JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 36/2018

LEVI LEVY v R

Miss Melrose Reid for the appellant

Miss Kathy-Ann Pyke and Miss Sophia Rowe for the Crown

18 November 2020 and 4 March 2022

P WILLIAMS JA

[1] On 26 February 2018, Levi Levy ('the appellant') was arraigned in the Home Circuit Court before Harris J (as she then was) ('the learned judge') and a jury on an indictment containing two counts. The first count charged him with the offence of rape and the second with the offence of grievous sexual assault. On 28 February 2018, he was found guilty on both counts. On 20 March 2018, he was sentenced to 18 years' imprisonment at hard labour on each count. In relation to count one of the indictment, the learned judge specified that he should not be eligible for parole until he has served 12 years.

[2] On 14 January 2020, a single judge of this court refused the appellant's application for leave to appeal his conviction, having found that there was no basis in law or fact on which the verdict could justifiably be disturbed. However, leave to appeal sentence was granted for this court to formally bring the sentence for grievous sexual assault in line

with the stipulation of section 6(2) of the Sexual Offences Act. As is his right, the appellant renewed his application for leave to appeal conviction before us.

Background

[3] There were some undisputed facts that form the background of what transpired between the appellant and the complainant ('YH') on the night of 3 January 2015. They met via the social media platform Facebook and had been communicating via that medium and the telephone from sometime in December 2014. She knew his name only as "Jefferton". After several conversations, they agreed that they would meet on 3 January 2015 at York Pharmacy in Half-Way-Tree in the parish of Saint Andrew.

[4] They met, as agreed, sometime between 8:00 pm and 9:00 pm on that night and the appellant drove to Bachelor's Guest House in the Cross Roads area. Upon arrival, he exited the car leaving YH alone for a while and went to speak to two ladies on the premises. He returned to the car and eventually invited YH to accompany him into the building. They ended up in a bedroom where sexual intercourse took place, and he placed his penis in her mouth. YH said she did not consent to either of those activities but was forced to participate. The appellant said they engaged in pre-arranged consensual sex.

The case for the Crown

[5] YH testified that the plan that night was to go to Pulse in New Kingston, which the appellant had told her was his usual hang out spot. However, he instead took her to the location in the Cross Roads area. She said when they got there, she questioned him about the place because it looked like a motel. He told her that it was a regular spot for him and that it had a "chill place where you can drink, like a bar".

[6] She explained that after seeing him speak to the two ladies, with whom he seemed familiar, she felt comfortable enough to have accepted his invitation to leave the car and go around to the back of the premises with him. However, instead, they went inside the building, where she noticed that there was, in fact, no bar. She questioned him about this. He responded by saying, "A what, you fraid a mi? Mi naah duh yuh nothing". She

continued to complain and he told her that she had to come with him because he had already paid the money. When he opened a door near the lobby, she noticed a bed was in the room. YH testified that she said to him, "Mi nuh up to whe yuh up to". This time he responded by saying "Well mi already pay mi money, mi naa do yuh nutten soh yuh nuh haffi feel fraid". She told him that she would not have sex with him and went into the room and sat on a chair.

[7] YH's evidence was that whilst she sat there texting on her phone, the appellant went into the bathroom in the room. Upon exiting the bathroom, he lay on the bed and asked her to come and lie beside him. She refused. He then told her that he was tired and was going to take off his clothes and lie on the bed until it was time to leave. She said he proceeded to ask her some sexual questions before he again asked her to come to lie with him on the bed. At that point, she started feeling fearful and sent some text messages to her sister about her fear.

[8] YH said the appellant eventually got up, approached her and started touching her. She told him, "Mi nuh deh pon what you deh pon", and she told him she was ready to go home. He then held her hands and pulled her to the bed. She again told him "Mi nuh deh pon weh yuh deh pon". He pushed her on the bed, and she started screaming.

[9] YH testified that she continued screaming and crying while telling him she did not want to have sex with him. Despite her efforts, he got on top of her, ripped off her panties and eventually inserted his penis into her vagina. She described his actions as being overly aggressive, and he ordered her to stop the noise. When he eventually got off her, he went into the bathroom, and she too got up and started to put on her clothes and underwear. He came back into the room and asked her if she was not going to perform oral sex on him. She responded, "Mi nuh do dem somting deh, mi just waa go a mi yard".

[10] YH said he then told her to get on her knees. She was crying and refused to do so. He said, "Don't mek mi have fi do things to yuh whe mi nuh waa do". She said this made her feel scared, so she went on her knees. He told her to open her mouth and used

his hand to slap her several times in her face. He then pushed his penis into her mouth, and she bit him on it. He slapped her in her face again, and this time her face started to bleed.

[11] She said that when the appellant noticed that her face was bleeding, he apologized and "was trying to be nice to her". She then went into the bathroom and saw that there were welts on her face. The appellant followed her to the bathroom and continued to apologise, and told her not to tell anyone while trying to use her hair to hide the welts. She told him to leave her alone and repeated that she wanted to go home. He responded that they could leave at that point because the time he had paid for was expired. By this time, it was about 11:30 pm.

[12] The appellant took YH to Halfway Tree, where she got a taxi to go home. Whilst in the taxi, YH said she went on Facebook and started sending messages to the appellant expressing her disbelief that he could have done what he did to her and ended by "unfriending" him. The following morning YH told her sister MT, with whom she lived, what had happened to her. She said, at that time, her face was swollen and had a lot of pink bruises.

[13] Whilst YH was with her sister, the appellant texted her, insisting that she should "add [him] back" and threatened to release a video of her performing oral sex on him. Soon thereafter he called her, and she put the phone on speaker. He told her she was his "bitch" now and said other abusive and threatening things to her. She said her sister recorded what was being said. After being encouraged by her sister to do so, YH discussed the matter with a police officer that she knew. A few days later, YH reported the matter at the Spanish Town Police Station and then went to the Centre for the Investigation of Sexual Offences and Child Abuse in Saint Andrew.

[14] The appellant continued to send her messages, and upon reporting this to the police, they gave her certain instructions. As a result, she arranged to meet the appellant again at York Pharmacy. On 9 January 2015, at about 8:40 pm, YH and the police went

to York Pharmacy, and, at about 9:15 pm, the appellant drove up. YH remained inside the pharmacy while the police approached the appellant and arrested him. She subsequently attended an identification parade where she identified the appellant as the person who had raped her.

[15] Under intense cross-examination, YH agreed that she had discussed with the appellant her need for $50,000.00 to assist with funding her studies. She was a student at the University of the West Indies at the time. She also agreed that the appellant had promised to assist her. She, however, said that based on their conversations, the appellant "was saying if everything goes well and [they] continue talking by the time [she] was ready to go on the [student work and travel] programme he will help [her]".

[16] She acknowledged that some of the conversations they had via Facebook had been sexual in nature. She denied that based on those conversations, she knew that a possibility existed that the appellant wanted to have sex with her. She denied suggestions that she had engaged in sexual activity with the appellant consensually. She denied that she had agreed to have sex with him in exchange for the money and that she had fabricated the story about being raped by the appellant because he had failed to give her the money as promised.

[17] When pressed to explain why she had agreed to meet with the appellant, she said that based on their conversations, she got the courage to meet up with him "because [they] were conversing and everything was good". She explained that she had not felt uncomfortable as they travelled in the car nor when they got to the motel and entered the room. She said that she was saying to herself that "If him want duh something, [she] ah goh tell him no, because [she] wasn't thinking that he would try and force the issue".

[18] YH accepted that shortly after leaving the appellant on 3 January 2018, she had messaged him telling him that he was not a good person, not a man of his word and that he was to keep his money. She, however, explained that she was referring to the money he had offered to refund her for chartering a taxi to travel to meet with him.

[19] She admitted that initially, she was not going to make a report about what had happened, but after speaking with her sister and other persons, she decided to do so. This, she said, was what accounted for the delay in making the report. She said that it was mainly because of the threatening things he said to her that she was encouraged to make the report. In response to the suggestion that her motive for making the report to the police was because she was frightened by the threats the appellant had made about the video he had of her, YH said it was because of the calls she had received.

[20] In answers to questions from the learned judge, YH said that the appellant had not had "any video over her head", and she was told he was just using the threat about a video to get her. Arising from this, further cross-examination was permitted by the learned judge, and she acknowledged that no such video might have existed.

[21] YH was the only one of the Crown's four witnesses who gave evidence at the trial. It was agreed by counsel that the witness statements of the other three witnesses would be read into evidence.

[22] YH's sister, MT, in her witness statement, which was edited before being read to the jury, largely supported the account given by YH of how she had met the appellant and gone out with him. MT further corroborated what YH had testified to telling her about what the appellant had done, and she spoke of the injuries she saw on YH's face. MT also supported YH's account of the messages YH said she subsequently received from the appellant.

[23] The statements of two police officers were also read to the jury. The first was that of Constable Nadia Edwards who, on 5 January 2015, had received the initial report from YH and had accompanied her to the doctor to be examined. The second was that of Detective Sergeant Patricia Butler, who was the investigating officer. She received information from Constable Edwards and, after interviewing YH, coordinated the operation on 9 January 2015, which led to the apprehension of the appellant at York

Pharmacy. Detective Sergeant Butler also arranged for a question-and-answer interview with the appellant and requested that the identification parade be held for him.

The case for the defence

[24] The appellant, in his defence, made an unsworn statement from the dock in which he agreed with YH's account of how they met and made an agreement to meet at York Pharmacy. He said that he promised her $50,000.00, and they would meet to have sex. He explained that on the night they went to the guesthouse, while waiting for 45 minutes in the car to get a room, he had let her count $100,000.00 that he had in his glove compartment.

[25] The appellant insisted that the sexual intercourse with YH had been pre-arranged. He described how they bathed and watched "porn" together and insisted that not only had she voluntarily performed oral sex and other acts on him, but it was she who initiated the acts. He said that he had "spanked her on her jaw" but that he did so with her consent and explained that it was "in the action of spanking" that one of the earrings she was wearing "barely give her a little scrape".

[26] He maintained that she became upset when he failed to give her $50,000.00, as promised, but told her that the next time he saw her, he would give her "fi see if she loyal, if she would come back again, [he] would give her it". As a result, he said, she had sent him "a lot of cursing words" via Facebook messages and accused him of not being a man of his word and told him he could keep his money. He acknowledged that he called her the following morning and said he told her that she must not sell herself and that "suppose [he] was videoing her, [he] woulda send the video out on facebook, but [he] didn't have no video of her, [he] never videoed her". He declared that he would never rape.

Grounds of appeal

[27] Leave was granted to the appellant to withdraw the original grounds filed and to argue the following grounds of appeal:

"1. That the [learned judge] failed to effectively deal with the issue of **credibility** instead of leaving credibility ***solely*** to the Jury.

2. The [learned judge] failed to adequately address the effect of the **Inconsistency** of [YH] either seeing two ladies after she left the motel room or not seeing two ladies after she left the room.

3. The [learned judge] being the Referee of the case should not have allowed the full statement of [MT] (the sister of [YH] the Complainant) to be read into evidence and put to the Jury – as the [learned judge] ought to have to [sic] ensured that parts of the statement was [sic] **edited;** as the Jury seeing the entire statement came to the conclusion that the [appellant] was guilty;

4. The [learned judge] descended into the arena **evidentially** when she told the Jury what Dr Blackman would have said had he been called as a witness, resulting in the Jury convicting the [appellant].

5. In light of the circumstances of this case, the Sentences are manifestly excessive." (Emphasis as in original)

[28] During the hearing, Miss Melrose Reid, counsel for the appellant, indicated that she would not pursue ground 3 because at the time the grounds were formulated, she had not had sight of the transcript of the notes of evidence, and upon receiving and perusing same, it was apparent that MT's statement had, in fact, been edited. Thus, the complaint on this ground was baseless.

Ground 1: That the [learned judge] failed to effectively deal with the issue of credibility instead of leaving credibility solely to the Jury.

Appellant's submissions

[29] Miss Reid submitted that the learned judge failed to properly and effectively put the issue of credibility to the jury. The learned judge, she argued, should have asked the jury to consider whether, based on all the evidence, YH could be believed that she had

not consented. Counsel complained that, although the learned judge spent a long time explaining to the jury what credibility was, she did not effectively show how important credibility was to this case and had failed to expound on the issue. Counsel noted, in particular, the failure to expound on whether YH had seen two ladies after she left the motel room and how important such a sighting would have been in a rape case.

[30] Miss Reid contended, in her usual passionate style, that the learned judge, in addressing the issue of credibility, ought to have put the case in a balanced manner and ask the jury to timely examine the times that YH had the opportunity to leave or escape especially given that she was an intelligent university student. She complained that in the learned judge's summation, YH was portrayed as a lamb to the slaughter. She highlighted certain events, which she said demonstrated that the issue of credibility "lurked heavily". Counsel noted that YH failed to protest when the appellant took her on a different route other than the one she knew should have been taken to Pulse. Further, counsel pointed to the fact that YH failed to make "lots of protest" when they ended up at a motel which "has a particular stigma".

[31] Miss Reid maintained that it defied logic that YH would have waited with the appellant in the car in the parking lot for an extended period if they were going to a bar on the premises. Counsel questioned why YH had not screamed, made a noise or done anything to try to run away when, upon entering the motel, she was led to a door that led to a room other than a bar. Miss Reid pointed out that the evidence that YH voluntarily entered the room, which had a bed without being forced and remained there as the appellant went into the bathroom and returned, took off his clothes and lay on that bed, was more evidence that clearly placed YH's credibility in issue. Counsel also noted that YH made no effort to alert anyone whilst leaving the guesthouse with the appellant who had just raped her. .

[32] Counsel contended that YH's story was shown to be even more incredible when she said that while she sat using her phone, she had not used that opportunity to get help. Counsel highlighted that YH did not attempt to call the police as she made her way

home, nor did she ask the taxi driver to take her to a police station and, once home, she failed to awaken her sister immediately. This, counsel submitted, must only have been because the appellant had not raped her.

[33] Miss Reid submitted that although honest belief was not a sustainable defence in a case where the defence is one of consent, given the undisputed evidence of how they had met, how they travelled together to the motel where they had entered the room, along with how YH had been dressed in keeping with their previous discussions, the appellant would have had the honest belief she had come "ready for sex".

[34] Counsel contended that YH only made the report that she had been raped because of the threat by the appellant to release a video of her, his failure to pay her the monies he had promised her and the prompting by her sister. Counsel submitted that it was logical to deduce that YH cried rape because the appellant had "breached the contract" to assist her with her study programme and tertiary study.

[35] Counsel referred to **Mervin Jarrett v R** [2017] JMCA Crim 18, which, she submitted, demonstrated how this court had overturned a conviction when it found that the learned judge had not properly dealt with the issue of credibility. She further submitted that whilst not on all fours with this matter, the decision "bares [sic] similar resemblances". She also referred to the case of **United States v Cadet Jacob D Whisenhunt, United States Army** 20170274, judgment delivered 3 June 2019, which, she said, was quite instructive, noting that credibility was also an issue in that case and that it "throws some light on the case at bar and the general [behaviour] of rape victims".

[36] Miss Reid submitted that the learned judge had just merely rehearsed what YH said and what the appellant had said which was inadequate to effectively educate the jury on the issue of credibility. She contended that, as arbiter and judge of the law, the learned judge should have placed greater emphasis on highlighting the substratum of the case. This, counsel submitted, was because the jurisprudence of how a trial judge sums up cases has been shifting to now requiring that a trial judge looks at the underlying

issues of the case. She posited that the substratum was whether the story was believable and the possible underlying factors that could make a complainant, such as YH, "cry rape". Counsel relied on **R v Parviz Yousefi** [2020] EWCA Crim 791, **Heppenstall and Potter v R** [2007] EWCA Crim 2485, and **R v Cooper** [1969] 1 All ER 32, in support of her submissions. Such was her extensive research that counsel also shared an article from the Economic Times in India and an extract from a Mauritius Practice Direction on a judge's summing-up on issues and evidence.

Respondent's submissions

[37] In responding on behalf of the Crown, Miss Sophia Rowe submitted that there would be an undue burden placed on the learned judge if she was to pose a myriad of questions in relation to every bit of evidence. Counsel submitted that it was trite law that the jury sits as the tribunal of fact, and the question of the credibility of the witnesses falls squarely within their remit. She further submitted that the learned judge correctly gave the jury comprehensive and fulsome directions on credibility, generally and specifically with regards to YH's evidence. The learned judge, it was contended, was not required to ferret out every question that arose on the evidence and point it out to the jury for their consideration in resolving whom to believe.

[38] It was submitted that the learned judge's directions on the issue of credibility of the witnesses were adequate to equip the jury with the tools needed to assess the facts.

Discussion

[39] It is irrefutable that in a trial by jury, it is for the jury as judges of the fact to determine the credibility of witnesses and determine who to believe or on whose evidence they should rely. It is also trite that it is the role of the judge to guide them based on the relevant law in the circumstances of the case and give sufficient directions as to how to properly assess the evidence in coming to a verdict. It is of utmost importance, however, that the trial judge must not do anything that could be viewed as usurping the jury's role. The trial judge must be fair, impartial, and balanced while reviewing the evidence, never

losing sight of the seminal fact that the burden of removing the protection of the presumption of innocence remains on the Crown.

[40] On this ground, the complaint is that the learned judge did not adequately deal with the issue of credibility in circumstances where the main issue was whether YH had consented to have sexual intercourse and oral sex with the appellant. It is, therefore, necessary to look at the learned judge's approach in addressing this.

[41] At the outset, the learned judge explained to the jury the options they had in treating with the evidence of the witnesses, and she stated:

> "Now in deciding what evidence to accept and what evidence to reject, I want you to bear in mind, in your consideration, that you can accept all the evidence that a witness has given, [i]f you find that the witness is truthful, accurate and reliable. You can also reject all the evidence that a witness has given if you find that the witness is untruthful, inaccurate or otherwise unreliable. But as judges of the facts, you do have a 3rd [sic] option and that option is, you can accept a part of the evidence of a witness and reject another part of the evidence of that same witness, providing of course, that the aspects of the witnesses evidence that you are accepting, you find to be truthful and credible and the aspect of the evidence that you reject you find to be inaccurate or otherwise unreliable."

[42] The learned judge outlined the factors to be taken into account in determining whether the witness' testimony was credible. Indeed, in her submissions, Miss Reid acknowledged that the learned judge spent a long time explaining to the jury how to deal with the issue of credibility, and there was no challenge to the accuracy of those directions.

[43] The learned judge, usefully, in the circumstances of this case, reminded the jury as follows:

> "In assessing the evidence and coming to your conclusions as to what evidence is reliable or not, I remind you, that you are permitted and should use your knowledge

> of everyday life and experience in Jamaica. The knowledge that you have gained over many years of living, collectively of your Jamaican people and your Jamaican culture, to assess the evidence you have heard."

[44] The learned judge also appropriately addressed and dealt thoroughly with the issue of consent, recognising that the issues were inextricably linked. The learned judge also gave necessary and impeccable directions on "stereotypical assumptions" usually made in cases of this nature, especially in light of evidence elicited during cross-examination of YH, about her discussions with the appellant, prior to meeting with him, her manner of dress on the night, and her willingness to go with him into the room at the motel. Significantly, the learned judge among these directions stated:

> "Now, another stereotyped assumption that I want you to disabuse your minds of, when you are assessing the evidence in this case, as it relates to the issue now of consent. Consenting to go on a date does not mean that you are consenting to have sexual intercourse. And as it relates to consent, what the law says is that it must be unequivocally, meaning with clarity, communicated that you are agreeing to the sexual conduct."

[45] The learned judge further advised the jury that:

> "[The appellant] is saying that she consented. She is saying that she did not. That is the issue. What took place at the point of sexual contact, did [YH] agree to it or not? Not any of the other as I call them, fluff. You judge the evidence based on what has been said by [YH] both examination in chief and cross-examination. And you also judge what took place based on what [the appellant] has told you. Where is the truth, that is your duty. Did she consent to sex, whether of oral or penile nature or not."

[46] The learned judge, in outlining the elements of the offence of rape, reviewed the relevant part of YH's evidence relating to the issue of consent. After rehearsing YH's evidence of what had happened in the hotel room, the learned judge stated:

> "... [I]f you accept this aspect of the evidence, if you are sure that [YH] is speaking the truth when she said all of those things – because, remember what the [appellant] is saying is that nothing like that happened. She consented, they agreed to the sex even before they met up at York Pharmacy."

[47] She later stated:

> "Now, the main issue in this case is that of credibility and you would have recognized, ... that very little is in dispute in this case, save and except the circumstances of what took place down at Bachelor's Hotel.
>
> You have heard two accounts of what took place. It is now for you to decide which of the two accounts is the truth, because they both can't be true. Someone, somewhere, is not speaking the truth.
>
> That is the important and narrow issue for you to decide, did [YH] consent?"

The above excerpts from the learned judge's summation are demonstrative of the entirely adequate guidance given on the issues of credibility and consent.

[48] In **Mervin Jarrett v R**, Morrison P, writing on behalf of the court, re-affirmed the need for judges to assist the jury regarding the aspects of the evidence which could have been seen as lending support to the accused's defence of consent or "[i]n other words to take sufficient steps to relate [the] directions in law to the evidence in the case". He explained that this necessarily must involve identifying matters that could impact the complainant's credibility, which should be left for the jury's consideration (see paras [25]–[26]).

[49] In this case, the defence was not seeking to establish that the appellant had any honest belief that YH was consenting; he was asserting that the activities that night were all part of a pre-arranged plan to engage in sex. With YH asserting that she had agreed to go out with him and that she felt comfortable going to the room in the motel with him, believing that he would not force himself on her, the approach of the learned judge, in

giving extensive directions on credibility and consent, cannot be faulted. It is against this background, that the steps the learned judge took to relate her directions in law to the evidence must be considered.

[50] The learned judge commenced the review of the evidence by observing that most of the evidence presented was not in dispute. She then addressed the first significant bit of evidence that was in dispute as follows:

> "Now, you have to decide, because this aspect of evidence is disputed, so you have to decide which of the accounts you accept. Because what [the appellant] said is that from even before they met at York Pharmacy, there was an agreement between them, that they will engage in sexual intercourse. So, what, [the appellant] is saying, that there was no agreement to go to any Pulse, the agreement was to go to some place where it would be convenient for them to engage in consensual intercourse, that is, [YH] said that when she arrived at the motel now, she became concerned, because according to her, from her understanding, they were going to Pulse, and she said that when she realized that they were at the motel, and she said she is familiar with how motels look, and she asked him why were they there, and his response, she said, was that, that place, Bachelor's Hotel, was a regular hangout spot for him, and that there was a place like a chill-out bar, to use her phrase, that was to the back of the motel. In other words, what she is saying is that, according to her, she was still under the impression that they were going to have a drink, not at Pulse this time, but at the bar that was in the back of this building."

This manner of juxtaposing the competing accounts would have assisted the jury in appreciating that it was for them to determine whether they believed YH's account.

[51] Miss Reid referred to some aspects of the evidence and opined that the jury ought to have been invited to consider YH's failure to protest or try to get away, and how this impacted on her credibility. However, YH gave evidence as to why she behaved the way she did, and the learned judge reviewed the evidence faithfully. In relation to the issue of why she remained at the motel, the learned judge stated:

> "Now in terms of her explanation because she was asked by [defence counsel] why when she realized she was at a motel, why did she go with [the appellant] into the motel. And she told you—she gave you the explanation that she went with him because he told her, remember she said she didn't know this place before. He told her that there was a bar at the back of the motel, so she went with him to go to this bar in the motel. Now that is the explanation that she has given you, you must decide, Madam Foreman and your members, if you find it acceptable and reasonable to you.
>
> In terms of her travelling in the motor car with the [appellant] to this motel. Remember the evidence came out in cross-examination that she knew where Pulse was located. And the direction that the vehicle drove towards was not in the direction of Pulse. She was asked why she continued on the journey with the [appellant] and this was the explanation she gave. She said that she drove with the [appellant] from Half Way Tree in a direction that isn't Pulse because he, the [appellant] said he was going to another place, that was his regular chill place. So, she said because he told her that they were going somewhere else for the drink. She did not have any objection to doing so."

The learned judge cannot, therefore, be faulted for the manner in which she rehearsed the evidence and left it for the jury to decide if they believed the explanations YH gave for her behaviour in assessing her credibility.

[52] In relation to whether YH's story could be believed given the fact that she did not scream out to alert anyone, the learned judge addressed the issue by noting that there was no evidence of where the two ladies YH admitted seeing before going into the building, were when the appellant and YH were in the room. The learned judge reminded the jury that YH had admitted that she had stopped screaming because he "was just going to do what he was doing".

[53] Miss Reid also made much of the fact that YH sat texting on her phone and did not call for help, and indicated that the jury should have been invited to use this evidence to question the credibility of her story and whether it could have supported the appellant's contention that the sex was consensual. However, YH testified that she did not initially

feel uncomfortable, having made it clear to the appellant that she was not interested in having sex. YH also gave evidence that once she became fearful, she sent a text to her sister to relay her fears. The learned judge reviewed those bits of evidence and, again, properly invited the jury to decide whether they believed YH.

[54] On a proper assessment of the entire summation, it was apparent that the learned judge gave the jury proper guidance on the issue of credibility, and so this ground must fail.

Ground 2: The [learned judge] failed to adequately address the effect of the Inconsistency of [YH] either seeing two ladies after she left the motel room or not seeing two ladies after she left the room.

Appellant's submissions

[55] On this ground, the complaint was that the learned judge failed to adequately address the effect of the inconsistency in YH's evidence as was required. Miss Reid submitted that it was not sufficient to merely point out the inconsistencies and that the learned judge should have explained the effect of the inconsistencies.

[56] The learned judge, it was submitted, ought to have explained the significance of whether YH saw the two ladies after she was raped when leaving the hotel. Counsel contended that if YH saw these two ladies, one would expect her to run and say something to the ladies. Further, given the circumstances of the case, where the sole issue was whether YH consented to have sex with the appellant, the learned judge ought to have spent "quality time" on the effect of this bit of inconsistency, especially since there was no explanation for the inconsistency.

[57] In support of this submission, counsel referred to **Anand Mohan Kissoon and Rohan Singh v The State** (1994) 50 WIR 266 and **R v Colin Shippey and Others** (1988) Crim LR 767. It was noted that in **R v Colin Shippey** it was held that the inconsistencies in the complainant's evidence were substantial, and so required a warning to the jury of the effect of the inconsistencies and an indication of the difficulty and danger in acting on evidence of that quality.

[58] Miss Reid went on to submit that it was the law that where there are blatant inconsistencies that go to the root of the case, some credible explanation must be given to the satisfaction of the tribunal and that the explanation must emanate from the witness who made the inconsistent statements or testimonies. She referred to **R v Curtis Irving** (1975) 13 JLR 139 and **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 & 52/1986, judgment delivered 3 June 1987.

[59] Miss Reid further submitted that if material inconsistencies are left unresolved, the jury cannot come to a positive finding, and whatever finding they arrived at would be erroneous. She referred to **R v Bryan Young and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 65, 66, 67 & 134/1990, judgment delivered 16 March 1992, in support of this submission. Counsel contended that although the learned judge, in her summation, characterised it as a lapse of memory, that could not resolve the inconsistency.

Respondent's submissions

[60] Miss Rowe countered that the learned judge gave full and thorough directions to the jury on the significance and effect of the inconsistency and did not merely regurgitate the evidence. Further, counsel contended that the direction given accorded with the settled law on the directions to be given to a jury on these issues and that the learned judge's directions were in accordance with the authorities. She referred to **Jason Richards v R** [2017] JMCA Crim 5 in support of this submission.

[61] Miss Rowe opined that the learned judge was not obliged to offer specific commentary in respect of the view to be taken of the witness' credibility based on the single inconsistency. It was submitted that this single inconsistency of whether YH saw the two ladies when she was leaving the motel with the appellant after he had raped her, did not strike a blow to the evidential base of the Crown's case. The jury, having been directed as to the law and reminded of the evidence, were properly left to determine whether YH's evidence was credible.

Discussion

[62] In **R v Carletto Linton and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4, and 5/2000, judgment delivered 20 December 2002, Harrison JA (as he then was) usefully explained how a trial judge should address discrepancies in the evidence of a witness in the following manner:

> "Discrepancies occurring in the evidence of a witness at trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.
>
> The duty of the trial judge is to remind the jury of the discrepancies which occurred in the evidence instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if the one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all…. Carey, P (Ag) as he then was, in **R v Peart et al** [(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1986, judgment delivered 18 October 1988], said of discrepancies, at page 5:
>
> > 'We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies.' "

[63] The inconsistency about which the complaint was made was indeed the only one highlighted in this matter. In YH's statement to the police, it was recorded that she had said that after the appellant raped her and they came out of the hotel room, she saw the two ladies with whom the appellant had spoken earlier. In her evidence to the court, she said that she did not see anyone when she was leaving the hotel. When she was cross-examined on this, she maintained that the contents of the statement were true but that

she did not recall seeing anyone and explained that "It was a long time ago [she] gave the statement so [she didn't] want to say, [she didn't] remember exactly what [she] said".

[64] The learned judge directed the jury as follows in relation to inconsistencies, discrepancies and omissions:

> "Next you have to determine if you find that they arise, if they are important or not. Are these conflicts in the evidence serious or slight. And one way of deciding whether or not the conflicts in the evidence are important is whether or not on the point that they arise, you find that it is vital to the case or to the credibility of the witnesses. And Madam Foreman and your members, the main issue, in this case, is that of credibility. And should you say, that the conflict in the evidence is vital to the case or the credibility of the witness or witnesses you have one of two choices. You can either decide that you are not going to accept the witness on the particular point that the conflict in evidence has arisen. Or you may decide that boy, this conflict in the evidence is so serious that I have to reject the witness's [sic] evidence in totality. Of course, if you should find that the conflict in the evidence that you find to have arisen is not serious, that it is is [sic] slight, you simply acknowledge that it exists but it does not impact on the view that you take of the witness' credibility."

[65] In relation to this inconsistency, the learned judge stated:

> "... And I would have already told you about what she had originally said to the police, pointed out that when in her police statement she had said that when she was leaving the motel with the [appellant] she saw the two ladies. And she didn't say anything to them according to her she was afraid. That was the explanation she gave for not saying anything to the ladies. You must determine whether you find it acceptable or not. She had said to you however, that she had seen nobody [sic] when she was leaving the hotel. So you have to decide if an inconsistency has arisen. If it is serious if it is slight and bearing in mind my earlier directions to you if you find that this inconsistency is vital to the case or to her credibility, you can either reject her evidence on that point or you can reject her evidence in its entirety.

> If this inconsistency, if you find that it arise [sic], it is not serious, you simply acknowledge that it exists but you do not find that it affects the view you take of her credibility. And the explanation that she gave for saying these two things is that she could not recall seeing anyone. And she said that it was a long time that this incident happened. And that she gave her statement to the police. So you must decide whether or not you accept that explanation and find it reasonable to explain the two versions."

[66] The learned judge's direction was clearly in keeping what was required in the circumstances of this case. She reminded the jury of the inconsistency, instructing them to determine whether it was slight or serious, reminded them further of the explanation given and properly left them to determine whether it was reasonable. This ground is without merit and must, therefore, fail.

Ground 4: The [learned judge] descended into the arena evidentially when she told the jury what Dr Blackman would have said had he been called as a witness, resulting in the jury convicting the [appellant].

Appellant's submissions

[67] Miss Reid submitted that the learned judge erred when she commented on any possible evidence from the doctor who had examined YH. Counsel noted that there was, in fact, no statement from the doctor, hence there could be none agreed to be read to the jury when he had not attended to give evidence. She further submitted that although the learned judge told the jury not to speculate about what the doctor could have said, she fell into error when she went on to say what the doctor would have said. Counsel contended that the learned judge thereby gave evidence and descended deep into the arena.

[68] Miss Reid also submitted that Constable Edwards' statement should have been edited to remove the reference to YH being medically examined to avoid the learned judge referring to the possible evidence of the doctor. The learned judge would then not have felt compelled to refer to the doctor, which led to her not only speculating but also

giving evidence. Counsel referred to the case of **Kolliari Mehmet Hulusi and Maurice Malcolm Purvis v R** (1974) 58 Cr App R 378.

Respondent's submissions

[69] Miss Rowe submitted that the learned judge did not seek to put into the record any evidential material but, in her summation, she warned the jury about the implications of speculation and used reference to the doctor as a tool of illustration.

[70] Counsel maintained that from the pronouncements of the learned judge, it is clear that in referring to Dr Blackman, she intended to deter the jury from speculating about evidential material that was not before them. Further, those remarks alone could not in any way have resulted in the jury convicting the appellant.

Discussion

[71] In opening comments and general directions to the jury, the learned judge addressed them on the issue of drawing reasonable inferences which encompassed the requirement that they avoid speculation and stated:

> "Now, in coming to your conclusion about reasonable inferences, you must not allow yourselves to be drawn into the realm of speculation. Speculation is guesswork and guesswork has no lot or part in a courtroom.
>
> So, for example, Madam foreman, the doctor, you would have heard from [YH], that she went to a doctor. You heard from Constable Nadia Edward [sic] that she accompanied [YH] to the Spanish Town Hospital where she was medically examined by a Dr. Blackman. Dr. Blackman did not come here to give evidence. You cannot speculate about that. You cannot say to yourself I wonder what Dr. Blackman would come and tell me, that is not evidence upon which you can act, you act upon evidence presented.
>
> Madam Foreman and your members, similarly, Dr. Blackman could not tell you that rape occurred. All that Dr. Blackman could come here to tell you, at its highest, is that he would have seen certain things on the vagina of [YH] that would indicate that sexual intercourse took place. He could

> not tell you that it was [the appellant] who had sex with [YH] because he was not in the room at Bachelor's Hotel when this was taking place. So you must not speculate about things like that because it is not in issue. It is not in issue that the [appellant] and [YH] had sexual intercourse. The [appellant] told you so, [YH] told you so. The only issue for you is whether she consented to it or not. That's it."

[72] In this context, it is clear that the learned judge was not referring to anything the doctor could have said for any evidential value but rather, fairly, referenced it to assist in making clear to the jury the need to avoid speculating. She explained the type of evidence the doctor could possibly have given if he had been called and its limited effect in relation to the real issue for the jury to decide, which was whether the sexual intercourse that the parties agreed was engaged in that night was consensual. In this context, the learned judge could hardly be viewed as having descended into the arena. There was no possible prejudice to the appellant's case and there was no miscarriage of justice based on the directions given to the jury. This ground also fails.

Ground 5: In the light of the circumstances of this case, the sentences are manifestly excessive.

Appellant's submissions

[73] Miss Reid appropriately recognised this court's power to increase the sentence and that the sentence could not be reduced merely because this court might have imposed a lesser one. She acknowledged that this court would have to examine whether the learned judge failed to apply the principles of sentencing. She referred to **R v Kenneth Ball** (1951) 35 Cr App R 164 ('**R v Ball**').

[74] In relation to count 1 for rape, Miss Reid submitted that although the learned judge attempted to apply the correct principles when she imposed the sentence of 18 years and then reduced it to 12 years, as a result of some mitigating factors such as the social enquiry report, she nevertheless failed to state her starting point. Counsel contended that one can deduce that her starting point was 18 years for rape, and she reduced it to 12 years.

[75] Counsel asked that the sentence be reduced even further, as this was not a case of violent rape where a weapon was involved, nor was it a case of the "regular" rape case as, in this case, the parties were ad idem throughout the evidence save for the issue of consent. She referred to the decisions in **Dwayne White v R** [2013] JMCA Crim 11, where a firearm was used in the commission of the offences of abduction and assault with intent to rape and sentences of 10 years' imprisonment each for illegal possession of firearm and abduction and two years' imprisonment for the assault were imposed; **Linford McIntosh v R** [2015] JMCA Crim 26, where sentences of 18 years' imprisonment for grievous sexual assault and eight years' imprisonment for rape were imposed; and **Samuel Blake v R** [2015] JMCA Crim 9, where, on a guilty plea, a sentence of four years' imprisonment for rape was imposed.

[76] In relation to count two for grievous sexual assault, Miss Reid contended that, in sentencing the appellant, the learned judge merely addressed some aggravating factors and had also noted that the appellant tricked YH into believing that he was taking her to a bar in the motel. She opined that it was because of this view that the learned judge had imposed the sentence of 18 years' imprisonment. Counsel further contended that the learned judge had not taken into consideration that YH was not a simpleton. She submitted that there had been no trickery, but YH had voluntarily gone into the room knowing it was not a bar. She referred to **R v Harvinder Singh Jheeta** [2007] EWCA Crim 1699 and **R v Navid Tabassum** [2000] EWCA Crim 90, which she described as cases of sexual tricks to show how trick and deception work and to distinguish this case from that nomenclature.

[77] Miss Reid further complained that the learned judge failed to state how she arrived at the sentence of 18 years for grievous sexual assault, save for mentioning the aggravating factors. Counsel opined that the learned judge may have started at 15 years and increased it to 18 years because of the aggravating factors. Counsel submitted that, in light of the jurisprudential movement with respect to clarity and the arithmetical working out of sentences, the learned judge erred in principle based on **Bernard Ballentyne v R** [2017] JMCA Crim 23 and **Meisha Clement v R** [2016] JMCA Crim 26.

She also referred to **Callachand and Another v The State** [2008] UKPC 49 as quite instructive.

[78] In further submissions, Miss Reid asked that this court set aside the period to be served before eligibility for parole of 12 years and substitute a period of 10 years. Counsel referred to the provisions of sections 6(1) and (2) of the Sexual Offences Act and section 6 of the Parole Act along with section 178 of the Correctional Institution (Adult Correctional Centre) Rules, 1991.

[79] Counsel posited that there were two arguments regarding sentencing in a matter like this. The first arose where the sentence imposed was more than the mandatory legislative minimum of 15 years, but the judge failed to apply the principles of sentencing, and the second where the judge failed to specify a period before the convict becomes eligible for parole or the period specified exceeds 10 years. In light of the circumstances of this case, counsel concluded that the learned judge, having failed to follow the sentencing principles, the sentence of 18 years for rape should be overturned and the mandatory minimum of 15 years be substituted especially since the appellant was a first offender with no previous convictions. Counsel also urged that since the learned judge had erred in not stating the specific period to be served before being eligible for parole on the second count, the period should be 10 years. Finally, counsel urged that the sentences should run concurrently and that the stipulation be that the appellant serves 10 years on each count before being eligible for parole.

Respondent's submissions

[80] Miss Rowe submitted that the sentences imposed by the learned judge were not manifestly excessive and that she left sufficient footprints in arriving at her final decision. It was posited that the learned judge weighed the mitigating factors in favour of the appellant as against the aggravating factors and the factors considered relevant were clearly stated.

[81] It was submitted that the learned judge applied aspects of the general principles of sentencing set out in **Meisha Clement v R**, adjusting her mind to identifying the statutory minimum for the offences though she did not go as far as indicating a starting point. Further, she considered the relevant aggravating features, the relevant mitigating features, the plea in mitigation and the social enquiry report.

[82] It was, however, conceded that the learned judge erred in failing to stipulate a period to be served before eligibility for parole for the offence of grievous sexual assault for which the appellant was sentenced to 18 years' imprisonment at hard labour. It was submitted that the provisions of section 6(2) of the Sexual Offences Act are clear. Counsel, therefore, submitted that the sentence in relation to sexual grievous assault (count two ought to be revisited for the parole period to be determined.

[83] In addition, it was submitted that if the court does not find favour with the Crown's arguments in this appeal, this case is one in which the proviso to section 14(1) may properly be applied. The cumulative effect of all the directions in law and considerations of fact were adequately covered by the learned judge, and so no miscarriage of justice would be occasioned should the appellant's convictions and sentences be affirmed.

Discussion

[84] It is well accepted that the following observation by Hilbery J in **R v Ball** provides the proper approach of this court where there is a challenge to the sentence which was imposed by a trial judge:

> "In the first place, 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."

[85] In **Meisha Clement v R**, Morrison P, stated at para [43], after citing the above quotation:

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

[86] The learned judge, in her sentencing remarks, pointed out that both offences for which the appellant was charged carry mandatory minimum sentences of 15 years. She then examined the mitigating factors and the aggravating factors and announced the sentences she considered appropriate. However, in utilising this approach in arriving at the sentences, the learned judge did in fact fail to identify a starting point before assessing the aggravating and mitigating factors and clearly demonstrate the impact of the factors identified. It is on this basis that this court would be able to interfere with the sentences imposed.

[87] In reviewing the sentences, it is useful to, firstly, recognise that the two offences, having been committed during the course of the same activity, it is not inappropriate to determine the sentence for each together. It should also be noted that the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, ('the sentencing guidelines'), issued in 2017, provide that the normal range of sentences for both these offences is 15-25 years and the usual starting point is 15 years. In the circumstances of the instant case, the range of 15-25 years with a starting point of 15 years (which is also the mandatory minimum sentence), would be appropriate.

[88] The aggravating factors identified were that the appellant had tricked YH into believing that he was taking her into a bar in a motel; YH had repeatedly told him she

was not interested in engaging in any form of sexual intercourse with him, yet he proceeded to do so without her consent; he hit her several times in her face causing redness, swelling and bleeding, thereby using personal violence; he threatened her during the ordeal; threatened to scandalise her to keep her quiet and to be subjected to his whims and fancy, and the incident occurred at night. The learned judge also noted, as aggravating, what she viewed as the appellant equating YH as a prostitute by saying that YH had sex with him for money, and when she did not get the money, she contrived the entire story. One final aggravating factor the learned judge identified was that YH had trusted the appellant and went out with him, and he betrayed that trust.

[89] The learned judge identified the mitigating factors as being the appellant's favourable social enquiry report with a positive community report which indicated that he was a hard worker, not a troublemaker or idler in that community. She took into account the plea in mitigation made by his counsel, in which he was described as the sole breadwinner on whom his wife was dependent for support. She noted that he had a previous conviction for an offence committed in 2012 but opted not to place too much weight on that fact, given the time that had elapsed.

[90] Although Miss Reid took issue with whether the appellant had tricked YH, all the factors identified are sufficiently appropriate. It is apparent that the aggravating factors far outweighed the mitigating ones. Therefore, when those factors are balanced, the sentence that is proportionate and commensurate with the crime falls within a range of 17 to 20 years.

[91] The sentence of 18 years imposed by the learned judge fell well within that range and therefore cannot be considered manifestly excessive. Ultimately it would seem that although not expressly stating it, the learned judge used a starting point of 15 years and could not be faulted in so doing.

[92] Section 6(1)(a) and (b) of the Sexual Offences Act states that:

> "(1) A person who –

(a) commits the offence of rape (whether against section 3 or 5) is liable on conviction in a Circuit Court to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years; or

(b) commits the offence of grievous sexual assault is liable-

(i) ...

(ii) on conviction in a Circuit Court, to imprisonment for life or such other term as the court considers appropriate not being less than fifteen years.

(c) ..."

[93] Section 6(2) states as follows:

> "Where a **person has been sentenced pursuant to subsection (1)(a) or (b)(ii),** then in substitution for the provisions of section 6(1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: **the court shall specify a period of not less than ten years, which that person shall serve before becoming eligible for parole.**" (Emphasis supplied)

[94] The provisions of section 6(2) are clear, and a mandatory duty was placed on the learned judge to specify a period for eligibility for parole for both offences. In relation to count 1 for rape, the learned judge had specified that the appellant should serve 12 years before being eligible for parole. In all the circumstances and given that due regard had been given to the aggravating and mitigating factors, the learned judge cannot be faulted for stipulating that the appellant should serve 12 years before becoming eligible for parole.

[95] However, the learned judge erred when she declined to impose a period of eligibility for parole on counts 2 for grievous sexual assault as required by section 6(2). This court will have to rectify this.

[96] Again, based on the circumstances of this case and having paid due regard to the aggravating and mitigating features as outlined, we are of the view that the appellant should also serve a period of 12 years' imprisonment before being eligible for parole for the offence of grievous sexual assault.

Conclusion

[97] There was no basis shown on which the verdict of the jury should be set aside. Entirely appropriate and unexceptional directions were given to address the evidence presented. Having seen and heard the parties and having been properly directed, the jury arrived at a verdict that cannot fairly be described as unreasonable and can be supported on the evidence. There was no apparent miscarriage of justice.

[98] The sentence of 18 years' imprisonment for both offences and the stipulation that the appellant serves 12 years before being eligible for parole on count one for rape cannot be viewed as manifestly excessive. However, as the learned judge failed to specify the period to be served before being eligible for parole on count two for grievous sexual assault, that sentence must be adjusted. The appellant will also serve 12 years' before being eligible for parole on that count.

[99] Accordingly, the order of the court shall be as follows:

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

(2) The appeal against sentence is allowed, in part.

(3) The sentence for rape (count 1) of 18 years' imprisonment at hard labour with the specification that the appellant serves a period of 12 years before being eligible for parole is affirmed.

(4) The sentence for grievous sexual assault (count 2) of 18 years' imprisonment at hard labour is set aside. Substituted therefor is a sentence of 18 years' imprisonment at hard labour with the specification that

the appellant serves 12 years before becoming eligible for parole.

(5) The sentences shall be reckoned as having commenced on 20 March 2018 and are to run concurrently.