

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

COMMONWEALTH OF DOMINICA

DOMHCRAP2015/0009

BETWEEN:

JOSEPH SENHOUSE

Appellant

and

THE STATE

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Gerard St.C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mrs. Dawn Yearwood-Stewart for the Appellant
Ms. Sherma Dalrymple with Ms. Daina Matthew for the Respondent

2023: May 8;
2024: February 16.

Criminal appeal – Appeal against conviction and sentence – Role of trial judge in summing up – Section 30 of the Sexual Offences Act of Dominica – Cross-examination of virtual complainant on previous sexual history – Unsworn statement – Whether trial judge is permitted to interrupt the appellant’s unsworn statement from the dock – Evidential value of unsworn statement - Whether interruptions by trial judge of defence counsel had effect of preventing counsel from fully and forcefully addressing the jury and/or prejudicing the jury’s mind against appellant – Whether learned judge erred in allowing the minor virtual complainant to testify on oath – Section 38 (1) of the Eastern Caribbean Supreme Court (Dominica) Act – Whether the proviso ought to be applied – Whether case is fit for retrial

The appellant, Joseph Senhouse, was indicted under the Sexual Offences Act of the Commonwealth of Dominica for certain sexual offences committed on an 8 year old girl between 1st January 2013 and 29th August 2013.

At the trial, the principal witnesses for the prosecution were the virtual complainant) and her mother, Sandra George. The evidence of the virtual complainant was that on four different occasions between 1st January 2013 and 29th August 2013, the appellant called her into his home where he engaged in sexual conduct with her. She testified that on the last occasion, her mother met her at the appellant's home and it is then that she told her mother what had occurred on the three previous occasions.

The virtual complainant's mother gave evidence that one day she met the virtual complainant in the appellant's home with him. She said that, in the presence of the appellant, the virtual complainant told her what transpired between her and the appellant on that day. She took the virtual complainant to the Prenville Health Center, then to the Portsmouth Police Station where they met Woman Police Constable Sharma Bellot ("WPC Bellot").

WPC Bellot gave evidence that she was on duty at the Portsmouth Police Station when the virtual complainant's mother made a report against the appellant for having unlawful sexual intercourse with her daughter. She went with the VC and her mother to the Portsmouth Hospital where Dr. Hector Le Bique examined the virtual complainant and wrote his findings on a medical form filled out in the name of the virtual complainant.

Woman Police Constable Joan Augustin Leblanc ("WPC Leblanc") testified that on 27th January 2014 she commenced investigations into the report by the virtual complainant and her mother. She testified that on the aforementioned day, she met the virtual complainant and her mother at the Portsmouth Police Station where they told her certain things. She was handed the medical examination form which was filled out in the name of the virtual complainant and contained the doctor's findings.

The appellant denied the allegations against him. On 24th November 2015, the appellant was found guilty of the offences of buggery, unlawful sexual intercourse and indecent assault, and on 11th December 2015 he was sentenced to 25 years imprisonment for the offence of buggery, 25 years imprisonment for the offence of unlawful sexual intercourse and 10 years imprisonment for the offence of unlawful assault; with the two 25-year sentences to run concurrently, but consecutively with the 10-year sentence.

On 11th December 2015, the appellant filed an appeal against his conviction and sentence on 11 grounds set out in paragraph 12 of this judgment; 10 of the grounds of appeal were against conviction and 1 against sentence. The appeal was heard on 8th May 2023.

Held: allowing the appeal, quashing the convictions, setting aside the sentences and ordering that the appellant be discharged, that:

1. A trial judge must refrain from presenting an unbalanced summation to the jury and must not embellish a case for either the prosecution or the defence. In determining whether this was done, the court is enjoined to consider the trial judge's summation as a whole. In this case, the trial judge explicitly told the jury that they ought not to

give much consideration to the delay in the investigative process, when this was indeed part of the appellant's case. This statement by the trial judge was improper and amounted to an irregularity, on the basis of which ground 1 of the appeal is allowed. This finding however is not sufficient on its own for a finding that the appellant's trial was unfair.

R v Gunning (1994) 98 Cr App Rep 303 applied; **Abraham Nelson v R** [1997] CRIM L.R. 234 CA applied; **Mears (Byfield) v R** (1993) 42 WIR 284 applied; **Sheldon Bain v The Queen** GDAHCRAP2016/0007 (delivered 1st November 2019, re-issued 8th November 2019, unreported) applied.

2. Pursuant to section 30 of the Sexual Offences Act, a trial judge may, upon an application made by or on behalf of the accused in the absence of the jury, allow cross examination of a complainant on previous sexual history if such evidence is necessary for the fair trial of the accused. A primary consideration by the court when determining such applications is the nature and relevance of the questions which are proposed to be put to the virtual complainant. The questions which were proposed to be put in this case did not go towards the credibility of the virtual complainant but were more relevant to the guilt or innocence of the appellant. The application was made in relation to the fact that the medical examination form which was referred to by WPC Bellot in giving her evidence was in respect of another individual who was prosecuted and convicted for sexual offences against the virtual complainant. There was a significant overlap between the dates of the offences for which the appellant was charged and those for which the other man was convicted. This conviction was relevant to the defence of the appellant, which was a complete denial of any sexual contact with the virtual complainant and a claim that the accusations against him were fabricated. Ground 2 of the appeal is therefore allowed.

Section 30 of the **Sexual Offences Act** Act No. 1 of 1998 of the Laws of the Commonwealth of Dominica applied; **R v Viola** [1982] 3 ALL ER 73 applied; **Director of Public Prosecutions v GK** [2007] 2 IR 92 applied.

3. The right of an accused to give an unsworn statement from the dock is circumscribed by the relevancy of the statement's content. In order to ensure that an accused does not give a purely irrelevant unsworn statement, the trial judge has the authority to limit the scope of the unsworn statement from the dock which may in some cases only be achievable by interrupting the accused. In this case, the appellant was prevented from completing his unsworn statement, the content of which was relevant to his defence; and even what the trial judge allowed him to say was discredited by the judge in his summation to the jury. The trial judge ought to have allowed the appellant to make his unsworn statement and left entirely to the jury the question as to what weight is to be given to it and his failure to do so effectively prevented the appellant's defence, advanced in his unsworn statement, from being adequately put to the jury. In the circumstances, grounds 3 and 8 of the appeal are allowed.

R v Dunn and O'Sullivan (1924) 17 Cr App R 12 applied; **DPP v Walker** [1974] 1 WLR 1090 applied; **Denison (Alvin) v R** [2014] JMCA Crim 7 applied.

4. The essential question to be asked when considering judicial interventions in a criminal trial is whether the nature and extent of the interventions have resulted in the defendant's trial becoming unfair. The question whether the interventions have denied the accused a fair trial depends on a qualitative evaluation of the effect the interruptions had on the fairness of the trial process. In this case, there is nothing which shows the learned judge's interruptions of counsel in her address to the jury prevented her from advancing the appellant's defence. Further, the judge's interruptions do not warrant a finding of bias so as to have caused the appellant's trial to be unfair. Ground 4 of the appeal is accordingly dismissed.

Richardson Fontaine v The State DOMHCRAP2015/0007 (delivered 13th May 2020, unreported) applied; **Allie Mohammed v The State** [1999] 2 AC. 111 applied.

5. A minor in respect of whom an offence is alleged to have been committed or any other minor of tender years who is called as a witness at a trial may give evidence on oath if, in the opinion of the court, he or she understands the nature of an oath. A belief in God and an understanding of the significance of the divine sanction provides a reasonable basis for concluding that the child understands the nature of an oath. In this case, the virtual complainant was able to distinguish between the truth and a lie and that there would be divine punishment if she told a lie. She was able to say that she was in court to tell the truth and that the truth means telling the court exactly what happened in the matter. The virtual complainant therefore understood the solemnity of the occasion and the duty to tell the truth. Ground 5 of the appeal is therefore dismissed.

Section 2 of the **Children and Young Person's Act** Act No. 12 of 1990 of the Laws of the Commonwealth of Dominica considered; Section 32 of the **Sexual Offences Act** Act No. 1 of 1998 of the Laws of the Commonwealth of Dominica applied; **Fazal Mohammed v The State** [1990] 2 AC 320 considered; **Abraham Nelson v R** [1997] CRIM L.R. 234 CA applied.

6. While a medical report is not required in law for the prosecution of a sexual offence, in this case there was no medical examination form tendered into evidence at the trial of the appellant, yet one of the witnesses gave evidence in relation to a medical form and a medical examination, neither of which though was in relation to the charges against the appellant, and the trial judge failed to address this in his summation to the jury. This cumulatively would have caused the trial of the appellant to be unfair. Ground 9 of the appeal is accordingly allowed.
7. The Court may, notwithstanding that it is of the opinion that the point raised in the appeal may be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred. The test is whether the appellate court is satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred. In this case, much of the

grounds of appeal which have been allowed concerned the appellant's defence and its ventilation at trial. Based on the overall conduct of the trial by the learned judge, it cannot safely be said that there was no miscarriage of justice. Therefore, the proviso ought not be applied and the appellant's appeal should be allowed and his conviction and sentence quashed.

Section 38 (1) of the **Eastern Caribbean Supreme Court (Dominica) Act**, Cap 4:02 of the Laws of the Commonwealth of Dominica applied; **Giselle Stafford v The State** [1999] 1 WLR 2026 applied; **Mathis Alson Woodman v The State** DOMHCRAP2016/0016 (delivered 4th July 2022, unreported) applied.

8. The test for determining whether the Court should order a retrial is whether it is in the interest of justice that such an order be made. In this case, justice will probably not be served to either the appellant or the virtual complainant if they and their families have to relive the sordid events which occurred between January and August 2013. Among other considerations, a new trial would also mean that the virtual complainant would have to undergo a third trial of this nature in her young life. Furthermore, witnesses may be unavailable or unwilling to testify to matters which occurred as many as 11 years prior, while others may simply not recall relevant details. A new trial resulting in a verdict being given over 8 years later than would have been the case if the trial judge had not fallen into error also swings the pendulum away from the grant of a retrial. There is an 11-year gap between the commission of the offences and the date by which a new trial may be held. The appellant has also already spent over 8 years in prison between the date of conviction in 2015 and the date of this judgment. In all the circumstances, a new trial will not be ordered.

Reid v The Queen [1979] 2 All ER 904 applied.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against the conviction of the appellant for the offences of buggery, unlawful sexual intercourse and indecent assault of a minor, and his sentences of 25 years imprisonment for buggery, 25 years for unlawful sexual intercourse and 10 years for indecent assault.

Background

- [2] The appellant, Joseph Senhouse, was indicted under the **Sexual Offences Act**¹ of the Commonwealth of Dominica (or “**the Act**”) for the offences of buggery, unlawful

¹ Act No. 1 of 1998 of the Laws of the Commonwealth of Dominica.

sexual intercourse, unlawful sexual connection and indecent assault of an 8 year-old girl (who shall be referred to in this judgment as “the virtual complainant” or “the VC”). The offences were committed between 1st January 2013 and 29th August 2013 at the home of the appellant in the Parish of St. Andrew in the Commonwealth of Dominica.

- [3] At the appellant’s trial, the principal witnesses for the prosecution were the virtual complainant and her mother, Sandra George.
- [4] The evidence of the virtual complainant at the trial was that on different occasions between 1st January 2013 and 29th August 2013, the appellant, with whom she was acquainted, called her into his home where he engaged in sexual conduct with her. She was unable to recall the dates of the incidents, but she testified that on the first occasion she was headed to a shop with her sister when the appellant called her to his home; she entered through the back door and, once inside, the appellant penetrated her anus on a bench in his living room. On the second occasion, she said that she was headed to her father’s home when the appellant again called her into his home and, once there, he put her to lie down on a piece of sponge in his living room where he removed her pants and underwear, began to play a pornographic film, and penetrated her vagina with his penis. On the third occasion, she said that the appellant again penetrated her [vaginally], this time on his bed. She said that there was a fourth occasion, but she could not recall what happened on that day. She said, though, that on that last occasion her mother met her and the appellant at the appellant’s home, and it was only then she reported to her mother what had taken place between her and the appellant on the 3 previous occasions. She said that she did not report the incidents to anyone previously because of the threats of physical harm made to her by the appellant.
- [5] The virtual complainant was taken to the Penville Health Center where she was examined by a nurse. She was then taken to the Portsmouth Police Station where she spoke to Woman Police Constable Joan Augustine Leblanc (“WPC Leblanc”)

and related what happened between her and the appellant. She was then taken to the Portsmouth Hospital where she was examined by a doctor in the presence of her mother and WPC Leblanc. Upon their return to the Portsmouth Police Station, the virtual complainant and her mother spoke to WPC Leblanc.

[6] The virtual complainant's mother, Sanda George, also testified at the trial. The crux of her evidence was that one day, upon returning home from Portsmouth, she discovered that the virtual complainant was not at home. She went in search of her and found her at the appellant's home with him. She said that her daughter was clothed, but the appellant was clad only in his underwear. She said that, in the presence of the appellant, her daughter told her what had transpired between her and the appellant on that day. She said that she then took her daughter to the Penville Health Center where she was examined by a nurse, who then made a phone call to the police station. She and her daughter then went to the Portsmouth Police Station where they met Woman Police Constable Sherma Bellot ("WPC Bellot") who took them to the Portsmouth Hospital. At the hospital, the virtual complainant was examined by a doctor. Ms. George said that the doctor handed over a form to WPC Bellot, who then took her daughter back to the Portsmouth Police Station. On the following day, WPC Bellot asked her to come with her daughter to the Portsmouth Police Station. At the police station, her daughter gave a statement to WPC Bellot.

[7] Evidence was also given by WPC Bellot, who indicated that she was on duty at the Portsmouth Police Station when Sanda George came to the station with the virtual complainant and made a report against Joseph Senhouse (the appellant) for having unlawful sexual intercourse with her daughter. WPC Bellot testified that the report was not made to her but was referred to her after it was made. She spoke to the virtual complainant in the presence of her mother and went with them to the Portsmouth Hospital where she (WPC Bellot) spoke to Dr. Hector Le Bique and handed him a medical examination form which she had filled out in the name of the virtual complainant. The virtual complainant was then examined by Dr. Le Bique in

the presence of WPC Bellot. Dr. Le Bique wrote his findings on the medical form and returned it to her (WPC Bellot), after which she returned to the Portsmouth Police Station with the virtual complainant and her mother.

[8] WPC Bellot testified that on 27th January 2014, she met and spoke to WPC Leblanc at the Portsmouth Police Station and handed her the medical examination form in the name of the virtual complainant. She testified that she did not thereafter engage in any other activities relating to the matter.

[9] WPC Leblanc gave evidence that on 27th January 2014, she commenced investigations into the report by the virtual complainant and her mother. Her evidence was that on the aforementioned day, she met the virtual complainant and her mother at the Portsmouth Police Station where they told her certain things. She was handed the medical examination form which was filled out in the name of the virtual complainant and which contained the doctor's findings.

[10] On 20th March 2014, she again met with the virtual complainant and her mother at the Portsmouth Police Station. On 2nd April 2014, she met the virtual complainant and her mother at their home and had another conversation with them. She then went to the appellant's home and informed him of the matter under investigation, to which he responded that he was unaware of such actions. The appellant was arrested and transported to the Penville Village Council Office where he was interviewed. In the interview, the appellant said that the virtual complainant never came to his home unaccompanied, and he denied ever having sexual intercourse with her.

[11] On 24th November 2015, the appellant was found guilty of the offences of buggery, unlawful sexual intercourse and indecent assault, and on 11th December 2015 he was sentenced to 25 years imprisonment for the offence of buggery, 25 years for the offence of unlawful sexual intercourse and 10 years for the offence of unlawful

assault; with the two 25-year sentences to run concurrently, but consecutively with the 10-year sentence.

The appeal

[12] On 11th December 2015, the appellant filed an appeal against his conviction and sentence on the following grounds:

- (1) The learned trial judge erred in law and misdirected himself when he advised the jury that they should not be unduly concerned about the timelines of the investigation into this matter because Dominica is not a rich country with limited resources and they should not make heavy weather of that fact.
- (2) The learned trial judge's exercise of his discretion was "Wednesbury unreasonable" when he denied the application of the appellant to cross-examine the virtual complainant on prior sexual activity under section 30 of the Sexual Offences Act.
- (3) The learned trial judge wrongly interrupted the appellant when he was giving his statement from the dock after he advised him of his [options] and the appellant chose to remain in the dock and gave his statement.
- (4) The learned trial judge wrongly interrupted trial counsel for the defence when she was addressing the jury by repeatedly interjecting into her address, thereby stultifying her presentation of the appellant's case to the jury.
- (5) The learned trial judge wrongly exercised his discretion to allow the virtual complainant to testify on oath when on the voir dire she was unable to tell the court what it means to tell the truth.
- (6) The learned trial judge wrongly directed the jury that the unlawful sexual connection was in the alternative to unlawful sexual intercourse when it

is the law that indecent assault is in the alternative to unlawful sexual intercourse and that unlawful sexual connection is in the alternative to buggery and unlawful sexual intercourse.

- (7) The learned trial judge erred in law and misdirected himself when, in exercising his discretion to give the jury a corroboration warning, he failed to assist the jury in determining why it was necessary to look for corroboration in this matter and to give them a full corroboration warning.
- (8) There was a material irregularity when the learned trial judge commented adversely on (i) relevance of the appellant's statement about him lending money to the virtual complainant's mother and (ii) by discrediting the appellant's dock statement when he said to the jury that the appellant said "I believe". The learned trial judge told the jury – "But in this Court you don't go with what you believe", thereby discrediting the appellant's statement and removing it from the jury's consideration.
- (9) The entire trial was unfair in that the defence of the appellant was not put to the jury at all or where put was discredited at every phase by the learned trial judge thereby resulting in the conviction being unsafe and unsatisfactory.
- (10) There was a material irregularity when the learned trial judge at the empaneling of the jury openly mocked the appellant by making sarcastic remarks to him as he stood in the witness box causing the jurors, both panel and empaneled to laugh at him much to his distress.
- (11) The sentence of 60 years imprisonment is severe and excessive in all the circumstances of this case.

[13] On 21st February 2022, the appellant made an application to rely on affidavit evidence on the ground that there were incidents which occurred at the trial of the matter, in the presence of the jury, but which were not reflected in the transcript of

proceedings. This application was unopposed by the respondent and, at the oral hearing of the appeal on 8th May 2023, this Court granted the application.

- [14] On 30th March 2022, the appellant filed skeleton arguments (with authorities) in support of the appeal in which he abandoned ground 6 of the notice of appeal filed on 11th December 2015 and sought instead to advance the following as ground 6 of his appeal:

“6. The learned trial [judge] erred in law and misdirected himself when he directed the jury that unlawful sexual connection meant the introduction to any extent into the vagina or anus of any person any part of the body of the other person to mean the penis into the vagina. For unlawful sexual connection it is not penis but hand, fingers tongue etc.”

- [15] In their skeleton arguments filed on 3rd May 2023 in opposition to the appeal, the respondent wholly conceded grounds 1, 3, 6 and 8, and partially conceded ground 9 of the appeal, whilst at the hearing of the appeal the respondent conceded ground 2. In the circumstances, at the hearing of the appeal, the appellant only advanced arguments on grounds 4, 5, 7, 9, 10 and 11. I will however treat (to some extent at least) with all of the grounds of appeal.

Ground 1

- [16] The appellant sought to advance grounds 1 and 9 together in his written submissions. However, ground 9 was addressed as an independent ground by counsel for the respondent and will be discussed separately later in this judgment.
- [17] In his first ground of appeal, the appellant submitted that the learned trial judge erred and misdirected himself when he advised the jury, *inter alia*, that they should not be unduly concerned about the timeliness of the investigation into the matter because Dominica is not a rich country with limited resources and they should not make heavy weather of that fact. The trial judge in fact said “a lot of resources” and not “limited resources”, but both sets of words seek to convey that Dominica is not wealthy and its resources are limited, and I will from hereon use the words used by the trial judge. Learned counsel for the appellant, Mrs. Dawn Yearwood-Stewart,

submitted that a part of the appellant's case was to show the unfairness of the investigative process against him as he was arrested 8 months after the report was first made against him. Mrs. Yearwood-Stewart contended that this argument should have been advanced to the jury and left for their consideration and, by making the statement that he did, the trial judge effectively sought to negate the appellant's argument, which had the effect of removing it from the jury's consideration in a dismissive manner, thus undermining the fairness of the trial and rendering the conviction unsafe.

[18] Mrs. Yearwood-Stewart further submitted that it was not a correct premise for the trial judge to tell the jury that delays in the delivery of justice are inevitable. She argued that, in the context of the offence of unlawful sexual intercourse with a minor, where the appellant was arrested 8 months after the report, the fairness to the accused/appellant is compromised because he would have a hard time recollecting his whereabouts at the time of the alleged offence.

[19] As earlier stated, the respondent conceded on this ground. The concession was to the effect that the trial judge ought not to have made that statement to the jury, because part of the appellant's defence was that there were inconsistencies in respect of the timeliness in the case. The Director of Public Prosecutions, Ms. Sherma Dalrymple, who appeared for the respondent was, however, silent as to whether this is enough to warrant a finding by this Court that the appellant did not receive a fair trial and thus justifying a quashing of the conviction on this ground.

[20] In the case of **R v Gunning**,² the English Court of Appeal likened the judge in a criminal trial to an umpire in a cricket match, who must not favour one side over the other. In the context of a trial judge's summation or address to the jury, a trial judge must refrain from presenting an unbalanced summation.

² (1994) 98 Cr App Rep 303.

[21] In **Abraham Nelson v R**,³ the Privy Council provided useful guidance as to the role of the learned trial judge in this respect. The Board stated:

“Every defendant, we repeat, has the right to have his defence, whatever it maybe, faithfully and accurately placed before the jury... The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence...”

[22] In **Mears (Byfield) v R**,⁴ the Board stated:

“...As Lloyd L J observed in *R v Gilbey* (1990) (unreported):

‘A judge ... is not entitled to comment in such a way as to make the summing-up as a whole unbalanced ... It cannot be said too often or too strongly that a summing-up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.’”

[23] The authorities are clear in establishing that a trial judge ought to present a balanced summation to the jury and cannot use the jury as a vehicle to support his own view of the case. In other words, the learned judge is not allowed to embellish a case for either the prosecution or the defence. Ordinarily, to make a determination whether this was done, the court is enjoined to consider the entirety of the summation. Indeed, in the case of **Sheldon Bain v The Queen**,⁵ this Court emphasised the importance of reading the summing up as a whole. But, for the purposes of this ground of appeal, the focus is on the following extract of the trial judge’s summation:⁶

“Madam Foreperson, Members of the Jury, Dominica is not a wealthy country with a lot of resources. Delays in the delivery of justice are inevitable. As a matter of fact in a celebrated case out of Jamaica many years ago which has been since modified they gave the Crown a period of time in which to do what they have to do otherwise they couldn’t execute people. I’m just trying to just show you that that system runs throughout, not just in developing countries, all over. So to try to make heavy weather of

³ [1997] CRIM L.R. 234 CA.

⁴ (1993) 42 WIR 284.

⁵ GDAHCRAP2016/0007 (delivered 1st November 2019, re-issued 8th November 2019, unreported).

⁶ Page 547 of the transcript of proceedings.

the fact that the events were reported in 2013 and they only started in 2014, deal with that. It's not five years. Like every other place, you have crimes that are being investigated and it is for the police authorities to say what is what. You cannot sit down there and say not guilty because it didn't happen right away, no, you cannot do that."

[24] Other aspects of the trial judge's summation are examined in other parts of this judgment. I therefore propose to limit the evaluation of this ground to the aforementioned extract.

[25] It is clear from a review of the record that part of the appellant's defence was to question the legitimacy of the investigative process leading to his arrest and charge. The recited portion of the trial judge's summing up however contravenes the established rules of summing up. He explicitly told the jury that they ought not to give much consideration to the delay in the investigative process, when this was indeed part of the appellant's case.

[26] I am of the view that this amounted to an irregularity, on the basis of which ground 1 of the appeal is allowed. I do not think, however, that this is in and of itself sufficient for a finding that the trial is unfair; though when considered in light of other elements of this case (which are still to be addressed in this judgment) such a determination may be made.

Ground 2

[27] In his second ground of appeal, the appellant submitted that the trial judge's exercise of his discretion to deny the application by the appellant to cross examine the VC on prior sexual activity under section 30 of the **Sexual Offences Act** was Wednesbury unreasonable.

[28] Learned counsel for the appellant placed much reliance on **R v Viola**⁷ in support of her submission that the proposed cross examination of the VC was not merely

⁷ [1982] 3 ALL ER 73.

challenging the credibility of the VC but was necessary for the fair trial of the appellant as it was being pursued to show that there was previous sexual activity involving the VC, so that the jury should not make any findings that if she is found to be sexually active, that this was necessarily attributable to the appellant.

[29] In responding to this ground of appeal, the learned Director of Public Prosecutions initially argued that there was no error in the trial judge's exercise of his discretion in rejecting the application to cross examine the VC on prior sexual activity, for 2 main reasons. Firstly, inasmuch as the ground of the application was that it raised a defence for the appellant that another individual was charged with sexual offences against the VC, it was an attempt to discredit the VC, contrary to section 30(2) of **the Act**. Secondly, the sexual history of the VC was not relevant to the case before the court.

[30] In a turn of events at the oral hearing, the DPP however conceded that the trial judge's exercise of his discretion to deny the application to cross examine the VC on previous sexual history was incorrect, and she submitted that the application ought to have been granted as it would have been of benefit to the appellant and was necessary for his fair trial. Specifically, she submitted, the application ought to have been granted inasmuch as it allowed questioning in relation to the conviction of another individual for the offence of unlawful sexual intercourse with the VC. The reasons for this change in position mainly concerned a medical evidence form which was led in the preliminary inquiry at the magistrate's court. This form was in relation to another accused who was charged and convicted for sexual offences against the VC which, according to his indictment, occurred during the same period as did the charges against the appellant. In other words, there was an overlap between the timeline of the commission of the offences for which the other individual was convicted and the timeline of the commission of the offences for which the appellant was charged. This medical form was also referred to in the evidence of WPC Bellot at the trial. There was therefore, in effect, no medical evidence connecting the appellant to the offences for which he was convicted. Despite this, however, and

despite her concession, the DPP invited the Court to apply the proviso under section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act**⁸ and maintain the appellant's conviction.

- [31] In the Commonwealth of Dominica, the basis of the cross-examination of a complainant on previous sexual history is contained in section 30 of the **Sexual Offences Act**. The section provides:

“30.(1) In proceedings in respect of an offence under this Act, evidence shall not be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless the Court, on an application made by or on behalf of the accused in the absence of the jury, thinks such evidence is necessary for a fair trial of the accused.

(2) Save as provided in subsection (1), evidence of sexual reputation is not admissible for the purpose of challenging or supporting the credibility of the complainant.”

- [32] In **R v Viola**, the appellant was charged with rape, which allegedly occurred at the home of the complainant. The issue at the trial was whether the complainant had consented to the sexual intercourse with the appellant. The appellant made an application under section 2 of the UK Sexual Offences (Amendment) Act (“the UK Act”) (since repealed and replaced), which is similar to section 30 of the Dominica **Sexual Offences Act**, for leave to cross-examine the virtual complainant regarding 2 incidents of sexual relations with other men shortly before and shortly after the alleged rape. The judge in that case denied the application and the appellant appealed.

- [33] Section 2 of the UK Act provided:

“(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

⁸ Cap 4:02 of the Laws of the Commonwealth of Dominica.

(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.”

[34] The UK court considered that the first question which the judge must ask himself is whether the questions proposed to be put are relevant according to the ordinary common law rules of evidence and relevant to the case as it is being put. The court held that a finding that the questions are not relevant brings this particular matter to an end, but if the judge finds them to be relevant, he must still determine whether they should be allowed in the interest of fairness to the accused.

[35] In the Irish case of **Director of Public Prosecutions v GK**,⁹ the appellant contended that the trial judge erred in refusing leave to cross-examine in circumstances where it had emerged that the complainant had engaged in inappropriate sexual activity with persons other than the accused during the time periods covered by the counts on the indictment. The accused argued that, taken in conjunction with the medical evidence, the presentation of the complainant as a young girl with no other sexual experience resulted in a real unfairness to him, because the jury was deprived of considering the proper weight to be attached to the complainant's evidence against a background where inappropriate sexual activity with other boys was taking place. The accused argued that, at the very least, such activity was capable of raising a reasonable doubt in the minds of the jury.

[36] In rendering its judgment in that case, the Irish Court of Criminal Appeal cited Archbold on Criminal Pleading, Evidence and Practice¹⁰ which at paragraph 8-12 states:

“Questions which really do go to the issue of consent should, it is submitted, never be excluded under the Act of 1976. Questions which do not go to that issue and which relate to the complainant's previous sexual experience

⁹ [2007] 2 IR 92.

¹⁰ Sweet & Maxwell, 2000.

should be excluded, unless they are such as might reasonably lead the jury to take a different view of the complainant's evidence. Clearly, if the complainant has lied about her previous sexual experience, this is a matter which *may* affect the weight to be attached to her evidence. The mere fact that the complainant *has* previous sexual experience, however, is of no significance whatsoever. Suppose, in the instant case, that the truth was that the girl had previously had intercourse with her boyfriend, aged 15, on a number of occasions; if she had said in her witness statement that she was a virgin, or her evidence was given in such a way as to suggest that this was the case, it would obviously be right to permit cross-examination, as affecting the weight of her evidence. In the absence of such features, or any other particular feature, it is submitted that such questioning should not be permitted: the apparent suggestion in this case was that the eliciting of such information would be relevant to the issue of consent. It is submitted that any such argument should be firmly resisted."

[37] In that case, the court held that the fact that the complainant had engaged in inappropriate sexual behaviour with other boys did not of itself undermine the complainant's evidence that she was sexually abused by the accused. Rather, it was the non-disclosure of the relevant evidence regarding the complainant's sexual history that gave rise to anxiety that the accused, in the absence of some form of limited questioning to clarify the issue, may not have received a fair trial.

[38] This Court recognizes the difficulty which a trial judge must face when asked to determine these applications. Nonetheless, and in line with the authorities, a primary consideration for the learned judge is to determine the relevance and nature of the questions which are proposed to be put to the virtual complainant. Mrs. Yearwood-Stewart indicated the relevance of the application to the fact that in issue was the medical examination form spoken to by WPC Bellot which, at the time when the VC was examined, was in respect of another individual who was prosecuted and convicted for sexual offences against the VC. Counsel then intimated that the basis of the application was to lay the foundation that another complaint was made at that time in respect of another individual and that it went to the appellant's defence that he did not engage in any sexual conduct with the VC during the time for which he was indicted. Counsel went further to indicate the two questions which were to be asked to the VC, namely: (1) did you make a report to the police in August 2013

regarding sexual activity with “one so and so” (referring to the other accused) and (2) was it in August of 2013.

[39] It is within the purview of the trial judge to limit the scope of the questioning to specific issues or matters. I am of the view that the grounds of the application put forward made it clear that the appellant was not seeking to cross examine the VC on her general sexual history, but was instead seeking permission to lay out his defence clearly.¹¹ The questions did not go towards the credibility of the VC *per se*, but were more relevant to the guilt or innocence of the appellant. The conviction of the other individual was relevant to the defence of the appellant in this case, which was a complete denial of any sexual contact with the VC and that the accusations against him were fabricated due to a pending matter which he had before the court with the mother of the VC. In other words, the learned trial judge ought to have allowed some limited questioning in respect of the conviction of the other individual for sexual offences against the VC.

[40] This entire issue is compounded by the fact that there is a significant overlap between the dates indicated in the appellant’s indictment and the indictment of the other accused. Although it is possible that two individuals could be guilty of committing similar offences at the same time, I am of the view that the overall circumstances of this case warranted at least some limited questioning in respect of the conviction of another accused. This issue is further compounded by the fact that the trial judge did not address the discrepancy as it pertains to the medical form in his summation. I am unable to find that this failure did not impact on the minds of the jury, because it is very possible that they would believe that the medical form referred to, which speaks to the fact that the VC was sexually active, was not in relation to the appellant.

[41] Ground 2 of the appeal is therefore allowed. As this is a fair trial issue, the appeal against conviction can be set aside on this ground alone. However, there are a

¹¹ Page 37, lines 9-14 of the transcript of proceedings.

number of other grounds advanced, some of which were conceded by counsel for the respondent and which may further justify allowing the appeal. I will, therefore, proceed to examine them.

Grounds 3 and 8

- [42] Grounds 3 and 8 both address the appellant's statement from the dock and were jointly addressed in the appellant's written submissions. In the third ground of appeal it was argued that the trial judge incorrectly interrupted the appellant while he was giving his unsworn statement. Mrs. Yearwood-Stewart submitted that the appellant was entitled to make an unsworn statement instead of testifying on his own behalf and the content of his statement should only be restricted by the test of relevance. She argued that while the trial judge may instruct the jury that a dock statement is less cogent because it is unsworn and not tested by cross-examination, he cannot interrupt the accused whilst he is giving his own version of what transpired and his view as to the reason why these allegations were made against him by the virtual complainant and her mother.
- [43] On ground 8, Mrs. Yearwood-Stewart submitted that there was a material irregularity when the trial judge commented adversely on the relevance of the accused's statement about him lending money to the virtual complainant's mother and by discrediting the accused's dock statement and removing it from the jury's consideration. The basis of the latter ground is that the trial judge told the jury, in relation to the appellant's statement of belief, that the court does not go based on belief.
- [44] The Director of Public Prosecutions conceded ground 3 insofar as it challenged the appropriateness of the trial judge's interruption of the appellant's dock statement. The DPP conceded that a statement from the dock is an uninterrupted statement that does not expose the defendant to cross-examination by the State or questioning by the judge; but she contended that the error by the trial judge in interrupting the

appellant whilst he was making his dock statement did not cause the conviction to be unsafe, because an unsworn statement has no probative value, particularly in light of the fact that the appellant did not call any witnesses to support his statement from the dock.

[45] In response to the appellant's eighth ground of appeal, the respondent conceded that the trial judge ought not to have commented adversely on the statement of the accused about him lending money to the virtual complainant's mother, because this formed part of his defence as to the reason why the virtual complainant and her mother would fabricate the allegations against him.

[46] The right to make unsworn statements in criminal trials, although abolished in several countries, still obtains in the Commonwealth of Dominica. It is generally understood that an unsworn statement in effect is an opportunity for the accused to give his version of the facts, and often contains an accused's defence. However, a defendant does not have the right to make a statement from the dock which is not relevant to any issue in the case then being tried, a point which was rightly submitted by counsel for the appellant. In **R v Dunn and O'Sullivan**,¹² Lord Chief Justice Hewart stated that "the notion that the prisoner has an unqualified right to fix the limits of what he may say is one which it is impossible to admit." It follows that an accused is not permitted to give a purely irrelevant unsworn statement. In order to ensure that this does not occur, the trial judge must have the authority to limit the scope of the unsworn statement from the dock which may in some cases only be achievable by interrupting the accused.

[47] The portion of the transcript reflecting the appellant's unsworn statement bears reproduction here:¹³

"THE DEFENDANT: My name is Joseph Senhouse. I live in Galba, Penville. I am here today because of an accusation that was made against me by Sandra Charles and Ivenia Kendra George.

¹² (1924) 17 Cr App R 12.

¹³ Page 453 of the transcript of proceedings.

THE COURT: Sorry?

THE DEFENDANT: And Ivenia Kendra George. Your Honour I did not have anything to do with Ivenia Kendra George referring to any sexual activity neither having sex, front or back, in any way. I believe that Sandra Charles accused me because a sum of money I had borrowed her in the year 2013 to help her son Carlos Charles in a matter at court. I can remember in the year 2014 Theresa Charles came at my home and asked me to put a ham in my fridge.

THE COURT: I cannot see how all these things are relevant to the charge of this, you know.

THE DEFENDANT: Your Honour, this is how it started. That's why Theresa Charles.

THE COURT: No, you have to speak to the charges you are facing because you are saying things that the other side would never be able to rebut or anything like that. This is unsworn testimony, okay. So let us be fair.

THE DEFENDANT: Your Honour, that's what causes all these issues.

THE COURT: Mr. Senhouse, do not go beyond where you have gone. I am not going to allow you to go any further. You have to speak, if anything at all, speak to the charges and what you know about the charges, do that.

THE DEFENDANT: Yes, Your Honour. I has no knowledge or I did not do anything to Kendra Charles, Your Honour.

THE COURT: That's where you have to go. To Kendra who?

THE DEFENDANT: To Kendra Ivenia George.

THE COURT: Yes.

THE DEFENDANT: That's all I have to say now because I did not do anything to Kendra Ivenia George.

THE COURT: You have witnesses?

THE DEFENDANT: God is my witness, Your Honour.

THE COURT: I did not ask you that. So God will come to give evidence? What are you saying, sir?

THE DEFENDANT: I said God is my witness. No, My Lord.

THE COURT: Okay, thank you very much.

MRS. DAWN YEARWOOD-STEWART: Case for the Defence, My Lord.”

[48] The learned trial judge recognized the requirement of relevance of an unsworn statement to the charge. However, in determining whether the trial judge erred by interrupting the appellant’s unsworn statement, this Court is enjoined to consider whether the contents of the appellant’s unsworn statement were indeed relevant to the charge. The appellant’s defence to the indictment is one of a complete denial. He averred that he did not engage in any inappropriate sexual behaviour with the virtual complainant, and that the allegations made against him by the virtual complainant and her mother were based on a fabricated story created by the virtual complainant’s mother because of a pending matter which he had in court with her. In his unsworn statement he proceeded to state this and attempted to explain the genesis of this allegation, at which point he was interrupted by the trial judge. As conceded by the DPP, the trial judge ought not to have interrupted the appellant in his attempt to give his version of the facts.

[49] The impact of this interruption on the conviction must be examined, and the examination should begin with a consideration of the evidential value of an unsworn statement. Generally, the purpose of an unsworn statement is to give the accused an opportunity to put his version of the facts without being cross examined on it. It is not strictly probative by itself, but it is to be considered in relation to the whole of the evidence. In essence, an unsworn statement is to be treated as part of the probative material which the jury has to consider along with all the evidence in the case, giving such weight to the unsworn statement as they think appropriate.

[50] In **DPP v Walker**¹⁴ the Board expressed that:

“There are however cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their

¹⁴ [1974] 1 WLR 1090.

Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing... The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

[51] In **Denison (Alvin) v R**,¹⁵ a decision from the Court of Appeal of Jamaica, the court undertook a thorough analysis of authorities on the role of the trial judge in directing the jury on the significance of an unsworn statement to a case. The court outlined that:

"But at the end of the day, as this court has repeatedly emphasised, the jury must be told unequivocally that the weight to be attached to the unsworn statement is a matter entirely for their assessment. Given that the defendant's defence is more often than not stated in the unsworn statement, a failure to give directions along these lines may effectively deprive the defendant of a fair consideration by the jury of his stated defence. This is therefore essentially a fair trial issue."

[52] The Jamaica Court of Appeal held that where the judge repeatedly directed the jury that the unsworn statement is not evidence and has less weight than sworn evidence, the learned judge was in effect substituting her own opinion of the weight to be attached to the applicant's unsworn statement for that of the jury. The court further noted that the judge's repeated qualification of the value and weight of the appellant's unsworn statement, which was his chosen vehicle for the purpose of conveying his defence to the jury, resulted in the defence not being fairly and adequately left to the jury.

[53] It is therefore clear that an unsworn statement can carry some value in the sense that it can be given consideration by the jury. Accordingly, in giving his direction or summation to the jury, the trial judge should not comment on the weight to be given

¹⁵ [2014] JMCA Crim 7.

to the appellant's unsworn statement or discredit the appellant's unsworn statement. The trial judge in this case directed the jury that it is for them to judge the statements (including the unsworn statement) in the context of the rest of the evidence, bearing in mind that he was not cross-examined, and reminded them that the appellant had nothing to prove. After telling the jury that the virtual complainant's mother denied the appellant's "belief" in relation to the money and the son, the trial judge stated that "In this court we don't go over anything about what you believe or what you think or whatever. It's what happened."¹⁶

[54] The trial judge also stated that:

"This is one instance where the question of... you see, the point is this in evidence cross-examination is the most important part of the evidence, most critical because that is where the witness leaves his comfort zone and be questioned by the other side, cross him up. So I am saying to you there was no opportunity... let me go back and say he has a right to do that but you also have a right as jurors to say well, this is unsworn testimony. How does this match up to that; you have a right to say that and make your determination based on that; is there any connection?"

[55] The appellant was prevented from continuing his unsworn statement and the content which he was allowed to give was discredited by the trial judge in his summation to the jury. This, in my view, was not remedied by the trial judge repeating to the jury that the matter is up to them. He ought to have left the question entirely to the jury as to what weight is to be given to the statement, and his failure to do so effectively prevented the appellant's defence, advanced in his unsworn statement, from being adequately put to the jury. In the circumstances, grounds 3 and 8 of the appeal are allowed. The issues raised in these grounds were fair trial issues, so allowing these grounds of appeal means that the trial of the appellant was unfair and his conviction therefore unsafe.

¹⁶ Page 545 of the transcript of proceedings lines 15-20.

Ground 4

- [56] The appellant's fourth ground of appeal takes issue with the learned trial judge's interruptions of the appellant's counsel's address to the jury. Mrs. Yearwood-Stewart, in reliance on **Richardson Fontaine v The State**,¹⁷ submitted that the repeated interjections by the trial judge interfered with the flow of her address and stultified the presentation of the appellant's case to the jury. As a result of the interjections, counsel argued, she spent much time responding to the trial judge instead of addressing the jury. Further, the repeated interjections caused the jury to have become more interested in the interaction between counsel and the judge instead of focusing on the contents of her address. This latter point is supplemented by the application to rely on affidavit evidence in which the appellant claims that he observed that whenever his counsel made a statement during her address to the jury, the jurors looked at the judge to see whether or not he opposed whatever she was saying. Mrs. Yearwood-Stewart argued that the trial judge should have waited until his summation to address any difficulty with counsel's address.
- [57] The learned DPP, in her submissions in reply, argued that the interruptions of defence counsel's address to the jury were justified and that there was no irregularity on the judge's part. The DPP submitted that counsel for the appellant failed to observe the rules of closing arguments and exceeded the ambit of what counsel is allowed to do in presenting an accused's case to the jury. The DPP further submitted that the trial judge did not make any prejudicial or unfair comments in his interjections and, despite the interruptions, Mrs. Yearwood-Stewart was not prevented from presenting the case for the appellant. The DPP also relied on **Richardson Fontaine** in support of her submissions.
- [58] An analysis of the appellant's fourth ground of appeal begins with a brief examination of the role of the trial judge in the context of judicial interruptions. In **Allie Mohammed v The State**,¹⁸ Lord Steyn expressed that "a trial judge ought to

¹⁷ DOMHCRA2015/0007 (delivered 13th May 2020, unreported).

¹⁸ [1999] 2 AC. 111.

intervene in more than a perfunctory manner during a wholly inappropriate address to the jury by trial counsel, or should take steps to address counsel's inappropriate address in his summation."

- [59] Useful guidance on the issue of judicial interruptions of counsel is also provided by this Court in **Richardson Fontaine**, where the appellant argued that the trial judge's interruptions (a total of 10) in the course of the closing address to the jury by defence counsel had the effect of stultifying counsel and preventing her from fully and forcefully addressing the jury. In giving judgment in that case, Michel JA stated that:

"The modern authority on judicial interventions in criminal trials is the decision of the Privy Council in *Peter Michel v The Queen*, where the Board emphasised that in such cases, the court's overarching concern is the safety of the defendant's conviction. Safety of the conviction in this sense, however, was not hinged by the Board on the strength of the evidence against the defendant, but on his right to a fair trial, this right being absolute. The Board accepted the position of the court below, whose decision was appealed to the Privy Council, that the essential question is, "whether the nature and extent of the interventions have resulted in the [defendant's] trial becoming unfair".

- [60] Michel JA ultimately concluded that:

"On the authority of *Peter Michel v The Queen*, the conclusion can be arrived at that the mere fact that a judge intervenes inordinately is not determinative. Rather than a mere quantitative evaluation of the interventions, the question whether the judicial interventions have denied an accused a fair trial depends on a qualitative evaluation of the effect the interventions had on the fairness of the trial process."

- [61] A trial judge is supposed to be a neutral actor in a criminal trial and is therefore allowed to interrupt counsel in his or her address, and the judge is not restricted to waiting until his summation to the jury to address any issues which he has with counsel's address. There may be circumstances however where the interruptions are of such an egregious nature that it takes them out of the range of what is normally permissible. The crucial question remains whether the interruptions militated against a fair trial of the accused. Thus, for the purposes of this appeal, the issue is whether the interruptions by the trial judge of Mrs. Yearwood- Stewart's closing address were such that it rendered the trial unfair.

- [62] Upon review of the relevant part of the transcript, which was relied on by counsel for the appellant, it appears that many of the interruptions were not separate interventions by the trial judge, but instead formed a chain whereby some interventions were follow-up questions and included counsel's responses to these questions. Accordingly, the following five distinct interruptions by the trial judge are identified and relied on by counsel for the appellant.
- [63] The first interruption¹⁹ reflected in the appellant's submissions is the instance where the trial judge interrupted counsel, who was in the process of addressing the jury on the VC's evidence, and said that counsel was giving evidence. The trial judge directed counsel that - "You tell the Jury please remember what she appeared to be doing on the witness stand. Demeanour, that should be the topic... I would tell the Jury all those things, credibility and demeanour and those things. You can't be telling them what you observed, that is evidence."²⁰
- [64] The second interruption occurred when counsel for the appellant attempted to make the point that when a body is prepared for sex, there is...to which the learned judge interjected, saying "counsel, counsel, counsel."²¹
- [65] Thereafter, counsel proceeded with her closing, addressing the buggery charge, at which point the trial judge interrupted again.²² Counsel in her address to the jury stated that "the accused is alleged to have just pulled down their underwear – his own and her own. No preparatory stuff, she never tell us about nothing else except he pulled down her underwear and his underwear and he pushed his adult penis into her butt and into her..." at which point the trial judge told counsel that the VC did not use the words 'adult penis' in her evidence, and therefore this was not the evidence before the court.

¹⁹ Page 492 of the transcript of proceedings.

²⁰ Page 492 of the transcript of proceedings.

²¹ Page 492 of the transcript of proceedings.

²² Page 493 of the transcript of proceedings.

[66] The fourth interruption, which is gleaned from the extract of the transcript provided by counsel for the appellant, was when the trial judge interrupted defence counsel with the question “couple doors down, whose evidence is that?” as counsel was addressing the jury on the location of the appellant’s home, where the incidents in question allegedly occurred.

[67] The fifth distinct interruption gleaned from the extract of the transcript of proceedings²³ was when counsel for the appellant was framing the question of the burden of proof to the jury. Mrs. Yearwood-Stewart in her address to the jury reminded them that “the law allows you to convict an accused based on the child’s say so alone but you must be sure that she is telling you the truth. You got to ask yourself “is that enough, what she tell me, is that enough? Is that all I need to find the accused guilty? Am I satisfied? Have the Prosecution proven their case beyond a reasonable doubt.” The trial judge interjected, saying that “the rule is lawyers don’t speak anything about law.” Mrs. Yearwood-Stewart then retorted - “My Lord, counsel was able to do it, you know. She tell them about feeling sure and are you satisfied and nobody said anything to her including me. I sat there and I said nothing, My Lord.” The tial judge responded, saying - “Counsel, it is one thing that she says it and it is correct and what you say is not correct.” There were further exchanges between the trial judge and counsel along those lines, with counsel concluding that part of the exchange by saying - “So that you feel sure, My Lord. All of it is correct.” The trial judge then took the opportunity to correct one of counsel’s statements on the evidence of the VC, to which counsel responded with her own correction of the judge.

[68] It is apparent from the extract of the transcript relied on by the appellant, that the interruptions did not prevent counsel from fully and forcefully addressing the jury or stultify the defence. On the contrary, counsel, following each interruption, was able to return to her closing address and was able to deliver it. The majority of interruptions were the learned judge’s attempts at rectifying what he determined to

²³ Page 496 of the transcript of proceedings.

be incorrect statements of the evidence made to the jury by counsel for the appellant. The interruptions were short, and in the cases where they appeared to be long, this was as a result of counsel's retorts. Overall, the interruptions did not prevent counsel from advancing the appellant's defence.

[69] The Court has had the benefit of the affidavit evidence of the appellant which deposes that at one time counsel informed the learned trial judge that his interjections were affecting the flow of her presentation, to which the learned trial judge directed counsel to "go ahead and flow", whilst waving his hand as if to simulate the flow of water, which caused the jury to laugh.

[70] The affidavit also averred that when counsel was making a statement, the jury would look at the judge to see whether or not he opposed whatever counsel was saying, and although this was not a ground of appeal, it was a complaint that the jury's perception of the appellant's case was somehow adversely influenced by the exchanges with the judge. While the conduct of the learned judge may be admonished, I am not of the view that it satisfied the test as contained in **Peter Michel v The Queen**²⁴ or **Richardson Fontaine**, because the actions of the trial judge cannot be said to have resulted in an unfair trial of the appellant.

[71] I add at this point that Mrs. Yearwood-Stewart submitted that the actions of the trial judge were biased in favour of the prosecution's case. She contended that this bias was evident in the trial judge stopping defence counsel from putting questions of law to the jury, while allowing the prosecutor to do so. I agree that the judge ought to have stopped the DPP from putting such questions in the same way that he stopped Mrs. Yearwood-Stewart from doing so, but I do not consider that the trial judge's actions warrant a finding of biasness such as to have caused the appellant's trial to be unfair vitiate.

²⁴ [2009] UKPC 41.

[72] For the foregoing reasons, ground 4 of the appeal is dismissed.

Ground 5

[73] In his fifth ground of appeal, the appellant challenged the decision of the trial judge to allow the VC to testify on oath when, on the *voir dire*, she was unable to tell the court what it means to tell the truth. Learned counsel submitted that the two requirements which must be satisfied in order for a child to give sworn testimony are that the child must understand the solemnity of the occasion and the added responsibility to tell the truth. Mrs. Yearwood-Stewart relied on the authority of **Abraham Nelson v R** in support of this submission. She challenged the adequacy of the *voir dire* on the ground that the trial judge failed to capture from the VC that she understood the solemnity of the occasion and the added responsibility to tell the truth. In support of this, Mrs. Yearwood-Stewart pointed to the record wherein the judge asked the VC if she knows what it means to tell the truth and no answer was forthcoming from the VC.

[74] The DPP in reply submitted that the inquiry which was done by the trial judge was sufficient. The DPP relied on the case of **Fazal Mohammed v The State**²⁵ in support of this submission. She submitted that the trial judge interrogated the VC in accordance with the law and that it is clear from the responses of the VC that she understood that she was in court, that in court she had to speak the truth and that she would be punished for not speaking the truth.

[75] Pursuant to Section 2 of the **Children and Young Person's Act**,²⁶ a child is defined as a person under 14 years of age. Additionally, Section 28 (1) provides:

“Where in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given on oath, if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but

²⁵ [1990] 2 AC 320.

²⁶ Act No. 12 of 1990 of the Laws of the Commonwealth of Dominica.

otherwise taken and reduced into writing in accordance with the Magistrate's Code of Procedure Act or this Act, shall be deemed to be a deposition; but where evidence admitted by virtue of this section is given on behalf of the prosecution the accused is not liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."

[76] Furthermore, section 32 (1) of the **Sexual Offences Act** provides:

"Where upon the hearing of a complaint under this act, a minor in respect of whom the offence is alleged to have been committed or any other minor of tender years who is tendered as a witness does not in the opinion of the Court understand the nature of an oath, the evidence of the minor may be received though not given upon oath, if, in the opinion of the Court – (a) The minor is possessed of sufficient intelligence to justify the reception of the evidence; and (b) The minor understands the duty of speaking the truth."

[77] In **Fazal Mohammed v The State**, the appellant was convicted of the murder of his common law wife. He appealed this decision on the ground that the judge did not question the deceased's daughter, Sharon, about her understanding of the nature of the oath and the solemn obligation that it carried with it. She was 11 years old at the time of the incident and 13 when she gave evidence. The only available record of the proceedings was contained in the judge's notes which showed that, before she was sworn, Sharon said that she was 13 years old and a pupil at Ste. Madeleine Junior Secondary School. She was then sworn. Under the relevant statute, section 19 of the Children Act of Trinidad and Tobago, the unsworn evidence of a child of 13 years is not receivable in a murder case. The Trinidad and Tobago Court of Appeal held that there is a settled practice in Trinidad and Tobago that requires a judge, in the case of a child under 14 years of age, to satisfy himself by appropriate inquiry that the child has sufficient understanding of the nature of an oath and the solemn obligation that it carries to tell the truth, before allowing the child to give sworn evidence. Because the judge's notes did not disclose that he had made any inquiry about Sharon's understanding of the oath, the Court of Appeal ruled that Sharon's evidence must be treated as inadmissible on the ground that she should not have been permitted to give sworn evidence in the absence of such an inquiry. The Privy Council affirmed the Court of Appeal's decision.

[78] In **Abraham Nelson**, Byron JA, relying on the opinion of Lord Bridge, stated that belief in God is a reasonable basis of demonstrating an understanding of the nature of an oath. Lord Bridge's words were in the following terms:

"I do not think that, by emphasising that a secular approach is acceptable within the context of the decline of religious practice in England, the Court of Appeal laid down any principle intended to undermine the concept that belief in God and the divine sanction, which is inherent in taking the oath, was an inadequate basis for appreciating the nature of an oath. In my view the fact that a person believes in God and understands the significance of the divine sanction provides a reasonable basis for concluding that he understands the nature of an oath, which is the statutory test which the witness must satisfy."

[79] It is accordingly difficult to accept the appellant's submissions on this ground. As expressed, much emphasis was placed on the inability of the VC to answer the learned judge's question as to what it means to tell the truth, but this does not capture the full essence of the *voir dire* and the questioning therein. Of note, although the trial judge did not receive an answer to that question, he reframed it in terms which the VC would have understood at her tender age, and asked - "Let me put it this way then, if you don't tell the truth, you know what will happen to you?" to which the VC replied yes. When pressed further about the consequences of not telling the truth, the VC was able to respond that there would be divine punishment and that accordingly the truth should be told. The VC was able to distinguish between a lie and the truth and to say that she is in court to tell the truth, and that the truth means telling the court exactly what happened in the matter. The VC therefore understood the solemnity of the occasion and the duty to tell the truth, which is made clear through the trial judge's questioning. Ground 5 of the appeal is therefore dismissed.

Ground 6

[80] In the appellant's sixth ground of appeal, it is argued that the trial judge erred in law and misdirected himself when he directed the jury that unlawful sexual connection meant the introduction to any extent into the vagina or anus of any person any part of the body of the other person to mean the penis into the vagina. Mrs. Yearwood-

Stewart submitted that unlawful sexual intercourse is the insertion to any extent of the penis into the vagina, but for unlawful sexual connection it is not penis but hand, fingers, tongue etc.

[81] The DPP submitted in reply that it is unclear in the trial judge's direction what he stated to be the law on unlawful sexual connection and that the direction seemingly obscured the elements of sexual intercourse and buggery. The DPP accordingly conceded on this ground, but submitted that this does not make the verdict unsafe because a verdict was not returned on the charge of unlawful sexual connection.

[82] The DPP is absolutely correct in her response that no verdict was returned on the charge of unlawful sexual connection. I find it unnecessary, therefore, to express any view on what does or does not constitute unlawful sexual connection and will, without more, summarily dismiss ground 6 of the appeal.

Ground 7

[83] In his written submissions, the appellant argued that the trial judge erred in law and misdirected himself when, in exercising his discretion to give the jury a corroboration warning, he failed to assist the jury in determining why it was necessary to look for corroboration in the matter and to give a full corroboration warning. The argument was as follows: the trial judge firstly decided that a corroboration warning was essential, but erred in his interpretation of section 28 of the **Sexual Offences Act** when he stated that:

“...The law accepts that you can have proof by a single witness...Kendra George but it is saying that before you come to that conclusion you have to review all the evidence upon which the testimony depends for its veracity, its truthfulness. What do you have? You have the mother's evidence and you have the evidence which he (sic) gave also in front of the accused at the confrontation, all those things. It's nothing else because WPC Bellot wasn't there and Leblanc wasn't there.”

[84] The appellant submitted too that in his summation the trial judge told the jury to look for evidence of the mother of the child when seeking to find corroboration from the testimony and what was said in the presence of the accused at the confrontation.

This, the appellant submitted, is not corroboration at all. Further, the appellant submitted, the trial judge did not assist the jury in determining what evidence is capable of amounting to corroboration or inform them that the VC's evidence was unreliable or that there was a need for caution in deciding whether to accept her evidence. In reliance on **Roger Naitram et al v The Queen**,²⁷ counsel for the appellant argued that the jury is expected to look for supporting material evidence other than the VC's testimony which independently connects the appellant to the offence.

[85] At the oral hearing of the appeal, learned counsel for the appellant conceded the respondent's submission that the learned trial judge was not required to and did not issue a corroboration warning.

[86] In the Court's view, this is a proper concession in the circumstances. A requirement for corroboration in sexual offences is non-existent in the Commonwealth of Dominica by virtue of the legislative provisions. This much was also made clear by this Court in **Richardson Fontaine**. Instead, and as is required by section 28 of the **Sexual Offences Act**, the trial judge directed the jury that the testimony of one witness is sufficient proof of any fact, but warned them that before finding any fact to be proved solely by the testimony of a single witness, they should carefully review all the testimony upon which the proof of the fact depends. There is therefore no error in the judge's direction in respect of a corroboration warning and ground 7 of the appeal accordingly fails.

Ground 9

[87] In ground 9, the appellant challenged the fairness of the trial on the basis that the defence of the appellant was not put to the jury at all or, when put, was discredited by the trial judge. Mrs. Yearwood-Stewart submitted that when she sought to raise doubts concerning the proof of dates by pointing to the fact that the prosecution had

²⁷ ANUHCRA2006/005, ANUHCRA2006/006, ANUHCRA2006/008 (delivered 15th December 2010, unreported).

failed to produce a station diary evidencing when the report was made or when the medical report was obtained, this was discredited by the trial judge when he told the jury that WPC Bellot's testimony of the date she took the VC to be examined was sufficient. Mrs. Yearwood-Stewart submitted too that a medical report was not provided despite statements made by witnesses that the virtual complainant was medically examined by a District Nurse and a Medical Doctor. Also, neither the nurse nor the doctor testified that they examined the VC pursuant to a report against the accused.

[88] The DPP partially conceded ground 9, insofar as it challenged the trial judge's statement to the jury during his summation that the date the VC was examined was sufficient, when part of the defence's case was that there were inconsistencies in respect of the prosecution not proving dates. The DPP conceded that that statement ought not to have been made to the jury. On the issue though of no medical report having been provided, the DPP submitted that there is no requirement in law that for the prosecution of sexual offences a medical report and/or medical evidence has to form part of the prosecution's case.

[89] The DPP is right that a medical report is not necessary for the prosecution of a sexual offence. There is argument that it may be considered best practice that a medical examiner should give oral evidence in sexual offence cases, or a good reason given for his or her absence, but there is no such requirement in law. Accordingly, the failure to adduce a medical report or call a medical officer, in and of itself, is not sufficient to justify a finding that the trial was unfair. The fact though that there was no medical examination form tendered into evidence at the trial, yet one of the witnesses gave evidence in relation to a medical form and a medical examination, when neither the medical form nor the medical examination was in relation to the charges against the appellant, and the trial judge failed to address this in his summation to the jury, would have caused the trial of the appellant to be unfair. Ground 9 of the appeal is accordingly allowed and, on this ground too the appellant's trial was unfair.

Ground 10

[90] In his tenth ground of appeal, the appellant argued that there was a material irregularity when the trial judge at the empaneling of the jury openly mocked him by making sarcastic remarks to him as he stood in the witness box, causing members of the jury panel, including those empaneled to hear his case, to laugh at him, much to his distress. This behaviour, counsel submitted, reeked of bad faith and biasness in favour of the prosecution.

[91] The respondent argued in reply that the events that transpired in court on the day in question did not create any prejudice to the appellant, because the trial judge simply made an inquiry of the appellant and eventually admonished the jury for their behaviour. This submission was buttressed by the case of **Tyrone Kadan, et al v The State**.²⁸

[92] This ground of appeal can be easily dispensed with. As unfortunate as it is that the appellant may have felt embarrassed at the jury's laughter, this is not sufficient to ground an appeal and could not be said to have impugned the fair trial of the appellant justifying the allowing of an appeal on this ground. Besides, the appellant did not say what, if any, adverse effect the statements of the trial judge had on the trial proceedings. This ground of appeal is accordingly dismissed.

Ground 11

[93] The appellant's eleventh ground of appeal is that the sentence of 60 years is severe and excessive in all the circumstances of the case. In light of the intended disposition of the appeal, however, I find it unnecessary to address this ground of appeal.

²⁸ DOMHCRAP2007/002 (delivered 17th May 2010, unreported).

The proviso

- [94] In this appeal, there were 10 grounds of appeal against conviction and 1 ground of appeal against sentence, some of which grounds were conceded by the respondent. Of the 10 grounds of appeal against conviction, 5 will be allowed and the other 5 will be dismissed. The appeal against sentence will be rendered otiose by the outcome of the appeal against conviction.
- [95] Ground 1 of the appeal is allowed on the basis of statements made by the trial judge in his address to the jury which amounted to an irregularity, but not resulting in the trial being unfair and the conviction unsafe.
- [96] Ground 2 of the appeal is allowed on the basis that the trial judge's exercise of his discretion to deny the application by the appellant to cross-examine the virtual complainant on prior sexual activity was unreasonable and affected the fair trial of the matter, resulting in the appellant's trial being unfair and the conviction being unsafe.
- [97] Grounds 3 and 8 of the appeal are allowed on the basis of the trial judge's wrongful interruptions of the appellant when he was giving his statement from the dock and the trial judge's adverse comments in his address to the jury discrediting the appellant's statement. This too affected the fairness of the trial, resulting in the appellant's trial being unfair and his conviction unsafe.
- [98] Ground 9 of the appeal is allowed on the basis that the trial judge erred in his directions to the jury about the sufficiency of the evidence of the police officer on relevant dates and on the failure to tender the medical form and a medical report and to lead medical evidence from the doctor and nurse who examined the virtual complainant. This affected the fairness of the trial, resulting in the appellant's trial being unfair and his conviction unsafe.

[99] Grounds 4, 5, 6, 7 and 10 of the appeal are dismissed. Be that as it may, allowing the appeal on grounds 2, 3, 8 and 9 is sufficient to vitiate the fairness of the appellant's trial and the safety of his conviction. This though is not the end of the matter and this Court must yet decide whether this is a fit and proper case for applying the proviso as contained in section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act**.

[100] Section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act** provides that:

“The Court of Appeal on any such appeal against conviction shall, subject as hereinafter provided, allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal. **However, the Court may, notwithstanding that it is of the opinion that the point raised in the appeal may be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.**” (emphasis mine).

[101] The test to determine whether the proviso should be applied or not was laid down by Lord Hope in delivering the judgment of the Privy Council in the case of **Giselle Stafford v The State**.²⁹ The test is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence. Put differently, the question to be decided is whether no reasonable jury after a proper summing up could have failed to convict the accused on the remainder of the admissible evidence.

[102] In **Mathis Alson Woodman v The State**,³⁰ this Court held that:

“The test for whether a miscarriage of justice has actually occurred is not simply whether the appellate court is itself persuaded of guilt. That would be to substitute trial by appellate judges for trial by jury. That the appellate court is satisfied of guilt is certainly necessary but is not by itself sufficient.

²⁹ [1999] 1 WLR 2026.

³⁰ DOMHCRAP2016/0016 (delivered 4th July 2022, unreported).

The test is normally whether the appellate court is, further, satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred. The more minor the error, the easier it is likely to be for the appellate court to address and answer the question whether any jury must inevitably have convicted if the error had not occurred. Conversely, the more extensive the errors at the trial, the more difficult it is likely to be for the appellate court to conclude that any jury must have convicted.”

[103] I am not convinced that there was no miscarriage of justice in this case. Indeed, much of the grounds of appeal which were allowed concerned the appellant’s defence and its proper ventilation. Although I have found that counsel for the appellant was not prevented from advancing the defence to the jury in her address, it cannot be said that the jurors’ minds were not prejudiced by the learned judge’s summation where he discredited much of the appellant’s unsworn statement, after interrupting him and preventing him from completing it in unjustified circumstances. Much also turns on the fact that there was no medical examination form tendered into evidence against the appellant in this matter, yet one of the witnesses gave evidence in relation to a medical form and a medical examination when neither the medical form nor the medical examination was in relation to the charges against the appellant; a fact which the learned judge failed to address in his summation to the jury. I am not satisfied that this did not prejudice the jury’s mind against the appellant. Accordingly, I find that, based on the overall conduct of the case by the learned judge, it cannot be safely said that there was no miscarriage of justice. In all the circumstances of the case, I am of the view that the proviso ought not to be applied and that the appeal should be allowed, with the convictions being quashed. With this, the appeal against sentence falls away.

[104] This is not, however, fully dispositive of the appeal and the court must consider whether a retrial should be ordered in the circumstances. The seminal case on this issue is **Reid v The Queen**³¹ where, on an appeal from the Court of Appeal of Jamaica, the Privy Council sought to answer the question – what are the principles

³¹ [1979] 2 All ER 904.

which should apply in considering whether or not a new trial should be ordered after a finding by the Court of Appeal that the verdict of the jury convicting the accused was unsafe or unsatisfactory and that the conviction should therefore be quashed.

[105] In giving the judgment of the Board, Lord Diplock stated that:

“[T]he interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them, it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant.

At the other extreme, where the evidence against a defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, *prima facie* the more appropriate course is to apply the proviso to s 14(1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between the two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which he ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that would have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies on the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that on a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that on a fresh trial an acquittal is on balance more likely than a conviction, it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery.”

[105] Lord Diplock was careful to point out that these are “some of the factors that are most likely to call for consideration in the common run of cases ... in which the court is called on to determine whether or not to exercise its power to order a new trial” and “that the factors they have referred to do not pretend to constitute an exhaustive list.” Lord Diplock was also careful to emphasise that none of the factors is necessarily more important than another and the weight to be attached to each of them in any particular case will depend on its own particular facts and on the social environment in which criminal justice in the country falls to be administered.

[106] The incidents leading to the arrest, charge, trial, conviction and sentence of the appellant occurred in 2013, when the virtual complainant was 8 years old. She is now a young adult aged between 18 and 19 years old. The appellant, who would have been 49 years old at the time of the offence, is now between 59 and 60 years old. Justice will probably not be served to either of them if they, and their families, have to relive the sordid events which occurred on these 4 occasions between January and August 2013. A new trial will also mean that the virtual complainant will have to undergo a third trial of this nature in her young life. Then too there is the fact that some witnesses may be unavailable or unwilling to testify to matters which

occurred as many as 11 years prior, while others may simply not recall relevant details.

- [107] The offences for which the appellant was convicted and sentenced are very serious ones, and although public interest is best served by the perpetrators of serious crimes being tried and punished for their crimes, it is not served by unfairness to accused persons such as might be occasioned by delays in the trial process not caused by the accused persons themselves. The appellant was convicted over 8 years ago. A new trial resulting in a verdict being given over 8 years later than would have been the case if the trial judge had not fallen into error, swings the balance against a retrial. There is also a likely 11-year gap between the commission of the offences between January and August 2013 and the date by which a new trial may be held. Also significant is the fact that the appellant would have spent over 8 years in prison between the date of his conviction in November 2015 and the date of this judgment. In all the circumstances, a new trial should not be ordered.

Conclusion

- [108] The justice of the case requires that the appeal be allowed, the convictions be quashed, the sentences be set aside and the appellant be discharged. I so order.

I concur.
Vicki-Ann Ellis
Justice of Appeal

I concur.
Gerard St.C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar