ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCRAP 2006/005
HCRAP 2006/006
HCRAP 2006/008

BETWEEN:

[1] ROGER NAITRAM
[2] LASSELL PUNCH
[3] LEARY MATHESON

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Madam Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Jason Martin for Roger Naitram and Leary Matheson
Peyton Knight for Lassell Punch
Anthony Armstrong (Director of Public Prosecutions) for the Respondent

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2010: June 29
December 15.

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Criminal Appeal–Unlawful Carnal Knowledge–Unlawful sexual intercourse-Appeal against conviction and sentence–Caution statement inadmissible–Breach of the Constitution of Antigua and Barbuda–Corroboration–Corroboration warning-Direction on corroboration-Sentence imposed excessive–Joinder of accused–Defence case not properly put to jury–Misstatement of evidence–Defence contained in caution statement–Sentencing guidelines in sexual offence cases

Roger Naitram, Lassell Punch and Leary Matheson ("the appellants") were convicted on an indictment containing three counts of unlawful sexual intercourse with a twelve year old girl. Each appellant was sentenced to eight years imprisonment. The case against the

appellants was not conducted on the basis of a joint enterprise. Instead, each count on the indictment referred to a specific appellant. Naitram was nineteen years old and Punch was a fifteen year old minor at the time of the offences. The prosecution's case against the appellants was that each one of them had sexual intercourse with the virtual complainant at different points in time in the space of about twelve hours. With respect to Punch and Matheson, the prosecution also relied on their caution statements. Each appellant has appealed his conviction and sentence. Punch appealed against conviction on the ground that the caution statement which was taken from him when he was detained was inadmissible as it was a breach of s. 5(3) of the Constitution of Antigua and Barbuda and against sentence on the ground that it was excessive. Naitram appealed against conviction on the following grounds: (1) that the learned judge erred in failing to exercise his discretion properly or at all in allowing each appellant to be tried with the other defendants charged with separate offences on the same indictment and (2) that the learned judge failed to properly direct the jury on corroboration. Naitram appealed against sentence on the ground that the trial judge erred in not decreasing the minimum sentence according to the degree by which the commission of the offence was mitigated by certain factors which include the age of the appellant and the absence of antecedents. Matheson appealed against conviction on the ground that the learned judge erred in his duty to put his defence properly or fairly or at all to the jury in the course of his summation.

Held:–dismissing the appeal of Roger Naitram against conviction and sentence, dismissing the appeal of Lassell Punch against conviction but allowing his appeal against sentence to the extent that it be varied to time served, and allowing the appeal of Leary Matheson against conviction thereby quashing his conviction and setting his sentence aside:

1. That the joinder of two or more accused in one indictment notwithstanding the absence of a joint charge against them is a matter of practice. Therefore, the Court of Appeal is entitled to dismiss an appeal against conviction advanced on the ground of joinder if there has been no miscarriage of justice especially where there has been a failure by the defence to object to the joint trial. The fact that the offences in the present case were related in time, nature and victim, with all witnesses being common in the case against each appellant, would gravitate towards the exercise of a discretion in favour of joinder.

   R v Assim [1966] 2 Q.B. 249 applied; R v Ferguson & Anor [2010] NICA 9 cited.

2. That the judge gave adequate direction on corroboration by warning the jury on several occasions that it is dangerous to convict on the sole testimony of a virtual complainant and by emphasizing that the virtual complainant was a child. Furthermore, the judge reminded the jury that there was no corroboration in the case and went on to tell them that if they believed the virtual complainant's evidence, they could convict. As indicated in Gilbert the question on whether to give a corroboration warning is a matter of discretion for the trial judge and it will only be in clear and exceptional cases that an appellate court will feel justified in interfering with the exercise of this discretion. Having decided that it was an appropriate case to give a corroboration warning, the strength and terms of the

warning were matters to be determined by the trial judge, who was in a position to assess the flow of evidence, the firmness of the testimony of the virtual complainant, the quality of the defence proffered as well as other aspects of the trial.

R v Rennie Gilbert [2002] UKPC 17 applied; Kyon Frederick v The Queen HCRAP 2006/008 distinguished.

3. In sexual offence cases, the question of fabrication and lies is the subject matter of the corroboration warning and in that regard, the learned judge was not off the mark when he stated that the underlying reason for the corroboration warning "is that people tell lies for different reasons, children included".

   R v Rennie Gilbert [2002] UKPC 17 applied.

4. That there was no error in principle on the part of the learned trial judge in imposing an eight year sentence on the first appellant and neither was this sentence manifestly excessive. As a result there are no proper grounds for departing from the sentencing guidelines laid down by this Court. The Court will not interfere with the discretion of the sentencing court on the ground that it might have passed a different sentence. While the court is mindful of the general undesirability of imprisoning young offenders, sometimes even in the case of young offenders because of the serious nature of the offence a term of imprisonment will normally be the appropriate disposal.

   Attorney General's Reference No. 29 of 2008 [2008] EWCA Crim. 2026 cited; R v Newsome, R v Browne [1970] 2 Q.B. 711 cited.

5. That the exclusion of the second appellant's caution statement does not necessarily lead to the quashing of his conviction. In the absence of the caution statement the sole evidence against the appellant would have come from the virtual complainant and the learned judge gave the jury adequate directions on how to treat her evidence. It was a matter for the jury whether or not to believe her evidence. The court has to weigh the public interest as well as that of the individual who has been exposed to an illegal invasion of his right in securing relevant evidence bearing on serious crimes so that justice can be done.

   Mohammed (Allie) v Trinidad and Tobago [1999] 2 A.C. 111 cited.

6. That the major inconsistencies in the virtual complainant's evidence referred to by counsel for the second appellant did not go to the heart of the matter. On the critical issue of sexual intercourse, the virtual complainant's evidence was unshaken. As judges of fact, the members of the jury were entitled to accept that evidence and act upon it, which they did by their finding of guilt. Reference to lurking doubt is just one way in which an appeal court addresses the fundamental question of whether or not the conviction is safe.

7. That the learned judge erred in not giving any or sufficient weight to the facts that the second appellant was only fifteen years old at the time of the offence and only a first time offender. This was an appropriate case to depart from the starting point of eight years identified in the guidelines. Having taken the guidelines into account the sentencing judge is enjoined to look at the circumstances of the individual case, particularly the aggravating and mitigating factors that may be present and impose the sentence which is appropriate. Therefore a sentencing judge can depart from the guidelines if adherence would result in an unjust sentence. Where the particular circumstances of a case may dictate deviating from the guidelines, it would be instructive for the sentencing judge to furnish reasons for so departing.

   Millberry v R [2002] EWCA Crim. 2091 applied.

8. That the learned judge failed in his duty to put the third appellant's defence which was contained in his caution statement, properly to the jury. This failure was made worse by a critical misstatement of the evidence. The judge's responsibility to summarise the main points made by a defendant in his caution statement is not diminished or made redundant by the fact that the jury would have the caution statement with them upon their retirement. The effect of this failure of the trial judge to put the appellant's defence fairly and properly to the jury renders his conviction unsafe.

   R v Curley and Cadwell [2004] EWCA Crim 2395 applied.

JUDGMENT

[1] BAPTISTE, J.A.: On 6th July 2006 Roger Naitram, Lassell Punch and Leary Matheson ("the appellants") were convicted on an indictment containing three counts of unlawful sexual intercourse with a girl under the age of fourteen. The incidents occurred in June 2004. On 20th July 2006 each appellant was sentenced to eight years imprisonment. They have appealed their conviction and sentence. The case against the appellants was not conducted on the basis of a joint enterprise. Each count on the indictment referred to a specific appellant. The prosecution's case depended on the evidence of the virtual complainant who was twelve years old at the time of the offences. With respect to Punch and Matheson, the prosecution also relied on their caution statements.

[2] I will now consider the appeal of Punch. In brief, the prosecution's case is that the virtual complainant went to the Golden Grove School to pick up her sister. Punch approached her and indicated his interest in having sex with her. She initially resisted the invitation then relented. Having agreed, they moved across the road into a little booth. Punch took off her clothes, stripped, put on a condom and inserted his penis into her vagina. His penis looked erect. After they had sex he got dressed and sat on the bed, then went outside.

[3] Corporal Cadette carried out investigations into the matter. On 29th June 2004, he met Punch at the Gray's Farm Police Station and informed him that he was making inquiries into a report that he had sexual intercourse with a twelve year old girl on 28th June 2004. After being cautioned Punch replied "that is my girlfriend". He detained Punch. The following day, in the presence of Ms. Sharon Punch (Punch's mother) and Police Constable Hughes, Corporal Cadette cautioned Punch and asked him whether he had anything to say about the report. As Punch had no objection to Corporal Cadette making a written record of what he had to say, Corporal Cadette proceeded to record a caution statement from Punch in the presence of Ms. Sharon Punch and Police Constable Hughes.

Caution Statement and breach of the Constitution

[4] The substratum of Punch's appeal is that the caution statement was inadmissible and absent the caution statement the evidence against him would be tenuous at best, there being no other corroborating evidence in support of the case. The attack on the caution statement is mounted on a breach of the Constitution of Antigua and Barbuda and a breach of the Judge's rules. Section 5(3) of the Constitution of Antigua and Barbuda ordains that:

> "Any person who is arrested or detained shall have the right, at any stage and at his own expense, to retain and instruct without delay a legal practitioner of his own choice, and to hold private communications with him, and in the case of a minor he shall also be afforded a reasonable opportunity for communication with his parent or guardian."

[5] In Rajesh Ramsarran v The Attorney General of Trinidad and Tobago[1] the Board stated:

> "The right of a person arrested on suspicion of having committed a criminal offence to retain and instruct a legal adviser and to hold communication with him is protected by the Constitution both on the proper construction of section 5(2)(c) [Section 5(3) in Antigua and Barbuda] and on the basis of settled practice embodied in the Judges' Rules."

The Board further stated that a person so arrested has the ancillary right to be informed of the existence of his right to legal advice, without which the latter right would be of little value. In Attorney General of Trinidad and Tobago v Whiteman[2] the Privy Council recognized that the right to communicate with a legal adviser is a right implicit in the right to retain, instruct and communicate with such an adviser.

[6] At the relevant time Punch was a fifteen year old minor. He was not informed of his right to retain and instruct a legal adviser and to hold communications with him. This right is guaranteed by the Constitution. There was a clear breach of that right. What is the effect of that breach on the admissibility of the caution statement?

[7] The approach to be taken in the case where a confession is obtained in breach of a constitutional right was considered by Lord Steyn in the Board's judgment in Mohammed (Allie) v Trinidad and Tobago[3]. His Lordship said:

> "It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right…On the other hand, it is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to

[1] [2005] UKPC 8 at paragraph 8(d)
[2] [1991] 2 A.C. 240 at pages 247-248
[3] [1999] 2 A.C. 111 at pages 123-124

consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded. But their Lordships make clear that the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case. Except for one point their Lordships do not propose to speculate on the varying circumstances which may come before the courts. The qualification is that it would generally not be right to admit a confession where the police have deliberately frustrated a suspect's constitutional rights."

[8] The following propositions can be distilled from Mohammed:

(1) In considering the effect of a breach of a right guaranteed by the Constitution, the Court is enjoined to take into account the nature of the particular constitutional guarantee and the nature of the breach.

(2) A breach of the defendant's right to a fair trial must inevitably result in the conviction being quashed.

(3) A defendant's right to be informed of his right to consult a lawyer is of great importance. However it is not every breach of the right to consult a lawyer that will result in a confession suffering the sanction of exclusion as breaches of that right can vary greatly in gravity.

(4) A breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case.

[9] Punch was of the vulnerable age of fifteen at the time he was detained at the police station when he went there to visit another accused. His mother was informed of his detainment. This was not a case where the police deliberately frustrated Punch's right to be informed of his right to retain and instruct a legal advisor. Further, Punch had a reasonable opportunity to communicate with his

mother as his caution statement was recorded in her presence; no doubt it was voluntarily given. The court has to weigh the public interest in securing relevant evidence bearing on serious crimes so that justice can be done and the interest of the individual who has been exposed to an illegal invasion of his right. The caution statement was essentially inculpatory. Had Punch the benefit of legal advice he may very well not have made the statement. In the circumstances the caution statement should not have been admitted in evidence. The breach of Punch's constitutional right should have been a major factor in favour of the exclusion of the caution statement.

[10] The exclusion of the caution statement does not necessarily lead to the quashing of Punch's conviction. Absent the caution statement, what was the state of the evidence against him? There was the clear evidence of the virtual complainant that Punch asked her for sex. She initially refused, but they later had sex in a booth. Punch placed his penis in her vagina. In the absence of the caution statement, the sole evidence against Punch would have come from the virtual complainant. It was a matter for the jury whether or not to believe her evidence. The learned judge gave the jury adequate directions as to how to treat the evidence of the virtual complainant.

[11] Mr. Knight complained that there were major inconsistencies with the virtual complainant's evidence which could cause one to conclude that the prosecution had not established their case to the requisite standard of law. Mr. Knight also cited R v Cooper[4] with respect to there being a lurking doubt about the safety of the conviction. The matters which Mr. Knight referred to as major inconsistencies were not matters going to the heart of the matter. For example in cross-examination the virtual complainant stated that Punch took off her clothes. In a previous statement to the police she said he did not take off her blouse and bra. The virtual complainant said that Decosta and Roger and herself slept in a queen size bed for the whole night in the room in the front of Decosta's house. Decosta

[4] [1969] 1 Q.B. 267

however stated that he slept at his mother's house. When he woke up and rapped at the door the virtual complainant came out. Finally, the virtual complainant said Roger offered her a place to sleep while Decosta said it was he who offered her a place to sleep after he saw her crying. In my judgment on the critical issue of sexual intercourse, the virtual complainant's evidence was unshaken. The jury as judges of the facts was entitled to accept that evidence and to act upon it, which they did by their finding of guilt. Reference to lurking doubt is really just one way in which an appeal court addresses the fundamental question: Is the conviction safe? I do not entertain any doubt about the safety of the conviction.

Sentencing and the Role of Sentencing Guidelines

[12] The maximum penalty for the offence of unlawful carnal knowledge of a girl under 14 is life imprisonment. Punch was sentenced to 8 years imprisonment. He was fifteen years old at the time of the offence. This was his first conviction. Mr. Knight submitted that the sentence imposed was excessive and that the judge should have exercised his discretion at the lower level of the scale. Mr. Knight invited the Court to substitute the sentence of imprisonment for a probation order, alternatively the sentence should be reduced.

[13] In Winston Joseph v The Queen[5] Byron CJ stated at paragraph 17 that the actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors. The Court must not only identify the presence of aggravating and mitigating factors, but must embark upon an evaluative process. The aggravating and mitigating factors must be weighed. If the aggravating factors are outweighed by the mitigating factors the tendency must be towards a lower sentence. Where the mitigating factors are outweighed by the aggravating factors, the sentence must tend to go higher.

[14] In the present case the mitigating factors are that Mr. Punch was fifteen years old and he was a first offender. No particular aggravating factor can be identified.

[5] Criminal Appeal No. 4 of 2000 (Saint Lucia)

In Desmond Baptiste v The Queen[6] Byron CJ stated at paragraph 30:

> "On the issue of age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should take such factors into account. In the same vein, in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances."

In addressing the importance of the circumstance that the offender was committing crime for the first time Byron CJ stated that this factor should be left to the discretion of the sentencer as a matter that is to be taken into account with all the other mitigating circumstances of the offence. The more serious the offence the less relevant will be the circumstance.

[15] In his ruling concerning sentencing the learned judge referred to Winston Joseph v The Queen[7], Benedict Charles v The Queen[8] and Glenroy Sean Victor v The Queen[9] and said that there was no legal basis for departing from the guidelines as laid down by the Court of Appeal. The learned judge further stated:

> "In any event, our Court of Appeal has ruled in Dwight Bibby v Commissioner of Police, Magisterial Criminal Appeal No. 47/2003 that the trial judge in applying the sentencing principles should apply less weight to the factor of rehabilitation where the offence is of a serious nature."

[16] In Winston Joseph with reference to the offence of unlawful carnal knowledge of a female under thirteen where the maximum imprisonment is life, Byron CJ stated at paragraph 13:

> "In this category a wide range is likely. Starting at a minimum where the girl is not far from her 13th birthday and there are no aggravating factors at 8 years and going upwards. It scarely [*sic:* scarcely] needs to be said the younger the girl when the sexual approach commences the more serious

[6] Criminal Appeal No. 8 of 2003 (Saint Vincent and the Grenadines)
[7] Criminal Appeal No. 4 of 2000 (Saint Lucia)
[8] Criminal Appeal No. 8 of 2000 (Saint Lucia)
[9] Criminal Appeal No. 7 of 2000 (Saint Lucia)

> the crime. The existence of a maximum sentence of life imprisonment for this offence would allow a rapid escalation of the term of imprisonment as the age of the complainant decreases."

[17] As indicated earlier, the learned judge stated that there was no legal basis for departing from the guidelines laid down by the Court of Appeal. This brings into focus the role of sentencing guidelines. In that regard I turn to the case of Millberry v R[10] where the Lord Chief Justice stated at paragraph 34:

> "Before concluding our general guidance with regard to sentencing on rape and turning to the cases of the individual appellants, we would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers adopt a mechanistic approach to the guidelines. It is essential that, having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances… Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge."

I fully adopt the above quotation from the Lord Chief Justice. Sentencing guidelines should not be applied mechanistically because a mechanistic approach can result in sentences which are unjust. Having taken the guidelines into account, the sentencing judge is enjoined to look at the circumstances of the individual case, particularly the aggravating and mitigating factors that may be present and impose the sentence which is appropriate. It follows therefore that a sentencing judge can depart from the guidelines if adherence would result in an unjust sentence. The existence of a particularly powerful personal mitigation or very strong aggravating factors may be a good reason to depart from the guidelines. Clearly the suggested starting points contained in sentencing guidelines are not immutable or rigid. Where the particular circumstances of a case may dictate deviating from the guidelines, it would be instructive for the sentencing judge to furnish reasons for so departing.

[18] The offence of unlawful sexual intercourse with a female under the age of fourteen is undoubtedly a serious one for which incarceration would normally be the

[10] [2002] EWCA Crim. 2891

appropriate disposal. The present case provided strong mitigating factors which ought to have occasioned a departure from the starting point of eight years identified in Winston Joseph. The extreme youthfulness of Punch, fifteen years old at the time of the offence and the fact that he was a first offender were weighty factors in his favour. The offence was in reality an opportunistic one and there was an absence of aggravating factors relating to the offence. In my judgment the learned judge erred in not giving any or sufficient weight to these factors in imposing an eight year prison sentence on Punch. This was an appropriate case to depart from the starting point of eight years identified in the guidelines. Justice called for a more merciful sentence than a guideline level may indicate. This is even more apparent as the two other appellants, ages 19 and 23, also received an eight year prison sentence.

[19] Another issue which arose in this appeal was the applicability of the Probation of Offenders Act[11]. Punch's counsel invited the learned judge to make a probation order pursuant to section 2(2) of the Act. The judge declined the invitation.

[20] Section 2(2) of the Probation of Offenders Act states:

> "Where any person has been convicted on indictment of any offence punishable with imprisonment, and the Court is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

[21] Section 2(2) confers upon the court a statutory discretion to release an offender on probation in the circumstances ordained in and upon the conditions dictated by the section. The judge, in the exercise of his discretion concluded that it was not a

[11] Cap. 345 of the Laws of Antigua and Barbuda.

proper case for the imposition of a probation order. It has not been shown that the judge erred in the exercise of his discretion or exercised his discretion in an irrational manner.

[22] Punch was sentenced to eight years imprisonment in July 2006 with time spent on remand to be taken into account. For the reasons indicated I would allow his appeal against sentence to the extent of varying the sentence of imprisonment to time served.

Appeal of Naitram and Matheson

[23] The appeal of Roger Naitram and Leroy Matheson will be considered together. The prosecution's case against Matheson is that after the virtual complainant had sex with Punch she later went back in the booth and saw Matheson; he told her to come with him and was pulling her. They went into a club house on Desouza Road not far from the booth. Matheson began touching her, he had sex with her, he pushed his penis in her vagina and he got up. She put on her clothes, got up and left.

[24] With respect to Roger Naitram the prosecution's case is that while going down Desouza road she met Naitram, he was with his friend, Decosta. It was after midnight. Roger asked her if she wanted somewhere to stay, she told him yes. She was afraid to go home. The virtual complainant testified that they went into a little house outside Decosta's house and they all slept on the same bed. Roger started touching her. She took off her clothes. Roger did not have on any clothes; he started to have sex with her. They had sex for about 45 minutes. After Roger discharged he went to sleep.

[25] Ground 1 of the appeal alleges that the learned judge erred in failing to exercise his discretion properly or at all in allowing each appellant to be tried with other defendants charged with separate offences on the same indictment.

Joinder of Accused

[26] This ground of appeal challenges the exercise of a discretion by the learned judge. It attracts the well established principle that an appeal court should not intervene save where the judge was so palpably or plainly wrong that his decision exceeded the ambit within which reasonable disagreement is possible. That includes the exercise of a wrong principle, the taking into account of irrelevant factors or failing to consider relevant factors. If the court intervenes on any of those grounds, it should treat the matter as at large and exercise its own discretion.

[27] The joinder of two or more accused in one indictment notwithstanding the absence of a joint charge against them is a matter of practice. In that regard "the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice[12]." Since joinder of offenders is merely a matter of practice the Court of Appeal is entitled to dismiss an appeal against conviction advanced on the ground of joinder if there has been no miscarriage of justice and especially where there has been a failure by the defence to object to the joint trial[13].

[28] In Assim, Sachs J stated that:

> "It is essentially a matter for the discretion of the court whether several offenders can properly be tried together at the same time and it is necessary for the trial judge to scrutinize matters closely with the same degree of care that is applied in dealing with the question whether a single person can be charged with several offences before the same jury."

[29] At page 261 in Assim, Sachs J stated:

> "As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are

[12] R v Assim [1966] 2 Q.B. 249 at page 258
[13] R v Ferguson & Anor [2010] NICA 9

> best served by their being tried together then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert but is not limited to such cases."

[30] Mr. Martin submitted that it was materially irregular to include the counts against the appellants in the same indictment and try them together simply because by mere coincidence they had sex with the virtual complainant the same day. Mr. Martin also contended that the learned judge never addressed his mind to the question of whether the appellants could properly be tried together at the same time and it could not be said that he scrutinized matters closely with the same degree of care that is applied in dealing with the question whether a single person can be charged with several offences before the same jury, as he was obligated to do. Mr. Martin further submitted that as a result of this irregularity each appellant suffered serious prejudice from the general tenor of the virtual complainant's evidence which was replete with sexual liaisons with persons other than each appellant during that day. Added to this was the confession statement of another accused person.

[31] Mr. Armstrong pointed out that the issue as to whether accused persons may be joined in the same indictment is a matter of practice for the court and the exercise of the trial judge's discretion. A factor informing such a discretion is where the offences are related in time. I agree. Mr. Armstrong also pointed out that the complainant and all other witnesses were common in the case against each appellant and the offences were committed by each appellant on the same day. Further, no objection was taken by any of the appellants to being joined in the same indictment.

[32] It is not disputed that the joinder of several offenders in one indictment is a matter of practice subject to the exercise of the discretion of the trial judge. In the circumstances of this case it has not been demonstrated that a joint trial was so palpably or plainly wrong that the decision of the learned trial judge exceeded the

ambit within which reasonable disagreement is possible. In the present case several factors gravitated towards and favoured the exercise of a discretion in favour of joinder. The appellants were all indicted for the offence of unlawful carnal knowledge in respect of the same female. All the offences occurred the same day. The offences were related in time, nature and victim. The complainant and all other witnesses were common in the case against each appellant. There is no evidence that the appellants suffered any real injustice consequent upon being tried together. Further, no objection was taken to the joint trial. For all the above reasons, Ground 1 of the appeal is dismissed.

Corroboration

[33] Ground 2 alleges that the learned judge failed to properly direct the jury on corroboration. In support of that ground Mr. Martin contended that the direction on corroboration was inadequate in the following respects:

(1) It was given as a set piece legal direction rather than as part of the learned judge's review of the evidence and his comments as to how the jury is to evaluate it;

(2) By the use of the phrase "In the circumstances, what the law says I must tell you is that it is always dangerous to convict on the sole testimony of a virtual complainant" the learned judge was not sufficiently clear that he was not speaking of all virtual complainants but of virtual complainants in sexual cases;

(3) It did not give the correct reason for the warning–that allegations of sexual impropriety are very easy to fabricate and extremely difficult to refute. Rather the learned judge cites the underlying reason in the decidedly more vague terms of "that people tell lies for different reasons";

(4) That he did not sufficiently differentiate between the warning to be given for the uncorroborated evidence of a virtual complainant in a sexual offence and the special warning to be given in respect of the uncorroborated evidence of young boys or girls in general; and in fact gave no specific special warning in respect of the age of the complainant;

(5) Incorrectly stated that in sexual offences one does not get corroboration, and that "evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the crime".

[34] Mr. Martin referred to R v Rennie Gilbert[14] and R v Makanjoula[15] and submitted that the learned judge was under a duty not just to state what he understood to be the law in regard to corroboration in sexual offences but to inform the jury of the evidential basis which may cause the evidence of the complainant to be unreliable so that the jury may evaluate the same. Mr. Martin further submitted that the misdirection was further compounded by the lack of any proper direction tailored specifically to the complainant's age. The age of the complainant was treated as just another factor to take into account without any special reference as to the special significance of the evidence of children or why the evidence of children need to be treated with special care. In the circumstances the direction on corroboration was wholly inadequate and the proviso should not be applied.

[35] Mr. Armstrong submitted that having regard to the nature of the evidence, the trial judge's direction on corroboration, and the decision in Gilbert, this ground of appeal must fail. There was no issue of identification, just the naked suggestion that they did not have sexual intercourse with the virtual complainant. It was largely if not entirely, a question of her credibility.

[14] [2002] UKPC 17
[15] (1995) 1 W.L.R. 1348

[36] The Privy Council recognized in Gilbert that the mandatory corroboration warning does not add to the fairness of the trial or to the achievement of safe verdicts. The rule of practice which best fulfils the needs of fairness and safety is set out in the judgment of Lord Taylor in Makanjuola, expressly approved by the Privy Council in Gilbert. The question whether to give a corroboration warning is a matter for the discretion of the trial judge. It will only be in clear and exceptional cases that an appellate court will feel justified in interfering with the exercise of the discretion of the trial judge.

[37] What factors then will inform the discretion of the trial judge as to whether or not to give a corroboration warning? The content and manner of the witness' evidence, the circumstances of the case and the issues raised will inform the judge's decision as to whether a corroboration warning is required as well as the strength and terms of that warning. The judge may often consider that no special warning is required at all.

[38] In some cases it may be appropriate for the trial judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence. If a witness has been shown to be unreliable, a judge may consider it necessary to urge caution. An evidential basis must exist to support a contention that the evidence of a witness is unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.

[39] Where a judge decides to give some warning in respect of a witness it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set piece legal direction. Judges are not required to conform to any formula and a warning does not have to be invested with the whole florid regime of the old corroboration rules.

[40] With these principles in mind, I consider the directions of the trial judge on corroboration. The learned judge said:

> "Now, Ladies and Gentlemen, I come now to a very critical stage in the whole summation. Before I go into the law, let me just give you some principles that apply in these circumstances and the question of the special warning which I must give to you. Now, Ladies and Gentlemen of the Jury, you are men and women of the world. You know that sex takes place in private for the most part sexual offences - - lawful sex takes place in private and for the most part unlawful sex takes place in private also. The consequence is that quite often there is no other evidence other than that of the person who is complaining, the virtual complainant. In the circumstances, what the law says I must tell you is that it is always dangerous to convict on the sole testimony of a virtual complainant. In this case, she is a child. But the law goes on to say that if you believe the testimony in this case of the child, you can convict. The underlying reason, of course, is that people tell lies for different reasons, children included. So, therefore, quite apart from the question - - the burden on the Prosecution, you have to bear in mind the law says it is dangerous to convict on sole testimony of a virtual complainant. And let me emphasize in this case it is a child, she is now 14. Now, what the law normally requires is corroboration, but as I said in sexual offences you don't get corroboration. But let me just tell you the principle of corroboration. Corroboration is evidence - - sorry. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the crime. In other words, it must be evidence which implicates him that which confirm in some material particular, not only the evidence that the crime had been committed, but also that the person committed the crime. Now, that is evidence in corroboration. But there is no corroboration in this case. I am just giving you the principle how it applies, and I'm telling you what the law says with regard to the whole question of sexual offences and where there is no corroboration it is always dangerous to convict on the sole testimony, and the added factor in the equation now is that … is a child of 14 years."

Later on in closing he said; p. 159, lines 7-14, vol. II;

> "The law further says that I must warn you it is dangerous to convict on the sole testimony of a virtual complainant and the further part of that equation in that in this case, it is a child. So it is dangerous and I must warn you. It is normally dangerous, but then again it is also saying sole testimony, child, but if you believe the child's evidence, if you believe her evidence, you can convict."

[41] This direction assumes the existence of a mandatory legal requirement to instruct the jury that it is always dangerous to convict on the sole testimony of a virtual

complainant. There is, of course, no such mandatory requirement, whether in the case of virtual complainants in general or in the case of virtual complainants in sexual cases. As indicated in Gilbert the question whether to give a corroboration warning is a matter for the discretion of the trial judge. In R v X[16] the Court of Appeal of Northern Island stated at paragraph 35:

> "The discretion available to the judge at trial as to whether a warning is required is necessarily a wide one. The judge is best placed to assess whether the flow of evidence, the firmness of the complainant's testimony, the quality of the defence proffered and a myriad of other aspects of the trial dictate the need for a warning. This court should be slow to interfere with the exercise of that judgment based as it must be not only on an analysis of the evidence but also on an impression of how witnesses have acquitted themselves under cross-examination and challenges to their accounts."

[42] On several occasions the judge warned the jury that it is dangerous to convict on the sole testimony of a virtual complainant and pointed out that the virtual complainant was a child. The judge was undoubtedly in a position to assess the flow of the evidence, the firmness of the testimony of the virtual complainant, the quality of the defence proffered as well as other aspects of the trial. Having decided that it was an appropriate case to give a corroboration warning, the strength and terms of the warning was a matter for the judge. The judge reminded the jury that there was no corroboration and emphasized the fact that the virtual complainant was a child, who was now 14 years old. The judge went on to tell the jury that if they believed her evidence they could convict. In my judgment the judge gave adequate directions on corroboration.

[43] Mr. Martin referred to the case of Woodall v R[17] and argued that the judge should have given a specific special warning in respect of the age of the complainant. Woodall was convicted of committing an act of serious indecency with a 15 year old boy. One of the grounds of appeal raised was whether the judge had failed to warn the jury about the possible unreliability of the evidence of the complainant in view of the absence of corroboration and of his age. Counsel for Woodall

[16] [2006] NICA 1
[17] (2005) 72 WIR 84

submitted and the Court of Appeal agreed that the judge was obliged to give the statutory warning in compliance with section 137(1)(c) of the Evidence Act that the evidence of the complainant might be unreliable because of his age. At paragraph 48 the Court of Appeal cited Phipson on Evidence[18] as containing the direction the judge is required to give the jury:

> "The jury should be warned that there is a danger in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced that the witness has told the truth."

[44] The Court went on to state at paragraph 49 that the jury should have been told that the evidence of children should be examined with special care. Further the jury should have given consideration to whether the evidence was supported or whether there were any possible weaknesses in the evidence.

[45] Mr. Martin did not point to any provision in the Laws of Antigua and Barbuda which imposed an obligation on the judge to warn the jury that the evidence of the virtual complainant might be unreliable because of her age. Be that as it may the learned judge addressed the issue of the age of the virtual complainant and the danger of acting on her sole evidence.

[46] A further ground of complaint was that the learned judge "incorrectly stated that in sexual offences one does not get corroboration, and that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the crime". The learned judge clearly erred when he stated that in sexual offences one does not get corroboration. The presence or absence of corroboration depends on the evidence which is presented. There is nothing wrong with the other aspect of the direction on corroboration referred to in the above-quotation.

[18] 13th edn, 1982 para 32 - 13

[47] In the course of his submissions Mr. Martin referred to the case of R v Henry and Manning[19] where the English Court of Appeal declined to apply the proviso in respect of Manning. Mr. Martin likewise invited this court not to apply the proviso. The question of the proviso is really academic as in my judgment the directions given on corroboration were adequate. It is still useful to comment on Henry and Manning for the following reasons. Salmon LJ referred to the corroboration directions given by the trial judge and at page 155 observed that the learned judge did not say why the jury was to scrutinize the evidence of the virtual complainant with care, did not say that it was dangerous to convict without corroboration, still less, why it was dangerous to convict. A close examination of the judgment clearly shows that Salmon J's observations were based on the long discredited notion that women and girls tell lies for all sorts of reasons and sometimes for no reason at all. As indicated earlier, the law has moved on from that position. Mr. Martin had submitted that Manning's position was almost identical on the facts to the appellant Matheson and on the law to both appellants Matheson and Naitram. For the reasons indicated above, Henry and Manning does not advance the appellant's case.

[48] Mr. Naitram cited the case of Kyon Frederick v The Queen[20] where this Court considered the application of section 136 of the Evidence Act of Saint Lucia. The section obligates the judge in the case of a prosecution for an offence of a sexual nature, unless there are good reasons for not doing so, to warn the jury that the evidence may be unreliable; inform the jury of the matters that may cause it to be unreliable; and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. The judge failed to comply with the clear statutory requirements and gave no reasons for so doing. Olivetti JA [Ag.] stated that the case cried aloud for full adherence to the section and held that the failure to comply was a grave error of law as it concerned the weight to be given to the only evidence adduced by the prosecution to show that the appellant

[19] (1969) 53 Cr. App. R. 150
[20] HCRAP 2006/008

had committed the offence. It concerned the very foundation of the prosecution's case.

[49] Kyon Frederick is distinguishable from the case under appeal in that there was a complete failure by the learned trial judge to comply with the relevant requirements of the Evidence Act. In the case under appeal there was no statutory obligation in respect of which the judge failed to comply. Corroboration is a rule of practice and it is entirely within the discretion of the trial judge as to whether he should give a warning. The learned trial judge gave an adequate warning. I do not agree with the submission of Mr. Martin that the learned trial judge made "a grave error of law as it concerned the weight to be given to the only evidence adduced by the prosecution to show that the appellant had committed the offence the - very foundation of the prosecution's case."

[50] Mr. Martin complained that the trial judge did not give the correct reason for the corroboration warning, that allegations of sexual impropriety are easy to fabricate and extremely difficult to refute. This contention harks back to the old corroboration rule of practice which required the judge to give the jury a specific direction and warning in respect of the evidence of the complainant in a sexual offence case. The classic version of the explanation as to why the warning is needed was given by Salmon LJ in Henry & Manning[21]. He stated:

> "…because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all."

[51] This explanation is expressly based upon a suggested propensity of girls and women to lie. Whatever may have been the position in the past, this does not represent the prevailing view. It is based upon the discredited belief that regardless of the circumstances the evidence of female complainants must be regarded as particularly suspect and particularly likely to be fabricated. This belief

[21] At page 153

is not conducive to the fairness of the trial nor to the safety of the verdict. See paragraph 16 of Gilbert. The reason advanced by Mr. Martin as the correct reason for the corroboration warning, that is, that allegations of sexual impropriety are very easy to fabricate and extremely difficult to refute, has been discredited.

[52] In sexual cases, the question of fabrication and lies is the subject matter of the corroboration warning (paragraph 16 of Gilbert). In that regard the learned judge was not off the mark when he stated that the underlying reason for the corroboration warning "is that people tell lies for different reasons, children included".

[53] For all the reasons mentioned this ground of appeal fails.

Ground 3

[54] The learned judge erred in his duty to put the defence case of the appellant Matheson properly or fairly or at all in the course of his summation.

[55] The appellant Matheson did not give evidence on oath, did not make a statement from the dock, and did not call any witnesses. He however gave a caution statement to the police which was tendered in evidence as part of the prosecution's case. I will refer to the pertinent parts of the caution statement. The statement is written partly in local dialect. In his caution statement, Matheson stated that he met the virtual complainant about five past three in the afternoon. They spoke. The virtual complainant told him "she will free up and gi me de wife". In local parlance "wife" means sexual intercourse. Matheson further stated "that she wan give me the sudden tan up". Again in local parlance this means having sexual intercourse from a standing position. Matheson stated that "me a try the sudden tan up, but me cannot do dat. So I ask she if she a come by me". The virtual complainant knew that he lived with his mother. She asked him what happened to his mother. Matheson stated:

> "…same time while we a go by me, me mother come an I ask she if she till a go by me and she say no. I tell she wha happen, you na give me the sudden an she say some other time. She say forget about it."

[56] Matheson went on to say that he left her chatting with two boys and went inside. It was about 9:30 p.m. When he came out they were still there chatting. He told them that he hoped they did not carry the virtual complainant and do her nothing bad. The virtual complainant replied "boy, just cool out". He turned and went on his business.

[57] From the caution statement of Matheson it is seen that he and the virtual complainant were engaged in a conversation about sex, the virtual complainant promised him sex, she wanted to engage in sexual intercourse from a standing position, he tried but could not execute that manoeuvre so he asked her to come to his home. He lived with his mother. She did not go to his home because his mother came. The presence of his mother thwarted the planned intercourse. He and the virtual complainant parted company.

[58] How did the learned judge deal with the caution statement? He stated:

> "Now, in his wit - - in his caution statement - - now, I will not attempt to read this [the caution statement] because I may read some of the things incorrectly, but you will have it to take to your - - but the question of 'she give me the sudden tan up,' now, you are men and women of Antigua. This is a matter entirely for you, and I leave that. You will have the statement to take in and you can deal with that."

[59] It is observed that the judge only made reference to one sentence of the caution statement, and ironically misstated that sentence. Mr. Martin contended that the misstatement lent itself to an incriminating interpretation. I agree. The learned judge said:

> "But the question of 'she give me the sudden tan up,' now, you are men and women of Antigua. That is a matter entirely for you."

However, the actual words in the caution statement as read into evidence were:

> "She wan give me the sudden tan up".

[60] Mr. Martin contended and I agree, that the obvious inference from the judge's misquote is that the virtual complainant and Matheson had sex (and therefore Matheson was guilty as charged). However, the actual inference from what Matheson actually said in his caution statement was that the virtual complainant was desirous of having sex with him, but not that they did. This inference is further bolstered by the statement that he attempted sex without success. The virtual complainant later changed her mind about having sex and they went their separate ways.

[61] Apart from this critical misstatement of what Matheson said, the learned judge did not put before the jury in any form what Matheson's defence at trial was. The general jurisprudence in such circumstances can be found in cases such as R v Akhtar[22] and R v Curley and Cadwell[23]. The matter is summarized in Archbold 2010, paragraph 7-65 by reference to R v Akhtar where a reference of [2000] 1 Archbold News 2 is given:

> "Where the defendant neither gives, nor calls evidence, but has been extensively interviewed, it is of particular importance that the summing up should at least summarise the main points made by the defendant; only rarely, if ever, would a conviction be adjudged safe notwithstanding a failure to sum up the defence."

[62] In Curley and Cadwell May LJ put the matter thus:

> "It needs to be emphasized and emphasized again that it is the plain duty of a judge summing up a criminal case to a jury to put fairly and sufficiently the defence case. Where [an appellant] has not given evidence, and in addition has not called any evidence on his behalf, there is no evidence from the witness box in support of that defence other than such evidence as has been gleaned by one way or another from other witnesses which have been called. Where that [appellant] who has not given evidence has been interviewed in detail and has given an account in interview which is relevant to their defence and which so far as it goes contains their defence, that is evidential material in the way that we have described and it is the duty of the judge, in our judgment, in putting the defence case properly and fairly to make such proper and structured

[22] [2000] 1 Archbold News 2
[23] [2004] EWCA Crim 2395

reference in summary to the material in the interview which constitutes the defence case in the criminal trial."

[63] I adopt and apply the above statement of the law to the present case. Matheson's defence is clearly gleaned from his caution statement to the police. The gist of which was that he attempted to have sexual intercourse with the virtual complainant but was not successful because of the physical position that entailed. He later asked the virtual complainant whether she was not giving him sex, she said some other time, forget about it. They parted company. Clearly Matheson is saying that he did not have sexual intercourse with the virtual complainant. That is his defence.

[64] It was the duty of the learned judge in putting the defence case properly and fairly to make a proper and structured reference in summary to the material in the caution statement which constituted Matheson's defence in the trial. The learned trial judge failed in that duty. The failure was made worse by a critical misstatement of the evidence. By making reference to a single sentence in the caution statement and telling the jury that it was a matter entirely for them the trial judge abdicated his responsibility to put the defence case fairly and properly to the jury. The judge's responsibility to summarise the main points made by a defendant in his caution statement is not diminished or made redundant by the fact that the jury would have the caution statement with them upon their retirement. A judge cannot relinquish that responsibility.

[65] What then is the effect of the failure of the trial judge to put the defence of Matheson fairly and properly to the jury? I have no doubt that in the circumstances of this case it renders the conviction unsafe. I do not consider this to be one of those rare and exceptional cases in which the omission of the judge does not affect the safety of the conviction. Matheson's appeal against conviction is allowed. Accordingly his conviction and sentence are quashed.

Appeal Against Sentence – Naitram

[66] This ground alleges that the trial judge erred in not decreasing the minimum sentence according to the degree by which the commission of the offence was mitigated by certain factors to include the age and absence of antecedents.

[67] Mr. Martin submitted that in contravention of the principles in Winston Joseph, the learned judge merely identified the lack of aggravating factors and the presence of mitigating factors. The learned judge did not embark on any type of evaluation process and made no express reference to the probation report which was prepared for sentencing purposes. Further, having identified two mitigating factors, the age of the defendants, and their lack of previous convictions, the learned judge failed to apply any type of discount to reflect the same. He submitted that these two circumstances are strong mitigating factors even for serious crimes deserving of a significant reduction to a custodial sentence. Mr. Martin also stated that Naitram came from a dysfunctional home, lacked a proper support structure in growing up but was nevertheless a good candidate for rehabilitation.

[68] Naitram was 19 years old at the time of the offence and that was his first conviction. The learned judge was of the view that there was no legal basis for departing from the guidelines laid down in Winston Joseph and therefore imposed an eight year term of imprisonment. While the court is mindful of the general undesirability of imprisoning young offenders, it is recognized that even in the case of young offenders because of the serious nature of the offence a term of imprisonment will normally be the appropriate disposal. The law acknowledges that in reality some children even as young as eleven years of age need protection from themselves. A custodial sentence indicates the essential principle that children may need protection from themselves[24]

[24] Attorney General's Reference No. 29 of 2008 [2008] EWCA Crim. 2026

[69] The Court of Appeal will interfere with a sentence passed if the sentence is not justified by law; if it is passed on the wrong factual basis; if some matter has been improperly taken into account or where the sentence was wrong in principle or manifestly excessive. The Court will not interfere with the discretion of the sentencing court on the ground that it might have passed a different sentence[25].

[70] I find no error in principle on the part of the learned judge in imposing an eight year prison sentence neither do I conclude that the sentence was manifestly excessive. I see no proper grounds for departing from the sentencing guidelines laid down by this Court. In the circumstances the appeal against sentence is dismissed and the sentence of eight years imprisonment is affirmed.

[71] In conclusion the appeal of Roger Naitram against conviction and sentence is dismissed and accordingly his conviction and sentence are affirmed. The appeal of Lassell Punch against conviction is dismissed and his conviction is affirmed. His appeal against sentence is allowed to the extent that his sentence is varied to time served. The appeal of Leary Matheson against conviction is allowed and his conviction is quashed and sentence set aside.

Davidson K. Baptiste
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Janice George-Creque
Justice of Appeal

[25] R v Newsome, R v Browne 54 [1970] 2 Q.B. 711