[2013] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 7/2009

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

DWAYNE WHITE v R

Delano Harrison QC for the appellant

Miss Dahlia Findlay for the Crown

7, 8 November 2012 and 1 March 2013

MORRISON JA

Background

[1] On 8 November 2012, this appeal was dismissed and the court ordered that the appellant's sentence should be reckoned from 10 March 2009. These are the promised reasons for this decision.

[2] This is an appeal, pursuant to leave granted on 4 June 2012 by a single judge of this court, from the appellant's conviction and sentence in the High Court Division of the Gun Court on 10 December 2008. The appellant was tried before Gayle J (Ag) (as he

then was) on an indictment containing three counts, for illegal possession of firearm (count one), abduction (count two) and assault with intent to rape (count three). He was sentenced to 10 years' imprisonment on each of counts one and two, and two years' imprisonment on count three. The sentences were ordered to run concurrently.

The Crown's case

[3] The main witness for the prosecution ('the complainant'), was at the material time a student at the Papine School in the parish of St Andrew. Her evidence was that, at about 10:45 am on 11 May 2006, she was standing by herself on the side of the road, dressed in her school uniform, in Industrial Village, Gordon Town, St Andrew. There was a bus stop on the left side of the road, going towards Papine from Gordon Town, and she was standing on the right side of the road, opposite the bus stop. As she stood there, a car headed in the direction of Papine stopped in front of her on her side of the road. The windows of the car were wound up initially, but when the window on the right side, which faced her, was wound down, she saw a man whom she did not know before. He was alone and sitting inside the car on the right side. He was holding a gun pointed in her direction. This man, who the complainant later identified as the appellant, ordered her into the car, telling her that, if she did not comply, he would kill her. Frightened, she went into the car, as ordered, taking a seat on the left side of the vehicle, in the passenger seat, whereupon the appellant drove off in the direction of Papine, with the gun still pointed at her. When he got to a point in the road known as 'Look up', the appellant turned the car onto Jacks Hill Road, where, according to the

complainant, he drove up the road and stopped the car, parking it "in a bushy place". During this journey, nothing was said between them.

[4] The appellant then took up the gun, which he had placed between his legs, and again pointed it at the complainant, telling her, "Do weh mi tell yuh fi do or mi a kill yuh". The appellant touched her breast, but she pushed away his hand, whereupon he stuck the gun in her side, attempting to pull the button on her uniform skirt and to push his hand under the skirt. She then started to cry, and asked the appellant if "him nuh have woman", to which his response was no, that was why he wanted her. A struggle ensued, during which the appellant took out his penis and instructed the complainant to perform oral sex on him, which she refused to do, and to take off her panties. She initially declined to do the latter, but the appellant hit her in the head with the gun and threatened to kill her, after which she removed her panties. After a further exchange between them, the appellant pulled the complainant down over him in the driver's seat of the car, at which point she pushed her foot underneath the seat and told the appellant that it was stuck under the seat. The appellant put down the gun, which was up to that time still in his hand, and tried to pull out the complainant's foot from under the seat. During this manoeuver, apparently inadvertently, the appellant opened the front door on the driver's side of the car and the complainant jumped out of the car, grabbing the gun at the same time, and fell to the ground.

[5] A further struggle now commenced between the appellant and the complainant for control of the gun. This is the complainant's account of what happened next:

"A: Mi and him was wrestling and him a draw the gun from me and mi hand between the round part and him draw the gun and mi a draw it back and when mi look, mi see a white van a come

Q: Stop. Yes.

A: The white van a come, mi draw the gun and wrestling the gun.

Q: On the ground same way?

A: No, him stand up on the side and spin go round and him a draw mi and mi draw him back, mi leggo the gun and just run towards the van.

HIS LORDSHIP: Yes?

A: The van stop and mi a run towards it and bawl and cry fi help.

MISS AUSTIN: And you cry fi help?

A: And mi run towards the van, mi just open the door and go inside there; two man did inside there.

Q: When you open the door to go inside the van…, was the van moving or it stopped?

A: It stop

Q: You saw the two men inside the van?

A: Yes.

Q: Continue please.

A: Mi just open the door and go inside and mi tell him the man a try fi rape mi.

HIS LORDSHIP: Yes?

A: And the man dem never move and dem stand up a watch him

and dem tek down the licence plate.

MISS AUSTIN: Just a moment. All right…

A: Wi deh-deh a watch him, him go round the other side where mi did deh.

Q: Him who?

A: The man who did a try fi rape mi.

Q: Go round the other side?

A: And him tek out mi bag and book and panty and mi short [sic] and threw [sic] out.

Q: Out of what?

A: The car and through [sic] them on the ground.

Q: The bag, panty, what else?

HIS LORDSHIP: And shorts, Yes?

A: And then him go round the other side and drive off but mi ID did leff inna him car.

MISS AUSTIN: All right. Now, after the man drove off, did you go anywhere?

A. The man den drive and go up little where him was and mi tek up mi panty, mi shorts and mi bag."

[6] The men who had rescued her assisted the complainant and in due course a report was made to the Papine Police Station. Some time afterwards, the complainant attended an identification parade at the Half-Way-Tree Police Station, where she identified the appellant as the person who had taken her away in his car on the day in question.

[7] The second witness for the prosecution was Mr Andre Britton. By the time of trial, Mr Britton was a university student, but at the material time he was an employee of his father's company. His evidence was that at approximately 10:50 am on 11 May 2006, in the company of a co-worker, he was driving a motor truck up Jacks Hill Road when he saw two persons, a female in uniform and a man, at a distance of about 18 metres or so, further up the road. The persons appeared to be fighting, "physically pulling and pushing" and, as Mr Britton reduced his speed, they continued to struggle with one another. But, as he got closer to them, the female ran off in the direction of the truck and jumped into the vehicle on the left side, beside Mr Britton's co-worker, "shouting 'help, him trying to rape me' or something like that". At this point the male, who Mr Britton subsequently identified as the appellant, went back into the car, which was stationary on the road ahead of Mr Britton's truck, turned the car around, threw a bag and some books out of the car onto the road and drove past the truck. As the car passed him, Mr Britton took down the licence number of the car, which he gave in court as 2079EP.

[8] During the course of a very brief cross-examination by the appellant's counsel at the trial, it was suggested to Mr Britton that the appellant and the complainant "were not engaged actually in a fight; from the distance you thought it was a fight". There was no response by the witness to this suggestion, but he was then asked whether there "[was] any reason why you didn't try to part the struggle or the fight?" to which he replied, "I was in a moving vehicle, I couldn't stop the fight."

[9] On 22 May 2006, Mr Britton attended an identification parade at the Half-Way-Tree Police Station, where he identified the appellant as the male person whom he had seen with the complainant on the Jacks Hill Road on the morning in question.

[10] Sergeant Livene Henry, who was at the material time the manager of the Divisional Intelligence Unit at the Hunts Bay Police Station, also gave evidence for the prosecution. Sergeant Henry told the court that the appellant was attached to that unit. She also said that a Mitsubishi Lancer motor car, licensed no 2079EP, was assigned to the unit and that the appellant, who was wearing civilian clothes at the time, had been given permission to drive the motor car on the morning of 11 May 2006. Cross-examined by counsel for the defence, Sergeant Henry said that the appellant had worked under her command for over a year and, when asked to state her reaction to the allegations that had been made against him in this case, she replied, "It was surprising to me." She went on to explain that, "I don't know of him to be involved – I know him as a decent young man, attached to our unit."

[11] Evidence having been given (without controversy) by Constable Edwin Campbell as to the conduct of the identification parade, the final witness for the prosecution was Sergeant Vancietta Craig, who was the arresting officer. Upon being cautioned, the appellant said, "I am not guilty of those charges, you are just doing your job." Cross-examined, Sergeant Craig said that she had known the appellant for approximately eight years before and that, when she heard of the allegations against him, she was "really astonished". She went on: "The person I know, I don't know him of that character."

The defence

[12] That was the case for the prosecution, after which the appellant gave evidence in his defence. At the material time, he had been a member of the Jamaica Constabulary Force for over eight years and was stationed at the Hunts Bay Police Station. He was also pursuing a degree in business administration at the University of Technology ('UTECH') and was due to be interviewed for participation in the force's accelerated promotion programme on 31 May 2006.

[13] On 11 May 2006, he had obtained permission to use the motor car licensed no 2079EP, for the purpose of visiting UTECH to make some enquiries. Having done that, he decided to drive to Gordon Town to visit a friend and, upon reaching Industrial Village, he saw a young lady, who was previously unknown to him, standing on the left hand side of the road going up. He stopped and enquired where she was going, to which she replied that she was going to Papine. He then told her that if he saw her

when he was on his way back down from Gordon Town he would carry her to Papine. Having completed his business in Gordon Town, he headed back down towards Papine and, on reaching Industrial Village, he saw the same young lady, who was the complainant, at the same spot at which he had seen her earlier. She gave a little signal and he drove across to the right side of the road going down and invited her to come into the car, which she did voluntarily. While he was at the time carrying a firearm, it was under his leg and he did not point it at her.

[14] With the complainant in the car, the appellant resumed driving in the direction of Papine and they exchanged names and casual, friendly conversation. The complainant, who was in uniform, told the appellant her name and that she was a student at Papine School. After further conversation between them, (during which, he said, he told her that she "looked like a hot girl"), he asked her if she knew of any place where they could "stop and talk" and it was she who indicated a turn off to the right of the main road to Papine. He took the right turn and continued driving, still talking, until they reached an open space, where, after the complainant again indicated, "here so", he stopped and switched off the engine of the car. As they sat there, the talk between them became increasingly intimate, during which he gave her $700.00 to assist her with the purchase of a pair of sneakers, which she said she needed. In answer to his question, she told him that she liked him and, after a while, came over to the side of the car on which he was sitting and sat on top of him. As she was doing this, he told her, "Weh you a do, you mad, you nuh see a roadside this", and switched on the engine of the car and put up the windows. During all of this, his firearm remained

under his leg. She pulled two or three buttons on her blouse and he touched her breast for about 15 seconds. Then he stopped, again telling her, "A roadside this you nuh, fix up you clothes." He did not threaten or assault her in any way, but they continued talking, discussing the possibility of meeting later that day after she finished school.

[15] He it was who then said, "All right, come, come, make me carry you down now", at which point she said that her foot was stuck. As he moved his foot to allow her to "ease out" her foot, he told the court, "the gun fly from under my leg on the floor, and that is the first time she see the gun…" He could see that the complainant was frightened by the sight of the gun (he had not told her that he was a policeman) and, after it fell to the floor, she grabbed on to it, but he took it back from her. She opened the door and he told her to come out of the car, "but before she could come out she dropped". The appellant denied that he and the complainant wrestled for the gun on the ground, but after she came out of the car he held on to her hand, telling her to relax and then he saw the white van or truck coming up the road. At that point, she called out for "rape", he let go of her hand and she ran towards the truck and jumped into it. He then went back to the car, retrieved her bag and book and put them on the ground, before driving off. He denied attempting to rape the complainant, fondling her, taking out his penis, hitting her in the head with the gun or threatening to shoot her in the foot.

[16] After the appellant was cross-examined and re-examined, the learned trial judge, after indicating that he wished to ask him "a few questions to clear up certain things", proceeded to ask a number of questions, which covered some six pages of the

transcript. The judge, who appeared particularly interested in how the appellant's firearm came to be dislodged from the spot in which he had put it under his leg, ended his questions on this note:

> "HIS LORDSHIP: Demonstrate that to me. How she saw the gun on the floor in all that position that I have asked. Remember her head is this distance, you are in a position, show us how.
>
> A: She was like this you know, and then she is going back across, so she would be like this and she foot stuck.
>
> HIS LORDSHIP: Remember the steering behind her.
>
> A: Yes, M'Lord
>
> HIS LORDSHIP: Protruding to...
>
> A: And she is going back across M'Lord, I ease up a little.
>
> HIS LORDSHIP: Which one of her foot?
>
> A: It would have been the left foot.
>
> HIS LORDSHIP: How you ease up?
>
> A: I ease up like this (Demonstrating)
>
> HIS LORDSHIP: When you eased up the gun fell?
>
> A: Yes, M'Lord
>
> HIS LORDSHIP: How you ease up?

A: Like this.

HIS LORDSHIP: When you ease up, something like this and you ease up?

A: I don't ease up straight.

HIS LORDSHIP: How?

A: Like this.

HIS LORDSHIP: Isn't it a fact, physics show you when you ease things come backwards rather than go forward?

A: I don't know.

HIS LORDSHIP: You don't know. Anything from this?"

The summing up and verdict

[17] That was the case for the defence. In summing up the case, Gayle J (Ag) considered that the main issue was that of credibility. Another issue, he said, was the appellant's good character: "What he is saying in effect is that I am of good character and I would not have committed these offences." After reminding himself of Sergeant Henry's evidence that the appellant was "a decent young man", the judge observed that "this is where his character comes into question and as such I make it an issue in this case". In a further comment on the matter, after reading over Sergeant Craig's evidence that, in the light of the person she knew the appellant to be, she was "astonished" at the allegations against him, the learned judge said that, "Again, his

character comes into issue and as such that is why I said, in previous witnesses, there is nothing of his character for me to consider whether he has committed this offence." And in a final comment towards the end of the summing up, the judge said that "[t]he defendant said I am of good character and that I never ever draw a gun on this person or pull a gun on this person". At the end of his summing up, the judge proclaimed himself satisfied on the evidence of the appellant's guilt on all three counts of the indictment, and passed sentence on him in the manner already indicated.

The grounds of appeal

[18] Mr Harrison QC for the appellant sought and was given leave to argue five supplemental grounds of appeal, in place of the original grounds filed by the appellant himself. These were as follows:

1) The learned trial judge erred in his treatment of the material before him, respecting the appellant's previously good character.
2) In his summation the learned trial judge failed to make it demonstrably clear that he took into account the probative significance of the fact that the appellant had, in fact, given sworn evidence in his defence.
3) The learned trial judge erred in his failure to direct himself that the evidence of the prosecution's witness, Andre Britton, of a complaint to him by the complainant that the appellant had, allegedly, recently sexually assaulted her, was not evidence of the truth of the act complained of nor did it constitute independent confirmation of the complainant's evidence on the issue.

4) The learned trial judge failed, generally, to approach the appellant's defence fairly and/or adequately and, in particular, clearly demonstrated this by the nature of his own examination of the appellant.

5) The learned trial judge failed to analyse or assess, or otherwise treat with, evidence that told significantly against the complainant vis-à-vis her reliability as a witness: her own evidence as to precisely where she was positioned on her first encounter with the appellant.

The argument

[19] Mr Harrison argued grounds one and two together. He submitted that the appellant was entitled to the benefit of both the propensity and the credibility limbs of the good character direction, he having put his character in issue by virtue of the evidence of Sergeant Henry and Sergeant Craig, and having given sworn evidence. Such a direction was particularly necessary in a case such as the instant case where the appellant's credibility was a live issue. While the judge appears to have recognised the need for a good character direction to some extent, such directions as he did give were "quite unclear". In support of this submission, we were referred to our own previous decisions in ***Norman Holmes v R*** [2010] JMCA Crim 19 and ***R v George Cameron*** (1989) 26 JLR 453.

[20] Turning to ground three, Mr Harrison's submission was that the judge ought to have directed himself specifically as to "the true legal status" of Mr Britton's evidence of what the complainant said to him, so as to make it clear that such evidence was not

evidence of the facts, but only went to show the complainant's consistency as a witness (***R v Islam*** [1999] 1 Cr App R 22).

[21] The complaint in ground four was that the judge's summing up had been wholly inadequate, in that he had simply read back the notes of the evidence which he had heard, without emphasising, as he was obliged to do, specific points in the defence on which the appellant relied, such as the fact that the complainant had only expressed fear of any kind after she had seen the firearm for the first time. Instead of highlighting the points in the evidence upon which the defence "sought legitimately to rely" (per Waterhouse J, in ***R v Berrada*** (1990) 91 Cr App R 131, 133), it was submitted, the judge had embarked on a line of questioning of the appellant which was unfair, "as it was, plainly, calculated to discredit the [appellant's] evidence".

[22] And finally, on ground five, it was submitted that, this being a case of the complainant's against the appellant's word, the trial judge was obliged to analyse and assess the complainant's evidence critically. Had he done so, learned counsel argued, he would have recognised that her own evidence of the position in which she had been standing on the Gordon Town Road tended to support the appellant's version that their encounter and the subsequent events were entirely consensual.

[23] Responding for the Crown, Miss Findlay pointed out firstly, on grounds one and two, that the learned trial judge was obviously aware of the fact that the appellant's character had been put in issue. However, she acknowledged, although the judge did refer to the appellant's character in the context of his credibility, he did not specifically

advert to the significance of the appellant having given sworn testimony, and there could have been "greater precision" in the judge's directions on the point. But, Miss Findlay submitted further, even if the judge's directions were inadequate, there was no miscarriage of justice, in the light of the other evidence in the case and the careful manner in which the judge analysed the appellant's evidence. This was a case in which the court should therefore apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ('the Act').

[24] On ground three, Miss Findlay submitted that the evidence given by Mr Britton, was in fact part of the *res gestae*, rather than evidence of a recent complaint, as Mr Harrison had contended. As such, it was evidence which could be relied on for the truth of its contents without any specific direction from the judge.

[25] On ground four, it was submitted that a trial judge is at liberty to ask questions for the purposes of clarification at any time during the trial, so long as he does not descend into the arena. The judge's questions in this case were within acceptable limits and were not unfair to the appellant.

[26] And finally, on ground five, it was submitted that the judge had directed himself adequately on the treatment of inconsistencies in the evidence, which were, in any event, matters for his jury mind.

Discussion

Grounds one and two

[27] In ***Holmes v R***, to which Mr Harrison referred us, this court confirmed (at para. [47]) that it is beyond question that a defendant who puts his character in issue and testifies in his own behalf "[i]s entitled to a credibility direction, that is, that a person of good character is more likely to be truthful than one of bad character, and a propensity direction, that is, that he is less likely to commit a crime, especially one of the nature with which he is charged". In the instant case, both Sergeant Henry, who was the appellant's immediate supervisor, and Sergeant Craig, who had known him for over eight years, expressed surprise at the allegations against him and considered them out of character. The appellant having chosen to give evidence in his defence, he was therefore entitled to both the credibility and the propensity limbs of the good character direction.

[28] While it is clear from what the learned judge said on the subject in his summing up (see para. [17] above) that he was aware, as Miss Findlay submitted, of the need for directions on the issue of good character, it is equally clear, it seems to us, that such directions as he did give lacked precision, as Miss Findlay euphemistically put it. While the judge's remark that what the appellant was saying was that "I am of good character and I would not have committed these offences", probably could pass muster as the propensity limb of the good character direction, there was absolutely no mention of the credibility limb. This was a particularly serious omission in a case which turned to a

very large extent on the resolution of the contest of credibility between the complainant and the appellant (see ***Teeluck & John v The State of Trinidad & Tobago*** (2005) 66 WIR 319, 329, where Lord Carswell said, "Where credibility is in issue, a 'good character' direction is always relevant"). There is also the additional consideration that the learned judge did not once mention the fact that the appellant gave sworn evidence as a matter of importance in assessing his credibility.

[29] But, as Lord Bingham of Cornhill said in ***Jagdeo Singh v The State*** (2005) 68 WIR 424, para. [30] (in a passage also referred to in ***Holmes v R***), "omission of a 'good character' direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction…[m]uch may turn on the nature of and issues in a case, and on the other available evidence". In this regard, Miss Findlay very properly drew our attention to Mr Britton's evidence, which strongly supported the evidence given by the complainant, and contradicted that given by the appellant, in at least two significant respects: first, that the complainant and the appellant were "fighting", "struggling" or "wrestling" after the complainant got out of the car; and second, that the appellant had thrown the complainant's belongings out of the car before driving off. This was therefore independent evidence, which was only faintly challenged in cross-examination by the appellant (see para. [8] above). It provided a clear basis upon which the trial judge was entitled to prefer the complainant's evidence over the appellant's on these critically important points.

[30] This was therefore a case in which it appears to us that the potential benefit of a good character direction to the appellant was wholly outweighed by the nature and

coherence of the other evidence which the judge obviously accepted (cf ***Balson v The State*** (2005) 65 WIR 128, para. [38]; ***Patricia Henry v R*** [2011] JMCA Crim 16, para. [51]; and ***France & Vassell v R*** [2012] UKPC 28, paras [42]-[49]).

Ground three

[31] The appellant complains on this ground of a failure by the learned trial judge to direct himself as to the true legal significance of Mr Britton's evidence that, after she got into the truck driven by him, the complainant had shouted for help, saying that the appellant was "'trying to rape me' or something like that" (see para. [7] above). According to Mr Harrison, this was evidence of a 'recent complaint', which may be given in a sexual case, as Lord Goddard CJ observed in ***R v Wallwork*** (1956) 42 Cr App R 153, 161, "…only for a particular purpose, not as evidence of the fact complained of…[but] for the purpose of showing consistency in her conduct and consistency with the evidence which she has given in the witness box" (see also ***Islam v R***, at page 26, where this statement is cited with approval by Buxton LJ).

[32] It appears to us that, as Miss Findlay submitted, this evidence, which was admitted without objection or argument at the trial, was in fact evidence forming part of the *res gestae*, and as such properly admitted as an exception to the rule against hearsay. In the classic modern case of ***Ratten v R*** [1971] 3 All ER 801 808, the Board (by way of a magisterial judgment by Lord Wilberforce) concluded, after a full review of the authorities, that –

> "…there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

[33] ***Ratten*** was applied by the House of Lords in the subsequent case of ***R v Andrews*** [1987] 1 All ER 513. That was a case in which the appellant and another man knocked on the door of the victim's flat and, when the victim opened it, the appellant stabbed him in the chest and stomach with a knife and the two men then robbed the flat. The victim was found some minutes later. The police were called and they arrived very soon after. The victim, who was seriously wounded, told the police that he had been attacked by two men, and gave the name of the appellant and the name and address of the other man before becoming unconscious. He was then taken to hospital where he died two months later. It was held that hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the *res gestae*, at the trial of the attacker, provided that the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible, it must be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event. The possibility of error in the facts narrated by the victim goes to the weight to be attached to the statement by the jury and not to admissibility. (***Andrews*** has been

followed and applied in judgments of this court in ***R v Icilda Brown*** (1990) 27 JLR 321 and ***R v Winston Hankle*** (1992) 29 JLR 62, and by the Privy Council in an appeal from Jamaica in ***Mills and Others v R*** [1995] 3 All ER 865, 875-876.)

[34] The complainant's statement to Mr Britton in the instant case fully satisfies, in our view, all the criteria of admissibility as being part of the *res gestae*: it was spontaneous, it was contemporaneous and it was plainly so closely associated in the complainant's mind with the appellant's attack on her that her mind was wholly dominated by the event. In addition, there was absolutely no opportunity for concoction or distortion to the appellant's disadvantage. Once admitted, such evidence is capable of being relied on, as Lord Wilberforce put it in ***Ratten*** (at page 805), "'testimonially', ie as establishing some fact narrated by the words". It is, in other words, proof of the truth of the facts narrated (thus providing, in our view, in addition to the matters mentioned in para. [29] above, an additional basis upon which the trial judge was entitled to have preferred the complainant's evidence over that given by the appellant). It therefore follows that ground three, which contends that Gayle J ought to have directed himself to the opposite effect, cannot succeed.

Ground four

[35] The appellant's complaint on this ground relates to the learned trial judge's treatment of the defence in his summing up. In this regard, Mr Harrison associated himself particularly with Waterhouse J's summary of the case for the appellant in ***Berrada*** (at page 133): "…the overall effect of many passages in the judge's summing

up was to weigh it unfairly in favour of the prosecution and to diminish to an unjust extent both the appellant's case generally and specific points on which the appellant sought legitimately to rely".

[36] At the very outset of the summing up, Gayle J stated that "the main issue is credibility". Thereafter, he undertook a review of all the evidence in the case, ending with a full rehearsal of the appellant's evidence. While he did not, perhaps unsurprisingly, characterise the appellant's case as colourfully as Mr Harrison did before us, that is, that "always consensual sexual exchanges went downhill because of the circumstance in which the complainant came to have seen the firearm for the first time that fateful morning", it is clear that the judge fully appreciated the purport of the appellant's evidence in this regard. Hence, he reminded himself that the appellant had said in evidence that, based on all that had happened before the gun came into view, "he honestly believed that she was up to all that was happening" and that "is the gun that make her frighten". However, as he was entitled – and, indeed, obliged - to do, during the course of his summary of the appellant's evidence the judge did occasionally contrast it with other evidence in the case, notably that of Mr Britton, whom he described, accurately, as "the independent witness". Thus, in relation to the appellant's evidence that he was at no stage wrestling with the complainant for his firearm, the judge recalled the evidence of Mr Britton that the complainant and the appellant were "outside wrestling". And again, as regards the appellant's evidence that the complainant did not grab the firearm and run, the judge pointed out that the independent witness "saw a struggle outside there".

[37] It cannot therefore be said, in our view, that the learned judge did not appreciate the nature of and deal adequately with the appellant's defence. But Mr Harrison also complained about the extent and nature of the questions which the judge posed to the appellant at the completion of his evidence. Thus, for example, the judge wanted to know how long the appellant and the complainant sat parked in the car on Jacks Hill before the complainant "ran from the car", to which the appellant's response was, "About 45 minutes to an hour". The judge was also interested to discover if the windows of the car were tinted (they were); whether the shade of tint was "dark midnight tint or regular tint" (it was a "dark tint"); whether the car had "bucket seat or regular seat" (there were two "regular" seats); whether the "gear levers" of the car were between the front seats (they were); whether the transmission was automatic (it was); which foot was used to control the car (the right foot); which hand was "used mostly" to control the car (the right hand); and what kind of firearm the appellant was carrying on the day in question (a Browning 9 millimetre).

[38] While it is true that the questioning, which, as we have indicated, covered six pages of the transcript, certainly seemed considerably more extensive than might ordinarily be expected for the purpose of clarifying "certain things", as the judge put it, it seems to us, taking the questions as a whole, that the entire exercise was essentially innocuous, and perhaps even superfluous. The only one of the judge's questions to which Mr Harrison drew specific attention was the one contained in the passage to which we have already referred to above (at para. [16]), that is, whether it was a fact that "physics show you when you ease [sic] things come backwards rather than

forward". This question was, counsel complained, "wholly unfair" and "confusing". We agree with the latter comment and we are as equally at a loss as the appellant obviously was to apprehend the meaning of it. But, having said that, we cannot see what possible prejudice could have been caused to the appellant by the question. The essential issue in the case was whether the complainant was forced by the appellant at gunpoint to enter the car driven by him at Industrial Village, or not. There was, as we have attempted to demonstrate, ample evidence from which the judge could have resolved this issue against the appellant and, in these circumstances, we do not think that there is anything in the judge's obscure reference to the laws of physics to require us to disturb this conclusion.

Ground five

[39] On this ground, the appellant complained of the effect of the "glaring inconsistencies" in the complainant's evidence. In the light of all that we have already said in this judgment, it suffices to say, we think, that the learned trial judge directed himself, in terms about which no complaint is made, on the effect of inconsistencies:

> "In every criminal trial there are inconsistencies sometimes, so I must pay attention to any major inconsistencies that may arrive [sic] in the evidence. As I look at the evidence in this case, I am to consider all aspects of the evidence. Inconsistencies fall into two categories: some inconsistencies go to the root of the case others are slight."

[40] It was entirely a matter for the judge to resolve such inconsistencies as there were in the complainant's evidence and it appears to us that the conclusion which he expressed in the following terms was entirely justified by the evidence in the case:

> "I have considered all the evidence and my findings are, and I find that the accused man pulled his gun at this complainant and ordered her into the car. I find that he abducted her and took her to this spot in the hills. I find that he fondled her, took out his penis and ordered her to come over him and I find that this man – she managed to grab the gun and wrestled outside for the gun after they came from the car. He flung these things that I have said from the car and I find that the independent witness wrote down the licence number. I reject his version of the case."

Disposal of the case

[41] It is for all of these reasons that the court considered that, notwithstanding that the points raised by the appellant on grounds one and two might be decided in his favour, this was a case in which the proviso to section 14(1) of the Act should be applied, no substantial miscarriage of justice having occurred. In the result, the appeal was dismissed, in terms set out at para. [1] above.