In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2025: No. 13

BETWEEN:

DRP[1]

Appellant

-v-

THE KING

Respondent

JUDGMENT

Date of Hearing: **28th & 30th July 9th, 16th & 29th September and 31st October 2025**
Date of Judgment: **18th December 2025**

Appearances: **Mr Paul Wilson of Marc Geoffrey Barristers & Attorneys**
Counsel for the Appellant
Mr Adley Duncan, Acting Deputy Director of Public Prosecutions
Counsel for the Respondent

JUDGMENT of Richards J

Introduction

1. This is an appeal against conviction. The Appellant was tried by the Worshipful Ms Auralee H. Cassidy J.P. ("**the Magistrate**") on an Information containing two charges, both of which were contrary to section 182E of the Criminal Code:

[1] In view of the conclusion reached in this judgment, the Appellant's name has been anonymised.

"1. Between the 1st August 2022 and the 2nd April 2023, in the Islands of Bermuda, by means of a communication medium, namely social media, communicated with TB, a child, for the purposes of committing unlawful carnal knowledge.

CONTRARY TO SECTION 182E OF THE CRIMINAL CODE ACT 1907

2. Between the 1st August 2022 and the 2nd April 2023, in the Islands of Bermuda, orally communicated with TB, a child, for the purposes of committing unlawful carnal knowledge.

CONTRARY TO SECTION 182E OF THE CRIMINAL CODE ACT 1907"

2. The matter was tried on 26th November 2024. Almost all of the evidence was agreed. TB gave oral evidence and was cross-examined, but not substantially challenged. The Appellant did not give evidence. The parties' closing submissions were filed in writing. On 24th February 2025, the Magistrate issued a written Judgment finding the Appellant guilty on both charges.

The Offence of Luring

3. Section 182E of the Criminal Code provides as follows:

"182E Luring

(1) Any person who, whether orally or in writing, by means of a communications medium or in any other manner, communicates with a child, for the purpose of committing any of the acts described in sections 177(1), 180, 181(1), 182A(1), 182B(1), 184(1), 185(1), 187(1), 188(1) or 189 is guilty of an offence and is liable—

(a) on conviction on indictment to imprisonment for ten years; or

(b) on summary conviction to imprisonment for five years.

(2) It is no defence to a charge under this section that the accused believed that the person was over the age of sixteen years unless the accused took all reasonable steps to ascertain the age of the person."

4. It will be apparent from the foregoing that the offence of Luring can be committed in a number of ways. Common to all of them is some form of communication with a child[2] that is engaged in for the purpose of committing any of the acts described in a number of other sections of the Code. The particular charges against the Appellant alleged that the relevant communication was for the purpose of committing "*unlawful carnal knowledge*".

5. According to undisputed evidence[3] before the Magistrate, TB was born on [REDACTED] and was therefore 15 years old throughout the period referenced in both charges.

6. Section 181 of the Criminal Code provides as follows:

> **"181 Unlawful carnal knowledge of girl between 14 and 16 years of age; attempts**
>
> (1) Any person who has, or attempts to have, unlawful carnal knowledge of a girl of or above fourteen years of age and under sixteen years of age is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment for five years and on conviction on indictment to imprisonment for a term not exceeding twenty years.
>
> (2) In the case of a person under eighteen years of age at the time of the commission of the offence, it shall be a defence, on one occasion only on which he is charged with an offence under this section, for him to prove that he had reasonable cause to believe and did in fact believe that the girl was of or above sixteen years of age."

7. Section 6 of the Criminal Code provides that *"When the expression "carnal knowledge"... is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration[4]."* It being 2025, it might be thought that the time has come to abandon the prudish idioms of the past and state plainly the elements of all offences, including sexual offences. That is, however, a matter for the Legislature.

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[2] Generally a person under the age of 18, but for the purposes of sections 182C to 182H of the Criminal Code, a person under the age of 16 – see section 176A.
[3] Exhibit 3 – Birth certificate of TB – Page 24 of the Record of Appeal
[4] Which means penetration of the vagina or anus with the penis – see *Carter's Criminal Law of Queensland* (19th Edition) at **[s 6.10] –** this terminology having been adopted from that jurisdiction.

8. In her Judgment (at paragraph 6), the Magistrate stated the elements of the offences as follows:

> "(a) The Defendant knowingly contacted or communicated (or attempted to do so) with a child.
>
> (b) The child is less than 16-years old and is at least 5-years younger than the Defendant.
>
> (c) The Defendant had the intent to solicit, persuade or lure the child to engage in sexual conduct/unlawful carnal knowledge.
>
> (d) The Defendant did not have the expressed consent and had the intent to avoid the consent of the child's parent/guardian (or other person legally responsible for the child)."

9. As Mr Wilson (who did not appear below) has pointed out and Mr Duncan accepts, there are a number of errors in this paragraph.

10. First, the insertion of the word *"knowingly"* in paragraph (a) is problematic because it implies that, in order to be guilty of Luring, a defendant must have known that the person with whom he was communicating was a child. However, section 182E(2) makes it clear that this cannot be an element of the offence. If belief that the person was over 16 is not a defence, unless the defendant took all reasonable steps to ascertain their age, he may be convicted despite believing (wrongly) that the person was an adult (and thus without knowing that they were in fact a child). The Magistrate's use of the non-statutory word "*contacted*" in addition to "*communicated*" in paragraph (a) also puzzled me at first, but I cannot see that it makes a material difference.

11. Secondly, section 182E requires actual and not merely attempted communication. It was, therefore, unclear why the Magistrate added the words in parentheses in her paragraph 6(a). It is true that, if the evidence had only established attempted communication (along with the other elements), the Magistrate could have convicted of an attempt (as defined in section 31 of the Criminal Code), but that would have been by virtue of section 495(1) (as applied to

summary proceedings by section 491). Some sections (e.g. 181) criminalise both a completed act and an attempt to commit that act (thereby avoiding the effect of sections 77 - 79), but section 182E does not. I initially thought that it may have been confusion with section 181 that led the Magistrate astray here, but as will become apparent I am satisfied it was not.

12. Thirdly, although the person with whom the defendant communicates must be under 16 (and is not otherwise a "*child*" for these purposes), there is no requirement for them to be *"at least 5 years younger than the Defendant"*. Neither Counsel could say where this extraneous element might have come from and I was not clear either. I initially wondered whether it might have its genesis in section 190, but that section is to different effect and does not, in any event, apply to offences contrary to sections 181 or 182E.

13. Fourthly, what must be proved (on the charges pleaded here) is that the communication was for the purpose of committing an act of unlawful carnal knowledge, which (as we have seen) implies penetration. It is neither necessary nor sufficient to prove that the defendant had "*the intent to solicit, persuade or lure the child to engage in sexual conduct*" (see (c) above). For example, if A communicated with a male child ("B") for the purpose of arranging to have unlawful carnal knowledge of B's sister (also a child), A would have committed an offence contrary to section 182E even though A had no intent to persuade B to engage in "*sexual conduct*". That phrase is in any event unknown to Bermuda's criminal law and it is not a good substitute for "*unlawful carnal knowledge*" because it does not necessarily connote penetrative sexual activity.

14. Fifthly, parental consent (see (d) above) is absolutely irrelevant. Unsurprisingly, the Legislature has determined that a person who communicates with a child for the purpose of committing unlawful carnal knowledge (or one of the other relevant sexual offences) is guilty of Luring even if they somehow have the child's parent's consent.

15. As will be apparent, Counsel were unclear as to how these errors arose. They certainly were not prompted by the parties' closing submissions, which I have reviewed and which correctly

stated the law. However, it has since come to my attention that many, if not all, of the extraneous elements included in the Magistrate's paragraph 6 feature in § 201.560 of the Nevada Revised Statutes, which creates the offense (sic) of "*Luring Children or Persons with Mental Illness*" in the law of that U.S. state. I am at a loss as to how it was that the Magistrate came to direct herself on the elements of Luring by reference to Nevada law (or the similarly phrased law of a third jurisdiction). Whatever the explanation may be, the result is that she clearly misdirected herself as to the requirements of Bermuda law in a number of ways.

16. In order to secure a finding of guilt on the charges in the Information, the prosecution had to prove that, at the relevant time (between 1st August 2022 and 2nd April 2023) and in the relevant place (the Islands of Bermuda), the Appellant had:
    (i) communicated orally (Count 2) or in writing (Count 1);
    (ii) by means of a communications medium (Count 1) or in any other manner (Count 2);
    (iii) with a person under 16 years of age;
    (iv) for the purpose of committing unlawful carnal knowledge.

17. A comparison of paragraphs 8 and 16 above will demonstrate that the Magistrate's errors largely increased the burden on the Crown. She purported to require them to prove several things that they were not required to prove. However, Mr Wilson argues that "*…her doing so is indicative of the overall pattern in which she erroneously expressed the law and thereby misdirected herself as to the issues that she was meant to consider*". Mr Duncan does not dispute the misdirections, but argues that, since none of them disadvantaged the Appellant, they do not affect the safety of the Magistrate's finding. I agree with the Respondent in most respects here, but in my judgment there was one respect in which the Magistrate wrongly diluted what the prosecution was required to prove, which is that analysed at paragraph 13 above. Before addressing this further, I think it is necessary to consider the case which the Appellant ran at trial (I return to this point at paragraph 27 below).

The Triable Issue

18. Through his Counsel, the Appellant accepted that the prosecution could prove all but one of the elements it was required to prove (i.e. those summarised in paragraph 16 above). The sole issue for the Magistrate's determination was whether the communication the Appellant had with TB had been for the purpose of committing an act of unlawful carnal knowledge. The Appellant's case was that he had no intention of having carnal knowledge of the Complainant until she was 16 and would thus be able to consent to it. He did not give evidence to this effect, but contended that the prosecution could not prove that the relevant communications had been made for the purpose of having carnal knowledge of TB before she turned 16.

19. Given the nature of the communications involved (which were on any view sexually explicit), it will surprise many that this could be a viable defence. It would not have been had the Appellant been charged (as I think he could have been) under section 53 of the Telecommunications Act 1986 or section 68 of the Electronic Communications Act 2011. However, this case concerned direct oral communication as well as messages and section 182E of the Criminal Code attracts a higher penalty than either of those sections. Further, a person convicted (and sentenced to a term of imprisonment) under it is required to register as a sex offender[5]. One can understand, therefore, why this case was charged as it was.

20. In requiring proof of a defendant's purpose beyond the communication itself, Bermuda's approach is consistent with that taken in some jurisdictions and different from others. For example, "*Luring a Child*" is an offence under section 172.1 of the Canadian Criminal Code. There it is an element of the offence that the relevant communication be *"for the purpose of facilitating the commission of an offence"* listed in the section. In *R v Marchand*[6] the Supreme Court of Canada (Martin J) confirmed that:

> "Luring is legislatively linked to listed secondary offences: an offender must communicate for the purpose of facilitating the commission of one such offence. While

[5] see section 329FA of the Criminal Code
[6] [2023] SCC 26

there will be cases where luring stands alone, it often accompanies the actual commission of a listed secondary offence. But the luring that preceded or produced the offence is in no way subsumed or supplanted within the secondary offence. This is because the offence of luring protects a distinct social interest and causes distinct harms compared to the secondary offences." (emphasis added)

21. A similar approach is taken in section 131AB of the New Zealand Crimes Act 1961 ("*Grooming for sexual conduct with young person*"). In contrast, the UK has taken a different approach. The closest comparable offence in England & Wales is entitled "*Sexual Communication with a Child*", which is defined in section 15A of the UK Sexual Offences Act 2003:

> "**15A Sexual Communication with a child**
>
> (1) A person aged 18 or over (A) commits an offence if—
>
> (a) for the purpose of obtaining sexual gratification, A intentionally communicates with another person (B),
>
> (b) the communication is sexual or is intended to encourage B to make (whether to A or to another) a communication that is sexual, and
>
> (c) B is under 16 and A does not reasonably believe that B is 16 or over.
>
> (2) For the purposes of this section, a communication is sexual if—
>
> (a) any part of it relates to sexual activity, or
>
> (b) a reasonable person would, in all the circumstances but regardless of any person's purpose, consider any part of the communication to be sexual;
>
> and in paragraph (a) "sexual activity" means an activity that a reasonable person would, in all the circumstances but regardless of any person's purpose, consider to be sexual."

22. This drafting focuses on the nature and purpose of the communication itself rather than any purpose for which the communication is made. Had it been possible to charge the Appellant in this way, I do not see that the defence he advanced at trial would have been available to him.

23. It may be thought that adults who have sexualised communication with children for their own gratification should be liable to conviction for an offence to which section 329FA applies regardless of whether it can be established that they did so for the purpose of committing a further offence. That is something the Legislature may wish to consider further in the future.

The Magistrate's Judgment

24. The misdirections that the Magistrate gave herself as to the elements of the offence clearly did factor into her "Ruling" as set out in paragraphs 19 to 32 of her Judgment. In most cases, however, the impact did not disadvantage the Appellant and so cannot, in my judgment, affect the safety of the convictions.

25. For example, at paragraph 21, she observed that *"The child was more than 5-years younger than the Defendant"*. That was true, but irrelevant.

26. At paragraph 23, the Magistrate commented that *"The conduct of the Defendant was such that he knowingly, willingly and covertly organised and lured the child to meet with him privately on several occasions without parental knowledge and consent in a calculated manner."* Here it is not entirely clear to me whether the Magistrate was only considering the lack of parental knowledge/consent to the extent that it supported an inference as to the Appellant's purpose or whether she was treating the lack of such consent as an element of the offence. However, I do not think it is material to the decision I must make because the Respondent ought not properly to have been required to establish the absence of such consent.

27. However, paragraph 27 causes me greater concern:

> "The Court rejects the evidence of the Defendant that he intended to wait for the child to be 16-years of age before engaging in act of unlawful carnal knowledge. The Court finds that there was no other logical reason to send messages of such a nature to a minor if not to lure her and or pressure her into engaging sexual conduct or unlawful carnal knowledge."

28. First, as Mr Wilson has pointed out, the Defendant did not give evidence. However, that is acknowledged elsewhere in the Judgment and at paragraph 29, for example, the Magistrate said instead that *"the Court rejects the Defense raised"*. As to the Court's finding that there was *"no other logical reason to send messages of such a nature"*, Mr Wilson submits that *"one such other reason could have been… that the Appellant was sending these messages, as he was interested in having sex with her once she was no longer a child… Another could have been that the messages formed part of the Appellant's grooming tactics"*. As to the latter, it is of course not inconsistent with the messages having been sent for the alleged purpose. What troubles me most about this passage is that the Magistrate appears to have thought that it was sufficient if the messages were sent for the purpose of *"engaging [in] sexual conduct or unlawful carnal knowledge"*. As the offence was pleaded, it was the latter purpose that was alleged. If *"engaging [in] sexual conduct"* (whatever that may mean) were one of the other offences mentioned in section 182E(1) this might not matter, but *"sexual conduct"* is not even a concept defined in Bermuda law (as observed above, it appears to come from elsewhere). The Respondent has not persuaded me that this misdirection is not material to the safety of the convictions. In my judgment it is.

29. In paragraph 31 the Magistrate observed that:

> "The only Defenses that could have been raise in law were that he did not knowingly communicate or intend to communicate with a child or that he had no knowledge that the child was in fact a child – the defenses were not raised and therefore are dismissed for consideration as possible defences for the Defendant."

The Appellant accepted communicating with TB at a time when she was and he knew her to be a child. As I have explained (see paragraph 10 above), he did not actually have to be proved to have known that. He was not asserting that he believed her to have been over 16 and had taken all reasonable steps to ascertain her age and so that statutory defence (section 182E(2)) did not properly arise. It would have been better if the Magistrate had said that instead, but given what was clearly in issue in the case I do not think it was incumbent upon her to do so. What does still trouble me, however, is the suggestion that these were *"the only Defenses that could have been raise[d]"*. Looking at the judgment as a whole, I think the

Respondent is right that the Magistrate did correctly understand the defence that was being raised (which was not summarised in paragraph 31). Still, the manner in which she expressed herself here is apt to create the impression that she did not think that that defence was one that could have been raised in law.

30. Had she directed herself in accordance with the law, as I believe it should be understood, the question for the Magistrate on this evidence was a narrow one. Had the relevant communications been made for the purpose of committing unlawful carnal knowledge? Although some oral communication was alleged (and accepted), both Counsel relied significantly upon the substance of the written communications to establish what the Appellant's purpose had been and what it had not. It seems to me that what was, therefore, required was an analysis of those messages. Either their content left the Magistrate sure that the messages were sent for the alleged purpose or it did not. However, there is almost no reference to the content of any of the messages in the Judgment. They are described as containing *"explicit sexual references"* and *"descriptions of behaviour that the Defendant and child were contemplating"*. Elsewhere they are characterised as *"sexually explicit"* and *"emotionally charged"* (all of which was accepted). None of the messages are reproduced and only a few (not inherently sexual) words from any of them are quoted. It does not appear to me that anyone who had not seen the messages (as I have done) could discern from the Judgment what it was about their content that left the Magistrate in no doubt that they had been sent for the alleged purpose. This is in contrast to the written closing submissions of trial Counsel, in which they both directed attention to (and reproduced) multiple specific messages in support of their respective cases.

Disposal

31. I have thus concluded that the convictions entered by the Magistrate cannot be sustained. The reason the hearing of this appeal was spread over a number of days was that the Respondent invited me first to consider that question (albeit differently framed) and then to consider (if necessary) whether I might nevertheless dismiss the appeal by application of the proviso to section 18(1) of the Criminal Appeal Act 1952 ("**CrAA**"). Both sides sought to

make further submissions on that issue and I sought their assistance on some aspects of section 18, subsections (1), (2) and (5) of which provide as follows:

"18 Appeals under section 3 against conviction or sentence

(1) Subject as hereinafter provided, the Supreme Court in determining an appeal under section 3 by an appellant against his conviction, shall allow the appeal if it appears to the Court—

(a) that the conviction should be set aside on the ground that, upon a weighing up of all the evidence, it ought not to be supported; or

(b) that the conviction should be set aside on the ground of a wrong decision in law; or

(c) that on any ground there was a miscarriage of justice;

and in any other case shall dismiss the appeal:

Provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction.

(2) Subject as hereinafter provided, the Supreme Court, if it allows an appeal against a conviction, shall quash the conviction and direct a judgment of dismissal of the information to be entered:

Provided that where an appellant has been convicted of an offence by a court of summary jurisdiction and that court could, in respect of the information before it, have convicted him of some other offence, and on the finding of the court of summary jurisdiction it appears to the Supreme Court that the court of summary jurisdiction must have been satisfied of facts which would have justified his conviction of that other offence, then in any such case the Supreme Court, instead of allowing or dismissing the appeal, may substitute for the conviction by the court of summary jurisdiction a conviction of that other offence, and may impose such sentence in substitution for the sentence imposed by the court of summary jurisdiction as may be allowed in law for that other offence so, however, that unless the appellant has appealed against the sentence imposed on

him by the court of summary jurisdiction, any sentence imposed by the Supreme Court under this subsection shall not be a sentence of greater severity than the original sentence.

…

(5) Notwithstanding anything in subsections (1) to (4), where it appears to the Supreme Court that by reason of any imperfection or irregularity—

(a) in the constitution of the court of summary jurisdiction; or

(b) in any criminal proceedings before the court of summary jurisdiction; or

(c) in any other matter,

an appellant who is appealing under section 3 against his conviction of an offence could not lawfully have been convicted by that court of summary jurisdiction of that offence, then in any such case the Supreme Court, instead of allowing or dismissing the appeal, may order a new trial of the appellant before a court of summary jurisdiction."

32. Mr Duncan has first sought to persuade me to apply the proviso to subsection (1). He referred me to *Sookal and Mansingh v The State* [1999] UKPC 37, wherein it was said (in reference to a similarly worded provision) that:

"The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462, per Viscount Sankey L.C. at pp. 482-483. In *Stirland v. Director of Public Prosecutions* [1944] A.C. 315 at p. 321 Viscount Simon said that the provision assumed *"a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict"*. Two distinct situations can be envisaged as to the application of this test. The first is where the verdict is criticised on the ground of a misdirection and no question is raised about the admission of inadmissible evidence. In such a case the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence."

As will be apparent, the second situation relates to inadmissible evidence and is not relevant here. Mr Wilson has of course sought to argue that convictions would not inevitably have resulted if the Magistrate had not misdirected herself. Indeed he says that, if she had directed herself correctly, she would have been bound to have acquitted. I do not fully agree with either the Respondent or the Appellant here. As will be apparent, it is the misdirection in paragraph 27 of the Judgment which causes me the greatest concern, but it is that, combined with the lack of any conspicuous analysis of the messages, that has caused me to conclude that the Magistrate's decision cannot stand. Since I cannot discern exactly what it was about the relevant communications that persuaded the Magistrate to convict, it is hard to tell whether she would inevitably have come to the same conclusion if she had not misdirected herself. The position of the Magistrate as trier of fact is not, in this respect, precisely analogous to that of a jury. I should be able to interrogate her reasoning and in this instance I find that I cannot[7]. I have, nevertheless, considered the messages carefully myself, but given the conclusion I have ultimately come to, I do not think I should say very much about my view of them. Whatever that may be, I am not a trier of fact and I must be careful not to conflate any view that I may have formed of the evidence with the view a properly directed Magistrate could take of it. The Appellant would be entitled to the benefit of any reasonable doubt that the evidence may leave in the mind of a properly directed Magistrate. Such a Magistrate may ultimately not be left in any such doubt, but I do not feel able to say that they *inevitably* would not.

33. In the alternative, Mr Duncan has drawn my attention to section 18(2), which he argues *"empowers the court to substitute the conviction for a conviction justified on the evidence. Whatever arguments may be debated about the parameters of the defendant's sexual intentions, there ought to be no reasonable debate that at a minimum the messages sent by the defendant were geared towards Sexual Exploitation of a Young Person, that young person being the complainant, who, on the unchallenged evidence, touched the defendant's penis upon his invitation so to do."* As I understand the evidence, this approach would only

[7] In contrast to the position in *CS* [2025] SC (Bda) 105 App, where I found that the Magistrate's reasons were such that I could say how she would have been bound to find if she had not erred in the admission of some evidence and/or misdirected herself as to its relevance.

properly entitle me to preserve a conviction on Count 2. I do not understand the Respondent ever previously to have sought or even countenanced a conviction on this basis. Further, the relevant proviso applies *"where an appellant has been convicted of an offence by a court of summary jurisdiction and that court could, in respect of the information before it, have convicted him of some other offence"* (emphasis added). I have not been persuaded that the Magistrate could have convicted the Appellant on this basis on the Information before her. It may be open to the Respondent to amend that Information in such a way that a conviction could properly be entered on that basis (either by adjusting or supplementing the existing count(s)), but I do not think I can achieve that under subsection (2). It also seems to me that there is a significant difference in seriousness between the two charges as they are pleaded in the Information and the conviction it is suggested I might substitute. On the evidence I have seen, I incline to the view that the Appellant should be properly tried on the existing charges. If I thought I could make the substitution the Respondent suggests, I might, therefore, not exercise my discretion in favour of doing so (although I recognise that, given my ultimate conclusion, the Respondent may be able to seek or accept a conviction on that basis in the future).

34. Prior to hearing this appeal I had, I must confess, assumed that this Court, on allowing an appeal against conviction from the Magistrates' Court, had the power either simply to quash the conviction or to order a retrial. However, it is clear from section 18 that it is not quite so simple. If an appeal is allowed under subsection (1) this court must, by virtue of subsection (2) *"quash the conviction and direct a judgment of dismissal of the information"*. There is a power to order a new trial of the appellant, but that is provided for under subsection (5). The test to be applied employs different language from that in (1) and this disposal would appear to be an alternative to *"allowing or dismissing the appeal"*.

35. In *Fubler v R* [2005] Bda L.R. 76, Kawaley J (as he then was) said:

> "Section 18(5) of the Criminal Appeal Act 1952 confers on the Court a broad discretion to set aside a decision and order a retrial instead of quashing a summary decision altogether. This seems to me to be an appropriate power to invoke where (a) the decision below cannot be supported by reason of the manner in which the

proceedings took place, and (b) the wider interests of justice (including the rights of the victim and the public generally) suggest that the conviction ought not to be quashed outright. I would accordingly quash the conviction and order a retrial before another Magistrate."

36. In *Keishun Trott v R* [2016] Bda LR 124, Kawaley CJ (as he had by then become) expressed a similar view of subsection (5), stating that it *"confer[ed] a broad discretion on the Court"*. His Lordship concluded that judgment as follows:

> "Despite the literal language of section 18(5), which implies that the matter can only be remitted for retrial without allowing the appeal and quashing the convictions, in my judgment the appropriate and customary Order in present circumstances is to (1) allow the appeal and quash the convictions, but also (2) to remit the matter for a new trial (should the Prosecution wish to pursue one) in the Magistrates' Court before another Magistrate."

37. With some trepidation, I find myself not in complete agreement with these statements of the law. However, having reflected upon them, my disagreement is not as profound as I first thought. Initially it seemed to me that the difference in the tests set out in subsection (1) and (5) was such that, if the first were met, this court would have no power to order a retrial. If, for example, I had concluded that the convictions here should be set aside on the ground of a wrong decision of law (i.e. a material misdirection as to the elements of the offence), it seemed to me that (unless I were also persuaded to apply the proviso to subsection (1)) subsection (2) would have the effect of precluding me from ordering a retrial. On this point Mr Duncan submitted persuasively that the *"power to order a retrial must derive from statute, and that power is specifically granted under sub-section (5) but not sub-section (1). The power to order a retrial attaches to the specific circumstances described in sub-section (5), and the absence of similar language in sub-section (1) exposes the readily available (and perhaps irresistible) inference that the legislature did not intend for an option for retrial to exist in circumstances not clearly defined in statute by it."*

38. However, it seems to me that the test in subsection (5) is broader than that in (1) (particularly by virtue of paragraph (5)(c)). This means that the former could be satisfied and the latter not, but it is hard to see how the reverse could be true. Since both (1) and (2) begin *"Subject as hereinafter provided…"* it seems to me that a new trial is properly to be regarded as a disposal supplemental to an outright dismissal and not one that is only available when the test in (1) is not met. As Kawaley J pointed out, reading the legislation in the latter way would, in some cases, run counter to the *"wider interests of justice (including the rights of the victim and the public generally)"*. In my judgment, those interests clearly favour a new trial over an outright dismissal in this case.

39. Where I remain respectfully unable to agree with Kawaley CJ is in his belief that it is possible to allow an appeal *and* order a new trial. It is not just the language of subsection (5) that precludes that, but also that of (2). In my judgment it is not satisfactory, when exercising a jurisdiction conferred by statute, to make an order in terms which the statue does not authorise merely because it is *"appropriate and customary"*. Further, it seems to me that whether an order for a new trial is properly to be regarded as allowing an appeal may matter for the purposes of determining what, if any, further review is available to the parties. For example, section 17(1) of the Court of Appeal Act 1964 provides that a person convicted by a court of summary jurisdiction and whose appeal to the Supreme Court under the CrAA has not been *allowed* may appeal to the Court of Appeal. Section 17(2) of the same provides that the DPP may appeal when an accused persons appeal to the Supreme Court has been *allowed*. The scope of the Court of Appeal's jurisdiction is not of course a matter I may determine, but Mr Duncan was certainly forthright in his acceptance that the Respondent could not appeal from an order for a new trial. Mr Wilson's position was a little more nuanced, but it seems to me that the Legislature could rationally have decided not to provide for either side to appeal from an order for a new trial, given that, if dissatisfied with the outcome of that trial, they would subsequently enjoy rights of appeal.

R v Forde

40. Shortly prior to 31st October 2025, when I was due to deliver judgment in this matter, I became aware of the case of *R v Ronald Forde* [2025] CA (Bda) 30 Crim, then pending

before the Court of Appeal. Since that case included an offence of Luring, I asked the parties whether they thought there would be any merit in my waiting to see whether the Court of Appeal said anything of relevance to this case before making a decision. I was somewhat doubtful that they would do so, given that the appeal was against sentence and not conviction (the defendant having pleaded guilty), but I understood that some submissions at first instance had nevertheless been directed to the definition of the offence. Nevertheless, the parties both submitted that I should wait and I therefore did so. The Court of Appeal issued its judgment on 21st November 2025. Since then, neither party has sought to make any further submissions based upon that judgment. I have also read it and am satisfied that it should not affect my decision in this appeal.

Conclusion

41. Without allowing or dismissing the appeal, I order a new trial in this matter before a differently constituted court of summary jurisdiction, in accordance with section 18(5) of the CrAA. The Appellant's bail will be extended for him to reappear in the Magistrates' Court on a date to be determined.

Dated this **18th** day of **December 2025**

THE HONOURABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE