

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

COMMONWEALTH OF DOMINICA

DOMHCRAP2015/0007

BETWEEN

RICHARDSON FONTAINE

Appellant

and

THE STATE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mrs. Dawn Yearwood-Stewart for the Appellant

Ms. Evelina Baptiste, Director of Public Prosecutions for the Respondent

2019: February 11;

2020: May 13.

Criminal appeal – Appeal against conviction and sentence – Unlawful sexual intercourse with a person under fourteen years – Corroboration warning in sexual offence cases – Section 28 of the Sexual Offences Act – Whether trial judge erred by failing to assist jury in determining what evidence amounts to corroboration in a sexual offence case – 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 trial judge failed to give a balanced and impartial summary of the cases for the prosecution and the defence – Whether trial judge failed to adequately direct jury on elements of credibility and propensity when giving good character direction – Whether verdict was unsafe and unsatisfactory – Whether sentence imposed was manifestly excessive

The appellant, who was married, was engaged in an extra-marital affair with a woman named Miranda, who is the cousin of the virtual complainant (“the VC”). On 23rd October 2012, the VC (who was 11 years old at the time) spent the night at Miranda’s home, where the appellant had sexual intercourse with her. The following morning, the

VC returned to her home and left later that morning for school. After the VC left, her mother noticed what appeared to be blood on the underwear which the VC was wearing when she returned from Miranda's house. When the VC returned home from school, her mother questioned her about the blood-stained underwear and the VC told her what had happened at Miranda's home. Following this, her mother went to Miranda's home to show her the underwear that the VC had been wearing when she came from Miranda's home that morning. The VC was subsequently examined by Miranda at the Health Centre where Miranda worked as a nurse, and a few weeks later was examined by a medical doctor at the Portsmouth Hospital. Following the examination at the Portsmouth Hospital, a report was made to the police, investigations were conducted and the appellant was charged for unlawful sexual intercourse with, and indecent assault of, the VC. The appellant was tried twice for both offences. The first trial produced a mistrial, while the second produced a conviction for unlawful sexual intercourse and a sentence of 10 years' imprisonment.

The appellant appealed against his conviction and sentence. The issues which arose for this Court's determination, based on the grounds of appeal are: (i) whether the learned judge erred by failing to assist the jury in determining what evidence amounts to corroboration in a sexual offence; (ii) whether the learned judge's interruptions of defence counsel during closing arguments had the effect of stultifying or preventing her from fully and forcefully addressing the jury and/or prejudicing the jury's mind against the appellant; (iii) whether the learned judge failed to give a balanced and impartial summary of the cases for both the prosecution and the defence; (iv) whether the learned judge, in giving the good character direction, failed to direct the jury fully on how to assess the elements of credibility and propensity; (v) whether in the circumstances of the case, the verdict was unsafe and unsatisfactory; and (vi) whether the sentence imposed on the appellant was manifestly excessive in all the circumstances of the case.

Held: allowing the appeal, quashing the conviction, setting aside the sentence and discharging the appellant, that:

1. The requirement of corroboration in sexual offence cases is non-existent in the Commonwealth of Dominica by virtue of both judicial authority and the legislative provision contained in section 28 of the Sexual Offences Act. Accordingly, the trial judge was prohibited from giving a corroboration warning in the instant case, but was permitted to give the jury the direction in section 28 of the Act, which he did in fact give.

Section 28 of the **Sexual Offences Act**, Act No. 1 of 1998 of the Laws of the Commonwealth of Dominica applied.

2. A judge, in a criminal trial, ought to 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. In such instances, the essential question is whether or not the nature and extent of the interventions have resulted in the defendant's trial becoming unfair. It is clear that the interruptions by the trial judge did nothing to stultify defence counsel and prevent her from fully and forcefully addressing the jury. However, there was potential for serious prejudice of the jurors when

the trial judge interrupted defence counsel's address to the jury to say that the appellant's engagement in an extra-marital affair "goes to the very matter that is very much your concern, good character". The prejudicing of the jury's mind against the appellant was at the very least capable of causing a miscarriage of justice, and it cannot be said with any certainty that the verdict would have been the same had their minds not been prejudiced.

Section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act** Cap. 4:02 of the Laws of the Commonwealth of Dominica applied; **Barry Randall v The Queen** [2002] UKPC 19 applied; **Peter Michel v The Queen** [2009] UKPC 41 applied; **R v Natalie Frances Woods** [2011] EWCA Crim 1305 applied; **Allie Mohammed v The State** [1999] 2 AC 111 applied; **Francis Eiley and others v The Queen** [2009] UKPC 40 applied.

3. The posture adopted by the trial judge in failing to adequately summarise the evidence of the accused is not a good practice and ought not to be followed by judges in jury trials. Nonetheless, it is not every departure from good practice that renders a trial unfair. In this case, although the judge's failure to at least summarise to the jury the key parts of the accused's evidence, instead of picking parts and portions, sometimes with the aim of highlighting discrepancies in the evidence of both the prosecution and defence's witnesses, was undesirable, it did not render the trial unfair so as to justify quashing the conviction for unlawful sexual intercourse.

Gregory Donnor v The State Criminal Appeal No. 25 of 2005 (Trinidad and Tobago) applied; **Barry Randall v The Queen** [2002] UKPC 19 followed.

4. The standard good character direction has two limbs. The credibility limb speaks to the greater likelihood of a person of good character being truthful than one of bad character, and the propensity limb speaks to the greater unlikelihood of a person of good character committing a crime, especially one of the seriousness of the crime with which the appellant was charged. The trial judge gave a good character direction which included both limbs and how to treat with them. This was necessary since the appellant had no previous convictions and his extra-marital affair had no bearing on the verdict which the jury was charged to render. But the trial judge was not required to, and probably ought not to have included in his direction to the jury the fact that the appellant had twice lied to the court. Nonetheless, this did not amount to a misdirection, nor was it of sufficient significance to negate the value of the good character direction which the judge did give.

R v Hunter & Others [2015] EWCA Crim 631 applied; **Andre Penn v The Queen** BVIHCRA2014/0006 (delivered 23rd November 2016, unreported) followed; **Teeluck (Mark) and John (Jason) v The State** (2005) 66 WIR 319 applied.

5. Though the trial judge did not establish the benchmark sentence for the offence of unlawful sexual intercourse with a minor in the Commonwealth of Dominica or any Eastern Caribbean Supreme Court member state, he did ascertain that the sentences imposed in recent years for unlawful sexual

intercourse ranged from 3 to 25 years' imprisonment. He also addressed the aggravating and mitigating factors and the sentencing principles before arriving at a sentence of 10 years' imprisonment, on a charge with a maximum penalty of 25 years' imprisonment. It cannot be said that a sentence of 10 years' imprisonment in all the circumstances was so excessive as to merit appellate interference.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against the conviction and sentence of Mr. Richardson Fontaine, ("the appellant") for the offence of unlawful sexual intercourse with the VC, aged 11. The appellant was convicted on 14th July 2015 and was sentenced on 29th September 2015 to 10 years' imprisonment.

Background

- [2] The appellant, who was married, was engaged in an extra-marital affair with a woman named Miranda, who is a cousin of the virtual complainant ("the VC") and who lives in the vicinity of the VC's home. On 23rd October 2012, the VC (who was 11 years old at the time) spent the night at Miranda's home, where the appellant had sexual intercourse with her. On the morning of 24th October 2012, the VC returned to her home and left later that morning to go to school. After the VC left for school, her mother noticed what appeared to be blood on the underwear which the VC was wearing when she returned from Miranda's home. When the VC returned home from school, her mother questioned her about the blood on her underwear and the VC told her what had happened at Miranda's home. Following this, her mother went to Miranda's home to show her the underwear that the VC had been wearing when she came from Miranda's home that morning. The VC was subsequently examined by Miranda at the Health Centre where Miranda worked as a nurse, and a few weeks later she was taken to the Portsmouth Hospital where she was examined by a medical doctor. Following the examination at the Portsmouth Hospital, a report was made to the police, investigations were conducted, and the appellant was charged for unlawful sexual intercourse with, and indecent assault of, the VC. The appellant was put on trial for both offences. The first attempt to try the appellant produced a mistrial, while the second attempt

produced a conviction for unlawful sexual intercourse and a sentence of ten (10) years' imprisonment.

The Appeal

[3] On 12th October 2015, the appellant filed a notice of appeal against his conviction and sentence on the following grounds:

- (1) The learned trial judge erred in law and misdirected himself when he failed to assist the jury in determining what corroboration is in a sexual offence matter.
- (2) The learned trial judge improperly interrupted trial counsel in her closing address to the jury which had the effect of stultifying trial counsel and preventing her from fully and forcefully addressing the jury.
- (3) The learned trial judge erred in law and misdirected himself when he allowed the prosecution to adduce highly prejudicial evidence about the appellant's personal life which had the effect of clouding the issue which the jury had to consider.
- (4) There was a material irregularity when the learned trial judge entered the arena on several occasions which had the effect of prejudicing the jury's mind against the appellant.
- (5) The learned trial judge did not forcefully, firmly and fairly put the appellant's defence to the jury as he did with the prosecution's case.
- (6) There was a material irregularity when the learned trial judge did not allow the witnesses to adduce any evidence whatsoever about conversations held in the absence of the appellant in clear breach of the Subramanian principle.
- (7) The decision is against the weight of the evidence.

(8) There was a material irregularity when the learned trial judge read the directions on the law to the jury at an extremely fast rate of speed which resulted in the jury being unable to discern the law on the case.

(9) The sentence of 10 years' imprisonment is severe in all the circumstances of this case.

[4] On 18th August 2017, the appellant filed skeleton arguments in support of his appeal and sought leave to argue additional grounds of appeal. In his skeleton arguments, the appellant merged grounds 2 and 4 of his grounds of appeal, abandoned grounds 3, 6 and 7, and added the following new grounds:

(1) The learned trial judge erred in law and misdirected himself when he failed to direct the jury fully on how to assess the elements of credibility and propensity when giving them the good character direction.

(2) The verdict was unsafe and unsatisfactory.

[5] The respondent filed skeleton arguments in opposition to the appeal on 1st October 2018.

Ground 1

[6] On ground 1 of his grounds of appeal, the appellant submitted that the trial judge, having found that there were several inconsistencies in the VC's testimony, decided that a corroboration warning was essential. However, he submitted that the learned trial judge erred in his interpretation of section 28 of the **Sexual Offences Act**¹ ("the Act") in that, after quoting the section to the jury, he said that, "What the law is saying is that you can't convict on the sole testimony of the virtual complainant."²

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

² See: Transcript of Trial Proceedings, p. 1085 lines 15 - 16.

- [7] Section 28 of the Act reads as follows:
- “Subject to section 32, where an accused is charged with an offence under this Act, corroboration is not required for a conviction and the Judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration, but may direct the jury as follows:
- ‘Testimony which you believe, given by one witness, is sufficient for the proof of any fact. However, before finding any fact to be proved solely by the testimony of a single witness, you should carefully review all the testimony upon which the proof of the fact depends.’”
- [8] The appellant submitted that, “nowhere in his summation does the Trial Judge tell the jury what exactly to look for when seeking to find corroboration from the testimony and the discrepancies while going through the evidence.”. The appellant then proceeded to quote the words of the trial judge, from page 1085 of the transcript, which – corrected for accurate reproduction - reads as follows:
- “Testimony which you believe given by one witness is sufficient for proof of any fact. However, before finding any fact proved solely on the testimony of a single witness, you should carefully review all the testimony upon which proof of the fact depends.”
- [9] The essence of the appellant’s submission on ground 1 is that, having decided that a corroboration warning was essential, the trial judge failed to offer assistance to the jury in determining what evidence is capable of amounting to corroboration.
- [10] At the hearing of the appeal, the Director of Public Prosecutions indicated to the Court that the quotation from page 1085 of the transcript that: “You can’t convict on the sole testimony of the virtual complainant” is inaccurate, and that the judge in fact said that “You can convict on the sole testimony of the virtual complainant”. The Court informed the Director of Public Prosecutions that it did not need to hear her further on this ground of appeal.
- [11] I am satisfied, as were the two other members of the Court, that in the context of what the trial judge said before and after the words quoted from lines 15 to 16 on page 1085 of the transcript, he could only have meant and must have

said that “you can convict on the sole testimony of the virtual complainant”. Once this is accepted, then the substratum of ground 1 would have collapsed and so therefore would the ground itself.

[12] The trial judge was not required to give any assistance to the jury in determining what corroboration is in a sexual offence, because corroboration of the evidence of the VC was not required. The requirement of corroboration in sexual offence cases is non-existent in the Commonwealth of Dominica by virtue of both legislative provision contained in section 28 of the Act and judicial authority, from cases like **R v Makanjuola**³ out of the United Kingdom (“UK”), **Damion Anderson v R**⁴ out of Jamaica, and **Andre Penn v The Queen**⁵ out of the Territory of the Virgin Islands (“the BVI”). Of note though, is the fact that the legislation in the Commonwealth of Dominica is more emphatic, in terms of dispensing with corroboration, than the equivalent legislation in the UK, Jamaica and the BVI.

[13] Section 28 of the Act in the Commonwealth of Dominica, which is quoted in paragraph 7 above, does not just say that a corroboration warning is not obligatory in sexual offence cases (as does the legislation in the UK) or is unnecessary (as does the legislation in Jamaica) or that it is discretionary (as does the legislation in the BVI), but specifically provides that, “...the Judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration...”. The trial judge in the Commonwealth of Dominica is therefore prohibited from giving such a warning in a sexual offence case, but is permitted to give the jury the direction which the trial judge did in fact give to the jury in this case, which direction is quoted in paragraph 8 above.

[14] In her oral submission before this Court, learned counsel for the appellant, although not withdrawing this ground of appeal, did not persist with it once it became clear what the thinking of the Court was on the issue.

³ [1995] 3 All ER 730.

⁴ [2012] JMCA Crim 46.

⁵ BVIHCRA2014/0006 (delivered 23rd November 2016, unreported).

- [15] In light of the foregoing, I would dismiss ground 1 of the appellant's grounds of appeal.

Grounds 2 and 4

- [16] The appellant combined his two grounds of appeal which addressed the issue of the trial judge's interruption of defence counsel's closing address to the jury which, the appellant submitted, had the effect of stultifying defence counsel and preventing her from fully and forcefully addressing the jury and/or prejudicing the jury's mind against the appellant. In support of this submission, the appellant referred the Court to **Taylor on Criminal Appeals**⁶ which, in addressing the conduct of the trial judge, states as follows:

"The role of the trial judge is to ensure a fair trial takes place for both the prosecution and the defence. Where the judge intervenes in such a way that he effectively undermines the defence case, the resulting conviction will be quashed. This may occur where the interventions: (a) effectively invite the jury to disbelieve the defence in a way in which even the usual direction, that the jury should ignore judicial comments if they disagree with them, is rendered nugatory; (b) have made it impossible for defending counsel to do his duty in putting the defence case; (c) have effectively prevented the defendant or a witness for the defence from giving evidence in his own way."

- [17] The appellant's complaint arising from ground 4 relates to the first category of interventions mentioned in **Taylor**, that is, interventions which effectively invite the jury to disbelieve the defence. His complaint arising from ground 2 relates to the second category of interventions mentioned in **Taylor**, that is, interventions which make it impossible for defence counsel to do her duty in putting the defence's case. The appellant referred the Court to 10 instances which he contended were improper interruptions by the trial judge of his counsel in her closing address to the jury which had the effect of stultifying his counsel and preventing her from fully and forcefully addressing the jury or of prejudicing the jury's mind against him. I will now set out the 10 interruptions referred to by the appellant in his skeleton arguments in support of his appeal.

⁶ Paul Taylor, *Taylor on Criminal Appeals* (2nd edn, Oxford University Press) at p. 308 paras 9.181 and 9.182.

- [18] The first instance⁷ was when the trial judge interrupted defence counsel, who was, at the time, putting to the jury that evidence relating to issues like the appellant's extra-marital affair with Miranda were irrelevant to the charges which the appellant had to answer to. The judge interrupted by saying, among other things, that these issues "[go] to the very matter that is very much your concern, good character".
- [19] The second instance⁸ was when the trial judge interrupted defence counsel, who was at the time putting to the jury the improbability of a big man with a full grown penis inserting it into the vagina of an 11 year old girl and she does not scream, cry out or make any noise. The judge interrupted by saying, among other things, "[w]ho said that? The doctor said size doesn't matter. Nobody gave that evidence."
- [20] The third instance⁹ was when the trial judge interrupted defence counsel who was, at the time, putting to the jury the incredulity of an 11 year old girl who was violated in the manner alleged, going back to sleep afterwards, getting up in the morning and having breakfast when Miranda called her to breakfast, and then going to her home without telling Miranda what the appellant had done to her. The trial judge interrupted by saying, among other things, "Counsel, to be fair to the VC...she said the reasons. She didn't say anything to Miranda because she wouldn't believe her...yes, but this is close to the events. This is when they woke up, everybody is up and she didn't get a chance to tell her. She said, I didn't tell her because she wouldn't believe me."
- [21] The fourth instance¹⁰ was when the trial judge interrupted defence counsel, who was putting to the jury the improbability of the VC saying nothing to her mother when she went to her home the morning after, because the appellant told her don't tell anybody, and counsel asking the jury – "Where is the threat in those words?". The trial judge interrupted by saying, among other things,

⁷ See: Transcript of Trial Proceedings, p. 995, lines 11 – 25.

⁸ See: Transcript of Trial Proceedings, p. 1002, lines 13 – 14.

⁹ See: Transcript of Trial Proceedings, p. 1010, lines 4 – 25.

¹⁰ See: Transcript of Trial Proceedings, p. 1015, lines 5 – 14.

“Did the child say the mother made an implied threat to her too ... I am asking you”.

- [22] The fifth and sixth instances¹¹ occurred when the trial judge interrupted defence counsel, who was putting to the jury that if the incident alleged by the VC had taken place it should have been a life changing event for the VC. The trial judge interrupted by saying: “Counsel, that is for a psychiatrist to say ...you cannot say those things. You are an attorney-at-law. That is an opinion on psychology.”
- [23] The seventh and eighth instances¹² occurred when the trial judge interrupted defence counsel when she was suggesting to the jury that the VC had grossly exaggerated the conduct of the examination of her at the Health Centre by Miranda. The trial judge interrupted by saying, among other things, that the jury must have regard to what was said by another nurse, who was Miranda’s supervisor, and he continued to interrupt defence counsel’s attempts to advance that point, saying to her that she has to be fair.
- [24] The ninth and tenth instances¹³ occurred when the trial judge interrupted defence counsel when she was saying to the jury that she believed that “we have picked the right nine to try the case” and that she was of the view that they will come with the right verdict, which is to find the appellant not guilty. The trial judge interrupted by saying to counsel, among other things, “So it’s you alone that pick all the thing. The prosecution didn’t have anything to do with this. It’s your pick.” The trial judge continued his interruption for a few minutes, insisting that defence counsel had suggested that it was she who picked the jury, when in fact counsel had specifically used the collective pronoun, “we”.
- [25] The appellant contended that these 10 interruptions by the trial judge of defence counsel’s address to the jury had the effect, as per ground 2, of

¹¹ See: Transcript of Trial Proceedings, p. 1021, line 20 to p. 1022, line 1 - 4.

¹² See: Transcript of Trial Proceedings, p. 1041, lines 14 - 25 and p. 1042, lines 1 – 25.

¹³ See: Transcript of Trial Proceedings, p. 1045 lines 4 - 25 on page and p.1046, lines 1 – 10.

stultifying defence counsel and preventing her from fully and forcefully addressing the jury and/or, as per ground 4, of prejudicing the jury's mind against the appellant.

[26] Although the appellant combined grounds 2 and 4 of his grounds of appeal and argued them together, the respondent (represented in criminal proceedings in the High Court by the Director of Public Prosecutions) responded separately to the two grounds of appeal.

[27] On ground 2, the respondent submitted that although the judge interrupted defence counsel in her closing address to the jury, it was necessary to do so since counsel was not observing most of the rules associated with closing arguments. The respondent submitted too that defence counsel was making unfair remarks in her closing address and it was necessary for the trial judge to intervene.

[28] The respondent contended that fairness does not only pertain to the accused, but also to the VC and that the interruptions by the trial judge were necessary and well-founded to ensure that the trial was fair and conducted in such a manner to uphold the interest of justice. The respondent further submitted that throughout her closing address defence counsel made speculative comments, misrepresented the evidence, gave her personal opinions, and that these things are not allowed. The judge, the respondent submitted, had no choice but to intervene to correct the errors, because the jurors were hearing all this incorrect information and, after all, they are the finders of fact. The respondent submitted too that the judge's interventions were done in the interest of justice to put a fair and accurate case before the jury.

[29] The respondent cited two cases to the Court in support of its submissions.

[30] The first of the cases cited by the respondent was the English case of **R v Sharp**.¹⁴ However, the quotation in **R v Sharp** to which the Court was

¹⁴ [1993] 3 All ER 225.

referred, was in fact a quotation from another English case, that is, the case of **R v Matthews**¹⁵ in which, after reviewing the authorities on judicial interruptions, Purchas LJ said:

“To summarise these authorities the following propositions appear to emerge: (1) Whilst a large number of interruptions must put this court on notice of the possibility of a denial of justice, mere statistics are not of themselves decisive; (2) The critical aspect of the investigation is the quality of the interventions as they relate to the attitude of the judge as might be observed by the jury and the effect that the interventions have either upon the orderly, proper and lucid deployment of the case for the defendant by his advocate or upon the efficacy of the attack to be made on the defendant's behalf upon vital prosecution witnesses by cross-examination administered by his advocate on his behalf; (3) In analysing the overall effect of the interventions, quantity and quality cannot be considered in isolation, but will react the one upon the other; but the question which is posed ultimately for this court is “*Might* the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing-up of the judge, be such that the jury's verdict might be unsafe?...”

[31] The second of the cases cited by the respondent was the case of **Jones v National Coal Board**,¹⁶ where the English Court of Appeal stated that one of the roles of the judge was, “to see that the advocates behave themselves seemly and keep to the rules laid down by law”. The respondent contended that this is what the trial judge was doing when he interrupted counsel; he was ensuring that counsel was operating within the parameters of the law and keeping to the rules laid down by the law. The respondent contended that “[t]he interruptions were necessary in the interest of justice.”

[32] The respondent's submission with respect to the appellant's fourth ground of appeal was twofold. First, the respondent submitted that the trial judge's interventions were to clarify issues so that he (the trial judge) got the evidence adduced correctly in his mind. The respondent contended too that the interruptions were an attempt to understand the evidence being given and that there is no proper ground for an appeal on this basis. The respondent concluded its submission on this ground of appeal by quoting from the

¹⁵ (1984) 78 Cr. App R 23 at p. 32.

¹⁶ [1957] 2 All ER 155 at p. 159.

decision of the Privy Council in the case of **Peter Michel v The Queen**¹⁷ wherein Lord Brown cited Lord Bingham in **Barry Randall v The Queen**¹⁸ who remarked that, “it is not every departure from good practice which renders a trial unfair.” Second, the respondent submitted that there was no bias on the part of the trial judge, and quoted cases in support of this submission.

[33] I will begin my analysis of the appellant’s fourth ground of appeal by removing the issue of bias from the discourse. The appellant never alleged bias on the part of the trial judge. He complained about the judge’s several interruptions of his counsel in her closing address, which he contended (in ground 4) had the effect of prejudicing the jury’s mind against him. This is altogether different from an allegation of bias, and I will say nothing further on the respondent’s “lack-of-bias argument”, which responds to no counter argument.

[34] On the real issue of the trial judge’s several interruptions of defence counsel in her closing address to the jury, the starting point in an analysis of this issue is to define the role of a judge in a criminal trial. This role was defined by analogy by the English Court of Appeal in the case of **R v Gunning**,¹⁹ where the court likened the judge in a criminal trial to an umpire in a cricket match.

[35] In **Allie Mohammed v The State**,²⁰ Lord Steyn expressed the view that a trial judge ought to 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. Similarly, in **Francis Eiley and others v The Queen**,²¹ the Privy Council recognised that a largely inappropriate address by counsel was an “occasion for intervention from the bench”. The judge must, however, hold true to his role as a neutral actor in the criminal process and should – as was stated by Pitchford LJ in the English Court of Appeal in the case of **R v Natalie Frances Woods**²² – “avoid giving the impression that he has a particular view of his own about the truth or

¹⁷ [2009] UKPC 41 at para 27.

¹⁸ [2002] UKPC 19.

¹⁹ (1994) 98 Cr App Rep 303.

²⁰ [1999] 2 AC 111.

²¹ [2009] UKPC 40 at para 35.

²² [2011] EWCA Crim 1305.

accuracy of [a party's] case". On occasion, a judge's interventions, however well intentioned, may have an adverse impact on a criminal trial to the extent that warrants appellate interference with a conviction.

[36] 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".

[37] In assessing whether a trial was rendered unfair and that a conviction should accordingly be overturned, the Privy Council had previously stated, in the words of Lord Bingham in the case of **Barry Randall v The Queen**, that "it is not every departure from good practice which renders a trial unfair" and that "[i]nvariably, in the course of a long trial, things are done or said which should not be done or said."

[38] Based on its decision in **Peter Michel v The Queen**, and coming after its decision in **Barry Randall v The Queen**, it appears that the Privy Council has set a high threshold for what will render a trial unfair and necessitate the quashing of a conviction. Lord Brown, who delivered the judgment of the Board, stated that, "Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process.". The Board made plain that the court's analysis in cases like this must hinge on more than the mere number of interventions. There were 273 interventions by the trial judge, but the Board considered that, notwithstanding the large number of interventions, "Of altogether greater significance than the mere number and length of these interruptions was, however, their character".

- [39] The Board however acknowledged, quoting Lord Bingham in **Barry Randall v The Queen**, that:
- “...There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty...”
- [40] 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.
- [41] For the purposes of this appeal, and in accordance with the appellant’s grounds of appeal and the submissions made on his behalf in support of his appeal, the question then becomes whether the 10 interruptions identified by the appellant, either individually or collectively, affected the fairness of his trial, because they had the effect either of stultifying his counsel and preventing her from fully and forcefully addressing the jury or of prejudicing the jury’s mind against him.
- [42] One can say straight off that an examination of the transcript makes it abundantly clear that the interruptions by the trial judge did nothing to stultify defence counsel and prevent her from fully and forcefully addressing the jury. It is true that an examination of the written transcript will not give the Appeal Court the benefit of discerning the manner, tone and vocal intensity with which words are spoken during a trial, but the transcript shows that after each interruption, defence counsel persisted uninhibited with her address to the jury, fully and forcefully, and that if it was the objective of the trial judge to stultify defence counsel in the course of her address, then that objective was not achieved. Of course, the trial judge would have had no such objective, but only that if it existed, it had failed.

- [43] The appellant's complaint in the other related ground, ground 4, which he combined with ground 2, may have a greater impact on the appeal. This is because the effect which this ground measures is not the effect of the judge's interruptions on counsel in her address to the jury, but the effect on the jury of the judge's interruptions of counsel.
- [44] The integration of grounds 2 and 4 allows the Court to consider the effect of the trial judge's interruptions of defence counsel's address on prejudice to the minds of the jury against the appellant.
- [45] It is difficult not to find the potential for serious prejudice against the appellant by members of the jury when the trial judge says, in the course of defence counsel's address to the jury, that the appellant's engagement in an extra-marital affair "goes to the very matter that is very much your concern, good character". This goes against the background of the appellant's admission of the extra-marital relationship and his reliance on his good character to support his credibility as a witness in his own defence and his lack of propensity to commit crime, particularly a crime so serious.
- [46] The other interruptions identified by the appellant all relate to the trial judge's dilution of the potency of defence counsel's attempts to bore holes in the fabric of the prosecution's case. The effect of this dilution is the attendant strengthening of the prosecution's case and the resulting prejudice of the jury's mind against the appellant.
- [47] Having regard to the definition by the court in **R v Gunning** of the role of the trial judge in a criminal matter, the circumstances which the courts in **Allie Mohammed v The State** and **Francis Eiley and Others v The Queen** considered to merit intervention by the trial judge, the statement by the court in **R v Natalie Frances Woods** as to what the trial judge must avoid doing, the admonition of the court in **Barry Randall v The Queen**, and the threshold established by the Privy Council in **Peter Michel v The Queen**, I take the view that the interruptions by the trial judge of defence counsel's address to the jury reached that threshold. The question posed by the court of appeal in **Peter**

Michel v The Queen, and embraced by the Privy Council on the appeal to the Judicial Committee, as to whether the nature and extent of the trial judge's interventions resulted in the appellant's trial being unfair, accordingly merits an affirmative response, because the trial judge's interventions had the likely effect of prejudicing the jury's mind against the appellant.

[48] I will accordingly allow this ground of appeal, which is essentially ground 4 merged with ground 2.

[49] This suffices to set aside the conviction and sentence of the appellant, subject to the determination of whether or not to apply the proviso. I will nonetheless address the other subsisting grounds of appeal for the sake of completeness and for the fact that a decision whether to apply the proviso can be based on one or more of the grounds of appeal that are allowed.

Ground 5

[50] The appellant's fifth ground of appeal is that the trial judge did not forcefully, firmly and fairly put the appellant's defence to the jury as he did with the prosecution's case. The appellant relied on a judgment from the Court of Appeal of Trinidad and Tobago in the case of **Gregory Donnor v The State**,²³ where Sharma CJ stated: "Where the defendant has given evidence, it will be desirable to summarise that evidence."

[51] The respondent submitted in response to ground 5 of the appellant's appeal that the judge gave a balanced and impartial summation of both cases for the prosecution and the defence. The respondent contended that the judge did not delve in depth into the evidence of neither the prosecution nor the defence and had in fact said early in his summation that he was not going to go into the evidence in any detail. The respondent submitted also that the judge gave a balanced and even account of the case for and against the prosecution and the accused.

²³ Criminal Appeal No. 25 of 2005 (Trinidad and Tobago).

[52] The appellant gave evidence at his trial and his evidence took up 231 pages of the Transcript, starting on page 393 with his examination-in-chief, continuing with cross-examination and re-examination, and ending on page 624 with questions from the foreman of the jury. Yet, the trial judge in his 48 page summation devoted less than half of a page to the evidence of the appellant, and certainly did not summarise the appellant's evidence as recommended by the court in **Gregory Donnor v The State**.

[53] On the face of it, this would appear to be unfair to the appellant, but this apparent unfairness is mitigated by the fact that the trial judge did not summarise or address in any more detail the evidence of the VC. Instead, he plucked and picked parts and portions of the evidence in the case, sometimes to point out discrepancies and inconsistencies in the evidence of the witnesses either for the prosecution or the defence.

[54] The posture adopted by the trial judge of failing to summarise the evidence of the accused following a trial lasting 6 days over a period of 5 months is not, in my view, a good practice. Au contraire, it is a practice not to be followed by judges in jury trials. The trial judge in this case should have at least summarised to the jury the key parts of the evidence of the accused. Nonetheless, as was stated by the Board in **Barry Randall**, "it is not every departure from good practice that renders a trial unfair". Unacceptable though it might be, I do not find that this departure by the trial judge from the good practice of summarising to the jury at least the key parts of the evidence of the accused in this case renders the trial unfair such as to justify the overturning of a conviction for unlawful sexual intercourse.

Ground 8

[55] Based on the fact that there were originally 9 grounds of appeal, 3 of which were abandoned by the appellant and 2 new ones were added, there should be a total of 8 subsisting grounds of appeal, 4 of which have already been addressed in this judgment, leaving 4 remaining. In the written and oral submissions advanced on behalf of the appellant, ground 8 was not addressed at all. It was also not addressed in the respondent's submissions. Since the

ground has never been abandoned, however, and remains therefore a subsisting ground, I shall reproduce it and then dismiss it, for the record.

[56] Ground 8 of the appellant's grounds of appeal states:

"There was a material irregularity when the Learned Trial Judge read the directions on the law to the jury at an extremely fast rate of speed which resulted in the jury being unable to discern the law on the case."

[57] It is difficult to see how this ground of appeal could be advanced and it is easy to see why it was not pursued. This ground has no substance, being both unsubstantial and unsubstantiated. Ground 8 is accordingly dismissed.

Other grounds of appeal

[58] The last of the appellant's original 9 grounds of appeal is an appeal against the sentence of 10 years' imprisonment imposed by the trial judge. As is customary, the appeal against sentence will be considered after the grounds of appeal against conviction are disposed of. I will therefore now address the appellant's two new grounds of appeal.

First new ground

[59] The first of the appellant's 2 new grounds of appeal states:

"The learned judge erred in law and misdirected himself when he failed to direct the jury fully on how to assess the elements of credibility and propensity when giving them the good character direction."

[60] In substantiation of this ground of appeal, the appellant submitted that the trial judge gave the good character direction on credibility and propensity, but the manner in which it was delivered clearly pointed the jury to disregard the appellant's good character. He submitted that on more than one occasion, whilst giving the direction, the trial judge warned the jury that good character is not a defence and that because a person has a good character it does not mean that he is not guilty. He also submitted that on more than one occasion, whilst giving the good character direction, the trial judge pointed the jury to the fact that the appellant had admitted lying to the court, but he (the trial judge) did not remind the jury of the nature of the lies or give them a Lucas direction

on lies. The appellant submitted too that the good character direction was deficient as there was no explicit positive direction that the jury should take his character into account in his favour.

[61] The appellant referred the Court to two cases on which he relied in support of this ground of appeal. The first case to which the Court was referred is the case of **Andre Penn v The Queen**,²⁴ where Baptiste JA stated that:

“...the judge should make it plain to the jury that good character supports the credibility of a defendant and the jury must take the defendant’s good character into account in deciding his truthfulness and believability. In that regard a person of good character is more likely to be truthful than one of bad character.”

The second case was **R v Malika Haddad Moustakim**,²⁵ where the English Court of Appeal held that the good character direction given by the trial judge was inadequate because:

- “1. There is no explicit positive direction that the jury should take the appellant’s good character into account in her favour.
2. The judge’s version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.
3. The judge’s version of the second limb of the direction did not say that her good character might mean that she was less likely than otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was perhaps less likely to have committed the crime. The use of the word ‘perhaps’ is a significant dilution of the required direction.
4. In the judge’s direction each limb is expressed as what the defendant is entitled to say or argue, not as it should have been a direction from the judge himself.”

[62] In response to the ‘good character ground’, the respondent submitted that the trial judge did give a proper direction on good character and he addressed both the propensity and credibility limbs. The respondent submitted also that, if this Court comes to the conclusion that the good character direction was

²⁴ Supra n. 6 at para 16.

²⁵ [2008] EWCA Crim 3096.

inadequate, this would not be fatal to the conviction. The respondent referred the Court to three cases in support of this submission, the most recent of which is the English case of **R v Hunter & Others**²⁶ where, according to the respondent, “the court made it clear that neither a failure to give a good character direction nor a misdirection will inevitably lead to a conviction being quashed”.

[63] The standard good character direction has two limbs. The credibility limb speaks to the greater likelihood of a person of good character being truthful than one of bad character, and the propensity limb speaks to the greater unlikelihood of a person of good character committing a crime, especially one of the seriousness of the crime with which the appellant was charged.²⁷

[64] A review of the transcript shows clearly that the trial judge did give a good character direction and that the direction included both the credibility limb and the propensity limb. A review of the transcript also shows that on two occasions whilst giving the direction, the trial judge pointed out to the jury that good character is not a defence and that being of good character does not mean that one is not guilty of the offence for which you are being tried. The transcript also reveals that on two occasions whilst giving the good character direction the trial judge pointed out to the jury that the appellant had lied to the court.

[65] Against the background of this review of the transcript, and guided by the plethora of cases on the issue of good character directions, including the 2015 decision of the English Court of Appeal in the case of **R v Hunter** and the 2016 judgment of Baptiste JA emanating from this Court in the case of **Andre Penn v The Queen**, which he followed up in 2018 with the judgment in the case of **Violet Hodge v The Commissioner of Police**,²⁸ I take the view that:

- (1) On the facts of this case, a good character direction was necessary, the appellant having no previous convictions, and his extra-marital

²⁶ [2015] EWCA Crim 631.

²⁷ See: *Teeluck (Mark) and John (Jason) v The State* (2005) 66 WIR 319.

²⁸ BVIMCRAP2015/0005 (delivered 27th February 2018, unreported).

relations having no bearing on the verdict which the jury was charged to render in the court below;

- (2) The trial judge in his summation did give the required good character direction touching on both the credibility and propensity limbs;
- (3) The trial judge did direct the jury on how to treat with both the credibility and propensity limbs of the direction;
- (4) The trial judge was not required to, but was entitled to, point out to the jury the fact that good character is not a defence and does not equate with innocence;
- (5) The trial judge was not required to, and probably ought not to have, included in his good character direction the fact of the appellant having twice lied to the court; and
- (6) The trial judge pointing out to the jury, in the course of his good character direction, that the appellant had twice lied to the court was not a misdirection, or at least not of sufficient significance to negate the value of the good character direction given to the jury by the trial judge, and did not affect the fairness of the trial of the appellant.

[66] Taken in the round, I do not consider that the trial judge, as complained in the ground of appeal under consideration, misdirected himself by failing to direct the jury on how to assess the elements of credibility and propensity when giving them the good character direction. I will accordingly dismiss this ground of appeal.

Second new ground

[67] The second of the appellant's 2 new grounds of appeal was that "the verdict was unsafe and unsatisfactory". The appellant's submission on this ground of appeal was stated in his skeleton arguments and elaborated in the oral submissions of his counsel at the hearing of the appeal as follows:

“Having regard to the misdirection given to the jury in relation to corroboration and the good character direction, the favourable directions given of the prosecution’s case and repeated on several occasions for emphasis to the jury the trial was clearly unfair and this Honourable Court should have a lurking doubt about the fairness of the conviction.”

[68] In support of this submission, the appellant cited the case of **R v Cooper**²⁹ where Widgery LJ said:

“...we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory...”

[69] The submissions in support of this ground of appeal betray what it really is; that is, an attempt to amalgamate some of the individual grounds of appeal to achieve a result that if none is by itself sufficient to allow the appeal then maybe, when put together, collectively they might do what singly none could do. But if, as is the case here, I take the view that there was no misdirection on corroboration or good character and that there was no fault with the way in which the judge put to the jury the case for the prosecution and the defence, then no lurking doubt would arise about the fairness of the appellant’s conviction, no basis would exist to impugn the safety and satisfactoriness of the verdict of the jury, or the overall fairness of the trial, with respect to one, some or all of the issues complained about. I will accordingly dismiss this ground of appeal.

[70] In his skeleton arguments in support of his appeal, the appellant expressly abandoned ground 7 of his grounds of appeal, that is, that the decision is against the weight of the evidence. In the same skeleton arguments, however, the appellant appeared to have been advancing arguments in support of this abandoned ground of appeal. I consider it unnecessary to address this ground of appeal, since it has been expressly abandoned. In any event, I do not regard this ground as having any merit. There was the sworn testimony of the VC that on the night of 23rd October 2012, the appellant had sexual intercourse with her whilst she was at the home of her cousin, Miranda. The

²⁹ [1969] 1 Q.B. 267 at p. 271.

evidence of the VC was vigorously tested under cross examination by defence counsel and, despite some apparent inconsistencies and discrepancies, her evidence was sufficiently strong that once the jury believed her evidence and not the appellant's denials, it could and did satisfy them beyond reasonable doubt that the appellant was guilty of the offence of unlawful sexual intercourse with the VC. I can see no basis, therefore, for this Court to interfere with the verdict of the jury on the abandoned ground that their decision was against the weight of the evidence.

Ground 9

[71] The appellant's ninth ground of appeal is that "the sentence of 10 years' imprisonment is severe in all the circumstances of this case". This wording was slightly varied in the appellant's skeleton arguments to read: "The sentence was excessive in all the circumstances of this case." In support of this ground of appeal, the appellant submitted that the trial judge did not use the guidelines as set out by the Court of Appeal in the case of **Winston Joseph v The Queen**³⁰ and that, had he used the guidelines, the period of sentence would have been less.

[72] In view of the intended disposition of this appeal, I find it unnecessary to dwell on the severity of the ten-year sentence. I will say though that the trial judge should have established what the benchmark sentence would be in the Commonwealth of Dominica (or in the Eastern Caribbean Supreme Court member states as a whole) for the offence of unlawful sexual intercourse with a minor. It appeared that he did ascertain the sentences imposed by the court (presumably in Dominica) from 2010 to 2015 for unlawful sexual intercourse and found that the sentences imposed ranged from 3 years' to 25 years' imprisonment, from which he should have been able to establish a benchmark sentence. It is against the background of the benchmark established that he should then have applied the aggravating and mitigating factors to determine the appropriate sentence.

³⁰ SLUHCRA2000/0004 (delivered 17th September 2001; re-issued 31st October 2001, unreported).

[73] Although the trial judge never established a benchmark sentence, he did address the issues of aggravating and mitigating factors and the sentencing principles before arriving at a sentence of 10 years' imprisonment on a charge which carries a maximum sentence of 25 years' imprisonment. It cannot, I believe, be said that a 10 year term of imprisonment following a 6 day trial on a charge of sexual intercourse with a child is one so off the track as to merit appellate interference.

Conclusion

[74] The appellant advanced 8 grounds of appeal against conviction and 1 ground of appeal against sentence. I would dismiss 7 of the 8 grounds of appeal against conviction and uphold 1. The ground upheld (adjusted to reflect its amalgamation with a kindred ground) complained about the trial judge's several interruptions of defence counsel in her closing address to the jury which had the effect of prejudicing the minds of the jury against the appellant. The appellant's appeal against his conviction should therefore be allowed and his conviction and sentence set aside, subject however to section 38(1) of the **Eastern Caribbean Supreme Court (Dominica) Act**³¹ ("the Supreme Court Act").

[75] Section 38(1) of the Supreme Court 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 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)

Having regard to the fact that what the jury had to do in this case was essentially to determine whether they believed the appellant or the VC, the prejudicing of the jury's mind against the appellant was at the very least

³¹ Cap. 4:02 of the Laws of the Commonwealth of Dominica.

capable of causing a miscarriage of justice, and I cannot say that no miscarriage was in fact caused. Indeed, the fact that the case turned on the very issue of whether or not the jury believed the VC or the appellant, it cannot be said with any certainty that the verdict of the jury would have been the same if their minds had not been prejudiced against the appellant. I will accordingly allow the appeal and quash the conviction of the appellant. The appeal against sentence will fall away as a result.

- [76] The only issue which remains for determination is whether there ought to be a retrial of the appellant. The incident leading to the arrest, charge, trial and conviction of the appellant occurred in 2012, when the VC was an 11 year-old child; she is now a young woman, 19 years old. The appellant himself would have been 49 at the date of the incident and is now 57 years old. Justice will probably not be served with respect to either of them if the events of that night in October 2012 have to be virtually relived by the parties and others around them. Witnesses may also be unavailable or unwilling to participate in a new trial likely to take place more than 8 years after the events or circumstances about which they testified at the previous trial. Granted, public interest is always best served by perpetrators of crime, particularly serious crimes like unlawful sexual intercourse with a child, being tried, convicted and punished for their crimes. However, public interest is also not well served by unfairness to accused persons, such as might be occasioned by delays in the trial process not caused by the accused persons themselves. So, to the extent that a new trial will result in a verdict having to be given by a jury over 5 years later than would have been the case if the trial judge had not fallen into error, swings the balance decidedly against a retrial. The balance is further swung against retrial by the fact that the appellant has spent in excess of 4 years and 9 months in prison between the date of his conviction on 14th July 2015 and the date of this judgment. Indeed, when one factors in that a 'prison year' in Dominica is equivalent to 8 months on the calendar, the appellant would effectively have served over 7 years in prison, that is, more than 70% of the sentence imposed by the trial judge. A new trial should not therefore be ordered.

Order

[77] For all of the foregoing reasons, I would allow the appeal, quash the conviction, set aside the sentence and discharge the appellant.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar