[2017] JMCA Crim 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 93/2010

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

MERVIN JARRETT v R

Roy S Fairclough for the appellant

Mrs Karen Seymour-Johnson for the Crown

30 January and 31 March 2017

MORRISON P

[1] On 28 and 29 July 2010, the appellant was tried in the Saint James Circuit Court before P Williams J (as she then was) ('the judge') and a jury, on an indictment containing three counts. The first count charged him with abduction, the second indecent assault and the third rape. Upon the appellant's conviction on 29 July 2010, the judge sentenced him to six years' imprisonment for abduction, two years' imprisonment for indecent assault and 12 years' imprisonment for rape, ordering that the sentences should run concurrently.

[2] The appellant sought leave to appeal his conviction and sentence and, on 4 July 2011, after consideration of the application on paper, a single judge of this court granted leave as prayed. The single judge also ordered that a full transcript of the evidence given at the trial should be obtained for the benefit of counsel and the court. Regrettably, for reasons which are not known, the transcript of the evidence did not reach this court until 20 November 2015.

[3] The appeal was finally heard on 30 January 2017. At the completion of the hearing, the court announced that the appeal would be allowed. The appellant's convictions were accordingly quashed, the sentences set aside, and a judgment and verdict of acquittal entered. These are the reasons for the court's decision which were promised at that time.

[4] The case for the prosecution was as follows. At about 8:30 pm on 5 May 2009, the complainant, who was then a 16-year-old schoolgirl in school uniform, was at Sam Sharpe Square in Montego Bay, waiting on a taxi to take her to the Westgate Hills area. The appellant drove up in a white Toyota Corolla motor car and shouted "Mount Salem", which was where the complainant wished to go. The complainant accordingly entered the appellant's car and sat in the seat behind the driver's seat. After leaving Sam Sharpe Square with the complainant as the only passenger in the vehicle, the appellant told her that he was going to the Kentucky Fried Chicken ('KFC') outlet to collect three ladies. There being two KFC outlets in Saint James, the complainant assumed that the appellant was heading for the one that was closest to Sam Sharpe

Square. But, when they got to a stop light in the vicinity of that outlet, the appellant indicated that he was going to the one further away, in the direction of Bogue. The appellant thereafter took the complainant to that KFC outlet. Not seeing the persons whom he was looking for there, he then went into a restaurant called Jerky's on the same compound, only to emerge alone. He drove off again, with the complainant still the lone passenger in the car.

[5] The appellant continued to drive in the opposite direction to Mount Salem, "going toward like you going Negril way", as the complainant put it in her evidence. When the complainant became concerned and asked where he was going, the appellant told her that he was going to a restaurant. They arrived in due course at a restaurant called 'Kokonutz' in the Reading area of Saint James. Leaving the complainant alone in the car, the appellant went into the restaurant, then returned, still alone, and continued driving as if to Negril. This prompted the complainant to ask him again where he was going. He told her that he was going up the road to urinate, since he did not want the police to charge him, as the fine was $5,000.00. He drove up a hill to a secluded area where he stopped on the road and came out of the car. He went towards the back of the car and stood up as if he were urinating. He then re-entered the car and drove off. This prompted the complainant, who was by this time worried and frightened, to ask again, "Driver where you going?", to which the appellant replied that he was going up the road to turn the car around. This done, the car headed back down the hill, when, according to the complainant, "the car began to rock like wobbling", leading the appellant to say, "How it come like one a mi tyre dem buss so". The appellant stopped

the car again, came out, and then re-entered through the back door onto the seat where the complainant was seated. Overcoming her efforts to resist, the appellant proceeded to indecently assault and rape her.

[6] When he was finished, the appellant went back into the driver's seat and drove off. Back in Montego Bay, the complainant told the appellant to let her off at a point on Howard Cooke Boulevard. Immediately upon exiting the car, the complainant noted the licence plate number (5733 FB) of the appellant's car and telephoned her mother. She then set out for her mother's house in Catherine Hall, which was within walking distance of where the appellant had let her off. There, she told her mother everything that had happened. Her sister was also present. Her parents later took her to the Montego Bay Police Station where she made a report and was then taken to the Cornwall Regional Hospital, where she was medically examined.

[7] The complainant was cross-examined at length by counsel who represented the appellant at the trial (Mr Ernest Smith) as to (i) the total amount of time she had spent in the appellant's car that night; (ii) the fact that she at no time told the appellant to let her out of his car so that she could take another taxi; (iii) the fact that, although she had been left alone in the car while the appellant went in to the KFC, Jerky's and the Kokonutz restaurants, she had made no attempt to leave the car, or telephone any of her relatives or friends to tell them where she was or to express fear; and (iv) the fact that she did not complain to the appellant that he was keeping her out too late.

[8] It was suggested to the complainant that she had in fact known the appellant before that night; that he had driven her in his car on several previous occasions; that they had both struck up a "friendly relationship"; that their meeting in Sam Sharpe Square that night was by pre-arrangement; that they had engaged in consensual sexual intercourse that night; that the reason why she went to her mother's house afterwards was because her father was very strict and she was afraid of what he would do as a result of her having come home so late; and that it was after her father was called about how late she had come home that she "then made a report that it is the accused man had raped you [sic]..." All of these suggestions were denied by the complainant. However, in response to the further suggestion that she knew "everything about the accused man and his car", so much so that in her statement to the police she was able to give "a full description and details of the car", the complainant's answer was "I don't remember".

[9] A few days after the incident, on 8 May 2009, the complainant's father, to whom she had given the licence number of the appellant's car, saw a white Toyota motor car bearing the same licence plate number in Hopewell in the parish of Hanover. A man, subsequently identified as the appellant, came out of the car, shouting "Mobay, Mobay". Upon seeing a police jeep coming from the Sandy Bay direction, the complainant's father stopped it and made a report to the police officers who were in the jeep. The officers approached the appellant and told him about the report they had received and asked him about the ownership of the car and who had possession of it on the night of 5 May 2009. According to the police officer, the appellant's response was that he had

loaned the car to a friend but he was unable to provide any information about the friend and the officers took him to the Sandy Bay Police Station.

[10] But it was put to the police officer by the appellant's counsel, in a suggestion which was denied, that the appellant did not tell him that he had loaned out his car on the night in question. And, in his unsworn statement, the appellant said that, when asked if he was the owner of the car, he replied affirmatively and that, in response to the suggestion that he had raped the complainant, he had answered, "Me and [the complainant] have a relationship sometime now".

[11] In due course, after investigation by the police, the appellant was arrested and charged with the offences of abduction, rape and indecent assault. The arresting officer gave evidence that, when cautioned, the appellant said this:

> "Me and har a 'fren for about two weeks now and because me promise fi give har Two Thousand Dollars and me never give har, that's why she go tell har father say me rape har."

[12] In his defence, the appellant made a brief unsworn statement, in which he said that he and the complainant had been involved in a relationship. He did not deny meeting the complainant and having sexual intercourse on the night of 5 May 2009, but said that this was the consensual outcome of a pre-arranged meeting. He said that the complainant told him that she could not go home to her father's house that evening because it was too late and she was going to her mother's house instead; and that she was the one who asked him to drop her off on the Howard Cooke Boulevard. Sometime

later, he was in Hopewell when a police car drove up beside his and, when the officers asked him if he was the owner of the car, he told them that he was. The appellant said that when, in the presence of the police officers, the complainant's father accused him of raping the complainant, his response was that he knew the complainant and that they had had a relationship "some time now".

[13] On this evidence, the judge having summed up the case to the jury, the appellant was convicted and in due course sentenced in the terms we have indicated.

[14] The appellant applied for leave to appeal on the ground that he had had an unfair trial. When the appeal came on for hearing before us, Mr Fairclough for the appellant was content to subsume his argument under that single ground. He submitted that the directions given to the jury by the judge on the question of consent were inadequate, particularly as regards the issue of honest belief; that there was no sufficient analysis for the benefit of the jury of the evidence of the complainant so as to enable them to properly assess her credibility; that the judge had given no warning as to the dangers of acting on the evidence of the complainant without corroboration in these circumstances; and that, generally speaking, the judge had failed to relate her directions to the evidence in the case.

[15] Responding for the prosecution, Mrs Seymour-Johnson conceded that there were what she described as deficiencies in the summing-up, with particular reference to the absence of any directions on honest belief and how to approach the question of the appellant's lie as to whether he was the driver of his car on 5 May 2009. However, Mrs

Seymour-Johnson submitted, this was an appropriate case for the application by this court of the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act ('the Act').

[16] The two live issues at the trial of this matter were the clearly related questions of consent and credibility. As regards the former, in the course of explaining the ingredients of the offence of rape to the jury, the judge said this:

> "But, another important aspect of this case - - of this offence in particular, in relation to this case, is that it must be had without the consent of the complainant.
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> Now, if the complainant yield [sic] to the act, because of fear of death, or fear of being hurt or exhaustion, this is not consent. There is a difference between consent and submission.
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> Now in this case, you do not have to decide who was it who had sexual intercourse with [the complainant]. You do not have to decide whether sex took place, because you have heard from the accused man himself. He's not denying having sex with [the complainant] that night. He is not denying that he drove her in his car up to Spring Garden and had sex with her that night.
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> He denies the various stops she alledges [sic] they made along the way. He denies that what he did, in going away with her, was against her consent, because he said that there was an arrangement. He says that the sex that took place that night, was with her consent. So the important thing for you to decide, is whether or not the consent did take place.
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> So, the important thing for you to decide is whether or not this consent actually existed. The Crown is saying it did not. It is the Crown's case, you have to decide that it did not take place. It is [the complainant's] evidence that you have to consider carefully and determine whether consent took place because in effect, what you now have is his word against

> hers. He does not have to prove anything. It is what she said that must satisfy you so that you feel sure. So, you have to approach your [sic] evidence carefully. There is no other independent evidence as to whether or not consent took place. So, it is her word against his. So, recognizing that there is no independent evidence, no other evidence other than hers that you have, when you consider whether or not consent was there, you approach her evidence carefully and decide whether or not, after you consider it carefully, whether you are satisfied so that you feel sure that she spoke the truth.
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> It is sometimes said in our law that it is easy for a woman to allege being assaulted sexually but it is difficult for a man to disprove it, because the nature of the act is such that it is generally done private, where, inevitably, it is going to end up being his word against hers. That is why when you approach the evidence, you consider it carefully, bearing in mind although there is no independent evidence, if you're satisfied of the strength of her evidence, if she came across to you as a witness who you can believe, certainly, you can accept her evidence and find him guilty, if you believe her. It is only if you do not believe her, if you have any doubts as to whether or not you can believe her, in those circumstances, you would have to find him not guilty."

[17] Further, dealing specifically with the appellant's unsworn statement, the judge said this:

> "Bear in mind that the accused man, having made his statement where he stood, was doing exactly what the law gives him the right to do. You consider what weight to attach to what he has said because, as I said, there is no issue in this case as to who had sexual intercourse with Shanna-Lee Edwards but what Mr Jarrett is alleging was 'making love' because that's what he said he did that night, he 'made love'. You have heard what Shanna-Lee said took place that night and what she has said, do you believe she consented to this man having sex with her? Do you believe that she consented to him pushing his finger up into her vagina? Do you believe that he took her away against her

> will, to some point, other than where she wanted to go, detaining her in that car and having sexual intercourse with her without her consent? That is what you have to decide, madam foreman and your members."

[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).

[19] The question of whether or not to give a corroboration warning in respect of the evidence of the complainant in this case was therefore entirely a matter for the discretion of the judge. Accordingly, on the basis of standard appellate court doctrine governing review of the exercise of a judicial discretion, this court will be loath to interfere unless it can be shown that the judge exercised it on an erroneous basis or principle (as to which see **The Attorney General of Jamaica v John MacKay** [2012]

JMCA App 1). As will be seen from the passage of the summing up set out above, the judge chose not to use the term corroboration at all. Instead, she told the jury that they should approach the complainant's evidence carefully, bearing in mind that there was no independent evidence, and that they could only convict if, after considering her evidence carefully, they were satisfied so that they felt sure that she spoke the truth. In our view, it was entirely a matter for the judge to determine whether she would give any warning at all and, if so, in what terms. It seems to us that in the light of what the judge did say to the jury, they could hardly have failed to appreciate the anxious level of scrutiny which she was inviting them to give to the complainant's evidence.

[20] More troubling though, is the question of the judge's directions on the issue of consent. The first matter which initially caused us some concern relates to whether the jury ought not to have been told that, even if they took the view that the complainant did not consent, they had to be satisfied in order to convict that he did not have an honest belief that she was consenting (see **Director of Public Prosecutions v Morgan** [1975] 2 All ER 347).

[21] But this court has more than once made it clear that, in order for the question of honest belief requiring such a direction to arise, there must on the evidence be, as Bingham JA put it in **R v Clement Jones**, SCCA No 5/1997, judgment delivered 27 April 1998 –

> "... room ... for any suggestion that the [defendant], based on the complainant's conduct, may either have obtained mixed signals or got his signals all wrong and had indulged

> in sexual intercourse with the complainant in the mistaken belief that she was consenting when in fact she was not."

[22] In the later case of **R v Aggrey Coombs**, SCCA No 9/1994, judgment delivered 20 March 1995, the applicant and the complainant were well known to each other. The applicant admitted having sexual intercourse with the complainant, but said he had done so with her consent and that sexual intercourse had taken place by arrangement. In delivering the judgment of the court, which rejected a submission that an honest belief direction ought to have been given, Wolfe JA (as he then was) said this:

> "This clearly was not an honest belief situation, consequently no direction on honest belief was required. While it is incumbent on a trial judge to leave for the consideration of the jury every defence which properly arises on the evidence, there is no obligation on a trial judge to leave to the jury fanciful defences for which there is no evidential support and trial judges should not indulge in this kind of patronage.
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> The question of honest belief in a case of rape only arises where the man misreads or misunderstandings the signals emanating from the woman. What the defence of honest belief amounts to is really this: I had sexual intercourse but I did so under the mistaken belief that she was consenting. That plainly was not what the applicant put forward as his defence."

[23] Most recently, in **Michael Reid v R** [2011] JMCA Crim 28, a case in which there was a direct clash of credibility between the complainant, who contended that the appellant had had sexual intercourse with her without her consent and the appellant, who admitted having had sexual intercourse with her but maintained that it was with

her consent, the question of whether an honest belief direction (which the trial judge in that case gave) ought to have been given again arose. This court considered (per Hibbert JA (Ag) at para. [21]), applying **Clement Jones** and **Aggrey Coombs**, "that the issue of honest belief did not really arise".

[24] Similarly, in the instant case, as it now seems to us, there was nothing in the evidence - or on the appellant's unsworn statement – to suggest that there was any question of a misreading by the appellant of a mixed signal or signals given by the complainant, therefore giving rise to the possibility that he may have entertained an honest belief that she was consenting to sexual intercourse. Rather, the case turned entirely, as the judge more than once told the jury, on whether the complainant's evidence satisfied them that she did not consent to sexual intercourse with the appellant. So the case was, again, a straight contest of credibility.

[25] But the yet further question arises whether, in summing up the case to the jury, the judge gave them sufficient assistance with regard to the aspects of the evidence which could have been seen as lending some support to the appellant's defence of consent. In other words, did the judge take sufficient steps to relate her directions in law to the evidence in the case?

[26] In this regard, we have in mind in particular the matters with which the complainant was taxed by counsel for the appellant in cross-examination. These related, as we have indicated (see para. [7] above), to the total amount of time that the complainant had remained in the appellant's car that night, without apparent

complaint; the absence from the evidence of any suggestion that she had asked the appellant to let her out of his car so that she could take another taxi; and the fact that, despite having had more than one opportunity to do so, she had made no attempt to leave the car, or telephone any of her relatives or friends to tell them where she was or to express fear. While none of these matters, either taken singly or in combination with each other, could provide a decisive indication that the complainant consented to sexual intercourse with the appellant, they were clearly critical components of the context in which the jury was required to consider the appellant's challenge to the prosecution's case. So, while the jury was told – correctly - that "the important thing for you to decide is whether or not this consent actually existed", it seems to us, with the greatest of respect to the experienced judge, that in this case the judge was obliged to have gone further by reminding the jury of these aspects of the evidence and pointing out to them their potential significance to the appellant's case. In our view, as Mr Fairclough submitted, these were matters which were plainly capable of impacting the complainant's credibility and ought therefore to have been identified as such and left for the jury's consideration.

[27] In addition to this, Mrs Seymour-Johnson quite properly brought to our attention that, despite pointing out to the jury that the prosecution relied on the statement attributed to the appellant by the complainant's father when he was first accosted by the police in Hopewell (that he had loaned out his car to a friend on the night on 5 May 2009 - see para. [9] above), the judge omitted to give the jury a 'Lucas' direction.

[28] The point arises in this way. The appellant's case at trial was that the car was in fact in his possession that night and that he and the complainant had had consensual sexual intercourse in it. This is what the judge told the jury about the appellant's alleged statement to the police:

> "... the police officer himself tells you that he told the accused man that he had received information that the car he owned was used to take a young girl ... into a section of St. James, where she was raped. So, you heard what the prosecution is saying the accused man's initial response was. They are saying that his initial response was to deny driving the car on that night. He said he had either lent it out or rented it out to a friend. This is what they're saying was his initial response, when he was confronted.
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> They are saying that he was unable to say who the friend was. He was unable to say where the friend lived. He was unable to tell them if he had any contact with the friend but when first confronted about the allegation, he denied using the car on that night. It was suggested to the officer that what the accused man actually told them was that he and [the complainant] were friends. It was suggested to the father that he was told that he and [the complainant] were in a relationship ... you had the suggestions being put, you saw the witnesses, they denied the suggestions, you have to decide what you make of it."

[29] Mrs Seymour-Johnson referred us to **R v Lucas** [1981] 2 All ER 1008 and **R v Goodway** [1993] 4 All ER 894. In **Lucas**, the issue was whether a proved lie told by the defendant, whether out of court or while giving evidence in court, could ever amount to corroboration of the evidence given against him by a prosecution witness (in this case by an accomplice). In answering this question in the affirmative, Lord Lane CJ said this (at page 1011):

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.
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> As a matter of good sense it is difficult to see why, subject to the same safeguard, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration."

[30] And in **Goodway**, which was a case of disputed identification, Lord Taylor of Gosforth CJ drew attention (at page 901) to the earlier decision of the Privy Council in **Broadhurst v R** [1964] 1 All ER 111, 119-120. In that case, Lord Devlin, giving the advice of the Board, explained the underlying rationale for such a direction:

> "It is very important that a jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so ... But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness.
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> That is the sort of direction which it is at least desirable to give to a jury."

[31] In **Goodway**, Lord Taylor CJ also referred to his own previous judgment in **R v Richens** [1993] 4 All ER 877, 886, given a few month earlier, in which he concluded that the obligation on a judge to give a 'Lucas' type direction was governed by the broad proposition identified by Lord Devlin in **Broadhurst**, and was not confined to corroboration or identification cases:

> "In principle ... the need for a warning along the lines indicated is the same in all cases where the jury are invited to regard, or there is a danger that they may regard, lies told by the defendant, or evasive or discreditable conduct by him, as probative of his guilt of the offence in question. It will be recalled that an analogous warning is required in relation to alibi evidence which the jury may conclude is false."

[32] These decisions therefore provide ample support for the proposition that wherever there is a danger that the jury may regard a statement made by the defendant, which they find to be a lie, as probative of the defendant's guilt of the offence for which he is currently on trial, the judge should, in language appropriate to the facts of the particular case, warn them against such a conclusion, pointing out that the defendant's lie could also have been motivated by reasons other than guilt.

[33] In this case, the clear implication of the prosecution's reliance on what the appellant was alleged to have said to the police when he was accosted in Hopewell on 9 May 2009 must have been that, if the jury were to find that he did say this, this had been proved to be a lie by his own subsequent statement at trial that he was in fact in possession of the car on the night in question. So in these circumstances, it seems to

us, the prosecution must have been inviting the jury to find that the appellant lied on this point and that this lie supported the complainant's version of events. In these circumstances, we considered that the judge ought to have given the jury a 'Lucas' direction, suitably adapted to the facts of the case, pointing out that, upon his first being confronted by the police, in the presence of the complainant's father, with the allegation that he had abducted and raped the complainant on the night of 5 May 2009, he could have been prompted by factors other than guilt to tell a lie. We therefore think, in agreement with Mrs Seymour-Johnson's very helpful submissions on this point, that this was a non-direction which amounted to a misdirection by the judge.

[34] At the conclusion of the hearing of this appeal, we accordingly came to the conclusion that the appellant was entitled to succeed on the two bases which we have identified: that is, that the judge failed (i) to give the jury any or any sufficient assistance on how to approach the evidence relating to the appellant's defence of consent; and (ii) to give a 'Lucas' direction in respect of the evidence which suggested that the appellant told a lie to the police when he was first confronted with the allegation that he had abducted and raped the complainant.

[35] This brings us, then, to the question of how best to dispose of the case. As we have indicated, Mrs Seymour-Johnson submitted that this was an appropriate case for the application of the proviso to section 14 of the Act, which provides that the court may, "notwithstanding that they are of opinion the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no

substantial miscarriage of justice has actually occurred". Among other things, Mrs Seymour-Johnson urged that the complainant's credibility remained intact at the end of the prosecution's case and referred to her conduct in reporting the incident to her mother and noting the licence plate number and colour of the appellant's motor vehicle. Mr Fairclough for his part observed that resort to the proviso should be reserved for cases in which the evidence of guilt is overwhelming and submitted that this was not such a case.

[36] In **Stafford and Carter v The State** (1998) 53 WIR 417, the Board considered the Trinidad and Tobago equivalent to section 14 (section 44(1) of the Supreme Court of Judicature Act). Citing in support the well-known decision of the House of Lords in **Woolmington v Director of Public Prosecutions** [1935] AC 462, Lord Hope of Craighead observed (at para. 9) that "[t]he test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence". In the subsequent case of **Dookran and another v The State** [2007] UKPC 15, the Board emphasised (at para. 12) that the true test is not whether a reasonable jury might well have convicted, as the Court of Appeal appears to have considered, but whether they would "inevitably" have convicted.

[37] As Lord Hope went on to explain in **Stafford and Carter**, where, as in this case, the verdict of the jury is criticised on the ground of misdirection, "the application of the proviso will depend upon an examination of the whole of the facts which were before

the jury in the evidence". In this case, taking into account the significance to the appellant's defence of the two matters in respect of which we concluded that the judge failed to give the jury the assistance which the circumstances of the case required of her, we found it impossible to say that, had the jury been properly directed, they would inevitably have convicted. On this basis, therefore, we declined to apply the proviso.

[38] The final question which arose was whether we should, in accordance with section 14(2) of the Act, allow the appeal and order a new trial in the interests of justice or direct the entry of a judgment and a verdict of acquittal. Mrs Seymour-Johnson submitted that we should do the former, while Mr Fairclough submitted that we should do the latter.

[39] As regards the criteria for an order of retrial, the relevant principles were recently comprehensively reviewed by Brooks JA, giving the decision of this court, in the case of **Morris Cargill v R** [2016] JMCA Crim 6 (at paras [60]-[61]):

> "[60] Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, 'if the interests of justice so require'. In **Dennis Reid v R** (1978) 16 JLR 246, the Privy Council ruled that a 'distinction must be made between cases in which the verdict of the jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder' (see the headnote). In delivering the judgment of the Board, Lord Diplock pointed out that a number of considerations should factor into the decision of whether or not to order a new trial. He said at pages 250-251:

'... It is not in the interests of justice as administered under the common law system of criminal procedure that the prosection [sic] should be given another chance to cure evidential deficiencies in its case against the Accused. At the other extreme, where the evidence against the Accused at the trial was so strong that any reasonable jury is properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso to s. 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the Accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

> The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery". This was said by the Full Court of Hong Kong when ordering a new trial in Ng Yuk Kin v Regina (1955) 39 H.K.L.R. 49 at p. 60. This was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone.'

[61] Their Lordships stressed that the factors, to which they had referred, did not pretend to constitute an exhaustive list. These considerations have been approved in a number of recent Privy Council cases such as **Nicholls v R** [2000] UKPC 52; (2000) 57 WIR 154, **Bennett and Another v R** [2001] UKPC 37; [2001] 5 LRC 665 and in judgments handed down by this court, such as **R v Sergeant** (2010) 78 WIR 410 and **Kenrick Dawkins v R** [2015] JMCA Crim 23. These authorities also suggest that the weight to be

> attached to the factors stated in **Reid v R** depends on the particular facts of each individual case."

[40] There is no question that the offences for which the appellant was charged in this case are offences of the utmost seriousness. Our conclusion that the appeal should be allowed was arrived at purely on the basis of non/misdirection by the judge, and not as a result of any fundamental deficiencies in the evidence relied on by the prosecution. In these circumstances, it might well appear that, on the face of it, an order for a new trial might have been an appropriate outcome in this case.

[41] But, on the other hand, we considered it relevant and necessary to bear in mind that, firstly, the offences with which the appellant was charged allegedly took place in May 2009, that is, almost fully eight years ago; and secondly, he was convicted and sentenced on 30 July 2010, now approaching seven years ago. The importance of lapse of time will naturally vary from case to case, but it may assume special significance because of the circumstances of a particular case. In this case, the appellant received concurrent sentences of two, six and 12 years respectively. The effect of this is that, as of 30 January 2017, which is the date on which we allowed the appeal, the appellant would have been just over a year short of having served two thirds of the longest period of imprisonment to which he was liable. Under the provisions of section 6(2) of the Parole Act, he would therefore become eligible for parole at the end of that period. In addition to which, quite apart from the question of parole, he would also become eligible for consideration for early release upon satisfactory completion of two thirds of

that sentence (pursuant to rule 178 of the Correctional Institution (Adult Correctional Centre) Rules, 1991).

[42] While neither of these factors is necessarily decisive, we considered them to be of importance to the question of whether to order a new trial in this case, particularly given the fact that no blame of any kind could be attributed to the appellant for the time it has taken for his appeal to come on for hearing. In all the circumstances, therefore, we came to the conclusion that an order for a new trial, which would necessarily entail another period of inevitable delay, would not have best served the interests of justice in this case.

[43] These are the reasons for the decision which we gave on 30 January 2017, the full terms of which are set out at paragraph [3] above.