EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2014/0006

BETWEEN:

ANDRE PENN

Appellant

and

THE QUEEN

Respondent

Consolidated with
BVIHCRAP2015/0002

BETWEEN:

THE QUEEN

Appellant

and

ANDRE PENN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Jerome Lynch, QC with him Ms. Valerie Gordon for Mr. Andre Penn

Mr. Wayne L. Rajbansie, the Director of Public Prosecutions, for the Crown

2016: July 19;
November 23.

Criminal appeal – Unlawful sexual intercourse – Whether learned trial judge erred in directions to jury – Whether sentence imposed was lenient

The appellant was convicted of seven counts of indecent assault, two counts of unlawful sexual intercourse with a girl under the age of thirteen, and two counts of buggery. The Crown's case against the appellant relied completely on the uncorroborated evidence of the complainant; as such credibility was a crucial matter at trial.

The appellant's case was a complete denial of the charges. Prior to his conviction, the appellant was a man of undoubted good character with an unblemished record and reputation.

The appellant has advanced several grounds of appeal against his conviction including that the learned trial judge did not properly direct the jury on (i) the critical aspect of his good character; and (ii) corroboration. Further that the learned trial judge did not give the mandatory statutory warning on self-interest ordained by section 146 of the Evidence Act, 2006; did not properly put the appellant's case to the jury; the learned judge's summation was weighted in favour of the Crown; and in all the circumstances there is a lurking doubt about the safety of the conviction.

The Crown has appealed the sentence of 10 years imprisonment imposed on the appellant, arguing that the learned trial judge, having found that the appellant was largely responsible for the delay in bringing the case to trial, erred in deducting five years for delay from the fifteen years.

Held: dismissing the appeal against conviction and the Crown's appeal against sentence, that:

1. The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where he is of good character and has testified or made pre-trial statements. A direction as to the relevance of good character to the likelihood of a defendant having committed the offence charged is to be given where he is of good character whether or not he has testified or made pre-trial answers or statements. In this case, the appellant gave evidence on oath as to his good character and in keeping with the general rule, the trial judge directed the jury on credibility and propensity. The judge directed the jury that the evidence about the appellant's good character was uncontradicted and they must take his good character into account in his favour. The jury would have been left with no doubt that the appellant's good character operates positively in his favour both as to propensity and credibility and it was for them to decide what weight they should give to it and in making that assessment they are to take into account

everything they heard about the appellant. Accordingly, this ground of appeal fails.

Teeluck and John v The State [2005] UKPC 14 applied; Hunter and Others v The Queen [2015] EWCA Crim 631 applied; R v Vye and Others [1993] 1 WLR 471 applied; R v Aziz [1996] AC 41 applied.

2. Section 146 of the Evidence Act, 2006 provides that where there is evidence, the reliability of which may be affected by self-interest the court shall, unless there is good reason otherwise, warn the jury that the evidence may be unreliable, inform the jury on matters which may cause the evidence to be unreliable and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be attached to that evidence. It would not be proper for a judge to direct the jury to regard the evidence of a witness with caution in the absence of a careful consideration whether there is a foundation for regarding the particular evidence as unreliable. The necessary foundation has to be established for regarding the complainant's evidence as unreliable. In this case there was no evidence on which a section 146 warning was required as the complainant's complaints against the appellant and the circumstances in which they came to be made, far from evincing self-interest, manifested the very antithesis of self-interest. The absence of a section 146 warning on self-interest does not inexorably lead to the conclusion that the resulting conviction is unsafe. Much may depend on the circumstances of the case including the nature of the evidence in question regarding the matter with respect to which the warning was not given

   Section 146 of the Evidence Act, 2006 applied.

3. Section 145 of the Evidence Act, 2006 provides that it is not necessary that evidence, on which a party relies, be corroborated. It is not necessary for the court to warn the jury that it is dangerous to act on uncorroborated evidence or give a warning as to the absence of such corroboration. It is within a trial judge's discretion whether he should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. Judges are not required to conform to any formula and an appeal court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content. The trial judge highlighted the tender age of the complainant at the time the allegations were first made, that her evidence might be unreliable and the need for the jury to exercise caution in deciding whether to accept her evidence. It cannot be said that the trial judge's exercise of his discretion was Wednesbury unreasonable. There is therefore no reason to interfere with the exercise of the discretion of the trial judge in his directions on corroboration.

   Regina v Makanjuola [1995] 1 WLR 1348 applied.

4. As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge but with the jury. If, therefore, there is a case to answer and, after proper directions, the jury has convicted, it is not open to the appellate court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or maybe unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury. In this case, there is nothing in the evidence or the trial process which leads to the inexorable conclusion that the trial of the appellant is unsafe.

   R v Pope [2012] EWCA Crim 2241 applied.

5. Ordinarily but not invariably, a successful appellant should not receive a longer sentence after conviction on a re-trial than he or she received at the original trial. Where the judge at the new trial considers that the circumstances of the case do call for a longer sentence he will not be absolutely fettered by the approach prima facie to be adopted. He is both at liberty, and indeed obliged, to give effect to his own assessment. Therefore, the trial judge cannot be properly criticised for imposing a longer sentence on the retrial.

   R v Bedford (1986) 5 NSWLR 711 applied.

JUDGMENT

[1] BAPTISTE JA: The appellant, Andre Penn, was convicted of seven counts of indecent assault, two counts of unlawful sexual intercourse with a girl under the age of thirteen, and two counts of buggery. All of the offences relate to a child – a girl under thirteen at the time, with whom he shared a familial connection through marriage to her aunt. At the time of the commission of the offences, the child resided at the marital home the appellant shared with his wife. The appellant has appealed his conviction and the Crown has also appealed the sentence of ten years imprisonment imposed upon him.

[2] Prior to his conviction, the appellant was a man of undoubted good character with an unblemished record and reputation. He had no previous encounter with the law. He was well educated. He held a Master's degree in the Romance languages and had been a school teacher for which he had received many accolades. He had also served as an elected member of the House of Assembly of the British Virgin Islands, having run and won on an independent ticket. The appellant's good character was an important plank of his defence.

[3] The Crown's case against the appellant relied completely on the evidence of the complainant. The Crown presented a case of an adult in a position of trust using the opportunity which was undoubtedly available to him - grooming a minor child over a period of time for his sexual gratification and pleasure involving and evolving from kissing, fingering, oral sex, sexual intercourse to buggery. The offences in question occurred both at home and in his office. The appellant admitted that the complainant would spend more time with him than with his wife and he would be responsible in part for her education, assisting her with her homework and assignments from time to time.

[4] The appellant's case was a complete denial of the charges. He relied on his good character. The reliability and credibility of the complainant's evidence was attacked. It was posited that her evidence was filled with inconsistencies and she was a self-confessed liar. Her evidence was uncorroborated and was motivated by self-interest. She fabricated her story out of a fear of being sent back to her homeland for misbehavior. The complainant was sexually aware, has fantasized and has a vivid imagination. The complainant has three main problems: sex, lies and stealing.

[5] The learned judge quite rightly observed that the case was essentially about whether or not the jury believed the complainant as her credibility was a crucial matter at the trial. Apart from her evidence, there was no other evidence supporting the case against the appellant. The jury was faced with a stark choice

as to whether or not they believed the complainant or the appellant. Credibility was a central plank of this matter.

[6] The appellant advanced several grounds of appeal against his conviction. In sum, they are that the learned trial judge did not properly direct the jury on the critical aspect of his good character; on corroboration; did not give the mandatory statutory warning on self-interest ordained by section 146 of the Evidence Act, 2006[1] of the Virgin Islands; did not properly put the appellant's case to the jury; did not put aspects of his defence to the jury; the learned judge's summation was weighted in favour of the Crown; and in all the circumstances there is a lurking doubt about the safety of the conviction.

[7] I will first consider the ground of appeal dealing with good character. The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where he is of good character and has testified or made pre-trial statements. A direction as to the relevance of good character to the likelihood of a defendant having committed the offence charged is to be given where he is of good character whether or not he has testified or made pre-trial answers or statements. These principles are derived from R v Vye and Others[2], and R v Aziz[3]. In this case, the appellant gave evidence on oath as to his good character and in keeping with the general rule, the trial judge directed the jury on credibility and propensity. Mr. Lynch, QC, the appellant's counsel, takes issue with the adequacy of the directions, arguing that they were woefully deficient.

[8] I now review Mr. Lynch, QC's arguments. With respect to the credibility limb, Mr. Lynch, QC complains that the learned judge failed to instruct the jury using affirmative and direct language to convey fully and fairly that a person of good character is more likely than not to be truthful. Rather, the trial judge perfunctorily, vaguely and benignly suggested that the appellant's good character supports his

[1] No. 15 of 2006.
[2] [1993] 1 WLR 471.
[3] [1996] AC 41.

credibility. Mr. Lynch, QC submits that this direction was defective in law particularly in circumstances where credibility was the heart of the case. The standard direction obliges the trial judge to instruct the jury to accept that a person of good character is more likely to be truthful and not to look at the person's good character as a means of 'assisting' in probing the defendant's character.

[9] With respect to the propensity limb, Mr. Lynch, QC says that the trial judge failed to convey to the jury that as a person of good character the appellant is less likely to commit a crime, especially one of the nature with which he is charged. Mr. Lynch, QC complains the trial judge diluted the required direction by using conditional and benign language rather that the required direct language.

[10] Mr. Lynch, QC posits that the language of the required direction is clear and unambiguous. Mr. Lynch, QC contends that in failing to issue the proper direction, the trial judge's direction assumed the appearance of an argument rather than a direction leaving the jury to resolve that argument thus leading it to consider matters outside the scope of its duty. Mr. Lynch, QC complains that the trial judge went on to adopt an even more augmentative stance, as if making submissions himself by stating "There is a first time for everything." Mr. Lynch, QC notes that while there are no exact words required, the potentially inflammatory nature of this statement takes it outside the scope of "direction" and takes it instead into the territory of an "argument".

[11] Mr. Lynch, QC states that he reiterates the Court's finding in Yourrick Furlonge v The Queen,[4] that in the event a good character direction is omitted it will rarely be possible for an appellate court to say that the giving of the direction could not have affected the outcome. Mr. Lynch, QC says that this is similarly the case where the direction is improperly and inadequately given. Mr. Lynch, QC submits that the trial judge's failure amounted to a material misdirection such that it cannot be known whether the jury would have acquitted the appellant had the appropriate full

[4] ANUHCRAP2009/0006 (delivered 27th January 2014, unreported).

direction been given. The judge's failure therefore resulted in grave injustice to the appellant and renders the conviction unsafe.

[12] In examining the merits of this ground of appeal it is instructive to briefly review the fundamentals of a good character direction and examine the direction the judge gave to the jury on the question of good character. The standard good character direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.[5] The weight to be given to each limb is a matter for the jury.[6]

[13] At paragraph 4 in Arthurton v The Queen[7] Dame Elias said that once absence of previous convictions is established, the trial judge is under a duty to direct the jury as to its relevance. In that regard, the jury must be directed that the accused good character is relevant in considering whether it is likely that he would have committed the offence; and where the credibility of the accused is in issue, the jury must also be directed that his good character is relevant in considering whether he is to be believed.

[14] The issue of good character was also addressed in Rajendra Krishna v The Republic of Trinidad and Tobago[8] where the Board stated at paragraph 36 that a defendant's good character may be relevant to his credibility as a witness (a person who is of good character is more likely to be truthful than one who is not) and also to his propensity to commit the crime in question.

[5] Per Lord Carswell in Teeluck and John v The State [2005] UKPC 14, para. 33; [2005] 1 WLR 2421.
[6] Hunter and Others v The Queen [2015] EWCA Crim 631 para. 78.
[7] [2005] 1 WLR 949; [2004] UKPC 25.
[8] [2011] UKPC 18.

[15] In France et al v The Queen[9] Lord Kerr expressed the position in a kindred way at paragraph 47. The good character direction comprises two elements: a credibility limb "(signifying that the defendant who has no previous convictions is entitled to claim that he should be more readily believed than one who has been convicted previously)" and a propensity limb "(which means that someone who has not been found guilty of an offence in the past should be regarded as less likely to have a predisposition to offend than someone who has a criminal record)".

[16] What comes out from the above cases with respect to the credibility limb is that the judge should make it plain to the jury that good character supports the credibility of a defendant and the jury must take the defendant's good character into account in deciding his truthfulness and believability. In that regard a person of good character is more likely to be truthful than one of bad character. Did the judge fail in that duty? The judge directed the jury that the evidence about the appellant's good character was uncontradicted and they must take his good character into account in his favour. The judge then proceeded to direct on how the jury should take it into account. On the credibility limb, the judge directed as follows:

> "As with a man of good character, his good character supports his credibility and it should assist you in deciding whether he is telling you the truth. You should take it into account in deciding whether to believe his evidence."[10]

To my mind, there is nothing remarkable about this direction. It brings to the fore that the appellant's good character supports his credibility and should be taken into account by the jury in deciding whether they believe his evidence. The judge did not only say that good character supports credibility; he went on to assert the importance of good character in deciding whether the appellant was telling the truth. In my judgment, Mr. Lynch's, QC complaints on the credibility limb are not justified.

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[9] [2012] UKPC 28.

[10] Transcript of Trial Proceedings – Judge's Summation and Verdict by Jury, p. 127, lines 10-14.

[17] With respect to the propensity limb the judge directed that:

> "In the second place, the fact that he is of good character may mean that he is less likely than otherwise to have committed the offences for which he is charged. Of course, ladies and gentlemen, there is always a first time for everything. Good character by itself, is not a defence to a criminal charge. There is a first time for everything. His good character is a matter which you should have regard to in the Accused's favour but at the end of the day, it is for you to decide what weight to give to it in this case."[11]

[18] The opening sentence of the judge's propensity direction clearly accords with the well-established position that a person of good character is less likely than otherwise to commit an offence, more so the offence for which he stands charged. No objection can properly be taken to that direction. Immediately following, the trial judge told the jury "Of course, ladies and gentlemen, there is always a first time for everything. Good character by itself, is not a defence to a criminal charge. There is a first time for everything". Mr. Lynch, QC takes strong exception to what he called "the potentially inflammatory nature" of the statement that "there is a first time for everything". It becomes necessary to examine the impact of that statement on the efficacy of the direction. There are cases in which that expression has been used by trial judges but nothing turned on that as the appeals were allowed on other grounds.

[19] Thus, in Arthurton v The Queen the trial judge in giving the good character direction, told the jury, "So you will take his good character into consideration. You will also bear in mind that counsel for the Crown told you there's a first time. So you will see you will have to weigh it."[12] Although Arthurton successfully appealed his conviction at the Privy Council, no issue appeared to have been taken with the comment that "there is a first time".

[20] Arthurton had appealed his conviction on two counts of unlawful sexual intercourse with a girl under 13. He complained that there was a miscarriage of justice rendering the conviction unsafe because the trial judge first declined to

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[11] Transcript of Trial Proceedings – Judge's Summation and Verdict by Jury, p. 127, lines 15-24.
[12] At para. 19.

discharge the jury when evidence prejudicial to the defence and of no probative value was given by a police witness and then failed to direct the jury in a manner which removed the prejudice caused by the evidence.

[21] The complainant in Arthurton was 11 years old at the time of the events giving rise to the charges. Apart from the evidence of opportunity, the case against the appellant at trial effectively depended on the uncorroborated evidence of the complainant. The appellant, who had no previous conviction, denied the charges. The prosecution's case turned on the credibility of the complainant and in the trial, the appellant's good character was a significant part of his defence (just as in this appellant's case). At paragraph 29 the Board noted that the central issue for the trial was whether the complainant was to be believed. The appellant's good character was critical to that inquiry. It entitled him to a credibility direction in respect of his evidence denying the sexual charges and to a direction that his good character was relevant in assessing the likelihood that he would have offended the way alleged. Although the judge gave those directions, evidence had been adduced which showed that the appellant had been arrested on another occasion on suspicion of similar offending. That evidence bore directly on the issue of propensity. As such, it directly undermined the propensity limb of the good character direction and with it a major plank in the defence case.

[22] In Singh v Trinidad and Tobago,[13] "there is always a first time" also appeared in the direction of the trial judge. Singh was convicted of two counts of corruption. One of the grounds of appeal was that his conviction was vitiated by an inadequate good character direction. The trial judge directed the jury on propensity but not credibility. In directing the jury, the judge stated, "It doesn't mean because you have good character you cannot be found guilty, or you cannot commit a crime, there is always a first time." The trial judge further directed that "when you are considering his evidence the fact that a person is a person of

[13] [2006] 1 WLR 146; [2005] UKPC 35.

unblemished record may mean that he is less likely than otherwise to commit this type of crime … because of his hitherto good character".

No issue appeared to have been taken with the terms of that direction. The Board said at paragraph 23 that this was not an ungenerous direction.

[23] On the issue of good character, the Board said at paragraph 21:

> "As a practising lawyer with no criminal convictions, no recorded blemish on his professional reputation and a commendable record of involvement in community activities, the appellant was entitled to the benefit of a full good character direction to the jury. Such a direction should have related both to his credibility as a witness and to the lack of any propensity to commit crimes of the kind charged against him".

In allowing the appeal, the Board concluded that it cannot be said that properly directed on the appellant's credibility, the jury would inevitably or without doubt have convicted.

[24] "There is a first time for everything" has been attacked frontally in this appeal. It was not a live issue in either Arthurton or Singh. "There is a first time for everything" is a fairly self-evident proposition, which I dare say, a jury would be aware of. Yet I do not see the necessity of importing it into a direction on propensity. I fail to see its utility. I think it may well be advisable for trial judges to refrain from employing it in their directions on the propensity limb of the good character direction.

[25] In the present appeal does the statement that "there is a first time for everything" undermine the propensity direction? The sexual offences for which the appellant was convicted spanned a period of two years and he was convicted of eleven counts. In Arthurton, the Board noted that sexual abuse of a child is a type of offence for which propensity may be significant.[14]

[14] At para. 31.

[26] The good character direction has to be looked at as a whole. In continuing the good character direction, the judge was quite careful. He said:

> "In considering his good character, you are entitled to take into account everything you have heard about it. His status in society, his family, respectability and standing, his own standing, his education and his teaching past, the fact that there has never been anything known against him by the law or any other previous allegations made against him. He was a man already of mature years when this allegation was first made against him. Having regard to what you know about the Accused, you may think he is entitled to ask you to give considerable weight to his good character when deciding whether the prosecution has satisfied you about his guilt."[15]

Having considered the good character direction in its entirety, I am not of the view that the inclusion of "there is always a first time for everything … there is a first time for everything" undermines the propensity limb of the good character direction, nor the safety of the conviction. In a nutshell, the jury would have been left with no doubt that the appellant's good character operates positively in his favour both as to propensity and credibility and it was for them to decide what weight they should give to it and in making that assessment they are to take into account everything they heard about the appellant.

[27] Mr. Lynch, QC also appears to take issue with that part of the direction which states that, "Having regard to what you know about the accused, you may think he is entitled to ask you to give considerable weight to his good character when deciding whether the Prosecution has satisfied you about his guilt". In R v Malika Haddad Moustakim,[16] the appellant's substantial ground of appeal against conviction was that the good character direction was deficient. The judge told the jury that the appellant had no convictions and fell to be dealt with by them as a person of good character. The judge further directed that:

> "… a defendant of good character is entitled to say that I am as worthy of belief as anyone, so in the first place it goes to the question of whether or not you believe Mrs. Moustakim's account. Secondly, she is entitled to have it argued on her behalf that she is perhaps less likely than a

[15] Transcript of Trial Proceedings – Judge's Summation and Verdict by Jury, p. 127, line 25, p. 128, lines 1-12.
[16] [2008] EWCA Crim 3096.

> defendant of bad character to have committed this or any criminal offence."[17]

Counsel for both the appellant and respondent agreed that the direction was deficient. The respondent however argued that the extent of the deficiency was moderate and that the direction taken as a whole communicated the sense of the good character direction sufficiently that it need not undermine the safety of the conviction.

[28] In allowing the appeal against conviction, the Court of Appeal held that the good character direction was inadequate because:

> "1. There is no explicit positive direction that the jury should take the appellant's good character into account in her favour.
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> 2. The judge's version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.
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> 3. The judge's version of the second limb of the direction did not say that her good character might mean that she was less likely than otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was perhaps less likely to have committed the crime. The use of the word "perhaps" is a significant dilution of the required direction.
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> 4. In the judge's direction each limb is expressed as what the defendant is entitled to say or argue, not as it should have been a direction from the judge himself."

[29] In France et al v The Queen,[18] a Privy Council case of recent vintage which originated from Jamaica's Court of Appeal, Lord Kerr, addressing the issue of the good character direction, had this to say:

> "The good character direction is, of course, comprised of two elements: a so-called credibility limb (signifying that the defendant who has no previous convictions is entitled to claim that he should be more readily believed than one who has been convicted previously) and a

[17] At para. 10.
[18] [2012] UKPC 28.

> propensity limb (which means that someone who has not been found guilty of an offence in the past should be regarded as less likely to have a predisposition to offend than someone who has a criminal record)."[19] (My emphasis).

This definition of the good character direction was later adopted by the Court of Appeal of Jamaica in the case of Ervine Brown O/C Marlon Robinson v R.[20]

[30] It is of interest to note the words of Weekes JA in the 2015 Trinidad and Tobago case Dennis Sandy et al v The State[21] at paragraph 22:

> "Ground four (4) can be described as a non-starter, in the sense that it misapprehends the meaning of the direction. The direction given by the trial judge is what is considered to be the standard direction. A jury is not bound to give any weight, far less considerable weight, to an accused's good character and that is why the direction is couched in the terms that "you, the jury may think that the accused is entitled to ask you to give considerable weight to his good character". The emphasis is on the degree of weight, not whether or not, they consider the issue of good character. It is entirely for the jury to decide whether or not an accused is entitled to ask them to give considerable weight to his good character. It is open to them to find that when they consider all that they have heard about an accused in the course of a trial, that despite the fact that he has no previous convictions, he is not entitled to ask them to give considerable weight to the fact."

[31] In this case, the judge's directions do not suffer from the deficiencies identified in R v Malika Haddad Moustakim. The judge clearly directed on the credibility and propensity limbs. Both limbs bore his imprimatur. Further, having regard to the fact that the issue of weight is pre-eminently a matter for the jury no objection or exception can properly be taken to the direction that, "Having regard to what you know about the accused, you may think he is entitled to ask you to give considerable weight to his good character when deciding whether the Prosecution has satisfied you about his guilt".

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[19] [2012] UKPC 28 at para 47.
[20] [2015] JMCA Crim 7.
[21] Crim App No. S0001 of 2015.

[32] The appellant's ground of appeal on the good character directions fails. The directions given do not undermine the safety of the conviction. In the circumstances Mr. Lynch's, QC reliance on the case of Yourrick Furlonge v The Queen is of no avail. For present purposes Mr. Lynch, QC invoked Yourrick Furlonge as part of his invitation to the Court to find that when a good character direction is improperly or inadequately given, it will rarely be possible to say that it would not have affected the outcome of the trial. In light of Mr. Lynch's, QC argument on this particular point, although it is not necessary for the disposal of this matter, it is useful to look at the law post Teeluck v State of Trinidad and Tobago.[22]

[33] In Teeluck v State of Trinidad and Tobago at paragraph 33(iv), Lord Carswell said that "where credibility is in issue, a good character direction is always relevant". At paragraph 33(ii) he said that:

> "The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given … If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial."

In Vijai Bhola v Trinidad and Tobago,[23] the Board considered those remarks of Lord Carswell. After reviewing the cases of Bally Sheng Balson v The State,[24] Jagdeo Singh v State of Trinidad and Tobago,[25] and Brown (Uriah) v The Queen,[26] Lord Brown in giving the judgment of the Board stated that the statement in paragraph 33(ii) of Teeluck required to be applied with some caution. His Lordship stated that the cases where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so "rare".

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[22] 2005] UKPC 14.
[23] [2006] UKPC 9.
[24] [2005] UKPC 2.
[25] [2006] 1 WLR 146.
[26] [2006] 1 AC 1.

[34] At paragraph 46 in France et al v The Queen the Board concluded that the approach in Bhola, if and in so far as it differed from that in Teeluck, was to be preferred. It observed that there would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. Jagdeo Singh and Teeluck were obvious examples. But it recognised that there would also be cases where the sheer force of the evidence against the appellant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. I note that Bally Sheng Balson v The State was a case where the strength and cogency of the circumstantial evidence against the appellant was such that a good character direction was of no significance. It would have made no difference.

[35] I now consider the appeal in respect of the statutory warning. Section 146 of the Evidence Act, 2006 provides that where there is evidence, the reliability of which may be affected by self-interest, age or ill-health, whether physical or mental, the court shall, unless there is good reason otherwise, warn the jury that the evidence may be unreliable, inform the jury on matters which may cause the evidence to be unreliable and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be attached to that evidence.

[36] Cases of self-interest can arise where an accused gives evidence implicating a co-defendant as in so doing he may have a purpose of his own to serve. There may be cases where a prisoner awaiting sentence gives evidence in an unrelated case or there be a case of a cell confession. This is not to say that the category of self-interest is necessarily limited to such cases, but in all of these cases self-interest would be manifestly evident and a judge would be obliged to give the requisite direction. Lord Kerr at paragraph 30 of Deenish Benjamin et al v The State of Trinidad and Tobago stated that:

> "The need in this context for a special caution about the approach to a witness's evidence derives from the possibility that she or he has a

> possible motive, which may be entirely extraneous to the directly relevant issues in the trial, for giving a less than truthful account. So, for instance, in the case of a cellmate's testimony about the admission made to him by the defendant, the need for caution stems from the possibility that the witness hopes to obtain (or already has obtained) some personal advantage as a result of the evidence that he gives about the accused's confession."

[37] No issue is taken with the judge's direction with respect to age and reliability. Mr. Lynch, QC takes issue with the absence of a direction on self-interest. He argues that the complainant had a clear self-interest in that there had been talk of her being sent back to her island of origin when she wished to remain in Tortola. In cross examination, the complainant confirmed that she feared being forced to return to her homeland because of her misbehavior. There was also evidence that the complainant had been upset with the appellant for failing to give her things she desired and that she had made threats to him as a result. Mr. Lynch, QC contends that there was therefore clear evidence that the complainant stood to gain by giving false evidence against the appellant and sufficient warning ought to have been given to the jury.

[38] The trial judge did not directly address the issue of self-interest but made reference to the complainant's fear of being sent back to her homeland. The judge directed that:

> "… the task is for you to decide whether [the complainant] is fabricating all of this out of fear of being sent back, out of an imagination and fantasy of being in a relationship with Mr. Penn and was jealous of his pregnant wife, and what she believed to be his unfair attitude towards her when she expected him to support her."[27]

[39] Section 146 requires there to be evidence the reliability of which may be affected by self-interest, age or illness. It would not be proper for a judge to direct the jury to regard the evidence of a witness with caution in the absence of a careful consideration whether there is a foundation for regarding the particular evidence

[27] Transcript of Trial Proceedings – Judge's Summation and Verdict by Jury, p. 103, lines 11-17.

as unreliable.[28] In that case the defendant had failed to establish a medical foundation for regarding the evidence of a key witness as unreliable. Though said in the context of mental illness, it would be equally applicable to the issue of self-interest. The necessary foundation has to be established for regarding the complainant's evidence as unreliable.

[40] To my mind it seems fanciful to suggest that the complainant had self-interest in making the complaints against the appellant. Much was made about the complainant's fear of being sent back to her homeland. There is no evidence that the appellant ever threatened to send the complainant back to her homeland or exercised disciplinary control over her. It appears to me that the complainant's complaints against the appellant and the circumstances in which they came to be made, far from evincing self-interest, manifested the very antithesis of self-interest. I am not of the view that Mr. Lynch's, QC complaint of self-interest is well founded.

[41] Assuming, however, that the trial judge erred in not giving a direction on self-interest in terms of section 146 of the Evidence Act, 2006 the question still remains as to the effect of this omission on the safety of the conviction. Would the omission be fatal to the conviction? It is not every omission on the part of a trial judge in directing a jury that would conduce to the unfairness of a trial or affect the safety of a conviction. The absence of a section 146 warning on self-interest does not inexorably lead to the conclusion that the resulting conviction is unsafe. Much may depend on the circumstances of the case including the nature of the evidence in question regarding the matter with respect to which the warning was not given.

[42] The circumstances in which the complainant came to make her allegations bear mentioning. The complainant came to the Virgin Islands in 2005. In May 2007 Dr. Hasting examined her and found that her hymen was intact and opined that she was not having sexual intercourse. Sometime in October/November 2008, a school teacher, Ms. Belle conducted two health science classes which involved

[28] See Milton and another v The Queen (British Virgin Islands) [2015] UKPC 42, para. 21.

the topic of communicable diseases. They were having discussions about AIDS and diseases and going to the doctor. The complainant testified that as a result of these classes she spoke to the appellant and told him that they could get into trouble because a doctor could find out that they were having sex. When she told him so, he replied okay, they will have sex in the anus. From that day, they stopped having sex in the vagina and started having anal sex.

[43] The complainant made her report about the sexual activities on 11th February 2009. She had complained of pain that day. Dr. Brewley examined her and found a yeast infection. The doctor opined that the yeast infection can cause pain in the lower abdomen. Dr. Brewley found that the hymen was missing and opined that the complaint was sexually active.

[44] Given the circumstances I am satisfied that a specific warning for the need for caution re self-interest was not required. The trial judge clearly brought home to the jury that the complainant's evidence may be unreliable and the need for caution in determining whether to accept her evidence. The judge gave extensive and repeated directions about the possible frailties in the complainant's evidence given the legitimate concerns raised by the appellant as to her veracity and reliability. The jury were clearly alerted of the need for care in evaluating the complainant's testimony. In that regard the judge gave specific warning of the need to be cautious.

[45] Mr. Rajbansie, the learned Director of Public Prosecutions, submits and I agree that in considering the reliability of the virtual complainant the judge stated repeatedly the defence's suggestions that she was a "chronic liar", "her story was preposterous", "she has a vivid imagination", "her evidence was fabricated", and "she was fantasizing". The judge also addressed her age and lack of viridity. There can be no dispute that the judge made it abundantly pellucid that the virtual complainant was a child at the time of the offending and that fact should cause the jury to view her evidence with caution. Her evidence was challenged and she

admitted to previous lies told at her tender age. And, her evidence was to be treated with caution. All the factors that could potentially weaken her evidence were fully explored as well as her explanations. It was for the jury to decide whether they believed her evidence. The jury had to determine what weight if any would be placed on her childish untruths and whether it would affect her overall credibility. In all the circumstances, the ground of appeal dealing with self-interest accordingly fails.

[46] Another ground of appeal concerns the issue of corroboration. Section 145 of the Evidence Act, 2006 provides that it is not necessary that evidence, on which a party relies, be corroborated. It is not necessary for the court to warn the jury that it is dangerous to act on uncorroborated evidence or give a warning as to the absence of such corroboration. Notwithstanding, the trial judge nevertheless felt it necessary to give a corroboration warning. Mr. Lynch, QC takes issue with that.

[47] Mr. Lynch, QC argues that having decided to give a corroboration warning the trial judge had a duty to highlight his reasons for believing in the necessity of such a warning. Mr. Lynch, QC contends that the trial judge should have used clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous 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. The judge should then go on to tell the jury that, bearing the warning well in mind, they have to look at the particular facts of the particular case and if, having given full weight to the warning, they come to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth, then the fact that there is no corroboration matters not at all, they are entitled to convict.

[48] Mr. Lynch, QC submits that the learned judge's directions fell short of the necessary requirements. The learned judge indicated that the complainant's evidence may be unreliable without corroboration but failed to warn clearly and simply that in the absence of corroboration evidence, it would be "dangerous to convict" on the sole basis of the complainant's evidence.

[49] Mr. Lynch, QC's submissions represent the traditional approach to corroboration. The law, however, has moved on. As the Privy Council explained in Regina v Gilbert[29] the corroboration rule 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, that is to say, the evidence of the person who says that he or she has been the victim. Its effect is that in any sexual case the jury must be directed that it is dangerous to convict the defendant upon the uncorroborated evidence of the complainant alone; the judge must tell the jury which evidence would, if they accept it, be capable of amounting to corroborating evidence but he can go on to tell them that they can convict on uncorroborated evidence if, having paid due heed to the warning, they are nevertheless convinced of the defendant's guilt. The trial judge is also required to explain to the jury why the warning is necessary. Thus the classic version of the explanation was given by Salmon LJ in R v Henry,[30] in these terms:

> "… 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."[31]

In Regina v Gilbert, the Privy Council stated that:

> "It will be noticed that this explanation is expressly based upon a suggested special propensity of girls and women to lie. In Pivotte v The Queen…, Satrohan Singh JA referred (as had others before him) to examples of such reasons as being sexual neurosis, fantasy, spite and refusal to admit consent because of shame."[32]

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[29] [2002] 2 AC 531.
[30] (1968) 53 Cr App R 150.
[31] At 153.
[32] At para. 8.

[50] The law has moved on from the traditional approach espoused by Mr. Lynch, QC. The prevailing approach is seen in Lord Taylor's guidance in Regina v Makanjuola[33] - whether as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. Lord Taylor noted that the judge will often consider that no special warning is required at all. Where a witness has been shown to be unreliable, the judge may consider it necessary to urge caution. In a more extreme case where the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the evidence of that witness. Lord Taylor stressed that judges are not required to conform to any formula and an appeal court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.

[51] Lord Taylor summarised the legal position thus:

> "…(2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
>
> (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.
>
> (4) …

[33] [1995] 1 WLR 1348.

> (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.
>
> (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules."

[52] In directing the jury, the judge said:

> "I have considered that it is appropriate I should warn you that because of her age, she was 12 years old when she first complained of this matter, and these types of allegations are very easy to make and very difficult to refute. But she was 12 years old, a tender age at the time when these allegations were first made, that her evidence might be unreliable and you should exercise caution in deciding whether to accept this evidence and what weight to give to it in the absence of other evidence which is capable of corroborating her evidence."[34]

[53] I see no reason to interfere with the exercise of the discretion of the trial judge in his directions on corroboration. He highlighted the tender age of the complainant at the time the allegations were first made, that her evidence might be unreliable and the need for the jury to exercise caution in deciding whether to accept her evidence. It cannot be said that the trial judge's exercise of his discretion was Wednesbury unreasonable. This ground of appeal accordingly fails.

[54] Mr. Lynch, QC also complained about the conduct of the prosecutor but quite properly did not press the point in his oral submissions. He readily accepted that this was not a Randall type case.[35] I agree. Having reviewed the transcript it cannot be said that "there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial".

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[34] Transcript of Trial Proceedings – Judge's Summation and Verdict by Jury, p. 72, lines 1-11.
[35] Randall v The Queen [2002] UKPC 19.

[55] Mr. Lynch, QC makes an assortment of criticisms about the summation of the trial judge and the treatment of the defence case. He complains that the learned judge erred in law in failing to properly direct the jury on the weight to be given to the complainant's evidence given the many inconsistencies in her evidence. He states that there were incidents never before mentioned by the complainant. One example refers to the alleged assault said to have taken place around the kitchen table while the complainant's aunt Cassandra Penn was also present. This event was never related in the confirmed 14 separate accounts given by the complainant. This was also the case with an event the complainant alleged to have taken place at home. Both encounters were fantastic in nature and, he submits that they would, if true have left an indelible impression on the complainant's mind. Yet neither was related in her previous statements to the police or to the school officials.

[56] Additionally, Mr. Lynch, QC complains that the accounts of the complainant's first sexual encounter with the appellant were inconsistent as it related to the location of that encounter, the sexual position used, the details surrounding that encounter and the year it took place. This is so notwithstanding that the complainant confirmed that, as her first sexual encounter, it would be burned in her memory. The complainant herself gave evidence of general timelines, the credibility of which was undermined in cross-examination. Additionally, there were also inconsistencies between the complainant's evidence and the evidence of Dr. Hastings.

[57] Mr. Lynch, QC complains that the trial judge provided an extensive treatment of the Crown's case but did not provide an equally balanced account of the appellant's case. Mr. Lynch, QC states the trial judge neglected to reference a central tenet of the appellant's defence, that is, the various inconsistencies and incredulities in the complainant's evidence. Additionally, the trial judge failed to bring to the jury's attention, the exculpatory forensic evidence. These ought to

have been brought to the jury's attention as being essential elements of the appellant's defence.

[58] Mr. Lynch, QC states that the complainant made fundamental and significant inconsistent statements in relation to each sexual encounter. She gave wholly inconsistent accounts of each episode on various occasions. Of particular note is her allegation of sexual intercourse which was established as being on 3 occasions only. Not only did she identify two different venues, she also described the sexual position in 4 different ways. These inconsistencies were reviewed extensively in closing arguments and deserved a detailed and careful review and the trial judge ought to have directed the jury on how to treat these inconsistencies. Yet, this essential element of the appellant's case was not so reviewed, either expansively or succinctly. Another critical element of the appellant's case referred to the vague timelines given by the Crown. The complainant was challenged on this extensively, revealing various falsehoods and inconsistencies in her accounts.

[59] These criticisms of the summation are largely unfounded and unjustified. The judge directed the jury on the need for caution as the complainant was twelve years old at the time she made the allegation and that her evidence may be unreliable. Contrary to what Mr. Lynch, QC asserts, the trial judge extensively referred the jury to the bits of evidence which may cause the complainants' evidence to be unreliable or inconsistent. Included therein is the evidence relating to her first sexual encounter and when it took place; the evidence relating to when her aunt went to a funeral, the oral sex which occurred and she and the appellant showering together. The fact that she first mentioned the shower incident while giving evidence in the magistrate's court; although, there were fourteen times when she had given accounts of this matter, she had never said that before in her statements to the police. Evidence that the appellant touched her under the table pulled out his penis and put her hand on it. This happened at a time they were sitting at the dining table and she was being told off by her aunt. The

complainant's evidence was that she had never said that before. The evidence relating to the access of pornography on the computer through Backpage was also discussed by the judge. The judge directed the jury that the sequence the complainant gave could not be correct having regard to the computer evidence, if they accepted that evidence. The judge clearly reminded the jury of the various inconsistencies in the complainant's evidence and the various versions she gave.

[60] The judge directed the jury that if they had doubt as to whether the complainant was being truthful, that would be the end of the matter and they would have to acquit the appellant. The judge directed the jury to exercise caution in acting on her uncorroborated evidence. The judge reminded the jury of the defence case of a complete denial of the charges; the complainant was a chronic liar, had misbehaved and she fabricated her story out of a fear of being sent to her home land. The judge adequately outlined the appellant's case and highlighted the major inconsistencies in the case for the prosecution.

[61] The judge directed the jury that the case was essentially about whether or not they believed the complainant; their task was to judge whether the essential parts of her evidence was truthfully given. The judge further stated that having made allowance for the complainant's age and immaturity they should act on her evidence only if they were sure she was telling the truth.

[62] As Mr. Rajbansie pointed out the approach to the appellant's case was two-fold. Where there was a direct clash of the evidence the case for both sides was succinctly juxtaposed. Secondly there was an independent review of the case for the appellant along with the witness he called. The appellant's evidence was put plainly without criticism or adverse comment. The review of the prosecution's case took longer because of the number of witnesses, the directions in law and the approach to the evidence. The defence's case only consisted of two witnesses and the second witness added nothing to the case. The evidence was straightforward and unremarkable. It must also be borne in mind that the trial

judge is not obliged to repeat all the evidence but must direct the jury that they still consider it all. This was done in the usual set piece directions.

[63] Specific directions were provided on the expert evidence presented by the two medical doctors. The evidence showed that up to May 2007 the virtual complainant was a virgin but at February 2009 she was no longer. The first act of vaginal sexual intercourse occurred in 2007. There was evidence that the last time of vaginal sexual contact was in 2008 and obviously by the time of examination in 2009 there were no fresh lacerations. From late 2008 the intercourse was anal but the last mentioned contact was in December and the examination occurred two months thereafter. This evidence was duly reviewed with the expert evidence which were in standard forma.

[64] Mr. Lynch, QC complains about widespread adverse publicity but conceded that this by itself would be insufficient to invalidate a verdict together. Mr. Lynch, QC however contends that with all the other misdirections which took place at retrial, there is good ground to find that the appellant had not received the fair retrial to which he was entitled. I find no substance in this contention.

[65] Finally, Mr. Lynch, QC contends that there is a lurking doubt about the safety of the convictions. In R v Pope,[36] the court stated at paragraph 14:

> "As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury. If, therefore, there is a case to answer and, after proper directions, the jury has convicted, it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or maybe unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury."

[36] [2012] EWCA Crim 2241.

[66] I apply R v Pope and find no merit in this ground of appeal. There is nothing in the evidence or the trial process which leads to the inexorable conclusion that the trial of the appellant is unsafe. For all the reasons advanced, I would dismiss the appeal against conviction.

[67] The Crown has appealed the sentence of 10 years imprisonment imposed on the appellant, arguing that the appropriate sentence is fifteen years. Essentially, the Crown contends that having found that the appellant was largely responsible for the delay in bringing the case to trial, the judge erred in deducting five years for delay from the fifteen years.[37] Contrary to Mr. Rajbansie's submission, it is clear that the learned judge came to no determination that the appellant was largely responsible for the delay. The premise upon which the Crown's appeal is based accordingly falls away.

[68] The learned trial judge in a detailed sentencing judgment had this to say:

> "I must say… that … [the appellant] brought a meritorious appeal when the Court of Appeal overturned his conviction. The time therefore, spent and lost on the first trial cannot be laid at his feet.
>
> … A defendant who maintains his innocence and uses the system in an attempt [to] vindicate his innocence cannot be fault [sic] for making applications for that purpose. No court has ruled that he has acted in a manner to abuse the system. I am … not [in a] position to make such a ruling now."[38]

He went on further at paragraph 93 to state, "This is a different case. It is a case of many aggravating factors. Further some of the delay must be laid at the feet of the defendant."

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[37] See p. 10, para. 19 of the Crown's submissions. The Crown as the appellant submitted that "The judge accepted that the respondent was the engineer of the delay and then credited him with a discount."
[38] The Queen v Andre Penn, BVIHCR2009/0031 (delivered 15th June 2015) at paras. 90 and 91

[69] There is a broader aspect to the Crown's appeal against sentence: Is it right in principle to impose a sentence at a retrial which is more severe than that imposed at the first trial? Firstly, this was a retrial and the sentence imposed at the retrial exceeded the sentence imposed at the first trial. Mr. Lynch, QC contends that the starting point for sentencing the appellant should not be more than twelve years as twelve years was imposed after the first trial. In the circumstances, Mr. Lynch, QC submits that it is wrong in principle to impose on the appellant a more severe sentence upon his retrial, compared to what he received at his first trial.

[70] In the New South Wales case of R v MM[39] Levine J delivering the judgment for the Court stated that "it has to be recognised that the second sentencing judge is not "resentencing" but exercising an independent sentencing discretion with respect to the offences of which the particular offender has been convicted". Levine J referred to R v Gilmore[40] and R H McL v The Queen[41] which recognised as sound principle that ordinarily but not invariably, a successful appellant should not receive a longer sentence after conviction on a re-trial than he or she received at the original trial.

[71] In R v Bedford[42] this issue was canvassed again. Street CJ explained:

> "It is significant to emphasise that the enunciation of the principle includes 'should ordinarily not receive'… Where the judge at the new trial considers that the circumstances of the case do call for a longer sentence he will not be absolutely fettered by the approach prima facie to be adopted. He is both at liberty, and indeed obliged, to give effect to his own assessment. It could be expected, however, that if he did take the view that a longer sentence were called for than that passed at the first trial, then there would be a specific indication of the reasons leading him to his view."

[72] This approach, albeit merely persuasive, commends itself to me. I note that Mr. Lynch, QC has not appealed the sentence imposed. Be that as it may, I would dismiss the Crown's appeal against sentence and affirm the sentence imposed.

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[39] (2002) 135 A Crim R 216.
[40] (1979) 1 A Crim R 416.
[41] (2000) 203 CLR 452.
[42] (1986) 5 NSWLR 711.

[73] In conclusion, the appeal against conviction is dismissed and the conviction is affirmed. The appeal by the Crown against sentence is also dismissed and the sentence of ten years imprisonment is affirmed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal