[2025] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL NO 87/2018

LLOYD ISAACS v R

Miss Deborah Martin and Miss Kelly Hamilton for the applicant

Janek Forbes for the Crown

6, 7, 8 February 2024 and 11 April 2025

Criminal Law – Application for leave to appeal conviction and sentence – Sexual intercourse with a person under 16 years – Amendment to indictment – Treatment by trial judge of evidence of other alleged instances of sexual intercourse that were not the subject of charges on the indictment – Adequacies of directions to the jury on inconsistencies, discrepancies and omissions in the evidence – Whether trial judge erred in directing the jury that the defence did not assert a motive on the part of the complainant to lie – Adequacy of directions to the jury regarding the young age of the complainant – Adequacy of directions on good character – Adequacy of directions to the jury on assessing the complainant's credibility

Constitutional law - Delay in the production of transcript of the trial resulting in a delay in hearing of the appeal - Redress for breach – Constitution of Jamaica, ss 16(1), (7) & (8)

STRAW JA

[1] Following a trial in the Home Circuit Court before Pettigrew-Collins J ('the learned trial judge') sitting with a jury, on an indictment containing two counts, Mr Lloyd Isaacs, the applicant, was convicted for the offence of sexual intercourse with a person under the age of 16 years, on 26 July 2018 (count one). He was found not guilty in relation to

a count of buggery (count two). On 12 October 2018, he was sentenced to 14 years and nine months' imprisonment at hard labour.

[2] The applicant sought leave to appeal the conviction and sentence on the basis of lack of evidence and unfair trial. A single judge of this court considered the application and, on 15 October 2020, refused leave to appeal. The applicant renewed his application for leave to appeal both conviction and sentence and, on 23 June 2023, filed eight supplemental grounds of appeal. At the hearing of this renewed application, permission was granted for the supplemental grounds to be argued alongside the original grounds.

The evidence at trial

[3] The Crown's case relied heavily on the evidence of the complainant, who was seven years old at the time of the incident. She gave evidence that she resided at the same address as the applicant, in the home of his niece, DM. DM was the complainant's caregiver while her mother, AG, went to work. The complainant testified that on dates unknown between 31 March 2013 and 12 May 2013, the applicant placed his penis inside her vagina and bottom. The evidence surrounded two separate incidents. The last incident was said to have taken place in a shed in the yard of the residence. The other incident was said to have occurred some days before the shed incident in the applicant's room. Following the shed incident, upon being questioned by her caregiver, the complainant revealed the applicant's actions. A report was made to the police, and the applicant was arrested and charged.

[4] At the commencement of the trial, the applicant was only indicted on one count (count one as described above). The particulars of the offence, at that time, indicated that it was committed between 1 April 2013 and 30 April 2013. At the end of the examination-in-chief of the complainant, the dates in the particulars for that count were amended to change the period to an unknown date between "the 31st day of March 2013 and the 12th day of May 2013". An amendment was also granted to add the second count of buggery that was alleged to have been committed on a date unknown between the same period as the amended count one. In relation to the incident of buggery, the

complainant testified that this was the last sexual encounter with the applicant and that it happened in the shed.

[5] During the trial, the applicant gave an unsworn statement and raised alibi as a defence. He stated that he is an electrician and, in February 2013, he was working in Bounty Hall, Trelawny. He returned to his residence in March for two weeks and was back in Trelawny for the month of April. He came home on 9 May 2013, but then went to Green Acres to work. At some point shortly thereafter, he received a call from his niece concerning a report that he had molested "the little girl". It was on his return home that he was arrested by the police. He denied "interfering" with the complainant.

[6] In support of his defence, the applicant called two witnesses, his son, Ricardo Isaacs and one Emmanuel Francis. Mr Francis gave evidence that he was a contractor and that the applicant and the applicant's son, both electricians, worked with him in Bounty Hall, Trelawny, on a construction site. The applicant did electrical work but also carpentry. He said that the project started in February 2013 and that he employed the applicant in March 2013. At that time, the applicant was involved in carpentry work. The applicant went home in March 2013. In April 2013, they were doing mostly electrical work and roofing. He stated that accommodation was provided for persons from Kingston and other parishes, including the applicant and that the applicant stayed on the job for the month of April until the first week in May. He, however, indicated that no log was kept of any movement of the workers on or off the site.

[7] The summation of the learned trial judge indicated that Ricardo Isaacs testified that he started working on the site near the end of March and that his father was there in April.

Grounds of appeal

[8] The grounds of appeal as advanced are as follows:

"Ground 1

The Learned Trial Judge erred when she failed to advise the jurors that the numerous instances of alleged sexual intercourse or sexual assault that arose in the evidence, were events that were not the subject of individual charges on the indictment and/or for which the [applicant] had no prior conviction and thus had not reached the standard of similar fact evidence, and thus were prejudicial and of no probative value in deciding the truth in relation to Count 1.

Furthermore, that allowing the Crown to lead such evidence resulted in gross prejudice to the [applicant] and rendered his trial unfair.

Ground 2

The Learned Trial Judge erred in leaving to the jury the Complainant's evidence that "he placed his finger in her vagina and her bottom", as conduct sufficient to prove Count 1 of the indictment.

Alternatively, the Learned Trial Judge erred in not directing the jury as to how to treat this issue of lack of proof on the essential ingredient of the offence charged, i.e., lack of any penetration by the penis.

Ground 3

The Learned Trial Judge erred when she told the jury that it was a matter for them whether or not they found that discrepancies, inconsistencies, omissions, or conflicts of interest arose on the evidence as well as a matter for them what weigh [sic] they should attach to them.

That this failure to assist them in adequately identifying the numerous inconsistencies and discrepancies that in fact arose, as well as assisting them in understanding their relevance to the issues they had to resolve was [sic] non-direction resulting in misdirection which rendered the trial unfair.

Ground 4

The Learned Trial Judge erred when she suggested to the jurors, when directing them, that there were numerous possibilities for why the complainant gave such inconsistent evidence and/or did not report what she testified that she had

experienced to her caregivers, with numerous examples that were not supported by the evidence.

That this invitation to the jury to speculate on such an important aspect of credibility denied the [applicant] a fair trial.

Ground 5

The Learned Trial Judge erred when she directed the jury that though there was no duty to prove a motive on the part of the complainant to lie, that the Defence had not produced any evidence of motive was a fact in circumstances where they would have to assess her credibility.

This error placed an undue, additional, and unfair burden on the [applicant], in circumstances where the defence was alibi and it was the defence that the Complainant had lied, to further prove her lie(s) with a motive.

Ground 6

The Learned Trial Judge, having directed that the Complainant was a child of tender years, made no distinction on the impact of this at the time of the incidents as opposed to when she was giving her evidence years later, and further erred in not demonstrating how this fact of her age would or could have impacted her conduct or credibility as revealed in the evidence.

That this failure to adequately assist the jury with the direction and an analysis of the evidence was a non-direction resulting in misdirection which rendered the trial unfair.

Ground 7

The Learned Trial Judge's direction on how to treat with the character evidence of the [applicant] which arose on the Crown's and Defence's case was inadequate.

Ground 8

The delays between arrest, trial and readiness of the record for appeal, for reasons that were not within the control of the [applicant] has resulted in a breach of his constitutional right to have his matter determined within a reasonable time."

[9] During the hearing of this appeal, counsel appearing for the applicant, Miss Martin, abandoned ground two of the supplemental grounds of appeal and posited that the original grounds were subsumed in the supplemental grounds.

Ground 1 - The Learned Trial Judge erred when she failed to advise the jurors that the numerous instances of alleged sexual intercourse or sexual assault that arose in the evidence, were events that were not the subject of individual charges on the indictment and/or for which the [applicant] had no prior conviction and thus had not reached the standard of similar fact evidence, and thus were prejudicial and of no probative value in deciding the truth in relation to Count 1. Furthermore, that allowing the Crown to lead such evidence resulted in gross prejudice to the [applicant] and rendered his trial unfair.

Submissions

[10] Miss Martin argued that the learned trial judge had failed to point out to the jury that the evidence of other occasions on which the applicant had sexual intercourse with the complainant was not the subject of a charge on the indictment, and so could not be relied upon by them to prove the events for which the applicant was indicted. She further argued that the evidence of other alleged encounters with the applicant was irrelevant and grossly prejudicial, as the evidence did not fall within the ambit of similar fact evidence and should not have been left to the jury as proof of conduct and/or identification concerning either of the charges. She also complained of the evidence of Sergeant Andrea Murray, the investigating officer, who stated that she told the applicant of the report by the complainant of sexual intercourse with her "sometime in 2011 and April 23, 2013". Miss Martin contended that the learned trial judge did not direct the jury on the effect of prejudicial evidence and that what was insinuated was that the applicant was a repeat offender who had been molesting the complainant for years.

[11] Counsel referred the court to section 31L of the Evidence Act as well as the cases of **DPP v Boardman** [1975] AC 421 and **Russell Samms v R** [2021] JMCA Crim 46.

[12] In response, Mr Forbes, for the Crown, argued that when the summation of the learned trial judge is considered in its entirety, it was made clear to the jury that the only offences for their consideration were the two counts on the indictment. Moreover, the

learned trial judge reminded the jury of the specific evidence in relation to each count. Counsel further submitted that the jury's rejection of count two on the indictment clearly illustrated that they were not influenced by the comments complained of by the applicant and had, in fact, considered the directions of the learned trial judge as a whole.

Analysis

[13] The complainant was seven years old at the time the offence was committed. She was 13 years old when she gave evidence at the trial. On a perusal of her evidence, it is clear that she had no accurate recollection of the dates of any sexual encounters with the applicant. The complainant recited several incidents of sexual contact between herself and the applicant while prosecuting counsel attempted to lead evidence of the specific incidents on the indictment. The evidence concerning buggery, which she indicated took place in the shed, was only raised during the trial. Hence, the application by the prosecution after the trial had started to enlarge the dates of the offence and to add a second count of buggery. The learned trial judge, in reviewing the complainant's evidence to the jury, stated as follows (see page 33, lines four to 25 to page 35, lines one to 18 of the summation):

> "She was asked about her interaction with Mr. Isaacs and she was specifically asked about when [DM] was her caregiver and she explained that one time when she was on the veranda the accused man took her into his room. She was asked about when did this happen, if she could recall, she said she could not recall the date and she could not recall what grade she was in.
>
> Now, when asked about her relationship with the accused man she had said she calls him Uncle Lloydie and she said that he would also tell her that he was going to buy bags and bags of sweets. And you heard her saying that she did not fancy sweets [sic] she would take fruits and vegetable over sweets. You will recall that she also said that the [applicant] said he would take care of her and that he would not let anything happen to her. It was her evidence that he would say these things in front of her mother and in front of [DM].

> Later on, she was asked how she would get into his room and she said either he would take her into his room or he would call her into his room. When asked what, if anything, happened inside the room she said he would close the door and remove her clothing and place his penis in her vagina and also in her bottom. Later on, she said that she thinks she was in grade 1 when this happened.
>
> She was asked if this happened just once and she said no. She also said no to the question if she could recall all the times these things happened. She said she could recall the last time. She said she didn't remember when it was, but it was a Saturday or a Sunday. Later on, she would have said it was during the month of April. But initially, she said she could not remember the month, but she thinks it was in 2013.
>
> She said on that particular occasion, he was on the veranda playing with Miguel as usual, and he fell asleep and she took him inside to lie down. And you will remember that she said that Miguel is the grandson of [DM] and then she also said that he is about 3 years younger than she is. She said at that time [DM] was also asleep in her room. She was asked if anybody else was at home, she said Mr. Isaacs. She said after she put Miguel down, she went back outside on the veranda and she said that the [applicant] was outside. And remember, when I say [applicant] I am referring to Mr. Isaacs, ... She was outside under the mango tree and he called her and she went to him. She said that he took her around to the shed. He pulled off her jeans skirt and her undergarment. He told her to bend over, placed his penis in her bottom. ... afterwards she turned around and saw white substance dripping from his penis. She said he fixed up his clothes and told her to put her clothes back on and he left and went back around the front before her."

[14] There was also general evidence given by the complainant as set out by the learned trial judge at page 39, lines seven to 25:

> "Now, she also explained in her evidence that she did not say anything to anyone before she spoke to [DM]. She said that the reason for this was that Mr. Isaacs told her not to tell anyone and that he told her that all the time when sexual intercourse took place between them. Her evidence is that the reason why she listened to him was because he told her that

> she is not supposed to tell her mother because she have 'pressure' and 'she will dead' and she said when he made reference to her mother, she understood him to be making reference to her biological mother.
>
> She also said that – and this was not in particular reference to the incident in relation to which he was indicted, but she is also saying when sexual intercourse took place, she would tell him to stop and he would place his finger over her lip and say, 'sheee' ..."

[15] She then reminded the jury of the specific evidence in relation to the count for which the applicant was found guilty (count one), on page 40, lines four to 15:

> "So, now, I am going to tell you about what she said about the incident in relation to which the accused man is charged for the offence of having sexual intercourse with a person under 16 years.
>
> She was asked about the last time that the accused man placed his penis in her vagina. Her evidence was that this happened some days before the shed incident and you remember I would have pointed out earlier that she said it was 4 or 5 days before the incident in the shed."

[16] The relevant evidence from the complainant on count one of the indictment is recorded at page 89, lines 18 to 25 and page 92, lines one to 20 of the notes of evidence. In summary, she was asked when was the last time that he put his penis in her vagina. She said this was some days before the last incident; that she was in his room at that time as he called her in there; he was sitting on his bed; he removed the bottom of her clothing, placed her on the bed, opened his zip and placed his penis in her vagina.

[17] As stated earlier, the evidence of other incidents arose as the complainant could not recall specific dates but described several incidents. In fact, her evidence as to when the matter was reported to the police was also not clear. However, the evidence of her mother was that she got a call on 11 May 2013 and rushed down to the house where her daughter stayed. When she reached, the police were already on the scene, and a report was made to her. It was in relation to this date that the complainant had indicated as the

date of the last occasion (the shed incident). She stated that it was on a Saturday or Sunday evening in 2013. She could not recall the month that DM spoke to her and in which the police and her mother were called.

[18] In relation to the evidence of the complainant and the dates, the learned trial judge directed the jury at page 12, lines one to 13 of the summation:

> "So, I would have indicated to you also that when you started out there was one charge and that during the course of the evidence, the prosecution added a second charge. So there are now two charges against [the applicant]. You have to consider each charge separately and distinctly. Your verdicts do not have to be the same on both counts. The evidence in support of each count has to be considered separately for and against [the applicant]. That is in order to determine whether the prosecution has succeeded in proving the ingredients of each offence."

[19] Also, at page 45, lines four to 13, as follows:

> "Now – all right, in this case we are concerned with two incidents. The incident which [the complainant] said happened in the shed when [the applicant] had anal intercourse with her and the incident which she said happened in his room and on his bed when [the applicant] put his penis in her vagina and bottom. Of course, [the complainant] is saying that the person who committed both acts is [the applicant]."

[20] Finally, at page 117, lines 20 to 25 and page 118, lines one to 24 of the summation, the learned trial judge stated:

> "Now, I would have said this before, but it bears repeating, you have to consider each count on the indictment separately. Before you can convict the accused man on any of the two counts you have to be sure about his guilt on that particular count. Even if you think that he is guilty on one count, it doesn't necessarily mean that he is guilty on the other count. If you are not sure that the accused man had sexual intercourse with [the complainant] between the 31st of March, 2013 and the 12th of May, 2013 then your verdict must be not

> guilty of the offence of having sexual intercourse with a person under the age of 16 years. Now, if you feel sure that this incident happened between those date [sic] 31st of March, 2013 and 12th of May, 2013, then it is open to you to find the accused man guilty on that count.
>
> Now, if you are not sure that the accused man had anal intercourse with [the complainant] on [sic] the 31st of March, 2013, and the 12th of May, 2013, then your verdict must be not guilty of buggery.
>
> Now, if you are sure that this incident happened between the 31st of March and 12th of May, 2013, then it is open to you find him guilty on that second count of buggery.
>
> Remember, I told you earlier about the ingredients of the offences and the elements of each count [sic] I just ask you to bear that in mind."

[21] The jury would have understood that their duty involved a consideration of only two counts. Their duty was to satisfy themselves that the two incidents described in the counts on the indictment took place. As Crown Counsel has submitted, it is evident that the jurors understood their duty, as they returned a verdict of not guilty on count two.

[22] The recall of several incidents of sexual assault was not deliberately entered into evidence to establish similar fact evidence. The learned trial judge did not treat these various other incidents as corroborative of the counts on the indictment (see **DPP v Boardman**). Counsel's reliance on **DPP v Boardman** is, therefore, not on solid ground. In that case, the appellant, the headmaster of a boarding school, was charged with, *inter alia*, buggery with S, a pupil aged 16 and inciting H, a pupil aged 17, to commit buggery on him. At the trial, the judge ruled and directed the jury that the evidence of S on the count concerning him was admissible as corroborative evidence in relation to the count concerning H and vice versa. On appeal to the House of Lords as to the judge's ruling on the admissibility of the boys' evidence, it was held that the evidence of criminal acts on the part of the accused, other than those with which he was charged, became admissible because of their striking similarity to the other acts being investigated and because of their resulting probative force. The House also held that it was for the judge to decide

whether the prejudice to the accused was outweighed by the probative force of the evidence and to rule accordingly, and on the facts, he was so entitled to direct the jury as he had done.

[23] In the case at bar, the learned trial judge did not treat the evidence of other sexual encounters as corroborative of the complainant's evidence. In fact, she directed the jury on the issue of corroboration at page 55, lines 12 to 25 to page 57, lines one to eight of the summation:

> "Now, I should warn you that, you know, there is a danger of acting on the evidence of children of tender years. Now, remember that evidence is that [the complainant] was seven years and some months at the time of the commission of the – well, at the time the incidents took place and she is now 13 at the time of giving evidence. Now, her evidence is that she spoke about what she said happened to her based on questions that were asked of her by [DM]. Now, the law is that children are susceptible to be influenced by third parties. Now, in this particular case there is no – it wasn't expressly said or anything like that, that she was being influenced by anyone. But counsel did bring up the fact that – and it was [the complainant's] evidence, you know, that the complaint came about to the police because [DM] asked her questions and she answered. So you – and you would have heard defence counsel say that children will sometimes tell you what you want to hear.
>
> You should therefore be mindful that no one saw any of the incident [sic] that [the complainant] speak [sic] about. She is the only person who can speak as to what she said happened. Now, and so the Crown is relying on the complainant's evidence in terms of what she said the [applicant] did to her. You will have to examine her account very carefully. Again, the law says in sexual offences you are to exercise caution in deciding whether or not to accept the evidence of a complainant when that evidence is uncorroborated. It is said that allegations of sexual offences are easy to make and hard to refute. It is said that a female, and we are talking about [the complainant], as a child, may say a sexual offence took place for all kinds of reason [sic] or for no reason at all. It is said that a child may fantasize and imagine things, that things

> in her own mind can seem to be real to her child. And so for those reasons the law says if the court deems it appropriate then I should give that warning to you. And I bear in mind [the complainant's] age and so I am giving that warning."

[24] As can be seen from the excerpts set out above, the learned trial judge would have repeated the narrative of the complainant as to various incidents of sexual assault in her address to the jury. This was in the context of her overall review of the complainant's evidence as to timelines, memory lapses and reasons why an earlier report was not made. There was no specific direction that they were to disregard the complainant's evidence of other incidents, in arriving at their verdict. But, in the round, it cannot be concluded that the absence of such a particular direction, in the circumstances of this case, could have led to a miscarriage of justice. The learned trial judge emphasised that the jurors had a duty to feel sure that the prosecution had made out a case on each count separately and that these were the only counts for their consideration. This, coupled with the corroboration warning, as well as her reminder to the jury that the complainant's credibility was under scrutiny (see page 28, lines six to 18 of the summation) and that she had admitted to telling lies to get out of trouble (see page 24, lines 11 to 15 of the summation), significantly diffused any potential that existed for the evidence that was given of other sexual assaults to have any potential prejudicial effect.

[25] This ground of appeal, therefore, fails.

Ground 3 - The Learned Trial Judge erred when she told the jury that it was a matter for them whether or not they found that discrepancies, inconsistencies, omissions, or conflicts of interest arose on the evidence as well as a matter for them what weigh [sic] they should attach to them. That this failure to assist them in adequately identifying the numerous inconsistencies and discrepancies that in fact arose, as well as assisting them in understanding their relevance to the issues they had to resolve was [sic] non-direction resulting in misdirection which rendered the trial unfair.

Submissions

[26] Miss Martin argued that, having regard to the numerous inconsistencies in the complainant's evidence, which resulted in the need for the Crown to enlarge the time in

the indictment and add another count, the learned trial judge ought to have done more in assisting the jury to identify the significant contradictions that had arisen on the evidence. The evident inconsistencies and contradictions necessitated deliberate assessment and treatment before the jury's deliberation. The learned trial judge's approach of leaving it to the jury to decide whether the evidence fell into any of the categories and whether they felt the contradictions and inconsistencies required any analysis was insufficient guidance. In support of this assertion, Miss Martin referred the court to the case of **Jermaine Burke v R** [2022] JMCA Crim 21 ('**Jermaine Burke**').

[27] On the other hand, Mr Forbes submitted that there were no deficiencies in the learned trial judge's directions to the jury on the issue of inconsistencies and omissions. The learned trial judge not only directed the jury on what, in law, amounted to inconsistencies, discrepancies and omissions but also directed them on how to approach the specific aspects of the offences and how they impacted the credibility of the Crown's case. She also highlighted to the jurors the major inconsistencies, discrepancies and omissions which arose on the evidence. Crown Counsel further argued that the learned trial judge was not obliged to identify every inconsistency, omission or discrepancy. The cases of **Jermaine Burke** and **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991, were cited in support.

Analysis

[28] The complaint about a trial judge's treatment of inconsistencies and discrepancies is frequently raised on appeal. This court has given guidance on this matter in several cases, including **Jermaine Burke** and **R v Fray Diedrick**. In summary, a trial judge must identify the inconsistencies and discrepancies in the evidence and explain their significance to the jury. However, there is no duty to identify every inconsistency and discrepancy that arises. It is expected that some examples of the conflicts in the evidence, whether internal or between different witnesses, will be highlighted, and any explanation offered by the witnesses for these will be pointed out to the jury. In particular, the jury's

attention should be drawn to those inconsistencies and discrepancies that are considered to be damaging to the prosecution's case (see **Jermaine Burke**; **R v Fray Diedrick**; **Morris Cargill v R** [2016] JMCA Crim 6; and **Vernaldo Graham v R** [2017] JMCA Crim 30).

[29] Counsel for the applicant, in her written submissions, listed what she deemed to be numerous inconsistencies in the evidence of the complainant:

> "I. events in the shed
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> II. particulars in the bedroom on various occasions
>
> III. her ability to give timelines,
>
> IV. instances and admissions of telling lies, and the discrepancies in her evidence with others for example;
>
> (i) how often the Complainant spent time with her mother,
>
> (ii) the vagueness with timelines given to the police by the Complainant."

[30] The learned trial judge treated with the issue of inconsistencies and discrepancies commencing at page 12 of the summation and gave instances of these at pages 13 to 18. She also explained what omissions were and cited examples of them from the complainant's statement to the police at pages 19 to 21. She directed the jury that these inconsistencies, discrepancies and omissions identified were relevant to the credibility of a witness. She also told them that they may have identified others and were at liberty to consider any such (see page 21, lines nine to 14). These included 1) whether it was a Saturday (as set out in the complainant's statement) or a Sunday (as said in her evidence) that she reported the incident to DM (the complainant agreed that it was not Sunday); 2) the complainant's evidence that the last sexual encounter with the applicant was in the shed when he had sexual intercourse with her in her bottom but admitted that she had told the police it was in her vagina; 3) that the complainant had said in her evidence that the last time the applicant put his penis in her vagina was four or five days before

the last incident (the shed incident) but she admitted that this detail was not in her statement.

[31] The learned trial judge also reminded the jury of a perceived inconsistency as to whether the complainant's hand was touching the ground while the applicant was pulling down her skirt and panty in the shed, and that the complainant agreed she did not say this in her evidence. The learned trial judge reminded the jury that the complainant said she was not asked that question, but she did give evidence that her hand was placed on the ground while in the shed.

[32] Further, on page 27, lines four to 13 of the summation, the learned judge instructed the jury as follows:

> "Now, if it is significant, you have 2 choices. You may say that the witness can't be believed at all on the particular point, or you may say that the witness is not to be believed at all and reject the witness totally and completely, but if you are left in doubt about the truthfulness of the complainant's account, because the conflict can't be satisfactory [sic] explained, you must find the [applicant] not guilty."

[33] She then gave general directions on how to treat with the evidence that they accepted or rejected in terms of assessing the reliability of the Crown's witnesses at page 27, lines 14 to 25 and page 28, lines one to five. She then stated at page 28, lines six to 23:

> "Now, the main issue in this case is credibility. The credibility of [the complainant] is critical. In considering the evidence of credibility and reliability you look at all the Crown's witnesses. You must look at, in particular, the evidence of [the complainant] because she is the main witness as to fact. Her evidence was severely challenged in cross-examination. It was suggested to her that there was no incident involving herself and [the applicant]. of [sic] course, the incident being referred to here is the subject of the charges before the court.

> The defence is saying that the complainant … is lying. In fact, you will remember counsel … for [the applicant] suggested to her that she was a pathological liar."

[34] The learned trial judge, having defined discrepancies (see page 17 of the summation), reminded the jury concerning the evidence of the complainant's mother about the times she saw her daughter and the evidence of the complainant, which was different (see page 18 of the summation). She told the jury that it was a matter for them as to whether they considered this a discrepancy. Counsel for the applicant was, therefore, incorrect in her submission that this specific discrepancy was not brought to the attention of the jury.

[35] On page 21, lines nine to 23 of the summation, the learned trial judge emphasised as follows, "[n]ow, inconsistencies, discrepancies and omissions, when you identify them you are to decide the matters of credibility of a witness. I have only pointed out some …. Now, you may have identified others and … you are at liberty to consider it". Further, she told the jury that it was unwise to assume that a true account "is always consistent or that an inconsistent account is always true [sic]" (see page 21, lines 23 to 25 and page 22, line one).

[36] The learned trial judge went on to explain that there may be various reasons for the inconsistency, including the fact that the memory of someone who has had such an experience as described by the complainant could be affected in different ways. However, she also reminded them that the complainant had told the court that she had a good memory, but they would have heard various examples of inconsistencies in her evidence. At page 22, line 21, she directed the jury to look at all the inconsistencies, including the ones not mentioned by her, and to decide what effect those inconsistencies have on a witness' evidence, and what effect on the complainant's truthfulness in particular. She stated at page 23, lines three to six, "[t]he point is, if you are sure that [the complainant's] account is true, then you are entitled to rely on it. If you are not sure that it is true then you cannot rely on it".

[37] What is also crucial is her directions from page 23, lines seven to 25, to page 25, lines one to six of the summation.

> "Now, in trying to determine the truth you must have regard to a number of factors, you must have regard to the age and ability of a witness to express herself. Now, at the time the incidents would have been alleged to have taken place, as I said before [the complainant] would have been 7 years and some months by virtue of her mother's evidence if you accept it.
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> Now, although the [applicant] was indicted in relation to two incidents you would have heard [the complainant's] evidence that there were several incidents. Now, is there a possibility that she might have been confused or made mistakes about the details of each incident, because she said there was a number of days of the alleged incident. That is something for you to consider, ladies. Again, she said she had good memory, but we have to consider that she is recounting incidents that occurred when she was a small child. We have to consider the amount of time that has transpired since the incidents are alleged to have taken place. We are now in 2018. The evidence is that the incidents would have taken place in 2013 sometime between the 31st of March and the 12th of May. You have to look to see whether she has any motive for lying. You have to take into consideration that the defence has not put forward any motive whatsoever.
>
> Now, you did hear [the complainant] say she tells lies to get out of trouble. Now, you have to consider whether you know [sic] you think she took the view she was in trouble and needed to tell lies to get out of it. Now, you also have to consider very importantly what, if any explanation, is given for the different accounts. For example, you will remember that [the complainant] said the reason that she did not tell police the last time the [applicant] put his penis inside her vagina was 4 or 5 days before the last incident was because she was not asked that question. You will also remember that her explanation was that she had mixed up the days when she was insisting that she did not tell -- she did not say in her statement that Saturday morning [DM] was still asking if uncle Lloydie touched my vagina and I told her yes. After her statement was put to her she agreed that she, in fact, said so in her statement."

[38] The summation demonstrates that the learned trial judge pointed out, in a detailed manner, several inconsistencies, discrepancies and omissions relevant to the complainant and her mother. She also reminded the jury of the age of the complainant at the time the incidents took place, the fact that the complainant admitted that she would lie to get out of trouble and reminded the jury of explanations given for some of the inconsistencies. She asked the jury to assess all of this.

[39] The learned trial judge also expressed to the jury that conflicts in the evidence (albeit she termed this at one stage as conflict of interest; see page 26, lines one to 24) can affect the credibility of the witness. Further, that once conflicts are identified, they must be carefully examined to determine their significance in relation to the truthfulness of the particular witness and all the witnesses; that the jury had to take into account whether the conflict was important and how to treat with it if they determined it was or was not important (see page 26, lines 23 to 25 and page 27, lines one to 12 of the summation).

[40] We are of the view that the learned trial judge identified and dealt sufficiently with the issues concerning the inconsistencies, discrepancies and omissions, especially having regard to the inability of the complainant to recall specific dates (see para. [37] of **Jermaine Burke**). The jury was adequately directed on how to treat with these and the effects on the complainant's credibility. The learned trial judge also reviewed the timelines of the offences and the impact on the complainant's credibility. The learned trial judge addressed these points raised by the applicant's trial lawyer in the context of the complainant's credibility. For example, she relayed to the jury the complaint of defence counsel concerning a new count being added during the trial and his comment about whether there was any "chickeeni business" (see page 67, lines one to seven of the summation).

[41] There is no merit in this ground of appeal.

Ground 4 - The Learned Trial Judge erred when she suggested to the jurors, when directing them, that there were numerous possibilities for why the

complainant gave such inconsistent evidence and/or did not report what she testified that she had experienced to her caregivers, with numerous examples that were not supported by the evidence. That this invitation to the jury to speculate on such an important aspect of credibility denied the [applicant] a fair trial.

Submissions

[42] Miss Martin contended that the learned trial judge's direction to the jury that children may not speak the truth for numerous reasons in circumstances where the evidence was quite specific as to why the complainant had not said anything (it would send up her mother's blood pressure and she would die) was a misdirection. This invitation by the learned trial judge to speculate as to why the complainant had made no complaint to anyone, she posited, was a misdirection that resulted in the applicant not having a fair trial. In support of this assertion, Miss Martin relied on the case of **Kory White v The Queen** [1999] 1 AC 210.

[43] On behalf of the Crown, Mr Forbes asserted that there was no invitation to the jury by the learned trial judge to speculate on any aspect of the evidence. She had specifically warned the jury at the start of her summation that they were only to decide the case on the evidence before them. There was, therefore, no invitation to speculate on the complainant's credibility, as the learned judge had indicated early in her summation to the jury that the main issue for their consideration was the complainant's credibility.

Analysis

[44] The complainant stated that the applicant had told her not to tell anyone, as her mother "has pressure and she could die". What came out in evidence is that DM asked the complainant a question (apparently on 11 May 2013) to which she responded. As a result, the police were contacted, and a report was made to them by the complainant on that same day. The learned trial judge reminded the jury of this at page 52, lines 16 to 25, page 53, lines one to 25 and page 54, line one of the summation:

> "Now, remember that when she -- and I am talking about [the complainant] -- when she was asked, 'when was it that [the applicant] told you not to tell anyone,' and her answer was, 'all the time when that happened he told me not to tell anyone,' and in the context of the evidence, she would have been referring to when sexual acts took place.
>
> Now, when asked, 'Is there a reason why you listened to him,' her answer was that [the applicant] told her that she should not -- as I told you before -- talk, because her mother has 'pressure' and she could die.
>
> Now, bearing in mind also that [the complainant's] evidence, in cross-examination, when she was asked if [the applicant] ever beat her or ever threatened her, she answered no. In relation to the question as to whether he ever threatened her, her response took the form of a question and I said so because she responded in a questioning tone, and her response was this, 'would you say 'if you tell your mother she going die,' would you call that threatening,' and counsel; that is, of course, counsel for [the applicant], asked her if she would consider that a threat. Her answer was yes, because he said if you tell your mother, she going to die.
>
> Now, it is entirely a matter for you if you believe any of this evidence, but I ask you to simply consider how her mind could have been impacted. Do you find it strange that a child, having regard to all she said, if you accept it, that she would remain silent in those circumstances and not talk about what happened until she was asked questions? It's entirely a matter for you."

[45] The reason why she did not report the matter in a timely manner was, therefore, put before the jury.

[46] In relation to Ms Martin's contention that the learned trial judge led the jury into speculation, it is expedient to set out what was actually stated. On pages 50, lines one to 25 and page 51, lines one to eight of the summation, the learned trial judge said this to the jury:

> "Now, you will remember that when [the complainant] gave her evidence she appeared and sounded quite calm. She

certainly did not appear to me to be traumatized. In fact, she could be described as assertive, but certainly a matter for you as to what impression you formed of her.

Now, what I want to say to you is that it would be wrong to assume that because she was not emotional or upset that that would indicate whether or not what she was saying is true. This is because experience has shown that different persons react to situations and cope with them in different ways. Some people, if they have to relate incidents of the kind that [the complainant] described, would become emotional and distress [sic], while others do not react in that way at all and so the manner in which a person gives evidence; that is, whether or not they show emotion or distress, is really not a reliable pointer to the truthfulness or untruthfulness of the evidence that that person is giving.

Now, having regard to the fact that the evidence is that she did not speak about any of the incidents immediately after they happened, because you remember that her evidence was that it was when [DM] asked her if Uncle Lloydie trouble her vagina; it was as a consequence of being questioned by [DM]… that she told about the incident ... ."

And, at page 51, lines 19 to 25 to page 52, lines one to 11 and 16 to 23:

"Now, again, experience has shown that children may not speak out about what happen [sic] to them for a number of reasons. You have to consider that a child maybe [sic] confused about what has happened and whether or not they would talk about it. Now sometimes a child may even blame herself for what has happened, or be concerned that she would be blamed or punished for what has happened. She might even be afraid of the consequences of speaking out and, of course, you know, when I say consequences, it could be -- in this case -- whether consequences for herself and/or consequences for her mother and she might even have felt that she might not be believed if she talk [sic]. She said, in this case, that she was told not to tell anyone. As I have said before, she might even have been embarrassed.

...

Now, remember that when she -- and I am talking about [the complainant] -- when she was asked, 'when was it that the

> [applicant] told you not to tell anyone,' and her answer was, 'all the time when that happened he told me not to tell anyone,' and in the context of the evidence she would have been referring to when sexual acts took place."

[47] In **Robert Rowe v R** [2014] JMCA Crim 3, this court referred to the judgment of Harrison JA in **Peter Campbell v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 17/2006, judgment delivered 16 May 2008, where at para. 30(ix), the following was endorsed:

> "account should be taken of the fact that victims both male and female often need time before they can bring themselves to tell what has been done to them. Whereas some victims find it impossible to complain to anyone other than a parent or member of their family, others may feel it quite impossible to tell their parents or family members (**Valentine** [1996] 2 Cr. App. R 213 at p. 224);"

[48] Reference is also made to Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book') at chapter 20-1, para. 7, dealing with sexual offences, where it is noted that the judge should alert the jury to guard against unwarranted assumptions made by jurors or where they are invited by advocates to do so. This includes the issue of delay in making a complaint. Para. 7 stipulates:

> " … This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions."

[49] The cases of **R v D (ja)** [2008] EWCA Crim 2557 and **R v Breeze** [2009] EWCA Crim 255 also endorse this approach (see the Bench Book at chapter 20-1, para. 6). Such directions were considered necessary in relation to sexual crimes to address stereotypical assumptions about issues such as delay in reporting allegations of this nature.

[50] The learned trial judge was at pains to warn the jury not to have any stereotypical assumptions about the lack of a report by the complainant, in particular, a child at that

age. She also reminded them of the actual reason given by the complainant for the delayed report, as previously indicated at para. [44] above.

[51] Further, her directions, as set out above, were done in the context of earlier warnings to the jury to consider carefully the credibility of the complainant and then warning that there was no corroboration of her testimony. We are, therefore, not of the view that the learned trial judge erred in cautioning the jury about unwarranted assumptions or that this direction invited speculation and led to an unfair trial.

[52] This ground, also, fails.

Ground 5 - The Learned Trial Judge erred when she directed the jury that though there was no duty to prove a motive on the part of the complainant to lie, that the Defence had not produced any evidence of motive was a fact in circumstances where they would have to assess her credibility. This error placed an undue, additional, and unfair burden on the [applicant], in circumstances where the defence was alibi and it was the defence that the Complainant had lied, to further prove her lie(s) with a motive.

Submissions

[53] Miss Martin argued that the learned trial judge's directions to the jury that there was no duty to prove a motive to lie on the part of the complainant and her direction as to how they should treat the applicant's defence of alibi, placed a burden on the applicant to prove a motive for lies in circumstances where the defence was alibi. In support of her point, she referred the court to the case of **R v Krack** 56 CCC (3d) 555 ('**Krack**').

[54] In rebutting these submissions, Mr Forbes advanced that considering the summation as a whole, there was no undue, additional and unfair burden placed on the applicant to prove that the complainant was lying. A thorough examination of the summation revealed that the learned trial judge gave directions to the jury on the burden and standard of proof in the initial stages of the summation and later on at the start of the defence's case. In addition, there was a later reminder to the jury that there was no burden placed on the applicant to prove his innocence and that the burden remained with the prosecution to prove the case against the applicant, as he was presumed innocent.

Therefore, when the summation is considered, on the whole, the assertion that there was an unfair burden placed on the applicant is unreasonable.

Analysis

[55] The learned trial judge reviewed the unsworn statement of the applicant and the evidence of the two defence witnesses, Mr Francis and Mr Isaacs, in support of the applicant's alibi. The learned trial judge's directions on this aspect of the applicant's case at trial have not been impugned. She reiterated that there was no burden of proof on the applicant (see page 89, lines 10 to 11 of the summation). Further, she instructed the jury that the burden of proof remained on the prosecution to disprove his alibi (see page 106, lines 10 to 12).

[56] In reminding the jury of the complainant's evidence, the learned trial judge, at page 24, lines seven to 10, stated, "[y]ou have to look to see whether she has any motive for lying. You have to take into consideration that the defence has not put forward any motive whatsoever". It does appear to us that the learned trial judge was making a comment to the jury within the context of defence counsel's suggestion to the complainant that she was lying, but with no specific reason being asserted. We do agree, however, that the learned trial judge should have indicated to the jury that the applicant had no duty to prove a motive to lie on the part of the complainant.

[57] Notwithstanding, given the summation as a whole, including the directions on the standard and burden of proof and the warning as to the absence of corroboration, the jury could not have been induced to believe that there was any burden on the applicant to prove that the complainant was lying. In fact, the learned trial judge's direction to the jury to consider the admission of the complainant that she lied at times, in their assessment of her credibility, came right after she made the impugned comment.

[58] Miss Martin's reliance on **Krack**, a case from the Ontario Court of Appeal, is misconceived. In that case, the trial judge was found to have erred, as he stated in his reasons for judgment, that to accept the appellant's denial of guilt, he would have had

to find, in effect, that the complainant fabricated or concocted the allegation of assault. The Court of Appeal stated that since the case turned entirely on credibility, the "learned trial judge appears to cast an onus on the accused to explain the complainant's allegations". The court held that this was an error in assessing credibility (see pages 561h to 562a). The learned trial judge made no such error in this case.

[59] This ground of appeal, therefore, is without merit and fails.

Ground 6 - The Learned Trial Judge, having directed that the Complainant was a child of tender years, made no distinction on the impact of this at the time of the incidents as opposed to when she was giving her evidence years later, and further erred in not demonstrating how this fact of her age would or could have impacted her conduct or credibility as revealed in the evidence. That this failure to adequately assist the jury with the direction and an analysis of the evidence was a non-direction resulting in misdirection which rendered the trial unfair.

Submissions

[60] Miss Martin argued that the learned trial judge ought to have gone further in assisting the jury regarding the child of tender years warning and caution, especially in light of the fact that other male family members lived on the premises. The failure on the part of the learned trial judge to demonstrate the need for the warning by assisting with an analysis of the evidence was a non-direction, which resulted in a misdirection that rendered the warning of little value. Counsel referred the court to **Joel Henry v R** [2018] JMCA Crim 32 for consideration.

[61] In response, Mr Forbes advanced that the learned trial judge placed into context the need for caution in relying on the evidence of children of tender years, especially where such evidence is uncorroborated. Furthermore, the learned trial judge had a discretion whether to give this warning. Therefore, the directions given to the jury were sufficient to address the specific dangers that corroboration sought to cure. The Crown commended the cases of **Joel Henry v R** as well as **Erron Hall v R** [2014] JMCA Crim 42 and referred the court to section 31Q of the Evidence Act.

Analysis

[62] This ground need not detain us. The learned trial judge's directions in relation to inconsistencies and discrepancies set out above (at ground three) adequately dealt with the issue of the complainant's credibility. Further, she reminded the jury that the complainant was seven years old at the time of the commission of the offences and was giving evidence at the age of 13 years. Her direction concerning corroboration also emphasised the need for the jury to pay careful attention to the credibility of the complainant because of her age at that time (see warning set out at para. [23] above). In relation to other family members of [DM], counsel below, in cross-examination, asked her about two specific males. She stated that one was attending a high School and the other worked at a garage. It is not apparent what more would have been required by the learned trial judge in relation to these two persons. The learned trial judge could not have asked the jury to speculate as to whether these persons were to be considered as potential perpetrators as no basis had been established to do so.

[63] This ground must, therefore, fail.

Ground 7 - The Learned Trial Judge's direction on how to treat with the character evidence of the [applicant] which arose on the Crown's and Defence's case was inadequate.

Submissions

[64] Miss Martin advanced that the learned trial judge's direction on the evidence concerning the applicant's good character was inadequate and that the failure to treat with the totality of the applicant's good character evidence denied the applicant the full benefit of the direction and ultimately denied him the right to a fair trial. Although the learned trial judge acknowledged the good character evidence of Mr Francis, the applicant's witness, there was other evidence on both the Crown and defence's cases as to the applicant's good character. The learned trial judge, therefore, failed to point out the cumulative effect that the evidence of good character had on the applicant's propensity to commit the offences alleged. This failure, counsel posited, denied the

applicant a fair trial. The case of **Hunter et al v R** [2015] EWCA Crim 631 was cited in support of this submission.

[65] By contrast, Mr Forbes asserted that the applicant had, in fact, benefitted from the propensity limb of the good character direction. The directions given by the learned trial judge captured the essence of a good character direction. They also accurately conveyed that where there was evidence of good character, this was indicative that the applicant would be less likely to commit the offences for which he was indicted. The case of **Rayon Williams v R** [2020] JMCA Crim 7 was commended to the court for consideration.

Analysis

[66] The contention is that the learned trial judge failed to take account of other good character evidence, including that of AG, who gave evidence that she had met the applicant at the bar where she worked and that it was he who introduced her to DM as a potential caregiver for the complainant. She said the applicant, "come like a father, we never disrespect", and "I thought that I see him as a respectable person". Apart from the evidence of Mr Francis, we have seen no other evidence from other witnesses speaking to the applicant's good character. The learned trial judge gave the good character direction in relation to the propensity limb, as the applicant had made an unsworn statement putting his good character in issue. She reminded the jury of his unsworn statement that "he grew up his niece, his niece's children, his daughter's children and he is a father to each and every one's [sic] children. … He also said he is a hard working person, working all his life … and he also said he is an Adventist" (see page 109 of the summation). She also reminded the jury of Mr Francis' evidence that the applicant is an honest, hardworking and reliable man (see page 110 of the summation). The learned trial judge directed the jury as follows:

> "Now, Mr. Francis, his witness also gave evidence that the accused is an honest [sic] hardworking and reliable man. Now, this makes him, in law, a man of good character. Now this does not mean that he could not have committed the offences with which he has been charged, but it means that

> it is less likely for him to have committed the offences or any of them.
>
> You should take this into account in the [applicant's] favour when you are considering his unsworn statement. It is for you to decide what importance you attach to it."

[67] The direction of the learned trial judge was adequate. The general rule is that the propensity limb of the good character direction is to be given when a defendant has made an unsworn statement putting his character in issue. F Williams JA, writing on behalf of this court in the case of **Craig Mitchell v R** [2019] JMCA Crim 8, provided a summary of the law on good character directions as follows:

> "[8] … in the case of **Leslie Moodie v R** [2015] JMCA Crim 16, Morrison JA (as he then was) made the following observation at paragraph [127] of the judgment:
>
> > '[127] The foundation of the modern law of good character directions is commonly acknowledged to be the decision of the Court of Appeal of England and Wales in **R v Vye, R v Wise, R v Stephenson** [1993] 3 All ER 241. That case established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant 'does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required' (per Lord Taylor CJ, at page 245).'
>
> [9] To similar effect is the dictum of Brooks JA in the later case of **Tino Jackson v R** [2016] JMCA Crim 13. At paragraph [24] of that judgment, it was stated that:
>
> > '…It is correct to say that there are two possible limbs to a good character direction. The first is the propensity limb and the second is the credibility limb. The propensity limb speaks to the likelihood, or more accurately, unlikelihood, of the person accused having committed such an offence. The credibility limb speaks to the likelihood of his being truthful in his assertions of innocence to the court. If an accused raises the issue of his good character

> in an unsworn statement only, the cases suggest that whereas he is entitled to a good character direction on the propensity limb, a direction on the credibility limb may be of limited effect.'
>
> [10] Even before these cases, however, and before the appellant was tried, was the case of **Michael Reid v R** in which Morrison JA (as he then was), setting out general principles relating to good character, gave the following guidance at paragraph 44 of the judgment:
>
> > '(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged…'"

[68] It is true that the learned trial judge did not remind the jury of what AG had said when directing them to consider the propensity limb of the good character direction. However, the jury heard this testimony and the corroboration warning would have enhanced the need for careful scrutiny of the complainant's evidence. It is unlikely that the addition of the evidence of AG, in the summary relevant to the good character direction, could have elevated the applicant's status to such an extent that the jury would have formed the opinion that based on propensity, they were not convinced of his guilt. In any event, even the complete absence of a good character direction when it is required does not automatically lead to a miscarriage of justice and acquittal on appeal (see **Horace Kirby v R** [2012] JMCA Crim 10 at paras. [12] and [13]).

[69] This ground of appeal, therefore, fails. There is no basis, therefore, to disturb the conviction.

[70] The applicant mounted no ground of appeal against the sentence that was imposed. Therefore, there is no basis to consider whether leave to appeal should be granted in relation to the sentence. The final ground of appeal relates to the issue of a

breach of his constitutional right and whether this court should award a remedy if such a breach is established.

Ground 8 - The delays between arrest, trial and readiness of the record for appeal, for reasons that were not within the control of the [applicant] has resulted in a breach of his constitutional right to have his matter determined within a reasonable time

Submissions

[71] Miss Martin highlighted the considerable delay in the progression of the applicant's case by the fact that the applicant was arrested on 11 May 2013 and was convicted on 16 July 2018. She further went on to highlight that there was significant delay in the production of the transcript from the applicant's trial and that even with the production of the same in 2022, there were aspects of the evidence that were missing. In the light of those circumstances, she posited that a reduction of the applicant's sentence would be an appropriate form of redress. In support of her position, she submitted the case of **Orville Watson v R** [2023] JMCA Crim 25.

[72] In response, Mr Forbes contended that although there was a delay in the progression of the applicant's case, it was not the most egregious case. Moreover, the missing portions of the transcript, it was argued, had not affected the applicant in the preparation of his grounds of appeal as the learned trial judge's summation (which was available) had captured the essence of the missing portion of the evidence. However, the Crown conceded that the delay resulted in a breach of the applicant's constitutional right to a fair trial and advanced that an appropriate redress would be a public acknowledgement of the breach or a nominal adjustment to the applicant's sentence. The cases of **Dwight Campbell v R** [2023] JMCA Crim 61, **Adolphus Knight v R** [2023] JMCA Crim 26 and **Germaine Smith and others v R** [2021] JMCA Crim 1 were relied upon.

Analysis

[73] The applicant was arrested on 11 May 2013 and tried and convicted in July 2018. He was on bail up to the date of his conviction (26 July 2018) but subsequently remanded in custody until his sentencing hearing on 12 October 2018. The learned trial judge deducted the pre-sentence custody of three months at the time of imposing the term of imprisonment of 14 years and nine months. The applicant sought leave to appeal his conviction and sentence on 19 November 2018.

[74] No submissions were advanced and no affidavits have been filed addressing the issue of pre-trial delay. We note also that the issue was never raised before the learned trial judge during the trial. This aspect of the appeal is, therefore, not a matter for our consideration (see **Julian Brown v R** [2020] JMCA Crim 42 at para. [86]).

[75] In relation to post-conviction delay, the summation of the learned trial judge was received in June 2020, and the notes of evidence in October 2022. The hearing of the appeal commenced in February 2024. There has been, in total, a delay of approximately five years and three months between the application for leave to appeal and the hearing of the appeal.

[76] The first issue is whether the post-conviction delay of five years and three months constitutes a breach of the applicant's right to have his conviction and sentence reviewed within a reasonable time under sections 16(1) and (8) of the Constitution of Jamaica ('the Constitution'). Secondly, it must be determined whether the missing portion of the transcript in relation to the evidence of the defence witness, Ricardo Isaacs, constitutes a breach of the applicant's right under section 16(7) of the Constitution to be given a copy of the record of proceedings and within a reasonable time (see para. [26] of **Orville Watson v R** referring to **Evon Jack v R** [2021] JMCA Crim 31).

[77] A further consideration in determining whether these constitutional rights have been breached is the issue of prejudice, that is, whether and, to what extent the applicant has suffered prejudice arising from the delay. No assertion of prejudice was made by the applicant. Notwithstanding this, it is noted that lengthy delay, without more, may be

considered prejudicial (see **Lloyd Forrester v R** [2023] JMCA Crim 20 at para. [71] ('**Lloyd Forrester**')).

[78] If the court determines that there has been inordinate delay that is not attributable to an applicant, it may be found that there was a breach of the constitutional right to a fair hearing within a reasonable time. The remedy to be provided depends on the court's assessment of the particular circumstances of each case.

[79] In **Evon Jack v R**, Brooks P identified several potential remedies for breaches of a person's constitutional rights as follows:

> "[44] Redress for breaches of constitutional rights may take a number of forms, ranging from a public acknowledgment of the breach to a quashing of the conviction. Public acknowledgment of the breach, reduction of the sentences and quashing of the convictions are remedies that this court can grant, in appropriate circumstances, without the appellants having to apply to the Supreme Court, pursuant to section 19 of the Constitution. This court has previously granted redress for delays in the hearing of appeals. It reduced the respective sentences in **Tapper v DPP**, in **Techla Simpson v R** [2019] JMCA Crim 37 and in **Alistair McDonald v R** [2020] JMCA Crim 38. …"

[80] In **Lloyd Forrester**, this court, at para. [76], referred to three authorities where there was a reduction in sentence due to delay: **Techla Simpson v R** [2019] JMCA Crim 37, a case of murder in which Mr Simpson was given a two-year reduction in sentence for a period of eight years' pre-trial delay; **Tussan Whyne v R** [2022] JMCA Crim 42, also a case of murder in which there was an eight-year pre-trial delay, resulting in a reduction in sentence of one year; and **Absolam and others v R** [2022] JMCA Crim 50, a case of illegal possession of firearm and robbery with aggravation in which there was a seven-year post-conviction delay resulting in the grant of a two-year reduction in the appellants' sentences.

[81] In the case of **Curtis Grey v R** [2019] JMCA Crim 6, on a review of sentence by this court, it was determined that account should be taken of the six-year delay in the

hearing of the appeal due to the unavailability of the transcript. Resultantly, in arriving at an appropriate sentence, this court deducted one year to account for the delay.

[82] The post-conviction delay in the case at bar of five years and three months (which cannot be attributed to the applicant) could be described as inordinate. It is, therefore, determined to be a breach of the applicant's constitutional right to a hearing within a reasonable time (section 16(8) of the Constitution).

[83] Before affording a remedy, however, it is important to determine if the missing portion of the transcript should give rise to any further remedy. In **Evon Jack v R**, there was a delay of six years between the appellant's conviction and the production of the trial judge's summation, which was deficient. Further, up to the time of the hearing of his appeal, eight years after his conviction, no notes of evidence were produced, and it was apparent that they would never be made available. This court found that the circumstances made it impossible to afford the appellant a fair review of his trial. In the result, in addition to declaring that there were breaches of the appellant's constitutional rights under sections 16(7) and (8) of the Constitution, this court also quashed the convictions and set aside the sentences imposed.

[84] In **Orville Watson v R**, major portions of the transcript were missing, including the defence case, as well as the assessment and recounting of the defence case from the summation. There were also issues with the length of delay, but the court concluded it would not be able to determine whether the conviction was sound due to the unavailability of the complete transcript. As a result, the convictions of the appellant were quashed, and the sentences set aside.

[85] At paras. [24] and [25] of that judgment, this court compared the circumstances of missing portions of evidence in both **Evon Jack v R** and **Delevan Smith and others v R** [2018] JMCA Crim 3 and the impact on the convictions as follows:

> "[24] In **Nordia Duhaney v R**, notes of evidence were present but the findings of facts were absent. The conviction

> was quashed on the basis that findings of facts are necessary in a judge alone case to assist the court to determine the appeal. A retrial was ordered. In **Evon Jack v R** where the appellant was convicted of carnal abuse, buggery and indecent assault, only the transcript of the summation was available. The conviction was quashed as it was held that the notes of evidence were necessary to determine whether i) there was adequate evidence for the jury to be sure there had been penetration of the child's anus or her vagina; ii) the evidence or aspects of the evidence of recent complaint was/were properly admitted; and iii) the directions on important inconsistencies and discrepancies were accurate. No retrial was ordered.
>
> [25] However, in **Delevan Smith and others v R** where the notes of evidence of three of the four witnesses for the Crown were missing, the conviction was nevertheless affirmed. This was the result as the very detailed summation by the trial judge on the law and evidence relating to identification, together with the available evidence on identification, enabled the court to adequately assess and ultimately dismiss the grounds raised in the appeal."

[86] In the case at bar, although the evidence of the defence witness Ricardo Isaacs was missing from the transcript, the learned trial judge's summation of his evidence was detailed and enabled the court to consider and determine all the grounds of appeal. We are not of the view that the applicant suffered any detriment in the circumstances, as the absence of the missing evidence was inconsequential (see also para. [26] of **Delevan Smith and others v R** in which the court highlighted rules 3.7(1)(c) and (d) and 3.8(2) of the Court of Appeal Rules, 2002 and that those rules require that the portion of the transcript that is relevant to the grounds of appeal, be provided).

[87] In light of the above, the applicant would only be entitled to a remedy for the breach of his Charter rights under section 16(8), and we consider that a one-year reduction in sentence is appropriate.

[88] This ground of appeal, therefore, succeeds.

Conclusion

[89] We considered several grounds of appeal challenging the fairness of the applicant's trial, particularly relating to the summation of the learned trial judge. We found no merit in any of those grounds of appeal and, therefore, affirm the applicant's conviction. Leave to appeal sentence was not pursued and the sentence imposed cannot be said to be manifestly excessive. Concerning the alleged breach of the applicant's constitutional right to a fair hearing within a reasonable time, we found an inordinate delay between the applicant's conviction and the hearing of the appeal (approximately five years and three months), none of which could be attributed to the applicant. This delay justifies an effective remedy, which we have determined should be a reduction in the sentence imposed. To give the remedy for the breach of his constitutional right, the sentence imposed will be reduced by one year.

[90] We, therefore, order as follows:

1. The application for leave to appeal against conviction and sentence is refused.

2. It is hereby declared that the right of the applicant under section 16(8) of the Constitution of Jamaica, to have his conviction and sentence reviewed by a superior court within a reasonable time, has been breached by the delay between his conviction and the hearing of his appeal.

3. By way of remedy for the breach of the applicant's constitutional rights under section 16(8) of the Constitution, the sentence of 14 years and nine months' imprisonment is set aside; substituted therefor is the sentence of 13 years and nine months' imprisonment.

4. The sentence is to be reckoned as having commenced on 12 October 2018, the date the sentence was imposed by the learned trial judge.