[2020] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 54/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SHERNETTE VIRGO ALEXANDER v R

Oswest Senior-Smith for the appellant

Stephen Smith and Miss Alexia McDonald for the Crown

13, 14 November 2019 and 4 May 2020

FOSTER-PUSEY JA

[1] On 31 May 2016, after a trial before Hibbert J ('the judge') and a jury in the Saint Ann Circuit Court, Shernette Virgo Alexander ("the appellant"), was convicted of the offence of causing grievous bodily harm with intent, but was acquitted of the offence of child abuse. On 9 June 2016, the judge sentenced the appellant to seven years' imprisonment at hard labour.

[2] On 24 August 2018, a single judge of appeal granted the appellant leave to appeal against conviction and sentence. We heard the appeal on 13 and 14 November 2019. On the latter date, we announced that the appeal would be dismissed and the conviction

affirmed; we also ordered that the appellant's sentence should run from 9 June 2016. These are the promised reasons for our decision.

[3] The particulars of the charges against the appellant were, firstly, that she, on a day between 1 and 24 December 2009, in the parish of Saint Ann, with intent to do so, caused grievous bodily harm to JW ("the complainant'). The specific injury to which this charge related was the complainant's broken left hand. Although the appellant was acquitted of the second charge, due to the nature of the arguments raised in the course of the appeal, it is necessary to outline it here. The appellant was also charged with child abuse contrary to section 9 of the Child Care and Protection Act. The particulars were that the appellant, on a day unknown between 1 January 2010 and 30 November 2010, in the parish of Saint Ann, being an adult with custody, care and charge of a child, assaulted the complainant, causing injury to her health. This charge related to an injury to the complainant's nose.

Background

The appeal

[4] At the hearing of the appeal, counsel for the appellant sought and was granted permission to argue supplemental grounds of appeal and abandoned the grounds of appeal originally filed.

[5] The following are the grounds on which the appellant has challenged her conviction and sentence:

"1. The appellant lost the court's usual protection when she was exposed to irretrievably prejudicial material during the course of the trial.

2. The appellant's defence was not fairly left to the jury for their consideration.

3. The appellant did not have the benefit of directions on her good character.

4. The sentence imposed was manifestly excessive."

The trial

[6] The prosecution led evidence from six witnesses. The first witness called by the prosecution was JC, the grandmother of the complainant. JC testified that, sometime in May 2009, her daughter V migrated, leaving behind her two children, including the complainant, who was born on 9 November 2007. She was unable to keep both children, and so she turned to the appellant, her best friend, for help to raise the complainant. The appellant had previously helped her to raise two of her children - V and one of her sons. After migrating, V sent $9000.00 every two weeks to assist in meeting the needs of her children. After this money was collected by the appellant, it was divided equally between JC and the appellant.

[7] Sometime between 1 and 19 December 2009, the appellant contacted her by telephone, and told her that she was at Saint Ann's Bay Hospital with the complainant, who had fallen down. JC got dressed to go to the hospital, but could not secure transportation. The appellant then called her and told her to meet her in Brown's Town. JC waited in Brown's Town, but the appellant did not meet her there. The appellant later told her that she had had to go home as she had something to do.

[8] On the 24 December 2009, Christmas Eve, JC saw the complainant and the appellant. The complainant was wearing a hoody jacket and had a broken arm, which was in a cast. Upon her enquiry as to what had happened, the appellant told her that the complainant had fallen off her bicycle.

[9] Sometime in 2010, JC met the appellant and the complainant in Brown's Town, for the sharing of funds, and she noticed that the complainant had a cut to her nose. The appellant told her that the complainant had injured her nose after a fall.

[10] In February 2011, JC's husband said something to her, as a result of which they both went to Saint Ann's Bay Hospital and enquired about the complainant. JC said that at the hospital, she saw a little girl with both her head and jaw swollen. She passed the little girl, still trying to find the complainant, and it was only when the little girl called out to her, saying "Grandma", that she realized that it was her granddaughter. The complainant was later transferred to the Children's Hospital in Kingston and, after that, did not return to live with the appellant. JC said that the appellant, on this occasion, had not told her that the complainant had been admitted to the hospital.

[11] In cross examination, JC denied that the appellant had, from the outset in December 2009, told her that the complainant's hand had been broken. After reviewing the statement that she had given to the police, however, she accepted that the appellant had done so.

[12] The next witness called by the prosecution was Mrs Jacqueline Mustafa, who, between 2010 and 2011, was a teacher at Burnt Ground Basic School. The complainant

started attending that school in October 2010, and was in that teacher's class up to February 2011. Mrs Mustafa testified that when she met the complainant in October 2010, she observed that she had scars all over her face and both of her arms were fractured. Sometime in January 2011, because of things she had observed, she called the Child Development Agency and spoke with someone there about the complainant. She later called and met with the police including Corporal Buchanan.

[13] The complainant then gave evidence. At the time of trial, she was eight years old. She testified that she had lived with the appellant, but had not gotten along with her, as the appellant had broken her hand. The complainant stated that the appellant had hit her with a mop stick five times on each of her hands. Both her hand and the mop stick broke. On another occasion, the appellant used a knife to cut her on her nose.

[14] During cross-examination, the complainant spoke of a wide variety food that she enjoyed when she was living with the appellant, including sardines, mackerel, bread, honey bun, eggs, frankfurters, pancakes, chocolate, melon, banana, oranges, cocoa and dasheen, pepperoni pizza, strawberry cakes, apples and grapes. In addition, the appellant bought Pediasure for her to consume. The complainant had her own room and the appellant had also provided her with many toys.

[15] On being asked whether she used to talk Bobette, the appellant's neighbour, the complainant said that she did not like that lady, as Bobette had boxed and beaten her. While the complainant agreed that her sister also came to the appellant's home and spent time with them, she stated that the appellant had "brutalized" her sister.

[16] Still in the course of cross-examination, the complainant said that the appellant tied her hands on a chair, taped her mouth so that she could not make a sound, and hit her five times with a mop stick causing both the mop stick and her forearm to break. In addition, the appellant had pushed her off her bicycle, and after cutting out her nose with a knife, used a lighter and burned her under her eyes, her ears and on her tummy. The complainant stated that on one occasion the appellant threw her off the verandah, causing her to break her hips. The complainant denied that it was on an occasion when she had fallen off her bicycle that she had both hurt her hand and had suffered a cut to her nose.

[17] Dr Natalie Wolfe, a dental surgeon, also gave evidence. On 8 February 2011, when she saw the complainant at the Bustamante Hospital for Children, she observed that the base of the nose, called the columnella, was detached from the skin.

[18] Corporal Kaydene Buchanan, who was assigned to the Centre for Investigations of Sexual Offences and Child Abuse (CISOCA), in the parish of Saint Ann, also gave evidence. On 1 February 2011, she spoke with Mrs Mustafa on the telephone. Afterwards, she contacted the Watt Town Police Station and gave instructions to a sergeant of police there. On 3 February 2011, the appellant, the complainant, and police officers from Watt Town came to the CISOCA office. In the presence of the appellant, Corporal Buchanan asked the complainant what had happened to her hand, and the complainant stated "…mommy lick me on it with broom". When the police officer informed the appellant of the report that she had received in relation to the complainant, and told her that she

would be laying charges against her, the appellant said, under caution, "…a lie [the complainant] a tell. A rude she damn rude." Corporal Buchanan also arranged for the complainant to be taken to the Saint Ann's Bay Hospital.

[19] The final witness for the prosecution was Dr Dayanand Sawh, an orthopaedic surgeon at the Bustamante Hospital for Children. On 19 April 2010 he examined the complainant, who, at the time, was a patient at the hospital for reasons not relating to the previous injury to her hand. An X-Ray done sometime after the complainant had been admitted to the hospital, revealed that she had suffered fractures of the left radius and ulna, two bones of the forearm, and there was a hypertrophic non-union of the bones- meaning that they were not joined. Dr Sawh explained that the forearm is comprised of the area between the elbow and the wrist. He opined that the injuries could have been caused by hitting with a stick, and at the time that he saw the X-ray of the hand, the fractures were not fresh.

[20] The appellant gave an unsworn statement from the dock. She stated that, on 12 December 2009, she was preparing the complainant to take a bath, and sent her for her slippers. When the complainant did not return, she went to look for her. She found the complainant on the verandah with a bicycle on top of her, with her hand "hitched" between the bicycle bar and blood coming from her nose. This was the cause of the complainant's broken hand and injured nose.

[21] The appellant denied taping the complainant's hands to a chair and using a mop, broom or any form of tool to hit her. She also denied using a knife to cut the complainant's nose and stated that the complainant frequently picked her nose.

The submissions

Ground (1): The appellant lost the court's usual protection when she was exposed to irretrievably prejudicial material during the course of the trial

The appellant's submissions

[22] Counsel for the appellant argued that, at trial, prejudicial material was elicited on a number of occasions. For example, evidence came out about injuries allegedly inflicted on the complainant by the appellant, although such injuries did not relate to the charges. He also referred to the evidence of JC, who, during examination-in-chief, in referring to the complainant, when she saw her in hospital, spoke of : "Her big head. She have a big abscess. … Her head was swollen … The same child that her head swell big and her jaw swell…" (see pages 28 and 30 of the notes of evidence). Mrs Mustafa, the complainant's former teacher, had stated, during examination-in-chief, "When she came I observed that she had scars all over her face ... Both arms were fractured, especially one of them" (see page 90 of the notes of evidence). In addition, counsel highlighted the evidence which emerged in relation to the complainant and Bobette, as well as the appellant and the complainant's sister. In his written submissions, Counsel also referred to pages 90-98, 164, 190-191, 194, 252, 256-257 and 260 of the notes of evidence. Counsel urged that the cumulative effect of the various instances, and the material in question, was devastating to the appellant's prospects of an acquittal, and could not be neutralized by

any subsequent directions in the judge's summation. He relied on **Peter McClymouth v R** (1995) 51 WIR 178.

The respondent's submissions

[23] Crown Counsel, in response, argued that, where the Crown's witnesses testified of matters which were arguably more prejudicial than probative in nature, the judge gave adequate directions to address any reasonable concern as to their probable adverse impact on the fairness of the trial. He referred to, for example, pages 1-2 of the judge's summation.

[24] Counsel then submitted that the jury, by their verdict, demonstrated that they had understood and had adhered to the judge's directions on the issue. In counsel's view, the fact that the jury did not find the appellant guilty in respect of count 2 of the indictment, is a testament to the fact that they did not consider to the detriment of the appellant, any of the general references to the abuse of the complainant.

[25] The appellant was convicted on count 1 of the indictment, which was focused on whether the appellant had broken the complainant's arm. While counsel for the appellant complained of the evidence led that the appellant had taped the complainant's hands to a chair, this was both relevant and admissible as to the circumstances in which the complainant sustained this injury.

The Law

[26] In **Peter McClymouth v R**, this court provided guidance on the approach to be taken when material prejudicial to an appellant or his counsel, has been introduced in the

course of a trial. The headnote, which, for this purpose, sufficiently summarises the case, reflects the following:

> "The appellant was charged with non-capital murder. At his trial his defence was alibi; but he called no witnesses to support the alibi. **The prosecution case depended on the evidence of an eye-witness who, in the course of her evidence, blurted out that the appellant was a repeat murderer and cast aspersions on his counsel.** At the end of the prosecution case, the defence submitted that there was no case to answer. The jury remained in court whilst the plea was heard. The arguments of the co-accused were heard by the jury before the submission was dismissed. **In summing-up, the trial judge warned the jury to disregard the disclosure of the appellant's bad character, but said nothing about the comment on the character of his counsel**. The co-accused were acquitted, but the appellant was convicted. **He appealed to the Court of Appeal on the grounds (*inter alia*)** that he had suffered prejudice as a result of the submission of no case to answer being heard in the presence of the jury and **that the jury ought to have been discharged after the eye-witness had blurted out his antecedents**….
>
> **Held (2) Allowing the appeal, that the whole case had depended on the evidence and credit of the eye-witness; it was expecting too much of the jurors that they should divorce from their minds that a credible witness had said that the appellant was a repeat murderer and had commented adversely on the character of his counsel**." (Emphasis supplied)

[27] Carey JA, in delivering the judgment of the court stated, at page 184,

> "The law applicable to circumstances such as eventuated in this case can, we think, be easily stated (per Sachs LJ at page 280):
>
> '…**The decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion. When that has**

> **been said, it follows, as is repeated time and again, that every case depends on its own facts.** As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged.'
>
> **The court will be slow to interfere unless it feels that the applicant would be justified in saying that what occurred was devastating. The court must have regard to what was divulged**, whether accidentally or deliberately, to appreciate whether it was perhaps a casual remark, as the court found in *R v Coughlan* (1976) 63 Cr App Rep 33, or **whether it was so prejudicial as to be not capable of curative action by the trial judge.**" (emphasis supplied)

[28] In **Dwight Gayle v R** [2018] JMCA Crim 34, a judgment of this court, Brooks JA, at paragraph [107], addressed the choices open to a judge when a potentially prejudicial statement has been improperly made:

> **"**In **Machel Gouldbourne v R** [2010] JMCA Crim 42, this court outlined the applicable principles where a potentially prejudicial statement is improperly made. The principles may be identified at paragraphs [21] and [22] of that judgment:
>
> a. Each case will depend on its own facts.
>
> b. In circumstances where potentially prejudicial statements are improperly made the trial judge has a wide discretion.
>
> c. **There are a number of choices that are open to a trial judge in exercising that discretion. These include, taking no action and making no mention of the matter, discharging the jury, immediately directing the jury appropriately, waiting until the summation to direct the jury on the matter, or combining both of the last two choices.**

> d. An appellate court will be loath to interfere with an exercise of that discretion. It will only do so in the most extreme cases. 'As Sachs LJ put it in the well-known case of **R v Weaver** [1967] 1 All ER 277, 280 ...the correct course 'depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted…' (see also Archbold, Criminal Pleading, Evidence and Practice 1992, para. 8-194, and the decision of this court in **McClymouth v R** (1995) 51 WIR 178).'" (Emphasis supplied)

[29] In light of these principles, the judge had a number of options open to him as to how to deal with the prejudicial material which had been admitted into evidence. We will therefore examine the choices he made in the exercise of his discretion.

Action taken by the judge before the summation

[30] After Mrs Mustafa had testified that she had noticed scars on the complainant's face, and that she had two fractured arms, defence counsel urged the judge to dismiss the jury. At pages 97-98 of the notes of evidence, the judge ruled that he would ask the jury to discount any evidence that was unrelated to the particular injuries for which the appellant was charged, and would impress on the jury "the evidence that they must consider in relation to the two counts to avoid any undue prejudice to the defendant".

[31] Later on in the trial, the judge intervened at a time when he felt that defence counsel was treading in dangerous waters. At page 190 of the notes of evidence, the following was recorded during the cross examination of the complainant by defence counsel:

> "
>
> A. Am sorry, but she spend a lot of days until [the appellant] brutalized her.

Q. [The appellant] brutalized [J]?

A. Yes, sir.

Q. Yes. So how was it that [the appellant] brutalized [J]?

HIS LORDSHIP: Just a minute, please. Do you want to go there, Mr. Smith? It has nothing to do with the case being tried here.

MR. SENIOR-SMITH: Well, m'Lord it's an interesting bit of information coming.

HIS LORDSHIP: I don't know. Am not stopping you. Just want to know if you want to go there.

MR. SENIOR-SMITH: Since it came out unbidden, I just thought that it was very interesting that it came out."

The summation

[32] Turning to the summation, the judge, on a number of occasions, reminded the jury that the charges which they were to consider related to two injuries only. At pages 1-2 of the transcript of the summation he stated:

> "Now, Madam Foreman and members of the jury, before you is [the appellant] who was charged on these two counts on this indictment. Let me make it quite clear from the outset, she is the only person who is charged and I mention that…because of what has been said about other persons, so please concentrate on this defendant as the only person who is charged with an offense. Secondly, this defendant is charged with only two offenses. So you bear in mind that anything else that you might have heard about anything else, she's not being tried for that. She's [sic] is being tried for two offences which I will mention…later."

[33] At pages 13, 14, 15, and 16-18 of the transcript the judge provided the promised guidance in respect of the two offences:

"Now, the first count charges [the appellant] with causing grievous bodily harm with intent. The particulars being that she, on a day between the first day of December, 2009---and the 24th day of December, 2009 … caused grievous bodily harm to [the complainant] with intent to cause her grievous bodily harm…

…In relation to this count…what the prosecution alleges is that she used a stick. You have heard it described as a mopstick or broomstick and caused an injury to the left forearm of [the complainant] causing the two bones in that arm to be fractured. I think there was a witness who mentioned some place about two, this accused stands [sic] for one and that is what you can consider and nothing else. You consider no other injury in relation to any other arm because [the complainant] herself told you about one and the doctor mentioned one, so that it was just one that you consider, that's the left arm.

…

Count two charges [the appellant] with child abuse contrary to Section 9 under the Child Care and Protection Act. It says…that she on a day unknown between the first day of January 2010 and the 30th of November 2010…assaulted the said [complainant] causing injury to her health…the nature of this assault is that she used a knife to cut [the complainant] here and you remember the doctor described it as the columnella of the nose and the doctor said it appeared to be detached…'

…the [appellant] is saying I did none of these acts which was alleged against me, none of these two acts which was alleged against me."

[34] Again, at pages 24, 33, 37-38 of the transcript the judge stated:

"Now, when you look at all the evidence…remember what your focus is. Remember I told you that the only charges against [the appellant] are those in the indictment…The charges before this Court are the one that causes grievous bodily harm with intent and for child abuse. Child abuse in a specific circumstance, …

…

> …but remember, Madam Foreman and members of the jury, 2 counts; 2 specific instances; nothing else that might have been happening, so please bear that in mind.
>
> …Now, the next witness called was Mrs. Mustafa… She said at the time she met [the complainant] she observed scars and two broken arms.
>
> Now let me remind you again. You remember I told you that the [appellant] is charged for causing a broken arm…It could well be that Mrs. Mustafa was mistaken and thought it might have been 2. She mentioned 2, but there is only one broken arm that she is charged for. So I would ask you to disregard any evidence that you have heard about any second broken arm. She was never charged with more than one…"

[35] In his submissions to this court, counsel for the appellant expressed concern about the evidence which came out in cross-examination as to how the appellant inflicted the injury to the complainant's arm. The judge, at pages 57, 59-60 addressed the issue:

> "Now, Madam Foreman and members of the jury, I wondered to myself how is it that she was hit with her hand held out like that and she didn't move them…An explanation came later…
>
> She said [the appellant] tape up her hands.
>
> Now, here we have the explanation. You remember I said I was a bit concerned about how it is that she had her hands out like that while being hit five times on each hand, but now we have --- during the cross-examination --- the explanation for this. She said her hand was on the chair and both hands were taped on the chair using duct tape. She was not only able to describe the tape, but she was able to tell you what type of tape was used.
>
> Now, again, do you believe her? Is it something from the fantasy of a child, or something that really happened to her? Is it something that somebody might have imparted to her for her to repeat? There was never any suggestion put to any of

> the witnesses that they encouraged her to make up these lies against [the appellant], but I would have to look at that. Is it something somebody encouraged her to do? Is it something that she made up in her head, or is it something that really happened to her?
>
> She said, and you remember she demonstrated, after she was hit 5 times on each hand [the appellant], she said, held the mop-stick like that and brought it down on her hand and then this mop-stick broke and she said that was when her hand was broken; not when she was receiving the 5 hits, but when the mop-stick was brought down on her hand."

[36] At page 65 of the transcript the judge again reminded the jury that the appellant had been charged in respect of two separate incidents, although the appellant appeared to be suggesting that both injuries occurred at the same time when the complainant had, allegedly, fallen off her bicycle.

[37] Towards the close of the summation the judge, at pages 101 and 103 of the transcript, reminded the jury of the two separate charges on the indictment and that they had to be considered individually. He further stated:

> "Now, basically the case for the prosecution was that this lady on these two occasions did certain things to [the complainant] which [the complainant] said happen [sic]."

Analysis and discussion

[38] In the instant case, the judge refused to discharge the jury when urged to do so, after prejudicial evidence, unrelated to the charges, was elicited. The question for our consideration is whether the judge properly exercised his discretion and, in addition, whether he adequately addressed the material which was seen as prejudicial.

[39] In our view, it cannot be said that the judge exercised his discretion improperly. The judge adopted a dual approach in addressing the issue. He exercised the option of, during the summation, warning the jury to ignore any prejudicial material that did not relate to the appellant (for example, reference to anything wrong done by any other persons), and that they were to ignore any allegations that did not relate to the two specific matters which were outlined in the indictment. As has been seen, the judge did so repeatedly and it appears, successfully. In addition, in the course of his summation, the judge did not repeat for the jury, some aspects of the prejudicial evidence which had been elicited – for example, he did not mention the complainant's allegation that the appellant had thrown her off the verandah causing her to suffer a broken hip.

[40] We agree with the submissions made by Crown Counsel, that, clearly, the jury fully understood the matters on which they were to focus and convicted the appellant solely in relation to the complainant's broken left arm. The appellant had not disputed that the complainant had suffered one broken arm. The dispute in the trial concerned the circumstances in which the complainant suffered the broken arm. While the complainant testified that she was hit five times with a mop stick or broom stick, the appellant, in her unsworn statement, had stated that the complainant sustained the injury when she fell off her bicycle and her hand was caught in the handlebars. It was therefore a matter for the jury as to whose account they believed.

[41] The jury did not convict the appellant of child abuse. It therefore appears that, having received directions from the judge, the jury ignored material that was more

prejudicial than of any probative value and which did not appear to form any of the charges on the indictment. Many of the prejudicial matters raised by or elicited from the prosecution witnesses, had the jury erroneously taken them into account, could have amounted to child abuse. The judge repeatedly reminded the jury of the two counts, arising from two incidents, which were before them for determination.

[42] One of the passages in the notes of evidence to which Mr Senior Smith referred, and complained that the evidence was of more prejudicial effect than probative value, related to the complainant's evidence that the appellant had taped her arms to a chair. This evidence was a detailed account as to how the complainant came to have a broken arm. We agree with Crown Counsel that, far from this evidence being of more prejudicial than of probative value, it was highly relevant and admissible.

[43] Having reviewed the evidence, and having considered the submissions of counsel, we agree with Crown Counsel's submissions that the judge adequately dealt with this issue. We find no basis on which to impugn the judge's exercise of discretion in the steps taken to ensure that the appellant was fairly treated. The judge, in our view, carefully protected the appellant from any adverse effects which could have flowed from the prejudicial evidence. He commenced his protective steps, even in the face of defence counsel's attempt to elicit further details of prejudicial material which came out in cross-examination. Therefore, this ground of appeal fails.

Ground (2): The appellant's defence was not fairly left to the jury for their consideration

The appellant's submissions

[44] Counsel argued that, in the course of summarizing the appellant's dfence, the judge's comments and/or queries appeared to question the truthfulness of her defence, thus depriving her of a fair evaluation by the jury. He drew the court's attention to a number of areas of concern in the summation and highlighted pages 15, 22-23, 28-29, 34, 36, 39-40, 47-50, 56, 59-60, 84-98, 101 and 103. Counsel also expressed a concern that the judge, from time to time, in referring to the appellant, used the words "this lady". He submitted that those words had a negative connotation. Relying on the case of **Sophia Spencer v R** (1985) 22 JLR 238, counsel submitted that the judge failed to follow the fundamental guidelines as regards a summing up, as usefully outlined by Carey JA.

[45] Referring to page 84 of the summation, counsel also raised for review the judge's directions in respect of the appellant's unsworn statement from the dock. He relied on **Alvin Dennison v R** [2014] JMCA Crim 7 on this issue.

The respondent's submissions

[46] Counsel for the Crown submitted that, when the summation is taken as a whole, and is examined within the general context of the evidence led, the judge presented the appellant's defence to the jury in a fair manner. Counsel argued that, while comments which are disparaging when putting the defence's case can render a conviction unsafe, there is no unfairness where the purpose of the comments is to assist the jury in properly

assessing the evidence. In the instant case, this is what the judge sought to do. The judge always sought to remind the jury to compare the case led by the prosecution as against the case for the defence.

[47] Counsel further submitted that the judge's summation was replete with instances which demonstrated a balanced and unbiased treatment of the evidence, and, by extension, the appellant's defence. References were made to pages 43 (lines 10-12), 49 (lines 15 -20), 74 (lines 6 -17), 85 (lines 9-14) and 103 (line 22) to 104 (line 4) of the judge's summation. In concluding on this point, counsel argued that the judge's comments were not spurious or "inflaming", in contrast with the circumstances reflected in the decision of **Fraser Marr v R** (1990) 90 Cr App Rep 154. Counsel also relied on **Ronald Webley and Rohan Meikle v R** [2013] JMCA Crim 22, per Brooks JA at paragraphs [47]-[48] and [52]).

[48] For these reasons, counsel submitted that this ground of appeal must fail.

The law

[49] A summing up is to assist the jury in discharging its responsibility. Carey JA in **Sophia Spencer v R** at page 244 outlined that:

> "A summing up, if it is to fulfil its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them."

[50] In **Alvin Dennison v R**, Morrison JA (as he then was), having reviewed a number of authorities on the nature of the directions to be given to the jury in respect of an unsworn statement from the dock, concluded as follows at paragraph [49]:

> "In a variety of circumstances…, the guidance provided by the Board in **DPP v Walker**…has been a constant through all the cases. It continues to provide authoritative guidance to trial judges for the direction of the jury in cases in which the defendant, in preference to remaining silent or giving evidence from the witness box, exercises his right to make an unsworn statement. It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. **While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, giving it such weight as they think it deserves.** While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will always be helpful to bear in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in gratuitous inventiveness in what is a settled area of the law." (Emphasis supplied).

[51] In addition, the defendant's case must be given a balanced treatment and consideration, regardless of how "unattractive" it might be - see **Fraser Marr v R**, and **Ronald Webley, Ronald Meikle v R**, at paragraphs [47]- [48] and [52].

The summation

[52] At page 15 of the summation the judge said:

> "What the prosecution is asking you to say here, **if this lady** used the stick to hit either two or three year old child to the extent that it broke two bones of the arm…"

[53] The appellant gave an unsworn statement from the dock. The judge was required to give directions to the jury as to how to treat with this statement. At pages 83-84 of the summation he stated:

> "Now, at the end of the case for the Prosecution, **a defendant has 3 options**. She may stay there where she is and say nothing at all. This is so because **it is the duty of the Prosecution to satisfy you to the extent that you feel sure that the offences were committed by the defendant**.
>
> **The defendant could also have opted to come into the witness box, take an oath to speak the truth, give evidence and subject herself to cross-examination**. You remember I said the primary purpose of cross-examination is to test what the witness said to see whether or not it can stand up to scrutiny.
>
> **She also could---as the defendant chose to do---give a statement from where she is.** You would have noted that the statement was not on oath….She opted to give a statement from where she is so she didn't have to swear, or affirm and you would also noticed [sic] that after she was finished, nobody could cross-examine her because when you make a statement from the dock you are not subjected to cross-examination.
>
> So you bear that in mind…that **it was not on oath and it was not subject to the test of cross-examination, but it is a right which she has and a right which she exercised. You can't, because she exercised that right, say that she is telling lies merely because of that. You will have to look at what was said.** You bear in mind that it was not on oath, but not subject to cross-examination and **you attach what weight you think it deserve,** [sic] **if it deserve any at all**." (Emphasis supplied)

[54] In addition, at pages 100-101 and 103 of the summation the judge stated:

> " Remember I told you earlier that the prosecution has it's [sic] duty to prove the case against the defendant. The defendant has the [sic] duty to establish any innocence and even where a defendant either gives evidence or makes a statement with the intention of establishing innocence, does not mean that she acquires any duty to do so. And even if you don't believe her, you cannot because of that alone say that she's guilty. You would have to go back to what the prosecution has presented to see whether or not on the totality of the evidence presented you say that she has committed any offense.
>
> …
>
> **Remember I told you that the defendant didn't have to say anything, but whatever she says you take into consideration. You bear in mind that it was not on oath. You bear in mind that it was not subject to cross-examination. You will have to look at it and to see what weight, if any, you will ascribe to it**." (Emphasis supplied)

[55] Counsel for the appellant, in seeking to further substantiate this ground of appeal, criticised several comments made by the judge. We outline a number of the criticised comments below. At pages 22-23 he stated:

> "She said she asked [the appellant] what had happened and she said it was broken and she asked her how, and she said [the complainant] fell off a bicycle.
>
> Now, you would have to consider all of this because a bicycle features in relation to the defense [sic]…Now, we have not seen the bicycle. We have not heard anything about the size of the bicycle, but you have heard [the complainant] described this bicycle…
>
> Now, when you sit as judges, …it doesn't mean that you leave your common senses outside. You take them with you and you use them. You would have to consider what type of

> bicycle could there be for a two (2) year old that she fell off. So this is something that you can picture because what the defence is saying is, that she had this bicycle and she fell from this bicycle and that is what caused the injury to her left arm.
>
> She said in 2010 she did not see [the complainant] or [the appellant] as often as she was accustomed to. She said she met [the appellant] in Brown's Town and asked her why she didn't bring [the complainant] and she said [the complainant] was in Montego Bay. You remember the address by counsel to you on that. A three (3) year old who she is supposed to be in charge of; she is in Brown's Town and this three (3) year old is in Montego Bay."

[56] Later on, at pages 28-29 of the summation we note the following:

> "She said while [the complainant] was living with [the appellant] she did not go to [the appellant's] house and you remember counsel addressing you on that. What sort of grandmother is this, that didn't go. Remember I started out by telling you that there's only one person on trial. Remember the prosecution is saying however, that this is a lady who had helped [JC] in the past to grow two of her children. You need to ask yourself this, would this be somebody that [JC] would need to be following up to make sure that she does or would [JC] have an idea as to her capabilities."

[57] At paragraph 20 of their submissions, Crown Counsel also highlighted certain aspects of the summation, some of which we outline below:

a. Page 43, lines 10-12-"So **what the defence is saying is that such a persons [sic] would not cause injury to [the complainant**]…"

b. Page 49, lines 15-20-"She said when [the appellant] cut her, [the appellant] said if I tell anyone, she would kill out my boxside. Now…**Is this something that this defendant would say?"**

c. Page 74, lines 6-17-"…It could well be that she had on those clothes because of how the temperature was and I would think also…that no real adverse effect would be done by the fact that she had on sweater at that time. **You can't really, in my view-**

again this is my view-draw the conclusion that she was trying to hide. It doesn't follow and you remember, for you to draw inferences you must have proven facts that lead up to the reasonable inference in all the circumstances…",

d. Page 85, lines 9-14**-"the defence is saying, now, somebody who was awaken to come and do this, would you think that such a person was a wicked person? The defence is saying that is not in keeping with what was heard about her**. You have to take that into consideration…". (Emphasis supplied in each of the above).

Crown counsel had also referred to an excerpt from pages 103-104 of the summation, which we outline later in this judgment.

[58] The judge, as reflected at pages 84-98, reminded the jury of the defence of the appellant as reflected in her unsworn statement. At times, the judge, having outlined the defence, made comments. An example is seen at pages 87-89:

> "She said she remember one evening she was talking to [JC] and [the complainant] was spinning and drop and the banging was heard and she said she had told [JC], 'you hear that. She drop and lick her head.' …and she said [JC] said, 'Lawd, Shernette, [the complainant] have to stay like that because all nine months when V was pregnant with her, she and [the complainant] father was fighting.'
>
> So there she is saying [JC] is giving a reason why [the complainant] does that because her mother and father used to fight.
>
> Now, you remember [JC] gave evidence and you remember I told you that the suggestions were put to the witness during cross-examination indicating, firstly, what the defence was saying. **I can't recall that being put to** [JC]**. Would you expect that if it had happened it would have been put to** [JC]**, or is it that counsel might have forgotten? You will have to consider this; or is it that this thing never happen and she is now making up something?**

…

[The complainant's] sister, [J] come and spend summer holidays. Said [the complainant] eventually caught chickenpox. She started picking them...Said she took pictures because she kept complaining about the picking and she sent the pictures to [the complainant's] mother…Now again you might wonder…[the complainant's] mother is abroad; [JC] who described [the appellant] as her best-friend lived nine and half miles away. [JC] she said was the one who had asked her to come and take [the complainant] …**You might wonder, this is something I throw out, why didn't she call** [JC] **about all of these things…Why call V and not [JC]?**" (Emphasis supplied)

[59] In continuing to relate the defence, the judge said, at pages 90-92:

"Said on the 12th of December, she went to the bathroom with [the complainant] and went to have a bath. She said she sent [the complainant] for slippers which was near to…next door to the bathroom. Said while she was there setting the water and [the complainant] say [sic] did not return. She went out and saw [the complainant] on the verandah with the bicycle on top of her and her hand hitch between the bicycle bar and blood was coming from her nose. **She said she called her mother overseas and told her that she had fallen off the bicycle and that she was not sure what was wrong with her…. Again, you might ask yourself, what could V do from where she was. Could [JC] have been better able to assist?**

…

…She said on reaching the St. Ann's Bay Hospital she spoke to the doctor and told the doctor that [the complainant] had fallen off the bicycle; and that she found her with her hand in the bar. She said the doctor held up [the complainant] hand. And remember she said the doctor said nothing is wrong with [the complainant]. She said nothing was wrong because if something was wrong, [the complainant] would have been crying. Remember what [the appellant] saying that [the complainant] doesn't cry but you have to look at that to see, because [the complainant] said this time she got her broken arm she cried. **You would have to see whether or not**

> **you believe [the complainant] as to how she got her broken arm**…" (Emphasis supplied)

[60] At pages 103-104 of the summation, as the judge approached the end of his summation, he said:

> "Now, basically the case for the prosecution was that **this lady** on these two occasions did certain things to [the complainant] which [the complainant] said happen. **The defence is that this lady, bearing in mind all the things that have been said, her generosity when she facilitated JC and two children and the willingness to take over the grandchild.** She used to provide for the grandchild. **The defence is saying on that basis, you cannot really rely on the evidence of [the complainant].**
>
> **Now, you would have to look at [the complainant's] evidence carefully**, because the prosecution's case turns on that. **She's telling a deliberate lie on this defendant? Was she put up to do so by somebody or is she fantasizing and making up stories, because sometimes it is said that children make up story. Is this something that she's doing or is it that she's relating something that really happened to her**. You will have to make that decision, Madam Foreman and members of the jury based on how you assess her as she gave her evidence." (Emphasis supplied)

Analysis and discussion

[61] The question for our consideration is whether the appellant's defence was left fairly to the jury for consideration.

[62] One of the questions flowing from that issue is whether the judge gave appropriate directions to the jury as regards the appellant's unsworn statement from the dock. In our view the judge's directions were adequate and appropriate. He made it clear that:

a. the appellant was entitled to exercise the option to make an unsworn statement from the dock;

b. the appellant, having made an unsworn statement, could not have been cross-examined. Nevertheless, it could not be concluded that the appellant was telling lies due to the choice that she made;

c. although the appellant was not subject to cross-examination arising from the content of the unsworn statement, the jury had to look at what was said and attach whatever weight, if any, that they felt the statement deserved; and

d. it is the duty of the prosecution to satisfy them so that they feel sure that the appellant had committed the offences in question.

[63] It would, however, have been also appropriate for the judge to remind the jury, that in considering whether the prosecution had satisfied them so that they felt sure that the appellant had committed the offences in question, they should bear the unsworn statement in mind giving it such weight as they think it deserves. Nevertheless, in our view, the judge conveyed the main substance of the required direction.

[64] Counsel for the appellant also expressed concern that the judge, from time to time, referred to the appellant as "this lady". We accept that it might have been better for the judge to have stayed with the time-honoured description of the person being tried as "the accused" or "the defendant". That having been said, however, it seems to us that,

in this case, the use of the term "this lady", did not, in our cultural context, suggest anything untoward or unfavourable about the appellant.

[65] The further matter for our consideration is whether the judge, in making comments on the appellant's defence, appeared to be questioning its truthfulness. Having reviewed the comments and looking at the summation in the round, these comments and queries were appropriate questions which the members of the jury could consider, so as to determine whether they believed the witnesses for the prosecution or the account given by the appellant.

[66] It was also quite proper for the judge to have highlighted that a particular aspect of the defence had not been put to the grandmother in cross-examination and in addition, no one had suggested that the complainant had been put up to tell lies on the appellant.

[67] The judge did not only ask questions and make comments on the case for the defence, he also made comments in respect of the case for prosecution, guiding the jury on occasions when it would not have been appropriate for them to make adverse inferences against or arrive at unfavourable conclusions in respect of the appellant.

[68] We agree with Crown Counsel that the judge approached the summation in a balanced and fair manner. His comments and queries were not denigrating, biased or unbalanced, but instead were to assist the jury, using their common sense, to determine what aspects of the various accounts they would accept or reject.

[69] This ground of appeal is therefore without merit and thus fails.

Ground (3): The appellant did not have the benefit of directions on her good character

The appellant's submissions

[70] Counsel submitted that the trial was "replete with a virtual plethora of passages of evidence that demonstrated the good character of the appellant", noting in particular that the grandmother and the virtual complainant provided testimonies which "redounded to the credit of the appellant".

[71] In counsel's view, the evidence led showed that the appellant possessed unimpeachably good antecedents in the raising of children within that same extended family. As a consequence, the appellant was entitled to the benefit of a good character direction on the issue of her propensity to commit the offences. The summation, however, failed to analyse and commend this material for the jury's assessment, which resulted in a denuding of the appellant's chances of acquittal. Counsel reiterated that the absence of a good character direction negatively impacted the appellant and rendered the guilty verdict unsafe. He relied on **Vince Edwards v R** [2017] JMCA Crim 24, particularly paragraphs [81] – [99] in which the case of **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, was cited.

The respondent's submissions

[72] Counsel for the Crown accepted that, although no witness was called to speak to the appellant's good character, responses elicited from the witnesses for prosecution raised the matter for consideration. He referred to **Tino Jackson v R** [2016] JMCA Crim 13, where Brooks JA, in dealing with how good character may arise in trial noted, at paragraph [29], that the issue must be raised by the calling of evidence or by putting questions on that issue to witnesses for the prosecution.

[73] He urged that the direction need not be in a specific format, and, that what is necessary is that the purpose of the direction be fulfilled. Counsel submitted that the judge included in his summation, points concerning the propensity of the appellant to commit the offences in question. He referred to pages 103-104 of the summation in this regard. In the alternative, even if a good character direction was not given, counsel urged that that omission does not inevitably mean that the conviction is unsafe. (see paragraph [45] per Brook JA in **Tino Jackson v R**).

The summation

[74] This is the aspect of the judge's summation to which Crown Counsel referred, see pages 103-104:

> "… The defence is that this lady, bearing in mind all the things that have been said, her generosity when she facilitated [JC] and two children and the willingness to take over the grandchild. She used to provide for the grandchild. The defence is saying on that basis, you cannot really rely on the evidence of [the complainant]."

The law

[75] In **Vince Edwards v R**, a judgment of this court, the appellant challenged his sentence and conviction on the basis that the judge's directions on good character were incomplete in law. Brooks JA, at the paragraphs highlighted below, outlined the applicable principles. He wrote:

> "[86] In **Horace Kirby v R** [2012] JMCA Crim 10, this court was faced with the complaint that Mr Kirby who had made an unsworn statement, in which he stated 'I have no previous conviction', was entitled to a good character direction. The issue was whether the trial judge's failure to give such a direction deprived Mr Kirby of a fair trial.
>
> [87] This court, in addressing the issue, found, at paragraph [11] of the judgment, that one of the principles gleaned from **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, was that '**where an accused does not give sworn testimony or make any pre-trial statements or answers which raise the issue of his good character, but raises the issue in an unsworn statement, there is no duty placed on the trial judge to give the jury directions in respect of the credibility limb of the good character direction". The court went further to observe that, "the accused was still entitled, however, to the benefit of a good character direction as to the relevance of his good character as it affects the issue of propensity'**. Morrison JA (as he then was) in **Michael Reid**, at pages 26-27 of the judgment of this court, said thus:
>
> > '(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, **such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his**

> **good character to his propensity to commit the offence with which he is charged** (**Muirhead v R**, paragraphs 26 and 35).'
>
> [88] The court in **Horace Kirby v R**, after having distilled the various principles applicable to that case found, at paragraph [21], that Mr Kirby was entitled to a good character direction on the propensity limb, and such a direction 'could have assisted the applicant in the thrust of his defence that he would only have made the fatal stroke in self-defence'
>
> …
>
> [90] In that case, Morrison JA (as he then was) on behalf of the court, stated thus at paragraph [127]:
>
> > 'The foundation of the modern law of good character directions is commonly acknowledged to be the decision of the Court of Appeal of England and Wales **in R v Vye, R v Wise, R v Stephenson** [1993] 3 All ER 241. **That case established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant "does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required"** (per Lord Taylor CJ, at page 245)'." (Emphasis supplied)

[76] **Ronald Webley and Rohan Meikle v R** is also helpful. In that case, the appellants argued that the judge prejudiced the good character direction, resulting in an unfair verdict. Brooks JA emphasized that the direction need not follow a particular format or wording. He stated:

> "[38] In the instant case, as Mrs Reid concedes, the appellants were not entitled to a direction with respect to the credibility

> aspect of the good character direction. This is because neither gave sworn testimony nor made pre-trial statements concerning that issue. Learned counsel submitted, however, that they sought 'indirectly' to put their respective good characters in issue through the cross-examination of the prosecution's witnesses. She argued that they were, therefore, entitled to a direction in respect of the propensity limb. The learned trial judge, nonetheless, purported to give a good character direction on both limbs of the direction. The issue is whether the words and phraseology that he used, did communicate the sense of what the good character direction was intended to convey.
>
> [39] **It would be helpful to remember that a summation is not required to conform to any particular format. It should be couched in language that communicates to the jury the nature of the issues and the approach to resolving those issues.** P. Harrison JA (as he then was) concisely stated this concept in **R v Anthony Rose** SCCA No 105/1997 (delivered 31 July 1998). The learned judge stated:
>
> > 'A summing-up is not required to conform to any particular format nor to any set formula. What is required is a careful direction of the jury of their functions, the relative law involved, what evidence to look for and how to apply that evidence to the law in order to find facts.'
>
> [40] Bearing that admonition in mind, **it is to be noted that where a good character direction is required, it is not to be diluted when it is given. If it is diluted, there will be a basis for questioning the validity of the conviction**…" (Emphasis supplied).

[77] Where a good character direction limited to the propensity limb is being given, it will be important for the judge to indicate that the defendant's good character is not a defence to the charge, but it may make it less likely that she has committed the offences in question. This should be taken into account in her favour, and it is for the jury to decide what importance they will attach to it.

[78] But, what if a judge failed to give a propensity direction when one was required? In such matters it will have to be determined, given the case as a whole, whether the jury would have inevitably convicted the accused, even if the proper direction had been given. In **Tino Jackson v R**, Brooks JA, at paragraphs [45]-[47] of the judgment, wrote:

> "[45] The failure to give the good character direction, when it is required, does not automatically amount to a miscarriage of justice. It was said in **Michael Reid v R** SCCA No 113/2007 (delivered on 3 April 2009), at pages 27-28, that **the focus in each case should be the impact that the omission had on the trial and the verdict. The question to be decided in such circumstances is whether the jury, given the case as a whole, would inevitably have convicted the accused, even if the proper direction had been given.**
>
> [46] In the present case, the many instances of discrepancies and inconsistencies in the prosecution's case were such that credibility was a major issue. Their Lordships stated in paragraph 33(iv) of **Teeluck**, that '[where] credibility is in issue, a good character direction is always relevant…'. In this court, in **R v Newton Clacher** SCCA No 50/2002 (delivered on 29 September 2003), Cooke JA (Ag), as he then was, endorsed the principle that "evidence of good character is part of the totality of the evidence which is for the tribunal of fact" (page 19). At page 22 he stated, as being guiding principle, the fact that '[e]vidence of good character is of probative significance'.
>
> [47] This was a backdrop against which it cannot be said that a good character direction, especially on the issue of credibility would, nonetheless, have resulted in a conviction. It cannot be said that the 'sheer force of the evidence against the defendant was so overwhelming" (paragraph [130] of Moodie), that the case would inevitably have concluded in a conviction…'" (Emphasis supplied).

Analysis

[79] There is no doubt that, in light of the favourable evidence about the appellant which was elicited from the prosecution's witnesses, the appellant was entitled to a good character direction, certainly in relation to the propensity limb. We agree with the submissions of Crown Counsel, that the direction need not be in a particular format and so proceeded to review the passage to which Crown Counsel referred, at pages 103-104 of the transcript. Counsel had submitted that what the judge said on that occasion, fulfilled the requirements of a good character direction limited to the propensity limb. We disagree. As counsel for the appellant highlighted, the judge prefaced what was said with the words "The defence is that...". In our respectful view, the judge ought to have directed the jury that the matter of the appellant's good character arose in light of the evidence elicited from the witnesses from the prosecution. This evidence as to good character was not a defence to the charges being faced by the appellant, however it could suggest that the appellant was less likely to have committed the offences in question. The jury was to take this evidence of the appellant's good character into account in her favour, and decide what importance they would attach to it. We therefore agree with the appellant's submissions that what the judge said at pages 103-104, in the passage to which Crown Counsel referred, did not fulfil the requirements of a good character direction as to propensity.

[80] On the other hand, we agree with the submissions of counsel for the Crown, that it is unlikely that a good character direction as to propensity would have made a difference in this matter. As we highlighted before, the appellant did not dispute the fact that the

complainant had suffered a broken arm. Furthermore, there was medical evidence confirming the fact that the left arm had been fractured. The evidence against the appellant was very strong. This was not a case in which there were numerous inconsistencies and discrepancies in the prosecution's case such that the credibility of the prosecution's witnesses was a major issue. The complainant, although she was quite young, did not waver in her account as to how the injury had occurred. From as early as 2011 when she was questioned by the police, and up to the trial in 2016, she maintained her account. On the contrary, the appellant's defence as to how the injury occurred was not credible. The jury had to determine whose account they believed as to how the injury took place.

[81] The appellant's kindness was always at the forefront of the trial, since this is what clearly led her to assist with the care of the complainant at very short notice. While not gainsaying the fact that the complainant's mother regularly sent monetary contributions towards the expenses for her care, the evidence which came out at the trial, showed that the appellant was extremely generous in providing food, accommodation and toys for complainant. As a result, the jury could have been asking themselves whether such a generous and kind-hearted individual could have committed the offences in question. Nevertheless, in our view, in light of the strength of the evidence against the appellant, it was inevitable that the case would have concluded in a conviction, even if a good character direction on the propensity limb had been given. As such, this ground of appeal also fails.

Ground (4): The sentence imposed was manifestly excessive

The appellant's submissions

[82] Counsel contended that the court should not have imposed a custodial sentence, and even if it did, a sentence of seven years was manifestly excessive. Counsel argued that there are cases in which a sentence of seven years has been imposed for the offence of murder, a much more serious offence. He therefore urged the court to set aside the sentence.

The respondent's submissions

[83] Crown Counsel argued that this ground of appeal is without merit. He noted that the judge did not have the benefit of the Sentencing Guidelines For Use By Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines"), at the time of the hearing, as they were published afterwards. Nevertheless, the sentence imposed by the judge for the offence coincided with the usual starting point of seven years, as outlined in the Sentencing Guidelines. The judge then took into account aggravating and mitigating factors, for example the youth of the virtual complainant, who was two plus years old at the time when her forearm was broken by the appellant. For these reasons, counsel disagreed with counsel for the appellant that the sentence was manifestly excessive.

The comments of the judge before imposing sentence

[84] At pages 125-128 of the transcript the judge stated:

> "A lot have [sic] been said about you which is good and that came from [JC] and that came from [the complainant]

and…from persons within your community. However, a lot has been said about you which is not good. That also came from the same set of persons; [JC], [the complainant] and your community.

I will have to look at what you are charged for and what you were convicted for. It is not a situation where it could be said that this was inflicting a corporal punishment in a particular way; anybody who heard what you had been convicted of would say that, and I am sure even if it was done to an adult person they would not take very kindly to that...It was not an adolescent. It was a mere child of 2 years old. I have to take that into consideration…

…What was described by [the complainant] was a deliberate and cruel act. She was tied. She said you used dock [sic] tape to tape her hand to the chair. You hit her on both arms and then you brought the stick down on her arm, causing both the stick and her arm to be broken.

Now, this is a very serious matter…I have to look at what is good in your favour, then I have to look at what has happened to [the complainant].

Your attorney said that having seen [the complainant], she appears not to have been scarred mentally by what happened to her…If she can so vividly remember what happened to her 2 years ago and can repeat what happened to her, I think that this is something that she will remember for the rest of her life. I have to take that into consideration.

Now, in my view, I do not think that a sentence of imprisonment which is suspended would be appropriate. I think a sentence which is to be given must be more substantial. In the circumstances I think that an appropriate sentence is that you be imprisoned for a period of seven years.

Persons might wonder how is it that a person who kills another person receives a sentence of 7 years. I tell you what the difference is, just in case everyone wonders.

The person who got 7 years for manslaughter, showed contrition…He forego [sic] preliminary examination because he wanted to own up to what he did and he also took the

> opportunity to use particular bits of legislation which says if you plea [sic] guilty…he could receive up to 50 percent discount off his sentence.
>
> So there is a big difference between these 2 set of circumstances."

The law

[85] In reviewing a sentence imposed by a judge at first instance, this court is guided by the principles outlined in the case of **R v Alpha Green** (1969) 11 JLR 283 at 284, in which the dictum of Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164, at page 165 of the judgment was relied on:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. **It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then the Court will intervene.**" (Emphasis supplied)

[86] In **Meisha Clement v R** [2016] JMCA Crim 26, Morrison P provided very useful steps to assist judges in the sentencing process. At paragraph [41] he stated:

> "As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines, derives clear support from the authorities to which we have referred:
>
> (i) identify the appropriate starting point;

(ii) consider any relevant aggravating features;

(iii) consider any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, any reduction for a guilty plea; and

(v) decide on the appropriate sentence (giving reasons)"

[87] The Sentencing Guidelines at Appendix A – Quick Reference Table outline the following:

Offence	**Section of Act**	**Statutory Maximum (SMax)**	**Statutory Minimum (SMin)**	**Normal Range (NR)**	**Usual Starting Point (USP)**
Shooting or attempting to shoot or **wounding with intent to do grievous bodily harm**	S. 20	Life	15 years (in the case of persons convicted of shooting with intent or wounding with intent involving the use of a firearm) *S. 20(2)	5 – 20 years	7 years (other than when SMin applies)

[88] In **Courtney McLeod v R** [2018] JMCA Crim 23, the appellant, who was convicted of wounding with intent to cause grievous bodily harm, was sentenced to seven years' imprisonment at hard labour. He challenged the sentence imposed. The appellant, who was 18 years old at the time of the offence, had stabbed the complainant with a knife in

the course of a confrontation involving a group of schoolboys. The complainant was admitted to hospital where he remained for four days, undergoing surgery and receiving treatment. The judge in that matter had used a starting point of 10 years. At paragraph [18] of the judgment Morrison P stated:

> "Although the sentencing exercise in this case predated both the decision in **Meisha Clement v R** and the subsequent publication of the Sentencing Guidelines, the structure of the judge's sentencing remarks strongly suggests that she would have had in mind the general approach distilled by them. However, as Mr Wilkinson correctly pointed out, the usual starting point for wounding with intent indicated in the Sentencing Guidelines is in fact seven years and not the 10 years chosen by the judge. While the judge would not have had access to the final version of the Sentencing Guidelines, it seems clear that, as the guidelines themselves indicate (at paragraph 7.5), '[t]he suggested usual starting points reflect experience gathered over time as well as previous sentencing decisions of the Court of Appeal'. So, although the judge may not have had access to the guidelines (which were still in draft form when the judge sentenced the appellant in this case), there is some indication from them that the starting point chosen by her may have been on the high side."

[89] Later on in the judgment, Morrison P referred to the decisions of this court in **Raymond Whyte v R** [2010] JMCA Crim 10 and **Ernie Williams v R** [2011] JMCA Crim 37. In **Raymond Whyte v R** the applicant had brutally attacked a woman with whom he had had a romantic connection. He used a cutlass to chop her severely on her left hand and to beat her. The complainant in that case had to undergo two rounds of surgery over seven months at the end of which her left hand could hardly be used. He unsuccessfully appealed the sentence of 12 years which had been imposed.

[90] In **Ernie Williams v R** a dispute arose between the applicant and his brother. The applicant stabbed his brother in the back with one of their mother's kitchen knives. Medical evidence at the trial revealed that the brother had suffered four stab wounds to his back. The applicant unsuccessfully appealed a sentence of seven years' imprisonment. Commenting on both cases, Morrison P stated at paragraph [26] of the judgment,

> "In our view, both of these cases are…plainly distinguishable in favour of the appellant in this case. **Raymond Whyte v R** was a case of a wounding of the utmost severity, far more so than this case. The court's observation that offences of that nature would 'regularly attract sentences of between 8 and 12 years imprisonment' suggests to us that, in a far less serious case of wounding such as the one committed by the appellant in this case, a sentence somewhat below the bottom end of that range might be more appropriate. And, perhaps even more to the point, **Ernie Williams v R** seems to us to be a clear demonstration that the sentence of seven years' imprisonment in the circumstances of this case, against the backdrop of less severe injuries and the several mitigating factors which we have identified, was significantly outside of the usual range of sentences."

[91] What if, in the process of arriving at a sentence, a judge fails to indicate a starting point? **A v R** [2018] JMCA Crim 26 provides useful guidance in treating with this issue. Brooks JA explained that:

> "[17] …A starting point for sentencing was one of the steps stipulated in **Meisha Clement v R.** It is accepted that this case predated the decision in **Meisha Clement v R**, but that does not prevent the application of the sentencing procedure so lucidly set out in that case. **It must also be said that the failure to use a starting point, by itself, will not necessarily result in a sentence being set aside**…."

Analysis

[92] The trial and sentencing of the appellant predated both **Meisha Clement v R** and the Sentencing Guidelines. However, the principles outlined in **Meisha Clement** were distilled from a review of the approach of decided cases over the years. It is a similar position in respect of the Sentencing Guidelines, which were published in December 2017. The principles in both **Meisha Clement** and the Sentencing Guidelines are therefore still helpful to our consideration of the issues in this matter.

[93] Section 20 of the Offences Against the Person Act provides that the maximum sentence that can be imposed for the offence of wounding with intent to do grievous bodily harm, is life imprisonment. The Sentencing Guidelines indicate that the normal range of sentences for this offence is five to 20 years, with the starting point being seven years, except for circumstances in which the statutory minimum applies.

[94] The judge did not identify a usual starting point; however, by itself, this does not mean that the sentence should be set aside. We would need to examine the approach that he followed so as to determine whether he erred in principle, and whether the sentence imposed is excessive so as to warrant our interference.

[95] The judge clearly considered the aggravating features of the offence as well as the personal mitigating circumstances of the appellant. He took into account the following:

i. The good and bad reports from the same set of persons in the appellant's community;

ii. The situation was not one where the appellant was inflicting corporal punishment;

iii. The appellant caused harm to a mere 2-year-old child;

iv. The appellant's act was deliberate and cruel;

v. The complainant's hands were tied up to the chair with the use of duct tape;

vi. The appellant hit the complainant on both arms, brought the stick down on the complainant's arm, causing both the stick and her arm to be broken; and

vii. While the complainant may not have appeared to have been mentally scarred, what had happened to her was something that she would remember for the rest of her life.

[96] In our view, there were no mitigating circumstances in relation to the offence itself. There were, however, good reports from the community, which were personal mitigating circumstances for the appellant. On the other hand, there were several aggravating circumstances which had to be taken into account. Apart from those matters outlined by the judge, Dr Sawh had also testified that, as at April 2010, the fractures had not been healing properly.

[97] If the judge had utilized a starting point of seven years, as outlined in the Sentencing Guidelines, the personal mitigating circumstances of the appellant could not have resulted in much of a reduction from that point. On the other hand, the aggravating circumstances, which were severe and many, would, in all likelihood, have led to an increase in the number of years of imprisonment imposed. We agree with the position taken by the judge that, in all the circumstances, this was a case which merited a custodial sentence. It was a wounding of some severity, inflicted on a very young child - a two-year-old. In addition, the child was strapped to a chair while being hit by a mop stick. This was a serious case which merited a sentence of seven years' imprisonment with hard labour.

[98] We find that the judge did not err in principle and, as a result there is no basis on which to interfere with the sentence imposed. For these reasons, this ground of appeal fails.

[99] It was for all of the above reasons that we made the orders outlined in paragraph [2] herein.