[2020] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 60/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

ROHAN EBANKS v R

Donald Bryan instructed by Donald A Bryan and Associates for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Monique Corrie for the Crown

3, 4, 5 October 2018 and 25 September 2020

P WILLIAMS JA

[1] On 11 May 2016, Rohan Ebanks, the appellant, was arraigned in the Home Circuit Court, before Daye J and a jury, on an indictment in which he was jointly charged with Venoshia Reeves. The indictment contained three counts. The first count charged him with the offence of trafficking in persons, contrary to section 4(1)(c) of the Trafficking in Persons (Prevention, Suppression and Punishment) Act ("the Act"). The second count charged them jointly with the offence of facilitating trafficking in persons, contrary to section 4(5) of the Act and the third count also charged them jointly with the offence of rape.

[2] On 16 May 2016, the indictment was amended and Miss Reeves' name was deleted from the particulars of offence for the third count which was for rape. (Since Miss Reeves had been arraigned on the count, the proper course may have been for the prosecution to have offered no evidence against her, and for a formal verdict of not guilty to be entered.) She pleaded guilty to the second count for facilitating trafficking in persons.

[3] On 13 June 2016, another amendment was permitted and a fourth count for trafficking in persons, contrary to section 4(1)(a) of the Act, was added to the indictment. The appellant pleaded not guilty to this additional count. On 17 June 2016, he was found guilty, by a majority verdict of the jury, on the original three counts. On 7 July 2016, the learned trial judge sentenced him to 14 years' imprisonment at hard labour in respect of count one, 10 years' imprisonment at hard labour in respect of count two and 16 years' imprisonment at hard labour in respect of count three with the stipulation that he would not be eligible for parole until he had served 10 years. The sentences were ordered to run concurrently. The appellant was also ordered to pay restitution to the victim in the amount of $1,000,000.00 for the costs of medical and psychological treatment, and $1,000,000.00 as compensation for pain and suffering.

[4] By notice dated 19 July 2016, the appellant applied for leave to appeal against conviction and sentence on the following grounds:

> "1. The verdict is unreasonable and is not supported by the evidence.

2. The addition of a fourth count to the indictment, charging the appellant/applicant with Trafficking in Persons in Jamaica, at the close of the case for the defence caused irreparable prejudice to him, thereby rendering the trial unfair.

3. The Learned Trial Judge erred in failing to direct the jury on the issue of whether the prosecution had a sinister motive for presenting the case in the manner in which it did to appease a foreign state, namely the government of the United States of America.

4. The Learned Trial Judge erred in failing to direct the jury on the issue of the complainant and other witness(es) for the prosecution giving responses to questions under cross-examination after being cued or prompted by parties to the proceedings and others present in the courtroom, thereby rendering the trial unfair.

5. The trial was tainted by material witness(es) for the prosecution being present in court during the evidence of the complainant and prior to those other witness(es) giving evidence themselves and who were conversing with the said complainant during the breaks in the evidence, thereby rendering the trial unfair.

6. The sentence is manifestly excessive."

[5] On 24 August 2017, a single judge of this court considered his application and leave to appeal was granted. At the time, the judge had sight of the transcript of the summation of the learned trial judge only, so it was therefore ordered that the full transcript of evidence should be obtained for the hearing of the appeal.

[6] At the hearing of the appeal, Mr Bryan sought and was granted permission to argue the following amended and supplemental grounds:

"1. The verdict is unreasonable and unsafe having regard to the evidence.

2. The learned trial judge failed to give adequate directions, on the issue of the identification made of the appellant by the complainant in Haiti, thereby rendering the conviction [sic] on counts 1 and 2 unsafe.

3. The learned trial judge failed to give directions on lies to the jury in circumstances which necessitated such directions, thereby depriving the appellant of his case being given proper consideration by the jury and ultimately denying him of a possible acquittal.

4. The learned trial judge erred in allowing the prosecution to add count 4 to the indictment after the appellant had given evidence on oath and further erred when he directed the jury that it was an alternative count, in doing so, irreparable prejudice was caused to the appellant.

5. The misdirections and non-directions present throughout the case led to a substantial miscarriage of justice.

6. The summation lacked clarity in material aspects of the case thereby rendering it on a whole, circular and confusing.

7. The inconsistencies and discrepancies were so material to the issue of credibility that the learned trial judge should have gone on to identify ways in which they have undermined the prosecution's case.

8. The sentence was manifestly excessive."

[7] On 5 October 2018, having heard and considered the submissions of counsel, we made the following orders: -

"1. The appeals against convictions are dismissed.

2. Appeal against sentences are allowed in part.

3. The sentence of 14 years' imprisonment on count 1 imposed by the learned trial judge is set aside and a sentence of 10 years' imprisonment imposed in its stead.

4. The sentences are affirmed in all other respects and are to run from the 7th July 2016."

[8] As promised, we now put our reasons in writing with apologies for the delay in doing so.

The prosecution's case

[9] The complainant, MD, was born in Haiti and she testified that she was born on 16 November 1996. At the time of trial, she said she was 19 years old. She testified that she met the appellant in Ile-A-Vache, an island off the coast of Haiti, where she lived with her family; namely, her mother RT, her three sisters and four brothers. At the time, she and her family lived under poor circumstances and she was not attending school. She knew the appellant by the names 'Colour man' or 'Colour' but came to learn his name to be Rohan Ebanks.

[10] Sometime after her 14th birthday, and before the Christmas holidays in 2010, she said she was somewhere out in her community, having a discussion with one of her friends about school and her plans for the future. The appellant approached her and asked her if she wanted to go to Jamaica, which he said was a place "where beautiful people and kind people" lived. He also said he "would bring [her] to Jamaica to carry [her] to school and provide job and [she] could be able to help [her] family afterwards". She refused his offer. They conversed in Creole French.

[11] She saw him again the following morning. This time he was standing in front of her house speaking with her elder sister PE. She was unable to hear what they were talking about.

[12] Three days later she returned home from visiting a friend to find the appellant in conversation with her mother and PE. He was speaking in English with PE who was then translating to Creole French for her mother. MD heard PE tell her mother that the appellant wanted to take her to Jamaica, to give her a better life. Her mother then repeated to MD what the appellant had said and told MD she "left it to her".

[13] MD testified that she realised it was a good opportunity for her to go to school, to get a job and help her family. This time her response was yes. Her mother told her she should go and behave herself and be a good girl.

[14] The following morning the appellant returned and gave MD $1,000.00 in Haitian currency and told her not to carry "whole heap of clothes". She gave the money to PE and they went to the market to purchase some clothes.

[15] Later that morning, accompanied by her mother, MD went to the seaside where she met with the appellant. He was busy packing a boat, which the complainant described as a good size fishing boat with an engine. Her brother came along and gave her a hug and a phone number with instructions that she should call him "if anything". Her brother put her in the boat and then the appellant and two other men got in and they left Haiti. This was at some time after 9:00 am.

[16] They arrived in Jamaica at some time after 1 am the following day. The appellant made some phone calls and eventually a car came to pick them up. The appellant drove to a place the complainant described as "a friend's house". At that house the appellant made a call to PE and MD was able to speak to her and also to her mother.

[17] After sleeping there for a while, MD and the appellant left, and he drove to a place she later learnt to be Tryall in Saint Elizabeth. The appellant took her to a house where she was introduced to his baby mother, Jody, and their four children, ages ranging from seven years to two months. It would emerge during the trial that Jody's given name was Venoshia Reeves.

[18] During the time they lived at Tryall, the complainant said the appellant and Jody would lock her in the house with the children when they went shopping. She had no means of getting out and coming back in freely. She would help to clean the house and take care of the children, which meant that she would wash their clothes, bathe them, get them ready for school and make their breakfast. She would also clean out the appellant's and Jody's room and she said that that even included spreading their bed. When the appellant was not there, Jody left all the work to her. MD would take the children to school and pick them up after, but she said she did not speak to anyone on these occasions.

[19] The complainant testified that she would be up by the latest 6:00 am and go to bed by 9:00 pm. She was never given any pocket money as payment for the work she

did. She explained that when the appellant was home, Jody would speak to him and he would translate what Jody said. The appellant would speak to her in Creole French.

[20] MD explained that it was three months after she had arrived in Jamaica, that "all of this start beginning". She said the appellant was not in Jamaica when Jody started telling her to do all the work. During that time at Tryall, she did not know sufficient English to communicate with Jody, but Jody would show her what was to be done and she was able to understand enough to know when she was to do things around the house, like washing the dishes or cleaning the house.

[21] However, even when the appellant returned, MD would do all the work sometimes. She said that initially the treatment she received from the appellant was "okay" but afterwards everything changed. She described the change as follows:

> "He stopped paying me no mind. And just naaw say nothing to me. Nothing about school, nothing about whatever."

[22] During the time at Tryall, MD said, she asked the appellant if she could speak with her family. Sometimes he said he did not have any credit and other times he said the phone needed to be charged and she was never able to speak with her family. She said the appellant never said anything to her about school and she never asked him about it.

[23] MD testified about times when she got ill while at the house in Tryall. She was never taken to a doctor and so she never got any medication. This she eventually testified would be the situation at the other places they lived.

[24] Sometime in 2011, they moved from Tryall to another place in Saint Elizabeth named Comma Pen. MD said initially it was Jody, the children and herself, along with a man she described as Jody's boyfriend, who lived in the house at Comma Pen. The appellant was not then in Jamaica. On his return, Jody told MD not to say anything to him about what had happened in his absence.

[25] However, sometime after he came to live with them at Comma Pen, the appellant returned to the house one day and started to quarrel with Jody. He asked MD why she had not told him Jody was cheating on him. When she responded that she did not know what he was talking about, he hit her in her face. He left the house with Jody, returned without her and proceeded to question MD again. He hit her in her face for a second time.

[26] Thereafter, for the time they remained at Comma Pen, MD said the appellant's treatment of her got worst. He started to hit her with his hands. He hit her in her ears, and she said that, even at the time she was giving evidence, she still had "an effect with the ear". She continued to perform chores similar to those at Tryall and she still received no payment for her work.

[27] While at Comma Pen, MD said she told the appellant, on more than one occasion, that she wanted to go home. He would remind her that her country was poor and he could give her a better life. She began to learn English by listening to it and "recording" it in her memory. She spoke to the appellant about her going to school and he told her that, if she went without papers, 'Babylon' would send her to prison and she

would never see her family again. She later came to learn that 'Babylon' meant the police. She explained that she had left Haiti without a passport or birth certificate and the appellant never told her when he would get her the necessary documents.

[28] MD said Jody introduced her to the appellant's father and niece as well as Jody's sister and told them that she was from France. MD would occasionally see the appellant's father at both of the homes at Tryall and Comma Pen.

[29] The family moved from Comma Pen to Bull Savannah, also in Saint Elizabeth, later in year 2011. This was to a bigger house and MD said she now had her own bedroom for the first time. Once more, she was denied access to a telephone and was never allowed to speak to her family. She had the same tasks, namely, to clean, wash and cook, especially for the children. She also continued to take the children to school and pick them up from school occasionally. For the first time, however, she was given a key to the house.

[30] MD said that the appellant and Jody would only permit her to go to a nearby shop to buy cigarettes for them. She continued to ask about going to school and the appellant continued to remind her of her not having any papers, which could cause 'Babylon' to send her to prison and she would never see her family again.

[31] MD testified that one night she was lying on the bed in her room after she had completed doing all the chores. Jody was not at home. The appellant came and stood at the door to her room, clad only in his underpants. She described how he had a bright

smile on his face. She asked him what he wanted and he replied that she "know what he want".

[32] She got up out of the bed and pulled on her pants under her nighty. He grabbed her by her nighty, pulling a chain from her neck. He pulled her to him, tied a handkerchief around her mouth and tore off the nighty and the pants. He then put his penis inside her vagina and raped her. When he was finished he told her to go bathe. On her return to her room, he returned and told her not to tell Jody what had happened.

[33] The next morning, however, she tried to tell Jody what had happened but Jody did not believe her. She even showed Jody the torn pants and the panty in an effort to prove to Jody what had happened but Jody still would not believe her.

[34] Some months later MD realized she was pregnant. She told the appellant. He gave her something to drink and when she refused to drink it; he used a knife and stabbed her on her right hand. She eventually drank what he gave her. Later that night she became ill. Jody came into her room and asked her what was wrong. She told Jody that her "belly" was hurting her and Jody gave her a pill to take.

[35] Two days later, Jody had MD take a pregnancy test in front of her. When this test confirmed the fact that MD was pregnant, Jody questioned MD who told her what had happened. Jody confronted the appellant and shortly after, they left the house and returned with what MD described as "different bush". Jody then made a drink with it and told MD to drink it, which she did.

[36] MD described how later that night the pain in her stomach worsened. She eventually went to the bathroom and aborted a tiny foetus. She screamed when she saw it and the appellant came and told her to bathe and throw it away. She did as he instructed.

[37] For some time after that, the appellant would not give MD anything to eat and his little daughter would share her food with her. MD said the appellant threatened her and told her she was not to go to anyone and say anything about what had happened. MD tried to run away more than once but the appellant would take her back to the house.

[38] MD said one day the appellant hit her in her face and started to squeeze her neck, but she fought back until she was able to get a knife and stab him on his leg. He screamed and called Jody who came to his assistance and locked MD in her room. MD described how she tore off the mesh, which was over the window in her room, climbed through the window and jumped out.

[39] As she ran off, MD said she saw the appellant's father, Mr Lovis Ebanks, leaving the house. She went to him, pretended that everything was "okay" and told him she wished to spend some time with him. Mr Ebanks took her to his home in Todd Town, also in Saint Elizabeth. However, due to the small size of his home, Mr Ebanks arranged for MD to stay with his sister Miss Norma Ebanks, who MD called Claire, who lived nearby in the same yard.

[40] Although she could not say exactly how long she stayed with Miss Ebanks, MD said Miss Ebanks treated her "good" and treated her "like a daughter". She was taken to church where she got baptized. She eventually told Miss Ebanks where she was from and admitted that she had no passport. She said one Sabbath morning Miss Ebanks called a taxi and asked the driver to take her to the Junction Police Station.

[41] MD said that, when she got there, "the police just question" her, but she "did not answer them". She was taken to the doctor and then to the Black River Police Station where she was locked up in a cell.

[42] MD said that on that Saturday evening an immigration officer called the station and spoke with her but she would not answer the questions she was asked. He had her speak with an interpreter whom she eventually told her "family names". Eventually, she said, she spoke with a female police officer. She admitted that initially she lied to this officer. This she did because of her fear based on what the appellant had told her would happen if she told Babylon she was from Haiti. She feared being sent to prison and not being able to see her family again.

[43] Under a very thorough and vigorous cross-examination, MD was confronted with the several lies she admitted telling the police and with several inconsistencies between what she had told the police and the evidence she had given. Her accounts of being raped and how she eventually left the appellant's home were extensively explored and possible contradictions in her account exposed.

[44] One of the lies that she admitted to telling the police was that she had never been pregnant, never done a pregnancy test and would never "dash wey no pickney". Under re-examination, she said she had lied because at the time she did not feel comfortable talking about it. She also said she feared what people would think or say about her.

[45] MD also admitted having lied to the police about what had happened on the day she had run away from the appellant's house. She had told them that she had seen an old woman whom she had asked if she could live with her and that she had lived with this woman in Todd Town. Under re-examination, she explained that she had lied because she did not want to get Miss Ebanks involved, given how Miss Ebanks had helped her.

[46] MD denied the suggestion that she had travelled from Haiti with her step-father, Fritz, with the intention of going to Miami and had ended up in Jamaica. She also denied the suggestion that she had called her family and told them that her step-father had died in Jamaica. She maintained that her step-father had died from 2008.

[47] On 23 April 2013, MD attended the Kingston Central Police Station where a video identification parade was held and she identified the appellant as the person who "sexually abused her in the night at Bull Savannah, Saint Elizabeth". The statement of Sergeant Dianne Grant-Taylor, who had conducted the parade, was read to the jury.

[48] Mr Lovis Ebanks, the father of the appellant, gave evidence about his contact with the complainant. He testified that he first met her sometime in 2012. He said the

appellant claimed MD was his daughter. Mr Ebanks said MD called the appellant 'daddy' and called him 'grandfather'. On the occasions he visited the appellant's home he would see MD washing plates or cleaning. He said that on those occasions he would not see his son there. He never saw MD attending school. He spoke to his son about this and was told that "it want plenty of money to get him paper".

[49] Mr Ebanks explained how one morning when he was going to Bull Savannah from Todd Town, he saw MD on the road. She told him that she was on her way to his house and that the appellant and Jody "a disadvantage her". He said she looked terrible, as if she was not sleeping at nights. He took her to his home and she ended up going to stay with his sister.

[50] Mr Ebanks said that MD told him that the appellant had sex with her while she was living at his house. This, Mr Ebanks said, made him so vexed that he confronted the appellant about it and said to him "you told me is your daughter and you turn roun' and sexing him". He said the appellant "neva look please", but did not say anything in response to the accusation.

[51] Miss Norma Ebanks supported the story that MD had stayed with her for some time before being sent to the police station. She said that MD had initially told her that she was from Portmore but later admitted that she was from Haiti. It was on learning from MD how she had entered Jamaica and that she did not have a passport that Miss Ebanks said she sent her to the police station.

[52] Mr Jervaise Ennis was the immigration officer who was called by the police and who spoke with MD. He testified that this happened on 7 April 2013. He met MD at the Pedro Plains Police Station and said that at first she was very shaky and seemed somewhat frightened. She would not talk with him and kept crying. He thought she did not fully understand what he was saying so he contacted a Haitian national residing in Jamaica who normally assisted in communicating with Haitians in custody. With this assistance, Mr Ennis said he was able to learn the complainant's name and was able to confirm that she was from Haiti and was undocumented, having entered Jamaica illegally sometime in 2010.

[53] On 8 April 2013, Mr Ennis contacted Corporal Pearline Simmonds who was at the time attached to the Centre for Investigations of Sexual Offences and Child Abuse ('CISOCA') at the Black River Police Station. Later that day, Corporal Simmonds met MD and interviewed her with the assistance of an interpreter. Corporal Simmonds took MD to be medically examined before making arrangements for her to be housed at a safe location rather than being kept at a police station. Corporal Simmonds testified that she then made contact with the Organised Crime Investigations Division ('OCID') which was the division trained to investigate matters of human trafficking.

[54] On 12 April 2013, MD was examined by Dr Micas Campbell. She was taken by Detective Sergeant Kemisha Gordon who was attached to OCID and was assigned to the Anti-Trafficking in Persons Unit.

[55] Dr Campbell testified that MD appeared to be very withdrawn and scared and did not want to speak much. After the doctor examined her and interacted with her, the diagnosis was that MD was suffering from post-traumatic stress disorder, was sexually active and was having symptoms of depression. It was Dr Campbell's recommendation that MD be placed in state care and be given psychiatric counselling and evaluation for her symptoms of depression and post-traumatic stress. She opined that major depressive disorder and post-traumatic stress, if not treated properly and quickly, can be chronic in the long term.

[56] On 20 April 2013, at about 10:30 am, a team of officers from OCID journeyed from Kingston to Bull Savannah on a special operation. Constable Yolene Walcott was a member of the team and was the investigating officer in this matter. She testified that the purpose of the operation was to search for the appellant and Jody. The appellant was seen at a house in Bull Savannah and taken into custody. He was later transported into Kingston where she subsequently arrested and charged him.

[57] Detective Sergeant Gordon also travelled to Saint Elizabeth on 20 April 2013. At about 6:30 that evening, she went to the Junction Police Station in Saint Elizabeth where she was introduced to the appellant and Jody who were in custody there. Detective Sergeant Gordon testified that her team took custody of the appellant and Jody for the purpose of transporting them into Kingston. The appellant was placed in the same vehicle that Detective Sergeant Gordon was travelling in.

[58] During the journey, Detective Sergeant Gordon said she advised the appellant of the allegations against him and cautioned him. The appellant confirmed that he understood the words of the caution and then went on to say the following:

> "Mek me tell unno the truth. Me carry [MD] come a Jamaica from Haiti on me boat, yes, but a try me a try fi help out dem, because har mother and father dead, so me did a try help dem out."

[59] Detective Sergeant Gordon said that she asked the appellant if MD went to school to which he responded that he was waiting for her papers from her sister but had not received them. When asked what was the nature of MD's daily routine, the appellant told the officer that MD "helped out around the house and that she helped out with the kids, his children".

[60] Detective Sergeant Gordon said that when she asked if he had ever had any reason to hit MD, his response was "yes me haffi lick har because she did feisty" and continued to say "Me haffi lick har too cause she did a seh she pregnant fi me". This prompted Detective Sergeant Gordon to ask him if he had sex with MD to which he responded 'no'. Detective Sergeant Gordon said she then asked the appellant if he knew where MD was. He said "she run whe". He went on to say that MD "wanted man now so that's why she act up and run weh".

[61] Detective Sergeant Gordon testified that she asked the appellant if he had ever been to Haiti and his response was "me use to go deh often". He went on to explain that he was doing a little business in Haiti but it was not working out but he got money from his mother who lived overseas and who sent him money almost every week. The

officer said she then reminded him of the caution and the fact that he did not have to say anything and he responded "yes, ma'am, me know".

[62] Detective Sergeant Gordon said the appellant was treated properly and no form of threat or inducement was made to him. Nothing was done to cause him to make these responses, which he gave freely.

[63] In cross-examination, it was suggested to Detective Sergeant Gordon that she had made up this conversation with the appellant in an effort to secure a conviction against him. She denied this suggestion.

[64] Detective Sergeant Gordon was asked whether any member of the Jamaica Constabulary Force visited Haiti during the course of the investigations. She said she was advised that Constable Walcott, accompanied by the senior officer of the unit, Assistant Superintendent Berry, had visited Haiti and that statements had been recorded from PE and RT.

[65] The prosecution also called two other police officers who had visited and taken photographs of the homes at Bull Savannah and Todd Town where MD had lived. The photographs were admitted into evidence and MD was questioned about them.

The case for the defence

[66] The appellant gave sworn evidence. He said he was a fisherman and had lived in Kingston before moving to live in Saint Elizabeth in 2011. He admitted that he had been to Haiti in 2009. He explained that this visit was as a result of his boat having broken

down while he and his crew of five men were on a fishing expedition on the Morant Cays. This led to the boat drifting for three to four days away from Jamaican waters. They were eventually given a tow by men in a sailboat and ended up in Port-au-Prince. It took around a week and a half to have repairs done to the boat. He insisted that he never returned to Haiti after that trip and he did not go there in 2010.

[67] The appellant said he met the complainant in Portland, Jamaica in 2011. He explained that, having attended a function there with his uncle and wife along with three of his children, they were returning home to Saint Elizabeth when he saw a young lady on the road. They were travelling in a vehicle being driven by his uncle. This incident took place sometime after midnight but he could not remember the exact time or the month in which it happened.

[68] The young lady was waving her hand, which he understood to mean that she was begging a ride. They stopped and enquired of her where she was going and she told them "down the road". She was invited into the car and offered a lift. He would eventually learn her name and identified her as the complainant.

[69] As the journey continued, the appellant said he engaged in conversation with MD and observed that she had a different accent. She told him she was from France. He said he told her "[i]s bear white people come from France ... you look like a Haitian". She did not respond. The appellant said he proceeded to question her about her parents and when he asked her about her father she started to cry.

[70] The appellant said she eventually told him that "she and her father was travelling on a boat where she lose her father". She went on to tell him she was staying with some people who were ill-treating her so she was asking him for help because she did not have anywhere to go. He asked her for her mother and she told him that her mother was in Haiti.

[71] The appellant testified that he eventually gave MD his phone and had her call her mother. She told him that her mother did not speak English, but her sister did. So he spoke with the sister whose name he learnt was PE. During the conversation the sister asked him if he could keep MD "till whenever time they could get her back". The appellant said he felt sorry for MD and so decided to take her home with him.

[72] They proceeded to his home at Tryall in Saint Elizabeth where he introduced her to his girlfriend Jody and his four children. She lived with them at Tryall for almost a year. The appellant said he was often away on fishing trips during this time. He said he never received any complaints from MD about her treatment whilst living there. She was never locked in her room or the house, never physically or sexually assaulted, nor was she forced to engage in any domestic work. He also never received any reports of Jody doing anything to MD.

[73] The appellant said MD had access to both his and Jody's phones and he would permit and assist her to call her mother and her family. MD never told him she wanted to return home and never complained about not being able to attend school.

[74] The appellant said that they all moved to Comma Pen where they remained for less than a month before moving to Bull Savannah. He said that during the time at Comma Pen, MD continued to communicate with her family.

[75] The appellant testified that MD was lying when she gave evidence about doing domestic work under force from early in the morning until late at nights. He said he had no knowledge of Jody locking MD in her room. He denied raping MD and said there was no truth to her story about getting pregnant and being given something to drink to cause her to have an abortion.

[76] The appellant said that whilst living at Bull Savannah he gave MD a phone. She had access to the keys to the house. He explained that all MD had to do was to take the children to school occasionally. She was able to do so freely, without anyone watching her to ensure that she did not speak to anyone and to make sure she came back. She only had to clean her room and to help around the house as "normally a fourteen year old young lady or child would do". She never complained about being unable to go to school and he had never promised to send her. She was never physically assaulted and was always given sufficient food to eat.

[77] The appellant said MD left the home sometime in either October or November of 2012. He was aware that she went to stay with his father in Todd Town. He did not know why she chose to leave. He, however, did not visit her while she lived there.

[78] Under cross-examination, the appellant explained that he did think it was important for MD to attend school but he and Jody tried "house training her". This he

said meant that Jody taught her how to read and write in English. He went on to explain that he was hardly at home so he was not the one doing the house training.

[79] The appellant admitted that he had fathered one child in Haiti but insisted that he had been to Haiti only once. He denied being able to converse in Creole French. He said he had never seen MD's mother or sister. He maintained that MD never told him she wanted to go back to Haiti.

[80] In answers to questions from the learned trial judge, the appellant gave details about the occasions when, while out on fishing trips, his boat broke down and he and his crew drifted away from Jamaican waters. The first was in 2007 when they drifted into Caymanian waters and the second was in 2009 when they drifted into Haitian waters. In relation to the second occasion, he testified that it took him two days and three nights to get from Haiti to Jamaica and they landed somewhere around Saint Thomas.

[81] The defence was permitted to have a statement admitted into evidence with no objections from the prosecution. This was the statement of RT dated 15 January 2014. It was in Creole French and an interpreter was called who had previously been given the statement and requested to prepare the English translation. The English translation was also admitted into evidence. The interpreter read the English translation to the jury.

[82] In the statement, RT said that MD was the sixth of her nine children. She stated that MD and her father, PD had left their home one day and four months later MD

called from a telephone belonging to a man named 'Roan'. She expressed her shock when during that conversation MD told her that "she lost her father because he had passed away in Jamaica". She stated she "never allowed her daughter to leave the house with anyone, whether Haitian or Jamaican".

[83] After the close of the case for the defence, the prosecution was permitted to call evidence in rebuttal of the appellant's evidence relating to circumstances surrounding what he said was his only visit to Haiti. This was particularly in relation to where he said he was when his boat had broken down and where he said he drifted to and whether that could have happened in the manner he said it did.

[84] Sergeant Everton Reynolds, then attached to the Marine Division of the Jamaica Constabulary Force, testified that, from courses he had attended and his experience, he was familiar with the set and drift of currents, winds and tides within Jamaican waters. He had travelled to Haiti by sea on three occasions on board a Jamaica Defence Force Coast Guard vessel. He was asked about the likelihood of someone lost or broken down in Jamaican waters, travelling from Pedro Cays or Morant Point or Morant Cays, drifting to Haiti. Using charts to assist him, Sergeant Reynolds explained that, due to the equatorial current, it was highly improbable but not impossible for such a drift to take place. He went on to explain that it could only occur if there was a change due to unusual circumstances such as a hurricane or tropical storm. Further, he stated that it was hardly likely that a vessel, such as a fishing boat with two engines, would survive a hurricane or tropical storm force winds. Ultimately, it was his opinion that, under normal

sea conditions, it was highly improbable that a boat could drift from Jamaican waters to Haiti.

The appeal

Ground 1- The verdict is unreasonable and unsafe having regard to the evidence

The appellant's submissions

[85] On behalf of the appellant, Mr Bryan submitted that the evidence of the complainant on the material issues in the indictment was confusing, vague, and contradictory, therefore rendering it unreliable.

[86] Counsel reviewed the evidence as to what happened at the three different homes separately. He submitted that for each of the locations, the evidence was that the appellant was not the one who assigned MD with her tasks. He noted that the appellant was often away and upon his return, he would ask MD if everything was all right and she would say 'yes'.

[87] Counsel contended that MD repeatedly stated that it was Jody who gave her work to do while they lived at Tryall. He submitted that the references to the appellant at that home did not support the charges in counts one and two. He noted that MD said she performed chores at Tryall in a "helping capacity" and that it was only sometimes that she did this. Counsel also pointed to what he described as 'unequivocal evidence', given by MD, that the appellant was not in Jamaica when the labour exploitation complained of started and it was Jody who told her what work to do.

[88] Mr Bryan highlighted the fact that MD testified that the appellant did not initially move to Comma Pen with her, Jody and the children. He noted that it was Jody who would leave MD to take care of the children there. He pointed out that even though MD spoke of the worsening treatment she received from the appellant when he eventually came to live at Comma Pen, she did not refer to anything amounting to labour exploitation.

[89] Mr Bryan noted that when asked what her chores while living at Bull Savannah were, MD said that she "had to clean same way, wash their uniform and wash their hair and make sure their bag clean and their shoes and their socks". She went on to say that she also would take the children to and from school sometimes.

[90] Counsel submitted that, in light of this evidence, there was a clear distinction between what Jody and the appellant were alleged to have done. He contended that the acts amounting to labour exploitation "did not fall at the hands of the appellant". Counsel questioned whether, in any event, these duties were over and beyond what would be expected in a household.

[91] It was counsel's submission that the learned trial judge ought to have directed the jury that it was not only necessary for the prosecution to show that the appellant knowingly and intentionally committed the offences in counts one and two, but that he knew of Jody's conduct in regards to any labour exploitation and further that he aided, encouraged and/or counselled her in that behaviour towards the complainant. The question of the appellant's intention ought to have been left for the consideration of the

jury. They would have to find that the appellant intended the labour exploitation from the outset. Counsel contended that there was no direct evidence of this and in terms of what unfolded from the evidence, there was no inescapable inference that this was the appellant's intention.

[92] Counsel contended that the evidence presented relating to the issue of labour exploitation was not in keeping with the requirements of the Act. Firstly, he observed that the term 'labour exploitation' as used in the indictment was not one used in the Act. He pointed to section 2(1) of the act, which defines exploitation to include, among other things, "compelling or causing a person to provide forced labour". The case of **Regina v SK** [2011] EWCA Crim 1691 was referred to in the course of the submissions.

[93] Counsel further submitted that directions on common design were required, especially in light of the plea of guilty to count two by Jody, at the commencement of the trial. It was counsel's submission that the failure to give such directions rendered the trial unfair.

The Crown's response

[94] The Director of Public Prosecutions, Miss Paula Llewellyn QC, commenced her response to this ground by considering the relevant provisions of the Act. She submitted that the Crown was obliged to prove that the role the appellant played in the circumstances of the complainant being in Jamaica amounted to human trafficking and this was not limited to just the circumstances of how she had come to work with his family. Further, she, it was the Crown's duty to establish that the appellant was the

enabler in the commission of the offence of trafficking the complainant. It was urged that, given the scope of the provisions of the Act, in looking to see if the ingredients of the offences are made out, the evidence must be looked at in a holistic manner bearing in mind the sensitivities of the complainant, including her age and vulnerability.

[95] Miss Llewelyn accepted that the evidence as to what happened at Tryall suggested that it was Jody who gave instructions to the complainant as to what work was to be done. However, she noted that MD, at that time, did not speak English, so the appellant was the only one capable of communicating with MD. The Director noted that it was not clear from the manner in which the evidence was led if Jody alone continued to give instructions to MD when the family moved to the other homes. The evidence was sufficient to establish that the appellant was well aware of the fact that MD was being made to perform a lot of housework without being paid. It was submitted that given the nature of the offences, it was not just who gave MD instructions as to what she was to do that was required to prove that the offences had been committed.

[96] The Director pointed to the fact that, on the Crown's case, it was the appellant who had taken MD from Haiti with promises to send her to school and had failed to keep those promises. She highlighted the evidence presented by the Crown which addressed the act and the means by which the complainant came to travel to Jamaica. She pointed to the evidence, which demonstrated that the complainant trusted the appellant who was her only means of sustenance. She noted that the complainant could only communicate through the appellant. Further she pointed out that it was the

appellant who failed to assist MD to contact her family back home in Haiti. The Director contended that these were some of the factors which were to be considered in determining whether the offences were made out.

[97] Miss Llewellyn acknowledged that the indictment referred to the purpose of the trafficking as 'labour exploitation' which is not a term used in the legislation. She submitted that the usage of the term can be viewed as trying to make clear what type of exploitation was being contemplated without being limited to terms specifically defined in the legislation. She opined that the issue of servitude would be most relevant in the circumstances of this case. She contended that in any event, the appellant knew precisely what case he had to meet. She concluded that there was an abundance of evidence presented in proof of the ingredients of the offences.

Discussion

[98] The first observation that must be made is that the submissions that were made in relation to this ground were limited to the first two counts of the indictment. It is therefore useful to set out those counts.

"Statement of offence - Count I

Trafficking in Persons contrary to Section 4(1)(c) of the Trafficking in Persons (Prevention, Suppression and Punishment) Act.

Particulars of offence

> Rohan Ebanks on a day unknown between the 1st day of January, 2010 and the 31st day of December, 2010 in the parish of St. Elizabeth, trafficked [MD] from Haiti to Jamaica for the purpose of labour exploitation, she being a female under the age of eighteen (18) years.
>
> Statement of offence - Count II
>
> Facilitating Trafficking in Persons contrary to Section 4 (5) of the Trafficking in Persons (Prevention, Suppression and Punishment) Act.
>
> Particulars of offence
>
> Rohan Ebanks and Venoshia Reeves on a day unknown between the 1st day of January, 2010 and the 30th day of November, 2012 in the parish of St. Elizabeth, facilitated the trafficking in person of [MD] for the purpose of labour exploitation, she being a female under the age of eighteen (18) years."

[99] The second observation to be made of the submissions made on behalf of the appellant on this ground is that although the general complaint was made that the evidence of the complainant was confusing, vague and contradictory, therefore rendering it unreliable, the attack on the evidence was primarily attempting to demonstrate that any allegations of forced labour could only be sustained against Jody.

[100] In challenging the verdict of the jury on the ground that it is unreasonable and unsafe having regard to the evidence, it must be shown that the verdict was obviously and palpably wrong. The case oft cited as setting out the threshold to be met in making this complaint is **R v Joseph Lao** (1973) 12 JLR 1238. The head note at page 1238 provides a useful statement of the principle:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight

> of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

[101] The elements of the offence of trafficking in persons are accepted to be the act, the means, and the purpose. The act refers to what an accused does to the victim, namely he recruits, transports, transfers, harbours or receives the victim (see section 4(1) of the Act). The means refers to the method engaged by the accused to get control of the victim. The methods outlined in the Act are by threat or use of force or other coercion; abduction; deception or fraud; the abuse of power or position of vulnerability; or the giving or receiving of benefits for consent (see section 4(2)).

[102] The purpose refers to the reason for the commission of the act and specifically it must be done for the purpose of exploitation. The interpretation section of the Act provides that exploitation includes the prostitution of a person, forced labour, slavery or servitude, sexual exploitation, illicit removal of organs and keeping a person in debt bondage (see section 2(1)). The section goes on to state what is meant by these various types of exploitation. The fact that the term 'exploitation' itself is not specifically defined and the interpretation section refers to only what it includes suggests that the categories are not closed. It is therefore useful to consider and bear in mind the natural meaning of 'exploitation', which is the act of taking advantage of someone in order to profit from them or otherwise benefit oneself.

[103] Significantly, it is to be noted that where the victim is a child, the act, together with the purpose, is sufficient in establishing the commission of the offence. Notwithstanding the absence of any evidence as to the means by which the act was accomplished, a person who carries out any of the acts for the purpose of exploitation of that child, commits the offence (section 4(3) of the Act). A child is defined as any person less than 18 years (section 2(1) of the Act). The consent of a victim is immaterial and provides no defence to an accused (see section 4(4) of the Act).

[104] Section 4(5) provides that a person who facilitates the offence of trafficking in persons commits an offence. Further, section 4(9) provides that the offence of trafficking is facilitated where the facilitator knows such an offence is intended to be facilitated, whether or not he knows the specific nature of the offence that is intended to be facilitated and whether or not the offence was actually committed.

[105] There was no dispute that MD was a child, hence the prosecution was under no obligation to establish the means by which she was transported to Jamaica. However, the learned trial judge did spend some time considering this ingredient and identified deception, some form of coercion and vulnerability as possible means by which the act was accomplished. He left for the jury's consideration, whether the prosecution had proven any of the means specified in the Act although he did tell them that "once it is a child, if the means does not exist, the offence is still committed".

[106] It is irrefutable that the purpose for which the appellant was indicted, labour exploitation, is not a purpose specified in the Act. The learned trial judge recognised this fact and commented on it at page 54 in this way:

> "So the prosecution is relying upon labour exploitation. The word 'labour exploitation' is not in this particular list, but the definition of exploitation starts off by saying 'Exploitation includes these', it doesn't say it is exclusively limited to these forms, it just lists these [sic] list of exploitation and the Prosecution is relying on labour exploitation in this particular case."

And at page 56 he went on to say the following:

> "So there are other forms of exploitation, these are limited ones, and the prosecution is relying on labour exploitation. And the idea behind giving an open-ended list is to make sure that new and subtle and other forms of exploitation are not excluded, because they were not specially named, one, two, three, four, in the list, all right. So bring that to your attention for your consideration when you are looking at this trial, which says, the indictment says 'labour exploitation'. But whatever the list is, you as jurors realize by now that there must be the intention. Whatever the list wants to be, there must be the intention to produce a situation of labour exploitation, because intention is an essential ingredient, intention at the time the act was done, and [sic] intention to maintain the person in the situation of labour exploitation."

[107] This was a sufficiently accurate treatment of the issue given that the evidence of the circumstances under which the complainant lived and worked did not fall entirely within any of the categories, which are included in the Act. It was apparent that the prosecution set out to establish that MD had to perform tasks and work in circumstances where she was being treated unfairly and was being taken advantage of to the benefit of the appellant and his family.

[108] Mr Bryan was correct that the evidence of MD was that, while at Tryall, it was Jody who told her to do all the work. She, however, said that while the appellant was there, he would translate for her what Jody wanted her to do and she would still sometimes do all the work. In these circumstances, it cannot be said that the appellant would not have been aware of what MD was doing. In any event, the Director was also correct that the concept of exploitation involved more than just giving the orders or directions relating to the work to be done.

[109] Early in his summation, as he discussed the ingredients of the offence, the learned trial judge gave the following directions to the jury at page 58;

> "So you have to look and judge from your experience whether this type of work that was done, and the degree of it, whether it was a situation where it was labour exploitation in the sense, having regard to the fact that the [sic] amount of people that she was working for, the young children, the adults, the times she was working for, the lack of compensation that she received, and you have to look at it in the context too of her own status, that she was a child, and you have to look at everything else what she said was promised to her when she came to Jamaica, that she would be sent to school. You have to look at all of that when you are considering the question whether there was exploitation of her labour and services in this home."

[110] The totality of the evidence by the Crown presented a child who was encouraged to travel from her home to a place where she knew no one and did not speak the language, with the promise of being able to go to school and improve herself to a point where she could assist her family. She was required to work several hours a day, had no resources of her own and was not paid for the work she did. She was therefore wholly dependent on the appellant who had taken her from her homeland. She was cut

off from her family with no means of communicating with them. She was not sent to school despite the promises made to her by the appellant. She was made to fear the possibility of being arrested since she did not have necessary documents and the appellant failed to keep his promise to assist her to get them. In these circumstances, it was certainly open to the jury, if they believed her account, to find that she was exploited for her labour.

[111] The next aspect of the complaint in this ground related to the sufficiency of the learned trial judge's treatment of the issue of intention. From early in the summation, when dealing with the ingredients of the offence, the learned trial judge had this to say at pages 25-26:

> "The third element is the purpose of exploitation, which means that the person who did the act, either of recruiting or transporting or transferring, with the means of abusing or deception, it must be proved that the person had the intention to exploit the complainant. The person must have the intention to exploit the complainant. That is a third element that must be proved. And the intention must exist at the time the act of recruitment and means were set in motion, must exist. And I will point out to you that the question of intention is always relevant for a criminal charge, and it is relevant to this charge of trafficking in persons. It is not sufficient just to do the act or have the means. You must have the intention to exploit, and that is relevant to many criminal and most criminal offences. The offence is not made out unless there is the requisite intention."

[112] The learned trial judge then went on to give the usual directions as to how intention may be proved. The learned trial judge re-visited this issue in a similar but expanded manner once more in his summation. He also related aspects of the evidence to this ingredient when rehearsing the evidence for the jury.

[113] The appellant failed to show that the verdict was so against the weight of the evidence so as to be unreasonable and insupportable. This ground therefore failed to supply a basis for disturbing or interfering with the conviction.

Ground two

The learned trial judge failed to give adequate directions, on the issue of the identification made of the appellant by the complainant in Haiti, thereby rendering the convictions on counts 1 and 2 unsafe

Submissions on behalf of the appellant

[114] Mr Bryan commenced the submissions in relation to this ground by reminding the court of the well-known guidelines to be observed when identification is an issue as laid down by the English Court of Appeal in **R v Turnbull and others** (1976) 63 Cr App R 132, at pages 137-140.

[115] Counsel acknowledged that the learned trial judge gave the requisite warning as to the need for caution before convicting on the correctness of identification evidence and the need for such a warning. But he contended that the learned judge had fallen into error when he failed to give the full **Turnbull** directions, which were required in circumstances where, as in this case, the complainant did not know the appellant before.

Discussion

[116] On the Crown's case, the evidence was that the person who transported MD from Haiti was the person with whom she lived for almost three years in Jamaica. She said that this was a person who was known to her and her family, having seen him in

Haiti on more than one occasion. The challenge mounted by the defence at trial was against the assertion that it was the appellant who had met MD and her family in Haiti and who had transported her to Jamaica. It is therefore apparent that, on this issue, MD's credibility was of primary significance.

[117] In **Shand v Regina** (1995) 47 WIR 346, Lord Slynn of Hadley, who delivered the judgment of the Board, considered the warning necessary where the credibility of the identifying witness is an issue in a case involving recognition and at page 350 stated:

> "In cases where the defence challenges the credibility of identifying witnesses as the principal or sole means of defence, there may be exceptional cases where a Turnbull direction is unnecessary or where it is sufficient to give it more briefly than in a case where the accuracy of identification is challenged."

At page 351 he said:

> "The importance in identification cases of giving the Turnbull warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in Turnbull."

[118] Mr Bryan accepted that the learned trial judge did adhere to the usual general directions and warnings as stipulated by the **Turnbull** guidelines. Counsel in

complaining about the learned trial judge's treatment of the issue referred to one point in his extensive summation where the learned trial judge addressed the issue. At page 103, lines 3-15, he had this to say:

> "The accused's defence is that he never took her from Haiti at all, it is a denial. Certainly, it raises the issue of her credibility, but there is another issue by virtue of that denial, he is raising the issue of identity, whether she knows he was the person who took her from Haiti. He is raising the issue by denying "I never took her at all" so we have to look at the issue of identification."

[119] Counsel however stopped short of acknowledging that, shortly after this, the learned trial judge went on to give directions, largely in keeping with the **Turnbull** guidelines, about which there was no complaint. Significantly, at pages 106 -107, the learned trial judge continued and had this to say:

> "As I said, this issue arises because he is not only denying that he took her, and by virtue of that denial, he is raising the issue of identification. Bear in mind that recognition may be more reliable than identification of a stranger, because she is saying he is not a stranger because she had known him before. Even when the witness is purporting to recognise someone who he or she knows, I remind you that mistakes can be made in recognition of close friends and relatives. So as jurors, what you are to look at is the quality of the identification, whether he was known before, how many times she saw him before, where she was with him, what time of the day, how long she spent with him and how much he had her in his presence, and decide, before you rely on her identification evidence, whether or not she is mistaken, and if you apply that warning and find that she is not mistaken, then you can proceed to make your finding of fact, subject to believing her otherwise, whether it is that she knew the accused as colourman, and she knew who is the person who took her, and the accused is the same, Rohan Ebanks, the same colourman, who took her in that boat from Haiti to Jamaica, and in particular, St. Elizabeth."

[120] The learned trial judge, while rehearsing in detail the evidence of the complainant at pages 244 - 245, also said the following:

> "So that evidence that she gives is evidence that the Prosecution presents of identification. The accused is someone that she saw before in her hometown, Ile-a-Vache. At the time she did not know his name was Rohan Ebanks, she knew him as Colour Man. There was no evidence contradicting this in court that he is not known as Colour Man. Nobody else call him that on the evidence. He gave sworn evidence, but he doesn't dispute that he is known by that name.
>
> That is relevant evidence to the question of identification, which you have to consider, because he is saying he never take this young lady, at all, from Haiti. And her evidence is that she was taken by someone who she knew before from her hometown called Ile-a Vache, and by what means. But because it is identification, you must bear in mind the warning, whether or not she is mistaken who tek har from Haiti. But look at the evidence and look at the circumstances that she described and having given yourself that warning ask yourself if you are satisfied that she is not mistaken as to who is the person who took her from Haiti and whether she knew that person and is not mistaken about who the person is."

[121] The learned trial judge tailored the requisite directions relating to identification in a manner which was wholly appropriate, given the circumstances of the case. This ground was clearly without merit and had to fail.

Ground three

The learned trial judge failed to give directions on lies to the jury in circumstances which necessitated such directions, thereby depriving the appellant of his case being given proper consideration by the jury and ultimately denying him of a possible acquittal

The submissions on behalf of the appellant

[122] Mr Bryan noted that the appellant gave evidence that he had only been to Haiti once when his boat was disabled and drifted there. This was challenged by the prosecution to the extent that they relied on expert evidence to disprove the appellant's account as to how he ended up in Haiti. Counsel submitted that in these circumstances, where the Crown was relying on the fact that the appellant had lied as to how he had ended up in Haiti, a **Lucas** direction was required in accordance with **R v Lucas** [1981] QB 720.

[123] Counsel relied on **R v Goodway** (1994) 98 Cr App R 11 in support of the submission that where lies are relied on by the prosecution or might be used by the jury to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a full **Lucas** direction is required.

The Crown's response

[124] The written submissions of the Crown in relation to this ground were noted. It was submitted that the lies of the appellant were not the core of the Crown's case and there was other evidence to buttress a conviction. A **Lucas** direction in the circumstances might therefore have been otiose.

[125] Relying on the observations of Lord Lane CJ in **R v Lucas**, it was submitted that the four criteria which the court held was necessary for lies (whether told in or out of court) to be left for the jury's consideration, were:

a. the lie must firstly be deliberate;

b. secondly, it must relate to a material issue;

c. thirdly, the motive for the lie must be a realization of guilt and a fear of the truth; and

d. the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

[126] **R v Goodway** and **R v Burge and Pegg** [1996] 1 Cr App R 163 were relied on in advancing the circumstances which should guide the need for the **Lucas** direction.

[127] It was submitted that although the learned trial judge did not go into detail in giving a **Lucas** direction to the jury, the summation was adequate in that it was sufficiently left to the jury to consider that any lie or apparent lie made by the appellant was not in and of itself evidence of his guilt. In any event, the submissions continued, given the circumstances of the case, what was said by the learned trial judge concerning the evidence was not so inadequate to cause any undue influence or a miscarriage of justice or unfairness to the appellant. The court was urged to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act if it was found that a **Lucas** direction ought to be given.

Discussion

[128] A useful exposition on what has come to be known as the **Lucas** direction was given by Lord Taylor CJ in **R v Goodway**. Writing on behalf of the court, he had this to say at pages 900-902:

> "It is well established that where lies told by the defendant are relied on by the Crown, or may be relied upon by the jury as corroboration, where that is required, or as support for identification evidence, the judge should give a direction along the lines indicated in **R v Lucas** [1981] 2 All ER 1008 at 1011, [1981] QB 720 at 724. That is to the effect that the lie must be deliberate and must relate to a material issue. The jury must be satisfied that there is no innocent motive for the lie and should be reminded that people sometimes lie, for example, in an attempt to bolster a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour. In regard to corroboration, the lie must be established by evidence other than that of the witness who is to be corroborated...
>
> However, [counsel for the appellant] goes further and contends for a broader proposition. He submitted that a **Lucas** direction should be given whenever lies are relied upon by the Crown, or might be used by the jury to support evidence of guilt as opposed to merely reflecting on the appellant's credibility.
>
> Accordingly, we consider [counsel for the appellant's] broader proposition is sound and a **Lucas** direction should be given, save where it is otiose as indicated in **R v Dehar**, whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt."

[129] The appellant had given evidence as to the circumstances under which he had been to Haiti while maintaining that he had never met the complainant or her family in Haiti. Indeed he never wavered from his position that he had never been to the area the complainant was from. The evidence of the witness who the Crown was permitted

to call to rebut the appellant's evidence of having drifted to Haiti after his boat had broken down in Jamaican waters, was that it was highly improbable but not impossible for such a drift to occur, based on the witness' knowledge and experience. This evidence of the witness was correctly treated as that of an expert who was giving an opinion.

[130] The learned trial judge had this to say about the witness at page 122:

> "That officer gave evidence of opinion. He's not a witness of fact. He wasn't there and saw anything and you have a chart there that he referred to. He gave evidence of opinion, and this is how you look at evidence of opinion."

After giving appropriate and unexceptional directions on expert evidence, the learned trial judge went on to say this over pages 123-128:

> "So the marine officer gave evidence of opinion...
>
> That evidence was presented, it related to an issue of credibility, not of the complainant's, but of the accused's, because he said on one of the occasions he had broken down --twice he had broken down at sea, the boat had given problems, one ended up in Cayman Islands and the other occasion he ended up in Haiti. But he said he had drifted the boat, two engines, problems in the waters, outside the waters of Jamaica and he drifted to Haiti.
>
> So the evidence of the marine officer is that, it is a matter for you, he says, look, you cannot drift from the Jamaican waters like that and end up in Haiti; that is the opinion. And the reason he gives, because, he says, that equatorial current would carry you back to---you see the map – towards, back to Jamaica and around, right, it wouldn't carry you to Haiti...
>
> But that evidence was presented to show you that the accused man is not truthful when he said he drifted to Haiti.

> Not that the Prosecution is saying he never went to Haiti, but not the way he said he went to Haiti....
>
> So what the Prosecution is saying, is not that he didn't go there, but he went there deliberately and not by misfortune, as he is saying. So that is what? Evidence they brought, through the expert, to say there is no drifting...
>
> So that is, Mr. Foreman and Members of the Jury how you are to look at the evidence of the expert. You are not bound to accept it, but if it can assist you, you can give it due weight. If not, then you are to make your own finding on this issue, whether the accused man is to be believed on that issue and on his own defence on this whole issue of Haiti, that he drifted there, or is a place that he can go, has gone, and knows very well how to travel."

[131] The learned trial judge accurately rehearsed the evidence and correctly identified the issue which arose due to the opinion advanced by the expert witness. The opinion of the witness which was presented to rebut the evidence of the appellant was not evidence of facts which clearly established that the appellant must have been lying.

[132] At page 361, the learned trial judge returned to the issue and had this to say:

> "[Sergeant Reynolds] was cross-examined and he said only in unusual circumstances you would find that you would have a change of current that cause you to end up there. It's a matter for you. He says it is not probable, but possible. It's a matter for you. And, his testimony is, if you are going to drift, you would drift into the direction of – back into Jamaica, not to Haiti. So, that's the evidence, but that evidence relates to a challenge to the account and credibility of the accused."

[133] The directions given were sufficient to deal with the issue. In these circumstances., the manner in which the learned trial judge dealt with the matter was

wholly appropriate and the failure to give a **Lucas** direction was not fatal to the conviction of the appellant.

Ground four

The learned trial judge erred in allowing the prosecution to add count 4 to the indictment after the appellant had given evidence on oath and further erred when he directed the jury that it was an alternative count, in doing so, irreparable prejudice was caused to the appellant.

The submissions on behalf of the appellant

[134] Mr Bryan observed that the additional count that was added after the appellant had given his evidence was not a count in the alternative, but a substantive count which was on the same platform as count one, the substantive count, in all material particulars. Counsel contended that a count in the alternative meant that an alternative verdict is returnable by the jury flowing from the evidence in the case and as such, the learned trial judge was under an obligation to define, for the benefit of the jury, what an alternative count is and its effect.

[135] Counsel referred to **R v Fairbanks** 83 Cr App R 251, in which Mustill LJ stated that an alternative offence should not be left where the lesser verdict simply does not arise in the way in which the case had been presented to the court. Counsel submitted that the amendment suggested that the prosecution was going in one direction but, after hearing the appellant, went in another direction. This, counsel contended, could have confused the jury as to what was the Crown's case and would have created some prejudice to the appellant.

[136] Counsel complained that the learned trial judge failed to ascertain whether the appellant needed more time to prepare to meet the new count and to determine whether he wanted to call witnesses. Counsel further submitted that the proper approach for the learned trial judge to have taken was to leave the issue of whether the appellant had met the complainant in Portland, as a matter of credibility. Counsel contended that in these circumstances, the appellant was severely prejudiced by that count being added in the alternative and was further prejudiced by not being given time to meet the new count evidentially.

The Crown's response

[137] In the written submissions, it was firstly submitted that the timing of the amendment did not unfairly prejudice the appellant, having regard to the evidence. The charge in count four was merely put forward so that, if the jury did not believe that MD was taken from Haiti to Jamaica, they could thereafter consider whether they believed she was trafficked intra-island.

[138] The provisions of section 6(1) of the Indictment Act was referred to and it was submitted that the legislation clearly made provision for such an amendment. It was submitted that the learned trial judge's summation and direction on this alternative count was adequate and would not have confused a jury properly directed. He set out for the jury, the elements necessary to prove this count, and properly invited the jury to consider all the evidence, including that of the defence.

Discussion

[139] The power of the court to allow an amendment of an indictment is given in section 6(1) of the Indictments Act, which provides:

> "Where, before trial, or at any stage of trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such an order as to the payment of any costs incurred owing to the necessity for the amendment as the Court thinks fit."

[140] It is now well settled that an amendment of any kind, including the addition or substitution of a count, may be made at any stage of a trial. The amendment must be demonstrated to be necessary to meet the circumstances of the case (See **Melanie Tapper and Winston McKenzie v R** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 28/2007, judgment delivered on 27 February 2009). The essential question is whether the amendment can be made without injustice to the accused.

[141] Counsel for the Crown made the application to amend after the attorney-at-law for the appellant had completed his address and after she had already commenced her address. Despite what was clearly a late application, it was certainly permissible for the amendment to have been made at this stage of the trial. It cannot be said that the fact that it was done at the end of the defence's case and after the addresses had commenced meant, without more, that the amendment was prejudicial to the appellant.

[142] Unfortunately, the submissions made in respect to the application to amend are absent from the transcript. It is recorded that the only request made by the attorney-at-law for the appellant was that, in light of the amendment, he be afforded an opportunity to address the jury specifically on the new count. This request was granted and, after the appellant was pleaded to the new count, the defence attorney addressed the jury for a further 20 minutes.

[143] The particulars of count four were that the appellant, on a day unknown between 1 January 2011 and 31 March 2011, trafficked MD within the island of Jamaica. This count was clearly related to the evidence of the appellant himself as to when and where he had met the complainant and had transported her to his home. Thus, based on his own evidence, the circumstances of the case were such that there was now presented an alternative account as to how the complainant had come to end up at the appellant's home. This was therefore not a lesser count that was being left for the jury's consideration.

[144] Since the count arose from his case, it is hard to imagine that the appellant would have any evidence to counter the new count. The permission granted to counsel for the appellant to further address the jury would have been sufficient to avoid any injustice to the appellant.

[145] The learned trial judge commenced his summation to the jury by directing them to first consider the indictment. When dealing with count four, he had this to say at pages 6-7:

> "This count is added as an alternative, that is, if you don't accept that there was trafficking from Haiti to Jamaica, that is, if you don't, then this count is on the indictment for you to consider if there was trafficking of the complainant within the island of Jamaica, which is, from Portland to St Elizabeth, because there is a section of the act that deals with both situations. One section deals with from outside into Jamaica, and one section deals with one part of Jamaica to the other. These are matters for you…
>
> And bear in mind that Count 1, is an alternative to Count 4, which was added. That means if you return a verdict on Count 1, you do not need to return a verdict on Count 4. And when I say return a verdict of guilty, if you return a verdict of not guilty on Count 1, you may then look at the alternative to decide whether guilty or not guilty on Count 4."

[146] After this opening, he went on to direct the jury on the burden and standard of proof before giving directions on the ingredients for each count. He said this about count four at page 29:

> "The difference between that count is that Count 1 says - the Prosecution says the complainant was trafficked from Haiti and Count 4 is that the complainant was trafficked from Portland to St. Elizabeth, if you find all the other elements established, but based upon the evidence which was presented, the totality of the evidence, which includes what the accused has said, that is how Count 4 arises because of the accused evidence, which he accepts, there is no dispute about that, he says, 'Yes, I took up this complainant the year when they had this 'Beenie' man show' but what you have to decide is—but he's saying, 'I took her up to assist her and to rescue her from a desperate situation.'
>
> On that account, if you accept that, there would be no, there would be no what--on his account, and if you accept that account, there would be no intention to exploit on that account, but you still have to look at the totality of the evidence and see what was done after to determine if there was any intention to exploit."

[147] In the circumstances, it was entirely within the power of the learned trial judge to permit the amendment to the indictment in keeping with the evidence of the appellant. The appellant could not have been prejudiced by the addition of this alternate count, which arose from his evidence. The directions that the learned trial judge gave as to how the jury was to approach the added count were fair and appropriate. There was therefore no merit to this ground of appeal.

Ground five

The misdirections and non-directions present throughout the case led to a substantial miscarriage of justice.

Ground six

The summation lacked clarity in material aspects of the case thereby rendering it, on a whole, circular and confusing.

The submissions on behalf of the appellant

[148] In the course of making submissions, Mr Bryan noted that ground six was largely subsumed in ground five and therefore it was convenient to deal with both at the same time.

[149] Mr Bryan submitted that the directions of the learned trial judge fell short of the standard required in this particular case, bearing in mind, also, that he did not leave for the jury's consideration, inferences from the evidence consistent with the appellant's innocence or assist them in evaluating such evidence. It was contended that the learned trial judge should have instructed the jury that they must rule out all inferences consistent with innocence before they could be satisfied that the inference of guilt had been proven correct. **Ian McKay v R** [2014] JMCA Crim 30 was referred to in support

of this submission. Counsel also pointed to several statements of the learned trial judge, which he submitted were examples of the misdirections. These will be rehearsed, as necessary, in the discussion to follow. Counsel also pointed to the directions given in relation to the photographs taken at the houses as an example of directions that lacked clarity.

[150] Counsel submitted that the direction by the learned trial judge on the count of rape was fatally flawed in that he omitted to indicate to the jury that they should determine whether there was penetration of the vagina by the penis. Counsel contended that the omission becomes more pronounced and material in light of the appellant's denial of the offence, the omission of any allegation of rape in the complainant's statement and her initially lying to the police on the issue.

The response from the Crown

[151] Miss Llewelyn, at the invitation of the court, first responded to the complaint about the directions given in relation to the offence of rape. She appropriately conceded that the learned trial judge had failed to give the standard directions required for this offence in that he did not direct the jury that there must be penetration of the vagina of the complainant by the penis of the appellant. She pointed out that the complainant had given evidence that although she was only 15 years of age at the time, this was not the first time that she had had sexual intercourse. She also noted that the complainant had clearly stated that the appellant had placed his penis in her vagina. Miss Llewelyn observed that if the learned trial judge had given the usual definition of rape, the jury might well have wondered if their intelligence was being questioned.

[152] Miss Llewelyn invited the court to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, since although this point was to be decided in favour of the appellant, no substantial injustice had actually occurred in all the circumstances.

[153] In relation to the complaints about the summation, the Director submitted that the examples that were given as being misdirections should be read in their full context. She noted that the learned trial judge did repeat some directions, especially in relation to the issue of the credibility of the complainant. She contended that there was no unfairness in the treatment of the defence of the appellant. She opined that the summation might not have been "elegant" but that the directions were adequate for all the areas of law raised.

[154] The Director acknowledged that the summation may well have been prolix and presented in a circular manner, but this could be viewed as the learned trial judge endeavouring to be extremely detailed and thorough. She noted that this may have led to instances of repetition but ultimately there was no unfairness or miscarriage of justice.

Discussion

[155] The Director was correct that each of the examples given by Mr Bryan has to be considered in its context for there to be a fair assessment of whether there was a misdirection or non-direction that resulted in a miscarriage of justice. Ultimately, the issue was whether the directions were sufficiently clear for the jury to understand the

issue that they had to consider and the law that they were to apply to the facts that they found proved to the requisite standard.

[156] The first complaint was in relation to this single comment at page 357, lines 6-7 - "But you also have to consider, is it probable what she says". It was submitted that this comment introduced a lower standard of proof, in favour of the Crown, on a material issue.

[157] The context of the comment was that the learned trial judge was then reviewing the evidence of Detective Sergeant Kemisha Gordon who had testified about statements the appellant had made to her after being cautioned. The learned trial judge accurately categorized those statements as evidence of admissions by the appellant that he had taken the complainant from Haiti in a boat and that she had not gone to school, but had helped out around the house and helped with the children. The learned trial judge also reminded the jury that the officer said that appellant had admitted to hitting the complainant because she had said she was pregnant for him but he had maintained that he had never had sexual intercourse with her. The learned trial judge had noted that the officer had expressed surprise about this, since that was the first time she had heard "allegations of pregnancy".

[158] The learned trial judge noted that the defence had challenged the evidence of the officer "strenuously". He fairly and accurately noted the bases of the challenge by the defence, starting with the fact that there was no written record of the statements. The learned trial judge then had this to say :

> "So what you have to consider is if he really tell [sic] the police those words against the background of his constant denial in the context of him just going there and say it. But you also have to consider, is it probable what she says? Because she is saying it's the first she hearing about pregnancy and all that…
>
> So all I am saying is that the question of her pregnancy and the question of relating to sexual offence, sexual rape, was in the police domain from the 8th of April, and this officer, she was not involved in the investigation from that stage…But the point is that, that information was in the police domain, meaning that personnel collected that information. So that is challenged, and you must decide what weight you give to it, and if you accept that he gave an admission that he took [MD] from Haiti, whether you accept that evidence…"

[159] The section of the summation about which Mr Bryan has complained was part of the learned trial judge's invitation to the jury to consider whether they believed the officer and whether they accepted that she was hearing the allegations about the pregnancy for the first time on 20 April, when it had been in the "police domain" from 8 April. This could be viewed as providing one area for the jury to consider in assessing the credibility of the officer. In the circumstances, this was a perfectly fair observation and certainly could not be seen as prejudicial to the appellant. In this context, the complaint that the learned trial judge was introducing a lower standard of proof in favour of the Crown was totally without merit.

[160] The next complaint was that the learned trial judge was wrong in directing the jury that the evidence of the photographs of the house was not evidence of fact but was "just a view of the location". Counsel complained that this direction undermined the appellant's case, as the jury might have treated the photographs with scant regard.

Counsel submitted that the learned trial judge ought to have instructed the jury to attach such weight they think the photographs deserved, in the circumstances of the case.

[161] The section of the summation from which the comment is taken at pages 358-360 is as follows:

> "Then there is other evidence before you, but I call them formal evidence. Two of the police gave evidence, Constable Walters, and Walcott. They gave evidence about just going to Todd Town and taking photographs, and it was shown to you, Exhibit 4, of Todd Town. One police just took the photographs, and he prepared the CD's and you saw them. That is the evidence. That is not evidence of fact, it was just a view of the location.
>
> Questions were asked to contradict her, [MD], about where she jumped from and where she came through, but you saw all of that and all of the pictures to bring your attention to where is the location, that's the evidence of the locus, where she was in St. Elizabeth, the two places. As I said, there is nothing dilapidated or substantial in any of the places. This is not a case where she was found in any dilapidated physical condition."

[162] The learned trial judge here invited the jury to relate the evidence of the complainant with the pictures of the location that were exhibited. Certainly this exercise would have assisted the jury to better understand the evidence. This cannot be regarded as encouragement to treat the photographs with scant regard and the complaint in that regard is without merit.

[163] In ground six, counsel went on to observe that the learned trial judge reminded the jury that questions were asked to contradict the complainant about how

she escaped from the house and, with that, it went beyond the house being a mere location. This approach, counsel contended, would have left the jury in a state of confusion on the issue that they were to determine.

[164] This approach of relating the evidence to the pictures could not have been avoided and the learned trial judge was being fair in encouraging the jury to use the photographs to assist them in determining if they believed the complainant's account.

[165] Earlier in the summation, the learned trial judge had said the following at pages 109-110:

> "As I said to you, Mr. Foreman and members of the jury, the evidence consists of the witness from the witness box, but the evidence also consists of exhibits ...
>
> Another Exhibit—two other exhibits are the CDs and the images of the premises at Bull Savannah, that's part of the evidence. The CDs and images of the premises at Todd Town and that aspect of the evidence is just giving you the place where she was living and the place where she said she escaped from and the place that she was staying before she was taken to Junction Police Station."

[166] The learned trial judge here made it clear that the exhibits, including the photographs, were a part of the evidence that the jury had to consider. He correctly gave the jury the requisite directions as to their role as the finders of the facts of the case. Certainly, in the context of this duty, the photographs could not be regarded as facts. In these circumstances, the manner in which the learned trial judge dealt with the issue of the photographs cannot be faulted.

[167] Counsel next complained about two directions which he contended were misdirections which rendered the evidence of the appellant null and void. At page 143 lines 8-9, the following portion of the learned trial judge's directions was pointed out for complaint:

> "It is a fact, it is her (the complainant's) evidence that you will have to rely on as opposed to his (the appellant)."

The learned trial judge at the time was directing the jury on the ingredients required for proof of the offence of trafficking and was dealing specifically with the issue of transportation. The jury was invited to consider what the learned trial judge described as the "critical issue, who brought her here on the boat that she came in?" He also told the jury the following:

> "The answer to the question, who took her depends on the credibility of the witness who do you believe. Do you believe [MD] when she said it was the accused, Rohan, who took her?"

Within the context that the learned trial judge made the comment, he was correct that, given the appellant's denial, the jury had to be satisfied about the evidence of the complainant before they could find that the appellant transported her to Jamaica from Haiti. There was no merit to the complaint.

[168] The second portion identified for attack was page 362 from lines 11-19, but only the following was highlighted:

> "...It is not what the accused says. It is the evidence that the Prosecution brings, that's what you must be convinced

> of and satisfied so that you feel sure in relationship to the elements."

[169] Immediately preceding this statement the learned trial judge had said this:

> "An accused person, in a criminal trial, does not have to say anything in defence. I told you that from the first day because it is the Prosecution that has the burden of proof and must bring the evidence. That's why I keep saying, look at the Prosecution [sic] evidence, and I will be going through it."

And immediately after the statement complained about he said:

> "An accused person does not have to say anything, that's one option; or, he could stand and give a statement where he could not be cross-examined. In this case, it was his free choice and he gave sworn evidence. He has put his evidence to be tested for cross-examination and you would have to decide, when you see what the issues are, whether you accept his evidence. If you accept his evidence, then you would have to find him not guilty. If, when you listen to his evidence, you have a reasonable doubt in relationship to any of the offences, you would have to find him not guilty in relationship to any of the offences that you have a reasonable doubt or you do not feel sure that the Prosecution has made out.
>
> If, when you listen to his evidence, you don't believe him at all, you don't turn around and convict him because you don't believe him because he doesn't have to say anything and he doesn't have a duty to prove anything. What you are to do, and which I have been pointing out to you, look at the evidence of the Prosecution witness in relationship to all the elements that must be proved in the offence of Trafficking, Facilitating and then afterwards in the offence of Rape, and when you look at that, you take into account what the accused man says also and then ask yourself, are you satisfied, do you feel sure the Prosecution has proved the element...?"

[170] When the entire passage from which the statement complained of was taken is looked at, it is clear that the learned trial judge gave sufficiently accurate directions relative to the burden and standard of proof. The full context shows that there was no misdirection rendering the appellant's defence null and void.

[171] The final complaint was with the learned trial judge's treatment of the definition of rape. The Crown quite properly conceded that the learned trial judge failed to give the classic definition of sexual intercourse.

[172] When dealing with the definition of rape, the learned trial judge had this to say at page 42:

> "So let us look at the definition of rape, and it is in the Sexual Offences Act, it is right here in that Legislation here. Definition: Section 3, of the Act. It's not a new offence. Rape has existed long ago at the common law but it is placed now in this Act. 'A man commits the offence of rape if he has sexual intercourse with a woman, (a), without the woman's consent'. So all I am trying to show is that different offence requires [sic] different ingredients, but in terms of rape, sexual intercourse without the woman's consent and (b), knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not.' So that is the offence of rape; (a), there must be sexual intercourse, a man must have sexual intercourse with the woman, that is the first thing, the act.
>
> ...rape also involves a mental element, the knowledge that the woman is not consenting."

[173] Thereafter, whenever the learned trial judge referred to the offence of rape, he spoke about the act of sexual intercourse. Whilst he had correctly noted what was set

out in the relevant legislation, he failed to recognise the need to explain what in law amounted to sexual intercourse. He reviewed accurately the complainant's account of what the appellant had done on the night the alleged rape had taken place. Included in that account was her assertion that the appellant had placed his penis in her vagina. After his review of her evidence about that night, the learned trial judge said the following at page 303:

> "So this is the evidence of sexual intercourse, the accused had sexual intercourse with the complainant without her consent, and on the evidence, she is giving evidence that he used force."

In this approach, the learned trial judge pointed the jury to the evidence of the act of the placing of the penis into the vagina but stopped short of explaining that proof of such an act was necessary as proof of the offence.

[174] There being no doubt that the learned trial judge's direction on the definition of rape failed to include the definition of sexual intercourse, this complaint would have to be decided in favour of the appellant. However, this one issue could not affect the sustainability of the jury's decision in the case. In any event, on a consideration of the whole evidence, had the jury received the proper direction on this issue, it seemed they would inevitably have reached the same conclusion. The error made here by the learned trial judge was not fatal to the conviction.

[175] In regards to the complaint that the summation lacked clarity in material aspects of the case that rendered it on a whole circular and confusing, the first obvious fact was that it was indeed quite lengthy. The learned trial judge commenced the

summation in the afternoon of 13 June 2016 and concluded in the morning of 17 June. In his summing up of the case, it is also pellucid that there was some repetition of both the applicable law and the evidence.

[176] It has long been recognised that a summing up need not follow a prescribed format. In **McGreevy v The Director of Public Prosecutions** [1973] 1 All ER 503, Lord Morris of Borth-Y-Gest, writing on behalf of the House of Lords, had this to say at page 507:

> "The particular form and style of a summing up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable...."

[177] It must therefore be borne in mind that this was a trial in which the evidence had commenced on 17 May 2016 and had been presented to the jury over some 14 days. The offence commonly referred to as human trafficking, was then, and could still be regarded as novel. There is no doubt that the learned trial judge was being detailed and careful in how he summed up the case in a style he felt was necessary to be fair and which would assist the jury in discharging its responsibility.

[178] The guidance given by Carey JA, in delivering the judgment of this court in **Sophia Spencer v R** (1985) 22 JLR 238, as to the purpose of a summation, remains relevant. At page 244 he stated:

> "A summing up, if it is to fulfil its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully

> review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them.
>
> If it is so couched in language neither patronizing nor technical, then it cannot fail but be helpful to a jury of reasonable men and women in this country."

[179] Apart from the flaw in his directions on the issue of rape, the learned trial judge did correctly and extensively explain the relevant law. Given the amount of evidence and the manner in which it was presented, the learned trial judge commendably reviewed all of it and related it to the applicable law in an appropriate manner. He also usefully juxtaposed the evidence of the Crown with that of the defence in a fair manner where required. The appellant's efforts to point out misdirections that resulted in any substantial miscarriage of justice were unsuccessful. Although the complaint was that the summation lacked clarity in material aspects of the case, there was none actually delineated in the submissions made on behalf of the appellant.

[180] In the circumstances, this ground was found to be devoid of merit and accordingly failed.

Ground seven

The inconsistencies and discrepancies were so material to the issue of credibility that the learned trial judge should have gone on to identify ways in which they have undermined the prosecution's case

The submissions for the appellant

[181] Mr Bryan acknowledged that the learned trial judge did give directions about discrepancies and inconsistencies, but submitted that he should have gone on further to

pinpoint how the discrepancies would have impacted the Crown's case. Counsel contended that the learned trial judge mentioned some of the inconsistencies and discrepancies, then told the jury it was a matter for them and that they were to look whether there was an explanation. This, counsel submitted, was not enough. Counsel referred to the dicta of Harrison JA (as he then was) in **R v Carletto Linton, Omar Neil and Roger Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4, and 5/ 2000, judgment delivered 20 December 2002, in support of his submissions.

[182] Counsel pointed to two bits of evidence from the complainant which were inconsistent and for which he said there was no explanation. The first was in relation to when she said she left Haiti. He noted that at one point she said it was close to her birthday in November, yet she said that she had arrived in Jamaica on Mother's Day which, Counsel pointed out, was normally in May. Secondly, he noted that the complainant had said that they had departed Haiti at 9:00 am and arrived in Jamaica at 1:00 am the following day. Counsel contended that no explanation was given as to how both bits of evidence could be true, when taken together.

Discussion

[183] In **R v Carletto Linton et al** Harrison JA gave the following guidance as to the duties of a trial judge when dealing with issues of discrepancies:

> "Discrepancies occurring in the evidence of a witness at a trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.

> The duty of the trial judge is to remind the jury of the discrepancies which occurred in the evidence instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if the one given is one they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all…"

[184] In a decision before **R v Carletto Linton et al**, Carey JA, in delivering the judgment of the court in **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered on 22 March 1991, stated the following at page 9:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or between different witnesses."

[185] There is no dispute that the learned trial judge gave the jury the appropriate directions relative to discrepancies and inconsistencies. He first gave directions on how to deal with inconsistencies and after comprehensive general directions, he stated the following at page 84:

> "So in this trial, there are many instances of inconsistency between the testimony of the complainant and previous statements and these are matters which are relevant to her credibility and you must decide if they are serious or slight

> and whether it means that you'll not accept her on that point or completely in relation to the charges and the counts on this indictment."

[186] The learned trial judge continued by highlighting to the jury, an exhibit which was a portion of the complainant's statement to the police, which was inconsistent with the evidence she had given at trial. When he later reviewed her evidence, the learned trial judge pointed out other inconsistencies.

[187] After dealing with inconsistencies, the learned trial judge gave sufficiently accurate directions on how to deal with discrepancies. He then identified for the jury, one conflict that occurred between the evidence of MD and that of Mr Lovis Ebanks, the father of the appellant, as to whether she had ever been to Mr Ebanks' home while living in the home at Bull Savannah. She said she had not, but he said she had. The learned trial judge noted that no explanation was given for that discrepancy. He then went on to highlight the conflict between the evidence of MD and that of Mr Ebanks as to the circumstances of their meeting on the day she left the home at Bull Savannah.

[188] The learned trial judge, before moving on from this area, concluded with the following at page 97:

> "There are other aspects to look at, we'll come to that later, but I am just pointing out that there are discrepancies and you have to look at what is the material issue, what is your finding of fact of the material issue and decide if the complainant, [MD] is discredited because of any one or more or combinations of discrepancies along with inconsistencies. That is your function as judges of the facts, which is an issue that you have to deal with, credibility, on that aspect of the complainant."

[189] The learned trial judge went through an extensive review of the evidence of the complainant. He highlighted several inconsistencies which had been brought out, especially during her cross-examination. He fairly presented to the jury instances where MD had admitted that she had lied on crucial issues such as whether she had told the police about her having been raped by the appellant and being forced to abort the pregnancy. He even left for the jury's consideration, the statement from the MD's mother which conflicted entirely with MD's account of how she arrived in Jamaica.

[190] At the end of his review of MD's evidence, the learned trial judge had this to say at page 351:

> "So, these are the several ways in which her testimony was challenged, Mr. Foreman and members of the jury, and it doesn't end there. There are other areas. You, as the jurors, go through them, I've identified them as they appear in the evidence, and at each stage apply the principle, are there discrepancies? Is it slight, serious, is it material or immaterial and whether you can accept her on the point that there is the inconsistency and whether you are going to reject her evidence completely because of that inconsistency or the cumulative effect of that inconsistency. And that is the extent, Mr Foreman and members of the jury, that I would leave you with the complainant's testimony for you to determine her credibility on these charges."

[191] When the entire summation is considered, the learned trial judge's directions in relation to the manner the jury should deal with conflicts in the evidence was more than adequate and in keeping with what was required of him. He may not have addressed the two areas that Mr Bryan highlighted, but his failure to do so was not sufficient to disturb the decision of the jury.

Ground eight

The sentence was manifestly excessive

The submissions

[192] The single complaint about the sentence advanced by Mr Bryan was that, when compared to the sentence handed down to the co-accused, who had pleaded guilty, the term of imprisonment imposed on the appellant was excessive, especially given the mitigating circumstances.

[193] Miss Llewellyn commendably pointed out that in relation to count one, the learned trial judge had imposed a sentence in excess of the statutory maximum permitted under the legislation at the time. It was, however, submitted that in arriving at his decision on a reasonable sentence, the learned trial judge took into consideration the plea in mitigation made by counsel for the appellant, the information contained in the social enquiry report as well as the character evidence from the mother of the appellant. It was also noted that the learned trial judge considered aggravating factors such as the abuse of MD meted by the appellant.

Discussion

[194] In **Meisha Clement v R** [2016] JMCA Crim 26, Morrison P conducted one of the more useful expositions on sentencing conducted by this court in recent times. At paragraph [43], in considering the proper approach for this court when considering appeals against sentence, he had this to say:

> "[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by

> the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[195] In his remarks during the sentencing exercise, the learned trial judge clearly demonstrated his appreciation of the usual, known and accepted principles of sentencing. When dealing first with the count for rape, he considered the circumstances of the offence and identified one of the aggravating circumstances to be the fact that it arose from the trafficking in persons. He considered the mitigating circumstances to include the fact that the appellant was consistently employed and had children who depend on him for support. He recognised that the statutory maximum sentence was life and statutory minimum was 15 years. He also acknowledged that the law provided that the court specifies a term of not less than 10 years which was to be served before eligibility for parole. The sentence imposed of 16 years' imprisonment at hard labour with the specification that he serve 10 years before being eligible for parole was, therefore, well within the range for such an offence and there was no basis to interfere with it.

[196] On the sentence of trafficking in persons, the learned trial judge referred to the amendment to the legislation, which had taken place in 2013, which had increased the maximum sentence from 10 to 20 years. It had also permitted the imposition of an additional term of imprisonment, not exceeding 10 years, if any of the aggravating circumstances specified are present in the course of committing the offence. The

offence for which the appellant had been found guilty had taken place in 2010, before the amendment.

[197] Section 16(11) of the Constitution of Jamaica provides:

> "No penalty shall be imposed in relation to any criminal offence or in relation to an infringement of a civil nature which is more severe than the maximum penalty which might have been imposed for the offence or in respect of that infringement, at the time when the offence was committed or the infringement occurred."

[198] The learned trial judge therefore erred when he imposed a sentence of 14 years imprisonment which was outside of the range that he was empowered to give. He also incorrectly considered the aggravating circumstances as outlined in the amendment in considering the appropriate sentence and fell into further error when he identified four such and factored them in arriving at the sentence .

[199] The learned trial judge had initially found that 10 years was an appropriate term. He then factored in the aggravating circumstances he identified and arrived at a sentence of 14 years' imprisonment at hard labour.

[200] In all the circumstances, especially given the age of the complainant and the circumstances under which she lived and worked for the approximately three years she was with the appellant and his family, we found that a sentence of ten years' imprisonment at hard labour was reasonable.

[201] The evidence presented by the Crown was sufficient to support the conviction and the verdict of the jury cannot therefore be regarded as unreasonable. The learned

trial judge gave adequate directions on the issue of identification. There was no need to give Lucas directions in the circumstances. Ultimately, the learned trial judge gave adequate and unexceptional directions, on the evidence and the issues as required and the summation cannot be faulted. It was for these reasons that we made the orders outlined at paragraph [7] above.