JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 113/2007

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag)

MICHAEL REID
v R

Mrs Jacqueline Samuels-Brown and **Miss Nicholene Nelson** for the applicant
Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and **Mrs Suzette Whittingham-Maxwell,** Assistant Crown Counsel for the Crown

17, 18, 19 November, 19 December 2008 and 3 April 2009

MORRISON, J.A.:

Introduction

1. The application for leave to appeal in this matter was heard on 17, 18 and 20 November 2008. On 19 December 2008 the court announced that the application would be granted, the hearing of the application treated as the hearing of the appeal and the appeal allowed. In the interests of justice, a new trial was ordered in the Home Circuit Court during the session starting on 7 January 2009.

2. These are the reasons for that decision. In the light of the disposal of the appeal, we propose to give no more than a brief summary of the relevant facts.

The trial

3. On 5 July 2007 the applicant was convicted of one count of rape and sentenced to imprisonment for seven years. The case for the prosecution was that the complainant and the applicant, who were known to each other before, met by pre-arrangement shortly after midnight on 27 January 2006 when the applicant collected the complainant at her place of work for the purpose of giving her a drive in his motor car to her home. En route, the applicant made a stop at the apartment complex at which he lived, ostensibly for the purpose of putting on some lights in his apartment. Upon their arrival at the complex, they were admitted by a security guard at the gate and the complainant was led by the applicant into his apartment where he forced himself upon her and had sexual intercourse with her against her will. Thereafter, the applicant took the complainant in his car to a point close to her home, where he left her at her request. On the following day the complainant made a report to the police and in due course the applicant was arrested and charged for the offence of rape. From the outset, he maintained his innocence, protesting to the arresting officer after caution, "officer I did not rape her, ask her again."

4. In addition to the complainant herself, the prosecution called two police witnesses, but there was no medical or other evidence called in support.

5. The applicant in his defence made an unsworn statement from the dock, in which he stated that he and the complainant had known each other for some three months prior to the night in question, when she had consented to sexual intercourse with him. On his account, the detour to his apartment had been made without protest or objection of any kind from the complainant. They had spoken to each other by telephone on several occasions before and after that night. The applicant called no witnesses in support of his defence.

6. The learned trial judge having summed up the case to them, the jury, after retiring for just over two hours, returned a unanimous verdict of guilt against the applicant. Thereafter three witnesses were called in mitigation of sentence on the applicant's behalf. They all spoke in glowing terms of the applicant's character.

The grounds of appeal

7. Mrs Jacqueline Samuels-Brown, who did not appear for the applicant at trial, filed and was given permission to argue on his behalf the following supplemental grounds of appeal:

> "1. The Learned Trial Judge's references to the virtual Complainant as the 'victim' at crucial points in her directions to the jury served to undermine the directions on the burden and standard of proof and/or invited the jury to prejudge the Appellant's guilt; whereupon there has been a miscarriage of justice.
>
> 2. The Learned Trial Judge's omission to give the jury any directions as to the legal significance of

recent complaint amounts to misdirection in law; whereby there has been a miscarriage of justice.

3. The Learned Trial Judge's directions relative to the Appellant's unsworn evidence were inadequate and/or unfair.

4. The sentence of the Court is manifestly excessive.

5. The appellant did not receive a fair trial as:

(a) Witnesses who were relevant and available were not called to give evidence on his behalf as per his instructions and he did not receive advice on matters essential to his defence.

(b) He did not understand the implications of giving an unsworn statement and/or not giving sworn evidence."

A preliminary matter

8. When the appeal first came on for hearing, Mrs Samuels-Brown sought and was given permission, without objection from the Crown, to rely on the transcript of the evidence taken at the trial of the matter, as well as on a number of affidavits sworn to after conviction by the applicant and by others on his behalf. It may be helpful to refer briefly to some of these affidavits at this stage.

9. In an affidavit sworn to on 25 September 2008, the applicant stated as follows:

"1...

2...

3...

4. I was represented at the preliminary enquiry and at the trial by Mr. Hugh Thompson, Attorney-at-Law. Mr. Thompson told me of my options in presenting my defence that is to remain silent, give an unsworn statement or give sworn evidence. However he did not explain to me in [sic] the implications of each option.

5. Similarly I was not informed of my right to call character evidence in the course of the trial, as a part of my defence. The first time there was any mention of character witnesses to me by Mr. Thompson was after I was convicted.

6. My Attorney-at-Law for the purposes of this appeal enquired of me why I had not given sworn evidence or called character witnesses as a part of my defence and I gave her instructions in terms of the matters in paragraphs 4 and 5 above.

7. I gave my said attorney permission to confirm these matters with Mr. Thompson and she informs me that she did contact him alerting him that it was proposed to incorporate Grounds of Appeal on my behalf relative to these matters.

8. I am informed by my said attorney that Mr. Thompson informed her that he was at pains to point out to me the legal consequences of making an unsworn statement. I have no recollection of this.

9. My attorney also informs me that in relation to character witnesses Mr. Thompson stated that he did not think this would make any difference. In this regard I crave leave to exhibit hereto letter from Mr. Thompson to Mrs. Samuels-Brown dated April 28, 2008 as exhibit **"MR-2"**.

10. In the letter referred to in the applicant's affidavit as "**MR-2**", Mr Hugh Thompson, who had been the applicant's counsel at the trial, confirmed, in answer to Mrs Samuels-Brown's enquiry, that he was of the view "that calling character witnesses prior to sentencing would have made no difference".

11. Affidavits were also sworn to by two ladies, aunts of the applicant, both of whom asserted that, had they known that it was possible to do so and that it might have been of any value, they would both have been willing to give evidence on his behalf at his trial.

12. We directed that these affidavits be referred to Mr Thompson for his comments and these were in due course received in the form of an affidavit sworn to by him on 30 September 2008, which it is necessary to reproduce in full below:

> "I, **HUGH THOMPSON** being duly sworn and make oath as follows:
>
> 1. I reside at Golden Acres, Red Hills in the parish of Saint Andrew.
>
> 2. That I am an Attorney-at-Law practicing for over thirty-five *(35)* years.
>
> 3. That Ninety percent (90%) of my practice surrounds criminal matters.
>
> 4. That I represented Michael Reid who was charged for Rape in the Supreme Court on July 4th & 5th, 2007.

5. That it is true that I advised Mr. Reid of his options i.e. his right to remain silent, give an unsworn statement or give sworn evidence.

6. It is totally false for him to swear by affidavit that I did not explain the implications of these options.

7. That I was at pains to explain the implications of these options and it is my view that Mr. Reid, who appears to be a highly intelligent man, fully comprehended the implications of the options.

8. That the options were explained to him months before the matter was tried in the Supreme Court and he was constantly reminded leading up to the trial.

9. That Mr. Reid seemed very comfortable in making an unsworn statement, it is also my view that based on his demeanor and general attitude, the best option for him would be to make an unsworn statement.

10. That I arrived at this conclusion based on my years experience of dealing with accused persons.

11. That at no time did Mr. Reid express a desire to make a sworn statement, he seemed most relieved when I informed him of the option of making an unswom statement.

12. That in respect of paragraph five (5) Mr. Reid did not instruct me to call character witnesses during the trial.

13. That in any event it was my considered view after many years of experience practicing at the Criminal Bar that calling character witnesses on his case would have been of no

assistance having regard to the type of issues ventilated at his trial.

14. It is true that after his conviction, I invited him to make available people who knew him over a prolonged period and consequently would be able to speak to or about his character.

15. That he sent four (4) persons to my office and I interviewed them all and duly called them in mitigation after his conviction."

13. Mr Thompson's affidavit in turn elicited a response from the applicant by way of a further affidavit sworn to on 11 November 2008. These were his comments:

"1...

2. I have seen the Affidavit dated September 30, 2008 filed by my former attorney Mr. Hugh Thompson and now wish to respond.

3. I do not recall Mr. Hugh Thompson explaining the implications of the options of my right to remain silent or giving an unsworn statement or giving sworn evidence at my trial.

4. I do believe that if he had constantly reminded me of these options I would not have forgotten.

5. This case represented the first time I was charged for anything. Prior to this case I had never been in a courtroom before and I genuinely did not know of these options.

6. I gave my trial attorney a full written and signed statement in which I set out my contact with Ms. Graham before, during and after the night of January 27, 2007. In this statement I

made reference to the security guard and the telephone contacts by text messages which Ms. Graham made with me on the days following. She telephoned me on my Cable &Wireless number 773-8668 from her Cable & Wireless number. I believe it either started with 759 or 5437. I crave leave to exhibit hereto marked **"MR-1"** correspondence between my attorney and Cable & Wireless. Letter dated October 15, 2008, Letter dated October 28, 2008, Letter dated November 3, 2008 and Letter dated November 6, 2008.

7. It is true that I was comfortable making the unsworn statement because I was and I am sure of my innocence and I relied on Mr. Thompson to guide me on the process. I did not instruct Mr. Thompson to call character witnesses before the verdict of the jury because I did not know that this could be done.

8. However one of my aunts, mainly Ms. Pat Reid came to court everyday both when the case was at Half Way Tree and at the Supreme Court and I know that she would have given character evidence for me or made other character witnesses available on my behalf. As a matter of fact, character witnesses did give evidence for me at very short notice after my conviction. "

14. This material provided the basis for Mrs Samuels-Brown's primary contention on the appeal, which is fully stated in supplemental ground 5, and which she was given permission to argue first. By this ground the applicant complains that relevant evidence from witnesses who were available was not adduced by his counsel on his behalf at the trial and that he was not advised on matters essential to his defence, including the implications of electing to

make an unsworn statement from the dock as opposed to giving sworn evidence. At the heart of the applicant's complaint on this ground lies the failure to adduce character evidence as part of his defence. We think that it might be helpful therefore, before going to the admirably detailed submissions of both counsel on the ground itself, to set out in general terms the modern law on the value of such evidence.

Character evidence generally

15. The overriding requirement in any criminal trial is "to ensure that the defendant accused of crime is fairly tried" (per Lord Bingham of Cornhill in ***Randall v R*** (2002) 60 WIR 103, 108). While this requirement is fundamental and immutable, the actual content of what is required to guarantee a fair trial may shift or change from time to time in the light of experience, changing values and standards. The revolution brought about in the area of identification evidence by the seminal decision in ***R v Turnbull*** [1977] QB 224 provides a prime example of such a shift in emphasis driven by experience.

16. And another is to be found in the thinking on evidence of the good character of a defendant otherwise than in mitigation of sentence after conviction. The starting point in the modern law is now generally taken to

be ***R v Vye*** [1993] 3 All ER 241, 248 where the relevant principles were stated as follows:

> "(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements".

17. But as Cooke JA (Ag), as he then was, stated in ***R v Newton Clacher*** (Supreme Court Criminal Appeal No. 50 of 2002, judgment delivered 29 September 2003), the development of the law in this area, "while not beset by turbulent waters has not been characterised by smooth sailing", as is shown by the following extract from the speech of Lord Steyn in ***R v Aziz*** [1995]) 3 All ER 149, 156:

> "Lord Taylor of Gosforth CJ started his judgment by saying that the issues debated in ***R v Vye*** would at one time not have been regarded as arguable...I would add that in recent years there has been a veritable sea-change in judicial thinking in regard to the proper way in which a judge should direct a jury on the good character of a defendant. It has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modem practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in

> a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance. Leaving it entirely to the discretion of trial judges to decide whether to give directions on good character led to inconsistency and to repeated appeals. Hence there has been a shift from discretion to rules of practice. And ***R v Vye*** was the culmination of this development. This is the context in which Lord Taylor CJ enunciated the principles already quoted".

18. In ***Teeluck and John v The State of Trinidad and Tobago*** (2005) 66 WIR 319, 329, Lord Carswell summarised the principles as they have emerged from the authorities in the following way:

> "The principles to be applied regarding good character directions have been much more clearly settled by a number of decisions in recent years, and what might have been properly regarded at one time as a question of discretion for the trial judge has crystallised into an obligation as a matter of law. There is already quite a substantial body of case-law on the various aspects of the application of the principles, not all of which is relevant to the present appeals. Their Lordships consider that the principles which are material to the issues now before them can conveniently be encapsulated in the following series of propositions.
>
> > (i) when a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the benefit of 'good character' direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: ***Thompson v R*** (1998) 52 WIR 203, following ***R v Aziz*** [1996] AC 41 and ***R v Vye*** [1993] 1 WLR 471.

(ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: ***R v Fulcher*** [1995] 2 Cr App Rep 251 at 260. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a 'good character' direction could not have affected the outcome of the trial: ***R v Kamar,*** (1999) The Times (London), 14 May.

(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue, a 'good character' direction is always relevant: ***Berry v R*** (1992) 41 WIR 244; ***Barrow v The State*** (1998) 52 WIR 493; ***Sealey v The State*** (2002) 61 WIR 491, para 34.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: ***Barrow v The State***... following ***Thompson v R...***It is a necessary part of counsel's duty to his client to ensure that a 'good character' direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence not by the judge, and, if it is not raised by the defence the judge is under no duty to raise it himself: ***Thompson v R***."

19. However, as the learned Director pointed out, one aspect of ***Teeluck & John*** must be read subject to the later decision of the Board in ***Vijai Bhola v The State*** (2006) 66 WIR 319, 456, in which Lord Brown of Eaton-under-Heywood observed "that the statement in paragraph 33 (ii) of ***Teeluck's*** case that the directions 'will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial', needs to be applied with some caution". On the basis of an examination of a trilogy of 2005 decisions of the Board (***Balson v The State*** (2005) 65 WIR 128, ***Brown v R*** (2005) 66 WIR 238 and ***Jagdeo Singh v The State*** (2005) 68 WIR 424), Lord Brown's comment (at paragraph 17) was that the cases "where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so 'rare'."

20. It is against this now relatively uncontroversial background that we come to consider the submissions of counsel on supplemental ground 5.

<u>Ground 5</u>

21. There is no question that the applicant did not have the benefit of a good character direction from the learned trial judge. But absolutely no criticism can attach to the judge for this, as it is equally clear that the issue of his good character was not raised either by the applicant or counsel on

his behalf, other than in mitigation of sentence as described in paragraph 6 above. As has been seen (paragraph 10 above), his former counsel maintained the view in answer to Mrs Samuels-Brown's enquiry "that calling character witnesses prior to sentencing would have made no difference".

22. Mrs Samuels-Brown submitted that this was a case in which the jury had two contradictory versions, the resolution of which would turn on which of the two they accepted as credible. It followed, she submitted further, that character evidence "would be of seminal importance in a case such as this", bearing in mind in particular that the prosecution's case was based on the uncorroborated evidence of the complainant. Had character evidence been called on behalf of the applicant, he would have been entitled to a good character direction. In a case such as this, where character witnesses would have been available if needed, where defence counsel did not advise or do anything to facilitate their giving evidence, whether because he acted contrary to instructions or misunderstood the legal position and so did not give appropriate advice, the appeal should be allowed on the ground that there may have been a miscarriage of justice.

23. But in addition to the failure to call character evidence, Mrs Samuels-Brown also complained that several other potential witnesses could have been called on behalf of the applicant, including the security

guard at his apartment complex and evidence of the applicant's mobile telephone records, particularly with regard to such contact as he may have had with the complainant in the days before and after the incident.

24. In support of these submissions Mrs Samuels-Brown relied on a number of fairly recent authorities, both English and from the Privy Council, culminating in a judgment on appeal from this court in ***Maye v R*** (Privy Council Appeal No. 104/2006, judgment delivered 1 July 2008).

25. Miss Llewellyn, Q.C. for the Crown invited the court to accept Mr Thompson's account of what had transpired between him and the applicant, in particular on the question of the applicant's involvement in and approval of the decision that he should make an unsworn statement rather than give sworn evidence. As to the absence of the good character direction, she submitted that the crucial question for this court was whether the result of the case would inevitably have been the same had character evidence been given. This case was, she pointed out, a contest between sworn evidence adduced by the Crown and an unsworn statement made by the applicant. The situation would have been different, she said, if the applicant had given sworn evidence, in which event the Crown would have felt obliged to concede the appeal.

26. In support of these submissions, we were referred by the learned Director to a number of decisions from the Privy Council, to demonstrate in particular the inefficacy of an unsworn statement in these

circumstances. She also referred us to the recent decision of the Board from this court in ***Gerald Muirhead v R*** (Privy Council Appeal No. 103/2006 judgment delivered 28 July 2008) by way of a caution against an appellate court too readily giving way to the complaints of convicted persons as to the conduct of their trials by counsel.

27. Mrs Samuels-Brown in reply took the position that the authorities which suggested that an unsworn statement might carry less weight than sworn evidence given by an accused person in fact supported the applicant on his appeal, since an integral part of his complaint was that he had had no assistance from his counsel on this very question.

The authorities

28. ***Sealy and Headley v The State*** (2002) 61 WIR 491 is a case in which both appellants, who were charged with murder, had clear records and stated on affidavit on appeal that they had so informed their counsel. However, no steps were taken by counsel to establish their good character during the trial, in circumstances in which, as Lord Hutton observed, "it [was] clear that had the good character of the appellants been established the judge would have been under a duty to give the jury a direction as to the relevance of the good character of each appellant to his credibility and a further direction as to the relevance of his good character to the likelihood of his having committed the offence charged" (page 502).

29. Delivering the judgment of the majority (Hoffman, Hutton and Rodger), Lord Hutton said this:

> "29. In the present case the fact that the appellants did not have the advantage of a good character direction was not due to the fault of the trial judge, it was due to the fault of defence counsel. There is no duty on the trial judge to give a direction on good character when the issue of good character has not been raised in evidence by the defence; see ***Thompson v R***...and ***Barrow v The State***...
>
> *30.* Whilst it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of defence counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel *(**Thompson v R**...)* can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice: see ***R v Clinton*** [1993] 1 WLR 1181."

30. Lord Hutton went on to point out (at page 505) that the crucial question in the case was one of credibility as between the appellants, both of whom had set up an alibi, and the single police witness who identified them as the persons who committed the murder. Lord Hutton's further comment was as follows:

> "This was the very issue on which a direction as to credibility and propensity based on good character might have been of considerable importance. The importance of credibility may vary depending on the factual issue in dispute between the prosecution witness and the

> accused in a particular case, but where the issue in dispute is fundamental to the question of the 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."

31. In these circumstances, the majority were unable to say that the jury would inevitably have convicted if a good character direction had been given and therefore allowed the appeal on the ground of the failure of the appellants' counsel to raise their good character.

32. The dissenting judgment delivered by Lord Hope and Sir Philip Otton was based entirely on their conclusion that in the circumstances of the case a good character direction would have made no difference to the verdict of guilt which the jury returned. On the broad question of principle, they too considered that it was "plain" that evidence of the appellants' good character should have been led by their counsel (page 506) and they identified the critical issue in these circumstances to be as follows (at page 507):

> "The underlying question must always be whether the defendant was deprived of his right to a fair trial because the effect of the conduct which is complained of was that his defence was not put to the court. An unexplained omission of evidence of good character bears directly on that issue, as a defendant is entitled to the benefit of his good character as part of his defence. So we agree with the majority that the

> consequences for the safety of these convictions are the same irrespective of whether the fault lay with the judge or with the defence."

33. In ***Maye v R***, the appellant made an unsworn statement in his defence to a charge of murder. He was convicted and his appeal to the Privy Council was allowed on the basis of the failure of defence counsel to call a highly material witness and to adduce evidence of the appellant's good character. Had the evidence of the witness and a good character direction been given, the Board found itself unable to conclude that the jury would inevitably have convicted the appellant of murder. The Board did however accept the Crown's contention that the impact of the credibility limb of the good character direction "would to some extent have been weakened" by the appellant's failure to give sworn evidence (see per Lord Brown at paragraph 19).

34. ***Muirhead v R*** is a case which neatly captures both elements of the applicant's contention on this appeal. The appellant in that case made an unsworn statement (on advice from his counsel, by which he was, he said, "surprised and disconcerted") and no evidence of his good character was called. Despite the fact that an opportunity to respond was given to them, neither counsel who appeared for the appellant at trial provided any explanation or information to the Board in respect of these matters. The Board accordingly felt constrained to allow the appeal, "with very considerable misgivings", because, in the absence of

any response from counsel, there was "too great a risk that the appellant did not have a fair trial" (per Lord Hoffman at paragraphs 30 and 31).

35. Lord Hoffman who delivered the judgment of the majority (Hoffman Rodger and Neuberger), and Lords Carswell and Mance, who delivered a joint concurrence, spoke to the reduced value of a direction on the relevance of good character to credibility in a case in which the accused did not give sworn evidence. Lord Hoffman described this aspect of the direction in these circumstances as having "doubtful" value (paragraph 26) while Lords Carswell and Mance observed that its importance "is reduced" (paragraph 35). The Board was, however, unanimous in concluding that the appellant was nevertheless entitled to the propensity limb of the direction and it was certainly the view of Lords Carswell and Mance that, had the appellant been advised to give sworn evidence, the good character direction "may have had an effect on the jury in accepting or rejecting his evidence" (paragraph 38).

36. The Board in ***Muirhead v R*** also renewed its caution previously issued in ***Bethel v The State*** (1998) 55 WIR 394, 398 against uncritical acceptance of self-serving statements from convicted persons after trial as to discussions with and instructions given to counsel before and during the trial. Such statements, as Lords Carswell and Mance observed, "are easy

to make and not always easy to rebut" (paragraph 37; see also per Lord Hoffman at paragraph 39).

37. On the perennial question of the value of an unsworn statement, Miss Llewellyn also directed our attention to the decisions of the Privy Council in ***Beckford v R*** [1987] 3 All ER 425 and ***Mills and Others v R*** (1995) 46 WIR 240.

38. ***Beckford*** is, of course, well known as having established that the test on a plea of self-defence is the defendant's honest belief that the circumstances required him to defend himself (a subjective test), and not whether that belief was reasonable (an objective test). But for present purposes, Miss Llewellyn was primarily concerned to remind us of Lord Griffiths' caution to defence counsel in cases in which self-defence is in issue that "there is an obvious danger that a jury may be unwilling to accept that an accused had an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination" (page 430). And in ***Mills*** it was held that in a case where an accused who relies on an alibi makes an unsworn statement from the dock, no directions are required from the trial judge as to the impact of the rejection by the jury of the alibi (in accordance with ***R v Turnbull*** [1977] QB 224, 230). In such a case it will be sufficient to tell the jury that they should

accord to such statement "only such weight as they may think it deserves" (***Director of Public Prosecutions v Walker*** (1974) 21 WIR 406, 411).

39. These cases, all on appeal from Jamaica, are to some extent complemented by ***R v Clinton*** [1993] 1 WLR 1181, a decision of the English Court of Appeal, to which we were referred by Mrs Samuels-Brown. That was a case in which the prosecution depended on the correctness of the complainant's identification of the appellant as her assailant (he was charged with kidnapping and indecent assault), as well as his incriminating statements made by him after his arrest. The appellant gave no evidence and was not advised by his counsel to do so; and no other evidence was called on his behalf. His appeal was allowed on the basis that the nature of the prosecution evidence had made it essential that he be advised in the strongest possible terms to give evidence, and the failure of his counsel to do so, in combination with the absence of any supporting evidence, was a grave error. As a result his instructions, which, if accepted by the jury, provided him with a strong positive defence, were never put to the jury.

40. The judgment of the court was given by Rougier J, who stated at the outset that "the circumstances in which a court is entitled to overset a jury's verdict when the grounds advanced consist wholly or substantially of criticisms of defence counsel's conduct of the trial, or of matters

preparatory thereto, must of necessity be extremely rare" (page 1186). The reason given for this was that during the course of any criminal trial "counsel for defence is called upon to make a number of tactical decisions not the least of which is whether or not to call his client to give evidence" (page 1187).

41. After a consideration of some of the recent cases on the matter, Rougier J concluded as follows:

> "We think that the proper interpretation of the cases to which we have referred is that the court was doing no more than providing general guidelines as to the correct approach. The court was rightly concerned to emphasise that where counsel had made decisions in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory. Particularly does this apply to the decision as to whether or not to call the defendant. Conversely and, we stress, exceptionally, where it is shown that the decision was taken either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way, it may be open to an appellate court to set aside the verdict by reason of the terms of section 2(1)(a) of the [Criminal Appeal Act 1968]. It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection".

42. ***R v Clinton*** was referred to and applied by this court in ***Ricardo Whilby v R*** (Supreme Court Criminal Appeal No. 72/99, judgment delivered 20 December 2000), in which it was emphasised that it will be necessary in every case in which counsel's conduct of the defence is made the subject of an appeal for the court to make its own assessment of the effect of such shortcomings on the part of counsel as there might have been on the trial or verdict (see the judgment of Cooke JA (Ag), at page 12).

43. Section 2(1)(a) of the UK Criminal Appeal Act 1968, as amended by section 44 of the Criminal Law Act 1977, permits the Court of Appeal to allow an appeal against conviction if the court is of the view that the conviction is "unsafe or unsatisfactory". While there is no provision in similar terms in our law, section 14(1) of the Judicature (Appellate Jurisdiction) Act does, as Mrs Samuels-Brown pointed out, empower this court to allow an appeal if it considers "that on any ground there has been a miscarriage of justice".

The applicable principles

44. In our view, the following principles may be deduced from the authorities to which we have been referred:

(i) While it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful

appeal against conviction, there are some circumstances in which the failure of counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel, can lead to the conclusion that there may have been a miscarriage of justice (***Sealy and Headley v The State,*** paragraph 30 and the Judicature (Appellate Jurisdiction) Act, section 14 (1)).

(ii) Such a breach of duty may also include a failure to advise, in an appropriate case, if necessary in strong terms, on whether the accused person should make an unsworn statement from the dock, give sworn evidence, or say anything at all in his defence (***R v Clinton)***.

(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with

which he is charged (***Muirhead v R***, paragraphs 26 and 35).

(iv) On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be of relevance and will ordinarily, in the absence of other factors, be accepted by the court (***Bethel v The State,*** page 398; ***Muirhead v R,*** paragraphs 30 and 37).

(v) The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury,

properly directed, would inevitably or without doubt have convicted (***Whilby v R***, per Cooke JA (Ag) at page 12, ***Jagdeo Singh v The State*** (2005) 68 WIR 424, per Lord Bingham at pages 435-436).

Applying the principles

45. While there remains an unresolved question of fact whether the applicant was fully advised by Mr Thompson on the implications of his remaining silent, giving sworn evidence or making an unsworn statement from the dock (and on this the court would naturally be inclined to accept Mr Thompson's statement that he did), it appears to us from his own account that such advice as he gave would plainly have had no character dimension. In other words, given his own clearly stated view that this was not a case in which he saw any role for character evidence as part of the defence case, counsel is unlikely to have advised the applicant that the combination of giving sworn evidence and adducing character evidence would have entitled him to the benefit of an unqualified good character direction from the judge relating to both credibility and propensity. Given the fact that the issue of credibility loomed large in the case, "if [the applicant] had given sworn evidence, the direction may have had an effect on the jury in accepting or rejecting his evidence" (per Lords Carswell and Mance in ***Muirhead v R***, at paragraph 38).

46. But even if the applicant had in the face of such advice chosen, as in fact he might well have done, to make an unsworn statement, Mr Thompson's own wholly admirable candour on the matter also serves to remove any question whether any or any sufficient consideration was given to the significant benefit that the direction could nevertheless have afforded the applicant, in particular on the issue of propensity, in the circumstances of this case.

47. The applicant was 37 years of age at the time of trial and there is no question that he was, as emerged from the evidence given in mitigation, of good character. Had character evidence been called on his behalf, the trial judge would have been obliged to give a standard good character direction to the jury. While, in the light of the applicant's unsworn statement, the value of the credibility limb might have been reduced, the judge would still have been obliged to invite the jurors to ask themselves whether someone of his unsullied background would be likely to have committed the offence.

48. We cannot doubt that Mr Thompson's advice and tactical decisions in the conduct of this matter were born of pure good faith in what he considered to be the applicant's best interests. However it appears to us that he clearly misapprehended the significance in a case such as this of character evidence and the potential benefit to the applicant of a standard good character direction. In these

circumstances, we are unable to say that if, correctly advised, the applicant had chosen to give sworn evidence and had had the benefit of such a direction, the jury would inevitably or without doubt have convicted. And even if, after appropriate advice, he had remained resolved to make an unsworn statement, as in fact he did, we are equally unable to predict the effect that such a direction would have had on the jury.

49. It is for these reasons that we came to the conclusion that the applicant was entitled to succeed on this ground.

The other grounds

50. In the light of our conclusion on supplemental ground 5, which suffices to dispose of the appeal, we will deal with the other grounds together and briefly.

51. Supplemental ground 1 complained that the learned trial judge had referred to the complainant as the 'victim' at crucial points in her summing-up to the jury, thus undermining her directions on the burden and standard of proof and/or inviting the jury to pre-judge the applicant's guilt. Miss Llewellyn, on the other hand, pointed out that the word 'victim' had been used by the judge no more than three times during the summing-up, not so much in reference to the complainant, but as part of the judge's explanation of the issues to the jury. So, for instance, the judge told the jury that "if there is any force, or if the victim is put in fear

this would negative consent...". We agree with Miss Llewellyn that the possibility that the jury might have taken the learned judge to have already assessed the complainant to be a 'victim', notwithstanding that that was the very matter being left to them for decision, was remote. Perhaps it might have been better for the avoidance of all doubt to eschew the use of the word 'victim' altogether, but it cannot in our view be successfully maintained that its use in the context could have given rise to a miscarriage of justice.

52. Supplemental ground 2 complains that the trial judge failed to point out to the jury that the complainant had made no complaint of rape to her relatives immediately or shortly after the incident involving the applicant. Miss Llewellyn countered by submitting that in the absence of any evidence of recent complaint there was no obligation on the part of the judge to deal with this issue, and we agree. In the light of the evidence in the case, which did not disclose any recent complaint, any such direction could have been no more than an invitation to the jury to speculate on the reasons for the absence of such a complaint.

53. Supplemental ground 3, as set out in printed form by Mrs Samuels-Brown, complained that the judge's directions as to the applicant's unsworn statement "were inadequate and/or unfair." However, it turned out during the argument that her real complaint was that the judge had failed to highlight an aspect of the defence to the jury, which was the

evidence that the complainant and the applicant had been in contact with each other both before and after the night in question. However, in our view the judge dealt fully and fairly with the applicant's defence as it emerged from his unsworn statement, ending her directions with the now time honoured ***D.P.P. v Walker*** formula that "in considering your verdict you should give the accused man's unsworn statement only such weight as you think it deserves".

54. And finally, supplemental ground 4 complained that the sentence of 7 years imprisonment was manifestly excessive, Mrs Samuels-Brown's main point being that the judge treated a custodial sentence as mandatory for the offence of rape. In fact, what the learned judge said was that "this is not a type of offence where I can give a non-custodial sentence...[it] is much too serious", indicating, quite unexceptionably in our view, that the facts of the case seemed to her to call for a custodial sentence. In the result, we do not think that the sentence imposed can by any measure be described as manifestly excessive.

Conclusion

55. The applicant therefore succeeds on supplemental ground 5, with the result described in paragraph 1 of this judgment. But we cannot leave this appeal without recording our gratitude to learned counsel on both sides for their careful, restrained and highly responsible submissions in what must have been for them a difficult matter professionally.