[2023] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 53/18

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

ONEIL FORREST v R

Robert Fletcher and Ms Sasha Kaye Shaw for the applicant

Mrs Kameisha Johnson O'Connor for the Crown

5, 6 October 2021 and 31 March 2023

SIMMONS JA

[1] On 13 March 2018, following a trial in the Circuit Court for the parish of Saint Catherine before G Fraser J ('the learned judge'), Oneil Forrest ('the applicant') was convicted of the offence of rape. On 25 May 2018, he was sentenced to 18 years' imprisonment with the stipulation that he serves a period of 12 years before being eligible for parole.

[2] The applicant aggrieved by this outcome filed an application for leave to appeal his conviction and sentence dated 6 June 2018. On 2 July 2020, a single judge of this court refused his application for leave to appeal against his sentence and conviction. The applicant renewed his application for leave before the full court as is his right.

[3] At the commencement of this hearing, counsel for the applicant applied and was granted permission to abandon the original grounds of appeal and to rely on the supplemental grounds of appeal filed on 8 September 2021. The supplemental grounds of appeal are as follows:

> "1. Ground one: The treatment by the learned trial judge of the jury's failure to arrive at a[n] unanimous verdict was a misdirection in several critical respects and cumulatively amounted to pressure on them to be unanimous.
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> 2. Ground two: The learned trial judge erred in not leaving for the jury's consideration the lesser, alternative offence of Indecent Assault. This denied the applicant a fair consideration of his case.
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> 3. Ground three: Given the nature of the prosecution's evidence the learned trial judge in her summation did not give a true account of the discrepancies, inconsistency [sic] and omissions and therefore denied the accused a fair trial.
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> 4. Ground four: The learned trial judge through her interference descended into the arena and elicited irrelevant prejudicial information that would affect the applicant, seeking to discredit the quality of the evidence of the character witness for the applicant.
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> 5. Ground five: The learned trial judge discounted the value and effectiveness of her good character directions.
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> 6. Ground six: The sentence is manifestly excessive."

Background

[4] It was the prosecution's case that on or about 14 September 2015 at about 2:00 am, in the community of Phoenix Vista, in the parish of Saint Catherine, the complainant was raped by the applicant. At the time, the applicant who was employed to a private security company as a security guard was on duty in the said community.

[5] At trial, the Crown relied on the evidence of four witnesses; the complainant, Corporal Marsha Morrison, Andre Hepburn and Kenroy Bailey. The applicant gave an unsworn statement from the dock and called Mr Alton Johnson as a character witness.

Complainant's evidence

[6] It was the complainant's evidence that, on 14 September 2015, she accompanied her father's girlfriend, JA, to a quad ('the house') that she had rented in Phoenix Vista in

the parish of Saint Catherine. Whilst walking to the house, they met the applicant and Mr Kenroy Bailey who were traveling in a marked security vehicle. JA sought their assistance to enter the house as she did not have the key in her possession. She gave the complainant's number to the men as she did not have her phone with her. The men then drove away. The complainant and JA were subsequently able to enter the house with the assistance of a neighbour.

[7] Shortly after, the complainant received a phone call and she gave the phone to JA who provided the men with the directions to the house. Upon their arrival, JA sought their assistance to transport some items to a train line at Gregory Park in the parish of Saint Catherine. The men agreed and both women entered the car.

[8] En route, the men escorted a customer of the security company to Naggo Head in the said parish. When they arrived at the train line, the women removed the items from the car. The men drove them back to Phoenix Vista and upon arrival, JA exited the car. Sometime after, Mr Bailey who was in the front passenger seat also exited the vehicle. At the time, the applicant was seated in the driver's seat and the complainant was in the back of the vehicle. They started to converse and the applicant invited the complainant to come around to the front passenger seat and she agreed. Shortly after, Mr Bailey came outside and spoke to them. The applicant subsequently received a call to attend the Bridgeport Library. He and the complainant went to that location after which they returned to Phoenix Vista.

[9] The applicant asked the complainant for a kiss and she refused. He then asked for a hug and she said "…not even my mother I don't hug". The complainant stated that the applicant came over to her seat, pushed it back, tried to kiss her and touched her between her legs. She told him "no" but he managed to open her legs and began to rub his penis on her underwear. The applicant then shifted her underwear and forced his penis inside of her vagina. She was crying and telling him to stop and he put his hand over her mouth.

[10] Whilst the applicant was having sex with her, the complainant told him that she needed to urinate and that he would not appreciate it if she urinated in his car. The applicant released her and she got out of the car for that purpose. As she was walking past the house, the applicant came out of the car and held onto her. She shouted and called JA's name and JA came outside. The complainant told JA that the applicant had raped her. He denied it and the complainant ran and hid in a churchyard at Christian Pen for a few minutes. She then started to walk home. Whilst on her way, the car in which JA, the applicant and Mr Bailey were travelling drove up. JA asked to her get in. She refused and JA exited the car. The complainant then left the scene and eventually went to her mother's house where she slept on the "house top" until sometime between 5:00 am and 6:00 am.

[11] Later that day she spoke to her father who spoke to JA. The complainant then reported the matter to the police.

[12] In cross-examination, the complainant maintained that she had resisted the applicant's advances and that he forced himself on her. She agreed that she did not tell the police that she ran to the churchyard. She, however, maintained that she was speaking the truth about the incident.

Corporal Marsha Morrison

[13] At the time of the incident, the witness was a Detective Corporal of Police stationed at the Portmore Police Station. Corporal Morrison recalled that, on 15 September 2015, the complainant attended the station and made a report concerning an incident of rape against the applicant. She took statements from the complainant, Mr Bailey who was on duty with the applicant, and other witnesses. The officer indicated that the vehicle that was being used by the applicant at the time of the incident was made available to the police and was processed. On 21 September 2015, the applicant voluntarily attended the station where he was cautioned and subsequently charged with the offence of rape.

Andre Hepburn

[14] This witness at the time of the trial was employed to the security company as an assistant manager. At the time of the incident, he was the applicant's supervisor. He stated that on 13 September 2015, the applicant and Mr Bailey were scheduled to work the night shift which began at 7:00 pm and ended on 14 September 2015 at 7:00 am. They were assigned to work in the Portmore area. The witness explained that it was the company's policy that its vehicle was only to be used for the purposes of its business.

Kenroy Bailey

[15] Mr Bailey's evidence was that on 13 September 2015, he and the applicant were on duty and were travelling along the Gregory Park main road. JA who was with the complainant, signalled the vehicle to stop and asked them to assist her to gain access to her house as her boyfriend had her key. The men exchanged telephone numbers with her and then proceeded to another location.

[16] They subsequently received a text message from one of the women advising that they were able to enter the house and invited them come over. Upon arrival, the complainant, he said, seemed excited and went to speak with the applicant. Mr Bailey went into the house with JA. Sometime after he heard a scream coming from outside. When he opened the door he saw the applicant standing directly behind the door. He asked the applicant what happened and his response was that he did not know. The applicant asked JA if the complainant was 21 years' old and she said "yes". Mr Bailey's evidence was that when he questioned the applicant further, he said that the complainant had screamed because she wanted to get out of the car to urinate. The witness then asked the applicant if he had prevented the complainant from leaving the car or if he was beating her, and he answered "no". When Mr Bailey enquired where the complainant had gone, he was told that she ran off.

[17] Mr Bailey, the applicant and JA then left Phoenix Park in search of the complainant. On reaching the Gregory Park main road they saw the complainant. He said that "[w]hen she realize it was the …vehicle, she start run" and went and hid behind an old refrigerator.

JA went to her and the men drove off. Mr Bailey subsequently discovered that the complainant had left her slippers in the vehicle and turned back to give them to her. Upon seeing the car, the complainant ran and JA asked them to throw the slippers through the window of the vehicle. That was done and the men left the scene.

[18] Mr Bailey again asked the applicant what if anything he had done. Specifically, he asked "if him fuck it". The applicant's response was "he wouldn't call that fuck, because him know her pussy tight, because him never come". This was recorded in the statement that he gave to Corporal Morrison.

The defence

[19] The applicant made an unsworn statement from the dock. He said that on the night in question, he and Mr Bailey were on duty. They had completed a task and were travelling along the main road when the complainant and JA signalled the vehicle to stop and the parties spoke. He stated that JA requested their assistance to enter her house as she did not have the key. The men did not assist but the applicant gave his number to the complainant. The men proceeded to another location and were later invited to spend time with the women who had been able to gain entry to the house.

[20] Upon arrival, Mr Bailey and JA went inside the house. The applicant said he and the complainant remained in the car and spoke until he received a call that required him to escort a client of the security company to Naggos Head. At that time, JA indicated that she wanted to take some bags to Gregory Park and the men agreed to take her there. Both women sat in the back of the car and they drove to Naggos Head. Having completed that duty, they proceeded to Gregory Park.

[21] The parties then returned to Phoenix Vista and Mr Bailey and JA went inside the house. The complainant came around and sat in the front passenger seat beside the applicant. The two of them engaged in conversation during which the applicant asked the complainant what she enjoyed doing for fun. Her response was that she liked to smoke. Mr Bailey subsequently came outside and he and the complainant started to speak about

smoking ganja and he asked her where she could purchase some. She told him that she has her "peeps" and she knew where to go to buy ganja. Mr Bailey gave the complainant $100.00 to buy the ganja.

[22] The applicant and the complainant travelled to three locations before the complainant was able to purchase the ganja. Thereafter, the applicant got a call to go to the Greater Portmore Library. While they were en route to the library, the applicant said that the complainant "started building up the spliff". Upon arrival to the library he attended to the call and when he returned she started to "light it". He did not smoke any of the ganja.

[23] They then returned to Phoenix Vista where Mr Bailey came outside and collected a bag of ganja from the complainant. The applicant indicated that the windows of the car were down and he indicated to the complainant that the "smoke of the weed needed to blow out of the car, because somebody else is going to use it the next day".

[24] The applicant questioned the complainant as to whether she was single and if he could be her boyfriend. She said "not a problem". The applicant assisted the complainant to recline the car seat as she seemed to have had some difficulty doing so. Whilst assisting her, he kissed her neck and she did not resist either verbally or physically. He continued kissing her neck and there was no resistance. He then went over to her side of the car and was on his knees and again kissed her neck with no issue. The complainant then opened her legs and he continued to kiss her on her neck. The applicant asked her if she was okay but she did not respond. He continued kissing her and again asked her if she was okay. She responded that she needed to urinate. The applicant then went back over to the driver's seat so that she could exit the car.

[25] The complainant exited the car and stood about 10 feet away just looking at the house. The applicant asked her if she was okay and then opened his door. The complainant walked away and called out to JA who came outside. The complainant told JA that "him a try hold mi". JA questioned the applicant as to what had taken place and

he explained that they were inside the car talking and kissing until the complainant said that she needed to urinate and then stood outside looking at the house before running off. Mr Bailey also asked the applicant what had happened and he answered that he was not sure and that it appeared that something was wrong with the complainant.

[26] All three of them went in search of the complainant. They saw her on the main road but when she saw the car she hid. They then drove off. Having discovered that the complainant's slippers were in the car they returned and JA told them that the complainant had run away. JA asked him why he did not tell her that the complainant had smoked weed as, "when she smoke weed she act a different way". They then took JA to the house.

[27] The applicant recounted that JA had told him that the reason why the women were at Phoenix Vista was because she had gotten into a fight with her boyfriend. Further, her boyfriend found out that the men were at the house and one was inside and he told her that "him must get back to the one wid the scar in a him face". He says that this may have been the motive as to why he was before the court as he did not do any of the things of which he is accused.

Alton Johnson

[28] Mr Johnson stated that he and the applicant had been friends for over 20 years. He testified that the applicant was the vice president of the Jamaica Draughts Association and was very sociable, religious, reliable and a good organizer. He indicated that he would go to the applicant for advice and had heard him advising other persons.

[29] When Mr Johnson heard about the matter before the court, he said he was dumbstruck as he knew the applicant to be a truthful person. When cross-examined, he said that the applicant is married and very dedicated to his job. He also stated that he would be surprised to hear that the applicant was in a car with a woman other than his wife offering to be her boyfriend.

Summation

[30] The learned judge in her summation directed the jury to consider the evidence in its entirety including any aspects that were disputed. She reminded them that it was their duty to consider all the relevant evidence although she would remind them of salient features of the evidence. They were directed that even where she emphasized certain aspects of the evidence, they did not have to accept it unless they agreed with it. She gave full directions in respect of inferences.

[31] The elements required to prove the offence of rape were outlined to the jury. In order to further assist them, the learned judge reviewed the complainant's and the applicant's evidence and directed them on the issue of credibility. In so doing, the learned judge directed the jury, at length, on how to treat with conflicts in the evidence such as inconsistencies and discrepancies. She recounted the evidence of each witness in detail and then proceeded to deal with the issue of whether the complainant had any motive for telling lies on the applicant as was asserted by him in his unsworn statement. They were directed as to how to treat with the applicant's unsworn statement in order to determine the weight to be attached to it.

Ground one: The treatment by the learned trial judge of the jury's failure to arrive at a unanimous verdict was a misdirection in several critical respects and cumulatively amounted to pressure on them to be unanimous.

Applicant's submissions

[32] Counsel for the applicant, Mr Robert Fletcher, indicated that when the jury informed the learned judge that they were unable to arrive at a unanimous verdict, she "planted the seeds of pressure", when she stated at page 118 lines 14-18 of her summation:

> "…by law I would not be allowed to accept such a verdict and I appreciate that you might be having some difficulty in reaching a unanimous verdict, that is the agreement of everybody.

> Now, while it is not imperative that you do so. It is obviously the desire that you all would come to the same verdict…"

[33] Reference was also made to page 118 lines 19 -24 where the learned judge stated that it was "desirable" for the jury to arrive at the same verdict and that they should do their "utmost" to achieve this outcome. Counsel also directed our attention to page 119 lines 11-24, where the learned judge reminded the jury that they took an oath to arrive at a "true verdict".

[34] Counsel submitted that a judge ought to say nothing or couch further enquiries or directions in terms which suggest that the jury must come to a particular verdict or arrive at a verdict all. He stated that a judge must be careful not to cross the thin line between encouraging the jury to continue to deliberate in an effort to arrive at a unanimous verdict and exerting pressure on them to do so.

[35] He submitted that the directions referred to above when examined in light of the fact that they were given after the jury retired, gave the jury the impression: (i) that their decision was "not true" as everyone's position was not considered, (ii) that anything less than a unanimous verdict was not acceptable and (iii) that they may have been influenced by outside considerations. It was submitted further, that when looked at cumulatively, those directions would have given the jury the impression that the learned judge was suspicious of their initial decision and that they were under an obligation to return a unanimous verdict. Reliance was placed on **Patrick Brown and Richard McLean v R** [2014] JMCA Crim 24 ('**Patrick Brown**') at para. [16] and **Dwayne Green v R** [2016] JMCA Crim 35 ('**Dwayne Green**').

[36] It was counsel's position that the learned judge's further directions placed pressure on the jury to return a unanimous verdict. Those directions, he said, are to be contrasted with her directions to the jury before they first retired, that their duty upon retiring was to share ideas and consider whether the Crown had satisfied them of the guilt of the accused. This, he stated, is the core duty of a jury as noted in the decision of **Junior Edwards and Vassel Davis v R** [2012] JMCA Crim 50 ('**Junior Edwards**') at para.

[36]. They were also told that they were not to subordinate their view of the evidence for the sake of reaching a verdict. He also stated that nothing prevented the learned judge from accepting the verdict as even where there is a hung jury, it is still a decision.

[37] Counsel also took issue with the fact that it was the learned judge who sent for the jury after they had retired for the second time. He stated that this was unlike the situation in **Junior Edwards**, where the jury had returned of their own volition. In the instant case, counsel submitted, the jury was not afforded sufficient time in which to complete its deliberations.

The Crown's submissions

[38] Counsel for the Crown, Mrs Kameisha Johnson O'Connor, submitted that this ground has no merit as there was nothing in the tenor of the learned judge's directions that amounted to pressure or intimidation. It was submitted further that the learned judge was well within the proper discharge of her duties to try and assist the jury to arrive at a verdict. Reference was made to **Junior Edwards**, **Dwayne Green** and **Clive Barrett** in support of that submission.

[39] Counsel also relied on **Mohammed and others v R** TT 1992 CA 1 ('**Mohammed**'), that was referred to by Mangatal JA (Ag) in **Patrick Brown**, where the applicable test to determine whether there was any pressure on the jury in reaching a unanimous verdict was stated in the following terms:

> "The test to be applied in determining whether the direction given is satisfactory is if one of the jurors could have reasonably understood that there was an obligation to agree upon a verdict then the direction would be bad in law."

[40] In the present case, counsel submitted that there was nothing in the tenor of the learned judge's directions which suggested that the jurors were obliged to arrive at a verdict. The learned judge was said to have been well within the proper discharge of her duty to endeavour to assist the jury in arriving at a verdict. Counsel argued that that assistance did not amount to pressure or intimidation as the learned judge only queried

whether the jury needed assistance on a question of law or if they required more time to deliberate (see **Patrick Brown**, **Junior Edwards**, **Dwayne Green** and **R v Clive Barrett and others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 74, 75 and 76/1992, judgment delivered 24 May 1994 ('**Clive Barrett**')).

Analysis

[41] It is well-settled that the jury must be free to deliberate free from any pressure. This principle was applied in **Patrick Brown** by Mangatal JA (Ag), who stated at para. [18]:

> "As pointed out by Panton JA in ***R v Tommy Walker*** …the jury must be left to deliberate in complete freedom, and they should be directed in terms that do not exert or purport to exert any improper pressure on them."

[42] In **R v Tommy Walker** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 105/2000, judgment delivered 20 December 2001, to which Mangatal JA (Ag) referred, Panton JA (as he then was) stated at page 4:

> "In ***Watson,*** a decision of the English Court of Appeal, it was held that, since a jury had to be free to deliberate without any form of pressure being imposed on them, **they should, at the judge's discretion, be directed in terms that made it clear that no pressure was being exerted**.
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> In ***R v. McKenna*** [1960] 1 All E.R. 326, a case cited in argument in ***Watson***, the earlier English Court of Criminal Appeal held:
>
> > 'It is a cardinal principle of English criminal law that **a jury in considering their verdict shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat: they still stand between the Crown and the subject, and they are still one of the main defences of personal liberty**'." (Emphasis supplied)

[43] The standard direction which a judge can be expected to give is derived from **R v Watson and others** [1988] 1 ALL ER 897 ('**Watson**'). In that case, at page 903, Lord Lane CJ stated:

> "In the judgment of this court there is no reason why a jury should not be directed as follows:
>
> > 'Each of you has taken an oath to return **a true verdict according to the evidence**. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which [an] agreement is reached. If, unhappily, [ten of] you cannot reach [an] agreement you must say so.'
>
> It is a matter for the discretion of the judge whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we have heard, are often dangerous and should, if possible, be avoided. Where the words are thought to be necessary or desirable, they are probably best included as part of the summing up or given or repeated after the jury have had time to consider the majority direction." (Emphasis supplied)

[44] This is now known as "the Watson direction".

[45] In assessing whether the further directions given by the trial judge had the effect of exerting pressure on the jury, the intention of the judge is not the determining factor. The words used are to be assessed in the context of what they could convey to the jury. In **Patrick Brown** at para. [15] Mangatal JA (Ag) stated:

> "[15] We also found instructive a passage on page 839 of ***Latour v The King***, where Fauteux J quoted with approval

from a number of authorities, including ***Rex v Gallagher*** (1922) 63 DLR 629 at 630 and 37 Can. CC 83, at p. 84, 17 Alta. LR 519. Stuart LJ is reported to have astutely stated:

> **'It is not what the Judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter**. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal'." (Emphasis supplied)

[46] This test was applied by the Court of Appeal of Trinidad and Tobago in **Mohammed**, in which Ibrahim JA stated:

> "It will be observed that the direction given to the jury on the desirability of arriving at a consensus must leave them in no doubt whatever that they have the right to disagree and the right to say so. Whether that right is exercised bona fide or not is immaterial. This does not mean that the direction must always be in those words as stated above but whatever words are used the trial judge must be careful to leave that right with the jury. **The test to be applied in determining whether the direction given is satisfactory is if one of the jurors could have reasonably understood that there was an obligation to agree upon a verdict then the direction would be bad in law**. That test was applied in *Rex v. Latour* (1951) SCR 19 and which we approve. Applying, that test to the instant case can we say that the right to disagree was left with the jury? The judge told the jury 'the twelve of you must agree one way or the other with respect to each accused' ……..'there is no intermediary in this, it is either the accused is guilty as charged or not guilty - so twelve of you must agree, unanimously, that is twelve of you must agree ones [sic] way or the other ……..'
>
> **It is quite clear that the language used by the judge was of a compelling nature and the fact that it was given as the final charge to the jury must have left them in no doubt whatever that they must arrive at an**

> **agreement**. There is nothing in that direction to suggest to them that he was leaving with them their finally [sic] to disagree if they are so disposed. Accordingly, we are of the opinion that that was a misdirection given to the jury…" (Emphasis supplied)

[47] In **Patrick Brown**, the directions complained of, which were reproduced at para. [9] of the judgment, are as follows:

> "[9] 'You each take to the jury room your individual experience and wisdom. You give your views and you listen to the views of others. It is by discussion, argument and give and take that you will come to an agreement. Your verdict should be unanimous. Your verdict can only be guilty or not guilty in respect of each count'." (Underlining as in original)

[48] Mangatal JA (Ag) in her analysis of whether the learned judge erred in couching the direction in those terms, stated at paras. [21] – [23]:

> "[21] …Fine distinctions are inevitable in this type of situation. We are of the view that, at first blush, it would seem arguable that the learned trial judge's use of the word 'should' (as opposed to the word 'must') may not necessarily have signified to the jury that they were bound to agree. In the Concise Oxford English Dictionary, 11th Edition, there are a number of definitions given of the word 'should'. One definition given is that the word 'should' is a modal verb, 'used to indicate obligation, duty, or correctness'. However, two other definitions are provided i.e. 'used to give or ask advice or suggestions', and 'used to indicate what is probable'. What we understand Stuart LJ to be declaring so ably in the passage quoted above at paragraph [15] from the Canadian case of ***Rex v Gallagher***, is that, even if the language used is capable of more than one meaning, one harmful and one innocuous, **it is just as likely that the jury (or, indeed, in our view, even a single juror) could have understood the words in the prohibited sense as that they could have understood them in their harmless sense. In other words, we just cannot tell how they took the words. If that be the case, then the error is material**.

> [22] In our judgment, the learned trial judge fell into the pitfall which Lord Lane in Watson sought to warn against. She varied the words of the Watson direction, or in any event, used words which altered the crucial sense of the direction in so far as they may have exerted improper pressure on the jury or its members. This is so because one possible meaning of the words used by the learned trial judge is that it was compulsory or obligatory for the jury to agree upon a verdict. In addition, this was essentially all that was said upon the topic of how they were to arrive at their verdict. Thus, there was nothing else said that could have provided an 'antidote' to the forbidden, compulsory and incorrect meaning.
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> [23] Whilst the error may at first sight appear slight, when closely examined it is plainly of a fatal nature and renders the direction bad in law. In the circumstances, there was a miscarriage of justice." (Emphasis supplied)

[49] Another case in which the direction of the trial judge was called into question is **Junior Edwards**. The direction that was given by the trial judge was re-produced in para. [32] of the judgment in that case as follows:

> "[32] 'Now in a case of murder we look for a unanimous verdict, meaning that all twelve of you have to come to the same conclusion before it is a verdict. We have spent since last week Monday, although you didn't hear any evidence Monday, we empanelled Monday and we started the evidence Tuesday and it will be a thorough waist [sic] of time if you should go in their [sic] and fail, but, let the chips fall where they may. All of you go in their [sic] knock heads together, not physically, but exchange ideas and on the point where some of you disagree and talk about it and try and come to one decision. The only offence I am leaving for your consideration is murder, no other offence. They are either guilty or not guilty of murder'."

[50] In that case, the Crown submitted that "[while] the language used may have been blunt, indelicate and unforensic", the words used could not be construed so as to exert pressure on the jury to reach a verdict. This submission found favour with the court and, at para. [37], Phillips JA stated:

> "[37] In my view, in the instant case, there is no indication in the directions given by the learned trial judge to the members of the jury, which could have caused them to feel intimidated, or pressured, either to make a decision, or to decide to convict. This was clearly an instance of encouragement by the trial judge, with which one could find no fault. The jury was not being told that time was running out, that they were only being given 10 minutes to arrive at a verdict, or that once sequestered they would be incarcerated for hours, inconveniently, until their decision was given. They certainly were not directed to arrive at a specific conclusion, one to which all of them could not agree. **To the contrary, they were merely being told that it would be unfortunate if after the time spent they were unable to arrive at a decision, and were being urged to have dialogue so that they could try to arrive at a consensus, but if that did not occur, then so be it**. They had spent time hearing the matter, but then they continued to take their time, namely 3:41 hours, to arrive at their verdict. They did not appear to be rushed or in any way constrained in their consideration of the verdict, and they were not recalled by the judge before they had completed their deliberations." (Emphasis supplied)

[51] It is clear from the above cases that there is sometimes a fine distinction between a direction that may be viewed as creating pressure on the jury and one which may be described as encouraging them to reach a verdict.

[52] A judge has a duty to direct the jury to consider the evidence and seek to arrive at a unanimous verdict. In **Clive Barrett** at page 13, Phillips JA stated that "[o]ne of the primary objectives of a trial is to ensure that a decision is arrived at if possible without the parties having to go through the ordeal of a retrial".

[53] In the instant case, the jury retired at 11:02 am and, upon their return at 1:04 pm, indicated that they were unable to reach a unanimous decision and were divided four to three. The learned judge, in an effort to assist them, stated at page 118 lines 14-25 and pages 119 and 120 of the summation:

"HER LADYSHIP: [B]y law I would not be allowed to accept such a verdict and I appreciate that you might be having some difficulty in reaching a unanimous verdict, that is the agreement of everyone.

Now, while it is **not** imperative that you do so. It is obviously the desire that you all would come to the same verdict. You have undertaken to give a true verdict based upon the evidence and that you must do your utmost to achieve at the end. I have the discretion to discharge you from giving a verdict where it appears that further deliberation would be futile. However this power should not be exercised lightly or too quickly. Frequently, when jurors are given more time to talk amongst themselves they are able to reach an agreement. **My objective is not to convince you to change your minds, but rather to encourage you to present your own views of the evidence to your fellow jurors to ensure that everyone's opinion has been fully considered**.

While you may have already formed an opinion as to the proper verdict I would ask that you still keep an open mind and carefully consider your fellow juror's view point. **However, in reconsidering your position I would remind you that at the beginning of the trial each of you took an oath or made an affirmation to return a true verdict according to the evidence. It is crucial that no one betrays that oath or affirmation. Therefore, your verdict must be based on the evidence alone** and you must not allow yourselves to be influenced by any extraneous considerations, that is, outside considerations.

…**is there anything in relation to the facts that the Court could assist you with or is it that more time, sorry, in relation to the law that the Court could assist you with or is it that with more time you could come to an agreement or a decision?** So, first of all, is there anything that this Court can assist in relation to the law, yes or no?

MADAM FOREMAN: No, Madam Judge, nothing in relation to the law.

> HER LADYSHIP: Do you believe with further time you would be able to come to a decision?
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> MADAM FOREMAN: More time.
>
> HER LADYSHIP: More time will assist. So I will comment to you as I had before that you listen to each other and remember that sometimes there might be some give and take, but certainly you are to listen to each other and each other's viewpoints and do your best to arrive at an **acceptable** verdict." (Emphasis supplied)

[54] The jury retired at 1:10 pm and returned at 3:38 pm, at which time they indicated that they had reached a unanimous verdict of guilty.

[55] The learned judge, having been informed that the jury was divided four to three, was, in our view, duty-bound to try to assist them. Had she not done so, this would have been an irregularity. This issue was discussed in **Dwayne Green**, where at para. [8] Morrison P stated:

> "[8] However, in our view quite properly, Mrs Milwood-Moore went on to concede that, by declining to offer any assistance to the jury save on a question of law, the judge had flown in the face of the authorities, some of them emanating from this court, which made it clear that the jury were entitled to assistance from the judge at any stage of the proceedings on any area, whether of law or of fact. In **R v Linton Edwards** (SCCA No 250/2001, judgment delivered 21 May 2003, page 8), for example, to which Mr Wilson referred us, Bingham JA observed that 'there can never be any stage of a trial with a jury that the jury may not need some assistance from the learned trial judge'. This observation was explicitly based on the decision of the Privy Council on appeal from this court in **Berry v The Queen** [1992] 3 All ER 881, in which Lord Lowry explained (at page 894) that:
>
> > 'The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending upon the circumstances, since, if the jury return

> a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part'."

[56] Morrison P continued in a subsequent paragraph also numbered [8]:

> "[8] … we will not go so far as Mr Wilson invites us to, which is to say that, at the point when the jury returned to indicate that they had reached a decision, but that it was not unanimous, the judge ought then and there, without more, to have accepted the verdict. We say this because the law permits the entering of a majority verdict in these circumstances only if the jury is divided in a certain proportion, that is, five to two. So that the next step for the judge to have taken, in our view, ought to have been to make an enquiry of the jury as to how they were divided. It is only upon being told that the jury were divided in a manner which permitted the court to accept a majority verdict according to law, that the judge would then have been obliged to consider the question of accepting the majority verdict."

[57] The learned judge's further directions, in our view, cannot be impugned. Counsel for the applicant has argued that the exhortation to the jury to arrive at a "true" and "acceptable" verdict could be interpreted to mean that unless their verdict was unanimous it would not be "true" or acceptable. With respect, we do not agree. The jury was reminded that they were to return a true verdict "according to the evidence" as was done in **Watson**. Whilst the learned judge may have departed somewhat from the Watson direction, the jury was directed that it was not imperative that they all reach the same verdict. She also clearly stated that she was not attempting to convince them to change their minds. In addition, she made it clear that they were not to subject their views to that of other jurors but that they should each make their decision based on the "evidence alone". Her words were, therefore, not capable of being reasonably construed that anything less than a unanimous verdict was not acceptable or true.

[58] Further, we have noted that the directions complained of were not the only ones given by the learned judge pertaining to how the jury was to arrive at a verdict. At pages 114-116 of her summation she stated:

> "Now, Madam Foreman and members of the jury, the essence of [sic] jury system is the process of reasoning together and exchanging your views and talking about the evidence. I point out also that all seven of you are expected to pool your collective wisdom and experiences and arrive at a verdict.
>
> No one juror has any greater say in the decision process not even Madam Foreman. Madam Foreman is selected as a matter of convenience, or in other words your mouthpiece so she can communicate your decisions and so on to the Court.
>
> Madam Foreman, it is expected that you will pool your views of the evidence. This means that there might be some exchange of opinions, give and take. I must, however, emphasize that this does not mean that you must subordinate your view of the evidence just for the sake of reaching a verdict. It is, of course, desirable that you all try to agree to try the case to the best of your ability…"

[59] The jury requested additional time to consider the matter and that request was granted. The jury having been further directed, deliberated for another two hours and 28 minutes before they were asked by the learned judge to return. At that time, the learned judge noted on the record that they had retired for a total of four hours. At no time was the jury told that there was any time constraint and the additional time for which they deliberated cannot be properly described as being of short duration. In addition, the learned judge did not direct them to arrive at a particular decision.

[60] In the circumstances, it is our view that no pressure was exerted on the jury to return a unanimous verdict and as such, there was no misdirection by the learned judge. We find that this ground has no merit and therefore, fails.

Ground two: The learned trial judge erred in not leaving for the jury's consideration the lesser, alternative offence of Indecent Assault. This denied the applicant a fair consideration of his case.

Applicant's submissions

[61] Counsel submitted that the learned judge erred in not directing the jury to consider the lesser offences of indecent assault and attempted rape. He stated that where the

commission of one offence in a count may or does involve the commission of another offence, an allegation of the other offence is impliedly included in that count. Reference was made to **Commissioner of Police of the Metropolis v Wilson** [1984] 1 AC 242 and **R v Hodgson** [1973] 1 QB 565, in support of that submission.

[62] He stated that there was evidence to support the view that the applicant attempted to initiate sexual intercourse with the complainant without her consent and, in so doing, did things that amounted to an assault. Counsel also pointed out that the applicant in his unsworn statement said that he never had sex with her but that there was some attempt to have some sort of sexual interaction.

The Crown's submissions

[63] Counsel submitted that this ground has no merit. She stated that based on the complainant's evidence, there was a series of continuous acts leading up to the commission of the rape. In addition, the evidence of Mr Bailey pertaining to his conversation with the applicant after the offence allegedly took place, supported the complainant's evidence that penetration did, in fact, occur. The 'indecent' assault she argued, was part and parcel of the rape and was, therefore, subsumed in the commission of that offence, given the continuity of the events. Further, there is no doubt as to whether the elements required to prove the offence of rape were present as there was no indication on the Crown's case, that penetration did not take place. In addition, the applicant asserted that he touched the complainant with her consent. In those circumstances, the offence of indecent assault would not arise. As such, the interests of justice would not be served by leaving the offence of indecent assault for the jury's consideration. In this regard, reliance was placed on **R v Coutts** [2006] 1 WLR 2154 ('**Coutts**') and **Hunte and Khan v The State** [2015] UKPC 33 ('**Hunte and Khan**').

Analysis

[64] In certain situations, it is open to a jury to find the accused not guilty of the offence alleged in a count but guilty of some other alternative offence. Where the evidence is

such that the accused may only be guilty of the lesser offence, in the interests of justice, the jury ought to be given the appropriate directions. In Blackstone's Criminal Practice 2007 at para. D17.49, the learned authors state:

> "The judge in summing up is not obliged to direct the jury about the option of finding the accused guilty of an alternative offence, even if that option is available to them as a matter of law. If, however, the possibility that the accused is guilty only of a lesser offence has been obviously raised by the evidence, then the judge should, in the interests of justice leave the alternative offence to be left to the jury."

[65] This statement of the principle is based on the decision of the House of Lords in **Coutts**, which is the leading authority on how to treat with the issue of whether a direction as to a lesser alternative offence should be given. In **Coutts**, the court approved the following dicta in **R v Fairbanks** [1986] 1 WLR 1202. The question before the court in **Fairbanks** was whether, on an indictment charging the appellant with death by reckless driving, the alternative of driving without due care and attention should have been left to the jury. Mustill LJ at 1205–1206 explained:

> "These cases bear out the conclusion, which we should in any event have reached, that **the judge is obliged to leave the lesser alternative only if this is necessary in the interests of justice**. **Such interests will never be served in a situation where the lesser verdict simply does not arise on the way in which the case had been presented to the court**: for example if the defence has never sought to deny that the full offence charged has been committed, but challenges that it was committed by the defendant. Again there may be instances where there was at one stage a question which would, if pursued, have left open the possibility of a lesser verdict, but which, in the light of the way the trial has developed, has simply ceased to be a live issue. In these and other situations it would only be harmful to confuse the jury by advising them of the possibility of a verdict which could make no sense.
>
> We can also envisage cases where the principal offence is so grave and the alternative so trifling, that the judge thinks it best not to distract the jury by forcing them to consider

> something which is remote from the real point of the case: and this may be so particularly where there are already a series of realistic alternatives which call for careful handling by judge and jury, and where the possibility of conviction for a trivial offence would be an unnecessary further complication.
>
> On the other hand the interests of justice will sometimes demand that the lesser alternatives are left to the jury. **It must be remembered that justice serves the interests of the public as well as those of the defendant, and if the evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be acquitted altogether merely because the jury cannot be sure that he was guilty of the greater**." (Emphasis supplied)

[66] In **Coutts**, the appellant was convicted of the offence of murder. His defence was that he had consensual asphyxial sex with a woman which resulted in her accidental death. During the trial, evidence was adduced, which if accepted, would have enabled a rational jury to convict him of manslaughter. The defendant having been advised by his counsel agreed that the judge would not be asked to leave manslaughter to the jury. His appeal was dismissed by the Court of Appeal. On appeal to the House of Lords, at page 2155, it was stated that the point of law of general public importance certified by the Court of Appeal to be considered was:

> "Whether on a murder charge, a judge is obliged to leave an alternative verdict of manslaughter which arises on the evidence, if the version of events on which it depends is inconsistent with the Crown's case and in the view of the trial judge, it will not be in the interest of justice to leave an alternative verdict of manslaughter because: (a) it would be unfair to the defendant to do so; (b) directions as to manslaughter would unduly complicate the task of the jury; (c) both the counsels for the prosecution and the defence do not want the alternative verdict left to the jury."

[67] The House of Lords ruled that the learned judge should have left the offence of manslaughter to the jury for their consideration. His failure to do so was found to be a

material irregularity as a result of which, the appeal was allowed. Lord Bingham stated at para. 12:

> "12. **In any criminal prosecution for a serious offence there is an important public interest in the outcome** (see *R v Fairbanks* [1986] 1 WLR 1202 at 1206). **The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged.** The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (see *Von Starck v R* [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275; *Hunter v R* [2003] UKPC 69 at [27], [2004] 2 LRC 719 at [27])." (Emphasis supplied)

[68] In **Coutts**, what was described as the "fullest statement of the principle", was said to be that given in the Privy Council decision of **Von Starck v R** [2000] 1 WLR 1270 at 1275 by Lord Clyde, who stated thus:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is

> required to put to the jury for their consideration, in a fair and balanced manner, the respective contentions which have been presented. But his responsibility does not end there**. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial, whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside**." (Emphasis supplied)

[69] In **Hunte and Khan**, the principle was stated at para. [38], in the following terms by Lord Toulson who delivered the judgment on behalf of the Board:

> "38 **But the question only arises in cases where the evidence before the jury provides an obvious basis for conviction of an alternative offence**. In Coutts Lord Bingham referred to an 'obvious alternative offence which there is evidence to support' at para 23. Other judges used other formulations to the same general effect (summarised in Foster at para 54). **It is not the law that a bare possibility that a defendant may have been guilty of a lesser offence makes it incumbent on the trial judge in all circumstances to leave an alternative verdict to the jury**. In Foster the court approved the decision of the Court of Appeal in R v Banton [2007] EWCA Crim 1847, that the judge would be justified in not leaving an alternative verdict to the jury if he reasonably considered it to be remote from the real point of the case (see Foster paras. 57-58)." (Emphasis supplied)

[70] An indecent assault is committed where a defendant assaults the complainant and the assault is accompanied by circumstances of indecency on the part of the defendant

towards the complainant (see **Christopher Johnson v R** [2019] JMCA Crim 44 at para [11]). In **R v Court** [1989] AC 28 at page 45, Lord Ackner stated:

> "…on a charge of indecent assault the prosecution must not only prove that the accused intentionally assaulted the victim, but that in so doing he intended to commit an indecent assault i.e. an assault which right-minded persons would think was indecent. Accordingly, any evidence which tends to explain the reason for the defendant's conduct, be it his own admission or otherwise, would be relevant to establish whether or not he intended to commit, not only an assault, but an indecent one."

[71] In this matter, the following extract from the transcript is relevant:

> "A. [The applicant] approach me. I remember him coming over to my seat, coming over.
>
> Q. Keep your voice up. I remember him?
>
> A. Coming over to me, coming over me, putting my seat back, all the way back and came over and trying to kiss me and touch me. …..
>
> HER LADYSHIP: Feel you where?
>
> THE WITNESS: Between the legs.
>
> A. Afterwards it was still …while he was doing all of that I was telling him no and I had my legs closed and he was trying to open them.
>
> Q. Yes, Miss…
>
> A. After that he was still trying, because he was trying for a while, until he got them open and he began to rub his penis on my panty.
>
> Q. Yes, Miss…
>
> A. Afterwards he shift it, started to force….
>
> HER LADYSHIP: ……

A. He shift my panty and tried to force his penis in, and started to force it in.

HER LADYSHIP: …tried to force his penis where?

A. Inside my vagina

Q. Yes, Miss…

A. I was telling him to stop. I was crying, asking him to stop and he put his hand over my mouth.

Q. Yes, Miss…

A. Meanwhile he was doing what he was doing. I told him that I wanted to pee.

HER LADYSHIP: Sorry, you said he did what he was doing; what did he do?

A. Meanwhile he was having sex with me."

When she was challenged in cross-examination, the complainant stated:

"His penis was inside of me, going in and out for a while."

[72] Mr Bailey's evidence was that when he first asked the applicant if he had sex with the complainant, his first response was "he wouldn't call that fuck". Later on in their discourse, the applicant stated that Mr Bailey "a gwaan like [him] nuh get pussy too".

[73] The following extract from Mr Bailey's evidence at page 105 is also relevant:

"Q. Can you tell us what you recall?

A. After asking him if him fuck it, he seh him wouldn't call it fuck, but him know her pussy tight.

HER LADYSHIP: Not hearing you

A. Seh him wouldn't call it fuck, because him know her pussy tight, because him never come."

[74] When the evidence is considered as a whole, there is no "obvious basis" on which the applicant could have reasonably been convicted of the offence of indecent assault.

As stated by Lord Toulson in **Hunte and Khan**, the "bare possibility" that the applicant may have been guilty of indecent assault did not make it incumbent on the learned judge to leave that offence to the jury for its consideration. The elements required to prove rape were present. It was open to the jury to convict the applicant of that offence if they accepted the complainant's evidence. There was therefore, no error on her part with the result that this ground is unlikely to succeed.

Ground three: Given the nature of the prosecution's evidence the learned trial judge in her summation did not give a true account of the discrepancies, inconsistencies and omissions and therefore denied the accused a fair trial.

Applicant's submissions

[75] At the hearing of the application, counsel did not pursue this ground with much vigour. However, for the purpose of recounting the substance of the submissions I have noted what was advanced in the written submissions.

[76] It was counsel's submission that the learned judge failed to highlight the discrepancies, inconsistencies and omissions arising on the evidence. These included:

i. The complainant in examination in chief said that the accused covered her mouth but in cross examination she said that they were having a conversation.

ii. The discrepancy in the evidence between Mr Bailey and the complainant as to where she was after she screamed. On her account she was outside of the car. However, Mr Bailey said that she was nowhere to be found.

iii. The complainant's evidence was that she and JA were taken to the train line by the men. However, Mr Bailey does not speak of this in his evidence.

The Crown's submissions

[77] It was submitted there is no merit in this ground as the learned judge having defined the terms 'inconsistencies' and 'discrepancies', provided examples of both and gave adequate directions as to how to treat with them. Reliance was placed on the decision of **R v Fray Diedrick** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991.

Analysis

[78] A trial judge is not required to point out every inconsistency and discrepancy that arises during the trial. As explained by this court, at page 9 in **R v Fray Deidrick**:

> "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 in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[79] The duty of a trial judge was succinctly described in **Vernaldo Graham v R** [2017] JMCA Crim 30 at para. [106], in the following terms:

> "[106] Based on the authorities, the duty of the trial judge in directing the jury in the case of inconsistencies and discrepancies appearing in the evidence at trial may be summed up as follows:
>
> 1. There is no duty to comb through the evidence to find all the inconsistencies and discrepancies there may be, but the trial judge may give some examples of them or remind the jury of the major ones.
>
> 2. The trial judge should explain to the jury the effect a proved or admitted previous inconsistent statement should have on the evidence.
>
> 3. The trial judge should point out to the jury what the result may be if the inconsistency or discrepancy were to be found by them to be material and how it may undermine the evidence.

> Once this approach is taken, it is then a matter for the jury whether they consider the witness to be discredited."

[80] This is to be balanced with the caution given by Brooks JA (as he then was) at para. [30] in **Morris Cargill v R** [2016] JMCA Crim 6, that "it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case".

[81] The learned judge directed the jury's attention to the various conflicts in the evidence and gave appropriate directions on how to deal with them. Importantly, she pointed out to them that "[c]onflicts in the evidence can impact the credibility of the witnesses…". She also indicated that they were to examine each conflict in the evidence and make a determination of whether it was "significant in relation to the truthfulness of the witness'." Her directions were in our view, sufficient, as she did not merely recount the evidence.

[82] In this regard, we noted that when dealing with the issue of consent, the learned judge directed the jury's attention to the complainant's evidence that she kept telling the applicant "no" and that he had his hand over her mouth. She said at pages 19 – 20 of her summation:

> "…you will have to consider all the evidence, all that she said from the start that his hand was over her mouth, so you will have to determine whether she could have spoken or if all she is saying, according to the defence, is pure lies. You will have to use your commonsense [sic] and experience in life and to determine what you believe and return a verdict according to the evidence. That is your duty to decide."

[83] At page 26, the learned judge pointed out to the jury that there was no independent evidence that the offence occurred and warned them to be careful in their assessment of the evidence. This was a critical issue in the case. She also indicated that the burden of proof was on the prosecution to satisfy them so that they felt sure that the applicant was guilty of the offence.

[84] As stated in **R v Fray Deidrick**, the learned judge was not required to identify each and every conflict that arose in the evidence. The learned judge in this case, directed the jury's attention to several aspects of the evidence where there was conflict and gave thorough directions on how they were to treat with them. Consequently, we are of the view that this ground cannot succeed.

Ground four: The learned trial judge through her interference descended into the arena and elicited irrelevant prejudicial information that would affect the applicant, seeking to discredit the quality of the evidence of the character witness for the applicant.

Applicant's submissions

[85] Mr Fletcher gave numerous examples from the summation which form the basis of this ground. He submitted that the learned judge committed the following errors in her summation to the jury:

i. Directing the jury not to allow evidence that the complainant had taken the applicant to several places to buy ganja to influence their decision. This, it was argued, limited the ability of the jury to consider the evidence before them as the conduct of the complainant was relevant and vital.

ii. Recounting the questions she had posed to Mr Hepburn regarding the security company's work policy. That evidence the learned judge said was irrelevant and prejudicial and as such, no reliance ought to have been placed on it.

iii. By stating that the applicant had told the court his age when in fact, he had not done so.

iv. Her mis-statement of the evidence when she said that the complainant did not initiate any conversation and did not tell anyone that she wanted to buy ganja.

v. Incorrectly recounting what the applicant had said in his unsworn statement in respect of how he came to recline the complainant's seat.

vi. Imposing her opinion as to whether the applicant would have forgotten in his unsworn statement to indicate to the court that the complainant opened her legs and wrapped them around him if that had occurred.

vii. Stating that the applicant "might" have told the complainant that he was not going to do anything without a condom when the complainant had admitted that the applicant had said those words.

viii. Inviting the jury to speculate as to how the applicant would have known that the complainant had tissue in her underwear. This was said to be inappropriate given the learned judge's interference with defence counsel's cross examination on this issue on the basis of relevance.

ix. Inviting the jury to consider whether the complainant's explanation as to why she slept on the roof was a lie, in light of the fact that she was 21 years old.

x. Incorrectly stating that the applicant had said that the complainant seemed "stand-offish" and that Mr Bailey had said that the complainant was "sitting round the back".

xi. The learned judge redacted what the applicant had said in relation to the purchase of the ganja, however she gave the impression that she was recounting the applicant's unsworn statement verbatim.

xii. Omitting to remind the jury that the applicant had stated that the complainant had not resisted after he reclined her seat and began kissing her.

xiii. Indicating to the jury that the applicant in his unsworn statement had said that "[the complainant] said to [JA] that a hold him-that him a hold mi down" when the complainant had told JA "him a try hold me".

xiv. Incorrectly stating that defence counsel had suggested to the complainant that she lied about being raped because she was embarrassed about the tissue in her underwear.

xv. When she incorrectly stated that defence counsel had suggested to the complainant that she had lied about being raped because she was out late and could not explain her whereabouts.

xvi. When the learned judge directed the jury that counsel for the applicant did not cross-examine the complainant about her smoking ganja despite the assertion that this was the reason for her weird behaviour.

[86] It was also submitted that the applicant's case was prejudiced as the learned judge posed questions to his character witness, Mr Johnson, with the intention of discrediting the quality of the evidence rather than clarifying any aspect of the witness' evidence. It was further submitted that by engaging in that line of questioning, the learned judge descended into the arena (point xvii).

The Crown's submissions

[87] Mrs Johnson-O'Connor addressed each of the complaints as follows:

i. It was submitted that the directions of the learned judge pertaining to the issue of the ganja were intended to protect the applicant from

any prejudice in light of the evidence that he took the complainant to buy ganja.

ii. Regarding the character evidence, counsel submitted that the learned judge was entitled to recount the evidence given by the witness and the nature of the questions posed to that witness was not prejudicial. She posited that there was no prejudice as the applicant himself, in his unsworn statement, had admitted that he did a lot of wrong things and that by being at Phoenix Vista on the night in question he was outside of his assigned duty position. In essence, he admitted that he breached the company's policy. Mrs Johnson-O'Connor also stated that the assertion that the learned judge asked too many questions is incorrect as she only asked the witness a few questions. Reference was made to **Carlton Baddal v R** [2011] JMCA Crim 6 in which Panton P at para. [17] stated:

> "[17] Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been overlooked or left obscure'(Jones v National Coal Board [1957] 2 All ER 155 at 159G). "

iv. Counsel agreed that the applicant did not state his age in his unsworn statement. However, she submitted that the error was insignificant and did not affect the overall fairness of the trial.

v. It was submitted that the learned judge was correct, based on the evidence, that the complainant did not initiate any conversation about buying ganja. She also did not tell anyone she wanted ganja. It was, however, borne out that the complainant directed the

applicant where to get ganja. In the circumstances, it was submitted that that the learned trial judge's directions reflected the evidence.

vi. Mrs Johnson-O'Connor agreed that the learned judge erred in recounting what the applicant stated in his unsworn statement. This error she stated was corrected at a later stage in the summation when the learned judge gave an accurate reminder to the jury of that aspect of the applicant's unsworn statement. In the circumstances, it was submitted that no prejudice was suffered by the applicant.

[88] In respect of point viii, it was counsel's submission that whilst the learned judge drew inferences in respect of the tissue being in the complainant's underwear, she reminded the jury that it was a matter for them to decide how to treat with the evidence.

[89] Where point x is concerned, it was submitted that the learned judge was not incorrect when in para-phrasing she used the words "stand-offish" in relation to the applicant's statement that the complainant seemed reluctant to speak to him at first. In any event, that statement was not material and could not result in any prejudice to the applicant.

[90] Further, that whilst the learned judge omitted to recount the words "there was no resistance whatsoever," it was clear to the jury that the applicant's position was that there was no resistance on the part of the complainant. In this regard, the learned judge reminded the jury that he said "[w]hile I kissed her neck, she did not resist either verbally or physically". Moreover, the jurors had the benefit of hearing the unsworn statement and at the date of the summation, it would have been fresh in their minds.

[91] In relation to points xiv and xv counsel agreed that at no point were suggestions made in respect of the motive of the complainant to make up an allegation of rape.

[92] It was submitted that, in any event, even though there were errors in the learned judge's summation, the question is whether the summation, when taken as a whole, was such that the applicant was deprived of a fair trial. The learned judge, she submitted, was fair and balanced in her summation and gave the jury the proper directions. She gave due regard to the applicant's unsworn statement and gave the requisite directions to the jury on how to treat with same. It was submitted further that the learned judge reminded the jury at the outset, and throughout her summation, that the facts were within their purview and that they were to determine how to treat with them. She also reminded them that they were not to speculate; that the facts were entirely their responsibility; that they were to disregard any views expressed that did not accord with their own; and that, even if some aspect of the evidence is omitted in the summation, they should still have regard to it, if they think it is important. Reference was made to the following passage in the learned judge's summation at page 111, lines 11-25:

> "What I have said in relation to [the applicant's] statement some of which are comments from me, remember what I told you about comments made by the lawyers and comments by even the judge. If they do not accord with your own findings, you are to ignore them. It is only if they accord with what you yourselves have determined the facts to be then you of course, can adopt them. The findings are entirely for you. The evidence is for you to sift and make up your own mind about, nobody else is to help you with that. You are to look at that all by yourselves. So all of these matters are left to your assessment of what actually happened in the case. Based on your good sense, your experience and your knowledge of human nature because that's why you are here."

[93] This passage was said to be crucial as the learned judge reminded the jury of the importance of disregarding material that does not accord with their findings, irrespective of who it is coming from (see **Shawn Campbell and Others v R** [2020] JMCA Crim 10 ('**Shawn Campbell**').

[94] It was submitted that point xvii has no merit as the questions asked of Mr Johnson by the learned judge were fair. It was submitted further that no questions were asked that were out the norm for a character witness and no prejudicial material was elicited.

[95] In the circumstances, it was submitted that this ground has no merit.

Analysis

[96] A trial judge in his summation must be careful not to make any comments or lead the evidence in a manner that would be prejudicial to either the prosecution or the defence. The trial judge must, therefore, be mindful of what he says and should never lose sight of the overarching principle of fairness. This was the position of the court in **Carlton Baddal v R**, where at paras. [17]-[18] Panton P stated:

> "[17] We also take this opportunity to remind trial judges that **it is no part of their duty to lead evidence, or to give the impression that they are so doing**. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction. **Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings**. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been overlooked or left obscure' (***Jones v National Coal Board*** [1957] 2 All ER 155 at 159G).
>
> [18] In this case, it cannot be said that there has been any unfairness to the appellant. He and his legal representative were not hindered in any way in the conduct of the trial. He was allowed to give his story in the way he wished. No words were put in the mouth of the identifying witness, and counsel for the prosecution was not substituted by the judge. The case against the appellant was a strong one, and the questions posed by the judge during the evidence of the identifying witness did not in any way make the case appear any stronger; nor did those questions cause any unfairness to the appellant." (Emphasis supplied)

[97] This was also the position of the court in **Shawn Campbell** where it was stated at para. [326] that the errors made by the trial judge in the summation "were no more than missteps in the course of what was a thorough and well-balanced summing-up".

[98] I will now examine the points raised by the applicant.

[99] Points i and iv deal with the evidence pertaining to the discussion about ganja and its subsequent purchase. The learned judge, having referred to that evidence which she correctly stated was highlighted during the cross-examination of the complainant, directed the jury that that evidence should not influence their decision.

[100] The learned judge directed the jury that the complainant did not initiate or tell anyone that she wanted ganja. The applicant, in his statement, indicated that when he asked the complainant what she liked to do for fun, her response was that she liked smoking. When Mr Bailey came outside, the applicant told him that the complainant smoked weed. The applicant stated that Mr Bailey and the complainant then proceeded to speak about smoking ganja and where the complainant could get some to buy. Mr Bailey then gave her money to buy some ganja for him and the applicant and the complainant went in search of same.

[101] The learned judge, in her summation, made it clear that none of the parties were before the court in relation to ganja and gave the following direction:

> "You heard that Miss Johnson had gone to buy ganja and she directed the accused man to several places to buy the ganja, because this was highlighted during the course of the cross-examination. This should not influence your decision."

[102] The learned judge, therefore, did not misquote the evidence and her directions in relation to this aspect of the evidence were appropriate.

[103] With respect to the company's policy (point ii), the learned judge asked certain questions of Mr Hepburn, who was an assistant manager at the company. The following portions of the transcript are relevant:

"HER LADYSHIP: In relation to the vehicle and its usage, was there any company policy in relation to that?

THE WITNESS: Yes, we have policies with regards to the use of the vehicle. It must only be used in operation of the company business.

HER LADYSHIP: So in relation to persons who are not officers, or workers of [the company], were officers allowed to give drives and so on to those kind of persons?

THE WITNESS: It's not permitted.

HER LADYSHIP: One other question, sir.

In relation to that time period, 13th, 14th of September 2015, can you say what areas Mr. Forrest would have been covering in his duties?

THE WITNESS: He would have been assigned to work in Portmore, environs of Portmore. That would take him anywhere from just about Caymanas crossing, all the way back to Hellshire, and Dunbeholden Road, just about

HER LADYSHIP: And anywhere in between?

THE WITNESS: Anywhere in between, all the areas between.

HER LADYSHIP: Anything arising from that, Miss Williams?

MISS R. WILLIAMS: No, m'Lady.

HER LADYSHIP: Mr. Morris?

MR. L. MORRIS: Nothing, m'Lady."

[104] The learned judge, in her summation, recounted the above and indicated to the jury that that evidence was not challenged and stated that "…you could say it is accepted by the defence".

[105] Counsel for the applicant has argued that the learned judge's recounting of that evidence was prejudicial to his case. This aspect of the evidence was, in our view, part

of the general narrative. The treatment of this aspect of the evidence was a matter entirely for the jury's consideration.

[106] In relation to point iii, the learned judge indicated to the jury that the applicant told the complainant that he was 36 years' old but in his statement had said that he was 40 years' old. This was incorrect as the applicant never stated his age. It was the complainant, in her evidence, who said that the applicant had told her that he was 36 at the time. This error was, in our view, unlikely to cause any prejudice to the applicant as this was not a case in which the age of the applicant was a material factor.

[107] Point v raised by the applicant is concerned with the applicant's statement pertaining to the reclining of the complainant's seat. The applicant in his unsworn statement stated:

> "She was trying to pull the lever to recline the seat and she seems [sic] not to be able to do so, so I stretched across and assisted her to recline the seat. While I was doing so, I kissed her against her neck and she did not resist, whether verbally or physically. I continued kissing her against her neck, there was no resistant [sic] whatsoever. I then stepped over to the passenger side of the car and I was on my knees and I kissed her on her neck more. [The complainant] eventually spread her legs—opened her legs and I leaned over to her and continued to kiss her against her neck. I looked at her and asked her if she was okay and she didn't respond. I continued kissing her on her neck, again, and I looked at her and asked her again if she is okay, she said she wanted to pee. I immediately got up from her side of the car, went back in the driver's seat and [the complainant] opened the door and stepped out…"

[108] Point vi took issue with the learned judge's treatment of a suggestion that was made to the complainant by counsel for the applicant. The learned judge stated to the jury:

> "It was suggested to her that while [the applicant] leaned over she opened up her legs and wrapped her legs around his waist. She denied this. You will recall the version given by Mr.

> Forrest he told you that he went over her side and he kneeled down before her and tried to kiss her and was kissing upon her neck. He never mentioned anything about her opening up her legs and wrapping them around him. If you believe it is something significant, Madam Foreman and members of the jury, something as significant as this, would the accused man have forgotten it?"

[109] The learned judge invited the jury to consider whether the alleged actions of the complainant were significant and, if so, whether the applicant would have forgotten to say that she wrapped her legs around his waist. The learned judge did, however, misdirect the jury when she recounted that the applicant did not say that the complainant opened her legs. This error, in our view, did not result in a miscarriage of justice. The totality of the evidence before the jury pertaining to sexual activity having taken place, included the evidence of Mr Bailey of what the applicant had said to him. That evidence was capable of supporting the complainant's contention that sexual intercourse took place. The jury was given full instructions on how to treat with conflicts in the evidence and were instructed several times that they were the ultimate decision-makers. They would have had to consider whose version of the events was more credible and it was, therefore, open to them to reject the applicant's version, which they obviously did.

[110] Counsel for the applicant also took issue with the following comments made by the learned judge (point vii):

> "**It was also suggested to her that while she and [the applicant] were in the car, he told her he was not going to do anything without a condom and she said whilst he was forcing himself on me he did tell me that.** Now, she is saying that he might have said words like that, but his intention was clear based on what he was doing because this was while he was forcing himself on me he was telling me those things." (Emphasis supplied)

[111] Mr Fletcher argued that the use of the word "might" was incorrect as the complainant, in cross-examination, had indicated that the applicant had in fact told her that he was not doing anything without a condom. Mr Fletcher's recount of the evidence

is correct. The learned judge's use of the word "might", by itself, may have conveyed to the jury that the complainant was unsure whether the applicant had used those words. However, it is our view that the use of the word "might" was a paraphrase of the complainant's evidence as the learned judge had earlier stated that the complainant had in fact admitted that the applicant had told her that he "was not going to do anything without a condom". The issue was whether the appellant had sexual intercourse without the complainant's consent. The appellant's defence was that sexual intercourse did not take place at all. The jury was tasked with weighing both accounts and to ultimately decide whether the complainant's evidence was credible. There is, therefore, no merit to this complaint.

[112] With respect to the issue of the tissue (points viii and xiv), the learned judge in her summation stated:

> "Now, this incident about the tissue, because [sic] remember it was the accused man who said that all he did was knelt [sic] before the complainant and he was repeatedly kissing her on her neck and stopping and asking her, 'Are you all right, are you all right?' And that's all he said he did. Now, this questioning about the tissue, it did not come out by what the prosecution had raised; it was the defence counsel who brought it out. ..how would Mr. Forest know the complainant had the tissue in her underwear unless he had gone into [her] underwear, and if it is that he went into her underwear, what for? What is in a woman's underwear? Her genitalia. He said he didn't go in there so how he knows that it is down there? Matter for you."

[113] Counsel for the applicant took issue with those comments because the learned judge had interrupted counsel's cross-examination in relation to this issue. Mr Fletcher submitted that counsel's suggestion was limited to the issue of embarrassment and she was prevented by the learned judge from pursuing the issue any further on the basis of relevance. Further the learned judge erred when she caused the jury to speculate as to why the applicant did not mention anything about the tissue.

[114] The following passage of the transcript is relevant:

"Q. I am suggesting to you, ma'am, that what you did, in fact, tell the police is that Tyrese shift my panty and asked me what is this?

A. Yes, ma'am.

HER LADYSHIP: And asked what?

MISS R. WILLIAMS: What is this?

HER LADYSHIP: What is this?

…

Q. When he asked you that, ma'am, you responded, 'I told him that it was tissue?

A. Yes, ma'am.

….

Q. I am suggesting to you, ma'am, that you and [the applicant] was [sic] never having sex?

A. His penis was inside of me, going in and out for a while.

Q. In fact, ma'am, it was whilst you were making out, you felt embarrassed about the tissue in your underwear?

….

Q. Miss Johnson, you were embarrassed about the tissue in your underwear, yes?

A. No, ma'am.

Q. Miss Johnson, why were you wearing a piece of tissue in your underwear?

HER LADYSHIP: What is the relevance of that...The allegation is that he was the one [who] without her consent went into her panty. This is what this case is about. I don't see the relevance, it's her business."

[115] Based on the above, it does not appear that counsel was interrupted whilst asking questions pertaining to the tissue until counsel asked the complainant why the tissue was in her underwear. The learned judge questioned the relevance of that question.

[116] The learned judge, in her summation, invited the jury to consider how the applicant could have known that the complainant had tissue in her underwear "unless he had gone into underwear". Importantly, she stated that the consideration of that evidence was a matter for them.

[117] She stated further, in her summation, that counsel had suggested to the complainant that she had lied about being raped because she was embarrassed about the tissue in her underwear. The transcript reads as follows:

> "Now the following motives are being ascribed to prosecution witnesses and this is through cross-examination and through what Mr Forrest said when he spoke from the dock. Now according to counsel, …, [the complainant] was embarrassed by the tissue in her panty and so she makes up the allegation of rape, …"

There was no specific suggestion by counsel for the applicant that the complainant lying about being raped was because she was embarrassed about the tissue. However, it appears that, based on the context in which the suggestion was made, the learned judge inferred that this was what was being suggested. That inference, in our view, was not unreasonable having been preceded by the suggestion that sexual intercourse did not take place. In the circumstances, the learned judge's direction to the jury cannot be faulted.

[118] Pertaining to point ix, the learned judge, in her summation, directed the jury that it was suggested to the complainant by the defence that she had lied about being raped because she could not explain to her family where she was throughout the night. The jury was reminded that the complainant had said that she was 21 years old, that she is an adult and is not answerable to anyone. This was an accurate account of the evidence of the complainant in cross-examination. The jury was directed that this was a matter for

their consideration. As such, we are of the view that there was no prejudice to the applicant's defence.

[119] Issue was also taken with the use of the term "stand-offish" by the learned judge in her summation, when recounting the applicant's statement (point x). In that statement he said that the complainant was reluctant to speak to him at first. The phrase used by the learned judge, in our view, was an accurate synonym and was unlikely to cause any injustice to the applicant.

[120] Where point xi is concerned, we noted that counsel alleged that the learned judge incorrectly recounted for the jury those aspects of the applicant's unsworn statement pertaining to the purchasing of the ganja. The transcript does not support this allegation.

[121] In relation to point xii, we noted that the learned judge, in the first part of her summation, omitted to remind the jury of the applicant's assertion that the complainant had not resisted his advances. That was a critical aspect of his defence. We are, however, mindful that on the following day the learned judge addressed the issue, thus:

> "…yesterday I was just about to go into the statement that Mr. Forrest had given. So I would just go straight to it. This was his statement."

She stated:

> "She was trying to pull the seat to recline, I stretch across to recline the seat. While I was doing so I kissed her against her neck, she did not resist either verbally or physically. I continued kissing her against her neck. I was on my knees and I kissed her on her neck some more. [The complainant] eventually opened her legs and I leaned over to her and continue to kiss her on her neck…"

[122] That passage, in our view, recounted fully and accurately, the facts as asserted by the applicant.

[123] Counsel for the applicant also took issue with the learned judge's statement that the applicant had said, in his unsworn statement, that the complainant had said to JA

"…him a hold mi down" (point xiii). Counsel pointed out that the words used by the applicant were "him a try hold me". This mis-statement, in our view, did not result in any miscarriage of justice based on the totality of the evidence. The issue was whether the applicant had sexual intercourse with the complainant against her will. The jury would have to decide whether the account given by the complainant was true or if the applicant was to be believed.

[124] Pertaining to point xv, the learned judge also stated that counsel for the applicant had suggested to the complainant that she lied about being raped because she could not explain where she was. The jury was reminded that the complainant had said that she was 21 years old, an adult, and not answerable to anyone. The jury was directed that the consideration of the evidence was for them and as such, the recounting of this aspect of the evidence was unlikely to have resulted in any prejudice to the applicant.

[125] In her summation, the learned judge advised the jury that the applicant was trying to suggest that the reason for the complainant's behaviour was because she had smoked ganja (point xvi). However, she noted that it was never suggested to the complainant in cross-examination that she had smoked any ganja at the time of the incident.

[126] The learned judge, at page 107 lines 22-25 and 108 lines 1-17, dealt extensively with the issue of ganja. She stated:

> "Now the [applicant] when he spoke from the dock he said that [the complainant] had been smoking ganja and he is asking you to say that she was high, those are my words, high, but he did say that JA told him that when she smoke ganja how she behave funny, weird, act strange. So he is asking you to think that this is what accounted for her behaviour, that she was smoking, and because she was smoking, it fly up in her head as you would say, a matter for you.
>
> But, I recall the evidence given by [the complainant] and although she said she had gone and purchase ganja there was no evidence that she actually smoke [sic] any. As a matter of fact, it is [the applicant] who said it was Mr Bailey who gave

her money to purchase ganja for him, but he said she smoke some but that was never suggested to her when she was being cross-examined, so for the first time when he spoke from the dock, we heard that she was smoking so that did not come out in any evidence.

Remember what I have told you it is the evidence that you are to consider. You must listen to [the applicant's] statement and give what weight you believe it is worth."

[127] We have noted that during the cross-examination of the complainant in respect of this issue, the prosecution raised an objection on the basis of relevance. At that time, the complainant had been asked whether she told the applicant that she wanted to get some ganja to smoke and where they had gone to make the purchase. The transcript then reads:

"MR. L. MORRIS: Any relevance to this, respectfully?

HER LADYSHIP: I don't know. I am still waiting to hear.

Yes, nobody is charged for ganja.

[the applicant] is not charged for smoking or buying ganja and if he was, it would not be in this court.

MISS R. WILLIAMS: Very well, m'Lady. I will withdraw that line of question."

[128] Counsel opted not to pursue that line of questioning any further. There was no suggestion that the complainant had smoked ganja and there was no attempt to elicit any evidence that, if so, her behaviour was in any way linked to that activity.

[129] The applicant stated, in his unsworn statement, that the complainant had started to "light a spliff". He did not actually say that the complainant smoked any of the ganja. In response to JA's and Mr Bailey's enquiries as to what had happened, the applicant said:

"This girl look like sup'm wrong or what, I don't know. The girl look like sup'm wrong with her or something, I don't know.

> But anyways, I have sisters and female families [sic] so let's go look for her"

He continued:

> "[JA] said why yuh never tell us she smoke weed because when she smoke weed she act a different way."

[130] The learned judge was technically correct when she stated in her directions to the jury that there had been no suggestion that the complainant's behaviour was caused by her smoking ganja. However, her use of the word "suggested" may have given the jury the impression that the applicant was not speaking the truth. It may have, therefore, been more helpful for the learned judge to have pointed out to them that the complainant was never asked whether she had smoked any of the ganja. While we note that counsel below attempted to cross-examine the complainant on this issue, when the relevance of that course was questioned, no attempt was made to indicate its importance to the applicant's defence. In any event, it is our view that any potential evidence from the complainant that she had smoked ganja would not have changed the outcome of the case. It was clear, that the jury accepted the complainant's evidence that the applicant had sexual intercourse with her without her consent.

[131] In the circumstances, the learned judge's directions did not result in a miscarriage of justice.

[132] Where the questions posed by the learned judge to the applicant's character witness are concerned, we have noted that she asked:

i. Whether he was aware of the applicant's family life.

ii. How long the applicant had been married?

iii. If he knew anything of the applicant's work life?

iv. If he knew what happened in his place of work apart from what he does for work? Such as how he operates?

vi. If he knew anything about his church going life? and

vii. Whether he is involved in the church community?

[133] We are of the view that it was well within the learned judge's discretion to seek clarity in relation to the evidence given by applicant's character witness (point xvii).

[134] The issue of whether the applicant was deprived of a fair trial as a result of the comments made by the learned judge is to be considered in light of both the evidence and the summation as a whole. As indicated above, the errors made by the learned judge were for the most part not material. The evidence of all the witnesses and the statement of the applicant were recounted for the jury and they were directed on how to treat with conflicts in the evidence. We, therefore, find that this ground cannot succeed.

Ground five: The learned trial judge discounted the value and effectiveness of her good character directions

[135] Counsel for the applicant rightly conceded that the law did not support this ground.

[136] The learned judge's directions were complete and she generously invited the jury to consider both limbs of the good character direction although the applicant, having made a statement from the dock, was not entitled to the credibility limb. She did not err when she stated that the applicant's good character was not a defence. Accordingly, this ground has no prospect of success.

Ground six: The sentence is manifestly excessive

Applicant's submissions

[137] Counsel indicated that he was relying on the submissions in mitigation advanced at the trial. Reference was made to The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), which states that judges are required to keep in mind the character and antecedents of the offender when considering sentence. Counsel also relied on the evidence of the three witnesses who gave character evidence on behalf of the applicant. It was highlighted that the applicant was said to have been involved in church and to be on the path of reformation.

[138] In respect of the mitigating factors, counsel noted that: the applicant had no previous conviction for a similar offence, no firearm or offensive weapon was used, no violence was used in the commission of the offence. It was also pointed out that the victim had no particular vulnerability (that is no physical or mental disabilities) (see **Percival Campbell** [2013] JMCA Crim 48 ('**Percival Campbell**') and **Lindford McIntosh** [2015] JMCA Crim 26 ('**Lindford McIntosh**') as to the considerations of the court in determining the appropriate sentence). The aggravating factors were submitted to be minimal when compared to the situation in both of the above cases. It was further submitted that at the time of the offence the applicant was gainfully employed and that all the factors were in favour of a lenient sentence.

[139] Counsel, in his written submissions, submitted that the learned judge placed undue emphasis on the absence of a confession of guilt to the probation aftercare officer and was sceptical about persons attempting to become Christians after conviction.

The Crown's submissions

[140] Counsel submitted that this court can only interfere with the sentence if there has been an error in principle. In the instant case, the learned judge noted the aims of sentencing and identified the appropriate starting point, the aggravating and mitigating factors. Counsel conceded that the learned judge ought not to have included the fact that the applicant maintained his innocence as an aggravating factor as it was within his right to do so. In light of this error, the court must consider whether the sentence is excessive despite this error. A comparison was made with the decision of **Paul Maitland v R** [2013] JMCA Crim 7 ('**Paul Maitland**') where the sentence of the appellant who was convicted of rape and indecent assault and had a previous conviction of unlawful wounding which included violence against the person was reduced to 23 years' imprisonment. In the circumstances, the sentence was said to not be excessive.

Analysis

[141] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[142] However, as indicated by Hilbery J in **R v Kenneth John Ball** (1951) 35 Cr App R 164 at page 165:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. **If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene**." (Emphasis supplied)

[143] The procedure to be adopted in arriving at an appropriate starting point was set out in **Meisha Clement v R** [2016] JMCA Crim 26 and in the Sentencing Guidelines. In **Meisha Clement v R**, Morrison P stated:

> "[26] Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley**, to 'make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise'. More recently, making the same point in **R v Saw and others** ([2009] 2 All ER 1138, 1142), Lord Judge CJ observed that 'the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features'.
>
> [27] In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in

> practice. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence."

[144] The procedure was further addressed in **Daniel Roulston v R** [2018] JMCA Crim 20 by McDonald-Bishop JA who stated:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);
>
> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and
>
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[145] The learned judge, in treating with the issue of sentence, commenced by reminding herself of the principles of sentencing. She noted that, based on the social enquiry report, the applicant was maintaining his innocence and asserting that the complainant had told lies on him because her father had influenced her to do so. The adverse effect of the offence on the complainant was also considered and the learned judge expressed the view that, based on the social enquiry report, the experience resulted in "dire consequences in terms of her mental status and stability".

[146] The mitigating factors were identified as the fact that no weapon was used, there were no further "acts of perversion" following the act of sexual intercourse, and the applicant was gainfully employed and has been a contributing member of society. On the

other hand, the aggravating factors were: the seriousness of the offence, the applicant's previous conviction for wounding and his lack of remorse.

[147] The learned judge analysed the character evidence given on behalf of the applicant and concluded that two of the witnesses could not speak to his character prior to the date of the offence. In her consideration of the evidence of the other character witness the learned judge stated:

> "So I don't know that any of the persons who came here could really say that the offence for which [the applicant] is charged, that it is really out of character in terms of his interaction in that way, because none of the three of those witnesses would have been in a setting with [the applicant], in relation to a similar experience".

[148] The usual starting point was identified as being 15 years and the sentencing range as 15 to 25 years with a minimum period of 10 years before eligibility for parole. The learned judge indicated that a starting point of 18 years was appropriate in this case having regard to (i) the applicant's lack of remorse and (ii) the negative impact of the offence on the complainant. The sentence imposed was 18 years' imprisonment with the stipulation that the applicant must serve 12 years before becoming eligible for parole.

[149] There was, however, no mathematical computation to take account of the mitigating and aggravating factors. Further, the applicant's lack of remorse was, in our view, incorrectly treated as an aggravating factor as the applicant was entitled to maintain his innocence. It is to be noted that it has been stated by this court that caution should be exercised when treating with the absence of remorse as an aggravating factor (see **Bernard Ballentyne v R** [2017] JMCA Crim 23).

[150] In light of those mis-steps by the learned judge this court would be entitled to consider the issue of sentence afresh. There is, therefore, merit in this ground.

[151] The Sentencing Guidelines state that the normal range of sentences for this offence is 15 to 25 years' imprisonment with a minimum period of 10 years before

eligibility for parole. The usual starting point is 15 years' imprisonment. The aggravating factors are:

i) the fact that the applicant was employed to the security company as a security guard and therefore there was a breach of trust;

ii) the applicant was on duty at the relevant time;

iii) the offence was committed in the security company's motor vehicle;

iv) the parties met in circumstances where the complainant was in the company of JA who was seeking help; and

v) the impact of the offence on the complainant.

[152] The mitigating factors are:

i) there was no weapon used in the commission of the offence;

ii) there was no additional violence used in the commission of the offence; and

iii) the fact that the applicant was gainfully employed and he had no previous conviction for a similar offence.

[153] In assessing whether the sentence imposed was excessive, it is useful to examine similar cases from this court. In **Percival Campbell**, the court reduced the sentence of 21 years' imprisonment to 18 years where the appellant was convicted of raping the granddaughter of his wife. In that case the appellant tricked the complainant into going to her grandmother's house by telling her that her grandmother was calling her. When she got there he raped her. After the act, he paid her $500.00 and said that she should be his little girlfriend. The aggravating factors included the complainant's age, the appellant was her senior and grandmother's husband and that the appellant did not spare

the complainant the embarrassment by entering a guilty plea. The court, in comparing that case to others such as **Paul Maitland**, said at para. [21] that:

> "[21] no firearm or other weapon was used by the appellant in the commission of the offence; there was no 'unusual' violence, beyond the single dreadful act of rape itself; the complainant was not subjected to further sexual indignities or perversions; and the appellant acted alone, rather than in concert with other persons. The absence of these factors, it seems to us, certainly serves in one way or the other to distinguish this case – in the appellant's favour - from **Sheldon Brown v R**, **Paul Allen v R** and **Maitland v R**."

The court, in the circumstances, found that the sentence of 21 years was excessive.

[154] In **Paul Maitland**, the complainant was forced by two men to walk to an open lot where she was raped by both of them. Afterwards she was left in the lot where she was told to wait for a certain amount of time. The court at para. [38] stated:

> "[38] In the instant case, what must be considered would include the ordeal to which C was subjected, the fact that Mr Maitland was 35 years old at the time of conviction, did not employ a firearm in the commission of the offences and had a previous conviction for an offence involving the person of another, namely, robbery with aggravation. **An appropriate sentence would be 23 years imprisonment.** In the circumstances, the sentence of 30 years would be manifestly excessive. This court may, therefore, set it aside and substitute a lower term."

[155] In **Paul Allen v R** [2010] JMCA Crim 79, the appellant held the complainant at gunpoint and forced her onto premises where he robbed and raped her. On appeal, there was no reduction of the sentence of 20 years which was imposed for the offence of rape.

[156] Finally, in **Sheldon Brown v R** [2010] JMCA Crim 38 ('**Sheldon Brown**'), the applicant, whilst naked, broke into the complainant's home in the middle of the night and told the complainant that he had been contracted to kill her. He attempted to choke her and forced her to leave the home in her nightgown only. She was forcibly taken to several

places where she was raped and when they returned to her house she was raped again. On appeal, the court affirmed the sentence of 20 years' imprisonment at hard labour.

[157] This case is somewhat similar to that of **Percival Campbell** where a sentence of 18 years was found to be appropriate. There was similarly no firearm, no violence, no perversion beyond the sexual act and the applicant acted alone. The circumstances in the instant case were not as severe as those in **Paul Allen** and **Paul Maitland** where sentences of 20 and 23 years were found to be suitable. We have, however, noted that the appellant in **Percival Campbell** was related to the complainant. In the instant case, the applicant was a security guard. Whilst the applicant may not have been in the same position as the appellant in **Percival Campbell**, in light of his occupation, the violation of the complainant should not have been on his radar at all.

[158] We are of the view that based on the circumstances of this case, the usual starting point of 15 years' imprisonment should be used. The aggravating factors would increase the sentence to 20 years and the mitigating factors would reduce it to 18 years.

[159] Based on the above, we are of the view that the sentence imposed was not manifestly excessive and as such, ought not to be disturbed.

Disposal

[160] We, therefore, make the following orders:

(1) The application for permission to appeal conviction is refused.

(2) The application for permission to appeal sentence is granted.

(3) The hearing of the application for permission to appeal sentence is treated as the hearing of the appeal against sentence.

(4) The appeal against sentence is dismissed and the sentence 18 years' imprisonment with the stipulation that the applicant

serves a period of 12 years before being eligible for parole imposed on 25 May 2018 is affirmed.

(5) The sentence is reckoned to have commenced on 25 May 2018, the date when it was imposed.