IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS

CRIMINAL APPEAL No. 16 of 2015

BETWEEN:

OSWALD WILSON

APPLICANT

AND

REGINA

RESPONDENT

BEFORE:

The Honourable Mr. Justice Mottley,	President
The Honourable Mr. Justice Stollmeyer,	Justice of Appeal
The Honourable Mdme Justice Weekes,	Justice of Appeal

APPEARANCES:
Mr. Noel Skippings for the Applicant
Ms Gilllian Williams and Ms Leanna Brooks for the Respondent

09 February 2017; 01 December 2017

;JUDGMENT

Weekes, JA.

1. We heard this matter on 7th February 2017, and on 21st February 2017, gave our decision, dismissing the appeal and affirming conviction and sentence. This is the written judgment..

2. The appellant was charged by in indictment dated 3rd June 2015, with five counts of indecent assault, all contrary to section 32 of the Offences against the Person Ordinance Cap 3:08 (as amended). Each count alleged that he, in South Caicos, indecently assaulted DB, a female under 13 years of age. These offences were allegedly committed on dates in March, September, November, December 2013 and January 2014. DB was 10 years old at the time of the March 2013 count and 11 years at the remaining counts.

3. After a trial, at which the appellant testified and called five witnesses on his behalf, the jury found him guilty on counts 2, 3, 4 and 5. He was sentenced in respect of count 2 to imprisonment for two years; count 3, imprisonment for three years; count 4, imprisonment for four years and count 5 imprisonment for five years; sentences to run concurrently.

4. In respect of count 1, he was found not guilty.

BACKGROUND

5. DB was the daughter of FB and LSH. On 18th December 2010, LSH died and DB was sent to live with her aunt, and the appellant, who was her aunt's husband. At that time she was just over eight years old.

6. In June 2015, after a *voire dire*, DB, then aged 12, gave sworn testimony. She had lived in Providenciales with her mother until her mother's death and then moved to South Caicos to live with her aunt and the appellant. Over the period March 2013 to January 2014, the appellant on five separate occasions (as reflected in the counts on the indictment) engaged in conduct of a sexual nature with DB, including kissing her on the mouth, fondling and sucking her breasts, placing his finger in her vagina and causing her to fondle his penis.

7. At trial, DB's age was in issue. FB, her father, testified that she was born on September 21st 2002, at the Jackson Memorial Hospital in Florida, USA. While he was not present at her birth, he and LSH had lived together immediately preceding and succeeding her birth and he

first saw DB two weeks after she was born. A passport giving DB's date of birth as 21st September 2002 was admitted through this witness without objection.

8. Through the investigating officer, Sergeant Samadia Lightbourne, a copy of DB's birth certificate issued by the Office of Vital Statistics, State of Florida, was admitted into evidence, again without objection (that certificate gives D.O.B. as September 20th 2002). The witness testified that she was unable to obtain the original.

9. The appellant's defence was a denial that there were any sexual encounters between himself and the appellant and that she had fabricated the allegations against him. He called a number of witness who testified as to occasions, unrelated to the indictment, on which DB had told lies. He also called two witnesses who gave evidence that DB had, subsequent to the charges being laid, told them that she had lied about the appellant having indecently assaulted her.

GROUNDS OF APPEAL

10. Mr. Skippings, on behalf of the appellant, advanced a number of grounds which will be dealt with serially. At the hearing, he withdrew his complaint that the trial was irregular since the Offence Against The Person (Amendment) Ordinance 2009 never took legal effect because the Ordinance did not have a commencement date. The Crown produced a copy of the Ordinance showing a commencement date of December 21st 2009.

Ground 1

1. ***Error of Law***

(a) the virtual complainant's age was not determined according to law.

11. Mr Skippings submitted that proof of DB's age, specifically that she was under 13 at the time of the alleged offences, was critical to proof of the Crown's case and that being so, a certified copy of her birth certificate, meeting the legal requirements of the jurisdiction, should have been produced and exhibited. He further argued that had DB's mother been able to testify as

to the birth, or someone who was present during the birth, that would have been admissible evidence, capable of proving DB's age, but that FB's evidence was hearsay as he was not present when DB was born. He also submitted that DB herself was not capable of giving evidence to prove her age.

12. In support of his arguments, Mr Skippings relied on the Evidence Ordinance, Cap. 2:06 section 61(f).

    The following public documents may be proved as follows:

    > *"(f) public documents of any other class in a foreign country by the original or by a copy certified by the legal keeper thereof with a certificate under the seal of a Notary Public, or a British Consul, or Diplomatic Agent, that the copy s duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the foreign country."*

13. He also referred the court to **Archbold 2004 Criminal Pleadings and Practice** para. 20-73, page 1824:

    > *"The girl must be proved to have been under 13 years of age when the offence was committed. The best way of coupled with evidence of identity, but the age may be proved by any other legal means. R v Cox. (1898) 1 QB 179. (age could be proven by persons who had seen the child and by a teacher at an elementary school which the child attended. Where a certificate of birth is put in, there must be evidence of identity as well. R v Bellis, 6 Cr App R. 283 CCA; R v Rogers 10 Cr. App. R.; 276 CCA.*

14. He cited the authority of ***Clinton Higgs v The Queen, Court of Appeal, Turks and Caicos Islands [citation not provided].***

15. The Crown responded that since no objection was taken to proof of DB's age at trial, the time is passed for such arguments and relies on the Criminal Procedure Ordinance Cap 3:03 section 48. Of course, section 48 also provides that nothing in the section shall be construed as being in derogation of any powers conferred upon the Court of Appeal to entertain any appeal in the exercise of its criminal jurisdiction. They also relied on the principle in ***R v Cox [1989] 1 Q.B. 179,*** that the age of a child can be proven by any person who knew her

and could be expected to have reliable information as to the date of birth. The Crown submitted that FB was such a person.

16. It is a trite principle of law that any evidence relevant to an issue, which is not excluded by any rule of evidence, is admissible and the weight or value of such evidence is to be determined by the tribunal. Of course, the best evidence is most desirable and in the case of proof of age, a properly issued certificate of birth is best evidence. However, it is not the only evidence capable of such proof.

17. In the instant case, FB lived with DB's mother immediately before her birth and the mother left the jurisdiction for Florida USA, shortly before the child was born. She returned two weeks later with the infant child and immediately resumed cohabitation with FB. While FB was not present at the birth, he most certainly can provide proof thereof, at least within a reasonable window. It is a wholly reasonable inference that FB is able to provide reliable evidence of DB's date of birth. If an issue was to be taken as to the weight of this admissible evidence, that time was to be at trial. No such issue was taken at that stage.

18. We pause to note that the Criminal Procedure Ordinance Section 48 does not have the effect of making what would otherwise be inadmissible admissible by virtue of the fact that no objection was taken.

19. We do not find the inconsistency between FB's evidence and the admitted birth certificate to be of any moment. What is certain is that in March 2013, DB was 10 years old and by September 2013 she was 11 years old; that was the matter in issue and of which proof needed to be had.

20. This ground therefore fails.

(b) the informations upon which the defendant was charged were defective.

21. Mr. Skippings submitted that the appellant was first charged under the Offences against the Person Ordinance Cap 3:08 section 33 and that any amendment thereto had to comply with the provisions of the Criminal Procedure Ordinance Cap 3:03, section 20(1) and (2), which state:

> *S. 20(1) " Where, before a trial upon Information or at any stage of such trial, it appears that the court that the Information is defective, the Court SHALL make such order for the amendment of the Information as the Court considers necessary to meet the circumstances, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. Any such amendments shall be made upon such terms as the Court shall seem just."*
>
> *(2) "Where an Information is amended under this section, a note of the order for amendment shall be endorsed on the Information and thereafter the Information shall be treated for the purposes of all proceedings in connection therewith as having been filed in the amended form."*

22. He argued that the requirements of the section had not been complied with and that as the section was mandatory, any amendment was unlawful, rendering the convictions and sentences based on them null and void.

23. The Crown conceded that initially the section under which the appellant had been charged was incorrect since by virtue of the Offences against the Person (Amendment) Ordinance 2009, a new section 32 had been created which states:

> *"32. Whosoever indecently assaults any girl under thirteen years of age, whether with or without her consent, shall be guilty of an offence and liable on conviction to imprisonment for fourteen years."*

24. However, the eventual indictment was laid using the correct section. After the indictments were laid, there was an amendment to the date in count 2 and the words "as amended" were inserted to signify that the original section had been repealed. These amendments were filed with the court before trial and no objection was taken to then. The respondent further conceded that while there is a court stamp acknowledging the filing of the amendment, the learned judge did not endorse a note of the Order for Amendment, but Ms. Williams argued

that this failure is not fatal to the indictment and cannot render the proceedings thereunder a nullity. She relied on the authority of ***R v Leeks*** ***[2010] 1 Cr App R 87.*** In that case, Holman J, quoting Lord Bingham of Cornhill in ***R v Clarke and Mc Daid*** said:

> *"Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place."*

25. The question for us is whether, in the words of Holman J, the technicality is of the kind referred to by Lord Bingham, which, if so, in this matter would result in the proceedings being a nullity. We do not find so. At all times, it was pellucidly clear to the appellant what charges he was facing and in any event, the impugned amendments were made with notice and were not the subject of objection. The placing of the endorsement was an administrative/procedural step and the omission of the judge to place the relevant note cannot and should not render the indictment defective, especially since the court stamp evidenced the amendment. The '*shall*' used in the legislation is discretionary, not mandatory.

26. This ground cannot succeed.

Ground 2

The taking of the jury's verdict was irregular and unfair.

27. Before going further into this ground, we remark that it appears to us that it was based on a misunderstanding as to the sequence of events leading to the reception of the verdict.

28. The record is here reproduced:

> 16. Jury retires under sworn guard x 2 - 1:10 p.m.
> 17. Defendant to remain in the precincts
> 18. Jury returns 3:54
> 19. Yes all agreed
> 20. Count 1 verdict guilty
> 21. Not agreed divided 4 to 2
> 22. Watson direction given

23. Agreed x 2
24. Retired again and deliberate with a view to reaching a verdict - 3:56 p.m.
25. Joan Joyner
26. Jury returned at : 4:25 p.m.

28. After quite faithfully reflecting the procedure followed, Mr. Skippings submitted that was flawed for a number of reasons:

(i) When the jury returned to the courtroom for the first time, the Learned judge should have taken verdicts for all counts, and not just Count 1.

(ii) If the jury had not reached a unanimous verdict in respect of Count 1 only, and unanimous verdicts in respect of the other counts, the Learned judge should have sent the jury back to decide a majority verdict in respect of Count 1 only.

(iii) If the jury returned stating that they could not arrive at a majority verdict, the Learned judge should have then given a Watson Direction. The Learned judge gave a Watson Direction when she sent the jury out a second time to reach a verdict on which they all agreed, not even after giving a majority direction. At best, the Learned judge gave a Watson direction simultaneous to the majority direction; which was wrong.

(iv) Even if the Learned judge sent the jury out the second time after giving a majority direction, the Learned judge was still wrong, as she gave a Majority Verdict and a Watson Direction simultaneously, which should never be done.

29. In essence, he argued that by giving a **Watson Direction** combined with a majority direction, the judge must have confused the jury and led them to believe that they had to return unanimous verdicts in favour of guilt on all counts except the first on which they had already declared. The Crown submitted that the procedure used by the judge was appropriate and correct and there was no majority direction called for by the circumstances nor was any given.

30. The Jury Ordinance Cap 2:09 provides in section 23 -

> *23. Every criminal case, other than treason, murder or piracy, and every Civil case tried with a jury, shall be tried before a jury, whether special or common, of seven persons duly sworn and empaneled. (Amended by Ord. 7 of 2002)*

In section 36:

> *36. In every criminal case, other than treason, murder or piracy, and in every civil case, if after the jury, whether special or common, have been in deliberation for at least three hours, they have not unanimously agreed on a verdict, it shall be competent for five persons of such jury to find a verdict, and such verdict when so delivered shall have the same force and effect as if the whole jury had concurred therein: Provided always that in delivering such verdict the foreman shall declare to the Court, in the presence of the jury, that five of their number have agreed thereto. (Amended by Ord. 7 of 2002)*

And in section 37:

> *37. (1) Subject to subsections (2) and (3), if during the trial of any civil or criminal case, a juror dies or is discharged by the court (whether as being through illness incapable of continuing to act or for any other reason) but the number of jurors remaining is not reduced below ten in the case of the trial of a person charged with treason, murder or piracy, or five in any other case, the jury shall be considered as remaining, for all the purposes of the trial, properly constituted, and the trial shall proceed and a verdict may be given accordingly.*

30. In this case one of the original seven jurors was discharged before deliberations began and the court acted in accordance with section 37. The trial continued with six jurors. The three-hour period referred to in section 36 had not yet elapsed when the jury first returned to the courtroom. It would appear that they returned on their own volition. The judge could not at that juncture receive a majority verdict, such a course would have been premature. A perusal of the record discloses that no majority direction was given. Mr. Skipping has misinterpreted the record in this regard.

31. When it became apparent that the jurors had not arrived at a unanimous verdict, the judge correctly gave them a direction in keeping with the authority of ***R v Watson** [1988] Q.B. 690,* and sent them back to continue deliberations. In her discretion, she then left the jury undisturbed until, of its own volition, it returned the second time with its verdicts.

32. The decision whether to give a **Watson Direction** is a matter of discretion for a judge and may be useful when a jury is unable to arrive at a unanimous verdict. Since the judge could not accept a majority verdict at the two hour, forty-four minute point, it was indeed a proper use of the discretion to send the jury to deliberate further. A **Watson Direction** is given in the terms of the words found in the authority:

> *"Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [10 of] you cannot reach agreement you must say so" (post, p. 700F-G).*

33. Mr Skippings impugned the judge's decision to halt the process of receiving the verdicts after hearing the jurors' split decision on the first ground. He advanced that she ought to have heard their position on all five grounds when the jurors first returned to the courtroom. This was a matter for the judge's discretion and we are of the view that it was correctly exercised in the circumstances.

34. Where there are multiple counts on an indictment, although the jury is entitled to return discrete verdicts, the judge will have a sense of the case: is this the kind of matter where a jury can logically arrive at different verdicts on the various counts or is the case so hinged together that it is more than likely that the same verdict will be arrived at. It is that sense that will determine whether the judge takes all verdicts even where the first of the series is unacceptable at the given time.

35. In the instant case DB's evidence spoke of a course of conduct by the appellant over an eleven month period and the particulars of each allegation were of the same nature and the defence to each was the same. It would therefore have been reasonable for the

judge to anticipate the same division on all charges and so, without receiving the verdicts, return the jury to deliberate. The exercise of the discretion cannot be faulted simply because of the fact that the jury did eventually return a different verdict on a single count.

36. We do not find the taking of the jury's verdict to be either irregular or unfair. At worst, it may be said to have been somewhat untidy.

37. We take this opportunity to offer some guidance to trial judges on receiving a verdict. Jurors are often consumed by anxiety in the process of deliberating and returning their verdict. This, coupled with a possible misunderstanding of what they are being asked, places a burden on the court to be exceptionally clear and unambiguous in what it asks of them. The questions asked of the foreman at this critical juncture need to be simple, and where necessary, properly sequenced. While they are usually asked by the judge's assistant, the judge is responsible for their form and clarity.

38. The initial inquiry, whether they have arrived at a verdict on which they all agree, must be very deliberate. There is no precise formula for the words used but they must be comprehensible to even the most anxious juror, forms such as." Have you all come to the same verdict?" "Are you all agreed on guilty or not guilty?" "Does every one of you agree on the same verdict"? "Is there a verdict to which you all agree?" On an indication of agreement, the further question, "What do you all say?", may be asked. It behooves a court where there is more than one count to enquire whether there is agreement in respect of all counts, before asking the jury what is its verdict in respect of any of them.

39. Where the jury has returned before the statutory period has elapsed, even greater care need be taken since it is not unusual for a jury that is hopelessly deadlocked before the statutory time has elapsed to signal that they are ready to return to court. The jury is ignorant of the fact that there is a minimum time for their deliberations when they have not achieved unanimity. On a

multiple count indictment, it is advisable to seek the jury's initial indication in respect of each count first. Should there be a dissonance among the indications, it is a matter of discretion for the judge whether to accept the verdict where unanimity exists and then treat with the others or whether, without receiving any verdict, to return the jurors to their deliberations.

40. Where the statutory time has elapsed, and there is the possibility of acceptance of a majority verdict, then that process must be in distinct stages. The jury must be asked to give the numbers of their division without indication of how many say what. It might be advisable to tell them explicitly that their answer should be made up of two numbers and nothing further. Only if the division admits of a majority verdict should they be allowed to give the nature of the majority.

41. This careful process minimises the danger of a jury complicating the penultimate stage of the trial by communicating the wrong decision to the court and it also gives the judge, at earliest opportunity and before error occurs, the ability to put the process back on the rails.

Ground 3

The judge was Wednesbury Unreasonable when she refused to give a corroboration warning to the jury about convicting on the virtual complainant's evidence alone.

42. The judge, in the instant case, having considered the issue, determined that no corroboration warning would be given to the jury. There was no corroboration of DB's evidence.

43. Mr Skippings acknowledged the effect of the Evidence (Special Provisions) Ordinance Cap 2:07 section 3, which provides:

> **3.** *(1) A requirement at a trial by jury that the court must warn the jury about convicting the accused on the uncorroborated evidence of a person merely because that person is –*
>
> *(a) ...*

(b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed; or

(c) a child,

shall be abrogated.

44. He submitted, however, that in all the circumstances of this case, the judge should have exercised her discretion in favour of giving a corroboration warning. In his words, the case "cried out for the warning to be given", for a number of reasons including that DB was of tender years at the time, 11 years old; in giving evidence, DB admitted that she sometimes told lies; CC, a defence witness, testified that FB said that DB sometimes lied; that a defence witness said that DB admitted to her that she lied about the allegations in the instant case; that a second defence witness said that DB had told her that the allegations were not true; that yet another defence witness testified that DB had once lied about stealing money; that DB said in her evidence that she never once recalled getting drops to school but another prosecution witness said that she recalled someone dropping DB to school; that DB said that her aunt does not go to church, she can't recall the last time her aunt went to church, while another prosecution witness testified that her aunt went to church frequently.

45. He submitted that in light of the foregoing, the judge should have warned the jury that they needed to be careful in convicting the appellant on DB's uncorroborated evidence.

46. Mr Skippings relied on the case of ***R v Makanjuola; Rv Easton*** ***[1995] 2 Cr App R 469*** in which the English Court of Appeal, shortly after that jurisdiction had abrogated the obligatory requirement on a judge to direct the jury that it is dangerous to convict on the uncorroborated evidence of a complainant in a sexual case, held that it was a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness. The court went on to hold that, "whether the judge chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised, the content and the quality of the witness's evidence and whether there is an evidential basis for suggesting that

the evidence of the witness may be unreliable, which goes beyond mere suggestion by cross-examining counsel."

47. The Crown responded that the judge had properly directed herself in law and that the appellant had failed to demonstrate any cogent reason why the warning was necessary. It contended that the matters referenced by the appellant were of minimal consequence and did not demand a corroboration warning.

48. Other than in cases in which an accused claims that the virtual complainant was mistaken in her identification of him as the assailant, every plea of "not guilty" in a sexual offence inherently asserts that the virtual complainant is not telling the truth; sometimes by way of cross-examination, or by way of defence evidence, a reason for the virtual complainant to lie is advanced. Since it is beyond dispute that not every contested case of a sexual offence in which the defence is not mistaken identity requires a corroboration warning, in each case the particular facts and circumstances must be considered in the round to decide how the discretion is to be exercised by the trial judge. The mechanical rules of corroboration having been abrogated, a judge has a wide discretion in deciding how to sum up a case.

49. To determine whether a corroboration direction was mandated by the circumstances of this case, one must pay close regard to the details in ***R v Makanjuola; Rv Easton***. In ***R v Makanjuola*** the appellant did not testify or call witnesses, so it is more useful here to look at the facts of ***R v Easton***, in with the accused did testify.

50. We take the facts directly from the judgment.

> ***"Application of Easton***
>
> *On 24th February 1995 in the Crown Court at Isleworth this applicant, now aged 41, was convicted of indecent assault upon a female. On 25 April before the same court he was sentenced to a probation order for two years and ordered to pay prosecution costs of £886 at the rate of £100 per month. He applied for leave to appeal against conviction, the registrar having referred the application to this court to be heard in conjunction with the application of Makanjuola.*

The complainant, Charlotte Sidwell, was aged 16 at the time of the alleged offence. She is the daughter of the sister of the applicant's ex-wife, Sharon, with whom the applicant was still living, despite their divorce 18 years ago. They had three children, two living at home, namely Holly aged 8 and Rebecca aged 15. The complainant was effectively the applicant's niece. She stayed at the applicant's home from time to time. On 28th July 1994 she arrived unannounced. The applicant was at a public house with her father. Since Rebecca was away, Holly was sleeping in Rebecca's bed and the complainant, Charlotte, in Holly's bed. Although they were in the same room there was a partition in the middle. It was common ground that when the applicant came home at 11:45 pm both Holly and Charlotte were awake. The applicant came into their bedroom and spoke to both of them. He then made a cup of tea for himself and brought a drink for Holly. ***It was his evidence that he then went to bed and had no further contact with Charlotte.*** *She, however, gave evidence that as she was dozing the applicant returned to the bedroom a third time. She was awoken by his touching her breasts and her genitals. She was distressed and asked him to stop. He said: 'Relax.' He forced himself upon her pulling her knickers away and putting his hand under her T-shirt onto her breasts. He said: 'Don't tell anyone.' She asked if he would leave her alone providing she did not tell anyone. He said she had beautiful breasts. He then stopped touching her, said 'Better luck next time', and left the room. Charlotte said that she waited ten minutes, got up and went home. She told her mother on arrival about 1:30 am that the applicant had been touching her. The mother confirmed this and said that the complainant looked shocked and upset. The police were called and Charlotte gave an account of what occurred. Later that day she made a formal statement.*

The applicant went to the police station with his solicitor by appointment on 9 August. He had been away on holiday from 2 to 7 August and only learnt of the accusation on his return. He was arrested and he denied the offence in interview. ***He gave evidence that he had not returned to the bedroom a third time and had not assaulted Charlotte.***

It was put to Charlotte in cross-examination that either she had made up the complaint deliberately or that she had fantasized or she imagined or dreamt it whilst she was dozing.

In summing the case up, the trial judge, who was the same judge as in the case of Makanjuola, gave no corroboration warning. Mr Kent submits that he should have done so in the exercise of his discretion. In particular, he bases his contention on the fact that the complainant was a 16-year-old girl who had been asleep or dozing in bed immediately before the alleged assault. In effect, the submission was that in these circumstances the judge should have given the time-honoured direction that complainants of sexual offences may be prone to fantasize or dream or fabricate untrue complaints.

We reject that submission. Here, as in the application of Makanjuola, ***there was no evidential basis for regarding this 16-year-old complainant as an inherently unreliable witness." [Emphases ours]***

51. In ***Easton's*** case there was evidence for the defence which amounted to a denial that the offence had taken place at all and it was suggested that the virtual complainant had either deliberately made up the story or had fantasized it. Implicit in his defence, the appellant was saying that the virtual complainant had lied and her account was not to be believed. Nevertheless, the Court of Appeal held that there was no evidential basis for regarding the virtual complainant as an inherently unreliable witness. An important aspect of a judge's consideration, therefore is whether, quite apart from any evidence for the defence, there is an evidential basis for regarding a virtual complainant as inherently unreliable.

52. Some learning from ***R v Makanjuola; R v Easton*** might be apposite here. After commenting that the applications raised important issues about the effect of the English Criminal Justice and Public Order Act 1994 section 32 (*in pari materia* with the Evidence (Special Provisions) Ordinance Cap 2:07 section 3), Lord Taylor of Gosforth CJ, went on to explain that:

> *"...The underlying rationale of the corroboration rules developed in case law was that accomplices may well have purposes of their own to serve and complainants about sexual offences may lie or fantasize for unascertainable reasons or no reason at all.*
>
> *...It is clear that the judge does have a discretion to warn the jury if he thinks it necessary, but the use of the word 'merely' in the subsection shows that Parliament does not envisage such a warning being given just because a witness complains of a sexual offence or is an alleged accomplice.*
>
> *...Given that the requirement of a corroboration direction is abrogated in the terms of s 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them.....* ***Where,*** *however,* ***the witness has been shown to be unreliable****, he or she may consider it necessary to urge caution. In a more extreme case, if 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 impugned witness's evidence.....****this 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. [Emphases ours]***

53. Applying ***R v Makanjuola; R v Easton*** to the instant case we see that on the case for the defence several witnesses spoke of DB telling lies; some in respect of irrelevant matters and the appellant asserting that she was lying on these allegations and two of his witnesses claiming that she had admitted to them that she had lied when she reported that he had indecently assaulted her. The defence assertions on relevant matters were disputed and denied by DB.

54. It is perhaps useful to look at a number of cases which followed and applied ***R v Makanjuola; R Easton***. In ***R v Blasiak [2010] EWCA Crim 2620***, the issue was whether the judge was wrong in not giving a direction to the jury that caution had to be exercised before convicting on the uncorroborated evidence of the complainant in the particular circumstances of that case. The complainant, who was 15 years old was an inmate of a psychiatric unit, having been diagnosed with a complex post-traumatic stress disorder. She had been arrested on suspicion of criminal damage and taken to a police station. She ran away from the station and shortly thereafter met the appellant in a carpark. Later that evening she reported to an adult that people had been "doing things" to her and had been hurting her and later that night she told the police that she had been raped.

55. On her account, when she met the appellant in the carpark he had initially been helpful but then later began kissing her and eventually penetrated her with his penis. He thereafter left the scene. The appellant's defence was that he met the complainant and they had engaged in consensual sexual activity short of penetration and that she had initiated the activity. The trial judge gave no corroboration warning.

56. The appellant argued that it had been ***Wednesbury Unreasonable*** not to give the direction.

57. The court found that on the facts the question of the complainant's unreliability was a live issue given her history but found that the issue of her reliability was fairly and squarely brought to the jury's attention, the judge having said more than enough to direct them on central question of her reliability or unreliability and the need for caution in considering her evidence. The judge gave a fair summary of the evidence on both sides and concluded with a summary of the rival prosecution and defence cases as laid out at paragraph 22 of the judgment. The judge's failure to give the corroboration warning in its standard form was mitigated by the thoroughness of his direction on the issue of the witness's reliability.

58. The court found that the issue of corroboration had been invoked on the peculiar facts, in other words, there was an evidential basis for the warning. This case provides an illustration of the type of evidential basis that could be said to raise the issue of whether a virtual complainant's evidence was inherently unreliable.

59. In ***R v R [2004] EWCA Crim 1964*** the appellant was convicted on several counts relating to sexual offences in respect of a child including indecent assault. One of his grounds of appeal was that the judge wrongly decided not to give a corroboration warning to the jury. The facts were once again that the complainant was the appellant's step-daughter and the offences alleged had been committed over a period of six years when she was aged between 11 and 13. Among the allegations were that the appellant had touched the complainant on her breasts and inserted his fingers in her vagina. Also that he had invited her to perform oral sex or masturbate him.

60. During cross-examination the complainant agreed that she had received sex education but had not seen any programmes about child abuse. She was referred to some diary entries in which she referred to the appellant as "bad tempered and a dick head". There was no mention of sexual abuse in any of the diary entries. She agreed that she was pleased when he had to leave home....She insisted that the allegations were true and not brought because she resented the prospect of the appellant continuing to have authority over her.

61. The appellant gave evidence and denied that any of the allegations had taken place. He described the family background and said that he had argued with the complainant since the beginning of 2002 about the company she was keeping. They had argued on 15 June 2002 (immediately before she made the allegations).....He had taken a prepared list of reasons to the police station as to why the complainant might have brought the allegations against him.

62. The Court of Appeal noted that the judge had a discretion. It referred to ***R v Makanjuola; R v Easton*** and set out the well-known passage in the judgment of Lord Taylor at page 472, which stressed both the discretionary nature of the exercise and fact that a Court of Appeal would be slow to interfere with its exercise, particularly since it was the trial judge who would have seen and heard the witnesses, notably, the complainant. They went on to observe that a court will often consider that no special warning was required and that this was indeed such a case. The judge was entitled to conclude that there were no special features of the case which required a special warning. The Court of Appeal concluded that the judge did not err in principle, nor was he plainly wrong, he had simply exercised his discretion in accordance with the relevant principles. We cannot but observe the similarities between ***R v R*** and the instant appeal.

63. The courts in Hong Kong have also had to treat with this issue after their abolition of the mandatory corroboration warning in 1999. ***R v Makanjuola; R v Easton*** has been followed there in numerous cases. In ***HKSAR v Chan Sau Man*** ***[2001] 3 HKLRD 593***, the CA rejected the argument that the trial judge had erred by failing to give a corroboration direction. At page 599, the court, in rejecting arguments of counsel for the applicant, stated:

> "There was, as (the applicant's counsel) acknowledged, no requirement to give any specific warning to the jury about their approach to the complaint's evidence. This was a straightforward case whether the complainant's evidence, the accuracy of her evidence and her veracity, on the central issue stood alone. The judge had meticulously pinpointed all the areas in the evidence where her account was materially disputed and had invited the jury to look at her evidence with care. In the circumstances, the judge was perfectly entitled, in the sensible exercise of his discretion, to adopt this course."

64. Now turning to the instant appeal. The methodology by which jurors are required to make their findings of fact is to consider first the case for the defence, and if they accept it or are left in doubt as to its credibility, they must return a verdict of not guilty since the burden of proof is on the prosecution to prove to the extent that the jurors are sure of the prosecution's case. Whether DB had told the defence witnesses that she had lied in making the allegations against the appellant was a straight question of fact; did the jury believe those witnesses or were they left in doubt as to whether the witnesses might have been telling the truth. It was not a question of whether DB was an inherently unreliable witness.

65. Clearly if the defence case on that evidence had any traction with the jurors they would have, in accordance with the judge's direction, returned verdicts of not guilty on respective counts. As seen in ***Easton's*** case, mere evidence by the defence asserting that the virtual complainant is untruthful is not sufficient, by itself, to trigger a corroboration warning. What is required is something arising from the evidence or circumstances of the case that serves to raise the concern that the virtual complainant is an inherently unreliable witness.

66. In this case, the virtual complainant was 12 years old at the time that she gave evidence. On the record there is the *voire dire* conducted by the trial judge before deciding whether to receive her evidence at all or and/or whether to have her give sworn evidence. Without more, unlike in the case of a very young child, there is nothing to suggest that the average 12 year old is inherently unreliable. The judge was in the best position, having seen and heard DB, to decide whether her age/manner was sufficient to warrant a corroboration warning. Nothing contained in the record raises a concern about the age of DB in the context of a corroboration warning.

67. None of the examples found in Lord Taylor of Gosforth's judgment in ***R v Makanjuola; R v Easton*** applies in this case and while he does not purport to give a complete list, one can glean the nature of such circumstances as are likely to cause concern about the witness's reliability. While DB did admit to having told lies on wholly irrelevant and minor matters,

that did not automatically make her an inherently unreliable witness. In fact, her reliability would have been more suspect had she denied ever having told lies. We find nothing on the evidence as a whole that makes her an inherently unreliable witness.

68. Neither the age of DB nor the quality of the evidence or the combination thereof, in our view, made a corroboration direction mandatory. Like the court in ***R v Makanjuola; Rv Easton***, we would be slow to interfere with the trial judge's exercise of her discretion as she had the advantage of assessing the witness's manner and her evidence. We are disinclined to interfere with the exercise of her discretion as we do not find that in exercising it she was unreasonable in the ***Wednesbury*** sense. It is not for us to substitute our discretion for that of the trial judge but rather for us to determine whether the discretion was exercised judicially and we are satisfied that it was.

69. This ground fails.

Ground 4

The learned judge did not list the discrepancies and inconsistencies for the jury.

70. Mr Skippings referred to several items of evidence which he claims raised discrepancies and inconsistencies that should have been, during the judge's summation, brought to the mind of the jurors. We do not find it necessary to rehearse them here.

71. The Crown's response that this ground cannot be entertained since the record does not contain the judge's summation and therefore, neither Mr Skippings nor the court is in a position to say what was or was not told to the jury.

72. We will have to agree that this ground is a non-starter for the reason given by the Crown, but will in any event, note that there is no duty on a trial judge to rehearse all of the evidence in a trial or the evidence which discloses discrepancies or inconsistencies. The court is only bound, in assisting the jury to grapple with the evidence, to point out relevant discrepancies

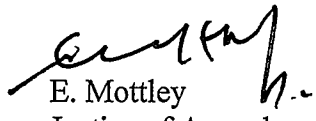
and inconsistencies that touch on matters in issue that are likely to have bearing on the jury's verdict.

73. This case was starkly contested. DB gave evidence of certain events, events which the appellant stoutly denied and he brought witnesses who claimed that DB had admitted that she had lied on the appellant. It would not have been difficult for the jurors to understand the thrust of either case: these were matters which fell squarely within the range of their competence. They could not have failed to understand where the issue was joined and would have been easily able to grasp and evaluate the competing accounts. This was not the type of case in which legal niceties demanded that the judge sift carefully through the evidence and draw to the jury's attention certain obtuse aspects that they needed to consider in order to arrive at a true verdict.

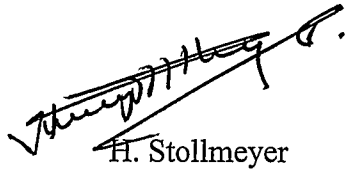
74. This ground cannot succeed.

DISPOSITION

75. In the above premises, these appeals were dismissed and the convictions and sentences affirmed.



E. Mottley
Justice of Appeal



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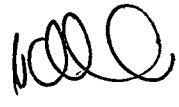
Justice of Appeal



P. Weekes
Justice of Appeal