**[2013] JMCA Crim 33**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 43/2010**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MR JUSTICE MORRISON JA**
**THE HON MISS JUSTICE PHILLIPS JA**

**JEROME DALEY v R**

**Barrington Frankson and Miss Jodi-Ann Hammitt instructed by Frankson & Richmond for the appellant**

**Jeremy Taylor and Mrs Lori-Anne Cole-Montaque for the Crown**

**17 May, 15 June 2012 and 31 July 2013**

**PHILLIPS JA**

[1] The appellant was tried on an indictment containing two counts of carnal abuse. The particulars of count one were that on a day unknown between 1 and 31 March 2009, in the parish of Saint Catherine, the appellant carnally knew and abused RT, a girl above the age of 12 years and under the age of 16. The particulars in respect of count two were that, in the said parish, the appellant had carnally known and abused RT on 25 April 2009. At the end of the case for the defence, the indictment was

amended in respect of count two, to state that the relevant date was between 1 March 2009 and 4 May 2009.

[2] The matter was tried in the Saint Catherine Circuit Court before Gayle J and a jury, and on 8 February 2010, the jury returned verdicts of guilty on count one and not guilty in respect of count two. On 18 February, the appellant was sentenced to five years imprisonment at hard labour. On 22 June 2011 a single judge of appeal gave leave to appeal against conviction, stating, inter alia, with particular reference to what was argued on this appeal, that, "... it is arguable that the verdict of the jury is inconsistent with regard to counts one & two on the indictment".

[3] The appeal was heard on 17 May 2012, and on 15 June 2012 the court gave its decision and made this order:

> "The appeal is dismissed. The conviction and sentence are affirmed. Sentence is to commence from 1 April 2010."

These are the reasons we promised for that decision. We apologize for the delay in the delivery of the same.

[4] At the hearing of the appeal counsel for the appellant abandoned the original grounds filed by the appellant and requested leave to argue five supplemental grounds of appeal filed on 14 May 2012, which request was granted. The grounds were as follows:

"**Ground 1**

That the verdict of guilty on Count One of the indictment is inconsistent with the verdict of not guilty on Count Two of the indictment.

**Ground 2**

The verdict of the Jury in respect of Count One of the indictment is unreasonable and cannot be supported by the evidence.

**Ground 3**

The Learned Trial Judge failed to guide the jury carefully in respect of the distinction between each of the two counts based on the alleged number of occasions when the offence occurred and the number of counts proffered on the indictment. The summation was wholly silent as to the third occasion and no assistance was given to the jury as to how to properly treat it.

**Ground 4**

The credibility of the Complainant is indivisible and accordingly the Verdict is inconsistent and unreasonable and no jury who applied their minds properly to the facts in the case could have arrived at such a conclusion based on the evidence before the court.

**Ground 5**

The Learned Trial Judge erred in Law when he overruled the submission of no case made by Counsel for the Appellant at the close of the Crown's case and this error is manifested in the Jury's inconsistent verdict of guilty on Count One and not guilty on Count Two."

**The prosecution's case**

[5] The complainant gave sworn testimony after the court was satisfied that she understood the importance of taking the oath. She testified that she was a student attending Old Harbour High School, who was in grade 8 and was 14 years of age, when giving evidence. She said that in March 2009 she lived in Bartons, Saint Catherine with her grandparents, an aunt and her sister. She testified that she travelled to and from Old Harbour High School by taxi and that sometimes she took the appellant's taxi three times per week. She said that she had known the appellant for five years prior to March 2009, that he came from Red Ground, and she indicated that she was at court "because I had sex with Jerome". She testified further that she used to see the appellant sometimes every day. She said that in March 2009 she was on the afternoon shift at school, which would normally end at 5:30 pm, and it took her approximately one hour to travel from Old Harbour to Bartons.

[6] The complainant gave evidence of her recollection of the incident in March 2009, which related to count one on the indictment. She did not recall the day of the incident but she said it was a week-day, and she had arrived home from school at 6:00 pm, had changed her uniform and went out on to the street in Bartons. At about 7:00 pm she saw the appellant in his taxi and she went into the car with him. There was no-one else in the taxi, and she said she was able to see him as the roof light was on. She said that he drove about a mile to a particular place in Red Ground, called Webley Farm. It was her evidence that once they arrived there the appellant asked her to have sex with him and she answered in the affirmative. The car she said had come to a stop. She was

then sitting in the front passenger seat. He pulled his pants zip down, put on a condom, shifted her panties to the side, inserted his penis in her vagina and started moving on top of her. At that time she was lying on the seat. She was able to see all of this and his face as the roof light of the car was on. When asked, she explained that she knew what sex is. She said, "Sex is when a man and a woman – no, when the man take out his penis and insert it into a lady's vagina." When it was over she said that she put her panties back in place, the appellant pulled back up his zip and drove her back home. She stated that on that evening she had been wearing a short jeans pants which was down at her ankle while she was having sex.

[7] With respect to the alleged incident which grounded the second count on the indictment, the complainant said that she did not recall 25 April 2009. She stated that she had had sex with the appellant twice, and the incident she had described in March 2009 was the first occasion, but she could not recall what month she had had sex with the appellant on the second occasion. She said she recalled that it was on the weekend, but she could not recall the time of the day that this second encounter took place, although she stated that it was in the night. She could not recall either, where she had seen the appellant that night. However, she said that the appellant had sex with her "at the same place" meaning "Webley Farm". She said that she went out on the street that night, and the appellant drove her there. No-one else had entered the vehicle, and when they got to Webley Farm they "did the same thing", that is, he pulled his zip down, put on a condom, pulled her panties to the side, inserted his penis into her vagina and moved on top of her. On that occasion, she said that she had been wearing

a merino and a skirt. She said that she had been able to see his face as the roof light in the car was on, and after they had sex, he drove her home. She could not recall where she had been living when the second incident occurred.

[8] The complainant testified that on 4 May 2009, which was subsequent to the second occasion on which she had had sex with the appellant, she had been on the road talking to some friends when her mother came and took the house key from her. She said she then went home, and her mother asked her certain questions to which she did not respond. Her mother took up a stone, and then put it back down. She then took up a stick and hit her on her thigh. She said her mother hit her because she had not answered her, which she did once she had been struck with the stick. She said she was told to bathe, and put on her uniform, which she did. Subsequently she went with her mother to the Old Harbour Police Station, and made a report to Deputy Superintendent of Police (DSP) Foster–Gardener. On 7 May 2009 she returned to the station and went with her mother and DSP Foster-Gardener to a doctor, Dr Francis.

[9] In cross-examination, although at first denying that she had ever said that she had had sex with the appellant three times, when confronted with her deposition at the preliminary inquiry she said that she had not remembered the third occasion, but did so then, and indicated that, although not recalling the date that it had occurred, it had happened at the same place, and in the same manner as previously described. She accepted that although the situations were similar, she did not recall matters relating to the third incident, which she agreed would have been the most recent.

[10] She was challenged with regard to the light in the car, and she said that it was turned off after she got into the car, turned on when the appellant was putting on the condom, and then turned off when they were having sex. She maintained therefore that she was able to see his face with the assistance of the roof light of the car. She said initially that it was the appellant who had taken off her shorts, but finally admitted, having been confronted with her deposition, that she had taken them off herself. She admitted that when she had said that the appellant had pulled her panties to the side, that had not been the truth; instead, what she had told the court at the preliminary inquiry was the truth, namely that she had taken off her panties. Her explanation for the inconsistency in her evidence was that she could not remember everything or "what was on the paper". She agreed that at the preliminary inquiry she could not remember what she had been wearing on the second and third occasions when she had had sex with the appellant, but she said that she had been able to do so when giving evidence in court, which meant, she agreed that her memory had been improving with time.

[11] She described Webley Farm in more detail. There was a container to the left as one left the main road, a playing field to the right, and there were houses as one travelled beyond the playing field. There was, she insisted, no light by the playing field but there was a light on the container. She was challenged that in the statement that she gave to DSP Foster-Gardener she had stated that the first incident took place on a Saturday, and that portion of the statement was admitted into evidence as exhibit one. She maintained that she had only given a date to DSP Foster-Gardener, she did not

recall what day in the week that it was, and the officer had taken the day from the almanac. She was further challenged that in her statement to DSP Foster-Gardener she had said that her mother had "used a golf stick to hit her twice," and not once, as she had stated in examination in chief and as she had insisted subsequently in cross-examination. That portion of the statement was tendered as exhibit two.

[12] In re-examination she explained that although she had stated in cross-examination that the appellant had not come out of the car during any of the incidents, he had been able to come on top of her as "he move over from his seat to the passenger seat". To the court she indicated that although she had on a tight fitting jeans it was not one of those that one would have difficulty pulling down; in fact it would "come off easy".

[13] The mother of the complainant gave evidence and confirmed that the complainant was born on 24 November 1995, and so was 14 years old when giving evidence. She said that the complainant had lived in Bartons with her grandmother prior to March 2009, and subsequent thereto, had lived with her in Red Ground. She testified that on 4 May 2009, based on certain information received, and on the response from the complainant to a query she had put to her, she had initially taken up a stone to hit her, but had put it down. She had, however, hit the complainant twice with a stick. She confirmed that the complainant had made a report to DSP Foster-Gardener and had been to the doctor also. In cross-examination, she admitted that she had beaten the complainant previously with a belt and a stick, but on different occasions. The last time she had beaten her with the stick, which was a golf stick, was

when she had heard about Jerome Daley, and she had hit her on her thigh twice. It was her evidence that there were two containers as one turned off the main road to Webley Farm which were not always lit, but there was a street-light right next to the playing field. To the court she stated that in respect of the different occasions on which she had hit her daughter, two weeks had passed between when she had beaten her with the belt as against when she had hit her with the stick.

[14] DSP Foster-Gardener testified and confirmed the report made to her by the complainant and her mother on 4 May 2009, and the medical examination by Dr Francis on 7 May 2009. Based on her investigations she arrested the appellant on a warrant and charged him with two counts of carnal abuse. On caution, she said that he said, "I never had sex with her." She testified that she was aware that the appellant was the owner of a motor car but she had not caused the motor car to be processed by scene of crime personnel, nor had she obtained any items of clothing from the appellant, as she said that when the appellant was taken into custody the incident had not recently occurred.

[15] An unsuccessful no case submission was made on behalf of the appellant.

**The defence**

[16] The appellant gave evidence. He said that he was a cabinet maker and that he sometimes operated a taxi. He denied having sex with the complainant. In cross-examination he stated that he and the complainant were not friends. He admitted that the complainant had travelled in his taxi, but had not done so regularly. He accepted,

however, that it was possible that she had traveled in his taxi more than once per week. He said that he used to talk to her, but had stopped doing so from 2008. He said that he had only heard about the allegation that he had had sex with the complainant on 4 May 2009, and he had not spoken with her about it but had spoken to his lawyer. He said that he did not speak to the complainant normally, save and except to give her change when she travelled in the taxi. In fact, he said that he had seen her in uniform, but there was nothing special about her. When asked:

> "So if there is nothing special about her, how is it that you remember her?"

He said:

> "Because if I see her I know her."

Then later he said:

> "because she take the taxi."

He maintained that when he told the court that he had not had sex with her, he had not been lying to the court.

**The appeal**

[17] In our view there are really two issues in this appeal, namely:

(i) Are the verdicts on counts one and two so inconsistent as to render the conviction unreasonable and unsafe? (grounds one, three and five)

(ii) Is the verdict on count one unreasonable due to inconsistencies in the complainant's evidence, sufficient to show that the learned judge erred in failing to uphold the no case submission? (grounds two and four).

**Submissions**

[18] Counsel for the appellant submitted that all the grounds of appeal could be argued together and so we will treat with his submissions accordingly. Counsel pointed out that the complainant's evidence was unclear as to the dates in respect of which each of the two counts on the indictment had occurred. In fact, he stated, there was no evidence differentiating the counts on the indictment so that the jury could have given separate verdicts, which he said, supported his contention that the jury must have been confused. Counsel argued that all the offences were stated by the complainant to have occurred at the same place and in the same way.

[19] Counsel insisted that the fact that the date of the third occasion was unknown could only have resulted in speculation on the part of the jury with regard to which of the two counts on the indictment that third occasion was referable. Or, put another way, the fundamental question which confronted the jury was: as the appellant was charged with two offences, and there were three occasions relative to the offences during the period stated in the indictment, which of those three occasions grounded the two counts on the indictment? It was counsel's further contention that the learned trial judge had not assisted the jury in this regard; in fact the summation was "wholly silent"

in relation to the third occasion. Counsel maintained that there was no explanation for the inconsistency in the verdicts of the jury, and that no reasonable jury who had applied their minds properly to the facts of the case could have arrived at the conclusions reached by them, and accordingly in those circumstances the verdict was unsatisfactory and unsafe. Counsel relied on **R v Leonard Johnson** (1970) 11 JLR 525, **R v Durante** [1972] 3 All ER 962, **R v Paul McKenzie** SCCA No 153/1995 delivered 24 November 1997, **The Queen v Rhys Thomas Lewis, Lee James Ward and Mark David Cook** [2010] EWCA Crim 496 and **Regina v William Andrew Rafferty and William Kinmond Rafferty** [2004] EWCA Crim 968 in support of these submissions.

[20] Counsel submitted further that there were manifest inconsistencies in the evidence of the complainant and gave examples with regard to her statement that the first occasion took place on a weekday, a day that she had attended school, then later she said that she was not sure if it was a Saturday, Sunday, Monday or Friday. Additionally, the manner in which the incidents occurred changed as, he submitted, the complainant finally admitted that it was she who had taken off her shorts and pulled aside her panties and not the appellant as she had originally testified. Her inability also to recall the specific dates on which she had allegedly had sex with the appellant was telling. Counsel submitted that this was not a case where the credibility of the complainant was divisible and the jury could accept one part of the testimony and reject the other part. Her evidence was similar and indivisible. It was on this basis that counsel argued that the learned judge erred in law when he rejected the submission on

behalf of the appellant at the close of the Crown's case of no case to answer. Counsel concluded that the danger of doing was manifest in the inconsistent verdicts of the jury.

[21] Counsel for the respondent referred to the case of **R v Kevin McCluskey** (1994) 98 Cr App R 216 for the principles relevant to the law on inconsistent verdicts, and submitted that the verdict could stand as the appellant had not established that the jury had not applied their minds properly to the evidence before them and the burden was on the appellant to establish that. Counsel also argued, in the alternative, that there was nothing to show that the jury was confused or had adopted the wrong approach. Counsel submitted that the verdict reflected a view that could reasonably have been taken by the jury on the facts, and that it has been held on appeal that the fact that other juries faced with the same evidence may have acquitted or convicted on each count does not necessarily mean that the verdict is unsafe. Counsel submitted that the learned judge gave adequate directions, with particular regard to the fact that the jury should decide the facts, which facts they would accept and those they would reject and make a determination on each count separately. The learned judge, he said, warned the jury about the importance of corroboration and the concerns in respect of the evidence of a young person and emphasized that there was no corroboration in this case. In the final analysis, he submitted, the appellant had failed to meet the burden placed on him to show that the jury was confused, had taken the wrong approach, and that no reasonable jury would have arrived at that verdict.

[22] Counsel submitted that the learned trial judge had given extensive directions on inconsistencies and discrepancies and highlighted to the jury the inability of the

complainant to recall certain material facts. Additionally, he argued that the credibility of a witness can be indivisible if he had lied, but on this occasion the complainant had said repeatedly that she could not recall. Counsel stressed that the directions to the jury and comments by the learned judge, which, he submitted, were skewed in favour of the appellant, were all important, and the jurors who heard the evidence and saw the demeanour of the witnesses "were entitled in considering the two counts to find the accused guilty on count 1 and not guilty on count 2 with all its attendant inconsistencies and memory lapses.."

**Discussion and analysis**

[23] The relevant principle of law and the approach of the court in dealing with the complaint of inconsistent verdicts have been set out with clarity through the years and endorsed in this court.

[24] The case of **R v Ian Drury** (1971) 56 Cr App R 104 is instructive. In that case the indictment contained a count for theft and two counts for obtaining goods by deception. In the judgment of the court, Edmund Davies LJ referred to the summation of the learned deputy recorder who instructed the jury to consider whether the appellant had disposed of certain oranges dishonestly, that is, knowing that he was not entitled to do so, and directed that if they were sure about that, then the correct verdict was guilty on all three counts, but if they were not sure then the correct verdict was not guilty on all three counts. The jury having inquired if they could return different verdicts on each of the counts and having been told that it was possible to do so as

they were obliged to bring in separate verdicts in respect of each offence, but, were told that "'dishonest' is the basic question in respect of each of them", acquitted on the count for theft, but convicted on the other two counts. The court restated the fact that "dishonesty was an ingredient common to all the offences" and in quashing the convictions on counts two and three, stated on page 114 of the judgment:

> "This is one of those cases where the verdicts of the jury on different counts, depending as they do upon the same basic ingredients, are so violently at odds that we see no alternative but to hold that the convictions on the second and third counts, notwithstanding the cogency of the evidence to which we have referred, must in the light of the acquittal on the first count be regarded as unsafe and unsatisfactory."

Edmund Davies LJ, however, had stated on page 105:

> "We reject as too bold the proposition that the simple fact that a jury has returned inconsistent verdicts, acquitting on some count or counts and convicting on others, means that in every such case this Court is obliged *ex necessitate* to quash the convictions. There are cases which, in our view, can arise when it would be proper for this court to say that, notwithstanding the inconsistency, the conviction or convictions must stand."

[25] In **R v Durante** the issue related to the appellant's handling of a blank cheque form which had been stolen from a cheque book belonging to a limited company. He claimed in his evidence that he had been given the blank cheque form with the imprint of the company while in a taxi on the way to the public house, by a man whom he had only met half-an-hour before, which he filled out himself before entering the public house, and told the manager it related to a week's wages. He was charged on two counts, namely handling a stolen cheque and endeavouring to obtain money on a

forged instrument. His defence was that he had had too much to drink to form the necessary criminal intent. The jury convicted on the first count but acquitted him on the second count. Edmund Davies LJ in giving the judgment of the court stated that the verdicts were remarkably inconsistent. He referred to the above statement of the court in the case of **R v Drury** at page 105 but stated that in this case the facts lay within a period of 15-20 minutes and he gave express approval to what he described as a useful passage from Lord Parker CJ in **R v Hunt** [1968] 2 All ER 1056 at 1058 where he referred to the judgment of Devlin J in **R v Stone** (13 December 1954) unreported CA, with regard to the approach that the court should adopt in cases of inconsistent verdicts. It reads thus:

> "When an appellant seeks to persuade this court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly on him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind [sic] properly to the facts in the case could have arrived at the conclusion, and once one assumes that they were an unreasonable jury, or that they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is on the defence to establish that."

He concluded (in **R v Durante**) that the appellant had discharged the burden and satisfied the court that no reasonable jury who had applied their minds to the facts of the case could have come to differing conclusions on the two counts. Accordingly, the conviction on the first count in respect of the handling of the cheque was quashed as being unsafe and unsatisfactory, and the appeal was allowed.

[26] **R v Segal** 1976 RTR 319 was a case where the appellant was charged on an indictment with two counts under the Road Traffic Act, namely driving in a dangerous manner and at a dangerous speed. The police officer gave evidence of the appellant driving at an excessive speed, emerging suddenly from a minor on to a major road, overtaking another vehicle on the brow of a hill while crossing a central continuous white line, and zigzagging dangerously. The appellant admitted that he had driven fast at times but denied the manner of driving dangerously as testified by the prosecution's witnesses. Speed was obviously an element of both offences and the appellant accepted that the driving described by the police officer would satisfy the offence of driving in a dangerous manner, so the matter was one of credibility. The jury found the appellant guilty of driving at a dangerous speed, but not in a dangerous manner. The appeal against conviction on the ground that the verdicts were inconsistent was dismissed by the Court of Appeal, comprising Scarman LJ, Willis and Mais JJ, on the basis that there was no rule of law that a verdict of guilty had to be quashed if it was inconsistent with another verdict of not guilty. The dictum of Edmund Davies LJ in **R v Drury** was applied. The court held:

> "That, on the facts, the jury having accepted the officer's evidence as to speed and having concluded that it was dangerous, could have decided to reach no final conclusion on the other incidents of driving and to acquit the appellant of driving in a dangerous manner..; so that, while the verdicts were inconsistent in law, the conviction was neither unsafe nor unsatisfactory within section 2(1)(a) of the Act of 1968, nor lacking in common sense and was sensible once the jury had decided that they preferred the evidence of the officer to that called for the defence.."

[27] In **R v McCluskey** the facts so far as relevant to this appeal were that the appellant had been charged with murder and affray, both counts arising out of the same incident. His defence to the murder charge was self-defence. The judge directed the jury that if they found that the appellant had acted in self- defence, they must acquit him of murder, but that if they found him not guilty of murder on some other basis then they had to consider manslaughter. The judge also directed the jury that if they convicted the appellant of either murder or manslaughter, there was no defence to the count of affray. The jury returned a verdict of guilty of manslaughter by a majority of 11 to one, and acquitted the appellant of affray. On appeal on the grounds that the verdicts were inconsistent, the court (Watkins LJ, Henry and Pill JJ) held, dismissing the appeal:

> "(1) [T]hat although the verdicts on manslaughter and affray were clearly inconsistent, the fact that two verdicts were shown to be logically inconsistent did not make the verdict complained of unsafe unless the only explanation for the inconsistency must or might be that the jury was confused and/or adopted the wrong approach. The jury in the present case were trying the most serious of crimes. The central issue was self-defence and, the judge having directed them on that issue in the clearest terms three times, it was inconceivable that they had misunderstood it. Their acquittal on the relatively minor count of affray could be regarded as no more than a conclusion that, having convicted the appellant of manslaughter, the second count was academic;.."

[28] In a case with facts closer to those of the instant case, **R v G** [1998] Crim LR 483, the appellant was convicted of four counts of indecent assault and two counts of gross indecency. The complainant was his niece, who, at the age of 22 years, was

testifying with regard to offences which had been committed when she was between four and 10 years old. He was acquitted of two further counts of rape. On appeal, it was argued that the convictions were inconsistent with the acquittal on the rape counts and that the case depended not only on the reliability of the complainant but also on her credibility and if the jury was not satisfied with her credibility on the rape counts it ought not to have been satisfied with her credibility on the other counts. The court in dismissing the appeal held, inter alia, that it was for the appellant to show that the verdicts were logically inconsistent and, if they were, that it was not possible to postulate a legitimate chain of reasoning which could reasonably explain the inconsistency; that logical inconsistency was an essential pre-requisite; and that the convictions were not necessarily unsafe where the complainant's credibility was in issue.

[29] Of even more importance to the case at bar, were the findings of the court that:

> "...(2) A person's credibility is not a seamless robe, any more than is their reliability. The jury had to consider (as they were rightly directed) each count separately, and might take a different view of the reliability of the evidence on different counts. It was too simplistic to draw a stark distinction between reliability and credibility (as had been put in the argument). It was for the jury to decide on the basis of all the material before it whether it was sure of the particular allegation in each count. The verdicts were no more logically inconsistent as were those in *Bell*, and the appeal fell at the first hurdle.
>
> (3) Even if that had not been so, on the facts it was quite understandable on the evidence that the jury came to differing conclusions on different counts.."

[30] **Rohan Chin v R** SCCA No 84/2004, delivered on 26 July 2005, is a decision of this court, in which the applicant was charged on counts one, two and three with having carnal knowledge of PC, a girl above the age of 12 years and under the age of 16 years and on count four with buggery committed on SC, the sister of PC. The jury found him guilty on counts two and three and not guilty on counts one and four. Smith JA in delivering the judgment of the court, in which the grounds of appeal focused on the unreasonableness and inconsistency of the verdicts and the failure of the trial judge in her summation to direct the jury how to treat with the credibility of the complainant, endorsed the principles already set out herein in **R v Durante** and **R v McCluskey**, and added that the learned judge having referred to the extensive cross-examination of the complainant, PC, the jury may have had some doubt as to what had taken place with regard to counts one and four. He made the point that, "[v]ery often an apparent inconsistency reflects no more than that the jury is not satisfied that an offence has been 'proven'. It does not necessarily indicate that the jury had found the witness to be not credible".

[31] With regard to how the court should view the issue of the credibility of the witness in these circumstances, the learned judge of appeal had this to say:

> "It has been said that the credibility of a witness is not divisible. In **R v Mark Burke** 25 JLR 215 this Court held that the phrase 'the credit of a witness is indivisible' applies to a situation where a particular witness has given evidence and has lied or has been discredited in relation to one aspect of his evidence, and therefore his entire evidence should be rejected. However, whatever this phrase means it does not mean that the jury may not accept a part of a witness' evidence and reject a part. And it certainly does not mean

> that where two or more counts all depend on the evidence of the same witness that the counts must stand or fall together. As the judge correctly directed the jury, it was their duty to consider each count separately (see **Williams and Banks v R** (1997) 51 WIR 212 at 221 g-j)."

The grounds of appeal failed.

[32] The conclusion we have arrived at based on a review of the authorities is as follows:

(i) The verdicts of the jury on the varying counts must not be irreconcilable or they will be considered by the court to be unsafe or unsatisfactory.

(ii) The fact, however, that the jury has returned inconsistent verdicts does not necessarily mean that the conviction must be quashed.

(iii) The burden is always on the applicant to show that the verdict is either repugnant or inconsistent or that the verdicts cannot stand together, in that no jury having directed their minds properly to the facts could have arrived at that conclusion.

(iv) The verdict can yet be safe and satisfactory though inconsistent, if it is clear that the jury could have accepted certain evidence of the prosecution,

sufficient to make a finding on one count, and therefore make no final conclusion on other counts before them; especially if it can be shown that the jury were not confused nor had they adopted a wrong approach.

(v) For the inconsistent verdicts to be held to be unsafe, logical inconsistency is an essential pre-requisite;

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

[33] In the instant case the learned judge, having told the jury that they were superior as far as the facts were concerned, exhorted them to decide what facts they accepted and which they rejected, but to return a true verdict in accordance with the evidence. He also very early in his summation to the jury advised them as follows:

> "You do not have to decide every point which has been raised in a case. What you have to decide however, Madam Foreman and Members of the Jury, are matters which will enable you to say whether the charges against the defendant has been proved. In order to do this you have to look at what the charges are and what is needed to be

> proven. Later in my summation to you I will review the charges to you. I will tell you what the charges are, what the ingredients are and what is required to be proved by the Prosecution."

Later on pages 16 and 17 he clarified their obligation in relation to each count on the indictment. This is what he said:

> "… So the first count - you should make note that they [sic] are two counts in this indictment, that means each count is separate. This is very important, each count is a separate charge and you as the judges of fact will have to make a determination to [sic] relation to each count separately. Very important. And in making a determination in relation to each count you look at the evidence as it relates to each count. Not because they are charged together you will say if he is guilty of one, he must be guilty of the other. It is not like that. Or if he is not guilty of one he is not guilty of the other. It is not like that.
>
> You look at the evidence as it relates to each count, each charge and return your verdict as it relates to each count. So there are two counts of Carnal Abuse that he is charged for in this case. So you look at the evidence as it relates to each one. So look at the evidence as presented to you as I said as it relates to each count."

[34] It is patent that the jury had clear directions with regard to how to treat the evidence given by the complainant in respect of each count. With regard to the complainant's evidence on the second count as indicated previously, she could not recall what month or what time of day it was that she had allegedly had sex with the appellant. She could not recall where the appellant was when she saw him in the night on that occasion, nor where she had been living at the time of the second occasion on which she had sex with him. And this failure to recall was evidence given in examination in chief. The learned judge faithfully recounted the evidence and reminded the jury

that it was a matter for their consideration but commented that he found certain evidence in relation to the second occasion "interesting". The complainant had greater recall in relation to the evidence she gave pertaining to count one. The finding by the jury therefore of not guilty on count two, despite the fact that both counts relate to the same ingredients and the evidence in respect of both counts was adduced from the same witness, would not be "so violently at odds". The appellant also has not discharged the burden which plainly lay on him, to show that in the circumstances of this case the verdicts on the two counts cannot stand together, meaning that no reasonable jury who properly applied their minds to the facts of the case, could not have arrived at the differing verdicts on the two counts on the indictment. The verdicts even if appearing inconsistent were not in the circumstances unsafe or unsatisfactory, as the jury clearly thought that the offence had been proven in relation to count one but not so in relation to count two.

[35] We do not believe that the verdicts are logically inconsistent, for, as has been shown, the jury could have been satisfied with regard to the complainant's credibility in respect of the evidence given on count one but not so with regard to the evidence given in respect of count two. There was nothing to prevent the jury from accepting the complainant's evidence as it related to count one as against that in relation to count two. One could not conclude that the jury were confused or had adopted the wrong approach and /or had misunderstood the evidence or the directions given by the trial judge. In the final analysis counsel for the appellant could not persuade us that the verdicts were in fact inconsistent, so those grounds failed.

[36] Before dealing with the other main issue in this appeal, we feel constrained to comment that we do not agree with counsel for the appellant that the fact that there appeared to have been a third occasion on which the complainant had sex with the appellant, that that should have caused the jury to have been confused as to which of the occasions grounded the counts in the indictment. Equally, that fact does not give any merit to the argument that the verdicts were inconsistent. There was no count on the indictment referring to a third occasion, and so the judge was not required to give directions in that regard to the jury. That would be a matter relating to the complainant's credibility and any inconsistency relative thereto. In any event, the evidence relating to the third occasion will be dealt with below when we treat with what, in our opinion, is the other main issue on appeal.

[37] There is no doubt that there were inconsistencies in the complainant's evidence, with regard to the day in the week that the first incident had taken place; the removal of her garments prior to having sex with the appellant; the incidents of being struck by her mother with the stick; the recall at trial, though not before, of the clothes she had been wearing in respect of the second and third occasions; and her inability to recall in any detail what took place on the third occasion, although it would appear on the evidence to have been the most recent incident.

[38] However, it was clear that this was not a situation where there was no evidence that the appellant had committed the crime alleged, nor that the evidence was so tenuous that no jury properly directed would convict on it. This case fell within the second limb of **Regina v Galbraith** [1981] 1 WLR, 1039 where the view to be taken of

the strengths and weaknesses of the witness fell within the province of the jury. The no case submission therefore was properly refused.

[39] The learned trial judge in his directions to the jury indicated how they should treat with inconsistencies in the testimony of a witness. At various instances between pages 25 - 29 of the transcript, he said this:

> "Madam foreman and members of the jury, in this case and almost every case that you encounter, you will find what we call inconsistencies or discrepancies. Inconsistencies are statements made by one person describing the same event and these statements are different, vary at different times…
>
> Now what is the purpose of looking for inconsistencies and discrepancies? Simple, to make you aware of what the witness is saying and to make you determine whether this witness is reliable or can be accepted as being a witness of truth.
>
> That's the main purpose of it. If this person is reliable, can I rely on this person, that's the purpose of discrepancy and inconsistency. You will have to apply your common sense…
>
> Now, if you find that inconsistencies or discrepancies exist, you will have to go further, you will have to make a determination as to whether or not these inconsistencies and/or discrepancies are serious or slight. If they are slight, Madame Foreman and members of the Jury, you may say, well they don't really affect the case, I am not going to pay any mind to these. However, you might have inconsistencies and discrepancies which are very serious and are serious [sic] and go to the root of the case, because you know a tree without any root is no tree at all, so if it goes to the root then you will have to take a careful look at them…
>
> Now, when you come to look at inconsistencies and discrepancies and how you treat them, you decide whether or not they are slight or serious. If they are serious ,you look at them, are these so serious or numerous so I have to reject all of this witness' testimony or is it that I will reject a

> part or accept a part, that's what you will have to determine, Madam Foreman and members of the Jury. Your function..."

[40] Having given those directions the learned judge then highlighted the inconsistencies in the complainant's evidence and also those matters that she had difficulty remembering. The most glaring one stated by him in his summation as he rehearsed her evidence were the following:

> "She was then cross-examined by Mr. Frankson for the accused man. And this is what she said, I don't tell lie because liers go to hell. She said she tell no lies to this court or any other court. I never tell anyone that accused had sex with me three times, that's what she said. I never give evidence at the Old Harbour Court, that's the preliminary examination, I never tell the Judge he had sex with me three times."

Then he explained what her deposition was, that it had been read to her and she had been told that she could make any adjustments to it and she had signed it. Then he said:

> "And when the document was shown to her this is what she said, I did not remember the third occasion. That's what she said. I did not remember the third occasion. I now remember the third occasion. And this is what she said the third occasion, same place same thing..I did not remember the third occasion, which is the last time."

The learned judge felt forced to comment and said this:

> "I pause here for a moment. I am no psychiatrist, but it has been said that the most recent things are the things you most easily remember, the things that happen to you last are the things you remember most easily, so I understand nature makes us. The further away the thing is the less you

> remember, because your memory fades with time. Matter for you."

With regard to the removal of the clothes he reminded the jury of the evidence as it unfolded thus:

> "Then she went on to say that if she told the court in Old Harbour that he took off the panty that would not be true. In other words that would be a lie. And she said yes I told the court today that he took off my shorts, then she went on to say I did not tell the judge in Old Harbour Court, I took off my shorts. Mr Frankson put that he himself cross-examined her down there and he put that question to her.
>
> The deposition, that piece of document that the Registrar had was shown to her and having looked at the deposition and it was read to her, the Registrar quietly read it to her. This is what she said, 'I now recall that I said in Old Harbour Court I took off my shorts and that is the truth. I told the Judge I took off my panty, that was not true.' And this is what she said finally, I don't know why I tell the judge a lie. Then she said this young man had sex with me. Then she said the second occasion or the second time that they had sex I don't remember if I took off my panty…"

He said in conclusion on this aspect of her evidence:

> "Once again the deposition was shown to her and she said, I said to the Old Harbour Court I took off my panty and that's the truth' And she went on to say, 'I did not tell the truth to the court today when I say he pulled down - he pulled the panty aside! So she admits that she told this Court a lie".

With regard to her evidence as to her recollection of what she had been wearing on the different occasions, the learned judge rehearsed the evidence thus:

> "Then she went on to say, 'I told the Court in Old Harbour I don't remember what I was wearing the second occasion, but I now remember today.' That's what she said. Then she said, 'I don't remember what I was wearing on the third occasion too.' Then she went back and said. 'I remember now.' Then she went on to Old Harbour, 'I don't remember

> what I was wearing the second and third occasions'; and this I find rather interesting being - but as time goes by my memory gets better. That is her evidence. That is what she said and I am quoting her verbatim."

[41] Having pointed out these inconsistencies and others referred to earlier in this judgment, and having gone through all the evidence he directed the jury as to their responsibility in this way:

> "In other words, that is the evidence Madame Foreman and members of the Jury. What is it that you have to decide in this case? Do you accept R that she was under sixteen years? Do you accept that intercourse took place between she and that accused man, bearing in mind all the inconsistencies? You must also remember the warning that I have given to you, the warning of corroboration the uncorroborative [sic] evidence, person of tender years what they are likely to imagine and do. All these warnings you have to take into effect. The facts are entirely yours.
>
> You must also look at the evidence separately in each case. You will have to decide Madame Foreman and Members of the Jury, bearing in mind the caution that I have given you, you can say to yourselves in spite of this caution, in spite of the absence of corroboration, you will have to determine can I accept this young girl, R, as being truthful. You will have to determine that. And that's what it comes down to, you being the Judges of the facts, you will have to retire and deliberate".

[42] There is no question that the issue of the credibility of the complainant would have been in the forefront of the deliberations of the jury, based on the directions given to them by the trial judge. However, there was evidence that the complainant knew what sexual intercourse was, and her evidence in that regard was sufficiently specific

and clear in relation to count one. There was evidence that she was under 16 years of age. There was no issue of identification. The appellant was well known to her. Although he denied having sexual intercourse with her he did not deny knowing her. The jury could have found that the inconsistencies were slight and did not affect the total credibility of the complainant, and could have accepted and rejected such parts of her evidence as they saw fit. As counsel for the respondent submitted, with which we agree, the jurors who heard the evidence and had seen the demeanour of the witness were entitled to find the accused guilty on count one in spite of all the attendant inconsistencies and memory lapses, and in all the circumstances not guilty on count two. Reasonable doubt obviously could and did arise in respect of count two on the indictment. In fact the jury retired for 37 minutes and returned unanimous verdicts on counts one and two. In our view, this is not a case where the verdict of the jury is unreasonable, and as stated in **R v Leonard Johnson**, the burden is on the appellant to show that no reasonable jury who had applied their minds to the facts of the case could have arrived at the conclusion reached by them. This, he has failed to do. These grounds could not succeed.

[43] In the light of the foregoing, subsequent to hearing the appeal we dismissed it, and confirmed the sentences as stated in paragraph [3] herein.