as she lay in the bed in the back room of the house. Shown her statement to the police, the complainant agreed that she did tell the police that, after the incident in the midday region in which the appellant had put his penis in her vagina, "he did not trouble me again after that". But, when she was re-examined by counsel for the prosecution, the complainant insisted that the appellant did "trouble" her a second time that day.

[9] The complainant's brother, Sheldon, testified that on two separate occasions, on dates which he was unable to recall, the complainant had reported to him that the

appellant was "fassing with her". She had also told him that the appellant had given her "a one hundred dollar to not tell her mother". On the occasion of the first report, he had not told anyone, because he did not believe what the complainant had said, but, on the second occasion, he told Miss PG what the complainant had reported to him.

[10] In her evidence, Miss PG confirmed that she had taken the complainant to the police station in October 2005 upon receiving the report concerning her and the appellant and that she had moved out of his house within three days of receiving the report. She denied that the appellant had asked her to leave his house with her children from before 2005 and insisted that it was she who had left him in October 2005.

[11] Corporal Sandra Edwards-Green told the court that she was stationed at the Linstead Police Station on 16 October 2005. On that day, the complainant, accompanied by her mother, attended at the station and made a report. The complainant was referred to the Rape Unit, where a statement was recorded from her and in due course Corporal Edwards-Green arrested the appellant. When he was cautioned, the appellant stated that, "Mi nuh know 'bout that. Because mi and her break up why she build up something." After being charged with the offence of carnal abuse, the appellant asked, "Why if is from so long she just a said [sic] that?"

[12] Before closing its case, the prosecution applied to amend the indictment to add a count charging the appellant with the offence of buggery, as a result of the complainant's evidence that the appellant had also put his penis in her bottom. Against

strong opposition from the defence, this application was granted and the appellant, who was then re-pleaded, entered a plea of not guilty on this count.

[13] At the close of the prosecution's case, counsel for the appellant made a brief no case submission which, although there is no indication of this on the record, was clearly rejected by the learned trial judge.

[14] The appellant was the sole witness for the defence. In his evidence, he chronicled the history of his relationship with Miss PG and her children. At first, after Miss PG and her three children came to live with him in his house, the relationship was "good" and together they had a child of their own. But then it got "shaky", because of "[t]he children on a whole…not having any manners to mi". In time, because things were not working out between Miss PG and himself, the appellant said, he started "a different relationship" and asked Miss PG "to move on", as he had. The appellant said that, having asked Miss PG to leave in 2004, she finally left his house on 16 October 2005, after a dispute between them, which resulted in Sheldon throwing stones at the house and he (the appellant) "throwing back stones" at Sheldon and Miss PG. According to the appellant, on 6 November 2005 Miss PG returned to his house, accompanied by two police officers and 13 other persons, to move out her possessions. After she had done so, a further dispute erupted between them, as a result of which the police officers, who had remained close by, suggested to him "seh is best me stay in custody, and cool out myself". A few days later, while still in custody at the Bog Walk Police Station, he learned of the allegation for the first time that he had sexually interfered

with the complainant. The appellant categorically denied putting his penis in either the complainant's vagina or her bottom.

[15] In summing up the case to the jury, the learned trial judge told them in clear and explicit terms, about which no complaint is made, that, in cases involving sexual offences, "the law requires me to warn you that it is a dangerous thing to act on the uncorroborated evidence of the complainant, and when I say uncorroborated, corroboration simply means some independent evidence intended to support the allegations of the complainant". Expanding on the reasons for the warning, the judge continued:

> "The law recognizes that it is comparatively easy for someone to allege having been sexually abused. However, it is not as easy for the accused to disprove that allegation, and let me hasten to remind you that the accused has nothing to prove. It is the prosecution who must satisfy you to the extent that you feel sure that he is guilty of the acts that they have alleged against him.
>
> Recognizing this, the law further states that when you consider cases of carnal abuse, and buggery, and when the evidence of the complainant is not corroborated, that is, it is not borne out by any independent testimony, then you must exercise particular care, caution. You have to be very cautious in considering the case. And it is my duty to warn you of acting on uncorroborated evidence in convicting an accused in sexual offence cases. So when you come to deal with cases of this nature, where there is no independent evidence, other than the complainant, you have to be very cautious. You have to, as I say, weigh the evidence, assess it, and assess it carefully with great care.

Now, on a charge of carnal abuse, the corroborative evidence must confirm, in some material particular, that sexual intercourse has taken place and it is this accused who committed it, likewise on the charge of buggery, corroborative evidence must confirm in some material particular, that anal intercourse has taken place, and it was the accused who committed it. Bear in mind that if he committed such acts – his defence, and I remind you, is that it is a story that has been concocted by this family out of spite and malice, because of the relationship that had gone sour between himself and Miss [PG]. So, if there is no such corroboration, no such independent evidence, then it is dangerous to act on the evidence of the complainant alone and convict the accused.

But, Mr Foreman and members of the jury, you must bear in mind that it does not mean that if there is no such corroboration, you are bound to acquit, if having considered the evidence and having given full weight to the warning, you feel quite sure quite satisfied, quite convinced, that the complainant…has spoken the truth, then it is open to you to convict on that evidence although it is not supported by any other independent evidence in the case.

However, as I told you before, it is dangerous for you to do so, and you must be very sure that [the complainant] spoke the truth before you can act on her evidence. On this matter of corroboration, as far as this accused is concerned, there is no corroboration in the case. No one came here to say they saw what happened, except for [the complainant] and this is, therefore, very important in the case. Because, as I have told you before and I will re-emphasize, this is a case which is based on the credibility of the witnesses."

[16] However, the judge did not say anything about the dangers of acting on the uncorroborated evidence of children. Before leaving the case to the jury at the end of the summing-up, the judge enquired of counsel on both sides whether there was anything that she had omitted to say. Both counsel replied in the negative, with Mr Kinghorn, who appeared for the appellant in the court below, as he did in this court, adding that, "…I have nothing to be added, impeccable as usual." The jury then retired for a little over 40 minutes before returning with a verdict of guilty of carnal abuse, but not guilty of buggery. As we have already indicated, the appellant was sentenced to 10 years' imprisonment at hard labour.

[17] The appellant filed four grounds of appeal:

> "(a) The learned trial judge erred in her summing up to the jury in that she did not give the requisite warning in relation to the evidence of children and young female complainants.
>
> (b) The learned trial judge erred in law in not upholding the 'No Case Submission' advanced by Defence Counsel at the close of the prosecution case.
>
> (c) The learned trial judge erred in allowing an amendment to the indictment to include a count for Buggery.
>
> (d) The verdict of the jury is perverse and blatantly inconsistent with the clear evidence."

[18] Mr Kinghorn described ground (a) as his strongest ground. He submitted that, both on principle and on authority, the trial judge was obliged to give the jury a warning, separate and distinct from the warning which she gave them as to the dangers of convicting on the uncorroborated evidence of complainants in sexual cases, on the dangers of convicting on the uncorroborated evidence of children. In the

alternative, Mr Kinghorn submitted, even if the judge was not obliged to give a warning in these terms, the evidence given by the complainant in this case was "so inconsistent, tenuous, vague, uncertain and shifty", that a warning should have been given, in the interests of justice and in fairness to the appellant. In support of this submission, Mr Kinghorn relied primarily on the decision of this court in **R v Joseph McKenzie** (1992) 29 JLR 509. But he also quite properly referred us to the more recent decision of the Privy Council in **Carlos Hamilton & Jason Lewis v R** [2012] UKPC 37, in which the Board appeared to question whether the common law still requires that the jury should be warned of the dangers of acting on the uncorroborated evidence of a child.

[19] In opening her response to these submissions, Mrs Seymour-Johnson for the Crown directed our attention to Mr Kinghorn's approving comment on the quality of the learned trial judge's summing-up. While she accepted that the judge did not in terms warn the jury of the dangers of acting on the uncorroborated evidence of a child, Mrs Seymour-Johnson observed that no special formula was required for this purpose. But she too – again, quite properly – drew our attention to an authority which appeared on its face to be against her; that is, the decision of this court in **R v Earl Britton** (1996) 33 JLR 307, in which, on a concession by the Crown, Walker JA (Ag) (as he then was) characterised the requirement to warn the jury of the dangers of acting on the uncorroborated evidence of children of tender years as "an inflexible rule of practice". However, Mrs Seymour-Johnson did point out that in that case the child in question was eight years old, while in this case the complainant was 11 years old at the time of the alleged offence.

[20] In considering this ground, we begin with a brief word of background. As is well known, there is no general requirement that evidence in a criminal trial must be corroborated; nor is there any general requirement that the tribunal of fact must be warned – or must warn itself - of the danger of acting on uncorroborated evidence. However, there are certain cases in which, exceptionally, corroboration is required either (a) by statute, or (b) by rules of practice (see generally Keane & McKeown, The Modern Law of Evidence, 9th edn, pages 222-223).

[21] The best known example of a case in the first category is provided by section 20(1) of the Child Care and Protection Act. That section, upon certain conditions being satisfied, permits the evidence of a "child of tender years" (defined in section 20(3) as a child under the age of 14) to be received unsworn. However, section 20(2) provides that, where evidence is admitted by virtue of this section on behalf of the prosecution, "the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by other material evidence in support thereof implicating him". (The section replaces section 54 of the Juveniles Act, which in turn mirrored the provisions of section 38(1) of the now repealed English Children and Young Persons Act 1933.)

[22] In cases falling within the second category, although corroboration is not required by statute, the common law position, arrived at by rules of practice developed over many years, is that the tribunal of fact must be warned of the danger of acting on the uncorroborated evidence of particular classes of witnesses. These are (a) accomplices testifying on behalf of the prosecution (on the basis of the perceived danger that the accomplice will "minimise his role in the crime and exaggerate that of

the accused" - see Cross on Evidence, 3rd edn, page 169); (b) complainants in sexual cases (on the basis of the view that, as Salmon LJ put it in **R v Henry** (1968) 53 Cr App Rep 150, 153, "human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute" – although it is well established that the rule applies equally to male as well as female victims of sexual offences); and (c) children giving evidence on oath (because, it is said, "although children may be less likely to be acting from improper motives than adults, they are more susceptible to the influence of third persons, and they may allow their imaginations to run away with them" - Cross, op. cit. page 175).

[23] In England and Wales, mandatory corroboration warnings in respect of all three categories of witnesses have long been abolished by statute (as regards accomplices and complainants in sexual cases, by section 32 of the Criminal Justice and Public Order Act 1994; and, as regards the sworn evidence of children, by section 34(2) of the Criminal Justice Act 1988). Among the various objections to mandatory corroboration warnings which prompted their abolition, Keane and McKeown considered the most serious to be "…that the rules applied on a class basis, ie irrespective of the circumstances of the particular case and the credibility of the particular witness". It is no doubt because of this consideration that, even after the abolition of mandatory corroboration warnings in that jurisdiction, the trial judge nevertheless retains a discretion to give some form of warning if, in her view, the circumstances of the particular case require that this be done (see generally the influential judgment of Lord Taylor CJ in **R v Makanjuola** [1995] 3 All ER 730).

[24] As is equally well known, there is no statutory equivalent of these provisions in Jamaica. However, in **R v Gilbert** [2002] UKPC 17, in a decision on appeal from the Court of Appeal of Grenada, the Privy Council abolished the rule of practice requiring a mandatory corroboration warning to the jury in respect of the evidence of complainants in sexual cases. Delivering the judgment of the Board (at para. 16), Lord Hobhouse described the belief that, regardless of the circumstances, the evidence of female complainants must be regarded as particularly suspect and particularly likely to be fabricated as "discredited" and "not conducive to the fairness of the trial nor to the safety of the verdict". Thus in that case, in which the only issue on a charge of rape was identification (the appellant having set up an alibi), it was held that the trial judge had been correct to approach the matter on the basis that a **Turnbull** warning (**R v Turnbull** [1977] QB 224) was all that was needed and that it was not necessary to give an additional warning on the danger of acting on the uncorroborated evidence of the complainant. In arriving at this conclusion, the Board adopted the approach of the English Court of Appeal in **R v Chance** [1988] QB 932, a decision which predated the formal abolition in England and Wales of the need for a mandatory corroboration warning in sexual cases.

[25] It is therefore now a matter entirely within the discretion of the trial judge to determine whether, in the light of the content and manner of the witness' evidence, the circumstances of the case and the issues raised, to give any warning at all; and, if so, in what terms. **Gilbert** has been followed and applied by this court on a number of occasions, including a case to which Mr Kinghorn referred us, **R v Prince Duncan &**

Herman Ellis (SCCA Nos 147 & 148/2003, judgment delivered 1 February 2008), in which identification was also the only issue.

[26] But, up until quite recently, there has been no hint of any departure from the requirement of a corroboration warning in relation to the sworn evidence of children. The strictness with which the rule has been applied is illustrated by each of the decisions of this court to which we were referred by Mr Kinghorn and Mrs Seymour-Johnson. In **Joseph McKenzie**, for instance, the appellant was convicted on two counts of incest committed allegedly against his 15 year old daughter. The allegations, which were denied by him, were that he had had sexual intercourse with her on a total of seven occasions. The sole issue in the case was therefore one of credibility. The trial judge explained the nature of corroborative evidence to the jury and warned them that it was "dangerous and unsafe to convict on the evidence of the complainant alone"; but he did not tell them whether or not there was any evidence in the case which was capable of amounting to corroboration. On appeal, the appellant's single ground was that the judge had failed to direct the jury adequately on the issue of corroboration. This was, it was said, "of crucial importance in cases involving young children and particularly so in this case".

[27] The appeal was allowed. Speaking for the court, Morgan JA said this (at page 510):

> "It is the responsibility of a judge to tell jurors whether or not there is evidence capable of amounting to corroboration and also to assist a jury in finding it. If there is corroboration, he must indicate to them that area of the

> evidence – if there is no corroboration he must say so. This is important in two areas, that is, whether the sexual intercourse took place, and, that it was the appellant who committed it. No attempt was made by the learned trial judge to guide the jurors as to whether on the evidence produced in this matter there was anything amounting to corroboration…
>
> Again, the case involved a complainant who was a child of fifteen years and gave sworn evidence. Notwithstanding, the jury should have been directed that it was dangerous to convict on the uncorroborated evidence of a child. This is so because of the susceptibility of children to influence, their fallibility of memory, the fact that they are prone to fanciful thinking and sometimes inventive, but that they may convict if having seen and heard her they were convinced that the child was speaking the truth."

[28] In **Earl Britton**, the appellant was convicted of the offence of carnal abuse, allegedly committed against an eight year old child. At the trial, the complainant gave sworn – uncorroborated - evidence and the appellant, in an unsworn statement from the dock, denied molesting her. Although the trial judge pointed out to the jury that the complainant's evidence was uncorroborated, he failed to give the jury a warning arising from the fact that she was a child of tender years. Walker JA (Ag) said this (at pages 307-308):

> "There was no corroboration of the complainant's evidence and the learned trial judge gave the requisite warning in that regard. However, he failed to give to the jury the warning necessitated by the fact that the complainant was a child of tender years. The short point which fell for our determination was whether the conviction of the appellant could be sustained against the background of such an omission. Mr Hibbert frankly conceded that it could not, and we considered that he was eminently right in making that concession. It is an inflexible rule of practice that a jury should be warned of the danger of acting on the evidence of

> a child of tender years, and should at the same time be told why it is dangerous so to act. The dangers, of course, include the risk of unreliability and inaccuracy, over-imaginativeness and the susceptibility to being influenced by third persons."

[29] This brings us then to the recent decision of the Privy Council in **Hamilton & Lewis**. The appellants in that case were convicted of the offence of murder. One of the two chief witnesses for the prosecution as to fact ('Manase'), who was 13 years of age at the time of the incident, had turned 16 by the time he came to give sworn evidence at the trial. In a ground that was not raised in their unsuccessful appeal to this court, the appellants complained that the trial judge should have warned the jury of the dangers of acting on Manase's uncorroborated evidence.

[30] Delivering the judgment of the Board, Sir Anthony Hooper first observed (at para. 32) that, although the requirement of a corroboration warning in relation to a child's sworn evidence had not been abolished by statute in Jamaica, "it has been abolished in most other common law countries" (citing The Evidence of Children: the Law and Psychology, by J R Spencer and Rhona Flin, 1990, page 173; see now the 2nd edn, at page 214). Next, it was pointed out (at para. 33) that, in the older leading case of **R v Campbell** [1956] 2 QB 432, 436, "Lord Goddard CJ seems to have taken the view that a child is someone aged under 14". And further (at para. 35), in **R v Morgan (Michael)** [1978] 1 WLR 735, "the Court thought that it was not possible to state as a general proposition what [is] the age above which it is unnecessary for a judge to give

a warning and the judge is much better placed than an appellate court to consider the matter". Against this background, Sir Anthony concluded (at para. 36) –

> "On the questionable assumption that the common law still requires a warning of the dangers of acting on his uncorroborated evidence, we take the view that the judge was certainly not required to give a warning of the kind sought, given the age of Manase. Even if we are wrong about that, there was ample corroboration of the presence of Hamilton and Lewis at the scene of the killing…"

[31] Although this dictum does not in terms affect the requirement of a corroboration warning in the case of child witnesses, it is clear that it could well be a reliable indicator of what the future holds in this regard. But the actual decision in the case was ultimately premised on the continued existence of the requirement in this jurisdiction. It therefore seems to us that, in this case, on the basis of the longstanding rule of practice which has been consistently applied in our courts, we are bound to approach the matter in the same way. It accordingly follows that, if the complainant in the instant case fell to be regarded as a child when she gave evidence against the appellant at the trial, the judge erred in omitting to warn the jury specifically against the danger of acting on the uncorroborated evidence of a child, notwithstanding the entirely adequate warning to the same effect in relation to her status as a complainant in a sexual case. For, as Mr Kinghorn submitted, the rationale underlying the warning in each case is essentially different.

[32] Three factors appear to us to be of particular relevance in this regard. First, as we have already pointed out, section 20(3) of the Child Care and Protection Act

provides (albeit for a different, though not entirely unrelated, purpose) that a child of tender years is a child under the age of 14 years. Second, as was said in **Morgan (Michael)**, because there is no fixed age above which the warning in the case of the sworn evidence of children is unnecessary, it is a matter for the trial judge to determine in each case whether one should be given. Third, the complainant in this case was 15 years of age by the time of trial.

[33] The combination of these factors leads us to think that it was entirely a matter for the very experienced trial judge to determine, having observed the complainant as she gave her evidence, and having chosen to give a full and careful warning as to the danger of acting on her uncorroborated evidence as a complainant in a sexual case, whether her age warranted a further specific warning to the same effect. In exercising her discretion against doing so, we are therefore quite unable to say that the judge acted on any wrong principle. For this reason, we have come to the clear conclusion that ground (a) must accordingly fail.

[34] Purely as a footnote to the discussion on this ground, however, we would add that, as Roch J, giving the judgment of the court, pointed out in **R v Chance** (at page 932):

> "The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. This involves the necessity of the judge tailoring his direction to the facts of the particular case."

[35] Therefore, even in a case in which a trial judge considers it necessary to give both a 'complainant in sexual cases' and a 'child witness' direction in relation to the same witness, we consider that the task will be adequately discharged by a composite warning as to the dangers of acting on the uncorroborated evidence of the witness, once the dual elements of the justification for the warning in the particular case are clearly stated. In other words, unnecessary – and potentially confusing – duplication is to be avoided. But, hopefully, this is an area which will attract legislative attention before too long, assuming that the Privy Council does not get there first.

[36] The appellant's remaining grounds, in respect of which Mr Kinghorn was content to rest on his written submissions, can be dealt with more briefly. The complaint in ground (b) is that the learned trial judge erred in law in not upholding the no case submission advanced by defence counsel at the close of the prosecution's case. We are handicapped in considering this complaint because of the absence from the record of any indication of the precise grounds of the submission that was made to the judge. However, it suffices to say that, in our view, this was plainly a case in which the strength or weakness of the case for the prosecution depended on the jury's view of the complainant's reliability and credibility, and that there was evidence on which the jury could properly come to the conclusion that the appellant was guilty. Therefore, in accordance with the governing authority of **R v Galbraith** [1981] 2 All ER 1060, on which Mr Kinghorn relied, we consider that the trial judge was entirely correct to leave the case to the jury.

[37] In ground (c), the appellant complains that the judge ought not to have allowed the amendment to the indictment to include a count for buggery. The power of the court to order amendment of an indictment is given in section 6(1) of the Indictments Act:

> "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice…"

And section 6(4) provides that –

> "Where, before trial, or at any stage of a trial, the Court is of opinion that the postponement of the trial…is expedient as a consequence of the exercise of any power of the Court under this Act to amend an indictment…the Court shall make such order as to the postponement of the trial as appears necessary."

[38] Delivering the judgment of this court in **Melanie Tapper & Winston McKenzie v R** (RMCA 28/2007, judgment delivered 27 February 2009), Smith JA explained the ambit of the power thus given to the court to amend an indictment in this way (at page 27):

> "An amendment of any kind, including the addition or the substitution of a count may be made at any stage of the trial provided that having regard to the circumstances of the case and the power of the court to direct a separate trial of any accused or to postpone the trial, the amendment can be made without injustice."

[39] In her ruling on the application to amend the indictment in this case, G Smith J was clearly fully aware of these principles:

> "The Court rules that the amendment will be granted for a second count to be added to the indictment, for the Offence of Buggery, as in the Court's view, no injustice will be caused to the accused. The power to amend an indictment, once it has been proffered, extend [sic] to the addition of a count or counts charges [sic] offences which are not disclosed in the committal evidence but which are disclosed by the evidence which subsequently comes out. What is noteworthy in this case, is that it was during cross-examination and vigorous cross-examination, that this evidence came to light, and was confirmed in re-examination, and I am a little taken a back, when Mr Kinghorn in his novel submissions would seek to say, that his client was taken by surprise. Having gotten it out, I am sure, he must have anticipated that counsel for the prosecution would have moved along this way. However, because of the fact that he might not have been given sufficient time to get proper instructions from his client, as to this aspect of the case, I would be minded to grant an adjournment to give him sufficient time to take proper instructions and for us to proceed in the matter."

[40] Further, the judge stated her willingness to accede to a request from the defence to be allowed to recall the complainant for further cross-examination in the light of the added count to the indictment. As a result, the appellant having been re-pleaded to the amended indictment, the trial was adjourned in mid-afternoon to allow counsel to advise himself. The following morning, counsel for the defence informed the court that, having reviewed the notes of evidence in relation to the new count and having taken instructions, he considered that it would be "a waist [sic] of judicial time" to put the complainant back in the witness box, given that "whatever it is, that I would have solicited from her now I have it already".

[41] In these circumstances, we consider that it was fully within the judge's power to allow the indictment to be amended in conformity with the evidence which had been elicited by the defence during the cross-examination of the complainant. Having granted the amendment, no complaint can, in our view, be made about the judge's approach to the matter, which demonstrated her clear appreciation of the need to be fair to the appellant and the interests of justice generally. Nor can any complaint be made, it seems to us, as to the judge's directions to the jury on how to approach the added count of buggery:

> "Now, the Crown closed its case, and you would recall that just before they had close [sic] their case, they had amended their indictment, because when we had started with one count of carnal abuse and then later the second count for the buggery was added, and that was permissible, because as the evidence unfolded in the court, this other aspect, which had not been told to Crown Counsel, came out, that on [the complainant's] evidence, that according to her, there was a second incident that same day when Mr Hall is alleged to have put his penis in her anus and so that second count was added, but again, as I said, you would have to look at the overall picture, because you must examine carefully, and ask yourselves how come it was only in the cross-examination that we were hearing about this for the very first time? If it did happen, how come, on all the previous occasions when she gave statement [sic] to the police, when she went before the Magistrates at Linstead and Miss Thompson was asking her questions, not a whisper of that came to light, how come? Is it, as I used the word, a work in progress, and as we go along little bits and pieces are now emerging? I am only the judge of the law, you are the judges of the fact, you will have to weigh those, grapple with them, analyze them and see how they fit into the scheme of events, and to see whether or not you think that [the complainant] is telling the truth or is it like Mr Hall is saying it is a makeup story and that is why we have bits and pieces coming along as the case progresses? A matter for you."

[42] It is clear that, from their verdict of acquittal on the count of buggery, the jury must have had these directions firmly in mind. In these circumstances, it appears to us that the appellant ultimately suffered no real prejudice from the judge's decision to amend the indictment to include that count.

[43] Ground (d), in which the appellant complains that the verdict of the jury was "perverse and blatantly inconsistent with the clear evidence", is even less promising. It suffices to say that there was, as we have already observed in relation to ground (b), evidence from which the jury, properly directed, could come to the conclusion that the appellant was guilty of the offence of carnal abuse. At the end of the day, the appellant having given evidence on oath, the jury were presented with a contest of credibility, between his evidence and that of the complainant, which they resolved in favour of the latter. In these circumstances, it is well established that, in order to succeed on a complaint that the verdict of the jury is against the weight of the evidence, the appellant must show that the verdict is unreasonable and insupportable (**R v Joseph Lao** (1973) 12 JLR 1238). This is a high bar which, in our view, the appellant has failed to cross in this case.

[44] All four grounds of appeal having failed, it followed that the appeal against conviction had to be dismissed. No argument was advanced to us in support of the appeal against sentence and, in our view, the sentence imposed by the trial judge was fully justified in the circumstances of the case. Accordingly, the appeal against sentence was also dismissed and the sentence was ordered to run from 7 May 2009.