Neutral Citation Number: [2025] CA (Bda) 3 Civ

Criminal Appeal No. 10 of 2022

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS
CASE NUMBER 2021: No. 25

Sessions House
Hamilton, Bermuda HM 12

Date: xx/3/2025

Before:

THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL THE HON GEOFFREY BELL
and
JUSTICE OF APPEAL THE RT HON DAME ELIZABETH GLOSTER

- -

Between:

MALEKE MARTIN

Appellant

- and -

THE KING

Respondent

Appearances:
Ms. Elizabeth Christopher of Christopher's, Counsel on behalf of the Appellant
Ms. Cindy Clarke Director of the Department of Public Prosecutions, Counsel for the Respondent

Hearing date: 20 November 2024
Date of Judgment: 21 March 2025

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Child Safeguarding provisions – corroboration of the evidence of a child witness - competence - the rule in Browne v Dunn – safety measures governing the evidence of a vulnerable child witness

JUDGMENT

BELL JA:

Introduction

1. Maleke Martin, the appellant in this case, ("the Appellant") was convicted on 9 December 2022 of three charges, two being the sexual exploitation of a young person by a person in a position of trust, contrary to section 182B(1)(b) and section 182B(1)(a) of the Criminal Code Act 1907 ("the Code") respectively, and the third being the offence of showing offensive material to a child, contrary to section 182(c) of the Code. He was sentenced on 11 April 2023 to terms of imprisonment of 13.5 years, 16 years and 6 years respectively, the said terms to run concurrently, for a total of 16 years.

2. The notice of appeal was dated 28 December 2022, and contained the following grounds of appeal:

    1. The Learned Trial Judge erred by inviting the jury to speculate that the Appellant had masturbated in the presence of the complainant.

    2. The Learned Trial Judge erred in law by deciding to apply the principle of Browne and Dunn to the response to a question put to the Appellant by the Prosecution about telling the mother that he was removing a pair of underpants from the laundry to carry for the young complainant. The Learned Trial Judge failed to take sufficient account

        a. of the reason for not having asked the question of the mother
        b. that the purpose of the rule is to seek the truth of the matter, to ensure that justice is done, it will usually be possible to recall a witness where counsel has failed to put a point to the witness whether through oversight or misjudgment of the importance of the issue.
        c. there has generally been a relaxation of the rule in Browne and Dunn
        d. that the answer offered was not part of the defence case

    3. The Learned Trial Judge erred by not forbidding the Prosecution to use the contents of the Appellant's phone against him, in this instance photographs.

Notwithstanding that the Prosecution had been in possession of the Appellant's devices since before he was charged, a copy was never provided to the Appellant nor his counsel. The Prosecution had possession of them for 15 months. Weeks after the evidence of the Complainant was led and after the first day of trial which had included the Complainant's mother (whom the Appellant asserts took some of the photographs), the Prosecution implicitly threatened to use them against the Appellant in cross-examination. The appellant through counsel sought a copy of the devices. Because they were 'not going to be used as part of the Prosecution's case', no copy of the Appellant's phone was provided that would have given context to the photographs. The Appellant seeks immediate disclosure of a copy of his devices. The effect of the failure to disclose was that the Appellant was required to answer inflammatory questions without context in a manner which was likely to prejudice him in the face of the jury. In the Learned Trial Judge' ruling when it was sought to introduce the photos as rebuttal evidence, the Learned Trial Judge stated that she didn't think this statement (of the person who inspected the phone) or the images behind this statement qualify as a rebuttal as to what D has said and she had no problem with DPP asking if D has seen C naked (depending on his answer could potentially allow the images to be admitted)

4. *Both the Prosecution and the Learned Trial Judge alluded to the pre-recording of the Complainant in a way that was prejudicial to the Appellant. It was announced to the jury that they would not be able to review the Complainant's evidence, then the Prosecution referred to a shiver of the Complainant in her closing when all present for the pre-recording knew that the child suffered from severe eczema and was unusually cold. The Learned Trial judge alluded to the Complainant's reaction to her questions when there was a significant change in tone in the way in which she put them.*

5. *The Learned Trial Judge improperly posed questions to the Complainant at the end of the evidence notwithstanding that counsel were constrained throughout in the way in which they could ask questions.*

6. *The Learned Trial Judge erred in implementing the Child-Safeguarding legislation without the inception of any formalized training for the participants involved, including the intermediary.*

3. The background circumstances are that the Appellant was a long-time friend of the complainant's partner, the complainant being the mother of the child victim. I will refer to them respectively as the Mother and the Child. In early August 2020 the Mother, her fiancé, her one year old child and the Child, then aged 7, had moved into a new home. The Appellant moved into the lower bedroom of the 2 storey house, which had access via an internal stairwell and an external sliding glass door. In late October 2020, the Mother had learned of the underlying matters complained of, and the Child had been interviewed by the police in the presence of a social worker.

4. Subsequently, on 2 March 2021, the Appellant was arrested and later that day a search of that part of the residence comprising his living quarters was conducted. During that search, several electronic items were seized, as well as a pair of child's underpants, which were located in a clear sealed zip-lock bag inside the Appellant's backpack. The same day he was interviewed under caution and replied "No comment" to the questions asked.

Submissions

5. Because of repeated failures on the part of the Appellant's counsel to file submissions in accordance with the court's orders, the Crown's submissions were in fact filed before those of the Appellant, but I will nevertheless deal with the Appellant's submissions first. Unhelpfully, not all of the grounds of appeal were addressed in the written submissions, and the first reference to the numbered grounds appeared on the eighth page. However, the preceding pages cover the second ground of appeal. Since there were no written or oral submissions on the first ground, I will assume that is not pursued. But the submissions did refer to the issue of corroboration, and I will therefore try to deal with the manner in which the Appellant's case on corroboration was put in the submissions.

6. The basis upon which the issue of corroboration arose was in relation to the items found in the Appellant's black bag. At this point it is necessary to give some context in relation to the items found in the bag. The evidence of the police officer who undertook the search was that he attended the Appellant's residence on 2 March 2021 and searched the Appellant's bedroom with another police officer. When doing so he located a black bag with the word "Security" written on it (the Appellant worked for a security company), and within the cavity of the bag he observed a clear zip-lock bag containing underwear or panties that a female child might wear. He did not open the zip-lock bag but placed it in a police evidence bag. He described the black bag as being a work bag, containing paraphernalia which a security guard might use.

7. The same officer conducted a further search of the Appellant's residence on 10 August 2021, again seizing electronic items, and also searched the Appellant's car, which contained the same black bag as had previously been searched. This time the officer found a pair of white and purple socks in the left side pocket of the bag. He left the socks inside the bag and seized the entire bag.

8. The submissions referred to the Crown's case that the items found in the black security bag corroborated the Child's evidence. The question had been addressed at a pre-trial hearing, and the Appellant's counsel had made written submissions on the issue. At a pre-trial conference held on 17 November 2022 (the trial began on 5 December 2022), the issue of corroboration was raised by Ms Christopher in the context of whether a direction needed to be given to the jury on the question, and the need for the judge to have ruled on the Child's competence before taking her evidence.

9. The submissions then relied on the case of *R v MB* [1999] WL 33230758, where the need to identify supporting evidence was stressed, and then on the case of *Wellman v R*, Bermuda Court of Appeal, 24 July 1992. While that last was a case concerning the need for an accomplice

warning, attention was drawn to that part of the judgment which indicated that it was the task of the judge to explain to the jury which items were capable of amounting to corroboration, and the consequences of a failure by the judge to give the appropriate directions. *Wellman* was of course decided before the change in the law affecting the need for corroboration.

10. The second ground of appeal related to the rule in *Browne v Dunn*. This rule concerns the failure of a cross-examiner to challenge the evidence of a witness on a particular point. The Queensland Bench Book notes that considerable caution is required in applying the rule in criminal cases, since there may be any number of reasons for oversight, including counsel's error. In this case, Ms Christopher informed the court that she had not regarded the issue (whether the Appellant had told the Mother that he had the Child's panties and socks, for which she then gave him her permission) as being one of importance.

11. I pause to note at this stage that the officer was cross-examined extensively regarding the searches of his bag; in fact, the transcript of the cross-examination covers five pages, all of which are concerned with the searches and the finding of the panties, and, later, the socks in the Appellant's bag. In her opening remarks to the jury Ms Clarke had referred to the finding of what she called a pair of little girl panties, noting that these had both the Child's and the Appellant's DNA on them, and the later discovery of a pair of little girl socks.

12. Turning back to the submissions, these referred to the judge's summing up (page 286 of the Record), and suggested that the officer's description of his search should create doubt as to the true circumstances of the search. The submissions next made complaint about the cross-examination of the Appellant, and referred to what was described as the problematic cross-examination, at pages 183-4 of the Record, where it had been put to the Appellant that the Mother had not known that he had taken the Child's panties and socks, and he had responded that he had informed the Mother the same week that he had taken them, to which she had responded "Okay, no problem". It was put to him that he had made up his answer that the Mother had been aware that he had taken the panties and socks. Ms Clarke in her closing submissions referred to the Appellant's retention of the panties and socks as being kept as a trophy, to be taken out when he wanted to be reminded of the events in question, which no doubt was why the issue assumed importance during the trial.

13. The reason for suggesting that the Appellant had made up the Mother's knowledge of his possession of these items was because Ms Christopher had not asked the Mother whether she was aware that the Appellant had them, and that the Mother had advised him that was not a problem. And the submissions referred to the failure to cross-examine the Mother regarding the issue, while noting that Ms Christopher had expressed on the record that she did not think that this was an issue of great import. In her summing up the judge had cautioned the jury that they should consider other possible explanations for the failure to put those questions to the Mother, and must not simply assume that the reason for the omission was that the Appellant had changed or recently made up his story. The submissions referred to the case of *R v Coswello* No S APCR 2009 0684, and particularly paragraphs 48 and 59. Next was the case of *Riyaz v The State* [2021] Criminal Appeal No. AAU 17, which summarised the principles of *Browne v Dunn*, although the passages relied upon came from a Hong Kong Court of Appeal case.

14. Finally with regard to the underwear and socks, it was submitted that the judge had invited the jury to speculate, in having to look at the underwear to decide for themselves whether they appeared freshly laundered. It was submitted that the only relevant evidence came from the DNA expert, who had given evidence that she could not tell whether the DNA was deposited before or after laundering.

15. The third ground of appeal was concerned with the late service of additional evidence in the form of photos taken from the Appellant's phones and/or laptop, which the Crown had had for more than a year. Upon service of this evidence, the Crown had advised that they did not intend to rely upon the photos, but might use them in cross-examination if the need arose. The first complaint was that by reason of the late service, the Child and the Mother had finished giving their evidence; and it was submitted that it would be undesirable to call the Child a second time (for what purpose was not made clear). The second complaint was that the late service meant that the Appellant had a sword of Damocles hanging over his head, because he might be obliged to answer a question affirmatively (for instance regarding his having seen the Child naked) in order to avoid the photos going before the jury. It was submitted that they should have been excluded as unfair, per *R (on the application of Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134.

16. Ground 4 related to the evidence of the Child, conducted with the assistance of a qualified intermediary who, as indicated, had met with the Child before she gave evidence. The purpose of such appointment was both for the intermediary to establish a rapport with the Child and to provide guidance as to the Child's capacity to receive questions and give evidence. During her evidence it was said that the Child had seemed to shiver, and when she had been asked by Ms Clarke if she was cold, she had given an affirmative nod. The submissions suggested that the judge "ought to have corrected this with the authority of her post", but in what manner was not made clear.

17. Grounds 5 and 6 are concerned with the Child Safeguarding legislation effected by amendment to the Evidence Act 1905 in 2019, with an effective date of 15 July 2022. This was the first case conducted under the new regimen. It was submitted that the judge failed to discuss with counsel in advance how limitations placed on counsel in questioning the child complainant would be dealt with. Specifically, the areas of best practice identified in *R v PMH* [2018] EWCA Crim 2452 were set out, and the case of *R v Lubemba* [2014] EWCA Crim 2064 also relied upon.

18. The specific complaint made was that the parties did not have clarity about the yardstick that was going to be used to ask questions, beyond the '20 questions' document given at a conference attended by counsel (and the judge), the subject of which had been the safeguarding principles recently introduced. Further, it was submitted that the court had found an intermediary who did not understand her task and gave inappropriate advice about the questioning which had to be corrected by counsel. I pause to note that the intermediary's letter to the court of 2 November 2022 is reasonably comprehensive and concludes with 7 recommendations, included in which was one that reliance should be placed on closed questions.

19. Then there was the complaint that counsel had been restrained in her questioning style by the judge, who asked questions that counsel herself had felt constrained from asking. The judge did in fact ask just two questions at the end of counsel's questions, and having done so asked counsel in the usual way whether they had any questions arising from her questions, to which both counsel had responded in the negative. Both of the judge's questions had gone to the detail of the alleged sexual contact in a manner which counsel's cross-examination had not.

20. Finally, in regard to the need for training for dealing with a child witness, reference was made to the case of *R v Rashid* [2017] Crim 2 (paragraphs 80 to 82) and *Wills v The Crown* [2011] EWCA Crim 1938 (paragraphs 19 to 39).

21. As indicated, the Crown's submissions were not responsive to the Appellant's, but drafted with reference to the grounds of appeal. Grounds 1 and 4 were dealt with together, and essentially made the point that the prosecution had not made any reference to inadmissible evidence or irrelevant material; counsel for the Appellant was entitled to make whatever comment she wished regarding the child's testimony. In relation to ground 1, the submissions acknowledged that the judge had recounted what the witness described seeing and commented that the description was consistent with masturbation. The submissions made the point that the judge was entitled to comment on the facts. The jury had been properly directed as to how to identify and determine the factual issues, and the facts were fairly put before the jury in the context of the issues as they emerged.

22. In relation to the *Browne v Dunn* point, ground 2, the Crown's case was that the presence of the Child's underwear in the Appellant's knapsack was an integral part of the prosecution case, and the evidence was tendered to corroborate the Child's evidence. The defence case was a bare denial of the allegations, and as part of that case proffered an innocent explanation for the presence of the Child's underwear which had not been put to the Mother. Neither the defence nor the prosecution had sought to recall the Mother, who had remained in court during the Appellant's evidence. In determining whether the rule had been breached, the court was not limited only to considering what questions were asked or not asked, but also obliged to examine whether in the subsequent conduct of the defence, facts or propositions were advanced that had not been 'fully or fairly' put to the relevant witnesses – see *KC v R* [2011] 32 VR 61.

23. As to ground 3, the Crown conceded that the photos had been disclosed late, but noted the disclosure was before the end of the Crown's case, at a time when the Crown did not know whether the Appellant was going to give evidence. In the event, he did give evidence, during which he accepted that he had seen the Child naked, and provided an explanation. There was, thus, no need for the photos to be exhibited, and they were not.

24. As to ground 5, the Crown submissions contended that it was trite that the judge may ask questions of a witness to assist the jury. There was no complaint that the judge's question was disruptive.

25. Finally, in relation to ground 6, the Crown relied on the process established to ensure a fair trial. Once satisfied that counsel was competent, there is no requirement for the court to ensure that counsel has any specific expertise. And the submissions referred to the case of *Fox v R* [2008]

Bda LR 69, and the test for establishing lack of safety in a case where the competence of counsel was in issue.

Analysis and findings

26. I would not propose to review counsel's oral argument separately, but will refer to the relevant submissions made to this court where appropriate.

27. In relation to ground 1, the complaint that the judge had erred by inviting the jury to speculate that the Appellant had masturbated in the Child's presence, it is important to remember the Child's evidence on the issue. When asked about the time she had seen the Appellant's penis (the Child used the word 'noodle'), the Child referred to the fact that at the relevant time she had socks on her hands, and then said that she had touched the Appellant's penis. When asked whether the penis had done anything when she touched it, the Child said that it 'dribbled'. There was no cross-examination on the subject. Neither was the subject covered in counsel's oral submissions.

28. I do not think the judge can properly be criticised for her choice of words in summing up, and would reject the contention that she invited the jury to speculate regarding the issue. When this aspect of the Child's evidence was referred to during the judge's summing up (page 283/284 of the Record) the judge referred correctly to the words used by the Child, and then asked, no doubt rhetorically, whether those words were how a child of that age would describe having seen the Appellant sexually excited to the point of some form of ejaculation. There is nothing to this ground of appeal, and I would dismiss it.

29. I turn next to the issue of corroboration, and would just note that, unsurprisingly, the Crown's written submissions made no reference to the issue of corroboration, since it was not raised by any of the grounds of appeal. Ms Christopher began her submissions on the issue by referring to her undated written submissions filed with the court, which concluded by drawing the court's attention to section 42 of the Evidence Act 1905, which precludes a witness from being sworn unless he or she has attained the age of 14 years. Section 42A of the Evidence Act then governs, and requires that where a child is not permitted to be sworn (ie is under the age of 14), unsworn evidence may be given provided the child is competent. Ms Christopher submitted that the Child was not competent, and submitted that the issue of competence needed to be addressed before the Child gave her evidence.

30. There had then been a case management hearing held on 17 November 2022. This started by dealing with the draft questions submitted to the appointed intermediary, Ms Thomas. It should be noted in connection with a subsequent ground of appeal that the judge asked counsel if she needed to hear from them in relation to the draft questions which the intermediary had indicated were agreed. Ms Christopher and Ms Clarke both responded in the negative. It should also be noted that, as is clear from paragraph 18 above, the questions to be put to the Child had been the subject of amendment to reflect the views of counsel.

31. Ms Christopher then referred to the outstanding issue of competence and submitted that the court needed to make a decision as to whether the Child's evidence ought to be corroborated,

and the terms of a direction to be given to the jury. During the course of submissions Ms Clarke put the test of competence as being whether the witness, in this case the Child, was of sufficient intelligence and understood the duty of speaking the truth. Ms Christopher essentially accepted those criteria, and Ms Clarke noted that Ms Thomas had already said in her report that the Child was clearly intelligent. This is rather paraphrasing what Ms Thomas had said, but in her report Ms Thomas had said that the Child demonstrated a degree of competence in answering questions, and had the capacity to participate in the proceedings. The judge gave her ruling on the issue of the Child's competence on 21 November 2022, and accepted that the Child was a competent witness. She was entitled so to do.

32. Ms Christopher's oral presentation then referred to the case of *R v MB*, cited in paragraph 9 above, and *Wellman*. Ms Christopher referred the court to a passage in the judgment of Henry LJ in *R v MB*, where the jury had been told that it was essential for them to look for and pay attention to supporting evidence, but had been given no help at all as to what might or might not be such evidence. The right direction would have been that there was no supporting evidence, but if the judge had thought that there was independent supporting evidence, he was bound to identify it.

33. *R v MB* was a case concerning the application of section 34 of the UK Criminal Justice and Public Order Act of 1994, which permitted inferences to be drawn if an accused, on being questioned by a police officer, failed to mention any fact which he could reasonably have been expected to mention when so questioned. The case related to charges of rape and unlawful sexual intercourse in respect of two girls. At trial the motive of the girls in making the underlying allegations was said to have been jealousy. But when the accused had been first asked by a police officer whether he could think of any motive for the girls making up the allegations against him, had said that he could not. The appeal was allowed on the basis that it had not been established that the accused was aware of the jealousy of his step-daughter when he was questioned by the police officer, and so could not reasonably have been expected to mention it. So I do not think it is helpful to look at the passage to which Ms Christopher directed the court, without reference to the rather different background in which that case was decided, and the different legislation pertaining.

34. Ms Christopher's submissions turned on the corroborative nature of the panties and socks. Ms Clarke in her opening had referred to those items. And there had been ample references to the panties and socks in the pre-trial case management hearings, so that Ms Christopher was well aware of the way in which the Crown was putting its case.

35. At the case management hearing held on 17 November 2022, counsel were agreed that the court would need to make a decision as to the need for corroboration and the direction to be given to the jury regarding the issue. But although headed 'Submissions on Corroboration', they were mostly concerned with the Child's competence, and that was the issue the judge ruled on.

36. The judge did refer to the issue of corroboration in her summing up at page 291 of the Record, where she said, referring to the constant uphill battle which the defence said it faced, that it was even more important to look at things that might corroborate the Crown's evidence or might independently assist the defence case. And the defence case was that the police had deprived

them of the science which might have assisted their case because of a substandard investigation. The written submissions closed by saying that the judge should have been more explicit in speaking to the jury about competing inferences and circumstantial evidence.

37. In my view the importance which the Crown placed on the fact that the Appellant had the Child's panties and socks in his work bag had been made abundantly clear (see, for instance, paragraph 8 above), and that is no doubt why Ms Christopher cross-examined DC Abraham thoroughly on the issue. Indeed, it was during this cross-examination that the officer referred to the answer which the Appellant had originally given as to whom the socks had belonged to (his cousin's or another relative's), something to which Ms Clarke had referred in her closing submissions. The issue had been thoroughly canvassed in pre-trial case management hearings. So there was no question of the defence being in any doubt as to how the Crown put its case on the corroborative nature of the presence of the Child's panties and socks in the Appellant's bag.

38. The critical question is whether the judge's direction to the jury was fair, so that the conviction was safe. In my view it was indeed fair and balanced, and the judge's comments regarding corroboration were sufficient. Ms Christopher sought to exclude the admission into evidence of both the panties and the socks, on the basis that they had no probative value, and the judge ruled against her on that issue at the start of the trial. That ruling was not the subject of a ground of appeal. I would dismiss this complaint, if and insofar as it does constitute a ground of appeal.

39. I next turn to ground 2, the complaint that the judge had erred in the application of the rule in *Browne v Dunn*. I have referred above to the fact that it was clear at all times how the Crown put its case, in terms of the relevance of the Child's panties and socks having been found in the Appellant's work bag. So the question which obviously arose is what was the Appellant's explanation for their presence in his bag. Defence counsel should always have anticipated that the Appellant would be asked for an explanation as to the reason he had retained these items. And if the answer to that question was that he had informed the Mother that he had taken the panties so that the Child had a clean pair to use if necessary, and that the Mother had said "Okay, no problem", then it seems to me to follow that counsel would ordinarily put to the Mother that she had effectively given her permission to the Appellant being in possession of that item (although not the socks, which the Appellant said had not been discussed). When that course was not followed, I would regard it as entirely natural that Ms Clarke should seek to draw the adverse inference that the Appellant had made up the story on the witness stand. Regarding Ms Christopher's statement that she did not regard the question (the Appellant's possession of the panties) as being of importance, I confess I do not understand how she had reached that conclusion. One would not expect a security guard to be carrying a child's underwear in his work bag. What I do understand is why Ms Christopher might be reluctant to seek to recall the Mother to give evidence on the issue. If she were to give evidence contradictory to what the Appellant had said in his evidence, the impact might be considerable. In any event the judge in summing up made it clear to the jury that they should consider other possible explanations for the failure of counsel to put those questions to the Mother, and warned them that they should not draw any inferences adverse to the Appellant's credibility unless in their view there was no other reasonable explanation for the failure to put the issue to the Mother. In my view that direction was more than sufficient in the circumstances and I would dismiss this ground of appeal.

40. I now turn to the third ground of appeal, the late service of the photos on the Appellant's phone and/or other devices. As Ms Clarke commented, in the event no application was ever made to introduce the photos, and they were never put in evidence. I should say straight away that I do not accept Ms Christopher's "sword of Damocles" argument. If the Appellant had never seen the Child naked, one would expect him to say so, rather than to lie by giving a response which was potentially prejudicial. There was no implicit threat by reason of the fact that the Crown had the photos in question, and I do not accept the theory that the effect of the failure to disclose the photos earlier was to "require" the Appellant to answer inflammatory questions dishonestly, without context. The fact that a negative answer from the Appellant might have led to an application from the Crown to admit the photos does not mean that the Appellant was obliged to lie (and thereby perjure himself) in his answer. In the event, he accepted that he had seen the Child naked, at which moment the issue became a non-point. I would dismiss this ground of appeal.

41. Ground 4 covers the manner in which the Child gave her evidence, and contended that both the Crown and the judge had alluded to the pre-recording of the Child's evidence in a way that was prejudicial to the Appellant. I assume that the alleged prejudice related to the three matters that followed; the fact that the jury were told that they would not be able to review the Child's evidence, the fact that the Crown had referred to the Child having shivered, and the judge having alluded to the Child's reaction to her questions when it was said that there had been a significant change of tone in the way in which she put them.

42. As the Crown's written submissions pointed out, this ground does not actually make a complaint of prosecution impropriety. But let me take the complaints in turn, starting with the fact that the jury had been told that they would not be able to review the Child's evidence. Ms Christopher referred the court to those cases in the UK where guidance had been given as to how a vulnerable child witness should be treated. One of the earliest cases was *R v B* [2010] EWCA Crim 4, where the Lord Chief Justice gave guidance as to the circumstances in which very small children might give evidence in criminal trials. His words were repeated in the case of *Wills*. It was accepted that there needed to be limitations imposed on the cross-examination of vulnerable young complainants. Nowhere in the cases could I see any judicial pronouncements suggesting that there was anything improper in restricting a jury from reviewing the evidence of a child complainant, and Ms Christopher did not refer us to any case suggesting that it was inappropriate to impose such a restriction. Jurors do not get to see a video of any other witness's evidence, which they might be able to view more than once, and I can see the good sense (and likely benefit to a defendant) in restricting them from repeated viewing of the evidence of a child complainant.

43. I would also note that the manner in which the Child would give evidence had been canvassed at a case management hearing held on 7 September 2022, on which the judge had delivered a detailed ruling on 27 October 2022. I did not see any reference in the ruling to the number of times the jury might be expected to view the video of the Child's evidence. Then there was a further case management hearing held on 17 November 2022, part of which dealt with the logistics of the Child's pre-recorded evidence. During the course of that hearing, Ms Christopher was asked if she had anything to add. If she had wanted to raise the issue of the

video being available for repeated viewing by the jury, that would have been a good time to do so. Finally, there was a case management hearing held on 21 November 2022, by which time the Child's evidence had apparently been heard, at which the question of editing the video of the Child's evidence was discussed. Again, the matter could have been raised then. Looking at the issue as a whole, I would not regard the restriction imposed in this case as being in any way improper, and do not think it would render a conviction unsafe.

44. As to the Child having shivered at some point during her evidence, I watched the video of the Child's evidence with care, and what was described as a shiver seemed to me more like one sudden movement. But if it was indeed a shiver, there was in fact a commonsense reason for this, of which all were aware, because it had been covered in terms in the report of the intermediary, where she referred to the Child's eczema, which caused her to scratch herself, particularly when she felt under stress, and reference had been made to the fact that the Child often felt cold as a result of this condition. When the Child had shivered, Ms Clarke had asked her if she felt cold and she had nodded and mouthed yes. There does not seem to me to be any basis for suggesting that such an exchange was in any way improper, or could render the verdict unsafe.

45. As to the alleged change of tone when the judge asked the Child questions, the two questions asked by the judge took less than a minute. I do not understand the reference to the judge's change in tone in putting her two questions to the Child; she had not previously put any questions to the Child. The judge used her normal voice, and there was nothing unusual in the Child's reaction to her questions. Ms Christopher did not expand upon or explain what she meant by this ground in her oral submissions. I would dismiss this ground of appeal.

46. Ground 5 essentially makes two complaints, first that the judge improperly posed questions to the Child, and, implicitly, that counsel were constrained throughout in the manner in which they could ask questions. As to the first, the notion that a judge should not be permitted to ask questions of a witness, even a vulnerable child witness, is one that I find extraordinary. The Appellant's written submissions set out the proposed areas of best practice set out in *R v PMH*. They do not suggest that the judge should be inhibited in any way in choosing to ask his or her own questions.

47. As to the second complaint, it is important to remember that the trial was preceded by case management hearings at which the scope of questioning of the child witness was canvassed. As noted in paragraph 30 above, the hearing held on 17 November 2022, with the intermediary and both counsel present, considered the scope of the questions which had been agreed between the intermediary and counsel. The judge asked counsel whether she needed to hear from them in relation to the draft questions. Both responded in the negative. And, as mentioned in paragraph 18 above, it appears that the draft questions were in fact changed to reflect counsel's views. If Ms Christopher had felt that she was constrained in any way regarding the scope of the questions she wished to put to the Child, that was the time for her to raise the issue. Arguably, another opportunity arose at the beginning of her cross-examination of the Child, and yet another arose after the judge had put her two questions to the Child. Ms Christopher was asked whether she had any questions arising from the judge's questions, and said "No". While it is true that the judge's two questions went directly to the occasion when the Appellant's penis had

touched the Child's vagina, there was nothing to prevent Ms Christopher having asked a question along the same lines. Bearing in mind the nature of the Appellant's defence (that the Child had made up and lied about the incident) one can well understand why counsel might have found it counterproductive herself to ask questions along the lines of those asked by the judge. But the choice was counsel's, and I reject the notion that counsel was constrained in any way in asking whatever questions she wished. I would dismiss this ground of appeal.

48. Finally, the complaint in ground 6 was that the judge had erred in implementing the Child-Safeguarding legislation without any formalised training for the participants involved, including the intermediary. Ms Christopher described the conference on the subject which both she and the judge had attended (we were not advised whether the intermediary attended, but she was an experienced and well-qualified professional who had frequently acted as a litigation guardian) and no objection was ever taken as to her suitability for her role. Ms Christopher herself is probably the most senior defence counsel at the Bermuda bar. In its submissions in a related case, the Crown referred to the cases of *Fox v R* [2008] Bda LR 69, where complaint had been made regarding the competence of counsel, and *R v Day* [2003] EWCA Crim 1060, where the court commented that "incompetent representation … cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe." The test is indeed the single test of safety.

49. One typically sees complaints regarding the competence of counsel taken by replacement counsel. It is true that in this case Ms Christopher does not suggest in terms that she was not competent in her conduct in the trial. But that is the gravamen of the complaint. If she (or any other counsel) would not have felt competent to conduct the trial without formalised training, she should have declined to act, or at least raised the issue with the judge at one of the case management hearings. But as the cases make clear, the proper test is whether the conviction is safe, not whether counsel lacked competence. In this case the defence was conducted by senior counsel who had attended a conference on the issue of child safeguarding, and there is no suggestion made anywhere that Ms Christopher did not conduct the trial with the necessary skill and competence, or that the trial was unsafe because of the lack of training given to counsel. I would dismiss this ground of appeal.

50. It follows that this appeal should be dismissed, and I would so order.

GLOSTER JA:

51. I agree.

CLARKE, P:

52. I also agree.