ANGUILLA

IN THE COURT OF APPEAL

HCRAP2006/001

BETWEEN:

GLEN RICHARDSON

Appellant

and

REGINA

Respondent

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal
The Hon. Mr. Errol Thomas	Justice of Appeal [Ag]

Appearances:

Ms. Nicole Sylvester and Ms E. Fontaine for the Appellant
Mr. Evans B. Welch Jr. and Ms. Vernette Richardson for the Respondent

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2007: October 22;
2008: April 7.

Criminal Appeal – Sexual Intercourse with a minor – Sections 142 (1) and 143 (1) Criminal Code Anguilla CAP C140 – Appeal against conviction – whether unsafe or unsatisfactory - whether the trial judge erred in rejecting a no case submission – lack of particularity and specificity of dates in count 4 on the indictment – Appeal against sentence – sentence was excessive – Whether summation was unfair – whether a material irregularity occurred at the trial

The appellant was charged with four counts of having sexual intercourse with a minor. The virtual complainant (VC) Kenra Webster was born on the 15th January 1989. One of the main issues of contention was that the precise date on which one of the incidents took place was uncertain. It was on a day unknown between 15th January and 28th February 2003. The second issue is that a particular incident which took place in her bedroom was not told to anyone at first instance. This,

the VC said was because she was afraid. The appellant argued that a no case submission at the trial should have been upheld as the jury would have to speculate in light of the evidence adduced.

Held: allowing the appeal to the extent that:

(a) the conviction on the fourth count is quashed (Rawlins JA and Thomas JA (Ag); Barrow JA dissenting); and

(b) concurrent sentences of 8 years imprisonment on count one, 9 years on each of counts two and three are substituted for those imposed by the learned trial judge.

R v Galbraith [1981] 1 WLR 1039 applied
R v Cooper [1969] 1QB 267, 271 distinguished
R v Radcliffe [1990] Crim. LR 524 distinguished
Kwong Kin-Lung v The Queen [1996] UKPC 39 considered

JUDGMENT

[1] **THOMAS, J.A. [AG]**: The appellant, Glen Richardson, was charged with four counts of having sexual intercourse, at diverse places in Anguilla with a minor, Kenra Webster, contrary to section 142 (1) and 143 (1) of the Criminal Code, Revised Statutes of Anguilla, Chapter C140. ("the Code") The dates specified in the four counts were on a day unknown between 1st and 31st October 2001, a day unknown between 1st September and 31st December 2002, and a day unknown between 15th January and 28th February 2003.

[2] The trial of the accused/appellant took place between 6th and 9th June 2006 before Creque J. and a jury and he was found guilty on all four counts. Then on 20th June 2006 he was sentenced by the Court to a term of ten years on each of the counts one to three and nine years on the fourth count. The terms with respect to the second, third and fourth counts were ordered to run concurrently, and that with respect to the first count was ordered to run consecutively to the other terms.

[3] Mr. Glen Richardson has now appealed. Of the eight grounds of appeal, learned counsel for the appellant Ms. Nicole Sylvester, informed the Court at the start of her address that grounds three and four will not be pursued and that grounds two, five and seven will be

argued together. Therefore, the grounds of appeal argued relate to: the lack of particularity in Counts 2 and 3 on the indictment, the rejection of the no case submission by the learned trial judge, the conviction being unsafe and unsatisfactory, the sentence being unsatisfactory, the summation being unfair and a material irregularity occurring at the trial. These will be analysed in turn.

Ground 2: The learned trial judge erred in rejecting the No Case Submission on behalf of the appellant and found on the evidence led by the Prosecution that it was sufficient and of a quality on which a reasonable jury could convict.

[4] In submitting that the learned trial judge erred in rejecting the no case submission learned counsel makes references to different aspects of the evidence of the virtual complainant, Kenra Webster, both in evidence-in-chief and cross-examination. The first of these relates to an incident with the appellant at Island Harbour "in the month of January 2003." The second relates to an incident in Kenra's bedroom and the fact that this was not told to anyone because she was afraid. Then in cross-examination her admission that contrary to her evidence-in-chief, she did not tell the police that the accused had sex with her between 15th January and 28th February 2003. Thirdly, in relation to the incident in her bedroom, her inability to say whether it was in the first, second or third week in January.

[5] In the circumstances learned counsel, Ms. Nicole Sylvester, further submitted that the jury would have to speculate in light of the evidence adduced and as such would have entered into the realm of speculation. Counsel submitted that for these reasons, the no case submission should have been upheld by the learned trial judge.

[6] In written responses, learned counsel for the respondent, Mr. Evans Welsh submitted tersely that the fact that the virtual complainant could only remember the time span during which the offence occurred and not the date of the occurrence is, if anything, purely a matter of the weight to be attached to her evidence and was essentially an issue for the jury. Accordingly, he contended that such a circumstance was not a basis upon which a no case submission can succeed.

[7] It is also submitted that while this virtual complainant's age was an important ingredient of the offence and that therefore the date of its occurrence was relevant, the virtual complainant would have remained within the relevant statutory age throughout the period particularized in the counts.

[8] In reply the appellant submitted that it is erroneous to advance 'in the light of the specifics of the virtual complainant's testimony and the appellant's defence to it, the larger issue was essentially one of fact – did the events occur or not.' It is further contended that given the fact that the virtual complainant is a child giving details of sexual acts and varied accounts, the child could be transposing to the appellant experiences which she had with others or fantasising about experiences with the appellant.

[9] Learned Counsel on both sides refer to the case of **R v Galbraith** as enunciating the law on no-case submissions. The relevant learning is that of Lord Lane CJ at page 1042:

> "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 the 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 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."

[10] It will be recalled that the issue with the evidence is the lack of specificity as to when the alleged acts of sexual intercourse took place. This excludes the "no evidence" limb of **Galbraith** and activates the second limb which contains certain principles. In particular, it speaks of the circumstance that 'the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability'. And the limb goes on to say that 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.

[11] At the end of the no case submission this is precisely what the learned trial judge did. This is her ruling:

> "… I have considered the evidence, particularly that of the virtual complainant, but taking all of the evidence in its totality, notwithstanding that there is a lack of specificity as to specific dates, nonetheless, there are time periods which, to my mind are adequately made out in the evidence and as such applying the applicable principles which has (*sic)* been set out in the *Queen v Galbraith* which has been followed by our courts time and time again and taking into account the statement made by the learned judges in the *State v Mitchell* it is my opinion that there is sufficient evidence on which a reasonable jury properly directed might convict in this case. As such, it is a matter to be properly left to the jury and I so do. The Defendant is accordingly called upon to make his defence."

Was the learned judge correct in rejecting the No Case Submission?

[12] Clearly, the answer to the question posed depends on compliance with the requirements of the law. In this regard in **Blackstone's Criminal Practice 2004**, the following learning is recorded at paragraph D14.27 at page 1465:

> "It is clear from Lord Lane's judgment that it is no longer appropriate to argue on a submission of no case that it would be unsafe for the jury to convict, if only because that tempts the judge to impose his own views of the witnesses' veracity (see especially p. 1041 B-C). But it is submitted that the second limb of the *Galbraith* test still leaves a residual role for the judge as assessor of the reliability of the evidence. If that is so, the judge is not obliged to accept everything a prosecution witness has said, however implausible, but may at least ask whether it is too inherently weak or vague for any sensible person to rely on it. In other words, he should give the witness's evidence the greatest weight that any reasonable jury could give to it but need not pretend to believe arrant nonsense."

[13] And addressing the interpretation of the *Galbraith* test in **Shippey** the same learned editors say this:

> "Turner J took a more robust view. He said that 'taking the prosecution's case at its highest' did not mean 'taking out the plums and leaving the duff behind'. It is for him to assess the evidence and, if it was self-contradictory and out of reason and all common sense' then he could properly conclude that it was inherently weak or tenuous within the meaning of the second limb of Lord Lane's test. Moreover, in

forming his judgment, he could take into account both internal inconsistencies between one prosecution witness and another."

[14] Giving an opinion on the ***Galbraith*** test as far back as 1988 in the Guyana Court of Appeal, Massiah C must be considered to be part of the vanguard in this respect. This is his approach in **The State v Mitchell** after a review of the authorities:

> "A distillation of the principles stated in those authorities, stripped of whatever philosophical or esoteric content some may conceive them to possess yields the following. A trial judge ought to send the case to the jury where in his opinion there is sufficient evidence upon which a reasonable jury, properly directed, *might* convict. I place emphasis on the word 'might' and on its subjunctive character. The trial judge ought, on the other hand, to withdraw the case, if the evidence is so unsatisfactory or unsound (established through cross-examination or otherwise) that no reasonable jury could convict on it, or if the evidence, even if believed is so weak, tenuous or insufficient, that it cannot yield a lawful conviction. I have no desire to go beyond those established concepts, and it is on that fundamental level that the evidence must be examined and the question answered."

[15] It may therefore be said that the requirements embodied in the *Galbraith* test involve the trial judge forming an opinion, in the context of a no case submission, as to whether on the state of the prosecutor's evidence the case ought to be put to the jury. It involves a consideration of all of the evidence – the plums and the duff, the internal inconsistencies in a witness's testimony as well as the inconsistencies between witnesses. And at the end of the day the opinion must relate to whether on the state of the evidence a jury properly directed might convict the accused.

[16] The learned trial judge in giving her opinion said that she considered the evidence, especially that of the virtual complainant, but that on a consideration of the totality of the evidence, even without the specific dates, she considered that there were time periods which to her mind were 'adequately made out'.

[17] The totality of the evidence at that stage of the trial consisted of the testimony of the following witnesses: Parris Webster Richardson (the virtual complainant's mother), Judith Ruan, a female police officer, Kenra Webster, the virtual complainant, and Urmin Webster.

[18] Ms. Parris Webster Richardson, the wife of the accused admitted in cross-examination that she took Kenra to St. Maarten and went on to say: "She was missing her period so before them go to the States I just wanted to make sure that she was okay". She however denied that the appellant accompanied them to St. Maarten.

[19] The police officer's evidence centered essentially on the report made by the virtual complainant and the interview of the said virtual complainant in the presence of her step mother, Urmin Webster.

[20] In evidence-in-chief the virtual complainant gave evidence of four instances of sexual encounters with the appellant. She testified that the first was in October 2001 at home when the appellant came into her room asked her for wife which she understood to be sex and on which occasion he told her what to do in terms of her clothing. The second occasion was in September 2002 on Scrubb Island having journeyed there by boat. The third event, according to Kenra Webster was at Captain's Bay between September and December 2002 having journeyed there in her mother's car driven by the appellant. The fourth instance of sexual intercourse was again in her room at home at Island Harbour in January 2003.

[21] The virtual complainant was cross-examined by Mr. Hamilton on these incidents and related events. There was specific cross-examination in relation to the incident which the virtual complainant said took place in 2003.

[22] In this regard, learned counsel sought to show that Kenra Webster had made other statements in the Magistrate's Court and that she had not told the police about the incident.

[23] First, in relation to the Magistrate's Court testimony, Ms. Webster agreed that she told the Magistrate that she did not recall the incident between 15th January and 28th January 2003. However, she went on to say that she had corrected herself in relation to the month and date which she did before the Magistrate.

[24] In relation to the statement given to police officer Ruan, it was put to the virtual complainant that in her statement of 8th June 2004 she never told the officer of the said incident. Initially, her response was in the affirmative but when the statement was shown to her she agreed that it was not told to the police. It was later again put to the witness and she confirmed that she did not report the incident.

[25] Concerning the incidents the witness maintained that the appellant did ask her for sex and the acts did take place. However, there were discrepancies in terms of the dates. In particular, the witness testified that with respect to the Scrubb Island incident she could not recall precisely the day or month or whether it was between September and December, 2002. Further, as regard the appellant coming to her room, she could not recall the time of night or the time of month in 2003. This latter discrepancy is particularly significant as it relates to count four which alleges that at the time of the offence the virtual complainant was between 14 and 16 years old.

[26] In the course of her cross-examination, Kenra Webster testified that she had told Glen Richardson that she did not see her period before she left Anguilla. However in evidence-in-chief the witness testified about her conversation with the appellant concerning the non-appearance of her period, his response and subsequent visits to St. Maarten to see a doctor. But while there was cross-examination on the dates of the incidents, statements to police and testimony in the Magistrate's Court, she was not cross-examined on her conversation with the appellant. This evidence was part of the 'totality' of the evidence considered by the learned trial judge. Indeed, it is considered sufficiently important that it be reproduced herewith in part.

[27] The evidence identified begins at page 108 of the Transcript and ends on page 110 with the questions being asked by the Prosecutor, Ms. Holder:

> "Q. Kenra, these incidents that Glen Richardson had sex with you, do you know if he ever wore a condom?
> A. No, Ma'am, he didn't.
> Q. After that incident, tell the jury what, if anything, happened?

A. I told Glen that I did not see my period.

THE COURT: You told who?

The WITNESS: Glen and he said it could not be because he did not come inside of me.

THE COURT: Because he did not?

THE WITNESS: Come inside of me.

THE COURT: Yes.

THE WITNESS: And then he said that he was going to take me to St. Maarten to a doctor to give me a shot to bring down my cycle.

BY MS. HOLDER:

Q. And did you – after he told you that, did you go to St. Maarten?

A. Yes, Ma'am.

Q. With whom?

A. Glen Richardson and my aunt, Lillian Webster.

THE COURT: You went to St. Marten with Glen?

THE WITNESS: Richardson

THE COURT: And your aunt you said?

THE WITNESS: Yes, Ma'am, Lillian Webster.

BY MS. HOLDER:

Q. What happened in St. Maarten?

A. When we got to the doctor's office I did not get to see the doctor because the doctor's office was closed.

Q. What happened after that?

A. Then my mom and my aunt Lillian –

MR. HAMILTON: Your what?

THE WITNESS: My mother and my aunt Lillian took me back to St. Maarten the next day to see a doctor, and I still did not get to see the doctor because the office was full.

BY MS. HOLDER:

Q. After that, did you remain in Anguilla?

A. No, Ma'am

Q. Where did you go?

A. To St. Thomas.

Q. Who you went to in St. Thomas?

A. My aunt, Jessica Richardson.

Q. Did you remain in St. Thomas?

A. No, ma'am

Q. Where did you go?

A. To Texas by my father.

Q. Where?

A. To Texas.

Q. To who in Texas?

A. My father and my stepmother Urmin Webster."

Conclusion

[28] As noted above, the second limb of **Galbraith** and the various interpretations thereof suggest that the trial judge is required to form an opinion as to whether on the evidence before the Court a jury properly directed might convict. It thus requires a full consideration of all of the evidence in this case "the totality of the evidence."

[29] Before the Court was the evidence of the virtual complainant with some doubt created about the dates of the various events between the virtual complainant and the appellant. More importantly, however, is the uncontradicted evidence of Kenra Webster that after she told the appellant that she did not have her period his response was to doubt it because, according to her, he said 'he did not come inside me'. Then there was the question of the appellant taking Kenra to St. Maarten to see a doctor to give her a shot 'to bring down my cycle'. And of the two visits to St. Maarten the appellant accompanied Kenra on one occasion.

[30] Learned counsel for the appellant, Ms. Sylvester, in her submissions placed great emphasis on the discrepancies or lack of certainty regarding the dates of the events. This according to learned counsel would have led the jury to speculate. But the fact is that this case involves sexual offences and as the learning shows, it is a matter of credibility as between the two persons involved where the offence would have taken place in private. Therefore, as learned counsel for the respondent, Mr. Welch contends the discrepancies or uncertainty go toward the matter of weight which the jury would attach to the evidence.

[31] Having regard to the submissions of learned counsel for the accused at the no-case stage and those of Ms. Sylvester at the appeal stage, it is clear that a difficulty was perceived with respect to the fourth count.

[32] The fourth count is under section 143(1) of the Code and, unlike section 142(1) of the same statute, the age of the victim must be between fourteen and sixteen.

[33] The evidence is that Ms. Kenra Webster was born on 15th January 1989 so that on 15th January 2003 she was then aged 14 and therefore section 143(1) of the Criminal Code covered her circumstance.

[34] That there was sexual intercourse between the appellant and Kenra Webster is not open to doubt. What creates doubt is the uncertainty as to the dates when one of the sexual acts took place. This is because counts one to three rest on section 142(1) of the Criminal Code under which the age requirement in relation to the victim is under 14. Therefore there can be no legal difficulty with respect to the acts which took place between 2001 and 2002 when the virtual complainant was within that requirement. But the uncertainty as regards the fourth count creates a different situation since 143(1) of the Code prescribes the age requirement as being between 14 and 16. Therefore, the constituents of the indictment which alleges that the sexual act took place between 15th January and 28th February, 2003 when the virtual complainant was between 14 and 16 must be proven by the prosecution beyond a reasonable doubt. In this regard the virtual complainant's uncertainty as to whether the sexual act took place on or after her birthday negatived this legal requirement.

[35] Therefore, having regard to the nature of the evidence before the Court, it cannot be said that the learned trial judge correctly applied the test in the second limb of **Galbraith** in relation to counts one to three but not in relation to count 4. I am therefore of the view that the learned trial judge fell into error in rejecting the no case submission on count four.

Ground 5: That the conviction of the appellant by the jury on the evidence led is unsafe and unsatisfactory in all respects as there was no credible evidence upon which the jury could convict

Submissions

[36] In support of this ground the appellant submits the following: 1. The inability of the appellant to raise a defence on the issue of alibi evidence thereby creating a material irregularity and thus a miscarriage of justice. 2. The appellant was prejudiced by the fact that on the second, third and fourth counts of the indictment the appellant was deprived of the ability to rely on alibi evidence and as a consequence the appellant was not able to conduct his defence fairly or at all. 3. The case does not involve recent complaint rather it is a case in which the virtual complainant had sexual intercourse with more than one person. 4. The evidence adduced at the trial lacked the necessary credibility and cogency because evidence was led regarding the dates of the offences despite objection from counsel for the appellant, the width of the dates specified in the indictment, discrepancies in the evidence of the virtual complainant and the failure of the prosecution to prove that the virtual complainant was between 14 and 16 for the purposes of the fourth count on the indictment.

[37] In response, learned counsel for the respondent submitted the following: 1. The matters raised by the appellant relate essentially to matters within the province of the jury – credibility and reliability of the virtual complainant and the weight to be attached to her evidence. 2. The Court of Appeal is being asked to retry matters within the province of the jury which must be rejected because there is an explanation for the delay in reporting the matter, the virtual complainant admitted all the persons with whom she had sex and there was no conflict between that evidence and that relating to the appellant, the fact that the virtual complainant said that Conejo was the father of her child is of no consequence. 3. Section 36(1) of the Eastern Caribbean Supreme Court Act is not to be interpreted as giving the court licence to upset verdicts of the jury, rather it must be exercised in limited circumstances with caution.

[38] Given the fact that the appellant's submissions relate essentially to the verdict being unsafe and unsatisfactory, it will be examined under the following sub-heads: 1. The width of the dates in the indictment. 2. The virtual complainant's evidence. 3. The learned trial judge's directions to the jury regarding the virtual complainant's evidence.

Dates

[39] Section 4(1) of the **Indictments Act** (RSA) Cap. 110 provides that:

> " Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

[40] Learning on this issue is also contained in Blackstone's Criminal Practice 2004 at paragraph D10.9 and reads thus:

> "In order to provide reasonable particulars of the offence charged, the court should state the date on which it occurred insofar as it is known. Normal practice is to give the day of the month, followed by the year (e.g., 'on 1 January 2003'). If the precise date is unknown, it is sufficient to allege that the offence occurred 'on or about' a specified date, or 'on a day unknown' before a specified date, or 'on a date other than the date in count one', or 'on a day unknown between' two specified dates. If the last-mentioned formula is adopted, the days specified should be those immediately before the earliest and immediately after the latest days on which the offence could have been committed. Thus, if the accused is found in possession of stolen goods on 31 December 2003 and the prosecution case is that the goods were stolen on 1 January 2002, a count for handling would allege that he received the goods 'on a day unknown between 31 December 2001 and 1 January 2004'.
>
> If the evidence at a trial as to time differs from the date laid in the count, that is not as a rule, fatal to a conviction (*Dossi* (1918) 13 Cr App R 158). There may, however be cases in which the allegation as to date is not merely procedural, but may determine the outcome of the case, for example where the age of a victim is important.
>
> It has, however, been stated that, where the formula 'on or about' a date is used the evidence must show the offence to have been committed 'within some period that has a reasonable approximation to the date mentioned in the indictment' (per Sachs JL in Hartley [1972] 2 QB 1 at p. 7). Where the defence may have been prejudiced in the preparation of their case by a divergence between the evidence as to time and the date specified in the count, it is submitted that the trial should be adjourned to allow them to respond to the altered situation. Alternatively, it might be necessary to discharge the jury and have a second trial on an amended indictment. Failure to allow the adjournment could result in the quashing of any resultant conviction as being unsafe or unsatisfactory. The above propositions are derived from *Wright* v *Nicholson* [1970] 1 WLR 142 …."

[41] The foregoing shows that the manner in which the indictment stood after the accused was put in charge of the jury accords with the law. Indeed the original form did not and based on submissions by learned counsel for the accused, the Court ruled that with respect to the then first count "…the time frame was too vague as it would cause prejudice to the accused in mounting his defence to it given the underlying evidence on the depositions." The factual basis of the ruling was that the period in issue covered an entire year.

[42] The four counts which the accused ultimately faced related to the following time periods: Count 1 – 1st and 31st October 2001; Counts 2 & 3 – 1st September 2002 and 31st December 2002 respectively; Count 4 - 15th January 2003 and 28th February 2003.

[43] The law requires reasonable particulars given the material consideration of the accused's defence. And with the time periods in this instance of three months or less, the issue of vague particulars would be unwarranted given all the circumstances.

Virtual Complainant's Evidence

[44] The virtual complainant's evidence has already been noted and as such there is no need to repeat it and it suffices to say it related to all four counts on the indictment. Likewise the discrepancies in relation to the evidence in the Magistrate's Court and the nature and extent of Ms. Webster's report to the police were noted above. But the law is that whatever a witness says in Court is the evidence in the case and other statements or evidence merely go towards the issue of credibility of that witness. It then depends on the nature of the directions to the jury in terms of the evidence generally and the discrepancies in particular.

Judge's directions

[45] In the course of her summation the learned trial judge told the jury this:

> "Now, if you believe and you accept the evidence of the virtual complainant, Kenra Webster, then subject to the warning which I will give to you later on when I give you further directions, it is open to you on her evidence alone to find the defendant guilty of the charges if you consider that they have been made out, and I will tell you why I say that when I come to deal with the elements of the offences which have been charged proof of which must be established by the Prosecution**."**

[46] The learned trial judge then went on to give an overview of all the counts and the elements thereof and in so doing pointed out the special nature of the fourth count in terms of the age as prescribed by law for this offence and then with each offence as stated in the indictment. And later in the summation the learned trial judge outlined the evidence adduced in relation to each count.

[47] The warnings alluded to by the learned trial judge in relation to the evidence of the virtual complainant were as follows:

> "Now you would remember that she was cross-examined about the statement that she gave to the police in terms of whether she said that the Defendant had sex with her between 15th January 2003 and 28th February 2003. And she agreed with defence counsel that she did not report to the police that the Defendant had sex with her between 15th of January and 28th February. She hadn't reported that. Then she was questioned about what she said in her deposition in the Magistrate's Court. Now what transpired there is that she said she couldn't recall any incident after 15th of January, but then, she also said in her evidence before the court, she corrected herself. So you would determine what all you make of that."

[48] The learned judge continued:

> **"**Now, I also want to urge upon you caution in considering the evidence, because this case as I said is based solely on the evidence of Kenra. You take the time frames when it is reported. These incidents of course are incidents which happened when they were alone together. You have also a lack of specifics in terms of surrounding circumstances."

[49] The final warning is in these terms:

> "In cases of this nature, I must warn you that it is, because of the very nature of the act, it is a sexual offence. They are sexual offences. They take place in private. One person's word against the other. They are allegations that are very easy to make. They are by that same token very difficult to refute those allegations. So it is for all those reasons that I think it's appropriate to warn you to exercise caution in your consideration of the evidence and of the danger of convicting or acting on the

evidence of Kenra alone. But as I have said, if having taken that caution into account and having considered all of the evidence and all the surrounding circumstances, if you believe the evidence of Kenra that these things happened to her and that the accused was the person who committed these acts, then it is open to you on her evidence alone to find the Defendant guilty."

[50] The phrase "unsafe or unsatisfactory" is part of a common statutory provision which empowers a Court of competent jurisdiction to set aside the verdict of a jury. It is contained in English legislation and has been interpreted accordingly by the English Courts.

[51] The case of **R v Cooper** is generally accepted as the locus classicus of the test to be applied in applying the statutory provision. It was articulated by Lord Justice Widgery in these terms:

> "…[W]e are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court in the end must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

[52] The submissions on both sides, as noted before, cover a myriad of issues to be subsumed under this test. But the best must be done in the circumstances. Learned counsel for the respondent makes the submission that many of the issues raised by the appellant under this ground of appeal go to matters within the province of the jury. But that is the very point of the statutory provisions.

[53] The various issues must now be examined for the purposes of the test of unsafe or unsatisfactory.

[54] The matter of the width of the dates with respect to the various counts has already been analysed and determined to be reasonable and noting the fact that the learned trial judge

disallowed one count wherein the period spanned a year. Her reason for so doing rested on the matter of mounting an effective defence over such a period.

[55] With the narrowed dates the appellant was able in his defence not only to deny that he had sex with Kenra, but he was able to give his hours of work, the fact that up to five men worked with him and the fact that he could not go to a certain place at the material time of year and that with the type of fishing in which he engaged required more than one person and as such would not have gone there with Kenra.

[56] As far as the virtual complaint's evidence is concerned, although accurate dates were not given, she gave details of the events between herself and the appellant during the periods concerned. This is not to minimize the nature of the discrepancies. And critically she was cross-examined by the learned counsel, Mr. Dane Hamilton.

[57] The issue of sexual intercourse between Kenra and Conejo arose when the former was asked to name her other partners. She did not lie about this. She said who they were and Conejo was one of them. Nor did she hide the nature of her conversation with the appellant concerning the missing of her period, his response and the trip to see a doctor accompanied by him and her aunt. The trip to St. Maarten was denied by the appellant but his wife did testify that she took Kenra to St. Maarten to see a doctor but the appellant did not accompany her.

[58] But even if Conejo had sex, he is not charged and his episode was subsequent to January and February 2003. In any event, the legal issue before the court is not paternity.

[59] Great attention has been paid to the learned trial judge's directions to the jury. Importantly, the learned trial judge drew the discrepancies to the jury and having done that she said: "So you would determine what all you make of that." She also cautioned the jury about considering the evidence as it is based solely on the testimony of Kenra Webster. She cautioned further on convictions in relation to sexual offences given the fact that such acts take place in private.

[60] Even more importantly the learned trial judge dealt with the offences in detail – the elements as laid down by the law. Further, the learned trial judge drew the distinction in law as to the age threshold between counts one, two and three on the one hand and the fourth on the other. She explained that the latter count related to the ages between 14 and 16 and that on Kenra's birthday on 15th January 2003 she would have been 15 years old thus within the statutory requirement.

[61] This lets in the case of **R v. Radcliffe** which was cited by learned counsel for the appellant in the face of what was perceived to be a difficulty with count four. But the immediate point about the **Radcliffe** case is that in the face of a number of counts spanning different ages within a context of certain statutory prescriptions, the learned trial judge told the jury dates in the indictment were immaterial. The accused was convicted and on appeal it was held that the direction gave the jury the impression that the dates of the events mattered not.

[62] In this case the learned trial judge did no such thing, she made it clear that Kenra's age did matter in relation to all of the counts.

[63] Given the context, one of the relevant cases is **Kwong Kin-Lung v The Queen**– an appeal from the Court of Appeal of Hong Kong. The case concerns the conviction of the appellant for rape on the uncorroborated evidence of two sisters aged sixteen and seventeen.

[64] There were many weaknesses in the Crown's case. Neither sister complained to the police until three months after the alleged rape. One sister met her boyfriend shortly after the alleged rape. She complained to him that she had been assaulted but made no mention of rape. She said that she had sexual intercourse with the appellant on a previous occasion but could not remember the time and place and when she returned home she made no complaint of rape to her parents. Moreover, there were discrepancies in the evidence. The sisters contradicted each other. There were also inconsistencies between

the evidence of each sister and their statements to the police. But each sister insisted throughout in evidence that they had been raped in turn.

[65] The Court of Appeal refused leave to appeal by a majority. They reasoned that they were not persuaded that the jury's verdict was perverse. The minority judge said that he had a 'lurking doubt'.

[66] In the Privy Council, their Lordships indicated that they were persuaded that the flaws in the prosecution's case needed to be considered in the light of the common thread in the evidence of the sisters which would give a balanced assessment of the Crown's case. Both sisters agreed on the identity of the persons present in the flat with the appellant being present throughout. The sisters went on to give evidence in detail about assaults, a tea ceremony, being raped, signing on an IOU by both of them, and the attendance of the appellant at the flat.

[67] The question before the Board as it was before the Court of Appeal of Hong Kong was whether the conviction was 'unsafe and unsatisfactory' as prescribed by section 83 of the **Criminal Procedure Ordinance** Cap. 221.

[68] Lord Steyn, for the Board, reasoned in this manner at paragraphs 14 to 16 with respect to the test of 'unsafe or unsatisfactory' within the meaning of the statute:

> "Thus in Stafford v Director of Public Prosecutions [1974] A.C 878 at page 912 Lord Kilbrandon summarized the test to be applied by each member of the appellate court as follows: 'Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction is unsafe or unsatisfactory?' Ultimately, their Lordships conclude, that words of the statute must govern the position. Refining his argument Lord Thomas said that the majority ought to have posed the question whether the conviction was unsafe or unsatisfactory. Instead, he argued, they considered a different and higher test, namely whether the verdicts of the jury can be said to be perverse. Their Lordships disagree. The statutory test was invoked by the grounds of appeal and a skeleton argument filed on behalf of the Appellant. The majority expressly examined the contention that:- 'the convictions are unsafe and unsatisfactory in that the jury acted perversely in relying on the uncorroborated evidence of the sisters and that there must therefore be a lurking doubt as to the guilt of the applicant'.

> The test whether each member of an appellate court considers the verdicts 'unsafe or unsatisfactory' is part of the very alphabet of the criminal law. The majority would have not lost sight of it. Indeed, it is clear that in considering whether the verdicts were perverse the majority were simply applying the statutory test in the context of the particular case before them. The statement that the verdicts were not perverse was shorthand for saying that there was evidence upon which a properly directed jury (as this jury was) could conscientiously have convicted. Given the evidence, and the verdict of the jury, they regarded the convictions as safe. They therefore posed no different or higher test than that envisaged by the statute. The real difference between the majority and Penlington J.A. was that the majority, as a matter of judgment accorded a higher degree of deference to the verdict of the jury – than Penlington J.A. did. That difference of degree in reasoning raises no issue of principle of law. And the reasoning of the majority cannot be faulted. It follows that their Lordships reject Lord Thomas' principal submission. *Prima facie* that is the end of the matter and their Lordships need not consider the *minutiae* of the case. But Lord Thomas submitted that it can be demonstrated that there are substantial grounds for thinking that there might have been a miscarriage of justice. It is unnecessary to consider the legal basis of this submission. Given the state of the evidence, the terms of the summing up and the verdicts of the jury, there is no reason to doubt that the convictions were safe and satisfactory."

[69] Given the extensive quotation from the **Kwong Kin-Lung** case, it is necessary to restate the weaknesses of that case: there was no report to the police until three months after the alleged rape; one sister told her boyfriend about being assaulted but no mention of rape; no complaint was made to the parents; there was no corroboration of the allegations; there were numerous discrepancies in the evidence; the sisters contradicted each other both in their evidence at trial and in their statements to the police. In the face of these difficulties their Lordships were persuaded that there was "a common thread of evidence in the evidence of the sisters."

[70] The question now becomes whether the verdict of the jury against Glen Richardson can be considered by this Court to be unsafe or unsatisfactory. The answer lies in a consideration of all the following issues: the fact that the events which started in 2001 were not reported to the police until the year 2004, the age of the virtual complainant, being 12 years when the events commenced; the evidence as a whole and especially that of the virtual complainant.

[71] The **Kwong Kin-Lung** case is in part distinguishable because there was no age qualification in that matter. In this case age permeates the entire indictment.

[72] Having regard to the evidence and the law in relation to counts one, two and three, it cannot be said that the verdicts were unsafe or unsatisfactory. However for the reasons given in the discussion of the no case submission in relation to the fourth count, I consider that the conviction on this count is unsafe and unsatisfactory and is hereby quashed.

[73] This ground of appeal succeeds in relation to the verdict on count 4.

Ground 7 – The learned trial judge's summing up was unfair and weighed against the appellant in favour of the Prosecution

[74] On this ground the submission on behalf of the appellant is that the evidence as adduced by the prosecution at no time linked the virtual complainant's pregnancy with the appellant, however, at page 323 of the Transcript, lines 15-21 the learned trial judge directed the jury: 'You also know because you have heard it from the evidence, that Kenra gave birth to a baby girl and this was on October 29th 2003. So if you take that date by which she gave birth to the baby, you would be calculating that back, you would see that by October 29th when she gave birth to her baby Keniah, that she had not made 15 years of age'. In the absence of DNA no inference ought to be drawn of paternity of the virtual complainant's baby.

[75] Learned counsel for the respondent, on the other hand submits that the learned trial judge's summation was balanced and that she put to the jury every factor, circumstance or bit of evidence which weighed in favour of the appellant. This is illustrated by the learned trial judge's directions on the delay in reporting the matter to the police and whether this affected the virtual complainant's credibility. According to him the jury was also directed to consider whether such delay could have caused a disadvantage to the appellant which would in turn have a bearing on whether they considered the prosecution made them feel sure of the accused's guilt.

[76] It is also submitted by the counsel for the respondent that the appellant received the benefit of a comprehensive good character direction and the warning about convicting on the sole evidence of a virtual complainant.

[77] Having regard to the summation as a whole it is considered that the respondent's submissions are correct. In this regard guidance is taken from the following rule from **R v Nelson**

> "The judge has no duty to cloud the merits either by obscuring the strengths of one side or weakness of the other. Impartially means no more and no less than the judge shall fairly state and analyse the case from both sides. Justice, moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence."

[78] This must necessarily begin with the context in which the learned trial judge dealt with these matters.

[79] At page 322 of the Transcript at line 5 the learned trial judge gave this direction to the jury:

> **"**So what your task is basically to marry up, as it were, the directions on the law as I have set out to you and apply those to the facts of the case which you accept as being true.
> Now, I am going to go into some points in evidence to try and assist you in your task in doing that."

[80] In terms of the appellant's evidence the learned trial Judge told the jury in part as follows:

> "Now, as I said the Defendant took the stand and he gave evidence in his own behalf.
> He tells you he had nothing whatsoever to do with Kenra at any time. He never interfered with her, never took her to Scrub Island, never took her to Captains Bay, never interfered with her at the house in Island Harbour whether in 2001, 2003 or at any time. He says the relationship was good. He treated them just as he did his own little daughter Glenisha. There was no difference. He said he went into their bedrooms, he went through all the rooms in the house. He described himself as the man of the house and so on. And he said he doesn't have a clue as to why Kenra would make these allegations against him and he is hurt by the allegations.
> He described for you the appearance, the physical appearance between Kenisha at the time and Kenra. He said that Kenisha was more developed sort of a more bigger boned person and Kenra sort of the smaller one. Kenisha was more outspoken and Kenra he said was more active. Glenisha he said is a very quiet child. That he respects them and that he would never step out of line. He said that Kenra never told him that she missed her period. So there is the dispute in

> the evidence that you **would** have to [resolve] those in terms of whom you believe, what you believe. Remember that he said that he saw – he found out, he didn't know that Kenra was pregnant until a phone call sometime 3:00 o'clock a morning when Kenra's father Ken Webster called for her mother Parris and told her Kenra is seven months pregnant. And at that time he said the name that was called was Conejo, his nephew"

[81] The learned trial Judge then went on to address the jury on the question of the dates given by the appellant and other dates given in evidence and then the other question of the delay between the alleged events and the report to the police and the further issue of prejudice to the appellant. This is the manner in which the jury was directed on the issue of prejudice:

> **"**Now, because of this, you must appreciate that there is some real danger. There is the danger of prejudice to the Defendant in terms of delay. So this possibility has to be in your mind when you decide whether the prosecution has made you sure of the Defendant's guilt. Because you are entitled to consider why nothing was said when matters didn't come to light sooner. If it was found out in, for example, September, early September 2003, why it is that nothing was said before June, 7th of June 2004. You may wish to know. Is this a reflection on the credibility of the Complainant? Does it have anything to do with the Accused or how he behaved, of his conduct? What we know and what we have been given is that Kenra said that she was afraid to say anything and so she really didn't tell anyone until she seem not to have much of a choice any more because she was now pregnant and some explanation and some inquiry needed to be carried out as to how this happened. What was the cause? So you should make some allowances for the passage of time that has occurred, because in that passage if time as you have seen the virtual complainant Kenra herself could not give you many specifics in terms of the exact day or the precise date. So memories fade over that time. So witnesses, no matter whom they are, they don't remember everything in the same pattern because our brains they are not computers so we just don't go in that orderly fashion and we may just remember things bits and pieces. We may not remember the specifics of how something occurred."

[82] The learned trial judge continued by directing the jury thus:

> "So you must make allowances for the Defendant's point of view because the longer the time since the alleged incidents the longer the time you will appreciate that the more difficult it becomes for him to answer the charges, because the time for example may deprive a Defendant of an opportunity, for example, to put forward some alibi or to say well I was some other place at a specific point in time and you can only begin to appreciate what problems are caused by the delay. So you take those matters into account in favour of the Defendant if you believe that the delay in the case is understandable. If you decide that because of this that

> Defendant has been placed at a disadvantage in putting forward his case, you take all of that into account in his favour in deciding whether the Prosecution has made you sure of his guilt."

[83] Finally, the learned trial judge told the jury about the appellant's age at the time of the alleged events and what it is presently, his good character and the fact that he had no previous convictions or arrests. She went on to explain that good character of itself cannot exonerate an accused but is merely a matter to be taken into account in his favour in that it supports his credibility. Further, it could also mean that he is less likely than otherwise might be the case to commit the crime for which he is charged.

[84] It is therefore reasonable to say that the learned trial judge put the appellant's evidence fully before the jury and indicating those evidential issues that are in favour and the manner in which they are to be dealt with. More than that, the appellant's good character was put, as was his impeccable record and how this features in their consideration.

[85] On the whole, having regard to the manner in which the summation was delivered, especially in relation to the appellant's evidence, it would be unreasonable to say that the summation was weighed against the appellant. This ground therefore fails.

Ground 1: Counts 2 and 3 of the indictment as drawn lacked particularity and specificity in that alleging that the offences were committed sometime between September 1st 2002 and December 31st 2002 made it impossible for the appellant to mount any effective defence to the said counts and undermined the fairness of the trial of the appellant

[86] The basic submission of the appellant is in reality reflected in the actual ground of appeal to say that the indictment lacked particularity and specificity which resulted in the appellant's inability to mount any effective defence.

[87] It has already been shown that the particularity and specificity contained in the indictment is what the law permits and contemplates. Accordingly, no further time will be spent on this issue. Time will however be spent on the appellant's evidence.

[88] In his defence, the appellant said that Kenra has made allegations against him which are untrue and further that he did not have sex with the said Kenra on any occasion. He added that while engaged in building boats, he normally has a staff of about five persons and his working hours are 7 a.m. to 9 or 10 p.m.

[89] In terms of his wife's working hours, he said that they are 9 a.m. to 5 p.m. or 6 p.m. He added that Kenra goes to school from 7.30 a.m. to 3.30 p.m.

[90] Concerning Scrubb Island where it was alleged he took Kenra to have sex, the appellant testified that during the time alleged it is rough sea season and that he would only go there when it was smooth which is May to August. It is to be noted that in cross-examination he said the island was three miles from Anguilla.

[91] The appellant also denied the events alleged to have taken place at Captain's Bay as during the time alleged the sea is also rough and further that his type of fishing is net fishing which requires more than one person.

[92] The appellant denied being told by Kenra about her pregnancy. Instead, he said that he received a call from Kenra's father in this connection. It was also denied that he took Kenra to St. Maarten and visiting Kenra's bedroom.

[93] It is the testimony of Glen Richardson that he first became aware of the allegations against him in June 2003 while he was in St. Maarten working and that when he returned to Anguilla he went to the police whereupon he was charged. He said further that he never threatened or beat Kenra.

[94] The appellant admitted going to St. Thomas to visit Kenra after she went away at which time there were no allegations against him by Kenra. He said that at this time also everything appeared to be normal with her.

[95] The further testimony of the appellant is that he was never arrested for any matter of this nature or at all – even at the age of thirty-three.

[96] In cross-examination the appellant said that he could not remember the date of the call concerning Kenra's pregnancy but he did learn that at that time she was seven months pregnant.

[97] It was admitted by the appellant that he has been alone with Kenra, Kenisha and Glenisha and that he has gone into Kenra's bedroom when nobody else was there as he was the man of the house and that there was nothing wrong with that.

[98] The appellant described his relationship with Kenra as being "very well" and that he has given her whatever she wants. It is his further evidence that Kenra calls him daddy and went on to deny that he ever had sex with her.

[99] It is the appellant's testimony that he misses Kenra and he is sorry that she has gone away. He described his relationship with his wife in 2001 as being "one of the best times we ever been." He added that it was the best because he stopped going out and stayed at home with his wife. He testified further that after his name was called in connection with Kenra his relationship with his wife did not change because she knew that it was not true as she was aware that he would never do that kind of thing such as having sex with his step daughter as he has a principle which he described as: "Not only step daughter nor under age."

[100] In further testimony the appellant said that he never had sex with any other woman besides Parris Webster.

[101] Mr. Richardson told the Court that he owns a house which is close to one owned by his mother and that he goes there everyday. According to him: "I there from morning to night."

[102] In terms of leaving home, the appellant said that before 2001 he used to go out with his co-workers at which time his wife would be at home.

[103] Returning to the question of sex with Kenra, the appellant said: "What I remember about this case, Ma'am is that allegations are made out against me is not true and I sitting here to defend myself, okay, because it's a - - it was shameful on me and I would like at the end of the day to prevail justice." He then proceeded to deny that he had sex with Kenra on the days alleged at Scrubb Island and at Captain's Bay.

[104] It is the further testimony of the appellant that he knew that Parris took Kenra to St. Maarten and he also knew that she did see a doctor; but was not aware as to what happened after that in terms of Kenra's period. He added that he did not know why Kenra was taken to St. Maarten to see a doctor when there were all kinds of doctors in Anguilla.

[105] Mr. Glen Richardson further testified that he knew a lady called Arlene Pemberton who was his good friend and who did all of his paper work. It is his further evidence that he was married to Parris Webster on 27th October 2002.

[106] In re-examination the appellant said that he was aware as to why Kenra's family did not like him and did not want to see him live.

[107] In response to a question from the jury the appellant testified that he was at his mother's house.

[108] The appellant's clear contention is that he never had sex with Kenra Webster. Not only that, he also said it was not possible for him to go to Scrubb Island due to rough seas at the time of the incident. Further still, he would not have gone to Captain's Bay without help because net fishing requires more than one person to be involved. He also denied going into Kenra's room while she occupied it. And to complicate matters, the appellant testified that he lives at his mother's house.

[109] Given the appellant's evidence in his defence, it becomes difficult what effective defence he was prevented from mounting in respect to the periods covered by the indictment. Indeed, there is nothing on the records to show that there was any ruling that prevented him from calling any or all of the five persons who worked with him daily from 7 a.m. to 9 or 10 p.m.

[110] In all the circumstances this ground must fail.

Ground 8: That a material irregularity occurred in the course of the appellant's trial and the entire process was tainted and any verdict found was unsafe and unsatisfactory

[111] On this ground, the appellant's submission is that there was a material irregularity in the course of the appellant's High Court trial since the learned trial judge in her summing up erred in providing the jury with misinformation in relation to the facts presented at the trial on the matter. The quoted misinformation is as follows:

> "What we know is that she gave birth to a baby on 29th October and she was at that time over 14, she was under 16. So some nine months counting backwards prior to the normal scheme of things somebody had sexual intercourse with Kenra."

[112] Essentially, this ground is directed at count 4 which has already been addressed and determined in favour of the appellant. However I consider it necessary to say that the verdict in respect of the fourth count could not have tainted the verdicts on the other three counts since the evidence was different and, in my judgment, compelling. There is nothing more that can be usefully said in relation to this ground. It therefore fails.

Ground 6: **The learned trial judge ought not to have imposed the sentence of ten years on count two, ten years on count three, nine years on count four, and the second, third and fourth counts to run concurrently and first count to run consecutive to the second, third and fourth counts as this sentence was excessive given the circumstances and nature of the particular case.**

[113] In this regard it is submitted by learned counsel for the appellant that the learned trail judge ought not to have imposed a sentence of ten years on the first count, ten years on the second count, ten years on the third count, nine years on count four, with the sentences with respect to the second, third and fourth counts running concurrently and that for the first count to run consecutive to those for the second, third and fourth counts.

[114] In support, learned counsel refers to the appellant's age and good character, self-employment as a boat builder, and respected in the community. Reliance is also placed on the fact that there are no aggravating factors directly connected to the offence.

[115] Learned counsel concedes that the offences took place while the virtual complainant was under the age of fourteen and the maximum sentence is life imprisonment. However mention is made of the fact that the offences allegedly occurred in 2001, 2002 and 2003 but only reported in June 2004, a fact which, according to her, caused the appellant substantial prejudice.

[116] Learned counsel also refers to the trilogy of cases relating to sentencing with respect to offences of this nature. In particular at paragraph 17 of these judgments Byron CJ's judgment is cited. It reads thus:

> …"the actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors …the tendency would be towards a higher sentence if the aggravating factors are outweighed by the mitigating factors."

[117] The respondent's submissions on this ground are in these terms:

> "The appellant was effectively sentenced to a period of 20 years in prison for an offence for which he could have been sentenced to life imprisonment.
> For the following reasons it is submitted that this sentence is appropriate and not excessive as contended for by the counsel for the appellant.
>
> (i) This was a repeated pattern of abuse of a young child of whom the appellant was the de facto father from the age of two years. Three of the counts related to a period when the virtual complainant was under 14 years of age. The last count was at a time when she had barely passed the said age. It was a gross abuse and violation of the position of trust he held in relation to the virtual complainant.

(ii) The offence is also a very serious one, which no doubt would have carried a certain level of psychological impact on the young victim.

(iii) The absence of violence, force and degrading acts are not mitigating factors. Where they are present, they serve as aggravating factors, warranting an increase in the sentence, which would have ordinarily been imposed. When they are not present, their absence does not mitigate. It means that the sentence, which would have been ordinarily imposed, remains the appropriate one. It is truly artificial to suggest that a defendant who has engaged in repeated sexual abuse of his young victim should be given credit for not resorting to violence and other such matters. He was doing her no favours.

(iv) There was no undue delay in bringing the matter to justice. This was a young victim and the factors of delay or complete failure to report is not an unknown element in this type of case. The last act was in 2003 and the matter was initiated in 2004, and brought to trial in 2006. This was by no means a lengthy or undue delay.

(v) Within the last 3 years and continuing to the present, there have been several such cases in the courts in this jurisdiction. Their prevalence calls for a strong message to be sent to potential offenders. See sentencing remarks Transcript pg. 358. As observed in Benjamin v. R 7 W.I.R 459 Tab 27 where the relevant principles of sentencing are extensively reviewed, prevalence of the offence calls for a deterrent approach on the part of the trial judge in the matter.

(vi) The Appellant showed no level of remorse, and was not a young person at the time of the commission of the offences.

It is submitted that in all the circumstances of the case, the sentence was appropriate."

[118] Elements of the submissions can be accepted from both sides of the equation. The delay, absence of violence in the commission of the offences, and the good character on one hand and the repeat of the offences by a de facto father, the age of the victim and the seriousness of the offences, the prevalence of the offence in the jurisdiction and the age of the appellant at the time of the offences.

[119] The factor of the prevalence of the offence in Anguilla sets in motion the celebrated dictum of Lord Simonds in **Shaw v Director Of Public Prosecutions.** This case was decided in

the midst of the controversy of characteristics of a crime and the function of the criminal law. The dictum is as follows:

> "… there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state."

[120] Of course the society of Great Britain in the 1960's is far different from the society of Anguilla in the 2000's. But one cannot pretend that Anguilla is a large society or that no moral welfare to be protected by the courts of law, Legislature has so empowered the Courts with very wide powers of sentencing to be exercised as the need demands in relation to statutory rape.

[121] In giving the courts the power to impose a sentence of life imprisonment for an offence begs the question as to what exactly Legislature had in mind as to when this sentence might be imposed. So that when learned counsel for the respondent tells the court that crimes of this nature are prevalent in Anguilla would seem to be the occasion when that residual power ought to be exercised in order to protect Anguilla. Indirectly before the court is an instance of a school child who has mothered another child. Nothing more needs to be said about that.

[122] Learned counsel for the appellant by her submissions is seeking a different sentence without accepting that a custodial sentence is appropriate. On the other hand, for learned counsel for the respondent imprisonment is a condign sentence.

[123] But the implications and the events surrounding the offences committed are far more serious than either side admits or recognizes. For one thing the first offence took place at the home, while the appellant and the then Ms. Parris Webster lived as man and wife. And it continued even after the two parties were married on 27th October 2002. Further, when the appellant took Kenra to Captain's Bay he did so in Kenra's mother's car (although the appellant denied this). Additionally, based on the evidence Kenra must have attended school for some time while she was pregnant. This is all in the small community of

Anguilla which implicitly sends a call for serious deterrence as these events, without a doubt, epitomize the essence of moral turpitude which must have been within the contemplation of the Parliament of Anguilla given the penalties prescribed.

[124] Consideration must now be given to the sentences imposed by the learned trail judge. They are stated thus:

> "First count, 10 years; second count 10 years; third count, 10 years; fourth count 9 years. The second, third and fourth counts are to run concurrently and the first count will run consecutively to the second, third and fourth counts. This my sentence."

[125] In all circumstances of the case I consider the sentences imposed to be excessive. This must now be addressed.

[126] The sentencing guidelines laid down in the trilogy of cases by Chief Justice Dennis Byron are based on sections 215, 216 and 233 of the St. Lucia Criminal Code. The said sections concern carnal knowledge under the age of 13, carnal knowledge between the ages of 13 and 16 years and incest, respectively.

[127] In terms of punishment under section 215 of the St. Lucia Criminal Code, it is life imprisonment and flogging while under both sections 215 and 223 it is 15 years imprisonment. However, given the circumstances of this case the sole concern is with carnal knowledge under 13 years.

[128] When the provisions relating to carnal knowledge under 13 years in the case of St. Lucia and up to 13 in the case of Anguilla are compared the difference is patent. In terms of the punishment both provisions provide for life imprisonment but the St. Lucia provision also prescribes flogging.

[129] The actual sentencing guidelines enunciated by the Chief Justice with respect to carnal knowledge under 13 years old are in these terms: "Starting at the minimum where the girl is not far from her 13th birthday and there are no aggravating factors at 8 years and going

upwards. It scarcely needs to be said that the younger girl when the sexual approach commenced the more serious the crime."

[130] It is against the background of the foregoing that the sentence equation must be drawn. On the one hand, the aggravating factors and the places where the acts were committed, the fact that the first sexual act took place when the virtual complainant was twelve years old and the relationship between the virtual complainant, her mother and the appellant. On the other hand, the sole mitigating factor is the fact that the appellant is unknown to the law. These factors must be considered in the context of the aims of sentencing –retribution, deterrence and protection.

[131] Using the test laid down by this court in the trilogy of cases, it is clear that the aggravating factors greatly outweigh the mitigating factors. Further, it is considered that the repeat of the offence merits special mention and should be reflected in the sentence.

[132] All matters considered the following sentences are substituted: count one, 8 years and counts two and three 9 years each. The sentences will run concurrently.

Result

[133] The appeal is allowed to the extent that:

(a) the conviction on the fourth count is quashed as it it considered unsafe and unsatisfactory; and

(b) concurrent sentences of 8 years imprisonment on count one, 9 years on each of counts two and three are substituted for those imposed by the learned trial judge.

Errol L. Thomas
Justice of Appeal (Ag)

[1] **BARROW J.A.**: I agree with Thomas JA (Ag.) that the appeal against convictions on counts 1, 2 and 3 should be dismissed, that the appeal against sentences should be allowed, and that the sentences he proposes should be substituted. However, in my view, the appeal against conviction on count 4 should also be dismissed.

[2] Count 4 charged the appellant pursuant to sec 143(1) of the **Criminal Code** with unlawful sexual intercourse with a minor of 14 years of age. That section provides for a maximum sentence of 20 years' imprisonment on conviction for the offence it creates. The argument of the appellant was that there was no evidence that the girl had yet reached her 14th birthday. Therefore, he argued, it could not be proved that he had committed the offence charged.

[3] Incredibly, the appellant was thereby arguing that because the minor may have been younger than 14 years of age -- sexual intercourse with a minor younger than 14 years carries a sentence of life imprisonment pursuant to section 142(1) of the Code and is, therefore, the more serious offence -- he should be acquitted of the lesser offence with which he was charged and found guilty of no offence.

[4] The short response to that argument is that it is an offence to have sexual intercourse with a minor who is under 16 years of age. If a minor is under 14 years of age an accused may be charged under section 142. If a minor is 14 years of age or above 14 years of age but under 16 years of age an accused may be charged under section 143. Therefore, by having sexual intercourse with a minor who is under 16 years of age an offender commits at least the lesser offence, regardless of whether he also commits the greater offence. This, in my view, is fundamental. If there is doubt whether or not the minor has yet reached her fourteenth birthday an accused is entitled to the benefit of the doubt and may not be convicted of the greater offence. But where, as in this case, it is certain that the minor is, at most, 14 years of age then there is no reason why an accused cannot be convicted of the offence of having sexual intercourse with a minor under 16 years of age. The possibility that a minor may have been younger than the alleged 14 years simply means the appellant may have committed an offence more serious than the one charged.

[5] The scheme of Part 14 of the **Criminal Code** of Anguilla is to create "Sexual Offences". This is how that Part is headed. Section 139 defines "sexual offence" to mean an offence committed against a minor under section 142 (Sexual intercourse with person under 14 years of age); section 143 (Sexual intercourse with person between 14 and 16 years of age); section 144 (Sexual intercourse with minor suffering from mental disorder); section 145 (Sexual intercourse with dependent child); section 146 (Indecent assault on minor); section 147 (Procuration of minor); section 148 (Living on earnings of prostitution of minor); or section 163 (Incest).

[6] Section 146 (Indecent assault on minor) confirms the underlying premise that makes sexual intercourse with a minor who is under 16 years of age an offence. In section 146(1) it is provided that any person who indecently assaults any minor (earlier defined as a person under 18 years of age) is guilty of an offence. Then subsection (2) states: "It is no defence to a charge of an indecent assault committed on a minor under 16 years of age to prove that the minor consented to the act of indecency." In short, a minor under 16 years of age cannot consent to sexual intercourse.

[7] That statement in section 146(2), that a minor under 16 years of age cannot consent, is a fundamental and familiar proposition of law and the same proposition appears in both sections 142(1) and 143(1) -- the offence is committed "whether with or without the consent of that minor". How can it matter, then, that in this case the minor with whom unlawful sexual intercourse was committed may have been further below the threshold age of 16 years than the particulars charged?

[8] In my view it is a mistake to think that on a charge laid pursuant to section 143(1) it is an essential ingredient of the offence or even a material allegation that the minor was 14 years of age. The offence, on a proper reading of the section, is unlawful sexual intercourse with a minor under 16 years of age. This is how the section is worded:

> "143. (1) Any person who has unlawful sexual intercourse with a minor 14 years of age, or with a minor above 14 years of age but under 16 years of age, whether with or

without the consent of that minor, is guilty of an offence and is liable to imprisonment for 20 years." (Emphasis added).

[9] The only reason for referring in the section to the age of 14 years is to separate this sexual offence from the immediately preceding and more serious offence, in section 142 (1), of sexual intercourse with a person under 14 years of age. The offence created by section 143 (1) is unlawful sexual intercourse with a minor "under 16 years of age", to quote the wording of the section.

[10] Not as a guide to interpretation but as confirmatory of this interpretation of the section and understanding of the underlying concept, I refer to the comparable provision in the (repealed) English **Sexual Offences Act 1956** which created two sections similar to sections 142(1) and 143(1). Section 5 of the English Act creates the offence of "unlawful sexual intercourse with a girl under the age of thirteen." Section 6 of that Act states the following offence:

> "6.—(1) It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl not under the age of thirteen but under the age of sixteen."

In substance, the difference of 13 years instead of 14 years apart, this provision is the same as our section 143(1).

[11] In **Archbold 2003** the section 6(1) offence is treated at paragraph 20-74 and in reproducing section 6(1) the authors simply omit the words "not under the age of thirteen but", so as to give a straightforward reading to the section as creating the offence of having unlawful sexual intercourse with a girl under sixteen. The sample indictment that is offered in this treatment appears thus:

> "STATEMENT OF OFFENCE
>
> Sexual intercourse with a girl under 16, contrary to section 6(1) of the Sexual Offences Act 1956.
>
> PARTICULARS OF OFFENCE
>
> A B, on the ---------- day of ----------, 20---, had unlawful sexual intercourse with J N, a girl under the age of 16 years.'

[12] Any lingering doubt as to the substance of this offence is removed by the statement of Lord Steyn in the House of Lords decision in **R v K**. His Lordship unhesitatingly referred to the "offences of having sexual intercourse with girls under 13 (section 5) and with girls under 16 (section 6) …" This makes clear that the English section 6 offence is not, as the appellant's argument would make it, 'having sexual intercourse with a girl not under 13 but under 16,' but, as I have stated, "having sexual intercourse with a girl under 16".

[13] This treatment, as I have said, simply confirms what is revealed by an examination of the structure and the language of the Anguilla Criminal Code: that the material element in the offence is unlawful sexual intercourse with a minor who is under the age of 16 years and that the reference to the lower age of 14 years in section 143(1) is to distinguish this offence from the more serious offence created by the immediately preceding section 142(1), which makes that lower age a material element of the section 142(1) offence.

[14] The appellant's argument in relation to the section 143(1) offence stems fundamentally from the wording of Count 4 of the indictment. The counts that later became Count 1 and Count 4 were drawn as follows:

"**First Count**

STATEMENT OF OFFENCE

Sexual intercourse with a minor, contrary to section 142(1) of the Criminal code, revised Statutes of Anguilla, chapter C140

Particulars of Offence

Glen Richardson on a day unknown between the 1st and 31st day of October 2001, at Island Harbour in the island of Anguilla, had unlawful sexual intercourse with Kenra Webster, a minor under the age of fourteen years."

"**Fourth Count**
STATEMENT OF OFFENCE

Sexual intercourse with a minor, contrary to section 143(1) of the Criminal code, Revised Statutes of Anguilla, chapter C140

Particulars of Offence

> Glen Richardson on a day unknown between the 15th of January 2003 and the 28th day of February 2003, at Island Harbour in the island of Anguilla, had unlawful sexual intercourse with Kenra Webster, a minor of the age of fourteen years."

[15] With respect to Count 1 it was an essential element of the offence and hence a material averment that the minor was under the age of fourteen years. It was therefore necessary and right that the particulars in that count were framed as they were to accord with how section 142(1) is worded. With respect to Count 4 there could have been no objection and it would have avoided the present argument if, after the name of the minor, the particulars had stated

> "a minor under the age of sixteen years".

[16] Had Count 4 been so framed it would simply have been following the framing of Count 1 – which did not state the age of the minor, 12 years or 13 years, but stated, instead, that the minor was under 14 years of age. On the particular facts of this case, where the offence occurred around the date of the minor's fourteenth birthday and there was no evidence whether it was before or after the birthday, it would have avoided the present argument if the particulars had simply described the minor as under the age of sixteen years. But there is no suggestion that the appellant was misled, given the specification in Count 4 that the appellant was charged under section 143(1), by the failure to draw the indictment in such terms. Realistically, the way Count 4 was drawn, by stating the minor was of fourteen years of age, was a sufficiently clear (even if indirect) way of stating that the minor was under 16 years, since a person 14 years of age is necessarily a person under 16 years of age. The situation would have been no different if the indictment in Count 1 had described the minor as being thirteen years of age instead of stating, as it did, that the minor was under 14 years.

[17] The purpose of particulars, in the present context, is to give reasonable information as to the charge to enable the defence to know the case that it has to meet. In every case a

relevant question will be whether a defendant is prejudiced or embarrassed in his defence by the failure to disclose a particular or by framing it in a given way. If there will be no prejudice or embarrassment the particular or the given way of framing it as immaterial. It follows, in my view, that an immaterial particular need not be either alleged or proved. What must be alleged and proved are facts that are material to establishing that the charged offence has been committed.

[18] At the stage when the submission of no case to answer was made in this case the prosecution had proved the material facts, including the fact that the minor was under 16 years of age. It was immaterial that it was not proved that the minor had yet reached the age of 14 years. In my view the judge was right to reject the submission. I entertain not the slightest misgiving that the conviction on Count 4 may have been unsafe or unsatisfactory. Therefore, I would dismiss the appeal against Count 4 and affirm the conviction.

[19] Consistent with my agreement that the sentences on the other counts, based on the more serious section 142 offences, were excessive, especially the consecutive sentence, I would regard the sentence of 9 years imprisonment on this count, because it was for the less serious section 143 offence, as excessive. In its place I would impose a sentence, because the offence charged in Count 4 was a repeat offence, higher than in the case of an isolated occurrence, of 8 years imprisonment, to run concurrently with the other sentences.

Denys Barrow, SC
Justice of Appeal

I have read the judgments of my brothers Barrow JA and Thomas JA [Ag.]. I agree with the decision of Thomas JA [Ag.] and with the order that he proposes.

Hugh Rawlins
Justice of Appeal