Neutral Citation Number: [2026] CA (Bda) 23 Crim

Criminal Appeal No. 9 of 2023

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 MARK PETTINGILL, ASSISTANT JUSTICE
CASE No. 34 of 2018

Dame Lois Browne-Evans Building
58 Court Street, Hamilton
Bermuda

Date: 20 November 2026

Before:

THE RT HON JUSTICE ANTHONY SMELLIE, PRESIDENT (Acting)
THE HON NARINDER HARGUN, JUSTICE OF APPEAL
and
THE HON LARRY MUSSENDEN, JUSTICE OF APPEAL (Acting)

- -

Between:

CAHLII SMITH

Appellant

- and -

THE KING

Respondent

Appearances: **Ms. Elizabeth Christopher MBE for the Appellant**
Mr. Adley Duncan, Senior Crown Counsel, and Mr. Matthew Frick for the Crown.

Hearing date(s): **17 and 18 March 2026**
Date Judgment circulated: **30 October 2026**
Date of Judgment: **20 November 2026**

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JUDGMENT

SMELLIE, P (Acting)

1. Following a trial before Acting Justice Pettingill and a jury, the Appellant was convicted on 4 July 2023 on an amended indictment for the offences of blackmail (counts 1 and 2), making child pornography (counts 3, 4 and 6), distributing child pornography (count 5) and accessing child pornography (count 7). On 31 January 2024 he was sentenced to a total of 11 years imprisonment. He appeals against the convictions and sentence but the arguments on sentence were not presented. The Court heard arguments on 17 and 18 March on 8 grounds of appeal against conviction. Judgment was reserved. This is the judgment on the appeal against conviction.

2. The offences are alleged to have been committed between December 2013 and July 2015 and to have involved two victims (referred to anonymously as "Q" and "T"), who were then minor girls, aged 13 and 14. At trial some 7-8 years later, they testified as young adult women aged 21 and 22. They described their relationships with the Appellant, who is respectively 8 and 9 years their senior, as one of friendship and trust, developed in a context in which their talents as singers were to be fostered and promoted through a music production group known as "Dem Biez", of which the Appellant was a member. In their evidence at trial, Q and T described the predicament in which they were placed by being coerced and blackmailed through Facebook by an anonymous person, to provide sexually explicit and compromising images of themselves. Q confided in the Appellant about their predicament but, she alleged, the Appellant urged her to comply with the blackmailer's demands or face rejection from Dem Biez if ever the blackmailer's threats of publishing her images were carried out. She complied with the demands of the blackmailer but only out of fear of being rejected from Dem Biez.

3. For her part, T had been the victim of similar blackmailing demands from even earlier in 2013. When told by Q in 2015 of her predicament, she resolved to support Q by complying with the blackmailer's demands that they provide video-recordings of themselves engaged together in compromising sexual activity.

4. The evidence at trial will be examined below as the necessary context for the assessment of each ground of appeal. The essence of Q's and T's allegations is captured in the following summary of their accounts in the trial judge's ruling on sentence (at paragraphs 5 and 9): "*5. In the case at Bar, it is unequivocally accepted that the two young female victims were simply not willing participants, they were absolutely not precocious, were loving children, good students from good families with all the types of dreams and aspirations that young people of that age can have. They were manipulated by the Defendant into committing sexual acts against their will which was sapped by his blackmailing scheme."* … "9. *The Defendant exploited the relationship he had as a mentor to the young girls who had dreams of music careers in a large part under his direct guidance and stewardship. He took advantage of this relationship in order to manipulate the victims and on their evidence did nothing to assist them when they brought the issues of blackmail and forced sexual activity to his attention. Clearly the relationship was such that they believed the Defendant would potentially assist them when in fact he was the director and producer of the whole sordid affair as the Jury clearly felt sure on the evidence.*"

5. The evidence that the Appellant was the person who "*manipulated'* the victims to commit sexual acts and provide sexually explicit images and videos of themselves against their will, did not, however, come directly from the victims themselves. It arose by dint of circumstances by which the incriminating images and videos were found on and recovered from his iPod and laptop computer. It is therefore the admissibility and reliability of this circumstantial evidence upon which the safety of the convictions depends.

6. Delay became a regrettable feature of the case – both in relation to the passage of time from when the offences were reported to the police and when the Appellant was first arrested (in July 2015) but not charged until in 2018, and the further delay in bringing the case to trial in 2023. Concerns were also raised by Ms. Christopher about delay in the course of the trial itself, including lengthy adjournments. The ultimate concern is whether delay in any of these contexts impacted the fairness of the trial or safety of the conviction and so this issue will be addressed with those considerations in mind.

7. Following now is a further summary of the evidence from the witnesses themselves and as required for the examination of each ground of appeal in its proper context.

8. Q testified that it was while she was attending school at The Berkley Institute that she became involved with Dem Biez. She was then merely 11 years old. She was passionate about music. She didn't have many friends or other interests, music was "*basically all that I did*", and so she spent her time after school making music and doing gigs with Dem Biez, whom she regarded not only as a music production company but also as friends. The group was

comprised of three young men in their early twenties - the Appellant (whom she described as the "singer/producer"), Jamar Hayward and Shomari Warner. The "production studio" where they met was located on the ground floor of Shomari Warner's family home. By the time of the events in 2015 she was 14 years old and had been singing and recording with the group for more than three years. She described herself, T and a third girl "C.E.", as "the main artists" of the group.

9. Q described her relationship with the group as follows: "We *would have gigs... going out to perform... we would meet at the studio, pick out some songs that I liked and record covers or we would write something, they would show me something they had written, and we would make a song and record that song".* She had been active in "*Chewstick*", a non-profit group with whom she sang sometimes, and it was when she did a gig with them at an annual Exhibition, that the Dem Biez group approached her and asked her to join.

10. As to her relationship with the Appellant himself she said: "*I would see him once or twice per week and we would talk on social media (Facebook). I would say we were like family, like best friends, like he was a brother."*

11. Q explained that she ceased having contact with the Appellant in about July 2015 when the circumstances of the case started to unravel and "*once everything came out*".

12. The blackmailing attempts against her began in about late March to early April 2015, when she first got a message on her cellphone from a Facebook account from someone she thought she knew, with the account name "Priya Lewis" but there was no photo attached to the account. This suggests that she could not verify whose account it really was. The message was "*I am a hacker; I'm in your phone. I have naked photos of you, and I will distribute them if you don't listen to what I say, to what I am going to tell you."*

13. She was immediately panicked and scared and so she texted T, whom she described as her best friend, asking her to call her. She told T what had happened and T advised her not to engage with the hacker.

14. Q then contacted the Appellant, as she related in examination in chief, over his Facebook account "*with his picture on it*" and told him what had happened. This was because as she explained, she wanted a second opinion from someone she trusted and respected. The Appellant asked her if she had any naked photos of herself. Q responded that she did not think so, but the hacker person was saying that that's what they had. To this she said the Appellant responded: "*I am not saying to do it but if you don't and something happens or if this were to come out, we will drop you as an artist and we would no longer make music with you*."

15. After this conversation with the Appellant, Q, in her words "*just responded to the hacker*", asking, '*what do you want me to do, what do you want from me?*". She said that the hacker directed her to add them to her Skype account, using the name "BDAHoes", which she did. The hacker then directed her "*to put on my Skype video to go on a call with them and to take all my clothes off and show myself in the camera.*" She said she did as she was directed because "*I couldn't say for sure if I was being hacked and if they already had something on me. And ... I felt that if I didn't do what they said then I would never do music again ... because Cahlii explicitly told me that.*" This involved her undressing and revealing herself: "*I touched my breasts, touched my butt, like, gyrate in front of the camera*." She explained that while the camera was on, she could neither see nor hear the other person, the hacker. Instead, she would get messages underneath the screen that would instruct her what to do next. There came a point in time when the hacker messaged saying "*okay, you are done*" and then the call ended and "*that was that for then*".

16. She continued that she didn't hear from the hacker '*for about a week and then every week or so I heard from them and have to do it all over again*." It "*would just be a message out of the blue really that would just say "Hey you know, I'll still put out your stuff. So, you gonna call me and do it again., stuff like that*."

17. Q explained that up to this point the messages appeared to be coming from the Priya Lewis Skype account. Although she had a passing acquaintance with a fellow student named Priya Lewis, she never spoke to her about the matter because, as she said, she was "*just embarrassed*." She recalled that the account names appearing on Skype were different variations of the BDAHoes username. At times there were other random names which she could not recall. She continued to receive threatening messages such as: "These *pictures of you... the naked photos of you or naked videos of you, .. "I will put those out if you don't call me right away and do what I tell you*." She continued to comply by recording videos of herself while stripped of her clothing, doing as the hacker instructed her. At the time of being forced to do these things, she felt "*scared, very isolated and anxious*." But during the time this was happening to her, she said that "*I mainly kept in contact with Cahlii and [T] about it*". She recalled in particular going to Cahlii on another occasion, concerned, tired and not wanting to do it anymore, when he said "*Well you already did it so you might as well keep doing it*."

18. After a month or two and being required to do more and more, Q testified that "*the hacker basically said they wanted to see more, and me doing more, so they instructed me to go over to T's house at the time and record ourselves... the hacker put us in a group chat... a Facebook group conversation... and he said, you are going to go over ... to meet and film yourselves, like touching each other, kissing, stuff like that*".

19. Q complied, and her friend T agreed to comply as well, both of them out of fear that the hacker would publish the explicit images he had already coerced from Q. From her testimony in examination in chief at trial in response to Mr. Duncan, Q continued her narrative as follows:

> "*Ques: I hate to keep asking you, but I must be clear; why did you go over to meet [T]?. What was your reasoning or your motivation?*
> *A: I felt that we had no other choice.*
> *Ques: And what is it that made you feel like you had no other choice?*
> *A: Because this hacker had already compiled a lot of naked embarrassing photos and videos of me and the stakes were getting a lot higher.*
> *Ques: And when you were instructed to go over to [T's] house and video yourself, did the hacker say anything about those photos and videos already compiled of you?*
> *A; Yes.*
> *Ques: What was said?*
> *A: That they would put them out if we don't listen…*
> *Ques: … do you remember around what time period this would have happened, this incident of going to [T's] house?*
> *A: It was later, maybe May.*
> *Ques: And what happened when you went to [T's] house?*
> *A: … We just read our phones of what we were being told to do and then we just set up my phone or her phone, I don't remember, to record ourselves and then, you know, we took off our clothes and we went in front of the camera and we were touching ourselves… we already had a paragraph that was sent to us from the hacker to instruct us on what we needed… This was over Facebook to do…*
> *Ques: this incident with [T], did you ever tell anyone about it?*
> *A: yes… Cahlii.*
> *Ques: Did you have any kind of or reaction when you told Cahlii about this?*
> *A: … I think it was just flippant. Just "Oh well it's whatever, you could just do it"*
> *Ques: Did he ever discourage it?*
> *A: Yes.*
> *Ques: In what way?*
> *A: So, if I ever texted him about it over Facebook, it felt like he would just act as if he didn't know what I was talking about, so I would always take my concerns to him in person.*
> *Ques: … Taking those concerns to him in person, by that what do you mean?*
> *A: If we were at the studio and no one else was around I would bring it up with him that it is still happening. I remember one point in particular we were filming a music video for a song that I recorded that was coming out and [T] was there as well, and*

this was right before we were asked to do stuff together. And we had approached him. We pulled him aside and we told him what was going on. … And he was just like "Yeah well", the kind of the same answer ... He would always say, "You don't have to do it but if you don't do it and something happens then you are not making music anymore."

[At this stage in the proceedings there were submissions made to the Judge the upshot of which was that the witness was required to describe the 'hacker" no longer as such but as the "blackmailer" or as "the anonymous person".]

Ques: …So, after this incident with [T], did you have any more conversations or more incidents with this alleged blackmailer?

A: Yes. So, after the incident with [T] some time had went on. I would say maybe a week or two, and one evening I got a message … sorry, let me go back. When everything had finished with [T] we were told, "Okay, that's it, you are done" … we wouldn't have to do it anymore. So, a week went by, two weeks maybe and I got another message in the evening stating "Actually never mind you're not done… You have got to go and find a boy or find a person and you have to do stuff with them.

Ques... by what means by what platform did you get this message?

A: On Facebook.

Ques: … what was your understanding about what you were being instructed to do?

A: Initially I was being asked to have sex with this person … with a person of my choosing. It was more, it wasn't asked, it was more directly instructed... It was in the same threatening vein that the other messages had been in the past where he said here's what you are going to do. By the time I had not had sex with anybody so I said I can't do that.

Ques: When you responded that you couldn't do that, what happens after that?

A: The anonymous person, they I guess talked me down to just doing a blow job instead and to film that and send to him, to them…

Ques: And what was your understanding about what would happen if you did not do this?

A: That everything that I had already done previously would be released everywhere.

Ques: And with that instruction and with that understanding as a result when did you do anything?

A: That same evening… I snuck out of my house. I had messaged one of my friends in the neighbourhood to meet me somewhere close by and I couldn't tell them everything explicitly, not that I wasn't allowed to, I just don't think I was able to at the time. I couldn't articulate myself; I was too embarrassed. I just said I am going through something, and this is what I have to do otherwise something very bad will happen to me.

Ques: What happened.

A: We walked to some corner hidden in my neighbourhood and I set up my phone and I recorded myself giving a boy a blowjob.
Ques: And did you ever do anything with that recording you made?
A: I went home, I sent it over the same Facebook account that had been messaging me to say that it was done and I don't remember how soon after, maybe a day or two later, they said it was not good enough and I had to go back and do it again.
Ques: And did you?
A: Yes…
Ques: And did you do anything with that recording?
A: I just sent it to the same account.
Ques: And did the person respond?...
A: They said it was fine and I wouldn't be hearing from them anymore
..
Ques: These incidents with this boy, have you ever told Cahlii about those incidents?
A; Yes, I did … I reached out to him and I know there was an instance where he was helping in a way… Cahlii basically told me that he knew of someone who was good at hacking who would then be able to stop this person, the anonymous person, from harassing me.
Ques: And after Cahlii said that to you, did the harassment stop or did it continue?
A: It was paused… Initially the anonymous person that I was speaking to online they acknowledged the fact that Cahlii did know and that there was an attempt being made against them to thwart the whole operation.
Ques: This is what the person told you?
A: This is what the anonymous person online said to me.
Ques: …. Was this before or after the incidents with the boy?
A: This was before.
Ques: .. were there further incidents?
A: So after that point it was quiet again. It went through that same one week/two week pause… and then I started getting messaged again. I got a message again saying that it doesn't matter I would now have to have sex with someone and record that. But by that point I was tired, I was over it, so I stopped responding.
Ques: Can you give us an approximation of time from when you got this first set of threatening messages to when you stopped answering …
A: Maybe six months.
Ques: So, after you received this instruction that now you are supposed to have sex with somebody and you stopped answering messages, did anything happen after that?
A: Yes, so the messages became more threatening like once they realized I wasn't answering any more. The anonymous person reached out to the boy involved… Over time, over the duration of all the conversations that I have had with the anonymous person, there were times where I decided to just continue conversing with them online

to express my frustrations with the situation that they had put me in, how isolated I felt, how scared I felt, how I wanted it to be over, that I wanted to die. So, when it all came to a head, the messages were "If you don't answer me I'm going to put it out right now, I'll put these photos out". Then it turned to "I don't care if you kill yourself, I am going to put these photos out right now. If you don't do what I'm asking you." It was just amping themselves up in a way to what I knew was probably going to come.
Ques; Tell us what you knew was going to come…
A: The photos were released, the videos were released and they made it everywhere.
Ques: And the question may sound silly… why do you say the photos and videos were released?
A: My friends had it. My nana had it. The regiment had it. Teachers that work in my school had it. And a day didn't go by after that day where somebody didn't fail to bring it up to me.
Ques: Was the release of all this, was this in 2015?
A: Yes….
Ques: Now, after you stopped answering messages and you mentioned the release of the photos, what became of your relationship with Dem Biez, the entertainment, the production and music group?
A: Immediately after I decided that I was no longer going to be responding to this anonymous person, we all continued on briefly, like it was fine. Our dynamic was strained due to external things but everything was normal... Once the videos and photos came out nearly the entire group ceased all contact immediately... with myself and with [T] as well.
Ques: Did you continue doing music with them after they ceased contact with you?
A: No
Ques:… what became of your relationship with Cahlii?
A: I never heard from him again."

20. In roving cross-examination by Ms. Christopher, Q was questioned about many chat messages attributed to a Facebook account in the name of *Cahlii Samuel Smith*. The transcript of these was admitted as Defence Exhibit 1. While these transcripts contain some relevant exchanges between Q and the Appellant, they do not contain many exchanges of which she spoke and in which, according to her, the Appellant advised her to comply with the blackmailers' demands at peril of not otherwise being able to continue to work with Dem Biez. Other Facebook accounts in the name of *Cahlii Smith* and *Cahlii S Smith* existed, the former of which came to be acknowledged by the Appellant as his but which he testified had been hacked by some unknown person. The latter he disclaimed, describing it as a "*spoof account*". He testified that he had asked Facebook to discontinue both accounts because they had been hacked. Extracts of messages from the *Cahlii S Smith* account, which Ms. Christopher in cross -examination also described as the "*spoof account*" were provided by

the Appellant and admitted at trial as Defence Exhibit 8. None of these extracts had a bearing on the case. No records of the *Cahlii Smith* account were available because, according to the Appellant, it had been discontinued by Facebook and so he no longer had access to it.

21. There were however, as already mentioned, the extracts from the *Cahlii Samuel Smith* account (Defence Exhibit 1), including some conversations between the witness Q and the Appellant. In some of these exchanges Q warns the Appellant that the anonymous person might post embarrassing images about him and actually forwards to the Appellant, an explicit sexual image of himself and his former girlfriend, which Q explained had been sent to her by the anonymous person and which she sent on to the Appellant out of concern to protect him, implying, as she acknowledged in cross-examination, that she did not suspect the Appellant to be the anonymous person. This was an image of the Appellant being fellated by his former girl and which the Appellant admitted in cross-examination, he had originally recorded with his cellphone during the act. How such a private and intimate recording could have gotten into the possession of an anonymous hacker remained unexplained. The suggestion put to the witness Q by Ms. Christopher, that the Appellant was therefore as much a victim of the blackmailer as Q herself and that he was therefore not the blackmailer, was very much a matter for the jury to consider.

22. On the momentum of this line of questioning, Ms. Christopher also suggested to Q that until that point in time which was, on the Facebook record, late June 2015, the Appellant did not have any direct knowledge that Q was sending "*things*" (ie: photos and videos) to the anonymous person. In response to this Q was, however, quite emphatic: "*Had he never known I would have never participated*".

23. It was further suggested to Q, in order to refute her account of the Appellant's influencing her decision to comply, that she could not definitely say that the person with whom she was communicating on the *Cahlii Smith* or *Cahlii S Smith* Facebook accounts was the Appellant. To this her response was that while she could not so assert: "*Any message that was ever shared between the two of us regardless of the account, it was a well-known fact he had multiple accounts. We would call, we would send voice notes, I know what his voice sounds like, and it would be followed with that evidence*.' And further *"... to clarify, most of the conversations we had online would circle back and be had in person, on the telephone, I would see him once, twice a week in the studio or whatever through it all."*

24. Further in this vein, it was put to Q by Ms. Christopher as follows: "*I am going to suggest to you that you are confusing occasions that you communicated with him face to face with occasions you communicated with him on Facebook*" To which Q responded: "*And I can firmly deny that."* And still further in making clear her sense of the exchanges she had had with the Appellant: "*If I say to Cahlii " Cahlii, I'm scared, this hacker is messaging me, they*

are saying they have naked photos of me and they want me to do stuff on camera so they don't then release these naked photos', the line is drawn".

25. Ms. Christopher: "I *agree. I agree that that is a very serious thing to say but I am simply saying you did not say that in person. You said that to somebody, Cahlii Smith, Cahlii S Smith, on a Facebook message.*" To which Q responded: "*But a direct example of that in person, the day of the video shoot, my... video shoot, I believe that is also in my statement as well, I say [T] and myself, we approached Cahlii to say "Hey, this hacker this anonymous person is asking us to do stuff together", and although I may have just said "stuff", you know, Cahlii knew exactly what we were talking about when we referred to stuff. They want us to do stuff together in the same vein as in the beginning where I'd say this person has naked photos of me and wants to do stuff, I think between myself and him, we both knew what "stuff" would mean and what it was defined*." Ms. Christopher: "*I am suggesting to you that no such conversation takes place with Cahlii at a video shoot where you said that the anonymous person was trying to get you to do stuff together with [T]. I use the word "stuff*". Q in response (after the question was repeated by the Judge): *"It did".*

26. Of further significance from this cross- examination, it was suggested to Q that the breakdown of her relationship with Dem Biez was not because of the publication of the embarrassing images but because she had breached faith with the group by performing elsewhere, in particular at her mother's insistence, doing a show with the violinist Taylor Rankin, and a concert for the Bermuda Pageant - Ms. Christopher: " *And so Cahlii had said to you that they have to look for a new girl "because your Mom is going behind our backs. You can tell her if you want. Don't tell her which one said it or say the whole team I don't care but [what the heck] ... "although that is probably ... a bit stronger that, stepping up for the show and you know you're going to end up performing"- and then you took it from that that he was saying you were off of Dem Biez; correct?*" Q: "*Yes."*

27. It appears however from the *Cahlii Samuel Smith* Facebook exchanges (Defence Exhibit 1), that that was but a part of the reason for the falling out. The narrative continues from further cross-examination of Q by Ms. Christopher in relation to those exchanges in particular from pages 54 to 63 of the transcript of evidence[1]. From this it appears that the falling out between Q and the Appellant also related to her seeking his commiseration and support when she was threatened with the disclosure of the embarrassing images, but this was never forthcoming. Instead, these exchanges in cross-examination suggest the Appellant seeking to distance himself from any knowledge of Q's predicament by denying that she had confided in him:

[1] Record of Appeal (Supplemental Bundle).

> *"Ms.* Christopher: *Ques: Then you say, if you look at the bottom of page 315, "Me and [T] pulled you aside and said we didn't know what to do and you said to do what he says because it will keep stuff from getting posted" isn't that true? Ans: "Yes"*
> *Ques: And he said "You didn't tell me anything, your dad told us everything, the practices, the performances and I have no idea what you are talking about, you trying to pull me into that shit, terrible" – isn't that what he said in answer to that?*
> *Ans: Yes*
> *Ques: Right. Then he said, "Whatever [Q], you know you gave us complete." he starts talking about the contract again I guess or the music business; yes?*
> *Ans: Yes.*
> *Ques: And then he angrily said, "You are not friends any more either", "Definitely not my cousin", Were you cousins, you think you are cousins?*
> *Ans: Yes.*
> *...*
> *Ques: And then you said: 'I meant we told you about the hacker, you knew about it from day one, you were the only person I told and you said to do what he says. [T] said not to but I believed you over her because I thought you were helping me and the mental abuse I've suffered since. You would know I told you ..."*

28. From those exchanges, it would have been a matter for the jury to decide whether to accept Q's or the Appellant's version of events, in particular as to whether she had confided in him and told to comply with the blackmailing threats as she alleged.

29. T also testified. Following is a summary of her evidence. She confirmed her relationship with Q as one of longstanding friendship since primary school and that they had a common interest in music which they both pursued through their engagements with the group Dem Biez. T said that she wrote songs, and that she sang and recorded at the studio with Dem Biez. By 2015, when she was 14 years old, she had been doing this for about two years, since she was 12.

30. T described, in examination in chief, having experienced the "*hacker situation*" even before Q did:

> *Ques: "Do you recall anything ever happening with Q that affected her relationship with the studio?*
> *A: With the studio? I know because – she used to sing more. I know once there must have been a situation where she wanted to perform – well, someone wanted her to perform with them and she was sort of advised against it but she did it anyway, so that might have caused a rift. The hacker situation caused an issue as well.*
> *Ques: The hacker situation, what do you mean? What was the hacker situation?*

A: Basically, from 2013 to 2015 there was somebody hacking people's Facebook accounts and requesting explicit photos and sort of blackmailing girls for them.
Ques: Okay. Did this ever happen to you?
A: Yes.
Ques: Do you remember around when was the first time this happened to you?
A: December 2013… In December 2013 it was like sometime in the night. ...I got a message from someone named Ebony Lightbourne and I knew Ebony because we were friends… Basically, we made normal conversation and then she sent photos of herself. So, we were talking after that and then she requested that I had sent something, so I sent something back and then after that the account was swapped to a different name and the person basically said that they aren't Ebony and they are someone else and started blackmailing me from there…. Basically, they were saying "if you do not send me this or that then I will release your photos to the public or I will send them to your parents" and things like that… they wanted like naked photos or pictures in my underwear...
Ques: How, over what medium are these things being said to you or these requests being made?
A: It was on Facebook.
Ques: Was it one account, different accounts? What was it?
A: They had several different accounts, and they swapped the name of the accounts in the picture…
Ques: Did you ever speak to Ebony about the first set of messages?
A: Yes, I contacted her on a completely different Facebook account ….
Ques: For what purpose or what reason? ..
A: I contacted her to ask her about the new Facebook account and see if it was her, and she said it wasn't.
Ques: After that communication was made with Ebony, did you ever receive any more communication from this person about explicit pictures?
A: Yes
Ques: So the first time you said was December 2013. Can you remember the next time?
A: It was still in December 2013 and it was continuous from there.
Ques: .. what was being said to you?...
A: They are telling me to send them explicit pictures or else they are going to post the ones that they had on social media or send them to my parents.
Ques: … how was that making you feel?
A: It made me feel uncomfortable because it is like why would you do that?
Ques: How old were you at the time?
A: I was 13.
Ques... Did you ever send explicit pictures?
A: Yes.

Ques: … When you sent these explicit photographs, these are photographs of who?
A: Of me.
Ques: When you sent these explicit photographs of yourself, what was operating on your mind?
A: Because I (unclear) post pictures of me publicly or send the pictures to my parents.
Ques:.. How long did this go on for?
A: It went on for two years but there would be breaks in between because sometimes I would get frustrated and not answer but then the person would continuously message me on Facebook and then sometimes they would swap the Facebook accounts to my name and then one of the pictures of me to get my attention….
Ques: Did you ever speak out, reach out to tell anyone what was happening to you in terms of this? ..
A; Well, they had reached the point where I was ignoring them, where they had put me in a group chat with Jumar and Cahlii and I think Shamari might have been there. Basically, they sent some of the pictures in the group chat and started asking me questions… The hacker was asking Cahlii and Jumar questions in the chat group. They were basically like "do you know her?" type of thing…
Ques: Did any of these Facebook conversations where these demands or requests are being made of you, did any of them ever take place while you were in the studio?
A: No.
Ques: … Did you …ever tell anyone or complain to anyone about what was happening?
A: No. I talked to Jumar afterwards and he reported it to the police…
Ques: Is there anything you can tell us in relation to what was happening to you and [Q].
A; Basically, the hacker had contacted me first and asked me if I knew [Q]... I believe this was in 2014 when that happened… They basically told me that they wanted my help getting pictures of her but I refused to do that because that is my friend...
Ques: Did anything else …further ever happen in terms of this hacker and yourself and Q?
A: Yes. After they had basically gotten her to send them something, I know a couple of months later they basically told us that they wanted us to do a video together and sent Q the specific instructions…
Ques: Did you in fact do this video?
*A: Yes… It was like summertime... right before the summer actually... I did it with Q… They kept on threatening to release our photos and videos and at first I was like "okay, go ahead and release my stuff" because at this point I am not doing what they requested... but I genuinely felt uncomfortable and upset because I could see that my friend was upset, so I said 'okay we will do it", to prevent them from posting all of her stuff and then sending it to her parents (*unclear*), so we did the videos."*

31. T was then asked to describe the explicit nature and content of the videos which she said were three in all recorded on the same day "as *instructed by the hacker".* These were identified and admitted into evidence as Prosecution Exhibit 2.

32. Her narrative continued:

> *Ques: You do these videos. Did anything else request – pictures, videos, anything. Did anything else happen with this hacker after that?*
> *A: Yes… Basically, after we did that, a while after that they contacted me and said.. they had made one girl have sex on camera, they made another girl give head on camera, so basically, I had to do the same thing or else they were going to post the videos and my pictures.*
> *Ques: How did you respond to that?*
> *A: I told them I am not doing it.*
> *Ques: When you told them that you aren't doing it, can you say whether anything became of any of the three videos that you mentioned to me?*
> *A: Yes, I know that the second one was released … I was in China (for the Global Young Leaders Conference) people were sending it to me and asking me what happened...*
> *Ques: In terms of this approximate two-year period over time when these requests are being made of you … did you ever speak with anybody in Dem Biez about it?*
> *A: I spoke to Jumar and I spoke to Cahlii about it also.*
> *Ques: What was Cahlii's response or reaction when you would talk to him about it?*
> *A: He did not really say much but after the group chat with the hacker there was a point in time in the group chat where him and the hacker seemed to know each other… Then like a couple of months later Cahlii and I had a falling out... well the hacker claimed he had a conversation with him … the hacker claimed that he was the person that Cahlii had saved (*referencing a confrontation on Front Street in Hamilton) *and thanked him…*
> *Ques: At any point in time, when you sent these photos of yourself in underwear or naked, did you ever want to send any of these photographs?*
> *A: No.*
> *Ques: Did you ever want to do any of those videos with [Q]?*
> *A: No."*

33. T was then cross-examined by Ms. Christopher. Most relevant to the present enquiry were the following exchanges:

Ques: "... When [Q] approached you, saying that the anonymous person was contacting her with respect to this sending photos and the like, did you tell her about your experience?
A: I explained it after.
Ques: But when she approached you, you told her "No, don't do it", correct?
A: Yes
Ques: Did you say when I sent pictures because you (sent) a picture not knowing – thinking you were sending it to your contemporary that you knew and they ended up blackmailing you. You did not explain to [Q] what was likely to happen if the picture was sent?
A: I told her that if she sent something, they say that they will stop messaging her after that but they will continue to do it.
Ques: You said that when she initially confronted you about sending a picture?
A: When she asked me for advice?
Ques: Yes.
A: Yes, I explained to her after I explained the Snapchat situation.
Ques: But you did not explain that you had been through the exact same scenario?
A: I don't believe that I told her the extent of mine."

34. DC Malcolm Dill, the investigating officer for the case, next testified. He explained that on 17 July 2015 he had been assigned to investigate a report concerning a juvenile female by the name of [Q], who had complained that a hacker had coerced her to send to the hacker sexually explicit images of herself as well as of her friend, another young girl. It was also reported that these sexually explicit images had "gone viral" on social media. After contact with Q's parents and accompanied by Jean Hayward, a social worker, he conducted a video-recorded interview with Q. He later attended before a Magistrate and obtained a search warrant for the Appellant's home where, on 23 July 2015, accompanied by three other police officers, he conducted a search in the presence of the Appellant.

35. On arrival they were met by Calvon Smith who identified himself as the Appellant's brother and who acknowledged that the Appellant, Cahlii Smith, was present at the residence. Calvon summoned the Appellant who came to the front door. The Appellant was then told by DC Dill that there was a warrant to search his residence and that he was under arrest for suspicion of making and distributing child pornography. According to DC Dill, as he was cautioning the Appellant, Calvon Smith said to the Appellant "*what is this about*" to which the Appellant replied "about *[Q]*".

36. This exchange occurred inside the doorway, in the living room. DC Dill then noticed a white iPod Touch on a chair in the living room area which he seized as an exhibit and placed in a bag marked A102482. The Appellant was then asked to show the way to his bedroom which

he did, leading the officers upstairs. A search was there conducted while DC Brackstone kept notes. A black and silver Dell XPS laptop was seen by DC Dill in a container on top of a table in the bedroom. He seized the laptop and placed it in an exhibit bag labelled with reference number C73677. The Appellant then said that the laptop does not work but he uses it to charge the iPod which had been seized downstairs. Another laptop, a Toshiba, was seen on a bed and was also seized as an exhibit. At this point the Appellant said that he shared the bedroom with his younger brother, Calvon.

37. The search was then concluded, the Appellant was asked to read the search notes and sign them, which he did. He was then escorted to Hamilton Police Station where he was booked in and detained.

38. DC Dill and his colleagues next attended at 46 Radnor Road, Hamilton Parish, the residence of Shamari Warner where the Dem Biez studio is located. They were met upon arrival by Mr. Simon Warner who identified himself as Shamari's father. He was informed of the intention to search the premises and co-operated by producing a key to the door to the studio. A number of electronic devices seen in the studio were seized as exhibits but were not found by the Police to be of evidential significance in the case. As DC Dill explained in cross-examination by Ms. Christopher, they were searching for child pornographic material but as none was found, these devices were regarded as having no evidential bearing. They were all eventually returned to Shamari Warner.

39. The iPod (which became exhibit 4 at trial) and Dell laptop (exhibit 5), both of which had been seized at the Appellant's home, were taken by DC Dill to the Police's IT Department and handed over to Mr. Antoine Cannonier, then the Police Service's digital forensic analyst. Mr. Cannonier was instructed by DC Dill to examine the laptop. From this exercise Mr. Cannonier produced DVDs of the images found. He gave these DVDs to DC Dill who viewed them and made a compilation and screen shots of the images and video recordings seen. There were images, according to DC Dill of "several juveniles" among whom he was able to identify, from his earlier investigative interviews of them, Q and T. The narrative of this evidence appears from pp131- 132 of the transcripts as follows:

> "*Ques: Did you ever do anything with any of these images or videos that you compiled?*
> *Ans: Yes*
> *Ques: What did you do?*
> *Ans: We identified certain persons from the DVDs.*
> *Ques: ... Did you identify [Q], (to) whom you had spoken, on these DVDs?*
> *Ans. Yes.*
> *Ques: Did you identify [T] on these DVDs?*
> *Ans: Yes.*

Ques: In terms of your viewing of the DVDs, can you say anything about any images or videos that you saw of [Q]?
Ans. Yes.
Ques: Please tell us.
Ans: They had no clothes on. No tops on.
Ques: So let us deal with them individually. So tell us about [Q].
Ans: She had no top on, which exposed her chest.
Ques: Did you view any images or videos of [Q] doing anything?
Ans: Yes.
Ques: Yes. Please tell us…
Ans. In one of the images [T] was in the image as well.
Ques: Can you tell me more about it please?
Ans: They were engaged in sexual activity…"

40. At this point in the trial the birth certificates of Q and T were admitted into evidence as Prosecution exhibits 6 and 7 respectively, presumably to confirm their ages and to ground the allegations relating to child pornography in the indictment.

41. DC Dill continued to explain that upon the departure of Mr. Cannonier from the Police Service, it became necessary for a full forensic examination of the iPod and laptop (exhibits 4 and 5), that the images and videos they contained be downloaded to an external hard drive. This was done by DC Nigel Richardson (himself another digital forensic analyst within the Police Service) and handed over, along with the DVDs Mr. Cannonier had produced and delivered to DC Dill, to Ms. Loryn Bell for analysis. Ms. Bell, though a civilian, was engaged full-time with the Police Service as a digital forensic analyst with particular experience. She came to testify in detail about the results of her analysis and that testimony will be examined below. Here it will suffice to note that she produced reports of her analysis which were delivered to DC Dill and of which he spoke at the trial. And, as DC Dill also explained (at page 135 of the transcript of evidence), having earlier delivered the material to her, on 29 March 2021 he attended Ms. Bell's residence (from whence she was working during the Covid-19 shutdowns). There Ms. Bell showed him a number of "thumbnails"; viz: digital photographic images, reduced in size, which she had recovered from the Appellant's iPod, exhibit 4. He examined the thumbnails and recognized the images of Q and T, undressed and engaged in sexual activity. It appeared to him that the thumbnails were the same images, reduced in size, that had been discovered on the Appellant's Dell laptop, exhibit 5.

42. In cross-examination by Ms. Christopher, DC Dill acknowledged, as recorded in his investigation notes, that Mr. Cannonier had experienced technical difficulties in attempting to recover the images from the laptop exhibit 5, as distinct from having made the DVD copies which he made. The officer was however, unable to explain the nature of the technical

difficulties or why it was that having made the DVD copies, Mr. Cannonier was unable to make an image copy of the entire hard drive of the computer or why that latter exercise was not done until in 2018, some 2 1/2 years after the DVD copies had been made in 2016, and some 3 1/2 years after the devices had been seized and the Appellant arrested, in July 2015.

43. The officer did however, acknowledge that, at his request, and in response to a court order to that effect in 2019, Ms. Christopher on behalf of the Appellant had been given access to the laptop exhibit 5 in order that she might engage an independent forensic analysis of it. Considerably later, in 2021 or 2022, but before the trial started in May 2023, a copy of the hard drive of exhibit 5 which had been created by DC Richardson, was also provided to the defence.

44. On the issue of delay, it also emerged from DC Dill's evidence, that as early as in January 2014, Jumar Hayward had indeed (as surmised by T in her testimony) attended at the Hamilton Police Station and filed a report concerning blackmailing. However, the police incidence book merely recorded then that "VPU [Vulnerable Person's Unit] to conduct further enquiries". Although the VPU is a unit of the Police Service charged with dealing with offences concerning children and other vulnerable people, it does not appear that any investigation was undertaken until that in 2015 by DC Dill, prompted then by concerns from Q's parents.

45. It also emerged from the cross-examination of DC Dill by Ms. Christopher (at page 165 -169 of the transcripts) that he had conducted a search to see whether "Belanay Correia" (the putative Facebook user appearing on the Cahlii Samuel Smith account Defence exhibit 1 at pp 59 -63 of the Exhibit Record, spelt "Bellanae") was a real person. His enquiries at the Transport Control Department (presumably by reference to drivers' licensing data), suggested not. The officer admitted that he did not check Facebook records to see whether such a person existed, but he was aware that a number of accounts existed in the name of "Cahlii" and "Smith". He was also aware, from reading the Appellant's defence statement, that he was contending that the Cahlii S Smith account was a spoof account which he the Appellant was unable to delete and which he believed remained active even up to the time of trial.

46. The next witness was DC Nigel Richardson. He explained that he had been attached to the digital forensic unit of the BPS since 2009 where his role was to collect any digital evidence of forensic value, whether that be cell phone, computers, IPods, CCTV, DVRs or downloads from the Cloud, "*Basically, anything electronic*." After describing his training and experience, by agreement between Counsel, the witness was allowed by the Judge to testify as an expert (see pp 181 -182 of the transcripts). He testified that on 5 November 2018, he received what he described as Exhibit 2 (but which became Exhibit 5 at trial), the Dell laptop

from DC Dill, who asked him to create an exact copy of the hard drive. This he did by removing the hard drive from the laptop and by connecting it to a Falcon device driven by FTK software. The resulting report confirmed that an exact reproduction had been created onto the new 3 tetrabyte hard drive which DC Dill had provided. He handed the reproduced hard drive to DC Dill.

47. In cross-examination by Ms. Christopher, the witness acknowledged that from his examination of the laptop, he had observed that on being turned on, while one could see lines and dots on it, the screen did not work – there was no picture although one could tell that the actual display itself was on. This state of the laptop he also explained in re-examination, could simply be the result of age or damage. The witness also accepted in cross-examination that the physical hard drive of the laptop could be attached to another computer and logged into in that way.

48. The next witness was Loryn Bell. She described herself as an intelligence analyst employed by the BPS since 2011.She had been an intelligence analyst since 2002 in the United Kingdom attached to the Northumbria Police. In Bermuda she is attached to the Serious Crimes Unit whose responsibilities include the investigation of crimes against vulnerable persons, including children. Her training and accreditation as an intelligence analyst had involved telecom investigations, child protection courses and internet for investigators courses. During her career of over 20 years, she had testified as an expert and professional witness on data analysis and electronic devices on many occasions. While not so admitted at the outset of her evidence, the witness was eventually admitted by the Judge to testify as an expert witness and this decision of the Judge's became a cause of complaint by Ms. Christopher as a ground of appeal on behalf of the Appellant.

49. In his response to the arguments on this ground of appeal, Mr. Duncan, on 18 March 2026 during the hearing, handed up to the Court two Notices of Additional Evidence containing, among others, witness statements of this witness. One had been filed with the Supreme Court and served on the Defence (per Ms. Christopher) on 7 February 2019 and the other on 8 April 2021. These statements explained in detail the evidence intended to be given by Ms. Bell relating to her examination of the laptop (exhibit 5) and the iPod Touch (exhibit 4). The expertise of the witness required to conduct the examination and explain her findings would have been apparent to the Defence from these statements, as would the need to consult an independent expert if the intention was to challenge the witness's opinions. This is a factor which this Court must consider when addressing this ground of appeal below.

50. As one sees from the transcripts (in particular at pp336-371), and as will be examined below, the witness's evidence was however, in the end neither contested nor contradicted in cross-examination by Ms. Christopher. And this was although, as Ms. Christopher acknowledged,

the defence had had access to its own expert in relation to the examination of the contents of the laptop.

51. It will therefore suffice to give a summary of the salient aspects of the witness' evidence. She testified that on 11 October 2018 she was given an external hard drive by DC Dill marked exhibit MD2. – that which had been reproduced from the Dell laptop Exhibit (5). Her initial task was to identify if there were any items which could be considered as child abusive material, and if there were, to categorise them according to the grades or levels 1-5, designated by the UK Sentencing Council Guidelines, depending on seriousness.

52. The witness said that, without in any way altering it, she loaded the data from the hard drive exhibit MD 2 into software provided by the BPS, called Forensic Tool Kit ("FTK"), which was used to identify images and videos containing child abusive material. The FTK software also enabled her to track certain parts of the internet history - searches that had been done on the computer- and to identify what user accounts had been used to access the computer.

53. She found that there were two main user accounts, one called "Donna" and the other "Guest". She also found that there was a Skype program on the laptop. There were also programs called Frostwire and Limewire.

54. The witness said that she found several images associating the laptop to Cahlii Smith, including pictures of him, screenshots of Facebook chats and screenshots of emails. There was a folder on the laptop containing what was labeled "Cahlii Album" which had images which had been saved within it.

55. Within the laptop, the witness said that she was also able to identify 106 images that would be deemed child abusive material, found in a variety of locations. The majority, 95 of these, were stored under the Donna profile user account and then within that account, within different sub-folders. One of these images was under the Guest user profile and 10 were found directly in the program files, where all applications are stored on the laptop. She classified these images in keeping with the Sentencing Guidelines. 104 were at Level 1; (ie: images or videos depicting a child posing in an erotic nature). 2 were classified at level 2; (ie: images or videos of a child engaged in non-penetrative sexual activity or solo masturbation by a child).

56. The witness testified that she also found 91 videos containing child abusive material. These were stored both in the Donna user profile (32) and the Guest user profile (57), with two (2) of them, in the program files location. She classified these videos: 16 at level 1, 14 at level 2, 18 at level 3 (non-penetrative sexual activity between adults and children); 41 at level 4 (penetrative sexual activity involving a child or children or both children and adults) and 2 were at level 5 (sadism or sexual activity involving an animal) but were of adults only.

57. From her examination of the metadata found on the laptop, she was able to say that the earliest creation date on the laptop of the child abusive images was 3 January 2014 and the most recent creation date, 26 April 2015. The last time any of the child abusive images had been accessed on the laptop was 26 April 2015.

58. As regards the videos, the earliest creation and access date was 19 July 2014, and the most recent creation and access date was 22 July 2015. Some of the abusive material had been downloaded via the internet by FrostWire from a site called "Pre-teen hardcore" , a pre-teen, said the witness, being a child between the ages 9 and 13. And, at p215 of the transcripts, the witness is recorded as explaining that there are a variety of ways in which the child abusive images might have gotten onto the laptop – they could have been downloaded from the internet (as in the case of the Pre-teen hardcore images), they could have been received by email or transferred from another device such as a cell phone or computer.

59. Indications of a link between the Appellant and the laptop was the file labelled "Cahlii Album" which contained pictures of him, Facebook screenshots of the Cahlii (Samuel) Smith Facebook account, including the profile picture used on that account, as well as a bookmark created on 15 December 2014 on the homepage URL to the location "DemBiez.freshbooks.com/home", which was under the Donna profile. A disc compiled by the witness contained 51 images which she said helped to attribute the use of the laptop to Cahlii Smith. This disc of images marked exhibit LB1 by the witness was later admitted into evidence as prosecution exhibit 8 (see pp 292 and 308 of the transcripts). The transcripts show (pp 308-315) that the jury was invited to examine a selection of 6 of these images.

60. In relation to the Skype program found on the laptop, there were two main accounts, one named "BDAHoes" and the other "RhythmSoulChild". By application of the FTK software, the witness said that the BDAHoes account was shown to have logged on to the laptop between 4 July 2014 and 11 June 2015. The RhythmSoulChild account logged on between 17 April 2014 and 1 February 2015.

61. In relation to Q and T (who had both been identified to her by DC Dill) the witness testified (see pp 220 et seq) that she found images and videos of both of them on the laptop hard drive. There were files labelled "Tonya" saved on the laptop which were of T and there were files labelled either "Q", "Qq", "Q2", "Q4", and "Q6", which were of Q. They were all stored in folders or sub-folders under the Donna profile account, the same account under which the "Cahlii Album" file was stored. This became of further significance in light of the witness's testimony, which arose in cross-examination, that, as of 26 December 2013, the Donna profile account became password protected and so could have been accessed after that time only by someone to whom that password was known.

62. There was then a significant break in the flow of the witness's testimony while the Judge was engaged with arguments over the admissibility of her evidence as that of an expert. See pages 228 to 290 of the transcripts. The outcome was that she was then, on 21 June 2023 at 3:40pm, declared by the Judge to be an expert witness and her testimony allowed to be considered by the jury as such. This decision became the ground of appeal already mentioned and to be addressed below.

63. The narrative of her evidence resumed at page 290 -291. There the witness explains that she had found that the BDAHoes Skype account (otherwise labeled "Jayden has taken over") had registered logs on the hard drive of the laptop, between 4 July 2014 to 11 June 2015, 162 times. And during the same period, the RhythmSoulChild Skype account (otherwise labeled as "Cahlii Dembiez Smith") had logged on 98 times. The witness also prepared a chart to show the location of the child abusive images on the laptop. These she said were found in files or subfiles mainly under the Donna Username profile but some also under the Guest profile. They were found located alongside files of other images that were not of a child abusive nature, including music files, videos and pictures of Cahlii Smith himself. This chart, marked by the witness as her exhibit LB8 was admitted into evidence at trial as prosecution exhibit 6. A copy was helpfully presented to this Court by Ms. Christopher during the hearing of the appeal[2].

64. The witness also presented a CD Rom disc containing a PowerPoint presentation of screenshots of the Skype video recordings retrieved from the laptop. This became prosecution exhibit 7. It contained 86 slides of images of both Q and T, (including one -slide # 2 - of a video of the Appellant's former girlfriend Dejah Denbrook, and himself). The video images were recorded along with captioning which also recorded the instructions from the BDAHoes Skype account directing the movements of Q and T as they video-recorded themselves responding to the directions. These are recorded at pp 319 to 335 of the transcripts as having been shown and explained to the jury by the witness Ms. Bell. It will suffice for present purposes to give a sense of how Q and T were coerced, simply to refer to a few of the contents of these slides.

65. On Slide 10 one can see the Skype screen with the BDAHoes account and the Q Skype account. The female figure is shown in a bathroom with messages being sent, with the last: "*I couldn't figure out how to put my hand just now*" And then the response from BDAHoes:

[2] Mr Duncan also handed up, on 17 March 2026, a detailed Schedule, prepared by this witness, of all Skype Log Files in relation to the Skype names "BDAHoes" and "Rhythmsoulchild" extracted from the hard drive MD/2. This we were told however, had not been shown to the jury and so was not considered by the Court.

"*Okay. All you have to do is what I say. Then I'll leave you alone. Is that simple*?" The response: "*Okay*". Then the response from BDAHoes: "*Let me see you take the top half off*."

66. On Slide 25 are images of the same female (transcript p 324), now appearing to be fully undressed. The image follows on the chat exchanges: BDAHoes: "*I wanna see you in the mirror unzipped*". Q: "*I am wearing a thong*" BDAHoes: "*That's good*" Q: "*My battery"s on 10 per cent*." BDAHoes: "*All the way down. I wanna see ass"* Q: *That's as far as my zip goes*"" BDAHoes: *"Take it off then*".

67. Slide 40 related to T. One sees her Skype username and the messages going back and forth with the BDAHoes username: BDAHoes: "*Hello*" "*Turn the camera on"* T: "*Okay*" BDAHoes: "*Okay. Set it up like how we always do*". Response: "*Okay*" And then BDAHoes: "*Go back a little to make it less blurry*".

68. Finally, Slide 66. BDAHoes: "*Let's make this sweet and short. You know the routine. I don't have to tell you. Turn your camera on.*" T: "*I never said I wasn't. Still in bed... so hold on*" BDAHoes: "*If you are testing to see how long I let you be smart and do as you please, you shouldn't. Let's go. I don't have all night*." T: "*Oh*".

69. In cross-examination by Ms. Christopher, the witness confirmed that she observed from the metadata, that the date range for the download of the child abusive images and videos to the laptop was between 3 January 2014 and 26 April 2015 and so after the password for the Donna profile account was last changed on 26 December 2013.

70. She also confirmed that she had noted the dates when files were created, downloaded, modified or accessed. Ms. Christopher then raised with the witness (beginning at p342 of the transcript and continuing at pp344, 362 and 367), a number of propositions on the meaning of those four terms with which the witness eventually all agreed. To the extent therefore that the defence relied upon any of those propositions as suggesting that someone other than the Appellant was responsible for the images and videos, the witness's testimony was, in effect, generic and neutral. This will be a factor for consideration when addressing the ground challenging the expertise of this witness. An illustration can be taken from page 376 of the transcript:

> "Ms. *Christopher. Ques: Would it be right to say that apart from this child porn and Skype and the attribution folders [ie: those containing child abusive materials], there was not too much else going on, on this computer, was there, as far as you recollect?*
> *Ans: There was music files on there...*
> *Ques: Right... Go ahead.*
> *Ans: There were some music files, recordings, some music that had been downloaded, and also recordings of people singing on there as well.*

Ques: And Frostwire, LimeWire?
Ans: Yes.
Ques: Can you agree with this proposition that once you start to download a file in this (inaudible) software, whenever your computer is on and connected to the internet, they continue to download?
Ans: They will, unless the ... Unless where you're downloading that from, if that user disconnects, the download pauses.
Ques: Alright. So let me record what your answer is to that…
Ans: Okay
Ques: So once you start a download, they continue to download whenever the computer is on and has an internet connection, provided the file on the other end is connected so that it can be downloaded.
Ans: Yes, so it is still accessible to be downloaded."

The findings and opinions of the witness are, of course, to be distinguished from the inferences that might properly have been drawn by the jury from her evidence, if they accepted it, in the context of the case as a whole. For instance, one telling example, would have been her opinion, cited at [57] above, that the most recent creation and access date of the Skype video account was 22 July 2015, when considered with the fact that the laptop was in the possession of the Appellant when he was arrested the next day, 23 July 2015.

71. The witness was cross-examined further specifically about four matters. The first was a series of four (4) notes of voice messages which the witness had found on and downloaded from the Appellant's iPod, prosecution exhibit 4. These were played for the jury (see transcript pp 339 to 341 and 366). They appear to be recordings of conversations between the Appellant and someone assisting him with trying to get the laptop to work and so tending to confirm the defence case that it had not been serviceable. Transcripts of these voice notes were tendered in evidence to the jury as Defence exhibit 6A.

72. The second was about a screenshot of the Cahlii Samuel Smith Facebook page found on the laptop (the Facebook account admitted by the Appellant to be his), lewdly captioned "*LMS, if you've ever eaten ass*", followed by a chat between someone posting as "Cahlii", another as "Dashonte" and others. The cross-examination about it, which runs from pages 350 to 354 of the transcripts, establishes that this screenshot found its way onto the laptop on 9 February 2014 and so after the password had been changed on 26 December 2013.

73. The third matter related to the use of the Skype accounts, this line of questioning seeming to seek to establish that the Skype video recordings could somehow have found their way automatically from the laptop to the iPod or vice versa. The exchanges come from the transcripts at p 364:

"*Ques: ... Let us talk about Skype for a second.*
Ans: Okay
I am going to suggest to you – and you can either agree or disagree – that Skype logs or Skype tends to be transferred from one... the data from one Skype account, if it is on both the computer and, for example, an iPod or other device, will transfer between those devices.
Ans: Yes, once you've logged on.
Ques: Once you are logged on?
Ans: Yes.
Justice Pettingill: Automatically?
Ans: Yes… "It synchronises" is the best way to describe it.
Justice Pettingill: Okay. There we go. Alright. If I may – sorry, M.s Christopher – just for my own understanding. If they are connected – I know my phone does this. So if they are connected to related devices, if something comes onto one, it kind of automatically transfers it to the other?
Ms. Christopher: To Skype, yes.
Witness: Yes.
Justice Pettingill: To Skype. Good. Okay."

74. Further questions related to the functionality of Skype were asked by Ms. Christopher by reference to another software application named "Red Kawa" or "Videorama" iPod converter. In this regard the witness confirmed at page 368 of the transcripts, that it is a free bit of software that allows a user to convert a video so that they can play them on different forms of media, such as onto an iPod. The witness confirms that this is so and that basically what the software does is shrink the size of the file to make it easier to share and to save space on a computer. This evidence serves to contextualise the thumbnail images found on the iPod exhibit 4 and which the witness confirms in her written statement that she had shown to DC Dill when he attended her residence on 29 March 2021 and about which he testified as mentioned above.

75. The fourth matter raised with the witness (see page 364 to 365 and 371 of the transcripts) related to a software application named "Freshbooks", a bookmark to which labelled "Dem Biez Freshbooks" she had found on the laptop's URL homepage. She agreed with Ms. Christopher that the Freshbooks website is an accounting website. This line of questioning laid the foundation for Ms. Christopher, in her closing arguments, (see page 773 of the transcripts) to suggest to the jury that someone else from Dem Biez must have been using the laptop because the Appellant had no accounting role within the group.

76. In re-examination by Mr. Duncan, the witness testified that from her examination of the logfile of the laptop, she established that the name associated with the password protected Donna profile user account was "Cahlii" and that since the password had been last changed in December 2013, the account had been logged into on 576 occasions. The Guest user account, which was not password protected, had been logged into 525 times. The last time someone had logged onto the Donna user account was 15 July 2015 at 10 minutes past 9:00 in the evening.

77. This last statement would have been, if accepted by them, a further significant fact for the jury to consider, given that the Appellant was arrested only 8 days later on the 23 July 2015, when the laptop was under his control.

78. Dejah Denbrook became a witness for the prosecution by way of her written statements, which were read into evidence. She spoke of her relationship with the Appellant which began in 2010 when she was 16 years old and continued on and off, while she was away at college from 2012, for some 7 years. She confirmed that the Dell laptop (Prosecution exhibit 5) was given by her to the Appellant in 2012 after she had acquired a new laptop for use in college. She had earlier acquired the laptop as a "hand me down" from her mother, Donna Dembrook. Her mother may also have used the laptop. The witness also stated that while she was away at college, *"Cahlii and I did Skype one another. To the best of my knowledge he would have used the laptop I gave him or an iPod*".

79. The last prosecution witness was Shomari Warner. In examination in chief he simply confirmed his membership of Dem Biez. He was then presented for cross-examination by Ms. Christopher. In response he confirmed that the administrative work, including accounting for the group, was done mainly by Jahmar Hayward. Regular access to the studio he said was available to himself, although he was mostly away at school or college in Canada, Cahlii and Jahmar but other persons would often come and go - including artists like Q and T - whomever they were recording from time to time. He remained in regular contact with his partners by Facebook, WhatsApp or cellphone. On a given day perhaps as many as 5 or 6 people would visit the studio. He confirmed that he had received demands from a Facebook account named "Belanay Correia" for pictures of his ex-girlfriend with which he did not comply. Cahlii had also told him that he was getting similar demands from that Facebook account, for pictures of his girlfriend Dejah Denbrook, and that this was just before summer 2015. Further, that when Cahlii was arrested, the Belanay Correia account chatted him – he believed it was the same day he was arrested but could not be certain. It could have been the day after. The chat said: "*See what happened to your friend?*" And: "*What you guys are going to do is tell everybody that he did it" "I can't remember the exact words, but it was on the lines of we were supposed to make some sort of statement, and that the rest of us would be I guess not be messed with anymore".* The witness also testified that Cahlii had told him that

the Belanay Correia account had texted him saying that they "*were going to get him*", that "*they are coming for you and you are going down.*"

80. In re-examination by Mr. Duncan, the witness said that it was after a video shoot at Bulls Head Park involving Q that he had seen the compromising pictures of her, and that this was in July 2015. He had also seen the video of Q and T while at work at the airport – it had gone viral.

81. He also confirmed that Cahlii's laptop had been known not to work and had on occasion been left around in the Dem Biez studio.

82. At this point the prosecution's case was closed and the Appellant then testified. In essence he articulated the denials and responses to the prosecution's case adumbrated in Ms. Christopher's cross-examination of the prosecution's witnesses and which she later addressed the jury about in her closing arguments. He denied that he proactively encouraged or coerced Q or T, whom he knew to be children at the time, to send naked and compromising images or videos of themselves to a person soliciting them. He did not know how such images or videos came to be within his computer or iPod. He could only surmise that his computer, which had not been functioning properly since mid-2013 and which he kept only for the purpose of charging his iPod, had been abused by someone who had managed to get access to it while it laid around at the Dem Biez studio. The Dem Biez studio was a high traffic environment with many individuals present daily. The laptop was left on a communal table and physically accessible to others. There was no confession, admission or direct evidence of downloading activity by him. The images on his iPod must, inferentially, have gotten there automatically by the synchronizing capability between the laptop and the iPod. That someone else, the ominous and anonymous Belanay Correia, was shown to be motivated to implicate him in wrong-doing of which he was innocent. By the posting of the intimate image of himself and his girlfriend on Facebook, that person was shown to have the ability to frame him. Shamari Warner who had received similar threats, was present with him when the blackmailing images were received. The Appellant was reacting to an apparent external actor, not orchestrating events. The existence of Facebook accounts in the Appellant's name did not prove authorship or control by him. He was aware of only one Facebook account in his name at the relevant time and did not post the offensive or incriminating comments attributed to him. When an explicit image of himself was sent, he became naturally concerned. He believed the matter could be resolved by blocking accounts bearing his name (the two others of which he later became aware) and so did so.

83. As regards the angry or harsh messages he was shown to have sent to Q, he accepted that he sent them but only out of being upset over perceived professional betrayal. He would have adopted a different tone had he known what she was going through. He did not blackmail or exploit the complainants. Any threatening communications originated from an unknown

third party. As regards his reaction when asked by his brother Calvon why the police had arrived; ie "*about Q*", this was only because he was aware that Jomari had made a report to the police.

84. This being a case based on circumstantial evidence, it was open to Ms. Christopher as she did in her closing arguments to the jury, to ask rhetorically: "*If the defendant knew that the images and videos were on the laptop and as he was aware of the investigation, why wouldn't he have just thrown the computer away*?".

85. Whether the images and videos could have entered it by the laptop having been hacked into externally was not, however, a proposition that Ms. Christopher was able to pursue on behalf of the Defence, as there was no evidence to support it. This was conceded as appears from her report to the trial judge (at page 584 of the transcripts) after consulting the defence expert. A similar concession came during her exchanges with this Court at the appeal hearing when she confirmed that in the transcripts "*there were numerous references to my not relying on the computer being hacked*". This is, also of course, only consistent with the opinion of the witness Loryn Bell summarized above, that the child abusive images found on the laptop had been downloaded from the internet and that the videos had been received into it via the Skype BDAHoes account.

86. Against that background provided by the summary of the evidence, the grounds of appeal may now be examined.

The Grounds of Appeal

Ground 1 – *that the learned trial judge persistently gave, then took away, the good character direction to the jury, to which the Appellant was entitled, by qualifying it.*

87. In this regard, the transcripts show that the Judge did, indeed, give varying directions. In the present state of the law, clear directions in his favour were required to be given in the context of the Appellant having had no previous convictions[3] and having made no admissions to the allegations of wrong-doing. On the contrary, he had during two cautioned interviews by the police (the first on the day of his arrest and the second after Loryn Bell had submitted her report of her findings in relation to his computer), steadfastly protested his innocence. The

[3] Settled though the law on the subject may now be, its rationale is not beyond debate. Higher Courts have expressed doubts about the logical basis for an entitlement to good character directions based simply on the absence of prior criminal record. See for instance *Carlton Junior Hall v R* [2020] CCJ 1 (AJ) at para 46*, Gregory August and Alwin Gabb* v R [2018] [2018] CCJ 7 (per Jacob Wit J) at para 161, and Hallett LJ in *Nigel Hunter & Ors v R* [2015] EWCA Crim 631 at para 67. The ideological basis for the directions may be seen as consonant with the burden of proof resting upon the prosecution and so according to a defendant the benefit of the doubt; ie: until proven guilty he must be presumed innocent. But the tried and proven directions on standard and burden of proof may be regarded as covering that ground, without the need for further directions based upon what in the typical case, would be a wholly artificial presumption. Nonetheless, our analysis that follows must, of course, be faithful to the law as it now stands.

first direction, in extensive terms is given at page 74 line 20 to the end of page 75 of the Record of Appeal:

> "*You have heard about character, and I will talk to you about this with regard to the accused. You have not heard of the accused that in his years he has any previous convictions, I think not even a speeding ticket. And therefore from this that you can take it that he is a person of good character – not just in the sense of having no convictions recorded against him, but as a witness it has been put out there that he is a person of good character, and nobody has seemingly said otherwise. He was a guy that was, you know, with Dem Biez doing his stuff and nobody has come along, other than the allegations made in this case, and said anything that is bad about his character. So you have that presumption that he is a person of good character.*
>
> *Of course, good character cannot by itself provide a defence to a criminal charge, but it is evidence which you should take into account in the accused's favour in the following ways. In the first place, the accused has given evidence. His good character is a positive feature of the accused, and as with any person of good character it supports his credibility. His good character, that supports his credibility. If it was a case where someone had fifteen convictions for bank fraud and all these types of things, you may think they are a bit dodgy, right? But not here. That supports his credibility. This means that it is a fact which you should take into account when deciding whether you believe his evidence. You weigh that in there as well, right?*
>
> *In the second place, the fact that he is of good character and has not offended in the past may mean that it is less likely that he acted as is now alleged against him.* ***With that factor you are going to put in the fact that these offences are while he was an adult. In large part they are alleged to have occurred when he was quite young. So he hasn't had a lot of years to build up a good character or a good reputation. And there are instances, particularly with younger people, where they commit crimes for the first time. So you have to assess that and also consider with regard to that that position on character. It does not necessarily mean that just because you say "I'm of good character" that you are not guilty of committing these offences.*** *But he is entitled to that, for you to approach the evidence. And it is a matter for you as to what weight should be given to the accused's good character which assists on the facts of this particular case are for you to make. So you don't just look at it singularly like that. You take the good character, you use it in the positive, but then you look at all the other evidence.* ***And part of the Crown's case, kind of endeavouring I think to undermine that, was: look at these responses that he was giving to (Q), to this 14-year old girl that he knew about, and the way that he was speaking to her about when she was (I will call it) in breach of contract with regards to doing the Rankin concert. You have***

> ***seen and you have all of that dialogue: "Look at those responses. They are not very nice. They don't reflect a person of good character." is effectively what they are saying. The Defence comes along and says "No. those are things that I responded to at the time. I felt they were lying to me and I was saying these things because I was angry and annoyed. Had I known she was going through this, I wouldn't do it, which therefore makes me a person of good character, because that is how I would have looked at it. With the benefit of hindsight I wouldn't have spoken to her like that. The Crown's case is effectively saying that this is just another element of the controlling feature of this case and that is what the Defendant was doing."***

88. Even while the rest of the foregoing directions were acceptable, the passages in bold emphasis above were clearly objectionable. First, they introduced for the jury's consideration the irrelevant and illogical proposition whether, because of his relatively young age at the time of the alleged offences, the accused might not yet have been able to acquire good character. Second, they invite the jury to confuse morally questionable conduct on the part of the accused with past criminal misconduct, the latter being that which is required to negate the entitlement to a good character direction.

89. Ms. Christopher voiced her objections about the form of this direction and, as shown at page 172 of the Additional Record, on 3 July 2023, the trial judge accepted that his comments, which he described as an "*adornment*" were misleading and agreed to "*revisit that in a more simplistic form*." His redirections including as to both credibility and propensity, appear at page 88 of the Record in what Ms. Christopher describes as "*classic terms*":

> *"… I kind of want to repeat what you should pay attention to with regard to character…So the accused has given evidence. His good character is a positive feature of the accused, and with any person of good character it supports his credibility. This means that it is a fact which you should take into account when dealing with whether you believe his evidence. The fact that he is of good character supports his credibility – that's number one. In the second place, the fact that he is of good character and has not offended in the past may mean that it is less likely that he acted as is now alleged against him… However, the judgments as to what weight should be given to the accused's good character and the extent to which it assists on the facts of this particular case are for you to make. In making that assessment, you are entitled to take account of everything that you have heard and the evidence you have seen in relation to him…"*

90. Immediately before summing up the Defence's case, the judge gave the following further directions (at Record of Appeal page 144 lines 6-20), which, had the matter rested there, would surely have avoided the criticisms now raised:

> "*In the first place, the accused has given evidence, his character is a positive feature of the accused and as with any person of good character it supports his credibility. So you marry those two together. This means that it is a fact which you should take into account when deciding whether you believe his evidence. It's a fact that you should take into account and consider whether or not you believe his evidence.*
> *In the second place, the fact that he is of good character and has not offended in the past may mean that it is less likely that he acted, as is now alleged against him. So the fact that he is deemed to be of good character now and was of good character at the time, it is less likely that he would have committed these offences that he is charged with with regard to blackmail and child pornography. However, the judgments as to what weight should be given to the accused's good character and the extent to which it assists on the facts of this particular case are for you to make. So remember that just because of good character, it's not that that's an automatic defence; it is something that you should weigh significantly, with regard to his credibility. In making that assessment, you are entitled to take account of everything you have heard about him.*"

91. There were however, still further directions which are criticized, as having once again confused the legal question of good character with morally questionable conduct, at page 149- 150 of the Record on 4 July 2023:

> "*And he is asked about conversations that are taking place in that chat. This is about the conversations with regard to the Taylor Rankin issue and the emojis and what he is saying to (Q)… And that also involved the conversation about Q's mother invested in her career… So that's why he had made comments about "Your mum is fucking up your career". That is also a matter for you to weigh with regard to those conversations.* ***It is for you to consider that evidence, bearing in mind we have this 21 year old man of assumed good character and he is speaking to this 14 year old girl that works with him, and it's for you to consider whether you think those conversations are passive aggressive, or even potentially bullying.*** *That is a matter for your interpretation and to weigh all of the evidence with regard to the conversations of what is going on with the hacker or the blackmailer, and the tone of the conversations as you see it with regard to Cahlii, the exchanges that are there and then what he has to say on the stand with regard to those things…"*

92. The words in bold emphasis immediately above are those which are criticised as detracting from the earlier proper directions on good character. Even while the judge was here apparently attempting to direct the jury on how they might assess the conflicting evidence of Q and the Appellant on whether she had been coerced by him into complying with the blackmailer's demands, the reference to his "*assumed good character*" in this context was

potentially misleading. It implied that coercive or bullying conduct was inconsistent with a good character within the meaning of the law as the jury had been earlier directed. It therefore carried a potential air of qualification upon the earlier directions. There is therefore merit in Ms. Christopher's criticism that, taken with the very first misdirection, the effect of this direction to the jury, could have been to neutralise the good character direction. The suggestion by the judge that controlling behaviour, which was being disputed, could detract from the accused's good character, was wrong in principle.

93. Further in this regard, there were the following final comments by the judge near the end of his summing up and in the context of concluding his summary of the Defence's case (beginning at line 30, page 167 of the Record):

> "*That was the Defence case. I have already indicated to you that that is nothing abnormal, the Defence calling less evidence in relation to a case, and that they don't have to prove anything. What they are doing through their case is raising those doubts, and you should look at the doubts that are raised with regard to the various instances and consider that, bearing in mind the character and credibility that you have to afford to the Defendant because he is a person of good character. And you have to assess his evidence in that light, of course, as I have told you a few times now*."

94. While this last comment reminded the jury correctly of the credibility limb of the good character direction, what results in the end is a mixed bag of directions such that it cannot be said that the Appellant received, as was his entitlement as a person having no previous convictions and having throughout protested his innocence, an unqualified good character direction, covering both credibility and propensity. Mr. Duncan properly acknowledged that this is so. He also acknowledged that there was no authority for the proposition first raised by the trial judge, that the good character direction may be qualified on account of the relative young age of the accused, nor for the judge's suggestion that even if admitted in the course of trial, morally questionable behaviour falling short of criminality, could be regarded as negating the entitlement to the direction.

95. The case law is, indeed settled and clear, even if its rationale is not beyond debate. In *Formanchuk v The Queen* [2004] Bda L.R. 24 (at internal page 7) this Court, after a review of the then leading English cases, including the House of Lords decision in *R v Aziz et al* [1995] 2 Cr App R 478, and the earlier English Court of Appeal decision in *Vye, Wise & Stephenson* (1993) 97 Cr App R 134 concluded as follows:

> "*In the case before us, there was evidence from the appellant at trial that she had not been in trouble with the police before, nor did she have any previous convictions. In those circumstances, the trial judge was obliged to give a good character direction*

> *as to credibility and propensity. He failed to give any direction at all as to the good character of the appellant...*
>
> *The failure of the trial judge to give the good character direction amounted to a material irregularity in the trial. This was a case in which the credibility of the appellant was at the forefront of her case.*
>
> *We felt obliged to hold that the conviction should be quashed and the sentence set aside. There may be cases where the Court will not quash the conviction where there has been a non direction as to good character. Peyton v The Queen [1998] Bda LR 3. This is not such a case..."*

96. *Formanchuk* was subsequently followed and applied by the Supreme Court (per Subair Williams J) in *Brangman v The Queen* [2018] Bda LR 38.

97. However, while that learned judge also considered and applied the high case authorities which *Formanchuk* had itself considered (including *Vye, Wise & Stephenson and R v Aziz)* she did not seem to have placed before her and did not consider the important judgment of the English Court of Appeal given in *Hunter and Four Others v Regina* [2015] EWCA Crim 631. There, in five conjoined appeals raising the issue of the extent and nature of the good character direction; the Court undertook a comprehensive review of the case law (including the Privy Council decisions in *Shaw v Regina* [2001] 1 WLR 1519; *Thompson v Regina* [1998] AC 811 PC and *Bolson v Regina* [2005] UKPC 2) and of statutory developments in England and Wales. Some of these latter, in particular section 101 of the Criminal Justice Act 2003 which allows evidence of bad character to be adduced by the prosecution in particular circumstances, has not yet found its way into Bermuda legislation[4]. The principles are nonetheless applicable here. At [68] the Court of Appeal gave the following summary which I accept as encapsulating the modern principles, including implicitly (as they were also reviewed and approved), as recognized in the Privy Council cases:

> "*68. We return therefore to the principles we derive from Vye [and others] [1993]1 WLR 471 and Aziz [1996] AC 41 by which we remain bound.*

[4] There appears to be no such provision in the Bermuda Criminal Code or Police and Criminal Evidence Act. Counsel were invited to confirm this and in his response, Mr Duncan stated that there is no Bermuda equivalent of section 101of the UK Criminal Justice Act. He is fortified in this view by the comment by the Privy Council in paragraph 40 of *Myers, Brangman and Cox v Regina* [2015] UKPC 40, that "*In jurisdictions, of which Bermuda is one, where there is no statutory modification of the common law to allow the admission of propensity alone in defined circumstances (such as sections 98-113 of the Criminal Justice Act 2003 do in England and Wales, the general rule in Makin ([1894] AC 57) stands. Mere propensity to behave badly is to be excluded as unfair."*

> *a) The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements.*
> *b) The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements.*
> *c) Where a defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.*
> *d) There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance Vye [(ie: as at a) and b) above)]. The judge then has a residual discretion to decline to give a good character direction.*
> *e) A jury must not be misled.*
> *f) A judge is not obliged to give absurd or meaningless directions."*

98. The Court of Appeal went further, to disabuse misconceptions, by noting what *Vye* and *Aziz* did not decide:

> "*69. a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character;*
> *b) that a defendant with previous convictions is entitled to good character directions;*
> *c) that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar to those charged;*
> *d) that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely upon the previous convictions as probative of guilt;*
> *e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction.*

99. It is clear that those principles from *Hunter* at [68] a) and b) above, apply particularly to the Appellant in this case. Their requirements regrettably, were not met. The judge's directions on the issue of good character were not unqualified, as they should have been. That however, is not the end of the matter. As the case law considered above also explains, a failure to give a good character direction does not inevitably lead to a quashing of the conviction. The ultimate question is whether a miscarriage of justice has occurred such that the conviction is unsafe and may not be allowed to stand. I will return to consider this question by reference to the principles, summarized above from *Hunter* - after addressing the remaining grounds of appeal.

Grounds 2 and 3 may conveniently be taken together:
Ground 2: "***That the learned trial judge failed to adequately and independently consider the impact of delay upon the Appellant and the fairness of the trial. The Appellant was first arrested in this matter in July 2015 and was not charged until 2018. Trial commenced on 10th May 2023*".**
Ground 3: "***The learned trial judge erred in ordering a 2 week break in the middle of the trial over the objection of the Appellant's counsel. The cross-examination of the complainant(s) which was carefully constructed (and had to be as she was recounting events of 8 years prior) occurred 7 weeks before the jury were sent out. In point of fact no evidence was heard in the case between 19 May 2023 and 20 June 2023. The learned trial judge failed to properly put the Appellant's defence as concerns this evidence. The effect was unfair to the Defendant. It was a key element of the Appellant's case that the witness [Q] could not differentiate between what she told the Appellant to his face, whether she spoke to a spoof Facebook account, whether in making assumptions about the Appellant's knowledge of blackmail she was assuming certain things that were not communicated directly to him"***.

100. The events in respect of which the Appellant was convicted occurred over a period of 18 months from January 2014 to June 2015. The Appellant was charged in July 2018, and his trial commenced in May 2023, a lapse of some 5 years for which no clear explanation appears from the record. There is some indication that change of police personnel and the intervention of the Covid-19 pandemic may have been contributory factors. But, as Mr. Duncan properly conceded, there can be no argument that this case, like so many others on the criminal list, was impacted by delay such as should be avoided in criminal cases. The question for this Court here too, is whether delay vitiated the trial's fairness so as to have rendered the conviction unsafe.

101. Ms. Christopher contends that it did and seeks to advance two main ways in which this came about. She points to arguments placed before the Supreme Court in an earlier unsuccessful application for stay of the indictment on grounds of abuse of process when the complaint was that there had then been a delay of 3 years between the commission of the offences and the defendant being charged. She contends that the outcome in the Supreme Court notwithstanding, the trial judge here should have conducted his own independent assessment of the impact of delay and considered the merits of her arguments at trial which, she asserts he failed to do.

102. After consideration of her submissions, we are satisfied that the complaints remain essentially the same as they were before the Supreme Court which, in its written judgment against which there was no appeal, properly refused them[5]. At [4] and [5] of that judgment, Simmons J summarized the complaints as follows:

[5] See Judgment of Simmons J of 12 October 2020 *SC Bda. Crim: 2018: No 38*, at pp 1- 6 of the Additional Record

"4. (*Ms. Christopher contends that the allegations contained in the charges amounts (sic) to speculation and inferences. That due to lapse of time it would be difficult for the Defendant to put competing inferences to witnesses due to loss of memory by him and witnesses. Ms. Christopher further submits that the defence only became aware of potential lines of enquiry once they were able to take a more substantial view of the allegations.*

5. She criticises the police because other computers that were present in the Defendant's work studio were returned without examination. She submits that the Defendant has lost an opportunity to advance a positive case by being deprived of potentially exculpatory evidence that may be contained in those unexamined computers. For this she relies in particular on the case of Gajree 20 September 1994, No 94/3269/Y2 wherein the court stated:

> *"We are satisfied that because of the passage of time and the inertia of the police officers, this appellant was deprived of evidence that might otherwise (have) been available to him, and in our view, renders the verdict in the case unsafe and unsatisfactory."*

103. Simmons J also noted the Crown's response in the following terms which she accepted:

"*6. Ms. Clark submits that notwithstanding the 3 years between the last date of the commission of the offences and the commencement of the prosecution, that could not be described as such a delay as would result in prejudice to the Defendant. To the extent that it could, she contends that it could be cured by a direction to the jury on the possible effects of the delay.*

7. She refutes the defence assertion that the other computers in the case, which were returned to the defence (sic), were not analyzed. She states that they were, and that no criminal activity was found in them. She alleges that the defence is attempting to rely on gaps in the prosecution case, which is a common occurrence and should not be relied upon. For that she relies on R (Ebrahim) v Feltham Magistrates Court – para 27 and Paul Barry Taylor v R [2013] EWCA Crim 2398.

8. Ms. Clark submits that the fact that potential evidence is lost is not sufficient in itself to justify a stay of prosecution. She argues that the defence is entitled to make any point that they may wish to concerning the absence of evidence from the other computers or any faults of the police investigation to the jury. She contends that the trial process is

> *equipped to deal with it. She relies on Christopher Mero Allan [2017] EWCA Crim 2396.*
>
> *9. For these reasons the Crown's case is that whatever delay there has been in this case does not amount to an abuse of process; that in any event any concerns that the defence has can be cured by a direction to the jury and there has been no serious prejudice caused to the Defendant*."

104. In my view the trial process in the case has vindicated Simmons J's acceptance of the Crown's response. First, it is to be noted in this regard that Ms. Christopher renewed her abuse of process stay application before the trial judge. At page 566 to 567 of the transcripts the judge is recorded as having refused that application, having found that there were no exceptional circumstances in the case to warrant exercise of the discretion to stay. The concerns raised before this Court by Ms. Christopher remain essentially the same: (i) that records of Facebook accounts procured in the name of the Appellant by an unknown third party and with which Q in particular must have been communicating, are, due to the passage of time, no longer available despite his best efforts to recover them. Had they been available, he would have been able to persuade the jury that that third party was not only the person who coerced Q (and for that matter T) into complying with the blackmailing demands but must also have been the person who coerced them into sending the videos of themselves which found their way into his laptop. (ii) That the computer equipment which had been taken from the Dem Biez premises had been prematurely returned to Shomari Warner on behalf of Dem Biez (mistakenly noted by Simmons J above as returned to the Defence) without the Defence having had an opportunity to examine them and had they done so, it is reasonably likely that material may have been found tending to show that someone else within the group was responsible for the blackmailing attempts.

105. I agree with Mr. Duncan that both of these two propositions were fully canvassed before the jury and must have been rejected by them. As to the first, the jury would have seen that Q was firm and clear in her responses in cross-examination that the Appellant was indeed her interlocutor on Facebook because the conversations had by that medium would later also continue in person. She was clear that his threats of discontinuance of her engagement with Dem Biez should she refuse to comply with the blackmailing demands, took place in person. His denial of knowledge of the blackmailing was also undermined by the conversation between himself and Q recorded in his acknowledged Facebook account Defence Exhibit 1, where (at page 99 of the Additional Documents Record) she confronts him with the fact that she had been telling him about it "from day one". T, for her part, also confirmed in cross-examination that her own experiences of blackmail were discussed with members of Dem Biez, including the Appellant. Ultimately however, whether Q or T had confided in the Appellant and been persuaded to comply (or not persuaded not to comply) would have been

simply tangential to the question of how the damning images and videos came to be in the Appellant's laptop and iPod. The jury were directed as to the pivotal significance of the computer evidence. The absence of Facebook records for the Cahlii Smith account and limited availability of records of the Cahlii S Smith account, the latter as disclosed by the Appellant himself (see Defence Exhibit 8), provided no basis for the suggestion now raised by Ms. Christopher, that the Appellant was unfairly hampered in his cross-examination of the witnesses. The absence of any such record provides no basis for the suggestion that the jury ought not to have accepted Q's or T's evidence.

106. Nor could there have been any confusion due to the absence of the Dem Biez equipment in light of the clear evidence that they had been examined and found to contain no incriminating material before they were returned. The suggestion that they might have been of assistance to the Defence is therefore merely unfounded speculation. The same must be said of the argument that the Appellant was somehow disadvantaged in the presentation of his defence by having had a copy of the laptop hard drive no earlier than 2021. That was still two years before the trial commenced. DC Richardson's statement and Loryn Bell's reports were provided respectively even earlier in 2019 and 2021. Ms. Christopher had been afforded access to a defence expert and no suggestion was raised at trial that more time was needed for consultation due to the prosecution's evidence having been disclosed late.

107. Ms. Christopher in Ground 2, also complains that the trial judge failed to consider or direct the jury as to the impact of delay upon the Appellant and the fairness of the trial. The effect of my analysis above, is that this complaint is unfounded in the absence of showing of some specific prejudice of the kind alleged in relation to cross-examination of witnesses or the absence of computer equipment. As the Record reveals, there was detailed and extensive cross-examination of the prosecution's witnesses by Ms. Christopher. In about as thorough a defence statement as could be made, the Appellant, while accepting that the laptop and iPod were his, denied blackmailing the complainants and specifically denied seeking the compromising images of them. He was permitted to, and in fact did, fully and fairly present his defense at trial and that defense I accept, as Mr. Duncan submits, was fully and properly left by the trial judge for the jury's consideration, with appropriate directions in particular as to the standard and burden of proof. But, in any event, as Mr. Duncan also points out, the trial judge was not oblivious to the possible impact of delay in the general sense upon the presentation of the Defense.

108. At Record of Appeal, page 66 and following, he reminded the jury that the case was "*of some vintage*" and that the complainants "*were recalling things from what occurred at the time.*" He observed that it was "*the same thing with the defendant – going back and recalling things from some time ag*o". He also urged the jury to "*maintain a sense of perspective and proportion*" and remember "*what I said when people say that "I can't recall" They are not*

necessarily being difficult. Especially in a case which is over a period of time, because the accused has said "I don't recall that", is that unreasonable given the passage of time? Or because other witnesses for the Crown came and gave evidence and at times they also said, "I can't recall that" You may well conclude that that is not necessarily being evasive or trying to duck the question. They simply do not recall. That would be drawing on reasonable experience with regard to all of us trying to recall things that happened some time ago."

109. Further, with respect to the evidence of witnesses, and particularly in light of Ms. Christopher's emphasis upon the witnesses' ability to recollect rather than any suggestion of fabrication of their evidence: "*People sometimes do not see the same things in the same way. They sometimes see things from different angles, and their memories and recollections are sometimes different. That may not necessarily mean that they are lying, not at all. They may be mistaken, or confused, or, particularly in this instance, just forgetful."*

110. Specifically as delay is said to be of significance in the case, the judge directed the jury at page 70-72 of the Record of Appeal in part as follows:

> "*I am just going to touch again on delay. That is something that you should keep in the back of your minds. It is a constitutional issue with regard to it, like trials being brought at a reasonable time, and that it is much fairer… The wheels of justice should not spin slowly. Sometimes they do. In cases involving children where things have happened to them when they're younger, they might not make complaints for years down the road until they are adults and they get the courage up, you know, to do that. In cases involving murder and all kinds of other things the crimes may not be discovered or figured out for years down the road when the cases are brought. They can be twenty years old. It does happen. But that is never ideal. Part of the concerns and the issues in this case for the Defense and that the defense raise is that it is alleged to have happened in part potentially ten years ago, and that the complaint was made many years ago and the police had the evidence many, many years ago, and that here we are now in 2023 and it is just coming to trial. And with regard to being able to properly assess all of the computer evidence and the hacker evidence and all these types of things, that this has made it difficult, that the delay has caused issues in that regard, and caused issues more particularly on witnesses' memory and their credibility. You have to assess how the delay, if at all, has impacted on any of the evidence so that you can feel sure about it.*
>
> *The complainants did make statements when they were still children, and they come to court and they were questioned in relation to some of those things. You don't get the statements, because you have to remember that the evidence is what they say from the [witness] box. But part of that is when you get the evidence when asked the question*

in particular – I will give you some examples of these- and the answer is "I don't recall", that's not much use to you. It's not a denial. The Defence is saying that they don't recall. So you can't rely on what that was. There are a number of examples of that. There are also a number of other examples where the complainants are saying, "No, I entirely recall that very specifically. That is what I said in my statement. That is what I am saying here. That is the way it happened" That is the evidence and then you have to carefully assess that: "Can I feel sure about what the evidence is that they've been saying?" [Q] is a good example of that in the sense of saying that she went to him and told him these things were going on, and he told her to basically carry on doing it. That is key evidence for you to assess. Even then you don't automatically jump to that means he is guilty. Was he protecting her as a singer, and the record label? Or was he a younger man and wasn't thinking through it very clearly. Or does it mean something more nefarious, as the Crown would have you say, that he was taking advantage of that situation. Remember that the Defence's position on that is that it didn't happen at all. It is not an explanation for that; they're just saying that that didn't happen like that, that it never happened.

But the delay is something in analysing all of this and bringing your own common sense to the table that you have to weigh and have regard for, depending on what it was…"

111. Both Ms. Christopher and Mr. Duncan rely upon *Regina v PS* [2013] EWCA Crim 992 which they describe as the leading case on the subject of delay affecting a criminal trial. In that case, the English Court of Appeal affirmed the convictions of an appellant who had complained of the thirty-four year delay in the bringing of charges of sexual offences against him. The sole issue before the Court was the adequacy of the trial judge's direction to the jury on the approach they should take to that very considerable delay. The Court of Appeal upheld the conviction in question but made the following observations on which Ms. Christopher especially relies (at [37]):

"*Although viewed globally the judge's direction contained all the essential elements he needed to include when directing the jury on this issue (ie: as earlier described by the Court at [35] how delay might impact the defendant's ability to present his defense), we do not consider that it was necessarily structured in the most appropriate way, given the circumstances of this case. As with the direction on the burden and standard of proof, the direction regarding delay – **as it affects the defendant** – is designed to ensure his criminal trial is fair. The courts have decided that even very considerable delays in bringing prosecutions can, save exceptionally, be managed in the trial process. But this is often (although not necessarily always) best addressed by a short, self-contained direction that focuses on the defendant rather than*

> *amalgamating it with other aspects of the relevance of delay, for instance as regards the victim or victims. The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that the direction, as the principle (sic) means of protecting the defendant, is diluted and its force is diminished."*

112. While I recognize and endorse the cogency of that statement of principle, there are other observations of the Court[6] which unsurprisingly also emphasise the importance of assessing each case according to its peculiar circumstances. Mr. Duncan extracted them helpfully in his written submissions at [23] to [25]. Ultimately, we recognize and endorse the conclusion in *PS* [24], that "*no two cases are the same and whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case. We stress, therefore, that the need for a direction, its formulation and the matters to be included will depend on the circumstances of, and the issues arising in the trial*."

113. In the circumstances of the present case, where no real prejudicial impact of delay was identified or articulated before the trial judge but only in general terms as argued before this Court, I am unable to conclude that his directions on delay were inappropriate or inadequate.

Ground 4- ***Although the learned trial judge was correct in deciding that the subject matter of the evidence given by Loryn Bell required an expert to deliver it, he was wrong in deciding that Loryn Bell was qualified to be a witness that could deliver it.***

114. It must first be noted that the admission of a witness to testify as an expert is a matter of discretion for the trial judge. A threshold question for the judge will be whether the opinion to be given is on a subject calling for expertise, which a lay person such as a juror, could not be expected to possess to a degree sufficient to understand the evidence given in the case. Albeit only after Loryn Bell had begun her testimony, it nonetheless became apparent that her evidence was of sufficient technicality as to give rise to that threshold question. No objection had been raised beforehand by the Defence although her reports, contained in formal witness statements, explaining her experience and expertise and the kind and extent of the evidence she would give, had been disclosed to the Defence respectively in 2019 and 2021 and so, some years before the trial commenced. The Defence had therefore had ample opportunity to instruct its own expert to scrutinize Loryn Bell's reports and, as we have seen, had in fact done so. There was therefore no concern that the Defence would not have been afforded "equality of arms", which would have been another consideration for the judge. See *Blackstone's* 2023 Ed. A7.92, citing *Bonish v Austria* (1987) 9 EHRR 191. Once the question of her expertise was raised, her experience (including having given prior testimony as an

[6] Citing earlier dicta from *Henry H* (1998) 2 Cr App R 161, per Potter LJ at [21] and *Brian M* [2000] 1 Cr App R 49, per Rose LJ at [23]

expert) and technical qualifications were explained to the trial judge. The trial judge's decision ultimately to admit Loryn Bell as an expert competent to testify as she did[7] must be viewed in light of all the foregoing. There appears no basis for the criticism that his decision fell afoul of the principles pronounced in *Lutterell* [2004] EWCA 1344 at [32].

115. There is moreover, no suggestion at trial by Ms. Christopher that Loryn Bell's opinions or conclusions were wrong or unreliable. As discussed above, the cross-examination of this witness proceeded largely on the basis of propositions from Ms. Christopher with which the witness ultimately agreed and Ms. Christopher's address to the jury adopted and relied upon those agreed propositions. They were, in fact uncontroversial. Loryn Bell, with reference to the metadata, explained her evidence about the creation, modification and access dates of the incriminating files and the downloading of files, matters squarely within the ambit of her expertise and permissible scope of her testimony. Had this been regarded as controversial, the Defence could have called its expert in rebuttal but clearly saw no need to do so.

116. It must however, be recognized and accepted that Loryn Bell's reports did not contain any declaration that she understood her duty to the Court to give independent evidence, whichever side it may favour. There was no statement that if there was any material which weighed against any proposition which she was advancing then it was her duty to bring that evidence to the attention of the Court. That a declaration in such terms (reflecting the duties of an expert witness as enumerated by the Privy Council in *Myers v R* [2015] UKPC 40 at [59]) is now to be regarded as a standard requirement of experts, before they might be tendered to testify as such, appears to be settled practice for Bermuda since the decision of the Privy Council in *Julian Washington v R* [2024] UKPC 34, delivered on 17 June 2024 and so after the trial in the case. See [58] of the Privy Council's judgment in that case.

117. But failings of formality, if as such it may be regarded here (and which are to be avoided in the future) are not the gravamen of the Defence's concerns. The true position as I discern it, is that Ms. Christopher now seeks to re-litigate the significance of the expert evidence by way of argument and without having adduced any contrary evidence from her expert[8]. A pronounced example of this appears from her written submissions at [27] to [28] and following:

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[7] This, as we have seen above, followed on very lengthy exchanges between counsel and the Court. Moreover, in his written submissions Mr. Duncan states that (although not apparent from the Record) a formal *voir dire* was held, including arguments on the legal principles. Ms. Chrisopher asserts in her written submissions that no formal *voir dire* was held and, there is some indication in the judge's ruling which followed at pp 289 to 290 of the Transcripts, that he did not consider there was a need for a formal *voir dire*. What we do have is that ruling in which he concluded that Ms Bell should be declared "*an expert witness in intelligence analysis and digital analysis, including the analysis of various digital devices, computers, phones and so on*".

[8] I note that in her written submissions Ms. Christopher at pp17 to 19 also raises criticisms of the evidence of DC Nigel Richardson but seems to have abandoned those in favour of her criticisms of Loryn Bell's evidence

"*27. The metadata dates were very important as there was a password change that occurred on the computer cited as 26 December 2013, at 15.03.47. But a password change can be from having no password to having a password. According to the Appellant, he did not have a password on the computer (page 436 of the Supplemental Record) after he received it. How and when the files came into existence was very important and that (is) why it was important to ascertain what the metadata meant...*
28. The iPod contained inappropriate thumbnail images and also voice notes, but they suffered from the same metadata issues as identified above. As well he had thumbnails which he described as left over when images of the complainants went viral and he viewed them – page 443 of the Supplemental record.
29. What Loryn Bell gave evidence about was interpretations of forensic artefacts. Yet she could not speak adequately to the meaning of the forensic artefacts – the implications of metadata. Parasitic on this was the Frostwire downloads. We have supplied excerpts from her evidence that demonstrate the nature of the evidence she sought to give in Annex 1. It also shows her limits as she had to 'do homework.'
30. She confirms in chief that:

- *Frostwire/Limewire downloads continue automatically once started.*
- *Files were downloaded during certain date ranges.*
- *Files were associated with particular activity.*
- *She really could not assist with how the attribution (ie incriminating) images came to be on the laptop or when.*
- *The locations of files were significantly different.*

31. This involved drawing an inference from forensic artefacts that she was not qualified to do.

File date + application + timing = download event. She could not really account for the downloading events. That would have been a true forensic computing conclusions (sic).
32. If the interpretative step from file event to human actor is unsound or insufficiently scrutinized, the attribution inference is unsafe. She could not situate a human person in time, let alone be able to ascribe the computer activity to a particular person. That interpretive step was central to conviction in this matter. The trial court:

- *Did not clearly distinguish descriptive from interpretative evidence.*
- *Did not confine the scope of permitted opinion.*
- *Did not scrutinize the technical basis of attribution inference.*
- *Allowed metadata interpretation to underpin circumstantial evidence.*
- *33. The presence of files was not disputed. The issue was knowledge and authorship. The Crown case depended upon a chain:*
- *Creation date > Download event > User activity > Knowledge.*

33. If that interpretative chain is unsound, the case collapses. This ground concerns the way in which the evidence of Ms. Loryn Bell was admitted and used in relation to

> *metadata- specifically creation dates, modification dates, download activity, and user profile placement. The issue is not whether dates appeared on the screen. The issue is whether the interpretation of those dates was expert forensic opinion central to attribution – and whether it was properly scrutinized.*
> *34. Though the learned trial judge recited much of the evidence, he failed to indicate how the evidence adversely impacted the Crown's case and how it could support the defence. He failed to see how the use of software could devastate their case by impacting dates, or that because an attribution file appears in the same folder as a pornographic folder it does not mean that the Appellant placed it there. He did not explain the limits of the evidence. The Appellant's case was not properly put to the jury."*

118. All of these criticisms are in my view misplaced and misconceived.

119. So far as Loryn Bell's evidence is said to have attributed any of the incriminating images found on the laptop to the Appellant, that is simply incorrect. The inferences to be drawn from her evidence as to when creation of files, access to or modification of them or downloads occurred, was properly a matter for the jury having regard to all the circumstances of the case, including the Appellant's ownership and control of the laptop at relevant times. Loryn Bell did not purport to opine as to whether it was he who did any of those things. So too must be regarded her evidence of finding material peculiarly related to the Appellant on the laptop accessible by the same route as the password protected files in which the incriminating images and videos were found. That evidence was not by way of her in any way attributing anything to the actions of the Appellant. She was simply reporting what she found on the laptop. The implications of all that was a matter for the jury to consider and was properly so left to them by the judge, including with directions on the presumption of innocence, the nature and meaning of circumstantial evidence and the drawing of inferences adverse to the Appellant. See in these regards, Record of Appeal page 60 line 31 to page 61 line 5; page 64 lines 13-27; Record of Appeal, page 61 line 6 to page 63 line 25. I agree with Mr Duncan's submission that the prosecution's experts (Loryn Bell in particular) did little other than present in a neutral manner unchallenged evidence about the existence of incriminating files on the laptop accepted to have been owned and used (albeit only, at material times for charging his iPod) by the Appellant. The Appellant still accepts on appeal, as had been accepted at trial, that "*The presence of files was not disputed*." See Submissions on Appeal at page 36. Attribution was therefore an interpretative exercise for the jury, with reference to other surrounding circumstantial evidence including opportunity and motive.

120. If, as Ms. Christopher now asserts, Loryn Bell's evidence was capable of undermining the prosecution's case, by for instance "*as to how the use of software could devastate their case by impacting dates*" (see her [35] above), one would have expected her to call expert

evidence to ground such an argument. It is not a proposition that she can now simply raise in argument, still less one she can properly raise for the purpose of criticizing the judge's failure to address it with the jury when there was no expert evidence to support it.

Ground 5. ***The learned trial judge erred in failing to assist the jury with respect to how the evidence in the case and particularly the Appellant's defence impacted the evidence that Loryn Bell gave, particularly on the topic of attribution, which appears to have contributed to his failure to fully put the Appellant's defence and making comments tending to diminish the Appellant's defence.***

121. Here too Ms. Christopher seeks, improperly in my view, to introduce new technical evidence without a proper foundation where she submits as follows (from page 36 [3] to [5] of her written submissions):

> "*3. The entire defence case was that the Metadata mechanics are complex*
> - *Creation date ≠ necessarily download date.*
> - *Modification may generate new creation date.*
> - *Copying between drives alters timestamps.*
> - *Access may be triggered by system process.*
> - *Synchronisation may generate artefacts automatically*
>
> *4. The invitation to the jury to "work backwards" totally reverses the burden of proof. It substitutes opportunity for culpability. That should be enough for the Court to find on this ground. It is incidental that the prosecution case on this point was severely undermined by cross-examination so that the building blocks of opportunity cannot stand.*
>
> *5. The summing-up initially rehearsed technical metadata mechanics. However the later direction that the case was "really not that complex" and that the jury could "work backwards" from the presence of the files to timeframe and access materially understated the forensic uncertainties central to the defence. The direction did not clearly separate system-generated artefacts from human agency. In a case resting entirely on circumstantial digital attribution, that simplification created a real risk that the jury equated file artefacts with culpability.*"

122. What Ms. Christopher appears to be suggesting by these submissions, is that the relevant images or videos could somehow have been created or otherwise found their way into the Appellant's laptop by way of "*system-generated artefacts*" other than by way of "*human agency*". There is no evidential basis for that suggestion. No such suggestion was put to her and nothing that Loryn Bell said provides a foundation for it. Had Ms. Christopher had such a theory in mind as part of the defence, she would have been obliged at least to raise it with Loryn Bell and if rejected, call her expert to support it. That was not done.

123. It follows that her criticism here of the judge's summing-up is also misplaced. The case was indeed "*not that complicated*." The real issue regarding the laptop was who was responsible for the incriminating images and videos found on it. By the approach of "*working backwards*" it is clear that the judge was simply inviting the jury to consider the relevant time-frames, including from when the laptop was recovered from the Appellant, the download, access or creation dates of incriminating material found on it as revealed by the metadata, and the times of the events described by Q and T. Loryn Bell's evidence regarding the metadata was factual evidence of what she found and her opinion of its significance, and it was entirely appropriate for the judge to invite the jury to have regard to it as part of their working backwards exercise in considering whether, in all the circumstances of the case, someone other than the Appellant could have used the laptop in the ways it was used. That was very much an issue of fact for the jury in their determination of the identity of the blackmailer.

Ground 6- ***The learned trial judge mis-stated the evidence, the effect of which was unfair*.**

124. The sum of Ms. Christopher's argument here is that the judge in his directions to the jury unfairly emphasized the Appellant's Facebook comment to Q that he was "not stressing" despite the embarrassing image of his girlfriend Dejah and himself having been posted to Q with a threat of wider publication. Ms. Christopher relies on the fact that during extensive cross-examination on this issue by Mr. Duncan (see pp 442-451 of the transcripts) the Appellant had in fact said, as he had in examination in chief (as to the latter see p409 line 28 of the transcripts) that he was indeed stressed about the matter.

125. 124. I have considered this complaint about the judge's direction in its full context and conclude that the criticism is unjustified. The judge's comments appear at the Record of Appeal at page 158-159. They are made in the context of his reminding the jury of the prosecution's view of this evidence, as evidence of the Appellant's manipulative control of Q and T and of the circumstances surrounding the release, not only of the images and videos of them, but also the fact that he was the person who recorded (and so must have had control of) the video of his girlfriend and himself. Hence the suggestion during his cross-examination by Mr. Duncan (at pp 442-451 of the transcripts) that he was the person who sent the image to Q.

126. That was a permissible reminder of the evidence and the prosecution's reliance on it. But the judge did not fail also to remind the jury of the Appellant's rebuttal that he was indeed stressed by the incident. See p 167, lines 1-6 of the Record of Appeal.

Ground 7: ***The learned judge erred in his ruling dated 7 April 2021 by deciding in answer to the Appellant's section 31 application at paragraph 20 that the sexually explicit images and or video recordings allegedly sent to the Appellant by each of the complainants constitutes property for the purposes of section 330(2), 334(1) and 355 of the Criminal Code.***

127. I regard this not as an appeal from the judge's ruling of 7 April 2021 (which was not placed before us) but as a ground of appeal against conviction on what are said to be legally unsustainable and invalid counts on the indictment. That state of the matter is said to have arisen from the statutory requirements of the offence of blackmail which, on the facts of this case, Ms. Christopher asserts, could not be met. Her point is that the digital images found on and recovered from the Appellant's laptop and which are the subject of the Blackmail counts on the indictment (Counts 1 and 2) are not property within the meaning of section 355 as read with section 344 (1) of the Criminal Code Act 1907 (the "Criminal Code").

128. The enquiry must therefore begin with the provisions of the Criminal Code itself. Section 355 (which comes within Chapter 2 of the Criminal Code) declares that:

> *"(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose, a demand with menaces is unwarranted unless the person making it does so in the belief -*
>
> *(a) that he has reasonable grounds for making the demand; and*
>
> *(b) that the use of the menaces is a proper means of reinforcing the demand.*
>
> *(2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.*
>
> *(3) A person guilty of blackmail shall be liable on conviction on indictment to a fine of $250,000 or imprisonment for fourteen years or both*."

129. Section 330 (1) states that "*Sections 334(1) and 335(1) shall apply generally for the purposes of this Chapter as they apply for the purposes of section 331*." [which section prescribes the offence of Theft]

Section 330 (2) states:

> *"(2) For the purposes of this Chapter -*
>
> *"gain" and "loss" are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and -*
>
> *(a) "gain" includes a gain by keeping what one has, as well as a gain by getting what one has not: and*

> *(b) "loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has;*
> *(c) "goods", except in so far as the context otherwise requires, includes money and every other description of property except land, and includes things severed from the land by stealing;*
> *"deception" has the meaning given in section 345."*

130. Finally, and of pivotal importance on this point, Section 334 (1) states: *"Property includes money and all other property, real or personal, including things in action and other tangible property."*

131. It is acknowledged that the definition of Blackmail as set out above required the prosecution to prove (i) that the Appellant made unwarranted demands with menaces and (ii) that he did so, on the allegations in this case, with a view to gain for himself. It is also acknowledged that the gain to be obtained by him (from the unwarranted demands with menaces) related to "*money or other property*" and that property "*includes money and all other property, real or personal, including things in action and other intangible property*". It must also be uncontroversial, as the Criminal Code so states, that property "*shall be regarded as belonging to any person having possession of it, or having in it any proprietary right or interest*." Property therefore includes all property, not only money or other asset of monetary or tangible value but also intangible property which may or may not have monetary or tangible value.

132. As Mr. Duncan submits, the statutory purport reflects longstanding jurisprudence and is intentionally wide. As explained by Lord Watson in *Dilworth v Commissioner of Stamps* [1899] AC 99 at 105-106, the word "i*ncludes*" "*is used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include*."

133. Similarly, as Lord Selbourne LC observed in *Robinson v Local Board of Barton-Eccles* (1883) 8 App Cas 798 with reference to the word "*includes*", " *An interpretation clause of this kind is not meant to prevent the word from receiving its ordinary, popular and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or subject matter to the contrary, to be applied to some things to which it would not ordinarily be applicable*."

134. I agree with Mr. Duncan that the word "*property*" therefore retains its wide original meaning, derived as it is from the latin "*proprius*" meaning "*one's own*", something belonging

specifically to a person. Viewed in this broad inclusive way as the Criminal Code on its face requires, it is difficult to see why a most intimate video recording of a person's nude body would not come within the statutory meaning as being that person's property – either as something owned by that person or as something in which she or he has a right or interest.

135. Cases cited by Mr. Duncan show that the natural meaning has gained strong currency in judgments of the English Courts, when sentencing for offences (among others) of blackmail proscribed by identical statutory wording[9] as that in the Bermuda Act. Indeed, the natural meaning appears to have been taken as an accepted premise for conviction and sentence, in circumstances similar[10] to the present case, without the need for debate as to whether the pictures or video images involved constituted property within the meaning of the statute. See *R v Robert Sinclair* [2015] EWCA Crim 265; *R v Aaron Martin Honey* [2015] EWCA Crim 371 and *R v Paul George Leighton* [2017] EWCA Crim 2057 (a case of sentencing before the English Court of Appeal).

136. That approach to the law has found still further acceptance in the English Court of Appeal. In upholding sentence for offences of blackmail (and other related offences) following guilty pleas in *Regina v Mathew Alexander Falder* [2018] EWCA Crim 2514, the Court per Holroyde LJ, commented as follows:

> "*10. From 2010 (the applicant) began to use the internet to commit blackmail and other serious offences. It is a feature of his offending that he displayed considerable technical skill in ensuring, by use of false names, encryption, untraceable email addresses and the dark web, to avoid being detected and identified...*
> *12. ... As an illustration of what he did with the recordings (which he had obtained by use of hidden cameras), he hacked into the Facebook account of one of his victims, and replaced her profile picture with an image which he had recorded of her naked. He sent emails to another of his victims attaching naked pictures of her, saying that unless she responded he was "going to share this". He retained the recordings, which were found on his computer on arrest.*
> *13. The second category of offences involved blackmail, sexual exploitation, fraud and distribution. These offences involved the ruthless targeting by the applicant of more than twenty victims, most of them female and aged under 18. One of his victims was aged only 13, others aged 14 and 15.*
> *14… Once his selected victim had been induced to provide initial images, the applicant asked for more. He continued to offer (but never actually to make) payment. Having*

[9] See section 21 of the Theft Act of England and Wales
[10] Ie: *the blackmailers demanded nude pictures or videos of their victims with threats to publish others they had already obtained if they did not comply.*

> *acquired the images he wanted, he then used the threat of disclosing them to family, friends and neighbours to blackmail his victim into obeying his commands.*
> *15. In contrast to many blackmailers, the applicant does not appear to have been motivated by financial reward. Rather, he appears to have derived pleasure from manipulating, humiliating and distressing his victims.*
> *16. By way of illustration, he blackmailed a 15-year-old girl into sending him increasingly graphic sexual images of herself, which he then threatened to distribute. He was wholly unmoved by her pitiable pleas to be left alone. When she told him that she had informed her parents, who were going to report the matter to the police, the applicant's response was to boast about the fact that he could not be caught and to increase his blackmail threats…*
> *17. Other victims of the applicant's blackmail were required not only to provide sexual images of themselves but also to engage in utterly degrading and demeaning conduct…*
> *18. An illustration of another way in which the applicant used the product of his blackmail relates to one of the victims whom he had covertly recorded in a voyeurism offence…"*

137. In the outcome of the appeal, the three distinct blackmail offences for which the applicant Falder was charged pursuant to section 21 of the Theft Act, were dealt with by way of terms of years of imprisonment without any suggestion that the charges were unfounded because no property within the meaning of the statute was involved.

138. The specific question whether indecent images coerced by unwarranted demands and sent electronically as digital files are "*property*" within the meaning of the Theft Act for the purposes of blackmail offences, has been the subject of consideration by the Crown Court of Northern Ireland. In a brief, clearly reasoned judgment (per O'Hara J.) dismissing the application for discharge of the indictment (termed a "No Bill"), the Court found as follows:

> *"[17] In my judgment the application for No Bill on the blackmail charges must fail because in each case the images which the defendant is alleged to have obtained from his victims with menaces were property within the meaning of section 4 of the Theft Act.*[11] *I agree entirely that the intuitive response is not necessarily the legally correct one but in this case I believe that it is.*
> *[18] The authors of the LQR article*[12] *were concerned about the effect of the Supreme Court [of New Zealand] decision on copyright law. With respect, that is irrelevant. Their approach is to my mind unduly and unattractively narrow and legalistic and sits uneasily with their concession that "some may plausibly argue that social and*

[11] Expressed in identical terms to section 344(1) of the Bermuda Act and section 21 of the Theft Act of England and Wales.
[12] Entitled "*Digital files as property in the New Zealand Supreme Court: innovation or confusion?"* LQR 2016, 132 (Jul) 394-399

> *economic cha(n)ges demand that digital files be recognized as the object of some new form of intangible property …"*
>
> *[19] Finally, on this issue I agree with the prosecution submission that it is appropriate to acknowledge that at least two cases of blackmail have been considered by the Court of Appeal in England and Wales in respect of sentence – R v Falder [2019] 1 Cr App R (S) at page 309 and R v Leighton [2017] EWCA Crim 2057. In each case the defendant pleaded guilty to offences of blackmail involving indecent images. In neither case was any issue taken that the charges should fail because no property was involved. It does not follow automatically from these cases that the property issue raised in the present application for a No Bill should fail but in my judgment those cases support the contention that on any proper analysis digital images are property as defined by the Theft Act."*

139. The referenced decision of the Supreme Court of New Zealand was that in *Dixon v The Queen* [2015] NZSC 147. The question before that final appellate court was whether CCTV file images downloaded from a computer by Mr Dixon for a dishonest purpose and without the permission of the owner were property within the meaning of section 249 (1)(a) of the Crimes Act 1961. That section provides that a person commits an offence if he or she "*directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right … obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration.*"

140. For the purposes of section 249(1)(a), "*property*" is defined by section 2 of the Crimes Act as including: "*real and personal property, and any estate or interest in real or personal property, money, electricity, and any debt, and any thing in action, and any right or interest*."

141. It will be seen that the different focus of the legislation upon dishonest access to computer systems notwithstanding, the issue was the same as that arising here under section 355 of the Criminal Code as it relates to the offence of blackmail – that is, whether data created and kept in electronic or digital form on a computer can comprise property within the meaning of the legislation[13].

[13] This is as the Supreme Court itself declared at [6], [33] and [50] of its judgment. The factual background comes from [1] and [2] of the judgment: The data in question comprised CCTV footage of Mr Mike Tindall, a relative of the Queen and vice-captain of the English rugby squad then on tour in New Zealand, and a female companion, as they were recorded socializing in a bar and later leaving the premises together. The appellant Dixon worked for a company which provided security services at the bar. He obtained a compilation of the relevant CCTV footage and attempted, unsuccessfully, to sell it to overseas media interests. He eventually posted it on a video-sharing site, which resulted in a media uproar.

142. Consonant with my conclusion above in relation to the definition in the Bermuda Criminal Code, the New Zealand Supreme Court held at [11] in relation to the meaning of "*property*" that:

> "*As can be seen, the definition is:*
> *(a) inclusive rather than exclusive;*
> *(b) circular, in that property is defined as including real and personal property" and*
> *(c) in wide terms. In particular, it includes tangible and intangible property."*

143. Further at [25]: *"In this case we are concerned with the dishonest acquisition of property from a computer system under s. 249(1)9a). In that context and in light of the definition of property in s 2, we have no doubt that the digital files at issue are property and not simply information. In summary, we consider that the digital files can be identified, have a value and are capable of being transferred to others. They also have a physical presence, albeit one that cannot be detected by means of the unaided senses. Whether they are classified as tangible or intangible, the digital files are nevertheless property for the purposes of s 249(1)(a)".*

144. And still further at [50]- [51], after a survey of New Zealand, Australian, English and United States case law:

> *"[50] The key question for us is whether the digital files are "property" for the purposes of section 249(1)(a) rather than whether they are tangible or intangible property, given that the definition of "property" in s.2 includes both tangible and intangible property. What emerges from our brief discussion of the United States authorities is that although they differ as to whether software is tangible or intangible, they are in general agreement that software is "property". There seems no reason to treat data files differently from software in this respect. Even though the English Court of Appeal[14] considered that an electronic database was not tangible property capable of being converted, it acknowledged that it might be property.*
> *[51] Like the Court of Appeal, we consider that conduct such as Mr. Dixon's is clearly within the statutory purpose of s 249. However, we think it a more natural interpretation of s 249(1)(a) to say that Mr. Dixon took "property" when he downloaded the compilation of digital files to his USB stick and deleted them from the desktop computer than it is to say that he acquired a "benefit" [(as the Court of Appeal had instead held)]. A benefit is an "advantage, "good" or "profit"[15] and it was not clear at the point he acquired them whether Mr. Dixon obtained any advantage or*

[14] In *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, per Moorebick LJ who delivered the principal judgment addressing the question whether a database represented tangible property of a kind that is capable of forming the subject-matter of the torts, such as conversion, which are concerned with an interference with possession.
[15] Citing the Shorter Oxford English Dictionary meaning.

> *profit from having the files: at best he acquired something that was potentially of advantage or profit to him. We consider that interpreting the word "property" as we have is not only required by the statutory purpose and context but is also consistent with the common conception of "property*".

145. It is clearly appropriate to take the same view of the meaning of "property" for the purposes of the offence of blackmail, where as we have seen, and is all too notoriously the case, the criminal vice to be deterred, is the obtaining by menaces of sensitive digital images and the abuse of them to the detriment of the victims. Whether the images are in tangible form (such as hard copy photographs or film) and can be traded for profit or intangible form such as digital datafiles on a computer (which can equally be traded for profit), is irrelevant to the purposes of the legislation, which is to deter the criminal conduct.

146. Indeed, as we have also seen from the decided cases, often the motive of the blackmailer is not monetary reward but the ability to manipulate, embarrass and control. Whether or not he is successful in doing so or in obtaining some other tangible reward, is irrelevant to the criminal modalities deployed, which are what the Criminal Code seeks to proscribe. In this regard it is worth noting the views of the learned editors of *Blackstone's* 2023 Ed at B5.52 that: "*The definition of the offence of blackmail in the Theft Act 1968, 2. 21, is deliberately drafted in such a way as to penalize the making of the blackmailing demand, rather than the obtaining of property or the intimidation of V. In other words, it is a "conduct crime" in which the consequences or success of D's behaviour form no constituent part of the offence*", citing *Pugmore* [2017] EWCA Crim 925, [2018] 2 Cr App R 2 (14) at [30].

147. Despite the weight and clear direction of travel of the foregoing body of jurisprudence, Ms. Christopher seeks to persuade this Court that the digital files containing the incriminating images and video recordings recovered from the Appellant's laptop, do not constitute property within the meaning of the Criminal Code. For this proposition she seems to rely mainly on a distinction between the nature of the data files as comprising merely "confidential information" and what would be the more tangible nature of the subject-matters, had they been in hard copy or other physical tangible form.

146. As she submits at [7] and [8] of her written submissions: *"[7] There is an issue with the meaning of "property" in section 4. While we understand that by virtue of section 330 as read with section 4(1) of the Code, "property" can also mean intangible property, we submit that the Crown must show that what is alleged to have been done in this instance falls within the definition of section 334 and the UK courts have consistently found that it does not. [8] The leading case in this area is the case of Oxford v Moss (1979) 68 Cr. App. R. wherein it was held that confidential information is not a form of intangible property*".

148. In *Oxford v Moss*, the defendant, a civil engineering undergraduate, in May 1976 dishonestly obtained the proof of an examination paper to be held at his university in June 1976. He returned the paper from where he had got it after he had read its contents. He was charged by the university authorities with the theft of the confidential information from the senate of the university contrary to section 1 of the Theft Act 1968. The magistrate dismissed the information [charge] on the ground that there had been no appropriation of "property" within the meaning of section 4(1) of that Act. On appeal by the prosecutor that confidential information could be property "within" section 4(1), it was held by the Divisional Court (sitting in its appellate jurisdiction), that although the defendant's conduct was to be condemned and would be described by a layman as "cheating", the confidential information so obtained by him did not fall within the definition of "intangible property" in section 4(1) of the Theft Act and so could not be the subject-matter of a charge of theft, accordingly, the appeal would be dismissed.

149. *Oxford v Moss* was considered by both the Irish Crown Court and New Zealand Supreme Court in the cases discussed above, for its distinction between confidential information and the medium on which it is written or stored, - giving rise, in the New Zealand case, to the question whether the computer disc would be property but the digital footage (ie: confidential information) on it would not. The Court of Appeal answered that question in favour of the appellant Mr. Dixon but, as we have seen, was reversed by the Supreme Court. In the Irish case, short shrift was given to the defence argument, relying on *Oxford v Moss*, that if a photograph comprising tangible property had been demanded the offence would have been established but as the digital images contained neither tangible nor intangible property, the offence could not be established.

150. I would approach *Oxford v Moss* with equal caution. The Court of Appeal whose decision was reversed in the New Zealand case, even while having been persuaded by it, described it as "*not a closely reasoned decision*" but one which remains good law.[16] It is indeed difficult to see why confidential information which is dishonestly accessed, seen and retained in memory (or perhaps transcribed or photocopied) to the advantage of the culprit and detriment of the owner is not to be regarded as property (however intangible) but the document or other medium on which it is originally recorded is. But be all that as it may, I would refuse to follow *Oxford v Moss* in this case for the further reason that it is clearly distinguishable on the facts. What we have here is not simply "confidential information" of the kind considered in that case. Here we are concerned with the digital and video recorded nude images of complainants obtained from them by menaces, which can be seen (even if necessarily by aid of some electronic device) and which were potentially alterable and publishable, to the detriment of the complainants or advantage of the Appellant.

[16] See R v Mc Cartney (above) at [13].

151. Like the Supreme Court of New Zealand (see [25] of their judgment at [136] above), I have no hesitation in holding that the digital images at issue are property within the meaning of the Act and not just information.

152. In deference to her industry and dedication, I note, in passing, the other case authorities cited by Ms. Christopher in her written submissions – *Douglas v Hello! Ltd (No 6) [2005] EWCA Civ 595; OBG Limited and others; Mainstream Properties Limited v Young and others and another* [2007] UKHL 21 and *Fairstar Heavy Transport NV Adkins* [2013] EWCA Civ 886; *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281 (this last mentioned already above). However, in light of the foregoing analysis based on those cases dealing specifically with the question of the meaning of property for the purposes of the Criminal Code (and equivalent provisions in other jurisdictions) I do not regard these cases, decided in different commercial or contractual contexts, as helpful.

153. Finally on this issue, Ms. Christopher pointed to section 33 of the Criminal Justice and Courts Act 2015 (UK) as having "*created the offence of disclosing private sexual photographs and films without consent ("revenge porn", precisely because the Theft Act did not cover digital images as property*." This is a misunderstanding of the purposes of that section. As stated by *Blackstone's* 2023 Ed. At B18.35: "*The offence was enacted in the 2015 Act to deal with what has come to be known as "revenge pornography" which refers to the publication, typically via the internet, of intimate images of former sexual partners without their consent. The offence was amended by the Domestic Abuse Act 2021, s. 69, with effect from 29 June 2021, so as to include threats to disclose, as well as actual disclosure of private photographs and films*." There is no suggestion that this has anything to do with the intimate images having been necessarily obtained by criminal conduct such as blackmail.

Ground 8: ***The learned trial judge erred in his ruling when he decided that the jury having acquitted the Appellant on count one of the indictment and despite clerical error having acquitted him, he could then resuscitate the count once evidence had been led in the intervening 4 days (May 11 to May 15, 2023). During this time all of the evidence of the main complainant had been completed and some of the evidence of the second complainant had been led.***

154. The relevant background is that after submissions by Ms. Christopher, it was decided by the prosecution that count seven (7) of the amended indictment on which the Appellant had been put in charge of the jury, would be withdrawn. This was immediately prior to the commencement of Q's evidence. The initial arraignment resulting in not guilty pleas to all counts by the Appellant had occurred on 10 May 2023 when the trial began. On 11 May, the prosecution having offered no evidence on count 7, the jury were directed by the trial judge to return a formal verdict of not guilty on that count. There was however, a regrettable but

clear error by the Court Clerk, as the following excerpt from the transcripts of the proceedings (provided by Ms. Christopher in her written submissions) show:

> "*COURT*: *Ladies and gentlemen, Mr. Foreman, we are just going to correct something I had indicated to you about* ***Count 7****, that the Crown wasn't calling any evidence on that basis. So what we're going to do now is, instead of waiting until the end of trial,* ***that count*** *is going to be put to you for deliberation at this stage, and that* ***I'm directing that you must, with respect enter a not guilty plea, on that count, Count 7****, that way you can scratch (it) off the list easier.*
> *CLERK: Mr. Foreman, may you stand please?* ***With respect to count one****, have the jury reached a verdict upon which all 12 are agreed? Please answer yes or no. What is your verdict? Guilty or not guilty.*
> *FOREMAN:* ***Not guilty****.*
> *COURT:* ***That's as easy as it's going to get. Count seven. Thank you. It's done***." [emphases added]

155. Mr. Duncan in his written submissions asserts that the error was realized relatively quickly, and counsel made submissions to the judge in the absence of the jury. This as Ms. Christopher asserts and as shown from transcripts happened four days later on 15 May 2023. The jury, who were in their jury room while counsel addressed the judge, were then invited to return to the courtroom, and the subject of the original instruction on Count 7 was redirected to them for their formal verdict on Count 7 to be received. A formal verdict of Not Guilty was duly returned on Count 7 on which the Crown had offered no evidence and the Appellant duly discharged on that Count. The transcripts[17], show the following comments, among others made then, on 15 May 2023, by the judge to the jury:

> "*Court: .. And I explained to you that it was going to be count 7, which related to the distribution of child pornography. There were reasons for that and so on and so forth, and I told you what they were. And I told you that when the clerk was going to read it to you, so I directed you on the count seven, and that you would have to return a verdict of not guilty. You remember all that, right? So, what happened? We all missed it. The law is my remit, right? So having given you the direction, the clerk, who is just human, she stood up and read out count one to you, not count seven, and you then returned a verdict of not guilty on count one*
> *Court: I take the view that at this stage of the trial, I am not functus from redirecting you on that mistake, which was very, very clearly a mistake with regard to count one. That was not what I directed you to return a count on. I'm not saying you disobeyed me, right? All the wheels came off. I'm smiling because this is how it can happen, all of us in here, everybody looking at it. It all got missed.*

[17] Presented to this Court in tab 21 of the Appellant's binder of authorities.

> *Court: I'm the one that really has to pick up on these things, and I didn't…so we rectify mistakes. It's in the interest of justice. It's in the constitutional interest of justice. It wasn't meant to go that way. It's not unfair to the defendant because now we are going to do it again. We are going to get it right, and there is still going to be a count that is going to come off the indictment, right....*
> *Court:.. So now we are going to redo it again so that count one effectively, because of the error, will stay on for you to consider at the latest stage of the trial. But at this stage of the trial, we are going to give a direction with regard to count 7, which is distributing child pornography contrary to section [182F (2)?] of the Criminal Code. And the clerk is going to read you that count. I'm going to be leaning over here and making sure that it's all read properly.*
> *Court: Then I'm directing Mr. Foreman to return a verdict of not guilty to that count. The other count, in my view, then just stays live for a later stage of consideration. Please make a note so everybody gets that. It's probably not even as complicated as I made it sound, but it's something we have to rectify Right, please read Count 7*
> *Court …Thank you Mr. Foreman. Okay, so just to be clear, count one that is on the indictment that you'll see, still has to be considered by you that relates to blackmail, right? ...."*[18]

155. Despite those emphatic and cautious efforts on the part of the trial judge to rectify the error and allow the trial to proceed as intended, Ms. Christopher submits that there was undue interference in the deliberation process of the jury and that the judge had no authority to interfere so as to restore Count 1, the jury's verdict having been rendered on it. And, as I understand her submissions, if that Count were to be "resuscitated", a new trial, ("*venire de novo*"), would have been required. For these submissions she relies on authorities which emphasise the sacrosanct nature of the jury's verdict and the inviolability of their deliberation process.[19] I will not discuss those cases further because they do not appear to be helpful. It is clear from what transpired that there was no such interference, indeed there was no deliberation by the jury nor any considered verdict following such deliberation with which to interfere.

156. Rather the process involved in the first instance the jury being directed by the judge to return a formal verdict after the Crown determined to offer no further evidence but by clerical error, a mistaken verdict was returned. Thus, no duly rendered verdict was returned as directed by

[18] The outcome of this process appears from the indictment as finally amended on 11 May 2023 (and finally dated and stamped by the Registrar on 29 June 2023-(see page 9 of the Record of Appeal), that after the formal verdict eliminating count 7, count 8 alleging "Accessing Child Pornography contrary to section 182H(1) of the Criminal Code" became the seventh and last count. And it was the indictment as so amended upon which the jury eventually returned their verdict.
[19] Citing Section 5 of *The Administration of Justice (Contempt of Court) Act 1979*, *Mirza* [2004] 1 A.C 1118 and *Pendleton* [2002] 1 Cr App R. 34.

the judge. That which was purportedly returned was a nullity, the effect of which, as the judge correctly in my view determined, was that Count 1 remained unaffected on the indictment on which the Appellant had been arraigned and the jury then enjoined to return a proper verdict. The matter was sought to be rectified by redirection of the judge when the correct formal verdict was duly returned on count 7 and the Appellant acquitted and discharged on that count. At the close of the evidence and closing arguments and in keeping with the final directions of the judge, the jury was required to deliberate and return their verdicts on the indictment as it then stood before them, including count 1.

157. There had been no gap in the hearing of the evidence by the jury and nor therefore, in my view can it properly be said that the Appellant's right to a fair trial was in any way prejudiced by the procedural error.

158. Given the unusual nature of the circumstances under consideration, I note also my acceptance of Mr. Duncan's clear and helpful submissions on this issue at [87] to [90] of his written submissions. They accord with my understanding, as set out above, of the respective roles and authority of the prosecution, the judge and the jury, in relation to the offering of no evidence or no further evidence by the prosecution, on a particular count or counts of an indictment, and the return of a formal verdict by the jury in such circumstances. For completeness those submissions are as follows:

> *"87. The jurisdiction vested in a jury to return a formal verdict of Not Guilty derives from the positive act by the prosecution of declining to proceed with a charge, by either offering no evidence or offering no further evidence. The prosecution in this case offered no evidence on Count 7 and, there being no evidence offered in support of that count, it followed that there was no evidence upon which the jury could have properly returned a [verdict of] conviction.*
>
> *88. The inexorable result of the positive act by the prosecution, of offering no evidence on an indictment's count, is the return by the jury of a formal verdict of Not Guilty on that count.*
>
> *89. A jury's jurisdiction to return a formal verdict of Not Guilty also derives from judicial ruling that a defendant has no case to answer on a particular count. In both cases, the withdrawal of the charge is a condition precedent to the validity of a formal verdict of Not Guilty, where such charge is withdrawn either by the judge or the prosecutor.*
>
> *90. The converse of this uncontroversial proposition is that any charge which is not withdrawn by either the prosecution or the judge remains live. Count 1 therefore remained a live count at the material time, as it had not been withdrawn by any party with the power to withdraw it. The jury was therefore not seised of count 1 and could not validly deliver a verdict upon it at that time. Any purported verdict on Count 1 at*

that stage was a nullity, and did not constitute a duly rendered verdict, as the jury had no jurisdiction at that point in the proceedings to return a verdict on a live count."

The Appellant's entitlement to the good character direction.

159. It remains only to determine the consequences of the failure of the trial judge to give an unqualified good character direction. As noted above from the summary of the case law in *Hunter,* a failure to give a good character direction does not inevitably lead to a quashing of the conviction. The ultimate question is whether a miscarriage of justice has occurred such that the conviction of the Appellant is unsafe and may not be allowed to stand.

160. After consideration of all the circumstances of the case for the purposes of dealing with the issues raised on appeal, I am satisfied that this error by the trial judge was not such as could have eroded the overall fairness of the trial or caused a substantial miscarriage of justice. The evidence, and more particularly the incriminating circumstantial evidence of the images and videos found on the Appellant's laptop, was overwhelmingly probative of his role as the blackmailer. The evidence was such that, however complete a good character direction in his favour might have been given, neither his credibility as a witness nor his hitherto lack of propensity, as factors for their consideration, could, in my view, have persuaded the jury otherwise than to convict.

161. In keeping with the foregoing conclusions, I am satisfied that the appeal should be dismissed and would so order.

Hargun JA:

162. I agree.

Mussenden JA (Acting):

163. I also agree.