Neutral Citation Number: [2020] CA (Bda) 17 Crim

Case No: Civ/2020/7

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATTE CRIMINAL JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2019: No. 011

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 11/12/2020

Before:

JUSTICE OF APPEAL SIR MAURICE KAY (PRESIDING)
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

KENNETH HURF WILLIAMS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Mr. Jerome Lynch, QC and Ms. Sara-Ann Tucker of Trott & Duncan Ltd. for the Appellant

Ms. Maria Sofianos, Office of the Director of Public Prosecutions for the Respondent

Hearing date: 18 November 2020

- -

APPROVED JUDGMENT

BELL JA:

Introduction:

1. On 20 November 2020, we gave judgment allowing the above appeal, quashing the Appellant's convictions and directing verdicts of acquittal. We indicated that we would give reasons for our decisions in due course. This we now do.

2. The Appellant in this case was convicted in the Magistrates' Court by the Worshipful Tyrone Chin on nine counts involving offences against a young female child, as follows:

Count 1
On a date unknown between 8 April 2014 and 20 April 2014, knowingly showed a 12 year old child offensive material namely, sexually explicit and You Tube videos contrary to section 182C of the Criminal Code.

Count 2
On a date unknown between 8 April 2014 and 20 April 2014, whilst being a person in a position of trust, did, for a sexual purpose, directly touch (with the hand) the breast of a young person under the age of 14 years old contrary to section 182B(1)(a) of the Criminal Code.

Count 3
On a date unknown between 5 August 2014 and 28 August 2015 whilst being a person in a position of trust, did, for a sexual purpose, directly touch (with the penis) the buttocks (under her clothing) of a young person under the age of 14 years old contrary to section 182B(1)(a) of the Criminal Code.

Count 4
On a date unknown between 5 August 2014 and 28 August 2015 whilst being a person in a position of trust, did, for a sexual purpose, directly touch (with the Appellant's penis) the buttocks (over her clothing) of a young person under the age of 14 years old contrary to section 182B(1)(a) of the Criminal Code.

Count 5
On 23 January 2016 intruded upon the privacy of a girl, in such a manner as to be likely to alarm a girl and did in fact alarm a girl, contrary to section 199(2) of the Criminal Code.

Count 6
On a date unknown between 5 August 2015 and 23 January 2016, in the Islands of Bermuda, wilfully and without reasonable excuse committed an indecent act in the presence of a child contrary to section 198(2) of the Criminal Code.

Count 8
On a date unknown between 1 January 2015 and 23 January 2016 did directly touch (with the Appellant's fingers) the vagina of a young person under the age of 14 years old contrary to section 182A(1)(a) of the Criminal Code.

Count 9
On a date unknown between 1 January 2015 and 23 January 2016 did directly touch (with the Appellant's fingers) the vagina of a young person under the age of 14 years old contrary to section 182A(1)(a) of the Criminal Code.

Count 11
On a date unknown between 1 January 2015 and 31 December 2015 did directly touch (with the Appellant's body) the body of a young person under the age of 14 years old contrary to section 182A(1)(a) of the Criminal Code.

3. The Appellant was convicted by the magistrate on 15 May 2019 and sentenced on 26 July 2019. The sentence for each offence comprised a term of imprisonment ranging between 6 months and 18 months, and the magistrate divided these into three groups based on the timeframe within which the offences in question had occurred, with all the sentences within each such group to run concurrently, and the three groups together to run consecutively. The net effect was that the total sentence amounted to three years' imprisonment. The Appellant appealed the convictions to the Supreme Court, which appeal was heard by Subair Williams PJ on 1 July 2020. Her judgment dismissing the appeal was handed down on 28 August 2020.

The Proceedings before the Magistrate

4. The magistrate's judgment helpfully set out the chronological history of the trial, and I duplicate that, as follows:

> ***"Evidence of the Child Complainant*:**
>
> | | |
> |---|---|
> | *(1) Hearing:* | *22 August 2017.* |
> | *(2) Hearing:* | *23 August 2017: adjourned as no Government internet therefore no Skype evidence for a vulnerable witness* |
> | *(3) Hearing:* | *24 August 2017: continuation.* |
> | *(4) Hearing:* | *25 August 2017: did not occur - adjourned to 31 August 2017.* |
> | *(6) Hearing:* | *1 September 2017: Maria Sofianos (Crown) stuck in another jurisdiction without use of her passport, could not arrive for 31 August 2017.* |
> | *(7) Hearing:* | *6 September 2017: continuation.* |

(8) Hearing:	*19 September 2017: continuation: adjourned to 30 October 2017.*
(9) Hearing:	*30 October 2017: end of the child's evidence.*
(10) Hearing:	*3 November 2017: Read in statements of Pauline DeShield and Joy Bean.*
(11) Hearing:	*18 December 2017: vacated.*
(12) Hearing:	*16 January 2018: Abandonment of Mistrial Application by S. Tucker (Defendant). Adjourned to 1 February 2018."*

Evidence of the Child's Mother:

(13) Hearing:	*1 February 2018: continuation.*
(14) Hearing:	*6 February 2018: continuation.*
(15) Hearing:	*23 February 2018: continuation. The Court (T. Chin) on holiday leave 12-16 March 2018 and then UK training 19-23 March 2018. Adjourned to 29 March 2018.*
(16) Hearing:	*29 March 2018: Sara Tucker (Defendant) absent due to a burn. Adjourned to 2:30 today.*
(17) Hearing:	*29 March 2018 2:30 adjourned to 6 April 2018 due to Sara Tucker's burn injury.*
(18) Hearing:	*6 April 2018: continuation. T. Chin on leave 9-23 April and Maria Sofianos in Supreme Court trial on 30 April for 2 weeks. Adjourned to 15 May 2018 with continuation on 18 May 2018.*
(19) Hearing:	*15 May 2018 continuation. Adjourned to 1 June 2018. D.C. Simmons end of the Mother's evidence.*

D.C. Rock's Evidence:

(20) Hearing:	*1 June 2018: continuation. T Chin off island 19-22 June Sara Tucker not available 27 June 2018. Maria Sofianos not available 5 July 2018. Adjourned to 9, 18 and 19 July all days.*
(21) Hearing:	*9 July 2018: continuation. Adjourned to 18 and 19 July 2018. Sara Tucker on leave 6-8 August and Maria Sofianos on leave 21 Sept - 5/6 Oct. 2018. The Court said to pencil in 12, 13, 14 Sept. 2018 in order to finish this case ASAP.*
(22) Hearing:	*19 July 2018: continuation. Adjourned to 12 Sept. 2018. D.C. Rock completed.*
(23) Hearing:	*12 September 2018: continuation. Crown amends information by Section 489. Crown withdraws counts 7 and 10.*
(24) Hearing:	*13 Sept. 2018: continuation. Sara Tucker off island 18 Sept-2 Oct 2018 and then Supreme Court trial until 12 October 2018. T. Chin off island 21-24, 26 and 29 September-22 October 2018. Adjourned to 17 September 2018 to give Ruling of Sara Tucker's No Case to Answer.*
(25) 17 September 2018:	*Court requires additional time to draft Ruling due to too short time span and voluminous notes. Adjourned to 31 October 2018 and the Court pencils in 7, 8, and 9 November 2018 for continuation.*
(26) 31 October 2018:	*continuation. Ruling: Case to Answer.*

Kenneth Williams' Evidence:

(27) Hearing:	*7 November 2018: Start of defendant's case.*

(28) Hearing:	*8 November 2018: continuation, adjourned to 9 November 2018.*
(29) Hearing:	*9 November 2018: continuation, adjourned to 30 November 2018.*
(30) Hearing:.	*30 November 2018: no continuation as short 1 magistrate due to food poison. Adjourned to 3 December 2018*
(31) Hearing:	*3 December 2018: continuation. After only 33 questions in cross-examination Kenneth Williams asks for adjournment due to food poison. Adjourned to 10 December 2018.*
(32) Hearing:	*10 December 2018: continuation. Sara Tucker off island 17 Dec. 2 January 2019 during which Court has several availabilities. Adjourned to 3 January 2019 and continue on 9, 10 and 11 January 2019.*
(33) Hearing:	*3 January 2019: continuation. Adjourned to 7 January 2019. Both sides reminded that if case not finished on 7, 9, 10 or 11 January 2019 then continuation date will be in April/May 2019 as T. Chin given new Court in Magistrates Court 3.*
(34) Hearing:	*7 January 2019: continuation. Finish K. Williams evidence and start with Theresa Rawlins. Court available on 8 January 2019 both Counsel not available therefore adjourned to 9 January 2019.*

Theresa Rawlins' Evidence:

(35) Hearing:	*9 January 2019: continuation. Adjourned to 10 January 2019.*
(36) Hearing:	*10 January 2019: continuation. Adjourned to 11 January 2019.*

(37) Hearing:	*11 January 2019: continuation. End of T. Rawlins' evidence. Court available 15, 22 and 29 January 2019 but not Maria Sofianos. Court available 5 February but not Maria Sofianos. 19 Feb' 2019 set aside. Adjourned to 12 February 2019.*
(38) Hearing:	*24 and 25 January 2019: Sara Tucker's application for a mistrial for failure of investigating officer to disclose evidence of a material nature to Crown and by extension to Defence Counsel. Adjourned to 25 January 2019.*
(39) 28 January 2019:	*Ruling against mistrial application adjourned to 31 January 2019 for continuation.*
(40) 31 January 2019:	*Maria Sofianos' daughter is ill at school. Court available 1st February 2019 but both counsel are not available. Maria Sofianos in Supreme Court trial 4-8 February 2019. Adjourned to 12 February 2019 for continuation. Sara Tucker to contact Maria Sofianos for continuation dates after 12 February 2019.*
(41) Hearing:	*12 February 2019: continuation. The Court will pencil in 21 February, 5 March, 6 March, 7 March. Court available 18 February 2019 but Sara Tucker is not available. Adjourned to 19 February 2019. 19 February 2019*
(42) Hearing:	*continuation. Defendant's next witness cannot appear this afternoon as he is laying concrete. Adjourned to 21 February 2019.*
(43) 21 February 2019:	*Defendant's 3 witnesses cannot appear (1) Alfie Wolfe in hospital due to high blood pressure, (2) Another witness reluctant to appear due to her own Court issues (3) Another witness cannot*

	appear as just started new job. Court wishes to complete case ASAP. Agreed to continue on 5, 6, 7, 18, 19, 20 and 21 March 2019.
(44) Hearing:	*5 March 2019: continues, ends at 11:05 a.m. Rest of day lost as Defendant's last witness is not available for Skype at 2:30p.m. Today. Maria Sofianos now not available to continue on 6 and 7 March due to Supreme Court prep and trial. Both counsel only available on 18, 19, 20 and 21 March 2019 at various times. Adjourned to 18 March 2019.*
(45) Hearing:	*18 March 2019: continuation. Sara Tucker informs Court that she is in Supreme Court today and 19 March 2019. Sara Tucker and Maria Sofianos will canvas dates themselves for 8-11 April 2019 but T. Chin on leave that very week. Adjourned to 28 March 2019. Sara Tucker out of office 16-28 April 2019.*
(46) Hearing:	*28 March 2019: Sara Tucker stated no more Defendant's witnesses. Defendant's case closed. Adjourned to 2 April 2019 for legal submissions.*
(47) 2 April 2019:	*S. Tucker not completed her legal submissions. M. Sofianos legal submissions completed. Adjourned to 3 April 2019.*
(48) 3 April 2019:	*Legal submissions. Adjourned to 6 May 2019 for judgment.*
(49) 6 May 2019:	*Court requires more time to complete its judgment. Adjourned to 15 May 2019.*
(50) 15 May 2019:	*Finding of Fact: Judgment.*

5. So it can be seen that the trial ran from its commencement on 22 August 2017 until judgment was handed down on 15 May 2019, involving no less than 50 separate court sittings, not all of which

involved any or any real progress being made. Mr Lynch QC for the Appellant indicated at the outset of his submissions before us that the two grounds of appeal could be truncated, and could be dealt with together, and that his submissions under ground 1 could effectively be dealt with by his submissions under ground 2. I set out below that second ground:

> *"The learned Judge erred in law as she either failed to apply the relevant Andrew Robinson authority or failed to apply it correctly which led to other errors in law namely,*
>
> *a) Criticism of Defence Counsel as having contributed to the delay;*
> *b) Criticism of Defence Counsel making applications during the course of the criminal trial;*
> *c) Criticism of Defence Counsel for not having made a constitutional application prior to its pursuit of the Appeal;*
> *d) Not putting proper weight on the indictment being amended 15 months after the commencement of the criminal proceedings;*
> *e) Not putting proper weight to the Defence case specifically as it relates to inter alia the motive to lie theory;*
> *f) Not putting proper weight on the failure of the Judgment to properly and accurately sum up the defence case;*
> *g) Not putting proper weight on the misdirection in law complained of during the Appeal as it relates to the Learned Magistrate's misdirection in law on the fiduciary relationship between the complainant and the Appellant in his Judgment; and*
> *h) Drew conclusions from evidence concerning the conduct of counsel without having heard submissions on the evidential points only raised during the course of the Judge's deliberation."*

6. Since this ground of appeal concerns the length and fragmented nature of the trial, it is no doubt convenient to start by reviewing the trial's course, notwithstanding the detail provided by the magistrate as set out above.

7. The complainant's evidence was taken between 22 August and 30 October 2017, during which time there were six hearing days, and three other days originally scheduled for evidence, but lost for different reasons. The court's internet was down on 23 August, and on 1 September Ms Sofianos, for the Crown, was delayed in another jurisdiction, and efforts to proceed by Skype were unsuccessful. Then on 19 September, the matter was scheduled to resume at 2.00 pm, but the matter was adjourned without any reason being evident from the magistrate's notes, which simply say "The court adjourns this matter". The adjournment was in fact for approximately 6 weeks, to 30 October 2017. That was an unfortunately long delay for a trial which was already a month old. But on 30 October the evidence of the complainant was concluded, and the matter was adjourned to 3 November 2017.

8. On that date two statements were read in by agreement, and the complainant's mother then began to give her evidence. During the early part of her evidence, the witness became agitated, and it transpired that the cause was the fact that some 15 years earlier, the magistrate, sitting in the Family

Court, had made an order which involved the removal of the complainant's elder sibling from the mother's custody. This led to an application being made by Ms Tucker, for the Appellant, for the magistrate to recuse himself. At least, that was how matters were described in the judgment of Subair Williams PJ, and that is how the matter is referred to in the judge's commentary on the second ground of appeal. It is, however, far from clear from the magistrate's notes that this was the application made by Ms Tucker for the Appellant. The magistrate's notes suggest that the issue was whether this particular evidence should be allowed in, but indicate that the magistrate decided to reserve his decision until the next sitting, adjourning to 13 December, some six weeks later, with 18 December also reserved. I pause at this stage to comment that while the magistrate's notes are clear and full, at the same time, one would expect that the trial would move relatively slowly with such a full handwritten note being taken. For instance, the notes typically record both question and answer, rather than combining the two, to reflect the question in the witness's answer.

9. It is not clear from the magistrate's notes when his ruling was given, but I expect that this was on 13 December 2017. His short ruling notes that he has no recollection of the previous matter, having heard "thousands of cases" since then, and indicating that "for the overriding objective and for the proper conduct of the case" the court must proceed. Ms Tucker immediately advised that she was instructed to apply for a mistrial, and asked for an adjournment so that she could make that application. This led to the magistrate vacating the 18 December date, and instead fixing 16 January for the case to resume, a delay of another month, albeit over the Christmas holiday period. However, on 5 January 2018, Ms Tucker submitted a letter to the Magistrates' Court, in which she withdrew her application for a mistrial. It does not appear that this letter in fact came to the magistrate's attention before the 16 January return date, with the consequence that the mother was not present to continue her evidence, which caused further delay, and led the magistrate to set dates for the matter to resume on 1 and 6 February 2018, more than five months after the commencement of the trial, and with the evidence of only one witness completed. One would have expected that the magistrate could have delivered his short ruling on the recusal application on 3 November 2017, without any delay, or, at most, within an hour or so. One would also expect that Ms Tucker must have been alive to the possibility that her application for a mistrial might be refused, in which case she had plenty of time within which to prepare her application so that it could proceed immediately upon the ruling being given. As it was, three months were lost, in a trial which was already moving very slowly.

10. The cross-examination of the mother continued on 1 February, but unfortunately, not for a full day, since the case did not start until 3.15 pm. And on 6 February, the case started at 2.05 pm, and continued only until 4.15 pm. The court then adjourned until 23 February at 2.30 pm, though the case did not actually start until 2.55 pm. The magistrate was on leave in mid-March, so the trial was then adjourned until 29 March. On that day, it turned out that Ms Tucker had suffered an injury, and the case was then adjourned until 6 April, when the mother's cross-examination continued, some five months after she had started to give her evidence. The court started that day at 10.28 am, and continued until 12.45 pm, when the case was adjourned for a further period of more than five weeks, until 15 May, at 2.30 pm. The magistrate's notes explain that he had a period of leave scheduled, and Ms Sofianos had a Supreme Court trial fixed for the first two weeks of May. The mother's evidence was concluded, and a police officer began his evidence, but without making much progress before the case was adjourned until 1 June, at 9.30 am. In the event, there was a problem finding a vacant court on that day, and the case did not restart until 2.37 pm, at

which time the officer's evidence was concluded and a second officer began giving her evidence, at 4.10 pm. When it became necessary to fix the date for resumption of the case, there were again absences of the magistrate and both counsel to be taken into account, and the case was adjourned to the afternoon of 9 July. At the end of the afternoon, the case was adjourned until 18 July 2018, and the magistrate also pencilled in 12, 13 and 14 September as continuation dates. Earlier dates were not possible because of the commitments of counsel, and the magistrate finished his note with the words "the court is trying its best to complete this trial as soon as possible". The case was, by then, coming up for its first anniversary.

11. The case in fact resumed on 19 July, when the officer's evidence was concluded, and the case was adjourned until 12 September, a further delay of some eight weeks. The magistrate's note does not indicate why such a lengthy delay was necessary. On that date, the mother's passport details were given to the court, and the Crown sought to amend the information, which application was granted without objection. The Crown then closed its case, and Ms Tucker opened the defence case by making a no case submission, for which she had prepared written submissions. Ms Sofianos indicated a wish to provide written submissions herself, and the court adjourned until the following day. At the conclusion of submissions, the magistrate adjourned until 17 September to give his ruling on the no case submission, which of course meant that the two days previously pencilled in were lost. However, on that return date the magistrate had been unable to draft his ruling, so that a further adjournment was required. Because of Ms Tucker's commitments, the date fixed for delivery of the ruling had to be 31 October, a delay of another six weeks, which took the case comfortably past its first anniversary.

12. The magistrate's ruling on the no case submission was comprehensive and in broad terms held that there were cases to answer in respect of counts 1 to 6, 8, 9 and 11. The matter was then adjourned until 7 November, at which time the magistrate first dealt with amendments to Counts 5 and 6, which he allowed. Thereafter, the defence case began, with the Appellant giving his evidence-in-chief. That evidence continued until 4.30 pm, and resumed the following day at 10.40 am, continuing throughout the day, until the magistrate adjourned to the following afternoon, when the evidence resumed at 2.35 pm, but continuing only until 4.03 pm. It appears that at that point Ms Tucker had finished her examination-in-chief, but she asked for time so that she could review her notes and ensure that she had covered everything. That is something which counsel typically does in a matter of minutes, but in this case the request was granted and the matter was adjourned until 30 November, at 2.30 pm. On that date, the court found itself occupied with other matters, and the case was adjourned to 3 December, when it resumed at 9.58 am. In the event, there was no further evidence-in-chief given, and cross-examination commenced. So again, some three weeks were lost, at a time when the trial had already been under way for more than fifteen months.

13. However, within a short time (10.40 am) from the start of his evidence, the Appellant began to feel unwell, and the magistrate adjourned until 10 December. Cross-examination resumed on that day at 9.44 am, and ran until 4.32 pm. At this point the magistrate was concerned to fix dates to finish the trial, because Ms Tucker was scheduled to be off the Island over Christmas, and dates were set for a full day on 3 January 2019, with other court times set for 7, 9, 10 and 11 January. The case did continue on 3 January, getting under way at 11.03 am, because the magistrate has been required to conduct plea court. But cross-examination and re-examination were completed that day by 3.35 pm, at which time Ms Tucker advised she wished to call Theresa Rawlins. She was not

immediately available, so the case was adjourned to 7 January, with additional dates of 9, 10 and 11 January also set aside. At that point the magistrate advised counsel that if the case did not finish by 11 January, then the continuation date would be in April or May, because he had been assigned new responsibilities.

14. While the evidence of Ms Rawlins was taken until 3.40 pm, the court rose early because she had to collect her child from school, and the case was adjourned until 2.00 pm on 9 January, because although the magistrate was available on 8 January, counsel were not, this date not having been one of the alternative dates previously mooted.

15. The case did continue on 9 January, at 2.39 pm, continuing until 4.35 pm when the matter was adjourned until the following afternoon. It then continued from 2.37 pm until 4.23 pm, at which point proceedings were adjourned until 11 January at 9.30 am, though in fact they started that day at 10.20 am. At 12.15 pm, an issue arose concerning some photographs which had been taken by the police at the residence shared by the Appellant and Ms Rawlins, showing its layout, but which had not previously been shared with Ms Tucker. That brought proceedings to a halt for the day, and the resumption was set for 12 February, Ms Sofianos not having been available for some alternative dates. The court also set aside 19 February.

16. However, the magistrate called for counsel to appear earlier, and on 24 January the matter resumed, and Ms Tucker made an application for a mistrial based on the failure to disclose the photographs of the premises where some of the offences were alleged to have occurred, and counsel addressed the magistrate throughout the day, adjourning at 4.02 pm, and resuming at 12.02 pm on 25 January. At 12.47 pm, the magistrate adjourned to 28 January to deliver his ruling on Ms Tucker's application. He refused the application, whereupon Ms Tucker indicated that she would appeal to the Supreme Court and asked that the matter be stayed. She was asked by the magistrate to identify which statutory provision pertained, and the matter was adjourned to 31 January to be considered further. But on that date Ms Sofianos's daughter had become ill, and the matter was adjourned to 12 February.

17. By that date the question of a mistrial seems to have evaporated, and the cross-examination of Ms Rawlins continued and concluded, but re-examination was not completed and the matter was adjourned to 19 February, and the evidence of Norris Wilkinson was heard. At 12.52 pm, the court adjourned until 2.45 pm, but at that time no-one appeared, apparently because Ms Tucker had experienced problems having her next witness attend court, and had so advised by email. The magistrate adjourned until 21 February, but those witness difficulties continued, and again, dates for the continuation of the trial were canvassed, with the magistrate noting that he wished to finish the case as soon as possible. The case did resume on 5 March, with Alfred Wolffe giving evidence, which concluded at 10.59 am. Ms Tucker's next witness was resident in the UK, and she wished his evidence to be given by Skype, and because that was not possible at that point, the matter was again adjourned, to 18 March. On that date, counsel could not proceed because of other commitments, and the matter was adjourned to 28 March, when at 3.10 pm, Ms Tucker advised that she was not calling any further witnesses, and closed the defence case. Counsel then agreed 2 April for closing submissions, but there was some confusion as to location and when counsel were located Ms Tucker advised that she had not completed her submissions. The matter was adjourned until the following day, at which time counsel finished submissions and the magistrate adjourned

for judgment to be given on 6 May. This date was put back to 15 May 2019, at which time the magistrate's judgment was given.

18. I have gone into this level of detail because the complaint of delay is at the heart of this appeal, as well as to demonstrate the various reasons which led to delay in concluding the matter in a timely manner. Beyond that, the magistrate's record of the hearing days, set out in paragraph 4 above, might give the impression that a full day's hearing had taken place on a particular day, when in fact only an hour or so of evidence was possible. The magistrate had expressed his concern at the delay in bringing matters to a conclusion, yet was not able to manage the case so as to achieve that. At some stage, the magistrate needed to ensure that a sufficiently substantial period of time was set aside so as to enable the case to be taken through to its conclusion. Expressions of concern at the delay on the magistrate's part achieved nothing in the absence of effective case management. And counsel were very much alive to the need to dedicate a block of time, so that the case could continue uninterrupted, as appears from the 5 January 2018 letter sent by Ms Tucker, abandoning her application for a mistrial, when she asked that the case be set down for 5 more full days, in any other available court.

The Magistrate's Judgment

19. The magistrate's judgment, delivered on 15 May dealt fully with the evidence, starting with that of the child complainant. He held that that evidence supported the different counts against the Appellant. There were two lengthy periods when the child complainant stayed with the Appellant and his girlfriend, at the request of the child's mother, first for a period from 8 to 20 April 2014, when the Appellant was living at Spanish Point and again from 5 to 28 August 2015, by which time the Appellant and his girlfriend were living in an apartment on Court Street. The Appellant's case was that in respect of both periods, he could not have committed the offences (which according to the child occurred when only the two of them were in the home), because for each of these periods he left the house early in the morning and returned in the evening. For the first period, the Appellant was unemployed, and his evidence was that he was absent from the home all day looking for work, or hustles. During the second period, the Appellant's girlfriend was heavily pregnant and ordered to bed rest.

20. The magistrate found the child complainant's evidence to be credible and reliable. He found the Appellant's evidence that he never spent any "one on one" time with the child to be hard to believe. He found the girlfriend's evidence to be well memorised and seemingly well-rehearsed. After various references to the evidence, he set out detailed findings of fact in which he identified those parts of the Appellant's evidence which he did not believe, and similarly so for the girlfriend's evidence. He made some findings of fact in relation to his acceptance of the child complainant's evidence, but did not do so in respect of every incident. He concluded by declaring himself satisfied beyond reasonable doubt in relation to each of the nine counts.

The Appeal to the Supreme Court

21. Before the Supreme Court, five grounds of appeal were argued. The first was in relation to the length of trial, making complaint that the trial was unduly prolonged due to the magistrate's lack of trial management, and resulting in unfairness to the Appellant. The second ground of appeal is

described as having been on the basis that the magistrate had erred in law by refusing a stay arising out of material non-disclosure, but was actually the consequence of the magistrate's refusal to recuse himself, as described in paragraphs 8 and 9 above. The third ground appears to have been written in the same terms as the second, but related to the photographs referred to in paragraph 15 above. The fourth ground contended that the magistrate had misdirected himself on the law and the facts, in terms of his use of the word fiduciary. The fifth ground was based on a complaint that the magistrate had failed to consider the defence case. Given the grounds that are now pursued in the appeal to this court, no useful purpose is served in addressing grounds apart from the complaint of delay.

22. I therefore turn to the issue of delay, noting at the outset that it is an obvious aspect of the fair trial principle that there can come a point at which a trial has become so piecemeal and fragmented by delays that it has to be condemned as an unfair trial. The learned judge rehearsed the history as set out in the magistrate's judgment and this judgment. She referred to the failure of the recusal application and described it as "dumbfounding" that the magistrate permitted another adjournment of the trial in an attempt by the defence to put forward the same arguments which had failed in the recusal application – see paragraphs 45 and 48 of the judgment. While I wholeheartedly agree with that sentiment, the fact remains that it was for the magistrate to manage the case, and the loss of three months at a time when it had already taken more than two months to conclude the evidence of the first witness demonstrates the magistrate's case management failure.

23. The judge next noted the delay in ruling on the no case submission (paragraph 52), saying she was bound to attribute the six week delay occasioned by this aspect of matters to the magistrate. I agree. The judge next dealt with what she described as a meritless mistrial application arising from the late production of photographs of the inside of the Court Street apartment. I agree with that characterisation, but fortunately the loss of time was relatively small.

24. The judge then turned to her analysis of the case of *Andrew Robinson v Commissioner of Police* [1995] Bda LR 64. The judge commented on the reasons for the delay in the case (paragraph 64), referring to the challenges faced by the court. In regard to that aspect of matters, the words of Lord Bingham in *Dyer v Watson* [2004] 1 AC 379, cited with approval in the Privy Council case of *Boolell v State of Mauritius* [2012] 1 WLR 3718 at 3727 are apposite:

> *"It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured."*

25. The judge then made a finding that the defence was responsible for four specified periods of delay, which together totalled more than eight months. The fourth of these involved a relatively nominal period of lost time, and I would not therefore spend time on it. The first and third periods of delay relate to the periods during which it was said that the that the defence had "excessively cross-examined" first the child, and secondly, the mother. I would start with reference to the alleged excessive cross-examination of the child, and repeat the point made by Gloster JA during argument before us, namely that a period of seven and a half hours of cross-examination is not

disproportionate to three hours of evidence-in-chief, and half an hour of re-examination. And when considering the length of time for the evidence to be given, one must bear in mind the point made in paragraph 8 above, in relation to the magistrate's very full note. Mr Lynch suggested that the effect of that should be to cut the time actually spent in half, and on any basis some significant reduction is clearly appropriate. In relation to the cross-examination of the mother, the total period according to Mr Lynch was under eight hours.

26. But there is a point of principle here, and it does not seem to me to be right that delay occasioned by allegedly excessive cross-examination should effectively be excluded from the overall delay which is the subject of complaint in this case. An experienced magistrate (as Mr Chin is) has the duty to ensure that cross-examination not be excessive, something the judge recognised in paragraph 67 of her judgment, when she said … "it must be said that it was the duty of the magistrate to manage the trial and in this case he failed to keep sufficient command over the Defence's conduct at trial". Somewhat strangely, she continued by saying that the Defence must not be permitted "to benefit from its own folly". But having said that, she carried on to identify the real question for her consideration as being "whether the magistrate's final judgment was clear and accurate despite the trial interruptions and whether the magistrate fairly determined the issues in question and came to the right result". She concluded by answering those questions in the affirmative, and dismissed the ground of appeal based on the trial having been unduly prolonged by reason of the complaint that the magistrate's lack of trial management had resulted in unfairness to the Appellant.

27. The key issue in this appeal is the fairness of the trial, to which I will come in due course. And in this regard I would emphasise that it is the fairness of the process which is in issue, and not the question whether the magistrate ultimately reached the right conclusion. But before moving to that, I would address the remaining period of delay identified by the judge, being the question of the three months' loss of time "wasted in pursuit of the recusal application and the abandoned application for a mistrial." I have commented on the magistrate's responsibility for proper case management in regard to these aspects of the case at paragraphs 9, 22 and 26 above. It does not seem to me that this delay should be regarded as attributable to the defence, if indeed this is the effect of the judge's comments. I do not regard it as appropriate to blame the defence for the delay of eight months identified, and if and insofar as the judge did so, in my view that was wrong. When the cases talk of a defendant's conduct as negating the effect of delay, as in *Boolell*, one must bear in mind that the conduct in that case was truly egregious, and the delay was of a much greater extent. And even then, with delay caused by the defendant as in *Boolell*, Lord Carswell said at page 3728:

> *"Their Lordships consider, however, that when it became clear that time was dragging on and that the defendant was bent on dislocating the course of the trial and prolonging the proceedings by every means within his power, it was incumbent on the court to take such steps as it could to expedite matters and reach a conclusion. This should have led to the injection of an element of urgency after the nolle prosequi was entered and the trial had to begin afresh.* ***Certainly from that point onwards, the court should have explored more effectively ways of conducting the trial without gaps between sitting days and of moving it quickly on after the disposal of attempts by the defendant to delay it***.(emphasis added)*"*

Conducting the trial without gaps, and certainly without lengthy gaps, between sitting days is clearly a critical feature of a fair trial, and one that Mr Lynch rightly emphasised. This was particularly the case in relation to the mother's evidence, which took place over a period of more than six months, over some six or seven separate hearing days. As Mr Lynch pointed out, such a fragmented process necessarily meant that time would be wasted in orientation at the start of each session.

The Authorities

28. I shall start by referring to the case of *Andrew Robinson*, which was the subject of a complaint by the defence at one stage that the judge erred in refusing to hear submissions on this authority, to which she had not been referred during the course of argument. Mr Lynch very sensibly opted to go straight to the issue of delay, no doubt because while the judge did not choose to hear counsel, she did have regard to the authority, and her judgment reflects this.

29. *Robinson* was a case decided by Ground PJ, as he then was, where the underlying trial was heard over an eight month period, in what the judge described as five widely separated blocks. On completion of the hearing, there was then "a wholly exceptionable" four month delay until delivery of judgment. Apart from the length of time over which the hearings took place, it was apparent to the judge on going through the record that many of the hearings were not for a full day, but were fitted in round the magistrate's other commitments, a feature which that case has in common with the hearings in this case. Then there was the delay of four months in the delivery of judgment, a feature not present in this case. Finally, in *Robinson*, the judge noted that the magistrate had confused one important issue and appeared to have disposed of defence witnesses on grounds which were at best unclear.

30. The judge in *Robinson* recognised that even with such a disjointed process there could be a fair trial, but said that the protracted and disjointed nature of the proceedings meant that he was unable to say that that was so in the case before him. The judge took the view that the spreading out of the criminal trial over a period of eight months and five separate blocks of hearings was wholly inappropriate, noting that in such circumstances it was unlikely that the appellant could feel that he had had a fair trial, and unlikely that it would appear to have been a fair trial to any impartial observer. It is a statement of the obvious that both the overall length of the trial and the number of hearing days were very much greater in this case than in *Robinson*.

31. Mr Lynch also relied upon the case of *Goose v Wilson Sandford & Co* [1998] WL 1042375. That case turned mainly on the inordinate length of time between completion of the trial and delivery of the judgment, and has less application to the sort of delays occurring in this case. More helpful, in my view, is the case of *Dennis Robinson and Rebecca Wallingford v The Director of Public Prosecutions and the Attorney General* [2019] SC (Bda) 60 Civ, a decision of Duncan AJ. In that case, the two plaintiffs had been arrested on drug related charges in November 2016. One of the consequences of that arrest for the first plaintiff was the revocation of his parole and his detention in custody while the trial process began. Although a trial date was set for 13 April 2017, the trial did not commence on that date, and despite further trial dates being set in July, October and January

2018, the trial did not in fact get under way until 31 May 2018. The evidence was completed the following day and the matter was adjourned for closing submissions, which were not heard until 18 July 2018. After closing submissions, the matter was adjourned for judgment to be given on 17 August. Judgment was not ready on that date, nor on two further dates in August and September which had been set for judgment to be delivered, resulting in there being further adjournments for the same reason. Then on 5 October 2018 came the extraordinary development that the magistrate, who had heard the trial more than ten weeks previously, advised counsel that he had become aware of a conflict, and recused himself. So in a matter where the trial took place some fifteen months after the first court appearance, the defendants at trial were back at square one a few months later. In the event the plaintiffs sought redress under section 6(1) of the Bermuda Constitution, which provides that "if any person is charged with a criminal offence, the case shall be afforded a fair hearing **within a reasonable time** by an independent and impartial court established by law" (emphasis added).

32. The judge rejected a contention that the plaintiffs had themselves attempted to delay the trial, and found that their conduct did not disentitle them from making the argument that the retrial of the criminal charges should be stayed because of delay. The judge found that both plaintiffs had been prejudiced by the delay to such an extent that their rights under section 6 of the Constitution had been breached. However, he differentiated between the two because of the first plaintiff's substantial period in custody, staying the proceedings as against him, but allowing them to proceed against the second plaintiff on the basis that such prejudice as she had suffered could be mitigated in the sentence the trial court could impose at the conclusion of the criminal proceedings.

Conclusion

33. At the end of the day, the question for this court is whether there was a fair trial. Ms Sofianos in her address submitted that there was no unfairness to the Appellant and that the judge's judgment, supporting that of the magistrate, was sound. I have already indicated that I do not think that the judge was right to blame defence counsel for delay said to have been caused by excessive cross-examination of the Crown's witnesses, nor in relation to meritless applications made by defence counsel, when the task of case management was one for the magistrate. Meritless applications should be dealt with quickly, so as not to delay the trial process inappropriately. The view that Ground PJ took of the delay in the case of *Andrew Robinson* seems to me also to apply in this case, namely that by reason of the numerous interruptions and delays, the whole process amounted to a miscarriage of justice. In saying that I appreciate that the magistrate did express concern at the slow pace of the trial. But it was up to him to do something about it, for instance by acceding to counsel's request (when it was apparent that the trial was moving far too slowly) that a sufficient block of time should be reserved to enable the trial to be completed without any further delay. That request was made in January 2018, after the trial had been under way for almost five months, but unfortunately it fell on deaf ears, such that another sixteen months passed before judgment was given. I do not think it is an answer to the unfairness of the trial to say, as the judge did in paragraph 67 of her judgment, that the magistrate's judgment was clear and accurate, and that he came to the right result. The ultimate issue is whether the trial process has been fair, and for the reasons advanced by Mr Lynch, in relation to its length and fragmented nature, I do not think that it was. For this reason, I would set aside the convictions, and substitute verdicts of acquittal, as we did.

Retrial

34. In giving judgment, we indicated that in consequence of the direction that verdicts of acquittal should be substituted for the convictions, there should be no retrial. In this regard we were acutely conscious of the fact that the Appellant has been in custody since his conviction on 15 May 2019, and so has in fact been incarcerated for some 18 months, approximately half of the sentence he received on 26 July 2019. Quite apart from the fact that a retrial would no doubt be deeply traumatic for the child complainant, well more than three years after she had originally given evidence, we took into account the Appellant's substantial period of incarceration while the appellate process has been undertaken, in ordering that there should not be a retrial.

Postscript

35. I appreciate that the Magistrates' Court handles a heavy workload, from relatively minor cases to extremely serious cases such as this one. Nevertheless, the words of Lord Bingham in *Dyer v Watson* cited in paragraph 24 above have both to be recognised and given effect. It is incumbent on the judicial system in Bermuda so to organise its resources as to ensure that the reasonable time requirement is honoured. In saying this, I do recognise that magistrates rely upon counsel to provide an accurate estimate of the likely length of trial. But the onus is on the magistrate to fix dates that enable a trial to be concluded without excessive delays, such as occurred in this case. I should add that one step which might perhaps be taken with a view to achieving this would be to install a digitally based system of recording which could produce transcripts at greater speed and less expense than provided by the current system, which leaves the judge or magistrate having to take a detailed note that inevitably slows down the judicial process to a crawl. It does not need to be so. But separate and apart from that, the need to avoid a long hearing becoming fragmented by multiple sittings over months and years is paramount, and it is the task of the magistrate to ensure that the reasonable time requirement is indeed honoured in this jurisdiction.

GLOSTER JA:

36. I agree.

KAY JA *(Presiding)*:

37. I also agree.