[2023] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00001

RASHANE DESOUZA v R

Miss Melrose Reid instructed by Melrose G Reid & Associates for the appellant

Miss Paula Llewellyn KC and Dwayne Green for the Crown

28 November, 20 December 2022 and 20 January 2023

LAING JA (AG)

Background

[1] On 20 September 2019, after a trial before a judge ('the learned trial judge') sitting with a jury in the Home Circuit Court at King Street in the parish of Kingston, Rashane Desouza ('the appellant') was found guilty on an indictment charging him with the offences of indecent assault (count 1), and rape (count 2). He was found not guilty of assault for which he was charged on count 3 of the indictment. On 19 December 2019, he was sentenced to three years and two months' imprisonment for indecent assault and for rape he was sentenced to 15 years' imprisonment with the stipulation that he serves 10 years before being eligible for parole. The sentences were ordered to run concurrently. The learned trial judge also issued a certificate pursuant to section 42K of the Criminal Justice Administration (Amendment) Act 2015, the effect of which will be addressed in this judgment.

[2] The prosecution relied on five witnesses; the complainant, the medical doctor who examined her, the complainant's cousin Christopher Johnson, Detective Sergeant Tricia Johnson, and Sergeant Carron Taylor the investigating officer. The appellant at his trial gave sworn evidence in which he raised consent as his defence. He called one witness, Malik Hamilton. The main issue at trial was one of credibility.

[3] The appellant applied for leave to appeal his conviction and sentence. His application was considered by a single judge of this court who granted leave to appeal against the sentence only. The appellant, as is his right, has renewed his application for leave to appeal his conviction before this court.

[4] In this appeal, we were not provided with the full transcript of the trial. We only had access to the portion of the trial relating to the learned trial judge's summation and the sentencing. The facts outlined below are as gleaned from the learned trial judge's summation and the submissions on behalf of the parties.

The prosecution's case

[5] On 28 June 2017, the complainant, a student at the Stony Hill HEART Academy who lived in the student dormitory, was coming from a class at that institution at approximately 7:00 pm. She saw the appellant whom she knew and considered to be a friend. He had in the past told her that he liked her, but she told him that she was only interested in being friends with him. He was with two of his male friends and he told her that he was going for a walk. He invited her to join him. She agreed. She went and placed her bag in her dormitory and left the campus with the appellant and his friends. They went to Rocky's bar in Stony Hill. While there, the appellant offered her a drink and she had a Malta (which we understand to be a non-alcoholic beverage).

[6] The complainant accompanied the appellant when they left the bar to visit his aunt. They later returned to the bar and re-joined the appellant's two friends. The complainant asked the appellant if there was a bathroom. He said yes and offered to show it to her. She followed him through a passage inside the bar to a door with a grille.

The appellant opened the grille and the door and turned on the light. The complainant entered the room behind him, and he closed the door. Inside the room, there was a bed and a fan. The appellant tried to kiss and hug her, but she pushed him off. He pulled a knife from his waist "held it to her" and told her that if she made any noise, he was going to hurt her.

[7] He pushed her down onto the bed and "went over her" with the knife. He put his hands in her brassiere and started to fondle her breasts. She told him to get off and was pushing him away, but she said he was strong and still had the knife. He kept saying that if she made any noise, he would use it to hurt her. The appellant was trying to pull down the loose-fitting one-piece garment that she was wearing as pants, while she was trying to pull it back up. They were wrestling with her clothes and after a minute, the complainant said she gave up. Her clothes came off. The appellant then took out his penis and had sexual intercourse with her against her will.

[8] The complainant asked the appellant to be let out through the back door because she did not want anyone to think that she had done something wrong. She went back to her dorm and texted her cousin Christopher Johnson and told him that a guy just raped her.

[9] The evidence of the complainant's cousin constituted a recent complaint and he confirmed that she made a report to him that she was raped. His evidence was, therefore, only admitted to show consistency in the complainant's conduct and was not probative of a rape having occurred. The evidence of the doctor was equivocal, in that it was equally consistent with consensual and non-consensual sexual intercourse. To this extent, nothing turned on it. Also, nothing of significance turned on the evidence of the police officers, save that the complainant made a report to Sergeant Carron Taylor on 29 June 2017, the day after the incident and he also carried out a search of the appellant's locker during which a knife was found.

The case for the defence

[10] The appellant gave sworn evidence in which the defence of consent was raised. He stated that in June 2017 he was a student at the Stony Hill HEART Academy. He met the complainant who was also a student there and a relationship developed and they were "boyfriend and girlfriend". They would communicate via texts and WhatsApp messages and (telephone) calls. She also sent him pictures.

[11] On the day in question, the complainant, two of his friends, and himself went to Rocky's bar after 7:00 pm. He spoke to his cousin who was running the bar. He also went to speak to an aunt and his grandmother. The complainant accompanied him and he introduced her to his aunt.

[12] They went back to the bar and the appellant ordered drinks for all of them. He and the complainant discussed having sex, and she asked if there was a private room that they could use. He told her that he could arrange that. He said that they both went into a room, and they had sex. He said he did not force her to have sex with him, nor did he hold a knife to her or threaten her, in fact, he did not have a knife when he went to the bar. He denied forcibly pulling down her clothes. He said after they had sex, the bar had gotten crowded, and he asked her if she wanted to exit around the back. She went through (a door) at the back and came around and met him in the bar, where they re-joined the other two friends.

[13] On their way back to school he stopped at a gas station and asked the complainant what she wanted, and she said she only needed a $200.00 Digicel phone card. He said that on the journey from the bar to the gas station, to the dorm, they were all laughing and talking, and they passed the police station on the way back to the dorm. They checked back onto the campus at the same time and reached the dorm at the same time.

[14] The appellant said that he and the complainant spoke when they got back to campus, and she told him that she needed $2000.00 to get a morning-after pill. He told her that he did not have any more money on him but that he would get it to her Thursday

evening, and she said that Thursday evening would be too late. He said that she said she wanted it now and that if he did not give it to her now, she would make his life miserable.

[15] The next day while the appellant was in class, a member of the school administration approached him, and he was asked to follow her to the office. Members of the Jamaica Constabulary Force spoke to him at the school, and he was asked if he owns a knife. He admitted that he did. He consented to the search of his locker, and they went to the dorm where he handed over the key to his locker. A search was done of his locker and a knife was recovered. He explained that he used the knife to peel oranges and pine and to open tins of milk. It was openly used, and others would have seen him using the knife. He said he never took it in public (which we understand to mean off-campus) and he never carried it in his waist. It was also kept in his locker and when it was not in the locker it would be in his pocket.

[16] During cross-examination, he said a relationship between himself, and the complainant started after he began school on 4 June 2017. He met her in June 2017 and the relationship started as soon as they met. They were in a relationship for three to three and a half weeks at the time of the incident. He denied that he told her that he liked her, and that in response she said that she only wanted them to be friends. He said that was the first time they went out and his friends knew they were in a relationship. He admitted that the complainant's reaction was very odd with her "crying rape" at the end.

[17] The evidence of Malik Hamilton was that they went to the bar together, and while there the complainant and the appellant left and went around the back for about 15 minutes or more. They returned and they all made their way back to campus. On their way back to the campus they stopped at the gas station and the appellant bought a juice for himself and two phone cards, one of which he gave to the complainant. He says the mood was friendly and he did not see anyone crying and no complaint was made. He did not see the appellant with a knife that night at the bar or whilst they walked. He denied the suggestion that everyone did not leave the bar together and that the complainant left ahead of them.

The grounds of appeal

[18] The appellant was granted permission to abandon the original ground of appeal filed and to argue the following supplemental grounds:

> "Ground 1 – The [learned trial judge] failed to adequately address the substratum of the case so that the Jury could adequately analyse the case and see the underlying motive for the Complainant "crying" rape.
>
> Ground 2 -Although there is no absolute legal requirement for Corroboration in a sexual offence case-in this case and with the evidence given and the circumstances surrounding this case, the [learned trial judge] was bound to issue a strong corroboration warning.
>
> Ground 3- The Sentence is manifestly excessive in light of the circumstances and in light of the fact that the Learned Trial Judge issued a Certificate vide Section 42 K of the Criminal Justice Administration (Amendment) Act 2015."

Ground 1

The submissions

[19] In support of her submissions in respect of the importance of the substratum of the case, Ms Reid relied on the Australian case of **The Queen v Lloyd Ronald Thompson** [2008] VSCA 144 from the Court of Appeal (Supreme Court of Victoria). Ms Reid also relied on a later judgment of the same court, namely, **Murrell v The Queen** [2014] VSCA 334 which was to a similar effect.

[20] Ms Reid posited that each fact that was relevant to the issue of the complainant's credibility constituted an independent substratum of the defence's case, and accordingly the learned trial judge was required to assist the jury by demonstrating to them how these facts, individually and collectively, could assist their view of the complainant's case and by extension, the defence case. Counsel identified a number of key facts and these included:

a) the short time during which the complainant knew the appellant but nevertheless sent him photographs of herself;

b) the short time since the start of the term but yet the complainant said she needed a break from classes;

c) the complainant leaving through the back door;

d) the demand for $2000.00 to buy a morning-after pill; and

e) the unlikelihood that the appellant would have retained the knife if he had used it in the commission of a crime.

[21] The Crown's response was that the issue of the credibility of the complainant was a live issue, however, the learned trial judge adequately and correctly placed before the jury all the relevant evidence which was relevant to the issue of the complainant's credibility.

Analysis

[22] We understand the essence of the submissions made by Ms Reid to be that the learned trial judge had failed to properly analyse or deal with the defence's case, primarily as it relates to the possible motive or reason for the complainant making the report that she was raped.

[23] In **The Queen v Lloyd Ronald Thompson**, separate opinions were delivered by the three judges. Redlich JA referred to the fact that the common law obligations of a judge in every jury trial were summarised in **R v AJS** [2005] 12 VR 563, 577 (Maxwell P, Nettle and Redlich JJA) and that the judge's oral directions must satisfy the common law obligations. He made the following observations at paras. 137 and 138:

> "137. In the oral charge, the jury's attention must ordinarily be drawn to the relevant evidence which bears upon the issues of fact in dispute. The duty to expose the facts relevant to the issues is not confined to the ultimate facts in issue comprising one or more of the elements of the offence but

> relates also to the substratum of facts which are in dispute and which bear upon the resolution of the ultimate issues. The evidence which is relevant to those subsidiary issues must also be identified. Ormiston JA in *De'Zilwa* spoke of the fallacy in assuming that jurors will recollect the same things that a trained and experienced lawyer would recollect. Moreover, the real significance of pieces of evidence may not be apparent when the evidence is given. A common experience of trial judges has been that the jury may not have recognised the significance of individual pieces of evidence or how that evidence relates to other evidence and supports an argument of a party during the course of the evidence.
>
> 138. Though the common law obligations prescribe the minimum assistance which a jury must be given, there is no particular means by which the oral directions must satisfy them. The level of particularity at which the evidence and arguments need to be summarised will vary, depending upon the nature of the issues and the circumstances of the trial. The summary should highlight the evidence which bears upon the resolution of the issues in the trial without an unnecessary recitation of unimportant evidence. But enough must be said to ensure that the jurors have sufficient knowledge and understanding of the relevant evidence and the issues to which they relate, to discharge their duty to determine the case according to the evidence." (Footnotes in original omitted)

In **Murrell v R**, Redlich JA, with whom Maxwell P agreed, again summarised the law at para. 11 of the judgment in similar terms.

[24] To the extent that these two cases summarise the common law position, there is nothing particularly novel about them. It has long been recognised in this jurisdiction that there is no specific formulation or manner in which the trial judge should direct the jury. All that is required is that the summation is done in a way that assists the jury in properly discharging their duty and which ensures that the defendant is not deprived of his right to a fair trial.

[25] In **Millings and Ennis v R** [2021] JMCA Crim 6, Brooks P in dealing with the duty of the trial judge in directing the jury stated, at para. [28], that:

> "A trial judge is not required to use any particular formulation in giving the directions to the jury. The summation will vary from case to case, according to the style of the judge and the jury being addressed. Carey JA, in **Sophia Spencer v R** (1985) 22 JLR 238, admirably explained the purpose of a summation to the jury. He said, in part, at page 244:
>
> > 'A summing up, if it is to fulfill [sic] its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them.
> >
> > If it is so couched in language neither patronizing nor technical, then it cannot fail but be helpful to a jury of reasonable [men] and women in this country.'"

[26] It is, therefore, beyond debate, that the requirement for fairness in the directions to the jury, is clear in this jurisdiction. It appears to us that the Australian cases cited by Ms Reid are consistent with the law in our jurisdiction. The ultimate aim of the trial judge must be to give directions that will assist and guide the jury based on the issues in the case. The judge's approach should ensure that the appellant gets a fair trial, inclusive of a balanced and fair summation. Therefore, to the extent that the Australian cases cited by Ms Reid involve facts that are quite different from those which we have under consideration, they are unhelpful. This is because the submissions of Ms Reid are very fact specific. Counsel's complaint is that, in order to assist the jury in this case, the learned trial judge should have gone further by addressing in greater detail the implications of the specific facts identified and itemised by counsel.

[27] In most cases, there are issues and sub-issues. Viewed in that context, we agree with the view of Redlich JA in **Murrell** and **Thompson**, that the trial judge has a duty to

identify the ultimate facts in issue comprising one or more of the elements of the offence, and also the evidence related to "the substratum of facts which were in dispute, and which bore upon the resolution of the ultimate issues".

[28] In practice, there may be cascading levels of sub-issues and facts that are of varying levels of importance to the determination of the ultimate issues. However, the court must guard against any approach which suggests that the judge must identify every possible permutation of the ways in which the evidence may be interpreted when a fact in issue falls for the jury's consideration.

[29] The learned trial judge in this case clearly appreciated that there were secondary issues, in respect of which there might not be a resolution by the jury. This is reflected in her summation at page 18 lines 17 to 24 of the transcript, where she stated:

> "So, you are the ones who decide who is telling the truth and whether they are telling the truth in whole or in part. You don't have to decide every point. Focus on matters which enable you to say whether each charge or count has been proved. Stand back and assess the big picture there are always a number of secondary issues, but it may not be necessary to decide them all, as in life you won't find the answer to each and every question and you don't have to find the answer to each and every issue here."

[30] The main issue of the case was the credibility of the complainant. This was accepted by the Crown. The facts in relation to what transpired at the bar, as well as what transpired after the complainant and the applicant left the bar and returned to the campus, were hotly disputed. Similarly, there was a dispute as to the inferences that could have been drawn from the facts as alleged by the complainant and the appellant respectively. Accordingly, these disputed facts and inferences spawn some of the key sub-issues.

[31] Whereas we are hesitant to agree with the manner in which Ms Reid characterised each of the facts she highlighted as constituting an independent substratum of the case, it is nevertheless necessary to address each of these facts in order to determine whether

individually or collectively they are relevant to the issue of the complainant's credibility. If they are relevant, an additional and natural enquiry flowing therefrom is whether the directions of the learned trial judge were adequate or whether she should have gone further in assisting the jury by demonstrating to them how each of these facts could assist or influence their view of the complainant's credibility and by extension, the case of the defence. We will consider each of the key facts identified by counsel in turn, albeit not necessarily in the order in which counsel addressed them.

The purpose of the $2000.00

[32] A fact in issue was whether the complainant spoke to the appellant after they returned and demanded that she be given $2000.00 immediately, failing which she said that she would make life miserable for him.

[33] In support of her submission that the learned trial judge failed to adequately address the purpose of the $2000.00, Ms Reid took issue with the portion of the summation on page 61 lines 9-19 where the learned judge made the following statement to the jury:

> "… You will have to ask yourselves, do you find it strange that on the version put forward by the defence, that she was in a jovial mood and then she changes to demanding money and accusing him of rape, because she didn't get it? She went so far as to tell a relative that she was raped when she got to the dorm and she's still maintaining this to this day. Do you believe that it is a lie, that she's maintaining this lie for all this time, because she did not get the $2000? …"

[34] Ms Reid's first complainant was that the learned trial judge incorrectly characterised as "demanding", the manner in which the appellant testified that the complainant sought the $2000.00 from him. The WHSmith Concise English Dictionary defines 'demand' to include; 'to request peremptorily or urgently'. That is the common usage of the term and sense in which we believe the jury would have understood the word. There is therefore ample evidence from the appellant, that the complainant

"demanded" $2000.00 from him. Accordingly, we do not find any error in the learned trial judge's characterisation of the appellant's evidence of the complainant's request.

[35] In our opinion, the failure of the learned trial judge to have repeated at that juncture (page 61 of the summation quoted above), that the complainant was demanding the $2000.00 specifically for a "morning-after pill" cannot, in our opinion, be considered a failure to put the substratum of the case to the jury.

[36] Ms Reid has submitted that in order to assess the appellant's complaint that the learned trial judge failed to adequately address the purpose of the $2000.00 as comprising a substratum of the case, the demand has to be placed in the context of the defence's theory of the case. The defence case, she argued, is that the appellant and the complainant were in a relationship. The complainant was concerned about the possibility of getting pregnant following their consensual sexual intercourse and so she demanded $2000.00 to purchase a "morning-after pill" which the appellant said he would give to her on Thursday evening.

[37] We have not seen any indication in the summing up of the learned trial judge that this theory of the complainant being fearful of getting pregnant, was specifically put to the complainant. However, we understood Ms Reid to have postulated that this notion of fear of pregnancy on the part of the complainant, could be deduced from the evidence of the appellant that the complainant asserted that the purpose of the money was to purchase a morning-after pill. This is because it is not in dispute that the morning-after pill is used to prevent pregnancy.

[38] Ms Reid posited, that the evidence of the appellant, was that when he offered to give the money to the complainant on Thursday, she said then would have been too late, and so it may be inferred that the appellant in not acceding to her request, did not acknowledge and/or appreciate the immediacy of the need. Ms Reid theorized, that the appellant offering to provide the money on Thursday afternoon, created bitterness on the complainant's part, and as counsel expressed it "…for that reason she cried rape just in

case she might have gotten pregnant (a deep substratum)". As framed by Ms Reid, these are arguably two separate reasons for the complainant alleging that she was raped (a) the complainant was bitter because she did not get the $2000.00 she asked for to buy a morning-after pill, and (b) it was a pre-emptive explanation in the event that she became pregnant.

[39] The plinth of Ms Reid's complaint is that the learned trial judge misrepresented the complainant's motive for lying which was being advanced by the defence. This is because the learned trial judge, she says, framed the defence as one which was capable of suggesting to the jury that the complainant claimed that she was raped simply because she did not get $2000.00, whereas the case, which the defence wanted to be made clear to the jury, was much more nuanced than that. The point the defence wished to emphasise, was, that, the complainant alleged rape because she did not get $2000.00 for the specific purpose of purchasing a "morning-after pill".

[40] The point, as articulated by Ms Reid, was that this is a distinction that would have been important in how the jury would have perceived the motive the complainant had to lie. The argument advanced before us by counsel was that the jury might have scoffed at the suggestion that the complainant lied simply because the appellant did not agree to immediately give her $2000.00, for an unspecified purpose. This would have undermined the defence. However, the jury was much more likely to have considered as probable, that the complainant lied because the appellant did not agree to immediately give her $2000.00 for the specific purpose of purchasing a "morning-after pill" that she needed after she just had consensual sexual intercourse with him.

[41] The argument, taken to its logical conclusion, was that, had the learned trial judge made the case of the defence clear in this regard, it would have provided the jury with an understandable, relatable and believable motive for the complainant to lie, and in fact, would have identified two possible planks of that motive. Counsel maintained that these planks were firstly, the complainant's bitterness brought about by the appellant's

response, and secondly her desire to provide a pre-emptive explanation in the event that she became pregnant.

[42] Whereas Ms Reid, with the benefit of hindsight, has advanced this finely nuanced theory of the defence case before us, there is no indication from the learned trial judge's summing up that an equally pellucid and refined defence was deployed at the trial. We are therefore constrained to assess the fairness of the approach of the learned trial judge to the summing up, based on the primary facts which both counsel agree were before the jury for its consideration.

[43] It is clear from the summation that the learned trial judge reminded the jury that during cross-examination, the complainant initially said she did not speak to the appellant after they returned to the campus but in response to the suggestion that she told him that if she did not get the money, she would make life miserable for him and that he would not be able to come back to school, she said she did not remember. It was also pointed out that, in re-examination, when asked to clarify whether she spoke to the appellant after they returned to campus, the complainant said she did not remember. The learned trial judge asked the jury (at page 37 of the summation) whether having spoken to the appellant after the incident is something the complainant would not remember and asked them to consider if it affected how they viewed her evidence in general, or just that aspect of it.

[44] The trial was a relatively short one in which the verdict was handed down on the third day. During her review of the evidence the learned trial judge reminded the jury that the evidence of the appellant was that the complainant demanded $2000.00 for a morning-after pill, and said that if she did not get it immediately, she would make life miserable for him. If the jury accepted the evidence of the appellant in this regard, then there was only one purpose which he said the money was for. The purpose of the demand for the money would therefore have been obvious to the jury if they accepted the evidence of the appellant on this issue.

[45] There was no other purpose for the money raised during the trial and, accordingly, any reference to "the $2000.00" by the learned trial judge could only have been reasonably understood by the jury to be a reference to the $2000.00 for the purpose of purchasing a "morning-after pill". Furthermore, near to the close of her summation, the learned trial judge, at the suggestion of Crown Counsel, reminded the jury that if there are some aspects of the evidence that she did not bring to their attention that they considered important, they were to consider it. The possibility that the jury would have forgotten the purpose of the money as being for a morning-after pill was, therefore, very unlikely.

[46] If the jury accepted the evidence of the appellant on this fact in issue, and the contents of the conversation that the appellant asserted, it was open to them, using their collective experience, to decide what were the possible reactions of the complaint to the appellant saying he would provide the money on Thursday evening when the complainant said she wanted it immediately. More specifically, whether her reaction was to say that he had raped her. Whether her reason for saying so was because of (a) bitterness; and/or (b) as a pre-emptive explanation in the event she became pregnant, were inferences or conclusions to which the jury may or may not have arrived.

[47] We have determined that these two reasons for a motive to lie, were not specific reasons that the learned trial judge was required to introduce to the jury as possible inferences that they could have made. This is because the learned trial judge had reminded the jury of the evidence of the subsidiary fact in dispute which was whether the complainant made a demand of $2000.00 for a "morning-after pill". To borrow Ms Reid's characterisation, the specific motive that the complainant may have had was a "deep substratum" of the case. Accordingly, in our view, the learned trial judge was not required to descend to that level or depth, in fairly giving assistance to the jury.

[48] We have concluded that the learned trial judge provided the jury with sufficient directions in order to assist them in determining the relevance of the demand for the $2000.00 to the main substratum of the case, which was the issue of the complainant's

credibility, the resolution of which would have enabled them to determine the ultimate issue, which was whether the complainant consented to having sexual intercourse.

The complainant's conduct after sexual intercourse

[49] Ms Reid attached much significance to the evidence of the complainant that she asked the appellant to be let out through the back door because she did not want anyone to think that she had done something wrong. Counsel suggested that the learned trial judge should not just regurgitate the evidence but show it to the jury for their consideration, "… why would she think that people would think that she did something wrong". Furthermore, this was the complainant's first opportunity after the incident to communicate with someone at the bar or her friends.

[50] We do not share counsel's view of the importance of the complainant's evidence of going through the back door. It is undisputed that she did so. Her having done so is equally consistent with her having consented or not having consented. This is because it is understandable why a young female might not wish to have patrons of the bar wonder what she was doing with the accused, for approximately 15 minutes on the evidence of Malik Hamilton, after they left through the passage. It is a universally accepted fact that victims of rape often feel a sense of guilt and shame. It is also noteworthy that the appellant said after they had sex the bar had gotten crowded and he asked her if she wanted to exit around the back. So, even the appellant who asserted that sexual intercourse was consensual, and who presumably was of the view that he had done nothing wrong, thought at the time that it was appropriate for her to take the route through the back door. Accordingly, there is nothing particularly significant about the complainant's evidence of being concerned that persons might think that she had done something wrong.

[51] Another fact in issue was whether the complainant left the bar ahead of the appellant and his friends and walked back to the campus, passing a police station on the way. The learned trial judge reminded the jury that in cross-examination, the complainant initially denied the suggestion that she walked back to campus with the appellant and his

friends and that she also stopped at the gas station. However, subsequently, when it was suggested to her that they all stopped at the gas station and she was offered a drink and said all she wanted was a phone card, her response was that she did not remember.

[52] The learned trial judge at page 38 of her summation also gave sufficient directions on other elements of the complainant's conduct after the incident and the significance of the first complaint being to her cousin (having passed a police station).

> "Now, you are all adults and by the way, you might have come to have some amount of life's experiences and you probably have noted that persons who have gone through a traumatic incident, their responding and the way how they behave. Just her not going to the police right away, if she had been raped, casts doubts on her account? Could her going straight to her dorm, she discovered what she said, what she had just gone through, or do you find that her account casts doubt on her account? What do you make of her saying that she wanted to speak to her cousin whom he said she trusts and whom she felt comfortable telling? Now, it is for you to decide what happened to her and for you to determine what you make of her reaction, but what I will say to you, is something that we probably notice each day, that people are different and people respond differently and we see it everyday. For instance, you will hear that someone had been killed on the street, and you will find that some people would run in that direction to see the body, and you will see that other people going in an opposite direction. So people respond differently to different things, so you have to bear that in mind when you look at her behaviour. The fact that it may be different from how you would have reacted, doesn't necessarily means [sic] that it is untrue. It could be that it is a lie and it could be that she lied, but you have to look at it in that context, to determine whether or not you believe her or whether you disbelieve her."

We have concluded that this portion of the complainant's evidence related to her conduct after the incident, did not require any additional treatment by the learned trial judge. It was open to the jury to consider it along with all the evidence in assessing her credibility by applying the guidance given to them by the learned trial judge.

The photographs and the complainant's evidence of needing a break from school

[53] Counsel questioned why the complainant would have sent photographs of herself to the appellant whom she had only met three to three and a half weeks before and suggested that this was somehow unusual.

[54] The jury was quite capable of attaching any significance they wished to the sharing of photographs in assessing the complainant's credibility especially as it related to her evidence that the appellant and herself were only friends. There is no basis on which it can be reasonably suggested that the sharing of pictures by young adults who are friends in today's smartphone-based world is indicative of any special relationship which should lead the learned trial judge to comment on that. The fact that they were on the same campus and may have seen each other every day is of no significance. Sharing a picture with a friend in the context of today's society is quite normal and is not indicative of an intimate relationship.

[55] As it relates to the complainant saying she felt like she needed a break after three and a half weeks of school we find nothing unusual about that which required the learned trial judge to comment. The complainant was living in a dorm and one could understand the feeling of a student needing a break from the campus after that time period.

The appellant's possession of the knife

[56] Counsel submitted that the fact that the appellant kept the knife he had used whilst committing the offence of rape is illogical behaviour and inconsistent with his guilt. Accordingly, the learned trial judge should have highlighted this fact. We do not agree. Many persons who commit sexual offences do not think that they will be arrested and charged. Persons who commit crimes often do not necessarily focus their attention on eliminating all the incriminating evidence of the crime. Therefore, to suggest that it was somehow a natural step for the appellant to have discarded the knife if it was used in the commission of rape is not borne out in reality. Consequently, it needed no additional comment by the learned trial judge in order to place this in the forefront of the jury's

mind. In any event, the jury by their verdict found that the knife was not used, but nevertheless found the appellant guilty of rape and indecent assault.

Conclusion on ground 1

[57] In our view, this is not a case in which it can reasonably be advanced that the learned trial judge failed to properly address the substratum of the case. The learned trial judge adequately addressed the issue of the complainant's credibility and gave the jury sufficient directions in respect of the facts which could have assisted them in making a determination as to her credibility. The result was that the learned trial judge fairly put the defence to the jury as she was obliged to do.

[58] We find that there is no merit in this ground of appeal.

Ground 2

The submissions

[59] The essence of Ms Reid's complaint on this ground was that despite there being no legal requirement for the learned trial judge to give a corroboration warning, she ought to have done so since one was appropriate given the facts of this case.

[60] In response, the Crown submitted that section 26 of the Sexual Offences Act provides that it shall not be necessary for a corroboration warning to be given, but that the trial judge may, where it is appropriate to do so, give a warning to the jury to exercise caution in determining whether to accept the complainant's uncorroborated evidence, and the weight to be given to such evidence. It was further submitted that, in addressing the issue of the complainant's credibility and the nature of these types of cases, the learned trial judge had given an appropriate direction to the jury at page 47 lines 2 to 16 of the summation.

Analysis

[61] In **Mervin Jarrett v R** [2017] JMCA Crim 18, Morrison P, writing on behalf of the court, made the following observation at para. [18]:

> "[18] We will first say a word on the matter of corroboration. By section 26(1) of the Sexual Offences Act 2009, there is now no mandatory requirement for a corroboration warning in relation to the evidence of the complainant in a sexual case. Instead, as section 26(2) provides, the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining (a) whether to accept the complainant's uncorroborated evidence; and (b) the weight to be given to such evidence. These provisions reflect the position to which the common law had already come, as demonstrated by the decision of the Privy Council in **R v Gilbert** [2002] UKPC 17 (applying **R v Makanjuola**; **R v Easton** [1995] 1 WLR 1348), which confirmed that the question whether to give a corroboration warning in sexual cases was a matter for the discretion of the trial judge (see also the decision of this court in **R v Prince Duncan & Herman Ellis**, SCCA Nos 147 & 148/2003, judgment delivered 1 February 2008)."

Morrison P referred to the case of **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 and reinforced the applicability of what he described as the "standard appellate court doctrine governing review of the exercise of a judicial discretion", which is that this court will be loath to interfere unless it can be shown that the judge exercised it on an erroneous basis or principle.

[62] In the case under consideration the learned trial judge did not give a corroboration warning in the strict sense by using that term, but gave the following caution to the jury at page 47 of the summation, which the Crown argued was sufficient in the circumstances:

> "In doing this, in examining whether the crown has proven its case, as I said, it is the credibility of [the complainant] that the case largely turned on, and it largely is a question of her words against him. And as I say that, I want you to bear in mind, that it is relatively easy to make an allegation of this

> nature and some may say difficult to disprove, but let me quickly add, remember Mr. DeSouza has nothing to prove or disprove. So it's very important that you scrutinize the evidence carefully, bear in mind also, that these offences are generally committed in private, without being witness, [sic] so it is often difficult to deny these offences. So, I have dealt with the prosecution's case. Let me now turn to the case of the accused man, Mr. DeSouza."

Conclusion on ground 2

[63] In our view, it was entirely a matter for the judge to determine whether she would give a corroboration warning or any warning at all and, if so, in what terms. The learned trial judge emphasized the need for the jury to approach the complainant's evidence carefully, bearing in mind that it was largely a question of her word against the appellant's, and it was easy to make an allegation of this nature but difficult to disprove. It was, therefore, clearly brought home to the jury the need for caution and the reason for the caution, in analysing the complainant's evidence. This, in our view, was sufficient in the circumstances of the case and we agree with the submissions of the Crown in this regard. Accordingly, we find that there was no merit in this ground of appeal.

Ground 3

The submissions

[64] Ms Reid did not pursue any arguments in respect of the sentence imposed for the offence of indecent assault. Instead, counsel concentrated on the sentence for the offence of rape. It was submitted that the learned trial judge quite correctly issued a certificate pursuant to section 42K of the Criminal Justice Administration (Amendment) Act ('the CJAA'). However, counsel submitted that the sentence of 11 years suggested by the learned trial judge was still manifestly excessive in the circumstances of the case at bar. Counsel submitted that the appropriate sentence was one of nine years with a stipulation that the appellant serves a period of not less than two-thirds of this new sentence.

[65] The Crown did not take any issue with the appropriateness of the learned trial judge issuing a certificate pursuant to section 42K of the CJAA. It was submitted that the suggested approach of the learned trial judge of using a starting point of 15 years and reducing it by four years to arrive at a sentence of 11 years' imprisonment would not be manifestly excessive in the circumstances of the case at bar. Counsel urged the court to adopt the recommendation of the learned trial judge and to stipulate that the appellant serves two-thirds of the sentence which would be seven years.

Analysis

[66] There was no issue raised as to the learned trial judge issuing a certificate pursuant to Section 42K of the CJAA. Section 42K (1) provides for the learned trial judge to issue a certificate in respect of an appeal in certain circumstances as follows:

> "42K (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall –
>
> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence."

[67] Both counsel acknowledged that the certificate issued by the learned trial judge does not bind this court. In that regard, section 42K (3) is instructive. It provides as follows:

> "(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may-

> (a) impose on the defendant a sentence that is below the prescribed minimum penalty; and
>
> (b) Notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[68] We agree with the decision of the learned trial judge and we find that there are compelling reasons that would render the minimum sentence of 15 years for the offence of rape manifestly excessive and unjust given the facts of this case and the circumstances of the appellant. Nevertheless, we wish to reiterate, as this court has done on numerous occasions, that the offence of rape is an egregious violation of the body and psyche of the victim, which explains the legislature's enactment of a minimum sentence.

[69] In assessing what is an appropriate sentence for the offence of rape, in this case, we consider the sentencing range of 15 to 25 years' imprisonment and utilise the usual starting point of 15 years suggested in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017. We have concluded that these recommendations are appropriate on the facts of this case.

[70] In considering the particular circumstance of this case, we have noted that the jury was not convinced beyond a reasonable doubt that the appellant used a knife in the commission of the offence. By their verdict, they have found that the force used by him was no more than was necessary to overcome her resistance.

[71] Whereas there is some betrayal inherent in every rape where the victim is previously known to the assailant, we are unable to agree with the learned trial judge that because the appellant and the complainant were friends, his conduct would have amounted to a betrayal of this friendship which would be properly regarded in law, as an independent aggravating factor. Similarly, we do not agree with the learned trial judge that the age of the complainant, being 19 years old at the time of the offence, would be an independent aggravating factor. We do not consider that it would be so, particularly having regard to the relatively small disparity between the ages of the complainant and

the appellant at the time of the offence. The appellant was then 22 years of age. Accordingly, we have found that there were no aggravating features relevant to the commission of the offence.

[72] As it relates to the circumstances of the offender, the appellant, we accept that there are a number of mitigating factors. He has no previous convictions. At the time of the offence, he was 22 years of age and was enrolled in an educational institution. We agree with the learned trial judge that this suggests that he is a progressive and ambitious individual with potential. The appellant also received a positive social enquiry report, and the members of the community in which he resided expressed shock on learning of his conviction because, in their view, such behaviour was uncharacteristic of him. We are accordingly of the view that he is a young offender in respect of whom rehabilitation as an objective of sentencing should weigh in his favour.

Conclusion on ground 3

[73] Having balanced the aggravating and the mitigating factors, we conclude that the appropriate sentence is a term of nine years' imprisonment at hard labour, from which the period of three months and 10 days spent in custody on pre-sentence remand will be deducted, which results in a sentence of eight years, eight months and 20 days' imprisonment.

[74] Whereas we have used the methodology proposed in **Meisha Clement v R** [2016] JMCA Crim 26 as modified by **Daniel Roulston v R** [2018] JMCA Crim 20 in arriving at the sentence for rape, the court is required by section 42K (3)(b) of the CJAA to specify a period of not less than two-thirds of the sentence we have imposed which the appellant shall serve before becoming eligible for parole. We, therefore, specify that the appellant shall serve six years' imprisonment at hard labour before becoming eligible for parole.

Disposition

[75] For the reasons expressed herein, we make the following orders:

1. The application for leave to appeal against conviction is refused.

2. The appeal against sentence is allowed in part.

3. The sentence on count 1, of three years and two months' imprisonment at hard labour for indecent assault, is affirmed.

4. The sentence on count 2 of 15 years' imprisonment at hard labour for rape, is set aside, and substituted therefor is a sentence of eight years, eight months and 20 days' imprisonment at hard labour (with three months and 10 days spent on pre-sentence remand having been credited), with the stipulation that he serves six years' imprisonment at hard labour before becoming eligible for parole.

5. The sentences are to be reckoned as having commenced on 19 December 2019, the date they were imposed, and are to run concurrently.