[2025] JMCA Crim 27

JAMAICA

BEFORE: THE HON MS JUSTICE P WILLIAMS JA
THE HON MS JUSTICE EDWARDS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 31/2016

APPLICATION NO COA2023APP00046

MILTON BAKER v R

Miss Zara Lewis for the applicant

Miss Kathy Anne Pyke and Ms Debra Bryan for the Crown

20 May 2024 and 14 November 2025

Criminal Law – Practice and procedure – Application to adduce fresh evidence – principles to be considered – Section 28 of Judicature (Appellate Jurisdiction) Act

Criminal Law – Evidence and procedure – Inconsistencies, discrepancies and omissions – Whether directions of the trial judge were adequate in the circumstances of complainant's mental condition – Verdict – Whether verdict unreasonable or amounted to a miscarriage of justice

P WILLIAMS JA

Introduction

[1] On 15 March 2016, Mr Milton Baker ('the applicant') was convicted on two counts of rape in the Saint Thomas Circuit Court, after a trial before Dunbar Green J (as she then was) ('the learned trial judge') sitting with a jury. Subsequently, on 17 March 2016, he was sentenced to 15 years' imprisonment on each count with the stipulation that he serve 10 years before eligibility for parole. The sentences were ordered to run concurrently.

[2] Being dissatisfied with the outcome of the trial, the applicant, by way of Criminal Form B1, dated 5 April 2016 and filed on 13 April 2016, sought permission to appeal his convictions and sentences, setting out the headings to four grounds as follows: "(1) unfair trial, (2) lack of evidence, (3) miscarriage of justice and (4) that the verdict is unreasonable and cannot be supported by the evidence". On 3 August 2017, a single judge of this court duly considered but refused his application for permission to appeal. At that time, the transcript of the notes of evidence from the trial was not available; however, the single judge was satisfied from the transcript of the summation that the main issue for the jury to consider was that of credibility and that the learned trial judge gave extensive directions on the issue and appropriately highlighted possible discrepancies and inconsistencies, accompanied by adequate directions relative to those issues.

[3] The applicant renewed his application to this court, as he is entitled to do. Prior to the renewed application being set for hearing, on 17 November 2021, he filed an amended application seeking *subpoenas duces tecum* for the complainant's medical records. He requested, amongst other things, that the South East Regional Health Authority be ordered to produce psychiatric records and reports from the Princess Margaret Hospital and the Community Health Services relating to the complainant's assessment, diagnosis, and treatment for the period January 2012 to March 2016. On 18 October 2022, a panel comprising of F Williams JA, D Fraser JA and Laing JA (Ag) (as he then was) heard the application and granted the orders sought. On 13 December 2022 the same panel further ordered that the psychiatrist who had primary care of the complainant, or if unavailable another psychiatrist from the Princess Margaret Hospital, provide a summary report on the complainant's psychiatric condition and its effect on her perception and cognition for the period 12 January 2012 to 31 March 2016. The report was to be provided on or before 31 January 2023.

[4] On 15 February 2023, the applicant filed a notice of application for court orders seeking leave for the medical report, which had been obtained, to be admitted as fresh evidence on the appeal. On 20 May 2024, the court heard submissions in relation to both

that application and the renewed application for permission to appeal, and subsequently made the following orders:

> "1. The appellant is permitted to adduce the fresh evidence contained in the medical report attached to the affidavit of Milton Baker in support of the notice of application for court orders dated 15 February 2023.
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> 2. The application for permission to appeal convictions and sentences is granted.
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> 3. The hearing of the application is treated as the hearing of the appeal.
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> 4. The appeal against convictions and sentences is allowed.
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> 5. The convictions are quashed and the sentences are set aside.
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> 6. Judgment and verdict of acquittal are entered on each count."

[5] We promised to provide reasons for the decision and, at the time, did not anticipate that there would be a delay in doing so. These reasons are a fulfilment of that promise with our apology for the delay.

Summary of the prosecution's case at trial

[6] The complainant is the step-daughter of the applicant. At the time she alleged that the applicant raped her in January 2013, she was residing with her maternal grandmother and grandfather in Saint Thomas. She was 17 years old at that time, and 19 years old at the date of trial. Her mother, Shernetta Burke ('Miss Burke'), lived with the applicant in the same community.

[7] The complainant testified that, on 7 January 2013, on her way home from school, she stopped at the house that the applicant shared with her mother, to look for her mother. She said that this was the first time she was going to that house. The complainant stated that the applicant told her that her mother was not there. He then, pulled her into the house, locked the door, and had sex with her without her consent. She said she screamed and made a lot of noise, calling for help, but no one came. The applicant

shouted at her to stop the noise and said he was not letting her out until she did so. She further testified that when he stopped having sex with her, he opened the door and she was able to leave. She saw that she was "messed up" because she was bleeding from her vagina. The complainant made her way home, where she saw and spoke with her grandfather. He advised her to tell her mother, which she did. She stated that at the time she spoke to her mother she was still "messed up". Her mother did not believe her. She also told her grandmother while she was still "messed up".

[8] The complainant went on to testify that the next day she went to school and spoke to the guidance counsellor, Mr Robert Bogle ('Mr Bogle'). Mr Bogle took her home to her grandfather and contacted her mother. She stated that her mother and Mr Bogle then accompanied her to the Trinityville Police Station, where she made a report. She was subsequently taken to the hospital, where she was examined.

[9] The complainant further testified that some days thereafter, whilst walking home from school along a shortcut, she was grabbed and pulled under a nearby bridge. She identified the applicant as the person who grabbed her. She stated that he held her down and raped her despite her screaming and calling for help. When the incident ended, she left from under the bridge and went home where she reported what had happened to her grandfather and grandmother.

[10] During her testimony, the complainant could not recall much of the circumstances surrounding the two incidents of rape as well of some details about herself. As an example, she could not recall the position the applicant was in at the times he sexually assaulted her. During the incident in the house, she said she only remembered that she was on the bed. During the incident under the bridge, she said he "hold her down" and she was standing but she could not remember his position.

[11] Mr Bogle testified and gave an account which differed from that of the complainant. He recalled that it was on 22 January 2013 that the complainant spoke to him. He said the complainant told him she had been raped twice by her step-father. At

the time the complainant also told him something which caused him to look out in the direction of the playing field where he saw a man "slightly in the bushes across the field". The complainant appeared fearful. Mr Bogle contacted the police who eventually arrived and left with the complainant. Mr Bogle testified that sometime after that both the applicant and Miss Burke came to the school and spoke with him. The applicant professed his innocence and sought to provide an explanation as to why the complainant would have lied in accusing him of raping her.

[12] The prosecution also led evidence from the investigating officer, Woman Corporal Shaney Scott ('Corporal Scott'). She testified that on 13 February 2013, at about 5:50 pm, while stationed at the Centre for Investigation of Sexual Offences and Child Abuse ('CISOCA') at the Morant Bay Police Station, she met the complainant and Miss Burke. She stated that she interviewed the complainant, recorded a statement, and commenced an investigation into the alleged case of rape against the applicant. Corporal Scott also testified that, on that same day, she went to the holding area in the police station where she saw the applicant, at which time she cautioned him and charged him with two counts of rape. When cautioned the applicant said "Mi nuh kno wah she a talk bout".

Summary of the defence's case

[13] The applicant gave sworn evidence denying the allegations. He maintained that the complainant never came to his house when he was there alone. He explained that Miss Burke was always at home with him when he was there. He further explained that he was a farmer and that Miss Burke would always be with him, assisting him when he was working on the farm. When questioned specifically about the allegation that he had raped the complainant under a bridge, he insisted he knew nothing about those allegations and stated that he did not "[meet] her under the bridge and assault her".

[14] The applicant further testified that he knew of three "issues" why the complainant would have falsely accused him of the offences. Firstly, when the complainant was 13 years old, she had come to the farm where he was reaping sorrel with her mother and another person and "was holding argument with her mother, [which involved] some

unpleasant language". He spoke to her about it and she started to tell him some indecent language. He "tek up a piece of the sorrel [,] [sic] tell her she can't talk to her mother like that and… swish her pon her foot". Secondly, the complainant blamed him for causing her to be placed in a children's home sometime in 2010. The third reason was that he accused the complainant of taking a memory card out of his Blackberry cell phone and while she had acknowledged taking it, he never got it back.

[15] Miss Burke testified on behalf of the applicant. She stated that the complainant is the second of her of six children. She explained that the complainant had been living with her grandmother since she was about 12 years old, while attending high school. However, Miss Burke maintained that she and the complainant shared a close relationship.

[16] Miss Burke also testified that she had been living with the applicant for "a couple of years" and continued to do so up to that time of the trial. They had one child, who was about five years old at the time of the trial. The complainant visited the home she shared with the applicant, but "not very regular[ly]."

[17] Miss Burke testified that there was no occasion when she would be away from the home she shared with the applicant with him remaining there alone. She insisted the complainant never visited the home when she was not there. She asserted that she and the applicant were always together. She denied that the complainant made a report to her about something that the applicant had done. Specifically, Miss Burke testified that the complainant never told her that the applicant had "troubled" her under a bridge. The first time she heard that the applicant had "troubled" the complainant was on the streets when people were talking. She acknowledged that she had visited the school to see Mr Bogle and explained to him that a missing "phone chip" was what had caused the complainant to lie.

[18] Miss Burke said the complainant grew up with her for some time. In response to a question from Mr Horace Gray ('Mr Gray'), the attorney-at-law who appeared for the applicant at trial, Miss Burke said the complainant "not really all right that much". She

expanded on her answer by stating that the complainant was not really normal and "will tell lie…and is that kind of person who nuh truthful". She supported the applicant's account of how he came to "switch" the complainant on her foot with a piece of sorrel. Under cross-examination, she further explained that she had never left the applicant alone over the seven years they had been in the relationship, and they went everywhere together. She never left him at home alone. She maintained that she loved both the applicant and her daughter and was not taking sides.

The application to adduce fresh evidence

[19] At the commencement of the hearing, counsel for the applicant, Miss Zara Lewis ('Miss Lewis'), first pursued the application for leave to adduce fresh evidence contained in a report concerning the psychiatric history of the complainant issued by the South East Regional Health Authority, Princess Margaret Hospital, dated 23 January 2023 ('the report'). The application was made pursuant to section 28(a) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). In this application, the applicant relied on seven grounds as set out below:

> "1. It is necessary and expedient in the interest of justice to allow the Appellant/Applicant to adduce the information contained in the Psychiatric report.
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> 2. The evidence in the psychiatric report is relevant to the issues to be determined in the appeal and [is] such that if this application is granted, [it] would have an important influence on the outcome of the appeal.
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> 3. The evidence, if received, would form the basis of grounds filed and to be filed in the event this application is granted.
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> 4. The [Applicant] will be significantly prejudiced if the orders sought herein are not granted by this Honourable Court.
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> 5. It is necessary and expedient in the interest of justice to grant the orders sought.
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> 6. The affidavits are relevant to the issues to be determined in the appeal.

7. The interest of justice and the due administration of the court would be enhanced by the granting of the orders sought."

[20] The application was supported by an affidavit sworn by the applicant on 15 February 2023, in which he attached the report, which had as the stated purpose to summarise the complainant's psychological functioning during the period 21 August 2012 to 20 July 2020. It revealed that the complainant attended the adult outpatient mental clinic at the Princess Margaret Hospital grounds from 21 August 2012 to 10 March 2015. This would have been at the time the offence had allegedly taken place. An initial diagnosis of schizophrenia was updated in 2013 to a schizoaffective disorder, both disorders were considered chronic and becoming debilitative with inconsistent treatment. It was noted that the complainant did not methodically engage with treatment care providers to understand the social consequences of her condition or to benefit from available psychological and social remedial interventions. The report detailed the complainant's treatment history and referenced her social and medical history to buttress an opinion before expressing a conclusion as to what was required to maintain continued good mental health of the complainant.

Summary submissions for the application to adduce fresh evidence

[21] In support of the application to adduce fresh evidence, Miss Lewis submitted that pursuant to section 28 of JAJA, this court has the power to admit fresh evidence in an appeal whenever it is necessary or expedient in the interests of justice to do so. She relied on and referred to the dictum of McDonald-Bishop JA (as she then was) in the case of **Harold Brady v General Legal Council** [2021] JMCA App 27, which included an acknowledgement of **R v Parks** [1961] 3 All ER 633, where Lord Parker set out relevant principles for the consideration of such an application. Counsel also relied on **Ladd v Marshall** [1954] 3 All ER 1.

[22] Counsel contended that the evidence contained in the report would have satisfied the test of fresh evidence, as it was not available at trial and could not have been obtained with reasonable diligence at the trial. She urged that the complainant's mental illness, its

severity, and the symptoms that she would have been experiencing were not brought up during the course of the trial. Therefore, the report was essential as it spoke to the credibility of the complainant's accusation against the applicant, which could not properly be assessed without it. She also argued that the report fell squarely within the category of "plainly capable of belief" given its source. Counsel further submitted that the report, if admitted, would have an impact on the safety of the conviction, and it could lead to a conclusion that there was possibly a miscarriage of justice. Counsel further observed that the court has an overriding discretion to admit fresh evidence if there is a risk of a miscarriage of justice if the evidence is excluded, even if the evidence was not completely fresh. In support of her submissions, she relied on **Lescene Edwards v The Queen** [2022] UKPC 11.

[23] In opposing the application on behalf of the Crown, Miss Kathy Ann Pyke ('Miss Pyke') agreed that **R v Parks** was the authority that should guide this court in considering applications for adducing fresh evidence on appeal. It was further submitted that, as this court observed in **Rayon Williams v R** [2022] JMCA Crim 41, the overriding objective is the interests of justice. Reference was also made to **Sadiki Heslop v R** [2011] JMCA Crim 48 and **Omar Neil v R** [2015] JMCA Crim 30.

[24] Miss Pyke's submission was that, in applying the test in **R v Parks**, the potential evidence was not fresh in the true sense of the word. She referred to comments made by Mr Gray, from which it may be inferred that he had obtained instructions regarding the complainant's mental state after her cross-examination, which prompted him to attempt to pursue the issue through other witnesses. Hence, he specifically questioned Miss Burke as to what kind of person the complainant was. Miss Pyke argued that this approach served to raise issues for the jury's consideration regarding the complainant's status and reliability.

[25] Miss Pyke further submitted that based on the principles endorsed in **Lescene Edwards v The Queen**, the relevant issue would not be whether the evidence was available at trial but the impact that it would have on the safety of the conviction; and

whether the evidence should be admitted, nevertheless, in the interests of justice. Thus, counsel contended the question was whether the fresh evidence, if presented, had any potential impact on how the complainant was to be viewed, such that it would in turn impact the safety of the conviction. She maintained that there was a need for more exploration of the effect of the complainant's condition on her ability to speak the truth. Counsel concluded that even if the report had been presented during the trial, with the diagnosis of schizoaffective disorder and the symptoms of hearing voices, the jury's considerations would have been the same.

Ruling on the application to adduce fresh evidence

[26] Section 28 of the JAJA provides the statutory authority for this court's power to admit fresh evidence at the stage of an appeal. It states as follows:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice —
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
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> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in [sic] manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court;…"

[27] In **R v Parks**, Lord Parker CJ in interpreting the power of the court under the English provision which is similar to section 28 to this court's statutory authority stated:

> "As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the

> court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial."

[28] This court in **Mario McCallum v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 93/2006, Application No 78/2008, judgment delivered 18 June 2008, stated, that "the conditions in **R v Parks** are cumulative hence the appellant must satisfy each one".

[29] The principles articulated in **R v Sales** [2000] 2 Cr App R 431 has been accepted as providing guidance as to the approach in considering fresh evidence of a documentary nature (see **Brian Smythe v R** [2018] JMCA App 3). In **R v Sales**, Rose LJ, at page 438 of the judgment, explained:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for [the] Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief."

[30] In the recent decision of the Privy Council, **Lescene Edwards v The Queen**, Sir David Bean writing on behalf the Board, at para. 42, affirmed that the overriding test for the consideration of admitting fresh evidence is, as stated by the Board in **Lundy v R** [2013] UKPC 28, 2 NZLR 273, "the new evidence should be admitted if the interests of justice require it".

[31] It is necessary to appreciate that this being an application under section 28 of JAJA, there needs to be a slightly different approach to the stringent test required for an application to adduce fresh evidence. This court in **Jerome Dixon v R** [2022] JMCA Crim 2, in considering the nature an application under section 28 of JAJA, stated:

> "[26] The discretionary power under section 28 of JAJA is only to be exercised if, after investigation of all the circumstances, the court thinks it necessary in the interest of justice to do so. However, this would still incorporate a consideration of the criteria as set out in **R v Parks**. It is recognised that in appropriate cases, the court need not be as stringent in its application of the first criterion as set out in **R v Parks**. It follows that any relaxation of the principle must be justified, based on the material presented and if it is in the interest of justice to do so..."

[32] Having considered the principles established in the relevant authorities and after hearing the submissions, this court granted the application. At that time, we stated that our reasons would be given at a later date, and we now provide them briefly.

[33] We accepted Miss Pyke's submission that Mr Gray's line of questioning of Miss Burke suggested that the complainant may have been experiencing certain challenges of which, as her mother, Miss Burke was aware. Mr Gray attempted to ask Miss Burke if the complainant "is a all right little girl?" and whether she was "…somebody who operates normally?" Following objections from the prosecutor, the learned trial judge permitted him only to ask what kind of person the complainant was. In response, Miss Burke stated that the complainant "[was] not really normal". However, Miss Burke agreed under cross-examination that she never "had any reason at all to do anything in relation to [the complainant] and her behaviour", which she went on to describe as "unruly bad". Hence, it may well be argued that any information about the complainant's mental state ought to have been obtained and presented at trial as Miss Burke could not have been relied on to give evidence as to the exact nature of the complainant's condition.

[34] While giving her evidence, there were several instances where the complainant had to be encouraged to speak up, lift her head, and refrain from covering her mouth. It was also notable how often she indicated that she did not understand questions that, on their face, appeared clear and simple enough for a 19-year-old to understand, even accounting for the sometimes intimidating environment of a courtroom. Even more significant were the numerous occasions on which she indicated an inability to recall matters, not just limited to the details of the offences, but also personal matters regarding herself.

[35] Applying the established principles, we were satisfied that, although the potential evidence may not have been new and could have been obtained at the time of the trial, it was nonetheless relevant to assessing the credibility of the complainant. The source of the information made it plainly capable of belief, and it appeared necessary for the proper determination of the appeal. In these circumstances, we concluded that granting the application was expedient in the interests of justice.

The grounds for appeal

[36] As already noted, the applicant originally filed four grounds of appeal, asserting unfair trial, lack of evidence, miscarriage of justice, and unreasonable verdict. Miss Lewis withdrew the ground regarding lack of evidence, and requested and was granted permission to abandon the ground relating to miscarriage of justice. The remaining grounds are set out below:

> "i. Unfair Trial: - that the Court failed to recognized [sic] the fact that the main witness fabricated the alleged 'rape' story against me. I was just playing my fatherly role and due to my sternness I was accused of a crime I knew nothing about.
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> …
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> iv. That the verdict is unreasonable and cannot be supported by the evidence."

[37] Counsel also sought and was granted leave to argue four supplementary grounds of appeal but subsequently indicated that she would not be pursuing two of those supplementary grounds. The following (as originally numbered) are the remaining two of the four supplementary grounds of appeal:

> " i. The learned Trial Judge failed to tailor her directions to the jury on the issue of the virtual complainant's omissions and its effect on her credibility. Further, in explaining to the jury the given reasons for the omissions the learned Trial Judge [sic] weighted the case for the prosecution thus making her summation unbalanced and unfair.
>
> ii. The learned Trial Judge erred in law by failing to give the jury careful directions on omissions in the testimony of [the complainant] and general credit tailored to the case of the Applicant. The failure to do so unfairly [sic] weighted the case for the prosecution thus making the summation unbalanced and unfair."

[38] There were two main issues identified as arising from the grounds, namely:

1. Whether the learned trial judge gave adequate directions addressing the omissions and gaps in the evidence of the virtual complainant and whether those directions were balanced and fair.

2. Whether the verdict was unreasonable and could not be supported by the evidence, especially given the admission of the fresh evidence.

Whether the learned trial judge gave adequate directions addressing the omissions and gaps in the evidence of the virtual complainant and whether these directions were balanced and fair

Submissions on behalf of the applicant

[39] Miss Lewis argued that the learned trial judge addressed the omissions and inconsistencies in the complainant's evidence in a general way. She complained that the learned trial judge did not emphasise to the jury the materiality of those omissions when

considering the evidence in respect of the applicant. Further, counsel contended that the directions given by the learned trial judge on omissions and discrepancies were inadequate, particularly because the court did not have the medical evidence regarding the complainant's mental disorder, which could have explained the gaps in her testimony. Miss Lewis drew the court's attention to specific portions of the complainant's evidence in which she could not recall whether she had ever visited the house the applicant shared with her mother; and whether her mother had a child with the applicant. Counsel contended that these are significant gaps in the complainant's memory that would affect the assessment of her credibility. As such the directions of the learned trial judge needed to go further. Reliance was placed on **Toohey v Metropolitan Police Commissioner** [1965] 1 All ER 506.

[40] In conclusion, Miss Lewis submitted that, considering the totality of the evidence, the appeal ought to be allowed. She contended that the learned trial judge's summation would have to be "tailored" in a manner that would include the medical evidence to account for inconsistencies, discrepancies and omissions in the complainant's testimony.

Submissions on behalf of the Crown

[41] In response, Miss Pyke contended that the learned trial judge adequately and even copiously dealt with the omissions, inconsistencies, and discrepancies that arose and did so in a fair and balanced manner. Counsel stated that the learned trial judge's summation ought to be assessed using the principles that a judge is not required to highlight every discrepancy, inconsistency, and omission in his or her summation. However, the learned trial judge is required to summarise the evidence and highlight what he or she considers to be the main issue to the jury. Reference was made to **Anthony Atkinson and Paulston Mairs v R** [2016] JMCA Crim 4.

[42] Counsel contended that the learned trial judge's summation should be taken as a whole when seeking to determine its resultant effect. She further submitted that the learned trial judge undertook a review of the prominent aspects of the case, then went on to highlight the specific omissions and present a balanced perspective in relation to

the evidence. In regard to the inconsistencies and discrepancies, Miss Pyke submitted that the learned trial judge's treatment of the inconsistencies and discrepancies was not at odds with the guidance set out in **R v Carletto Linton and others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4, 5/2000, judgment delivered 20 December 2002.

[43] Miss Pyke was invited by this court to consider the issue of the learned trial judge's failure to comment on the evidence of Miss Burke where she stated that the complainant was "not normal", in light of the medical report that was now before the court. In response, Miss Pyke submitted that a simple direction on credibility and the witnesses' ability to recall would be sufficient and the failure to comment on this issue would not result in a miscarriage of justice. However, Miss Pyke ultimately recognised that perhaps the report could have better informed the jury as to how to properly assess the complainant and that it could not be denied that the evidence may have had an effect on the mind of the jury.

[44] In concluding, Miss Pyke addressed the question of whether it would be in the interests of justice to urge the court to order a re-trial. She accepted that with the passage of time the Crown's case may well be rehabilitated to the unfair disadvantage of the applicant. She concluded that, after bearing in mind the principles as outlined in **Dennis Reid v R** (1978) 27 WIR 254, in all the circumstances, she would decline from asking for such an order.

Discussion/analysis

[45] This issue is ultimately related to the learned trial judge's treatment of the complainant's credibility, which, according to Miss Lewis, was severely impacted by the significant inconsistencies in the complainant's evidence. Generally, it was contended by counsel for the applicant that a judicious consideration of the case against the applicant required a more careful framing of the directions to the jury than what was done by the learned trial judge. On the other hand, Miss Pyke maintained that there was sufficient

evidence for the jury to resolve the factual issues regarding the applicant's innocence or guilt.

[46] It is trite that discrepancies and inconsistencies are not uncommon features in a case. There is a plethora of judicial authorities providing guidance on the issue of what is required of a trial judge sitting with a jury when addressing the issue. Trial judges are required to explain to jury the nature and significance of inconsistencies and discrepancies and give directions on how they should treat those elements that occur in the evidence. It is well established that trial judges are not required to identify every inconsistency and discrepancy that manifests itself during the trial (see **R v Fray Diedrick** (unreported), Court of Appeal, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991 and **Morris Cargill v R** [2016] JMCA Crim 6). Nonetheless, it would be best for a trial judge to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case. The court must look at the inconsistencies cumulatively in relation to the material issues to see if they make the prosecution's case unreliable and tenuous (see **Oliver Jones and Karl Roberts v R** [2019] JMCA Crim 20).

[47] The learned trial judge did address the issues of inconsistencies, and discrepancies that appeared on the complainant's evidence. She adequately explained what each category was, how they could manifest, and how the jury should address them. She correctly and extensively gave the usual directions on how to approach assessing the evidence of witnesses and, in so doing, pointed to the need to carefully consider the demeanour and urged that they "do not use people's deficits, like language problems and intelligence problems, to determine that they are telling lies".

[48] The learned trial judge noted and gave adequate directions on the evidence from the complainant, and in doing so highlighted possible inconsistencies. The learned trial judge said:

> "While I am on that, let's just look at a few things. Counsel for the defence when he was speaking to you, when he was addressing, he told you there were some inconsistent statements made by

> [the complainant], and he said that when he was addressing you, he spoke to you in relation to things which he said she would have told the judge at the preliminary enquiry… So counsel was saying that [the complainant] would have made some statements there, and she made different statement here. What she said there would not be evidence up here unless she accepts it as the truth, she accepts it and said what was said was the truth.
>
> It so happens that in this case, what she said is that she couldn't recall what was said, and counsel said that inconsistencies would have been primary [sic] in relation to her age. She had said she was nineteen then and how could she be nineteen now. There was [sic] inconsistencies in relation to the dates of the offence and when she spoke to the Guidance Counselor [sic], when she would have told her mother and grandparents about the incident. Counsel said there would have been inconsistencies.
>
> You heard the evidence and you heard what took place. She said she couldn't remember what happened. So again you have to determine if there was [sic] any inconsistencies, [and] how you treat it. Is it slight or material to the case, or would it affect her credibility? Would it mean that she is a lier [sic], or there is some explanation for the inconsistencies which you accept?"

[49] Importantly, the learned trial judge also addressed the issue of the complainant's credibility in a comprehensive manner. From the extracts of the learned trial judge's summation, it is evident that she appreciated that the complainant's ability to recall was an integral component for the jury to resolve the issue of the complainant's credibility. This was demonstrated in the careful manner in which she examined the evidence, pointed out instances where the complainant was unable to recall the details of the incident, and guided the jury on how to treat that issue. She highlighted the frequency with which the complainant expressed an inability to recall and directed the jury to consider the possible reasons for this. She pointed out that a witness could have an inability to recall due to several factors and gave as examples the passage of time between the incident and the trial, the traumatic nature of the event, or the age and level of intelligence of the witness. She urged the jury to consider whether the complainant was deliberately concealing information or that she was genuinely unable to recall certain details.

[50] The learned trial judge highlighted instances where there were obvious gaps in the complainant's evidence. One example was when she stated that:

> "[The complainant] could not remember the position she was in when she said that she was raped.
>
> Initially, she told you it was on the bed, but she provided no details. As adults, you know that sexual intercourse can occur in various positions. She didn't specify that. She said she couldn't remember. She also did not tell you the position she was in at the bridge when she claimed sexual intercourse or the rape occurred. At first, she said she was standing, then she said she could not remember.
>
> She didn't tell you when she was taken to the doctor, but you would have some idea based on the officer's evidence, because the officer told you when the report was made to her…"

[51] Further in her summation, the learned trial judge said:

> "… So it is for you to look at all the evidence and see whether you can fill in those gaps. She didn't tell you how many times she went to see the Guidance Counsellor about the alleged incidents too, and she was not able to say how many times her mother had gone to see the guidance counsellor. She was not able to say whether the house that Mr. Baker had been in had windows, but she told you later that she thought they were wooden windows, and then she said they should have been opened because there was light in the room when the incident would have taken place. She told you she just could not remember, and you can remember her sitting there and also saying to you 'is not that I want to tell lies, or it is not [sic] I don't want to say, but I just can't remember.' It is a matter for you.
>
> In cross-examination she also said she could not recall quite a lot of details, details about various aspects of her early life. You will have to decide whether those are details which are material to this case which are important to your decision. If they are important and if you believe that [the complainant] honestly did not recall, then you'll obviously look at the case in one particular way. But if you are of the view having looked at the evidence in its totality that she was seeking to mislead the court, then obviously you would have been of the view [sic]. She told counsel in cross-examination that she could not recall who she lived with

> before she lived with her grandparents. She told counsel that she did not remember if her mother lived with her grandparents, what grade she was in at the time of the alleged incident. She said she could not recall if she went to school on the 7th of January 2013, the date of the alleged incident. But she had told you earlier that she was in her school uniform and she was coming from school. She told you that before attending Robert Lightbourne school, she could not remember what primary school she had gone to. She told you that she could not remember her teacher's [sic] names except for Mr Bogle's. She could not remember the year she graduated from high school, and she could not remember going for [sic] Mr. Baker's house before the 7th of January. She could not remember exactly what she told her grandmother, but she told her she was raped. She could not remember whether she told the Guidance Counsellor that her step-father was outside the school by the bridge with violent intentions towards her, and she could not remember whether the police had taken her home."

[52] The learned trial judge ultimately stated:

> "…Madam Foreman and your members, you have to look at all of that and determine, was she being defiant, was she saying to you and to this Court that she had no obligation to come and tell you of those details? Is that what she was saying? Or was there a reason for her not to remember all these things? Or did she remember but she just didn't want to say it? What do you make of all of that? She said to you at the end, it is not that I don't want to tell you the truth but I just can't remember. When we had [sic] somewhat recall some events, we tend to want them to recall what we want to say at a particular moment… You have to decide whether that might have been the case, or there was some other reason."

[53] The learned trial judge dealt with the issue of the omissions, inconsistencies and discrepancies in an entirely adequate, fair and balanced manner. She not only dealt in general terms with the issue, but she appropriately identified for the jury's consideration several examples. The directions were tailored to address the quality of the evidence the complainant had given in a manner that cannot be faulted. Accordingly, there was no merit to the grounds which sought to challenge the learned trial judge's treatment of these issues.

Whether the verdict was unreasonable and cannot be supported by the evidence, especially given the admission of the fresh evidence.

[54] A challenge to the verdict of a jury on the ground that it is unreasonable and cannot be supported by the evidence presented must demonstrate that the verdict was obviously and palpably wrong. The case oft cited as setting out the threshold to be met in a challenge of this nature is **R v Joseph Lao** [1973]12 JLR 1238. In **Lescene Edwards v R**, at para. 53, the Board expressly acknowledged that this ought to be the appropriate standard but reminded that "authorities such as [**R v Joseph Lao]** do not assist in fresh evidence cases nor where it is alleged that there was a misdirection by the judge or a material irregularity in the course of the trial".

[55] Having admitted the report as fresh evidence, we had to consider the impact of this evidence. This court in **Morris Cargill v R** revisited the duty of the court once fresh evidence had been accepted. Brooks JA, (as he then was), writing on behalf of the court, stated at paras. [55] to [57]:

> "[55] In **Patrick Taylor v R** SCCA No 85/1994 (delivered 24 October 2008) Panton P, stated that there were two tasks which the court should undertake in consideration of the fresh evidence. The first is to decide whether or not to accept the fresh evidence. The second task is to decide whether or not to allow the appeal. In performing the second task the court has to decide whether the fresh evidence raised any doubt as to whether the verdict is unreasonable or there has been a miscarriage of justice, as contemplated by section 14(1) of the Judicature (Appellate) Jurisdiction Act, which would warrant allowing the appeal.
>
> [56] It is a decision that the court must make based on its view of the evidence and not based on what would have been the effect of that evidence on the jury. Their Lordships in **Bonnett Taylor v R** [2013] UKPC 8, in an appeal from a judgment of this court, confirmed at paragraph 41, the validity of the view stated in **R v Pendleton**, [2001] UK HL 86, [2002] 1 All ER 524 concerning the correct approach of an appellate court in such circumstances. Their Lordships, in **Pendleton,** reminded appellate courts that their court is not to determine whether or not the appellant is guilty, but rather to decide whether the conviction was safe. Their Lordships stated that the appellate

> court may, in a case of any difficulty, test its own view by considering whether the evidence 'might reasonably have affected the decision of the jury to convict.' (paragraph 19 of **R v Pendleton**).
>
> [57] In **Orville Murray v R** SCCA No 176/2000 delivered 19 December 2008, this court accepted the validity of the principles laid down in **Pendleton**. Harrison JA adopted the following passage from paragraph 31 of Lord Brown's judgment in the Privy Council decision of **Dial and Another v The State of Trinidad and Tobago** [2005] UKPC 4; [2005] 1 WLR 1660:
>
> > 'In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the Court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused, it will dismiss the appeal. The primary question is for the Court itself and is not the effect the fresh evidence would have had on the mind of the jury…'"

[56] Having considered the fresh evidence from the report outlining the mental challenges faced by the complainant at the time the alleged incidents took place, the issue for this court was whether this evidence impacted on the view of her credibility or affected the assessment of her credibility. At the trial, the reliability of her account of being sexually assaulted twice by the applicant depended substantially on her evidence alone. As already noted, the report revealed that the complainant had attended the adult outpatient mental clinic from August 2012 to March 2015, where she was initially diagnosed with early-onset schizophrenia, and that this diagnosis was subsequently updated in 2013 to schizoaffective disorder, both conditions falling within the psychotic spectrum. Therefore, she would have been under psychiatric care at the time the alleged incidents took place in January 2013.

[57] Further clarification of the report by the psychiatrist may have been useful; however, the findings contained in the report were sufficient to have caused this court to

question whether the conviction could be regarded as safe. Evidence of the complainant's psychiatric issues, although not necessarily rendering her evidence incredible, was a significant factor that may reasonably have affected the decision of the jury to convict. The impact of this fresh evidence on the overall safety of the conviction was such that we were compelled to conclude that the conviction could not be sustained. We, therefore, set aside the conviction as there may well have been a miscarriage of justice.

Should there be a retrial?

[58] The court briefly considered whether, in accordance with section 14(2) of JAJA, it would be in the interests of justice to order a new trial. Section 14(2) empowers this court, upon quashing a conviction, to direct a new trial "if the interests of justice so require". In **Dennis Reid v The Queen** (1978) 16 JLR 246**,** the Privy Council made clear that a distinction must be drawn between cases where a conviction is set aside due to the insufficiency of the prosecution's evidence, and those where the conviction is quashed as a result of a misdirection or some procedural or technical error.

[59] We found no basis upon which to order a retrial in this matter and, notably, Miss Pyke commendably conceded that a retrial should not be ordered. A retrial would significantly prejudice the applicant, given that approximately 12 years had elapsed since the commission of the alleged offence. Moreover, there was no evidence before the court indicating whether the complainant had received appropriate medical treatment in the intervening period or what was the current state of her mental health. In any event any improvement in her mental condition could be viewed as unfairly affording the prosecution an opportunity to rehabilitate her. Additionally, the applicant had already served approximately 12 years of his sentence. In all the circumstances, we were satisfied that the interests of justice would be best served by declining to order a new trial.

[60] It was for these reasons that we made the orders set out at para. [4] of this judgment.