

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

MONTSERRAT

MNIHCRAP2021/0004

BETWEEN:

DAVID BRANDT

Appellant

and

THE KING

Respondent

Before:

The Hon. Mr. Trevor M. Ward
The Hon. Mr. Reginald Armour
The Hon. Mde. Paula Gilford

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

Appearances:

Dr. David Dorsett for the Appellant
Ms. Anesta Weeks KC for the Respondent

2025: June 6;
November 27.

Re-Issued: December 9.

Criminal Law – Constitutional Law – Search and Seizure – Protection of private life and property – Admissibility of Evidence – Section 9, Montserrat Constitution – Warrant authorising seizure of electronic devices but not expressly authorising search of digital content – Whether search of cellular phone contents was unlawful or unconstitutional – Balancing of constitutional rights and public interest in administering justice – Offences against the Penal Code – Sexual Exploitation of a person under the age of 18 (s 141(1)(a) and (d)) – Evidence – No case submission - Proof of age – Whether there was admissible evidence to prove that the virtual complainants were each under the age of 18 at the material time – Whether their own statements as to their age was sufficient – Whether judge erred in dismissing the no case submission - Procedure – Jury management – Whether the judge erred in permitting the jury to have copies of the transcripts of the video recorded interviews of the virtual complaints during the trial and in permitting the jury to retire with them without directing them as to the use that could be made of them – Whether fatal to the conviction – Jury directions - Corroboration – Whether the judge erred in failing to give a corroboration warning in relation to the evidence of S - Perverting the Course of Public Justice – Jury directions – whether the judge misdirected the jury on the particulars of the actus reus that were essential to prove the offence – Perverting the course of Justice - Principles of Sentencing – Manifestly excessive sentence - Whether sentence of 15 years manifestly excessive.

The appellant, an attorney-at-law and former Chief Minister of Montserrat, was convicted by a jury on seven counts of sexual exploitation of minors and one count of perverting the course of public justice, and sentenced to concurrent terms of imprisonment, including 15 years for perverting the course of justice. He appealed against his convictions on counts 1 -7 and the sentence for perverting the course of justice.

The key grounds of appeal concerned: (i) the admissibility of WhatsApp messages retrieved from his cell phone which was seized under a search warrant that authorized searching his premises for electronic items, but did not specifically authorise the search of the phone's digital content; (ii) the decision of the judge to permit the jury to have copies of the transcripts of the video recorded interviews of the virtual complainants without any directions; (iii) the sufficiency of evidence going to proof of age of the virtual complainants; (iv) the failure of the judge to give a corroboration warning; (v) the alleged misdirection on the particulars of the actus reus necessary to establish the offence of perverting the course of justice per the indictment; and (vi) a challenge to the sentence of 15 years imprisonment for perverting the course of justice.

Held: allowing the appeal in part: quashing the convictions and sentences in relation to counts 3, 4 and 5; affirming the convictions and sentences in relation to counts 2, 6, and 7; and allowing the appeal against the sentence imposed for count 8 which is quashed and substituting a sentence of 4 years imprisonment.

1. While acknowledging the principle derived from **R v Vu** that electronic devices are fundamentally different from traditional receptacles and that a specific warrant to search digital content is generally a constitutional requirement under Section 9 of the Montserrat **Constitution**, the evidence of the WhatsApp messages was nonetheless admissible notwithstanding that the search warrant did not specifically authorise the search of the phone's digital content. There are several compelling reasons to conclude that admitting the WhatsApp data into evidence did not compromise the fairness of the appellant's trial. At the application for the search warrants, the Chief Magistrate was presented with WhatsApp communications between the appellant and other individuals, which revealed plans involving the provision of underaged girls for sexual exploitation. This information provided sufficient grounds for the Chief Magistrate to reasonably infer that the search warrant was sought to access electronic data on the appellant's devices, allowing her to assess the privacy implications prior to issuing the warrant. It would be inappropriate to assume she failed to do so. Secondly, unchallenged evidence indicates that, in 2015, there was no established practice or expectation in Montserrat requiring explicit authorisation to search digital data within electronic devices. Consequently, DCP Thompson, along with others involved, legitimately believed that a warrant specifically permitting entry and the search for electronic devices also covered searches of data stored on those devices. Under these circumstances, it cannot be asserted that the evidence was collected recklessly or in blatant disregard of the appellant's constitutional rights. Thirdly, there is neither evidence nor allegation suggesting that more data than was necessary for the investigation of the alleged offence was extracted. Fourth, the evidence was highly material and directly relevant to the Crown's case, serving as its primary foundation and enabling a proper adjudication on the merits. The appellant has not disputed authorship of the WhatsApp messages. Therefore, considering the gravity of the

charges, the public interest in resolving the case based on its merits outweighs, though does not diminish, the significance of the appellant's privacy interests.

R v Vu 2013 SCC 60 applied.

2. Transcripts of an ABE interview should be provided to the jury only after thorough consideration involving consultation between the judge and counsel, and only when there is a strong justification—such as challenges in following video evidence or compromised audio clarity. If transcripts are made available to the jury, the judge must promptly instruct the jury to concentrate on the video presentation, underscoring the importance of observing the witness's demeanour. Except in highly exceptional situations, transcripts should be collected from the jury once the ABE video evidence in chief has concluded. Should it be considered necessary for the jury to retain transcripts during cross-examination, this matter must be addressed comprehensively in advance—preferably prior to the commencement of evidence in chief—and the reason for retention clearly conveyed to the jury. Any transcripts retained during cross-examination should be retrieved immediately upon the completion of the witness's testimony; as a general rule, the jury should not retain access to these materials thereafter. In circumstances where it is thought appropriate for the jury to retain the transcripts after the conclusion of the witness's evidence, there should be substantive discussion between the bench and bar, with explicit and cogent reasons recorded by the judge in a formal ruling. Ordinarily, the jury should not retire with the transcripts except in rare cases. An example is where it is specifically requested by the defence and the judge is satisfied that compelling reasons exist. In such instances, the judge must explain the purpose of providing the transcripts to the jury during the summing-up, emphasising their limited scope—namely, to facilitate comprehension of the witness's evidence in chief or pursuant to a defence request. Furthermore, the judge must present a comprehensive summary of both the cross-examination and re-examination phases, ensuring the jury appreciates all facets of the testimony and avoids undue reliance on the evidence in chief alone.

R v Popescu [2010] EWCA Crim 1230 considered.

3. It is apparent from the summation that the judge made use of the transcripts for the very limited purpose of reminding the jury of certain details of the evidence in chief of the virtual complainants, particularly those parts of the evidence in chief that went towards establishing the elements of each offence. It is not apparent why the jury would have thought that they could use the transcripts for any other purpose but to remind themselves of pertinent details of the evidence in chief. There were 7 counts on the indictment involving different virtual complainants, who engaged sexually with the appellant in different ways over divers periods. The jury had the task of considering each count separately and satisfying themselves that each element of each offence was made out. The references to the transcripts were intended to assist them in that task. **Popsecu** recognises this as a proper purpose for which the jury may retain possession of the transcript after retirement. Furthermore, the risk that the jury would place disproportionate reliance on the transcripts and ignore the whole of the evidence, especially cross-examination, was considerably attenuated when the judge specifically directed the jury on the importance of cross examination in a criminal trial. Furthermore, the judge referred to the cross-examination of the

witnesses and reminded the jury of what the appellant's defence was throughout the summation. The appellant does not complain that the judge did not sum up the case in a balanced way or did not adequately and fairly put the defence to the jury. While it is true that the judge did not specifically tell the jury why they were permitted to have the transcripts and the use to which they could put them, in light of the circumstances surrounding the jury having possession of them without objection by the appellant, who obviously wanted them to have the transcripts, and who made use of them during his cross examination of the virtual complainants and his closing address, this omission does not afford a basis for finding that the prosecution derived any unfair procedural or evidential advantage or that the accused did not have a fair trial.

3. In practice, proof of age of a child or young person is often achieved by calling a parent to testify as to his or her date of birth. This may not always be feasible. Age may be proved by various means, including the statement by a witness of his own age and the opinion of a witness as to the age of another person. However, when age is in issue stricter methods of proof may be required. In sexual offences cases, the complaint's evidence of their age is required to be supported by some other admissible evidence. In practice, this is normally achieved by the production of a birth certificate or a certified copy of same. However, this must be supplemented by evidence identifying the person whose birth is certified. A person's age may also be proved, among other ways, by the evidence of a witness who was present at the birth of the person concerned, such as a parent; by the admission of a party; or by any other admissible evidence from which the age of a person at the material time can be inferred.

Halsbury's Laws of England Volume 12 (2020.) considered; **Blackstone's Criminal Practice 2026**, para. F8.24 considered; **R v Rogers** (1914) 10 Cr App R 276 considered; **Polini v Gray** [1873 P. 162]; **Sturla v Freccia** [1876 S. 353] -(1879) 11 Ch. D. 741 considered.

4. In relation to the virtual complainants in counts 3, 4 and 5, there was no admissible evidence to support their own statements as to their age. The judge erred in not upholding the no case submission in relation to these counts. However, on counts 1, 2, 6 and 7 there was other admissible evidence in support, including the evidence of the mother of two of the virtual complainants, and a certified copy of a birth certificate. The judge was correct to dismiss the no case submission in relation to these virtual complainants.
5. Although Montserrat has not statutorily abrogated the requirement to give the corroboration warning, in the absence of any statutory requirement in Montserrat that imposes an obligation on the judge to give a corroboration direction in the case of accomplice evidence, the common law, as developed in **R v Makanjuola** now applies with full force, and the old common law rules as reflected in **Davies v Director of Public Prosecutions** no longer apply. It is a matter for the judge's discretion. It follows that the appellant's submission that the judge was obligated to give a corroboration warning because S was an accomplice, and that his failure to do so means that the conviction is unsafe is an unsound legal proposition. It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness. Whether he chooses to give a warning and in what terms will depend on the circumstances

of the case, the issues raised and the content and quality of the witness's evidence. In the circumstances of this case, there is no basis for saying that the judge erred in not giving a corroboration warning.

R v Makanjuola [1995] 1 WLR 1348 applied; **R v Rennie Gilbert** [2002] 2 AC 531 applied.

6. A summing up has to be viewed as a whole and not in isolated passages. When viewed as a whole the jury could not have failed to understand that if they were sure that the appellant had committed the three acts alleged in the indictment, then it was open to them to convict the appellant of perverting the course of justice. The overall effect of the judge's directions to the jury does not convey that the judge was directing the jury that they must convict the appellant, or that they could convict him solely on the basis that he had breached his bail condition by contacting NM.
7. The 15-year sentence for perverting the course of public justice (Count 8) was manifestly excessive, as conceded by the respondent. The judge gave no reasons for the sentence he imposed. Acknowledging the principle that deterrence is an important aim, and considering the seriousness of the underlying offence, the persistence of the appellant in sending money to dissuade a virtual complainant from speaking to the police over two months, and the consequences of those actions, but giving credit for the appellant's previous good character, the sentence of 15 years imprisonment is quashed and a sentence of 4 years substituted. .

JUDGMENT

- [1] **WARD, JA:** The appellant is an attorney-at-law and former Chief Minister of Montserrat from 22nd August 1997 to 5th April 2001 in Montserrat. He was charged with 7 counts of sexual exploitation of persons who were at the material times under the age of 18, contrary to section 141(1)(a) and (d) of the **Penal Code**¹. These offences were allegedly committed in Montserrat between 2010 and 2015. Additionally, he was charged with one count of doing an act tending to and intended to pervert the course of public justice, contrary to common law.

Background

- [2] I will refer to the virtual complainants by their initials throughout this judgment. In September 2015, the police in Montserrat received information that led them to have reasonable suspicion that the appellant had committed the offence of

¹ Cap 4.02 of the Revised Laws of Montserrat.

conspiracy to commit unlawful sexual intercourse with a girl under the age of 16. On 16th September 2015, they applied for and obtained from the Chief Magistrate a warrant to search his home and office for cell phones, iPads, computers and other electronic items. The Chief Magistrate subsequently issued two further warrants on 19th and 22nd September 2015 which also authorised the search for articles essential to the inquiry into the offence.

- [3] On 22 September 2015 the police executed the search warrants at the appellant's offices and home. They seized various items belonging to the appellant, including his cell phones. Police searched the cell phones and found WhatsApp messages and sexually explicit photos that were incriminating. The appellant has not denied sending these messages.
- [4] On 14th September 2016 the appellant was charged with offences contrary to section 141(a) and (d) of the Penal Code. In summary, the charges under section 141(a) alleged that the appellant sent sums of money to female persons so that they would bring under-age girls to Montserrat to have sex with him. The charge under section 141(d) alleged that the appellant provided financial support to an under-age girl to have sex with him. The evidence in relation to the sexual exploitation offences consisted largely of WhatsApp messages, images and other electronic data which were retrieved from the appellant's cell phone and the evidence of the virtual complainants, whose evidence in chief was given via video recorded interviews. The parties have referred to them in their submissions as ABE (Available Best Evidence) interviews and I adopt that term.

The appellant's case

- [5] The appellant opted to give evidence at the trial. A large part of what purported to be his defence consisted of submissions to the jury on the failure of the prosecution to establish certain elements of the offences. From the evidence that the actually gave his defence was essentially a denial that he had committed any of the offences alleged against him, although he did not deny being the author of the WhatsApp messages. For example, in relation to counts 1 and 2, he stated that he never arranged with Giselle to bring M to his office. Giselle was at his office to solicit funds for a welcoming party for her son who was coming to

Montserrat. The money that he gave to her was as a financial contribution towards the party and not for the purposes of sexual exploitation of M. Neither did he show her any sexual images, nor did he see any photos of a sexual kind. He denied contacting M and her mother on numerous occasions to have N, M's younger sister, brought to Montserrat to have sexual relations with him. According to him, it was M who contacted him. He alleged a conspiracy between M, her mother and N to lead him to believe that there would be sexual relations between himself and N, when they knew they did not intend to fulfil their promises to him. The object of their scheme was to obtain money from him. The messages from him describing what sexual acts he would perform with N was merely him repeating what M had said to him. He explained that the money he sent to M was to contribute to a birthday party for N. In relation to the photos of N's genitalia, he said that he had not taken those pictures: they were sent by M and N and were in any event fake photos. In relation to photos of C, the VC in count 3, his defence was the same: the pictures sent to him purporting to be of her were fake and taken from somewhere else. Money he sent to M for the benefit of C was not for the supply of photos of C but for C's birthday. He similarly denied the allegations against him in counts 4, 5 and 6. The only VC with whom he spoke to M about having sexual relations was G. In relation to the count of perverting the course of justice, he denied sending money to S to transmit to NM in order stop NM from speaking to the police. He claimed this was a fabrication by S because he had lent her \$5000.00 and she did not wish to repay it.

[6] On 30th June 2021, after a trial by judge and jury, the appellant was convicted by majority verdict on all counts, save count 1. On 19th July 2021 he was sentenced as follows: Count 2: 8 years and 9 months; Count 3: 9 years and 9 months; Count 4: 9 years and 9 months; Count 5: 7 years and 9 months; Count 6: 9 years and 9 months; Count 7: 7 years and 9 months; and Count 8: 15 years, imprisonment to run concurrently with the terms imposed for Counts 2 - 7.

[7] By notice of appeal filed on 21st July 2021, the appellant originally challenged his conviction on 3 grounds. Ground 1 is that "the judge misdirected himself in law when he ruled that the search of the appellant's telephone without a search warrant authorising them to do (sic) was not illegal or unconstitutional." Ground

2 states that “the judge misdirected himself in law when during the trial he allowed the jury to be given transcripts of the interviews and permitted them to retire with them without informing them during his summing up the use they could utilize them for” without any discussion with the appellant. Ground 3 is that “the judge wrongly rejected the appellants’ (sic) submission that there was no case to answer on the charges of sexual exploitation on the ground that there was no admissible evidence that the complainants were under the age of 18 at the time of the alleged commission of the offences.” These grounds of appeal were supported by skeleton arguments filed on 8th March 2024, following receipt of the trial transcripts in or about June 2023.

- [8] By notice of application filed on 22nd October 2024, the appellant sought leave to amend the notice of appeal to add three additional grounds of appeal as follows. Ground 4 is that “the Judge misdirected himself in law when he failed to direct the jury that although they may convict on the evidence of S it would be dangerous to act upon her uncorroborated evidence; that no corroboration of her evidence existed or if it did exist the judge failed to identify it; and to direct the jury that in order for them to convict the appellant, they had to feel sure that the evidence was convincing, cogent and irresistible, and if there was none to direct the jury to that effect”. Ground 5 is that “the Learned Judge erred in law when he directed the jury that [the appellant] was guilty of perverting the Course of Justice because he broke his bail conditions, by speaking to NM when he was not indicted for breaking his bail conditions by speaking to NM. Ground 6 is that the sentence for perverting the course of justice was too severe.”

- [9] The appellant attributes the delay in filing these additional grounds to the written ruling of the judge on the admissibility of the WhatsApp messages not being available until August 2024, and the challenges encountered in obtaining instructions from the appellant owing to deteriorating physical condition. The Court entertained arguments on these additional grounds as the respondent, despite registering its objections to the application, had filed detailed skeleton submissions addressing each of these additional grounds.

[10] I will examine each ground in the order in which they were argued. Having regard to the nature of the grounds of appeal, it is not necessary to set out the factual background in any detail. Such facts as are relevant will be explored as part of the discussion of the grounds of appeal.

Ground 1 – “The judge misdirected himself in law when he ruled that the search of the appellant’s telephone without a search warrant authorising them to do (sic) was not illegal or unconstitutional.”

[11] In relation to ground 1, the arguments advanced by learned counsel for the appellant, Dr. David Dorsett, may be summarised in the following terms. First, the search of the appellant’s telephone occurred without a search warrant that specifically authorised the search of that device. Section 9 of the Montserrat Constitution protects the right to respect for private life and prohibits searches of the person or property without consent, except under lawful authority. The search of the appellant’s phone without a specific warrant was therefore an invasion of his privacy and constituted a contravention of his constitutional right to privacy.

[12] Dr. Dorsett relies on the judgment of the Canadian Supreme Court in **R v Vu**² and the High Court decision in **Shankiell Myland v The Commissioner of Police et al**³ to support this contention. **R v Vu** is held out as authority for the proposition that computers and similar devices, such as mobile phones, differ from traditional receptacles such as cupboards and filing cabinets, and give rise to particular privacy concerns. If in the course of executing a search warrant, police officers seize a device which might contain material for which the search was authorised, they must obtain further specific judicial authorisation to search that device. This principle, it is argued, was accepted and applied by the Eastern Caribbean Supreme Court in **Myland**, which held that any search of seized computers and cell phones must be expressly authorised in a warrant to avoid a constitutional violation.

² 2013 SCC 60; [2014] 3 LRC 515.

³ GDAHCV2012/0045.

[13] The appellant argues that once a constitutional breach is established, the court must give effective constitutional redress by excluding the unlawfully obtained evidence, as it would be "wholly unreasonable and fundamentally unfair" to allow the Crown to use self-incriminating evidence obtained in contravention of a citizen's constitutional rights. In this vein, the appellant contended that the well-known decision in **Kuruma v The Queen**,⁴ which it is said espoused "the narrow view that the admissibility of evidence does not depend on how it was obtained", is obsolete and should no longer be considered good law in light of the Privy Council's later decision in **Allie Mohammed v The State**⁵ and **A v Secretary of State for the Home Department (No. 2)**⁶ The constitutional character of the infringed right attaches an "added value" to its protection.

[14] The appellant submitted that, in light of the foregoing, the judge was required to perform a balancing exercise to determine if the evidence should be admitted, considering such factors as: (a) the seriousness of the state's conduct (e.g., deliberate or reckless disregard); (b) the impact of the breach on the accused's interests; (c) society's interest in the case being adjudicated on its merits. From the appellant's perspective, the judge's failure to deal properly with the question of the contravention of section 9 of the Constitution was a major failing on his part. His conclusion that the WhatsApp messages were admissible seemed based on the premise that the police were "entitled to seize and search the phones" simply because they were "investigating a serious crime".

The respondent's submissions

[15] On behalf of the respondent, Ms. Anesta Weekes KC submitted that the trial judge was correct to admit the WhatsApp messages into evidence, despite the fact that the search warrant did not specifically authorise the search of the appellant's cellular phone. Nonetheless, any irregularity or illegality in obtaining evidence does not result in automatic inadmissibility under English law, which she submitted applies to the law in Montserrat. Evidence is excluded only if its effect on the trial would be unfair. Ms. Weekes sought to defend the trial judge's

⁴ [1955] AC 197.

⁵ [1998] UKPC 49; [1999] 2 A.C. 111

⁶ [2005] UKHL 71; [2006] 2 AC 221, para. 87.

ruling that the search was not unlawful by reference to the principles derived from cases like **Ghani and others v Jones**⁷ and **Warren v The State (Pitcairn Islands)**⁸.

[16] Further, Ms. Weekes placed much emphasis on the evidence elicited on the voir dire in relation to the evidence led before the Chief Magistrate which caused her to issue the search warrant in the first place. Ms. Weekes submitted that when the terms of the warrants are considered against the information given to the Chief Magistrate, it is evident that the warrants were directed at the WhatsApp data and communications on the appellant's electronic devices, having regard to the nature of the offences under investigation, and not merely the devices only, as by themselves they would be valueless. DCP Thompson testified on the voir dire that he genuinely believed that the one warrant he had to search for and seize the phone also covered the search of its contents, as Montserrat did not have any statutory provision in 2015 requiring a separate warrant to search the phone's content.

[17] In the alternative, Ms. Weekes submitted that even if the search was unlawful, the police were investigating a serious crime and were therefore entitled to seize and search the cellular phone. The WhatsApp data was said to be highly relevant to the issues because it addressed the appellant's purpose for sending messages to young girls, identifies the multiple complainants, and shows the method of communication. The WhatsApp data must be regarded as very reliable because the messages were written/produced by the appellant and came from his own cellular phone. Furthermore, submitted Ms. Weekes, there was no unfairness to the appellant at trial as he had the option to explain the messages, and there was no evidence suggesting the phone belonged to or was used by another male person to send the messages.

[18] It was submitted that the trial judge followed the principles of **R v Vu**, in that he considered the reliability of the evidence, the seriousness of the offences, and

⁷ [1970] 1 QB 693.

⁸ [2018] UKPC 20 ; [2018] All ER (D) 196 (Jul).

the balancing exercise which includes the need to bring serious crime and criminals to court.

- [19] In so far as the alleged breach of the Montserrat Constitution is concerned, Ms. Weekes submitted that admitting the WhatsApp messages did not breach section 9 of the Constitution. She argued that if a citizen's WhatsApp messages contain evidence of a criminal offence involving girls under the age of 18, the protection of private life and property will not apply to prevent law enforcement from retrieving those messages from the phone. The extraction of the WhatsApp messages to present as evidence of criminal activity against girls under 18 is an act that is "reasonably justifiable in a democratic society". Ms. Weekes submitted that the trial judge was entitled to rule that the search was not unlawful and that the extraction of the messages was not a breach of the appellant's rights under the Montserrat Constitution.

Discussion

- [20] Three issues arise under ground 1. The first is one of fact: whether the search warrant authorised the search of the appellant's phone for WhatsApp messages. If the answer to this is no, the second issue is whether the search of the appellant's phone without a warrant specifically authorizing its search was unlawful and/or unconstitutional, and, third, if yes, whether the WhatsApp messages extracted from the phone were nonetheless admissible at the trial. Of necessity, exploration and analysis of these issues are likely to be better aided by first considering the statutory framework in relation to search warrants and the factual matrix giving rise to the issue of the search warrant under consideration in this case.

The legal framework and factual matrix

- [21] Section 4 of the **Criminal Procedure Code**⁹ (the Code), governs the procedure for entry and search under a warrant. It provides:

"4. (1) If a Court or magistrate or justice of the peace is satisfied by evidence on oath that there is reasonable cause to believe that property with respect to which an offence has been committed is in any place, the Court, magistrate or justice of the peace may issue a warrant

⁹ Cap 4.01 of the Laws of Montserrat.

directed to a police officer or other person to enter and search the place in any part of Montserrat, by reasonable force if necessary, at any time.”

(2) If the property or any part of it is found, the police officer or person shall seize it and bring the same and the person in whose position the place is, or a person in the place reasonably suspected of being privy to the property being therein, before the magistrate’s court to be dealt with according to law.”

- [22] No doubt acting pursuant to these provisions, on 16th September 2015, DCP Thompson applied to the Chief Magistrate for two search warrants, having received certain documentary information in relation to the appellant. One was to search the appellant’s office; the other to search his home. The Chief Magistrate granted the warrants, which she endorsed in the following terms:

“Whereas the court is satisfied by information on oath that there is reasonable suspicion of the commission of the offence of Conspiracy to commit unlawful sexual intercourse with a girl under the age of 16 years and have in your position cell phones, lpads, computers and other electronic items and other documents and it has been made to appear to this court that there are articles essential to the inquiry into the said offence in or upon the premises occupied by David Brandt as offices of David Brandt and Associates situated at Brades

NOW, THEREFORE, this warrant is to authorise and require you to enter upon and search the said premises and, if any such articles are discovered, to take possession of such articles and to produce them forthwith before the court, returning this warrant to the court with and (sic) endorsement certifying the manner of execution thereof.
Given under my hand (and the seal of the court) this 16th day of September 2015.”

- [23] Another search warrant was obtained on 22nd September 2015 to search the appellant’s home. This warrant does not appear to be in issue. DCP Thompson executed the search warrants at the appellant’s office and home. Among the items seized at the appellant’s home was his cell phone. That very day, the cellphone was sent to England for forensic examination.

- [24] The appellant challenged the admissibility of the WhatsApp messages which had been downloaded from his cell phone on the basis that the warrant did not authorise the search of the cellphone’s content, and the search therefore breached his constitutional right to privacy.

[25] At the voir dire, DCP Thompson gave evidence of the information which he had disclosed to the Chief Magistrate in order to secure the search warrants¹⁰. He testified that he told the Chief Magistrate that he was in possession of information and WhatsApp messages between the appellant and other persons which revealed a plan to provide underaged girls to engage in sexual activities with the appellant. Those WhatsApp messages were Exhibit 1 in the voir dire, and part of their content was read at the voir dire.¹¹ DCP Thompson further testified that at the time he applied for the search warrants in 2015 there was no procedure in place that required him to obtain a separate warrant to search the cell phone.¹²

[26] Under cross-examination by the appellant at the voir dire, DCP Thompson agreed that the WhatsApp messages in question were downloaded from the phone seized at his home. He accepted that the search warrant did not specifically authorise a search of the contents of the cell phone.

The judge's ruling on the voir dire

[27] At the conclusion of the voir dire, the judge ruled that the WhatsApp messages were admissible, and promised to furnish written reasons at a later date. The judge's ruling is dated 31st May, 2021, although it seems it was only filed with the court, and thus made available to the parties, on 16th August 2024. Those reasons are very brief. The judge asked himself rhetorically: "of what value would the cell phones have been to the police having regard to the nature of the information in their possession?" Then, basing himself on the authorities of **Ghani v Jones** and **Warren v The State**, he applied dicta from the latter that "the admissibility of evidence depends in the first instance on its relevance. Irregularity or illegality in the obtaining of evidence does not result in automatic inadmissibility...the test of exclusion is not the nature of any irregularity in obtaining the evidence, but rather the extent of any unfairness caused thereby." The judge then stated his conclusion that "the search of the cellphone was not illegal".

¹⁰ Voir Dire "Exhibit 1".

¹¹ See ROA at electronic pages 139 – 142.

¹² ROA , EP 147, lines 9 -13.

- [28] In relation to the constitutional challenge, the judge set out the provisions of section 9(1) and (2) of the Constitution before turning his attention to subsection 9(3), the terms of which he set out in full. Having done so, the judge stated his conclusion in one sentence: “In my view all the circumstances of this case subsection 9(3) prevails”. Accordingly, he held that there was no breach of any of the appellant’s Constitutional rights under section 9.
- [29] While there is some justification for the appellant’s complaint about the pithiness of the judge’s written reasons, it is at least clear that he accepted the evidence of DCP Thompson that he followed the then practice for obtaining a search warrant to search for electronic devices and to search their data content. It is also clear that he considered that in light of the information that was placed before the Chief Magistrate to obtain the warrant, there could be no other purpose for issuing the warrant if not to authorize their seizure and search of their data content.

Analysis and conclusions.

- [30] In relation to the first issue, this much appears to have been common ground at the trial: the search warrant did not specifically authorise the search of the appellant’s cellular phone. DCP Thompson accepted this on the voir dire¹³, and in his written decision on the voir dire, the judge states that that fact was not in dispute. The warrants authorised the search of the appellant’s home and office for cell phones, ipads, computers and other electronic items and other documents. This raises a significant legal issue: whether, as a matter of law, it is necessary to obtain a separate search warrant that specifically authorises the search of the digital contents of electronic devices. In this judgment, I will use the expression electronic devices to cover cellphones, computers and the like.
- [31] The appellant’s contention is that “place” refers to physical structures such as a house or office and physical receptacles found therein. Section 9 of the Constitution impels the conclusion that a specific warrant is required to search electronic devices found on premises during a search as these are an entirely different specie. The respondent argues that in the circumstances of this case, a

¹³ ROA, p. 163, l. 13.

search warrant that authorised a search of the appellant's home for electronic devices implicitly authorised the search of the contents of any such device recovered.

[32] Neither party place before the Court any regional case law on this discreet subject save for the High Court judgment in **Myland**. However, some assistance is derived from Canadian jurisprudence, which will be considered alongside the common law that obtains in Montserrat and the Constitution of Montserrat.

[33] The Canadian perspective is articulated by its Supreme Court of Canada (SCC) in the case of **R v Vu**. In that case, the police obtained a warrant authorising the search of a residence for evidence of theft of electricity, including documentation identifying the owners and/or occupants of the residence. Although the application for the warrant mentioned the intention to look for items such as 'computer generated notes,' the warrant itself did not specifically mention computers or grant permission to search them. During the search, officers found marijuana, two computers, and a cellular phone. One computer was linked to a security system monitoring the property's entrance. When the devices were examined, evidence emerged which established that the defendant was the occupant of the residence. The defendant was subsequently charged with producing marijuana, possessing marijuana for trafficking, and stealing electricity. At trial, he contended that the searches violated his rights under section 8 of the Canadian Charter of Rights and Freedoms, which protects against unreasonable searches and seizures, and requested that the evidence be excluded as a result.

[34] The issue was whether the warrant permitted the police to search for the documentation sought on the computers and cellular phone found in the residence. The Supreme Court acknowledged that the traditional operative framework of a search warrant was that once police obtained a warrant to search a place for certain things, they can search for those things anywhere in that place where those things might reasonably be. The search could therefore extend to receptacles on the premises, cupboards, filing cabinets etc. The issue for the Court was whether that framework is appropriate for computer searches, such

that the law of search and seizure should treat a computer as if it were a filing cabinet or cupboard. The Supreme Court held that the traditional framework was inappropriate in relation to electronic devices and highlighted several fundamental differences between electronic devices and receptacles to which the traditional framework applied.

[35] In summary, the SCC considered that electronic devices possess massive information storage capacity. The scale and variety of this material make comparison with traditional storage receptacles unrealistic as a computer 'can be a repository for an almost unlimited universe of information'. Secondly, electronic devices contain information that is automatically generated, often without the user being aware. Such information can include temporary files that allow reconstruction of file development, and browser history and search terms that can reveal intimate details about a user's interests, habits, and identity. There can be no analogy between this kind of information and the information retrieved from traditional physical receptacles. Thirdly, even after a user thinks he has deleted files and data, a significant amount of data can often be recovered because marking a file as "deleted" does not actually erase the data. The SCC considered that these features make computers fundamentally different from the type of physical receptacles to which the law of search and seizure traditionally applied.

[36] Accordingly, the Supreme court held that the search of the appellant's devices without a warrant specifically authorising that search, violated the appellant's right to be free of unreasonable search and seizure under section 8 Charter.

[37] In summary, the position in Canada is that it is a Constitutional requirement stemming from section 8 of the Charter that the police must generally obtain a search warrant specifically authorising the search of the digital contents of electronic devices. The peculiar character and nature of electronic devices fundamentally distinguish them from physical receptacles. A standard search warrant authorising the search of a place does not implicitly authorise the search of the digital contents of electronic devices found at that place. If police intend to search the digital content of an electronic device, they must satisfy the

authorising justice that there are reasonable grounds to believe that the device contains evidence of the kind sought. If they search a place and find electronic devices, they may seize them but must obtain a separate warrant to search the data on those devices.

The Montserrat Constitution

[38] At common law, every person enjoyed protection from unlawful search and seizure.¹⁴ This protection is now enshrined in the various constitutions of Commonwealth Caribbean countries. Section 2 of the **Montserrat Constitution** declares the fundamental rights and freedoms to which an individual is entitled. Among them is the right to protection for his or her private and family life, the privacy of his or her home and other property. Section 9 guarantees protection of these rights in the following terms:

“Protection of private and family life and privacy of home and other property

9.—(1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence.

(2) Except with his or her consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

(a) in the interests of defence, public safety, public order, public morality, public health, town or country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) for the purpose of protecting the rights and freedoms of other persons;...

(d) to enable an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises

¹⁴ See *Entick v Carrington* (1765) 2 Wils 275.

and that belongs to the Government or that authority or body corporate, as the case may be; or

(e) to authorise, for the purpose of enforcing the judgment or order of a court, the search of any person or property by order of a court or the entry on such premises by such order.”

[39] The constitution places a high premium on the individual’s right to privacy and, more particularly for present purposes, protection against the search of his or her person or property. That right can only be derogated from with the person’s consent.

[40] Nonetheless, this right is not absolute. It has long been recognised that there are situations where the authority to enter and conduct a search without the owner’s consent is essential for the effective operation of a democratic society, but the search must be justified by law. The Constitution itself subjects the protection against the search of the person or property to certain exceptions, where, notwithstanding the absence of consent, the search of an individual’s person or property will not contravene the Constitution. This will be the case where the act is authorised by any law or done under its authority, provided that the law is reasonably justifiable in a democratic society. Those circumstances include where the search is conducted for the prevention or detection of offences against the criminal law: section 9(3)(c).

[41] The law therefore seeks to balance or reconcile the tensions between two conflicting interests. On the one hand, the high public interest in protecting the individual from unjustified interference with his person or property; on the other, the high public interest in detecting and punishing criminal offences. Occasionally, one must yield to the other.

[42] The Criminal Procedure Code is a law under which search and seizure procedures are laid down. Part 2 of the Code contains provisions relating to powers of investigation. Section 4 provides:

“4.(1) If a Court or magistrate or justice of the peace is satisfied by evidence on oath that there is reasonable cause to believe that property with respect to which an offence has been committed is in any place, the Court, magistrate or justice of the peace may issue a warrant

directed to a police officer or other person to enter and search the place in any part of Montserrat, by reasonable force if necessary, at any time.

(2) If the property or any part of it is found, the police officer or person shall seize it and bring the same and the person in whose possession the place is, or a person in the place reasonably suspected of being privy to the property being therein, before the magistrate's court to be dealt with according to law."

- [43] Section 2 of the Code provides a definition of place. It stipulates that "place" includes any building, ship, vehicle, aircraft, box, receptacle or locality whatsoever in any part of Montserrat. A search of any place authorised by a search warrant issued by a judicial officer will therefore not contravene section 9 of the Constitution, as the search would have been conducted under the lawful authority of the Criminal Procedure Code. Such a power of search would be plainly conducted for the prevention or detection of offences against the criminal law and would therefore be constitutional. There has been no suggestion that these provisions in relation to search and seizure are not reasonably required in a democratic society.

Did the warrant authorise the search of the appellant's cellular phone?

- [44] The issue in this case is whether the search warrants obtained by DCP Thompson authorised the search of the appellant's cellular phone or whether the police acted outside the lawful authority conferred by the search warrants. I agree with the opinion expressed in **R v Vu** that electronic devices are fundamentally different from physical receptacles. As such, I agree in principle that it is a constitutional requirement that where the police intend to search a place for electronic devices and intend to search the digital content of those devices they must satisfy the authorising judicial officer that there is reasonable cause to believe that the device contains evidence of the kind sought. To this end, the officer must provide sufficient information to the judicial officer on oath to establish the grounds for his reasonable belief.
- [45] Because the issue of a warrant is a judicial act, the judicial officer to whom application is made must "*apply an anxious degree of scrutiny*" to satisfy himself that, objectively, the officer applying for a search warrant does in fact have reasonable cause for that belief, and should apply his mind to the matters upon

which the officer's cause for belief is founded and to the officer's credibility: **Attorney-General v Williams (Danhai) and Another**.¹⁵ That duty has been defined expansively by the Board in **Attorney-General v Williams**:

"The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or other executive officer of the state to enter upon a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met."¹⁶

- [46] The evidence elicited on the voir dire establishes clearly that the particulars upon which DCP Thompson's suspicion was grounded, and which he provided to the Chief Magistrate on oath, included information and WhatsApp messages between the appellant and other persons. The offence which the appellant was suspected of committing was conspiracy to commit unlawful sexual intercourse with a girl under the age of 16 years.
- [47] Against a background where the information provided to the Chief Magistrate included WhatsApp data obviously derived from an electronic device, it seems inconceivable that the Chief Magistrate could have failed to appreciate that DCP Thompson's interest in securing a search warrant lay in obtaining the appellant's electronic devices for the purpose of interrogating their digital content, which might afford evidence of the conspiracy alleged. These devices were the objects specifically targeted in the search warrant, which specified "cell phones ipads, computers and other electronic items and other documents". The warrant authorised entry upon and search of the appellant's premises and, if any such articles were discovered, to take possession of them.
- [48] Herein lies one readily apparent distinguishing feature between this case and **R v Vu**. The warrant in **R v Vu** did not even mention electronic devices, yet the

¹⁵ (1997) 51 WIR 264.

¹⁶ Ibid, p. 270, b – d.

police seized them and proceeded to search their contents; here, they are the very central subjects of the search warrant issued by the Chief Magistrate.

[49] Admittedly, on the face of the warrant, it merely authorises entry onto the appellant's premises to search for and seize electronic devices, but not to search the devices. When construed in the context of the information that was placed before the Chief Magistrate, and in circumstances where there was no practice in Montserrat of police officers applying for a separate warrant to search the digital content of electronic devices, nor of magistrates issuing such warrants, it is at least a reasonable inference that it was the intention of the Chief Magistrate to authorise the search of the appellant's cellular phone, even though the warrant did not expressly authorise the search of the appellant's cellular phone. However, the actual terms of the search warrant do not reflect any such inferred intention. The question is whether background evidence about the circumstances surrounding the obtaining of the search warrant can be considered in construing the search warrant to determine whether it authorised searching the appellant's mobile phone.

[50] In considering whether the search warrant authorised the search of the appellant's cellular phone, I am mindful of the guidance provided by the Board in **Attorney-General v Williams** as to the approach to be taken when considering whether a warrant made a particular act lawful. Their Lordships answered the question in the following terms:

“This must depend upon two questions of construction: first, did the matters of which complaint is made fall within the acts of authorised by the warrant; and, secondly, did the statute give the person who issued the warrant power to authorise those acts?

In construing both the warrant and the empowering statute, the court, in Lord Diplock's words (at page 1008) –

‘...ought, , no doubt, to remind itself, if reminders should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority. So if the statutory words relied upon as authorizing the acts are ambiguous or obscure, a construction

should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law.”¹⁷

[51] Relating these principles to the present case, the approach should be to ask: (a) were the acts complained of (the search of the appellant’s phone) authorised by the warrant, and (b) does the Criminal Procedure Code empower the judicial officer to authorise those acts? When interpreting both the warrant and the statute, the court must recognise that entering, searching, and seizing property are torts and may be in breach of the Constitution unless justified at common law or by statute. If statutory language or the language of the warrant authorising such acts is unclear, it should be interpreted in a way that least restricts individual rights protected by common law or the Constitution.

[52] Adopting this approach, in answering the first question, I would hold that as a matter of construction, the search warrant did not expressly authorise the search of the digital contents of the appellant’s cellular phone; it authorised the entry and search of the appellant’s “premises” for electronic devices, and further authorised the seizure and production of same to the Court.

[53] In relation to the question of whether the Criminal Procedure Code empowered the magistrate to authorise the search of the appellant’s phone, on a literal reading it does not appear to do expressly do so. This is perhaps understandable given that the era of its enactment pre-dated the advent of prevalent cybercrimes in Montserrat. As Ellis J, observed in **Myland**, in the Grenada context, “the general search warrant regime under the Grenada Criminal Procedure Code was directed at tangible rather than intangible data and was developed before computer searches were widely contemplated”.

[54] I contrast the language of the **Criminal Procedure Code** with other statutory provisions in other jurisdictions whose language expressly make provision for the search for computer data. Within the Eastern Caribbean, Saint Lucia’s Criminal Code provides an example. Section 624 provides:

“624. Information for search warrant

¹⁷ Ibid, page 275, e – j.

(1) A magistrate who is satisfied by information on oath that there are reasonable grounds for believing that there is in a building, ship, carriage, box, receptacle or place –

(a) Anything on or in respect of which any offence has been or is suspected to have been committed.

(b) Anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence; or

(c) Anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against any person for which a person may be arrested without a warrant.

(d) any offence-related property,

may at any time issue a warrant authorizing a police officer who is named in the warrant –

(2) to search the building, receptacle or place for any such thing and to seize it, and

(ii) bring the thing seized before the justice or some other magistrate to be dealt with by him or her according to law.”

“(2) A person authorized under this section to search computer system in a building or place for data may

(a) use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system;

(b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

(c) seize the print-out or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the data.

(3) A person who is in possession or control of any building or place in respect of which is which is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(a) to use or cause to be used in any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;

(b) to obtain a hard copy of the data and to seize it; and

- (c) to use or cause to be used any copying equipment at the place to make copies of the data.

[55] Clearly, the Saint Lucia Code puts it beyond doubt that in Saint Lucia, a search warrant may specifically authorise the search and seizure of computer data.

[56] In England, this situation would be covered by the Police and Criminal Evidence Act where provision is made at section 19 for a constable who is lawfully on premises to require information which is stored electronically on a computer which is accessible from the premises to be produced in a form which can be carried away if the constable believes, inter alia, that it is evidence in relation to an offence which he is investigating or any other offence. This provision is buttressed by section 20 which extends the power of seizure conferred on an officer by an enactment to which the section applies so that that power of seizure is to be construed as including a power to require information which is stored electronically on a computer which is accessible from the premises to be produced in a form which can be carried away.

[57] By contrast, the language of the **Montserrat Criminal Code** is clear on its face and the scope for resorting to a purposive construction to extend the meaning of “place” to include the contents of electronic devices seems limited. In my view, it cannot be read as empowering the judicial officer to authorise accessing data on electronic devices. Indeed, this seems to be the conclusion reached by the respondent, who at paragraph 3.10 of its written submissions state: *“There is no law in Montserrat in 2015 to authorise a search of a phone.”*

[58] For these reasons, I have come to the conclusion that the search of the appellant’s cellular phone was unlawful and in breach of section 9 of the **Constitution** as this was not authorised by or done under the authority of the law.

Should the evidence of the WhatsApp data have been excluded

[59] Even though I have found that the search of the appellant's cellular phone was unlawful and unconstitutional, it does not automatically follow that the WhatsApp data was inadmissible at trial. The operative principles in such a case would be those culled from the English common law. English jurisprudence of considerable vintage has explored, and I daresay settled, the approach courts take when the issue of the admissibility of unlawfully obtained evidence arises. In sum, the illegally obtained evidence will not be deemed inadmissible merely because it was obtained illegally. A line of authorities going as far back as **Kuruma v The King** affirms this proposition.

[60] The brief facts of that case are that the appellant, Kuruma, was convicted in Kenya (then a British colony) for the unlawful possession of ammunition; an offence punishable by death under the Emergency Regulations during the Mau-Mau Uprising. The ammunition was found during a search of Kuruma's person by police officers who were technically not legally authorised under the Regulations to conduct the search. Legal Issue: The core question was whether that illegally or irregularly obtained evidence was admissible in court, or if the illegality of the search rendered the evidence inadmissible. The key principles emerging from the case is that the general rule is that if evidence is relevant to the charge, it is admissible. The court is generally not concerned with how the evidence was obtained, even if obtained illegally, wrongfully, or by breach of statute. However, the Board acknowledged an exception to the general rule, in holding that a trial judge always retains a discretion to disallow evidence if its strict admissibility would operate unfairly against the accused, for example if the evidence was obtained from the defendant by trickery, oppression, or fraud. The judgment therefore affirms the common law position that there is no rule of law requiring the automatic exclusion of evidence solely because it was obtained unlawfully or irregularly.

[61] **Kurumu** was followed and applied by the Privy Council in the Jamaican case of **King v R**¹⁸. The appellant was found on JC's premises during a police search under a warrant issued pursuant to section 21 of Jamaica's Dangerous Drugs Law.

¹⁸ (1968) 12 WIR, 268.

The appellant was searched and ganja was found in his pocket. However, the warrant did not name a constable, nor did it in terms authorise the search of any person. The appellant was not taken before a justice of the peace to be searched in accordance with the provisions of the Constabulary Force Law. Despite these procedural failures, the appellant's conviction for possession was upheld by the Court of Appeal and the Privy Council. The Board held that although there was no legal justification for his search, this was not a case in which the evidence had been obtained by conduct of which the Crown ought not to take advantage. The court had discretion whether or not to admit the evidence and this discretion was not taken away by the protection against search of persons or property without consent enshrined in the Jamaican Constitution. In the circumstances, there was no ground for interfering with the way in which the discretion had been exercised.

- [62] Yet more recently, the Privy Council once again re-affirmed these settled principles in relation to the common law's approach to unlawfully obtained evidence. This is illustrated in **Warren v The State**. The appellant, Michael Warren, was convicted on 20 charges of possessing child pornography under s 160 of the Criminal Justice Act 1988 (UK). He was also convicted on two charges of possessing grossly indecent items contrary to s 8 of the Pitcairn Summary Offences Ordinance. He launched numerous applications to the Supreme Court and Court of Appeal, claiming his rights under the Pitcairn Islands Constitution (specifically ss 8 and 11, the right to a fair trial and respect for private life) had been breached. These were brought under s 25 of the Constitution and as applications for relief in the criminal proceedings. Both lower courts dismissed these applications, holding that adequate means of redress were available within the criminal proceedings, and resorting to s 25 was an abuse of process. Warren appealed to the Judicial Committee of the Privy Council. Among the matters for which he sought special leave to argue additional grounds was his challenge to the validity of the issue of a search warrant and its execution. This was based on a number of grounds, including: (a) the jurisdiction of the island magistrate and his alleged lack of independence; (b) the grounds on which the warrant was sought; (c) an alleged lack of independence in the police officer making the application; (d) an alleged lack of candor or good faith in the application; (e) breach of his Constitutional right to respect for his private and family life and home; (f) alleged

excessive seizure of material which on examination turned out to be unconnected to the offences charged; and (g) removal of the exhibits to New Zealand for examination.

- [63] The Privy Council refused special leave for the additional grounds, finding each of them to be lacking in merit. In so far as the search warrant issue was concerned, they held:

“[33] It should, however, be added that even if there had been any of the suggested irregularities in the issue or execution of the search warrant, it would not follow that the evidence of the contents of the appellant’s computer would thereby have become inadmissible. In English law, the admissibility of evidence depends in the first instance on its relevance. Irregularity or illegality in the obtaining of evidence does not result in automatic inadmissibility: see *Kuruma, Son of Kaniu v R* [1955] 1 All ER 236, *Jeffrey v Black* [1978] 1 All ER 555, *R v Sang* [1979] 2 All ER 1222, and a great many other cases. Prosecution evidence may of course be excluded if its effect on the trial would be unfair: this has been the rule since at least *Noor Mohammed v R* [1949] 1 All ER 365 and it now has statutory endorsement in s 78 of the Police and Criminal Evidence Act 1984. But the test of exclusion is not the nature of any irregularity in obtaining the evidence, but rather the extent of any unfairness caused thereby.”

- [64] To my mind, this case effectively rebuts Dr. Dorsett’s rather sweeping submission that **Kuruma** and the line of cases that followed it are no longer good law because of the following statement in **Allie Mohammed v The State**:

“It will be recalled that in *King* Lord Hodson observed that it matters not whether the right infringed is enshrined in a Constitution or is simply a common law right (or presumably an ordinary statutory right). Their Lordships are satisfied that in *King*, which was decided in 1968, the Board took too narrow a view on this point. It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality on a citizen’s rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right. The narrow view expressed in *King* is no longer good law.”

- [65] From these words, Dr. Dorsett reasoned in written submissions that: “The Privy Council’s finding that ‘The narrow view expressed in *King* [*King (Herman) v The Queen* (1968) 12 WIR 268] is no longer good law’ casts doubt on the rule in *Kuruma v The Queen* [1955] AC 19. Euphemistically, it was saying in tempered judicial language that *Kuruma* is no longer to be followed as it is not good law.

Indeed, Lord Hoffman in *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221 at [87] said:

“... since *Kuruma* the law has moved on. English law has developed a principle, illustrated by cases like *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of the processes of the court [emphasis supplied].”¹⁹

[66] With respect, this argument misses the point. The “narrow view” referred to in **Allie Mohammed** is in relation to the failure to distinguish between breaches of a constitutional right and breaches which do not impinge on a constitutional right. Indeed, In **Allie Mohammed**, the Board made it clear that the effect or consequence of a breach of a Constitutional right can vary and underscored the need for the Court to perform a balancing exercise, having regard to all the circumstances of the case. As Lord Steyn explained at 629 -630:

“The stamp of constitutionality on a citizen’s rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right. The narrow view expressed in *King* is no longer good law. On the other hand, it is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant’s constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded. But their Lordships make clear that the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case. Except for one point their Lordships do not propose to speculate on the varying circumstances which may come before the courts. (Emphasis added)

[67] It will be observed that in **Warren v The State**, the appellant asserted the breach of a Constitutional right and yet did not prevail in that argument. The principle

¹⁹ Appellant’s skeleton arguments, paragraph 27.

derived from **Kuruma** and a long line of cases to similar effect is firmly rooted in the common law and remains good law in Montserrat.

[68] Furthermore, while Dr. Dorsett urged this Court to view the **Kuruma** line of authority as no longer good law, and to follow the approach in **R v Vu**, it is noteworthy that in that case the finding that the search of Vu's computer was unconstitutional did not result in the evidence obtained from it being excluded. Section 24(2) of the Canadian Charter provided, so far as material:

"...(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[69] The Supreme Court considered the terms of section 24(2) and held that when considering an application for exclusion under section 24(2), the court must assess and balance the influence of admitting the evidence on public confidence in the justice system by evaluating: (1) the seriousness of the Charter-infringing state conduct (2) the impact of the breach on Charter-protected interests of the accused; and (3) society's interest in adjudication on the merits. The SCC considered that while the search of the computer was not explicitly authorised, the police had reasonable grounds for suspecting that it contained relevant evidence as the application documents referenced the officers' intent to search for computer-generated documents, and the legal landscape concerning searches of computers within premises was unsettled at the time of investigation. The Langley department maintained a policy permitting searches of computers found on site, and no definitive law prohibited such action. The trial judge had acknowledged in his decision on the voir dire that the officers believed they were acting within the lawful authority of the warrant. Given the uncertainty in applicable law at the time and the otherwise reasonable manner in which the search was executed, the SCC concluded that the violation was not serious. While accepting that privacy interests implicated in computer searches are of the utmost importance, and that the search here was 'very intrusive and comprehensive', still, the record shows the police did not access more information than necessary given the limited objectives defined by the warrant.

The SCC considered that the central question was whether the truth-seeking function of the criminal process would be better served by admitting or excluding the evidence. Factors relevant to that determination included the reliability of the evidence, its importance to the Crown's case, and the gravity of the offence.

[70] After weighing these considerations, the SCC expressed its conclusion in the following terms:

“[73]...The trial judge found that all the documents and photographs retrieved from the hard drives of the computers and the cellular phone are reliable, real evidence. She also found that the evidence was required to establish knowledge of and control over the marijuana found growing in the basement of the residence. When the case was heard, the absence of this evidence substantially weakened the Crown's case. Finally, with respect to the third factor, I agree with the trial judge that there is a clear societal interest in adjudicating on their merits charges of production and possession of marijuana for the purpose of trafficking.

[74] Balancing these factors, I am of the view that the evidence should not be excluded. The police believed on reasonable grounds that the search of the computer was authorised by the warrant. While every search of a personal or home computer is a significant invasion of privacy, the search here did not step outside the purposes for which the warrant had been issued and it did not include forensic examination. The evidence obtained was reliable, real evidence which was important to the adjudication of the charges on their merits.”

[71] Self-evidently, by another route, the Canadian Courts perform essentially the same exercise as the English common law jurisprudence to determine whether in all the circumstances of a given case, it would be just to exclude unlawfully obtained evidence, albeit theirs is an express Constitutional mandate to consider the question of exclusion of evidence. Such an express requirement is absent from the Montserrat Constitution. Notably, even though there was a positive finding of a breach of section 8 Charter right with its additional value, the evidence was not excluded. The essential point is that under both systems of law, unlawfully obtained evidence, even when in breach of a constitutional right, does not automatically result in its exclusion. Various factors have to be placed in the scales and weighed.

[72] In my view, balancing all relevant factors in the circumstances of this case, there are several compelling reasons why it cannot be said that the effect of admitting

the WhatsApp data into evidence rendered the trial of the appellant unfair. In the first place, the information placed before the Chief Magistrate to obtain the search warrant included WhatsApp data between the appellant and other persons that disclosed a plan to provide him with underaged girls for sexual exploitation. DCP Thompson therefore furnished the Chief Magistrate with ample evidence from which she could draw the reasonable and inescapable inference that the purpose for seeking a search warrant was to access the electronic data on the appellant's electronic devices. She was therefore well placed to consider the implications of issuing such a warrant on the appellant's privacy rights before deciding to issue the warrant. It should not be assumed that she did not.

[73] Secondly, the uncontroverted evidence is that in 2015 there was no practice or understanding in Montserrat that there was a requirement to obtain specific authorisation to search the data within electronic devices. For that reason, DCP Thompson, and everyone else apparently, honestly believed that a warrant specifically authorising entry and search for electronic devices at a place, as this search warrant did, extended to a search of the data on any electronic devices recovered at that place. In these circumstances, it cannot be said that the evidence was obtained recklessly or in willful disregard of the appellant's constitutional rights.

[74] Third, there is no evidence or complaint that any more data than was strictly necessary for the purposes of the offence under investigation was retrieved.

[75] Fourth, the evidence was highly relevant and probative of the Crown's case. Indeed, it was the major plank on which the case stood and on which a proper adjudication of the case on its merits depended. The appellant has not denied that he was the author of those WhatsApp messages. It follows from this that the public interest in resolving this case on its merit outweighs the appellant's privacy interests, as important as those undoubtedly are, given the extremely serious nature of the charges which the appellant faced.

[76] For all the foregoing reasons, I would hold that the evidence of the WhatsApp data retrieved from the appellant's cellular phone was properly admitted into

evidence, notwithstanding the manner in which they were obtained. I would accordingly dismiss ground 1.

Ground 2 – Wrongfully permitting the jury to retain ABE interview transcripts

- [77] The nub of the complaint in ground 2 is that the judge erred in allowing the jury to retire with the transcripts of the interviews of the virtual complainants, which served as their evidence-in-chief, without properly directing the jury how to treat with them.
- [78] The appellant asserts that these complainants gave evidence in chief via video link and the transcripts of their evidence-in-chief was read into evidence and exhibited. These transcripts were utilised by the appellant to cross-examine the complainants, and the judge also directed the jury to specific parts of them by page number during his summation. The appellant accepts that he did not object to the judge permitting the jury to retire with the transcripts.
- [79] Nonetheless, the appellant contends that it was still incumbent on the judge to properly instruct the jury, explaining why they were permitted to retire with the transcripts and the use to which they could put the transcripts, in accordance with the principles derived from **R v Popescu**²⁰. Several failures are attributed to the judge under this ground: (i) he failed to give the jury any directions whatsoever, which posed the risk that the jury would attach disproportionate weight to the complainants' evidence-in-chief; (ii) he failed to warn the jury that the transcripts were not evidence in the case and that they should not use them for any other purpose than to remind themselves of the evidence in chief of the complainants; (iii) he failed to hold discussions with counsel for the prosecution and the appellant before deciding to allow the jury to retire with the transcripts; and (iv) he failed to ensure that the examination and cross-examination of other relevant witnesses were summed up fully to the jury. The judge's failure is said to amount to a material procedural irregularity which rendered the appellant's trial unfair and the verdicts unsafe.

²⁰ [2010] EWCA Crim 1230.

[80] The respondent takes issue with the assertion that the jury retired with the transcripts. Ms. Weekes expressed surprise at this ground and maintained that this did not occur. As such, there could be no failure by the judge to give proper directions because the occasion for giving such directions simply did not arise. To buttress this submission, Ms. Weekes referred the Court to the point in the transcript of proceedings when the jury was about to retire. There the judge told the jury “You will receive all the exhibits in the case. You will have with you your bundles”.²¹ Ms. Weekes suggested that the judge’s reference to “exhibits” should be understood as meaning the exhibit bundles containing “various documents such as money transfers, immigration documents and letters and the WhatsApp bundles. The reference is not to the ABE transcripts”.²²

[81] Dr. Dorsett countered these submissions by drawing the Court’s attention to the Record of Appeal, where some of the ABE interviews bear exhibit numbers in the High Court proceedings. These include, “J.L.6”, which is the ABE interview disc of M²³; “M.B.1”, which is the ABE interview transcript of M²⁴; “J.L.7,” which is the ABE interview of N; “L.B.D.1,” which is the ABE interview transcript of N.²⁵ Dr Dorsett submitted that this is evidence that the transcripts were tendered as exhibits and were included among the exhibits that were with the jury when they retired.

Discussion and analysis – Ground 2

[82] The issue for resolution here is whether the judge erred in permitting the jury to have copies of the transcript of the video recorded interviews of the virtual complainants and to retire with them without appropriate directions as to what use they could make of them.

[83] In Montserrat, the **Criminal Procedure Code** makes provisions for the use of special measures in relation to vulnerable and intimidated witnesses and for

²¹ At page 2272.

²² Respondent’s skeleton arguments, para 7.3.

²³ ROA, p. 2648 – 2649.

²⁴ ROA 2690 -

²⁵ ROA 2670 – 2689.

special measures directions to be given in relation to such witnesses. One such special measure direction for eligible witnesses, pursuant to section 281(1), is for a video recording of an interview of the witness to be admitted as their evidence in chief. Section 281(5) provides:

- “(5) Where a recording is admitted under this section—
(a) the witness must be called by the party tendering it in evidence, unless—
 (i) a special measures direction provides for the witness’s evidence on cross-examination to be given except by testimony in Court; or
 (ii) the parties to the proceedings have agreed as mentioned in subsection (4)(a)(ii); and
(b) the witness may not give evidence in chief except by means of the recording—
 (i) as to any matter which, in the opinion of the Court, has been dealt with adequately in the witness’s recorded testimony; or
 (ii) without the permission of the Court, as to any other matter which, in the opinion of the Court, is dealt with in that testimony.”

[84] In this case, the evidence in chief of the virtual complainants was in the form of video recorded interviews. The interview of G was excluded at trial pursuant to section 218(4) because she was not available for cross-examination.

[85] It is not in dispute that transcripts of these video recorded interviews were produced, and, it seems, played or read at the trial. There is, however, a factual dispute which must be resolved to determine whether there is any merit to this ground of appeal. The appellant’s submissions only get off the ground for consideration if the transcripts of the interviews were in fact exhibited during the trial as he contends. The respondent’s strident position is that they were not exhibited. Ms. Weekes was adamant about that and pointed to areas of the transcript which we were invited to treat as confirming her position.

[86] In relation to those parts of the transcripts to which Ms. Weekes referred, it is impossible to interpret what the judge meant by “exhibits” by merely reading the one sentence to which Ms. Weekes drew attention. The context simply sheds no light on what he meant to include or exclude as exhibits. Similarly, the reference to line 7 of page 2276 which records the judge saying “You may take (inaudible)”

is totally unhelpful as the sentence is incomplete, and I will not speculate on what if any words are missing.

[87] I have also examined the parts of the Record of Appeal on which Dr. Dorsett relies ground his submission that the ABE interviews were exhibited in the trial. On the face of the record, it appears that they were.

[88] In my view, to put the matter beyond doubt, the sensible approach is to start by considering what are exhibits in a criminal case, and the procedure by which items become exhibits in the case. The basic rule is that the party wishing to exhibit the item produces it in court and requests the judge to have it tendered and marked as an exhibit in the case. Each exhibit is then numbered sequentially. It would therefore be useful to examine the transcripts to identify whether there is any point in time when a request was made to tender and mark the transcripts as evidence in the case.

[89] Page 1721 of the Record of Appeal provides some useful insight as to what occurred during the course of the trial. It is apparent that Special Constable Jane Lawrenson conducted the ABE interviews with M on 11th and 12th May 2016 and with C on 17th August 2016. Special Constable Lawrenson's witness statement was read into evidence. This is gleaned from page 1721 where Ms. Weekes tells the jury:

"Thank you. The first statement, members of the jury, to be read, is the 2nd November, 2015. "I am Jane Lawrenson". I have a number for her, police lag 9204493. She's seconded from the National Crime Agency in London, to be a special constable here in Montserrat. She started that role in Montserrat 17th of September, 2015. On the 18th September 2015, she conducted an ABE, which means Achieving Best Evidence, with M." (Lines 2 – 10)

[90] Having identified the dates on which Ms. Lawrenson conducted the ABE interviews with M and C respectively, Ms. Weekes is recorded as stating the following:

"I am now moving on to that last interview just to tell you that the 25th of January, 2017 in your bundle, was filled (sic) the interview of M. Delma Perez was the interpreter."

Again, speaking to the interviews themselves, does My Lord perhaps say that I want to exhibit, and I want to be able to put in completeness

each of the ABE interviews as I go along, because the disks have been played very well in the Court.

THE COURT: Yes.

MS WEEKES: Thank you. May I ask for the three disks (sic) for the 11th, 12th, and 21st of January 2017? The other two being '16 can be exhibited –tendered and exhibited.

THE COURT: As?

MS. WEEKES: It will be –or ought to be JL—JL-1 or (sic) three of those disks (sic).

THE COURT: The three, the three disks –

MS. WEEKES: Yes.

THE COURT: Tendered as JL-1.

MS. WEEKES: And that's from –

THE COURT: That's the disks with the interviews.”

[91] From this extract, it is reasonably clear that what was in fact exhibited were the discs containing the audio recording of the ABE interviews of these particular complainants.

[92] Special Constable Lawrenson also conducted a video interview with S. The transcript of that interview was exhibited with her statement. That transcript was made an exhibit in the case together with a Western Union Card obtained from S. The tendering of the transcript of the interview is recorded at pages 1727 - 1728 of the Record of Appeal, which reflect the exchange between Ms. Weekes and the judge:

“She [Special Constable Lawrenson] placed that in the exhibit bag, and also exhibited the transcript of the interview. So this will be the next –
THE COURT: Proceed.

MS. WEEKES: -- two matters that I invite My Lord to enter into evidence –

THE COURT: Yes.

MS. WEEKES: -- with an exhibit number. The interview –

THE COURT: Yes, the Western Union Card.

MS. WEEKES: Yes.

THE COURT: And the –

MS. WEEKES: Interview.

THE COURT: --transcript of the interview?

MS. WEEKES: Yes please.

THE COURT: I am admitting into evidence. Any objection?

THE ACCUSED: No, My Lord.

THE COURT: As I admitted it out of (sic) objection.

MS. WEEKES: Perhaps this should be JL-2, which is, S interview JL-2.

THE COURT: JL-2. Proceed.”

[93] The record of appeal further shows that all but one of the other transcripts of the ABE Interviews were tendered into evidence and given exhibit numbers. The interview of C is JL-6²⁶; interview transcript of N is JL-7²⁷, the interview transcripts of M is M.B.1.

[94] It is patently clear that Ms. Weekes' strident denial, both in oral and written submissions, that the ABE interview transcripts were exhibited, is flatly contradicted by the record of appeal, which demonstrates clearly that they were exhibited on the application of Ms. Weekes but without objection by the appellant.

Non-direction on transcripts

[95] It is a fact that the judge gave the jury no directions on how to treat with these transcripts of the ABE interviews. The issue is whether that failure was a procedural irregularity which renders the appellant's conviction unsafe. It must be said that the Court received no submissions from the respondent on the impact of this failure because they maintained, wrongly, that the transcripts were not exhibited.

[96] It is to be noted that under the Montserrat Criminal Procedure Code, it is the video recorded interview that is admissible in the proceedings. These would normally be in the form of a disc. The Code makes no reference to transcripts of a video recorded interview being admissible. However, it appears from the record of appeal that the video recorded interviews were played but there was some difficulty with the audio as at least three jurors were unable to hear properly. This seems to be the reason why recourse to the transcripts was thought expedient for the jurors to properly follow the audio.²⁸

[97] The appellant relies on the case of **R v Popescu** as an authority which provides guidance on how the court should treat with the transcripts of such interviews. In that case, the complainant in a rape case gave two video recorded interviews to the police. The transcripts of those two interviews ran to 62 and 76 pages

²⁶ ROA, p. 1736.

²⁷ ROA p. 1738.

²⁸ See ROA, pp. 1109 – 1115.

respectively. At trial, she gave her evidence in chief in the form of those interview videos, which were played to the jury. At some stage during the course of her evidence, the jury were given copies of the transcripts. In cross-examination of the complainant, counsel for the appellant used the transcripts to provide references for his questions. Counsel also made substantial references to the transcripts during closing speeches. The jurors retained possession of the transcripts during the closing addresses of counsel. The judge also referred to the transcripts during the course of his summation. The jury retired with the ABE interviews. The appellant was convicted.

[98] The sole ground of appeal was that the verdicts against him were unsafe because the judge permitted the jury to keep their copies of the ABE interview transcripts throughout the trial and to retire with them. The case is helpful for the guidance it provides in relation to whether the jury can or should be given a transcript of the ABE interview, and, if so, in what circumstances, in which the jury may be permitted to retain possession of the transcript after the evidence has been given.

[99] The salient principles emerging from that case may be distilled thus:

- (i) Transcripts of an ABE interview should only be provided to the jury after careful consideration following discussion between the judge and counsel, and solely when there is a compelling justification—such as difficulty following the evidence on screen or compromised audio quality.
- (ii) Secondly, if transcripts are distributed to the jury, the judge must immediately warn the jury to focus on the video as it is shown, emphasising the significance of the witness's demeanour.
- (iii) Thirdly, save in very exceptional circumstances, transcripts should be withdrawn from the jury once the ABE video evidence in chief has concluded. Should retention of transcripts during cross-examination be contemplated, this issue must be thoroughly discussed beforehand, ideally prior to the commencement of the evidence in chief, and reasons for

retaining the transcripts must be clearly communicated to the jury.

- (iv) Fourth, transcripts retained during cross-examination should be retrieved once the witness has completed their testimony, with the general rule being that the jury should not have access to the transcripts thereafter.
- (v) Fifth, if the jury are to have access to the transcripts after the witness has completed their testimony, this must follow from discussion between bench and bar, with cogent reasons for permitting this course, documented in a ruling by the judge.
- (vi) Sixth, except in rare cases, the jury should not retire with the transcripts. An exceptional circumstance may be where the defence specifically request it and the judge is satisfied that there are very good reasons why the jury should retire with the transcripts. Where this course is adopted, the judge must explain to the jury during summing-up the rationale for allowing them to have the transcripts and emphasise its restricted purpose, namely, to aid in understanding the witness's evidence in chief or that it is at the request of the defence. In such cases, the judge must provide a comprehensive summary of the cross-examination and re-examination of the witness, reminding the jury to consider all aspects of the testimony and to avoid undue reliance on the evidence in chief alone.

[100] The Court summed up the rational for this rigid protocol in the following terms:

"The practices and safeguards which have been developed in relation to the use of transcripts by the jury are all founded on one central principle, which is the right of the defendant in a criminal trial to have a fair trial, with no unfair procedural or evidential advantage being given to the prosecution. If this right to a fair trial has been infringed, then the verdict cannot be regarded as safe, however strong the case is against the accused."²⁹

²⁹ Supra at Para 34.

[101] In this case, the ground of appeal complains about the jury having possession of the transcripts during the trial and being allowed to retire with them, with no instructions by the judge and without any discussion with counsel of the appellant. I have already addressed the fact that transcripts were provided to the jury because some jurors were having difficulty with the audio quality of the video recorded interviews. The appellant accepts that he did not object to the jurors being given the transcripts during the trial or retiring with them. It is also evident that the appellant desired to make use of the transcripts for the purpose of his cross-examination. It is not necessary to set out all the occasions on which he did so one or two examples will suffice.

[102] In relation to M, at pages 1117 to 1125 the appellant submitted to the judge that there were inconsistencies between the first two interviews of M dated 18th September 2015 and 10th February 2016 respectively and a later interview dated 11th May 2016, interpreted by a different person. He asserted that M gave different answers to the same question in some cases. He had discovered this because he had been served with all of these interviews. However, his complaint was that all of these interviews were not in the jury bundle. He made an application in the following terms at pages 1124 -1125:

“...I am saying that those interviews should also be in the bundle of the jury.

THE COURT: So that—

THE ACCUSED: Because when I refer to those pages, the jury did not have them.

THE COURT: No. I—I accept what you are saying. Oh, one moment.

THE ACCUSED: So, my application, My Lord, is a copy of that original jury bundle be given to the jury, and to yourself as well. So when I say something and refer to the page, it could be verified that it happen.”

[103] Ultimately, while not allowing the entire original bundle to go before the jury because it contained highly prejudicial material to the appellant and the translation was found to be highly unsatisfactory and had therefore been abandoned by the prosecution in favour of the translation of 11th May 2016, the judge ruled that the appellant would be permitted to refer to and put the inconsistencies he had identified.

[104] In the case of C, the appellant can be seen making use of the interview transcripts which formed part of the jury bundle at pages' 1266, lines 11 -19 and 1268, lines 13 – 23 of the record of appeal. The appellant went on to make references to the interview transcripts during the course of his closing address³⁰. Clearly, the appellant wanted the jury to have possession of the interview transcripts, no doubt so that the jury could properly consider the points and areas of the transcript he drew to their attention during his cross-examination and closing address. The prosecutor also made reference to the transcripts during the course of her closing address. The judge also directed the jury's attention to them during the course of his summation for the purpose of reminding the jury of various details of the evidence in chief of the virtual complainants.

[105] In so far as the complaint relates to the jury retiring with the transcripts, it is clear that prior to permitting the jury to retire with the transcripts, the judge did not give them any specific directions on the use to which they could put the transcripts, and certainly nothing along the **Popsecu** guidelines. However, it is at least arguable that under the Criminal Procedure Code he was not under a strict obligation to do so. Section 286 governs what warning, if any, the judge should give the jury where special measures have been deployed. It provides:

"Warning to jury

286. Where on trial on indictment evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused."

[106] It appears from this section that any warning, and the content of such a warning if given, is a matter within the discretion of the trial judge.

[107] But even if the **Popsecu** guidelines apply in Montserrat, it is apparent from the summation that the judge made use of the transcripts for the very limited purpose of reminding the jury of certain details of the evidence in chief of the virtual complainants. In particular, the judge used the transcripts to draw the jury's attention to those parts of the evidence in chief that went towards establishing

³⁰ See, for example ROA, p. 2076; p. 2092, line 24 to 2093, line 25;

the elements of each offence, such as evidence from the virtual complainant's in relation to their age,³¹ the arrangements they entered into with the appellant³² and the types of sexual activities in which they were engaged with him³³. It is not apparent why the jury would have thought that they could use the transcripts for any other purpose but to remind themselves of pertinent details of the evidence in chief. There were 8 counts on the indictment involving different virtual complainants, who engaged sexually with the appellant in different ways over divers periods. The jury had the task of considering each count separately and satisfying themselves that each element of each offence was made out. The references to the transcripts were intended to assist them in that task. **Popsecu** recognises this as a proper purpose for which the jury may retain possession of the transcript after retirement.

[108] Furthermore, it seems to me that the risk that the jury would place disproportionate reliance on the transcripts and ignore the whole of the evidence, especially cross-examination, was considerably attenuated when the judge directed the jury:

“I want to say something about cross examination. Cross examination is a very important tool in the criminal justice (sic) because it allows a person the opportunity to test the veracity or the credibility of the person who is making an acquisition (sic) [accusation] against him or her. And you would recall nearly all the witnesses who were called or (sic) were cross examined.”³⁴

[109] Here the judge brings clearly to the jury's mind the significance of considering the evidence elicited during cross examination. There is no reason to think that the jury would have disregarded these clear directions merely because they had the transcripts in hand. Juries are presumed to be faithful to the directions they are given. **Popsecu** does not prescribe any particular form of words to communicate this.

³¹ See, e.g. ROA, p. 2119, lines 7 -16; p. 2120, lines 3 - 18.

³² See ROA, p. 2120, lines 19 -25 p. 2121, lines 1 – 18; p. 2122, lines 12 -25; P.2123, p. 2124, lines 1 – 9.

³³ See ROA, p. 2126, lines 18 -25; p. 2127 – 2128, line 14.

³⁴ ROA, p. 2111, lines 21 et seq.

[110] Furthermore, the judge referred to the cross-examination of the witnesses and reminded the jury of what the appellant's defence was throughout the summation. The appellant does not complain that the judge did not sum up the case in a balanced way or did not adequately and fairly put the defence to the jury. While it is true that the judge did not specifically tell the jury why they were permitted to have the transcripts and the use to which they could put them, in light of the circumstances surrounding the jury having possession of them without objection by the appellant, who obviously wanted them to have the transcripts, and who made use of them during his cross examination of the virtual complainants and his closing address, this omission does not afford a basis for finding that the prosecution derived any unfair procedural or evidential advantage or that the accused did not have a fair trial. I would dismiss this ground of appeal.

Ground 3 – Rejection of no case submission

[111] Ground 3 is that "the judge wrongly rejected the appellant's submission that there was no case to answer on the charges of sexual exploitation on the ground that there was no admissible evidence that the complainants were under the age of 18 at the time of the alleged commission of the offences.

[112] The appellant submitted that the learned trial judge was wrong to rule that there was a case to answer based on the documents which were tendered to prove date of birth or age in respect of M, N, G and C. He invoked section 144(2) of the **Criminal Procedure Code** which mandates that all evidence be recorded in English and if any evidence is given in any other language it shall be interpreted and in the case of any documents tendered in evidence which are written in a foreign language a translation shall be provided by a person appointed or approved for the purpose by the High Court. This did not occur here. No such interpretation or translation of the copies of the birth certificates of M, N, the copy of the document purporting to be the page of G's passport or the document purporting to be copy of the identification card of G made by a person approved or appointed by the Court was tendered in evidence.

[113] It was further submitted that the disputed documents were inadmissible at common law. The appellant cites Lord Selbourne in **Lyell v Kennedy**³⁵ said:

“Foreign registers of baptisms or certified extracts from them are receivable in evidence in the courts of this country as to those matters which are properly recorded on them where it sufficiently appears (in the words of Mr. Hubbocks learned work on evidence) that they have been kept under the sanction of public authority and are recognised by the tribunals of the country (i.e. of the country they are kept) as authentic records.”

[114] Since no evidence was led to this effect, the documents could not be admitted at all. The other documents which were tendered to prove age and date of birth were certified copy of the birth certificate of S and a computer-generated document purporting to be an immigration record of the entry and exit of S, NM, M, N and G in and out of Montserrat, by a person who had access to a computer and who was not the compiler of the documents. These documents were hearsay and inadmissible to prove date of birth or age on the authorities. In order for the documents to have been admitted in evidence they had to fulfil the following requirements: (a) the documents were made and preserved for public purpose and contained matters of public interest. (b) They must be open to the public (c) the entries or records were made by a person having a duty to enquire and satisfy himself of the facts recorded (d) the entries were made promptly after the events they appear to record.

Respondent's submissions

[115] The respondent submitted that the age or date of birth of each of the complainants was never raised by the appellant as an issue during the trial. It was submitted that if there is a date of birth in English for each of the complainants on at least one document that is sufficient, legally admissible evidence of that witness' age. In relation to M, the respondent submitted that in her ABE interview she stated her date of birth and that proved her age. It was conceded that the birth certificate that was tendered in evidence in relation to her was in Spanish. In relation to N, the respondent submitted that her date of birth is in her ABE interview and that was sufficient to prove her age. In relation to C,

³⁵ (1889) 14 App Cas 437 at 448-9.

it is also said that her date of birth is recorded in her ABE interview. In relation to S, it is said that she stated her date of birth in her ABE interview, stated her name in the trial and a certified copy of her birth certificate was exhibited. In relation to G, the submission was that while not called to give evidence at the trial, there is her ABE interview in which she stated her date of birth. I observe here that that interview was excluded at trial.

- [116] The respondent's written submissions further posit that the dates of births of some of the complainants have been recorded by immigration officers in a schedule which was provided for the trial and provided to the jury. This evidence supported the dates of birth which appeared in the ABE interviews of the complainants. By way of example, it was submitted that M's date of birth and passport number are reflected in the immigration schedule. Similarly, N's date of birth is also in the schedule.³⁶ While she was not a witness at trial, there was reference to her name in the WhatsApp messages. Further, any public document must be kept. Immigration documents are required by law to be kept. Invoking section 14 of the **Evidence Act**³⁷, the respondent submitted the evidence relating to the age of the complainants included the immigration schedule and the ABE interviews in English.

Discussion – No case submission

- [117] The principles in relation to no case submissions are well settled and do not require extensive rehearsal here. In summary, a no case submission may be upheld where: (i) the prosecution has failed to establish an essential element of the offence; or (ii) the evidence adduced by the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict. Within the Eastern Caribbean Supreme Court jurisdictions **R v Galbraith**,³⁸ is regarded as the seminal authority on the approach that a trial judge should take when met with a no case submission.

³⁶ See transcript pages 2414 to 2415.

³⁷ Cap. 2:08 Laws of Monsterrat.

³⁸ [1981] 2 All ER 1060 ;73 Cr. App. R. 124 CA.

[118] The role of the Court of Appeal when considering a ground of appeal challenging a judge's ruling on a no case submission is settled. This court has held in **Edwin Gomez v The Queen**³⁹ applying **R v McLeod and Others**,⁴⁰ and more recently in **Yannick Pelage v PC 785 Mario Chicquot**⁴¹ that on an appeal against conviction on the ground that there is no case to answer, this Court will focus on whether there was in fact a case to answer. The real question in considering the judge's ruling that there was a case to answer is not whether his statement of the legal principles as understood by him were correct but whether his assessment of the sufficiency of evidence was correct. In other words, the Court of Appeal's task is to examine the evidence to determine whether it supports the verdict.

[119] In this case, the appellant based his submission on the first limb, namely that an essential element of the offence had not been proved. In his directions to the jury, the judge was clearly mindful of the fact that one of the essential elements of the offence which the prosecution was required to prove beyond reasonable doubt was that the virtual complainants were each under the age of 18 years at the material time.⁴²

Proof of age

[120] In practice, proof of age of a child or young person is often achieved by calling a parent to testify as to his or her date of birth. This may not always be feasible, as where the parents are either unknown or deceased or for some other reason unavailable. It would be an entirely unsatisfactory state of affairs if the law were that the only admissible evidence of proof of age was the evidence of a parent in relation to the child's date of birth. At paragraph 732 of **Halsbury's Laws of England**⁴³, it is stated that "age may be proved by various means , including the statement by a witness of his own age and the opinion of a witness as to the age of another person, **R v Cox**⁴⁴ is cited in support of the proposition. But when age is in issue stricter methods of proof may be required.

³⁹ ANUHCRA2014/0012 (delivered 17th August 2022, unreported).

⁴⁰ [2017] EWCA Crim 800.

⁴¹ SLUMCRA2023/0002 (delivered 8th May 2025, unreported).

⁴² ROA, p. 2117, lines 1 – 7.

⁴³ Volume 12 (2020.)

⁴⁴ [1898] 1 QB 179.

[121] In **R v Cox**, two defendants were tried on an indictment charging them in several counts with having unlawfully and willfully neglected certain children under the age of 16 years who were in their custody. At the trial, the prosecution led evidence to prove that some of the children, who were not produced before the court, were under the age of 16. That evidence consisted of the statement of a witness that he had seen the children and who stated what he believed were their respective ages, all of which were under 16. A police constable gave evidence to similar effect, and the mistress of the school was called and she said that the children attended public elementary school and she believed that they were under the statutory age limit for such schools. Counsel for the defendants contended that there was not sufficient evidence to go to the jury that the children were under 16. That submission was overruled, and the case was left to the jury, who convicted the defendants. On appeal, one of the questions for the Court was whether there was any legal evidence of the age of the children to go to the jury. In delivering the judgment, Lord Russell CJ stated:

“The fourth question upon which our opinion is asked is whether there was any legal evidence of the children’s age to go to the jury. Counsel for the defendant said that the only legal evidence of the age was the production of the certificate of birth, coupled with evidence of identity. There is no such statutory requirement. The fact that the child is under the age of sixteen may be proved by any lawful evidence. The evidence here was that which is stated in the third paragraph. It is in my opinion impossible to see that there was not evidence, proper to be left to the jury, that the children were under sixteen. The conviction must be affirmed.”

[122] This seems to be a case where opinion evidence of what appeared to be the age of the children or inference from appearance of age was considered sufficient to be left for the jury’s consideration. However, a different outcome was reached in **Lockwood v Walker**.⁴⁵ Here the defendant was charged and convicted of the offence of behaving in a lewd and indecent manner towards a girl under puberty. The court quashed the conviction on the grounds that the only evidence adduced that she was under puberty was her own uncorroborated statement of her age. Lord Clerk in delivering judgment stated:

“We know – for Mr. Fraser has been very frank with us and has told us so - that the only evidence adduced of the age of the child was that the child herself was asked what her age was and said that it was eleven. I

⁴⁵ 1910 S.C. (J.), 3.

think that in a case so serious in its consequences as this case is, the fact that no other evidence was adduced is in itself conclusive. The proper course would have been to produce unimpeachable evidence of the age of the child. It was suggested by Lord Aardwall in the course of the debate that an extract of the child's birth should have been produced by the prosecutor. For myself I cannot say that I consider that essential, but I'm clearly of opinion that the evidence must be sufficient. No doubt our law does not require that every fact in a case shall be proved by two witnesses, but it most certainly does require that every crucial fact shall be so proved, or proved where there is only one witness by corroborative facts and circumstances proved or by corroborative documentary evidence. In this case there could have been no difficulty at all in complying with the requirements of the law. The child's mother was a witness, and could have been asked. Instead of that the child's statement was left absolutely uncorroborated. It is said that corroboration is got from the fact as the respondent says that the magistrate was of opinion that the child looks like a child of eleven years of age. Clearly that is not corroboration in any way whatsoever. Accordingly in the circumstances now disclosed to us, this conviction is wrong, because the offence charged was not proved."

- [123] This case illustrates the principle that where strict proof of age is required, as in sexual offences cases, the complaint's evidence of their age is required to be supported by some other admissible evidence. In practice, this is normally achieved by the production of a birth certificate or a certified copy of same. In Montserrat, section 27 of the Registration of Births and Deaths Act⁴⁶ provides for their admissibility in criminal proceedings:

"Evidence in civil and criminal cases

27. All copies of entries which shall be certified as true under the hand of the Registrar and purporting to be sealed or stamped with the seal of the General Registry Office (which seal it shall not be necessary to prove) shall be admissible in all civil and criminal cases as evidence of the births and deaths to which the same relate without any further or other proof of such entries; and no certified copy purporting to be issued from such General Registry Office shall be of any force or effect unless it is signed and sealed or stamped with the seal of such office."

- [124] However, this must be supplemented by evidence identifying the person whose birth is certified.⁴⁷ A person's age may also be proved, among other ways, by the evidence of a witness who was present at the birth of the person concerned,

⁴⁶ Cap. 6.13 of the Laws of Montserrat.

⁴⁷ R v Rogers (1914) 10 Cr App R 276.

such as a parent; by the admission of a party; or by any other admissible evidence from which the age of a person at the material time can be inferred.⁴⁸

[125] As to public documents, section 14 of the **Evidence Act**⁴⁹ states:

“Proof of certain public documents

14. (1) Whenever by the law for the time being in force in Montserrat or in any other territory formerly part of the former Federation of the West Indies—

(a) any public document; or

(b) any record required by law to be kept of any public document or proceeding; or

(c) any certified copy of any public document or instrument or of any entry in any public register or book,

is admissible in evidence for any purpose in Montserrat or in any such territory, it shall be admitted in evidence to the same extent and for the same purpose in all courts, if it purports to be sealed or impressed with a stamp, or sealed or signed, as directed by such law, without any proof of the stamp, seal or signature, as the case may be, of the person purporting to have made or issued the same and, in the case of a certified copy, without further proof thereof, in every case in which the original could have been received in evidence.”

[126] Additionally, there is a general provision in section 12 of the **Evidence Act** which states that documents admissible in England are admissible in Montserrat.

“12. Every document, which, by any law now in force, or hereinafter to be in force, is or shall be admissible in evidence in any Court of Justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any Court in Montserrat, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence.”

[127] In this regard, with specific reference to foreign documents, this provision imports into Montserrat the common law and statutory rules of the United Kingdom which allow for the admissibility of certified foreign public records. In Montserrat, however, 144(2) of the **Criminal Procedure Code** specifically requires any document written in a foreign language to be translated by a person appointed or approved for that purpose by the High Court. The section states:

“(2) All evidence shall be recorded in English and if any evidence is given in any other language it shall be interpreted; and in the case of any documents tendered in evidence which are written in a foreign language a translation shall be provided. Any interpretation or

⁴⁸ See Blackstone’s Criminal Practice 2026, para. F8.24.

⁴⁹ Cap. 2.08 of the Laws of Montserrat.

translation shall be made by a person appointed or approved for the purpose by the High Court.”

[128] In summary, in Montserrat, public documents, records required by law, certified copies of public documents, or entries in public registers are admissible in evidence for any purpose in Montserrat. These documents are accepted in court if they appear to be properly sealed, stamped, or signed as required by law, without needing further proof of the seal, stamp, or signature. Certified copies are also admissible without additional proof, provided the original would have been admissible in evidence. Additionally, section 12 of the **Evidence Act** provides a general rule that any document admissible in a court of justice in England is also admissible in Montserrat, to the same extent and for the same purpose. Documents tendered into evidence that are written in a foreign language must be translated into English by a court appointed translator.

[129] I should say immediately that immigration records are not admissible by virtue of section 14 of the **Evidence Act** as contended by the respondents, since they do not meet the test of “public document”. The **Evidence Act** does not contain a definition of “public document”, nor does the Interpretation Act. Resort must therefore be had to the common law definition. A document qualifies as a public document if it meets the following three criteria: (1) it is created by a public officer who had a legal or official duty to inquire into and record the facts contained in the document; (2) the document must have been prepared for the purpose of the public making use of it and intended for public keeping and inspection so that its contents can be scrutinised; and (3) the facts recorded must be of a public or general nature and interest, not merely a matter of private concern.⁵⁰ The evidence of Senior Immigration Office Pond, who produced the immigration records, is that they are not documents to which the public has access. They therefore fail the test of public document. If they were admissible at all, it would have to be by virtue of section 12 of the **Evidence Act**. I will return to this issue presently.

⁵⁰ Polini v Gray [1873 P. 162]; Sturla v Freccia [1876 S. 353]-(1879) 11 Ch.D. 741. (1878) 12 Ch. 411.

- [130] In relation to the birth certificate of M, that is inadmissible because there was no English translation of it by a court appointed translator. The same applies to the other documents written in Spanish.

Evidence of age in the case

- [131] Against that legal backdrop, the evidence adduced in relation to the age of the virtual complainants must now be considered. During his summation, the judge directed the jury's attention to the evidence going towards proof of age in relation to each virtual complainant.

- [132] In relation to M, the judge directed the jury:

"How can you be satisfied that M was 15 years old in this case? What was the evidence? The prosecution in this case has produced copies, parts of immigration records, carrying a date of birth. They have produced copies of birth certificates, in the foreign language, namely, Spanish."⁵¹

- [133] The judge further directed the jury that they could rely on M's ABE interview when she told the interviewing officer that she was 18 years old when she stopped having dealings with the appellant. He directed them that from this they could infer that she was under 18 when the relationship started.⁵² He also referred to a birth certificate showing a date of birth and to her statement in the ABE interview. As to this, the judge directed the jury:

"...as you go through your interview where M was asked how old she was, and she said about 15. And I said even if she said it was 15, and she may have been 16, or 14, what is important for you is for you to come to the – to be satisfied that M was under 18. In the ABE interview of M, with Officer Lawrence, in the presence of an interpreter, you will see at number – at page 435 this exchange. "When you were at school, what clothes did you wear at school? M, "The school uniform." And again, Officer Lawrence asked her, "And – and – just so, I want to be clear, how old are you when you leave school in Montserrat? When you leave senior school? And she says, "I went back. So M is saying at the time she was about 15 to 16. She then says, "Adulthood is 18. To be an adult, you have to be 18 to leave school, but I was in school." So from those bits of evidence, it is open to you, if you so wish, to come to a conclusion that at the material time M was under 18."⁵³

⁵¹ ROA, p. 2118 lines, 1 – 7.

⁵² ROA , p. 2119, lines 7 -16.

⁵³ ROA, page 2119, lines 23 -25; p. 2120, lines' 1 -18.

[134] In relation to the immigration records referred to by the judge, what is said here applies to all the complainants in relation to whom immigration records are relied on to prove age. These are admissible in England by virtue of section 117 of the Criminal Justice Act 2003, which allows a statement contained in a document to be admissible as evidence of any matter stated if: (a) the document was created or received by a person in the course of a trade, business, profession, or other occupation as the holder of a paid or unpaid office; (b) the person who supplied the information must have had, or be reasonably supposed to have had, personal knowledge of the matters dealt with; and (c) the person supplying the information received it in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

[135] Where the statement was prepared for the purposes of pending or contemplated criminal proceedings (not pursuant to an overseas request) any of the following additional requirements must be met: (a) that the relevant person is dead; (b) that the relevant person is unfit to be a witness because of his bodily or mental condition; (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance; (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken; (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence; or (f) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances).

[136] Immigration records can be admissible in Montserrat by virtue of section 12 of the **Evidence Act**. However, this is subject to these same conditions of admissibility. The immigration official producing the record was senior immigration officer and record keeper, Eunice Pond. She produced immigration records which she generated from the immigration database showing the travel history of G, M, NM, N and S. This was done at the request of one Sergeant Jessica Sweeney. The record contains columns showing flight number, surname,

forenames, date of birth, passport number, date of travel, arrival/departure, nationality and person sponsoring. The immigration records were generated by the immigration department in the course of its regular duties and so they are admissible in criminal proceedings as business documents, even if a particular immigration official who created them is not called to give live evidence. I am satisfied that they were admissible to prove the statements contained therein.

[137] Leaving aside, the foreign language, non-certified birth certificate, which I have determined was inadmissible to prove age, and even if the immigration record is ignored, M's statement of her age is admissible evidence to prove her age, although the weight to be attached to it is dependent on whether it is corroborated by any other admissible evidence. In my view, it plainly was. M's evidence was that at the material time she was a student and wore a school uniform to school. She said that the school leaving age was 18. From this evidence, it was open to the jury to infer that she was under 18 at the material time. There is more. M's mother, Josephina Mena, gave evidence at the trial. Astonishingly, she was never asked to state M's date of birth. Instead, she was asked to state the age of her youngest and oldest daughters. She stated that M's age at the date of trial in 2021 was 19.⁵⁴ The only reasonable inference to be drawn by the jury is that between 2010 and 2015 she must have been under 18.

[138] I am therefore satisfied that there was admissible evidence on which the jury could find that M was under 18 years of age at the material time, and the judge was right to reject the no case submission in relation to her.

[139] In relation to N's age, the judge referred the jury to WhatsApp messages between the appellant and N during which she told him she was 13 years old.⁵⁵ Other evidence of her age came from N's mother, Josephina Mena, who gave evidence at the trial. The prosecutor did not ask her about N's age or date of birth. However, in cross examination she testified that N came to Montserrat when she was 9 years old. She had previously testified that she came to Montserrat in 2014. The appellant elicited from her that from the age of 9 until the year 2015 their

⁵⁴ ROA, Vol 4, p. 1280, lines' 6 – 22.

⁵⁵ ROA, p. 2137, lines 13 -25; p. 2138, lines 1 -8

friendship continued. The appellant asked Ms. Mena: "At what age was N when you left her in Montserrat?. The mother replied, "Fourteen years old."⁵⁶ That was admissible evidence from which the jury could find that at the material time, N was under the age of 18. The no case submission in relation to her was rightly rejected.

[140] In relation to C, the judge directed the jury to her ABE interview in which she stated that her date of birth was 1st February 2001. He later told the jury:

"He says, "There is no evidence that C was under 18 years of age." I said members of the jury, the age is issue (sic) you will determine. You have heard C say, I am 13. She has given her date of birth to a police officer. That is evidence. You weigh that against Brandt saying she was on -- she was -- there's no evidence she was under 18."⁵⁷

[141] On the authorities, I conclude that the evidence of C in relation to her age was insufficient on its own to prove that she was under 18 at the material time. The no case submission should have been upheld in relation to her.

[142] As it relates to NM, she was not a witness at the trial. The judge directed the jury that proof of her age could be established by the immigration records which listed her date of birth as 28th November 1997. He told them that the immigration record was a public record and that "in order for them to get this record, you would imagine she would have had to produce a passport if she's traveling. A passport carries your date of birth, and to obtain a passport, you have to produce some evidence that your date of birth(sic). So members of the jury, the issue of whether she's under 18, over 18 is for you. You will look at the evidence and say well, is this evidence faked? Ms. Bond – Pond did say she cannot verify the accuracy of it. She just downloaded it."⁵⁸

[143] While I have found that an immigration record would be admissible in Montserrat pursuant to section 12 of the **Evidence Act** because it is admissible in England, there remains the requirement to link the complainant to the date of birth listed in the immigration record. NM was not called as a witness and there was no

⁵⁶ ROA, p. 1299, lines 9 -13.

⁵⁷ ROA, p. 2158, lines 8 -14.

⁵⁸ ROA , p. 2168, lines 11 to p. 2169, line 11.

evidence linking her to the immigration record. I am satisfied that the no case submission in relation to her should have been upheld.

[144] As it relates to S, a certified copy of her birth certificate was exhibited, fulfilling the requirements of section 27 of the **Registration of Births and Deaths Act**. This supported her own testimony in relation to her age. There was therefore admissible evidence from which the jury could find that she was under 18 at the material time.

[145] In relation to G, it appears that ultimately, her immigration record was not admitted in evidence because Senior Immigration Officer Pond was unable to properly identify the document. This is gleaned from the judge's summation.⁵⁹ Additionally, she was not called as a witness and her ABE interview in which she stated her age was excluded at trial. In these circumstances, it is difficult to see how the prosecution can maintain that there was evidence of her age before the jury. The no case submission in relation to her should have been upheld.

[146] For the foregoing reasons, I would quash the convictions in relation to counts 3, 4 and 5 because there was no admissible evidence to prove an essential element of the offence, namely, that the persons named in these counts were under the age of 18 at the material time.

Ground 4

[147] Ground 4 states that the judge misdirected himself in law when he failed to direct the jury that although they may convict on the evidence of S it would be dangerous to act upon her uncorroborated evidence. No corroboration of her evidence existed, or if it did exist, the judge failed to identify it and to direct the jury that in order for them to convict the appellant they had to be sure that the evidence was convincing, cogent and irresistible. If there was no corroborative evidence, the judge was required to tell the jury so.

⁵⁹ ROA, p. 2190, line 8, to p. 2191, line 2.

- [148] The appellant's written submissions assert that Shannelle Hyman confessed to participation in the alleged offence of attempting to pervert the course of justice this makes her accomplice. Furthermore, as an aider and abettor, she would be deemed a principal offender under section 19(1) of the **Penal Code**. She gave evidence for the prosecution to the effect that the appellant gave her money to send to NM to prevent her from speaking to the police regarding his pending criminal matter, and that she did send the money. She was therefore an accomplice, and the judge was required to warn the jury that, although they may convict on her evidence, it was dangerous to do so unless it is corroborated. The appellant relied on **Davies v Director of Public Prosecutions**⁶⁰ as authority for this proposition.
- [149] The appellant submitted that "there was not a particle of evidence, not a document, there was nothing or a living soul who corroborated the evidence of S." On the contrary, submitted the appellant, there was evidence against corroboration. It was solicited in the cross-examination of David Silcock that the police had interviewed NM in England and she told them that she did not receive any money directly or indirectly from the appellant.
- [150] In these circumstances, argued the appellant, the failure of the judge to give a corroboration warning is fatal to the conviction on count 8, and this is not an appropriate case for the Court of Appeal to apply the proviso pursuant to section 39(1) of the **Supreme Court Act**.⁶¹
- [151] On behalf of the respondent, it was submitted that as a general rule, there is no requirement that evidence be corroborated. Neither was this a case where the court was required by law to give a warning to the jury to exercise care before acting on the evidence of a certain type of witnesses. By statute, corroboration is only required in cases of perjury, offences of speeding, attempts to commit an offence and treason. It was further submitted that Ms. Hyman's evidence under cross-examination that sexual activity with the appellant only occurred after her 18th birthday means that she was not a credible witness in light of her evidence

⁶⁰ [1954] AC 378,400.

⁶¹ Cap 2.01 of the Laws of Monsterrat.

in chief. Ms. Hyman's lack of credibility "*means that corroboration is not relevant or required by law*".⁶²

- [152] Finally, the respondent submitted that, in any event Ms. Hyman's ABE interview, WhatsApp messages from the appellant speaking to NM while he was on bail, the contents of a letter sent to NM advising of the bail condition in relation to her, and exhibits of money transfers between Ms. Hyman and Ms. Meade constituted strong evidence for the prosecution.

Law and analysis – Corroboration

- [153] The first issue here is whether S was an accomplice and, if so, whether a corroboration warning is mandatory in Montserrat in relation to accomplice witnesses. In its primary and natural sense, an accomplice is a person who is a participant in the actual crime charged whether as principal or an accessory before or after the fact. Two other classes of accomplice have been recognised but are not relevant for the present discourse.
- [154] In **Davies v Director of Public Prosecutions**⁶³ the House of Lords defined an accomplice in the following terms:

"There is in the authorities no formal definition of the term "accomplice "; and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category :- (i) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term "accomplice ". But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz., (ii) receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*R. v. Jennings* (19); *R. v. Dixon* (20)), and (iii) when X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident in such cases the court has held that, in relation to such other similar offences, if evidence of them were given by parties to them, the

⁶² Respondent's written submissions, ROA Vol 1, para 5.4.

⁶³ [1954] 1 All ER 507.

evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration: *R. v. Mohamed Farid*"

[155] In the case at bar, ground 4 is predicated on the argument that S was an accomplice because she aided and abetted the offence of perverting the course of justice because in her evidence in chief she stated that the appellant gave her money to send to NM to prevent her from speaking to the police regarding his pending criminal matter, and that she did send the money. It is correct, as the appellant submits, that pursuant to section 19(1) of the **Penal Code** she could have been charged as a principal offender with this very offence. I am satisfied that she is properly to be regarded as an accomplice to the offence of attempting to pervert the course of justice. This leads to a consideration of the next issue: whether a corroboration warning was mandatory.

[156] Traditionally, at common law, where an accomplice was called as a witness for the prosecution, it was obligatory for the judge to warn the jury that, although they could, it was dangerous to convict on the uncorroborated evidence of an accomplice. This rule was of ancient vintage and also applied to other categories of witnesses, such as victims of sexual offences. The courts had consistently held that in the absence of such a warning the conviction must be quashed. In England, the requirement to give this obligatory warning was abolished with the passage of the Criminal Justice and Public Order Act 1994 Act. Section 32 of that Act provided so far as relevant:

“(1) Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person namely because that person is -
(a) an alleged accomplice of the accused, or
(b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed,
Is hereby abrogated...”

[157] This development meant that the decision whether to give a warning is now at the trial judge's discretion. The Court of Appeal in **R v Makanjuola**⁶⁴ provided clear guidance on interpreting the 1994 Act and how judges should use this discretion, as explained by Lord Taylor of Gosforth CJ:

⁶⁴ [1995] 1 WLR 1348.

"The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.

To summarise. . . (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence. (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel. (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches. (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction. (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules."

[158] This passage makes it very clear that with the enactment of section 32(1) of the 1994 Act, judges undoubtedly have a discretion whether to give a corroboration

warning, and guidance is furnished, in the form of a non-exhaustive list of factors relevant to the exercise of that discretion.

[159] Montserrat has not enacted a similar provision abrogating the requirement to give a corroboration warning in certain cases. However, this does not mean that the old common law position continues to apply, so that the judge is obliged to give the corroboration warning in the case of an accomplice.

[160] The Privy Council's decision in the Grenadian case of **R v Rennie Gilbert**⁶⁵ furnishes the answer to this question. In that case, the trial judge had failed to warn the jury in a sexual offences case about convicting on the uncorroborated evidence of the complainant, who was the sole identifying witness. The defendant was convicted of attempted rape. The Court of Appeal allowed his appeal and quashed his conviction, holding that the law of Grenada required a corroboration direction and warning to be given in all sexual offence cases and that, since the nature of the evidence left a lurking doubt as to the safety of the conviction, it would not be appropriate to consider the application of the proviso.

[161] The Crown appealed to the Privy Council in order to challenge the contention that the common law corroboration rule was still to be regarded as part of the law of Grenada, arguing that the English law abrogating the common law rule requiring a corroboration warning was applicable in Grenada by virtue of section 167 of Grenada's Evidence Act.

[162] Although rejecting this latter argument, the Privy Council nonetheless allowed the Crown's appeal. The Board held that the corroboration warning requirement was merely a rule of practice that had developed at common law and that as such it was always liable to be reassessed in the light of further experience or research and reformulated in order better to perform its function. The rule existed to give juries the appropriate directions to assist them to arrive at a safe verdict as part of a fair trial. However, the mandatory requirement that such a warning be given in all cases had not been conducive to achieving that result but rather had led to

⁶⁵ [2002] 2 AC 531.

inappropriate and indiscriminate directions being given which confused juries, created unfairness as between the prosecution and the defence and undermined the safety of the juries' verdicts. The Board therefore held that it should no longer apply in Grenada. The judge would have a discretion whether to give any corroboration warning and, if so, in what terms, depending on the circumstances of the case, the issues raised and the content and quality of that evidence. An appellate court would only interfere with the exercise of that discretion in clear and exceptional cases.

- [163] This judgment is significant because it establishes that even without a statutory counterpart to the English Act, the approach and principles enunciated in **Makanjuola** applied in Grenada. In so holding, the Board overruled a previous decision of the Eastern Caribbean Court of Appeal in **Pivotte v The Queen**⁶⁶ which had held that, in Grenada, the corroboration rule could be abrogated only by statute. The Board held that the common law corroboration rule should no longer be followed when they stated:

“In their Lordships’ opinion the rule of practice which now will best fulfil the needs of fairness and safety is that set out in the passage they have quoted from the judgment of Lord Taylor of Gosforth CJ in *R v Makanjuola* [1995] 1 WLR 1348, 1351 - 1352. The guidance given by Lord Taylor of Gosforth CJ should now be followed.”

- [164] It is very clear from the foregoing, that although Montserrat has not statutorily abrogated the requirement to give the corroboration warning, and in the absence of any statutory requirement in Montserrat that imposes an obligation on the judge to give a corroboration direction in the case of accomplice evidence, the common law, as developed in **Makanjuola** now applies with full force, and the old common law rules as reflected in **Davies** no longer apply.
- [165] It follows therefore that the appellant’s submission that the judge was obligated to give a corroboration warning because S was an accomplice, and that his failure to do so means that the conviction is unsafe is an unsound legal proposition. The proper question is whether the judge erred in failing to give a

⁶⁶ (1995) 50 WIR 114.

warning in relation to S in the circumstances of this case. I will recount those circumstances.

[166] The allegation against the appellant in count 8 was that on certain days between 1st January 2018 and 30th June 2018, with intent to pervert the course of public justice, gave sums of money to S and instructed her to transfer those sums of money to NM in the UK via Western Union in order to stop NM from speaking to the police about a pending criminal charge of sexual exploitation against him.

[167] In her ABE interview, which formed her evidence in chief, S had admitted to receiving funds from the appellant for that purpose, and that she had transferred these funds to NM. These money transfers were in evidence. After her video recorded interview was adduced in evidence, she took the oath and swore that her ABE interview on 16th October 2018 was true.⁶⁷ Ms. Weekes attempted several times to elicit whether she had showed her phone to the interviewing officer after her interview had concluded. The witness did not answer, although she confirmed to the court that she had heard the question. These attempts ended with the following exchanges:

“BY MS. WEEKES:

Q: What is your answer? Do you remember showing Lawrenson your phone?

A: I don't want to talk anymore.

Q: Okay. I'm going to put the question once more. Do you remember showing Ms. Lawrenson your phone? Can you answer?

A: I don't want to answer.

MS. WEEKES: Well, My Lord, I can't –

THE COURT: She's your witness.

MS. WEEKES: Yes, its not the business of lawyers to insist that witnesses answer, and I have asked her twice.

THE COURT: Anything else?”⁶⁸

[168] At that point, she was tendered for cross-examination. The appellant asked her whether he had ever given her any money to send to NM, and she replied “No”. She agreed that the sexual activities she had engaged in with him occurred after her 18th birthday. The appellant ended his cross examination on that note. Ms.

⁶⁷ ROA, p. 1798, lines 17 – 21.

⁶⁸ ROA, p. 1803, lines 7 – 18.

Weekes attempted to pose a question to her in re-examination but she abruptly left the facility in the UK from which she was giving her evidence.

[169] Plainly, this witness had repudiated completely two key aspects of her evidence in chief. In any sense, she had given evidence adverse to the party calling her as a witness. The jury was left with a witness who had given starkly conflicting accounts on the same issues. She might fairly be thought to have shown herself to be an unreliable witness. It was for the jury to decide what they made of her credibility.

[170] It is important to see how the judge dealt with this turn of events in his directions to the jury. He told them:

“Members of the jury, the ABE – this ABE was read to (sic) in the presence of S. At the conclusion of the reading of the ABE, Ms. Weekes for the prosecution got up, and you would recall said, “I want to ask you just to -- a few questions.”

Shannelle said, I'm not answering any further questions.” That was her answer. You would recall. It wasn't too long ago. It was just last week. As a consequence, the prosecution could go no further. She's not asking (sic) anymore questions.

Cross examination. And I want to read exactly what she said. Three answers. “How old were you when we met?” She said, “18”. She was old (sic) – It was 2016. She then said yes, she never gave -- he never gave her any money.

Now, members of the jury, I told you that the evidence is for you, I will go a step further and say to you, it is open to you to accept part of what a witness has said if believe it, and reject other parts. That's a matter entirely for you. So you can say, in this case, well, she seemed to have been quite clear about her birth, and what happened, and the sexual activities in the first interview.

There seem (sic) to be a shift in the second interview. You may reject it. It's a matter entirely for you.”

[171] The judge put S's conflicting evidence squarely before the jury and left it to them to consider her credibility. While she may have been an accomplice, the jury could be left with no doubt that at the trial, her intention was to give evidence that was favourable to the accused. If her oral testimony was to be believed, the appellant committed no offence in relation to her and did not collude with her to pervert the course of justice. This was therefore not the usual situation where the

corroboration warning is given to alert the jury to the possibility that the accomplice witness might be seeking to minimise their own role in the commission of the offence and implicate the defendant. In the circumstances of this case, where it seems the witness was attempting to exonerate the appellant, it would have been artificial to give a corroboration warning.

- [172] The judge exercised his discretion and determined to leave the issue to the jury as a matter of credibility and left it for them to determine which version of S's evidence they believed. By their verdict, they clearly rejected her oral testimony. I see no basis for saying that the judge erred in not giving a corroboration warning in this case.

Ground 5 –

- [173] Ground 5 is that the judge erred in law in directing the jury to find the appellant guilty of perverting the course of justice *because* he broke his bail conditions by speaking to NM. The appellant's written submissions contend that the appellant was not indicted for breaking his bail conditions by speaking to NM. Accordingly, it was a misdirection for the judge to tell the jury that contacting NM would be a breach of the appellant's bail conditions and that would be an act sufficient to amount to perverting the course of justice. This error is said to be so gross, prejudicial and irremediable, that it rendered the appellant's trial unfair such that his conviction should be quashed.

- [174] It is further said that the judge erred in directing the jury that they "must find" the appellant guilty if they found that he had contacted NM in breach of his bail conditions. There are no circumstances in which a judge is entitled to direct a jury to return a guilty verdict even where a defendant's guilt is plain. The appellant submitted that the minds of the jury were so poisoned by this direction that they were compelled to find against the appellant and therefore his conviction was unsafe.

- [175] In response to this ground of appeal, the respondent submitted that there is no evidence in the trial transcript which supports the contention that the trial judge directed the jury to find the appellant guilty of this count. They draw attention to

his directions at page 2273, line 22 and page 2274, line 1 to 17 where it was submitted he left the guilt of the accused to the jury.

Analysis and conclusion

- [176] This ground of appeal can be shortly taken because its resolution turns on a question of construction of what the judge actually told the jury about count 8. It is not in dispute that one of the appellant's bail conditions was that he must not contact NM by any means, either in person or through a third party. It is necessary to set out the relevant parts of his directions to the jury in relation to the count of perverting the course of justice. In explaining the count, the judge directed the jury:

"And the prosecution is saying -- is inviting you to find that he gave money to S, and further, he instructed S to transfer those monies to NM who was in the UK, via Western Unions (sic), for the purposes (sic) of stopping NM from speaking to the police about a pending criminal charge for sexual exploitation.

Put another way, members of the jury, in simpler terms, what the prosecution is alleging that (sic) Brandt was using a third person, namely Shannelle Hyman, to transmit monies to NM so that NM will not talk to the police about the pending criminal charge against him.

[Having directed the jury on the elements of the offence, the judge continued]

You members of the jury, must now find, or you can convict on this count that the accused Brandt did an act. And if it is a fact, if you find the fact, that he did contact her, either in person or through any third party, that would be a breach of the bail conditions, and that would be an act sufficient to amount to perverting the cause(sic) of public justice because she is a witness in the case, and contacting her...

You will have the several transfers that were admitted into evidence of Western Union, monies, that Shannelle sent to NM. The prosecution is inviting you to find that such acts by the accused in this case to, or an attempt or an attempt to prevent the cause of public justice. It is for you as judges of the facts, to determine do we accept what Shannelle has said? Do we accept the Western Union records? And again, I point out there's been no challenge to this, no challenge. And if you so find, you are satisfied, to the extent that you feel sure, and you are also satisfied that you feel sure that in doing it, in contacting Shannelle and Meade, it was intended, to pervert the course of public justice, the offence would be committed, and it would be open to you to return a verdict of guilty."

- [177] The appellant relied on the underlined words to argue that the effect of the judge's direction was to tell the jury that they must convict the appellant if they found that

he breached his bail condition by contacting NM because that would be sufficient to amount to perverting the course of justice.

- [178] In fairness, in isolation, the words are capable of bearing that meaning. But it has been said repeatedly that while it can always be said that a judge could have expressed himself better or with greater clarity in a particular passage, the summing up has to be looked at as a whole. In the first two paragraphs of the extract above, the judge clearly communicated to the jury the particular acts that the prosecution were required to prove to establish the offence. In the third paragraph, he reminded them of the evidence in relation to the money transfers and S's evidence and clearly left it for them to decide the guilt of the accused. It is also clear from the context, that although the judge had initially uttered the words "must find", it seems to me he immediately corrected himself, telling the jury they "can convict". The matter is put beyond doubt when he told the jury:

"The prosecution is inviting you to find that such acts by the accused in this case amount to acts intended to, or an attempt or an attempt to prevent the cause of public justice. It is for you as judges of the facts, to determine do we accept what Shannelle has said? Do we accept the Western Union records? And again, I point out there's been no challenge to this, no challenge. And if you so find, you are satisfied, to the extent that you feel sure, and you are also satisfied that you feel sure that in doing it, in contacting Shannelle and Meade, it was intended, to pervert the course of public justice, the offence would be committed, and it would be open to you to return a verdict of guilty."
(emphasis added)

- [179] In his final charge to the jury in recounting the matters of which they had to be sure in relation to count, the judge directed the jury:

"And so you have to ask yourselves are we sure that Brandt did a series of acts set out in paragraphs -- in count 8, one and two? One, two and three, did he do those acts? Well, the answer maybe, the answers (sic) there, and it is for you, again, as judges of the facts, members of the jury, to determine. Are we sure that when -- that is on the assumption that he did them, is it intension (sic) once(sic) to pervert the course of public justice. Those are the questions you have to ask yourselves."

- [180] When the summing up is viewed as a whole, the jury could not have failed to understand that if they were sure that the appellant had committed the three acts alleged, then it was open to them to convict. The overall effect of the judge's

directions to the jury does not convey that the judge was directing the jury that they must convict the appellant, or that they could convict him solely on the basis that he had breached his bail condition by contacting NM. I would dismiss this ground of appeal.

Ground 6 - Sentence

- [181] Ground 6 states that the sentence for perverting the course of justice was too severe. The appellant submitted that the 15 year sentence imposed for this offence greatly exceeds the sentence he received for the sexual exploitation offences for which he was convicted, which were the foundation offences giving rise to the perverting the course of justice charge. It was submitted that that is contrary to some legal and sentencing policy.
- [182] The respondent's written submission was merely to "invite this court to consider a possible amendment to the sentence of 15 years for perverting the course of justice. That amendment could be announced as a lesser sentence of 15 years to run concurrent all other offences." Whatever, that may mean, it seems that the respondent is conceding that the sentence for perverting the course of justice is manifestly excessive.
- [183] Rather unsatisfactorily, neither party assisted the Court with any sentencing precedents to guide the court in shaping a more appropriate sentence. Based on the record of appeal, it appears that the judge gave no reasons for imposing the sentence he did.
- [184] The offence of perverting the course of justice is a common law offence. Though the Eastern Caribbean Supreme Court has issued guidelines for various offences, there are none for this particular offence. Therefore, one must derive guidance as to relevant principles and considerations from previous cases. In this regard, I have found the case of **R v Abdulwahab (Mohamaed) (2018)**⁶⁹ to be quite helpful. The English Court of Appeal offered the following:

"There is no Definitive Sentencing Guideline for offences of this nature⁷⁰. A number of relevant principles are, however, clear from

⁶⁹ [2018] EWCA Crim 1399.

⁷⁰ This was prior to the introduction of sentencing guidelines covering this offence.

Radcliffe and other decisions of this court. First, conduct which tends and is intended to pervert the course of justice strikes at the heart of the administration of justice and almost invariably calls for a custodial sentence. Deterrence is an important aim of sentencing in such cases, although, as was pointed out in Radcliffe, the necessary deterrence may sometimes be achieved by the imposition of an immediate custodial sentence without necessarily requiring a sentence of great length. Secondly, the appropriate sentence of course depends on the particular circumstances of the specific case. The circumstances vary across a very wide range. Therefore, only limited assistance can be derived from considering previous decisions in other cases. Thirdly, in assessing the seriousness of a particular offence, relevant factors include the seriousness of the underlying offence, the nature of the deceptive conduct, the period of time over which it was continued, whether it cast suspicion upon or led to the arrest of an innocent person, and the success or otherwise of the attempt to pervert the course of justice. In addition, of course, the offender's previous character and any personal mitigation must be taken into account."

[185] A case at the other end of the spectrum is **R v Haase**⁷¹, where a sentence of 22 years was imposed for conspiracy to pervert the course of justice. In my view, this case is clearly distinguishable. It involved a highly sophisticated, planned, and protracted operation (spanning nearly two years) to systematically deceive investigators, the sentencing judge, and the Home Secretary. It was a full-scale subversion of the judicial system to avoid an 18-year sentence for a very serious underlying crime. The Court characterized it as "elaborate, unusual (if not unique) conspiracy" There can be no parallel between this and the case at bar, where the act complained of is the simple and uncomplicated act of paying for silence.

[186] I endorse and adopt the principles derived from **R v Abdulwahab** as being an appropriate framework within which to construct an appropriate sentence for this offence, alongside other settled general principles of sentencing. In calibrating an appropriate starting point in this case, relevant factors include that the underlying offence was a serious one involving sexual exploitation of a girl under the age of 18; the appellant persisted in sending money to her to prevent her speaking to the police over a period of approximately two months; the consequences of his acts are serious as his efforts appear to have borne fruit because the evidence at trial was that she refused to give a statement to the

⁷¹ [2011] EWCA Crim 3111.

police when approached, and the person who acted as a conduit to transmit the funds to her, S, herself proved to be adverse to the prosecution at trial. These matters are all the more serious when one considers how crucial the evidence of a virtual complainant is in securing a conviction for a sexual offence. Efforts to dissuade a virtual complainant from giving evidence must be strongly discouraged. In my view, a custodial sentence is warranted, and an appropriate starting point would be 5 years imprisonment.

[187] I must consider, however, that the appellant was previously a man of good character. This factor weighs in his favour as a mitigating circumstance and warrants a 1 year reduction in the sentence. To this extent, the appeal against the sentence imposed for count 8 is allowed. The sentence of 25 years imprisonment is quashed and a sentence of 6 years substituted for it.

Disposition

[188] For the reasons outlined in this judgment, the appeal is allowed in part. The convictions in relation to counts 3, 4 and 5 are quashed and the sentences imposed in relation to each of these counts are set aside. The convictions and sentences in relation to counts 2, 6, 7 and 8 are affirmed. The appeal against the sentence imposed for count 8 is allowed. The sentence of 15 years imprisonment is quashed and a sentence of 4 years substituted.

I concur.
Reginald Armour
Justice of Appeal [Ag.]

I concur.
Paula Gilford
Justice of Appeal [Ag.]

By the Court

Chief Registrar