[2013] JMCA Crim 62

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 21/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE LAWRENCE- BESWICK JA (AG)

JORDAN THOMPSON v R

Leroy Equiano instructed by the Kingston Legal Aid Clinic for the appellant

Miss Paula Llewellyn, QC, Director of Public Prosecutions and Miss Michelle Salmon for the Crown

14 May and 19 December 2013

PHILLIPS JA

[1] The appellant was tried in the Home Circuit Court before Pusey J, and a jury between 10 and 12 October 2007, and on 15 February 2008, he was found not guilty of the offence of manslaughter (count 1) but was convicted of the offence of unlawfully and maliciously causing a destructive thing to be taken contrary to section 25 of the Offences Against the Person Act (count 2). He was sentenced to a correctional order with recommendation for psychiatric and vocational training up to the age of 18 years at the Rio Cobre Correctional Centre.

[2] On 24 October 2011, the appellant's application for leave to appeal against conviction was granted by a single judge of this court on the basis that the evidence as related in the judge's summation was quite weak and that the summation itself may well have lacked clarity. The appeal was heard in May of this year, when we reserved our decision which we deliver now, and our reasons for arriving at the same.

[3] This case arises from the unfortunate circumstances surrounding the death of a five year old boy, Nathan Reynolds who was born on 9 January 2001. The Crown called three witnesses to prove its case, namely; the mother of the victim Miss Lacy-Ann Mitchell, a registered medical practitioner and consultant pathologist, Dr Gail Codrington and the investigating officer Constable Laurie O'Gilvie. The appellant made an unsworn statement and called no witnesses on his behalf.

The case for the prosecution

[4] Miss Lacey-Ann Mitchell testified that she was at home on 26 January 2006 with her two sons Nathan and his younger brother, Jason born on 26 August 2004. She said that Nathan went outside the house to play with his truck, while the younger son was inside sleeping. She left him outside and went inside to prepare his lunch. Later she called him and as she did not hear from him she went in search of him and saw him come to the doorway and in her own words said that he, "look a way.. Look away like him out fi drop an then.." She asked him she said, because of how he looked and because she had smelled rum on him, what was wrong with him and who had given him rum to drink. Nathan, she said, told her that it was the appellant who had given

him something to drink. She gave him some water, instructed him to lie down and went to find the appellant. She found him at the fence and told him that Sudoo (other name for Nathan) had said that he had given him something to drink and, she asked him what had he given Sudoo. The appellant responded that it was a lie as he had not given Sudoo anything and that he had not seen him that morning. She said that when she spoke to the appellant he looked frightened and scared.

[5] On re-entering the house she saw Nathan on the ground "flattering", which she explained meant that, "him a kick up a way" and also she noticed that "him belly a move up so fast" and that he vomited. She took him to the Police Station and then she was assisted to the doctor and eventually to the Bustamante Hospital for Children where he stayed for about two weeks and then died.

[6] In cross-examination Miss Mitchell was questioned at length about an accident which had occurred with her younger son, Jason where a cork (bottle cover) full of kerosene oil had spilled and some of it had gotten on his hand which he had placed in his mouth resulting in him being taken to the hospital with a fever. It was suggested that he had developed the fever and had to be taken to the hospital because of something he had drunk. Miss Mitchell denied this, insisting that Jason had been admitted to the hospital due to the high fever and not as a result of drinking poison.

[7] Corporal Laurie O'Gilvie gave evidence that on 26 January 2006 Miss Mitchell came with Nathan to the Lawrence Tavern Police Station. He said that she seemed very frightened, was crying and Nathan appeared unconscious, and was frothing from his

mouth and nostrils. He took Nathan and his mother to a doctor at a nearby clinic, and he said later that day Nathan was taken to the Bustamante Hospital for Children. On the following day, he went to the hospital to check on Nathan's condition and to speak with the doctor attending to him. He then, based on information received and on Nathan's condition and injury, went to find the appellant but did not locate him or his mother. The appellant's mother Miss Sherene Williams eventually came to the station a few days later but without the appellant. Constable O'Gilvie testified further that the appellant came to the station the following week and, he and Constable Lawes proceeded to the appellant's home with his mother where the appellant told all of them, that he had been to the shop by the main road, and while he was on his way there he had seen a pepsi bottle with liquid in it nearby the shop at an old abandoned house and, he had taken it up to his home. He stated that he had been playing with Nathan and they had poured out the liquid and he, the appellant had given Nathan some of it to drink. Constable O'Gilvie said that he went in search of the pepsi bottle as the appellant had indicated the exact area where he, (the appellant) had found the bottle. However, upon searching the entire area he had not found the bottle.

[8] He said that he had returned to the house later the same day and the appellant then told him that he had obtained the substance (which he later described as a green liquid) out of the toilet. The appellant said that the liquid was in a pit latrine beside the house and his mother had hung up the substance inside the toilet. The appellant stated he said, that he had mixed the liquid that he had found in the toilet with some rum that his mother had on the kitchen table, and it was that mixture that he had given Nathan

to drink. Constable O'Gilvie testified that he had searched the house and the surrounding area for the mixture described by the appellant but had found nothing. He indicated that he had found a bottle of liquid which appeared to be rum on the kitchen table which he took to the Lawrence Tavern Police Station. He said that he eventually charged the appellant with being a juvenile in need of protection. He also stated that at no point had the appellant looked ill nor had he complained about being ill. He accepted in cross-examination that he had made no mention in the statement prepared by him of the Pepsi bottle that the appellant had mentioned to him.

[9] Dr Gail Codrington, a pathologist for approximately 24 years, gave evidence on the cause of death in respect of Nathan. She had conducted a post mortem examination on him on 15 February 2006 and noted injury to several organs including the bowel, liver, brain, kidney, and lung. She concluded that death had been due to respiratory or lung failure as well as liver failure likely complicating the ingestion of a poison. She could not say definitively that the cause of death was poison.

The case for the defence

[10] The appellant gave a brief unsworn statement. This is what he said:

> "My name is Jordan Thompson. I am 14 years old. I live at 8 Duncan Avenue, Kingston 5. On the 26th of January, 2006, I did not give Sudoo anything to drink. I did not see Sudoo on that day."

The grounds of appeal

[11] Counsel for the appellant was granted permission to argue four grounds of appeal. They are as follows:

> "2.1 The learned trial judge erred when he allowed a witness to give evidence of what was said by another person in the absence of the accused.
>
> 2.2 The learned trial judge erred in law when he allowed the evidence of confessions alleged to have been made by the Appellant to be admitted as evidence.
>
> 2.3 The learned trial judge erred in law when he allowed the case to be decided by the jury.
>
> 2.4 Having allowed the case to go to the jury, the learned trial judge [sic] summation was vague and inadequate. It did not assist the jury sufficiently with how to treat with the factual and legal issues."

The submissions

Ground 1

For the appellant

[12] Counsel for the appellant referred to and relied on certain excerpts from a leading text, Criminal Pleading Evidence and Practice-Archbold 2002 edition, chapter 11, for the law with regard to the hearsay rule. He submitted inter alia that:

> "Hearsay evidence (whether oral or written) common law and statutory exceptions apart, is inadmissible in criminal proceedings. The mere fact that the statement was made on oath does not render the statement admissible as evidence of the truth of its contents: (Paragraph 11.2) [t]he mere fact that the maker is dead.. or that the statement is to be adduced or elicited by the defence in criminal proceedings.. does not render the statement

admissible as evidence of the truth of its contents. Nor has a judge any discretion to admit such evidence…"

[13] It was counsel's contention that if the witness could not be cross-examined the evidence ought not to be received. He argued that if Nathan's statement were to be admitted in evidence through Miss Mitchell, it would have to fall within one of the exceptions to the hearsay rule. The Crown was relying on the statement being a part of the *res gestae,* but counsel argued that the statement did not satisfy the necessary conditions to qualify under that doctrine. He set out in detail the circumstances in which the statement was made and then articulated his specific complaint which was that Nathan's statement to his mother that it was the appellant who had given him something to drink was not spontaneous as it had been spoken as a result of questions put to him by his mother. He also argued that for the statement to have been admissible it would have had to have been given directly by the maker of the statement, namely Nathan, and as he was a five year old child, his evidence would only have been admissible if certain conditions had been met. Evidence would have had to have been led, that he could have understood the oath and, that he was competent to give that evidence. If he was unable to give sworn evidence, he argued, then that evidence ought to have been corroborated. He maintained that the learned trial judge did not give any warning to the jury with regard to the difficulties surrounding the admissibility of the statement and how to treat with it.

For the respondent

[14] Learned counsel for the Crown, Miss Salmon submitted that the statement had been correctly admitted in evidence as part of the *res gestae* pursuant to the principles laid down in the Privy Council decision of **Leith McDonald Ratten v R** [1972] AC 378; [1971] 3 All ER 801 which is binding on this court, and which has been followed in several cases subsequently including in the House of Lords, in **R v Andrews** [1987] 1 All ER 513. Counsel further submitted that the statement remained spontaneous in spite of the fact that Nathan's mother had posed a question to him. It was clear, it was submitted, on the evidence, that there was no room for concoction, distortion or fabrication.

[15] Counsel argued that the submission of counsel for the appellant that if the maker of the statement is not present, the statement could not be admitted was erroneous as the provisions of the Evidence Act permitted the judge to make a determination as to whether such evidence could be admitted. Additionally, with regard to whether a child would have to satisfy certain conditions before being able to give evidence, counsel submitted that the relevant warnings could be given to the jury as necessary. There was also no reason why the child could not have recognised the solemnity of the occasion and have been accepted as a witness of truth.

[16] Counsel also asserted that there was nothing that could be considered malicious from the statement attributed to Nathan, bearing in mind his age, the fact that the statement had been made to his mother and that he had obviously been unwell.

[17] Counsel pointed out that no objection had been taken to the admissibility of the statement at trial although many other objections had been raised in respect of other matters. It is possible, counsel contended, that having heard the evidence "first hand" counsel who represented the appellant below, was of the opinion that no issue ought to have been taken with regard to it.

Discussion and analysis

[18] The principle of *res gestae* is well accepted as a common law exception to the hearsay rule. Statements by the deceased made immediately upon the occurrence which caused the death, but not under such circumstances as would render them admissible as dying declarations may be admitted in evidence as part of the *res gestae*. The Privy Council case of **Ratten v R** is the classic expression of the modern approach to the principle. In that case, the statement had allegedly been made by the deceased hysterically, to a trunk call operator, asking her to "get me the police please!", in circumstances where she was fatally shot a few minutes later by her husband who claimed that the discharge of the shotgun was accidental as he had been cleaning it. Bearing in mind the tenor of the defence, the statement from the telephonist was crucial to the case for the prosecution. Lord Wilberforce, after a careful review of the authorities stated the basis on which a statement could be considered as *res gestae*:

> ".. there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

[19] Lord Wilberforce stated that the issue of the clear and accurate recollection of what was said goes to weight, and the person testifying can be subjected to cross-examination and the accused person could give his own account if different. However, he said, the possibility for concoction or fabrication where it exists is a valid reason for exclusion of the statement and should be the real and relevant test that judges apply. The test he said should not therefore be the uncertain one as to whether the statement was in some sense part of the event or transaction, which may in certain instances be difficult to establish. He therefore concluded on behalf of the Board on the facts of that case:

> " …in their Lordships judgment there was ample evidence of the close and intimate connection between the statement ascribed to the deceased and the shooting which occurred very shortly afterwards. They were closely associated in place and time. The way in which the statement came to be made (in a call for the police) and the tone of voice used, showed intrinsically that the statement was being forced from the deceased by an overwhelming pressure of contemporary event. It carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the appellant with his gun. Even on the assumption that there was an element of hearsay in the words used, they were safely admitted. The jury was, additionally, directed with great care as to the use to which they might be put. On all counts, therefore, their Lordships can find no error in law in the admission of the evidence. They should add that they see no reason why the judge should have excluded it as prejudicial in the exercise of discretion."

[20] **Ratten v R** was applied by the House of Lords in the subsequent case of **R v Andrews** [1987] 1 All ER 513, in which the statement of the deceased which was admitted into evidence, was made moments after he had opened the door of his flat

and been viciously stabbed by the appellant in his chest and stomach with a knife, as a result of which he was seriously wounded. The appellant was with another man and they both robbed the flat. The deceased told the police who arrived shortly thereafter that he had been attacked by two men and gave the name of the appellant, and the name and address of the other man before becoming unconscious. He was taken into hospital and died two months later. The opinion of their Lordships in that case is clearly set out in the headnote, which reads:

> "Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the res gestae, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event. If there was a special feature, eg malice giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. However the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility. Since the victim's statement to the police was made by a seriously injured man in circumstances which were spontaneous and contemporaneous with the attack and there was thus no possibility of any concoction or fabrication of identification, the statement had been rightly admitted into evidence. The appeal would accordingly be dismissed".

[21] Lord Ackner also indicated on behalf of the court that once the judge had properly directed himself as to the proper approach to the evidence before him and that there was material which would entitle him to arrive at the conclusions which he

did, then his decision would be final and it would not be interfered with on appeal. **Andrews** has been followed and applied in several judgments of this court, for example in **R v Icilda Brown** (1990) 27 JLR 321, **R v Winston Hankle** (1992) 29 JLR 62, and **Dwayne White** [2013] JMCA Crim 11 and by the Privy Council in an appeal from Jamaica in **Mills and Others v R** [1995] 3 All ER 865; 875-876. In both **Hankle** and **Mills**, as in the instant case, there was no objection to the admissibility of the statement into evidence. Forte JA in **Hankle** on behalf of the court said that the learned judge in his summing up had nonetheless made it clear, the basis on which he had admitted the statement, that is, that it formed a part of the res gestae, a part of the whole transaction, which he said was in keeping with the principles enunciated in **Andrews**, in that, the time lapse was short, the deceased lay on the ground until he was assisted by his companions, all of which he said demonstrated a set of circumstances which revealed "an approximate contemporaneity to the shooting and which made it impossible for any concoction or distortion to have been made by the deceased". In **Mills**, Lord Steyn made the point that the "deceased's last words were closely associated with the attack which triggered his statement". It was made in conditions of approximate contemporaneity. The dramatic occurrence, and the victim's grave wounds, would have dominated his thoughts. The inference was irresistible that the possibility of concoction or distortion could be disregarded. In fact the judge was not asked to rule that the evidence was inadmissible. If a ruling had been sought, the trial judge would inevitably have ruled that the evidence of the last words of the deceased, once it had been blurted out by the witness, were admissible.

[22] Objection to the statement not having been taken at the trial, in the instant case counsel on appeal nonetheless argued valiantly that the fact that the statement had been made in answer to the deceased's mother's question rendered the statement inadmissible as it lacked the necessary spontaneity. The evidence of the mother in examination-in-chief, on page four to five of the transcript, reads as follows:

> " A: An as I go outside I saw him come at the doorway.
>
> Q: You notice anything about him?
>
> A: Look a way.
>
> Q: Tell us what you mean when you say he look a way[?]
>
> A: Him look a way like him out fi drop down an then…
>
> Q: Yes?
>
> A: An me say what do yuh.
>
> Q: Yes?
>
> A: Who gi you rum fi drink.
>
> Q: Hold on. Why did you ask him who give him rum fi drink?
>
> A: Cause to how him look, him low. When me a call him an to how him come an look an him smell a rum.
>
> Q: Yeh, continue. You asked him?
>
> A: An him say Jordan give him something to drink."

As can be seen from that exchange at the trial, the evidence disclosed that the deceased's mother noticed that her son looked unwell. She had asked him what was

the matter and as he smelled of rum, who had given him rum to drink. The deceased responded that it was the appellant who had given him "something" to drink. In our opinion, the deceased being a five year old child, feeling unwell and being asked by his mother about his condition, he was merely responding to her. And, in keeping with the principles laid down in **Ratten v R** and **R v Andrews**, the question had been posed in close proximity to the event, with insufficient time for the child to concoct or distort the statement. Additionally, if there was some error in the mother's recollection of what the deceased had said, in respect of the appellant, that would be a matter for the jury in respect of the weight to be given to the statement and not in respect of its admissibility. The statement was clearly spontaneous, contemporaneous, and plainly so closely associated in the deceased's mind with what had happened and his current state of not feeling well, that his mind would have been wholly dominated by the event. We agree with counsel for the prosecution that there was simply no opportunity for concoction or distortion to the appellant's disadvantage.

[23] Counsel's arguments also that the learned judge did not give the adequate warning to the jury in respect of the fact that the statement had been made by a young child was without merit as the learned judge treated with this aspect of the evidence on page 36-37 of the transcript in this way:

> "Now, remember in this matter, the evidence that you have in relation to that, is evidence which comes from one Lacy-Ann Mitchell who has -- she indicated what her son Nathan said to her. So, you have to determine whether or not you believe Lacy-Ann Mitchell in terms of what she said; is she reliable, do you believe her beyond a reasonable doubt in terms of what she said that Nathan had said to her? And, in

> any way you would have to then consider Nathan's evidence in these circumstances. Nathan said, what he said at the—based on what we have been told in this case, a short time after something happened to him because he was seen out there before and he said this when asked by his mother, you look at it and say, well, you consider very carefully because Nathan is a child but in these circumstances Nathan is a child and we know sometimes a child might make up things but in these particular circumstances where something is said at this time, shortly after something has happened to him and when the child was in this particular distress, can you in all the circumstances believe beyond a reasonable doubt that this is what Nathan has said? You also have to look at the evidence as I have said, of Mr Ogilvie."

In our view, once the statement had been admitted into evidence, without objection, the above direction was a more than adequate warning to the jury relevant to the statement of a young child, the issue of reliability of the evidence of the mother who gave the statement, and the spontaneity and contemporaneity of the said statement.

[24] It is our opinion, based on all of the above and, in particular the authorities cited, that the deceased's statement to his mother satisfies all the criteria of admissibility as being part of the *res gestae*. The statement of the deceased identifying the appellant as the person who gave him the "destructive thing" to drink, which shortly after ingestion caused him to fall ill, ultimately resulting in his death, clearly falls under the exception to the hearsay rule and was correctly admitted into evidence. The jury obviously preferred Miss Mitchell's evidence to the unsworn statement of the appellant which they were entitled to do. This first ground of appeal therefore has no merit and must fail.

Ground two

For the appellant

[25] Counsel relied on the principles enunciated in the Judges' Rules to submit that the confession of the appellant ought not to have been admitted into evidence as the Judges' Rules had been breached. His argument rested on the fact that the investigating officer ought to have administered a caution to the appellant and he did not do so. He submitted further that the officer would have received sufficient information which would have caused him to suspect that the appellant had or may have committed a crime and therefore was obliged to have cautioned him before eliciting any information from him. Additionally, he argued, the appellant was a minor at the time, and Constable O'Gilvie had gone in search of him and so the statements made to him even if in the presence of his parent, should only have been permitted, not only after the caution had been administered to him, but after special care had been taken to ensure that he understood the meaning and importance if it, as he was a child. Counsel relied on the following cases in support of these submissions: **R v Hunt** [1992] Crim LR 582, (CA), **R v Nelson and Rose** [1998] 2 Cr App R 399 (CA), and **R v James** [1996] Crim LR 650 (CA).

For the respondent

[26] Counsel submitted that the learned judge exercised his discretion properly in allowing this bit of evidence, although counsel conceded that it would have been helpful had the appellant been cautioned. However, she argued, the failure of the Police to give

a caution does not make the evidence inadmissible, but goes to the weight which ought to be accorded such evidence. Additionally, she asserted, in the instant case the probative value outweighed the prejudicial effect. Counsel reminded the court that counsel who acted on behalf of the appellant in the court below did not raise any objection to the admissibility of the statements of the appellant to Constable O'Gilvie, on this ground either.

Discussion and analysis

[27] As stated by Lord Carswell on behalf of the Board in **Shabadine Peart v The Queen,** PC Appeal No 5 of 2005, delivered 14 February 2006, a decision of the Privy Council in a case from Jamaica, "The Judges' Rules constitute a striking example of judge-made law". He stated that although originally they operated as administrative directions for the guidance of police officers when interviewing suspects, they have over the years acquired a higher status requiring that police officers observe them if confessions are to be admitted in evidence. They have now acquired legislative force in England, but although they have not been replaced by legislative provisions in Jamaica as Lord Carswell stated, "the Judges' Rules retain considerable importance". The Judges' Rules are recorded by way of Practice Note in [1964] 1 WLR 152. The preamble to the rules sets out certain principles which are said not to be affected by the rules themselves, relating to certain obligations and rights of suspects and those detained. Paragraph (e) is said to be overriding and applicable in all cases, and reads thus:

> "That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given

by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

[28] Of relevance to this appeal are rules I and II which read as follows:

> "I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.
>
> II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.
>
> The caution shall be in the following terms:
>
> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."
>
> When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present."

[29] How the rules should be interpreted and operated has been the subject of some scrutiny and attention in the courts. This must be done against the background of the particular offence as set out in the specific legislation and in light of the investigations being conducted in respect of the stated offence. Panton P in **Merrick Miller v R** [2013] JMCA Crim 5, referred to and endorsed the dictum of Lawton LJ in **Regina v**

Osbourne and Virtue [1973] QB 678 where he set out three stages existing in the investigation of cases and, the timing in respect of the obligations of police officers to administer a caution. This is how Lawton LJ put it:

> "The rules contemplate three stages in the investigations leading up to somebody being brought before a court for a criminal offence. The first is the gathering of information, and that can be gathered from anybody, including persons in custody provided they have not been charged. At the gathering of information stage no caution of any kind need be administered. The final stage, the one contemplated by rule III of the Judges' Rules, is when the police officer has got enough (and I stress the word 'enough') evidence to prefer a charge. That is clear from the introduction to the Judges' Rules which sets out the principle. But a police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer the charge. He reaches a stage where he has got the beginnings of evidence. It is at that stage that he must caution. In the judgment of this court, he is not bound to caution until he has got some information which he can put before the court as the beginnings of a case."

[30] In the instant case, Constable O'Gilvie had received certain information from Miss Mitchell by the time the appellant came to see him with his mother in the following week. However, he was clearly still in the information gathering stage when the appellant told him about the Pepsi bottle which he had found by the shop with the liquid in it, and which he said he had given Nathan to drink. He was also still at that stage later in the day when he returned to the appellant's home, having gone in search of the Pepsi bottle and not having found it, and was then told that the drink given to Nathan had come instead, from the latrine and had been mixed with rum from his

home. At that time, Nathan was in hospital, in intensive care, in serious condition. Constable O'Gilvie's evidence was that at that stage of his investigations, and based on his observations, that the appellant and other children in the community were always left on their own, he charged the appellant as "a juvenile in need of care and protection". It was not until Nathan died some days later that he said he charged the appellant for murder. Nonetheless, the question must still arise whether in those circumstances before the second confession, Constable O'Gilvie was at the " beginnings of evidence" with sufficient evidence to put before the court, or even at the final stage with enough information to prefer a charge, and in respect of either, a caution would have been required.

[31] In our view, in this particular case, the situation is somewhat blurred. It appears, as it was only on the death of Nathan, that the appellant was charged for murder, that on receipt of the information from Miss Mitchell, the Constable was not yet ready to prefer any other serious charge. Be that as it may, and the way in which the trial of the appellant unfolded, the ingredients of the offence, namely section 25 of the Offences Against the Person Act, such as were relied on by the prosecution, would have existed on 26 January 2006, in order for the appellant to have been a suspect before his confessions were made. In that situation once the constable had sufficient evidence to put before the court, the failure to caution the appellant could have been a breach of the Judges' Rules. However, the failure to give a caution does not automatically result in the inadmissibility of evidence.

[32] This court held in **Molina and others v R**, RMCA No 21/2007 delivered 27 June 2008, applying the decision of **Shabadine Peart**, that the Judges' Rules are discretionary and not mandatory. **Shabadine Peart**, was an appeal concerning the status of the Judges' Rules, and the requirements of rule III (b) in particular, and the way in which trial judges may exercise their discretion to admit evidence if there has been a breach of the rules. Rule III requires that a person be cautioned once he has been charged with or informed that he may be prosecuted for an offence. Rule III(b) states that it is only in exceptional circumstances that questions relating to the offence should be put to such a person. In **Shabadine Peart**, the issue related to 63 questions which had been asked of the appellant after he had been detained in custody, arrested and charged with the murder of the deceased. The court had to decide whether there were "exceptional circumstances" existing for such a process to have been undertaken. Although the instant case concerns rule I, of the Judges' Rules, as the appellant was not in custody, the law lords examined the efficacy of the application of the rules and set out certain guiding principles which are helpful.

[33] In paragraph 23, Lord Carswell having discussed whether the main consideration for the admissibility of the answers to the questions should be whether they had been given voluntarily, stated on behalf of the Board:

> "In their Lordships' opinion the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted into evidence. There may be cases, as Lord Diplock observed in the passage quoted from *R v Sang*, where an admission has been voluntarily made but it would be unfair to admit it.."

[34] In fact in paragraph 24, the Board indicated that there were four brief propositions which could be distilled from the discussion on the authorities. These were as follows:

> "(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
>
> (ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.
>
> (iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.
>
> (iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary."

[35] In **Shabadine Peart**, the Board held that in the circumstances the answers to the questions had not been given voluntarily but even if the judge's finding that they were given voluntarily was upheld, in their Lordships' view it would have been unfair to

have admitted that evidence. In a later decision by the Privy Council, in an appeal from Jamaica, **Ricardo Williams v R** [2006] WCPC 21; [2006] 69 WIR 348, the above propositions were reiterated, and Lord Carswell again pointed out that voluntariness of a statement was not the sole criterion for admissibility under the Judges' Rules but an essential criterion was the issue of fairness. This case concerned the admissibility of the statement of a young boy of 12 years old, whose literacy was in some doubt. He was interviewed in the absence of his parents but in the presence of a justice of the peace. The court held that in those circumstances, it would be unfair to admit the statement. The child should have been interviewed in the presence of his parent or guardian or in their absence, some person who was not a police officer.

[36] In the instant case, there was no evidence of oppression, in fact all the evidence suggested that the appellant gave his statements voluntarily to Constable O'Gilvie. Additionally, his mother was present on both occasions and he had willingly gone to the police station on the first occasion and on the second occasion the statement was given at his home. As a consequence, even if the constable could have considered the appellant a suspect before the second confession was made, in our view, in the circumstances of this case, it could not be considered unfair for the statements to have been admitted in evidence. The learned judge also warned the jury that it was for them to decide whether they accepted Constable O'Gilvie as a witness of truth, and that they could decide to accept or reject any part of his evidence, and he reminded the jury that the appellant had been 14 years old at the material time. Although the learned judge made no mention of the Judges' Rules in the summation, in our opinion, that is not

fatal, as there was no objection whatsoever to the admissibility of the statements at the trial. In our view, with respect to submissions of counsel, this ground must fail.

Ground three

For the appellant

[37] Counsel relied on the principles enunciated in **R v Galbraith** [1981] 2 All ER 1060;[1981] 1 WCR 1039, particularly to the effect that a submission of no case to answer should be upheld when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed could convict. In such a case, a directed verdict should be taken from the jury. Based on the facts of the instant case counsel submitted that the Crown had failed to establish two main ingredients of the offence, namely, that it was the appellant who had caused a destructive thing to be taken by Nathan. The Crown had also, he submitted, failed to prove that the appellant had acted unlawfully or maliciously. Counsel submitted further that none of the substances that the appellant said that he had given Nathan to drink were found. A bottle containing fluid, that according to the investigating officer appeared to be rum was taken from the home of the appellant. But there was no evidence that the substance (if administered) was destructive or was responsible for the condition of the deceased. He relied on the findings of the pathologist that death was due to respiratory or lung failure as well as kidney failure, "likely complicating the ingestion of a poison", but this was not definitive, and was so stated by the pathologist.

[38] Counsel submitted further that there had been no chemical analysis report presented by the Crown even though the pathologist had indicated that the material had been given to the investigating officer for such an analysis to have been undertaken. Counsel referred to English cases dealing with similar offences to assert that either the substance was identifiable as heroin, and so recognised as a noxious thing, (**R v Ronald Cato and Others** [1976] 1 All ER 260 Crim App R 41) or that the nature or quality and the quantity of the substance administered was known (**R v Lily Marcus** [1981] 73 Cr [1981] 2 All ER 833App R 49 and **R v Hill** (1986) 83 Cr App R 386). Counsel argued that the cases seemed to suggest that a substance could only be regarded as destructive if the nature, quality and quantity of the substance was known. A substance, he submitted, in normal quantity might not be destructive, and it was therefore a matter for the jury to consider and to decide, based on the evidence before it, as a question of fact and degree, whether the substance was destructive and or noxious. In the instant case as the jury never learned what the substance was, or the quantity administered, they were not in a position to determine whether it was destructive or not. It was counsel's serious contention that the nature of the substance must be proved, and as it had not been, the case should therefore have been taken away from the jury.

For the respondent

[39] Counsel for the respondent submitted that there was sufficient evidence at the close of the Crown's case upon which a tribunal of fact properly directed could return a verdict of guilt. She contended that all elements of the offence under section 25 of the

Offences Against the Person Act were proven. She outlined five elements of the offence, namely: (i) the act done by the appellant, (ii) that the act was unlawful, (iii) malicious, (iv) that the appellant caused to be taken a destructive or noxious drug, and (v) that there was life endangered as a result.

[40] Counsel submitted that it was clear that the appellant caused the thing to be taken. The evidence of the mother and of the constable was telling. Miss Mitchell noticed the deceased "flattering" and smelling of rum and vomiting, shortly after she left him outside playing and he told her that it was the appellant who had given him something to drink. Subsequently, he had to be taken to the hospital and then died two weeks after. The constable testified that the appellant had said that he had given the substance to Nathan. The act, she argued was also clearly unlawful, as no-one is allowed to give another person something that will cause him harm. The act was also malicious, in that, he either intended to cause harm or knew that what he had done would cause harm, or if he did not know whether it would, was reckless in that he did it anyway. Counsel relied on **R v Roy Cunningham** [1957] 2 All ER 412 R, 155 for the interpretation of malice. Counsel also contended that malice could be inferred from the fact that the appellant gave the noxious substance to Nathan but did not take it himself as he knew that it would cause harm, but gave it to Nathan anyway. Additionally he gave two differing accounts to Constable O'Gilvie which would suggest deception, particularly since one of the versions related to the substance being mixed with rum by him, which he did not take, which further demonstrated some foresight by him of possible harm on ingestion. Counsel maintained that it was very clear that the

substance was noxious based on the effect that it had on Nathan's body. On any review of the sequence of events, there was no other factor or intervening event, so it was reasonable to infer that it was the substance that caused him to look and react the way that he did. Counsel submitted that "a thing can be found to be destructive based on the effect it has on the person who consumes it". In this case, she argued, whatever was in the mixture given to Nathan was noxious in that it endangered his life.

Discussion and analysis

[41] The test as to the court's approach in dealing with no-case submissions has been clearly set out in the oft-cited judgment of Lord Lane CJ in **R v Galbraith** at page 1042 B-E. He stated:

> "How then should the judge approach a submission of "no-case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop, the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[42] In this court in **Albert Allen**, and **Maurice Williams v R** [2011] JMCA Crim 52, Harris JA, on behalf of the court, made it clear that the test encompasses two limbs. She stated:

> ".. The first relates to cases in which the evidence presented by the prosecution fails to disclose that an accused has committed the offence for which he has been charged. The second requires an assessment of the evidence by the trial judge, but at the same time it seeks to preserve the principle that issues of credibility and reliability are matters which fall within the province of the jury."

[43] In the instant case counsel for the appellant relied on the first limb, namely that the prosecution had failed to prove that the appellant had caused a destructive thing to be taken by Nathan; that he had done so maliciously and unlawfully; or that the thing taken was "destructive".

[44] Section 25 of the Offences Against the Person Act (OAPA) reads as follows:

> "Whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by any other person, any poison or other destructive or noxious thing so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labour."

[45] On 12 October 2007, at the end of the case for the prosecution an application was made and granted for the amendment of the indictment to add a second count. The statement and particulars of the offence read as follows:

> "STATEMENT OF OFFENCE
>
> Unlawfully and maliciously causing to be taken a destructive thing contrary to section 25 of the Offences Against the Person Act".
>
> PARTICULARS OF OFFENCE
>
> Jordan Thompson on the 26th day of January 2006 in the parish of Saint Andrew unlawfully and maliciously caused a destructive thing to be taken by Nathan Reynolds as thereby to endanger the life of the said Nathan Reynolds."

[46] The evidence of the consultant pathologist having described her observations of the body of the deceased, on the post mortem examination, concluded at page 49 of the transcript, "..**that death was due to respiratory or lung failure as well as liver failure likely complicating the ingestion of a poison**" (emphasis supplied). She clarified that to mean that on her observation, by way of a combination of findings, in her experience, it suggested the ingestion of poison, although she could not say so definitely.

[47] We have noticed that throughout the case counsel and the learned judge referred to the words, poison, noxious and destructive thing interchangeably, and also the words administering and causing to be taken, which is unfortunate, as the words in any given statute must be construed as stated, and against the background of the evidence in the particular case. It does not seem to have affected the outcome of this

case, but a caution must be given with regard to the approach to be taken to statutory offences.

[48] At the trial, counsel for the appellant did not make a submission that there was no case to answer, so we are not reviewing the decision of the trial judge made after submissions to him at the close of the case for the prosecution, we are assessing the submissions made to this court in respect of ground three, that the court nonetheless erred in allowing the case to be tried by the jury.

[49] In assessing the first limb of **R v Galbraith**, the court must consider the offences arising from the provision in the statute, under which the appellant was charged, which must be proved. In the House of Lords decision of **Regina v Kennedy (No 2)** [2007] UKHL 38 at paragraphs 9 - 10, Lord Bingham, in reviewing a similar section, in England, namely section 23 Of the Offences Against the Person Act, 1861, which also refers to "any poison or other destructive or noxious thing" stated that the provision creates three distinct offences: (1) administering a noxious thing to any other person; (2) causing a noxious thing to be administered to any other person; and (3) causing a noxious thing to be taken by any other person. Lord Bingham explained further that:

> "...Offence (1) is committed where D administers the noxious thing directly to V, as by injecting V with the noxious thing, holding a glass containing the noxious thing to V's lips, or (as in *R v Gillard*, (1988) 87 Cr App R 189) spraying the noxious thing in V's face. Offence (2) is typically committed where D does not directly administer the noxious thing to V but causes an innocent third party TP to administer it to V… Offence (3) covers the situation where

> the noxious thing is not administered to V but taken by him, provided D causes the noxious thing to be taken by V and V does not make a voluntary and informed decision to take it. If D puts a noxious thing in food which V is about to eat and V, ignorant of the presence of the noxious thing, eats it, D commits offence (3)."

[50] In the instant case, the offence would be the third listed above, for as is clear from the amended indictment, the appellant was being tried for the offence of "unlawfully and maliciously…. causing to be taken a destructive thing". The prosecution therefore would have been required to prove as elements of the offence that the appellant acted unlawfully and maliciously. The *actus reus* would be that the appellant caused Nathan to take the destructive thing, and the *mens rea* would be that the appellant had the intention to endanger Nathan's life.

[51] In **Phillip Frederick Hill** (1985) 81 Cr App R 206, Robert Goff LJ (as he then was) pointed out that in the opinion of the court, the expression "unlawfully" bore its ordinary meaning of

> "without lawful justification or excuse; and that, in ordinary circumstances, the consent of the person to whom the thing is administered will render the act lawful. However, this will not be so if, for example, the act itself is such that consent will not render it lawful (see Cato (1975) 62 Cr App R 41;) or where the person is too young to give his or her consent".

[52] There is no evidence in the instant case that Nathan knew what he was drinking, and in any event there could not be any question that Nathan was too young to give his consent.

[53] In **R v Roy Cunningham**, Byrne J, speaking for the court, (Byrne, Slade and Barry JJ), having canvassed several cases indicated that the court endorsed and accepted the principle propounded by the late Professor CS Kenny in the first edition of his *Outlines of Criminal Law*, published in 1902, and repeated in the 16th edition, edited by Mr J W Cecil Turner, and published in 1952, with regard to the interpretation of "malice" with reference to a crime in a statute. It reads thus:

> "...In any statutory definition of a crime, 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular *kind* of harm that in fact was done, or (ii) Recklessness as to whether such harm should occur or not (*i.e.* the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill will towards the person injured."

[54] In the instant case whereas the evidence may not disclose that the appellant intended the particular harm that occurred, the evidence suggested that he did not care whether such harm could occur. The real question also is not what the actual effect of the destructive thing may have but, whether there was an intention to endanger the life of the deceased.

[55] In reviewing the *actus reus* in respect of this case certain definitions were noted and found to be instructive:

(i) In Blackstone's Criminal Practice 2000, page 186, B2.57 it states that the word 'take' implies "ingestion of the substance".

(ii) In the Stroud's Judicial Dictionary of Words and Phrases, 7th edition, by Daniel

Greenberg, Volume 3 (P-Z), page 2503, under the word "POISON" the following is stated:

> "With regard to the meaning of the term "poison" (Offences Against the Person Act 1861 (c.100) s. 58) there are certain things which have acquired the name of poisons; and as to these, possibly if a small quantity only were administered, the administration might come within the statute… Coleridge CJ said, "a poison is defined to be that which, when administered, is injurious to the health or life."

(iii) In the Stroud's Judicial Dictionary of Words and Phrases, 7th edition, by Daniel Greenberg Volume 1 (A-E), page 693, under the word "DESTRUCTIVE" the following is stated:

> "Boiling water held to be 'destructive matter' (within section 25 of the Offences Against the Person Act 1837 (c. 85) (R v Crawford,2c ER 129); but not a 'destructive substance' within section 29 of the Offences Against the Person Act 1861 (c 100) (R v Martin, 62 L.T. 372)… "poison or other destructive thing": see R v Cluderoy, 19 LJMC 119, cited POISON."

(iv) In the Oxford Paperback Dictionary 4th edition edited by Elaine Pollard, the term "destructive" is defined on page 219 as:

> "destroying causing destruction" and the term "destroy" is defined on page 218 as:… reduce to a useless form.2. kill (a sick or unwanted animal) deliberately ; 3. put out of existence."

(v) In the Stroud's Judicial Dictionary, 7th edition, by Daniel Greenburg, Volume 2, (F-P),1808, under the word "NOXIOUS" the following is stated:

> "a thing is 'noxious' (Offences Against the Person Act 1861 (c.100), ss 23, 58, 59) if capable of doing harm, and if noxious as administered; although innocuous if differently administered (R v Cramp. 5 QBD 307; R v Brown, 63 J.P.791.

> … The concept of the 'noxious thing' involves not only the quality or nature but also the quantity of the substance administered. "Noxious" means something less in importance than, and different in quality from poison or other destructive things, and was here held to include eight sleeping tablets put into a neighbour's bottle of milk (R v Marcus [1981] 1 WLR 774)."

[56] There was ample evidence therefore, to put before the jury even without the submission of a chemical analysis report (which would have been ideal), that the green liquid taken from a latrine mixed with rum, was a "destructive thing". Such a substance in common use would appear capable of causing harm. Additionally, Nathan died two weeks later. That could have suggested that adequate causation was present, and no other cause of Nathan's death was supplied. There was no evidence of anything else having been given to Nathan and, the immediate adverse effect on him would have been instructive. The fact that the substance was never identified, as was readily the case in **Kennedy (No 2)** being heroin, or in **Cato** being morphine and therefore accepted as noxious (the charge in those cases) or, the exact quantities taken known, was in our view, not relevant or fatal to the issue as to whether this particular ingredient of the offence, the *actus reus*, was before the court and should be placed before the jury.

[57] With regard to the *mens rea*, and the intent to endanger Nathan's life, there was also ample evidence to go to the jury. The evidence was that it was the appellant who had given the destructive thing to Nathan. The act was clearly unlawful as there was no justification for it and Nathan could not and did not consent to taking a destructive

substance. We also agree with the submission of Crown counsel that the fact that the appellant mixed up this substance, gave it to Nathan, but drank none of it himself is indicative that he was aware that the liquid was injurious and harmful and in giving it to Nathan he intended to harm him.

[58] In our view the first limb of **R v Galbraith** was clearly satisfied, this ground is without merit and must fail.

Ground 4

For the appellant

[59] Counsel submitted that the learned trial judge did not place before the jury clearly or adequately the particular criteria that the Crown had to prove in order to establish the offence, and the evidence which had been adduced allegedly in relation thereto. Counsel stressed the element of malice, the definition of the same, and what the learned judge ought to have told the jury with regard to the intention or the foresight in respect of harm, which the appellant would have had to have shown, which he submitted the judge did not do. His further complaint related to the learned trial judge's direction with regard to the possible lies told by the appellant, which he said the judge said that the jury could consider in inferring guilt which was not in keeping with the **R v Lucas** (1981) 73 Cr App R 159 (CA) direction which has been upheld by this court. Counsel relied on **R v Goodway** [1993] 4 All ER 894; 98 Cr App R 11, (CA) for a statement of the full and proper direction in those circumstances. Counsel also complained that the learned trial judge erred in his summation with regard to his

statement that the substance was poison which the pathologist could not categorically confirm, and he also failed, counsel submitted, to warn the jury adequately that the statement from Nathan was from a child of very tender years, and the confession from the appellant was also from a young child, both of which, he submitted, were fatal to the conviction.

[60] It was counsel's contention that the appeal should be allowed as there was no evidence to support the charge, no proof of what had been ingested, the statement of a boy of five years was hearsay, the confession was in breach of the Judges' Rules, and the judge failed to give the directions required by the law and the facts of the case.

For the respondent

[61] Counsel conceded that in certain areas the learned trial judge was not as clear as he ought to have been, but ultimately where the summation lacked clarity the judge eventually explained the difficulties to the jury and no miscarriage of justice had occurred. Counsel submitted that the learned judge pointed out the variance in the testimonies of the witnesses and did warn them particularly about the effect of the statement of a child of tender years. Counsel argued that the learned judge had set out the ingredients of the offence, and although there may have been errors initially in the summation by the judge with regard to the issue of whether the substance was indeed poison (but which was later clarified) and with regard to the **R v Lucas** direction, counsel reiterated that no miscarriage of justice had occurred.

Discussion and analysis

[62] We will state at the outset that certain aspects of the summation of the trial judge were not as careful as they ought to have been. However, the question which arises for our consideration is whether there were any circumstances in which it could be said that there was a misdirection to the jury which could result in the verdict being unfair.

[63] The learned judge at the commencement of the summation referred to the amendment made to the indictment and stated the offence and the particulars of the offence accurately. However when he endeavoured to break down and detail what the charges were, this is what he said on page 18 of the transcript:

> "The second count in terms of administering noxious or harmful substance, destructive. Firstly, you are going to have to look to see whether this was done unlawfully, maliciously. The person did it, in simple words without being reckless, not being concerned about the fact that he caused harm to the person. You have to look at whether the accused person was the one who administered this thing and whether or not it endangered the life or the person who it was administered to."

[64] On pages 41 - 43 of the transcript (commencing at line 20), he gave a more detailed direction with regard to the elements of the offence. This is how he put it:

> "Now, this second charge which is the Administering of Destructive Substance. Firstly, I said it has to be done with malice which means in common language some bad intention, in other words, it was something which was done not for the good of the person. And, it will either be something which the person did, knowing that it would

> cause actual harm or in this case, it might be something which has been done where the person is what we say reckless, I mentioned before, in other words, if you believe that he gave him saying, well, you know it could cause him some harm but I don't really care less, doing it without much care or any amount of serious thought in the matter.
>
> Again for you to find Jordon [sic] Thompson guilty you would have to believe that he knew that this was a destructive substance, in other words, he didn't give him thinking that it was Pepsi or fruit juice or something else, that he has [sic] to know that this is something that's a destructive substance. You have to believe, based on the evidence, that it was Jordon [sic] who administered it and also that it endangered the life of this person that what Jordon [sic] administered is [sic] the thing that endangered the life of Nathan. So, these are the things that we need to decipher in relation to this matter and as I said in terms of any of these things, if you have a doubt, a reasonable doubt, then it is your responsibility to find the accused man not guilty."

[65] In our opinion the jury was adequately directed with regard to the elements of the offence, as set out earlier in this judgment (see paragraph [50]). However, as indicated earlier, the learned judge appeared to use the word "administer" interchangeably with the words "cause to be taken". It seems he must have utilized the definition as given in the Stroud's Judicial Dictionary of Words and Phrases, 7th edition by Daniel Greenburg, Volume 1 (A-E) which states that to "administer" a poison or drug, embraces every mode of giving it, or causing it to be taken. In our view, it would have been better and certainly more accurate to use the words of the statute, and as set out in the indictment, but in the circumstances and the facts of this case, we do not think that the jury were confused as to their duty in respect of arriving at a verdict on the basis of the offence for which the appellant was being tried.

[66] The learned judge, as can be seen from the above, dealt with the issue of malice several times in the summation. Just before retiring to consider their verdict the jury requested a further direction on the issue of malice. The judge obliged and on page 45 of the transcript, he put it this way:

> "Just to malice? A word we use, very old fashioned word, but in law what it means is that something have [sic] been done wrongly but requires either one, an act of intention to do the particular kind of harm that was, in fact, done or secondly recklessly whether such harm should occur or not. In other words, the person would have seen that the particular harm might be done and yet go ahead and do it, that is perhaps one of the ways of dealing with it."

[67] In our view, this direction complies with the dictum of Bryne J set out in **R v Cunningham.** The complaint of counsel for the appellant in this regard is without merit.

[68] Counsel's complaint with regard to the learned judge's failure to comply with the Lucas direction has more merit. The judge's direction on page 38 lines 1-25 to page 39 line 1 of the transcript, read like this:

> "You also have to look at the evidence if he is guilty, if he is not guilty. There is evidence that Jordan said something. He said that Jordan had two different explanations, or two different stories and you need to consider, firstly, whether or not you believe Mr. O'Gilvie in the particular circumstances and then consider how you are going to treat that evidence. I need to say to you that if you believe Mr O'Gilvie that he has [sic] been told these things by Jordan and Jordan told him two things, both of which could not be true, then although the burden remains on the prosecution to prove the guilt of Jordan in this case, you can look at the fact that he has given two different stories. And, if you find that he is

> untruthful, that is a fact that you can consider in terms of whether you want to infer guilt in these circumstances. In other words, you can look at the fact [sic] he said two different things and you can say this is an indication he was somebody that did something because he told a lie, really doesn't necessarily mean guilt, but something you can consider from the circumstances. So, you consider that."

[69] In our view although the learned judge directed the jury that the appellant had told two different stories and that if they found him untruthful it was a fact that they could consider as to whether or not to infer guilt in the circumstances, he was careful to say that it did not necessarily mean guilt. There was also a direction that the burden of proof lay on the Crown throughout. In this matter, there was no indication that the Crown was relying on the fact of the lie for the proof of its case, although deception pointing to guilt could be inferred from the two different versions of events given by the appellant, which were adduced by the prosecution in support of its case. The learned judge however, failed to inform the jury that an accused may lie for many reasons, in some cases to embellish an otherwise good defence, or out of shame, or out of a wish to conceal otherwise disgraceful behavior. He also did not say that the lie told by the defendant can only strengthen or support evidence against him if the jury was satisfied that (a) the lie was deliberate, (b) it relates to a material issue, and (c) there is no innocent explanation for it (**David Sergeant v R** [2010] JMCA Crim 2), (**R v Goodway** (1993) 4 All ER, 894). The **Lucas** direction was on the facts of this case required, but was as indicated, inadequate. However, in the circumstances of this case, we do not believe that a miscarriage of justice occurred. The direction with regard to the credibility of Constable O'Gilvie was explicit and, the appellant's position in his unsworn

statement was that he had not made those statements at all. So, the competing positions of the prosecution as against the defence were clear, and the jury was entitled to arrive at their own conclusions.

[70] The learned judge in the summation referred to the ingestion of poison as if the statement and the particulars of the offence on the indictment had read thus. He referred to the consultant pathologist's report in that context, as the results of the examination showed the deceased as possibly having ingested poison. However there was no direct evidence that the substance given to Nathan was "poison". With the encouragement from Crown counsel the learned judge made the correction at the end of the summation. This is what he said:

> "Crown Counsel, when I said the death was caused by poison, perhaps I properly ought to say a substance, you have to be sure, poison can mean a special thing and in this case we don't know what the particular thing is but that you need to be satisfied, Mr Foreman and members of the jury, that there is connection between a substance that was ingested and the death.."

[71] The jury were therefore directed that the particular substance was unknown and they would have to be sure that it was that unknown substance which when ingested had caused the death of Nathan. We do not believe that at the end of the day there was any confusion in the minds of the jury that it was for them to decide whether the substance could be harmful, had caused the death of Nathan, but was not any particular known "poison".

[72] The complaint that the learned judge had not dealt with the fact that the statement made by Nathan was made by a child of tender years, and therefore had not warned them accordingly, is inaccurate. He did so at page 37 of the transcript which has been referred to earlier in this judgment in paragraph [23]. In fine, we cannot agree with counsel for the appellant that the summation was vague and inadequate and did not assist the jury with the factual and legal issues. This ground also fails.

Conclusion

[73] On the basis that the statements were properly admitted in evidence, without any objection from counsel; that the failure to administer any caution, even if necessary in the circumstances of this case, would not make the trial unfair; also, the fact that there was ample evidence before the court in respect of the elements of the charge for the case to have been put to the jury, so that a no case submission could not succeed; and that the summation of the learned judge was on the whole adequate, the verdict of the jury in our view was in all the circumstances safe.

[74] The appeal is therefore dismissed. As indicated in paragraph [1] herein, a correctional order was imposed on the appellant on 15 February 2008. He was to remain at the Rio Cobre Correctional Centre until his 18th birthday. There was a recommendation for psychiatric and vocational training. The appellant would have been 21 years old at the hearing of the appeal in May of this year. He would therefore have already completed his sentence.