[2015] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 64/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BERES DOUGLAS v R

Alando Terrelonge and Miss Kristina Exell instructed by Bailey Terrelonge Allen for the appellant

Mrs Sharon Milwood-Moore, Deputy Director of Public Prosecutions for the Crown

16, 17 June and 28 September 2015

PHILLIPS JA

[1] The appellant was tried in the St Catherine Circuit Court on 20, 21 and 22 June 2011 before Edwards J (Ag) (as she then was) on an indictment containing three counts of carnal abuse to which he pleaded not guilty.

[2] By virtue of a circumstance which was beyond his control, the appellant was unrepresented for substantially the entire duration of the trial.

[3] The Crown called three witnesses in support of these counts: the complainant (KM), her mother (Ms MH) and Constable Shellyann Watson. The appellant said nothing in his defence and called no witnesses. He was found not guilty on counts one and two but guilty on count three and on 8 July 2011 he was sentenced to four years imprisonment at hard labour. His application for leave to appeal having been granted by a single judge of this court, the appellant challenged his conviction and sentence on the broad grounds that: (i) his trial without legal representation deprived him of his constitutional right to a fair trial; (ii) the verdicts of not guilty on counts one and two were inconsistent with the verdict of guilty on count three; and (iii) the sentence imposed by the learned trial judge was manifestly excessive.

Pre-trial background

[4] Counsel on record for the appellant was Mr Alando Terrelonge. On the 20 June 2011 when the trial was set to commence, Mr Terrelonge had asked another counsel, Mr Courtney Maxwell, to hold for him because he had two matters before the Gun Court in Kingston. Mr Maxwell in an affidavit dated 3 August 2011 deponed that he was advised and he verily believed that both Crown Counsel, Ms A Austin and Mr Terrelonge had agreed that there would have been an adjournment in the matter to a date in July 2011, because of Mr Terrelonge's difficulty and the fact that Crown Counsel wanted to obtain an additional statement. Mr Maxwell further deponed that he had informed the court that he was not prepared to proceed in the trial as he had not been briefed by Mr Terrelonge. However, Edwards J (Ag) decided to proceed with the matter, pointing out that KM was living overseas, that the matter was set for trial as a priority matter and

that the Practice Direction dated 11 September 2002 called for counsel being instructed by another counsel to be fully briefed to appear on his/her behalf and to proceed with the matter. As a consequence, Mr Maxwell participated in the jury selection and also took notes in KM's examination in chief in Mr Terrelonge's absence.

Trial background

[5] The appellant pleaded not guilty to the indictment charging him with three counts of carnal abuse and the Crown called KM as its first witness. The evidence led before the court was that the appellant had lived in the same community with KM for some time. He first spoke to her in late November 2008 when he said "*Little girl, you know seh mi love you*." Thereafter, the appellant (who was 56 years old at the time) had sexual intercourse with KM three times while she was 12 years old and living with CH (her uncle) in the parish of Saint Catherine.

[6] The first incident occurred on a day in December 2008. After coming home from school at about 6:00 pm, KM went outside her uncle's house to use the toilet when she saw the appellant who she called 'Gage' in the bushes beside the toilet wearing a black shirt. He called her saying "*Psst come here*". She went over to him, he started to take off his pants and brief and he put a condom on his penis. He told her to lie down on a piece of sponge that was on the ground and she complied. He then took off her shorts and underwear and had sex with her. She was crying and told him to stop, he complied and gave her $200.00 and told her not to tell anyone. KM then put on her clothes, went

home and told no one because he had an angry look on his face after intercourse and she was afraid.

[7] The testimony in relation to the second count was that on 28 January 2009, KM came home from school at about 6:00 pm, changed her school uniform and went to the same outside toilet. When she came out of the toilet, the appellant called her, she went over to him and he started taking off his clothes. At that time he was wearing a black shirt and black pants. He then placed a condom on his penis told her to lay on a piece of sponge, took off her shorts and underwear and then he had sex with her. She started crying and told him to stop, he complied and gave her $200.00 and told her that he loved her and she was to tell no one. She put on her clothes, went home and told no one because she was afraid he might do something to her.

[8] KM's testimony in relation to count three was that, on 2 February 2009, she came home from school at about 6:00 pm, changed her school uniform and went to the same outside toilet. The appellant called her, she went to him and he took off his clothes. He was wearing a blue shirt and black pants. The appellant also told her to lie on a piece of sponge, he took off her shorts and underwear and had sex with her. KM told the appellant to stop and he did not comply. She started to push and hit him and he stopped. After stopping he told her that he did not take any money with him because he was not sure he would see her. KM then pulled up her clothes and went home. Upon reaching home she saw her uncle and spoke to him. The matter was

reported to the Old Harbour Police and she was subsequently taken to be examined by a doctor.

[9] At the end of KM's examination-in-chief the matter was adjourned until 21 June 2011. On that date when the court resumed, Mr Terrelonge was present but told the court that he could not properly defend the appellant because he felt that the appellant was denied the benefit of his advice when the trial began in his absence. Mr Terrelonge further stated that the initiation of the trial process in his absence, denied him the opportunity to examine KM's composure, object to jurors and object to certain aspects of KM's testimony that had been led. Mr Terrelonge also denied sending Mr Maxwell to hold on his behalf and said that he had only asked counsel to give the court a date since he had already agreed to an adjournment with Crown Counsel. Having agreed to an adjournment with Crown Counsel he was most surprised that the matter had started in his absence. Mr Terrelonge in giving a brief history of the matter stated that he was recently assigned to this case and the date on which the adjournment was sought was only the second trial date.

[10] Edwards J refused to release Mr Terrelonge from the case because it had been set for priority and the date sent by Mr Terrelonge was not convenient. She also pointed out that KM was now living overseas and would also be inconvenienced by an adjournment. She was of the view that Mr Terrelonge's objection was without merit, since Mr Maxwell had been given an opportunity to read statements, speak to the appellant and he also ably participated in the jury selection process and in the

examination-in-chief. The learned judge made a general statement that she had a problem with attorneys who undertook legal aid assignments and then failed to attend court. She castigated counsel generally for not giving the same attention to matters in which they had been privately retained as against those in which they had been retained pursuant to the legal aid regime. Mr Terrelonge took great exception to those statements particularly if the learned judge was addressing those comments to him personally. Consequently, despite Edwards J's reluctance to release Mr Terrelonge from the matter, he nonetheless excused himself and took no further part therein.

[11] In balancing the appellant's right to counsel with, inter alia, the fact that a jury was already empanelled in the matter and the complainant was now living overseas, Edwards J decided to continue the trial in counsel's absence and the accused was forced to represent himself. The learned trial judge promised to assist him as he had been abandoned by counsel and throughout, she assisted the appellant in his cross-examination of KM in which he basically denied having sex with KM; displayed ignorance when it came to certain aspects of her testimony and suggested to her that she was lying.

[12] The second Crown witness was Ms MH, KM's mother. She testified that her daughter was born on 19 August 1996 and that at the time of the alleged incident she attended a high school in the parish of Saint Catherine in grade seven. She further testified that on 3 February 2003 her brother, CH told her something and she called KM on her phone. She then visited KM's school where she spoke to the guidance counselor

and the principal and later made a report to the police. Ms MH also testified that she knew the appellant and had seen him twice in her yard. She was not cross-examined by the appellant.

[13] The final Crown witness was Constable Watson. She testified that on 3 February 2009, KM and Ms MH made a report to her. Based on the report she commenced investigations into a case of carnal abuse against the appellant. She caused KM to be medically examined and took statements from KM and Ms MH. Thereafter, she made numerous attempts to find the appellant but was unsuccessful. He was arrested and charged on 18 January 2010 and when cautioned he said "A lie dem a tell pan mi." The appellant did not cross-examine Constable Watson and thereafter the Crown closed its case.

[14] At the close of the case for the prosecution Edwards J pointed out the three choices open to the appellant, that is, to give evidence, make an unsworn statement or to remain silent. After being told of his three choices the appellant remained silent and called no witnesses in support of his defence effectively closing his case.

[15] Edwards J gave a summation to the jurors that included directions on various aspects such as the credibility of witnesses and how to deal with the evidence. She also gave directions that the jury should totally disregard hearsay evidence that came out in the testimony which will be discussed later herein. The jury returned verdicts of not guilty on counts one and two and guilty on count three. As already indicated, the appellant was sentenced to four years imprisonment at hard labour on count three.

The appeal

[16] The appellant advanced seven grounds of appeal which may be summarized as follows:

1) The appellant was denied a fair hearing and the protection of his right to due process under the law pursuant to the Charter of Fundamental Rights and Freedoms enshrined in Chapter III of the Constitution of Jamaica when Edwards J denied him his right to legal representation in the conduct of his defence and/or legal representation of his own choosing.
2) The Crown and the defence having previously agreed to an adjournment of the matter, Edwards J erred and/or misdirected herself when she proceeded to commence the trial in the absence of counsel without any regard to the appellant's right to due process.
3) In proceeding with the trial in counsel's absence, Edwards J failed to pay sufficient regard to the seriousness of the offences for which the appellant was charged and his ability to understand the proceedings and conduct his own defence.
4) Edwards J failed to pay sufficient regard to the appellant's literacy and comprehension skills.
5) The jury having convicted the appellant on count three when there was no evidence that distinguished the third count from

counts one and two had been an inconsistency that tainted the verdict.

6) In all the circumstances there was a miscarriage of justice and the verdict is unsafe and ought to be quashed.
7) Alternatively, the sentence of four years imprisonment at hard labour was manifestly excessive and ought to be reduced.

Submissions

[17] In argument before us, Mr Terrelonge and Miss Exell for the appellant focused mainly on grounds one to five.

[18] In relation to ground one, Mr Terrelonge submitted that by virtue of section 16 of the Constitution of Jamaica, an accused is entitled to defend himself in person or be given the assistance to get legal representation. Counsel cited **Dunkley v R** [1995] 1 AC 419 and **Condon v R** [2006] NZSC 62 to show that the appellant suffered grave prejudice when he was forced to conduct his defence without counsel. Counsel further posited that the Edwards J erred when she made no enquiries as to whether the appellant was able to represent himself, his literacy level or whether he understood the nature of the proceedings. Consequently, his trial was unfair and the verdict rendered unsafe because he lost the chance of acquittal that may have been open to him if he had been represented by counsel.

[19] In response, Mrs Sharon Milwood-Moore for the Crown, submitted that commencing the trial in counsel's absence did not render it unfair since Mr Maxwell held

for Mr Terrelonge. In proof of this assertion, Mrs Milwood-Moore produced a transcript to this court outlining earlier exchanges between Mr Maxwell and Edwards J where Mr Maxwell did indeed tell Edwards J that he was holding for Mr Terrelonge. Mrs Milwood-Moore thereafter referenced the Practice Direction on counsel appearing on behalf of other counsel and asked this court to consider the fact that Edwards J had provided great assistance to the appellant in every stage of the trial. Nonetheless, Mrs Milwood-Moore acknowledged that Edwards J could have made efforts to secure alternative legal representation for the appellant but also cited **Dunkley (Errol) and Robinson (Beresford) v R** (1994) 45 WIR 318 and **Mitchell v R** (1999) 55 WIR 279 as proof that there was no right to legal representation.

[20] On ground two, Miss Exell for the appellant contended that Edwards J ought to have granted an adjournment in the matter and ought to have canvassed alternative legal representation for the appellant and cited **R v Raymond** (1988) 25 JLR 456 and **Barrette v R** [1977] 2 SCR 121 in support of these submissions. Counsel submitted further, that the reasons given by Edwards J for the refusal of an adjournment were unjustified and she ought to have considered the fact that an adjournment had been agreed between Crown Counsel and the defence.

[21] Mrs Milwood-Moore in response, asserted that the judge is the only person vested with the authority to grant an adjournment and so this ground was based on a questionable premise that counsel could agree to an adjournment. She cited **Pauline**

Gail v R [2010] JMCA Crim 44, at [25] to show why it is that a judge should not easily accommodate adjournments.

[22] Grounds three and four speak to the inadequacy of self representation. It was submitted that there was unfairness in the appellant's trial because the he was illiterate, unsophisticated in trial requirements, and struggled to understand or appreciate the trial process. It was further argued that it had been unfair to force the appellant to mount his own defence in a trial, on the same date that he was abandoned by his counsel, and furthermore, in relying on **R v Rice** 2011 ONSC 5532, any assistance given to the accused by Crown Counsel or Edwards J was insufficient.

[23] To refute these arguments, Mrs Milwood-Moore highlighted the number of instances in which the appellant was assisted by Mr Maxwell and the learned trial judge. She also asked this court to consider the fact that Edwards J refused to remove Mr Terrelonge's name from the record but unfortunately that was to no avail. Mrs Milwood-Moore pointed out to the court that it was only when the appellant was abandoned during the trial that his illiteracy was revealed, and it was most unfortunate that Mr Terrelonge did not bring this to the attention of the court before he abandoned his client.

[24] Ground five asserts that the verdict was inconsistent since there was nothing in the evidence that could distinguish the allegations surrounding counts one and two from the allegations on count three. In relying on **R v Cross** [2009] EWCA Crim 1553, **R v Dhillon** [2010] EWCA Crim 1577 and **R v Harrison** [1994] Crim LR 859, Miss Exell

argued that the only distinguishing feature in the instant case in respect of count three had been adduced by way of hearsay evidence that was elicited during cross-examination of the complainant, as set out below:

> "The Accused: Something happen first, second and third, so why the police involve the third time?
>
> The Witness: Because my mom - - my uncle find out.
>
> Her Ladyship: He didn't hear you, speak up.
>
> The Witness: My Uncle ask me where I was and I tell him I was using the toilet.
>
> Her Ladyship: So are you saying the police involve the third time because somebody finds out?
>
> The Witness: Yes and my uncle went down to the bottom of the road and saw him kneeling down in the bushes with the sponge.
>
> He Ladyship: Were you there?
>
> The Witness: No, Your Honour.
>
> Her Ladyship: Alright. So you can't tell us that. She is saying the police involve the third time because the police saw you in the bushes.
>
> The Accused: I don't know bout it neither." (page 77, lines 3 to 25 of the transcript)

[25] Counsel for the appellant contended that this hearsay evidence had been inadmissible and resulted in substantial prejudice to the appellant. This prejudice could not be cured by proper directions and without it no jury could logically and sensibly conclude that the appellant committed the offence on 2 February 2009 but not the ones

in December 2008 and January 2009. Consequently, the appellant's trial was prejudiced and the guilty verdict was unsafe.

[26] Mrs Milwood-Moore submitted that the trial judge had given adequate directions that they should consider each offence separately. She conceded that it was regrettable that hearsay evidence came out in relation to the third count, but posited that the learned trial judge had addressed this matter pointedly in her summation as follows:

> "...And she try to give evidence about somebody seeing the third time when he was leaving or something like that but I want you to disregard that because nobody has come here to tell you anything, so she is bringing hearsay evidence and I know you have heard this thing about hearsay, hearsay can't go a court, so it is like nobody said anything at all. So totally disregard that, do not consider that in your deliberation at all…" (page 143 lines 2 to 12 of the transcript)

[27] It was also Mrs Milwood-Moore's contention that there was evidence which distinguished the alleged acts and participation of the appellant. There were, she submitted, two such distinguishing features: (i) on the occasions which formed the subject of counts one and two the appellant gave KM $200.00 while on the third count he said that he had no money and (ii) the manner in which the report was brought to the attention of the authorities whereby she saw her uncle, spoke to him on the same day, spoke to her mother the next day and reported the matter to the police the next day. She relied on authorities such as **R v Littlewood** [2004] EWCA Crim 1648 and **R v Memi** [2007] EWCA Crim 3203, **R v B** [2004] EWCA Crim 2869 to show that once there are distinguishing features between the actions, referable to the different counts, the verdict of guilty on a particular count will not *per se* be rendered unsafe.

[28] Miss Exell submitted in that in all the circumstances, there was a miscarriage of justice due to the absence of legal representation, the refusal of an adjournment, the inadequacy of self representation and the inconsistent verdict which rendered the conviction unsafe and ought to be quashed without a re-trial. Mrs Milwood Moore submitted that if there was indeed a miscarriage of justice she was asking the court to give consideration to a re-trial since the witnesses were still available and the Crown was in possession of a statement from the uncle regarding count three.

Discussion and analysis

[29] In our view, based on the grounds of appeal and submissions advanced, there are five issues to be determined:

1) What is the effect of the appellant not being afforded the opportunity to obtain alternative legal representation where his counsel withdrew from the matter? (ground one)
2) What is the effect of Edwards J's refusal to grant an adjournment before the trial commenced and after Mr Terrelonge withdrew from the matter? (ground two)
3) Was the appellant's self-representation adequate? (grounds three and four)
4) Was the verdict on count three inconsistent with the verdicts on counts one and two? (ground five)
5) If the appeal is allowed, should a re-trial be ordered?

Effect of absence of legal representation

[30] It is trite law that a defendant has no absolute right to legal representation (see **Robinson v R** [1985] 2 All ER 594, **Dunkley and Robinson v R** and **Mitchell v R**). While the cases cited on the point had been decided before the passage of the Charter of Fundamental Rights and Freedoms, which replaced the previous sections dealing with fundamental rights and freedoms, section 20(6)(c) of the Constitution of Jamaica upon which those cases were decided is similar to section 16(6)(c) of the Charter of Fundamental Rights and Freedoms. Although section 16(6)(c) of the Charter of Fundamental Rights and Freedoms provides that persons charged with a criminal offence shall be entitled to either defend himself, obtain legal representation of his choice or be provided with the means to obtain representation, this section cannot be construed as giving the appellant an absolute right to legal representation. However, the denial of an opportunity to seek alternative legal representation may operate to deny the appellant's right to a fair hearing. This right is enshrined in section 16(1) of the Charter of Fundamental Rights and Freedoms endorsing the principles enunciated by the law lords in the Privy Council in **Randall v R** [2002] 1 WLR 2237. The Privy Council has in a number of cases provided some guidance as to the factors to be considered when deciding whether or not the absence of counsel rendered the appellant's trial unfair and his subsequent conviction unsafe.

[31] In **Dunkley and Robinson v R** the appellants were charged with murder and during the trial Mr Dunkley's counsel objected to an identification parade form being tendered into evidence. When his objection was not heard he withdrew from the case

and abandoned his client in the middle of the trial. Mr Dunkley told the court that he was not capable of defending himself and the judge stated that his inability to defend himself was not his problem and he could do nothing. He was convicted and sentenced to death. The Board in allowing the appeal held that counsel withdrawing from the case caused substantial prejudice to Mr Dunkley. Lord Jauncey of Tullichettle, in delivering the judgment of the Board stated, at pages 325-326, that

> "In the first place where counsel appearing for a defendant on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. If the proposed withdrawal arises out of an altercation with the trial judge he should consider whether it would be appropriate to adjourn the trial for a cooling-off period. The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If notwithstanding his efforts counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation… Their lordships can sympathize with the anxiety of the judge to proceed with a trial whose start had already had to be postponed on many occasions, but where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there be a reasonable adjournment to enable him to try to secure alternative legal representation."

[32] This reasoning was also upheld in **Mitchell v R** where the appellant was charged for capital murder. He had a disagreement with his counsel because he contended that she was forcing him to admit to things that he had not done. This disagreement led to him in effect dismissing his counsel. After much argument she was eventually released from the matter by the trial judge. The appellant's conviction was quashed because the Board felt that he had not had an opportunity to obtain

alternative legal representation. Lord Slynn, in delivering the judgment of the Board, in examining the circumstances to be considered said at pages 288-289, that:

> "The appellant clearly did not understand all the procedures of the court and was at times confused, not least as to the role of counsel in cross-examining. He was not advised by counsel as to the course he might take before the hearing. Nor, although he was told by the judge that it would be a wise thing to reconsider his position, was he given positive advice that he should ask for an adjournment to consider his position and to investigate whether other counsel could act for him.
>
> …there are limits to what the judge can do by way of cross-examination and on the *voir dire* the task of the judge both in cross-examining, and giving a ruling is a particularly difficult and sensitive one.
>
> Their lordships conclude here that the judge could not have been satisfied that the appellant would not, or at any rate might not, suffer prejudice by the withdrawal of counsel. Nor is there anything to indicate that the judge considered 'whether, and if so for how long, the trial should be adjourned to enable the [appellant] to try and obtain alternative representation'. They do not consider that it can be said that the lack of representation (see *Dunkley and Robinson v R* (1994) 45 WIR 318 at page 326) was due to his 'fault', nor that this was the 'most exceptional case' where 'a reasonable adjournment to enable him to try to secure alternative representation' was not required…"

[33] In **Allette v Chief of Police** (1965) 10 WIR 243, the magistrate refused the appellant an adjournment to brief counsel, and to summon witnesses. He was thereafter convicted of a traffic violation of driving a bus on a public road and willfully preventing the passage of another vehicle. He appealed. The appeal was allowed. The Court of Appeal of the Windward and Leeward Islands held:

> "An accused person has the right to be represented by counsel at his trial and to have his witnesses give evidence, and to deny him the opportunity of retaining and instructing counsel or securing the

> attendance of any witnesses in the usual manner to be called on his behalf is a clear denial of natural justice."

[34] In applying these principles (which are applicable in varied matters before the court) to the case at bar it is clear that the appellant suffered great prejudice as a result of the absence of counsel thereby rendering his trial unfair. It began with Mr Terrelonge's withdrawal from the matter because the trial had started in his absence. We understand and appreciate Mr Terrelonge's serious concern that the trial had begun in his absence, particularly having been told by Crown Counsel that there was another statement that she wished to obtain. We accept that part of an advocate's role is to assess the witness giving examination-in-chief in preparation for cross-examination, and that he is not present in court merely to write down what the witness has said. However, the fact that in the circumstances which obtained, his representation of the appellant would have been less than ideal, does not mean that it was appropriate to walk out of court leaving his illiterate client without his advice and assistance. The appellant suffered prejudice as he did not understand the trial process and so was unable to participate properly in the cross-examination of witnesses, and did not understand the importance of the right to remain silent and/or the efficacy of giving viva voce evidence in his trial. We find that Mr Terrelonge's withdrawal from the matter, was in breach of his obligations to the appellant, opened the appellant to severe prejudice and contributed to his trial being unfair.

[35] The manner in which Edwards J conducted the proceedings when Mr Terrelonge indicated that he wanted to withdraw also rendered the trial unfair. While she made

attempts to persuade Mr Terrelonge to remain in the matter, there was no adjournment to facilitate a cooling-off after the altercation between herself and counsel and no such adjournment was suggested by the Crown, the defence or the bench. When Mr Terrelonge decided to withdraw from the matter, Edwards J did not enquire whether the appellant wanted to seek another counsel and did not adjourn so that he could obtain alternative legal representation. In fact after considering various factors the appellant was forced to represent himself as seen at page 51 lines 3 – 25 and page 52 lines 1– 4 of the transcript:

> "Mr Douglas, your lawyer has abandoned you. And while I am conscious that it is a legal-aid assignment and you are entitled to be represented, an assignment was made, so your lawyer was on the record. As far as I am concerned, he is still on the record. He walked out of court and the jury is sitting here. So I don't know that I can adjourn for you to get another lawyer assigned to you, because I have to consider two things - - well three things, most importantly, your right to be represented, but also have to balance against the fact that the complainant has come all the way from overseas to have her case heard and she is due to leave shortly, against the fact that we are in a parish with a limited jury pool. I have seven here on the panel and a same seven or five that just walked out. Now, if I adjourn to tie up this jury nothing else would be done in the Circuit. And if I discharge this jury the complainant's case will never be heard. So taking all that into consideration, Mr Douglas, it appears you going to have to be your own lawyer, so you will have to represent yourself and I will assist you so far as I can and so far as I am allowed to do so…"

[36] The cumulative effect of all these factors meant that the appellant was not given an opportunity to seek alternative legal representation, thereby preventing him from mounting a proper defence and consequently rendered his trial unfair and his subsequent conviction unsafe.

Refusal of adjournment

[37] The power to grant an adjournment is given to a judge in the exercise of his discretion and not by an agreement between Crown Counsel and defence. Moreover, where a matter has been listed for trial, respect ought to be given to that date since witnesses would have abandoned prior arrangements and suffered great inconvenience and expense to attend. The presence of the case on the trial list also means that some other accused has been denied the opportunity of a trial on that date. A trial date is a date fixed for the hearing of the matter and ought not to be disregarded without a valid reason. We are grateful to Mrs Milwood-Moore for pointing us to the dictum of Harrison JA in **Pauline Gail v R** [2010] JMCA Crim 44 where he said at paragraph [25]:

> "There are several reasons why a trial judge should not easily accommodate adjournments. Firstly, witnesses lose interest in the cases after the frustration of several attendances at court and adjournments because counsel is not available. Secondly, when the cases do come on for trial, memories have faded and viva voce evidence becomes more and more a test of memory than a graphic recall of an important event. Thirdly, 'old cases' clutter up court lists and in the effort to deal with them, 'new cases' get pushed out of the list and in the long run suffer a fate similar to the 'old cases'."

[38] Similarly, in **Robinson v R** the appellant was charged jointly with another man for murder and failed to seek legal aid. Counsel on record refused to attend the trial because he was not fully paid and when he was in attendance he sought permission to withdraw from the matter for the same reason. His request for withdrawal was refused and he also refused to take the matter on a legal aid assignment. Despite the trial judge's objections he withdrew from the matter and the trial continued in his absence. While commenting that the attorney absented himself without the court's permission,

the Board held that the judge was not required to grant repeated adjournments, regardless of the circumstances to secure legal representation for the appellant. Moreover, the absence of counsel was due not only to counsel's conduct but also the appellant's failure to seek legal aid. The Board also held that on the facts, the judge took into consideration all the relevant factors which included the availability of witnesses, placing the appellant's defence before the jury fully and fairly, and in so doing had not exercised his discretion unfairly by refusing another adjournment.

[39] Bearing these principles in mind, an adjournment should not be lightly given where a matter has been set for trial and accorded priority status. Whilst it may have been a difficult decision, in our view, Edwards J's refusal to grant the adjournment on the first day of the date fixed for trial of the matter, and to continue with Mr Maxwell in court, but with Mr Terrelonge being absent, cannot be faulted.

[40] However, what occurred on the second day of the trial required entirely different considerations, in that with the withdrawal of representation of the appellant by Mr Terrelonge, a serious problem arose in Edwards J not granting an adjournment so that the appellant could have been provided with an opportunity to seek alternative representation. The decisions in all the Privy Council cases cited at paragraphs [28]-[31] herein, when similar situations arose, required that she ought to have enquired whether the appellant wanted another counsel to represent him, and if he did, ought to have granted an adjournment to facilitate this. This court in **R v Delroy Raymond** (1988) 25 JLR 456 has set aside a conviction and ordered a new trial where a judge

refused to adjourn a matter to give the appellant the opportunity to obtain legal representation. In that case the appellant applied for legal aid but at the time of the trial that had not yet been assigned. Crown Counsel informed the judge that a prosecution witness was about to leave the island and the judge thereupon refused to adjourn the matter to give the appellant the opportunity to obtain legal representation. He was convicted of illegal possession of firearm and robbery with aggravation. Carey P (Ag) in delivering the judgment of the court at page 458 said that the learned trial judge erred when he refused to exercise his discretion to grant an adjournment because he failed to consider that the legal representation to which the appellant was entitled had not been forthcoming due to no fault of his own thereby infringing his constitutional right to a fair hearing. He said:

> "In considering whether an adjournment should be granted, a trial judge is obliged to balance a number of competing factors. The judge would be entitled to consider the number of occasions the matter has been before the court ready for trial; the availability of the witnesses or their future availability; the length of time between the commission of the offence and the trial date; the possibility that a Crown witness may be eliminated or suborned; whether the defence have had sufficient time to prepare a defence…. The list does not pretend to be exhaustive."

Reference should also be made to the well known dictum of Lord Parker CJ in **R v Howes** [1964] 2 All ER 172, where he stated at page 175I -176A:

> "The real question at the end of the day is whether the [appellate] court is completely satisfied that notwithstanding the unfortunate course this case took in regard to the defendant not being represented, there has been no miscarriage of justice. If there is the slightest doubt in the matter, then the court ought to quash the convictions."

[41] It seems therefore that in the circumstances that obtained, Edwards J's failure to exercise her discretion to consider and adjourn the trial to allow the appellant an opportunity to secure alternative legal representation was wrong, rendered his trial unfair and resulted in a miscarriage of justice.

Adequacy of self-representation

[42] All the Privy Council cases cited above seem to suggest that a trial judge must give some consideration with regard to the appellant's ability to adequately represent himself. An accused should understand the trial process, his role in it and how he will participate in it. In fact, in the New Zealand case of **Condon v R** which was cited by the appellant's counsel, this was held to be an essential pre-requisite where the accused is unrepresented. Blanchard J of the New Zealand Supreme Court, at paragraph [82] said:

> "The court should examine the manner in which the judge presided over the trial, especially whether the judge clearly explained the court procedures to the accused and thereby minimised the disadvantage of being unfamiliar with the trial process and with rules of evidence. It will be relevant also whether the accused had the benefit of guidance from a lawyer or an amicus at any time prior to or during the trial. The court must have regard to the personal characteristics of the appellant, such as level of intelligence and education, previous experience in a courtroom and ability to express him or herself clearly and sensibly in that setting. It must look to see whether the case involved any difficult legal issues or had other complexities which might have benefited from analysis by a trained legal mind. It should also look at the nature of the Crown case and at how effectively the accused in fact managed to convey the nature of the defence in cross-examination of Crown witnesses, examining defence witnesses, giving evidence (if the accused chose to do so) and addressing submissions to the court. Mason J pointed out in *McInnis v R* (1979) 143 CLR 575 at 583 that the calibre of the accused's forensic performance is a relevant, but not a critical, factor

> in the determination of fairness. The appeal court should not be too ready to conclude from a reading of the transcript that the defence has been conducted as competently as counsel, with professional skill and detachment, would likely have done. A transcript does not necessarily convey the full atmosphere of the courtroom and in particular the demeanour of the accused before the jury. A fortiori, if the full transcript, including addresses, is not available."

[43] The fact that Edwards J appeared not to have given any adequate consideration to the appellant's ability to represent himself, and had made no enquiries as to whether the appellant was able to represent himself is clear from excerpts of the transcript below:

> "Her Ladyship: Now, you going to ask KM questions about all the things that she said about you yesterday. Now, you know how to ask a question? You know how to ask a question?
>
> Accused: Well, never been though this was. I never been though this way, ma'am.
>
> Her Ladyship: Not hearing you.
>
> Accused: I never go through this type of…
>
> Her Ladyship: Me neither. So this is a first time for the two of us. Okay.
>
> Accused: I don't know nothing 'bout that, I don't know how to ask the question because I - - I don't know.
>
> Her Ladyship: You don't know how to ask a question?
>
> Accused: I don't know what to ask her about.
> Her Ladyship: You going to ask her about the things that she said about you to show that she is lying. Yes, to show that she is not telling the truth about you.

Accused: Really of a fact I don't know anything about what she talking and…

Her Ladyship: Well, tell her that you don't.
Accused: Miss, I don't know anything about what you say, ma'am.

Her Ladyship: He is talking to you. Him say him don't know anything about what you say. What you have to say about that?

The Witness: I saw him.

…" (page 54 lines 3-25 and page 55 lines 1-12)

[44] Edwards J also seemed not to have paid any regard to the fact that the appellant had stated that he was unfamiliar with the court system. In fact the basic issue of whether the appellant could read was not recorded in the transcript until cross-examination of KM by the appellant began. Before granting a short adjournment to allow the appellant to read the statements, Edwards J said the following:

"Her Ladyship: At the back of the toilet. Ask her about that one in December 2008. You can read Mr Douglas?

Accused: No.

Her Ladyship: You can't read?

Accused: No.

Her Ladyship: You can write?

Accused: Well, me can write my name so far.

Her Ladyship: It would help if you could read. But with the lawyer having abandoned you, you have to read the statement. When you say you can help yourself, you can only sign your name?

Accused: Yes." (page 55 lines 18-25 and page 56 lines 1-7 of the transcript)

[45] The appellant's lack of knowledge of the trial process was also evident when he failed to point out certain inconsistencies in KM's testimony during cross-examination. The appellant could hardly put proper and appropriate questions to KM without the assistance of Edwards J. The learned judge did try to assist him in this regard but her efforts were understandably restricted by a need to remain objective and to appear so to the jury. The appellant did not even seem to understand the difference between the three choices that were available to him in respect of his defence to the charges, although this was not for a want of effort by the learned trial judge. This is evident in the transcript when Edwards J pointed out the choices open to the appellant, (the then accused) in his defence as follows:

"Her Ladyship: You have three choices so you can do one of three things, okay. Now I want you to start count them off with me. The first thing you can do, you can stay where you are, right where you are standing and tell the jury your side of the story. You can give a statement and when you are finish you sit down and no one can ask you any question and the jury will be left to give what weight they wish to what you have to say. The second one, you can come up here like the other witnesses have done, take the bible, swear on the Bible to tell the truth, but if you do that, the Crown prosecutor might ask you some question, yes and the jury will have that evidence to consider. The third choice, you can choose to remain silent. That is, you don't have to say anything at all and let the Crown prove its case against you. If you choose to remain silent, then the jury won't have your side of the story at all, so that is your choice. You can remain silent, let the

prosecution prove the case. You counting of with me?

The Accused: Yea.

Her Ladyship: The second one, you can stand up where you are and say anything you want to say and nobody can ask you any question or you can come swear on the Bible to tell the truth and give evidence and you might be asked some questions in cross-examination. You understand the three choices as I have outlined them to you?

The Accused: Yes, ma'am.

Her Ladyship: Which one do you choose to do?

The Accused: Let the jury decide it.

Her Ladyship: You have to decide what you going to do from here on remember. You said you understand what I said. You can stay from there and tell us, tell the jury what you want to tell them, your side of the story or you come up here and swear on the Bible and tell it up here or you can choose not to say anything from your side, so which one of them you have to say?

The Accused: So far I won't have anything else to say more than what go through already.

Her Ladyship: But you decide which one you want to say.

The Accused: I don't have anything to say because I don't know what to say.

Her Ladyship: So listen to me, you are unrepresented, you don't have a lawyer, so I'm duty bound to tell you that if you don't say anything it means that the jury is left without your side of the story, alright. You understand that?

The Accused: Yes, ma'am.

Her Ladyship: And you're still choosing to remain silent.

The Accused: But I don't have anything more to say than what me ask, the question dem.

Her Ladyship: If that is the same, you can repeat the question that you ask if you wish.

The Accused: I don't want to say anything.

Her Ladyship: You don't want to say it?

The Accused: No.

Her Ladyship: Alright.

Her Ladyship: Even though you choose to remain silent you may still call witnesses if you have any. Do you have any witnesses to call?

The Accused: No ma'am

Her Ladyship: Alright, so that is your case then. You may sit down." (page 99 lines 11- 25, page 100 lines 1-25 page 101 lines 1-25, page 102, lines 1-17)

[46] Mrs Milwood-Moore had submitted that the court ought to consider the fact that there were numerous instances where Edwards J assisted the appellant with his cross-examination. However, neither Edwards J nor Crown Counsel could adequately secure the interests of justice since there are limits as to the level of assistance they could provide the appellant. We are confident that the appellant did not even begin to understand issues relating to the burden of proof. When one considers the fact that the appellant was unfamiliar with the trial process, he was illiterate, his cross-examination was wanting despite assistance from the learned trial judge, and the fact that he was unable to understand the three choices open to him in his defence, it seems that the

appellant's self representation was grossly inadequate which also prejudiced his right to a fair trial.

Inconsistent Verdict

[47] A conviction will be quashed based on an inconsistent verdict where the verdicts are such that no reasonable jury, applying its mind to the evidence, could have reached the conclusions it did. This principle of law has been explained in a number of cases from this and other jurisdictions. This court canvassed several authorities in **Jerome Daley v R** [2013] JMCA Crim 33 where the appellant was charged with two counts of carnal abuse. The complainant, who was under the age of 16 at the time of the offence, gave evidence that she had sex with the appellant twice in a taxi. The appellant was convicted on count one and acquitted on count two. He appealed complaining that the verdicts were inconsistent. The appeal was dismissed because of inter alia the appellant's failure to establish that the verdicts were inconsistent. At paragraph [32] of the judgment, we set out the following six principles when deciding whether a verdict is inconsistent:

> "1) The verdicts of the jury on the varying counts must not be irreconcilable or they will be considered by the court to be unsafe or unsatisfactory.
>
> 2) The fact, however, that the jury has returned inconsistent verdicts does not necessarily mean that the conviction must be quashed.
>
> 3) The burden is always on the appellant to show that the verdict is either repugnant or inconsistent or that the verdicts cannot stand together, in that no jury having directed their minds properly to the facts could have arrived at that conclusion.

4) The verdict can yet be safe and satisfactory though inconsistent, if it is clear that the jury could have accepted certain evidence of the prosecution, sufficient to make a finding on one count, and therefore make no final conclusion on other counts before them; especially if it can be shown that the jury were not confused nor had they adopted a wrong approach.

5) For the inconsistent verdicts to be held to be unsafe, logical inconsistency is an essential pre-requisite.

6) The counts on the indictment must always be considered separately and so the jury may take a different view of the evidence on each count; the jury may accept one part of a witness' testimony and may reject another part, which could reasonably explain their conclusions."

[48] The case of **R v Dhillon** [2010] EWCA 1577 is instructive. In that case, the complainant and the appellant were both employed to the same company and lived at the same flat. After going to a wine bar the complainant got drunk. After returning to the flat it is alleged that the appellant inserted his fingers into the complainant's vagina (count one), inserted his fingers into her anus (count two), touched her breasts (count three), licked the complainant's vagina (count four) and attempted to rape her (count five). He admitted counts one, three and four, but said that these activities were consensual. He was convicted of counts one and three and acquitted of counts two, four and five. Elias LJ said at paragraph 33

> "It is notoriously difficult successfully to challenge a jury's verdict on the grounds that inconsistent verdicts have been returned."

The Court of Appeal set out all the principles that we referred to in **Jerome Daley v R** but also highlighted additional principles for consideration at paragraph[33]:

1) "Even where there is a logical inconsistency, a conviction may be safe if the court finds that there is an explanation for the inconsistency. It is only in the absence of any such explanation that the court is entitled to conclude that the jury must have been confused or adopted the wrong approach, with the consequence that the conviction should be quashed.
2) Each case turns on its own facts and no universal test can be formulated".

Elias LJ at paragraph 41 went on to state that:

> "Generally, therefore, in sex cases where it is alleged that different sexual incidents occurred on separate occasions, verdicts will not be inconsistent simply because a jury convicts on some counts and acquits on others, because there is likely to be an obvious legitimate chain of reasoning to explain the verdicts. The jury may be sure that a witness has reliably recalled one incident but remain unsure about another; or they may consider that some incidents are exaggerated or fabricated but not all. There have been numerous cases of this nature where challenges on the basis of inconsistent verdicts have unsurprisingly failed: e.g. *R v Bell* (unreported 15 May 1997) and *R v VV* [2004] EWCA Crim 355."

[49] These principles have been applied in several other cases from the English Court of Appeal. In **R v Littlewood** [2004] EWCA Crim 1648 the appellant was charged with 21 counts of various sexual offences on boys at a boy's home throughout the 1970's and 1980's. He was acquitted of two counts of cruelty to a child, three counts relating to a complainant who withdrew his statement, and one count of buggery in relation to a complainant named Gaynor. There was a third count of buggery in relation to Gaynor upon which the jury could not agree. He was convicted on all other counts. One of the grounds in his appeal against his conviction and sentence was that the verdicts in relation to the counts involving Gaynor were inconsistent. Waller LJ in delivering the judgment of the court said that it is true that when parts of a story are missing then

this casts doubt upon the entire event. However, where there are distinguishing features it is open to the jury to reach different verdicts on different counts. Waller LJ in dismissing the appeal said at paragraph [63]

> "The jury had been told that they could reach different verdicts on the different counts, even on counts relating to the same complainant. Why then, we ask rhetorically, should not the jury be sure that one act of buggery took place at the camp, not be sure that the second act of buggery in the office into which others might be able to look had not taken place, and be unable to agree in relation to the third act of buggery? We can see no reason. They were sure that the appellant had committed an act of buggery on Gaynor (count 11). The fact that they could not agree in relation to the totally separate incident, the subject of count 12, and were not sure about a totally separate incident, count 13, does not in our view on its own cast any doubt upon the safety of the conviction under count 11: in the words of Rose LJ "there is no 'logical inconsistency' between these verdicts."

[50] In **R v Memi** [2007] EWCA Crim 3203 the appellant had been accused of fondling the complainant's breast and placing his finger inside her vagina when she fell asleep on his shoulder in a plane. As soon as she felt his finger she spoke to a flight attendant and asked for another seat and was crying. She also told a police officer about the fondling at the airport but did not relate the incident about the finger being placed inside her vagina. The appellant was tried and convicted for the fondling but not for the penetration charge. It was argued on appeal that the jury could not have rationally distinguished between the two counts. It was held that both charges derived from a brief but separate incident. In fact on count one, there was evidence from two separate independent witnesses for the complainant to whom she had made complaints

shortly thereafter that the appellant had felt her breast. As a consequence there was nothing illogical about the jury's conviction.

[51] In **R v A** [2014] NICA 2 a case from the Ireland Court of Appeal, the appellant was tried on nine counts of various sexual offences against the daughter of his long-term partner. He was convicted on only two counts and acquitted on the other seven. The convictions were quashed based on the faulty directions given by the judge to the jury, but their lordships found no basis to find that the verdicts were inconsistent. Girvan LJ in delivering the judgment of the court at paragraph [16] said

> "There was no necessarily illogical inconsistency between the jury's conviction of the Appellant on Count 2 and acquittal on Count 3 or between their conviction of the Appellant on Count 4 and acquittal on Counts 5 and 6 or between the convictions and the acquittals on the remaining counts. The jury could logically have concluded that, while they were satisfied that the touching of the Complainant alleged on those two counts occurred, they were not satisfied that the Crown had proved that the other alleged acts had occurred. In view of the way in which the Complainant's evidence emerged it was entirely understandable why the jury were not satisfied in relation to the other counts. There was evidence in relation to Counts 2 and 4 which could have led the jury to conclude that the case was proved. The evidence was of a different quality."

[52] In **R v Raivich** [2015] EWCA Crim 632 the appellant was a medical doctor licensed in Germany but not in the United Kingdom. He participated in a sperm donation programme where he would use a tube to inseminate women with his sperm to allow them to conceive a child. It is alleged that he committed various sexual acts upon women during the process of insemination such as touching their breasts, placing his finger inside their vagina, and stimulating the clitoris. He was convicted of two

counts of sexual assault for stimulating the complainant's clitoris and touching her breasts but he was acquitted of the remaining counts that cited similar actions on different dates. It was argued on appeal that the verdicts were inconsistent with the jury failing to agree on verdicts for the remaining counts since the facts were similar. In citing **R v Dhillon** and the principles stated therein the appeal was dismissed. Sir Brian Leveson P in delivering the judgment of the court said at paragraphs [40]-[41]:

> "It was made clear that separate verdicts were required on each count in respect of each complainant and that different verdicts could be returned in respect of different counts depending on the findings of fact…
>
> The jury was entitled to consider the evidence of C (the complainant), the expert evidence, the contrast with what the character witnesses said happened to them, the appellant's interviews and the circumstances (including his decision not to give evidence) and reach their conclusions based upon all of it. It is not sufficient simply to look at the evidence of C to justify the allegation of inconsistency…"

[53] **R v Dhillon** has said explicitly that proving that a verdict is inconsistent is a hard task. However, this court in **R v Joseph Pat Tenn** (1975) 24 WIR 282 has provided an example of a case where the verdict was held to be inconsistent. The appellant and Kerr had a fight over the price of cigarettes, at a restaurant owned by the appellant, during which the appellant aimed his gun at Kerr and fired a shot at Kerr, that missed Kerr but wounded Gray. The appellant was convicted of two counts of illegal possession of firearm and shooting at Lascelles Kerr with intent to do him grievous bodily harm. He was acquitted of wounding Gray with the intent to do Lascelles Kerr grievous bodily harm. It was argued, citing **R v Durante** [1972] 3 All ER 962 and **R v Hunt** [1968] 2

All ER 1056 as authority, that the verdicts were inconsistent and were unsafe. Graham-Perkins JA at page 284 said:

> "On the evidence in this case we have not the least hesitation in holding that the applicant has discharged the burden that undoubtedly lies on him of showing that the verdicts on the first and second counts are, *ex necessitate*, inconsistent. We think that "no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the conclusion" reached by the jury in this case. Apart from one factor both counts depended on precisely the same factual situation. In respect of each of those counts the Crown was required to establish that the applicant had leveled a firearm at Kerr and had discharged a bullet at him, and that at the moment when the applicant discharged that bullet there was present in his mind an intention to inflict grievous bodily harm on Kerr. In addition to that situation the Crown was required to establish, in relation to the third count, that the bullet discharged by the applicant from the gun aimed at Kerr wounded Gray. There was here no question as to whether or not Gray received a wound, or whether or not that wound was caused by a bullet discharged from a gun fired by the applicant. The evidence on those matters was clear and unchallenged. Indeed, the applicant admitted that Gray was wounded. The only justification, therefore, for a verdict of not guilty on the second count was that the jury was not satisfied that the applicant intended to do grievous bodily harm to Kerr. In that event a verdict adverse to the applicant on the first count predicated on the existence of a particular intent must, inevitably, be in violent conflict with a verdict which, in precisely the same factual situation, denies the existence of that very intent."

[54] In summary, in the light of the above cases, the principles to be gleaned there from in addition to those set out in paragraphs [47] and [48], seem to be that when a jury has reached a different verdict on different counts in the case, if there are distinguishing features in respect of any particular count, then the verdicts may not be unsafe. So, if the evidence is of a different quality on each or a particular count, and/or there is an explanation for the different verdict on a particular count, the verdicts

although they may appear to be logically inconsistent may not be unsafe. Additionally, there may have been separate independent witnesses which may add to the credibility of the evidence in respect of a particular count(s). The evidence must as always be looked at as a whole.

[55] The cases highlighted herein on inconsistent verdicts all seem to examine whether the judge gave correct directions in law to the jury in respect of each count. In the case at bar, Edwards J gave the following directions to the jury:

At pages 109-110, lines 13-25 and lines 1-2 she stated respectively

> "And bearing in mind that you can accept everything that the witness said if you are satisfied that that particular witness spoke the truth on everything. If you do not believe the evidence of any of the witnesses you may reject it out of hand. If you believe some of what the witness says, but not the other half, you may accept the part that you believe and reject the part that you don't believe. If you are satisfied that the witness was mistaken as to one part, but truthful on the other or untruthful on one part and truthful as to one part, but truthful as to the other part, then you reject one part and you accept the other part accordingly."

And at page 119, lines 4-22, she said:

> "And this charge, he is charged with three separate counts and it is alleged that three separate incidents occurred. So you in coming to make your deliberations have to consider these three separate incidents separately. The evidence on each count is different. And therefore, your verdict on each need not be the same. So you may find that count 1, where it is alleged that sex took place between the 1st and 31st of December, 2008, is proved. But you may find that count 2, that where it is alleged sex took place on the 26th of February, 2009, is not proved and vice versa. So you may acquit on one count and convict on another count and so on. So where you have two separate counts each count is different. The evidence is different and you must consider the evidence on each count separately."

[56] Based on the directions given by Edwards J to the jury, it is clear that the learned judge had given adequate directions to the jury, namely that they were to examine each count separately, that they could take a different view on each count, and that they were entitled to accept parts of the complainant's evidence whilst rejecting or not being sure about other parts.

[57] Having examined the directions given to the jury, we must now assess whether or not the verdicts on the varying counts are irreconcilable. On the face of it these verdicts seem to be inconsistent since they describe the same set of actions occurring on all three occasions, although on different dates. However, the authorities on inconsistent verdicts seem to conclude that in reviewing the entire case, once there are some distinguishing features on the counts the verdict will not be held to be inconsistent. In this case, while there are no significant distinguishing features between counts one and two, there are distinguishing features between counts one and two on the one hand, and count three on the other, which would mean that the verdicts were not logically inconsistent. They are as follows:

1) On counts one and two the appellant was wearing a black shirt while on count three he was wearing a blue shirt.
2) When the appellant was having sex with KM on counts one and two when KM told him to stop he complied. However, on count three he refused to stop and she had to push and hit him.

3) On counts one and two, the appellant gave KM $200.00 but on count three the appellant did not give KM any money because he said that he was not sure he would see her.
4) On counts one and two, upon reaching home, KM did not speak to anyone after the sexual encounters but on count three, upon reaching home she spoke to her uncle CH, who spoke to KM's mother Ms MH the day after the alleged incident.
5) Ms MH then called KM on her phone at school and went to the school where she spoke to the guidance counselor and the vice principal.
6) On counts one and two, no report was made to the police but on count three a report was made to the police the day after this incident was alleged to have occurred and KM was examined by a doctor.

[58] These differences show that unlike in **R v Joseph Pat Tenn**, the verdicts on counts one and two did not 'violently conflict' with the verdict on count three, since they were not based precisely on the same factual situation, being different events on different dates, with different acts occurring. As a consequence, the verdict on count three does not appear to be inconsistent with those on counts one and two.

[59] **R v Dhillon** makes it clear that even where the verdict was logically inconsistent, once there is some plausible and sufficiently reasonable explanation for

the inconsistency then the conviction would not be disturbed. The authorities state that, it is perfectly reasonable for a jury, after having been directed to examine each count separately, to thereafter accept one part of the witnesses' testimony and reject another part, or not to be sure about other parts. In the instant case, the jury was entitled to accept or reject the evidence of Ms CH and Constable Watson that a report was made shortly after the third incident and that KM was medically examined. The jury was also entitled to examine all the distinguishing features and say which part of the evidence they believed and which parts they did not believe. As a consequence, we find that the verdict was not logically inconsistent, the appellant has not discharged his burden of proving that the verdict on count three was inconsistent with the verdicts on counts one and two, with no reasonable explanation. This ground of appeal therefore fails.

Re-trial

[60] After consideration of the matters discussed herein, it cannot be said that the appellant would still have been convicted if he had been represented by counsel. As a consequence, in our view, there was unfairness in the trial that resulted in a substantial miscarriage of justice and so the conviction ought to be quashed and the sentence set aside. An important question that remains however is whether a re-trial should be ordered since the appellant's previous trial was found to be unfair.

[61] The power to order a new trial is conferred upon this court by section 14(2) of the Judicature (Appellate Jurisdiction) Act, 1962, which is in the following terms:

> "(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct

> a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[62] The test for whether or not a re-trial should be ordered was stated by Lord Diplock on behalf of the Board, in the well known Privy Council case of **Reid v R** (1978) 27 WIR 254, as follows:

> "The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal. Among the factors to be considered in determining whether or not to order a new trial are: the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

[63] In all the cases assessed above, where a trial was held to be unfair due to the absence of counsel, refusal of an adjournment to obtain counsel, or the inadequacy of self representation, a re-trial was ordered by the court. Indeed in **Mitchell v R** and **Raymond v R** a re-trial was ordered when all the factors stated above were weighed together. It is necessary therefore to acknowledge the fact that sexual intercourse with underage persons is a serious and prevalent offence in this country. Additionally, it is commendable that after all this time the witnesses, particularly the complainant, are still

interested in the case and so are willing to make themselves available to give evidence in the event of a re-trial.

[64] The Privy Council in **Charles and Others v State of Trinidad and Tobago; carter (Steve) v Same; Carter (Leroy) v Same** (1999) Times, 27 May and this court in **Pauline Gail v R** have considered the delay between the commission of the offence and the new trial and the ordeal suffered by the appellant, in considering whether or not to grant a new trial. In the instant case, there has been some delay since it has been approximately seven years since the commission of the offence and four years since the trial and subsequent conviction. However, the appellant had been on bail during the trial and remained on bail during the hearing of this appeal, although one must still consider that the matter has remained outstanding, hanging over his head, and would continue to do so until finally determined.

[65] Nonetheless, we must balance these considerations with the fact that a new trial might give the Crown a second chance to put its house in order when it had so many opportunities to do so before the trial commenced. This factor was considered by the Privy Council in **Au Pui-Kuen v Attorney General of Hong Kong** [1980] A C 351 where it was held that it would be wrong to order a re-trial to give the prosecution a second chance to strengthen its case by adducing additional evidence. Similarly in another Privy Council case of **Nicholls v R** [2000] All ER (D) 2305 the Board dismissed the application by the Crown for a re-trial since in doing so would have given the Crown a chance to fix the deficiencies in the case. The Board went on to state that if certain

aspects of the evidence were to be excluded, namely the medical report, then a new prosecution without such evidence would fail.

[66] In the case at bar, the appellant was charged on 18 January 2010. There was therefore ample time between that date and 20 June 2011, when the trial commenced, for statements to have been collected from the witnesses whom the prosecution considered it necessary to call. If the case was not ready, it ought not to have been placed on the trial list. Indeed, before the trial began Edwards J asked Crown Counsel if she was ready and she elected to proceed without the statement of Mr CH. As a consequence, it is a concern that if a new trial is ordered, it would provide the Crown with an opportunity to strengthen its case and cure defects it had multiple chances to cure. However we cannot say, as was the case in **Nicholls v R** that, if the statement of Mr CH were to be excluded, a new prosecution without such evidence would fail.

[67] It continues to be important to remember, therefore, as stated by the Full Court of Hong Kong when ordering a new trial in **Ng Yuk Kin v Regina** (1953) 39 H K L R 49, at page 60, that-

> "it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery."

[68] As a consequence after weighing all the above factors together we are of the view that a new trial ought to be ordered. As indicated, although this matter has been hanging over the appellant's head for the past seven years, he has not been in custody

during and/or since the trial. Additionally, since the witnesses are still available and given the seriousness and the prevalence of this offence, it is our view that the interests of justice demand that a new trial ought to be ordered.

Conclusion

[69] Although the verdicts have not been found to be inconsistent, in all the circumstances the appellant suffered a substantial miscarriage of justice when Edwards J failed to grant an adjournment in order for alternative legal representation to have been obtained for him, and also when she failed to recognize the effect of his incapacity to represent himself thereby rendering his trial unfair. In all the circumstances therefore the appeal is allowed, the conviction is quashed, the sentence is set aside and in the interests of justice a new trial is ordered in respect of count three, to take place as soon as possible in the next sitting of the Saint Catherine Circuit Court.