[2024] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00030

DONDRE LEWIS v R

Terrence Williams and Miss Celine Deidrick for the appellant instructed by John Clarke

Mrs Andrea Martin-Swaby and Miss Cygale Pennant for the Crown

21, 22, 23, 30 March, 28 April 2023 and 18 October 2024

Criminal law –– Rape – Whether evidence of recent complaint – Trial judge's directions on evidence treated as recent complaint – Honest belief that complainant was consenting as defence to offence of rape – Whether honest belief arose on the evidence – Whether Trial judge's treatment of defence adequate – Good character – Whether the trial judge properly addressed the appellant's good character when assessing his evidence – Whether the sentences were manifestly excessive – Sexual Offences Act, Section 3(1)

F WILLIAMS JA

Background

[1] This appeal arises from the conviction and sentencing of Dondre Lewis ('the appellant') for the offences of: (i) rape, contrary to section 3(1) of the Sexual Offences Act ('the Act'), which was count one; and (ii) grievous sexual assault, contrary to section 4(1)(a)(i) of the Act, which was count two. The appellant was convicted in the Home Circuit Court, at King Street, Kingston, by a judge ('the learned trial judge') sitting without a jury, on 18 January 2019. On 29 March 2019, he was sentenced to 15 years' imprisonment at hard labour on count one and 15 years' imprisonment at hard labour on

count two, with the stipulation that he serve a period of 10 years before becoming eligible for parole, and with both sentences to run concurrently.

The application for leave to appeal

[2] The appellant, being dissatisfied with the outcome of his trial, made an application for admission to bail before this court which was refused on 29 December 2021. The appellant also subsequently filed an application for leave to appeal against his conviction and sentences which was granted by a single judge on 10 March 2023.

The decision

[3] After hearing the appeal over several days, on 28 April 2023, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The convictions are quashed, the sentences are set aside, and judgments and verdicts of acquittal are entered."

[4] This judgment is a fulfilment of our promise, made then, to provide brief reasons for making those orders.

Summary of evidence at trial

The Crown

[5] The brief facts are that on 19 August 2014, the 15-year-old complainant was at her home in the parish of Saint Andrew when the appellant, then 18 years of age, entered her home. The parties were neighbours and knew each other since they were children. The Crown's case was that, without the complainant's consent and knowing that she did not consent, the appellant inserted his finger into the complainant's vagina and then had sexual intercourse with her, whilst she lay on her bed and despite her physically resisting him and telling him to stop.

[6] The complainant testified that, several days later, she told a friend of her mother what had happened. Her mother was subsequently informed, and the matter was

reported to the police. The appellant was later arrested and charged with the offences for which he was later convicted.

The defence

[7] The appellant, on the other hand, gave sworn evidence that he and the complainant engaged in consensual sexual intercourse arising from an agreement that they had made to do so. The appellant maintained that he believed the complainant was 16 years' old at the material time and that she consented to having sex with him.

The grounds of appeal

[8] Three grounds of appeal were originally outlined in the Criminal Form B1 filed by the appellant. They were as follows:

> "(a) The verdict is unreasonable or cannot be supported having regard to [the] whole of the evidence
>
> (b) The sentence of 15 years for both count [sic] imposed by the learned trial judge is hard, [sic] unjust and manifestly excessive in the full circumstances of his case. It amounts to a breach of the constitution since the mandatory minimum sentence is a cruel and unjust punishment in light of the full circumstances of the case.
>
> (c) There has been a miscarriage of justice in light of the judge's failure to consider or demonstrate she considered: (1) Applicants [sic] good character, (2) honest belief in relation to complainant's consent, (3) law on hostile witness and treatment of evidence of Judy Ann Dixon as hostile witness (4) need for [L]ucas direction."

[9] Subsequently, the appellant abandoned the original grounds of appeal (except that relating to good character) and, on 28 April 2021, sought and was granted permission to argue the following supplemental grounds:

> "1. The learned trial judge erred in relying on evidence of recent complaint despite having rejected the evidence of the witness to whom the complaint was allegedly made.

> 2. The learned trial judge erred in convicting the appellant as the court had accepted that the defendant might have presumed that the virtual complainant had consented."

[10] On 24 October 2022, the appellant sought and was granted permission to argue the following further supplemental ground of appeal:

> "3. The sentence was manifestly excessive and the mandatory minimum sentence was disproportionate in its application in this case."

Issues

[11] Based on the three supplemental grounds of appeal filed and the submissions advanced herein, the main issues to be addressed are:

I. Whether the learned trial judge erred when, having rejected the evidence of recent complaint from the witness to whom the complaint was allegedly made, she nevertheless relied on that same evidence in convicting the appellant.

II. Whether the learned trial judge, in convicting the appellant, properly addressed the issue that he may have believed that the complainant had consented.

III. Whether the learned trial judge ought to have addressed the appellant's good character when assessing his evidence.

IV. Whether the appellant's sentences were manifestly excessive.

Issue I – Whether the learned trial judge erred when, having rejected the evidence of recent complaint from the witness to whom the complaint was allegedly made, she nevertheless relied on that same evidence when convicting the appellant.

Summary of submissions

For the appellant

[12] Mr Williams commenced his submissions by emphasising the point that, even though the Crown attempted to lead evidence of recent complaint, the evidence led actually supported the appellant's case of consensual sexual intercourse. He also highlighted the argument that, as a result of this, the Crown treated the witness as hostile, and the learned trial judge rejected her evidence. It was on this basis that counsel submitted that the learned trial judge erred when she subsequently relied on the rejected evidence of that same hostile witness to support the complainant's evidence, which ultimately resulted in the appellant's conviction. Mr Williams also referred to the case of **Kory White v R** [1991] 1 AC 210, which he deemed relevant to the issues in this appeal, and submitted that, in that case, the Privy Council allowed the appeal on the basis that evidence of a recent complaint was relied upon but was not "proved by the person to whom it was made". Upon the authority of **Kory White v R**, counsel encouraged this court to do the same and allow the appeal in the circumstances.

For the Crown

[13] Mrs Martin-Swaby submitted that a witness who is treated as hostile is not automatically deemed to be unreliable and that it is for the jury to determine whether that witness is credible. She cited **Clarke (Bertram) and anor v R** [2021] JMCA Crim 51, and submitted that, in that judgment, Dunbar-Green JA (Ag) (as she then was) referred to the case of **Kevin Grant v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 161/2004, judgment delivered 10 November 2006, and indicated that it was a relevant case outlining how the court is to treat the evidence of an impeached witness. In particular, counsel quoted from page 5 of **Kevin Grant v R** which referenced the case of **R v Maw** [1994] Criminal Law Report 841 CA ('**Maw**'). She

then submitted that **Maw** provides guidance on the directions that a trial judge should give to a jury on how to treat the evidence of a hostile witness.

[14] Upon the authority of those cases, Mrs Martin-Swaby contended that the learned trial judge, while acting as a judge of law and facts, was required to consider whether the witness was reliable, given that she had contradicted herself. Counsel further submitted that the trial judge clearly understood the difference between the witness' evidence in the witness box and her previous statement and adequately considered the witness' overall reliability and credibility. Therefore, she contended, even though the learned trial judge did not find the witness to be reliable, she was still entitled to exercise her jury mind in relation to this issue in the manner that she did. Counsel also argued that it was open to the learned trial judge to accept that a recent complaint was made and rely on a portion of the witness' evidence (in particular where she confirmed that the complainant made a complaint to her) despite the witness' contradictory evidence. This submission was made on the basis that the complainant remained consistent in her evidence that the appellant had sexual intercourse with her without her consent.

Analysis

[15] This court found the case of **Maw** to be relevant, as it provides guidance on the directions that a trial judge ought to give to a jury on how to treat the evidence of a hostile witness. In **Maw**, the Crown's witness gave evidence in court that contradicted his statements that he had earlier given to the police. In fact, the witness, Mr Cummings, gave contradictory evidence that exonerated the appellant in cross-examination but in re-examination he said that he was not sure. That appeal was brought on two bases, firstly, that the learned trial judge should have agreed that the case not be left to the jury; and secondly, that in the summing up, the jury was not properly directed on matters which they were to consider. The Privy Council found that, having treated the witness as hostile, the Crown should not have presented the witness to the jury as a witness upon whose evidence they could convict. In **Maw**, Hobhouse LJ, at page 7 said:

> "Once a witness has been attacked in the way that is involved in treating him as a hostile witness, questions of the creditworthiness of the witness arise both for the judge and the jury, and the jury should be clearly directed on that point. In his summing-up, the judge did not direct the jury's attention to that question, nor does it appear he considered it himself."

[16] At page 8 of **Maw**, Hobhouse LJ, further said:

> "In our judgment, this summing-up did not approach the question of the conflicting and unsatisfactory evidence of Mr Cummings in a satisfactory way. In our judgment, the Judge should have come to the conclusion that his evidence was not fit to provide the basis of a conviction. He should have exercised his own discretion to withdraw the case from the jury, and if he failed to adopt that course, he should have directed the jury that they should disregard the evidence of Mr Cummings."

[17] In **Maw**, the Privy Council held that the judge should not have allowed the case to go to the jury and that he should not have summed up in the manner he did. As a result, the appeal was allowed, and the appellant's conviction was quashed.

[18] That case is applicable to the instant appeal because of certain similarities between them. Firstly, in **Maw**, the witness gave evidence that could be regarded as having exonerated the appellant, and in the instant appeal Miss Dixon also gave evidence about what the complainant told her that could be regarded as having cast reasonable doubt on the Crown's case against the appellant. We say so because it is recognised that the evidence coming from the witness, Miss Dixon, was not received as evidence of the facts complained of but was relevant to whether there was consistency with the testimony of the complainant as tending to negative her consent. A perusal of the transcript shows the tenor of that evidence. At page 153, line 9 to page 154, line 15 of the transcript the following exchange is recorded:

> "**A.** I said what happened. Tell me what happened. She went on to say…

Q. Stop. Go ahead.

A. … she said they were playing touching. They were touching…

Q. Yes.

A. She was touching him and he was touching her.

Q. Yes

A. I said to her, I remember I said to her, you foolish or stupid, why would you be doing that. She didn't reply she kind of smile, smile like she was shy.

Q. Yes?

A. So I said to her what happened, she went on to say that he used his finger. I think she went on to say that he used his finger.

Q. Yes.

A. And she said he was playing with her with his finger up in her vagina and he had inserted.

…

A. She said he used his finger, he was playing with her vagina with his finger then he inserted his finger in her vagina.

Q. Yes.

A. So I said to her what else happened. She kind of—for a while and walk off laughing. And then I said to her this is—

Q. What happened, tell us what happened?

A. And she kind of didn't say anything for a while and then she came back and blurted out 'and then we had sex'."

[19] On this account, given up to this point, by Miss Dixon, there is no indication of forced or non-consensual sexual intercourse or of any other sexual assault. The narrative seems to speak to consensual sexual intercourse.

[20] Secondly, similar to **Maw**, the Crown, in the instant case, treated the witness as hostile and the learned trial judge in one instance rejected her evidence. Page 11, line 14 to page 12, line 18 of the learned trial judge's summation illustrate this, and are reproduced below:

> "In this case, the evidence of Miss Dixon, is that both [the complainant] and Mr. Lewis were playing around and then they had sex. However, her evidence is also further to the admission that she made to the Crown's questions is that [the complainant] did tell her that when Dondre began to fondle her, she told him to stop and that she was kicking him off her and telling him to go home. She admitted that she was kicking him off her and tell him to go home. So while the statement of Miss Dixon was not put into evidence by the Crown, on her own evidence before this Court, there is an inconsistency with respect to what she is saying she was told by [the complainant]. I find that Miss Dixon has, by her evidence in the witness box, displayed a serious conflict, and I suspect a conflict of interest. Her evidence is that she was close to both [the complainant] and Mr. Lewis. The inconsistency in her very evidence given before this Court, I believe, clearly indicates that she is not a reliable witness, and that there is in fact the level of conflict that she would have been experiencing, I believe, in light of her relationship with both [the complainant] and Mr. Lewis. Her inconsistency is such that I cannot accept the evidence that she has given in this matter. I cannot find her evidence to be reliable at all." (Emphasis added)

[21] However, despite the learned trial judge's rejection of Miss Dixon's evidence in its entirety we see where she subsequently relied on it to support the complainant's evidence. This can be seen at page 19, lines 15 to 25 of the transcript, which records the learned trial judge's summation, which reads as follows:

> "And, the Court is of the view that what she told [Miss Dixon] on the 19th of August, 2014, is that Dondre Lewis did, in fact, come over to her house and although she told him to leave, he didn't leave and when he inserted his finger in her vagina and she told him to stop, he persisted and he also inserted his

> penis into her vagina, although she told him to stop he would not stop."

[22] Page 21 lines 8-15 of the learned trial judge's summation records the following:

> "The Court therefore finds that the Crown has discharged its burden and has satisfied this Court, and this Court is sure that Mr. Dondre Lewis, did on the 19th day of August, had [sic] sexual intercourse with [the complainant], without her consent, and further, that he did insert his finger in her vagina without her consent."

[23] It is clear that the learned trial judge rejected a part of Miss Dixon's evidence, yet, she later relied on it when finding the appellant guilty. This was clearly an error on the part of the learned trial judge who, in her summation, said that Miss Dixon was not a reliable witness "at all". Based on that finding, she should not have considered Miss Dixon's evidence at all. In fact, she should have directed her jury mind to the matters that were properly to be considered and the matters that were to be excluded when determining the appellant's guilt. Therefore, upon the authority of **Maw**, it is our view that the learned trial judge erred when, having rejected the evidence of recent complaint from Miss Dixon, she nevertheless relied on aspects of that same evidence to convict the appellant. The appellant, therefore, succeeded on this issue. That was sufficient to have disposed of the appeal. However, in deference to counsel's efforts at addressing the other issues, we considered and discussed them as well.

Issue II – Whether the learned trial judge, in convicting the appellant, properly addressed the issue that he may have believed that the complainant had consented.

Summary of submissions

For the appellant

[24] Mr Williams submitted that the learned trial judge found that when the appellant asked for "a second round", it was based on his "presumption" of consent. To support this argument, he referred to page 20, lines one to 13 of the transcript and contended that, what was recorded as having been said at that part of the transcript, could only

mean that the learned trial judge found that the appellant had presumed (even if incorrectly) that it was consensual. On this basis, counsel submitted that the learned trial judge's verdict of guilty arose from a clear misunderstanding of the *mens rea* requirement outlined in sections 3(1)(b) and 4(3)(a)(ii) of the Act.

[25] Counsel also argued that the only issues in the trial in the court below were that of honest belief and credibility. He then cited **Director of Public Prosecutions v Morgan** [1976] A.C. 182, ('**DPP v Morgan**') and said that, in that case, it was held that, where a defendant had sexual intercourse without consent but with the honest belief that there was consent, then the defendant was not guilty of rape. Counsel further submitted that that case established that the intent to commit rape involves the intention to have sexual intercourse without the woman's consent or being reckless as to whether or not she consented. The case of **Denjah Blake v R** [2014] JMCA Crim 19, was also cited to support counsel's argument that, if in a trial judge's summation there is no correlation between legal principles and the evidence, the conviction is to be quashed, and he encouraged this court to be guided by this principle.

[26] Counsel additionally cited the case of **Loveroy Henry v R** [2019] JMCA Crim 43, in which, he submitted, this court overturned a conviction in similar circumstances. At page 2, para. 2.6 of his written submissions, he submitted that the conviction was overturned because the learned trial judge:

> "(1) failed to avert [sic] to the circumstances which might have caused the applicant to believe that the complainant was consenting to sexual intercourse;
>
> (2) undermined her initial correct direction in relation to the mens rea for rape; and
>
> (3) resolved the issues as to whether the applicant was telling the truth by returning to the Crown's case, as opposed to considering the evidence in its entirety."

For the Crown

[27] Mrs Martin-Swaby submitted that there was no need for the learned trial judge to have directed herself on the issue of honest belief. To support her argument, she referred to a number of authorities including **R v Aggrey Coombs** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 9/1994, judgment delivered 20 March 1995, and **R v Andrew Fuller** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 108/1999, judgment delivered 20 December 2021. She submitted that the complainant's evidence that she asked the appellant to leave and that she fought him, negated consent. Counsel also referred to section 3(2) of the Act which addresses the issue of consent. In particular, she emphasised section 3(2)(a) which states that consent does not exist where compliance is exacted by physical assault or fear.

Analysis

[28] The section of the Act, which defines the offence of rape, with which the appellant was charged, is the best starting point in addressing the issue of honest belief that the complainant consented to sexual intercourse. This is on the basis that it outlines the *actus reus* and the *mens rea* of the offence of rape. Section 3 of the Act states:

> "3. (1) A man commits the offence of rape if he has sexual intercourse with a woman—
>
> (a) without the woman's consent; and
>
> (b) knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not." (Emphasis added)

[29] The Act clearly indicates that a defendant's knowledge of whether the complainant consented or not is an important ingredient in determining his culpability in the commission of the offence of rape. There are numerous cases that address the treatment of honest belief in consent, some of which will be explored for a thorough resolution of this issue.

[30] The case of **DPP v Morgan**, deemed a landmark case in this area of the law, is relevant. It explores the importance of the intention of a defendant at the time of sexual intercourse. Although the case is quite well-known, it might still be beneficial to revisit its facts and the decision that was ultimately arrived at. In that case, Mr Morgan invited three younger men to his house to have sexual intercourse with his wife on the basis that she was kinky. He told them that if his wife resisted, it was just an act. The men complied with Morgan's instructions and had sexual intercourse with his wife although she resisted. Subsequently, they were all charged with rape and Morgan was charged with aiding and abetting that offence.

[31] At the trial, Morgan's wife gave evidence that she resisted and did not consent, while the men gave evidence that she resisted at first but later she actively participated. The men were convicted, and they appealed. The Court of Appeal, in dismissing the appeal, certified that a point of law of general public importance was involved in their decision, and granted the appellants leave to appeal to the House of Lords. The point of law was stated thus: "Whether in rape the defendant can properly be convicted, notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds".

[32] The House of Lords upheld the Court of Appeal's decision by applying the proviso to section 2(1) of the Criminal Appeal Act 1968, on the basis that, as the jury clearly rejected the defendants' allegations of the wife's cooperation and ready participation in the sex acts (an account which was diametrically opposed to hers), the jury would have returned a verdict of guilty, even if they had been properly directed.

[33] In **DPP v Morgan**, all the Law Lords gave written judgments. Their thinking in arriving at the result at which they did may be seen, for example, in the judgment of Lord Fraser of Tullybelton. At pages 236-237, Lord Fraser of Tullybelton opined as follows:

> "In the present case, the learned judge's direction to the jury about the mental element in the crime fell into two parts. The first part was exactly in accordance with the cases to which I

have referred. I need not quote the direction again in full but I would particularly refer to one sentence where the learned judge emphasised that the prosecution must prove 'not merely' that [the defendant] intended to have intercourse with [the woman] but 'that he intended to have intercourse without her consent.' He continued, with what was in my opinion complete logic,

'Therefore, if the defendant' believed or may have believed that [the woman] consented to him having 'sexual intercourse with her, then there would be no such intent in his 'mind and he would not be guilty of the offence of rape, but such a belief 'must be honestly held by the defendant . . .'

Strictly speaking, I do not think that a belief, if held at all, can be held otherwise than honestly, but I read that last phrase as a warning to the jury to consider carefully whether the evidence of the defendant's belief was honest. So far, the direction was unexceptionable. The difficulty arises in the immediately following sentence where the learned judge said:

'And, secondly, his belief must be a reasonable belief; such a belief' as a reasonable man would entertain if he applied his mind and 'thought about the matter.'

That second direction, although not without precedent, is in my opinion impossible to reconcile with the first. If the defendant believed (even on unreasonable grounds) that the woman was consenting to intercourse then he cannot have been carrying out an intention to have intercourse without her consent."

[34] At page 237 he added, so far as is relevant:

"If the effect of the evidence as a whole is that the defendant believed, or may have believed, that the woman was consenting, then the Crown has not discharged the onus of proving commission of the offence as fully defined and, as it seems to me, no question can arise as to whether the belief was reasonable or not. Of course, the reasonableness or otherwise of the belief will be important as evidence tending to show whether it was truly held by the defendant, but that is all."

[35] And, he concluded thus at page 239:

> "I would therefore answer the question in the negative — that is in favour of the accused. But for the reasons stated by my noble and learned friends, Lord Hailsham and Lord Edmund-Davies, I would apply the proviso to the Criminal Appeal Act 1968, section 2(1), and I would refuse the appeal."

[36] The issue of honest belief in consent in a case of rape is also addressed in the Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Criminal Bench Book') at page 318. In section 20-4, at para. 4, which is entitled "Consent and Reasonable Belief in Consent", the following is stated, using an extract from Archbold as an example:

> "In *Marlon Roberts v The State* the appellant challenged the adequacy of the trial judge's directions on the requisite mens rea for the offence of rape. The Court considered Archbold (2000) [17-58] as providing a useful guide on the direction that a trial judge should give a jury concerning the issue of consent:
>
> > [I]n summing-up a case for rape which involves the issue of consent, the judge should, in dealing with the state of mind of the defendant, direct the jury that before they can convict, the Crown must have proved either that he knew the woman did not consent to sexual intercourse, or that he was reckless as to whether she consented. If the jury is sure he knew she did not consent, they will find him guilty of rape knowing there to be no consent. If they are not sure about that, they will go on to consider reckless rape."

[37] This section in the Criminal Bench Book reiterates what was established in **DPP v Morgan** on a defendant's assertion of the belief that a complainant consented.

[38] Another relevant authority is **Loveroy Henry v R**. In that case, Simmons JA (Ag) (as she then was) cited **R v Chester Gayle** (1978) 25 JLR 317, at para. [41] and stated as follows:

> "In **R v Chester Gayle**, to which we were referred by Crown Counsel, in allowing the appeal it was held that 'in directing

> the jury on the issue of consent the trial judge had a duty to assist the jury by pointing out that on the Crown's case there were possible inferences from which it could be found that the accused believed that the complainant had consented as it was only by directing the jury along those lines that the trial judge could have alerted the jury as to whether or not the Crown had discharged the burden of proving the absence of such belief.' Downer JA made the observation that even though the learned judge's general directions early in his summing up were impeccable, they 'were not co-related to the evidence raising the issue of honest belief that must be negatived by the prosecution'."

[39] Additionally, in **Denjah Blake v R**, Morrison JA (as he then was), at para. [9], opined as follows:

> "[9] The first ground goes to the issue of consent, which lay at the heart of the appellant's defence. In the landmark case of **Director of Public Prosecutions v Morgan** [1976] AC 182, the House of Lords confirmed that if a defendant accused of rape believes that the complainant has consented, whether or not that belief is based on reasonable grounds, he cannot be found guilty of rape."

[40] Simply put, the case of **Denjah Blake v R** makes it clear that if a defendant at the time of sexual intercourse honestly believed, or may have honestly believed, that the complainant consented, he cannot be found guilty of rape.

[41] **DPP v Morgan** establishes a number of principles regarding the treatment of honest belief as a defence in a case of rape. Firstly, the burden of proof that the appellant had sexual intercourse without the complainant's consent or was reckless as to whether she consented or not, rests on the Crown. Secondly, where a defendant has sexual intercourse with the belief that the complainant consented, then he would not be guilty of rape. Upon the authority of **DPP v Morgan**, the appellant in the instant appeal could only be found guilty of rape if he had sexual intercourse with the complainant knowing that she did not consent, or he was reckless as to whether or not she consented. The focus of this discussion will, therefore, be on the appellant's contention that he honestly

believed her to have been consenting; or, to put his defence more precisely, that they had sexual intercourse pursuant to an agreement between them.

[42] We reviewed the transcript containing the evidence of the complainant and the appellant, to determine whether the learned trial judge ought to have addressed her jury mind to the point of the appellant's contended belief that the complainant consented. In this regard it is important to answer the question: What does the totality of the evidence show? The complainant's evidence is that she did not consent, and this evidence can be found on page 10, line 16 to page 11, line 24 of the transcript, which is reproduced below:

> "**A.** Him started to tell me fi easy myself and mi tell him, 'Dondre gwaan ova", and him neva did a gwan ova.
>
> **Q.** And did he do anything?
>
> **A.** Him started fi a hold mi hand.
>
> **Q.** Yes, and after he held your hands?
>
> …
>
> **A.** A start to use mi foot and started pushing him, and den him still a fight mi.
>
> **Q.** How was he holding your hand?
>
> **A.** Behind mi.
>
> **Q.** You said he held your hands behind you, what happened?
>
> **A.** he started to use his hand to shift my panty.
>
> **Q.** Yes, and what happened next?
>
> **A.** And then him start to use him finger to push it up in my vagina
>
> **Q.** And how long he had his finger in your vagina?
>
> **A.** I don't remember."

[43] Page 12 line 23 to page 15 line 4 of the transcript are also relevant and are reproduced below:

> "**Q.** So after Dondre pushed his finger into your vagina, what happened next?
>
> **A.** A pull up on the bed and him hold mi foot and draw me back to di edge a di bed.
>
> **Q.** What you mean by pull up on the bed?
>
> **A.** A go up pon the bed and try to come off of the bed.
>
> **Q.** You said you tell him to do what?
>
> **A.** When him draw mi down to di edge a di bed a was telling him to stop, stop, stop and he didn't want to stop.
>
> ….
>
> **Q.** Yes. After you told him to stop, what did he do?
>
> **A.** Him still a hol' on to mi, and a said, "Dondre stop nuh, and him still a try to shift mi panty.
>
> ….
>
> **Q.** At this time how were you positioned?
>
> **A.** A was still on my belly.
>
> **Q.** Where were your hands at this time?
>
> **A.** over my head.
>
> …
>
> He was using one of his hands to hold my hands.
>
> …
>
> **Q.** What was he doing with his other hand at that time?
>
> **A.** He was shifting my panty.

Q. What you say you were you doing at this time? Were you doing anything at this time?

A. A was trying to fight him off with mi foot because a was on ma belly."

[44] Page 15, line 8 to page 17 line 3 are also reproduced below:

"**A.** When a look behind mi he was taking out his penis out of his shorts.

Q. Yes, what happened next?

A. Then he started to have sex with me.

Q. What do you mean by he started to have sex with you, what was he doing why you say he was having sex with you?

A. He put his penis in my vagina

…

Q. While he had his penis in your vagina what were you doing at that time?

A. A was using my foot to push him off same way.

Q. Did you manage to use your foot to push him off?

A. No, miss.

Q. Did you say anything while he had his penis in your vagina?

A. I was telling him to stop.

Q. Did he say anything to you?

A. Him did a tell mi she fi easy myself because I am a big girl

…

A. Then afta him leggo mi hand and mi jump up offa di bed and mi look 'round…

…

A. Den a run go into the bathroom.

Q. Yes?

…

A. Him come in di bathroom and holding mi hand and seh dat him want to do a second round.

…

Q. You said after he said he wanted a second round, did you respond?

A. Mi tell him seh fi gwan mi don't want to do nutten wid him.

Q. Yes, what happened after that?

A. Afta a start to run him away, den him go outside and den a lock di door"

[45] On the other hand, the appellant gave sworn evidence in which he said that he and the complainant were very good friends and that they were both at his house, playing and having fun when the topic of sex came up. His evidence is that 19 August 2014 was not the first time he and the complainant had spoken about having sex. The appellant testified that, in keeping with their agreement to have sex, the complainant left his house to go to her house and after a while he followed her. According to the appellant, when he arrived at the complainant's house, her little brother was there, and she took him to her aunt's house and returned. The appellant's evidence is that he reminded her about the agreement they had, and she said yes. Page 217, line 21 to page 218, line 2 are reproduced below:

"**Q.** You said you started to touch her vagina. Did you do anything after you touched her vagina?

A. Yes. Afta a was feeling-up her vagina, den she still there laying down same way.

Q. Just to be clear for the Court, how was she laying down?

A. On her back."

[46] Page 218, line 6 to page 219 line 4 is also reproduced below:

> "**Q.** You heard her indicate to the Court that your finger went into her vagina. Is that true?
>
> **A.** well, I move her panty to the side and started to finger her. The reaction she gave me showed me that she was ok with everything.
>
> …
>
> **Q.** You heard her indicate to the Court that she was kicking during the time when your finger was in her vagina, is that so?
>
> **A.** Well she did not kick me, she didn't do anything. She was just there laying down on her back.
>
> **Q.** Did she do or say anything that made you knew [sic] that she didn't consent to this activity?
>
> **A.** No, she did not."

[47] Other relevant evidence is to be found at page 219, line 9 to page 221, line 15 of the transcript, which read as follows:

> **"Q.** Did you hear her indicate to the Court that your penis eventually went into her vagina?
>
> **A.** Yes, I did hear har seh dat.
>
> **Q.** Is this correct?
>
> **A.** Yes, that's true. That's true
>
> **Q.** Was it done with her consent or without her consent?
>
> **A.** Yes, with her consent because we were both talking about it before we eventually did it.
>
> **Q.** Whilst your penis was in her vagina did she do, or say anything to you to indicate that she didn't consent?
>
> **A.** No, she didn't.

Q. Did she kick you whilst your penis was in her vagina?

A. No, she did not kick me

Q. Did she say stop?

A. Well, yes, in the procedure she said stop and I did ease up and after I ease up she never move or do anything, so I continued.

…

Q. And at the time when she said stop, how did you interpret this?

A. She said, "Stop it hot you nuh" and I said all right [sic] then

Q. She said, "Stop it hot you nuh" what did you say?

A. I said, "Okay den I am going to take time".

Q. Did you take time after you said that?

A. Yes, I did take my time.

…

Q. What if anything happened after you come?

A. As soon as a come she get up, run off the bed and ran towards the bathroom.

…

Then I went into the bathroom and asked her if she all right [sic] and the reply was, "Yea mi good man you have to leave".

…

Q. Did she tell you why you had to leave?

A. The reason why she said I have to leave, she said she don't want har mother to come home come si har with nobody in the house." (Emphasis added)

[48] The sections of the transcript that have been reproduced reveal two different accounts of what happened. The Crown maintained that the appellant knew that the

complainant did not consent, yet Miss Dixon (one of the Crown's witnesses, though not an eyewitness) gave evidence that appeared in part to have supported the appellant's evidence that the sexual intercourse was consensual.

[49] On this state of the evidence, we directed the attention of counsel on both sides to the following cases: (i) **Clement Jones v R**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 5/1997, judgment delivered 27 April 1998; (ii) **Mervin Jarrett v R** [2017] JMCA Crim 18; and (iii) **Michael Reid v R** [2011] JMCA Crim 28. Although in the face of these authorities, counsel maintained their respective positions, it appeared to us that those authorities clearly indicate that, where in a case of a sexual offence the cases for the complainant and defendant are diametrically opposed (with the defendant alleging clear agreement or consent on the one hand, and the virtual complainant alleging forceful rape or other offence, on the other) an honest-belief direction may not be necessary. Or, its absence may not be fatal. In the case of **R v Aggrey Coombs** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 9/1994, judgment delivered 20 March 1995, for example, a case of rape, the defendant alleged consent as a result of a prior arrangement. At page 4 of the report, this is what this court (per Wolfe JA, as he then was) observed:

> "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.
>
> The question of honest belief in a case of rape only arises where the man misreads or misunderstands the signals emanating from the woman. What the defence of honest belief amounts to is 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."

[50] Similarly, in **Mervin Jarrett v R**, Morrison P, writing on behalf of this court, after reviewing cases such as **Aggrey Coombs v R**, **Clement Jones v R** and **Michael Reid v R**, opined at para. [24] as follows:

> "[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."

[51] Against the background of these authorities and the similarity between the issue on which the contest was joined in those cases and in the trial below, we found ourselves unable to say that an honest belief direction was necessary in the circumstances of this case. The appellant, therefore, failed on this issue.

III – Whether the learned trial judge ought to have addressed the appellant's good character when assessing his evidence.

Summary of submissions

For the appellant

[52] The evidence with respect to good character is found in the evidence of Dian Smith at pages 123 to 125 of the transcript. Her evidence was that she knew the appellant for approximately 10 years or more and did not know of him to be in any trouble with the law and was not she sure if he had ever been arrested. However, she said he got into problems at the two schools he attended. The appellant was also questioned in relation to his good character and his evidence, at page 233, is that he had never been arrested or charged with any criminal offence, and had never been in trouble with the law before this incident. The first time he knew that he was charged with rape and grievous sexual

assault was when the police arrested him and his evidence was that he felt bad because he knew he did not rape anyone.

[53] Mr Williams referred to this evidence and also made reference to the social enquiry report in advancing the argument that the learned trial judge ought to have given herself a good-character direction.

For the Crown

[54] Counsel cited **Seian Forbes and Tamoy Meggie v R** [2016] JMCA Crim 20, ('**Seian Forbes**') and referred to paras. [121] to [122] which, she submitted, summarises the law on good character. Counsel also referred to para. [45] of **Tino Jackson v R** [2016] JMCA Crim 13, which she quoted at page 12, para. 3 of her written submissions filed on 21 March 2023, which reads as follows:

> "[45] The failure to give the good character direction, when it is required, does not automatically amount to a miscarriage of justice. It was said in **Michael Reid v R** SCCA No 113/2007 (delivered on 3 April 2009), at pages 27-28, that the focus in each case should be the impact that the omission had on the trial and the verdict. The question to be decided in such circumstances is whether the jury, given the case as a whole, would inevitably have convicted the accused, even if the proper direction had been given."

[55] On the authority of **Tino Jackson v R**, she submitted that, even though the appellant's evidence was that he had never been in trouble with the law before, and although a trial judge is duty bound to give a good-character direction where the issue is raised and a defendant is a person of good character, a trial judge's failure to do so, generally, is not fatal and does not automatically amount to a miscarriage of justice. In concluding her submissions, Mrs Martin-Swaby referred to the case of **Dioncicio Salazar v The Queen** [2019] CCJ 12 [AJ], and encouraged this court to consider the fact that the trial was conducted by a judge alone, which, she submitted, meant that the learned trial judge's demonstration of her consideration of the issue, did not need to have been as detailed as directions to a jury.

Analysis

[56] We agreed that the question of the appellant's good character arose on the facts of this case

[57] In relation to the authorities, while the **Seian Forbes** case states that the lack of a direction on good character is not necessarily fatal, it is, nonetheless, important to note that credibility was the central issue in the trial.

[58] The more relevant authority in the circumstances of this appeal is **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered on 3 April 2009. In **Michael Reid v R**, the court explored a number of authorities that dealt with the requirement for the giving of a good-character direction, and the effect that the giving of or omission to give a good-character direction may have on a verdict. At para. 28 of the case Morrison JA (as he then was), cited **Sealy and Headley v The State** (2002) 61 WIR 491, where Lord Hutton pointed out that the need for a good-character direction varied, based on the issues in dispute between the complainant and the accused in a trial. At para. 30, Morrison JA, also quoted another section of the judgment in **Sealy and Headley v The State**, where Lord Hutton said:

> "…where the issue in dispute is fundamental to the question of guilt or innocence of the accused, then whether it relates to non-participation in the crime charged or to consent or to some other defence, their lordships consider that the good character direction is an important safeguard to the accused."

[59] Similarly helpful is the case of **Marlon Campbell v R** [2023] JMCA Crim 9, where, at para. [18](x), this court (per D Fraser JA) summarised the effect of the omission of a good-character direction as follows:

> "(x) The test to determine the effect of the omission or inadequacy of the good character directions on the soundness of the conviction, is whether having regard to the nature of and the issues in the case and taking into account the other available evidence, a reasonable jury, properly directed, would inevitably (or undoubtedly) have arrived at a verdict of

> guilty: **Chris Brooks v R**; **Sealey and Headley v The State**; **Whilby v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 72/1999, judgment delivered 20 December 2000, per Cooke JA at page 12; **Jagdeo Singh v The State** per Lord Bingham at pages 435 – 436; and **Michael Reid v R** per Morrison JA (as he then was) at pages 27 – 28."

[60] In the circumstances of the instant appeal, we have to consider the effect that the omission of the good-character direction would have had on the verdict. Upon the authority of all the cases reviewed, we are of the view that the lack of a good-character direction in this trial in which the issue of credibility was central, though not fatal by itself, when taken together with the learned trial judge's error with respect to the recent-complaint issue, rendered the conviction unsafe. Accordingly, the convictions could not stand.

Issue IV- Whether the appellant's sentence was manifestly excessive

[61] Having resolved the other issues relative to conviction in the manner that we did and, given the orders made by this court, it was not necessary for the court to address this issue.

Conclusion

[62] We formed the view that the learned trial judge erred in certain respects. The primary respect in which she erred was when, having rejected the evidence of recent complaint from the witness to whom the complaint was allegedly made, she nevertheless relied on that same evidence when convicting the appellant. Additionally, and against the background of that issue, her failure to give herself a good-character direction with respect to the appellant, (or demonstrating that she considered the matter of his good character) in circumstances in which credibility was the central issue, rendered the convictions unsafe. The cumulative effect of these caused us to quash the convictions.

[63] It was for the foregoing reasons that we have discussed that we made the orders that are reflected at para. [3] of this judgment.