[2020] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 16/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

JERMAINE MCKENZIE v R

Ms Melrose Reid for the appellant

Mrs Andrea Martin-Swaby and Atiba Dwyer for the Crown

26, 27 November 2019 and 3 April 2020

EDWARDS JA

Introduction

[1] The appellant was tried, before G Fraser J sitting with a jury, for the offence of having sexual intercourse with a person under 16 years. He was convicted and sentenced, on 6 March 2015, to life imprisonment with the stipulation that he serve 10 years before being eligible for parole.

[2] The appellant applied to a single judge of this court for leave to appeal his conviction and sentence. Leave to appeal the conviction was refused by the single judge of this court, who, nonetheless, granted leave to appeal against the sentence. In pursuing

his appeal against sentence, the appellant also renewed his application for leave to appeal his conviction.

Background facts

[3] The case against the appellant was that, on 26 September 2013, the complainant decided to walk to Wakefield Square in the parish of Trelawny, to get transportation to go home from school. At the time, she was dressed in her school uniform. On her way to Wakefield Square, she saw the appellant at Bay Road. She was familiar with the appellant, as he was a conductor on one of the buses that she would normally take to school. She called to him, went over to where he was and they spoke briefly. He asked her to have sexual intercourse with him and she agreed. They were taken by car to a house where the appellant gained entry by using a key from a bunch he had in his possession. He then had sexual intercourse with her on a settee inside the living room of the house.

[4] Subsequently, the complainant wrote a letter to her friend detailing her sexual encounter. This letter came into the hands of the school's guidance counsellor, who then called in the complainant's mother. The complainant initially refused to say who her sexual encounter was with. She later told her mother that it was someone named 'Deno' who had had sexual intercourse with her. Thereafter she admitted that she had lied, and some three months later, she pointed out the appellant to her mother as the person with whom she had had sexual intercourse. The appellant was later pointed out to the police by the mother. After the appellant was taken into custody, an identification parade was held and he was later charged.

[5] At his trial, the appellant gave sworn evidence and denied committing the offence. He admitted to knowing the complainant as someone who took the bus on which he was the conductor. He, however, said that he did not know her name. He told the court that from 5 or 6 September to 13 October, he was visiting his mother in another parish, and therefore, could not have had sex with the complainant as she claimed. He also claimed that he did not know the house to which the complainant said she was taken, and also indicated that the police did not take him there, before or after he was arrested.

Grounds of appeal

[6] At the hearing of the appeal, counsel for the appellant abandoned the original grounds of appeal which were filed, and sought and received permission to argue the following supplemental grounds:

> "1. The evidence does not support the conviction;
>
> 2. The learned trial judge was biased to [sic] the [appellant] in her summation resulting in the jury returning a verdict of guilt;
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> 3. The learned trial judge erred in not giving a corroboration warning or merely brushed on corroboration; and
>
> 4. The sentence is manifestly excessive."

[7] The appellant is, therefore, challenging both his conviction and sentence. Counsel for the appellant, as well as counsel for the Crown, relied on both written and oral submissions.

Ground one –The evidence does not support the conviction

Appellant's submissions

[8] Counsel for the appellant argued that the evidence did not support the conviction as the complainant initially told her mother that she had sexual intercourse with another man and only afterwards confessed that she had lied and had just made up a name. Counsel argued that there was no reason for the complainant to lie to protect the appellant, as the appellant and the complainant were not in a relationship so they were not "lovers" in regular communication. Counsel also pointed out that the complainant, in giving evidence, had failed to give an explanation as to why she lied.

[9] Counsel also argued that the lack of DNA evidence was unfortunate as this could have provided some assistance, and the learned judge ought to have mentioned this in her summation. It was submitted further, that the learned judge should also have addressed the circumstances under which the appellant was identified some three months after the incident. Counsel contended that the fact that it was the complainant's mother who pointed out the appellant to the police and the danger of such identification was not adequately addressed by the learned judge. Counsel also complained that the learned judge failed to properly deal with the identification parade, and further contended that if the learned judge had dispassionately dealt with the evidence on both sides, the jury would not have convicted the appellant.

[10] Additionally, counsel submitted that the learned judge failed to explain to the jury that there was a lacuna in the evidence regarding the house where the complainant said the appellant took her, and the keys the complaint alleged the appellant used to open

the door to the house, as there was no evidence led regarding his connection to this house or how he came by the keys. She complained also, that there was no evidence that any effort had been made to locate "Deno", the person whom the complainant initially said she had had sexual intercourse with.

Respondent's submissions

[11] It was submitted on behalf of the Crown that the learned judge gave appropriate directions on the relevant issues, including the inconsistencies in the prosecution's case, alibi and good character.

[12] Counsel for the Crown contended that the main issue for the jury to determine was the complainant's credibility and that the learned judge gave adequate directions to the jury regarding the method by which the credibility of the witnesses ought to have been addressed and assessed by them.

[13] Counsel pointed out that the jury convicted based on the evidence given by the complainant, which it was argued, suggests that they believed her. Counsel argued further that the conviction could not be effectively challenged given the state of the evidence and the soundness of the relevant directions given by the learned judge.

Analysis

[14] The case against the appellant rested, by and large, on the evidence given by the virtual complainant. The main issue for the jury to determine was whether the appellant did in fact have sex with the complainant. The issue, therefore, is whether the evidence

of the complainant was sufficiently credible for a jury of fact to safely return a verdict of guilt and whether the jury was adequately assisted in making that determination.

[15] The virtual complainant was almost 14 years old at the time she gave her evidence. Her mother gave evidence that she was 12 years old at the time of the offence. The complainant admitted to lying initially about who had had sexual intercourse with her. Her credibility was, therefore, crucial and the jury would have had to accept her as a credible witness in order to convict the appellant.

[16] The fact that she did not initially name the appellant as the offender did not, by itself, preclude the jury from finding her to be a credible witness and acting or relying on her evidence. However, the fact that she initially named someone else is far more troubling and the jury would have had to be assisted with how to approach this and the possible impact it may have had on her credibility. The duty of the learned judge, therefore, was to give adequate directions which could assist them with their task.

[17] We are satisfied that the learned judge fulfilled this duty. The learned judge gave proper directions on the issue of credibility for both the complainant and the appellant. She recounted the evidence of all the witnesses in the case and highlighted the salient aspects. In relation to how they should assess the evidence of the complainant, the learned judge told the jury to approach her evidence with caution, and directed them, on page 20 of the transcript, as follows:

> "Now, this is the approach that I want you to take in respect of the caution. You sift the evidence, you weigh it, you look at it from every angle and determine whether you are satisfied

> with it or not and then you make your decision, bearing in mind that I tell you to regard her evidence carefully because it is unsupported, and based also on her evidence that she had told a lie, granted she is telling you in her evidence that this is the man who had sexual intercourse with her."

[18] Then on pages 21 and 22 she continued:

> "Now, when we go through the evidence of the witness, I will assist you by highlighting any evidence that I am of the view that [sic] is capable of amounting to a conflict, but before we do that, I will give you some directions as to how you are to treat with conflicts where they occur or where you find that they have occurred during the course of the evidence.
>
> It is your business to not only assess the evidence, but also to assess witnesses because it is the witnesses who give evidence. So, you will have to determine if you consider persons who have given evidence in this trial to be truthful and whether you can rely upon them. [Defence Counsel] Mr Thomas pointed out that, and he criticized [the complainant's] evidence and, therefore, you will have to take account of that and take account of any conflict that you might find proven in [the complainant's] evidence."

[19] The learned judge then went on to state as follows:

> "... Now, Counsel, Mr Thomas, is asking you to say that the complainant is not a truthful witness and that this incident of sexual intercourse did not happen at all. And, as I say, Mr. Foreman and your members, that is entirely your assessment to make as judges of the facts ..."

[20] The jury also had to assess the complainant's evidence bearing in mind the appellant's sworn evidence.

[21] With regard to the house where the complainant said the incident took place, the learned judge made the following comments, at page 82 of the summation:

> "... as Crown Counsel pointed out to you and it's a matter of common sense, Mr. Foreman and members of the jury, the fact that someone might have access to a premises does not necessarily mean that he lives there, but we are not to speculate about that as to how and what connection he might have with the premises. The exercise for you is whether or not you believe the complainant was taken to the premises and that's the exercise for you to determine."

[22] In our view, the above directions were appropriate, given the circumstances of the case and the fact that there was no evidence from the prosecution as regards the appellant's connection to the house in question. The appellant denied going to or knowing this house. The learned judge advised the jury as to the correct approach to take in assessing the relevance or importance of this evidence. The jury was instructed not to speculate as to the connection between the house and the appellant, but rather, to determine whether the complainant had actually been taken there by him. Without any evidence as to the connection between the house and the appellant, the jury would only have been invited to speculate.

[23] The same must be said about the appellant's complaint about the lack of DNA evidence. There was no DNA evidence in this case, and this is not surprising given the time between when the incident was said to have occurred and when it came to the attention of the guidance counsellor. Apart from telling the jury just that, we cannot see what else the learned judge was required to say to the jury regarding DNA evidence.

[24] With regard to the issue of the identification of the appellant, the evidence was that the complainant eventually told her mother that the person she had sexual intercourse with was Jermaine. She pointed out Jermaine to her mother. It was her

mother who pointed out the Jermaine to the police. The evidence from the investigating officer was that because the appellant was pointed out to the police by the complainant's mother and not the complainant, an identification parade had been conducted.

[25] The learned judge directed the jury that, although an identification parade had been held, no one called evidence in respect of it. She also reminded the jury that the incident took place during the daytime, the complainant and the appellant were known to each other and were at close quarters to each other during the incident. She further reminded the jury of the evidence of the police officer that she caused an identification parade to be held because the complainant was not the one who pointed out the appellant to the police. The learned judge also told the jury that in those circumstances it was proper for an identification parade to have been held. She told them, however, that, as they might have appreciated, "the issue of identification was not live in this case and, therefore, the evidence in respect of that was not called as neither the Prosecution nor Defence Counsel needed to hear from that witness".

[26] We cannot fault the judge for taking this approach to the issue of identification. Although the appellant gave evidence of his alibi, there was no suggestion that the complainant could have been mistaken as to the person she had sex with. The case was clearly defended on the basis that the appellant did not have sexual intercourse with the complainant; that he was in another parish at the time she said the incident occurred and that she was lying. The jury was being asked not to accept her as a credible witness of truth.

[27] The question of the complainant's identification of the appellant as the person with whom she had sex went more to her credibility and did not, in our view, raise any issue of identification which would require a **Turnbull** warning (see **R v Turnbull and Another** [1977] QB 224). In our view, the learned judge adequately dealt with the issue of how the appellant was identified.

[28] With regard to counsel's complaint that there was no effort to locate 'Deno', the evidence of the complainant was that there was no 'Deno' and that it was a 'made-up' name. The evidence of her mother was that the complainant told her there was no 'Deno'. Therefore, it is unimaginable that the learned judge could have possibly correctly told the jury that no effort had been made to locate a person who they had already heard, in the evidence, did not exist. There was no evidence which even remotely pointed to a possibility that such a person might actually exist.

[29] At page 53 of the summation the learned judge told the jury:

> "Remember what I have been telling you that it is your business to look at all the evidence that you have heard and you are to assess it. You are to determine who is being truthful and whose evidence you find reliable and at the end of it all, you make a decision as to whether or not the prosecution has fulfilled their obligation and whether they have proved the case against Mr McKenzie."

[30] The appellant gave sworn evidence but the jury obviously believed the complainant and found her to be credible, which led to their finding of guilt.

[31] In **Erron Hall v R** [2014] JMCA Crim 42 Morrison JA, as he then was, in dealing with a similar ground, said at paragraph [43] that:

> "...At the end of the day, the appellant having given evidence on oath, the jury were presented with a contest of credibility, between his evidence and that of the complainant, which they resolved in favour of the latter. In these circumstances, it is well established that, in order to succeed on a complaint that the verdict is against the weight of the evidence, the appellant must show that the verdict is unreasonable and insupportable (**R v Joseph Lao** (1973) 12 JLR 1238). This is a high bar which, in our view, the appellant has failed to cross in this case."

[32] In the instant case, the verdict, based on the evidence, cannot be said to be unreasonable and insupportable, and the learned judge gave adequate directions on how to treat with the complainant's evidence in light of the fact that she had admittedly lied. This ground, therefore, fails.

Ground two – the learned judge was biased in her summing up

Appellant's submissions

[33] Counsel for the appellant submitted that the learned judge was biased in her summation and that when one reads the entire summation, it becomes obvious she felt sympathy for the complainant and was not just biased in favour of the complainant but was "drastically" biased against the appellant. Counsel referred the court to several passages in the summation in support of this contention.

[34] Counsel submitted that the learned judge's summation subtly and blatantly urged the jury to "convict", and that the judge's treatment of the appellant's case fell short of what is required. Counsel further submitted that the learned judge erred in telling the jury to disregard defence counsel's suggestion to "...make a decision that you can go home and sleep well on it...".

[35] Counsel cited the case of **R v Fraser Marr** (1990) 90 Cr App R 154, as well as **Mears v Regina** (1993) 97 Cr App R 239, which, she said, set out the proper parameters of judicial comment when summing-up to the jury.

[36] Counsel complained that the learned judge further displayed bias in her treatment of the investigating officer's evidence regarding the arrest and caution of the accused. Counsel submitted that, even if the appellant had lied to the police about not knowing the complainant, the learned judge should have given the relevant warning on lying, instead of positioning the case against the appellant and in favour of the complainant. In support of this submission, a passage from **R v Goodway** [1993] 4 ALL ER 894, quoting from the decision in **Broadhurst v R** [1964] 1 All ER 111, was relied on by counsel.

[37] Counsel also complained about the judge's treatment of the appellant's alibi and the comments she made with regard to it. Counsel argued that, in this case, the learned judge sided with the prosecution and failed to present the case for the appellant. Further, it was argued that the learned judge failed to sum-up the complainant's "negative/dubious" sides to the jury in a balanced manner.

Respondent's submissions

[38] Counsel for the Crown submitted that the learned judge was not biased in her reasoning and summing up of the evidence to the jury and that she gave adequate warnings and appropriate directions to the jury.

[39] Counsel submitted further that, at pages 54 – 55 of the summation, the learned judge merely reminded the jury of the prosecution's closing arguments, and in doing so

the learned judge did not show any bias or sympathy towards the complainant. It was also submitted that at no time did the learned judge use any language which could be interpreted as her telling the jury to "convict".

[40] It was the duty of the learned judge, counsel submitted, to sum up to the jury fairly and without bias. Counsel suggested that care should be taken to read the summation as a whole, rather than looking at certain passages in the summation in a piecemeal fashion. Counsel argued that the judge's treatment of the evidence was in keeping with good practices, and pointed out that the jury were told that they must analyse the appellant's sworn evidence the same way they would for the evidence of the prosecution's witnesses.

[41] Counsel argued that the comments of the learned judge did not show bias, and that the learned judge put the issues to the jury carefully, giving the appropriate directions and warnings, and leaving the ultimate decision to the jury.

Analysis

[42] Although the appellant's complaint in this ground is loosely framed in terms of bias, his real complaint is one of an unfair trial. Underpinning the complaint is the contention that the judge's comments bolstered the prosecution's case and undermined the defence. This does not raise an issue of actual or apparent bias in the tribunal, but really amounted to a contention that the trial was unfair.

[43] For this ground to succeed it must be shown that the learned judge's comments led to a miscarriage of justice or that the appellant was deprived of a fair trial.

[44] Section 14 of the Judicature (Appellate Jurisdiction) Act outlines this court's jurisdiction and thus the applicable test in dealing with criminal appeals. It states:

> "14.- (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or **that on any ground there was a miscarriage of justice**, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.
>
> …" (Emphasis added)

[45] A trial judge has a duty to be fair and balanced in summing up to the jury. This is to ensure that the defendant gets a fair trial. In **R v Lawrence** [1981] 1 All ER 974 Lord Hailsham made the following comment, at page 977, as to the requisite contents of a summation:

> "A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about primary facts.".

[46] The learned judge, in her summation, directed the jury on their differing roles. In relation to the burden and standard of proof, she said this at pages 9-10 of the summation:

> "In our justice system, and in criminal courts in particular, an accused person is presumed to be innocent unless and until a jury, by their verdict, say otherwise. He does not have to prove anything at all. It is the Prosecution who has brought him here to answer to the charge and, therefore, it is the Prosecution who must prove that the defendant is guilty.
>
> How does the Prosecution succeed in proving Mr. McKenzie's guilt? They must satisfy you, by evidence elicited from witnesses, so that you feel sure of his guilt and it is only if you are so satisfied that you can find him guilty and convict him. Nothing less than that will do.
>
> So, if after you consider all the evidence you are sure that the defendant committed the offence for which he is indicted, then it is open to you to return a verdict of guilty. If you believe him to be innocent or if you are not sure of his guilt, then your verdict must be one of not guilty."

[47] The learned judge also directed the jury on the burden of proof, inconsistencies and discrepancies, and all the other usual issues which arise in a trial by jury and were relevant to this case. At page 7 of the summation, she warned the jury not to be sympathetic. She did so in the following terms:

> "From what I have said, that your decision should be based solely on the evidence, this also means that you cannot make a decision based on sympathy for either the complainant or the accused man. There is to be no sympathy for the complainant despite her age of 12 years at the time or, indeed, any sympathy for her mother. You cannot decide the case because it could be your daughter. So too, you cannot take the approach that, 'Oh, poor Mr. McKenzie, he could be my son, grandson, nephew or my church sister's son and, therefore, I don't want to send nobody pickney to prison'. If

> either the complainant or the accused were your relatives or someone close to you, Mr Foreman and members, you would not be asked to sit in judgment of this case."

[48] In relation to holding any prejudice or bias she commented, at page 8, that:

> "Equally, you are not to entertain any prejudice against Mr McKenzie or against [the complainant]. You should not take the approach that taximen [sic], bus men and conductors are always interfering with school girls and on that basis you make a decision.
>
> As Mr. Thomas so rightly said to you yesterday, that you cannot take taximan, bus man and conductor fat and fry Mr. McKenzie. He is to be judged solely on the evidence against him and you decide whether he has breached the law or not based on the evidence that you have heard ..."

[49] In relation to the offence and the evidence in support of the charge, she said at pages 17 to 18 as follows:

> "If, therefore, on the evidence you are satisfied so that you feel sure that the prosecution has proven the necessary ingredients of the offence, that is to say, that the accused man penetrated the vagina of the complainant ... and that the complainant at the time was under the age of 16 years, then it would be open to you to find the accused man guilty as charged on the indictment.
>
> Now, [the complainant] in this case is the only witness as to fact. Only she could come here and present evidence as to what occurred on the day in question. You may well think, Mr. Foreman and members of the jury, that these things usually happen in private and there are not usually spectators but be that as it may, she is the only witness as to fact. There is no independent evidence which was brought to support her assertion of sexual intercourse having occurred between herself and Mr. McKenzie and, as such, the case will be proved on her evidence alone."

[50] The learned judge recounted for the jury the salient aspects of the closing remarks of both counsel. She also advised them where necessary to disabuse their minds of any aspect of those closing remarks that she thought was not in keeping with their function.

[51] The gravamen of the appellant's complaints is to be found in the following passages in the judge's summation, at pages 59 to 60, where she directed them regarding the closing remarks of defence counsel, as follows:

> "... Do not adopt the approach as suggested by Counsel Mr Thomas; that is to say, when he addressed you yesterday, he told you that you should make a decision that, 'You can go home and sleep well upon it'.
>
> That is not your approach because you might go home and you can't sleep well because of a number of reasons ... So that, of course, cannot be your approach. Your approach must be on the evidence you have heard which satisfies you one way or the other of the guilt or innocence of the accused man."

[52] This was reiterated at page 80, lines 3-7, where she reminded them of:

> "what I told you about his remark about, "you can make a decision that you can go home and sleep well on it." And, I told you that would be eliciting sympathy for the accused man, so you are to totally disregard that comment."

[53] In our view, the learned judge was correct to direct the jury in the manner that she did. Defence counsel's entreaty may not have been in keeping with the duty of the jury to decide the case in an objective and dispassionate manner. There is nothing in the learned judge's comments that would lend itself to a conclusion that she was biased against the appellant, or more accurately and importantly, which could have resulted in the appellant not receiving a fair trial. This is not a case in which the learned judge's

comments went beyond the proper bounds of judicial commentary, as in the case of **Mears** or **Fraser Marr**.

[54] Counsel also complained of what she described as favourable treatment of the evidence of the prosecution's witnesses by the learned judge, more specifically, that the learned judge said that:

(1) the complainant confessed by giving the name Jermaine Mckenzie;

(2) she confessed that she lied when she gave the name Deno;

(3) the mother of the complainant had not known him before so she "has no axe to grind";

(4) there was no history between the mother and the appellant to motivate her to tell lies on the appellant;

(5) the police officer in the case had no interest to serve; and

(6) no motive to frame the appellant had been established in the case.

[55] Another complaint made under this ground is about the learned judge's comments at page 77 of the summation where, in reference to the complainant, she said:

> "And she also told you to have regard to the fact how [the complainant] looked shame and hold down her head in the witness box and this is an indication that is shame she shame why she never want talk. The fact that she took so long to call Mr. McKenzie's name that does not mean that she is telling a lie on him. She never want to talk, that it's not easy for her to come to court and speak up of things in the presence of so

> many adults and even Mr. Thomas agreed with that assessment of the prosecutor."

[56] The learned judge's summation has to be considered in context and as a whole. She told the jury that she was going to go through the evidence of the three witnesses called for the prosecution, including the complainant, which she did. Having recounted the complainant's evidence to the jury, the learned judge alerted them with respect to possible conflicts, discrepancies, and omissions in relation to the complainant's evidence and that of the other witnesses. She also reminded them of her directions given on how to treat with inconsistencies or conflicts if they found they existed, because, as she told them at page 44:

> "…that is your task to, firstly, determine if it exists and, secondly, how you regard it and how it impacts on the evidence as a whole of the particular witness or the witnesses."

[57] After recounting the evidence of the prosecution's witnesses, the learned judge then reminded the jury that it was their duty to assess the evidence and determine who was being truthful and what evidence was reliable. At the end of it all, they were to determine whether the prosecution had fulfilled its obligation and had proved the case against the appellant. It was in that context that she told the jury that there was no suggestion that the complainant's mother had any reason to frame the appellant and had denied doing so; that the complainant's mother did not know the accused, had no history with him and that there was no suggestion that the mother had any "axe to grind" or any motive to tell lies on him; and, that the complainant had at first told her mother it was

'Deno' and thereafter 'confessed' that "it's not 'Deno'", it was instead the appellant. She also told them that the appellant said he would see the mother around but they had never spoken.

[58] It was also in the context of having recounted the evidence to the jury that she told them the police officer, who was a witness in the case, had no interest to serve. That she was given a file to investigate and did not know any of the parties in the case and there was no suggestion that it was she who instigated the complainant to call the appellant's name.

[59] In that same context, the learned judge pointed out to the jury that she had not seen where any motive to frame the appellant had been established in the case on the part of anyone and that the prosecution was not obliged to establish a motive. She told them, however, if they found that one was established on the evidence, then they could act on it.

[60] Counsel complained of the fact that the learned judge said that there was nothing to suggest that the complainant had any motive, but counsel failed to point out that the learned judge said the same for the appellant, the complainant's mother and the police officer. She also reminded the jury not to speculate.

[61] With regard to the learned judge's treatment of the complainant's lie to her mother and the resulting delay in identifying the appellant as the perpetrator, it is necessary only to refer to her directions. At page 28 of her summation she said this:

> "So, in particular, [the complainant] admitted to you that she lied in respect of giving the name 'Deno' to her mother, so it is up to you to judge her evidence as a whole and decide whether, notwithstanding that admission, you nonetheless believe her in respect of her other evidence and whether you will rely upon it. So you can choose to reject that aspect of her evidence and accept other aspects of it, you can choose to reject everything she has said, because if you do not find her to be creditworthy, that is a matter for you as judges of the facts".

[62] She also directed the jury in the following manner at page 18:

> "In this case, the defendant is denying the allegations made against him. Defence counsel, Mr. Thomas, has suggested to [the complainant] that no sexual intercourse took place at all between herself and Mr. McKenzie and whilst – remember she has denied the suggestion – she has, in fact, admitted that she initially lied about who had sexual intercourse with her and she told you, Mr. Foreman and members, that she made up the name 'Deno'. That is the name that she had indicated to her mother and she also told you that she didn't give the name of this accused until sometime after the guidance counsellor had called her up to the office on the day after she had sexual intercourse.
>
> Now, in the circumstances of what I have just said, I caution you that you must examine the account given by [the complainant] very carefully. I told you that you must examine her evidence carefully because the burden of proof is on the prosecution. The prosecution must make you feel sure of the guilt of the accused."

[63] The learned judge recounted the appellant's evidence to the jury from pages 56-87 of the summation. She directed the jury on how to deal with the appellant's case at pages 56 to 58. She stated thus:

> "So, in the case, the defendant called no witnesses but he took the witness stand. I must point out to you, however,

> that an accused person is not obliged to say anything at all in the trial because he is presumed innocent until you, by your verdict, might say otherwise and as Mr. Thomas pointed out, he could have remained silent. He could have stood in the dock and he could have made a statement and nobody could have questioned him, he had those choices, but he opted to give evidence and he has throughout, denied the charge against him and he has said that he did not do any of the things that [the complainant] said he did. Defence counsel, Mr. Thomas, he suggested to [the complainant], ... that no sexual intercourse took place at all between herself and Mr. McKenzie and he suggested that she was telling lies and she denied all these suggestions. Now, when you analyse the accused man's evidence in the case, you must treat it in the same manner as you have treated the evidence, as you would treat the evidence of the prosecution's witnesses. You have to weigh it on the same scale and give it equal consideration and scrutiny the same way that you give the evidence of [the complainant], Miss Bingham and Constable Mitchell, this must be your approach. The mettle of a witness is usually exposed by cross-examination and his or her demeanour in the witness box. This assessment applies equally to the defendant, Mr. McKenzie, and not only the prosecution's witnesses, you must look at the totality of the evidence in the case. If you believe the accused man's denial, then you must acquit him. Your belief of the accused is not the result of him satisfying any legal duty to prove his innocence, it is simply the result of having heard him and you believe him. If the defendant's account puts you in doubt about the prosecution's case, that is to say, you do not believe him completely but you are not sure that he committed the offence on [the complainant] then you must also acquit."

[64] She also reminded them that even if they rejected his defence, they had to go back to the prosecution's case, assess it and believe it, before they could convict him. She also gave full character directions, as well as directions on how to treat with the appellant's alibi, and the comments made to them on the issue by both counsel for the prosecution and for the defence. She also asked them not to take the approach of counsel for the prosecution and use "the fat of all other wayward conductors and bus drivers and

taximen to fry the [appellant]". Instead, they were told to only convict if they found, on the evidence, that he had done the act as alleged in the indictment.

[65] Some of what counsel claimed were statements made to the jury by the judge, were actually comments made by counsel for the prosecution, of which the judge reminded the jury. So the complaint that the jury were told on page 77 of the summation that 'the fact that the complainant took so long to call the appellant's name did not mean she was telling a lie on him", is without merit, as this was a comment made by the prosecuting counsel in closing and not the learned judge. The learned judge was merely narrating the comments made in closing arguments.

[66] Counsel also complained about the judge's comments on page 79, where she said:

> "I don't know, Mr. Foreman, and members of the jury, but we have four men up there on the jury, I don't know if you want to stay away from your girlfriend for so long, from the 5th or 6th of September until the 13th of October, don't even come look for her. You decide if that's how men behave, if that is a reasonable behaviour of adult men in such circumstances, even with his assistance up in Portland, you must decide whether it was entirely necessary for him to be there, matter for you."

[67] Again, this comment by the judge was taken out of context by counsel for the appellant. Apart from the fact that it is acceptable for the learned judge to ask the jury to take a common sense approach, immediately after these comments at page 79, she reminded them of the comments by counsel for the appellant. Counsel for the appellant had told the jury that the males amongst them could find themselves in the position of the appellant if someone were to say things about them which were not true. He also

reminded them that the complainant had called several names whereas the appellant was consistent in his denials, and the learned judge told them it was for them to decide whether counsel's submissions found favour with them.

[68] We find no fault with this aspect of the learned judge's summation on the appellant's case.

[69] In advising the jury as to how to assess the case in coming to their conclusion the learned judge took the following approach:

> "In order to convict him, you must do two things; you must first reject his defence and then you must go on to assess the Prosecution's case and must believe it in order to convict. If you do not believe the accused man, that alone does not entitle you to convict him. You must first reject his denial, you examine the Prosecution's case, that is all the evidence brought to you by the Prosecution, especially that of [the complainant], and then you ask yourselves, "Am I convinced, am I satisfied by the evidence so that I feel sure that he did the act that the complainant said he did?" And, if after considering all the evidence, your answer is, yes, then it is open to you to convict him.
>
> Now, you must also remember that your assessment of the defendant's evidence, as with all the evidence in this case, must be a dispassionate exercise. You should have no sympathy for him, neither should you harbour any prejudice against him. Bear in mind that he is not on trial for anything except an alleged breach of the law. You must take a dispassionate approach. Only be guided by the cold facts as you will find them proven..."

[70] The learned judge directed the jury in very practical terms and used examples where she thought necessary to assist the jury in carrying out their function. She directed

the jury in the following terms in her concluding remarks immediately before their retirement on pages 86 to 87:

> "Mr. Foreman and members of the jury, ... As you go into the jury room, I remind you that it is the Prosecution who must prove the case against this accused man, must prove him guilty to your satisfaction so that you feel sure. They must satisfy you, by the evidence, so that you feel sure and the defendant has no obligation to prove his innocence. But, notwithstanding this, he has given evidence and you will weigh all the evidence in this case in the same scale, including the evidence given by the defendant.
>
> I remind you of the caution I gave you in relation to the evidence of [the complainant] and the comments and criticisms that were levied by Defence Counsel, Mr. Thomas, and I have indicated to you how you are to treat with conflicts in the evidence, whether they be inconsistencies, discrepancies or omission, and bear in mind all that I have told you in relation to witnesses and their demeanor [sic] and how you approach the assessment of the witnesses and their evidence.
>
> I remind you also that in this case, the defendant has raised an alibi and I remind you that it is the Prosecution's responsibility to negate that alibi, that is to say, they are to convince you on the evidence that he was where the complainant said he was and not elsewhere in Portland as he raised in his alibi. And, I also indicated to you that in determining whether the Prosecution has disproved this alibi, you can consider all the circumstances of how and when and why the defendant said he was in Portland. The complainant, I remind you, is the sole witness as to fact and the case will either rise or fall on her evidence depending on the view of the witness as you see fit. And I remind you that it is entirely for you as to the findings of fact in this case as you are the jurors who are charged with the findings of fact in this case. That is entirely a matter for you."

[71] Again, we cannot fault the learned judge's summing up, and her balanced approach would have assisted the jury to properly and fairly assess the evidence

presented. In the light of this, we find that the extreme bias resulting in unfair trial complained of has not been borne out.

[72] Counsel for the appellant also contended that the learned judge ought to have given a 'Lucas direction' because of the police officer's evidence of what the appellant said to her on caution. The need for such a warning becomes live when a proved lie, told by a defendant in or out of court, is relied on as corroborative of the evidence against him given by a prosecution witness.

[73] With regard to the issue of the appellant's statement on caution, the appellant told the police he did not know who she was talking about when she told him the name of the complainant. The appellant's case was a general denial of the offence and the issue in this case was the credibility of the complainant as against his credibility. There is no evidence that the appellant was ever accused of lying with regards to not knowing the complainant, as his evidence was that he knew her but not her name, and the first he heard her name was when the police told him the name. The evidence of the complainant is that she knew him only by his first name. There is nothing to suggest that the prosecution relied on the appellant's statement on caution as a lie told by him, or that the jury were encouraged to, or that there was any danger that his statement on caution could have resulted in the jury inferring guilt.

[74] In **Goodway** and **Broadhurst** the question of when to give a **'Lucas'** type direction, named from the case **R v Lucas** [1981] 2 All ER 1008, was discussed. Lord

Taylor CJ, in **Goodway**, (at page 902) referred to his own judgment in **R v Richens** [1993] 4 All ER 877, where he had stated at page 886, that:

> "In principle…the need for a warning along the lines indicated is the same in all cases where the jury are invited to regard, or there is a danger that they may regard, lies told by the defendant, or evasive or discreditable conduct by him, as probative of his guilt of the offence in question."

[75] In our view, there was no reliance by the prosecution on this evidence in support of its case, and, therefore, no danger that the jury could consider that as probative of guilt, so that a '**Lucas** direction' would not have been required.

[76] With respect to the complainant's admitted lie, although it may have been ideal for the learned judge to have pointed out to the jury that there was no explanation for the admitted lie, she did emphasize that the complainant had admitted to lying and that she had made up the name, and had also said that she had no reason for doing so. The learned judge correctly told them that the issue was one of credibility, and did remind them to approach the complainant's evidence with caution because of that lie.

[77] This ground fails.

Ground three – The learned judge erred in not giving a corroboration warning or merely brushing on corroboration

Appellant's submissions

[78] Counsel for the appellant submitted that the learned judge erred in not giving a proper corroboration warning having merely touched on it. It was submitted that despite

the confusion created by a combination of the amendment to the Evidence Act, sections 31(P) and (Q), section 26(1) of the Sexual Offences Act' and section 20 of the Child Care and Protection Act, the learned judge should have given the warning as there was no form of corroborating evidence in this case.

[79] Counsel referred to the case of **Makanjuola** [1995] 1 WLR 1348 at 1351, and argued that, based on the circumstances in the instant case, which included the fact that the complainant lied about the name of the person who had sexual intercourse with her, a corroboration warning ought to have been given.

[80] Counsel argued that the learned judge should have gone further than the attempt she made in addressing the complainant's evidence. Counsel cited the cases of **Earl Britton** (1966) 33 JLR 307 and **Joel Henry** [2018] JMCA Crim 32, and contended that bearing in mind the entirety of the case, the conviction should be overturned.

Respondent's submissions

[81] Counsel for the Crown asked this court to note that the trial of the appellant in this case was before the amendment to the Evidence Act, which did away with the mandatory requirement for a corroboration warning in cases involving child witnesses. Counsel also submitted that the evidence of the complainant in this case, being the 'product' of sworn testimony, was not subject to the provision of section 20 of the Child Care and Protection Act.

[82] Counsel conceded that usually a corroboration warning is required as a rule of practice but submitted that, depending on the circumstances, there was a residual

discretion in the trial judge as to the nature of the direction that is to be given. She argued that the age of the child and the fact that the child gave sworn testimony were factors to be taken into account, in determining whether a warning was necessary in a particular case. Counsel relied on this court's decision in **Erron Hall v R** where, although the corroboration warning for a child witness was not given, the conviction was not disturbed because of the circumstances of the case, including the age of the child.

[83] It was further submitted that, since the need for the warning is contingent on age, it stands to reason that an older child would attract a less stringent warning than a younger child. Counsel also submitted that there was no particular form of words or set formula if a judge chose to give a warning.

[84] Counsel submitted that the learned judge gave sufficient warning to the jury on corroboration at page 17 of the summation, where she explained that the complainant was the only witness and that there was no independent evidence to support her assertions. Counsel said further, that at page 18 the learned judge directed the jury to carefully examine the complainant's evidence given the circumstances of the case and that she also gave a corroboration warning to the jury reminding them of how to treat the complainant's evidence.

[85] Counsel argued that the conviction was safe and ought not to be overturned.

Analysis

[86] This ground of appeal raises two issues. The first is whether the learned judge was required to give a corroboration warning, and the second is whether or not she actually gave one which could be considered adequate.

[87] The complainant was 13 years old when she gave evidence in the matter. Having been born in August 2001 she would not have attained the age of 14 until August 2015. The trial was in March 2015. By that time the Sexual Offences Act 2011 had abolished the mandatory requirement for judges to give a corroboration warning in the case of a complainant in a sexual case. Section 26 of the Sexual Offences Act 2011 provides:

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

[88] The Evidence Amendment Act came into effect August 2015, so that at the time of the trial of the appellant in March 2015, although it was no longer mandatory under the Sexual Offences Act in respect of complainants in sexual cases, there was still a mandatory requirement to give a corroboration warning with respect to the evidence of a young child according to the prevailing practice. That warning, traditionally, required the trial judge to warn the jury of the danger of convicting on the uncorroborated

evidence of a child of a young child. Morrison P at paragraph [21] of **Joel Henry v R** stated the requirement thus:

> "…[I]n order to be effective, such a warning was required to alert the jury to the dangers involved, which, as Walker JA (Ag) stated in **R v Earl Britton** (at page 308), "include the risk of unreliability and inaccuracy, over imaginativeness and susceptibility to being influenced by third persons." (See also **Erron Hall v R**, paragraph [31])

[89] In **R v Earl Britton**, Walker JA (Ag) (as he then was) stated, at pages 307-308 that "it is an inflexible rule of practice that a jury should be warned of the danger of acting on the evidence of a child of tender years, and should at the same time be told why it is dangerous so to act".

[90] Section 4 of the Evidence (Amendment) Act 2015, amended the Evidence Act by inserting a new Part 1C with the heading "Evidence of Child Witnesses Competence and Corroboration". A child for this purpose means a child under 14 years of age. Under Part 1C, a new section 31Q removed the mandatory requirement for the evidence of children to be corroborated. It states:

> "31Q – (1) Subject to subsection (2), it shall not be necessary for the evidence given by a child in civil or criminal proceedings to be corroborated for a determination of liability, a conviction or any other issue, as the case may be in such proceedings.
>
> (2) Notwithstanding the provisions of subsection (1), the trial judge (whether a judge of the Supreme Court or a Resident Magistrate) may –
>
> (a) in a trial by jury, where the trial judge
>
> considers that the circumstances of the case so

require, give a warning to the jury to exercise caution in determining whether to accept uncorroborated evidence of the child and the weight to be given to such evidence; or

(b) in a trial by judge alone, where the trial judge considers that the circumstances of the case so require, give himself the warning as provided under paragraph (a).

(3) ..."

[91] Section 20 of the Child Care and Protection Act which required the unsworn evidence of children under 14 years to be corroborated, was repealed by section 7 and the Schedule of the Evidence (Amendment) Act 2015. However, notwithstanding that the section was still in force at the time of the trial of the appellant, it is not relevant to this case, as it deals with the unsworn evidence of children, and in this case the complainant gave sworn evidence.

[92] The mandatory requirement to give a corroboration warning was abolished in the United Kingdom for child witnesses by section 34 of the Criminal Justice Act 1988. For sexual cases and in cases involving accomplices, it was abolished by section 32 of the Criminal justice and Public Order Act 1994. Section 26 of the Sexual Offences Act and section 31 Q of the Evidence Act as amended are now in line with the English position. In both instances, the warning is now only given as a matter of discretion by the trial judge. In **Laing v The Queen** [2013] UKPC 14 the Board cited, with approval, the case of **R v Makanjuola** [1995] 1 WLR 1348 at 1351-2 where, in describing the position after the abolition of the mandatory requirement, Lord Taylor CJ, at pages 1351-2 said the following:

"Given that the requirement of a corroboration direction is abrogated in the terms of section 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving "discretionary" warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.

To summarise:

(1) Section 32(1) abrogated the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.

(2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what

> terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence."

[93] This case provides acceptable guidance for trial judges in this jurisdiction who have to consider whether or not to give a corroboration warning in the absence of the mandatory requirement to do so. In respect of those cases, the decision to give a warning and the content thereof are matters for the discretion of the judge in the light of the evidence, the issues, and any weakness in the evidence resulting from a want in the credibility of the complainant (see also **Muncaster** [1998] EWCA Crim 296 which also applied **Makanjuola** with approval). The decision in **Makanjuola** was also considered and applied in the context of a child witness in **R v L** [1999] Crim LR 489 and **R v MH** [2012] EWCA Crim 2725.

[94] In **Joel Henry v R** Morrison P commented, at paragraph [24], on the impact of the provisions of the 2015 amendments to the Evidence Act. After discussing the provisions in section 31Q, the learned President went on to conclude at paragraph [24] that:

> "The upshot of all of this is that the requirement of a compulsory corroboration warning in respect of the evidence of a child has now been abolished. There remains, however, a discretion in the trial judge to warn the jury (or him or herself in the case of a trial by judge alone), where the circumstances appear to so require, to exercise caution in respect of such evidence. This therefore brings the law with regard to the requirement of corroboration of the evidence of children in line with that relating to the evidence of complainants in sexual cases."

[95] However, as we have already stated, the trial of the appellant was before the passing of the amendment to the Evidence Act in 2015, but after the passing of the

Sexual Offences Act 2011. With respect to this case, therefore, the established common law practice of giving a warning in respect of a child witness still existed. The learned judge did give a warning, but the issue is whether it was adequate.

[96] Both sides cited **Erron Hall v R** which was decided in 2014 before the amendment to the Evidence Act. The trial was in 2009 before the introduction in 2011 of Part VI to the Sexual Offences Act and section 26. That case was, therefore, decided on the then established common law practice, which has since been overtaken by statute. However, much of the reasoning in that case is still relevant to this case. In **Erron v Hall**, Morrison JA (as he then was), in giving the judgment of the court, referred to the Privy Council decision in **Carlos Hamilton and Jason Lewis v R** [2012] UKPC 37. In **Hamilton and Lewis**, the Privy Council cast a pall on the continued common law requirement for a corroboration warning for child witnesses in this jurisdiction, noting that the requirement had been abolished in most other common law countries. It also seemed to question the requirement to give such a warning in cases of older children (for instance over 14 years of age). Sir Anthony Cooper, who gave the judgment of the Board, said at paragraph 36 that:

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

[97] The Board also referred to the case of **R v Morgan (Michael)** [1978] 1 WLR 735 where the court found that no general proposition could be made as to the age above

which it is no longer necessary for a judge to give a warning and that it was best to leave that determination to the trial judge.

[98] In **Erron Hall**, the complainant was 15 years old, and this court, accepting that there was no fixed age above which the corroboration warning in the case of the sworn evidence of children is no longer necessary, took the view that, in the light of the child's age, it would not interfere with the judge's discretion not to give that warning.

[99] Section 20(3) of the Child Care and Protection Act defines a child of tender years for the purpose of that section (corroboration of the unsworn evidence of a child) to be a child under 14 years of age. Section 20 has now been repealed and replaced by section 31M of the Evidence (Amendment) Act 2015, which defines a child of tender years in the same terms. There is, therefore, still no established rule of practice or statutory provision establishing a fixed age above which the corroboration warning in the case of the sworn evidence of children is no longer necessary.

[100] In the case of **Joel Henry v R,** the trial took place a month before the passing of the amendment to the Evidence Act, (although the requirement for the warning in the case of a complainant in a sexual case had been abolished since 2011) and, therefore, the trial judge in that case was required to give the necessary warning on the need for caution in the case of the uncorroborated evidence of a child, in accordance with the then prevailing practice. In that case, the complainant was six years old at the time of the offence and eight years old at the time of the trial. This court held that the direction that

was given at that trial not sufficient to address the mischief which the corroboration warning in respect of young children, was meant to cure.

[101] Having established that the requirement to give a corroboration warning in a case where the witness is a young child still existed at the date of the appellant's trial, it is necessary to examine what the learned judge did in this case.

[102] The learned judge gave the following direction to the jury regarding the complainant's evidence at pages 17 – 20 of her summation:

> "Now, [the complainant] in this case is the only witness as to fact. Only she could come here and present evidence as to what occurred on the day in question. You may well think, Mr. Foreman and members of the jury, that these things usually happen in private and there are not usually spectators but be that as it may, she is the only witness as to fact. There is no independent evidence which was brought to support her assertion of sexual intercourse having occurred between herself and Mr. McKenzie and, as such, the case will be proved on her evidence alone."
>
> In this case, the defendant is denying the allegations made against him. Defence counsel, Mr. Thomas, has suggested to [the complainant] that no sexual intercourse took place at all between herself and Mr. McKenzie and whilst – remember she has denied the suggestion – she has, in fact, admitted that she initially lied about who had sexual intercourse with her and she told you, Mr. Foreman and members, that she made up the name 'Deno'. That is the name that she had indicated to her mother and she also told you that she didn't give the name of this accused until sometime after the guidance counsellor had called her up to the office on the day after she had sexual intercourse.
>
> Now, in the circumstances of what I have just said, I caution you that you must examine the account given by [the complainant] very carefully because the burden of proof is on

> the prosecution. The prosecution must make you feel sure of the guilt of the accused.
>
> Now, having given you the caution, this does not mean that you must throw up your hands and don't try the case, and how do you deal with the caution? Think of it in this way. Say, for instance, you are going along some road in parts of Trelawny and you come upon a sign which reads 'caution cattle crossing ahead'. You are driving your nice new motor vehicle and in those circumstances where you see such a sign, you may expect that some cow would come ambling across the road any time or run out on you ... but you don't want your nice new motor vehicle to smash up.
>
> So what do you do? Do you turn around and go back home and not continue your journey? You might have been going for a very important meeting. You might have been going to meet loved one or something of the sort. So, what will you do? Of course, you would drive at a reasonable pace. You will look left, you will look right, you will keep a sharp look out for cattle or any cow that will come straying across the road and you make your way carefully through the cattle zone until you leave it behind and then you continue on your journey.
>
> Now, this is the approach that I want you to take in respect of the caution. You sift the evidence, you weigh it, you look at it from every angle and determine whether you are satisfied with it or not and then you make your decision, bearing in mind that I tell you to regard her evidence carefully because it is unsupported, and based also on her evidence that she had told a lie, granted she is telling you in her evidence that this is the man who had sexual intercourse with her."

[103] In directing the jury as to how to treat generally with the evidence in the case, including the complainant's evidence the learned judge stated as follows, at pages 21 to 22 of the summation:

> "It is your business not only to assess the evidence, but also to assess witnesses because it is the witnesses who give evidence. So, you will have to determine if you consider persons who have given evidence in this trial to be truthful and whether you can rely upon them. Mr. Thomas pointed out

> that, and he had criticized [the complainant's] evidence and, therefore, you will have to take account of that and take account of any conflict that you might find proven in [the complainant's] evidence.
>
> ...Now, Counsel, Mr Thomas, is asking you to say that the complainant is not a truthful witness and that this incident of sexual intercourse did not happen at all. And, as I say, Mr Foreman and your members, that is entirely your assessment to make as judges of the facts ...

[104] She then told the jury, at page 28 of the summation, that:

> "[I]n particular, [the complainant] admitted to you that she lied in respect of giving the name 'Deno' to her mother, so it is up to you to judge her evidence as a whole and decide whether, notwithstanding that admission, you nonetheless believe her in respect of her other evidence and whether you will rely on it..."

[105] At page 86 she reminded the jury of her caution in relation to the evidence of the complainant and the comments and criticisms of defence counsel with respect to it. The learned judge also went on to remind the jury at page 87, that:

> "...The complainant, I remind you, is the sole witness as to fact and the case will either rise or fall on her evidence depending on the view of the witness as you see fit. And I remind you that it is entirely for you as to the findings of fact in this case as you are the jurors who are charged with the findings of fact in this case. That is entirely a matter for you."

[106] It is clear that the learned judge did not give a warning in the usual formula. She did not tell the jury that it is dangerous to act on the uncorroborated evidence of a child because they are often susceptible to fancy, or prone to imagination and are easily influenced by third parties. She did not tell them about the risk of unreliability and inaccuracy, from just merely being a young child.

[107] In this case, on the evidence, it was clearly not a fanciful notion that the complainant had had sexual intercourse with someone. The evidence was that she had not seen her period for three months after it came out that she had had sex and had to be taken to the type 5 clinic. Therefore, in our view, for the learned judge to tell the jury that an almost 14-year-old child, in these circumstances, might be fanciful about having sex would have led to confusion in the minds of the jury. As regards telling the jury that the child might be open to influence, this too would have made nonsense of the evidence, since it is clear that far from being influenced to lie, the complainant was reluctant to say anything at all. The learned judge in her summation pointed out to the jury, that the complainant refused to tell the guidance counsellor and her mother who had had sex with her and months later, even after she was hit by her mother to get her to speak, she still refused and gave what she said was a made-up name. The learned judge also gave ample directions on the absence of any prior association between any of the witnesses and the appellant and thus the absence of any motive to tell lies on the appellant. Although the learned judge did not give the appellant's age as a part of any warning, the jury were told of her age at the time of the incident and her age at the time of giving evidence.

[108] Against that background, given the age of the child, and given the fact that the complainant was a child who had admitted to telling a lie as to who had had sexual intercourse with her, it was more important and wholly appropriate for the learned judge to give a warning tailored to the evidence, rather than a formulaic warning which had no realistic connection with the evidence heard by the jury. In our view, the directions given were adequate to alert the jury that the evidence of the complainant was unsupported

by any other independent evidence as to the offence and therefore should be viewed with caution, especially in light of her admitted lie.

[109] In this case, from the learned judge's summation, it is clear that the learned judge directed the jury based on the fact that the complainant's credibility was tainted by her admitted lie. The learned judge told the jury that the complainant is the only witness for the prosecution and also gave them directions to aid them in determining what weight if any to place on the complainant's evidence or whether or not they could rely on it.

[110] It is clear that, following **Hamilton and Lewis** and **R v Morgan (Michael),** a seismic shift was coming with regard to the necessity for a warning in the case of older children (and even in the case of young children) and the nature of that warning. It has been lately recognised that any warning given should be done as part of the review of the evidence and the jury should be told of the need for caution and why, based on the peculiar feature of the evidence, such caution is required. The kind of evidence which may cause a trial judge to consider giving a warning may be evidence which strongly suggests that the witness may be unreliable, such as in this case, where the witness has admitted to lying.

[111] There is no set formula for a corroboration direction. It is within the judge's own discretion what words she uses to convey to the jury the need to approach a child witnesses' testimony with caution and why.

[112] In this case, it is clear that the judge did not give a corroboration warning in the classical sense but opted to give a general warning as to the fact that the complainant's

evidence was uncorroborated and the caution regarding the complainant's lie. In the circumstances of the case and the complainant's age, and taking into account the judge's summation as a whole, there is little doubt that the jury would have been aware that the complainant's evidence was unsupported by any other independent evidence, and that it would have to be looked at with a jaundiced eye bearing in mind she had admitted to lying about who had sex with her.

[113] This court would loath to interfere simply because, in a case involving a child who had clearly had sex with someone and was clearly reluctant to say with whom, the learned judge had not told the jury that children were prone to fantasy and imagination and were easily influenced to tell lies. We think it is also important to point out that at the end of the summation counsel for the defence as well as for the prosecution were asked if there was anything on the law or the evidence which the judge ought to have left to the jury and both said no.

[114] In the instant case, in the light of the complainant's conduct, the learned judge cannot be faulted for warning the jury in a manner tailored to the evidence. It was appropriate and important for the jury to be told that the complainant's evidence was unsupported and that she had called some other person's name before identifying the appellant as the perpetrator of the offence.

[115] In **R v Rennie Gilbert** [2002] UKPC 17, the Privy Council, in abolishing the common law rule of practice which required a mandatory corroboration warning to be given in all sexual cases, approved the judgment of the English Court of Appeal in **R v**

Chance (1988) QB 932. At paragraph 11 of the judgment, the Board quoted the following excerpt from **Chance**:

> "The aim of any direction to a jury must be to provide, realistic comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to guilt or innocence of the defendant. This involves the necessity of the judge tailoring his direction to the facts of the particular case. If he is required to apply rigid rules, there will inevitably be occasions when the direction will be inappropriate to the facts. Juries are quick to spot such anomalies and will understandably view the anomaly, and often, as a result, the rest of the directions, with suspicion, thus undermining the judge's purpose. Directions on corroboration are particularly subject to this danger: see *Reg v O'Reilly* [1967] 2 QB 722, 727, *per* Salmon L.J."

[116] In this case, the mandatory requirement for a full corroboration warning still existed at the time of the trial of the appellant, and the learned judge did not give that warning. However, the circumstances of this case were such, that although the directions given were not in keeping with the usual formula, taking the summation as a whole, they were adequate and appropriate to alert the jury as to the inherent weaknesses in the complainant's evidence and to assist them in arriving at a safe verdict as part of a fair trial (see **R v Gilbert** paragraph 14).

[117] It is clear that this was a case where the jury would inevitably have convicted, and therefore, we would apply the proviso, in any event.

[118] The judge's omission occasioned no miscarriage of justice and this ground fails.

Ground four-whether the sentence was manifestly excessive

Appellant's submissions

[119] Counsel for the appellant contended that the sentence was manifestly excessive and was disproportionate to the offence. Counsel pointed out that in cases such as **Dwayne White v R** [2013] JMCA Crim 11 and **Mervin Jarrett v R** [2017] JMCA Crim 18, the allegations were more serious and the court did not impose a sentence of life imprisonment. Counsel also argued that in the case of **Samuel Blake v R** [2015] JMCA Crim 9 in which the accused had pleaded guilty, a sentence of four years was imposed and this was upheld on appeal.

[120] Counsel submitted further that the learned judge failed to consider the social enquiry report and the principles outlined in **Ballantyne v R** [2017] JMCA Crim 23 and **Meisha Clement v R** [2016] JMCA Crim 26, and focused only on the aggravating factors. In addition, counsel argued that in **R v Errol Campbell** (1974) 12 JLR 1319 it was held that the sentencing judge can take into account, not only the facts of the case, but factors such as the conditions prevailing in the community at the relevant time.

[121] Counsel contended that the learned judge failed to take into account the appellant's good character when she imposed the life sentence, and she asked this court to reduce the sentence imposed. Counsel submitted that four years would have been an appropriate sentence, but given the content of the social enquiry report and the circumstances of the case, the court could also release the appellant on probation.

Respondent's submissions

[122] Counsel for the Crown conceded that there might be some merit in this ground of appeal. Counsel also conceded that the learned judge erred in her pronouncement that

she was required to impose a minimum sentence of 10 years as the appellant was charged under section 10(1) of the Sexual Offences Act, and not section 10(4) which carried that penalty. Counsel submitted that the learned judge seemed to have been operating under a misapprehension as regards the sentencing options open to her.

[123] Counsel also agreed that the learned judge did not embark upon the exercise of a careful assessment of the aggravating and mitigating circumstances in her determination of the duration of the custodial sentence imposed, due to her misapprehension.

[124] Counsel cited this court's decision in **Leighton Rowe v R** [2017] JMCA Crim 22, and highlighted the fact that, in that case, the sentence was reduced from 12 to eight years because the appellant had pleaded guilty. The court made it clear that when persons plead guilty they are to benefit from a lower sentence.

[125] Counsel submitted that the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, introduced in 2017, speak to a normal sentence range of 15 – 20 years for the offence of having sexual intercourse with a person under 16 years, and that the statutory maximum is life imprisonment. Counsel argued that, based on this court's decision in **Leighton Rowe** and **Drummond v R** [2010] JMCA Crim 5, the sentence of 12 years could be reasonably substituted and imposed on the appellant instead of life imprisonment.

Analysis

[126] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides that:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[127] In dealing with an appeal against sentence this court has to be guided by the following relevant principles. This court only has jurisdiction to interfere if the sentence is found to be excessive or the principles with regard to sentencing were not correctly applied. Morrison P, at paragraph [42] in **Meisha Clement v R** cited with approval the following statement quoted in **Alpha Green v R** (1969) 11 JLR 283, taken from **R v Ball** (1951) 35 Cr App R 164, where it was said that:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

[128] Morrison P said further, at paragraph [43], that:

> "On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to

interfere with the sentencing judge's exercise of his or her discretion."

[129] In the instant case the learned judge erred in her approach in determining the sentence to be imposed. This is because she presumed that she had to sentence the appellant pursuant to section 10(4) of the Sexual Offences Act. Section 10 of the Sexual Offences Act states:

> "10.- (1) Subject to subsection (3), a person who has sexual intercourse with another person who is under the age of sixteen years commits an offence.
>
> (2) Any person who attempts to have sexual intercourse with any person under the age of sixteen years commits an offence.
>
> (3) It is a defence for a person of twenty-three years of age or under who is charged for the first time with an offence under subsection (1) or (2), to show that he or she had reasonable cause to believe that the other person was of or over the age of sixteen years.
>
> **(4) Where the person charged with an offence under sub-section (1) is an adult in authority, then, he or she is liable upon conviction in a Circuit Court to imprisonment for life, or such other term as the court considers appropriate, not being less than fifteen years, and the Court may, where the person so convicted has authority or guardianship over the child concerned, exercise its like powers as under section 7(7).**
>
> (5) Where a person has been sentenced pursuant to sub-section (4), then, in substitution for the provisions of section 6(1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: the Court shall specify a period of not less than ten years which that person shall serve, before becoming eligible for parole.
>
> (6) In this section, "adult in authority" means an adult who –

> (a) is in a position of trust or authority in relation to a child;
>
> (b) is a person with whom a child is in a relationship of dependency; or
>
> (c) stands in *loco parentis* to a child." (Emphasis added)

[130] At page 116 of the transcript the learned judge made the following comment regarding the applicable sentence:

> "Oh, Mr. Thomas, you want to address me in relation to the penalty arising under Section 10 and in the Schedule, because I am of a particular view, my interpretation is that the maximum is life imprisonment, minimum of 15 years, so I don't know if you want to address me on that. As far as I'm concerned my hands are tied in relation to the particular sentence, I don't know if you have a different view of the section, you want to look at it and address me on that? Because I did look, this is the first … offence, I am really participating in, because I had been doing all those old carnal abuse matters coming from the old law and there the judge had a total discretion as to what sentence was to be imposed but in relation to the Sexual Offences Act as far as I can see, Section 10, it says life and minimum of 15 years and the schedule I was looking to see the difference in relation to -- depending on what the circumstances were but it still seems to be suggesting …"

The learned judge continued on pages 119 to 120:

> "I did look on the section, it is kind of ambiguous in terms of its wording, in my view, because it speaks of a person in authority to the child and I would imagine that would be a [sic] like a parent, guardian etc., **so I was looking further to see if there was something else in respect of other category of persons who were not persons in authority to the child and there isn't anything.** I went and I looked at the Schedule to see if there was something in the Schedule as well and it basically repeated what was in the provision at section 10..." (Emphasis added)

The learned judge then read the section and commented at page 121:

> "...so I guess for him it would be ten years, Section 10 and Sub-section 5, and then the Schedule itself; **so as I said, it is really ambiguous because when I look at the Schedule and certain offences and the penalties, it mentions 10 (1) in the case of an adult in authority which is life with fifteen years ... minimum**; 10 (2) is the same, attempts to have sexual intercourse with a child under sixteen, fifteen years, which is an attempt. So, it's really ambiguous that an attempt to have intercourse with a child under sixteen would net a person fifteen years, but the actual intercourse itself can be ten years, so I am really confused as to the sentencing scheme."

She continued as follows on page 122:

> "…Just taking a – [sic] on the face, reading of 10 (5), it appears to me that the minimum to be imposed is ten years [sic] life and ten years to be served before being eligible for parole, that seems to be what Section 10, Sub-section 5 is saying to me. So, we are still in a situation where the legislation dictates a particular minimum that is to be imposed by the Court."

[131] In announcing the sentence to be imposed on the appellant, the learned judge said:

> "Mr. McKenzie, there is not very much I have to say in the circumstances where you are maintaining your innocence and where you have advanced an opinion that you did not obtain a fair trial. I have nothing much to say because in the circumstances you have expressed no remorse.
>
> I take into account, however, that your antecedent indicates that you have no previous conviction recorded against your name and, therefore, this would [be] your first negative interaction with the law, so to speak.
>
> The sentence is life imprisonment at hard labour, mandatory incarceration of ten years to be served before becoming

> eligible for parole. Sir, so you will serve ten years, sir, before you are considered eligible for parole in relation to this offence."

[132] Based on this, it is clear that the learned judge sentenced the appellant pursuant to section 10(4) of the Sexual Offences Act. The learned judge erred as the appellant was not "an adult in authority" as defined in section 10(6) of the Act. Being "an adult in authority" is an aggravating feature of the offence created under section 10(1) and the legislation stipulates a harsher penalty for those offenders, being a sentence between a maximum of life imprisonment and a minimum of 15 years, with a possibility of parole after serving a minimum of 10 years. Under section 36 of the Sexual Offences Act, the second schedule stipulates that the maximum sentence for an offence under section 10(1) is life imprisonment. Within that parameter, the learned judge would be free, after applying the relevant principles and guidelines, to impose whatever sentence she deemed appropriate. No minimum is stipulated by that section of the legislation.

[133] This matter was heard in 2015 and predates the Sentencing Guidelines as well as this court's decision in **Meisha Clement v R**. However, the general principles expressed in that case, which approved and applied age-old principles expressed in the older cases such as **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, would still be applicable.

[134] The learned judge failed to apply the established principles, and misdirected herself as to the interpretation of the statute as it relates to the sentence for the offence of having sexual intercourse with a child under the age of 16 years. As a result, in

reviewing the sentence imposed, this court will have to apply the relevant and applicable principles in order to determine if the sentence imposed is manifestly excessive.

[135] The learned judge was required to determine the length of the sentence as a starting point, and then weigh the aggravating and the mitigating factors. In this case, the maximum sentence is life imprisonment but the accepted normal range is 15-20 years, with the usual starting point being 15 years. The aggravating factors in this case is the age of the complainant who was 12 years old at the time of the incident, and the fact that the appellant knew that she was a school girl, she being attired in her uniform when the offence was committed. The prevalence of this type of offence is a factor which may also be taken into account. Another factor which the learned judge did take into account in sentencing the appellant, was that, in her view, he showed no remorse.

[136] The mitigating factors include the fact that no violence was involved, and that the appellant had no previous conviction and was a person of previously good character. The social enquiry report seemed also to have been favourable to him.

[137] We have given this ground of appeal anxious consideration. The error by the learned judge, in sentencing the appellant, would have given the appellant the chance at parole after 10 years, which is less than any period within the usual range. Weighing the aggravating and the mitigating factors in this case, we believe a sentence of 12 to 13 years would have been appropriate.

[138] However, in light of the judge's error, this court is of the view that it would not be in the interests of justice to impose a sentence greater than 10 years, which the learned

judge thought was an appropriate period to impose before parole was to be considered for the appellant, despite the aggravating features she considered relevant in the case.

[139] In the light of the consideration of the ground of appeal in respect of the absence of the mandatory corroboration warning, the application for leave to appeal conviction is granted. The hearing of the application is treated as the hearing of the appeal. The appeal against conviction is, however, dismissed. The appeal against sentence is allowed. The sentence of life imprisonment with no possibility of parole until after 10 years is set aside, and substituted therefor is a sentence of 10 years' imprisonment at hard labour. The sentence is to run from 6 March 2015.