

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

(CRIMINAL DIVISION)

SAINT LUCIA

SLUHCRA2020/0004

BETWEEN:

GILROY AUGUSTE

Appellant

and

THE KING

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco Henry

Chief Justice [(Ag)]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Huggins Nicholas for the Appellant
Ms. Kelly Thomson for the Respondent

2024: March 15
2025: July 09.

Criminal appeal – Sexual intercourse with a minor – Procedural irregularities – Fair trial guarantee – Mis-directions and/or non-directions by the trial judge - Whether the conviction is unsafe and unsatisfactory and should be overturned – Whether the sentence is manifestly excessive or did not reflect time spent on remand

The factual matrix giving rise to this appeal is not complex. The case for the Crown is that on Monday 2nd January 2012, the virtual complainant (“VC”) who was twelve years old at the time, left her home at La Resource, Dennery to attend a function at Assou Square at the La Resource playing field. There she met the appellant, entered his vehicle and accompanied him to the Bordelais area ostensibly to collect another individual. When they arrived at the Bordelais area the appellant brandished a knife and told the VC to remove her clothing. Before she could do so, another person approached them whereupon the appellant drove off and took the VC to a house.

At the house, the appellant had the VC sit on a sofa and had sexual intercourse with her. He drove her to her home in the wee hours of the morning. Later that morning, the VC's parents confronted the appellant at a social gathering. The police were contacted and a report made to them. During a medical examination of the VC, it was discovered that her hymen was missing. She later identified the appellant as the person who had sex with her.

Further investigations were carried out, resulting in the appellant being arrested, charged with and indicted for the offences of sexual intercourse with a minor contrary to section 127(1) of the **Criminal Code of Saint Lucia ('Criminal Code')** and indecent assault contrary to section 130(1) of the **Criminal Code**.

The trial was scheduled to commence on 17th June 2019. However, when the case was called the appellant was absent. The learned judge conducted a hearing and received sworn testimony from the court orderly who testified that there was no response when the appellant's name was called three times at 9.45am that day. Consequently, the learned judge ordered that a bench warrant be issued for the appellant's arrest. He then commenced the empanelment of a jury in the appellant's absence. The appellant arrived at court during the course of jury selection, and he participated in the remainder of the proceedings. After the jury's empanelment the jury members were released for the rest of the day.

The learned judge then conducted an inquiry into the appellant's tardy arrival at court. The judge heard testimony from the security officer and from the appellant. The appellant explained that he was at a bus stop nearby and did not hear when his name was called. The learned judge determined that the appellant had lied to him, ruled that he thereby committed contempt of the court, revoked his bail and sentenced him to prison for the rest of the trial.

When the trial resumed the next day, the appellant made an application for bail which was denied. His bail was restored on 23rd June 2019. Among the Crown's witnesses were the VC (who was by then 20 years of age), her mother and her father. On 25th June 2019, the jury returned a unanimous verdict of guilty for sexual intercourse with a minor. No verdict was recorded on the count charging indecent assault.

Sentencing of the appellant was done on 19th December 2019, by a different judge. The sentence was expressly stated to commence from the date of conviction. The appellant was ordered to enroll in any sexual therapy and educational program available at the prison.

Being dissatisfied with the outcome of the trial, the appellant filed his notice of appeal. In his grounds of appeal, he contended that the conviction was rendered unsafe and unsatisfactory in several respects and that the entire trial was contaminated by numerous procedural irregularities. Additionally, it was submitted that the learned judge's summation to the jury was deficient in that it contained mis-directions and non-directions including the absence of a corroboration warning as required by the common law.

Regarding the appeal against sentence, the appellant contended that the sentence was manifestly excessive, and further, he should have been but was not credited for the period he spent on remand. It was submitted that this time should have been taken into account and deducted from his sentence. The respondent countered that the verdict is safe and there had been no miscarriage of justice. The sentence was defended as being just and reasonable.

Held: dismissing the appeal against conviction, upholding the conviction for the offence of sexual intercourse with a minor, allowing the appeal against sentence and substituting a sentence of ten years, six months and seven days, that:

1. Original jurisdiction to entertain claims alleging any past, present or anticipated breach of the constitutional fundamental rights provisions is vested in the High Court by section 16(2) of the **Constitution**. It is now accepted that properly interpreted, the provision reserves questions about breach of constitutional fundamental rights provisions, including a right to a fair trial, for determination by the High Court and that the Court of Appeal does not as a rule have original jurisdiction to consider those issues. Notwithstanding, the Court of Appeal may entertain and determine such questions a) where they arise in an appeal from a final decision of the High Court touching and concerning those issues; and b) if they arise in extant proceedings at the Court of Appeal. None of the constitutional issues that the appellant sought to argue in this appeal were raised during the trial. Thus, this Court did not consider the appellant's contention that he was denied a fair trial by an independent and impartial tribunal by reason of the alleged breaches of his constitutional right to due process.

Constitution of Saint Lucia Cap. 1.01 of the Revised Laws of Saint Lucia applied; **Hunte and Khan v The State** [2015] UKPC 33 considered, **Levi Maximea v The Chief of Police and others** DOMHCVAP2020/0009 (delivered on 7th December 2023, unreported) considered.

2. It is settled law that not every departure from procedural norms or errors of law or fact will invalidate a decision arrived at in legal proceedings. The proviso to section 35 (1) of the **Eastern Caribbean Supreme Court (Saint Lucia) Act ('Supreme Court Act')** provides that this Court may, if it thinks that a point raised on appeal might be decided in the appellant's favour, dismiss the appeal in an appropriate case if it considers that no miscarriage of justice has actually occurred. Applying the proviso to this case with respect to the contempt proceedings, while there were some procedural missteps by the learned judge in conducting the contempt proceedings it cannot be argued that a miscarriage of justice occurred that would undermine the overall criminal trial. Further, it cannot be said that the learned judge's determination that the appellant was guilty of contempt of court was contrary to the evidence or the law and was therefore unjustified.

The proviso to section 35 (1) of the **Eastern Caribbean Supreme Court (Saint Lucia) Act** Cap. 2.01 of the Laws of Saint Lucia applied.

3. A trial judge may be required by law to issue a corroboration warning to a jury in certain situations. In such a case, the judge is expected to warn the jury that it is dangerous to act on the uncorroborated evidence of a virtual complainant to convict an accused or words to such effect. Formerly, at common law such a warning was mandatory in trials for rape or other sexual offences. The requirement for a corroboration warning in sexual offence cases in Saint Lucia has been abolished by section 135 of the **Evidence Act**. Therefore, the learned judge had no obligation to include such a warning in his summation to the jury. He issued no corroboration warning in this case and cannot be faulted for not doing so.

Section 135 of the **Evidence Act**, Cap. 4.15 of the Revised Laws of Saint Lucia applied.

4. By section 136 of the **Evidence Act**, an ‘unreliability warning’ has been introduced and is deployed at the trial judge’s discretion depending on the circumstances of the case. In the case at the appeal bar, the learned judge highlighted for the jury that in relation to the VC’s evidence, they had to decide whether she was reliable in light of the offence charged. He explained that due to her age at the time of the alleged offence, the absence of an independent witness account regarding the alleged sexual assault by the appellant, and the inconclusive medical evidence concerning whether she was sexually assaulted, it was necessary to exercise special care in evaluating her testimony and determining the weight to be given to it. It can be said therefore that the learned judge captured the essentials of the ‘reliability caution’ specified in section 136 of the **Evidence Act** as to the care to be taken in evaluating the VC’s testimony as a whole and particularly in relation to her allegations of sexual assault by the appellant.

Section 136 of the **Evidence Act**, Cap. 4:15 of the Revised Laws of Saint Lucia applied; **Gael Dariah v R** SLUHCRA2017/0012 (delivered 10th March 2021, unreported) followed; **Darlington Noel and Jan Isidore v R** SLUHCRA2016/0008 and SLUHCRA2016/0007 (delivered 6th December 2022, unreported) followed.

5. It is an accepted principle of law that a trial judge is duty bound to ensure that a defendant has a fair trial whether or not he is represented by counsel. Where a defendant is unrepresented, the trial judge in seeking to ensure a just trial must be careful to take reasonable efforts to protect the interests of the defendant and other parties in the proceedings including the virtual complainant. In doing so, the judge is required as appropriate to provide guidance to the defendant on the parameters within which he must operate in framing questions for witnesses and putting his defence. The transcript of the proceedings demonstrates that the learned trial judge facilitated the appellant’s presentation of his defence and at appropriate junctures explained the procedures and his options to him. The appellant’s contention that he was not properly and sufficiently assisted by the learned trial judge is not borne out by the record.

R v Milton Brown [1998] All ER (D) 187 considered.

6. The **Evidence Act** makes provision for treating a witness as hostile on application pursuant to section 35. It is important to note that cross-examination of a hostile witness necessarily entails eliciting from that witness that he/she made certain statements in the previous written statement. At times, the witness’ attention may be drawn to the document itself. This does not require a separate application for the witness to refresh his or her memory. Likewise, strictly speaking, it does not amount to a ‘refreshing of the memory’ akin to the procedure under section 136 of the **Evidence Act** but rather, it is part and parcel of the hostile witness process. The learned judge had a duty to ensure that the defendant understood what treating a witness as hostile entailed before asking him whether he had objections. This was not done. However, it is trite law that not every irregularity in a criminal trial will render the proceedings invalid or constitute a miscarriage of justice sufficient to necessitate interference with a conviction. Looking at the circumstances of this case in the round, notwithstanding the learned judge’s failure to ensure that the appellant understood the substance of the hostile witness application, this Court is satisfied that a jury properly instructed would have been entitled to

convict him as the jury did. Consequently, no miscarriage of justice occurred in the circumstances.

Section 35 (2) of the **Evidence Act** Cap. 4.15 of the Revised Laws of Saint Lucia applied; **Darlington Noel and Jan Isidore v R** SLUHCRA2016/0008 and SLUHCRA2016/0007 (delivered 6th December 2022, unreported) followed.

7. It is the law that out of court statements recorded from an accused during the course of a criminal investigation may be admitted into evidence at his trial for a related criminal offence. However, such statements once admitted form part of the body of evidence in the case, although the contents of the statement are not probative of the truth. This principle applies not only to an accused's out-of-court statements but also to out-of-court statements by witnesses for the Crown. A trial judge is required to so direct a jury. The trial judge did so, but only with respect to the appellant's written statements and not in the context of statements by a hostile witness. With respect to the hostile witnesses in this case, the learned judge zeroed in on PC Torille's testimony and gave clear, unmistakable directions that should have left no doubt in the minds of the jury that his evidence and witness statement were suspect and innately unreliable. In view of this and his direction regarding the appellant's out-of-court statements was not persuaded that the non-direction was fatal or that it gave rise to a miscarriage of justice. In the case of Ms. Joseph, it is patently obvious that her testimony was superfluous and added nothing substantive to the case so that the absence of a hostile witness direction in relation to her would do no injustice to the appellant and necessitate a setting aside of the conviction.
8. The role of an appellate court in evaluating whether a trial judge gave adequate directions to a jury is not to examine any specific direction in isolation, but rather, to take a broad view of the overall summation to assess whether the judge sufficiently identified the issues in the case and provided the jury with sufficient directions to enable them to critically examine the evidence against the law and properly perform their fact-finding duty. In doing so, the appellate court must be cognisant that a trial judge may have failed to give as full a direction as required. However, such a failure would not necessarily be fatal to a conviction if the summation adequately captured the salient issues and gave a proper explanation to the jury about how they should approach arriving at a true and proper verdict. If a deficiency is identified, the appellate court must consider further whether it was significant enough to amount to a miscarriage of justice that warrants setting aside the conviction.

R v Trimmingham [2009] UKPC 25 followed.

9. An appellate court is entitled to disturb an appellant's sentence only if satisfied that the sentencing court erred in principle in arriving at the sentence and was manifestly wrong in exercising its discretion. However, the Court will not lightly interfere with a sentence by a trial judge even if it considered that a different sentence should have been imposed. It would do so only if satisfied that the sentence was manifestly excessive; wrong in principle because it was not justifiable in law or that it was made without considering relevant factors or based on the consideration of irrelevant matters; or if there is no factual basis underpinning it. An appeal against a sentence is not a re-hearing. Rather, it calls for an assessment of the sentence

passed, the steps taken to arrive at it, and an inquiry as to whether the sentencing judge failed to take into account or apply any settled principles of law.

R v Ball (1951) 35 Cr App R 164 considered.

10. When invited to review the sentence passed by a lower court, an appellate court is duty bound to seek to promote consistency in sentencing and as part of that exercise must apply established principles of law. The learned judge's consideration of the sentencing guidelines runs contrary to this Court's holding that the sentencing guidelines are inapplicable in cases where the offence was committed prior to their promulgation. The guidelines relied on by the learned judge came into force in 2019, seven years after the commission of the offence in this case. They should not have been invoked by the learned judge. She therefore erred in principle by applying them and made a sentencing judgment which cannot withstand appellate scrutiny. Consequently, this court must conduct its own re-sentencing exercise.

Mohamed Iqbal Callachand and Mohamed Anwar Callachand v The State [2008] UKPC 49 considered; **Desmond Baptiste v R** SVGHCRA2003/0008 (delivered 6th December 2004) followed; **Akim Monah v The Queen** GDAHCRAP2021/0015 (delivered 23rd February 2022, unreported).

JUDGMENT

- [1] **HENRY JA:** This is an appeal by Mr. Gilroy Auguste ('the appellant') against his conviction for sexual intercourse with a minor and against the sentence of 10 years, 8 months, 3 weeks and 3 days imprisonment imposed by the learned judge. The appellant filed his notice of appeal against sentence on 16th April 2020. He subsequently applied¹ for an extension of time within which to seek leave to appeal against his conviction and for an order that the application for such extension and leave be deemed to be the notice of appeal. That application was granted by order of court dated 20th July 2023.
- [2] In his notice of appeal, the appellant set out several grounds of appeal. Among them, he contended that a number of procedural irregularities and constitutional infractions took place during the trial and that the learned trial judge failed to direct the jury on critical legal principles as a result of which his conviction is unsafe and unsatisfactory and should be overturned. He further maintained that the sentence is manifestly excessive and against the spirit and intent

¹ By Notice of Application filed on 12th June 2023.

of the new Eastern Caribbean Supreme Court Sentencing Guidelines Rules 2019 (“the sentencing guidelines”).

- [3] The Crown resisted the appeal arguing that the conviction is safe and should be upheld; and that the sentence is just and reasonable. The Crown further posited that the appeal is without merit and should therefore be dismissed.

Background

- [4] The factual matrix giving rise to this appeal is not complex. The case for the Crown is that on Monday 2nd January 2012, the virtual complainant (“VC”) who was twelve years old at the time, left her home at La Resource, Dennery to attend a function at Assou Square at the La Resource playing field. There she met the appellant, entered his vehicle and accompanied him to the Bordelais area ostensibly to collect another individual. When they arrived at the Bordelais area the appellant brandished a knife and told the VC to remove her clothing. Before she could do so, another person approached them, whereupon the appellant drove off and took the VC to a house.
- [5] At the house, the appellant had the VC sit on a sofa and had sexual intercourse with her. He then drove her to her home in the wee hours of the morning. Later that morning, the VC’s parents confronted the appellant at a social gathering. The police were contacted and a report was made to them. During a medical examination of the VC, it was discovered that her hymen was missing. She identified the appellant as the person who had sex with her.
- [6] Further investigations were carried out resulting in the appellant being arrested, charged with and indicted for the offences of sexual intercourse with a minor contrary to section 127(1) of the **Criminal Code of Saint Lucia**² (‘**Criminal Code**’) and indecent assault contrary to section 130(1) of the **Criminal Code**.
- [7] The trial was scheduled to commence on 17th June 2019. When the case was called the appellant was absent. The learned judge conducted a hearing, received sworn testimony from the court orderly who

² Cap. 3:01 of the Revised Laws of Saint Lucia.

testified that there was no response when the appellant's name was called three times at 9.45am that day. Consequently, the learned judge ordered that a bench warrant be issued for the appellant's arrest.

[8] He then commenced the empanelment of a jury in the appellant's absence. Afterward, the appellant arrived at court during the course of jury selection, and he participated in the remainder of the proceedings. After the jury's empanelment, the jury members were released for the rest of the day. The learned judge then conducted an inquiry into the appellant's tardy arrival at court. The judge heard testimony from the security officer and from the appellant. The appellant explained that he was at a bus stop nearby and did not hear when his name was called. The learned judge determined that the appellant had lied to him, ruled that he thereby committed contempt of the court³, revoked his bail and sentenced him to prison for the rest of the trial.

[9] When the trial resumed the next day the appellant made an application for bail which was denied.⁴ His bail was restored on 23rd June 2019.⁵

[10] Among the Crown's witnesses were the VC (who was by then 20 years of age), her mother and her father. On 25th June 2019, the jury returned a unanimous verdict of guilty for sexual intercourse with a minor. No verdict was recorded on the count charging indecent assault.

[11] Sentencing of the appellant was done on 19th December 2019, by a different judge. The sentence was expressly stated to commence from the date of conviction. The appellant was ordered to enroll in any sexual therapy and educational program available at the prison.

[12] Being dissatisfied with the outcome of the trial, the appellant filed his notice of appeal. In his grounds of appeal, he contended that the conviction was rendered unsafe and unsatisfactory in several respects and that the entire trial was contaminated by numerous procedural irregularities. Additionally, it was submitted that the learned judge's summation to the jury was deficient in that it contained mis-directions and non-directions including the absence of a corroboration warning as required by the common law.

³ ARA pg. 85, lines 1-2.

⁴ Transcript of proceedings, pg. 175, lines 1-7.

⁵ Transcript of proceedings, pg. 263, lines 16-17.

[13] Regarding the appeal against sentence, the appellant contended that the sentence was manifestly excessive, and further, he should have been but was not credited for the period he spent on remand. It was submitted that this time should have been taken into account and deducted from his sentence.

[14] The respondent countered that the verdict is safe and there had been no miscarriage of justice. The sentence was defended as being just and reasonable.

Grounds of Appeal

[15] The appeal against conviction was predicated on several grounds. Among them was the contention that the learned trial judge erred in that:

- (1) There was no arraignment before the jury was empaneled. Compounding this, the jury was told that the appellant had pleaded not guilty. He was absent when the jury was empaneled and contrary to established practice and procedure was not permitted to challenge jurors when the oath was being administered to them.
- (2) A bench warrant was issued for his arrest in the jury's presence and hearing.
- (3) The judge commented on the VC's vulnerability and the traumatic state of mind she must be experiencing as a rape victim.
- (4) The judge entertained and granted an application in the jury's presence to permit the VC to give her testimony via video link
- (5) The appellant was convicted for contempt of court without a trial under circumstances which raise concerns about a real danger of apparent bias by the trial judge who revoked bail and remanded the appellant in custody without citing him for contempt of court and informing him of his right to be represented by counsel.
- (6) The learned judge made adverse comments in the jury's presence regarding the VC's detailed statement and emphasised her psychological state, as well as the need to have all of the evidence adduced for the jury's attention. He also asked questions that were prejudicial to the appellant.

- (7) The learned trial judge failed to resolve adequately or at all a number of highly technical legal issues that required him to ensure that the appellant properly understood the nature of the applications made by the prosecution before asking the appellant whether he objected to the respective applications or the evidence that the prosecution was seeking to adduce.
- (8) The summation to the jury was not sufficiently detailed to cover the legal technicalities arising during the trial and contained no directions in relation to:
- a) the effect of consistencies between and among the witnesses;
 - b) contradictions among witnesses on material issues (especially involving a prosecution witness who was treated as a hostile witness);
 - c) the effect of a hostile witness' evidence and the use to which it could be put, as it impacted on both the credibility and reliability of his testimony;
 - d) refreshing of memory by witnesses, the concomitant dangers of self-corroboration and self-serving evidence;
 - e) the impacts and effects of out-of-court witness statements admitted into evidence and whether they constitute evidence that could be relied upon as to the truth;
 - f) how to treat with Police Constable Earl Torille's ("PC Earl Torille") evidence in light of the learned judge's remarks that he may be prosecuted for perjury;
 - g) P.C. Torille's witness statement which was admitted into evidence, and the learned judge's direction that the jury could make whatever they wanted of it; and;
 - h) the fact that the VC was acting hysterical and had to give the last part of her evidence via video link.
- (9) The learned judge erred in law in that he failed to give a corroboration warning to the

jury, as required by the common law and sections 135 and 136 of the **Evidence Act**⁶ (**‘the Act’**) on the issue of recent complaints as to the identification of the appellant.

- (10) The appellant was not afforded a fair trial, by reason that a) the learned judge did not render adequate assistance to him; b) the judge made a number of important rulings on legal issues in the jury’s presence; c) the learned judge expressed an opinion on the importance of calling Justices of the Peace as witnesses; d) at the beginning of the trial the jury members were not asked if they knew the appellant but rather whether they knew anyone by that name; e) the judge allowed a number of witnesses to refresh their memory without first ensuring that the procedural pre-conditions for doing so as outlined in the **Evidence Act** were satisfied; f) the judge sanctioned the treatment of prosecution witnesses as hostile witnesses although the prosecution did not satisfy the requirements of section 35 of the Evidence Act; and g) witnesses were allowed to ‘corroborate’ themselves to correct inconsistencies that went to their credibility and reliability.

Issues

- [16] Notwithstanding the several matters highlighted in the grounds of appeal, the issues for this Court may be summarised under two broad headings, namely:-

- (1) Whether the conviction is unsafe and unsatisfactory by reason of any breach of the appellant’s constitutional fair trial guarantees; mis-directions and/or non-directions by the trial judge in his summation to the jury; and/or any fatal procedural irregularities in the conduct of the trial; and
- (2) Whether the sentence is manifestly excessive or did not reflect the time the appellant spent on remand.

Preliminary point

- [17] Arising out of the appellant’s submissions, the respondent invited the court to consider as a preliminary point, that the appellant’s arguments that his constitutional rights were breached should have been the subject of an originating constitutional motion before the High Court by reason that it retains original

⁶ Cap. 4.15 of the Revised Laws of Saint Lucia.

jurisdiction in respect of such matters under section 105 of the **Constitution of Saint Lucia**⁷. It was submitted that they ought to have been raised before the learned trial judge in order for them to form the basis of an appeal. Reliance was placed on **Keros Martin v DPP**⁸; **Hunte and Khan v The State**⁹; **Ramdeen v The State**¹⁰ and **Trevor Walker and another v R**¹¹ in support of this contention.

- [18] Learned counsel argued that the appellate jurisdiction to consider an allegation of breach of constitutional rights would only arise in circumstances where a constitutional motion for relief is filed and considered by the High Court, following which an appeal is made pursuant to section 107 of the **Constitution**. Only in such a case would an appellant be entitled to raise constitutional issues at the appellate level in criminal proceedings. Consequently, since the appellant in the case at the appeal bar did not raise any such constitutional issues during his trial, he is unable to do so on appeal.
- [19] It was submitted that the appellant's submissions that a) he did not receive a fair hearing by an independent and impartial tribunal; b) he was subjected to inconsistent verdicts in breach of this right; c) he was deprived of his liberty in the absence of a lawful order by a competent court (for contempt of court); d) he had a bench warrant issued in the jury's presence; and e) the comments by the judge on the VC's vulnerability and determination of video link application in the jury's presence, are matters that should properly have been the subject of complaints in the lower court. Since they were not, they cannot be raised on appeal for the first time and should therefore not be entertained.
- [20] The appellant agreed that the court should consider this matter as a preliminary point. He, however, disagreed with the respondent's contention that he was not at liberty to raise constitutional questions for the first time on appeal. Instead, it was submitted that an appellant is entitled to raise constitutional issues at this level even if they were not raised in the lower court. The appellant cited **The State v Brad Boyce**¹² which adopted the posture of the Court

⁷ Cap 1.01 of the Revised Laws of Saint Lucia.

⁸ Criminal Appeal No. P030 of 2022.

⁹ [2015] UKPC 33.

¹⁰ [2014] UKPC 7.

¹¹ [1994] 2 AC 36

¹² TT 2001 CA 67.

of Appeal of the Republic of Vanuatu in **Shem Rarua v The Electoral Commission of the Republic of Vanuata**. It was submitted that in **Boyce** and **Shem Rarua**, the Court of Appeal held that constitutional questions may be advanced and considered on appeal even where they did not arise in the court below. In **Boyce**, the constitutional question before the court related to a provision that empowered the Director of Public Prosecutions (the appellant) to appeal in criminal trials.

Discussion

- [21] Original jurisdiction to entertain claims alleging any past, present or anticipated breach of the fundamental rights and constitutional provisions is vested in the High Court by section 16(2) of the **Constitution** which states:

“The High Court shall have original jurisdiction-

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive): ...”

- [22] It is now accepted that properly interpreted, the foregoing provision reserves questions about breach of constitutional fundamental rights provisions, including a right to a fair trial, for determination by the High Court and that the Court of Appeal does not as a rule have original jurisdiction to consider those issues. Notwithstanding, the Court of Appeal may entertain and determine such questions a) where they arise in an appeal from a final decision of the High Court touching and concerning those issues; and b) if they arise in extant proceedings at the Court of Appeal.¹³ In the case at the appeal bar, the appellant would be permitted to advance his constitutional challenges only to the extent that those issues arose in the High Court or arise in these proceedings.

¹³ See *Hunte and Khan v The State* [2015] UKPC 33 and *Levi Maximea v The Chief of Police and others* DOMHCVAP2020/0009 (delivered on 7th December 2023, unreported).

[23] An examination of the transcript of the trial is therefore necessary to discover whether the appellant raised any of those issues in the court below - a review of which has unearthed no complaint by the appellant that he did not receive a fair hearing by an independent and impartial tribunal. With respect to his complaints that a bench warrant was issued in the jury's presence; that he was deprived of his liberty in the absence of a lawful order by a competent court; and regarding the learned judge's comments on the VC's vulnerability and the determination of the video link application in the jury's presence, I consider it instructive and beneficial to set out the relevant portions of the transcript.

Bench Warrant

[24] The amended record of appeal¹⁴ ('ARA') reflects that court orderly WSPC Francia Sealey was called on to testify about what transpired in the criminal court that morning (June 17th 2019) when case No. 80370 of 2012, the Queen v Gilroy Auguste was called.¹⁵ After supplying her name, rank and current attachment she stated that her duty includes being a court orderly at the High Court and Nyerah Court. She further explained that she called out the name 'Gilroy Auguste' three times that morning downstairs the Nyerah Court at approximately 9.35am, that no one responded to the call and that she did not see the appellant in the court. She also indicated that court normally commences at 9.00am.

[25] Thereafter, the learned trial judge stated:

"Okay, let us proceed to impanel the Jury, the Court will order a bench warrant be issued for the arrest of Gilroy Auguste after being brought to the Court to appear for his trial which commences today, the Defendant Gilroy having be - - Auguste haven't been present and the date of the commencement of the trial was determined and announced in open court. He's (sic) bail conditions are all - - now stand abeyance to be reviewed. Yes, let us commence the selection of the Jury."¹⁶ (Emphasis added)

The jury was present. Furthermore, the transcript contains no record of the appellant taking objection to the bench warrant being issued in the jury's presence after he became aware of the fact.

¹⁴ Filed on 7th Dec. 2022.

¹⁵ Her account starts at page 50 and ends at page 52.

¹⁶ At pg. 52, lines 9-14 of the Amended Record of Appeal.

Right to Liberty - Contempt of Court

- [26] Regarding the appellant's contention that his right to liberty was infringed because he was detained in custody without a lawful order being made, in ascertaining whether he objected to any part of that proceeding as being a breach of his constitutional right, the Court must consider the entirety of that inquiry, including the outcome. It is also critical to capture at this juncture the full breadth of the arguments made by the appellant on this point. This approach would facilitate complete exploration and consideration of all related complaints.
- [27] The appellant took issue with the procedure adopted by the learned judge with respect to the contempt of court proceedings related to his late arrival at court on the first day of the trial. He complained that he was convicted of contempt of court without being cited for contempt; without being informed of his right to legal representations; without a trial, in circumstances which give rise to fears that the proceedings were tainted by apparent bias on the part of the judge; and that the judge punished him for contempt by revoking his bail and imposing a sentence by remanding him in prison. He argued that these were serious mistakes that vitiate those proceedings and undermine his conviction for sexual intercourse with a minor.
- [28] The respondent cited section 380 of the **Criminal Code** in which contempt of court is defined. He also referenced section 1198 of the **Criminal Code** as the basis of a judge's authority to conduct a summary hearing in relation thereto and for the sentence prescribed to be a fine or term of imprisonment. It was submitted that the learned judge was entitled on the evidence led, to find the appellant guilty of contempt of court and to remand him in prison.
- [29] The respondent further relied on **Re Medicaments and Related Classes of Goods (No. 2)**¹⁷ as articulating the test to be applied in determining whether apparent bias tainted the proceedings and whether an impugned decision affected by apparent bias should be set aside. He noted that the court must first ascertain all the circumstances and determine whether a fair-minded and informed observer would conclude that there was a real possibility or danger that the adjudicator was biased. He concluded that even if this court finds that the presiding judge was affected by apparent bias, the proviso should be applied.

¹⁷ [2001] 1 WLR 700.

[30] The ARA reveals that the contempt of court inquiry began with the learned judge asking the defendant why he arrived late that day. The transcript records the following exchange between the learned judge and the appellant (who was not sworn before he responded):

THE COURT: Stand Mr. Auguste. Mr. Auguste, you have to tell the Court why you were late this morning. What happened?¹⁸

...

THE DEFENDANT: I was sitting down underneath the shanty, I thought - - when Mr. Cumberbatch was there, they was calling names, they was coming outside and call -

THE COURT: Who you talking about?

THE DEFENDANT: The, the other judge that was there.

THE COURT: When Mr. Cumberbatch was there, what use to happen? **THE**

DEFENDANT: Yeah, when - - they use to come out and call people names, so I was sitting down by the shanty there, my girl and I and they didn't call my name. When I came I ask the guy if they call my name; he say probably that name call already.

THE COURT: Yeah, what time did you come?

THE DEFENDANT: Ten to nine, I was here 1 already. My vehicle is packed outside.

THE COURT: And, you did not hear your name called?

THE DEFENDANT: No, My Worship, no.

THE ORDERLY: Sir, the procedure is that when you come to the Court, you go the security, you give a name and they are - - they direct you where you have to go to sit and they calling your name downstairs also.¹⁹

[31] The learned judge then asked the orderly whether it is customary for a defendant's name to be called outside the court building and she replied that it is. At the court's request, the orderly who was stationed on the lower level of the court building was called as a witness to explain what transpired. He was cross-examined by the prosecutor and then by the appellant.

[32] The learned judge next inquired of the appellant whether he wished to give evidence to which he initially replied in the negative and subsequently in the affirmative. The following exchange captured this interaction:

"Do you wish to say anything to the Court having heard that evidence?"

THE DEFENDANT: No, My Lord, no, My Lord.

THE COURT: Do you wish to say anything to the Court having heard the evidence that you just heard? Do you wish to say anything to the Court? Do you wish to give evidence yourself?

THE DEFENDANT: Yes, My Lord.

THE COURT: You wish to give evidence?

¹⁸ ARA, pg. 56 lines 24-25.

¹⁹ ARA, pg. 57 lines 9 -25; pg. 58 lines 1 – 8.

THE DEFENDANT: Yes, My Lord.

THE COURT: Okay, come. Oath or affirmation, please.”²⁰ (Emphasis added)

[33] Thereafter, the prosecutor cross-examined the appellant. This was followed by an exchange between the orderly and the prosecutor as follows:

“THE ORDERLY: Is when I was going to call the witnesses, I saw the security and he told me the guy just came.

MR. BRETTE: Yeah, then you came in and you told the Court that.

THE ORDERLY: Then I came I told the Judge the guy was there.”²¹

[34] The learned judge then invited the prosecutor to make his submissions, and he did so. He stated:

“MR. BRETTE: My Lord, it’s so obvious that this Defendant has just wasted the Court’s time because, My Lord, there is - - nobody is perfect, he has been to court on a number of occasions before and, I think, he has been present at all - - from what I’m seeing there he’s been present at all the times that the Court has call the matter; I don’t see him ever not being present. So, for him now to come and lie to the Court that he was there and he heard the officer call him and he answered is a blatant lie. He could have said to the Court, look, Sir, I’m sorry today I was late, can the Court forgive my tardiness but he’s embarked on, on - - have the court to embark on a voir dire which was unnecessary, a waste of time, only for him to come in there and as we say stick his foot in the seam of his pants (patois spoken) by telling lies. So, he stuck himself - - put himself in a quagmire.

(THE COURT: Yes.)

MR. BRETTE: Where as (sic) he could have said to the Court, I’m sorry, Sir, I came late, I apologize for being late but he saying he was there, he was by the, by the, the bus shelter. He knows the procedure is to come in when he comes and come upstairs but he was by the bus shelter then he heard the officer call him; he responded, when really and truly that is not correct. The officer went to call him at 9:35, came up to the Court says he was absent, the court proceeded on impaneling and it was only after the Jurors impaneled the security came to officer, told him the gentleman he went to call a while ago has just arrived and then he was already walking upstairs, he was taken in to the court. And, the phone call the he got confirms what he is saying is that at 9:54 is when he was present taking a call long after his names was call. He could have dispense with all of this enquiry and just ask the Court to forgive him for being late, My Lord. So, it’s obvious that he has now showed himself that he has lied to the Court and so the Court should deal with him accordingly.”²²

²⁰ ARA pg. 68 lines 13 -22.

²¹ ARA pg. 82 lines 20 -25.

²² ARA pg. 83, lines 9 – 19, 21 – 25; pg. 84 lines 1 – 8.

- [35] The appellant was not given a similar opportunity to make oral submissions to the court. Instead, right after the prosecutor's address, the learned judge delivered his decision in which he found the appellant had 'contempt for the court' and remanded him in custody for the period of the trial.' During these proceedings the appellant took no exception to any part of the inquiry and did not protest that any constitutional right was being infringed. Furthermore, upon being remanded in custody he did not complain that his right to liberty was being unlawfully and unconstitutionally curtailed.

Inconsistent verdicts
Appellant's submissions

- [36] The appellant contended that the jury returned a verdict of guilty on one count of the indictment and a not guilty verdict on the other count in circumstances where the evidence relied on by the prosecution in both instances was the same. He argued that for this reason the verdicts are inconsistent and irreconcilable, and further evidence that he did not receive a fair trial by an impartial and independent tribunal.

Respondent's submissions

- [37] The respondent countered that the issue does not arise. It was submitted that after pronouncement of the verdict on the first count on the indictment, the prosecutor informed the court that the offence of indecent assault charged in the second count was in the alternative thereby obviating the need to receive verdict on the second count. This ground of appeal must therefore fail.
- [38] This issue may be disposed of shortly. The record reveals that the jury returned a verdict of guilty on count 1 on the indictment which charged the appellant with sexual intercourse with a minor. The learned judge then inquired of the prosecutor whether a verdict was required on count 2 to which the prosecutor replied that it was in the alternative and that there was 'no need for the count.'. No verdict was received on count 2.
- [39] As recorded in the transcript, pronouncement of the verdict unfolded as follows:

THE CLERK: Mr. Foreman, have you arrived at a verdict?
THE FOREPERSON: Yes, My Lord.
THE CLERK: Is it a verdict upon which you have all agreed?

THE FOREPERSON: Yes, My Lord.
 THE CLERK: Is it unanimous?
 THE FOREPERSON: Yes, My Lord.
 THE CLERK: How say you; is the Defendant Gilroy Auguste guilty of sexual intercourse with a minor?
 THE FOREPERSON: Guilty.
 THE CLERK: Guilty, Sir.
 THE COURT: Yes. Count 2. Are you going to - - don't, don't bother with Count 2?
 MR. BRETTE: It's in the alternative, Sir.
 THE COURT: Yes.
 MR. BRETTE: There's no need for the count.
 THE COURT: Prosecution has said, Mr. Foreman, that Count 2 is in the alternative, so we will not receive a verdict on Count 2.²³

[40] It is readily apparent from the ARA that contrary to the appellant's contention, only one verdict was received in this case, i.e. the guilty verdict on the first count charging the appellant with unlawful sexual intercourse with a minor. No question arises about two verdicts and therefore no live issue of inconsistent verdicts or unconstitutionality in relation to same exists.

[41] I turn next to the appellant's complaints that the learned judge ill-advisedly and improperly commented on the VC's vulnerability and determined the video link application in the jury's presence. His assertion that the learned judge entertained and determined an application (in the jury's presence) for the VC's evidence to be led via video link is not borne out by the record. In fact, twice during the VC's testimony, the learned judge excused the jury when she was non-responsive or hesitant in her answers. The application to have her testify by video link was made after. It is useful to set out verbatim the several exchanges among the bench, the prosecution and the appellant.

[42] On the first occasion, the learned judge suggested a break and immediately asked the jury to retire:

'THE COURT: 'You wish to have a glass of water to drink? You need a break, okay. **Mr. Foreman and Members of the Jury, I'm going to ask you to retire for a few minutes.** I don't think I should need to explain, we're going to take a break. Of course, I would need to speak to Counsel and the Defendant in the absence of the Witness, so we will take a short break. As usual during the break just do not make any calls or anything to enquire about anything to do with this case, continue to observe

²³ ARA pg. 343 lines 22-25 and pg. 344 lines 1 – 15.

the oath or affirmation that you've taken to return a verdict based on the evidence. **So, you may rise and retire to the jury room for a few minutes.**
(Jury is excused)
(Jury left the courtroom)'²⁴

- [43] After the jury left the courtroom, the VC was also asked to leave. At this juncture, the appellant was asked if he wished to say anything and he declined. That exchange is recorded at page 113 of the ARA:

THE COURT: '... Okay, if you Miss - - yeah, you may just go out and yeah, have a seat outside and relax for a little bit, please.
(Witness excused)
Okay, Counsel and of course the Defendant will have to be involved in this. This is not unusual in these cases that the Virtual Complainant does not find it easy to proceed with the evidence at the first blow, so to speak. So, we have to use our judgment and decide how to, how to conduct this matter in the interest of Justice, so that is what is happening here, okay. So, is there any, anything anybody wants to say? Mr. Auguste, you want to say anything?'²⁵ (Emphasis added)

- [44] Thereafter, the prosecutor requested some time to make inquiries. The sitting was suspended for a few minutes to facilitate this. Soon after the sitting resumed, the jury was recalled. The learned judge mentioned nothing to them about what transpired in their absence, remarking simply:

'THE COURT: Yes, Mr. Foreman and Members of the Jury, we shall continue with the evidence of the Virtual Complainant. In these cases we expect things like this to happen, so please bear with us as the matter proceeds.'²⁶

- [45] The prosecutor resumed her questioning of the VC who remained unresponsive. Once again the learned judge asked the jury to retire, as recorded at on page 118 lines 2 – 8 of the ARA:

'THE COURT: Mr. Foreman and Members of the Jury, we shall - - I shall have to ask you to retire again; I will have to give some directions in relation to the continuation of this evidence. So we'll let you know what has happened in a few minutes, okay. So, I'll just ask you to rise for a few minutes and we'll see where we can go.
(Jury is excused from the courtroom)
(Jury left the courtroom)'

²⁴ ARA Pg. 113, lines 5 – 14.

²⁵ ARA Pg. 113 lines 14 – 23.

²⁶ ARA Pg. 116 lines 22-25.

[46] Initially, the proposal (from the bench) was for the VC to testify from behind a screen. The prosecution subsequently made an application in the jury's absence for permission to have the VC give her testimony via video link. The exchange went as follows:

THE COURT: ... Yes, St. Ville, don't leave yet, just wanted to - - yes. Okay, my suggestion is do we have Mr. - - yes, do we have a screen?

MR. BRETTE: We can get one, Sir.

THE COURT: Well, I will suggest that you get one.

MR. BRETTE: Yes, Sir.

THE COURT: I mean we can - - that's all we can do, try a few things and if those don't work, then we know we not getting anywhere, but at this moment that is only suggestion I can make that we put up a screen there so that there can be no eye contact between the two, the Witness and the, and the Defendant. Stand Mr. Auguste and - - right, I cannot proceed without letting you know that you have rights to object to make suggestions or say things on your own behalf. However, in these matters, it is now become well known that sometimes the level of insecurity is so great that we simply cannot allow the Witness to be able to even see you. So, I am making the suggestions that we find a screen that she cannot see you while she is making her - - she's speaking in, in court. You understand what I'm 1 saying?

THE DEFENDANT: Yes, My Lord.²⁷ (Emphasis added)

[47] The court eventually recessed once more. On resumption of the hearing in the jury's absence, the prosecution made an application for permission to lead the VC's evidence via video link pursuant to section 2 of the **Evidence Act**.²⁸ The appellant was asked if he objected. After hearing him and explaining the nature of and rationale of the application, the learned judge granted leave to the prosecution to lead the VC's evidence via video link.²⁹ The Court was then adjourned for other unrelated matters to be addressed.³⁰

[48] When the hearing resumed in the afternoon the jury was recalled. Without informing the jury of the details of what had transpired in their absence, the learned judge explained briefly to them that the Crown had applied for the VC to testify via video link and that the application was granted. He told them:

"You will not (sic) that certain circumstances have changed; an application was made by the Crown to have the Witness and the Virtual Complainant gave (sic) evidence from what was referred to as a video link rather than to having to sit in the Court. This

²⁷ ARA pg. 118, lines 11-25; and pg. 119 lines 1-3.

²⁸ ARA pg. 121 lines 16-25, and pg. 122 lines 2-4, lines 6-11.

²⁹ ARA pg. 123, lines 1-3, 5-9; 17-25; pg. 124 lines 1-25; pg. 125 lines 1 – 25; pg. 126, lines 1-5 and 9-13.

³⁰ ARA pg. 128 lines 15 to 17.

is provided by statute Section 29 of the Evidence Act. It is not used every day but it's used in modern courtroom. It's now not unusual because we have recognized that in order for justice to prevail, there are some witnesses referred to as vulnerable witnesses who has to be dealt with in this way. When the time comes to for me to sum up the matter, I will deal with this at further length, but at this time, I hope that you can understand what has taken place. So, this is twenty-first century and this is where the Court has had to adapt to the circumstance of the times and then make this kind of facility available so that we get justice done and not find ourselves inhibited or intimidated or controlled by other considerations. So, here we are, the evidence will be led as before by Crown Counsel and that will continue from where we left off."³¹ (Emphasis added)

[49] In his summation, the learned judge explained the rationale for considering the VC a vulnerable witness which in turn justified permitting her to testify via video link. He gave directions as to how the jury should deal with this information. He stated:

"Now, you would have recognized that in relation, again, to the Virtual Complainant, her evidence most of it was given by video link and, of course, I think it's important for us to explain that, that is in accordance with the law that we do have now, under the law, the whole issue of what is called a vulnerable witness and a person who allegedly was involved in sexual intercourse at the age of 12 with somebody who apparently was an adult at the time, would be an individual who is likely to be a vulnerable witness.

So, this is affected by age or maturity, any possible disability, possible trauma, witness' fear of intimidation, the background of the Witness, the nature of the proceedings, the nature of the evidence that the - - she's bound to give, that is , people as much as we hear it in songs, and so on an so forth, we really don't like to talk about sex, except we talking about it to a very good friend, but, we don't really like to talk to strangers about sex. So, that in itself is intimidating for a 20-year-old to come and talk about sex, that is something that happen to her in relation to sex, somebody having sex with her is going to be in itself fear of intimidation. And - - so, we can look at many of these things and determine that a witness may be vulnerable. And, what I think assisted us in this case, is that she really had difficulty delivering the evidence while she was in this courtroom.

I have to say that at the end of the day, it's open to you to come to whatever conclusion you wish to come to about that. We, as officers of the court, have certain duties to carry out and I think what we want to do at the end of the day is to ensure that justice is not compromised because of the vulnerability of a witness. So, we take certain steps to protect that witness because you don't want justice to be compromised because of that witness' vulnerability. We, we hold seriously to the view that justice would not be done, it's because of fear or trauma a virtual complainant or any witness, cannot give their evidence truthfully. So, we step in to ensure that justice prevails. As I said, at the end of the day it is a matter entirely for you to decide what you think about what happened. She could not give her evidence in the courtroom, she left, and on video

³¹ ARA Pg. 130, lines 5 – 17.

link you see her on the screen, she gave her evidence, okay, and, that is how we got the evidence before you. It's totally a matter for you, but I have to tell you we were following the law and we were following the law in relation to having identified her as a vulnerable witness."³² (Emphasis added)

[50] In essence, on both occasions the judge took care to ensure that the jury was informed as to why the VC's physical absence from the courtroom was allowed. In his summation he merely elaborated on his earlier explanation to the jury when they had re-entered court following the successful application to allow the VC to testify via video link. The jury directions add nothing substantive to his earlier remarks.

[51] Moreover, the judge's directions to the jury regarding the basis for treating the VC as a vulnerable witness add nothing further to his prior statements to the jury. From the foregoing, contrary to the appellant's submissions the learned judge entertained and disposed of the Crown's application to adduce the VC's evidence in the jury's absence. Furthermore, the appellant took no issue at the application stage or elsewhere in the trial as he now seeks to do.

[52] I hasten to add that to the extent that the appellant's criticism relates to the substance of the learned judge's remarks to the jury after leave was granted to permit the use of video link and during his summation, it is without merit. As a matter of law, it is settled that a trial judge is required to explain to the jury the use of special measures such as video links in the trial to accommodate vulnerable witnesses. The learned judge in the case at the appeal bar pellucidly did so and there is nothing legally objectionable in the explanation he deployed.

Conclusion -Constitutional Questions

[53] As illustrated in the preceding paragraphs, an examination of the transcript of the proceedings in the High Court reveals that the appellant did not raise any of the constitutional questions that he now seeks to have the Court of Appeal consider on appeal. In fact, it has been demonstrated that the video link application was considered and determined in the jury's absence and only one verdict was taken. In addition, none of the constitutional issues that the appellant seeks to argue on appeal arise in this appeal. In the circumstances, on the authority of **Hunte and Khan**

³² ARA pg. 325, line 13 - 326 line 19.

v The State and Levi Maximea v The Chief of Police and others I would decline to consider the appellant's contention that he was denied a fair trial by an independent and impartial tribunal by reason of the alleged breaches of his constitutional right to due process.

Discussion - Contempt

[54] Notwithstanding the ruling that the referenced constitutional questions do not arise for this court's consideration, I consider it prudent to address the appellant's contentions that the contempt of court proceedings were procedurally irregular. The central question highlighted by those submissions is whether the learned judge erred by implementing an improper procedure to determine whether the appellant had committed a contempt in the face of the court by arriving at the trial late. In this regard, the Court is invited to find that fatal mis-steps occurred relative to the composition of the tribunal, alleged failures to inform the appellant of the reason for the inquiry for contempt and that he was entitled to have an attorney represent him for purposes of the inquiry; a lack of an adequate hearing and/or illegal punishment or sanction. It seems to me that these contentions may be and were partially pursued without resorting to constitutional challenge. It is right that they be addressed.

[55] It appears that in framing this aspect of the appeal the appellant laboured under the notion that a charge of contempt of court must in each case be prosecuted by the formal laying of a charge by the Office of the Director of Public Prosecution which is followed by a full trial. The authorities suggest otherwise. It has long been settled that 'every court must possess inherently power to prevent contempt'.³³ Traditionally, contempt of court is not considered to be a crime per se but rather a *sui generis* offence against the court.³⁴

[56] The criminal offence of contempt of court is created by section 380 of the **Criminal Code** which states:

"380. CONTEMPT OF COURT

- (1) A person commits the offence of contempt of court if he or she—
- (a) assaults a judge or any other judicial officer while he or she is carrying out his or her official functions in the Court or threatens to assault the person in Court during Court proceedings;
 - (b) disturbs or obstructs Court proceedings by insulting behaviour;
 - (c) by words or conduct wilfully interrupts or disturbs proceedings of the Court;

³³ Hamilton v Anderson (1858) 6 WR 737.

³⁴ Petrie v Angus (1889) 17 R (J) 3; and Mayer v HM Advocate 2004 S.C.C.R. 734.

- (d) wilfully with force or threats hinders the person from entering or leaving any Court or removes any person from, or detains him or her in any Court;
- (e) being a witness, without lawful excuse, refuses to be sworn or on being sworn in refuses to answer any question;
- (f) being counsel in proceedings of a Court fails or refuses without lawful excuse to obey an order of the Court;
- (g) publishes any matter which is intended or is likely to prejudice the fair trial or conduct of criminal proceedings;
- (h) publishes any matter which prejudices issues which are to be tried or are being tried by the Court;
- (i) publishes any matter which is calculated to bring the Court or a Judge into contempt or to lower his or her authority or the lawful process of the Court;
- (j) makes any false or misleading statement either orally or in writing to or concerning a judge or magistrate in respect of the performance of his or her function which is calculated or is likely to bring him or her into ridicule odium or contempt.

- (2) A person who commits of an offence under subsection (1) is liable on conviction on indictment to **imprisonment for 2 years.**" (Emphasis added).

[57] The offence created by section 380 criminalises any conduct that tends to be disruptive of court proceedings; or any conduct that may undermine the legal process, challenge the court's authority or diminish respect for and the dignity of the court. Being indictable, the proceedings must be initiated in and tried in the High Court.

[58] A related but lesser offence is created by section 1198 of the **Criminal Code** which provides:

"1198. HIGH COURT TO FINE OR COMMIT FOR CONTEMPT

If any person commits any contempt of Court before the judge sitting in Court or in chambers, **it shall be lawful for the judge to punish the person in a summary manner by a fine not exceeding \$500, or by commitment to the correctional facility for any period not exceeding 3 months.**" (Emphasis added).

[59] While at first blush sections 380 and 1198 appear to be dealing with identical criminal offences, closer examination reveals that they each prescribe separate and different penalties. This demonstrates that the infraction contemplated under the latter is less grave than the former. In addition, while section 380 creates a raft of criminal offences which attracts a discrete penalty, section 1198 deals solely with what is commonly referred to as 'contempt in the face of the court' or contempt 'in *facie curiae*' for which a lesser punishment is prescribed. Another distinguishing feature in the two sections is the method of trial. Offences under section 380

would necessitate the laying of a formal charge against the defendant followed by a full trial. On the other hand, section 1198 expressly requires only a summary hearing and often before the judge in whose court the offence was committed.

[60] Contempt in the face of the court is described by the learned authors of **Halsbury's Laws of England**³⁵ thus:

"The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. Although the boundaries of this kind of contempt have not been precisely defined, a contempt in the face of the court may be broadly described as any word spoken or act done in, or in the precincts of, the court which obstructs or interferes with the due administration of justice or is calculated to do so [R v Almon (1765) Wilm 243 at 254]. In order to constitute a contempt in the face of the court, it appears to be unnecessary that the act of contempt should take place wholly, or in part, in a courtroom itself; nor does it seem to be necessary that all the circumstances of the contempt should be within the personal knowledge of the judicial officer dealing with the contempt."

[61] A similar description is supplied in **Stair Memorial Encyclopedia** as follows:

"The concept of contempt committed in the face of the court or *in facie curiae* appears to be one of English origin, being used with reference to cases where the court could act of its own motion and to distinguish the powers of superior and inferior courts of record. It was examined by Lord Denning MR in *Balogh v St Albans Crown Court* [[1975] QB 73] where he concluded that it 'covered all contempts for which a judge of his own motion could punish a man on the spot' and really meant 'contempt in the cognisance of the court'. The term does not, therefore, mean only contempts committed in sight of the court, but the precise scope of such contempts outside the sight or at least precincts of the court is debatable. One working definition is 'misconduct in the course of proceedings, either within the court itself or, at least, directly connected with what is happening in court'³⁶

[62] As to the procedure to be adopted by the court in dealing with contempt in the face of the "court in a summary manner, the learning in **Halsbury's Laws of England** is that:

"In the case of contempt in the face of the court the offender may be committed at once, and no notice or formal institution of proceedings is necessary. [However], [T]he contempt must be stated distinctly, and an opportunity of answering given. Any branch of the High Court and each division of the Court of Appeal has jurisdiction to punish contempts in its face."³⁷

³⁵ Volume 24 (2025) at para. 6.

³⁶ 2nd reissue at para 15.

³⁷ Volume 24 (2025) at para. 95.

[63] The learned authors of **Stair Memorial Encyclopedia** provide similar guidance. They cite **Robertson and Gough v HM Advocate**³⁸ in which the Scottish High Court ruled that use of the summary procedure for contempt in the face of the court (that is not directed at the presiding judge) does not violate the principles of fairness and article 6 of the European Convention on Human Rights. Furthermore, the High Court set out the following steps in the summary procedure: 1) informing the suspected contemnor of the nature of the contempt he is accused of committing; 2) if the conduct constitutes a crime, ascertaining from the Crown whether it intends to prosecute the suspect in which case the court may defer to the prosecutor; 3) allow the suspected contemnor the opportunity to receive legal advice and detain him for the shortest period necessary for such purpose; 4) permit the defendant to make representations on fact and law and where necessary adduce evidence; 5) hear submissions and render a determination on the facts and law as to whether the offence of contempt in the face of the court has been established; 6) if contempt is made out allow the opportunity for an apology and/or plea in mitigation [if not, discharge the defendant from the charge]; 7) decide what if any penalty to impose.

[64] It is to be noted that the decision of the Scottish High Court is not binding on this Court. However, the steps outlined in **Robertson and Gough** mirror the procedure in this jurisdiction for the summary disposal of ancillary proceedings in criminal proceedings in the High Court referred to as *voir dire*s. Importantly, these procedures incorporate natural justice prerequisites. In the absence of statutory procedural provisions in Saint Lucia's legislation, this approach commends itself as adequate, reasonable and just. I therefore adopt it as a useful guide against which to evaluate the approach taken by the learned judge at the trial.

[65] Reduced to essentials, the procedural steps in a summary hearing require firstly, that the defendant be informed that his conduct constitutes contempt in the face of the court and that an inquiry will be conducted by the court to determine whether such offence is made out on evidence before the court. It is imperative that he be told what is the conduct that is being impugned. Secondly, the defendant should be told that he is entitled to seek legal representation for purposes of the hearing. Thirdly, he must be afforded an opportunity to

³⁸ 2008 JC 146.

make representations in his defence by supplying evidence and making submissions. Fourthly, the court decides whether contempt is established. If it isn't, the defendant is discharged in respect of that inquiry. Fifthly, if contempt is proven beyond reasonable doubt the defendant should be allowed to enter a plea in mitigation after which the judge decides what if any, sanctions to impose and makes the appropriate order.

[66] The referenced extracts from the transcript reveal that the learned judge conducted a summary hearing of the contempt proceedings against the appellant. When examined against the procedural steps outlined in **Robertson and Gough**, the learned judge did not inform the appellant that he was facing a charge of contempt in the face of the court for arriving late before embarking on the inquiry. However, he understood that the inquiry concerned his tardiness. He was not informed that he was entitled to seek legal representation with respect to the hearing. In those respects, the learned judge erred by deviating from well-established natural justice and administrative law imperatives.

[67] The appellant was afforded the opportunity to cross-examine witnesses who testified and he was allowed to give evidence. To this extent, he was able to represent his version of the events that led up to his tardy arrival at court and to probe any perceived misrepresentations by the witnesses. Although the learned trial judge did not invite him to make submissions and this is the ideal, I am satisfied that this was not fatal to the conviction.

[68] Regrettably, the learned judge did not give the appellant an opportunity to make a plea in mitigation or revocation of bail before remanding him in prison. He thereby erred. The appellant contends that the procedural mis-steps by the learned judge in conducting the summary hearing were fatal to the appellant's conviction for contempt of court and by extension conviction of the substantive charge of sexual intercourse with a minor.

[69] Looking at the circumstances in the round, the appellant's engagement in the contempt hearing reflects that from the inception, he understood that the inquiry had to do with why he arrived at court late and whether he had a good explanation for so doing. It is not clear whether he understood that a finding could be made that he had committed contempt in the face of the

court or that sanctions could flow from such a finding. He has led no evidence that he did not and no finding is made that he did not. What is certain is that he appeared to appreciate that the court had embarked on an inquiry which was serious enough to cause him to elect to give exculpatory evidence.

[70] It is settled that not every departure from procedural norms or error of law or fact will invalidate a decision arrived at in legal proceedings. The proviso to section 35 (1) of **the Eastern Caribbean Supreme Court (Saint Lucia) Act ('Supreme Court Act')**³⁹ provides that this Court may if it thinks that a point raised on appeal might be decided in the appellant's favour dismiss the appeal in an appropriate case if it considers that no miscarriage of justice has actually occurred. Applying the proviso to this case with respect to the contempt proceedings, while there were some procedural missteps by the learned judge in conducting the contempt proceedings and in that regard the appellant might succeed in challenging the procedure adopted, I am not persuaded that a miscarriage of justice occurred in relation to that aspect of the case so as to contaminate the criminal trial in general. It cannot be said that the learned judge's determination that the appellant was guilty of contempt of court was contrary to the evidence or the law and was therefore unjustified. I would therefore dismiss this ground of appeal.

[71] I am therefore satisfied that despite the flawed approach taken by the learned judge by failing to inform the appellant of the nature of the offence being inquired into and of his right to legal representation, no serious injustice was thereby occasioned sufficient to invalidate the contempt of court proceedings or the determination by the learned trial judge that the appellant was guilty of contempt of court for which he was remanded in prison.

[72] It is noted that the period of the appellant's time in custody for contempt of court lasted from June 17th 2019⁴⁰ to June 26th 2019⁴¹ - a period of 10 days. He was never remanded prior to trial in respect of the offence of sexual intercourse with a minor.⁴² Suffice it to say that this

³⁹ Cap. 2:01 of the Laws of Saint Lucia.

⁴⁰ ARA pg. 89.

⁴¹ ARA pg. 85 lines 1-2; pg. 89 lines 10-13; pg. 215 lines 23-25.

⁴² ARA pg. 421 lines 10-15 and 22-25; and pg. 422 lines 1-5.

sentence is at the lower end of the penalty prescribed at section 1198 of the **Criminal Code** and was proportionate and is lawful.

Apparent bias

- [73] The appellant also sought to impugn the contempt proceedings and the trial by imputing apparent bias to the learned judge limited to the contempt hearing. **Re Medicaments and Related Classes of Goods (No. 2)** restated the test for apparent bias that was laid down in **Porter v McGill** in which the UK House of Lords articulated it to be:

‘whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal is biased.’⁴³

It is now accepted that the fair-minded and informed observer is considered to be a reasonable member of the public who is not complacent, naïve or unduly cynical or suspicious. In addition, he or she must adopt a balanced approach to evaluating allegations of apparent bias.

- [74] I remain mindful of the sentiment expressed in **Robertson and Gough** which I fully endorse, that a judge is not disqualified from adjudicating over ‘contempt in the face of the court proceedings’ simply because the impugned conduct took place in relation to proceedings that are ongoing before him. In fact, the very nature of such proceedings requires that they be resolved with dispatch, in a summary manner, without the usual formalities attendant on a full-blown inter-party trial, unless the circumstances are such that referral to another judge is warranted.
- [75] The appellant has pointed to nothing on the evidence, the surrounding circumstances or the law that distinguishes this case from the usual ones to qualify it for referral to another judge to resolve the contempt proceedings. I am satisfied that there is no such distinguishing feature that would have necessitated a recusal by the learned trial judge based on apparent bias.
- [76] Additionally, in my estimation, the contempt of court proceedings were incidental to the main trial; had no bearing on the evidence led in that trial, the jury’s deliberations or the sentence; and any procedural deficits in the *voir dire* would have no impact on the substantive trial. The

⁴³ [2001] UKHL 67 at para. 103.

proceedings were accordingly not fatal to the appellant's conviction and sentence for unlawful sexual intercourse of a minor.

Arraignment

[77] Another complaint by the appellant was that he was not arraigned in the jury's presence before they were impaneled. On this score, it is a matter of record that he was arraigned before Cumberbatch J. on 7th November 2013 when he pleaded not guilty to both counts on the indictment⁴⁴ following which the matter was adjourned for trial; and further adjourned on several occasions.⁴⁵ By then, Belle J. had replaced Cumberbatch J. and was the trial judge.

[78] When the case resumed on 18th June 2022, the learned trial judge placed the appellant in the charge of the jury by reading the counts on the indictment and stating that he had pleaded not guilty to both offences on the indictment. He instructed them:

'... Upon his indictment, he has arraigned and upon his arraignment, he has pleaded that he is not guilty. Your charge therefore is to require whether he is guilty or not and to listen to the evidence.'⁴⁶

[79] There is nothing on the record to demonstrate that the appellant took exception to this pronouncement by the learned judge at any point during the trial. In fact, the appellant cross-examined the witnesses presented by the prosecution and called a witness of his own which suggests that he had indeed evinced the intention to contest the charges. Moreover, the instant appeal against his conviction is confirmative of such intention. There is therefore nothing to this complaint.

[80] As regards the procedure for and the time of arraignment, the law requires that an accused be arraigned prior to his trial by having the offences on the indictment read to him to which he must enter a plea forthwith. The law contains no stipulation that the arraignment be conducted at the same sitting of the court at which evidence is presented. Indeed, section 887 of the **Criminal Code** is unequivocal and provides:

⁴⁴ See handwritten notation on the upper left corner of pg. 7 of the Amended Record of Appeal, signed by the presiding judge; and pg. 06A.

⁴⁵ ARA pg. 10 – 43.

⁴⁶ ARA pg. 100, lines 9-11.

“887. ACCUSED TO APPEAR AND PLEAD

- (1) At the time appointed for the trial or sentencing of the accused upon any indictment he or she shall appear or be placed at the bar.
- (2) The accused shall be informed in open Court of the offence with which he or she is charged as set forth in the indictment, and he or she shall be required to plead instantly to the indictment, unless where the accused, having been committed for trial objects, and the Court finds that he or she has not been duly served with a copy of the indictment.
- (3) A trial is deemed to begin when the accused is called upon to plead to the indictment.” (Emphasis added)

[81] In this case, the appellant was arraigned in accordance with the law. His belated complaints that he was not and that the jury was told erroneously that he was arraigned are therefore without merit.

Empanelment of the Jury (app present and able to challenge)

[82] It was submitted on the appellant’s behalf that he was not present when the jury was empaneled and he was not afforded an opportunity to challenge any juror before the oath was administered to them. He further criticised the learned judge for inquiring of the jury whether they knew someone by the name Gilroy Auguste. He submitted that they should instead have been asked whether they knew him and this was a flaw which invalidated the proceedings. Once again, the transcript sheds light on what transpired.

[83] Twelve jurors including alternates were selected following which the learned judge instructed them that if any of them knows someone by the name of Gilroy Auguste, is related to him, is his friend or for any other reason cannot render a fair verdict they should let him know.⁴⁷ He then asked the prosecutor if there was any challenge to the jurors. For completeness I set it out in its entirety:

“THE COURT: Okay, thank you. The twelve of you who have been selected, we are about to proceed with the trial of Gilroy Auguste, if you know someone by that name and you are his relative or friend or associate or you suspect that you know this person and you cannot render a fair verdict in this matter, please indicate so that we can have you replaced by another juror; so, that’s the first thing. This is a matter of sexual offence, so that’s another consideration. ... after we find out from counsel who is upfront if he has any challenges, if the prosecution have any challenges. Any challenges?

MISS ST. VILLE: No challenges, My Lord.”⁴⁸

⁴⁷ ARA pg. 53.

⁴⁸ ARA lines 3 -12.

[84] Immediately after, as the learned judge was about to invite the witnesses to present themselves to the jury, the court orderly announced that the appellant had arrived. Immediately, the learned judge inquired if he had any objections to any of the selected jurors. The following exchange took place between them:

“THE COURT: Well, we will - - he will have to come in to, to this box.

Just stand there please, in the, in the witness box, please, thank you. Yes, we have selected a - - some jurors so far, can you let the Court know whether you have any objection or to any of them sitting on your matter, your trial. Let the wit - - the other witnesses wait, please; we dealing with his objections at the moment, sorry. Yes, **any of these persons that you think should not sit in your jury?**

THE DEFENDANT: No, My Worship.

THE COURT: Sorry.

THE DEFENDANT: No, My Worship.

THE COURT: No, okay, so there're no challenges. Okay, have a sit (sic) for the time being. We shall have the witnesses, please. ...”⁴⁹ (Emphasis added).

[85] From this discourse, it is beyond contradiction that the learned judge invited the appellant to challenge any of the jurors if he had objections to such person sitting on the jury. He responded twice in the negative. This exercise took place after the jurors were selected and before the oath was administered to them and therefore before the empanelment was concluded. This accords with the letter and spirit of section 954 of the **Criminal Code** which states; ‘An objection to the whole panel of jurors must be made before any juror has taken his or her seat in the jury box and not afterwards.’ It is noteworthy that the appellant was present before and during the administration of the oaths to the jury members and raised no concerns whatsoever about the process being irregular or otherwise unfair or problematic.

[86] In any event, it is the law that if the jury is empaneled without challenge, it is deemed to be validly and properly constituted for all intents and purposes. Section 940 of the **Criminal Code** states expressly:

“940. PRESUMPTION OF REGULARITY AND LAWFULNESS OF PANEL

- (1) The persons selected shall be the jurors to serve for the trial of all issues at that sitting of the Court.
- (2) Unless challenged and set aside, the panel shall be deemed to be correctly selected and to be regular and lawful in every respect.”

⁴⁹ ARA pg. 53, lines 18 -25 and pg. 54 lines 1 – 3.

[87] Likewise, the learned judge explained to the jury members why he inquired of them if they knew anyone by that name. Each of them would have been placed on notice that they should indicate whether they were disqualified from serving as a juror by virtue of knowing him or being related to them. No doubt this admonition would have been fresh and operating in their minds when the appellant arrived to court a few minutes later and placed an onus on each of them to so signal to the court. It is reasonable to infer that they understood the caution and that their silence suggests that they did not know him or were otherwise disqualified. The appellant has advanced no evidence to suggest otherwise and there is nothing before this court to support such a finding or a ruling that the learned judge erred in this regard.

Corroboration

[88] Another argument advanced by the appellant relates to corroboration as an issue in the trial. As I understand it, the appellant takes issue with the absence of a corroboration warning from the learned judge's summation to the jury. It was submitted that a corroboration warning as to recent complaint regarding the identity of the alleged perpetrator of a sexual offence, is required by the common law and under sections 135 and 136 of the **Evidence Act**, no such direction was given and this deprived the appellant of a fair trial.

[89] Learned counsel for the Crown responded that the appellant's identity was never an issue because in his version of what took place on the night of the incident, the appellant placed himself in the VC's presence. Accordingly, the only aspect of the factual matrix that necessitated a corroboration or unreliability warning relates to the sexual element of the offence. It was contended that the learned judge gave adequate directions to the jury on those matters at page 336 of the transcript. This is in line with the best practice guidance articulated by Lord Hailsham in **R v Lawrence**⁵⁰ that 'A direction to a jury should be custom-built to make the jury understand their task in relation to the particular case'. Reliance was also placed on **Gael Dariah v R**⁵¹ and **Darlington Noel and Jan Isidore v R**⁵².

⁵⁰ [1982] AC 510 at pg. 519.

⁵¹ SLUHCRA2017/0012 (delivered 10th March 2021, unreported).

⁵² SLUHCRA2016/0008 and SLUHCRA2016/0007 (delivered 6th December 2022, unreported).

Discussion

[90] A trial judge may be required by law to issue a corroboration warning to a jury in certain situations. In such a case, the judge is expected to warn the jury that it is dangerous to act on the uncorroborated evidence of a virtual complainant to convict an accused or words to such effect. Formerly, at common law such a warning was mandatory in trials for rape or other sexual offences but is no longer required.

[91] The requirement for a corroboration warning in sexual offence cases has been abolished by section 135 of the **Evidence Act**. Therefore, the learned judge had no obligation to include such a warning in his summation to the jury. He issued no corroboration warning in this case and cannot be faulted for not doing so. The applicable part of section 135 provides:

“135. Corroboration requirements abolished

- (1) Subject to section 15, and to subsection (2), it is not necessary that evidence on which a party relies be corroborated.
- (2) ...
- (3) Despite any rule, whether of law or of practice, to the contrary, but subject to the other provisions of this Act and the Criminal Code, Chapter 2, Part 1, where there is a jury, it is not necessary that the Judge-
 - (a) Warn the jury that it is dangerous to act on the uncorroborated evidence or give a warning to the same effect; or
 - (b) Give a direction relating to the absence of corroboration.”

[92] By section 136 of the **Evidence Act**, an ‘unreliability warning’ has been introduced and is deployed at the trial judge’s discretion depending on the circumstances of the case. It appears that the appellant has conflated the corroboration warning with the unreliability warning. I shall endeavour to demystify their applicability in addressing the appellant’s submissions.

[93] The relevant parts of section 136 state:

“136. Unreliable Evidence

- (1) This section applies in relation to the following kinds of evidence-
 - (a) ...
 - (b) identification evidence;
 - (c) evidence the reliability of which may be affected by age, ill health, whether physical or mental, injury or the like;
 - (d) in criminal proceedings-
 - (i) evidence given by a witness called by the prosecutor, being a person who might reasonably be supposed to have been concerned in the events giving rise to the proceedings, or

- (ii) oral evidence of official questioning ...
- (e) in the case of a prosecution for an offence of a sexual nature, evidence given by a victim of the alleged offence; ...
- (2) Where there is a jury the Judge shall, unless there are good reasons for not doing so-
 - (a) warn the jury that the evidence may be unreliable;
 - (b) inform the jury of matters that may cause it to be unreliable; and
 - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
- (3) It is not necessary that a particular form of words be used in giving the warning or information.
- (4) This section does not affect any other power of the judge to give a warning to, or to inform the jury.” (Emphasis added)

[94] In **Gael Dariah v R**, this court explained that under section 136 of the **Evidence Act** a trial judge must decide whether or not to caution a jury regarding the potential unreliability of evidence given by a virtual complainant where the offence charged is of a sexual nature; or consists of identification evidence or where the reliability of the evidence may be affected by the age of the witness. If there are good reasons for not giving such a warning the judge need not caution the jury. If he elects to issue such a warning, he must direct the jury that such evidence may be unreliable, highlight the features of the evidence that renders it potentially unreliable and importantly, he must warn the jury that it is necessary to cautiously evaluate whether to accept the evidence and use caution in ascribing weight to such evidence.

[95] No particular form of words is necessary as long as the warning is given. As stated by Baptiste JA in **Darlington Noel** such warning:

“...is to be given in terms which are appropriate to the particular case rather than in the form of a standardised direction which slavishly adheres to the terms of the section. Also, warnings are not to be approached as mere matters of ritual. What needs to be said to a jury in order to ensure that they bring a full appreciation to a case will depend upon the individual case.”⁵³

[96] In practice, the learned trial judge should properly invite submissions from counsel for the respective parties as to the appropriateness of giving a warning. If he decides not to include such a warning, he should provide his reasons.⁵⁴

⁵³ Ibid at para. [32].

⁵⁴ Supra n. 52.

[97] In this case, the learned judge elected to give an unreliability warning. He directed the jury as follows:

"It's also very important that you assess the credibility of the Virtual Complainant in particular because, of course, the law says that you should do so. That you, you have to be - - determine whether she is reliable and in this particular case you use the same directions that I have given to make that determination. It's very important in a case such as this, and with an individual who allegedly suffered something like this at the age and time when it was - - allegedly suffered, at the age of 12 to determine whether or not her evidence is reliable. So, you have to decide whether you can rely on her evidence and when you have made that decision then you can determine whether what she was saying was true or not true and move to the next step based on that. That is very important because, in this particular case, there is, there is really nothing else to go on in relation to the allegation, the allegations in relation to the two counts other than her evidence. There is no eyewitness of sexual intercourse or an indecent assault, and the medical evidence as far as it goes, goes not further, you can check it for yourself, than to say that she was no longer a virgin, but you remember that although a swab was taken, the result for the swab were never produced in court to establish, you know, whether there was any chemical evidence, any, any, any trace evidence, I should say, that establishes that it was the Defendant who had sex with the Virtual Complainant and then if indeed it relates to this particular allegations or these allegations before the Court. So you take those into account."⁵⁵
(Emphasis added)

[98] In the case at the appeal bar, the learned judge highlighted for the jury that in relation to the VC's evidence, they had to decide whether she was reliable in light of the offence charged. He explained that because of her age at the time of the alleged offence, the absence of an independent witness account regarding the alleged sexual assault by the appellant, and the inconclusive medical evidence concerning whether she was sexually assaulted it was necessary to exercise special care in evaluating her testimony and determining the weight to be given to it. It can be said that the learned judge captured the essentials of the 'reliability caution' specified in section 136 of the **Evidence Act** as to the care to be taken in evaluating the VC's testimony as a whole and particularly in relation to her allegations of sexual assault by the appellant. To my mind, the judge neither misdirected the jury nor omitted any essential ingredient of the statutory warning.

⁵⁵ ARA Pg. 321 lines 4-22.

[99] As to the issue of identification, the learned judge directed the jury in his summation:

“The police accompanied her to doctor’s office, doctor examined her, took a swab, then they went to the Vieux Fort Police Station to identify, remember there was a police officer who came and his statement was tendered, that was all about identification, I didn’t think it was contentious, Mr. Auguste didn’t have any questions for him; you can look at the statement but at the end of the day Mr. Auguste is not disputing that the Virtual Complainant saw him that night; he’s saying there was no sex, all right, that’s what he’s saying. So I don’t know that the identification parade takes us anywhere. It has not been insinuated that she had sex with somebody else during that period of time. The, the idea is basically this is the person she was with, he is saying they he did not have sex with her. She described what that, what that identification parade went like and how she identified Shaggy or the, the Defendant”.⁵⁶

[100] From the foregoing, it is clear that the learned judge was satisfied that the appellant’s identity was not in issue at the trial. Accordingly, he determined that there was no need to give the jury a warning about identification. Additionally, he quite properly included a direction as to unreliability having regard to the fact that a sexual offence was charged. Before this court, the appellant has advanced no argument to suggest that identification was in issue in the High Court which made it imperative for the judge to caution the jury on the VC’s reliability in relation to his identity. I discern no such contention from the record. In the premises, I am satisfied that the learned judge was entitled to refrain from giving the jury a warning as to reliability with respect to the appellant’s identity. In doing so he did not omit a necessary direction.

Complaints as to Procedural Errors

[101] The appellant took issue with a number of other occurrences in the trial that he described as being unfair to him. It was argued that the judge voiced his opinion on the importance of calling Justices of Peace; the judge permitted a number of witnesses to refresh their memories without ensuring that the conditions of the **Evidence Act** were satisfied; the judge allowed witness statements to be tendered in evidence without the requirements of the **Evidence Act** being satisfied; the judge allowed prosecution witnesses to be treated as hostile without ensuring that section 35 of the **Evidence Act** was satisfied and witnesses were permitted to corroborate themselves to correct inconsistencies that went to their

⁵⁶ ARA pg. 335, lines 10 – 21.

credibility and reliability.

- [102] Relying on **Marius Wilson v R**⁵⁷ the appellant argued that the failure to treat with the issue of hostile witnesses as a matter of procedure and in directions to the jury constitutes a miscarriage of justice which renders the conviction unsafe and unsatisfactory. He highlighted in this regard the following pronouncement by this court in **Marius Wilson**:

“The judge must direct the jury that the previous statement is not evidence in the case and they cannot treat it as evidence in the case save where the witness adopts or confirms specific parts of their previous statement. Such a direction is necessary in Saint Lucia because, unlike some other jurisdictions, a previous inconsistent statement of a witness is not evidence of the truth of its contents. Thus, it is not open to a jury to treat what the witness said in their witness statement against an accused as the truth and act upon it. The bottom line is that the evidence is what the witness said in the witness box at trial and not what they said in their previous statement.”⁵⁸

Respondent’s submissions

- [103] Noting that reference to Justices of Peace (“JPs”) was made only once in the summation, learned counsel for the respondent submitted that no challenge was made to the admissibility of documentary evidence involving the use of JPs and no allegations of impropriety by the Police were raised. The Court should therefore find no fault with the learned judge’s direction that:

“you would have heard the mention of Justices of the Peace there were used in theses (sic) case to make sure that the police follow what we use to call once upon a time the judge’s rules, which means that you’re not supposed to use any force of any threats, etcetera, (sic) to obtain statements or any inducement,, etcetera, and the Justices of the Peace are there to make sure that that doesn’t happen, okay.”⁵⁹

- [104] As to the type of assistance that the court is expected to provide to an unrepresented defendant, the respondent submitted that there is no absolute right to legal representation in the State. The judge’s role when such a defendant is required to respond to a legal application is merely to explain in simple terms the nature of the application and the options available to the defendant. The learned judge did so in the instances when such applications were made during the trial.

⁵⁷ SLUHCRA2021/0003 (delivered 25th July 2023, unreported).

⁵⁸ Ibid at para [30].

⁵⁹ ARA pg. 339 lines 2-6.

- [105] Learned counsel for the respondent accepted that the appellant did not engage in robust cross-examination of the VC and as a result the material aspects of her testimony remained unchallenged. However, it was pointed out that the jury was directed that the defence was one of bare denial that permeated the appellant's statement under caution, his interview under caution and his closing statement at the trial. In the round, any degree of prejudice suffered through lack of legal representation was insufficient to amount to a miscarriage of justice. I agree with this submission.
- [106] Regarding the contention that witnesses were permitted to refresh their memories from their witness statements without the proper foundation being laid, it was submitted that Woman Police Corporal No. 554 Leila Belasse ("WPC Belasse") was invited to refresh her memory as to the surname of the VC's mother which had no bearing on any fact in issue.
- [107] It was also submitted that hostile witness applications were made on behalf of the VC's mother Shermin Joseph and PC Torille. It was argued that a necessary part of those applications were applications to refresh their memory, and a proper foundation was laid for doing so. It was contended that the statutory requirements of section 35(2) of the **Evidence Act** were satisfied in PC Torille's case. Arising from the applications, Ms. Joseph was deemed a hostile witness and cross-examined during which she accepted the material aspects of her witness statement. It was therefore not necessary to tender a redacted version of her witness statement into evidence. There was no material inconsistency in her evidence that would have affected her credibility. In any event, her testimony was so insignificant that it would have had little to no effect on the verdict.
- [108] As to the directions given in relation to PC Torille's evidence, the respondent submitted that the summation must be viewed as a whole for proper effect. It was submitted that while the learned judge used the words 'dismiss the evidence', the spirit of the entire direction suggests a reference to the witness statement that was given to the jury. When linked to his direction on how to assess a witness' credibility, the jury would have been left in no doubt

that they should exercise caution when considering PC Torille's evidence and attach little to no weight to his witness statement. The directions were therefore adequate.

Discussion

[109] It is an accepted principle of law that a trial judge is duty bound to ensure that a defendant has a fair trial whether or not he is represented by counsel.⁶⁰ Where a defendant is unrepresented, the trial judge in seeking to ensure a just trial must be careful to take reasonable efforts to protect the interests of the defendant and other parties in the proceedings including the virtual complainant. In doing so, the judge is required as appropriate to provide guidance to the defendant on the parameters within which he must operate in framing questions for witnesses and putting his defence. The transcript of the proceedings demonstrates that the learned trial judge facilitated the appellant's presentation of his defence and at appropriate junctures explained the procedures and his options to him. The judge is not permitted to descend into the arena and conduct the defendant's case by formulating and posing questions on his behalf.

[110] An example of the learned judge's engagement with the appellant is captured in the extract of the transcript above in relation to the suggestion that the VC testify from behind a screen. Not only did the learned judge explain to the appellant why this was being contemplated, he confirmed from him that he understood the explanation and later when the video link was being considered, afforded the appellant an opportunity to advance legitimate objections after giving an explanation as to the rationale for that measure. The appellant's contention that he was not properly and sufficiently assisted by the learned trial judge is not borne out by the record.

[111] Regarding the appellant's submission that the learned judge made important rulings on legal matters in the jury's presence, it is to be noted that those instances were not identified by the appellant. It is not the role of this court to peruse the transcript to pinpoint all instances when the learned judge made a ruling in the jury's presence, answer whether it concerned an important legal point and then determine the propriety of such an approach. It is for the

⁶⁰ See *R v Milton Brown* [1998] All ER (D) 187.

appellant to catalogue the bases for this criticism and present them for the court's consideration. His failure to do so is fatal.

Reference to Justice of the Peace

[112] The transcript contains a reference by WPC 370 Bridgette Algodel ("WPC Algodel") during her testimony to the use of a Justice of the Peace ("JP") for the purpose of recording a statement under caution and interview under caution. Basically, she testified that the police summoned a JP to witness the recording of both statements from the appellant. It is to be noted that the learned judge made no comments at that time regarding the involvement of a JP.

[113] He addressed the jury on this in his summation. He explained the rationale for involvement of JPs in this manner, indicating essentially that their presence seeks to address concerns about intimidation or coercion of accused persons. The appellant made no such allegations against the police. Accordingly, it was unnecessary for the learned judge to elaborate further about the role of the JP. In my estimation, he did not err by including that short statement in his summation. The appellant's criticism of him in this regard is unfounded.

Refreshing memory

[114] Turning next to the ground of appeal about applications for witnesses to refresh their memory, the **Evidence Act** makes provision for a witness while giving evidence to refresh his or her memory from a written record created at a time close to the occurrence about which testimony is being adduced. Refreshing of memory may be done only with leave of the court. Among the factors to be considered before permission is granted are whether the witness is able to recall the fact without using the written document, the date when the document was written, whether the contents were correct at that time and whether the document is an original or a copy. On this matter, section 30 of the **Evidence Act** states in part:

"30. Attempts to refresh memory in court

- (1) A witness may not in the course of giving evidence, use a document to try to refresh his or her memory about a fact without leave of the court.
- (2) The matters that the court shall take into account in determining whether to give leave pursuant to subsection (1) include –

- (a) whether the witness will be able to recall the fact adequately without using the document; and
- (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that –
 - (i) was written or made by the witness at a time when the events recorded in it were fresh in his or her memory, or
 - (ii) was, at such a time, found by the witness to be accurate.”

[115] In giving effect to this provision, it is trite law that the procedure entails a line of questioning (by the party for whom the witness is testifying) to ascertain that the witness cannot recall the particular fact, that a document exists which would assist in jogging her memory that was made at a time when the incident was fresh in her mind and that it is an accurate record of the event. An oral application is then made to the presiding judge for leave for the witness to refresh her memory. The court would inquire of the other party whether there is an objection to the application, decide whether it is a valid objection and would grant leave if the interest of justice so requires.

[116] In relation to WPC Belasse, it appears from the transcript that she had difficulty recalling the full name of the VC’s mother. She recounted:

My Lord, I was - - I proceeded to 22 the said office on Chisel Street, where I met with Miss Shermin Jules, Jules and Miss 23 Alpha Jules.’⁶¹

As the examination-in-chief proceeded, learned counsel Ms. St. Ville questioned her about this. The transcript on this part of the proceedings reveals how this unfolded:

“Q. You also told this Court that you met Miss Shermin Joseph and Miss - - Miss Shermin Jules, sorry, and Miss Alpha Jules at the, at the medical office; are you sure that the Virtual Complainant’s mother’s name is Shermin Jules?

A. From my recollection, yes, My Lord.

THE COURT: Yes, go ahead.

BY MISS ST. VILLE:

Q. Miss Bellase, do you recall giving a statement in this matter?

A. Yes, My Lord.

Q. And, at the time you gave your statement, the incident would have been fresh in your memory?

A. Definitely.

⁶¹ ARA pg. 184 at lines 22 – 24.

Q. And, if you were to see this statement again, how would you be able to identify it?

A. By my signature.

MISS ST. VILLE: My Lord, leave for the Witness to refresh her memory?

THE COURT: Just a moment please. Mr. - stand Mr. Auguste, do you have any objection to what the Counsel is trying to do; this, this issue of the name?

THE DEFENDANT: No, My Lord.

THE COURT: Sorry.

THE DEFENDANT: No, My Lord.

THE COURT: No, no objection.

THE DEFENDANT: No objection.” (Emphasis added)

- [117] This excerpt from the transcript reveals that the witness did not express any difficulty with recalling the surname Joseph. However, she proffered the incorrect surname ‘Jules’. Astute learned counsel sought and obtained the court’s leave without objection from the appellant to enable Corporal Bellase to refresh her memory. The procedure was flawless.

Hostile witness

- [118] The term ‘hostile witness’ applies to a witness for a party who after being sworn to testify in a matter is recalcitrant or unfavourable to that party and is unwilling to be truthful under examination-in-chief by that party. He may be deemed hostile by the court on it appearing that he is unwilling to co-operate with the party who has tendered him as a witness. In such a case, permission is usually granted to the applicant to cross-examine his own witness and to prove that he has on a previous occasion made a statement inconsistent with the testimony he is intent on giving. Before doing so the witness must be reminded of the circumstances under which that earlier statement was made and he must be asked if he made that statement.

- [119] The **Evidence Act** makes provision for treating a witness as hostile on application pursuant to section 35. Subsections (1) and (2) provide:

“35. Hostile Witnesses

- (1) Where a witness gives evidence that is hostile to the party who called the witness, that party may, with the leave of the court, question the witness about that evidence as though the party were cross-examining the witness.
- (2) Where, in examination-in-chief, a witness appears to the court not to be making a genuine attempt to give evidence about a matter of which the witness may reasonably be supposed to have knowledge, the party who called the witness may, with the leave of the court, question the witness about that matter as though the party was cross-examining the witness.”

[120] The Crown made applications pursuant to section 35(2) to treat Ms. Shermin Joseph (“Ms. Joseph”) and PC Torille as hostile witnesses. In Ms. Joseph’s case, the application was made after she was asked a question, and she responded that she was not ready to testify. The exchange went as follows:

‘BY MISS ST. VILLE:

Q. Miss Joseph, do you recall January second, two thousand and twelve?

A. I am not ready to testify and I will not testify because I will stick to my dreams and I never mislead my mother, she came to tell me that - -’⁶²

[121] Thereafter, prosecuting counsel made the application in these terms:

‘MR. BRETTE: My Lord, it appears - - the application is that based on the Witness’ response, I am not ready to testify and I’ll not testify, I will stick to my dreams; it appears that the Witness is not making a genuine attempt to give the evidence about the matter which the Witness obviously has knowledge of because she - -

...

MR. BRETTE: Yes, Sir. And, so leave to treat her as a hostile witness.’⁶³

[122] At that juncture, the learned judge explained the nature of the application to the appellant and asked if he had any objection. He said that he did not. Leave was then granted to cross-examine Ms. Joseph as a hostile witness. This is captured in the transcript at pages 195 and 196 of the amended record of appeal:

‘THE COURT: Stand, Mr. Auguste. This is a very technical matter, you are not a lawyer, but ordinarily, the person who brings a, a witness will not be allowed to question them - - to cross-examine them so to speak. What the Crown is saying in this particular case is that this Witness is not making a genuine attempt to give evidence, and therefore, they want to be able to cross - - to, to question her as though they are - - she’s being cross examined; do you understand what I am saying?

THE DEFENDANT: No, My Lord, explain a little on that.

THE COURT: Cross-examine is when the, when the witness gives evidence being led by their lawyer or in the case of the Prosecution being led by the Prosecution that is called evidence-in-chief or examination-in-chief. They are then cross-examined by the person from the other side so in this case you have a right to cross-examine her but what the Crown is saying is that because of her statement that she did not, she’s not ready to testify, they have concluded that she is not making a genuine attempt to give evidence and they are citing Section 35 of the Evidence Act to say that in those circumstances they can ask for the leave of the Court to cross-examine her which

⁶² ARA pg. 194, lines 7 – 9.

⁶³ ARA pg. 195, lines 2 – 6 and 12 – 13.

means that they treat her like if she's a witness for you, a witness for the Defence; treat her like if not that she is or they treat her like that because she's not forthcoming. Do you understand better now? THE DEFENDANT: **Okay, I understand a little but not much.**

THE COURT: Right. Do you have any objection? Do you have any objection?

THE DEFENDANT: No objections.⁶⁴

[123] The prosecutor then proceeded to cross-examine Ms. Joseph and started by obtaining her admission that she had given a statement to the police in connection with the incident relating to the VC on 5th January 2013, some three days after it happened and that she had signed it. She accepted that the incident was fresher in her mind at the time that she gave the statement. She was subsequently questioned about the contents of the statement. This approach conforms to the stipulations in section 35(2) of the **Evidence Act** regarding leave to treat a witness as hostile. The appellant's contentions that they deviate from the requirements of that provision are not correct. This criticism of the procedure adopted is therefore not made out. Ms. Joseph's witness statement was not admitted into evidence. No specific direction was required that its contents were not evidence.

[124] It is important to note that cross-examination of a hostile witness necessarily entails eliciting from that witness that he/she made certain statements in the previous written statement. At times, the witness' attention may be drawn to the document itself. This does not require a separate application for the witness to refresh his or her memory. Likewise, strictly speaking, it does not amount to a 'refreshing of the memory' akin to the procedure under section 136 of the **Evidence Act** but rather it is part and parcel of the hostile witness process. It is therefore not accurate for the appellant to refer to it as such or maintain that as a matter of law the learned judge permitted Ms. Joseph to refresh her memory without ensuring that the provisions of the **Evidence Act** were satisfied. It was enough for the application under section 35(2) to allow such reference to the witness statement.

[125] To the extent that the appellant contends that he did not understand the nature of the application to treat Ms. Joseph as a hostile witness before saying that he had no objections to this course of action, his response that he understands a little but not much bears this out.

⁶⁴ ARA pg. 195, lines 14 – 25, pg. 196 lines 1-13.

The learned judge had a duty to ensure that Mr. Auguste understood what treating a witness as hostile entailed before asking him whether he had objections. This was not done. However, it is trite law that not every irregularity in a criminal trial will render the proceedings invalid or constitute a miscarriage of justice sufficient to necessitate interference with a conviction. This leads to the question whether this irregularity constitutes a miscarriage of justice that would justify overturning the conviction. It is worth noting that the appellant declined cross-examination of Ms. Joseph.⁶⁵

[126] As indicated before, not every irregularity in a criminal trial will invalidate the proceedings. In **Darlington Noel v R**, this court held that “the test for whether a miscarriage of justice has occurred is not simply whether an appellate court is itself persuaded of guilt. While the appellate court’s satisfaction of guilt is certainly necessary, it is not by itself sufficient. The test is normally, whether the appellate court is further satisfied that any jury acting properly must inevitably have convicted the appellants if the flaws on the proceedings had not occurred. The question is fact specific and a matter of degree.”

[127] On the evidence before the jury, the VC’s testimony coupled with the surrounding circumstances such as the appellant’s admission that the VC accompanied him elsewhere in his vehicle, the manner in which and the time she was taken home suggest that something more than an innocent encounter took place between them the night of the incident. Looking at the circumstances of this case in the round, I am of the opinion that notwithstanding the learned judge’s failure to ensure that the appellant understood the substance of the hostile witness application that a jury properly instructed would have been entitled to convict him as this jury did. In my opinion, no miscarriage of justice occurred in the circumstances.

⁶⁵ ARA pg. 211 lines 3-5.

PC Earl Torille (PC Torille)

[128] The application for PC Torille to be treated as a hostile witness was preceded immediately by an application for him to refresh his memory. The appellant did not object to the application. The application came about in the following way:

“BY MR. BRETTE: ...

Q. Can you recall the contents of the Statement that you made from your memory now?

A. Yes, Sir.

Q. You can recall the full contents from your memory?

A. Not the full.

Q. And at that time that you made the Statement, the facts of the event that you witnessed was fresher in your memory.

A. Yes, Sir.

Q. And would you be able to give us a more accurate reproduction of your Statement if you were given an opportunity to refresh your memory from your Statement?

A. Yes, Sir. ...

MR. BRETTE: Right. My Lord, the application at this time is pursuant to Section 30 of the Evidence Act, more particularly, 30(1) and (2).

THE COURT: Mr. Auguste, yes, as I indicated, the Prosecution is asking for this Witness to be able to refresh his memory from this Statement that he gave, pursuant to the investigation of this matter. Do you have any objection?

THE DEFENDANT: No, My Lord.

THE COURT: Okay, you may have a seat. Yes, the Statement will be - - leave it granted to show the Witness the Statement.”⁶⁶ (Emphasis added)

[129] The hostile witness application was made within minutes thereafter and unfolded as follows:

“MR. BRETTE: I’d like to make an application under 35(1) in the absence of the Jury, please. ...

MR. BRETTE: My Lord, the Court has seen that I went, out of pains to, to get an application in under Section 30, bearing in mind that the officer said that from the time he gave the Statement he had never seen it and bearing in mind the lapse of time. The Court granted leave and I gave the officer the Statement to read to himself. ... He admitted that what he said to the officer was true and correct and he signed it. ... My Lord, I would have no, no other choice but to ask the Court to deem the Witness a hostile witness, because it appears that he is not making any effort to give the evidence which the court knows that he ought to give based on the Statement that he gave at a time when the facts, according to himself, was much fresher in his mind.

....

THE COURT: Mr. Auguste, the Crown has ask me to have this Witness declare a hostile witness. I think you observe the similar thing happened earlier in this case. Do you have any objection? It means that the Prosecution will be able to ask questions

⁶⁶ Pg. 278 ARA, lines 14 – 25; pg. 279 lines 10 – 18.

of this witness as though he were, basically your witness. They'll be able to cross-examine him.

THE COURT: So, this is an adversarial system and a person who is hostile is on the other side, they not on your side. They are, they are on the other side, that's why they declare it hostile. So, do you understand the application now - -

THE DEFENDANT: **Yes, My Lord.**

THE COURT: - - and do you have any objection to this Witness being treated as a hostile witness?

THE DEFENDANT: No objection, My Lord.

THE COURT: No objection. Right. Okay. You may sit. Yes, leave will be granted to treat the Witness as a hostile witness."⁶⁷

[130] As was the case with Ms. Joseph, the prosecutor conformed to the letter and spirit of section 35 of the **Evidence Act** in making the application for PC Torille to be treated as a hostile witness. In this instance, the appellant was unequivocal as to his understanding of the substance of the application. Contrary to what was set out in his witness statement, PC Torille testified that he saw three persons arguing around 8.30 or 8.00 pm or about 10.30pm on the night of the alleged incident and that he did not recognise any of them. In his written statement, he had indicated that he had seen three persons arguing after midnight and he recognised one of the three as Shaggi (an alias of the appellant).

[131] As a result of this inconsistency, the prosecutor formed the view that PC Torille was lying. He therefore made an application for WPC Algodel who had written the statement at PC Torille's dictation to produce the witness statement as exhibit BA-7⁶⁸. The appellant had no objections and the application was granted. The jury therefore had access to that statement and were able to read it for themselves.

[132] In his summation to the jury, the learned judge directed them that:

"In this case, we have one Witness who apparently came here not to tell the truth, even though he said he's giving evidence on oath, and in relation to that Witness it's really open to you to reject everything that person, that Witness had to say, and that is Officer Torille, it's a matter totally for you to decide, but I am saying to you that no one could say that you did anything wrong if you decided to reject everything that he had to say, because clearly his - - the way in which he was handling himself under cross-ex, under examination-in-chief not in - - it's not even in

⁶⁷ ARA pg. 281 lines 1 -2, 10 – 14, 21 -22, 24 – 25; pg. 282 lines 11 – 15; pg. 283 lines 1 -3, 8 -17.

⁶⁸ ARA pg. 293, lines 10 -11.

cross-examination, tended to imply that he did not come here to tell the truth. So, in trying to determine what the facts are, and in trying to determine what you consider to be true, you look at how the evidence is given, what seems to you to be making sense. If a person is shifting around on the facts, in other words, one time they're saying, as in his case eight o'clock, 8:30, now he's saying ..., and in deed and in fact in a, in a witness statement they said something totally different, you, you can't accept anything that person says. However, if a person said, "On that day I really can't remember but, you know, on the day, it's difficult for me to remember, but I think I was at such and such a place at such and such a time", that individual may be mistaken about the time."⁶⁹ (Emphasis added)

[133] Later on, he added:

'We had the last Witness, Mr. Torille and I, I have dealt with him already, but it's a matter for you, when you go through the evidence of the various witnesses to decide whether there are any big issues, ...'⁷⁰ (Emphasis added)

He made one final reference to PC Torille, directing the jury:

"We've had some other Witnesses, as I said you need to dismiss the evidence of Earl Torille, even though his Statement would've been given to you, it's given to you to the purposes of saying, well, this is what he had told, he had told the Investigating Officer, Bridgette Algodel, but it's a matter for you whether you can even accept what he says in his statement."⁷¹ (Emphasis added)

[134] Unapologetically and forcefully, the learned judge was telling the jury that the entirety of PC Torille's testimony was unreliable and they were entitled to find that it was and reject it. In relation to the witness statement tendered by WPC Algodel, he stated that it was provided to them merely for completeness as to the fact that he had made a statement. He emphasised and suggested strongly that they may reject it or they may choose to rely on it. At face value, he was basically suggesting that they reject any material from PC Torille, whether it was his oral testimony or the content of his witness statement.

[135] The learned judge was duty bound to direct the jury that the witness statement was not evidence of the truth of what is stated in it. He was required to do so by law. He stopped short of saying this and he thereby erred. I will revisit his jury directions on this issue when considering the appellant's ground of appeal relating to the summation.

⁶⁹ARA pg. 320 lines 3 – 20.

⁷⁰ARA pg. 325, lines 3 - 6.

⁷¹ ARA pg. 338 lines 22 – 25 and pg. 339 line 1.

Summation

Appellant's submissions

- [136] The appellant was very critical of the learned judge's summation to the jury, arguing that several essential directions were omitted or glossed over. I have already addressed the criticism regarding the corroboration warning and hostile witnesses. I will not revisit them.
- [137] It was submitted that the directions to the jury were lacking in substance in a number of respects, did not address the legal technicalities that arose during the trial and contained inadequate directions on the effect of consistencies among witnesses; the effect of testimony from a hostile witness and the use to which testimony by a hostile witness could be put in arriving at a verdict; refreshing of memory; and the impact and effects of out of court witness statements being admitted into evidence.

Respondent's submissions

- [138] Citing **Daniel Dick Trimmingham v The Queen**⁷², the respondent countered that no summation will be perfect. Invariably, a trial judge may not give as fulsome a direction as he or she ought to but that does not translate to a non-direction or misdirection. It was submitted that no more robust directions were required with respect to inconsistencies in witness testimony or hostile witnesses.
- [139] The respondent highlighted the guidance provided by this Court in **Marius Wilson v R** on the appropriate jury direction vis-à-vis hostile witnesses. It was submitted that the absence of a specific direction to like effect in the case at the appeal bar does not constitute a miscarriage of justice when considered in light of the entire case. In any event, as regards PC Torille's testimony, the direction from the judge was to the effect that very little to no weight should be attached to the contents of his witness statement.
- [140] The respondent accepted that the learned trial judge failed to direct the jury that it is normal for a witness to refresh his memory from a document, however learned counsel argued that

⁷² SVGHCRAP2004/0032 (delivered 13th October 2005, unreported).

his instructions to the jury sufficiently addressed that particular concern and was adequate warning to them to exercise caution, in that he directed them that:

“We do not have any separate evidence in this case that points to the Defendant, and it is not required. So, you do not need to go looking for scientific evidence or the other circumstantial evidence. Clearly, there’s no eyewitness evidence to do what we call corroborate or support, independent of what the Virtual Complainant is saying”.⁷³

[141] As to the learned judge’s treatment of the VC’s testimony, the respondent submitted that he stressed in his summation that the jury should not allow sympathy for the VC to influence their verdict and quite properly directed them that they should be impartial and approach their deliberations devoid of bias towards the VC or the appellant. His directions were fulsome and sound. In this regard, he stated:

“So, you have to remain impartial and not bias (sic) in order to return a true verdict, remember that; you have to remain impartial. You also must not be sympathetic, you know, you should say well somebody interfere with this girl so somebody has to pay and, therefore, they brought him here I’m gonna make him pay. The evidence has to lead you to that conclusion; if it doesn’t then you can’t do that, you can’t say he’s guilty based on sympathy. You have taken an affirmation or oath, you are to render a verdict that is based on the evidence and that is what is from the witness stand and the exhibits and that is it. So, no bias, no sympathy, be impartial and you proceed from there.”⁷⁴

Discussion

[142] The role of an appellate court in evaluating whether a trial judge gave adequate directions to a jury is not to examine any specific direction in isolation, but rather, to take a broad view of the overall summation to assess whether the judge sufficiently identified the issues in the case and provided the jury with sufficient directions to enable them to critically examine the evidence against the law and properly perform their fact-finding duty. In doing so, the appellate court must be cognisant that a trial judge may have failed to give as full a direction as required. However, such a failure would not necessarily be fatal to a conviction if the summation adequately captured the salient issues and gave a proper explanation to the jury about how they should approach arriving at a true and proper verdict. If a deficiency is identified, the appellate court must consider further whether it was significant enough to amount to a miscarriage of justice that warrants setting aside the conviction.

⁷³ ARA pg. 331 lines 1-5.

⁷⁴ ARA pg. 322 lines 8-16.

[143] In *R v Trimmingham*, the Board opined:

“There are few cases in which the judge’s summing-up could not be criticized in some respects and submissions advanced that the content or wording could have been improved upon. The present case is no exception. It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and give them a proper explanation of their task in relation to those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention.”⁷⁵

Hostile Witness and Refreshing Memory

[144] Bearing the Board’s guidance in mind, I now examine the appellant’s criticisms of the learned judge’s summation. As to the complaint that the learned judge did not direct the jury on the legal technicalities, it is to be noted that the two main issues complained about were the treatment of hostile witnesses and leave to the prosecution witnesses to refresh their memories. As a general principle regarding their role as judges of the fact and not of the law, the learned judge at the very beginning of his summation, said to the jury:

“You are the judges of fact; so you have to decide what the facts are. You have to decide where the truth lies in this case and in every criminal case, that is the role of the Jury. You have to sift the evidence and decide what you accept and what you reject, if anything, okay, and that’s basically your function. ... **it is important to understand that that is your role.** It doesn’t go beyond that. So, **you do not delve into the issue the law at all**, and that’s **why from time-to-time we ask you to retire to the jury room because, we most of that time, we are discussing issues of law, where decisions have to be made dire - - guided by the law and, therefore, it is not really anything for you to determine or to even think about.**”⁷⁶ (Emphasis added)

[145] In this case, two witnesses were treated as hostile – PC Torille and the VC’s mother. A specific hostile witness direction is the standard, is essential and desirable but was missing. A trial judge is required to explain to the jury that a witness may be treated as a hostile witness and be cross-examined about matters contained in witness statements made by them before trial, by the party who tenders him/her, if that witness makes no genuine effort to testify on matters reasonably expected to within their knowledge. Cross-examination of such a witness would be

⁷⁵ [2009] UKPC 25 at para. 12.

⁷⁶ ARA pg. 317 lines 3-7 and 8 – 12.

permitted to highlight inconsistencies between their testimony and the contents of previous written statements.

[146] In addition, in trials involving hostile witnesses, the trial judge is obligated to direct the jury that a hostile witness' written statement does not constitute evidence in the case and should not be treated as evidence except where the witness accepts the statement as being truthful. The learned judge did not give a distinct and separate direction regarding the nature of evidence from a hostile witness or how it should be approached or how to treat the witness statement of PC Torille. In this he erred.

[147] In the summation, the learned judge said very little about the VC's mother. He mentioned her only once stating:

'... in this particular case it seems pretty straightforward that the, the Defendant, sorry, that the Virtual Complainant is the child of the two persons who came before the Court and gave evidence; Charmaine and Alfred, Charmaine Joseph and Alfred Jules, ...'⁷⁷

[148] On the other hand, when dealing with PC Torille, the learned judge very pointedly opined that his evidence should not be believed or acted on. His overall characterisation of PC Torille's testimony, if adopted by the jury could indirectly have had the effect of placing the jury on notice that the witness statement did not constitute evidence, especially in view of his last mention of the statement.

[149] The learned judge's categorisation of the appellant's out of court statements conceivably alerted the jury to the fact that no out of court statement be it from an accused or witness is evidence of the truth of the contents. It is the law that out of court statements recorded from an accused during the course of a criminal investigation may be admitted into evidence at his trial for a related criminal offence. However, such statements once admitted form part of the body of evidence in the case, although the contents of the statement are not probative of the truth. This principle applies not only to an accused's out-of-court statements but also to out-of-court statements by witnesses for the Crown. A trial judge is required to so direct a jury.

⁷⁷ ARA pg. 332 lines 2-5.

The trial judge did so but only with respect to the appellant's written statements and not in the context of statements by a hostile witness.

[150] Almost at the beginning of his summation to the jury the learned judge gave directions regarding the appellant's written statement and interview. He told the jury:

"... you take into account what happen during that investigation. In this particular case, the Defendant made certain statements during the investigation and those form part of the evidence, therefore, you can refer to those - - to that material, in relation to how you assess, what he said at that time and what transpired during the trial, and, therefore, how that will affect any verdict that you may return. **You must understand, however, that those statements, even though they are evidence, there are not necessarily adduced, there are not being adduced to determine the facts that are in them, okay, because there were not statements given in this Court, they were given out of court. But it is a matter for you when having looked at them, having read them to decide whether or not you accept what is being said in those statements.** The Prosecution is here to prove the case for the Prosecution, and, therefore, **they will not bring statements like that to, to prove the case or help the defence per se. So, what they are doing is to say, well, this is what he said at the time when he was asked if he had anything to say, and that is how - - as far as they are going in terms of leading that evidence of those statements. But, you have to look at the statement and you have to decide what they - - you think they should be given, even though there, there are not evidence of the truths of the statements per se.**"⁷⁸ (Emphasis added)

[151] No similar instruction was given with respect to PC Torille's witness statement. As the appellant maintained, it is arguable that without a similar caution regarding PC Torille's statement, it was open to the jury to treat his witness statement as evidence of the truthfulness of the contents. If accepted as true, it contained information that was exculpatory and incriminatory of the appellant, some of which from the VC's own mouth negated the allegation that he had sexual intercourse with her and there are other parts which contained hearsay material through the VC's father that if believed would paint the appellant in a bad light. Undoubtedly, the jury would have needed proper instructions from the learned judge as to how to treat PC Torille's witness statement.

[152] In my opinion, by approaching the summation in the way that he did, the learned judge zeroed in on PC Torille's testimony and gave clear, unmistakable directions that should have left no

⁷⁸ ARA pg. 316 lines 2 -19.

doubt in the minds of the jury that his evidence and witness statement were suspect and innately unreliable. In view of this and his direction regarding the appellant's out-of-court statements I am not persuaded that the non-direction was fatal or that it gave rise to a miscarriage of justice. In the case of Ms. Joseph, it is patently obvious that her testimony was superfluous and added nothing substantive to the case so that the absence of a hostile witness direction in relation to her would do no injustice to the appellant that would necessitate a setting aside of the conviction.

[153] To my mind, while it was a requirement for the learned judge to identify the instances in which a witness was treated as hostile, explain how a hostile witness' evidence and out of court statement is to be approached and how to treat with evidence elicited from a witness refreshing of his or her memory, his failure to do so in the circumstances of this case was not fatal. In summary, taking a broad overview of all of the evidence and the summation in its totality, I am satisfied that on balance, notwithstanding the non-directions to the jury on the principles applicable to hostile witnesses and witness statements made out of court, in all of the circumstances, the summation contained adequate directions to assist the jury in arriving at a proper verdict. In my estimation, no miscarriage of justice occurred from those non-directions. I would dismiss this ground of appeal.

[154] For all the foregoing reasons, I would dismiss the appeal against conviction. That leaves the issue of sentence for consideration.

Sentence Appellant's Submissions

[155] The appellant took two points in relation to the sentence. The first is that the sentencing judge did not factor in a) the time he spent on remand between 17th June 2019 and 26th June 2019 a period of ten days - or b) the period from 26th June 2019 to 19th December 2019 during which he remain in custody awaiting his sentence – a total of 176 days (or 25 weeks and one day) - in calculating his sentence. He submitted that the court was not directed properly as to the precise period that he spent incarcerated during the trial. Secondly, the appellant submitted that the sentence of 10.75 years imprisonment was excessive and out of step with the spirit and intent of the sentencing guidelines.

Respondent's Submissions

- [156] The respondent argued that the learned judge did not err in conducting the sentencing exercise. In the respondent's view, the learned judge referenced the guiding principles on sentencing, meticulously considered and applied the sentencing guidelines and credited the appellant with the time he spent in custody awaiting sentence from 26th June 2019 to 19th December 2019. It was submitted that the ten-day period between 17th June 2019 and 23rd June 2019 was not to be deducted from the sentence because that period of incarceration arose out of separate contempt proceedings.

Discussion

- [157] An appellate court is entitled to disturb an appellant's sentence only if satisfied that the sentencing court erred in principle in arriving at the sentence and was manifestly wrong in exercising its discretion. However, the Court will not lightly interfere with a sentence by a trial judge even if it considered that a different sentence should have been imposed. It would do so only if satisfied that the sentence was manifestly excessive; wrong in principle because it was not justifiable in law or that it was made without considering relevant factors or based on the consideration of irrelevant matters; or if there is no factual basis underpinning it. An appeal against a sentence is not a re-hearing. Rather, it calls for an assessment of the sentence passed, the steps taken to arrive at it, and an inquiry as to whether the sentencing judge failed to take into account or apply any settled principles of law.

- [158] In **R v Ball** Hilbery J. expressed the principle thus:

"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."⁷⁹

⁷⁹ (1951) 35 Cr App R 164.

[159] It is now established that time spent on remand prior to sentencing should be factored into the equation in arriving at a sentence and deducted.⁸⁰ In **Mohamed Iqbal Callachand and Mohamed Anwar Callachand v The State** the Board emphasised that time spent in custody awaiting sentence raises fundamental issues of a right to liberty, stating:

“In principle ... where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. ... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing.”⁸¹

[160] In the case at the appeal bar, the appellant was detained in custody for 10 days, pursuant to a legitimate court order, following his conviction for contempt of court. He has not appealed successfully against that contempt of court finding or the sentence imposed for his default. His attempt to impugn that sentence fails. In those circumstances, the sentence of 10 days imprisonment for contempt of court therefore stands. Neither the sentencing court nor this Court is required to factor in that period of 10 days in arriving at an appropriate sentence for the offence of sexual intercourse with a minor.

[161] It is a matter of record that the appellant was convicted on 16th June 2019. After a number of adjournments, his sentencing was carried out before a different judge on 19th December 2019. In imposing the sentence of 10.75 years imprisonment, the learned judge expressly stated that the sentence would start from the commencement of the period the appellant spent in custody from the date of pronouncement of the verdict until he was sentenced. She said:

“Mr. Gilroy Auguste, also called Shaggi, I sentence you to eleven point seven-five years imprisonment and your date - - and **your sentence, sorry, will start from the date of your conviction, that is the twenty-sixth of June, twenty-nineteen. You sentence will take into account the five months and twenty-three days that you’ve spent this far, all-right.**”⁸² (Emphasis added)

This statement reflects that the sentence imposed took into account the relevant post-

⁸⁰. See *Shonovia Thomas v The Queen* BVIHCRA2010/0006 (delivered August 27th 2012); and *Tyrone Kadan and Jno Baptiste Stoute* DOMHCRA2007/0002 (delivered on May 17th 2010).

⁸¹ [2008] UKPC 49 at para 9.

⁸² ARA pg. 432 lines 17-21.

conviction period in custody. No further accounting needs to be made to the sentence. That aspect of the appeal against sentence fails likewise.

- [162] When invited to review the sentence passed by a lower court, an appellate court is duty bound to seek to promote consistency in sentencing and as part of that exercise must apply established principles of law. In **Desmond Baptiste v R**⁸³ a leading case from the Eastern Caribbean, the primary factors to be considered in arriving at an appropriate sentence were identified as the aims of sentencing (i.e. retribution, deterrence, prevention and punishment); the relevant mitigating and aggravating factors; sentence ranges and importantly appropriate allowances for time spent on remand including any period spent awaiting sentence. Sentencing guidelines where existent at the time of the commitment of the offence must also be applied in the sentencing exercise. Sentencing guidelines were introduced in 2019 and were invoked by the learned judge in arriving at the sentence.
- [163] As to the steps taken to arrive at the sentence in this case, the learned judge diligently followed the sentencing guidelines and principles of sentencing and clearly articulated her approach. She started off by announcing that the written submissions and authorities helpfully outlined the relevant legal principles on sentencing and were given due consideration by her.
- [164] She commenced by explaining the process and referred to the maximum penalty of fifteen years imprisonment prescribed by section 127 of the **Criminal Code**. She also gave regard to the cardinal principles of sentencing referenced earlier; the Eastern Caribbean Supreme Court Sentencing Guidelines Rules 2019, in particular Practice Direction A, Practice Direction 8(b) of 2019. The learned judge further took into account the facts of this case; the Probation Officer's report; the victim impact statement; the seriousness of the offence which was categorised as a type A category in the high range; the appellant's culpability and placed the offence in category one exceptional having found that the VC suffered extreme psychological harm and a significant degree of degradation and humiliation.

⁸³ SVGHCRA2003/0008 (delivered 6th December 2004).

- [165] She found that the facts disclosed that the offence occurred in circumstances which could be considered as an abuse by the appellant of a position of trust; that he used a weapon to frighten the VC and that it had the potential to injure her; that threats of violence were made to get her to undress placing the offending at level A seriousness in category 1 justifying a starting point of sixty-five percent of the maximum term of imprisonment with a range of fifty percent to eighty percent of that maximum sentence with a result that the starting point was calculated to 9.7 years.
- [166] The aggravating factors of this offence were identified as a) the prevalence of the offence and b) the age disparity between the VC and the appellant at the time of the incident, the appellant being 28 years to the VC's 12 years. The learned judge found that there was some degree of planning and premeditation, the evidence being that the appellant was able to persuade the VC to accompany him to pick up a friend. An upward adjustment of two years was made to the starting figure, taking it to 11.75 years. No mitigating factors of the offence were found. The next step in the process was consideration of the aggravating and mitigating factors of the offender. No aggravating factors were identified, and the sole mitigating feature was the absence of prior convictions.
- [167] The learned judge noted that the appellant demonstrated no remorse. She took note of his previous good character and made a downward adjustment of one year to 10.75 years. The appellant received no discount for a guilty plea because the case went to trial. He was therefore sentenced to 10.75 years imprisonment.
- [168] Having examined the sentencing remarks and methodology, I note that the learned judge's consideration of the sentencing guidelines runs contrary to this court's holding⁸⁴ that the sentencing guidelines are inapplicable in cases where the offence was committed prior to their promulgation. The guidelines relied on by the learned judge came into force in 2019, seven years after the commission of the offence in this case. They should not have been invoked by the learned judge. She therefore erred in principle by applying them and made a sentencing

⁸⁴ See *Akim Monah v The Queen* GDAHCRAP2021/0015 (delivered 23rd February 2022, unreported) at para [46].

judgment which cannot withstand appellate scrutiny. Consequently, this court must conduct its own re-sentencing exercise.

[169] Prior to the introduction of the sentencing guidelines, the Courts applied well-established principles in arriving at appropriate sentences both at first instance and on appeal guided by the imperative of promoting consistency in sentencing as far as practicable in view of the individual circumstances of each case. In carrying out the evaluative exercise, the aims of sentencing were the same even then – punishment, reformation, deterrence and retribution. The Court was required to weigh all relevant aggravating and mitigating features of the offence and the offender, any applicable sentence range and would grant credit for a guilty plea and time spent on remand. Additionally, the Court would consider what would be a proper starting point in formulating a just sentence.⁸⁵ In **Winston Joseph v The Queen**⁸⁶ this Court also indicated that a sentence would be on the higher end if the aggravating factors outweighed the mitigating factors. Obviously, the converse would apply.

[170] The maximum sentence prescribed for the offence of sexual intercourse with a person between the age of twelve and sixteen years is fifteen years imprisonment. In **Winston Joseph**, the Court suggested that a sentence for unlawful carnal knowledge with a girl between age thirteen and sixteen would range from eight years upwards.⁸⁷ Based on this indication, I would employ a starting point of eight years.

[171] In the case at the appeal bar, the salient background facts have been outlined earlier in the judgment and are not repeated at this juncture. I extract from them the relevant features for the purpose of constructing a sentence.

[172] The appellant was found guilty after a trial and spent five months and twenty-three days in custody before he was sentenced. He was not remanded in prison at any time. At the time of the offence the appellant had no prior convictions and was of good character. Mr. Auguste was 28 years old at that time, while the VC was 12 years old. It emerged during the trial that

⁸⁵ See *Desmond Baptiste v R* (SVGHCRA2003/0008 (delivered 6th December 2004, unreported).

⁸⁶ *SLUHCRA2002/0004* (delivered 17th September 2001 and re-issued 31st October 2001).

⁸⁷ *Ibid* at para. [13].

the appellant knew the VC and her mother. The Pre-sentence Report prepared by the Probation Officer also reflects that the VC suffered psychological trauma arising from the incident. Furthermore, the appellant used a knife during the commission of the offence to threaten the VC and secure her compliance with his wishes.

[173] In examining the aggravating features, I note the sixteen-year age difference between the appellant and the VC; the fact that the VC was a minor at the time; that she suffered emotional trauma as a result of the incident; that the offence appeared to be premeditated and the prevalence of such offences in the State. I would therefore adjust the sentence upwards by four years from eight years to twelve years.

[174] The sole mitigating feature is that the appellant is not known to the law. I would therefore make an adjustment downwards of one year to eleven years. From that, I would deduct the period of five months and twenty-three days that the appellant spent in custody post-conviction. This deduction yields a final sentence of ten years, six months and seven days. This sentence falls slightly lower than the term imposed by the sentencing judge. Comparatively speaking, it produces no significant change. In the circumstances, while the appellant obtained a reduction in sentence it cannot be said that the sentence imposed by the lower court was manifestly excessive. Notwithstanding, I would allow the appeal against sentence for the reasons articulated.

Miscellaneous

[175] Several of the appellant's grounds of appeal were plagued by lack of specificity. This was detrimental to the appellant's chances of success. In this category are his submissions that:

- (a) witnesses were allowed to corroborate themselves to correct inconsistencies, no examples of this provided. The court will not speculate as to what the appellant meant by this.
- (b) the judge did not render adequate assistance to him. This is a very general and broad accusation with no specifics. The court is for this reason unable to evaluate this criticism.

- (c) the judge made a number of important rulings in the jury's presence. This argument suffers from the same lack of specificity and is therefore disregarded.
- (d) the learned judge asked questions (presumably of the VC) that were prejudicial to him. The appellant did not indicate what were the questions. This absence of details is fatal to the appellant's contention.
- (e) the learned trial judge failed to resolve adequately or at all a number of highly technical legal issues that required him to ensure that the appellant properly understood the nature of the applications made by the prosecution before asking the appellant whether he objected to the respective applications and the evidence that the prosecution was seeking to adduce. The appellant did not point to any such examples in the record of appeal. This submission is therefore not considered.

Disposition

- [176] For all of the foregoing reasons I would dismiss the appeal against conviction and uphold the conviction. I would allow the appeal against sentence and substitute the sentence of ten years, six months and seven days.
- [177] I thank counsel for their submissions. I acknowledge the delay in completing this judgment and apologise to the parties for any inconvenience that this might have caused.

Mario Michel
Chief Justice [Ag.]

Trevor Ward
Justice of Appeal

By the Court

Chief Registrar