

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

MONTSERRAT

MNIHCRA2019/0002

BETWEEN:

JUNIOR MEADE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Mario Michel
The Hon. Mde. Margaret Price-Findlay

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

Appearances:

Mr. Jean Kelsick for the Appellant
Mr. Henry Gordon for the Respondent

2020: June 24;
2021: May 19.

Criminal appeal – Indecent assault – Appeal against conviction – Appellant’s defence contained in caution statement – Whether judge failed to adequately put the appellant’s defence to the jury – Adequacy of judge’s summation – Whether judge’s summation to the jury rendered the verdict unsafe and constituted a material irregularity – Whether in the circumstances the fresh evidence adduced at trial constituted a material irregularity – Disclosure – Section 64 of the Criminal Procedure Code – Whether judge erred in preventing defence from seeing psychologist’s notes

The appellant, Junior Meade, was found guilty of indecently assaulting a ten year-old girl (“the child”) and was sentenced to 15 months’ imprisonment. At the trial, the critical evidence against the appellant came from the child’s testimony. The appellant did not give evidence but gave a lengthy caution statement to the police denying the allegations against him. The appellant also suggested that there was an ulterior motive for the charge against him in that the child’s mother was using the child as bait against him for financial gain and further, that the child was over-sensitised by her mother to the sexual threat men posed.

The appellant has appealed against his conviction. He contended that the learned judge failed to put his defence to the jury fairly, adequately or at all and the direction fell short of what was expected. He also complained that the learned judge failed to examine the defences raised in the caution statement and that judge's long recital of the evidence in his summation to the jury, without a proper analysis of the issues and the evidence relating to them rendered the verdict unsafe and constituted a material irregularity in the trial. The appellant further posited that the extent and discriminatory nature of some of the fresh evidence adduced by the child's mother constituted a material irregularity and rendered the trial unfair, and that the judge erred in preventing the defence from seeing the psychologist's notes regarding the child.

The following issues arise for determination in this appeal: (i) whether the learned judge failed to adequately put the appellant's defence to the jury; (ii) whether in the circumstances the fresh evidence which was adduced at trial constituted a material irregularity thus rendering the trial unfair; (iii) whether the judge's summation to the jury rendered the verdict unsafe and constituted a material irregularity; and (iii) whether the judge erred in preventing the defence from seeing the psychologist's notes.

Held: dismissing the appeal and affirming the appellant's conviction, that:

1. The directions to the jury must set out the position of the Crown and the defence, the legal issues involved and the evidence that may be applied in resolving the legal issues and in determining the guilt or innocence of the accused. However, a judge in a criminal trial is under no obligation to review all of the evidence. The judge must refer to sufficient evidence in the context of the case and the entirety of the charge, to alert the jury to the specific parts of the evidence that are significant to its decision on particular issues and to the position of the parties on those issues. The judge's charge to the jury, read as a whole, must leave the jury with an adequate understanding of the evidence relied upon by the parties on the issues raised. It follows therefore that merely reading the appellant's caution statement in full, as part of the summing up, cannot without more, constitute putting of the defence to the jury. The judge has a duty to put to the jury all defences that appear on the facts whether or not the accused has advanced such a defence. In this case, the learned judge erred in failing to bring to the jury's attention to material in the caution statement which may have assisted the appellant.

R v Huard 2013 ONCA 650 considered; **R v Cooper** [1993] 1 SCR 146 considered; **R v Knox** 2017 SKCA 8 considered; **R v Daley** 2007 SCC 53 considered; **R v Royz**, 2009 SCC 13 considered; **R v Lawrence** [1982] AC 510 considered.

2. A trial judge needs to do more than just remind the jury of the inconsistencies in the evidence if they, the jury, find that inconsistencies exist. It will often be appropriate for the judge to refer to important inconsistencies or incongruities in the evidence. In this case, even though the matters raised were fully explored by the defence in cross-examination, it was incumbent upon the learned judge to

instruct the jury as to how to treat with the inconsistencies. However, the critical issue here boiled down to whether the jury believed the child's evidence and were sure that the appellant indecently assaulted her, as charged. The jury would have been cognisant that the appellant denied the charge and advanced two theories as to why the charge was preferred. Their verdict showed that the jury believed the child's evidence and rejected the theories that the child's mother was using her as bait to extract money from the appellant and that the child was over-sensitised by her mother to the sexual danger posed by men. Therefore, the jury were clearly entitled to convict the appellant on the child's evidence.

3. It is an established principle that disclosure is governed by relevance and materiality to ensure a fair trial for the accused. On that basis, section 64(1) of the **Criminal Procedure Code** provides that to the extent necessary to ensure a fair trial, the prosecution shall disclose material which will not form part of its case. Therefore, ordinary fairness would require that the defence be allowed to see the psychologist's notes before the judge made a decision disallowing the defence request. However, in this case, the psychologist's notes recorded nothing about what the child told the psychologist about what had happened to her. It follows therefore that nothing turns on the judge's decision to disallow the defence request with respect to the disposition of the appeal.

Section 64 (1) of the **Criminal Procedure Code**, Cap. 4.01, Revised Laws of Montserrat 2013 considered.

4. The test for whether a miscarriage of justice has actually occurred is not simply whether the appellate court is itself persuaded of guilt. 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. In this case, it is clear that notwithstanding the inadequacies in the summation, any jury acting properly would inevitably have convicted the appellant. In the circumstances, it cannot be said that any miscarriage of justice occurred. Accordingly, this is a fit case to apply the proviso to section 39 (1) of the **Eastern Caribbean Supreme Court Act**.

Section 39(1) of the **Eastern Caribbean Supreme Court (Montserrat) Act**, Cap. 2.01, Revised Laws of Montserrat 2013 applied; **Warren Cassell and another v The Queen** [2016] UKPC 19 applied.

JUDGMENT

- [1] **BAPTISTE JA:** After a trial before a judge and a jury of his peers, 59 year-old Junior Meade ("the appellant") was found guilty of indecently assaulting a ten year-old girl ("the child") by touching her vagina; a crime for which he was sentenced to

15 months' imprisonment. The critical evidence against him came from the child's unsworn testimony. The incident occurred at the appellant's home in an upstairs bedroom at a time when the child's mother and other persons were downstairs. The appellant did not give evidence but gave a lengthy caution statement to the police. He denied touching the child's vagina. The appellant suggested that there was an ulterior motive in the charge against him in that the mother was using the child as bait against him for financial gain; and further, that the child was over-sensitised by her mother to the sexual threat men posed.

- [2] In this appeal against conviction, Mr. Jean Kelsick, counsel for the appellant, severely criticised the learned judge's summation. He contended that the learned judge failed to put the defence to the jury fairly, adequately or at all and the direction fell short of what was expected. Mr. Kelsick complained that the learned judge failed to examine the defences raised in the caution statement. Further, the trial judge's long recital of the evidence in his summation to the jury, without a proper analysis of the issues and the evidence relating to them rendered the verdict unsafe and constituted a material irregularity in the trial.
- [3] Mr. Kelsick contended that the judge made no reference to and failed to explain any of the central defences (barring the mother's unreliability) but opted instead to speak of 'myriad other features'. By limiting his remark to the unreliability of the mother's evidence, the judge misled the jury into thinking that this was the only defence mounted or worth considering. Counsel also complained that the extent and discriminatory nature of some of the fresh evidence adduced by the child's mother constituted a material irregularity and rendered the trial unfair. Finally, he argued that the judge erred in preventing the defence from seeing the psychologist's notes regarding the child.
- [4] In response to the complaint that the learned judge failed to adequately put the defence to the jury, learned crown counsel, Mr. Henry Gordon submitted that:

- (i) the judge read the appellant's caution statement to the jury in full as part of his summing up;
- (ii) the appellant did not give evidence in his defence or advance a positive case;
- (iii) the judge reminded the jury of all the alleged inconsistencies in the evidence, as elicited in cross-examination;
- (iv) the jury were directed as to what the Crown had to establish to return a guilty verdict; and
- (v) the jury had the defence case clearly in mind at the point they retired.

[5] Mr. Gordon placed heavy emphasis on the fact that the appellant did not give evidence and in that regard, the judge's obligation is limited. Relying on **R v Hillier & Farrar**,¹ he posited that in that scenario it was no part of the judge's duty to build up a defence for someone who has not chosen to give the jury the benefit of his version of material circumstances and events. What the jury need to be reminded of in his defence when the defendant does not give evidence, is relevant matter contained in his pre-trial statements and interviews with the police and possibly such assistance, if any, as counsel had been able to extract from the Crown's witnesses in cross-examination. Mr. Gordon submitted that the judge did just that.

[6] Learned counsel argued that in reading aloud the appellant's statement under caution and reciting in detail the cross-examination of the prosecutions' witnesses, the learned judge did what was required of him in summing up a case in which the defendant did not give evidence. Counsel asserted that the appellant did not run a positive defence; his defence was one of plain denial, with two possible theories

¹ (1993) 97 Cr App R 349.

advanced as to why the child's account was wrong; either she had been manipulated by her mother in order to extract money from the appellant, or that her mother had over-sensitised her to the sexual threat posed by men. Mr. Gordon stated that the appellant's case was that these theories, coupled with the averred inconsistencies in the Crown's evidence, meant that the jury could not be sure of guilt. He submitted that the theories to a greater or lesser extent, were far-fetched.

[7] Before delving further into this matter, it would be instructive to refer to aspects of the well-known governing law with respect to the judge's charge to the jury in a criminal case. On the authority of **R v Huard**,² the charge equips the jury to make a decision in accordance with the applicable and governing legal principles. A charge must leave the jury with an understanding of: (i) the factual issues to be determined; (ii) the legal principles relating to the factual issues and the evidence adduced at trial; (iii) the position of the parties and; (iv) the evidence relevant to the position of the parties on the various legal issues. Further, the directions to the jury must set out the position of the Crown and the defence, the legal issues involved and the evidence that may be applied in resolving the legal issues and ultimately in determining the guilt or innocence of the accused.³

[8] In final instructions, the judge is under no obligation to review all of the evidence. A review of the evidence does not mean a serial and undifferentiated recitation of large parts of the judge's notes of the evidence of each, or most of the witnesses who have testified at the trial. The role of the trial judge is to decant and simplify. What is necessary are references to the evidence that are sufficient in the context of the case and the entirety of the charge, to alert the jury to the specific parts of the evidence that are significant to its decision on particular issues and to the position of the parties on those issues. A trial judge is under no obligation to rehash each and every argument advanced by counsel. However, it has well been

² 2013 ONCA 650 at para. 49.

³ See *R v Cooper* [1993] 1 SCR 146 at 16, *R v Knox* 2017 SKCA 8 at para. 22 and *R v Daley* 2007 SCC 53 at para. 58.

established that the judge's charge to the jury, read as a whole, must leave them with an adequate understanding of the evidence relied upon by the parties on the issues raised.⁴

- [9] The judge's obligation in summarising the evidence and arguments is clear and was spelt out in **R v Lawrence**⁵ when Lord Hailsham observed:

"A direction is seldom improved and may be considered damaged by copious recitations from the total content of a judge's notebook. A summation to the jury should be custom built to enable the jury to understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective role of jury and judge. But it should also include a succinct but accurate summary of the issues of facts as to which a decision is required, a correct but concise summary of the evidence and arguments of both sides and a correct statement of the inferences which a jury are entitled to draw from their particular conclusions about the primary facts. It is often sensible for the trial judge to remind the jury of counsel's submission but it is not mandatory for him to do so."

- [10] I now consider the summation, in particular the complaint that the learned judge did not put or properly put the defence case to the jury. The learned judge commenced his directions on the law in the first paragraph, then told the jury that it was entirely for them to decide what evidence to accept or what to reject. His Lordship then stated: 'I will sum up the evidence to aid your recollection. I will not repeat everything, though a lot of it. I will try to balance the issues and the case of each the prosecution and defence.'⁶ He ended at paragraph 26, by saying: '[h]aving given these directions of law in writing to you ... I will shortly turn now to summing up the evidence, which will involve the reading to you of my notes, which you will not have in writing, so please listen carefully'.⁷

- [11] Following this, the learned judge began the second part of his summation. He indicated that:

⁴ See R v Huard 2013 ONCA 650, at paras. 55-57.

⁵ [1982] AC 510 at 519.

⁶ Transcript of proceedings, pg. 171, lines 22-24.

⁷ Transcript of proceedings, pg. 179, lines 21-23.

“A summing up is not a short summary of evidence instead it involves going through in detail what the relevant evidence has been and will necessarily take appropriate time. What follows will be my record of the evidence as it emerged, noting please what is said in a question is not evidence. Only what is said or meant by the answer, which is what I try to record, though not always verbatim.”⁸

- [12] The learned judge then commenced a verbatim recitation of the evidence, reading out at length from his notes the evidence of each witness, entirely devoid of analysis of the issues or relating the evidence to those issues. Having done that, at the end of the summation, he purported to state the respective cases:

“On the one hand, the prosecution has pointed during a 45 minute speech to 10 features of the case which they say show the sure guilt of the defendant. On the other hand the defence points in a 1 hour 45 min speech to a myriad other features of the case which they say point to how the evidence of KH is unreliable so that reasonable doubt properly arises, meaning he is not guilty. I will not summarise each party’s points as each has made so many, and I have no doubt the points from these able speeches will be collectively in your minds. It is now your task to say whether you are sure of guilt; if not, you will acquit.”⁹

- [13] It can be seen at once that the learned judge’s approach is not what is countenanced by the learning. It is, therefore, not surprising, that Mr. Kelsick was severely critical of the judge’s summation and represented that the learned judge did not put the appellant’s case to the jury. It is interesting to note that in resisting the appellant’s complaint that the judge failed to put his defence to the jury, Mr. Gordon recognised that the appellant’s defence was one of plain denial with two possible theories as to why the child’s account was wrong; namely, maternal manipulation to extract money from the appellant or being overly-sensitised by her mother to the sexual threat posed by men. While learned counsel might consider these theories far-fetched, these are matters which the judge should specifically put to the jury, absent a proper basis for not doing so.

⁸ Transcript of proceedings, pg. 179, lines 25-29.

⁹ Transcript of proceedings, pg. 236, lines 3-11.

- [14] Mr. Kelsick submitted that given the critical role the caution statement played in the appellant's defence, it was incumbent upon the trial judge to make some reference to it in his summation. However, all the judge said, in this context, was that the appellant did not give evidence and was 'entitled to say through his counsel that he relies on his statement under caution'. In my judgment, that did not go far enough. The learned judge should have gone on to bring to the jury's attention to material in the caution statement which may have assisted the appellant.
- [15] With respect to Mr. Gordon's attempt to address the judge's omission or ameliorate its effect, in my judgment, merely reading the appellant's caution statement in full as part of the summing up, cannot without more, constitute putting of the defence to the jury. The fact that the appellant did not give evidence at the trial or advance a positive case does not relieve the judge of the obligation to point out to the jury aspects of a defence which can be gleaned from the caution statement or arise in cross-examination.
- [16] The submission that the jury had the defence case firmly in mind when they retired, as it was set out in the closing speech of Mr. Kelsick, is no substitute for the imprimatur of the learned judge. In directing the jury, it is incumbent upon the judge to put the defence fairly and squarely to the jury. The obligation to review the evidence and to relate it to the issues raised by the parties is for the trial judge and not counsel, whether prosecuting or defending. The closing arguments of the parties do not relieve the trial judge of the obligation to ensure that the jury understands the significance of the evidence to the issues in the case. As stated in **R v Royz**,¹⁰ juries may tend to place more weight on what the trial judge says about the evidence than on arguments by counsel. However, the trial judge may take into consideration the arguments of counsel in deciding how to discharge his or her obligations.¹¹

¹⁰ 2009 SCC 13 at para. 3.

¹¹ R v P.J.B., 2012 ONCA 730.

- [17] The fact that a defendant does not give evidence at a trial, while creating its own impediments in the context of a complaint that a judge failed to put the defence to the jury, is not, in itself fatal for the sustenance of such a complaint. That is so because a defence can be gleaned outside the parameters of testimony given in court by the defendant himself. A defendant's case can be put in cross-examination of the prosecution witnesses. The way defence counsel conducts the defence in the context of issues raised in cross-examination and the nature of the answers given by the witness, for example, are matters from which a defence can be gleaned. The contents of a caution statement given by the appellant and tendered into evidence can also be indicative of a defence relied on. So, a complaint that a judge did not put or properly put the defence cannot always be met by a response that the appellant did not give evidence at the trial.
- [18] The judge is obliged to put the defence case fairly to the jury and to summarise the respective cases of both the prosecution and the defence. In that regard, the judge said the prosecution pointed to ten features which they say pointed to the sure guilt of the accused. The defence pointed to a myriad of other features of the case to show that there was reasonable doubt of the appellant's guilt. Instead of pointing out what these features were, and summarising each party's case, the learned judge stated that he has no doubt that the points from the able speeches of counsel will be collectively in their minds.
- [19] The judge has a duty to put to the jury all defences that appear on the facts whether or not the accused has advanced such a defence. Speculative defences that are unfounded must not be put to the jury. The legal directions given by a judge ought to be well-structured and defined with a clear focus on each issue and the evidence that might be relevant to that issue. There is in rare cases, a tipping point that is reached, when, if the law and the defences' case is not properly addressed in a structured way by a judge, convictions are liable to be unsafe.¹²

¹² See *R v Browne* [2017] EWCA Crim 167 at paras. 70 and 71.

[20] Mr. Kelsick also complained about the fresh evidence that was adduced. He asserted that the circumstances in which a substantial body of fresh evidence was adduced by the child's mother, constituted a material irregularity thus rendering the trial unfair. Mr. Kelsick conceded that the defence was provided with all important witness statements, but contended that the prosecution should also forewarn the defence of incriminating fresh evidence that will be adduced at the trial.

[21] Mr. Kelsick stated that the learned judge only cursorily referred to the fresh evidence. Learned counsel highlighted the following fresh evidence, as highly incriminating:

“No. I asked the defendant if they could go upstairs because I don't like to have them around the adults because the conversations weren't appropriate at all so I asked him if they could go upstairs and eat their pizza up there and he said yes”.¹³

Mr. Kelsick pointed out that that was not said in any of her witness statements. It was highly incriminating and challenged in cross-examination because it suggested to the jury that the appellant readily agreed to this request in order to manoeuvre the child away from the rest of the adults where he could get her.

[22] Counsel also stated that the following evidence was also very incriminating as it suggested that the appellant was determined to get at the child when she was alone in his bedroom with her younger sister: ‘... but when they went upstairs I specifically said nobody go upstairs because my children are upstairs and he was the only one who came and ask me if he could put the envelope upstairs and come back’.¹⁴

[23] Mr. Kelsick referred to the following exchange in cross-examination:

¹³ Transcript of Proceedings, pg. 20, lines 12-15.

¹⁴ Transcript of Proceedings, pg. 39, lines 2-4.

“Question: In your testimony yesterday you said that when [the child] was whispering in your ear my client tried to cut her off?

Answer: Yes.

Question: You agree, you used (sic) the words cutting off for the first time at the trial.

Answer: Yes, I did.”¹⁵

Counsel submitted that it was highly incriminating as it suggested that the appellant was trying to prevent the child from revealing to her mother that he touched her indecently. He stated that the defence was not forewarned of this incriminating fresh evidence, when added to the considerable body of other less incriminating evidence the mother gave cumulatively disadvantaged the appellant, rendering the trial unfair.

[24] In response to the appellant’s complaint that the additional evidence given by the child’s mother rendered the conviction unsafe, Mr. Gordon stated that the Crown could not have forewarned the defence because it knew nothing about the incriminating fresh evidence. It was not forewarned about the evidence. However, there was no unfair disadvantage to the appellant. The defence highlighted the additional matters in cross-examination and in its closing.

[25] Mr. Gordon stated that the defence relied heavily on inconsistencies they perceived in the evidence. He submitted that in taking the jury through the evidence in detail during the course of the summing up, the learned judge was reminding them of a very large plank of the defence case: namely the additional matters the child mentioned in evidence and other inconsistencies between her evidence and her witness statements.

[26] With respect to inconsistencies, the position is that the judge needs to do more than just remind the jury of the inconsistencies in the evidence if they, the jury, find that inconsistencies exist. It will often be appropriate for the judge to refer to important inconsistencies or incongruities in the evidence. Even though the

¹⁵ Transcript of Proceedings, pgs. 47-48.

matters raised were fully explored by Mr. Kelsick in cross-examination, it was incumbent upon the learned judge to instruct the jury as to how to treat with the inconsistencies.

[27] At paragraph 15 of his directions on the law, the learned judge stated that there are features of the case which shows that the child has been consistent, and the appellant has not, which may or may not help the jury to conclude, this being very much a matter for them, that what she said was reliable. The judge proceeded to itemise the evidential features: ¹⁶

- “(i) three witnesses said that when the child came downstairs she looked scared. He stated that if the jury are sure of this description, which may point to how something had occurred to make her scared, may be more consistent with her believing something had happened to her, rather than her making something up;
- (ii) the second item concerned the recent complaint to her mother that the appellant had touched her vagina; and
- (ii) when the appellant said he had not touched her, though being only ten and he being an adult she did not know, she was willing to challenge him to his face by calling him a liar several times to his face, which may be consistent with something having happened to her”.

[28] Another complaint Mr. Kelsick advanced was that the trial judge erred by preventing the defence from seeing the psychologist's notes regarding the child and relied on the wrong statute in so doing. It emerged in cross-examination of the child's mother that the child had seen a psychologist after the incident. The defence subsequently informed the prosecution of its wish to see the report to ascertain if the child had made a previous inconsistent report to the psychologist.

[29] Mr. Kelsick stated that the judge allowed the prosecution, but not the defence to review the notes and accepted prosecuting counsel's opinion that the notes contained nothing he considered disclosable. At the instance of the defence, the trial judge reviewed the notes himself and agreed with the prosecution and denied

¹⁶ Transcript of Proceedings, pgs. 174- 175.

the defence's request to see the notes. Mr. Kelsick referred to section 64 (1) of the **Criminal Procedure Code**¹⁷ of Montserrat which provides that 'to the extent necessary to ensure a fair trial ... the prosecution shall disclose material which will not form part of its case'. The Crown's position was that notes could not in any sensible approach be regarded as undermining the Crown's case or assisting the appellant's case. The notes recorded nothing about what the child told the psychologist about what had happened to her.

- [30] Disclosure is governed by relevance and materiality to ensure a fair trial for the accused. Ordinary fairness would therefore require that the defence be allowed to see the notes before the judge made a decision disallowing the defence request. Nothing however turns on that with respect to the disposition of the appeal.
- [31] The shortcomings in the summation have been pointed out. The question which follows therefore is what is the effect on the safety of the conviction? As the Board stated in **Warren Cassell and another v The Queen**,¹⁸ embarking upon a very long recital of the evidence, witness by witness, is not a desirable way to sum up in a criminal case, as it risks causing the jury to lose sight of the wood for the trees, but by itself, would not afford a ground of appeal.
- [32] It is acknowledged that jury charges do not take place in isolation, but in the context of the trial as a whole. The case against the appellant was not a complex one or one involving a voluminous amount of evidence. The issues to be resolved by the jury were not complex. The critical issue really boiled down to whether the jury believed the child's evidence and were sure that the appellant indecently assaulted her, as charged. The jury would have been cognisant that the appellant denied the charge and advanced two theories as to why the charge was preferred. Their verdict showed that the jury believed the child's evidence and rejected the theories that the child's mother was using her as bait to extract money from the

¹⁷ Cap. 4.01, Revised Laws of Montserrat 2013.

¹⁸ [2016] UKPC 19, at para. 23.

appellant and that the child was over-sensitised by her mother to the sexual danger posed by men. The jury were clearly entitled to convict the appellant on the child's evidence.

- [33] I now address the question of the proviso. Section 39(1) of the **Eastern Caribbean Supreme Court (Montserrat) Act**¹⁹ provides that an appeal against conviction is to be allowed if the Court of Appeal thinks that the verdict of the jury should be set aside on the ground (inter alia) that it is unsafe or unsatisfactory but subject to the proviso:

“Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.”

- [34] In **Cassell**, Lord Hughes, at paragraph 28, stated as follows:

“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 appeal judges for trial by jury. True it is that the responsibility for applying or rejecting the proviso is laid squarely on the appellate court. That the appellate court is satisfied of guilt is certainly necessary, but is not by itself sufficient. The test is normally whether the appellate court is, further, satisfied that any jury acting properly must inevitably have convicted the defendant if the flaw(s) in the proceedings had not occurred.”

- [35] Not only am I persuaded of the guilt of the appellant, I am also persuaded that notwithstanding the inadequacies in the summation, any jury acting properly would inevitably have convicted the appellant. Any jury acting properly would have rejected the appellant's case that he did not indecently assault the child or that the child's mother put her up to make the allegation for financial gain or that the child was over-sensitised by her mother to the sexual danger posed by men. In the circumstances, I am satisfied that no miscarriage of justice occurred. Therefore, I find this to be a fit case to apply the proviso. The appeal is accordingly dismissed, and the appellant's conviction is affirmed.

¹⁹ Cap. 2.01, Revised Laws of Montserrat 2013.

I concur.
Mario Michel
Justice of Appeal

I concur.
Margaret Price-Findlay
Justice of Appeal [Ag.]

By the Court

Chief Registrar