[2025] JMCA Crim 12

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL 96/2018

GARFIELD GREEN v R

Isat Buchanan, Miss Alessandra LaBeach and Iqbal Cheverria for the appellant

Jeremy Taylor KC and Miss Alice-Ann Gabbidon for the Crown

24, 25 May, 6 June 2023 and 18 July 2025

Criminal law – Admissibility of evidence – Whether evidence of the complainant's complaint was improperly adduced by the prosecution – Whether learned judge erred in her directions to the jury concerning inadmissible evidence

Criminal procedure – No-case submission – Whether learned judge erred in rejecting the no-case submission

Criminal law – Reasonableness of verdicts – Sufficiency of evidence to support conviction – Whether the jury's verdicts were unreasonable or could not be supported by the evidence

Criminal procedure – Crown's duty to disclose – Whether Crown's failure to disclose a statement made by the complainant containing allegations against a third party rendered the trial unfair

Sentencing – Mandatory minimum sentence – Whether sentence imposed was manifestly excessive and unjust – Whether sentence to be reduced below the mandatory minimum sentence – The Criminal Justice (Administration) Act, section 42K

Constitutional law – Pre-conviction and post-conviction delay – Whether appellant's right to a fair hearing within reasonable time breached – Whether appellant's right to liberty breached – Appropriate remedy for breach of the

appellant's constitutional rights – Constitution of Jamaica, sections 14(1)(b), 16 (1) and 16(6)(b)

MCDONALD-BISHOP JA

[1] The appellant, Mr Garfield Green, was convicted in the Circuit Court for the parish of Saint Catherine on 21 November 2018, after a trial spanning several days before Brown-Beckford J ('the learned judge'), sitting with a jury. He was charged on an indictment containing four counts, namely, two counts of sexual touching of a child and two counts of grievous sexual assault.

[2] On 18 December 2018, he was sentenced to five years' imprisonment at hard labour for each count of sexual touching of a child and 16 years' imprisonment on each count of grievous sexual assault, with the stipulation that he serve 10 years' imprisonment before being eligible for parole on these latter counts. The learned judge ordered the sentences to run concurrently.

The prosecution's case

The complainant's evidence

[3] The evidence adduced from the complainant regarding the first count of sexual touching was that, on an unknown date between 1 November and 30 November 2011 in the parish of Saint Catherine, the complainant visited her friend ('S'), who is the appellant's sister. She had just left the room where she spoke to S and was in the living room when the appellant fondled her breast and her bottom. S had remained in the room.

[4] The second incident of sexual touching occurred at the same premises on a date unknown between 1 December and 31 December 2011. The complainant's evidence was that at some time between 7:00 pm and 8:00 pm, the appellant lifted her, placed her legs around his waist and felt, squeezed and touched her bottom. He told her he liked her shape and how she looked. On this occasion, like the first, S was at the premises.

[5] Regarding the two counts of grievous sexual assault, the complainant's evidence was that, on a day unknown between 1 January and 31 January 2012, she went to S's

house where she saw the appellant on the lawn. She enquired whether S was home, and he responded, "yes". She went inside and observed that no one was in the house. As she was about to exit S's bedroom, the appellant entered it and locked the door. She asked him why he told her that S was there when that was not true. He told her it was because he wanted to do something to her. He then placed her on the sofa and inserted his finger in her vagina. He subsequently placed his mouth on her vagina and performed "oral sex". When he was through, he told her to keep it quiet as he was not yet ready to have sexual intercourse with her (pages 37-44 and 54 of the transcript).

[6] The complainant eventually reported the incidents to her mother and stepfather in April 2012, which led to the arrest and charge of the appellant.

Evidence of the complainant's mother

[7] The complainant's mother testified that the complainant was 13 years old at the time the incidents occurred. She said that while speaking to the complainant about an unfavourable school report she had received, the complainant reported that the appellant committed the acts alleged. The school report was the subject of a discussion between her and the complainant from the time when she picked her up from school in the Corporate Area until they arrived home in Saint Catherine.

[8] The mother testified that the complainant's stepfather also spoke to the complainant about the school report in her presence. After speaking to the complainant, the stepfather left the family home and returned with the appellant, confronting the complainant with him. In the appellant's presence, the complainant's stepfather asked the complainant, "Did this man touch you?" to which the complainant responded, "Yes".

Evidence of the investigating officer

[9] The investigating officer, Detective Sergeant Merilyn Burnett ('Det Sgt Burnett') of the Portmore Police Station, was not called as a witness. The prosecution relied on her police statement, with the consent of the defence, pursuant to section 31C(A)(1)(a) of the Evidence Act. According to this evidence, on 4 April 2012, the investigating officer

received the report from the complainant's mother, which led her to meet and speak with the complainant at the Spanish Town Hospital. She then commenced an investigation against a man known to the complainant as "Ian".

[10] On 6 April 2012, Det Sgt Burnett saw the appellant at the Portmore Police Station CIB Office. He identified himself as "Garfield Norman Green" otherwise called "Ian". She told him of the report made against him and of her intention to place him on an identification parade. She arrested him, conducted a "question and answer" interview with him in the presence of his attorney-at-law, and subsequently caused him to be placed on an identification parade. Having received information that the complainant pointed him out on the identification parade, she informed him that he was pointed out as the perpetrator of the offences reported against him. She then arrested and charged him for those offences. She cautioned him and he made no statement.

The defence's case

[11] The appellant gave sworn evidence and was thoroughly cross-examined. He denied committing any of the acts alleged against him and for which he was tried and convicted. He also pointed out that the house where the incidents were said to have occurred was "always occupied". He recalled having spoken to the complainant on two or so occasions, the last one being about the impropriety of her attire in a short dress she was wearing at his house.

[12] He maintained that the complainant did not respond to him when he asked her in the presence of her mother and stepfather if he had done anything to her. After overhearing something said by the complainant's mother to neighbours one morning, he attended the Portmore Police Station and made a report. He was subsequently contacted by the investigating officer, who told him to return to the police station, which he did. It was then he was arrested and charged.

[13] He also testified that he had no previous convictions, had never been in trouble with the law and had worked closely with the police in his vocation as a bouncer at a night club.

[14] At the time of the alleged incidents, the appellant was said to be thirty years old.

The issues at trial

[15] The main issue for resolution by the jury was the credibility and reliability of the complainant and the appellant, especially having regard to matters such as conflicts in the evidence (particularly on the prosecution's case), and the evidence of the appellant's good character.

[16] The jury evidently accepted the complainant as a witness of truth and rejected the evidence of the appellant regarding the allegations. That was a matter exclusively for them, and they returned unanimous verdicts of guilty on all four counts.

The appeal

[17] Dissatisfied with his resultant conviction and sentence, the appellant applied for leave to appeal, which was considered by a single judge of this court. He was refused leave to appeal his conviction but was granted leave to appeal his sentence. The appellant renewed the application for leave to appeal conviction as he was entitled to do.

[18] The appellant based his application for leave to appeal on six grounds, which raise the following issues for consideration:

(1) whether inadmissible evidence of the complainant's complaint concerning the appellant was improperly adduced by the prosecution and improperly treated with by the learned judge in her directions to the jury (grounds 1, 2 and 3);

(2) whether the learned judge erred in law in failing to uphold the no-case submission given that the complainant' evidence was manifestly unreliable (ground 4);

(3) whether the verdicts are unreasonable in light of the evidence (ground 5);

(4) whether there was material non-disclosure by the prosecution that renders the convictions unsafe (ground 8);

(5) whether the sentence imposed by the learned judge is manifestly excessive and the mandatory minimum sentence disproportionate in its application in this case (ground 9); and

(6) whether the appellant's constitutional right to a fair hearing within a reasonable time and his right to liberty were breached due to delay, and if so, what remedy should be granted (grounds 6 and 7).

Appeal against conviction

Issue (1): whether inadmissible evidence of the complainant's complaint concerning the appellant was improperly adduced by the prosecution and improperly treated with by the learned judge in her directions to the jury (grounds 1, 2 and 3)

[19] The complaints of the appellant under this head are closely interrelated as they have their genesis in the same factual substratum and so, for convenience, have been dealt with together. The appellant maintains that the conviction is unsafe because:

(i) prosecuting counsel misconducted the prosecution by leading inadmissible evidence that the virtual complainant had made a complaint some time prior to the report to the police (ground 1);

(ii) the learned judge erred in permitting the prosecution to lead inadmissible evidence that the virtual complainant had made a complaint some time prior to the report to the police (ground 2); and

(iii) the learned judge insufficiently directed the jury on the inadmissible evidence that the virtual complainant had made a complaint some time prior to the report to the police (ground 3).

The appellant's submissions

[20] Mr Isat Buchanan, for the appellant, submitted that Crown Counsel led evidence of the complainant making a report to her stepfather prior to the report to the police and the stepfather was not called as a witness. The injustice, he said, was exacerbated by the complainant's mother "gratuitously testifying in examination in chief" that the father was told something, and the appellant was called and confronted about it. The mother was then led to say how she witnessed this report and she was "lost for words" and "angry".

[21] A key issue for the defence was that the complainant only made a complaint because of her poor performance. According to Mr Buchanan, there was no prompt report ("a hue and cry") and the first report was made to the police some six months after the incident.

[22] Mr Buchanan also submitted that at the close of the case, the jury was furnished with inadmissible evidence of the report made to the mother and stepfather and the hearsay evidence that a report was made to her stepfather and by her mother to the police.

[23] The learned judge, it was argued, did not address the hearsay evidence or warn the prosecution against proceeding further. The summation was described as "most imbalanced", and at no point was the jury instructed to ignore the evidence. The jury was also never advised that the defence's view - that prompt raising of the "hue and cry"

was a crucial factor - was correct. As a result, all directions given to the jury appeared to favour the prosecution.

[24] Mr Buchanan relied on the Privy Council's pronouncements in **Kory White v R** [1999] 1 AC 210 ('**Kory White**') and maintained that, like in **Kory White**, the complainant should not have been allowed to say that she made a complaint to her stepfather who was not called as a witness because the inference which the jury was bound to draw was that she had made a report in terms substantially the same as her evidence to the court. Therefore, the learned judge, in leaving it open to the jury to take such a view, erred in law because it was incumbent on her to give the jury clear instructions that the complainant's own evidence was of no value whatsoever.

[25] Counsel also cited **Delroy Hopson v R** (1994) 45 WIR 307 to make the point that, prior to **Kory White**, the Privy Council had warned against the reception of hearsay evidence by inference. Therefore, where such evidence is admitted without an express and clear direction by the trial judge, the jury should completely ignore it, and the conviction ought to be quashed. Accordingly, the conviction is unsafe in light of impermissible evidence being led and the jury not being warned about the limited use that could be made of it, thereby prejudicing the defence.

The Crown's response

[26] Mr Jeremy Taylor KC, on behalf of the Crown, submitted that there was no recent complaint in this case and the Privy Council's statements of principle in **Kory White,** relied on by Mr Buchanan, are not applicable. Firstly, he said, the prosecution did not lead inadmissible evidence as to the sexual encounter. Learned King's Counsel indicated that "an interrogation of the notes of evidence" reveals the following facts pertinent to the evidence of the stepfather, who was not called as a witness:

(i) The complainant had a discussion with her mother and stepfather about her school report.

(ii) The stepfather confronted the appellant in the presence of the complainant and her mother.

(iii) The mother who was present at the discussion of the school report and the confrontation with the appellant was called by the prosecution to testify.

(iv) The evidence of the confrontation of the appellant by the stepfather in the presence of the two witnesses called by the prosecution and the words said in that confrontation are admissible evidence. There was no basis for its exclusion. The evidence of the report was necessary to explain the subsequent confrontation between the appellant and the stepfather.

Therefore, given that there was no recent complaint adduced at trial, there was no duty on the learned judge to give any direction regarding a recent complaint.

Discussion

[27] The immediate question for consideration is: what is the hearsay evidence of recent complaint in this case that is inadmissible and caught within the prohibition established by **Kory White** as contended by the appellant? A brief insight into the circumstances of **Kory White** could prove useful in determining this question. The defendant, Kory White, was charged with rape and attempted buggery. The prosecution led evidence from the complainant that she had told five persons "what had happened" before eventually reporting the matter to the police rape unit. The prosecution did not call any of the persons to whom the complainant said she reported the incident as witnesses. The defendant was convicted, and on appeal, he complained, among other things, that the complainant's evidence of the report she made to the five persons who were not called as witnesses was inadmissible. The conviction was upheld by a majority.

[28] The defendant appealed to the Privy Council, and the conviction was quashed. The Board, in delivering its opinion (per Lord Hoffmann), held in so far as is crucially relevant to this matter of recent complaint in sexual offence cases:

(i) The complainant's evidence of the five complaints was not admissible to show her consistency since those persons did not testify about it.

(ii) The impugned evidence was not admissible to rebut the defence that the complainant's testimony was a recent invention since the evidence was given in chief before any suggestion of recent invention could be made.

(iii) The judge had left it open to the jury to take the view that they could regard that evidence as confirming the complainant's credibility, and that amounted to a misdirection.

[29] A detailed review of the transcript in the instant case reveals that the prosecution did not present any evidence of a recent complaint, nor was such evidence elicited during the trial. In fact, the prosecuting counsel was particularly careful to prevent the introduction of any inadmissible evidence relating to the details of any complaint or conversations between the complainant and her stepfather or mother. Interestingly, it was the defence counsel, despite the prosecution's objection, who persistently tried to introduce evidence of her report to her stepfather, and the learned judge permitted it on the grounds that it affected the complainant's credibility.

[30] The complainant's evidence-in-chief regarding her conversation with her stepfather, as led by the prosecution, went this way (see pages 56-58 of the transcript):

> "Q And did anyone speak to you because –**and don't tell us what was said**. Did anyone speak to you about your school report?
>
> A My stepfather.
>
> Q And how would you say that your stepfather appeared to you when he spoke to you about your school report?
>
> A He appeared very concerned.
>
> Q And so, did he ask you any questions about the report?
>
> A Yes, he asked.
>
> [Judge]: Stop

Q Pause. When he was asking you questions about the report, was anyone else there with you and him?

A My mother.

Q And where were you when your stepfather was asking you about your report?

A We were sitting at the kitchen…

Q We were sitting at the?

A At that particular time, in the kitchen, at the counter table.

Q At whose house?

A Of our house.

Q And what's the name of your stepfather?

A [omitted by this court]

Q And did you answer his questions?

A Yes, I did.

Q **Don't tell us what you said**, but you answered his questions?

A Yes.

Q And after you answered his questions, did he do anything?

A He said.

[Judge]: Stop.

Q No, did he do anything?

A He went for Ian at Ian's house.

Q And when you went out of the house, did you see anyone outside?

A I saw Ian.

Q Was Ian alone or was anyone else there? Where was your stepfather?

A He was standing beside of Ian.

Q All right. **Now, you can tell us what, if anything, was said.** So after you come outside and you see Ian and your stepfather standing beside Ian, what happened next?

A My stepfather asked if this is the man that molested me.

Q Did you answer him?

A Yes, I said yes.

Q And what happened after you said yes to him?

A My stepfather then told me to go inside.

Q Did you go inside the house?

A Yes." (Emphasis added)

[31] It is clear that during the examination-in-chief of the complainant, she was not asked about what she had told her stepfather. There were no statements of any complaint that aligned with the circumstances and evidence in **Kory White**. She did not say she told her stepfather "what had happened". The evidence shows that the stepfather asked, in the presence of the appellant, whether the appellant was the man who molested her, to which she replied yes.

[32] The examination of the mother by prosecuting counsel followed in these terms (pages 169 – 170 of the transcript):

"Q And did your husband eventually come home that day?

A Yes, my husband came home, eventually.

Q Now, remember don't tell us what, if anything, was said, but did your husband speak to [the complainant] when he got home that day?

A Yes, we were all home.

Q Pause. Remember, don't tell us what was said.

A I was just going to tell you where we were in the house.

Q Okay, where were you?

A We were all around the aisle in the living—in the dining room.

Q And by we all, who were you referring to?

A My husband, myself, and [the complainant]. The boys were in there with me.

Q Remember, again, **not to tell us what was said**, but after your husband spoke to [the complainant], did he do anything? Sorry, after he spoke to her, did she talk back to him?

A Yes, she did.

Q And after she responded, did your husband do anything?

A Yes.

Q What did he do? **Don't tell us if he said anything.**

A **He left the house.**

Q And did your husband return to the house that day?

A He returned to the front patio.

Q And when he returned to the front patio, was he alone or was anyone with him?

A He was not alone, he was with the accused.

Q And the person that you refer to as the accused, you know him by any names?

A Ian." (Emphasis added)

[33] Similarly, as in the case of the complainant's examination in chief, prosecuting counsel elicited no evidence regarding the terms of any conversation between the complainant and her stepfather prior to the confrontation of the complainant with the appellant. The complainant was only permitted to say that she spoke to her stepfather and to recount what happened after she spoke to him, which was the confrontation with the appellant and the complainant's identification of him as the man who "touched" her.

[34] Evidence of what transpired in the presence of the appellant during that confrontation was elicited not for the truth of the content of any report that was made to the stepfather by the complainant, but for the fact that the appellant was confronted with the fact of the report and his reaction upon being first taxed. Even if there is an implied assertion that the complainant told her parents that the appellant molested her based on the evidence, nothing was particularised to indicate a complaint in the nature and terms outlawed by **Kory White**.

[35] In **Kory White**, their Lordships explained how the fact of a prior report, like that to a parent, as in this case, may properly form part of an account of the complainant's behaviour after the alleged incident forming the subject matter of the charge. The Board stated, at page 217 of the judgment:

> "Their Lordships accept that when the complainant herself is giving evidence, it may be difficult for her to give a fair and coherent account of her behaviour after the incident without allowing her to mention that she spoke to other people who may not be available to give evidence (within the sexual complaints exception) of what she actually said. Their Lordships would not suggest that mere mention that the witness spoke to someone after the incident was inadmissible.
>
> In most cases it will be very difficult to draw any rational distinction between consistent conduct, which is plainly admissible (e.g. that the witness wept) and the fact that she spoke to someone such as a parent. On the other hand, it is important to avoid infringement of the spirit of the rule against previous self-consistent statements by conveying indirectly to the jury that she had given a previous account of the incident in similar terms with a view to inviting the jury to infer, not merely that her subsequent conduct was not inconsistent with her complaint but that her credibility was actually supported by the fact that she had told her the same story soon after the incident."

[36] In this case, there was no account of the complainant's behaviour after any of the incidents in which she was allegedly touched and assaulted. The account in question relates to the discovery by the parents of the allegations months later, and how the matter was brought to the attention of the police. There was nothing in the examination-in-chief of the complainant that could have indirectly conveyed to the jury that she had previously given an account of the incidents in similar terms. In particular, there was nothing to suggest that her evidence was framed in such a way as to invite the jury to infer, not merely that her subsequent conduct was not inconsistent with her complaint but that her credibility was actually supported by the fact that she had told someone the same story shortly after the incidents that led to the charges. There is absolutely nothing

in the evidence led by the prosecution which falls to be characterised as a recent complaint.

[37] Of greater importance is that the evidence regarding the conversation with the stepfather was introduced by the defence, despite considerable resistance from the prosecuting counsel, on the basis that the evidence was inadmissible. The transcript shows that when defence counsel asked the complainant about what her stepfather had inquired regarding her school report and what she told him, Crown Counsel objected, arguing that the conversation between the complainant and her stepfather was hearsay and that she was concerned about the question. The learned judge, after excusing the jury from the courtroom, asked Crown Counsel, "what's wrong with [the complainant's] response, because it is a matter of checking on her consistency" (page 124 of the transcript). Crown Counsel, despite defence counsel's insistence on eliciting the details of the conversation, stated "… But m' lady this is not a matter of recent complaint" (page 125 of the transcript). The following dialogue between Crown Counsel and the learned judge then ensued (pages 125 – 126 of the transcript):

> "[Judge]: But the circumstance in which she made the report must affect the credit of the account given by her.
>
> [Crown Counsel]: No, m' lady. M' Lady, with regards to that, m' lady, the circumstances, m' Lady, I respectfully submit would affect the report that is given. For instance, where you have her given the report recently, and making the complaint to someone else.
>
> [Judge]: Remember this is cross-examination.
>
> [Crown Counsel]: But, m'Lady –
>
> [Judge]: Counsel's obligation, and the defences [sic] are different. The issue, it is clear in this case the issue is credibility, and in the circumstances surrounding which such a report came to be made does affect the credibility of the report."

[38] After a back-and-forth exchange between Crown Counsel and the learned judge, defence counsel indicated that her purpose was to put to the witness something she said in her police statement about "Leon", which she had read over and signed as true and correct. Defence counsel told the learned judge: "I don't know how far it will take me but if I am permitted…". The learned judge then stated: "If that is a point you wish to explore then it would be within your purview of your cross examination".

[39] The transcript reveals that after the learned judge granted permission, the following dialogue between defence counsel and the complainant ensued (pages 128 – 129 of the transcript):

> "Q Do you recall telling the police, and I am going to quote, what you say – you said, this is in relation to when you told your stepfather about the incident.
>
> A Okay
>
> Q Yes, You said, "He asked me if anything was bothering me in Caribbean Estate"?
>
> A Yes.
>
> Q And I told him, 'Yes', yes?
>
> A Yes.
>
> Q And then you further told the police –
>
> [Judge] Just a minute. Just a minute. Yes
>
> Q And you further told the police that you told your stepfather, 'It was at that – it was then I told him and my mother what **Leon** did to me'?
>
> A **Ian**
>
> Q You didn't say Leon?
>
> A No, ma'am
>
> [Judge]: Yes.
>
> Miss A Morris: M'Lady, permission for the witness to be shown her statement

[Judge]: Very well.

A I said Ian. They might have heard Leon, I did not say that part, I'm sorry

Q Okay. But you read over your statement, did you?

Q I did, and I was in trauma, I did.

A So you are now saying that it's Leon, that's in the statement?

Q It's Leon in the statement

Q Leon?

A (Witness nods)".

[40] The conversation between the complainant and her stepfather was not introduced by the defence as direct evidence at the trial. Instead, it was established that in her statement to the police, she said that she told her stepfather that "Leon" and not "Ian" was the person who did something to her. This was a previous inconsistent statement put to the witness during cross-examination. The main aim of the cross-examination in this regard was to highlight a prior inconsistency regarding the name the complainant gave to the police about who had molested her. No attempt was made to present direct evidence of any recent complaint. Defence counsel, as she had indicated to the learned judge, was simply testing the complainant's credibility by demonstrating an inconsistency in her account.

[41] Ultimately, neither defence counsel, the learned judge, nor prosecuting counsel treated the evidence elicited as evidence of a recent complaint or anything akin to a recent complaint. Therefore, the appellant's complaint that the learned judge permitted the evidence to be elicited by Crown Counsel as a recent complaint is not correct.

[42] Furthermore, the learned judge permitted the evidence to be adduced to the benefit of the defence in undermining the credibility of the complainant. There can be no complaint of any injustice arising from the prosecution's examination of the complainant on the basis that inadmissible hearsay was adduced and permitted by the learned judge.

[43] Accordingly, there is no justifiable basis for the court to find that the prosecution led inadmissible evidence of a complaint that violated the rule against self-corroboration, previous consistent statement, or hearsay and was permitted by the learned judge to do so. Grounds 1 and 2 are, therefore, without merit.

[44] Concerning the learned judge's directions to the jury, there was no legal obligation on the learned judge to follow the **Kory White** prescription to address any evidence of a recent complaint or what could be viewed as a recent complaint. The evidence of what was stated in the police statement regarding the complainant's account of her conversation with her stepfather was introduced during cross-examination as an inconsistency and was treated as such by the learned judge, in keeping with the motive of the defence counsel.

[45] Therefore, given that the defence elicited the evidence regarding the complainant's conversation with her stepfather to discredit the complainant by demonstrating an inconsistency between her evidence and her previous statement to the police regarding the name she told her stepfather, the **Kory White** principles are not relevant to the directions of the learned judge. The learned judge's directions are, therefore, not impeachable on the strength of ground 3. For these reasons, this ground must also fail.

Issue (2): whether the learned judge erred in law in failing to uphold the no-case submission, given that the complainant's evidence was manifestly unreliable (ground 4)

The appellant's submissions

[46] The appellant complained that the learned judge should have upheld the no-case submission. According to Mr Buchanan, the issues of credibility were too complex for the case to be left to the jury and as such, a properly directed jury could not have returned an adverse verdict. Therefore, the learned judge should have upheld the no-case submission, as "the jury's reliance on the evidence would have been nugatory".

[47] Mr Buchanan also submitted that the prosecution failed to rebut the "sworn information" that the appellant was never alone at home. The complainant was shown to

be unreliable in relation to the deposition, where she "essentially back-tracked on many key aspects of her testimony". This rendered her testimony manifestly unreliable. Therefore, the evidence of the sole prosecution witness was of a tenuous character, as it was uncorroborated and laced with inconsistencies, and should not have been left to the jury. Reliance was placed on the oft-cited case of **R v Galbraith** [1981] 2 All ER 1060 ("**Galbraith**").

The Crown's response

[48] Also relying on **Galbraith**, the Crown, through Miss Alice-Ann Gabbidon, submitted that given the test to be applied to a no-case submission, the learned judge appropriately left the case for the jury's consideration. According to Crown Counsel, the key issue in the case was credibility, and the learned judge correctly recognised this fact. It is also acknowledged, she stated, that inconsistencies, discrepancies and omissions appeared in the prosecution's case. However, this is not enough to support a no-case submission. The test is whether the inconsistencies, discrepancies, and omissions are such that the evidence was so discredited or rendered so tenuous that it would have been unsafe to leave the case to the jury's consideration. In the Crown's view, that was not the situation. It, therefore, follows that the learned judge was correct in leaving the case to the jury as the fact-finders.

[49] The Crown drew additional support for these submissions from such authorities as **Steven Grant v R** [2010] JMCA Crim 77, and Lord Parker CJ's **Practice Direction (Submission of No Case)** [1962] 1 WLR 227, which have been considered.

Discussion and conclusion

[50] Both sides in their submissions rely heavily on **Galbraith** in support of their respective positions. It is, therefore, considered necessary to restate the oft-cited pronouncements of Lord Lane CJ that have memorialised the principles applicable to the consideration of a no-case submission in a criminal case as follows:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[51] From the transcript, it is clear that, in ruling on the no-case submission, the learned judge applied the correct principles and formed the view that the complainant was not discredited to the extent that a reasonable jury properly directed could not have relied on her evidence. She considered that the matters raised in the no-case submission concerning the credibility of the complainant's evidence were within the purview of the jury, and the appellant had a case to answer. Upon a close examination of the evidence, the court concludes that the learned judge cannot be faulted for holding this view.

[52] We conclude that the learned judge was correct in not upholding the no-case submission. Ground 4, therefore, lacks merit.

Issue (3): whether the verdicts of the jury should be set aside on the ground that they are unreasonable or cannot be supported having regard to the evidence (ground 5)

[53] Section 14(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA') gives this court the power to allow an appeal and set aside the verdict of a jury if it thinks that the verdict is unreasonable or cannot be supported by the evidence. In considering whether to

exercise its section 14(1) power, this court customarily applies the standard of review established in **R v Joseph Lao** (1973) 12 JLR 1238 ('**Lao**') and endorsed by its progeny. The standard applied is that the court will set aside a verdict on a question of fact alone only where the verdict was "obviously and palpably wrong" or where the verdict is "so against the weight of evidence as to be unreasonable or insupportable".

[54] In **Lescene Edwards v The Queen** [2022] UKPC 11, the Privy Council affirmed the standard of review expressed in **Lao** and stated that it has always been exceptional for an appellate court to set aside a verdict on the basis that it is unreasonable or against the weight of the evidence. According to their Lordships, a surprising verdict is not without more obviously or palpably wrong; and, the **Lao** standard of review does not apply in fresh evidence cases or in cases where it is alleged that there was a misdirection by the judge or a material irregularity in the course of the trial (see paras. 52 and 53 of the judgment).

[55] With this guidance in mind, it is noted that the appellant has not identified any specific verdict that is unsupported by the evidence, which he is required to do. Nevertheless, after reviewing the entire body of evidence presented by both the prosecution and the defence, the court finds no reason to interfere with the jury's verdicts on the ground that they were unreasonable. The elements of each offence were established on the strength of the prosecution's case. The jury, having heard the evidence, received the learned judge's directions and observed the demeanour of the witnesses, including the appellant's, and returned verdicts against the appellant on all counts. This occurred after full directions were given regarding the appellant's good character.

[56] In our view, the verdicts were supported by the evidence and cannot be said to have been obviously or palpably wrong. Ground 5 is, therefore, without merit.

Issue (4): whether there was material non-disclosure by the Crown that renders the conviction unsafe (ground 8)

[57] The complaint detailed in ground 8 is that there was material non-disclosure due to the prosecution's failure to provide the defence with copies of the statement made by the complainant against a third party. This statement, it was argued, reveals that the other complaint was made around the same time as the complaint against the appellant and was not disclosed to the parents until after the report in this case. According to Mr Buchanan, this complaint against a third party would have "certainly affected the credibility of the sole complainant if the jury was [sic] told about this issue". Furthermore, the defence could not have prepared its case properly in light of the non-disclosure of the statement, which he contended was in similar terms to the complaint in this case. He cited **R v Judith Ward** (1993) 96 Cr App Rep 1 in support of this argument.

[58] The Crown disagreed with the argument made on behalf of the appellant, and we agree with the Crown's position. The appellant was not entitled to disclosure of any statement from the complainant regarding a third party in circumstances entirely unrelated to those alleged against the appellant. The complainant's interaction with a third party was simply irrelevant in light of the evidence in the case. In fact, section 27 of the Sexual Offences Act prohibits questions to a complainant at trial about sexual encounters with persons other than the defendant in the proceedings without the court's permission. The trial judge may grant permission for such questions to be put to a complainant in only specified circumstances, and the appellant has not demonstrated that any such circumstances existed. Therefore, the appellant has failed to establish a legally acceptable basis for seeking disclosure of the statement.

[59] Indeed, even if there should have been disclosure of this statement, the appellant has failed to establish the effect of the non-disclosure on the fairness of the trial and the safety of the convictions. There is no established miscarriage of justice. Accordingly, ground 8 is without any prospect of success.

[60] In the premises, the court has found nothing in grounds 1 – 5 and 8 that renders any of the convictions impeachable. The convictions remain safe. The remaining issue to be addressed is whether the integrity of the convictions has been compromised by delay, resulting in a breach of the appellant's constitutional rights. That question is the focus of issue (6) below. Before tackling that matter, the appeal against sentence will first be considered, as sentencing is also relevant to a consideration of issue (6).

Appeal against sentence

Issue (5): whether the sentence imposed by the learned judge is manifestly excessive and the mandatory minimum sentence disproportionate in its application in this case (ground 9)

The submissions

[61] Mr Buchanan submitted that although section 6(1)(b)(ii) of the Sexual Offences Act provides a mandatory minimum sentence of 15 years for grievous sexual assault, the learned judge had issued a certificate under section 42K of the CJAA for a lesser sentence to be imposed. The learned judge declared that were it not for the mandatory minimum sentence of 15 years for the offence of grievous sexual assault, she would have sentenced the appellant to 12 years' imprisonment. Counsel submitted that by virtue of section 42K of the Criminal Justice (Administration) Act, and the indication by the learned judge, this court may order a reduction in sentence. In support of this argument, he cited **Kerone Morris v R** [2021] JMCA Crim 10, paras. [15] – [23] ("**Kerone Morris**") for support.

[62] Mr Buchanan also asked the court to consider whether the mandatory minimum sentence of 15 years for grievous sexual assault is just, given all the circumstances of the case. He pointed to mitigating factors which, he said, when they are considered, render the sentence "clearly excessive and disproportionate". These factors include: the appellant being a first-time offender, having a good character, a favourable social enquiry report and steady employment; there was no use of an offensive weapon; and no force greater than what was necessary was used to overcome resistance. Counsel cited the case of **Rashane Desouza v R** [2023] JMCA Crim 1 ("**Rashane Desouza**"), which he

said is comparable to this case because "the ages and familiarity roughly coincide". He, however, noted that in **Rashane Desouza**, the defendant used a knife to overpower the victim, whereas in this case, no weapon was used. Nevertheless, the court in **Rashane Desouza** reduced the defendant's sentence from 15 to nine years' imprisonment.

[63] Counsel also cited **Curtis Grey and anor v R** [2018] JMCA App 30 ("**Curtis Grey**") and submitted that based on the facts of that case, when compared to this case, the appellant should not be sentenced to more than 10 years for the offence of grievous assault "in the full circumstances of this case".

[64] The Crown's position on this point does not align with Mr Buchanan's. Miss Gabbidon argued that to determine whether the sentence imposed by the learned judge is appropriate, the court should consider the principles outlined in **Meisha Clement v R** [2016] JMCA Crim 26 ("**Meisha Clement**"). Crown Counsel noted that, when applying the methodology established in **Meisha Clement** to the instant case, the sentencing process conducted by the learned judge cannot be faulted and, generally, would not be subject to interference.

[65] Counsel for the Crown further noted that, although the learned judge's sentence for grievous sexual assault was appropriate in the circumstances, she had indicated her intent to issue a certificate with the recommendation of a sentence of 12 years' imprisonment with the stipulation of 10 years before eligibility for parole on each count. There is no indication whether this was done. However, whether it was done or not, the sentencing exercise was appropriate, and therefore, the sentence cannot reasonably be said to be unjust.

Discussion and conclusion

[66] Section 42K of the CJAA provides as follows: -

> "(1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to

sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall-

> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.

(2) A certificate issued to a defendant under subsection (1) shall outline the following namely-

> (a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;
>
> (b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and
>
> (c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.

(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the judge of the Court of Appeal may-

> (a) impose on the defendant a sentence that is below the prescribed penalty; and
>
> (b) notwithstanding the provisions of the Parole Act, specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[67] The court notes that the learned judge did not issue a certificate in keeping with the relevant statutory provision. However, there is precedent from this court which held that if the sentencing judge indicated an intention to issue a certificate as per the relevant

provision but failed to do so, justice requires this court to assume that a certificate was, in fact, issued and to proceed accordingly (see **Kerone Morris** and **Miguel Moss v R** [2022] JMCA Crim 10). This approach is somewhat analogous to the equitable principle that "equity considers as done what ought to be done".

[68] In **Kerone Morris**, Brooks P, writing on behalf of the court, stated that the sentencing judge erred when she failed to issue a section 42K certificate in writing after having formed the view that the sentence imposed should have been less severe than the statutory mandatory minimum. He also noted that there was no approved prescribed form for a section 42K certificate at the time that the appellant in that case was sentenced. The prescribed form was only approved by the Rules Committee of the Supreme Court in December 2020. Brooks P stated that the court is required in such circumstances to "act in the spirit of the [CJAA] and the inclination of the learned judge" because "[t]he justice of the case demands it" (para. [22]).

[69] The learned judge, in this case, made it clear in her sentencing remarks that she was minded to give a certificate pursuant to the CJAA, because she was of the view that the circumstances of the case warranted a lower sentence. She stated (pages 93-94 of the transcript):

> "I have given this some thought, and I am of the view that outside the minimum mandatory period I would have used a starting point of 12 years' imprisonment, and with the same considerations I would have to give the period for the aggravating features and the period for the qualities as having been indicated on your behalf. And I believe in the overall I would have to come to the view that a period of twelve years imprisonment would be the period that I would give to you. As such I would be prepared to give a certificate with that recommendation for purposes of the Criminal Justice Administration Act and the Judicature Amendment Act of 2015."

[70] The CJAA permits the court to issue different types of certificates upon sentencing a convicted person. The learned judge did not make any express reference to section 42K. However, it is evident from a reading of the CJAA that only a section 42K certificate would have been relevant to these proceedings.

[71] Applying the approach in **Kerone Morris**, we conclude that the learned judge was required to issue a section 42K certificate in writing given her indication that she "would be prepared to give a certificate" because a sentence less severe than the mandatory minimum was warranted. Additionally, the appellant in this case was sentenced on 18 December 2018, long before the Rules Committee of the Supreme Court approved a prescribed form for a section 42K certificate. Therefore, in the light of the learned judge's failure to issue a certificate in writing and the absence of a standard form of certificate, the learned judge's expressed intention to issue a certificate is not treated as fatal to the requirements of section 42K. Accordingly, and in keeping with the line of authority emanating from **Kerone Morris**, the court has considered whether there is any merit to the learned judge's view that a sentence less severe than the mandatory minimum was warranted in the circumstances.

[72] As can be seen from section 42K of the CJAA, the sentencing judge must set out the reasons why the mandatory minimum is considered manifestly excessive and unjust; however, this court is not bound to accept that opinion. This court can only properly accede to a reduction of the sentence below the statutory minimum if there are compelling reasons that would render the statutory minimum manifestly (not merely) excessive and unjust. Therefore, the learned judge's reasons for stating that a less severe sentence was warranted must be examined.

[73] In considering whether a certificate should be issued, the learned judge posed the question "whether or not [the period of 15 years] or a period less than 15 years would accomplish [what Parliament intended by imposing a mandatory minimum sentence] **as well as the object of rehabilitation**" (emphasis added). The learned judge appeared to give particular weight to the objective of rehabilitation when she reasoned thus (pages 92-93 of the transcript):

> "I take into account particularly that the offence, or we are now seven years post the offence, period of time that you would have been on bail, and that there have been no further reports against you in this regard which will suggest, as your

> Counsel has indicated that some rehabilitation took place even without intervention and that the rehabilitation which is one of the purposes of sentencing could be achieved in less than the 15 years, because in prescribing this minimum mandatory period of 15 years, the legislature is indeed saying that persons who behave in this way are dangerous and ought to be removed from society at least for a time."

[74] This, however, was not a compelling reason for the mandatory minimum sentence to be regarded as manifestly excessive and unjust in the circumstances of this case. There was no evidence of any tangible step having been taken by the appellant to establish his rehabilitation. This is a critical issue given that in the view of the probation officer, the appellant was at a "risk of reoffending and should undergo intense counselling". The views of the learned judge and defence counsel that the appellant was or might have been rehabilitated over the period was highly speculative, at best. There was, therefore, no compelling reason to impose a sentence three years below the statutory minimum on the basis contemplated by the learned judge.

[75] The factors identified by counsel in this case as mitigating factors would not lead to a downward adjustment to the starting point of 15 years, which is the mandatory minimum. There was nothing exceptional about the factors he noted that would have overridden the significant aggravating features of the case. The most notable aggravating features of this case include the age and vulnerability of the complainant; the age differential between the complainant and the appellant (the appellant was an adult more than twice the age of the complainant); the appellant's status as a father of minor children which should have instinctively caused him to assume the role of protector of another child; the incidents occurred in his family home when the minor complainant was a visitor and coming from school; the complainant was attired in her school uniform at the time of the commission of the offences, which would have made her minority and vulnerability even more pronounced; and the reported impact of the offences on the complainant.

[76] Furthermore, the appellant committed two separate acts of assault on the young complainant, followed by an indication of his intention to have sexual intercourse with

her in the future when he told her he was not yet ready to have sexual intercourse with her. He did not say he would never have sexual intercourse with her. This, as it stands, reflects what could be viewed as sexual grooming on his part, although he was never charged with that offence. It, however, compounds the gravity of his offending. The offending did not stop at a single count of grievous sexual assault but involved two separate and distinct acts. The weight of the aggravating factors would have pushed the starting point significantly above the statutory minimum.

[77] It was some of these aggravating factors that led the learned judge to impose a sentence of one year above the mandatory minimum sentence, applying the **Meisha Clement** methodology and the statutory minimum as the starting point. She cannot be faulted for so doing because, overall, the offending, with the aggravating features outweighing the mitigating features, warrants a sentence no less than the mandatory minimum of 15 years. The most favourable outcome for the appellant would have been the imposition of the mandatory minimum on the first count. A higher sentence on the second count would have been justified. It follows then that the 16 years' imprisonment imposed on the two counts of grievous sexual assault cannot properly be regarded as manifestly excessive and unjust.

[78] The prevalence of sexual offences committed by adult men against young girls is a cause for grave concern in this jurisdiction. The learned judge also noted this critical fact, and the penalty Parliament has prescribed for the offence must be viewed in that light. In **Samuel Blake v R** [2015] JMCA Crim 9, a case involving sexual contact by an adult male with an underage girl that resulted in pregnancy, this court found it necessary to state:

> "[28] Miss Kiffin has brought to our attention the cases from Canada and the UK, and has offered us an insight into how the courts in those jurisdictions treat with matters such as these. Having taken those authorities into account, however, **we consider it necessary to state for the record that we have recognised that we have our own peculiar difficulties here in this country in dealing with the scourge of these offences where**

> **young girls are constantly being abused and exploited by older men, especially by men who are old enough to be their fathers and grandfathers. <u>The court has to ensure that men who prey on these children really do get the message, loudly and clearly, that the children must be left alone to transition into adulthood without molestation</u>**." (Emphasis added)

The court's approach to these matters must be guided by Parliament's intention, except where doing so would result in manifest injustice or unconstitutionality. Therefore, there must be strong and compelling reasons aligned with the statutory framework to impose a sentence below the mandatory minimum. No such reasons exist in this case.

[79] Finally, it is clear from the learned judge's sentencing remarks that she did not consider the delay in the trial as a matter that engaged the appellant's constitutional right. The approximately seven-year delay was mentioned as mitigation, and as a period within which rehabilitation could have been achieved while the appellant was on bail, thus not justifying a sentence of 15 years. Had the learned judge regarded the delay in the disposal of the case as a breach of the reasonable time guarantee, that approach would have been more understandable. However, that does not appear to have been within her contemplation, especially since the appellant had not explicitly asserted his constitutional right before her during sentencing or at any other time during the trial.

[80] In **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26 ('**Tapper v DPP**') the Privy Council highlighted that the defendant must assert his constitutional right during the proceedings under review. In that case, this court did not consider any arguments regarding pre-trial delay but only addressed post-conviction delay. The Privy Council concluded that there was no acceptable evidence before it that the appellant in that case had asserted her constitutional rights during the proceedings before this court concerning pre-trial delay. Therefore, there was no obligation on this court, of its own volition, to extend the argument regarding breach of the appellant's constitutional rights beyond that already advanced by her legal representatives. Similarly, in the context of this case, since no arguments concerning any breach of the appellant's

constitutional rights and its effects on the sentences were raised in the court below, there would have been no basis for the learned judge to consider it on her own volition during sentencing. Consequently, the fact that the learned judge did not treat with the issue of delay within the constitutional context does not render her sentence unlawful. It was never asserted in those proceedings.

[81] For this reason, we find that the sentences imposed by the learned judge cannot be said to be manifestly excessive and unjust to warrant a reduction by virtue of section 42K of the CJAA and on the bases advanced by the appellant in ground 5.

[82] Accordingly, the appellant's complaint in ground 9 lacks merit.

Issue (6): whether the appellant's constitutional right to a fair hearing within a reasonable time and his right to liberty were breached due to delay, and if so, what remedy should be granted (grounds 6 and 7)

The appellant's submissions

[83] The appellant complained that the delay in the pre-trial process and the production of the trial transcript for his appeal to be prepared led to the case being before the courts for a global period of 12 years. This delay, he contended, has led to an abuse of the courts' processes and contravention of his fundamental right to a fair hearing within a reasonable time guaranteed by sections 16(1) and 16(6)(b) of the Constitution.

[84] The appellant also contended that section 31(3) of the JAJA is unconstitutional as it contravenes section 14(1)(b) of the Constitution. Consequently, as his post-conviction detention primarily stemmed from section 31(3) of the JAJA, his right to liberty was also infringed.

[85] In advancing the grounds giving rise to this issue under review, Mr Buchanan submitted that a period of seven years had elapsed between the appellant's arrest and trial and a further period of five years between the trial and appeal, cumulatively amounting to a delay of 12 years. The appellant, he contended, was disadvantaged in preparing his case for trial. Furthermore, only part of the transcript was received by this

court up to October 2022, and the absence of the completed transcript has significantly prejudiced the appellant in preparing his appeal, which amounts to a breach of his constitutional rights. Citing **Higgs v Minister of National Security** [2000] 2 LRC 656 for support, counsel submitted that the delay "has visited despair" on the appellant. Counsel further highlighted that there is no cogent basis for a finding that any delay is attributable to the appellant, which is demonstrated by affidavit evidence adduced by the appellant and the Crown.

[86] Mr Buchanan also referenced cases from this court to show that, in similar situations, the court has granted remedies such as quashing the conviction, reducing the sentence, or granting immediate release from custody due to delay. He argued that, in this case, quashing the conviction and sentence is the suitable remedy. Alternatively, counsel suggested that the court can reduce the sentence or order that the appellant has served his sentence. He contended that, at the very least, the appellant should be released from custody immediately. He relied on **Evon Jack v R** [2021] JMCA Crim 31 ('**Evon Jack'**); **Solomon Marin Jnr v The Queen** [2021] CCJ 6 (AJ) BZ; **Akim Monah v The Queen**, (unreported), Court of Appeal, Eastern Caribbean Supreme Court, Grenada, GDAHCRAP2021/0015, delivered on 23 February 2022; **Curtis Grey**; **Techla Simpson v R** [2019] JMCA Crim 37; **Tussan Whyne v R** [2022] JMCA Crim 42; **Jahvid Absolam and anor v R** [2022] JMCA Crim 50; and **Jerome Dixon v R** [2022] JMCA Crim 2).

The Crown's response

[87] Relying on several relevant authorities regarding pre-trial and post-trial delays, the Crown, in response, contended that the appellant had sufficient time and resources to prepare his trial and appeal. According to Mr Taylor for the Crown, the appellant failed to demonstrate that he was disadvantaged in preparing his defence at trial. Furthermore, he has not shown that he was prejudiced by the late submission of the transcript to this court.

[88] The appellant's case, it was further argued, does not rise to the level of seriousness for the remedies sought to be granted. While there has been a delay in the disposal of the appeal, it has not been inordinate. Additionally, the appellant has not explained how he has been disadvantaged even after receiving the transcript four years late.

[89] Mr Taylor provided a useful table of cases showing the remedies this court has awarded for delays, which include quashing convictions, reducing sentences, and backdating sentences. Mr Taylor argued that the convictions and sentences should stand; however, if the court considers granting a remedy, it is suggested that the sentence should be backdated to the date of conviction, as the appellant has not demonstrated that the conviction is unsafe due to delays and that quashing the conviction is an appropriate remedy. Consequently, this case is distinguishable from cases referenced by the appellant, which justified quashing the conviction or reducing the sentence due to missing transcripts.

[90] In making this submission that the missing transcript does not justify quashing of the conviction or other remedies sought by the appellant under this head, the Crown referenced the Court of Appeal Rules, 2002 ('CAR'), rules 3.8(2), 3.9(1) and several cases including **Rayon Williams v R** [2022] JMCA Crim 41; **Rockel West v R** [2023] JMCA Crim 14; **Delevan Smith and others v R** [2018] JMCA Crim 3; **Delton Smikle v R** [2020] JMCA Crim 48; **Bonnett Taylor v R** [2013] UKPC 8; **Jerome Dixon v R** [2022] JMCA Crim 2 at para. [71]; **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72; and **R v Dalton Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 127/1995, judgment delivered 24 June 1996.

Discussion and conclusion

[91] From the very outset, the court is obliged to dismiss the appellant's argument that his right to liberty, guaranteed by section 14(1)(b) of the Constitution, has been infringed by section 31(3) of the JAJA, as it is neither appropriate nor necessary to be the focus of the court in these proceedings. The appellant's concerns stemming from the delay in resolving his case are properly raised and addressed within the framework of the

reasonable time guarantees under the Constitution. The issue of the unconstitutionality of section 31(3) of JAJA does not form the subject of a ground of appeal, and, in any event, is one best reserved for the Supreme Court, as the appropriate forum.

[92] In contrast, the court accepts that the issue of whether the appellant's constitutional right to a fair hearing within a reasonable time and the right to have his case reviewed by this court is one that may properly be considered in these proceedings.

[93] Sections 16(1), 16(6) (b) and 16(8) of the Constitution provide that:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."
>
> […]
>
> (6) Every person charged with a criminal offence shall –
>
> (a) […]
>
> (b) have adequate time and facilities for the preparation of his defence;
>
> (7) […]
>
> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

[94] The court acknowledges that the appellant is complaining about both pre-conviction and post-conviction delays. It has long been accepted within our jurisprudence that the term "hearing" under section 16(1) extends to post-conviction proceedings (see **Tapper v DPP** and **Evon Jack.**

[95] The interplay between the provisions of section 16(1) and 16(8) was examined and settled in **Evon Jack** at para. [21] by Brooks P who concluded that given the requirement of a "reasonable time" in section subsection (1) and its applicability to

appeals, "it would be unarguable", that subsection (8) does not incorporate a requirement for appeals to be heard within a reasonable time.

[96] The appellant was granted permission by the court to rely on affidavit evidence filed in support of his claim that his constitutional rights have been breached on account of the delay, that he claimed to be 12 years. The Crown was also asked by the court to furnish affidavit evidence showing a chronology of events in the proceedings in this court and the courts below, as well as the reasons for the delay as the case progressed through the courts at the various levels.

[97] The court has considered the evidence adduced and the submissions of the parties in light of the preceding constitutional provisions and judicial pronouncements derived from the cases cited. It is clear that the trial of the applicant's case in the court below and the final review of his conviction and sentence were delayed. There is no question that sections 16(1), 16(6)(b) and 16(8) of the Constitution are engaged and will be infringed if the delay was not caused by the appellant but by the State with no proper justification.

[98] The question of whether there is a breach of the constitutional rights entitling the appellant to relief is examined against the background of the Privy Council and House of Lord's guidance in several cases including, **Flowers v The Queen [2000] UKPC 41**; **Attorney General's Reference (No 2 of 2001)** [2003] UKHL 68 ('**AG's Ref No 2**'); **Boolell v The State** [2006] UKPC 46 ('**Boolell**'); **Tapper v DPP;** and **Joseph Stewart Celine v The State of Mauritius** [2012] UKPC 32 ('**Celine**'). Guided by relevant judicial pronouncements in these cases, among others, the court considered the evidence presented by the parties, as well as the record of the proceedings in this court and the courts below.

[99] Regarding the length of the delay, the evidence and the record of proceedings disclose that the offences were committed in 2011 and early 2012. The appellant was arrested in April 2012 and placed before the Parish Court immediately after. The

preliminary enquiry in the Parish Court commenced in October 2014 and concluded in November 2014 – a period of approximately two years and six months would have elapsed since the appellant was charged.

[100] After the conclusion of the preliminary enquiry, the appellant was committed to stand trial in the Saint Catherine Circuit Court on 7 January 2015. However, the trial did not commence until November 2018, following the scheduling of 14 trial dates and five mention dates beforehand. This resulted in a delay of almost four years at the trial stage, making it close to seven years after the appellant's arrest. The delay at the pre-conviction stage is indisputably inordinate.

[101] There is also merit in the claim concerning post-conviction delay. The appellant lodged his application for leave to appeal on 18 December 2018, immediately after his sentencing. The transcript was received, in part, on 21 December 2020. The summation and notes of the sentencing hearing were received, but the notes of evidence were not, in circumstances where one of the grounds of appeal was that the verdict was unsupported by the evidence. It is debatable whether this broader ground of appeal would have required the notes of evidence to be supplied under rules 3.7(1) and (2) of the CAR. Nonetheless, the single judge of appeal reviewed the original application for leave to appeal based on the partial transcript, without the notes of evidence, and without requesting their production from the Supreme Court.

[102] The application for leave to appeal conviction was renewed on 10 May 2021, followed by an application for the production of the notes of evidence pursuant to rule 3.7(7) of the CAR. Following the court's order for their production, the notes of evidence were produced in January 2022.

[103] Supplemental grounds of appeal were eventually filed on 22 May 2023 in preparation for the hearing of the renewed application for leave to appeal conviction and the appeal against sentence. This would have been roughly four and a half years after

the appellant was sentenced. The matter was heard in 2023, with a further two-year delay before the final determination of the appeal.

[104] Up to the disposal of the appeal, the case would have been in our justice system for 13 years since the commission of the last set of offences and when charges were laid against the appellant. The delay is inordinate. The duration of the delay requires the court to consider the detailed facts and circumstances of the case (including the complexity of the case, the defendant's conduct, and how the case has been dealt with by the administrative and judicial authorities) and to determine whether the delays can be justified (**Boolell** at para. 33, citing para 52 of **Dyer v Watson** [2002] UKPC D1).

[105] A global examination of the facts, through the lens of the authorities, leads to the conclusion that the appellant's constitutional reasonable time guarantee was breached beyond justification by the State. In this regard, we only make brief remarks in relation to salient aspects of the case which led to that conclusion.

[106] The appellant's trial in the court below was not particularly complex. It was completed over five days – 14, 15, 16, 19, 20 and 21 November 2018 – all of which (except 16 November 2018) were half days. The trial involved two prosecution witnesses and three defence witnesses, and did not appear to raise any deeply technical issues of law or fact.

[107] In relation to the Parish Court proceedings, the appellant stated that he did not cause the delay in the Parish Court, and there is no evidence from the Crown to refute his claim. In the absence of any evidence explaining and justifying the delay, the court must conclude that the delay in resolving the case in the Parish Court was not due to the actions or inactions of the appellant. Consequently, the State must accept responsibility for it.

[108] The delay in the Circuit Court may be due to various factors, including the prosecution's need to complete disclosure, the unavailability of prosecution witnesses, the court's inability to facilitate the trial, the absence of defence counsel, and the

appellant's request for legal aid. The approximately one month it took for the appellant to obtain legal aid cannot be charged to him, as the provision of legal aid is a matter for the State. The same applies to the request for further disclosure, which was granted by the learned judge. The delay caused by awaiting further disclosure cannot be attributed to the appellant. Therefore, these shorter periods of delay cannot be attributed to the appellant when assessing the reasons for the delay.

[109] The post-conviction delay also cannot be attributed to the appellant. Once again, systemic issues within the State apparatus, over which the appellant had no control, have caused the delay at the appellate level.

[110] We, accordingly, conclude that the primary reasons for the delay, at all levels, originated from systemic problems within the judicial organ of the State, which must be weighed against the interests of the State. Therefore, the delay in disposing of the case against the appellant is more attributable to the State than to the appellant.

[111] On the authority of **Boolell**, inordinate delay will breach the reasonable time requirement, whether the appellant was prejudiced or not. This means that the appellant is not required to prove actual prejudice. He has, however, asserted that actual prejudice has arisen from the delay. The claim of actual prejudice is supported by affidavit evidence. The appellant pointed to the fact that due to the length of time it took for the preliminary enquiry to be held and the trial to commence, he could no longer afford a lawyer of his choice, resulting in the lawyer having to remove his name from the record. He was then left to apply for legal aid, which resulted in further delay. The appellant has also highlighted, among other disadvantages, the opportunities in prison that he has been unable to access and benefit from due to his extended status as an appellant.

[112] In relation to pre-trial delay, we do not find that the appellant's inability to secure a lawyer of his choice caused any prejudice to him, as he was provided legal representation by the State, and there is nothing to suggest he suffered any disadvantage

from legal aid. We accept, however, that he experienced some prejudice due to his anxiety and missed opportunities in detention awaiting his appeal to be resolved.

[113] In **Celine**, similar provisions to section 16(1) of the Constitution were considered by the Privy Council. The question for consideration was whether there was a breach of the reasonable time requirement under section 10(1) of the Constitution of Mauritius. It was conceded by the State that the requirement was breached. The Privy Council, in finding that the Supreme Court of Mauritius, to whom the appellant had appealed his conviction and sentence, should have reduced his sentence in recognition of the breach of the reasonable time requirement, opined:

> "**That delay was grossly excessive, however, and the appellant has had to confront the prospect of imprisonment when he is much older than he would have been if the trial had been conducted expeditiously. To reflect this and the serious failure of the State to fulfil the important constitutional guarantee of trial within a reasonable time,** the Board has concluded that a sentence of nine months' imprisonment should be substituted for that imposed by the Supreme Court." (Emphasis added)

[114] It is accepted on the foregoing reasoning of the Privy Council that at the time of sentencing, the appellant would have been, at least, six years older than when he committed the offences in question. Therefore, he had to confront the prospect of a long term of imprisonment at a later stage of his life than if the trial had been conducted expeditiously.

[115] Even more importantly, as it turned out, the single judge granted leave to the appellant to appeal sentence. Therefore, concerning post-conviction delay, it may be stated, as D Fraser JA opined in **Desmond Lawrence v R** [2022] JMCA Crim 68, that this appellant "… would be an appellant anxious (in the sense of being eager) for his matter to be heard, with at least some success at the appeal hearing". This is so because, at minimum, the appellant would have suffered some degree of anxiety to have this court review his appeal against sentence with the reasonable hope of a reduced sentence that

would have positive implications for his earliest date for release under the relevant laws governing his incarceration.

[116] We, therefore, conclude that the delay in the disposal of the appellant's case has caused some prejudice to him. While it cannot be said he was prejudiced in the preparation of his defence at trial, he was delayed or affected in the preparation of his appeal due to the delayed production of the transcript and the fact that the advancement of some of his grounds of appeal required an examination of the evidence.

[117] In the result, having established the inordinate delay, the lack of justification by the State, and actual prejudice to the appellant occasioned by the delay, among other considerations which we have weighed in the balance, we are satisfied that the appellant is entitled to a remedy for the breach of the reasonable time requirement.

The appropriate remedy

[118] The question now is the remedy to which he is entitled. At para. 24 of **AG's Ref No 2**, the House of Lords stated that any remedy granted for a breach of the reasonable time requirement must be "just and appropriate" or, in the words of the European Convention on Human Rights, "effective, just and proportionate". The House of Lords explained that where the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a (i) public acknowledgement of the breach; (ii) a reduction in the penalty imposed on a convicted defendant; (iii) the payment of compensation to an acquitted defendant; or (iv) quashing of the conviction, where it has been shown that the hearing was unfair or it was unfair to try the defendant.

[119] In **Tapper v DPP**, the Privy Council affirmed the application of these principles as representing the law of Jamaica, including where there is delay pending the determination of an appeal (see para. 28 of the Board's judgment). In relation to the quashing of a conviction on the basis of delay, the Privy Council said:

> "…even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time."

[120] Bearing this guidance in mind, along with the relevant legal principles identified from the authorities cited by the parties, we accept that the appellant is entitled, at the very least, to a declaration of the breach of his constitutional rights due to the 13-year delay in disposing of his case. However, the delay in reviewing the appeal within a reasonable time, caused by the delayed production of the transcript and delivery of this judgment (which the court has fairly taken into account), strengthens the argument that a more concrete remedy than a declaration would be appropriate.

[121] In determining whether the appellant is entitled to more than a declaration due to the delay, the principles espoused in **AG's Ref No 2** and **Tapper v DPP**, and particularly the requirement for a just and proportionate remedy, bear directly on the court's assessment.

[122] It appears there is no possibility of a monetary award for the breach of the reasonable time requirement, as the appellant has not been acquitted, because the court is satisfied that there is no basis to interfere with his convictions. The House of Lords' dicta in **AG's Ref No 2** is applied as explicitly foreclosing on that remedy in circumstances such as these.

[123] We reject the appellant's invitation to quash the conviction as a remedy for the breach of his constitutional rights. As the above-cited authorities demonstrate, the quashing of a conviction is not the usual remedy for a breach of the reasonable time requirement. It is an exceptional remedy to be deployed only when the court is satisfied that the conviction is otherwise not sound, the trial was unfair, or the appellant suffered some substantive prejudice as a result of the delay. Based on the court's analysis of the issues raised by the appellant in his application for leave to appeal against conviction,

and our review of the transcript of the proceedings, we are satisfied that none of these conditions have been met.

[124] While appreciating that the appellant would have suffered some prejudice from the late production of the transcript, we consider that prejudice to the appellant would not be as severe or have the same consequences as in the case of **Evon Jack**, where significant portions of the transcript were never received by this court. The missing parts of the transcript were so important to the review of that case that the court concluded that Mr Jack was substantially prejudiced in his appeal, as his case could not be properly reviewed. For that reason, the conviction was not allowed to stand.

[125] The delay in this case has not impacted the fairness of the trial, the safety of the convictions, or the proper conduct of the review on appeal. The entire record of evidence upon which the appellant was convicted was accessible for review and has been examined by the court, with no finding that the convictions are compromised or unsafe due to the delay. In these circumstances, the court accepts the Crown's submission that this case is notably different from **Evon Jack** and does not warrant the most serious remedy of quashing the convictions. Consequently, this remedy is denied.

[126] With all that said, we believe that the appropriate remedy is to grant a reduction in the sentence of imprisonment, considering the length and reasons for the delay, as well as the actual and presumed prejudice to the appellant caused by that delay. The court notes that the five-year sentences for the offence of sexual touching were the shortest sentences imposed by the learned judge, and, in any event, would have already been served once the court makes the usual order that they are to be reckoned as having commenced on the date they were imposed. Therefore, reducing those sentences would not provide a meaningful or effective remedy for the appellant. The court considers that the most appropriate, effective, and just remedy is to reduce the 16-year sentence for grievous sexual assault, even though this reduces the sentence below the mandatory minimum of 15 years. The constitutional imperatives and interests of justice necessitate no lesser remedy.

[127] This approach aligns with the court's stance established in the recent case of **Cecil Moore v R**, (unreported), Jamaica, Court of Appeal, Supreme Court Criminal Appeal No 25/2016, delivered on 6 March 2025 ('**Cecil Moore**'), regarding the awarding of full credit for time spent on pre-trial remand, in recognition of the appellant's constitutional right to liberty, even if it results in reducing the sentence below the mandatory minimum. In the instant case, reducing the sentences for the offence of sexual touching would be of no benefit to the appellant. In the circumstances, reducing the sentence below the mandatory minimum to allow for constitutional redress is necessary to safeguard the constitutional rights of the appellant within the framework of the Constitution's supremacy. Accordingly, the mandatory minimum must give way to the court's duty to uphold the Constitution.

[128] For the preceding reasons, this court does not find it appropriate, effective or just to adopt the approach taken in the earlier case of **Phillip Simpson and anor v R** [2023] JMCA Crim 33, where the mandatory minimum was accepted as an obstacle to granting a reduction in sentence as redress for breaching an appellant's constitutional rights. This viewpoint, understandably, was in line with the court's position prior to its decision in **Cecil Moore.**

[129] We conclude that grounds 6 and 7 are found to be meritorious, with the exception of the complaint regarding breach of the constitutional right to liberty.

Disposition

[130] The court, having considered all the grounds of appeal, has concluded that the application for leave to appeal the convictions is unmeritorious. The appeal against the sentences is also without merit as the sentences imposed by the learned judge for two counts of grievous sexual assault on a minor are not manifestly excessive or unjust.

[131] However, the appellant should be granted redress for the breach of his constitutional rights to have his trial and appeal considered and concluded within a reasonable time. Accordingly, the court will grant a declaration regarding the breach of

the appellant's constitutional rights, with a consequential order that there be a reduction of three years and three months in his sentence as an effective, appropriate and just remedy for the breach.

[132] As a result, through constitutional redress, the sentences imposed for grievous sexual assault are reduced below the mandatory minimum to 12 years and nine months imprisonment with the stipulation that he serve eight years and six months before eligibility for parole. It is for the correctional authorities to decide whether the appellant is eligible for early release following the reduction in sentence. This court, therefore, refuses to accept the submission of counsel that the appellant should be immediately released by the court.

Order

[133] Accordingly, the court hereby orders that:

1. The application for leave to appeal conviction is refused.

2. The appeal against sentence is dismissed.

3. However, it is hereby declared that the appellant's constitutional rights to have the case brought against him in the courts below as well as his appeal determined within a reasonable time, guaranteed by sections 16(1) and 16(8) of the Constitution, have been breached by the 13-year delay in the disposal of his case from the date he was charged.

4. As a remedy for the breach of the appellant's constitutional rights, the concurrent sentences of 16 years' imprisonment for the offence of grievous sexual assault, with the stipulation that the appellant serves 10 years before eligibility for parole, are set aside and substituted therefor are sentences of 12 years' and nine months'

imprisonment on each count, with the stipulation that he serve eight years and six months before eligibility for parole.

5. The sentences imposed for all four offences are to run concurrently and are to be reckoned as having commenced on 18 December 2018, the date they were imposed.