IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPEAL NO 18 OF 2012

HARRIM PEREZ Appellant

v

THE QUEEN Respondent

___

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

O Selgado for the appellant.
S Smith, Senior Crown Counsel, and J Chan, Crown Counsel, for the respondent.

___

27 October 2016 and 9 October 2018.

SIR MANUEL SOSA P

Introduction

[1] In the gathering darkness of the evening of 17 February 2009, at a point between mileposts 63 and 64 on the Western Highway not far from the premises of Running W, the virtual complainant DM ('D'), then aged 25, emerged stark naked from inside a motor vehicle ('the vehicle') and fled along the road until she was picked up by a tanker ('the tanker') driven by a Norris Dawson ('Mr Dawson'), a good Samaritan who lent her his overalls and took her, at her request, to a location at or near Hill View, Santa Elena, where she was reunited with friends of hers. (Unsatisfactorily, the vehicle is referred to variously in the notes of González J, the trial judge ('the judge'), as a green Ford Ranger and as a

gold Toyota 'Forerunner (*sic*)'; but the record indicates that a photograph of the vehicle was admitted in evidence and counsel for the appellant has not made an issue of this particular discrepancy.) On the next day, at the San Ignacio Police Station, the driver of the vehicle, Harrim Pérez ('the appellant'), was arrested and charged by the police with the rape of D. His trial commenced on 25 July 2012 before the judge and a jury and ended five days later with his conviction of rape and the imposition on him of the minimum mandatory sentence for that crime, viz a term of eight years' imprisonment. He filed notice of appeal on 10 August 2012; but, as a result of circumstances to be set out below, his appeal was not heard by this Court until 27 October 2016.

The delay in hearing the appeal

[2] It appears, most regrettably and inexcusably, that there was no stenographer present at the appellant's trial and, even worse, that no proper steps were taken, in the light of the absence of a stenographer, for the making of an audio recording of what was said during the course of the trial. This inexplicable departure from the norm was, disgracefully, not an isolated occurrence. The bigger picture shows that there were no less than 11 other such appeals, all filed in 2011 and 2012, from convictions or acquittals in criminal trials presided over by the judge. After a long period of difficult and painstaking work to try to gather material, such as judge's notes, full or otherwise, with which to endeavour to put together some semblance of a record of appeal in each such case, this Court was finally able in early 2016 to bring these appeals into the improved case management system which had been introduced under the JURIST Project in May 2015.

[3] Accordingly, it was decided to hold a series of extraordinary case management conferences to address the special problems arising in all cases where no stenographer had been present at the trial and no audio recording had been made of anything said during its course.

[4] It quickly emerged at the first case management session held in respect of the present case on 3 February 2016 that this was a particularly unfortunate one in that, not only was it a since-deceased attorney-at-law, viz Mr Lionel Welch, who had represented the appellant at trial, but counsel who had prosecuted thereat was no longer at the chambers of the Director of Public Prosecutions. With two possible sources of assistance

thus eliminated, the Registrar was directed formally to write the judge seeking from him by a specified date the summing-up itself, if it had been written out, or, if not, any pertinent note he may have made in relation thereto or to the evidence.

[5] Given the unprecedented nature of the challenge facing the Court, directions were also given at the session in question calling for written submissions from both sides by 24 February 2016 as to the appropriate order for this Court to make on the appeal being called up for mention at its next sitting commencing on 29 February 2016. From the Crown, given its involvement in all the problematic appeals, the case management panel required one set of submissions relating not only to this appeal but also to 11 other appeals.

[6] It was on the basis of the notes subsequently produced by the judge that the record of appeal for the present appeal was prepared, the completion date thereof being 18 February 2016. However, no copy thereof was made available to the President of this Court until 8 March 2016.

[7] Mr Selgado filed 'Grounds of Appeal on Behalf of the Appellant' and 'Skeleton Arguments on Behalf of the Appellant' on 29 February 2016. Likewise, however, those documents did not reach the hands of the President of this Court until 8 March 2016.

[8] The Crown, for its part, did not, in fact, meet its 24 February deadline, delaying the filing of its relevant submissions until 10 March 2016.

[9] The appeal came up for hearing, together with four others, at the First 2016 Session of the Court for 2016. Such hearing proved inadvisable. The frustration of the Court, and the cause thereof, is somewhat reflected in its order of 11 March 2016, which is best reproduced here, in its context:

> 'Having regard to the content of what has so far been filed by way of submissions in writing and skeleton arguments in some of these five appeals, and following reconsideration of the reports from the Registrar that material, eg notes of evidence, which was previously said not to exist may, in fact, exist (though possibly only – in some instances – in fragmentary form), the court has, in the interests of justice (though not without some regret over the consequential delay) decided to

adjourn all five matters it had hoped to deal with this morning. It is considered important to pause and take stock, in consultation with the Registrar, of what exactly is now, or may soon become, available for the use of counsel in these appeals and to ensure that any such materials are made available to counsel concerned in each of these appeals before attempting to go on to a hearing. Therefore we are adjourning to a date, or to different dates, to be announced.

We say "different dates" as we can no longer be sure that it shall be convenient to have a single hearing for all five of these appeals.'

[10] On 7 April 2019, at a special supplementary session of the Court held as a direct result of the JURIST Project, the appeal came up for further case management. The appellant was given up to 15 April to file any amended grounds of appeal and additional skeleton arguments he might wish to file. Failing to meet that deadline, Mr Selgado in fact filed 'Ammended (*sic*) Grounds of Appeal on Behalf of the Appellant' and 'Ammended (*sic*) Skeleton Arguments on Behalf of the Appellant' on 29 April 2016. Similarly, the Crown failed to file a skeleton argument in reply to the appellant's amended skeleton argument within the time period of two weeks given to them for so doing, not filing such reply until 24 May 2016. The case management panel's stated desire of seeing the case called for hearing during the Court's next session in 2016 was thus not fulfilled.

[11] On 15 September 2016, at the final case management session held in respect of this appeal, the case management panel indicated that the necessary steps would be taken to have the appeal considered for inclusion in the cause list for the Court's next session. Those steps having been duly taken, the appeal was heard on 27 October 2016.

The Crown evidence at trial

[12] It would appear that the case for the Crown at trial was presented on 25 and 26 July 2012 and that for the defence on 27 July, when both sides also gave closing speeches.

[13] Unusually, as far as the collective experience of the members of this Court goes, the virtual complainant did not testify at trial. Instead of her *viva voce* evidence, the judge received documentary evidence in the form of three statements recorded from her by the

police on as many separate occasions. In the first of these statements, the typewritten version of which was wrongly dated 17 February 2010 rather than 17 February 2009, D recounted that, sometime after 6.45 pm or so on that same day, in the village of Blackman Eddie, she trustingly accepted a lift from the appellant, who was driving the vehicle, oddly described therein, ie in the first statement, as 'a cream colour (*sic*) Ford Runner' (not, let it be noted, as a Toyota 4runner nor as a Ford Ranger). She did not know the appellant; and when, in the course of the ensuing light conversation, she asked whether his 'surname' was Cunil, he replied that his 'name' was Carlos. Seeing that the appellant was drinking from a beer bottle, D asked him whether he was drinking. The appellant not only responded in the affirmative but also twice offered to stop the vehicle and buy D a beer. Both these offers D refused.

[14] Upon their passing the premises of Running W, however, the light conversation abruptly ended and things took an ominous turn. Slowing down the vehicle, the appellant announced to D that the only thing he wanted from her was sex. Shocked by this announcement, D replied that she could not give him that. The appellant, however, in a 'demanding and aggressive manner', further informed D that he not only wanted, but would have, sex with her, regardless of her wishes. The appellant then pulled off the road, shut down the engine of the vehicle and demanded that D strip. When she replied that she would not do so, his retort, as he reached behind her seat, was, 'Dats why people have to dead out ya. No mek I have to get mi gun and shoot you.' Frightened, D proceeded completely to strip whilst seated in the front passenger seat, which the appellant had by now caused to tilt backwards into a 'recline' position. The appellant then left the driver's seat and mounted D. After briefly caressing her breasts, both manually and orally, he opened the front passenger-side door, alighted and began urinating. He then permitted D to alight as well and urinate, but stood guard next to her as she did so. Giving her no proper opportunity to clean herself, he pushed her back into the front passenger seat of the vehicle, and, following her in, locked the door once again. He then pulled down his trousers and, in the words of D, 'placed his erected (*sic*) penis into my vagina'. The ensuing intercourse was short-lived. In the estimation of D, its duration was 'not even two minutes', the reason being that, to borrow her language again, 'whenever he placed his penis in me it was (*sic*) slip out of my vagina'. But, alas, the appellant's quest for sexual

gratification did not end there. Having returned to the driver's seat, he proceeded to demand fellatio from D; and she, mindful of his earlier threat to her life, complied with such demand. Presently, upon being ordered by the unsatisfied appellant orally to stimulate his testicles as well, D told him that another vehicle was slowing down nearby and he looked outside. Taking full advantage of this momentary distraction, D unlocked the door and bolted out of the vehicle just as the appellant was starting the engine. It is not clear, on the evidence, how soon thereafter the tanker came along and picked up the fleeing D.

[15] A second statement was given by D and recorded by the police, some three days later, on 20 February 2009. In it, D said that she attended an identification parade held by the police at the San Ignacio Town Police Station on the day of that same date and that she pointed out the appellant, from amongst the nine men forming the line-up, as the man who had assaulted her. As will appear later in this judgment, this second statement, like D's fourth statement to the police, is not of significance for present purposes, identification not being an issue in this appeal.

[16] Before this Court, the Crown produced what purports to be a statement by D recorded by the police just over a year later, on 25 February 2009. As, however, there is nothing in the record to indicate that this statement was admitted in evidence at trial, it would not be right to advert to its contents in the present judgment.

[17] The final statement of D to the police of whose admission in evidence this Court is satisfied was given on 5 March 2010 and related exclusively to her ability to observe the face of the driver of the vehicle on the evening of 17 February 2009. As already noted above, no issue as to identification arises in this appeal.

[18] LG, a sister of D, testified regarding both some of the events of 17 February 2009 and the absence of D from Belize at the time of trial. On the former subject, she gave evidence, according to the judge's note, that D was picked up by 'a gold Toyota Forerunner (*sic*)', whose driver she did not see, which then continued along the highway in the direction of San Ignacio. She went on to say that, at about nine o'clock that night, D, speaking to her and crying on the telephone, informed her that 'the guy in the vehicle tried to rape her'. That testimony, given under examination-in-chief, was supplemented,

in re-examination, by the disclosure that D had left for the United States of America sometime before the trial because her fiancé resides there.

[19] Concerning the absence of D from Belize, LG gave evidence that, on 10 February 2011, that is to say, almost two full years after the rape, she saw the former board, at the Phillip Goldson International Airport, a plane bound for Los Angeles, California and that she had not seen D in Belize again since then.

[20] LG stated, during cross-examination, that D had advised her that she would not be coming to Belize for the appellant's trial but given her no reason for her decision not to do so.

[21] Mr Dawson gave evidence as to his picking up of the naked D in the vicinity of the premises of Running W on the Western Highway on the evening in question. He said, in evidence-in-chief, that she had 'a frantic expression whilst signaling the [tanker] to stop'. When she entered the tanker she was, as he put it, 'excited and full of emotions'. She asked him if he could 'catch the vehicle' and said that 'the guy tried to rape [her]'. (It is not possible to say whether the record's lack of specificity in respect of the vehicle and the 'guy' is the fault of Mr Dawson or that of the judge.) Under cross-examination, Mr Dawson repeated that what D told her was that the 'guy' tried to rape her.

[22] It is clear from the record that the first, second and fourth statements of D were admitted into evidence under section 123(1) of the Indictable Procedure Act ('the Act') on the strength of the testimony of different police officers who recorded them, viz the investigating officer, Woman Corporal Serano, Woman Corporal Pascasio and Sergeant Reyes, respectively. At page 31, record, the judge refers, in the course of his summing-up, to the contents of the first statement. At page 17, record, it is noted that the second statement is both admitted and read in court. And at page 14, record, it is to be seen that the third statement is marked 'RR2'. There is, moreover, no suggestion by counsel for the appellant that they were not so admitted. These statements, upon being admitted, would have been read out in court; and, as just indicated above, there is, in fact, a note at page 17, record, to the effect that the second statement was so read out.

[23] It is to be observed that Woman Corporal Serano further gave evidence that D was crying whilst giving her first statement, which, as already pointed out above, was on the very night of her ordeal, and that she (the corporal) was moved to (a) give her toilet paper with which to wipe away the tears and (b) leave her alone for a while in order for her to regain her composure. It was also the testimony of this corporal that she witnessed the medical examination of D by a Dr Rivas on the night of 17 February 2009. (The doctor did not, however, testify at trial.)

[24] The Crown further adduced in evidence a statement under caution ('the SUC') given by the appellant in the presence of a Justice of the Peace and recorded by Sgt Reyes at the San Ignacio Police Station on 20 February 2009. It appears from the record (page 11) that Mr Welch did not object to the admission of the SUC

[25] In the SUC, the appellant raised the defence of consent. He spoke of having picked up D at Blackman Eddie on Tuesday 17 February 2009, and of introductions, first of himself to her and then of her to him. Without saying that he was drinking whilst driving, he narrated that he invited her to have a beer with him, indicating that he could stop for that purpose, but that she declined, pointing out that she would not drink until her birthday which would fall on the Friday then coming. Having said that, the appellant nevertheless claimed, towards the end of the statement, that '… I also had a beer with me and she drank it in one leak (*sic*)' ['lick'?].

[26] He went on to tell, in the SUC, of an exchange of stares between him and D, after which, somewhere between Central Farm and Esperanza, he asked her whether she wished to have sex with him. He continued:

> 'At the same time I pulled over to the side of the road and she looked at me and asked me if I had condoms and I told her no and then she told me that she had condoms in her purse so by that time she was already starting to take off her clothes and she even asked me to pin off her braw (*sic*) and then she kept searching for the condom on (*sic*) the purse and I just told her to forget it and we will just take chance without a condom.' (emphasis added)

He then proceeded to admit intercourse as follows:

> 'We then started to have sexual intercourse but my mind was not concentrating on what we were doing because I was thinking in (*sic*) my wife who is sick and I had just brought her from the hospital and I taught (*sic*) that it was not fear (*sic*) as I was being unfaithful to my wife and marriage …'

[27] The SUC then dealt with the subject of oral sex, the appellant stating therein that D agreed to perform, and in fact performed, fellatio on him, when, having lost his erection, he told her that 'it' would not otherwise 'work'. It was, he said, in the middle of that act, which he was enjoying, that D 'all of a sudden just jump (*sic*) out of the vehicle and started to flag and called (*sic*) vehicles'. The appellant cryptically added a few lines later: '… maybe she felt intimidated because we were in a lonely zone and only vehicles were passing at high speed'.

The appellant's unsworn statement from the dock

[28] At trial, the appellant gave an unsworn statement from the dock, raising the defence of denial of intercourse, and called no witnesses.

[29] He was at pains to say from the outset that he is a married man with four children.

[30] He further said that, on the evening in question, he was driving on the Western Highway (re-named the George Price Highway later in 2012) on his way home, having been called earlier by his wife who needed his assistance.

[31] On seeing two women at the roadside in Blackman Eddie, he stopped his vehicle and one of the women entered it. She told him she was going to Esperanza and conversation thus started between them. He 'pulled out' a bottle or can of beer and began drinking it. He offered her one but she refused it 'because her birthday was Friday'. He went on to say:

> '… as we were laughing and talking I asked her if she wanted to have sex. I pull over because I knew I had a condom. I knew I had condoms but I did not find them. She said she had tried to open the pack but it burst.'

He spoke of having then caressed her, of her proceeding to undress, of both of them urinating outside the vehicle, of both re-entering the vehicle and of him being ready to

have sex with D. At that point, he said, his wife called him on his mobile phone and he lost his erection. He told D, 'Let's save this for another day.' As, however, she continued rubbing him, he told her he needed her to perform fellatio on him; and she proceeded to meet that need, much to his enjoyment. The act was, however, suddenly interrupted when she 'jumped out of the vehicle'. He saw her stop another vehicle some four to five minutes later, whereupon he panicked and drove off.

The grounds of appeal

[32] Of a total of six grounds of appeal against conviction filed, two were expressly abandoned at the hearing by Mr Selgado. In essence, those argued were numbered and set out as follows:

> 'II. The … judge allowed the statement of [D] to be tendered under section 123 of [the Act] when in fact [D] had constructively abandoned the complaint made …
>
> IV. Error of the … judge in summation to the jury, not giving proper warning on what weight to adopt on the major inconsistency between the sworn evidence of [LG] and [Mr Dawson] and the deposition of [D] that [the appellant] merely tried to rape [D].
>
> V. The evidence at its highest could not support a conviction since rape was not proved.
>
> VI. The judge omitted to give a good character direction to the jury during the summing up …'

[33] Against sentence, the grounds of appeal argued, albeit far from strenuously, were the following three:

> 'I. The mandatory statutory minimal sentence is inhumane, contrary to the principles of the separation of powers enshrined in the Constitution of Belize.
>
> II. The sentencing guidelines were not taken into consideration by [the judge] before he passed sentence on the appellant, thereby the sentence was excessive and inhumane.

III. The inherent jurisdiction of the Court to reduce sentence or set it aside.'

The relevant statutory provisions

[34] As here relevant, section 123 of the Act, which appears under the sub heading 'Use of Depositions at Trial' and carries a marginal note reading 'Giving depositions in evidence at trial', is in the terms following:

> '(1) Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in subsection (2) are satisfied, without further proof be read as evidence at the trial of that person, whether for that crime or for any other crime arising out of the same transaction or set of circumstances as that crime, provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence.
>
> (2) The conditions hereinbefore referred to are that the deposition must be the deposition either of a witness whose attendance at the trial is stated by or on behalf of the Director of Public Prosecutions to be unnecessary in accordance with section 55, or of a witness who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel or is absent from Belize.'

The rival submissions on the appeal against conviction

(i) The section 123(1) admission

[35] In setting out this ground of appeal (No II) above, the Court has deliberately omitted two sentences contained in Mr Selgado's formulation thereof, viz:

> 'This allowed the trial to proceed without [the appellant] facing his accuser and is a breach of the principles of natural justice. The [judge] then failed to properly direct the jury on what weight that piece of evidence ought to be given.'

The first of these sentences, is, in the view of the Court, not so much a part of the ground itself but part of the argument in support thereof. As to the second, the Court regards it as essentially a no-frills statement of the second ground argued (No IV).

[36] Thus viewed, the first ground argued turns on the question whether D can be said constructively to have abandoned, in any meaningful sense, her complaint against the appellant.

[37] At the hearing, significantly, as the Court sees it, Mr Selgado chose to put at the forefront of his argument a contention having nothing whatever to do with this question, viz that the judge misinterpreted subsection (2) of section 123 of the Act. Although this amounted to nothing less than an ambush of the Crown, one rendered especially inglorious by the fact that, on the record, the contention had not been deployed at trial, the Court allowed it to be developed and shall give it due consideration later in this judgment.

[38] Returning now to the true question raised by the first ground argued, the Court notes that such ground was based on allegations to the effect that D had said, even before leaving Belize, that she would not return; that she had not waited to see whether such a return would have proved financially affordable; that she did not consider the interests of justice; and that she did not inform the Director of Public Prosecutions that she had decided not to 'proceed with the matter'. Mr Selgado, in an attack fairly comparable to a beefless burger, described as 'appalling' what, to him, was a departure by D from the jurisdiction 'without any reason' and in the hope of a conviction of the appellant at his trial.

[39] In reply, Mr Chan, for the respondent, submitted that D could not accurately be said to have abandoned her complaint. Indeed, he went on, the suggestion that a virtual complainant can abandon or stop the progress of a criminal complaint is one based on pure misconception. In this connection, he directed the attention of the Court to *Eligio (Bert) v R*, Criminal Appeal No 5 of 2001 (judgment delivered on 25 October 2001), a decision of this Court (Rowe P, Mottley and Sosa JJA). Quite apart from that, said Crown counsel, section 123 of the Act plainly allowed the trial to proceed despite D's absence from Belize.

[40] The bushwhacking contention of Mr Selgado as to misinterpretation of section 123 of the Act was, as understood by the Court, to the following effect. The five closing words of subsection 2, viz 'or is absent from Belize', must be read conjunctively with the words 'to be dead or insane, or so ill as no to be able to travel' which precede it in the subsection.

(The use of the word ‘or’ before the words ‘is absent from Belize’ was the result of a ‘drafting error’.) Thus read, so ran the argument, the subsection requires not only that the person in question, in the present case D, be proved to be absent from Belize but also that she is either dead, insane or so ill as not to be able to travel. Otherwise, said Mr Selgado, the benefit of the section would be available even in a case in which the person who gave the deposition in question was wilfully absent from Belize at the time of trial. If that benefit were to be available even in such a case, accused persons would have been deprived of their right ‘at common law’ to face their accusers. Moreover, submitted Mr Selgado, unless the construction urged upon the Court by him were to be accepted, section 123 would compare unfavourably with section 105 of the Evidence Act which contains safeguards of its own, discussed by this Court in *Emerson Eagan v R*, Criminal Appeal No 10 of 2012 (judgment delivered on 1 November 2013, ie after the trial of the appellant). What is more, stressed Mr Selgado, rejection of the construction proposed by him would open the floodgates for cases in which allegations such as the one in the instant case were made by persons who thereafter proceeded to ‘flee the jurisdiction in the hope of the [accused person] being prosecuted in his (*sic*) absence’.

[41] Mr Chan, replying to Mr Selgado’s submission as to the correct interpretation of section 123 of the Act, contended that absence from Belize of the maker of a deposition (‘the maker’), when proven by the evidence of a witness under oath, was a free-standing ground for its admission. Once such absence was proven, there was no need for further proof of death, insanity or illness (to the degree described above) of the maker. All that was further required at such point was for the court of trial to be satisfied that admission of the relevant deposition would not materially prejudice the accused person before it, a limitation on the pertinent discretion of a trial judge amply recognised by this Court in *Micka Lee Williams v R*, Criminal Appeal No 16 of 2006 (judgment delivered on 22 June 2007). Mr Selgado’s point on the right of the accused person to face his accuser did not take into account what was said in that regard by their Lordship’s Board in *Barnes, Desquottes and Johnson v R* (1989) 37 WIR 330, at 340, a case involving a deceased witness.

(ii) Directions as to the effect of inconsistency

[42] The gravamen of the argument for the appellant under this ground (No IV) was that the directions to the jury failed to bring out the effect on the weight of D's evidence, as contained in her depositions, of evidence inconsistent with it given by the Crown witnesses LG and Mr Dawson. It was the submission of Mr Selgado that the judge had unacceptably limited himself to pointing out to the jury that the evidence of D was uncorroborated and that the appellant had been deprived of the opportunity to cross-examine her. Not only should the judge, consistently with dicta in *Eagan*, have given the jury examples of questions that one could expect to have been put to her in cross-examination. The judge ought to have gone farther and directed the jury in cautionary terms as to the danger of attaching too much weight to D's evidence that she had been raped given the evidence of both LG and Mr Dawson that the driver of the vehicle had tried to rape her. Counsel emphasised that, on the evidence, D had spoken to both LG and Mr Dawson before giving her relevant statement to the police. Paraphrasing him, she was more likely to have been truthful at the respective points of time when she spoke to these two witnesses than when, after the passage of time within which to turn things over in her mind, she spoke to the police; and this heightened the importance of a direction in the terms suggested. Citing *Eagan's* case, he contended that the jury should have been directed point blank that the evidence contained in D's pertinent deposition could not carry the same weight as that given under oath by LG and Mr Dawson.

[43] Venturing outside the four corners of the relevant ground (No IV), counsel suggested that the fact that, in his unsworn statement from the dock, the appellant had denied intercourse was added reason for the giving of a direction in the terms identified above. He attached significance in this regard to the fact that the jury were able to observe the demeanour of the appellant in giving such statement.

[44] Remaining outside the ambit of the ground he was supposed to be arguing (No IV), Mr Selgado raised the question of compliance by the judge with the requirements of section 92(3) of the Evidence Act, which, as material for present purposes, provides:

‘(3) Where at a trial on indictment –

(a) a person is prosecuted for rape …, and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed …;

…

the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution.’

He did so in a decidedly discursive part of his address. Doing its best, the Court has managed to identify three points, of widely varying breadth, made by him with respect to the supposed failure of the judge to comply with the requirements of this section, viz:

1. that the judge omitted to direct the jury as to the need for ‘some sort of independent corroboration’;

2. that the judge did not, as he was required to do, administer to the jury in the course of his summing-up, a special caution under section 92(3), supplemented by the directions held in *Eagan* to be required in the context of section 105 of the Evidence Act;

3. that the judge did not explain to the jury the special circumstances, viz with his accuser unavailable for cross examination and the jury in no position to observe her demeanour, in which the appellant was placed before the court, an explanatory exercise which would have required the judge to ‘delve into what it meant in law sufficiently to have them understood (*sic*) that there is a requirement that they must meet and understand’.

[45] Confining his reply to those of the matters raised by Mr Selgado which fell under the pertinent ground (No IV), Mr Chan submitted that the judge properly directed the jury on the question of the weight to be given to the evidence of D in the light of its alleged inconsistency with that which, according to LG and Mr Dawson, she had reported to them. He sought support for this contention in a passage of the summing-up in which the judge,

having singled out the relevant pieces of the testimonies of LG and Mr Dawson, went on to comment-

> 'So there is clearly a contradiction between the evidence of [D] and that of the two witnesses.'

This comment, argued Mr Chan, unjustifiably favoured the appellant inasmuch as there was, in fact, no contradiction. Moreover, continued Mr Chan, the judge proceeded to give the usual general direction on the correct way to treat inconsistencies and contradictions, depending on whether these were regarded as serious or minor, telling the jury in so many words that, if they considered the 'contradiction' serious, they would be entitled to 'accept the evidence of [Mr Dawson] and that of [LG] that the [appellant] had tried to rape [D]'.

(iii) Insufficient evidence of rape

[46] The time given by Mr Selgado to his argument of this ground (No V) at the hearing was revealingly short. Essentially, his submission was a bare one to the effect that the elements of the crime were not established or, put differently, that 'at the highest point in the evidence there could not have been a conviction had the judge properly directed the jury on the position of the law and simplified it to them'.

[47] Nor has the Court, for all its efforts, been able to find in the 'Ammended (*sic*) Skeleton Arguments on Behalf of the Appellant' ('the appellant's written submissions') any submission that is expressly linked to this ground. Indeed the Court feels constrained to make the general observation on the appellant's written submissions that, after a fairly orthodox beginning, complete with a sub-heading 'Unfair and Prejudicial Evidence: grounds 1 & 3', grounds abandoned at the hearing as already stated above, the document becomes a somewhat confusing collection of arguments (first against conviction and thereafter against sentence) jumbled together with no further attempt at assisting the reader to determine which argument goes with which ground.

[48] It is singularly difficult to understand why counsel did not expressly abandon this ground.

(iv) The absence from the summing-up of a good character direction

[49] Mr Selgado started his argument in support of this ground (No VI) by urging upon the Court the astounding proposition that the judge ought to have taken the unprecedented step, at some unspecified stage before his summing-up, of calling for an antecedent report in respect of the appellant. He obviously was not suggesting that this should have been done after the jury's delivery of its verdict. After all, for the judge to have done it at that point would plainly not have had any effect on the verdict of the jury, which was by then a fait accompli. (In point of fact, Mr Welch had himself raised, during the sentencing phase, the fact that the appellant had no criminal record.) The judge, said Mr Selgado, was under a common law duty to 'relate to the jury the character' of an accused person on trial before them so as to ensure a fair trial. Conceding that there was nothing in the record to suggest that the appellant's good character was raised during the trial proper, he invited this Court to assume that Mr Welch, being a senior practitioner, did raise it. He submitted, further, that, had the judge raised the issue of good character in his summing, such direction as then ensued would inevitably have impinged on the credibility of the appellant. Counsel's vague mention of '*Vye*', when pressed by the President for reference to a specific authority to support this astonishing argument, suggests that he was invoking *R v Vye* [1993] 1 WLR 471, without providing a citation thereof or pinpointing any particular passage therein. The argument bottomed out with Mr Selgado suggesting that the enunciation of a novel principle as a matter of 'judicial activism' might be the proper solution for the appellant's obvious problem (ie that his good character was not raised at the appropriate stage).

[50] The Crown was informed by the Court that it would not be required orally to reply to Mr Selgado in relation to this ground.

Discussion of the appeal against conviction

(i) The section 123(1) admission

[51] From whatever angle it is viewed, this ground, with the greatest respect to Mr Selgado, amounts to no more than a nut having a shell but no kernel. The problem of which it complains is entirely imaginary. D cannot be meaningfully accused of

abandonment of her own complaint; and hence the entire argument of counsel is idle and leads to nowhere.

[52] Mr Chan rightly reminded the Court of its decision in *Eligio*. In that case, Mr Eligio was convicted of the offences of dangerous harm and use of deadly means of harm. His victim enquired of the trial judge whether he (the victim) could withdraw the charges, indicating that it was his wish that the prosecution of Mr Eligio proceed no farther. This Court, dismissing the appeal of Mr Eligio, said that the victim's enquiry and indication did not constitute a good ground for withdrawing the case from the consideration of the jury, he having had no control over the proceedings. In the instant case, there is nothing at all to suggest that D ever asked the trial judge whether she could withdraw the charge in question or indicated to anyone that it was her wish that the prosecution of the appellant proceed no farther. She merely went to the United States, after giving witness statements to the police, and failed to attend at the court below when the appellant's case came on for trial (after the far from inconsiderable lapse of almost two full years, as already noted above). Although there is no indication in the judgment in *Eligio* that anyone ever suggested that Mr Eligio's victim, for all his proactive intervention at trial, had abandoned his complaint, the fact is that the trial of Mr Eligio proceeded to finality, which it obviously could not have done in the face of an abandonment. In short, abandonment in any meaningful sense of the word not having arisen on the facts in *Eligio*, the Court is at a loss to see how it can so arise in the present case, in which the posture of D has been contrastingly passive.

[53] The only other point that needs to be made in this context is that, in any event, the question of abandonment or otherwise by a complainant of his or her complaint is neither here nor there for purposes of section 123, as Mr Chan correctly stated in the course of oral argument. That section sets out the applicable pre-conditions for admission, making no reference whatever to the subject of a so-called abandonment. If the legislature had intended that the provisions of this section not apply in the case of a complainant who has 'abandoned' his or her complaint in the sense proposed by Mr Selgado, it could easily have ensured that the section was drafted so as to leave that point in no doubt. Instead, if the Court may paraphrase the submission of Mr Chan noted at para **[39]**, above, section

123, as enacted, unambiguously sanctions continuation to trial in circumstances such as those which obtained in the present case.

[54] The Court does not regard it as either necessary or appropriate to enter into the further question whether there is reason to interfere with the exercise by the judge of his discretion, the appellant not having, in fact, impugned such exercise. His counsel's absolute silence as to the well-known governing principle, enunciated by Devlin J in *R v Cook* [1959] 2 QB 340 and cited with approval by Viscount Dilhorne in *Selvey v DPP* [1970] AC 304, is, as the Court sees it, telling in this regard. All that can be said properly to be complained of in the ground under discussion is the admission of the deposition in circumstances where D had supposedly abandoned her complaint.

[55] This brings the Court to the other complaint of Mr Selgado, which, as already noted above, was sprung upon the Crown without prior notice at the hearing itself and which the Court hence regards as other than proper. The Court wishes to note that it saw no need to give the Crown time in which to prepare a reply to the submissions advanced on behalf of the appellant in this regard. This was because the Court was unable, at any point, to detect even the semblance of any substance in counsel's submissions. The suggestion that section 123(2) should be interpreted to mean that, in the case of a person absent from Belize, his or her deposition should not be capable of being read in evidence unless, in addition, that person is proved to be dead, insane or so ill as not to be able to travel only has to be made to be rejected as preposterous. Belize would be the laughing stock of the world if section 123 drew distinctions between a maker of a deposition who is dead, but whose remains lie within its borders, and another one who is also dead, but whose remains lie outside such borders. The result would be no different if that section distinguished between the maker of a deposition who subsequently becomes insane and happens to be in Belize and one who goes insane but is not in Belize. Nor would Belize be able to avoid being the butt of cruel jokes across the planet if section 123 treated differently the deposition of a person who is too ill to travel but finds himself just south of the Sarstoon River in neighbouring Guatemala and the deposition of another, just as unable to travel owing to illness, but who finds himself in, say, our remote southern village of Barranco. Happily, there is absolutely no basis for the argument that the section is to

be so interpreted. The section clearly provides for four entirely separate and distinct categories of case in which a deposition may be read in evidence, viz, (i) death, (ii) insanity, (iii) illness which prevents travel and (iv) absence from Belize. The only criticism which may fairly be levelled at the drafting of this section (but which Mr Selgado omitted to level at it) is that it fails neatly to connect the last of these categories with the phrase 'proved at the trial by the oath of a credible witness'. The cause of this failure is, of course, the presence of the word 'is' (instead of the words 'to be') in the phrase 'or is absent from Belize'. The sole result of such failure, however, is that the manner in which absence from Belize is to be established, as it plainly has to be, is left unstated. In the view of this Court, the use of 'is', instead of 'to be' in the phrase in question is a manifest drafting error in the face of which, as a matter of necessary implication, absence from Belize, too, must, at any relevant trial, be proved by the oath of a credible witness.

[56] Mr Selgado's professed concern as to the right of an accused person to be able to face his accusers is, in the light of the development of the law over the last three decades, not a valid one. It is true that, in its judgment in *Sánchez (Oscar) v R*, Criminal Appeal No 10 of 1983 (judgment delivered on 23 January 1984), this Court, dealing there with a precursor to section 123 of the Act, saw fit to say:

> '… it was also suggested that Section 37 subsection 10 of the Indictable Procedure Ordinance Chapter 22 of the Laws of Belize is in conflict with Section 6 subsection 3 of the Constitution. Although this matter was not seriously argued and although section 21 of the Constitution Ordinance contains a saving clause whereby it is provided that laws which appear to be in conflict with the provisions of the Constitution may not be questioned for a period of five years from the day coming (*sic*) into effect of the Constitution Ordinance it would seem that some mention must be made of this matter since its effects (*sic*) the right of an accused person to cross-examine a witness at the Preliminary Inquiry. The point that this Court would like to take is that whereas in the United Kingdom, a Preliminary Inquiry based entirely upon statements given to an investigating poilce (*sic*) officer is not mandatory but a matter which lies within the discretion of the parties to elect or otherwise, in this country the accused has no choice and all Preliminary Inquiries

are taken in this mode so that this raises a question as to whether this practice should await the passage of time and a manifest injustice allowed to continue to operate when it goes to the very essence of our system of justice …'

[57] The proverbial flow of water under the bridge in the intervening years has, however, been copious and all in the opposite direction. A little over five years after the decision in *Sánchez*, Lord Griffiths, writing for the Board in *Barnes, Desqouttes and Johnson v R* and *Scott and Walters v R* (1989) 37 WIR 330, appeals to the Judicial Committee from the Court of Appeal of Jamaica, said, at p 340 :

> '… their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence.'

Admittedly, the Board was there concerned with a judicial discretion arising at common law as opposed to a statutorily conferred judicial discretion such as the one under consideration in the instant case. Section 34 of the Jamaican statute, viz the Justices of the Peace Jurisdiction Act, conferred no discretion on the court of trial in cases where the witness was dead (as was the case in *Barnes*) or too ill to attend court, whereas section 123(1) of the Act contains a proviso under which the relevant Belizean court must be satisfied that the accused will not be materially prejudiced by the reception of the evidence in the deposition. This Court is unable to see why the remarks of the Board quoted above should not be regarded as equally applicable to the statutorily conferred discretion with which the present case is concerned

[58] The reception in evidence of a statement made out of court in the absence of its maker was again considered by the Judicial Committee in *Grant v R* [2006] UKPC 2 (16 January 2006), in which one of the issues raised was whether section 31D of the Evidence Act of Jamaica was inconsistent with the Constitution of that country. At the trial of Mr Grant, the judge had admitted a written statement recorded by the police from a security

officer who claimed to have witnessed part of an incident involving the fatal shooting of a man. Section 31 permitted such a statement to be read in evidence in a case where its maker could not be found after all necessary reasonable steps had been taken to find him or her. But section 20(6)(d) of the Constitution of Jamaica provided for a person charged with a criminal offence to be afforded facilities to examine the witnesses called by the prosecution before any court. The argument that section 31D was unconstitutional was the main one presented on behalf of Mr Grant before the Judicial Committee. And one of the sources of support for this argument, albeit not the principal one, was said to be, as Lord Bingham of Cornhill, delivering the judgment of the Board, put it, at para 14:

> '… the sixth amendment to the Constitution of the United States, guaranteeing to a criminal defendant the right "to be confronted with the witnesses against him".'

Mr Grant's main argument was roundly rejected by the Board.

[59] Given the close similarity between the expressions 'to be confronted with the witnesses against him' and 'to face his accusers', the Court will concentrate here on the Board's scant regard for counsel's reliance on the sixth amendment. It is evidenced in para 20, where short shrift was made of such reliance by a single sentence reading thus:

> 'Sixthly, the right to confrontation expressed in the sixth amendment to the US Constitution, for all its interest to legal antiquarians, is not matched by any corresponding requirement in English law: *R(D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 WLR 393, at para 14.'

[60] In *Camberwell Green Youth Court*, Lord Rodger of Earlsferry, at the paragraph cited by the Board in *Grant*, said:

> 'It is for the people of the United States, and not for your Lordships, to debate the virtues of the Sixth Amendment in today's world. It overlaps, to some extent, with article 6(3)(d) of the [European Convention on Human Rights] as interpreted by the European Court. But, as interpreted by the Supreme Court, the Sixth Amendment appears to go much further towards requiring, as a check on accuracy, that a witness must give his evidence under the very gaze of the accused. For my part, I would certainly not disparage the thinking behind that

> requirement. But, whatever the merits, this line of thought never gave rise to a corresponding requirement in English law. That is very amply demonstrated by the very brevity of the decision of the Court of Criminal Appeal in *Smellie* (1919) 4 Cr App R 128, holding that a judge could remove the accused from the sight of a witness whom his presence might intimidate.'

As this Court sees it, this paragraph, in general, and the penultimate sentence thereof, in particular, contain the answer of Lord Rodger to the rather bold argument of D in *Camberwell Green Youth Court* that 'the normal form of trial in Britain' was designed, like that in the United States, 'to give effect to a right of any defendant to be confronted with the witnesses against him and to look them in the eye while they are giving evidence': see para 13 of the judgment under consideration. That penultimate sentence of para 14, by itself, if not along with the rest of the paragraph, unquestionably constitutes one of Lord Rodger's reasons for decision. As such, it was concurred in by both Lord Nicholls of Birkenhead and Lord Brown of Eaton-under-Heywood, at paras 1 and 71, respectively.

[61] Yielding to the combined persuasive effect of *Grant* and *Camberwell Green Youth Court* on the point under discussion, this Court is unable to accept the submission of Mr Selgado as to the supposed violation by section 123 of a right to face one's accusers.

[62] Nor is the Court able to find any merit in Mr Selgado's contention that section 123 of the Act and section 105 of the Evidence Act ought effectively to be treated by trial judges as necessarily symmetrical.

[63] In *Director of Public Prosecutions v Trumbach (Avondale)*, Criminal Appeal No 17 of 2004 (judgment delivered on 24 June 2004), this Court (Mottley P and Sosa and Morrison JJA), dealing with the admission of statements of a deceased person under section 123 of the Act, considered the terms of section 105 of the Evidence Act and made the following tacitly approving observation:

> 'The editors of Blackstone's Criminal Practice 2004 in fact treat the modern UK equivalents of both sections under the general rubric "Exceptions to the rule against hearsay" as providing alternative bases of admissibility of what are

essentially hearsay statements (subject to overlapping but in some respects different pre-conditions – see paragraphs F16.3 to 19).

[64] Furthermore, this Court (Sosa P and Hafiz Bertram and Ducille JJA) has, since the hearing of the instant appeal, on the basis, in large part, of the reasoning found in the judgment in *Trumbach*, held as follows in *Salazar (Dionicio) v R*, Criminal Appeal No 6 of 2016 (judgment delivered on 16 March 2018), at para [40]:

> 'In our opinion, although the case of *Trumbach* dealt with admissibility of the statement and not the weight, for the same reasons discussed in that case, section 123 of the [Act] is unaffected by section 105 [of the Evidence Act] in relation to weight to be attached to a statement. Section 123 expressly provides that the court has to be satisfied that the accused will not be materially prejudiced by the reception of such evidence. That is, that the prejudicial effect of the statement does not outweigh the probative value of the same.'

This Court must strongly emphasise that these two sections were never intended to be symmetrical, are not symmetrical and ought not to be regarded by trial judges as symmetrical. To put the point another way, section 123 of the Act is not to be read as if it takes effect subject to section 105 of the Evidence Act. An overabundance of judicial caution, like too much of anything that is, in its nature, good, can sometimes lead to regrettable results (eg unnecessary confusion as to the true state of the law), as witness the summing-up in the very case of *Salazar*, where directions called for only in cases concerning section 105 of the Evidence Act were thrown in, supposedly for good measure, in a case concerning only section 123 of the Act. In this regard, the Court directs attention to its comment at para 47 of the judgment in *Salazar*, viz:

> '[The trial judge] was not required by section 123 of the [Act] to consider section 85 of the Evidence Act. But she did so in the assessment of the statement and this, in our view, was to the benefit of the accused.'

The purpose of that comment was merely to indicate that the appellant was in no position to complain, on appeal, of the trial judge's unnecessary generosity in considering section 85 of the Evidence Act, a section clearly meant to apply only in cases involving

admissions under it. The comment was not intended to endorse the creation, by the giving of that and other unnecessary directions to the jury in *Salazar*, of undesirable confusion, however short-lived, as to the state of the law.

[65] As to Mr Selgado's anticipation of cataclysmic consequences in the event of the rejection of his proposed interpretation of section 123 of the Act, the court sees no reason whatever to share it. The Act has made provision for the admission of the statement of a person who is absent from Belize since 1953: see *Trumbach* at para 23. In the intervening years, no judgment of any court has ever suggested that such an interpretation may be appropriate and, nevertheless, no 'floodgates', the term used by Mr Selgado, have been flung open. The rejection of a contention which no one has hitherto seen fit to make to this Court can hardly be expected to have the dire results predicted by counsel.

(ii) Directions as to inconsistency

[66] As already adumbrated above, section 123 of the Act and section 105 of the Evidence Act are not asymmetrical; and a trial judge directing a jury in a case involving a deposition read as evidence under the former is not required to direct them as if the case concerned a statement admitted in evidence under the latter.

[67] It is also to be noted that, in *Barnes*, their Lordships' Board, speaking of the appropriate directions to the jury in a comparable case, said, at p 340:

> 'It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case.'

The Court is certainly not oblivious to the differences between *Barnes* and the present case. In the former, the statutory provision involved had to do with what can rightly be called a deposition in the traditional sense of the term, ie the statement of a person ('the

maker') given at a preliminary inquiry at which he had been subjected to cross-examination conducted by counsel on behalf of the accused persons. The maker was, at the time of trial, dead. The relevant statutory provision distinguished between the case of a deceased maker and that of one merely absent from Jamaica. In the latter, the statement falls under the generous definition of the term 'deposition' found in the Act and was not given at a preliminary inquiry. Instead, it was merely read at a much simplified form of committal proceeding at which there was no cross-examination of the maker, who was only absent from Belize at the time of trial, not dead. And section 123 of the Act does not distinguish between the case of a deceased witness and that of a witness simply absent from Belize. This Court nevertheless sees no reason why the guidance given in *Barnes* should be considered inadequate to meet the needs of the present case.

[68] In the view of the Court, the judge's directions to the jury, such as they have been preserved in the record, were sufficient to satisfy the requirements indicated in *Barnes*. Thus, in respect of the first of the statements given to the police by D, he told the jury that it suffered from two 'weaknesses'. The first of these, he went on, was that the evidence contained in it was neither given under oath nor tested by cross-examination for purposes of ascertaining the credibility and veracity of D. As to the second weakness, he identified it as the fact that the jury had been afforded no opportunity to observe the demeanour of the complainant whilst telling her story in court. Having done that, the judge proceeded plainly to warn the jury of, as he put it, 'the need to be very careful and cautious in your consideration of this evidence'.

[69] The summation may have gone no further than this in terms of seeking to adhere to the requirements referred to in *Barnes* had it not been for a timely intervention by counsel on both sides to express concern as to the absence of a direction regarding that which D alleged in her first statement and that which the witnesses LG and Mr Dawson were, respectively, permitted to report she had told them under the law respecting recent complaint.

[70] The Court would pause here to express its view that, as Mr Chan suggested, this was not, strictly speaking, a case of other Crown witnesses contradicting the evidence of a virtual complainant. Here, D's evidence, on the one hand, was that she had been

vaginally penetrated by the appellant. There was no evidence from either LG or Mr Dawson, on the other hand, that she had not been so penetrated. Hence, there was no direct contradiction of D. Both LG and Mr Dawson were saying no more than that D had told them that the driver of the vehicle in question had tried to rape her. Put otherwise, they were only attributing to her a complaint other (and less serious) than the one contained in her first statement to the police. One can correctly speak of someone trying, with or without success, to commit any act, although to do so in the former case may be less common, and elegant, than to do so in the latter case.

[71] As a result of the intervention of counsel, the judge, speaking initially of the 'apparent inconsistency' in the evidence, added to the direction already noted above the following strong (if less than nuanced) guidance:

> '… shortly after the allege (*sic*) incident … [D] got a ride from [Mr Dawson], and complained to him that in her own words "the guy tried to rape her". Her sister [LG] also testified that [D] told her that the guy in the vehicle tried to rape her and that shove up [shores up?] the defence case that indeed the [appellant] did not rape [D]. He only tried to do so. So there is clearly a contradiction between the evidence of [D] and that of the two witnesses on this part. (emphasis added)

Amongst his remaining directions to the jury is to be found the following:

> '… if the contradiction is serious you may decide to accept the evidence of [Mr Dawson] and that of [LG] that the [appellant] had tried to rape [D] …This is a matter for you as judges of the matter (*sic*).'

This, in the respectful view of the Court, constitutes a development of the warning which had been given earlier in the summing up and such as the Board had in mind in the final sentence of the passage from the judgment in *Barnes* quoted at para **[67**], above. It is not for this Court to interfere with the judge's judgment call as to the proper extent of such development. He was fully immersed in the atmosphere of the courtroom throughout the trial and was in a better position than this Court will ever be in to determine the extent to which the warning needed to be developed. Moreover, this case stood far apart from *Barnes*, when it came to its evidential shape, in that the Crown evidence included the

SUC, in which penetration, now (ie at trial) rather awkwardly being denied, had been most freely admitted. And, not to be overlooked, the Board was clear in the same final sentence of the quoted passage that development of a warning may not be called for in every case and that a set of hard and fast guiding rules would be inappropriate.

[72] There is, with respect, nothing in counsel's argument that the appellant's denial of intercourse in his dock statement, conflicting sharply, as seen above, with his earlier free admission in the statement, constituted added reason for a direction as to inconsistency. Such argument flies directly in the face of well-established law, as laid down by their Lordship's Board in the decision in *Mills, Mills, Mills and Mills v R* (1995) 46 WIR 240, on appeal from the Court of Appeal of Jamaica, a decision followed by this Court (Rowe P and Mottley and Sosa JJA) in *Kelly (Andrew) v R*, Criminal Appeal No 25 of 2001 (judgment delivered on 28 June 2002). As this Court understands the Board's advice in *Mills*, the only direction called for in respect of an unsworn statement from the dock is that which was specified by the Board in *Director of Public Prosecutions v Walker* (1974) 21 WIR 406, at 411, another appeal from the Court of Appeal of Jamaica. (In a Belizean context, the case on point would, of course, in strictness, be *Ibañez (Marcotulio) v R*, Privy Council Appeal No 76 of 1996 (judgment delivered on 3 April 1998), rather than *Walker*.) The gloss provided by counsel for this argument, viz his allusion to the fact that the jury were able to observe the demeanour of the appellant as he gave his statement from the dock, adds no force to it for the same reason. Moreover, lest it be forgotten, the demeanour of an accused speaking in the assurance that he will not face cross-examination in the next few minutes is rarely going to be the same as that of an accused speaking in the knowledge that he will most likely be so cross-examined.

[73] The Court turns now to consider counsel's contention with respect to section 92(3) of the Evidence Act. Counsel's failure to get this hopeless submission off the ground was abysmal. The Court takes this view bearing fully in mind the incomplete state of the record before it (not to mention its – the record's - innumerable typographical errors). There is enough in such record to satisfy the Court that the judge was sufficiently guided by the requirements of this section in directing the jury. In answer to the first of counsel's three main points in this regard, already identified above, the Court notes that the judge, having

told the jury in the clearest terms that D's evidence as to penetration, was uncorroborated, said, equally expressly, to them-

> 'There (*sic*) (that?) is exercised (*sic*) (exercise?) caution in your consideration of the complainant (*sic*), given in that state in which it is, (if?) you accept it, as true, and you are sure of it. Provided you find all the other elements proved, you may act on it, convict on it.' (comma between 'it' and 'convict' added)

That is the sole warning that the judge was required to give, the warning as to corroboration having long ago been abolished. As regards the second of counsel's three points, the warning just quoted above was in fact the caution required under section 92(3). And the jury would have understood the reason why it was issued to them by the judge when, in his supplemental direction, given on the request of counsel on both sides, as already pointed out above, he directly addressed the difference between what D was recorded to have told the police and what she was reported by LG and Mr Dawson, respectively, to have told them. There was no need for the judge to supplement the directions so given with directions held in *Eagan* to be required in the context of section 105 of the Evidence Act, the reasons for this having already been given above. Finally, concerning counsel's third point, the judge did, in the opinion of this Court, taking his summing-up as a whole, leave the jury in no doubt whatever as to the fact that the appellant was, as permitted by law, on trial in somewhat unusual circumstances given that D was unavailable for cross examination and that the jury was in no position to observe her demeanour in the witness box. He was not, in the view of this Court, required to do any more than that in the circumstances of the present case.

(iii) Insufficient evidence of rape

[74] The Court has already expressed its view that this ground ought never to have been advanced. It was no surprise that counsel devoted no part of his skeleton argument and next to no part of his oral argument to it. The Court wholly rejects as unfounded his bald contention, already noted above, that 'at the highest point in the evidence there could not have been a conviction had the judge properly directed the jury on the position of the law and simplified it to them'. The record shows that the judge adequately directed the jury on all relevant points of law.

(iv) Good character

[75] The starting point on the short journey, if journey it be, towards rejection of this ground must be counsel's concession, judicially extracted rather than volunteered, that there is nothing on the record to suggest that the appellant's good character was raised during the trial proper. The journey ends almost immediately after it begins given the well-known principle that the judge is under no duty to raise the good character of an accused. The President made no effort to conceal during oral argument that he was far from impressed by Mr Selgado's invocation of *Vye,* a decision of the Court of Appeal of England and Wales, as authority for a contrary principle. It is to be noted that *Vye* preceded *R v Aziz* (1996) AC 41, a decision of the House of Lords. The latter decision was considered in depth by the Court of Appeal of the Eastern Caribbean States (Sir Vincent Floissac CJ and Byron and Liverpool JJA) in *Lockhart (Sonny) v R* (1995) 50 WIR 183. It concerned a certified question, quoted at page 185 of *Lockhart*, whose very wording (with its reference to *Vye*) is exceedingly instructive for present purposes, viz:

> 'Whether directions in accordance with *R v Vye* [1993] 1 WLR 471 must be given in all cases in which a defendant has adduced evidence of previous good character, and if not, in what circumstances must such directions be given?' (emphasis added)

[76] The words underlined above reflect the fact that both *Vye* and *Aziz* were cases, unlike the present one, in which evidence of the good character of the respective accused had been adduced at trial, thereby raising the issue of their good character. In *Lockhart*, having quoted at some length from the speech of Lord Steyn in *Aziz*, Sir Vincent Floissac CJ, delivering a judgment in which the other members of the court concurred, said, at pages 186-187:

> 'Lord Steyn's speech should be read in the context of the certified question which it purported to answer. In the present case, the appellant adduced no evidence of his good character. He did not advance such character as part of his defence. He did not rely on such character either as evidence of his credibility or as evidence of the improbability that he would commit murder or manslaughter. The result is that his alleged good character or the extent thereof was never investigated or

established at the trial. In these circumstances, the appellant cannot invoke the judicial obligation explained by the House of Lords in *R v Aziz*. This obligation arises only in a case where there is proof of the good character of the accused and where there is reliance on such good character as an integral part of the defence. The judge was therefore under no judicial obligation to give any direction based on the good character (if any) of the appellant.'

[77] This Court (Sosa, Carey and Morrison JJA) followed the decision in *Lockhart* in *Arzu (Sheldon) v R*, Criminal Appeal No 33 of 2005 (judgment delivered on 8 March 2007), in which Carey JA, writing for the Court, stated, at para 20:

'We are content to say that directions on good character were not called for as it was not raised in the case.'

[78] It should be noted that, cited in the judgment in *Arzu*, was the decision of their Lordships' Board in *Gilbert (Edmund) v R*, Privy Council Appeal No 25 of 2005 (judgment delivered on 27 March 2006) in which Lord Woolf, speaking for the Board, said, at para 21:

'… it is still the general rule that it is up to defending counsel and the defendant to ensure that the judge is aware that the defendant is relying on his good character.'

[79] It follows from the failure of all four grounds argued that the appeal against conviction is dismissed.

[80] Before proceeding, the Court would repeat a point made by the President at the hearing, viz that the judge's omission to advert at any point in his summing-up to the fact that the appellant had in the SUC plainly admitted having penetrated D amounted to an act of unrivalled generosity towards the appellant.

The appeal against sentence

[81] The Court has already observed above that the appeal against sentence was less than strenuously argued. (Counsel's excessively generalised treatment of the topic occupied less than a full page of typescript in the appellant's written submissions and just over a page in the transcript of the hearing: see pp 10-11 of the former and pp 36-37 of

the latter.) An appeal not strenuously argued is a thing much to be regretted, considering that there is always the entirely honourable option of withdrawal of the appeal in a timely fashion. Dealing with a not dissimilar situation some years ago in *Gillett (Louis) v R*, Criminal Appeal No 13 of 2005 (judgment delivered on 27 October 2006), this Court (Mottley P and Sosa and Carey JJA) said, at para 31:

> 'It should hardly need to be stated that this Court will not encourage the growth of a practice whereby counsel for an appellant barely raises an issue representing a potential ground of appeal and then leaves it up to the Court to go and conduct its own research in order to find out whether any meritorious point in fact arises.'

This continues to be the attitude of the Court.

[82] The Court is also acutely mindful of the length of the sentence imposed on the appellant, viewed from a purely objective standpoint. If the sentence was appropriate given the circumstances, the question of its constitutionality becomes an academic matter, all the more so where the argument does not ascend above the level of generalities.

[83] The appellant's crime was committed in circumstances resulting in unusual humiliation to the victim. D was placed in a situation where she submitted to her tormentor out of a justified fear of being shot dead on a dark stretch of the road in question. Apart from being penetrated vaginally, she was forced to perform oral sex on the appellant. Because of his insatiable desire for sexual gratification in that particular devious manner, he made a further demand on her which no doubt drove her to make the difficult choice between accepting further humiliation (by giving in to his new demand) or resorting to a do-or-die dash for her freedom, stark naked as she was. By forcing her to flee naked out into the highway, he stripped her of her remaining dignity, whilst forcing her into the perilous course of throwing herself at the mercy of strangers on a dark road. This was clearly a most harrowingly humiliating ordeal.

[84] Beyond that, the appellant disposed of D's clothing and other items of value, some just purchased, which she had no option but to leave in the vehicle. There was, as far as

the record goes, no apology or expression of remorse in the court below for that or any other act committed by the appellant to the detriment of D on the evening in question.

[85] Finally, the appellant, on his own showing, perpetrated this outrage against D, having previously been told by her that her birthday was only three days away. This was unbelievably callous and insensitive. A moment's reflection would have told him that the commission of this outrage on D was likely to spoil not only her next birthday but many, if not all, of those to follow in future years.

[86] It is difficult to grasp what could have led to the decision to appeal from this sentence of eight years. In the view of this Court, it is a sentence which eminently fits the crime of which the appellant was properly convicted. Put in different words, it is a sentence which would have been appropriate even if there were no minimum mandatory sentence prescribed for rape under the statute.

[87] Regrettably, there are not many cases known to the Court of sentences for rape imposed prior to the introduction in Belize in 1987 of a minimum mandatory sentence for rape.

[88] One such case, however, is *Williams (Harry) and Gilharry (Alfonso) v R*, Criminal Appeals Nos 10 and 11 of 1976 (judgment delivered on 20 July 1979), in which both original appellants were convicted of rape and each was sentenced to a term of seven years' imprisonment at hard labour. This Court having allowed Mr Gilharry's appeal against conviction, his sentence was of necessity set aside. (Mr Williams apparently escaped from prison and, thus, his appeal was never heard.) But the case is useful in that it indicates that the court below was imposing sentences of close to eight years for the crime of rape as far back as almost 42 years ago, at a time when there was no minimum mandatory sentence prescribed by statute for that crime. In *Williams and Gilharry*, the victim was a mature woman, LP, who had been drinking in an establishment of ill repute in the company of Mr Gilharry, Mr Williams and her common law husband, WH, up to well after midnight on the night of the events in question. At the end of the drinking session, all four of them left the location in the car of Mr Gilharry. Instead of taking LP and WH home, however, Mr Gilharry took them to a remote spot where he and Mr Williams took turns having sexual intercourse with LP. Later that same night, each had intercourse with

her again at another location. A medical doctor who examined her later that night testified that her physical and mental state were consistent with her having been through a traumatic experience and with her having been carnally known. Mr Gilharry's appeal against conviction was allowed largely because of the weakness of the evidence of lack of consent. Mr Gilharry also appealed, but without success, against a conviction for forcible abduction and applied, equally unsuccessfully, for leave to appeal against the three year sentence imposed on him for that crime.

[89] *Kerr (Eli) v R*, Criminal Appeal No 11 of 1985 (judgment delivered on 20 November 1985) and *Kerr (Eli) v R*, Criminal Appeal No 1 of 1986 (judgment delivered on 14 March 1986), are two other such cases. They concern the trial and retrial of Mr Kerr on one and the same indictment. Both appeals were from a conviction for the crime of attempted rape, for which, in the case of the first conviction, he was sentenced to seven years' imprisonment and, in the case of the second, to eight years' imprisonment. Like Mr Gilharry in his single appeal in *Williams and Gilharry*, Mr Kerr succeeded in both his appeals against conviction; and his sentences were, accordingly, perforce set aside. It may safely be assumed that each trial was before a different judge, the last on 23 January 1986, ie some 32 years ago. The facts, though inevitably disturbing, were not as revolting as those in the instant appeal. The Crown case at the first trial was that Mr Kerr showed up in broad daylight asking for a drink of water at premises where the virtual complainant, VS, happened to be alone at the time. Taking advantage of a moment's inattention on her part, he physically overpowered her, mounted her as she lay supine on the floor and evinced an intention to have sexual intercourse with her then and there. Using violence against her, he caused her to remove her pants and himself pulled her panties down. Fortunately, her screams for help brought someone to the door who promptly began knocking on it, causing Mr Kerr to leave the scene without having first penetrated her. The evidence adduced at the retrial was not different in any material respect. More than *Williams and Gilharry*, the *Kerr* cases show, albeit somewhat indirectly (since they involved only an attempt at rape), how the crime of rape was regarded by sentencers in the court below in the far distant days when there was no statutory requirement for the imposition of a minimum mandatory sentence for it.

[90] These three cases amply reinforce this Court in its view that the sentence imposed on the appellant in the present case was no more and no less than deserved, fit and condign punishment for his crime.

[91] That being the position, the Court can see no practical need to consider the constitutionality of the penal provision in question. Its own words in *Ya' axché Conservation Trust v Wilber Sabido and others*, Civil Appeal No 8 of 2011 (judgment delivered on 14 March 2014), come reverberating back. There, as here, the concern was as to one aspect only of the entire appeal. All members of the Court were united in the view, expressed at para [13], that-

> '[t]he general principle is that academic appeals will not ordinarily be entertained. Courts decide live issues between parties. They do not pronounce upon abstract questions of law when there is no dispute to be resolved. But there is no absolute rule to this effect. Whether an academic appeal will be entertained is a matter within the discretion of the court to be decided on the facts of the particular case.'

There was similar unanimity in the recognition, stated *ibid*, of the distinction in this regard between disputes concerning private law rights between private parties and public law cases and in the respectful recollection of the judgment of Lord Slynn in *R v Secretary of State for the Home Department, ex parte Salem* [1999] AC 450, 456-457, emphasising that, in the latter category of case, the parties should not be heard unless there is good reason in the public interest for so doing. Whilst, in the instant case, the parties have in fact been heard, it can hardly be in the public interest to decide a constitutional question rendered academic on the relevant facts when, in addition, both the quantity and quality of the argument for the appellant are glaringly unsatisfactory to the Court. It should be added here for completeness that an (unopposed) application for special leave to appeal from the decision of this Court in *Ya' axché* to the Caribbean Court of Justice was summarily refused: see *Ya' axché Conservation Trust v Sabido and others* [2014] CCJ (AJ).

[92] The appeal against sentence is, in the circumstances, also dismissed.

_____
SIR MANUEL SOSA P

_____
AWICH JA

_____
HAFIZ BERTRAM JA