[2025] JMCA Crim 28

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 COA2019CR00048

KEVIN WILLIAMS v R

Sanjay Smith for the applicant

Mrs Andrea Martin-Swaby and Mrs Kristen Anderson Palarche for the Crown

27 May, 5, 6 June 2024 and 14 November 2025

Criminal Law – Practice and procedure – Unfair Trial - Trial judge's discretion to grant or refuse an adjournment – Constitutional right to counsel of choice – Counsel unavailable at trial – Considerations for the granting of an adjournment – Whether trial judge erred in refusing the adjournment – Whether there is a risk of compromising the defence if adjournment is not granted – Interventions by the trial judge - Prosecution's duty to disclose – Form of disclosure – Retrial – Whether a new trial should be ordered – Section 14(2) of the Judicature (Appellate Jurisdiction) Act

V HARRIS JA

[1] After four days of trial before Graham-Allen J ('the learned trial judge') and a jury in the Home Circuit Court, the applicant, Mr Kevin Williams, was convicted on an indictment containing two counts, for indecent assault (count one) and sexual intercourse with a person under the age of 16 years contrary to section 10 of the Sexual Offences Act (count two). Consequent on the jury's verdict of guilty on both counts, the learned trial judge sentenced Mr Williams on 17 May 2019 to concurrent sentences of four years

and 11 months' imprisonment at hard labour on count one and 11 years and 11 months' imprisonment at hard labour on count two, with the stipulation that he serves 10 years before becoming eligible for parole.

[2] Aggrieved by his convictions and sentences, Mr Williams filed a notice of application for permission to appeal on 10 June 2019, which was refused by a single judge of this court. He has, however, renewed his application for leave to appeal against his convictions and sentences before us, as he is entitled to do.

The case for the prosecution

[3] In presenting its case against Mr Williams, the prosecution called four witnesses. Of these witnesses, the complainant was the first to testify. It was her evidence that on 12 October 2017, she and Mr Williams engaged in sexual intercourse. At the time of the incident, he was employed as a football coach at a high school in the parish of Saint Andrew ('the high school'). The complainant was a 15-year-old 11th-grade student at the high school.

[4] Mr Williams and the complainant met in August 2017 during summer school. At that time, she was completing a questionnaire for her school-based assessment. Accompanied by a classmate, she knocked on the door of Mr Williams' living quarters, which were located on the same property as the high school, just 5 feet from the grade 11 class. With his permission, they both entered his room and conducted the interview.

[5] The following month, during the new school term, Mr Williams and the complainant encountered each other occasionally. By then, the complainant knew he was a football coach. One day, Mr Williams approached her and told her that he liked her. The complainant, taken aback, offered no response. On another occasion, he gave her $500.00 to purchase lunch.

[6] In early October 2017, Mr Williams saw the complainant at the high school and asked her if they could meet to "chill and relax some time". Later that month, a social event was underway at the high school on 12 October 2017, the last day before the school term's break. At around 3:00 pm, Mr Williams approached the complainant, who was on the grade 11 block with others, having just finished a class. They spoke briefly, and then he gave her a black cap. Following his instructions, she put the cap on her head, lowered her gaze, and walked toward his room. Upon entering his room, Mr Williams tried to kiss her, but she pushed him off. He then undressed her, kissed her on the breast, undressed himself, and placed her on his bed. Mr Williams and the complainant engaged in sexual intercourse without a condom, and he ejaculated on her stomach.

[7] Subsequently, while she was getting dressed, Mr Williams looked outside to ensure no one was nearby. When he returned to the room, he gave her $1,500.00, and she left. On another occasion, he gave her a cellular phone. One evening, Mr Williams sent a message to that cellular phone asking her to "send some sexy pictures". She replied, saying "maybe", but did not send any pictures. They continued to communicate via the cellular phone, which eventually led to her mother's discovery of their inappropriate relationship.

[8] The complainant's mother, 'MR', testified that on 23 October 2017, at approximately 10:00 pm, she was at home with the complainant. She went upstairs and noticed the complainant lying on her bed. MR observed that the complainant appeared to be frightened. As a result, she lifted the pillow and saw a cellular phone on the bed. To her knowledge, the complainant did not own a cellular phone. Upon examining the device, she observed that the complainant was texting someone. She scrolled through the messages and saw a photograph of a male. MR noted a message that said, "send some sexy pictures, cause mi horny". A few days later, she and the complainant reported the matter to the Centre for Investigation of Sexual Offences and Child Abuse ('CISOCA') and gave them the cellular phone.

[9] Constable Sandrene Johnson also gave evidence for the prosecution. She was a corporal of police stationed at CISOCA when MR and the complainant lodged their complaints. As a result of those reports, she commenced her investigation into a case of alleged sexual intercourse with a person under the age of 16 years. The report concerned Mr Williams, who was then 44 years old. Having recorded statements from the complainant and MR, she arranged with Mr Williams' then attorney-at-law to conduct a question-and-answer interview with him (Mr Williams). Following the question-and-answer interview, she cautioned Mr Williams. He made no comment. During her investigation, Constable Johnson visited the high school, but she was unable to access the room. She observed that there were cameras installed in other areas of the high school, but did not recall seeing any in the vicinity of Mr Williams' room. She confirmed that the complainant had been medically examined, and the cellular phone taken from the complainant was handed over to her, placed in an envelope, and stored in her drawer.

[10] The complainant's friend, 'SC', testified that in October 2017, she was also attending the high school. She met Mr Williams in August 2017 and, at his behest, introduced him to the complainant on a later occasion. During their introduction, Mr Williams briefly spoke with the complainant, and SC was unable to hear their conversation. On a day in September 2017, she asked Mr Williams whether he liked the complainant, and he confirmed that he did. She later observed that Mr Williams and the complainant were friendly. On 18 October 2017, the complainant told her that Mr Williams gave her a cellular phone and money to purchase lunch. When she returned to the high school after the school break, the complainant told her that she and Mr Williams had "hook up". It was her understanding that they had sexual intercourse.

The case for the defence

[11] In his defence, Mr Williams gave an unsworn statement from the dock in which he denied the allegations against him. He stated that he had never been previously arrested

or charged with an offence. He further asserted that he had no sexual relations with the complainant and was not present at the high school during the alleged incident. In disputing the existence of any relationship with the complainant, he stated that he did not give her a cellular phone or have any discussions about liking her.

[12] Mr Williams spoke at length about his dedication to volunteerism and helping young individuals. He also sought to challenge the sufficiency of the evidence against him. He indicated that the high school had numerous surveillance cameras, two of which were positioned to face his door. Moreover, the high school's security guards patrolled the blocks continuously. As such, he emphasised that it was improbable, if not impossible, for people to enter and exit his room (presumably without being seen).

[13] He called one witness, Mr Michael Ricketts, a Justice of the Peace and the President of the Jamaica Football Federation. Mr Ricketts testified that he had known Mr Williams for approximately 30 years through their involvement in football. They first met when Mr Williams was still a teenager, and they interacted often. He described Mr Williams as "a quiet, humble, respectful person" and stated that he honestly did not believe the charges against him "[b]ecause of the person [he] knew him to be. Having known him from childhood, [he] never saw that in him at no time at all". Nevertheless, Mr Ricketts admitted under cross-examination that he could not say for certain that Mr Williams did not commit the offences for which he was charged.

The appeal

[14] Before us, Mr Williams was permitted to abandon the original grounds of appeal and argue instead the following grounds:

> "Ground 1: The Learned Trial Judge erred by not granting the adjournment
>
> Ground 2: The Defendant/ Applicant was denied his Right to Attorney of Choice

Ground 3: The Learned Trial Judge erred when she allowed the Trial to commence without Counsel receiving full disclosure

Ground 4: The Learned Trial erred by breaching the Defendant's Right to prepare his Defence

Ground 5: The Learned Trial Judge erred by limiting Defence Counsel in Cross Examination

Ground 6: The Learned Trial Judge descended into the arena

Ground 7: Critical pieces of evidence presented was [sic] not Corroboration [sic]

Ground 8: The Learned Trial Judge misdirected the jury

Ground 9: The LTJ erred when emotionally reacting in sentencing Applicant thus the sentence handed down is Manifestly excessive

Ground 10: Whether Failure to disclose or present 'Supporting Material' rendered the trial unfair"

[15] Having considered those grounds and the submissions of the parties, the issues raised can be adequately addressed under the following headings:

1. The adjournment issue (Grounds 1, 2, and 4)
2. The intervention issue (Grounds 5 and 6)
3. The disclosure issue (Grounds 3 and 10)
4. The corroboration issue (Grounds 7 and 8)
5. The sentence issue (Ground 9)

The adjournment issue

[16] This issue emerged as a consequence of the learned trial judge's exercise of her discretion to refuse the repeated requests of Miss G'Noj McDonald, attorney-at-law ('defence counsel'), to adjourn the trial. In an affidavit sworn on 11 September 2023, Mr Williams averred that upon being charged, he retained Mr Patrick Peterkin as his legal

representative. The night before the trial, Mr Peterkin called to inform him that he was out of the jurisdiction, engaged in another trial that had been delayed, and would not return in time to attend court.

[17] On the first day of trial, defence counsel (with whom he was not acquainted) attended court and notified the learned trial judge that Mr Peterkin was seeking an adjournment to the following Monday (one week) because he was detained in another trial in a different jurisdiction. After some discussion, the learned trial judge decided as follows:

> "HER LADYSHIP: ... I have no other case to do other than this one. I will start the case, so you will take instructions from Mr Williams.
>
> MS. G. MCDONALD: Take --
>
> HER LADYSHIP: You know there is dock instruction? You take instructions, I am not putting it off, witnesses are here. I will give you time to take instructions, and we are going to start the case."

[18] According to Mr Williams, defence counsel continued to beseech the learned trial judge to grant the adjournment unsuccessfully. He told the learned trial judge that he had never met with or discussed his matter with defence counsel, and that it would be unfair to force her to represent him in the trial. Notwithstanding, the learned trial judge insisted that the trial would begin that day and that defence counsel, being an attorney-at-law from Mr Peterkin's chambers, should act in his stead. Considering Mr Williams' account, we made an order on 27 May 2024 for additional affidavits from defence counsel and the learned trial judge, which will be ventilated in due course.

Submissions on behalf of Mr Williams

[19] Counsel Mr Sanjay Smith, appearing on behalf of Mr Williams, began his submissions with the contention that by refusing to grant an adjournment, the learned

trial judge deprived Mr Williams of his constitutional right to a fair trial. Since Mr Williams' counsel of choice was unable to attend the trial, defence counsel attended court to request an adjournment on his behalf. Mr Smith submitted that the reason for the adjournment could not be attributed to any fault on Mr Williams' part or his counsel. Moreover, the charges against Mr Williams were serious, with consequences including imprisonment, loss of income, and a criminal record. He argued that granting the adjournment would not have inconvenienced the court or prejudiced the complainant. Accordingly, the learned trial judge failed to undertake a balancing exercise to determine whether to grant the adjournment.

[20] It was counsel's submission that in assessing the fairness of the trial, it is not sufficient to merely assert that defence counsel was competent. It must also be considered whether the accused and his legal representative were afforded adequate time and facilities to prepare his defence (citing **Damion Stewart v R** [2010] JMCA Crim 3 in support of that point). In the circumstances, Mr Williams was prejudiced, as he was tried without his attorney of choice and denied his right to adequate time and facilities to properly instruct defence counsel and adequately prepare for his trial. Consequently, it was his position that the learned trial judge's refusal to grant an adjournment resulted in an unfair trial and rendered the verdict unsafe. Reliance was placed on **R v Thames Magistrates' Court; ex parte Polemis** [1974] 2 All ER 1219, **Franklyn Gibson v Attorney General** [2010] CCJ 3 (AJ), **Delroy Raymond v R** (1988) 25 JLR 456 and **Pauline Gail v R** [2010] JMCA Crim 44 in support of this submission.

Submissions on behalf of the Crown

[21] The Crown's position, as advanced by Mrs Kristen Anderson Palarche, is that an adjournment is not an entitlement but rather it is subject to judicial discretion (citing section 6 of the Criminal Justice (Administration) Act ('CJAA')). She further contended that the court has the authority to manage its proceedings and ensure that justice is

administered efficiently, which involves avoiding unnecessary delays. It was submitted that there are "multifaceted considerations" to weigh in determining whether to grant an adjournment, and a trial judge should not readily accommodate adjournments (citing **Delroy Raymond v R** and **Pauline Gail v R** in support of that point).

[22] In exercising her judicial discretion, the learned trial judge balanced the interests of both parties, Mrs Anderson Palarche submitted. Mr Williams had legal representation from the outset. Since Mr Peterkin was aware of his difficulty at least one week before the trial, he should have either notified the court prior to the trial date or made the necessary arrangements for the trial to proceed in his absence, the argument continued. Crown Counsel contended that it was implicit in the learned trial judge's decision that she was satisfied that defence counsel, being a member of the same chambers as Mr Peterkin and being present on the date of the trial, could adequately represent Mr Williams. It was submitted that defence counsel acted in a representative capacity throughout the proceedings, having collected disclosure and sought an adjournment on Mr Peterkin's behalf. Accordingly, there was no contravention of Mr Williams' entitlement to legal representation of his choice, since defence counsel undertook to represent him on behalf of his chosen counsel.

[23] Mrs Anderson Palarche contended that a defendant's preference in selecting their counsel is important but "subservient to the overarching goal of achieving a fair trial". Referring to **Newton McLeod v The Attorney General of Jamaica** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 32/1994, judgment delivered 9 February 2000), she further submitted that in Mr Peterkin's absence, it was necessary for defence counsel to proceed for the timely progression of the case. Counsel also argued that Mr Williams' constitutional right to be represented by legal counsel of his own choosing in the defence of his case is not absolute (citing the case of **Frank Robinson v The Queen** [1985] 1 AC 956).

Law and analysis

[24] It is well established that the decision to grant or refuse an adjournment lies within the broad discretion of the presiding judge. That discretion must be exercised judicially, in accordance with established legal principles and the interests of justice. Section 6 of the CJAA states that there is no right to challenge or delay the trial of any indictment presented against an individual in a Circuit Court; however, the court may grant an adjournment upon request if it believes that additional time is necessary for preparing the defence or for other justifiable reasons.

[25] It is clear from the authorities discussed below that in determining whether to grant an adjournment requested by the defence, the court must consider whether there is a real risk that the accused could be compromised in presenting his defence if the adjournment is not granted. While the interests of justice require the efficient management of the trial process, which includes avoiding unnecessary delays and leaving the court idle, those considerations must be balanced against the rights of the accused. Otherwise, depending on the circumstances, the refusal of an adjournment could potentially lead to a substantial miscarriage of justice.

The relevant constitutional rights

[26] The concept of a fair trial is not just a principle of natural justice; it is an enshrined constitutional right essential to the proper administration of justice. In Chapter III of the Constitution of Jamaica, "Charter of Fundamental Rights and Freedoms" ('the Charter'), the rights of a person charged with a criminal offence are articulated under the rubric titled "Protection of right to due process" (section 16). It commences with a recognition of the right of an accused person to a fair hearing within a reasonable time by an independent and impartial court established by law (section 16(1)). In reinforcing procedural fairness, section 16(6)(c) provides:

> "16. - ...

(6) Every person charged with a criminal offence shall -

...

> (c) be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice; ..."

[27] In the Judicial Committee of the Privy Council's decision, **Frank Robinson v The Queen**, their Lordships considered circumstances, similar to the case at bar, where the appellant was refused an adjournment at trial to facilitate the attendance of counsel of his own choosing. In that case, the appellant and another man were charged on an indictment for murder. The proceedings were adjourned on multiple occasions due to the prosecution's inability to locate the main witness. Having eventually secured the main witness, the matter proceeded to trial. On the trial date, neither of the appellant's counsel on the record appeared in court (although they knew of the trial date and were in the court building), but counsel for his co-accused was present. After certain exchanges between the bench and bar, the trial continued with the evidence in chief of the main witness. The following morning, the court was informed that the appellant's attorneys had not appeared because they had not been paid. Further to counsel's request, the trial judge refused leave for them to withdraw from the case. After additional discussions between the trial judge and one of the attorneys on the record, a legal aid assignment was offered and refused. The trial judge then exercised his discretion to refuse the application for an adjournment to allow the appellant's counsel to settle their retainer. Counsel absented themselves, and the appellant remained unrepresented throughout the trial.

[28] The appellant and his co-accused were convicted of murder after the jury returned a unanimous verdict after deliberating for only 22 minutes. They were both sentenced to death. Their applications for leave to appeal were dismissed. No reasons were provided.

The Board, however, granted special leave to the appellant to appeal against his conviction as a poor person.

[29] In the majority judgment delivered by Lord Roskill, their Lordships considered whether the trial and conviction of the appellant without legal representation was a breach of his constitutional rights. They examined Chapter III of the 1962 Constitution of Jamaica, particularly sections 20(1) and 20(6)(c) (now sections 16(1) and 16(6)(c) of the Charter, respectively). Section 20(6)(c) stipulated that every person charged with a criminal offence "shall be permitted to defend himself in person or by a legal representative of his own choice". Their Lordships highlighted the word "permitted" and construed it to mean that the accused person "...must not be prevented by the State in any of its manifestations, whether judicial or executive, from exercising the right accorded by the sub-section. He must be <u>permitted</u> to exercise those rights ..." (page 8). Accordingly, since the absence of legal representation was the fault of the appellant (having refused to seek legal aid and failed to settle his retainer), which was exacerbated by the conduct of his attorneys-at-law on the record, the appellant could not reasonably claim that he was deprived of his constitutional rights.

[30] In its discussion, the Board cited with approval a decision of this court in **R v Pusey** [1970] 12 JLR 243. In that case, counsel was retained on legal aid when the appellant's relatives arranged for a private attorney to represent him. When the matter came on for trial after being previously adjourned, the appellant advised the court that he wanted to be represented by the private attorney, who was unavailable at that time, rather than by the legal aid counsel who was available. He requested an adjournment, which the court refused. The trial proceeded with the accused being unrepresented, and he was convicted. On appeal, Luckhoo JA held that "the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future sufficient money to retain the services of counsel". The conclusion being that since the appellant had deprived himself of the services of legal

aid counsel, he could not subsequently claim that his constitutional rights had been breached.

[31] In the present case, Mr Williams exercised his right, under section 16(6)(c) of the Charter, to retain Mr Peterkin as his "legal representation of his own choosing". As stated earlier, on the first date of the trial, Mr Peterkin was appearing in another matter outside the jurisdiction. Defence counsel attended court solely to explain Mr Peterkin's absence and to request an adjournment. In her affidavit, filed on 30 May 2024, she averred that at the material time, she was working in the same chambers as Mr Peterkin. Mr Williams was not her client, and she first met him in court on the morning of the trial. She told the learned trial judge "both on and off the record" that she was not in a position to represent Mr Williams because she was not familiar with the prosecution's case against him and had no prior opportunity to take instructions from him. The learned trial judge acknowledged in her affidavit (filed on 31 May 2024) that defence counsel indicated that she was not holding for Mr Peterkin and that he had the file with him.

[32] The transcript sheds further light on what ensued. After defence counsel conveyed Mr Peterkin's request for the matter to be adjourned until the following Monday (18 March 2019), the learned trial judge stated her position as follows:

> "HER LADYSHIP: I am not sure I am going to adjourn this matter. The criminal case management rule is that no adjournment is to be sought on the morning of the trial. If it is that the defence or the prosecution realise that they have a difficulty for the trial date, you must apply before the trial date, not on the trial date. Those are the rules."

[33] The learned trial judge elucidated in her affidavit that she believed Mr Peterkin was aware of his impending absence a week before the trial, and so he had ample time to make an application to adjourn until his return. She generally referred to the criminal case management rule that no adjournment is to be sought on the morning of a trial,

and if either party realises that they have a difficulty, they must make an application before the trial date. The learned trial judge also considered that the trial date had been set almost a year earlier (on 23 July 2018), on which occasion Mr Peterkin was also absent. As she perceived the matter, defence counsel was an attorney-at-law from Mr Peterkin's chambers, and so as long as she was given the opportunity to take instructions and obtain the statements, the trial could proceed.

[34] The distinctions between this case and **Frank Robinson v The Queen** are readily apparent. At the outset, it is worth noting that Mr Williams was not unrepresented. Nevertheless, that authority provides some guidance on the extent of the court's role in safeguarding the right recognised in section 16(6)(c). It is necessary to acknowledge that, subsequent to that case, the Charter was amended and the word "permitted" was replaced with "entitled". Accordingly, an accused person is entitled to defend himself through legal representation of his own choosing. It appears to us that this entitlement would, at a minimum, constitute the Board's exposition of what "permitted" meant, that is, the court (or any other manifestation of the State) must not prevent a person charged with a criminal offence from exercising this right. Additionally, we find favour with McIntosh JA's recognition in **Roberto Nesbeth v R** [2014] JMCA Crim 23 that the substitution of the word "permitted" with "entitled" effectively "puts more force into the right".

[35] In **Leslie Moodie v R** [2015] JMCA Crim 16, the appellant was already represented by two attorneys of his choice, one of whom was "intimately familiar with the case" (para. [61]). Notwithstanding, he sought an adjournment to retain an additional senior counsel, which was refused. On appeal, the court considered section 16(6) of the Charter as well as the relevant authorities, including **Frank Robinson v The Queen** and determined, among other things, that "...there is no absolute right to representation by counsel, there is equally no 'right' to representation by senior counsel of one's choice. All will depend on the circumstances of each case" (para. [62]).

[36] On the issue of the risk of prejudice, Morrison JA (as he then was) further resolved that:

> "[63] ... there has been no suggestion of any kind in the instant case that absence of senior counsel was in any way detrimental or disadvantageous to the appellant's case. Nor have we been able to discern any reason for so thinking. We have therefore come to the clear conclusion that there was no breach of the appellant's constitutional rights in this case and that the first ground must accordingly be dismissed."

[37] It is trite that constitutional provisions protecting human rights must be given a generous and purposive interpretation. Section 16(6)(c), in preserving an accused person's right to defend himself, recognises that his entitlement to do so through legal representation of his choice must not be contravened by the State. In the circumstances of this case, Mr Williams exercised his right and retained Mr Peterkin. It is acknowledged that Mr Peterkin's absence at the trial is not due to any fault on Mr Williams' part. However, it was incumbent on Mr Peterkin, as the legal representative of Mr Williams' choosing, to make himself available for the trial. In the light of his difficulties, he ought to have instructed another attorney (with Mr Williams' consent) or, as correctly pointed out by the learned trial judge, sought an adjournment prior to the trial date. As a consequence of his failure to do either, the learned trial judge directed defence counsel to represent Mr Williams so that the trial could proceed.

[38] The predicament in this case, therefore, is not that Mr Williams was unrepresented but that counsel of his choosing did not represent him. While due regard must be given to the significance of the words "of his own choosing", we are not persuaded that, in the circumstances of this case, the denial of that element of the right would, on its own, constitute a breach of the right in its entirety. Even so, it does not necessarily follow that the learned trial judge's decision was correct. Accordingly, we will now examine the

factors to be considered when exercising the judicial discretion to grant or refuse an adjournment.

Considerations in exercising the discretion to adjourn

[39] As demonstrated by the authorities, the court will consider all the circumstances of the case in determining whether to grant an adjournment. Carey P (Ag) in **R v Delroy Raymond** helpfully identified some of the factors to be taken into account when dealing with an application for adjournment (at page 3):

> "In considering whether an adjournment should be granted, a trial judge is obliged to balance a number of competing factors. The judge would be entitled to consider the number of occasions the matter has been before the Court ready for trial; the availability of the witnesses or their future availability, the length of time between the commission of the offence and the trial date; the possibility that a Crown witness may be eliminated or suborned, whether the defence have had sufficient time to prepare a defence bearing in mind Section 6 of the Administration (Criminal Justice) [sic] Act. The list does not pretend to be exhaustive."

[40] Phillips JA echoed those sentiments in **Cecil Moore v R** [2014] JMCA Crim 55, in the context of when the defence claims to be unprepared and in need of an adjournment:

> "[21] ... the grant of an adjournment is a matter of discretion, as is borne out by section 6 [of the CJAA]. However, it is clear that where the defence needs further time to prepare, this is a circumstance in which the discretion should be exercised in favour of the defence. By the plain words of the section, it would seem that the question of whether the defence in fact needs time to prepare is a matter left entirely up to the judge's assessment.
>
> [22] However, it seems to us that the object of the [CJAA] is to achieve fairness in the conduct of the trial. This, we think, would oblige the judge to consider what is said by defence counsel as to the state of readiness of their case, as the defence is best placed to assess and indicate their position in this regard. Of course, based on the history of the matter and the period of time between the

> commission of the offence, the retaining of the services of counsel and the number of times the matter has been before the court, the judge may well consider that the defence has had sufficient time to prepare and form the view that the defence ought not to be allowed further time. ...
>
> [23] ... What appears to have been operating on [the judge's] mind was the fact that the witnesses were present and he had no other matter to be tried on that day. However, in adopting this posture, he completely disregarded all the pertinent factors which a judge should take into account before granting an adjournment as adumbrated by Carey JA in **Delroy Raymond v R**."

[41] The brief facts of **R v Delroy Raymond** are that the appellant had no legal representation at his trial, despite applying for legal aid. His co-accused, however, had two attorneys. Neither of the attorneys was willing to take a dock brief from the unrepresented appellant. The trial judge refused to adjourn the matter because the case had been scheduled for trial on three previous occasions, and the complainant was about to leave the jurisdiction. The trial proceeded, and both men were convicted. On appeal, the court ruled that the absence of counsel could not be attributed to the appellant since he had applied for legal aid, and no assignment had been made up to the date of trial. Furthermore, the trial judge did not enquire as to the reasons for the lapse in the legal aid assignment. It was ultimately determined that the trial judge exercised his discretion improperly, as he failed to consider that the legal representation to which the appellant was entitled was not forthcoming, due to no fault of his own. The appeal was allowed on that basis.

[42] On the other hand, the Board in **Frank Robinson v The Queen** also placed substantial emphasis on the circumstances which influenced the trial judge's refusal to adjourn and his decision to proceed with the trial in the absence of legal representation for the appellant. It was noted that the trial judge sought to assist the appellant by denying the request made by counsel on the record to withdraw. He also invited one of them to appear on legal aid, but he refused. Between 1979 and 1981, the case was

mentioned 19 times, six of which were fixed trial dates. The significant delay in the progress of the trial, along with the possibility that the main witness could disappear again, substantially informed the trial judge's decision. Their Lordships took the view that the trial judge's exercise of his discretion, in those circumstances, could not be faulted.

[43] Similarly, in **Pauline Gail v R**, 26 trial dates had elapsed before the trial commenced on 1 December 2008. The court proceeded, in the absence of counsel for the appellant, with the complainant's evidence in chief. Subsequently, the trial was adjourned to 9 December 2008 to facilitate the attendance of counsel. However, the trial resumed on 16 March 2009. Counsel participated in the trial on subsequent occasions, and on 20 August 2009, she was warned that there would be no further adjournments. On the next trial date, counsel was absent. Another attorney, holding for her, requested an adjournment. The resident magistrate declined to adjourn, leaving the appellant without representation on the final trial date.

[44] On appeal, having examined the legal authorities of **Frank Robinson v The Queen** and **R v Delroy Raymond**, it was noted that the appellant had retained the services of an attorney in accordance with her entitlement (pursuant to section 20(6)(c) of the Constitution prior to its amendment). In determining whether to grant an additional adjournment, there were valid concerns, such as the age of the case, the frequency of adjournments and the impending unavailability of the resident magistrate. Nevertheless, the court decided that:

> "[26] ... the fairness of the appellant's trial had been compromised by the Magistrate's insistence on proceeding without affording the appellant more time in order to have the legal representative of her choice complete the trial."

[45] In addition to the considerations illustrated in the cases above, it is clear that the court will also have significant regard to the conduct of the accused and his legal

representative of choice, as well as the extent of their fault or responsibility, if any, for the requested adjournment.

[46] The chronology of proceedings in this matter began on 23 July 2018, when the trial date of 11 March 2019 was fixed. There has been no indication, either expressed or implied from the record, of any prior adjournments (unlike in the previous authorities discussed). We observed that the request for an adjournment was made on the first date that the matter came on for trial. In response to that request, the learned trial judge noted that all the witnesses were present. She did not enquire of their availability if the matter were adjourned, nor was there any evidence of any potential difficulty regarding their availability at a later date (for instance, in **Frank Robinson v The Queen**, there was a risk of the prosecution's main witness disappearing, and in **R v Delroy Raymond**, the complainant was leaving the jurisdiction).

[47] The date of the commission of the offence was approximately one year and four months before the trial date. It cannot be said that this case suffered from any significant delay or peculiar difficulty in its progression. Additionally, this was not a matter that engaged the court for a lengthy period, given that it was concluded within four days. Given that there is nothing on the record to indicate that the learned trial judge conducted the relevant enquiries, it seems improbable that a short adjournment to the following Monday (a week later) could not have been accommodated. In keeping with the authorities, it is also noteworthy that Mr Peterkin's non-appearance was occasioned by his involvement in a matter in a different jurisdiction that had been delayed. Mr Williams was not at fault. Having been informed only the night before, he did not have sufficient time to make alternative arrangements.

[48] The question as to whether the defence had sufficient time to prepare is, however, more nuanced. Section 16(6)(b) of the Charter provides that an accused must be given adequate time and facilities for the preparation of his defence. Mr Williams contends that,

on account of the learned trial judge's failure to grant the adjournment, he was deprived of that right and, therefore, prejudiced in the presentation of his defence.

[49] In **Damion Stewart v R**, by the time the trial commenced, the applicant had no legal representation due to certain developments. On appeal, this court held that in accordance with section 20(6)(b) (now section 16(6)(b) of the Charter), the applicant ought to have been provided with the witness statements and afforded reasonable time to "study them". For that purpose, the nature of the allegations contained in the witness statements would have to be considered. It is noted that the term "study" was used, as it denotes a level of attention and analysis beyond merely reading. Certainly, that entitlement to a reasonable time to study the witness statements would extend to an accused's legal representative, which begs the question whether defence counsel had sufficient time to study the witness statements after obtaining them on the first day of trial.

[50] It is undisputed that, before the day the matter was set for trial, Mr Williams and defence counsel had never interacted. Her involvement was due to the court's direction, notwithstanding her unfamiliarity with the case and her preoccupation with other matters in another court on the said day. Prior to the commencement of the trial, the learned trial judge briefly adjourned at 10:46 am to allow defence counsel to take a dock brief. When the court resumed 45 minutes later, at 11:31 am, the learned trial judge stated:

> "HER LADYSHIP: Yes, ready to begin. This Court was advised by Ms. McDonald from Mr. Peterkin's Chambers, although she says, she is not holding, she is from that Chambers. The witnesses are here, all of them. This trial date was set as far back as July 23, 2018. Mr Peterkin was absent, but Mr. Stephan Jackson held when the trial date was set. The witnesses were bound over and they are all present.
>
> ...Ms. McDonald, informed this Court this morning that Mr. Peterkin is overseas in Providenciales, the capital of Turks and Caicos Island

> in the matter of Michael Misick and that the case is delayed a week, that is the case in Turks and Caicos Island.
>
> Now, no adjournment was sought before the trial date, and so, this Court has decided to start the case but before it did so, it gave – this Court told Ms. McDonald that I will allow her time to take dock brief from the accused, and I think I adjourned at something like 10:45 and that I will resume the Court at 11:30, the Court is now resumed and this Court intends to start this trial."

[51] In response, defence counsel disclosed that she had not yet completed taking instructions from Mr Williams in the dock, as she was also occupied with obtaining copies of the witness statements and had just been advised of the witnesses to be called for the defence. The learned trial judge decided to empanel the jury and adjourned the proceedings at 12:20 pm. When the court resumed at 2:00 pm, the learned trial judge enquired if defence counsel had received the statements of the witnesses, and she confirmed receipt. However, she had only read the complainant's statement and had not completed her review of all the witness statements. Nevertheless, the learned trial judge was undeterred and proceeded with the trial. The complainant's evidence in chief commenced at 2:15 pm. That same day, defence counsel began cross-examining the complainant at 3:30 pm until 3:40 pm. She continued the cross-examination the following day from 10:20 am to 12:43 pm.

[52] What constitutes "adequate time" to prepare the defence is, in part, influenced by the nature of the evidence and the seriousness of the offences. These proceedings concerned two criminal offences, one of which attracted a statutory maximum sentence of life imprisonment (count two). The prosecution's case was founded on the complainant's testimony. Credibility was, therefore, of central importance. Yet, defence counsel (an attorney with approximately four years' experience at the time of the trial) was allowed, in total, two hours and 25 minutes to prepare for the trial. In contrast, Mr Peterkin (an attorney with approximately 12 years' experience at the time of the trial) and the prosecution were afforded several months to prepare. In those circumstances,

we cannot agree with the Crown's contention that defence counsel was given ample time to receive and comprehend instructions.

[53] It stands to reason that defence counsel, being junior at the bar, unfamiliar with the matter and further deprived of an opportunity to adequately prepare, would have been adversely affected in her approach to the cross-examination of the complainant (as well as the other prosecution witnesses). Even if a generous view is taken of her further opportunity to prepare during the overnight adjournment, it certainly could not be considered fair when measured against the time the prosecution would have had to prepare.

[54] We think it prudent to observe at this point that adequate preparation in this case could not only entail the taking of instructions in the form of a dock brief and the reading of witness statements. By necessity, proper preparation prior to the commencement of a trial must include the review of all witness statements, advising oneself of the relevant law and the development of an appropriate strategy or approach in the light of the prosecution's case. This level of preparation would require significant forethought and is highly unlikely to be accomplished within a three-hour and/or an overnight adjournment.

[55] Furthermore, the transcript revealed the extent of the challenges defence counsel faced during cross-examination throughout the trial. We note that there has been no criticism of her conduct of the trial on the appeal. However, defence counsel stated in her affidavit (and understandably so) that she "was not in a position to advance Mr. Williams's [sic] defence in an effective way". She recalled that she had informed the learned trial judge of the difficulties she encountered, such as receiving the witness statements "in a piece meal fashion" (as stated by defence counsel in her affidavit), and also expressed that Mr Williams would be greatly prejudiced. Conversely, the learned trial judge indicated in her affidavit that she endeavoured to assist defence counsel by granting short adjournments (which were on the first day of trial) to afford her the

opportunity to take instructions and prepare her case. She also appeared to be satisfied with her conduct of the trial, as she stated that defence counsel extensively cross-examined the prosecution witnesses. Crown Counsel has contended that there is no evidence that the refusal of the adjournment resulted in any significant prejudice to Mr Williams. In making that point, great reliance was placed on defence counsel's efforts to put the inconsistencies and discrepancies to the complainant, as demonstrative of her understanding of her client's instructions.

[56] However, in our view, the exchanges between defence counsel and the learned trial judge are plainly indicative of the learned trial judge's perception of defence counsel's conduct of the trial. The learned trial judge repeatedly challenged her line of questioning, scrutinising its relevance, her instructions, and her approach. During one of their discussions on a point of law (in the absence of the jury and witnesses), the prosecution commented that "it does appear based on several questions previously asked, but in particular this one, that counsel is on a fishing expedition". On another occasion, when defence counsel was trying to confront the complainant with an inconsistent statement, she had difficulty laying the foundation. The learned trial judge intervened and undertook the task on her behalf. It can reasonably be concluded that had an adjournment been granted either for defence counsel to prepare or for Mr Peterkin to attend, it is unlikely that the defence's case would have encountered those difficulties.

[57] We also note (as stated at para. [76] below) that defence counsel did not suggest to the complainant that she had fabricated the incident because she was influenced by financial gain. This information formed part of the defence's case. It seems to us that a lack of adequate preparation may have contributed to defence counsel's failure to put this aspect of the defence's case to the complainant. This was disadvantageous to the appellant and, in the final analysis, compromised the fairness of the trial.

[58] We are aware that this was the only matter scheduled for the learned trial judge for that week, and the witnesses were present. However, there is no indication of any practical difficulty in granting the adjournment sought. Nor did these circumstances entail a risk that the matter would not be able to proceed if the adjournment was granted. The trial date was on a Monday. The request for an adjournment was not for an indefinite date but rather for the following Monday, which is not an unreasonable timeframe. Even if Mr Peterkin were not available by that adjourned date, the adjournment would have assisted defence counsel in preparing for the trial. A short adjournment would not have put the trial in peril, but the risk of injustice to Mr Williams was palpable. Taking into account all the circumstances set out above, we find that the learned trial judge erred in refusing to grant the adjournment, which resulted in an unfair trial. Therefore, grounds 1, 2 and 4 succeed. This determination is dispositive of the appeal. However, we will briefly address the second and third issues, as they also raise concerns regarding the fairness of the trial.

The judicial intervention issue

[59] This issue has given rise to the criticism of the learned trial judge's conduct of the trial, specifically, the nature and frequency of her interventions during defence counsel's cross-examination of the complainant.

Submissions on behalf of Mr Williams

[60] Mr Smith has submitted that a defendant must not be deprived of putting his suggestion to the prosecution's witness during cross-examination. Citing **DPP v Nelson** [2015] UKPC 7, it was further submitted that if a defendant is prevented from advancing his case, the trial would be rendered unfair. Counsel identified instances where the learned trial judge interrupted defence counsel and submitted that she was hindered in properly advancing Mr Williams' case in accordance with her instructions. Relying on the case of **R v Hamilton** [1969] Crim LR 486, he also contended that the learned trial judge

inappropriately descended into the arena in a way that showed that she did not believe the defence.

Submissions on behalf of the Crown

[61] Mrs Anderson Palarche, on the other hand, contended that the learned trial judge's interventions did not infringe Mr Williams' right to a fair trial. She submitted that in keeping with her duty to manage the court and ensure orderly elicitation of evidence, the learned trial judge ensured that the cross-examination remained within permissible bounds. Counsel argued further that defence counsel attempted to ask questions that were improper and irrelevant, and so the judicial interventions were appropriate and necessary for the efficiency of the trial. In support of that proposition, reliance was placed on **Lamont Ricketts v R** [2021] JMCA Crim 7 and **Lawrence Oliver and Dwayne Oliphant v R** [2023] JMCA Crim 48.

Law and analysis

[62] It is beyond dispute that it was part of the learned trial judge's role to manage the proceedings. In doing so, she had the authority to intervene where necessary to clarify ambiguities and ensure accurate note-taking of the evidence. Still, she would have had to refrain from descending into the arena and acting as an advocate (see **Jones v National Coal Board** [1957] 2 All ER 155, **R v Hulusi and Purvis** (1973) 58 Cr App Rep 378, **Lamont Ricketts v R** and **Tara Ball and Others v R** [2023] JMCA Crim 2).

[63] The civil case of **Jones v National Coal Board** [1957] 2 All ER 155 has been cited with approval in this court for establishing the general statement of the law regarding judicial intervention, which is also relevant in criminal cases (see **Jason Brown and Ricardo Lawrence v R** [2017] JMCA Crim 20 at para. [71]). At page 159, Denning LJ stated:

> "... And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost; see *R. v. Clewer* ((1953), 37 Cr. App. Rep. 37). The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; ... If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. LORD BACON spoke right when he said that:
>
> 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'."

[64] In **R v Hulusi and Purvis**, the dictum of Lord Parker CJ in **R v Hamilton** (an unreported judgment of the Court of Criminal Appeal in England delivered on 9 June 1969), pronouncing three types of judicial intervention that could lead to a miscarriage of justice, was adopted:

> "… those [interventions] which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury and you, the members of the jury, must disregard anything that I, the judge, may have said with which you disagree. The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[65] **R v Hulusi and Purvis** has been considered and applied in several cases emanating from this court, including **Dwayne Briscoe and Jermaine Litchmore v R** [2011] JMCA 58 at para. [88] and the more recent decisions of **Javid Absolam et al v**

R [2022] JMCA Crim 50 at para. [40] *et seq* and **Randeano Allen v R** [2021] JMCA Crim 8 at para. [46].

[66] The complaint in this case is not that the learned trial judge descended into the arena by improperly questioning the witnesses, but rather by hindering the defence from putting its case to the complainant. Whereas the first and third instances (set out in the quote above) would not be relevant on the facts of this case, the second raises the question of whether the interventions by the learned trial judge made it impossible for defence counsel to effectively perform her duties in presenting the defence's case.

[67] It is well established that excessive interference by the learned trial judge will not, by itself, lead to the conclusion that the fairness of the trial was compromised. An assessment of the quality of the interventions is also necessary to determine whether a miscarriage of justice has occurred. In evaluating the quality of the interventions, consideration should be given to the trial judge's attitude (as might be observed by the jury) or the effect on the "orderly, proper and lucid deployment" of the defence's case or on the efficacy of the defence's cross-examination of the prosecution's witnesses (**Omar Bolton v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 72/2002, judgment delivered 28 July 2006).

[68] In **Lamont Ricketts v R**, F Williams JA summarised the main principles derived from the authorities regarding the scope of the trial judge's interventions. Of relevance to this appeal are the following:

i) The nature and extent of the trial judge's questioning should not give the impression that she has taken sides, descended into the area or lost her impartiality.

ii) The trial judge should not interrupt the flow of the evidence.

iii) The trial judge should not, while hearing the arguments and evidence, display hostility, an adverse attitude or convey a negative view of the case or witness. However, the trial judge is entitled to evaluate the validity of those arguments.

iv) The trial judge is required to maintain a balanced and "umpire-like approach", as far as humanly possible.

[69] The learned trial judge was obligated to balance the risk of unfairness in the trial against the fulfilment of her duty. Therefore, the question for our determination is whether she conducted herself in a manner that effectively undermined the defence's case to the extent that he was deprived of a fair trial. The focus of this complaint was directed at defence counsel's cross-examination of the complainant. At first blush, the transcript discloses multiple instances of the learned trial judge's interruptions. It is not necessary to quantify the number of occurrences for the purposes of our assessment; however, the frequency will be borne in mind when evaluating the quality of those interventions.

[70] It is common ground that defence counsel was not the attorney-at-law retained by Mr Williams. It is also unchallenged that before the first day of the trial, she was unfamiliar with the case. Nevertheless, she acceded to the learned trial judge's direction to take a dock brief from Mr Williams. As noted earlier, the complainant's examination-in-chief was completed that same day, and defence counsel subsequently began her cross-examination.

[71] The first interruption by the learned trial judge occurred less than 10 minutes after defence counsel began examining the complainant. Defence counsel asked whether the survey she was conducting sought information regarding Mr Williams' earnings. The learned trial judge intervened to enquire about the relevance of that question. Defence

counsel explained that it related to her instructions and the complainant's credibility. Clearly dissatisfied with that response, the learned trial judge continued discussions with defence counsel in the absence of the jury and witnesses, following which she adjourned for the day. Defence counsel explained that Mr Williams' case was that the complainant had fabricated the allegation against him after finding out how much he earned. The learned trial judge decided to allow the question. When cross-examination recommenced the next day, the complainant stated that she was informed of a range of Mr Williams' earnings and that, although she had received money from him to buy lunch, she had not discussed it with him.

[72] Defence counsel continued her cross-examination and was again interrupted by the learned trial judge when she attempted to ask the complainant about a conversation with her friend, SC, regarding her relationship with her mother. The following dialogue ensued:

> "Q. ... Have you ever told [SC] that you were having problems with your mother at home?
>
> MRS. V. BLACKSTOCK-MURRAY: M'Lady ...
>
> HER LADYSHIP: Madam, miss, what is the relevance? What's the relevance of this?
>
> MISS G. McDONALD: My instructions and what has been disclosed to me. I was going no further, m'Lady.
>
> HER LADYSHIP: Yes, because your instructions must accord with the issue in the trial, you can get all kinds of the instructions, but it must accord with the issue in the trial, all right.
>
> MISS G. McDONALD: M'Lady, I may [sic] proceed with my question, m'Lady?
>
> HER LADYSHIP: No."

[73] Subsequently, the jurors and witnesses were asked to withdraw. Once again, defence counsel explained that her questions sought to establish a motive for the complainant to fabricate the allegations. They spoke for approximately seven minutes, then the learned trial judge upheld the prosecution's objection to the question on the basis that it was irrelevant. The learned trial judge advised defence counsel to rephrase the question. When the court resumed, however, defence counsel proceeded with a different line of questioning.

[74] On another occasion, during the cross-examination of the complainant, the learned trial judge assisted defence counsel in laying the foundation for challenging a purported inconsistent statement. The learned trial judge demonstrated her dissatisfaction with her approach when she interrupted to ask questions and offered guidance on the methodology. Defence counsel's cross-examination of the remaining three prosecution witnesses was relatively brief.

[75] A proper examination of the transcript revealed that, apart from the instances outlined above, the learned trial judge's interventions were brief and concerned questions that were either irrelevant, hearsay or beyond the scope of cross-examination. It cannot be said that they were so frequent that they disrupted the orderly progression of defence counsel's questioning. The nature of the interruptions was in keeping with her duty as the trial judge to manage the court and ensure compliance with the rules of evidence. However, in doing so, we also note that at times it appeared as if she was scrutinising the relevance of questions that were intended to support the defence's case, as she also admonished defence counsel for following instructions that, in her view, did not relate to the issues in the case.

[76] Ultimately, defence counsel did not put the defence's case to the complainant, that is, the suggestion that she was motivated by financial gain to fabricate the incident. Without attributing fault to the learned trial judge, we consider it appropriate to

respectfully remind members of the judiciary of the caution given by Lord Brown on the Board's advice in **Peter Michel v The Queen** [2009] UKPC 41:

> "34. ... Of course [the trial judge] can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. ... He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced."

[77] We find that although most of the learned trial judge's interventions were innocuous, she was also openly critical of defence counsel's handling of the trial. When taken as a whole, certain comments made by her had the potential of prejudicing the jury's consideration of not only the defence's case but also defence counsel's competency. Fortunately, her discontent with the manner in which defence counsel proceeded was more apparent in discussions held in the absence of the witnesses and the jury, although from Mr Williams' viewpoint, as stated in his affidavit, her overall conduct gave rise to the perception that he was subject to prejudicial treatment.

[78] In any event, this court "will not interfere merely on the ground that the judge has been guilty of discourtesy to counsel. The Court will only interfere if the conduct of the judge 'positively and actively obstructs counsel in the doing of his work' " (see pages 16-17 of **Omar Bolton v R**). Those acts of discourtesy would have to be "so many and so contemptuous and disparaging of counsel as was likely to prejudice the case for the defence in the eyes of the jury" (see page 909H of **R v Baker et al** 12 JLR 902).

[79] Bearing that in mind, we find that there is no definitive basis to conclude that defence counsel's failure to put the defence's case to the complainant was due to the learned trial judge preventing her from giving effect to her instructions. An examination

of the transcript does not support the view that the judicial interventions, whether by their frequency, nature or content, tended to obstruct defence counsel in the performance of her duty. For those reasons, grounds 5 and 6 must fail.

The disclosure issue

[80] Unlike the preceding issues, this concerns the assertion that the prosecution breached its duty of disclosure. A determination to that effect would call into question the fairness of the trial and the safety of the convictions.

Submissions on behalf of Mr Williams

[81] Mr Smith submitted that the prosecution has a duty to disclose the information on which it intends to rely to the defence. He further argued that disclosure must be full unless it is subject to exclusion according to the cases of **John Franklyn and Ian Vincent v The Queen** [1993] UKPC 11 (the need to protect witnesses from possible harm) and **Jairam and Another v The State (Trinidad and Tobago)** [2005] UKPC 21 (public interest immunity such as the need to protect witnesses from serious injury or death). Counsel contended that the prosecution failed in its duty to make full disclosure to the defence, which should have included the witness statements, cellular phone and any report on its contents, as well as the camera footage from the high school.

[82] It was argued that, contrary to the Crown's arguments, the cellular phone would not be regarded as a "tangible object" bound by the principles in **R v Blencowe** (1997) 118 CCC(3d) 529 (Ont Ct (Gen Div)) because the alleged messages would be of relevance to this case. Counsel also contended that the prosecution relied on the evidence of those messages allegedly sent from Mr Williams to the complainant for the truth of their contents, but failed to present the messages at trial. Moreover, there was no confirmation that the messages were sent from Mr Williams' phone. At any rate, he argued, that evidence would be prejudicial to Mr Williams, especially since no report regarding the contents of the cellular phone was generated and disclosed to the defence.

[83] Mr Smith further submitted that the cellular phone would fall within the meaning of "computer-generated evidence". He referred to section 31A – 31L of the Evidence Act and submitted that the cellular phone's contents should have been extracted and a report and certificate prepared for its admission into evidence at trial, unless its prejudicial effect outweighed its probative value, in which case, it should be excluded. Accordingly, he submitted, the prosecution had a duty to submit the cellular phone for examination by the relevant authority, from which a report should have been prepared and disclosed to the defence.

[84] Relying on the case of **R v Pendleton** [2001] UKHL 66, which was applied in **Sangster & Dixon v R** [2002] UKPC 58, Mr Smith contended that the emphasis should be on how the prosecution's failure to disclose affected the trial, rather than attempting to assess the extent of responsibility attributed to either the prosecution or defence counsel. It was his position, therefore, that there was a miscarriage of justice which rendered the conviction unsafe.

Submissions on behalf of the Crown

[85] The Crown maintained that it had not breached its duty to disclose. Mrs Anderson Palarche submitted that, in fulfilling that duty, the prosecution was obligated to provide the defence with copies of documentary evidence and facilitate access to tangible objects. All materials that it believed fell under disclosure obligation were disclosed, so if the defence knew or ought to have known of additional materials that may properly fall under the obligation, then the onus was on it to proactively request that disclosure. Reference was made to "Disclosure: A Jamaican Protocol", 2013, produced by the Office of the Director of Public Prosecutions, **R v Stinchcombe** (1991) 68 CCC (3d) 1 (SCC) and **R v Dixon** [1998] 1 SCR 244 in support of this point.

[86] In this context, she argued that the prosecution's duty in relation to the cellular phone was to provide "access". That required the prosecution's cooperation with the

defence by permitting the inspection and examination of the cellular phone (Blackstone's Criminal Practice 2024 Part F8.46 and the Canadian case of **R v Blencowe** were cited in support). Crown Counsel's submission was that the defence was aware of the existence and location of the cellular phone but did not request access to it. She acknowledged that the contents of the cellular phone in its possession could be considered relevant in this case. However, the prosecution had no obligation to produce the cellular phone at trial, as it did not rely on it, and no report of its contents was generated. Relying on **Omar Anderson v R** [2023] JMCA Crim 11, Crown Counsel further contended that although the complainant testified about the cellular phone and its contents, her evidence was based on her own observations and so would be independently admissible.

[87] If a view were to be taken that the prosecution failed in its duty to disclose, Crown Counsel has submitted that such a finding would not automatically warrant an acquittal (referring to **Willard Williamson v R** [2015] JMCA Crim 8 and **Bonnett Taylor v The Queen** [2013] UKPC 8). She advanced the proposition that the right to a fair trial was not compromised, since, throughout the proceedings, there was no challenge to the evidence related to the cellular phone (reliance was placed on **Omar Anderson v R**, **Nickoy Grant v R** [2013] JMCA Crim 30). Additionally, defence counsel failed to raise the issue of non-disclosure during the trial; had she done so, the learned trial judge could have remedied any potential prejudice to Mr Williams. The case of **R v Stinchcombe** was cited in support of this argument. The only evidence challenged in relation to the cellular phone was whether Mr Williams had given it to the complainant, she argued. Therefore, the non-disclosure of the cellular phone would have had no impact on the complainant's evidence or her credibility, nor would disclosure have assisted Mr Williams in his defence or the jury in determining where the interests of justice lie. Crown Counsel concluded her submissions by contending that counsel for Mr Williams did not demonstrate how the absence of the cellular phone at trial materially affected the fairness of the trial or the integrity of the verdict.

Law and analysis

[88] The right of an accused person to disclosure by the prosecution is recognised in section 16(6)(b) of the Charter, which mandates that he be provided with adequate time and facilities for the preparation of his defence. Therefore, non-disclosure can amount to a breach of the constitutional right to a fair hearing depending on the particular case: **John Franklyn and Ian Vincent v The Queen** and **Ferguson v Attorney General** (2001) 58 WIR 446. It is to be noted that the prosecution's duty to disclose to the defence in this jurisdiction is governed by common law. That obligation entails all relevant material, including evidence that could either weaken the prosecution's case or strengthen the defence's case (see **R v Ward** [1993] 2 All ER 577, **Franklyn and Vincent v R** and **Willard Williamson v R**). It is a continuing duty throughout the life of the case, and the defence may request additional disclosure at any time where it appears necessary.

[89] The question of whether material should be disclosed was elucidated in **R v Ward** (page 601j):

> "...We would emphasise that 'all relevant evidence of help to an accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led. ..."

[90] This issue was also considered in **Willard Williamson v R**. In that case, the defence sought disclosure for the purpose of inspecting devices used to record conversations between a witness and the appellant. The prosecution relied on the recordings but not the devices. The recordings and their respective transcripts were disclosed to the defence. In the decision of this court, which was delivered by McDonald-Bishop JA (as she then was), it was observed that:

> "[50] The relevant authorities have all established that it is the material in the possession of the prosecution (including the police) that may assist the defence or undermine the prosecution's case that is relevant for the purposes of disclosure. It follows, then, that the relevance of the devices, within that meaning, as distinct from the evidence produced by them and on which the prosecution intended to rely, would have had to have been first established before any duty to disclose, on the part of the prosecution, would have arisen. ..."

[91] It was determined, among other things, that "[t]he devices were not documents whose contents were being relied on and neither were they items required to be exhibited as real evidence in the case" (at para. [60]).

[92] In **Omar Anderson v R** [2023] JMCA Crim 11, Edwards JA provided the following guidance:

> "[124] It is generally good practice that any tangible material that is intended for use as evidence, at trial, be produced as an exhibit for inspection. However, it must be borne in mind that there is no rule of law or practice that an object must be produced, or that an explanation must be given for its non-production, before oral evidence can be given of its existence (See Blackstone's Criminal Practice 2021, Part F, Evidence, Section F8, Documentary Evidence and Real Evidence Tangible Objects F8.45 citing **Hocking v Ahlquist Bros Ltd** [1943] 2 ALL ER 722). ..."

[93] For the present purposes, the essential facts of that case involve the theft of a cellular phone, among other items, during a robbery. The stolen cellular phone was subsequently found in the appellant's possession. Although the cellular phone was sent to the relevant unit for examination, no report was generated. During the trial, oral evidence of the recovery of the cellular phone was allowed. The appellant did not dispute the evidence pertaining to the theft and recovery of the cellular phone. The prosecution did not produce it at trial, and neither did the defence request its production or an adjournment to facilitate the same. It was determined that, if the court accepted the

evidence that the cellular phone was taken from the victim during the robbery and subsequently recovered in the possession of the appellant, the physical production of the cellular phone in court was not required. Furthermore, the absence of the cellular phone would have only affected the weight of the evidence.

[94] It is well established, as stated in the case of **Willard Williamson v R**, that the prosecution is required to disclose the material in its possession. Mr Smith has taken issue with the purported non-disclosure of footage from the cameras on the high school's compound and with the report on the contents of the cellular phone, including whether the messages and relevant contact number were attributed to Mr Williams. The Crown's undisputed position is that it did not obtain the camera recordings, examine the cellular phone, or generate a report of its contents. Therefore, there could be no duty of disclosure in relation to material they did not possess. Given the current factual matrix, the only material in the prosecution's possession that would be subject to disclosure was the witness statements, in respect of which its duty was discharged.

[95] We agree with Crown Counsel that, having made the defence aware of the existence and relevance of the cellular phone prior to the trial, it was incumbent on the defence to request access. Defence counsel received a copy of the committal bundle on 4 June 2018, on behalf of Mr Peterkin. There is no indication of the documents contained in that bundle. However, it is safe to assume (in the absence of any submissions to the contrary) that the witness statements (that would have divulged the evidence related to the cellular phone) were included. Mr Peterkin would have certainly noticed that he did not receive a report detailing the contents of the cellular phone. At that point, it would have been prudent of him to make certain enquiries of the prosecution and, if deemed necessary, to request access to the cellular phone to have it examined. It has not been contended that such a request was made and refused by the prosecution. In circumstances where the defence was aware of the material relevance of the cellular

phone and did not request access, there can be no greater imposition on the prosecution's duty in this regard.

[96] We also find favour with the Crown's argument that the evidence adduced in relation to the cellular phone was not directly obtained from it but instead was borne out of the evidence given by the complainant and MR. Since the contents of the cellular phone were not admitted in support of those testimonies, whether Mr Williams gave the complainant the cellular phone and exchanged certain inappropriate messages with her via that cellular phone are questions of fact for the jury. We acknowledge, however, that given the peculiar position defence counsel was in, it may have been difficult for Mr Williams to contradict MR's credibility regarding her observations of the relevant messages. Nonetheless, as stated previously, this aspect of the evidence concerned the credibility of the witnesses, which was a matter for the jury.

[97] It is true that defence counsel during the trial did not have an opportunity to request access to the cellular phone, having been engaged in the matter on the first day without complete instructions. We are not prepared to find that she had previously received the prosecution's disclosure, since the unchallenged evidence is that she was not involved in the matter. Notwithstanding that, she worked in the same chambers and had signed for the disclosure documents on Mr Peterkin's behalf. While we appreciate that defence counsel may not have had sufficient time to adequately acquaint herself with the details of the case, nevertheless, having reviewed the prosecution's case on paper, if she considered it necessary, the onus would have been on her to seek an adjournment to request access to the cellular phone. Given the circumstances in which she became involved in representing Mr Williams at the trial, the learned trial judge would have been obliged to give serious consideration to any such application in the interests of justice.

[98] In any event, even if we were to accept that the prosecution did not fulfil its duty of disclosure, this court would have to consider whether it resulted in a miscarriage of justice. McDonald-Bishop JA, in **Willard Williamson v R,** applied the test established in **Bonnett Taylor v The Queen** [2013] UKPC 8:

> "[82] Their Lordships did go on to establish ... the relevant test in determining whether a miscarriage of justice had occurred, is whether, **after taking all the circumstances of the trial into account, there was a real possibility of a different outcome.** In other words, as his Lordship instructed, **this court must ask itself the question whether if the disclosure was made as requested, it might reasonably have affected the decision of the learned Resident Magistrate to convict**." (Emphasis added)

[99] Mr Smith's reliance on sections 31A – 31L of the Evidence Act is misplaced. Those provisions pertain to hearsay and computer-generated evidence, which do not apply to this case or to the evidence related to the cellular phone. Unfortunately, the cases he referred to the court on this issue also do not take the matter any further. For instance, the House of Lords case of **R v Pendleton** concerned fresh evidence adduced on appeal, which was found to be pivotal in determining whether the conviction was safe. The Privy Council applied that case in **Sangster & Dixon v R** (an appeal from Jamaica), in which video recording evidence became available on appeal as fresh evidence. During a robbery at a bank, a security guard was murdered. There were four surveillance cameras at the scene. The police reviewed the video recordings during their investigation, but did not disclose their existence to either the prosecution or the defence. In fact, when trial counsel enquired about the video recordings, the police stated that there were none. Their Lordships were satisfied that the video evidence was material, and had it been disclosed to the defence and led at trial, it might reasonably have affected the jury's decision.

[100] In those cases, the convictions were deemed unsafe substantially because of the admission of fresh evidence on appeal. No fresh evidence has been adduced before this

court. Mr Smith has simply asserted that a report of the contents of the cellular phone should have been generated and disclosed. We recognise that the contents of the cellular phone might have impacted the credibility of either case, but, in the absence of such material (having not been led at trial or presented to this court as fresh evidence), any suggestion that it could have affected the verdict remains purely speculative. We also wish to note that, unlike in **Sangster & Dixon v R**, where the defence did not know of the existence of the video recordings, the defence in this case knew of the existence and relevance of the cellular phone.

[101] We also note that **R v Blencowe** (a case cited by Crown Counsel) does consider the fundamental principles of disclosure in criminal cases. However, the court's finding in relation to the form of the prosecution's duty to disclose is also distinguishable. In that case, the charges were related to the contents found on video cassettes in the accused's possession. The court held that, under the prosecution's constitutional duty to disclose, it had to provide the defence with copies of the video cassettes on which they relied to establish criminal liability.

[102] As has already been established, the evidence regarding the cellular phone was that Mr Williams gave it to the complainant and that they communicated with each other through messages that were sexual in nature. Additionally, the complainant's mother discovered their inappropriate relationship after reading those messages. That evidence, if accepted by the jury, would lend support to the assertion that an inappropriate relationship existed between Mr Williams and the complainant. It would neither, however, directly corroborate nor refute the allegation against Mr Williams regarding the incident reported by the complainant. Therefore, it cannot be said for sure that the cellular phone or its contents were material to the finding of criminal liability or that it would have affected the trial or verdict had it been disclosed.

[103] For these reasons, we find that there is no merit in grounds 3 and 10.

The corroboration and sentence issues

[104] The resolution of the adjournment issue concludes the outcome of the appeal since Mr Williams was deprived of a fair trial, which rendered his verdict unsafe. As a result, we need not address the question of whether the sentences imposed by the learned trial judge were manifestly excessive. The issue regarding corroboration evidence and the corresponding warning is well settled, and further elaboration is unnecessary given the circumstances. For those reasons, there is no need to determine the merits of grounds 7, 8 and 9. We are, nonetheless, grateful to counsel for their submissions concerning those grounds.

Conclusion

[105] In determining the issue of whether the learned trial judge erred in her refusal to grant the adjournment, there were indeed "multifaceted considerations" (as contended by Crown Counsel), all of which, on our assessment of the circumstances and the relevant authorities, support the finding that the learned trial judge's decision to refuse the adjournment deprived Mr Williams of a fair trial, thereby rendering the verdict against him unsafe. The miscarriage of justice occasioned by that decision is a sufficient basis on which to allow the appeal and quash the convictions, notwithstanding our conclusion that the issues related to the judicial interventions and the prosecution's duty to disclose had no merit. For the foregoing reasons, the appeal should be allowed, the convictions quashed, and the sentences set aside.

[106] We have also given due consideration to the question of whether a new trial should be ordered, on which counsel briefly submitted.

Should a retrial be ordered?

[107] This court is empowered by section 14(2) of the Judicature (Appellate Jurisdiction) Act to order a new trial where the interests of justice so require. That section provides:

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

[108] In the headnote of the Privy Council case of **Dennis Reid v The Queen** (1978) 27 WIR 254 ('**Reid v R**'), the general guidance provided by Lord Diplock as to the factors to be considered in determining whether to order a new trial was stated as follows:

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

[109] In **Mark Russell v R** [2021] JMCA Crim 34, Brooks P considered the factors identified in **Reid v R** and observed that their Lordships recognised that some factors could carry greater weight than others depending on the circumstances of the case. He also referenced the case of **Bell v Director of Public Prosecutions and Another** (1985) 32 WIR 317, which acknowledged another factor to be taken into account, namely the issue of delay and the constitutional right to a fair trial within a reasonable time. At para. [72], he stated:

> "In assessing the constitutional right to a trial within a reasonable time, their Lordships introduced the element of the further time that will be required to commence the retrial. They said, in part, at page 326:
>
> > '…Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must

> be accepted if criminals are not to escape. Nevertheless, in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, **the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account**. ...'" (Emphasis as in the original)

[110] We are also guided by the case of **Mikal Tomlinson v R** [2020] JMCA Crim 54, in which this court decided not to order a new trial, having considered, among other things, that the appellant had already spent six years and seven months in custody since his conviction (in relation to a sentence of 10 years' imprisonment for the offence of illegal possession of firearm and 15 years' imprisonment for the offence of wounding with intent). In addition, the uncertainty of the timeframe for a retrial and the preparation and production of the transcript in the event of an appeal were also considered, given the very real possibility that the appellant would remain in custody for a significant number of years.

[111] The offences of indecent assault and having sexual intercourse with a person under the age of 16 years are, without a doubt, serious and, unfortunately, prevalent in this country. Certainly, it would be in the public interest for the charges against Mr Williams to be determined by a jury. As stated earlier, the prosecution's evidence in support of its case against Mr Williams was predicated on the complainant's evidence. The Crown did not indicate to us the complainant's availability if a new trial were to be ordered. We do note, however, that at the time of the hearing of the appeal, she would have been approximately 22 years old. We also do not know how, if at all, the passage of time would negatively affect the availability of all the witnesses.

[112] This raises a concern as to the length of time that would elapse between the offences and a new trial. At the time of the hearing of the appeal, the offences would have been committed approximately six years and seven months prior. We observe that

the trial lasted four days, so it cannot be said to have consumed a considerable amount of judicial time and resources. However, Mr Williams would also incur the additional expense of retaining an attorney-at-law to represent him in his defence in circumstances where the difficulty with the first trial was not his fault. At this juncture, Mr Williams is an appellant; therefore, despite his incarceration, he would not have commenced serving his term of imprisonment. Taking these circumstances into consideration, the impact of the delay on his constitutional right to a trial within a reasonable time (section 16(1) of the Charter) is a legitimate concern.

[113] To date, Mr Williams has been incarcerated for approximately six years. The greater of the concurrent sentences imposed was 11 years and 11 months, with the stipulation that he serve 10 years before being eligible for parole. It is unlikely that a new trial could proceed without further delay. Even if a retrial were to take place relatively quickly, a substantial period of time would have elapsed since his arrest. He has essentially served a majority of the sentence imposed on him while awaiting the hearing and determination of his appeal. Upon balancing the respective interests in this case, it does not weigh in favour of ordering a new trial.

Disposition

[114] As stated above (at para. [105]), we have decided to allow the appeal, quash the convictions and set aside the sentences. In the light of the exposition of the law regarding retrials and the fact that the appeal is being allowed for the reason that the fairness of the trial was compromised through no fault of Mr Williams, we find that the interests of justice would not be served if we were to order a new trial. As a result, a judgment and verdict of acquittal will be entered on both counts of the indictment. Therefore, the orders are as follows:

1. The application for permission to appeal conviction and sentence is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal against convictions and sentences is allowed.

4. The convictions are quashed, the sentences are set aside and a judgment and verdict of acquittal is entered on both counts of the indictment.