[2024] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00015

DALE WITTOCK v R

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

Ms Paula Llewellyn KC and Ms Paula Sue Ferguson for the Crown

15, 16, 17, 18, 19, 23 January and 25 October 2024

Criminal law – Rape – Incompetence of counsel - Failure to call witness on behalf of the defence – Failure to follow client's instructions – Whether the applicant received an unfair trial due to incompetence of counsel – Recent complaint – Whether the trial judge was required to direct the jury on how to treat with inadmissible evidence extracted from the complainant but not meeting the requirements of a recent complaint – The extent of the directions required from the trial judge concerning the defence of alibi – Whether the trial judge was required to give a Lucas direction - Identification evidence – Whether the prosecutor was permitted to lead evidence on identification - Effect of errors made by the trial judge in directing the jury on the law of rape – Whether the trial judge should have permitted defence counsel to cross-examine the complainant on sexual behaviour – Whether a retrial should be ordered - Sexual Offences Act, Ss 3(1), and 27

Constitutional law - Whether there was a breach of the applicant's right to a fair trial within a reasonable time – Pre-trial delay – Post-trial delay – Delay in the production of the transcript of proceedings – Incomplete transcript – Appropriate remedy for breach of constitutional rights – The Constitution of Jamaica, s 16(1)

STRAW JA (on behalf of the majority)

Introduction

[1] This appeal arises from the conviction and sentence of Dale Wittock ('the applicant'), for the offence of rape. He was convicted on 25 October 2018 after a trial in the Clarendon Circuit Court before Wiltshire J ('the learned judge'), sitting with a jury. He was sentenced on 7 December 2018 to 15 years' imprisonment at hard labour with the stipulation that he serves 10 years before becoming eligible for parole.

[2] The applicant made an application for leave to appeal against conviction and sentence. On 15 April 2021, the application was refused by a single judge of this court. The application has now been renewed before this court.

The background

[3] The virtual complainant ('the complainant') gave evidence that on 21 September 2012, after 6:00 am, while she was home alone, the applicant entered her home, covered her mouth, pushed her onto the bed, and inserted his penis inside her vagina. She resisted by pushing and kicking the applicant. She also gave evidence that he ejaculated on her leg. She was 14 years old at the time of the incident, and the applicant was well known to her. He and his spouse, Miss Ann Marie Simmonds ('Miss Simmonds'), were tenants of her aunt, with whom she resided, at the time of the incident. They rented a section of the premises to operate a bar but lived elsewhere. The Crown tendered medical evidence which supported vaginal penetration (some scarring from sexual intercourse).

[4] The applicant gave sworn evidence at the trial, but no witnesses were called on the case for the defence. He denied that any sexual contact took place between himself and the complainant. He raised the defence of alibi, in that, he was at home with Miss Simmonds at the time of the incident. He gave evidence, also, that he suffered from a disability to his right hand, which rendered him unable to use the said hand to its full extent. He stated that, in light of the rape allegations, the complainant's mother had demanded money from him. This demand, he asserted, took place at the complainant's

aunt's home in the presence of the complainant's mother, aunt, and Miss Simmonds. The applicant also put his good character in evidence by speaking of his lack of any previous convictions.

[5] Miss Simmonds was later called to give character evidence at the applicant's sentencing hearing, after his conviction.

Grounds of appeal

[6] On 21 November 2022, supplemental grounds of appeal were filed on behalf of the applicant. However, counsel Mr Williams stated that he would also be relying on the original grounds that were filed by the applicant. The grounds of appeal as cited were:

> "1. Unfair Trial.
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> 2. False accusation by witness.
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> 3. The cumulative effect of grounds 1 and 2 is to make the conviction unsafe.
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> 4. The state infringed the Applicant's constitutional rights to:
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> (a) provide a record of the trial proceedings (s.16(7));
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> (b) review his conviction before a superior court (s. 16 (8)); and
>
> (c) trial in a reasonable time (s. 16(2)),
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> and as these breaches have significantly disadvantaged the Applicant's prosecution of his appeal, the conviction ought to be quashed as an abuse of process.
>
> 5. The trial was a nullity as the indictment was for unlawful sex with girl under 16 but the conviction for rape.
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> 6. The conviction was a nullity as the indictment backing evinced that there was a majority verdict but the transcript indicates that the minimum statutory period to accept such a verdict had not elapsed.

7. a) Prosecuting counsel misconducted the prosecution by leading inadmissible evidence that the virtual complainant had made a complaint sometime prior to the report to the police.

   b) The learned trial judge erred in permitting the prosecution to lead inadmissible evidence that the virtual complainant had made a complaint sometime prior to the report to the police.

   c) the learned trial judge insufficiently directed the jury on the inadmissible evidence that the virtual complainant had made a complaint sometime prior to the report to the police.

8. The learned trial judge's direction on alibi were insufficient as no direction was given as to the repercussion upon a rejection of alibi.

9. (a) The prosecuting counsel misconducted herself by improperly leading the virtual complainant to give evidence as to the identification and recent complaint.

   (b) the learned trial judge acted improperly in permitting the prosecuting counsel to ask leading questions and failed to sufficiently direct the juror [sic] on the evidence so led.

10. The Applicant was denied a fair trial by the court's refusal of an application by his trial counsel to cross-examine the complainant concerning some issues. In the alternative, the learned judge was wrong to curtail trial counsel from advancing his instructions to the sole witness or calling the available witness.

11. The Applicant was denied a fair trial by the absence of a Lucas direction in the circumstances where 'lies' might be used by the jury to support evidence of guilt instead of merely reflecting on the [applicant's] credibility.

12. The learned judge erred by failing to give the applicant the appropriate discount for time spent in custody before the sentence.

13. That the learned trial judge's direction to the jury was weighted in favour of the Prosecution and consequently, the

> learned trial judge failed to outline the defence's case with equal emphasis, was unable to put to the jury for their consideration essential elements of the Applicant's case and failed to correct prosecutor's [sic] impermissible comments in closing speech resulting in the applicant not receiving a fair trial.
>
> 14. Alternatively, if this court is prepared to affirm the conviction and only reduce the sentence for 'time spent on remand' the court should also reduce the sentence for the constitutional breaches, including breach of guarantee for a fair trial in a reasonable time."

[7] Grounds of appeal five, six and 12 were withdrawn at the commencement of the hearing.

Application to adduce additional evidence

[8] At the hearing of this appeal, the applicant sought permission pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA') to introduce fresh evidence for this court's consideration. Mr Williams submitted that this evidence was relevant to grounds one to three of the grounds of appeal which, it was indicated, concerned inadequacy of counsel. In support of the application were the affidavits of the applicant filed 17 November 2022 and 17 November 2023 as well as the affidavits of Miss Simmonds. Defence counsel in the court below also filed affidavits on 16 December 2022, 10 March 2023 and 12 January 2024, refuting the allegations of inadequacy of counsel. In light of the conflicting affidavit evidence, this court had to hear oral evidence from the affiants to assess their credibility and ordered that they be present for cross-examination. The court, therefore, permitted counsel to rely on the affidavits of the applicant and defence counsel in the interests of justice, as well as received oral evidence from the applicant and defence counsel, who were both subject to cross-examination. Miss Simmonds failed to appear and so, I placed no reliance on the affidavits that were filed on her behalf. However, details of some of the contents of her affidavit will be stated in order to elucidate the allegations that were made against defence counsel and to which

there was a response. The affidavits from the applicant and defence counsel and the oral evidence formed the basis for my consideration of grounds of appeal one, two, and three.

The affidavits and the oral evidence

[9] In his affidavit filed on 17 November 2022, the applicant asserted that at trial, he raised the defence of alibi to his counsel and had proposed that Miss Simmonds be called to give evidence as to his alibi, good character, and physical incapacity. Concerning his physical incapacity, he stated that he intended for Miss Simmonds to attend the trial to explain to the jury that he was unable to do certain sexual acts due to the handicap to his hand. Despite this, defence counsel, without his consent, chose not to call Miss Simmonds to give evidence on his behalf. Under cross-examination, he admitted that he did not remember if he had told defence counsel that Miss Simmonds was able to give evidence in relation to his physical incapacity. There is no dispute that Miss Simmonds was present at court during the trial process.

[10] In his second affidavit filed 17 November 2023, the applicant deposed at length that he did not give defence counsel instructions that it was no longer necessary to call Miss Simmonds. He gave detailed reasons explaining why he would not have given such instructions and explained the nature of the prejudice he believed he suffered, arising from the failure to call Miss Simmonds.

[11] In both of his affidavits, the applicant took issue with the comment made by the learned judge that he failed to present a medical certificate to support his physical impairment. He asserted that he was never advised by defence counsel or the learned judge that he had a duty to provide a medical certificate. He subsequently made attempts, through his attorneys, to procure a medical certificate but was told by the South East Regional Health Authority ('SERHA') that the records for the relevant time period would have been expunged due to the lapse of time. It was indicated that records are expunged every 10 years. The applicant would have received the injury to his hand in 1995. He exhibited the letter from SERHA.

[12] By her affidavit sworn on 20 November 2022, Miss Simmonds averred that the applicant was her sexual partner and that he had a physical handicap of which she was intimately aware. According to Miss Simmonds, that handicap would have made it impossible for the applicant to have committed the act of rape of which he was accused, as he was unable to "use his sole good hand to have sexual intercourse … without [her] providing generous assistance to him".

[13] On the other hand, defence counsel, in his affidavit filed 16 December 2022, asserted that on his review of the applicant's file, the applicant had revealed a defence of denial, in that the complainant had told a lie against him and that her relatives had attempted to extort him in furtherance of her lies. Also, his file revealed that Miss Simmonds' role in the case would be to speak to the fact that the relatives of the complainant had attempted to extort the applicant under the guise that he had raped the complainant. Defence counsel asserted that the applicant had indicated that Miss Simmonds could support evidence of his good character. He, however, denied that he received instructions from the applicant or Miss Simmonds that the applicant could not use his right hand to have sexual intercourse with her without her providing generous assistance. The statements he collected from the applicant and Miss Simmonds were exhibited to his affidavit. These statements essentially confirmed defence counsel's assertions. He went on to state that at the close of the Crown's case, the applicant agreed that it was no longer necessary to have Miss Simmonds give evidence and that he had those instructions in writing.

[14] Under cross-examination, defence counsel contended that if he had received instructions concerning Miss Simmonds as an alibi witness, he would have recorded that information and would have called her as an alibi witness. Defence counsel was referred to the transcript where the applicant had given evidence under cross-examination that he was at home with Miss Simmonds at the time of the incident and intended to call her as a witness.

[15] Defence counsel explained, however, that at the end of the applicant's testimony, he had advised him that it would not have been in his best interest for Miss Simmonds to be called. In his affidavit, he stated that the reason for this advice was that, "it was not necessary so to call her as the issue of good character was already in evidence and the persons who were present when the demand for money was made were not called by the Crown as witnesses". However, under cross-examination, defence counsel stated that one of the reasons, as set out in his affidavit (that the Crown witnesses to the extortion were not called), was a mistake and that he had not examined the transcript before preparing the affidavit. Under further cross-examination by Mr Williams, the following exchange took place:

"Terrence Williams:	If the client agrees with you that the witness ought not to be called but then changes his mind you are duty bound to call the witness?
Defence Counsel:	Yes if he has changed his mind.
Terrence Williams:	In this particular case, during his cross-examination by Crown Counsel, [the applicant] said that he intended for Ann Marie Simmonds to come and give evidence for him, do you recall that?
Defence Counsel:	I don't recall that.
Terrence Williams:	Do you know Ann Marie Simmonds?
Defence Counsel:	Yes sir I met with her and took a statement from her.
Terrence Williams:	She ended up giving good character evidence after the man was convicted?
Defence Counsel:	Yes she gave character witness [sic] after the man was convicted.

Terrence Williams:	She was present at court for the trial?
Defence Counsel:	Yes she was present.
Terrence Williams:	[The applicant] expressed his desire that she be called as a witness?
Defence Counsel:	Yes sir.
Terrence Williams:	In open court, [the applicant], he said, Ann Marie Simmonds will come and give evidence for him?
Defence Counsel:	I don't remember."

[16] Mr Williams referred defence counsel to page 98, lines 19 to 22 of the transcript, set out below, which was an exchange between the applicant and prosecuting counsel, Ms Hickson, whilst the applicant was being cross-examined:

"Q [by Ms Hickson]:	Is Ann-Marie coming to give evidence for you?
A [from the applicant]:	Yes, miss.
Defence Counsel:	I don't think he can make that determination, I am counsel in the case."

[17] Mr Williams then continued his cross-examination as set out below:

"Terrence Williams:	Do you recall that as transpiring?
Defence Counsel:	I don't recall but it is the transcript.
Terrence Williams:	Do you recall him saying in the evidence saying he desired Ann Marie to give evidence for him?
Defence Counsel:	I can't recall, I have done a lot of matters since then.

Terrence Williams:	Do you recall in your latest affidavit, 12 January 2024, you say that…
	You say you don't remember you saying that 'I am counsel in the matter I don't think he can make that determination'?
Defence Counsel:	I recall now saying that.
Terrence Williams:	You agree with me that was not a correct statement to make? The determination to call the witness is his determination…
Defence Counsel:	The client has a right to change his mind, the lawyer would be obliged to…
Terrence Williams:	Now having recalled the context as regards [the applicant] expressing that he wanted to call Ann Marie, do you recall saying 'I am counsel in the case'?
Terrence Williams:	Do you recall saying 'I don't think he can make that determination I am counsel'?
Defence Counsel:	Yes, I recall saying that but I explained to him … and he agreed not to call her at that stage.
Terrence Williams:	When you said to the court that I don't think he can make that determination, 'I am counsel', you agree with me that is incorrect?
Defence Counsel:	Yes I agree with you.
Terrence Williams:	Your affidavit [sic] 12 January, you say [the applicant] gave you instructions to no longer call Ann Marie Simmonds and he gave those instructions in writing, do

you mean at the end of his cross-examination?

Defence Counsel: Yes sir.

Terrence Williams: At the end of cross-examination you had a private conversation with your client 'we don't need to call Ann Marie Simmonds because good character is already proven'?

Defence Counsel: Yes sir.

Terrence Williams: Because the person who was present at the extortion wasn't called?

Defence Counsel: Yes sir.

Terrence Williams: Were there any other reasons?

Defence Counsel: I don't recall … at the end of his testimony he agreed.

Terrence Williams: This was in a private room?

Defence Counsel: In the dock.

Terrence Williams: Court had broken?

Defence Counsel: I don't remember sir."

Mr Williams then referred defence counsel to page 109, lines one to 15 of the transcript, where the following is recorded:

"MISS P. HICKSON: May it so please you m'Lady, and Ladies [sic] and gentlemen of the jury. That is my questions [sic] for this witness.

(Miss P. Hickson sits at 11:51 a.m.)

[DEFENCE COUNSEL]: I have no questions in re-examination, m'Lady. If your Ladyship has no questions, that is the evidence.

HER LADYSHIP:	You may step down, Mr. Wittock.
Time: 11:51 a.m.	
[DEFENCE COUNSEL]:	Might it so please you m'Lady, might it so please you Mr. Foreman and your members, that's the case for [the applicant]"

Mr Williams then continued his cross-examination as follows:

"Terrence Williams:	…. There would have been no time to give [the applicant] the instructions.
Defence Counsel:	There was time and I wrote it down and read it to him.
Terrence Williams:	The transcript indicates there was no time.
Defence Counsel:	I have no control over the transcript sir.
Terrence Williams:	Your instructions from [the applicant] is [sic] written in ordinary English?
Defence Counsel:	Yes sir.
Terrence Williams:	You explained to him that your reasons for calling Ann Marie [sic] and that it was no longer necessary for her to be called?
Defence Counsel:	Yes sir.
Terrence Williams:	As counsel does the client sometimes give you instructions and you fail to write them down?
Defence Counsel:	No sir, I write down all my instructions.
Terrence Williams:	You were intending to call Miss Simmonds at one stage?

Defence Counsel:	Yes sir.
Terrence Williams:	There is nothing about good character in those instructions?
Defence Counsel:	Not necessary to write it down. I would have extracted a bit more from her, a bit more details - relevant to whether he was a good boyfriend, family, etc - that weren't necessary in the trial.
Terrence Williams:	[Defence Counsel] do you agree that in the actual instructions, you do not include any …
Defence Counsel:	I took instructions. I did not write it in her statement in detail about good character.
Terrence Williams:	You did not write it at all in the instructions ... agree with me about good character?
Defence Counsel:	I don't know what you mean by that sir… I don't have to write down all of that. Agree I didn't write it down from Ann Marie at all but if she had been called, she would have given evidence of good character as well as about the extortion.
Terrence Williams:	There was a time you were planning to call Ann Marie to give evidence and inclusive of that would be evidence of his good character but you did not record that in the instructions?
Defence Counsel:	I don't agree with that sir.
Terrence Williams:	The good character evidence you lead after conviction included that he is good with children?

Defence Counsel: I don’t remember.

Terrence Williams: You agree that there are some things that were told to you that you did not write down in your instructions?

Defence Counsel: No sir I don't agree.

Terrence Williams: To your mind what she told you about good character was not important?

Defence Counsel: I don't remember but what she told me I wrote down and I intended to call her for good character.

Terrence Williams: She told you points about his good character that you intended to ask her about …?

Oh I see. You are saying it was your intention to ask her questions about his good character not knowing what she would say?

Defence Counsel: Absolutely not sir, I would have interviewed her again before she goes into the box and indicated to her what I expected to extract from her before putting her in the witness box.

Terrence Williams: But you closed the case without interviewing her?

Defence Counsel: But there was no need to call her again.

Terrence Williams: The good character that came out was that he had no previous convictions correct?

Defence Counsel: Yes sir.

Terrence Williams:	You don't think it would be helpful that he was of good reputation in the community and around children?
Defence Counsel:	I don't know sir … the judge gave a good character direction.
Terrence Williams:	To your mind evidence that the man has no previous convictions is sufficient?
Defence Counsel:	When I examined the matter there was enough evidence.
Terrence Williams:	There was the minimal evidence …?
Defence Counsel:	In my mind there was, it would have obliged the judge to give a good character reference.
Terrence Williams:	That is sufficient.
Defence Counsel:	Yes sir.
Terrence Williams:	The person who made the demand was Joy?
Defence Counsel:	I wasn't there, my instructions was that it was the mother or aunt.
Terrence Williams:	(Counsel reads the instructions) On your case there was this occasion Joy made demands for money in the presence of Ann Marie. Your explanation that the persons who were present had not been called by the Crown was not correct.
Defence Counsel:	Of course it is correct. Joy was called.

(Court explains what Mr Williams is asserting)

Terrence Williams: In your affidavit, 16 December 2022, at paragraph 19, you are explaining why you didn't call Ann Marie – 'having assessed the potential evidence … and the persons who were present … were not called by the Crown as witnesses'. On your instructions, Joy was present and [the complainant] was also present. You give two reasons for not calling Ann Marie. Therefore, Miss Simmonds on your instructions was a witness coming to support an important aspect of the defence's case - extortion. You had no good reason not to call her.

Defence Counsel: Don't agree with you sir.

Terrence Williams: You agree with me that the reason you expressed in your affidavit is not true?

Defence Counsel: I made a mistake.

Terrence Williams: As regards the extortion there was no good reason for you not to call Ann Marie.

Defence Counsel: Don't agree. Would say what I said in my affidavit is not true. Made a mistake as I did not have the transcript. Did not give him the advice that the witnesses were not present. This is an error. I don't agree with you sir that there was no good reason. In my professional opinion it could go both ways if there was a demand for money - that could mean there was some sex. [The applicant]

	says no. It could work for him or against him in the matter.
Terrence Williams:	You say he agreed with you after you gave him that advice?
Defence Counsel:	Yes I gave him that advice and he agreed."

Grounds of appeal 1, 2 and 3 - unfair trial, false accusation by witness, the cumulative effect of grounds 1 and 2 is to make the conviction unsafe

Submissions

[18] Counsel Mr Terrence Williams argued that grounds one, two and three of the original grounds of appeal were manifested in inadequacy of counsel. He contended that defence counsel's failure to call Miss Simmonds as a witness for the defence must have been a combination of counsel not taking proper instructions or failing to recognise the importance of supporting testimony. Defence counsel failed to call Miss Simmonds to support the applicant's alibi defence; neither did defence counsel consult the applicant or take his instructions when he made the decision not to call Miss Simmonds. This, he advanced, could possibly have caused the jury not to give the applicant's case sufficient consideration, thus, making his trial unfair. In addition, counsel's defiance of his client's instructions as to the calling of a witness is a denial of due process that ought to lead to the quashing of a conviction. Mr Williams also contended that defence counsel could not unilaterally make important decisions on the conduct of the defence. Counsel asked the court to examine the transcript as set out above. He contended that the timeline shown on the transcript demonstrated that defence counsel would not have had sufficient time to advise his client and write his instructions before closing the case for the defence. The instructions setting out the agreement not to call Miss Simmonds were also unsigned by the applicant.

[19] The cumulative effect of these circumstances, he argued, resulted in the applicant not receiving a fair trial. He referred the court to the cases of **R v Christopher Patrick Walters** [2002] EWCA Crim 1603; **Kenyatha Brown v R** [2018] JMCA Crim 24; **R v**

Irwin [1987] 1 WLR 902; **Ebanks v R** [2006] UKPC 16; and **Andrew McKie v R** [2021] JMCA Crim 17. He also referred the court to the case of **Leslie McLeod v R** [2012] JMCA Crim 59 ('**Leslie McLeod**').

[20] Ms Paula Sue Ferguson, for the Crown, contended that the viability of grounds one to three would depend on the applicant's ability to prove that there was some mismanagement or act of incompetence, which fell below the standard of a reasonable attorney's conduct; and, that, in the circumstances, the attorney's misconduct or mismanagement adversely affected the outcome of the trial, thereby causing the trial process to become unfair or denying the applicant the right to due process. She argued that counsel for a defendant, with knowledge of trial techniques, was entitled to the latitude to call witnesses. Defence counsel had stated that Miss Simmonds' testimony could have gone both ways, in that her evidence could have inured to the benefit of the applicant's case or it could have damaged his case by alluding to the fact that there may have been some sexual contact between the complainant and the applicant. Ms Ferguson submitted that the evidence of defence counsel is capable of belief and is supported by what took place at the trial. It was also contended that it was possible that the applicant was just raising this alibi defence in the spur of the moment and, possibly, defence counsel could have been hearing about the alibi defence for the first time. Ms Ferguson posited that cases where the conduct of defence counsel could afford circumstances for an appeal were exceptional and this case was not one such.

[21] Ms Ferguson submitted that the decision taken by defence counsel was not one of incompetence but was a tactical decision, made in good faith after practical considerations of the applicant's circumstances. She stated that the court must find a nexus between counsel's management and a deleterious effect on the trial. In any event, in the instant case, the issues were discussed with the applicant and agreed upon. There was, therefore, no unfairness in the trial. Also, there was no prejudice and no denial of due process. Reference was made to the cases of **Paul Lashley and John Campayne v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ) ('**Paul Lashley**') and **Leslie McLeod**.

Analysis

[22] At the outset, it is difficult to comprehend the relevance of ground two (false accusation of witness) to this issue of inadequacy of counsel. What must be determined is whether the evidence reveals that defence counsel was inadequate in a manner that would leave this court to conclude that the trial was unfair. In this regard, the three areas of complaint were that defence counsel: (1) failed to call Miss Simmonds to give evidence concerning the demand for money made by the complainant's family members from the applicant and to give good character evidence on his behalf during the trial process; (2) failed to call Miss Simmonds to support the applicant's testimony as to his physical incapacity; and (3) failed to follow the instructions of the applicant to call Miss Simmonds in support of the alibi defence.

[23] In assessing the evidence before us, I had regard to the seminal principles derived from the common law when the court is considering the conduct of defence counsel, as a basis for appeal. These principles have been summarized by Brown Beckford JA (Ag) in **Troy Barrett v R** [2022] JMCA Crim 24 at paras. [39] to [41]:

> "[39] Phillips JA, writing for the court in **Kenyatha Brown v R** [2018] JMCA Crim 24, conducted a review of cases dealing with this issue of incompetence of counsel and extracted the following principles:
>
> 1. Counsel should ensure as a matter of course that there is a written record of the instructions received (**Bethel (Christopher) v The State** (1998) 55 WIR 394).
>
> 2. The court should be guided by the principles of fairness and due process rather than an assessment of the quality or degree of incompetence of counsel (**Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ)).
>
> 3. Counsel may not disregard his instructions and conduct the case as he feels best (**Sankar v The State of Trinidad and Tobago** [1995] 1 All ER 236).

4. It would be the exceptional case where the conduct of counsel will afford a basis for appeal (**Leslie McLeod v R** [2012] JMCA Crim 59).

5. Each case must be examined in the context of its own circumstances (**Michael Ewen v R** [2016] JMCA Crim 19).

6. Counsel should adequately put the defendant's case to the jury (**Daryeon Blake and Vaughn Blake v R** [2017] JMCA Crim 15).

Phillips JA writing for the court in the recent decision of **Andrew McKie** relied on the approach stated in **Kenyatha Brown**.

[40] In summary, the following principles guided the court in considering this complaint:

(i) the misconduct of counsel will not be a basis to interfere with the decision unless there is a denial of due process to the accused;

(ii) defence counsel is given a discretion to conduct the case in the way they believe is in the best interest of their client;

(iii) New counsel should be generally wary of criticizing the steps taken by the former counsel in advancing the case; and

(iv) in examining this issue, the court ought not to focus on the alleged incompetence of counsel but rather the impact which it may have had on the case of the accused.

[41] We were also mindful that defence counsel has the discretion, by virtue of the skills attendant on the profession, to decide on the tactical steps to take in advancing the accused's case, hence the caution given in **R v Doherty & McGregor** [1997] 2 Cr App R 218:

'[83] Unless in the particular circumstances it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced.'"

[24] The complaint about evidence to be given by Miss Simmonds regarding the applicant's physical disability can be dealt with in short shrift. Defence counsel has denied receiving such instructions from the applicant or Miss Simmonds. The statements exhibited by him reveal no such instructions. Further, in his cross-examination before this court, the applicant admitted that he could not recall if he gave any such instructions. I found that defence counsel's evidence in this regard withstood scrutiny.

[25] With regard to the instructions to call Miss Simmonds as an alibi witness, I did not find the applicant credible. I accepted that defence counsel had no instructions at all from the applicant that Miss Simmonds could support his alibi defence. There was no such indication in the written statements collected by defence counsel. Mr Williams' contention that other issues were not recorded in the applicant's statement but were nevertheless lead in evidence, did not add any credence to this complaint. For example, defence counsel did not include in his written instructions from the applicant that he had a physical disability, but he led evidence from the applicant in that regard. This raises a strong inference that there was a conversation between the applicant and defence counsel at some stage regarding the injury to his hand. Notwithstanding this, I found defence counsel to be credible when he stated that if he had received instructions regarding an alibi witness, it would have informed his decision to call Miss Simmonds.

[26] Further, based on the transcript, the mention of Miss Simmonds as a witness arose for the first time during the applicant's cross-examination by Crown Counsel. This was within the context that it was Miss Simmonds and not himself who lifted the bags (such as rice and flour) to put in the shop, since he was only able to use the right hand to do small things (see page 98 of the transcript). It was at that stage that he was asked if she was coming to give evidence on his behalf, and he said yes. Defence counsel, at that juncture, stated, "I don't think he can make that determination, I am counsel in the matter". I agree that decisions ought to be made with the agreement of the client (see **Troy Barrett v R** at paras. [39] and [40]), but it would appear that defence counsel was attempting to protect the applicant at this juncture, since, as I have accepted, he received no instructions from either the applicant or Miss Simmonds that she could be of assistance

regarding his physical disability. It was not until in further cross-examination, the applicant was asked who was at the house with him at the time of the incident, and he indicated "Ann-Marie Simmonds" (see page 93, lines nine to 10).

[27] I have had regard to the full context of defence counsel's evidence and his admission that he had made a mistake as to one of the reasons for his advice that Miss Simmonds should not be called. His explanation was that he had not refreshed his memory from the transcript, but the genuine reason was that it could harm the case for the applicant, as the emphasis of the evidence on extortion "could mean there was some sex". I cannot exclude, therefore, that defence counsel may have made a tactical decision not to call Miss Simmonds on the case for the applicant. However, the impact of this tactical decision will be further examined in light of all that transpired during the trial.

[28] With regard to the evidence of good character, I agree that Miss Simmonds' testimony may have buttressed it, but the applicant's case was not bereft of the good character direction. This was given by the learned judge on both limbs. The applicant also provided evidence concerning the demand for money. These issues were, therefore, left with the jury for their consideration. In the circumstances, defence counsel may be given some latitude in the employment of what he considered to be defence strategy (see Phillips JA in **Kenyatha Brown v R** at para. [25] quoting **Paul Lashley** and in **Andrew Mckie v R** at para. [59] quoting **Tyrone Da Costa Cardogan v The Queen** [2006] CCJ 4 (AJ)).

[29] However, in the round, the impact of defence counsel's conduct must be weighed in the context of what transpired during the cross-examination of the applicant and before the closing of the case for the defence. Did defence counsel act without the applicant's instructions in making the ultimate decision not to call Miss Simmonds? If so, would this be sufficient for a determination that the trial was unfair?

[30] Defence counsel gave evidence that he had both advised the applicant and obtained written instructions from him concerning the decision not to call Miss Simmonds.

He said he spoke to the applicant in the dock. On a perusal of the transcript (as set out at para. [17] above), the timeline of 11:51 am was noted as the time that the applicant left the witness box. It was after that timeline that defence counsel stated that the case for the defence was closed. No new timeline was recorded for defence counsel to make that statement concerning the closure of the applicant's case, and the transcript for that page ended at that point. An opportunity for some consultation in the dock may have, therefore, been possible. However, this could not have amounted to more than some "whispered advice" (**Sankar v The State of Trinidad and Tobago** [1995] 1 All ER 236). This could not be considered to be sufficient having regard to the fact that the applicant had stated that Miss Simmonds would be helpful regarding his physical disability. She also appeared to have been elevated as a potential alibi witness. In light of the state of affairs, defence counsel could have utilized the option to request an adjournment in order to take further instructions from the applicant. Defence counsel's assertion that he wrote out the instructions after the applicant left the witness box falls short of being credible since he failed to obtain the applicant's signature concerning those instructions. Further, no explanation has been offered by defence counsel for the absence of the applicant's signature. I am, therefore, compelled to conclude that defence counsel acted without any or proper instructions with the result that pertinent aspects of the defence were not investigated. What, then, is the impact of defence counsel's failure?

[31] In **Leslie McLeod**, Morrison JA (as he then was) at para. [54], stated that the common law has been slow to admit error or even incompetence of counsel as a ground of appeal and referenced this traditional position adopted by Rougier J in **R v Clinton** [1993] 1 WLR 1181 ('**Clinton**'):

> "…cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional…During the course of any criminal trial counsel for the 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. Some of these decisions turn out well, others less happily."

And, at para. [55]:

> "It will therefore ordinarily be difficult to impugn successfully decisions made by counsel 'in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client' (**Clinton**, per Rougier J, at page 1187). This is how Judge LJ (as he then was) stated the position in **R v Doherty & McGregor** [1997] 2 Cr App R 218, 220:
>
> > 'Unless in the particular circumstances it can be demonstrated that in the light of the information available to him, at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced. In Clinton itself it was emphasised that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defence counsel's conduct would 'of necessity be extremely rare'.'"

[32] In **Ebanks v R**, one of the complaints of the appellant against his original counsel before the Privy Council was that he had been denied a fair trial, as counsel had failed to call him to give evidence in his defence. Lord Rodger of Earlsferry, who delivered the majority decision, emphasized that the decision of whether or not to give evidence is always ultimately one for the defendant, after receiving appropriate advice from counsel and reiterated the importance of counsel having a written record of that decision (per paras. [17] and [18]). By majority, the Privy Council dismissed the appeal and held that although counsel failed to have a full record of instructions at the time, the evidence that the defendant's legal team were following the defendant's instructions in not calling him to give evidence was accepted. As a result, there was no adequate basis for holding that trial counsel had acted improperly.

[33] In **Kenyatha Brown v R**, Phillips JA examined some authorities relevant to the failure of counsel to comply with instructions or to obtain complete instructions or to

direct the strategy of the case without proper consultation with the client (see paras. [23] to [29]). It is expedient to set out para. [26] of that judgment as follows:

> "[26] In **Sankar v The State of Trinidad and Tobago** [1995] 1 All ER 236, the Privy Council found that, if counsel, when dealing with his representation, was told something by the appellant which caused embarrassment for his further conduct of the case, **he ought to investigate the same, explain the options to the appellant, and seek an adjournment if possible. He would not, however, have fulfilled the duty he owed to the appellant by unilaterally deciding, after giving no more than whispered advice to the appellant,** not to put him in the witness-box, or allowing him to make an unsworn statement from the dock. In doing so, he would have effectively abandoned any attempt for the appellant to make out a positive defence. In giving the judgment in this case, Lord Woolf on behalf of the Board, endorsed the *ratio decidendi* in **R v McLoughlin** [1985] 1 NZLR 106, at page 107, from the Court of Appeal in New Zealand. That case involved an appeal against convictions for rape. The facts were somewhat different, as, in that case the defendant and counsel differed as to how the case should be conducted, and counsel, contrary to the defendant's instructions, conducted the case in the way he thought was appropriate, rather than how the defendant wished the same to be conducted. The principles derived therefrom are, however, apposite to the present case. Hardie Boys J made these observations:
>
> > 'It does happen from time to time that a barrister will find himself unable or unwilling to act in accordance with his client's wishes. They may, for example, be incompatible with his duty to the Court or with his professional obligations; or he may consider that compliance would be prejudicial to his client's best interests. Should such a circumstance arise, then he must inform the client that unless the instructions are changed he will be unable to act further... But certainly counsel may not take it upon himself to disregard his instructions and to then conduct the case as he himself thinks best. It is basic in our law that an accused person receive a full and fair trial. That principle requires the accused be afforded every proper opportunity to

> put his defence to the jury... The present appellant has been deprived of that opportunity and justice has therefore been denied to him.'" (Emphasis supplied)

[34] The approach, however, as adopted in **Leslie McLeod**, at para. [56] of that judgment, is to seek to assess the impact of counsel's failure on the trial and verdict. At para. [61], Morrison JA cited **Boodram v The State of Trinidad & Tobago**, where the above approach was stated to be the general principle:

> "[61] In ***Boodram v The State of Trinidad & Tobago*** (2001) 59 WIR 493, the Board stated (at para. [39]) (citing ***Clinton*** and ***Sankar)*** that, where counsel's conduct is called in question on appeal, '**the general principle requires the court to focus on the impact of the faulty conduct'. Lord Steyn, who delivered the judgment of the Board, also went on to endorse de la Bastide CJ's qualification in *Bethel (No. 2)* that, on the other hand, there may be cases where 'counsel's misconduct has become so extreme as to result in a denial of due process to his client**' (see also, ***Balson v The State of Dominica*** [2005] UKPC 2; and ***Weekes v R***, Criminal Appeal No. 4 of 2000, judgment of the Court of Appeal of Barbados delivered 30 April 2004.)" (Emphasis supplied)

[35] Therefore, this court's duty is to (i) look at the faulty conduct and assess its impact on the trial and/or (ii) determine whether defence counsel's conduct could be considered "so extreme as to result in a denial of due process to his client" (see para. [64] of **Leslie McLeod**).

[36] The applicant gave sworn evidence and put his good character in issue. He received the full good character direction. All the important issues, including his physical disability and the attempted extortion by the complainant's mother, had already been placed before the jury. However, the difficulty I am having, is the combined effect of defence counsel's decision not to call Miss Simmonds in light of the evidence adduced from the applicant under cross-examination coupled with defence counsel's failure to obtain the instructions of the applicant in that regard.

[37] In **Bethel v The State (No 2)** (2000) 59 WIR 451, De La Bastide CJ, in the Court of Appeal of Trinidad and Tobago, gave some hypothetical examples of counsel's conduct that would result in a miscarriage of justice regardless of its impact. This included counsel conducting the defence without having taken his client's instructions (see pages 459 to 460). This, of course, depends on the entirety of the circumstances to be considered. In **Leslie McLeod**, this court was not in a position to resolve the conflict between counsel and the applicant as to whether the applicant received advice regarding giving an unsworn statement. Morrison JA assessed the issue on "the hypothesis that the applicant's version [was] the correct one and that he was not - or not adequately – advised on whether he should make an unsworn statement or give evidence" (para. [64]). Morrison JA considered that there was a possibility that sworn evidence from the applicant "might have carried greater weight with the jury than the unsworn statement …" (para. [65]). However, he went on to consider the totality of the evidence of the Crown's sole eye witness as to the facts and concluded, that "[d]espite long and searching cross-examination by counsel for the applicant, [the witness'] account of how the deceased lost his life remained at the end of the day substantially unimpaired" (para. [66]).

[38] It is recognised that the issue in **Leslie McLeod** concerned the benefit that the applicant would derive from giving sworn evidence. In assessing the impact of defence counsel's conduct, I cannot say whether or not the evidence of Miss Simmonds would have inured to the detriment of the applicant, as defence counsel feared, or benefited the case for the defence. The case for the Crown turned wholly on the credibility of the complainant which remained intact at the end of the case for the Crown. But the circumstances in the case at bar differed somewhat from that in **Leslie McLeod**, as the response of the applicant under cross-examination could be said to have created an expectancy in the jury that Miss Simmonds would have given evidence. The failure to call Miss Simmonds could have negatively impacted the applicant's overall credibility. Given the conundrum that existed after cross-examination, defence counselshould have requested an opportunity to properly consult with the applicant as to whether Miss Simmonds should or should not be called to give evidence. If the applicant had agreed

with the defence strategy, then signed instructions ought to have been obtained. In the round, I have concluded that the applicant may have been robbed of an opportunity to present a positive defence and meet the jury's expectation that the witness he spoke about as coming to give evidence on his behalf would have been called to support his case. It is, therefore, difficult to conclude that there has not been a denial of due process to the applicant in these circumstances.

[39] Ground one, therefore, succeeds.

[40] While my conclusion on this ground would lead to a determination of the appeal, I thought it essential to consider the remaining grounds, as some raise important issues and might have some bearing on whether there should be a retrial in this matter.

Ground of appeal 4 - The State infringed the applicant's constitutional rights to: (a) provide a record of the trial proceedings (s.16(7)); (b) review his conviction before a superior court (s. 16 (8)); and (c) trial in a reasonable time (s. 16(2)), and as these breaches have significantly disadvantaged the applicant's prosecution of his appeal, the conviction ought to be quashed as an abuse of process

[41] Grounds 4(a) and (b) no longer have any relevance in light of the production of the transcript and pursuit of the appeal. These grounds were, in fact, not argued by Mr Williams. Ground 4(c) is relevant to ground 14 and will be dealt with later in this judgment.

Ground of appeal 7 - Prosecuting counsel misconducted the prosecution by leading inadmissible evidence that the virtual complainant had made a complaint sometime prior to the report to the police. The learned trial judge erred in permitting the prosecution to lead inadmissible evidence that the virtual complainant had made a complaint sometime prior to the report to the police. The learned trial judge insufficiently directed the jury on the inadmissible evidence that the virtual complainant had made a complaint sometime prior to the report to the police.

Submissions

[42] In relation to ground seven, Mr Williams argued that the Crown had led inadmissible evidence that the complainant had made a complaint before making the

report to the police and that the learned judge had erred in permitting the inadmissible evidence to be led. He also argued that the learned judge had failed to adequately direct the jury on the inadmissibility of this evidence. Accordingly, there was a risk left open that the jury would have put what they heard to some use. In support of his submissions, Mr Williams referred the court to the cases of **R v Lillyman** [1896] 2 QB 167, **Kory White v R** [1999] 1 AC 210 ('**Kory White**'), and **Delroy Hopson v R** (1994) 45 WIR 307.

[43] Ms Ferguson for the Crown conceded that the evidence pertaining to a report being made to the complainant's cousin ought not to have been led. However, she argued that the exposure of the jury to inadmissible and/or prejudicial evidence, does not automatically require the jury to be discharged. The most appropriate response is left to the wide discretion of the judge, depending on the circumstances of each case. Furthermore, it was submitted that the effect of repeating the narrative to the jury by the learned judge would have been to elevate the alleged statements to the status of recent complaint when, in fact, the statement had not met the legal threshold that would require the direction of the judge to the jury to disregard it. Accordingly, the learned judge properly exercised her discretion by not mentioning the alleged report in her summation.

[44] In distinguishing the case of **Kory White**, the Crown submitted that the circumstances of the current case were not of the gravity so as to invoke the powers of this court to interfere with the learned judge's discretion. In support of these arguments, the Crown cited the cases of **Dwight Gayle v R** [2018] JMCA Crim 34, **Machel Gouldbourne v R** [2010] JMCA Crim 42 and **R v Weaver** [1967] 1 All ER 277.

Analysis

[45] It is well-settled law that the evidence of what a complainant actually reported to someone else after an incident of a sexual nature can only be led in evidence where the party to whom the complaint was made is also called to give evidence. This is considered to be a recent complaint, and a trial judge would be obliged to give directions to the jury

on how this evidence is to be considered. Recent complaint in cases involving sexual offences is an exception to the rule against self-serving statements. The general direction to the jury is in the vein that a recent complaint is admissible not to establish the truth of the contents of the complaint but to show the consistency of the complainant's evidence and to negate consent. If "… the recipients of the complaints do not give evidence, the complainant's own evidence that she made a complaint cannot assist in either proving her consistency or negating consent" (per Lord Hoffman in **Kory White** pages 215H to 216A). There was no evidence of recent complaint in this case, and the learned judge was correct not to give any directions on this issue.

[46] However, the prosecutor's choice of words in asking questions as she did, first at page 20, lines seven to 21 of the transcript was not proper in the circumstances:

> "Q. Now, you said you lived with your aunt?
>
> A. Yes.
>
> Q. Did you tell your aunt what happened?
>
> A. No.
>
> Q. Is there any particular reason why you didn't tell your aunt?
>
> A. Yes.
>
> Q. What is that reason?
>
> A. She miserable and mi 'fraid a har.
>
> Q. She miserable?
>
> A. Yes, and mi fraid a har. Mi nuh sit down and talk to har.
>
> Q. Did you tell anybody at school?
>
> A. Yes. I tell my cousin when I was coming from school. I don't remember if it was the same day."

And further at page 21, lines seven to 25 to page 22, lines ones to seven:

"Q. Do you recall September 26, 2012?

A. No.

Q. In relation to this matter?

A. No.

Q. Don't tell me what you told your cousin, but you said you told your cousin what happened?

A. Yes.

[DEFENCE COUNSEL]: Again, m'Lady, I am not sure, having regard to – I don't have any statement from any cousin, you know, so if it is that my friend is going to lead the witness to having spoken to somebody, that is heard by the jurors it's more than prejudicial, especially in light of the fact there is no statement, no statement. It is unfortunate that my friend led her to that and she told her cousin, because, in fact, I don't have any statement from the cousin."

[47] Prosecuting counsel was well aware that no evidence would be led from any recipient of a complaint from the complainant, so great care was required during the examination-in-chief. However, merely to ascertain if the complainant spoke to someone after the incident is not, *per se*, inadmissible. Lord Hoffman explained the rationale for this at page 217E - G of **Kory White**:

"Their Lordships accept that when the complainant herself is giving evidence, **it may be difficult for her to give a fair and coherent account of her behaviour after the incident without allowing her to mention that she spoke to other people who may not be available to give evidence … of what she actually said**. Their Lordships would not suggest **that the mere mention that the witness spoke to someone after the incident was inadmissible**. In most cases it will be very difficult to draw any rational distinction between consistent conduct, which is plainly admissible … and the fact that she spoke to someone such as a parent**. On the other hand, it is important to avoid infringement of the spirit of the rule against previous self-consistent statements by conveying indirectly to the jury that she had given a previous**

> **account of the incident in similar terms with a view to inviting the jury to infer, not merely that her subsequent conduct was not inconsistent with her complaint but that her credibility was actually supported by the fact that she had told the same story soon after the incident.**" (Emphasis supplied)

[48] The danger may, therefore, arise that there could be an inference drawn by the jury that there was a complaint which supports the credibility of the complainant. In this regard, the usual authorities dealing with the admissibility of prejudicial evidence such as **Dwight Gayle v R**, **Machel Gouldbourne v R**, and **R v Weaver** are not, strictly speaking, so relevant to this issue, as it has to be considered in the context of legally relevant principles applicable to cases of a sexual nature.

[49] In **Kory White**, the complainant gave evidence that she had told five people what had happened after the incident. None of those persons gave evidence at the trial. Lord Hoffman commented at pages 217H to 218A that the "prosecution probably went further than could be justified by the need to allow the complainant to give a fair account of her conduct after the incident … she should not have been allowed to say that she had told five people 'what had happened'". He stated that "the jury were bound to draw the inference that she had made the statements in terms substantially the same as her evidence to the court". Further, at page 218D, Lord Hoffman concluded that "they consider that the admission of that evidence made it necessary for the judge to give the jury a careful direction about the limited value which could be attached to it".

[50] In the case at bar, the prosecution led evidence as set out above at para. [46]. Defence counsel objected. The learned judge then made enquiries of prosecuting counsel as follows:

> "HER LADYSHIP: I presume you are not going anywhere with that?
>
> MISS P. HICKSON: I can take it no further than that.
>
> HER LADYSHIP: I will just indicate to the jury, the information with respect to speaking to

her cousin ends there, that is all that it is. Okay."

[51] The learned judge made no reference to this at all during her summation, and there was no direction concerning its limited evidential value or that it was to be disregarded.

[52] In **Kory White**, the judge failed to give the direction as posited by the Privy Council. Lord Hoffman stated that this failure made "it necessary to consider the summing up in rather more detail" (see page 218D). Aspects of the review of the summation as considered by the Privy Council are set out for expediency (see pages 218E to 219C):

> "The judge correctly directed the jury that the complainant's evidence was uncorroborated, that it was dangerous to convict upon uncorroborated evidence but that 'if you really believe what Keisha Anderson told you, if you accept that she is speaking the truth and you feel sure on all the material facts, you may act on her evidence.' He then reminded the jury of the evidence in narrative sequence, including the **series of complaints** following the report to the police:
>
> > 'She was still in tears and in a temper, she says, **and told Kerry about what had happened.** She said she had a **shower and disposed of her underwear, went home and spoke to her aunt, Carey Robinson, and told her what had happened**. The following morning she said she went and **spoke to her mother and told her what had happened** and she went and made a report at the rape unit. But before going to the rape unit she called her friend and neighbour, Mr. Puddy, a police officer, and **told him, the very evening of this incident, what had taken place ...** But she told Kerry her friend, about what took place and she did tell Mr. Puddy, a man whom she has known over a number of years living across the street from her, she did tell him that. A comment I make here, Mr. Foreman and members of the jury, if you believe that she spoke to her aunt, she spoke to her mother, she did not say anything about her father. Counsel for the Crown says her father is

> aging. She went to Mr. Puddy, she went to him, someone whom she knows. Why didn't you go to the police earlier than you did? That is the question she was asked. What was her response? 'I just never had the courage then, but I had enough courage to tell Mr. Puddy.' It is a matter for you, how you deal with what she tells the defence attorney about not going immediately to the rape unit because she did not have the courage to do so.'

The judge then mentioned the fact that none of the recipients of the complaints had been called as witnesses, saying:

> 'she has done her part, she has told the police who were the ones whom she spoke to, again Mr. Foreman and members of the jury, can you blame her if there is any deficiency on the part of the police investigating this case?'

At the end of the summing up, at the request of the Crown, the judge reminded the jury that the fact that the complainant had made reports to other people did not constitute corroboration. He also told the jury more than once not to speculate on matters on which there was no evidence." (Emphasis supplied)

Lord Hoffman concluded at pages 219D to 220C:

> "The Crown draw [sic] attention to the fact that, unlike *Reg. v. Fletcher* (unreported), 25 November 1996, in which the judge told the jury that they could use the complainant's own evidence of complaints to show consistency, the judge in this case gave no such direction. Apart from telling the jury that it did not amount to corroboration, he gave no indication of what use could be made of the complaints. Their Lordships consider that in the circumstances of this case, that was insufficient. **The passages cited from the summing up would have indicated to the jury that the evidence about the complaints were in some way a relevant circumstance to be taken into account in assessing the complainant's credibility,** upon which the whole prosecution case depended. On more than one occasion the jury had been told that it was a matter for them to decide whether the complaints had been made and whether it was

plausible that they should have been made to some people but not to others. They had been directed not to blame the complainant for the absence of evidence confirming the complaints, because this was a matter for the police. The jury must therefore have considered that, having formed an opinion on these matters, they were entitled to put it to some use. Quite what they would have made of the direction that the complaints did not constitute corroboration is hard to say, but this difficulty is also encountered in cases of admissible complaints, when the jury has to be instructed that the evidence is admissible to show consistency and negative consent but does not amount to corroboration. As the jury had been told that even without corroboration they could convict if they believed the complainant's evidence, there must have been a significant risk that they considered themselves entitled to regard the evidence of complaint as confirming her credibility. **To leave it open to the jury to take such a view was a misdirection.** It was in their Lordships' view incumbent upon the judge to give the jury clear instructions that the complainant's own evidence was for this purpose of no value whatever. If the judge thought it necessary to deal with the question of why she had not gone earlier to the rape unit, it would have been sufficient for him to tell the jury that they were entitled to take into account her explanation that she had lacked the courage to do so.

Since a direction that the complaint does not constitute corroboration has to be given even in cases in which it is admissible under the exception for sexual cases, their Lordships do not think that it was sufficient to deal with the situation in the present case. Their Lordships respectfully agree with Rattray P. when he said:

> 'A most careful direction was required from the learned trial judge which was not forthcoming. To tell the jury that this evidence coming from the complainant is not corroboration cannot be sufficient, since indeed it is not evidence at all and the jury should have been told to disregard it. In the circumstances of this particular case … the admission of the evidence without a clear direction to the jury from the trial judge to assist them as to its status, or lack of it, must indeed have been damaging to the [defendant's] prospects at the trial.'

> It may be that even without such evidence the jury would have preferred the evidence of the complainant to that of the defendant, but their Lordships think it quite impossible to say that this must inevitably have been the case. As the case turned entirely upon the complainant's credibility, it is not possible to apply the proviso and the appeal must be allowed and the conviction set aside." (Emphasis supplied)

[53] The only similarity of circumstance with the case at bar is that the complainant testified that she told a cousin what had happened. The learned judge, having upheld defence counsel's objection, indicated that it ended there. In her direction to the jury, no reference was made to that aspect of the evidence. No use was made of it as was done by the judge in **Kory White**.

[54] In her review of the evidence, the learned judge said (see page 13, lines eight to 25 to page 15, lines one to 20 of the summation):

> "She goes on, having being [sic] further questioned, to indicate that she didn't say anything to her aunty. And she didn't say anything to her aunty because she said her aunty was miserable, and she couldn't sit down and talk to her about anything. Subsequently, further evidence came out that it was on the 29th, some seven or eight days later that she went and reported or her mother took her and they made a report to the Police Station.
>
> Now, you would have heard [defence counsel]in his address to you, talk about the fact that there was this period of time between when she said the rape took place, and when she went to report it, and Counsel, in his address to you, said that was a long time for something like this to happen, and you don't go to report it and further, there was no explanation as to why there was this break, this period of time when you did not go and report what was said that Mr. Wittock did to you.
>
> Now, Counsel for the Crown, when she addressed you and she had asked you to take into consideration the fact that people respond different [sic] ways to trauma. So, some people might instantly be able to tell somebody about it, or go and make a report, but there are others because of how it affects them, they might take a longer time to report it.

> People do react differently to trauma in their life, and some of them do report it immediately, some want to talk about it immediately, some can't talk about it immediately, and they may choose not to. [The complainant's] evidence is that she couldn't talk to her aunt because her aunt is miserable, so she didn't say anything to her. The report wasn't made to the police station until seven or eight days later, but what the law says is that the fact that it might have been late or not immediate, in terms of her making the report to the police, it does not necessarily mean that what she said didn't go like that.
>
> So because she might have taken seven or eight days to make the report to the police doesn't automatically mean that what she said Mr. Wittock did was a lie. Okay.
>
> The flip side of that is, it doesn't mean that the fact that somebody went and report immediately, it doesn't automatically mean either that that person is telling the truth, you take the person as you get them when you assess them, and how they give their evidence, and you take her explanation as to why she didn't tell her aunt.
>
> If counsel is right, there is no explanation as to why it took the days it took to make the report to the police station. As I have said, when you assess the evidence in its totality, that length of time does not automatically mean that her evidence should be disregarded in terms of what she said happened. Okay."

And further at page 22, lines 15 to 25, and page 23, lines one to eight:

> "The medical evidence or the medical certificate would have indicated that sexual intercourse had taken place. There was evidence that there was sexual intercourse, some scarring from sexual intercourse, however, that medical certificate or that medical evidence is not confirmation that a rape took place. You understand that? All it is saying is that there was sexual intercourse that took place sometime with [the complainant].
>
> So it is not confirmation that there was a rape. And it is not confirmation that Mr. Wittock raped [the complainant]. So, all it establishes is that sexual intercourse took place, and you, therefore, have to determine how you treat and how you

> accept that medical report. Also, it doesn't indicate that the sexual intercourse that took place was a rape. Okay."

Finally, at page 33, lines 18 to 25:

> "So, members of the jury, ultimately your determination in this matter is whether you believe [the complainant] so that you are sure, based on the evidence before the Court, that Mr. Wittock committed the offence of Rape and whether or not she was, in fact, raped, by Mr. Wittock. Okay"

[55] It is expedient to set out the excerpt above as it is important, as demonstrated in **Kory White**, to consider the details of the summation to determine whether there has been a miscarriage of justice and, if so, whether it was substantial. I believe that the learned judge should have directed the jury to disregard the complainant's evidence that she told her cousin what happened, in keeping with the strictures set out in **Kory White**. However, having reviewed the totality of directions of the learned judge to the jury, the danger expressed by Lord Hoffman in **Kory White** would appear to be minimal in the case at bar. The learned judge did not refer to the impugned evidence but told the jury that there was no report of the rape until the complainant made the report to the police some seven or eight days after. She also reminded them of defence counsel's comment that there was no explanation of why it took that length of time to make the report. Prior to these statements, she had directed the jury that there may be gaps in what they had heard, but they were not to speculate or imagine what could have happened (see page four, lines four to 12 of the summation).

[56] In contrast, the comments of the judge to the jury in **Kory White** were found to have created a significant risk that the reports by the complainant could have been, in some way, relevant in assessing the complainant's credibility. I believe such a significant risk is absent in the present circumstances (see also **R v Gene Taylor** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 132/1997, judgment delivered 1 March 1999). Therefore, I do not find that the failure of the learned judge to indicate to the jury that the complainant's evidence (that she told her cousin what had

happened) should be disregarded or had a limited value (to establish a timeline for the report to the police) led to any substantial miscarriage of justice.

[57] Mr Williams also submitted that the learned judge gave directions of possible explanations for the absence of recent complaint without explaining the significance of recent complaint to the jury. I do not accept, as previously stated (see para. [45]), that the learned judge had any obligation to give any direction on the issue of recent complaint. To be contrasted is the case of **Everton Clarke v R** [2017] JMCA Crim 31, where this court accepted the necessity for such a direction as evidence was led from the complainant's father as to what she had told him. The trial judge directed the jury subsequently that a report was made but it did not meet the requirements of recent complaint, so they were to put it out of their minds.

[58] A further contention of counsel was that the "possible explanations" given by the learned judge for the delay in making a report to the police was an error. Those directions of the learned judge have been set out above at para. [54]. I do not accept that the learned judge erred in this regard. In **Robert Rowe v R** [2014] JMCA Crim 3, this court referred to the judgment of Harris JA in **Peter Campbell v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 17/2006, judgment delivered 16 May 2008, at para. 30(ix) where the following was endorsed:

> "account should be taken of the fact that victims both male and female often need time before they can bring themselves to tell what has been done to them. Whereas some victims find it impossible to complain to anyone other than a parent or member of their family, others may feel it quite impossible to tell their parents or family members."

[59] Reference is also made to the Supreme Court of Judicature of Jamaica, Criminal Bench Book ('the Bench Book') at para. 20-7, dealing with Sexual Offences, where it is noted that the judge should alert the jury to guard against unwarranted assumptions made by jurors or where they are invited by advocates to do so. This includes the issue of delay in making a complaint. Para. 20-7 states:

> "… This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions."

[60] The endorsement of this approach is also seen in two cases of the English Court of Appeal, **R v D (ja)** [2008] EWCA Crim 2557 and **R v Breeze** [2009] EWCA Crim 255 (see the Bench Book at para. 20-6). Such directions were considered necessary as relevant to sexual crimes to deal with stereotypical assumptions about issues such as delay in reporting allegations of this nature.

[61] In the case at bar, defence counsel had raised the issue of the delay in the making of the complaint (see pages 13 to 15 of the summation). In her summation, the learned judge directed the jury about the need to be cautious in adopting those stereotypical assumptions (see page 14, lines four to 25 and page 15, lines one to 20 cited above at para. [54]). She concluded by stating that "… when you assess the evidence in its totality, that length of time does not automatically mean that her evidence should be disregarded in terms of what she said happened ...". She also reminded the jury of the complainant's evidence as to why she did not make the report to her aunt with whom she resided, that "she couldn't talk to her aunt because her aunt is miserable, so she did not say anything to her" (see page 14, lines 17 to 19).

[62] These complaints, therefore, have no merit. I would, however, take this opportunity to remind prosecuting counsel and trial judges of their duty to be diligent in treating with these aspects of the evidence and that the directions as set out in **Kory White**, should be adhered to, where relevant.

[63] This ground of appeal fails.

Ground of appeal 9 - The prosecuting counsel misconducted herself by improperly leading the virtual complainant to give evidence as to the identification and recent complaint. The learned trial judge acted improperly in permitting the prosecuting counsel to ask leading questions and failed to sufficiently direct the juror [sic] on the evidence so led.

Submissions

[64] Mr Williams submitted that prosecuting counsel had improperly led the complainant to give evidence in relation to identification and recent complaint. In addition, that the learned judge acted improperly in permitting leading questions and had failed to adequately direct the jury on such evidence led. Mr Williams argued that the learned judge ought to have directed the jury that the specific questions asked were leading and that answers to such questions ought to be given very little weight. He relied on the cases of **Pop (Aurelio) v R** (2003) 62 WIR 18 and **R v Wilson** (1913) 9 Cr App Rep 124.

[65] Ms Ferguson, however, argued that given the circumstances, the question by prosecuting counsel concerning whether any report was made by the complainant, did not appear unreasonable and should not be used to impute any ill motive on the part of prosecuting counsel. She stated that, in any event, the learned judge had immediately instructed the jury that, "the information with respect to the cousin ends there and that is all that is". Furthermore, she argued that identification was not in issue at the trial and therefore, it could not accurately be asserted that prosecuting counsel misconducted herself in asking what was deemed a leading question as to identification.

Analysis

[66] Prosecuting counsel, in attempting to control the complainant (see excerpt from the transcript set out at para. [46] above), repeated that she had told her cousin what happened. I would use this opportunity to reiterate the need for care by prosecuting counsel in eliciting evidence of this nature. However, having assessed and determined ground seven, I find that, in the circumstances of the case at bar, there is no need to repeat what has been considered under that ground relevant to recent complaint. Further,

I have not identified any leading question asked by prosecuting counsel concerning identification. Mr Williams referred us to page 17, lines two to eight of the transcript, where prosecuting counsel asked the complainant "… what part of Dale did you see that you sure it was Dale …"? The complainant then answered "His face and his everything". Further, identification was not an issue in the case at bar as defence counsel expressly indicated that to the learned judge (see page 12, lines 22 to 25 of the transcript). **Pop v R** is distinguishable, as identification was a crucial issue in that case (see para. [7] of **Pop v R**). The complaint has no relevance in the case at bar. I find no merit in this ground.

Grounds of appeal 8, 11 and 13 - The learned trial judge's direction on alibi were insufficient as no direction was given as to the repercussion upon a rejection of alibi. The applicant was denied a fair trial by the absence of a Lucas direction in the circumstances where 'lies' might be used by the jury to support evidence of guilt instead of merely reflecting on the [applicant's] credibility. The learned trial judge's direction to the jury was weighted in favour of the prosecution and consequently, the learned trial judge failed to outline the defence's case with equal emphasis, was unable to put to the jury for their consideration essential elements of the applicant's case and failed to correct [sic] prosecutor's impermissible comments in closing speech resulting in the applicant not receiving a fair trial.

Submissions

[67] Mr Williams argued grounds eight, 11 and 13 in tandem as "summation grounds" (reflecting errors made by the learned judge). In relation to ground eight, he argued that the learned judge ought to have given the jury a proper direction on alibi that would include a direction on false alibi, in that, the rejection of the alibi by the jury should not be seen as supporting the evidence of identification. He stated also, that the learned judge should have directed the jury, that if they rejected the applicant's defence regarding alibi and the injury to his hand, then that by itself was not enough to prescribe guilt to the applicant. Concerning ground 11, Mr Williams argued that the applicant was denied a fair trial, as no Lucas direction was given, in circumstances where lies might be used by the jury, to support evidence of guilt.

[68] Counsel also advanced in relation to ground 13, that the learned judge's directions were weighted in favour of the prosecution and that she failed to outline the defence's case with equal emphasis. She also failed to correct the prosecutor's impermissible comments in the closing speech. This all resulted in the applicant not receiving a fair trial. He commended the cases of **R v Brown (Gavaska) and others** (2001) 62 WIR 234 ('**Gavaska Brown**'), and **R v Goodway** [1993] 4 ALL ER 894 ('**Goodway**') to the court.

[69] A further complaint was made in relation to the learned judge's treatment of the mental element of the offence of rape. Counsel contended that the learned judge misstated the mental element of the offence in her directions to the jury. He referred the court to pages nine, 10 and 27 of the summation and submitted that the learned judge treated the absence of the complainant's consent as an alternative to recklessness and confused an element of the *actus reus* with an element of the *mens rea*. Counsel contended that this latter direction would have left the jury in utter confusion as to the elements of the offence, or they would have been misdirected to think that the consent of the complainant, or recklessness in the assailant were alternative proofs to make out the offence. He referred the court to the Bench Book at page 318 para. 4 and **R v McVey** [1988] Crim LR 127.

[70] Other complaints concerned the learned judge's remarks to the jury on the failure of the defence to put in evidence a medical certificate to support the applicant's physical disability, as well as the fact that she left the failure of the defence to call supporting witnesses as a consideration. Mr Williams asked that the court also consider this ultimate issue because the failure to call Miss Simmonds was unusually played out before the jury. Counsel commended **Regina v Parviz Yousefi** [2020] EWCA Crim 791 ('**Yousefi**') and **R v Forsyth** [1997] 2 Cr App Rep 299 for the court's consideration.

[71] The submissions in relation to these grounds were made by the learned Director of Public Prosecutions ('DPP') and King's Counsel, Ms Paula Llewelyn. She contended that the learned judge gave an adequate direction on the issue of alibi, by directing the jury that it was the prosecution's duty to prove the case against the applicant at the required

standard, as well as to disprove the applicant's alibi. The learned judge had reinforced the applicant's evidence to the jury that he was not present in the complainant's room and that it was for the prosecution to prove that he was where the complainant said he was. King's Counsel submitted that a false alibi warning is not necessary in every case where alibi is raised and is only required where evidence is adduced in support of an alibi that is shown or proven to be false. In support of this contention, the court was referred to the cases of **R v Harron** [1996] Crim LR 581, **Oniel Roberts and Christopher Wiltshire v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 37 & 38/2000, judgment delivered 15 November 2001 ('**Oniel Roberts**'), and **Dal Moulton v R** [2021] JMCA Crim 14 ('**Dal Moulton**').

[72] As to whether a Lucas direction was required, learned King's Counsel submitted that lies were not a central theme in the prosecution's case, therefore, the learned judge's direction on alibi and the burden and standard of proof would have been sufficient. It was submitted, however, that if the court was of the view that a Lucas direction was required, the court should consider applying the proviso in section 14(1) of the JAJA, as the absence of such a direction did not result in a miscarriage of justice.

[73] Ms Llewellyn also submitted that the learned judge gave a balanced and reasoned summation. This included a review of the evidence concerning the applicant's physical disability. She referred the court to page 21, lines 12 to 15 and page 29, lines one to 25 of the summation. King's Counsel submitted that she also directed the jurors that it was a matter for them to determine whether the complainant and her mother, on the one hand, or the applicant, on the other hand, were credible.

[74] With respect to the mental element for the offence of rape, Ms Llewellyn submitted that Mr Williams had made a mountain out of a molehill. She referred the court to the learned judge's directions at page nine of the summation and submitted that the rendering by the learned judge puts a greater burden on the prosecution, therefore, the issue of the use of the missing conjunctive "and" in the context of the offence of rape would not be the cause of a miscarriage of justice. It would actually be more

advantageous to the defence. With reference to the directions at pages 26 and 27, there would have been a problem if the issue was consent or honest belief that there was consent. There was a denial in this case that there was any sexual act. What the jury had to determine was the issue of credibility, that is, whether to believe the complainant or the applicant, so, the directions of the learned judge would have been sufficient. The proper directions were given, in any event, at pages nine and 27 when she referred to the indictment. The summation is to be considered in its entirety.

[75] In relation to the learned judge's comment on the failure to call a defence witness and her treatment of the evidence of the applicant's disabled hand, learned King's Counsel contended that Mr Williams is asking this court to extract aspects of the summation, point by point, without considering the context where each comment is juxtaposed with another issue. King's Counsel submitted that the court should consider how the learned judge directed the jury to deal with comments.

[76] She also referred the court to pages 28 and 29 of the summation, where the learned judge reviewed the applicant's evidence. Ms Llewelyn submitted that the learned judge did not just pick out a part of what the applicant said but juxtaposed the discussion on his alibi with what he said about his hand and reminded the jury that the Crown had the burden to prove his guilt. The learned judge had given the usual directions on the burden of proof earlier. The jury would have understood what the applicant was saying, that he could not do what the complainant had said because of the injured hand. In relation to the medical report (see page 29, line nine of the summation) the learned judge said it was an issue of credibility, that is, whether they believed the applicant. At pages 30 and 31, she spoke of comments that had been made by both counsel in the trial. King's Counsel conceded that it may have been helpful for the learned judge to remind the jury at that point (regarding the medical certificate), that the applicant had no burden of proof. However, she contended that it is not required for the summation to be perfect. It must be clear and helpful and not usurp the burden and standard of proof.

Analysis

[77] The salient issue in relation to ground eight was whether the learned judge sufficiently treated with the defence of alibi in her directions to the jury. The learned judge, during her summation, gave the following directions at page 20, lines one to 12 and lines 17 to 21:

> "Mr. Wittock … he denies that he committed this offence. He said he did not rape the complainant. His evidence is that he was not at that house that day, he acknowledge [sic] that he knew her, he acknowledge [sic] that she lived at the house he [sic] said that he and his girlfriend rented somewhere from the aunt to run the bar and he said he was never at the house and he did not do what she said he did. He said as a matter of fact, he was at home and he didn't even come to the bar that morning to open it. … Mr. Wittock doesn't have to prove anything. There is no onus on him to prove whether he was there or not. It is again the crown who has to prove that he was there and that he did what she said that he did."

And further at page 28, lines three to 20 and page 33, lines 12 to 24:

> "Now, I had started going over Mr. Wittock's evidence yesterday. He had responded, given evidence and he said he did not rape the complainant. He went on to explain that he was never at the house at all on the morning of the 21st of September 2012, and he actually said he was at home, nowhere near the complainant's house. Now, that explanation in law, we call an alibi. So he has presented an alibi, he wasn't there. The law says that he does not have to prove, there is no onus or burden on him to prove that alibi. It is for the crown, for the prosecution, they are the ones who have the burden and the responsibility of disproving his alibi, that is, disproving that he was not at home on the 21st of September 2012, he doesn't have to prove that. Okay
>
> …
>
> As I have indicated, and I will repeat it, he has raised the defence of alibi but he didn't have to prove anything, it is the Crown that has the responsibility of disproving whether or not he was, in fact, at home on the day in question."

[78] There have been several authorities emanating from this court dealing with the specific complaint of Mr Williams. Edwards JA in **Dal Moulton** stated, at para. [52], that the false alibi warning "is not necessary in every case where alibi is raised and is only necessary where evidence is adduced suggesting or in support of an alibi that is shown or proven to be false (see **R v Harron** [1996] Crim LR 581)".

[79] Smith JA (Ag), in **Oniel Roberts**, at page 21, stated "[t]he judge may tailor his direction to fit the particular case he is dealing with …. As was said in **R v Kevin Geddes et al** … a summing up must be custom built that is, it must have regard to the facts in the case and to the issues joined". However, under certain circumstances, such as where identification is the crucial issue, more may be required of the learned judge. In **Gavaska Brown**, Smith JA (Ag) referred to Lord Widgery's explanation for this in **R v Turnbull and others** [1977] 1 QB 224 ('**Turnbull**') at page 242 c to e, as follows:

> "We now come to the third point. Lord Widgery CJ in *Turnbull* said ([1974] QB at p 230):
>
> > 'Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasion [sic] like any other witnesses [sic] can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.'"

[80] In **Gavaska Brown**, the absence of the false alibi direction was held to be crucial for the reasons expressed by Smith JA (Ag) at page 242 g and h:

> "However, in the instant case the appellant called an alibi witness. The trial judge pointed out the discrepancies between the appellant's unsworn statement and the witness's evidence. In these circumstances a rejection of the alibi evidence by the jury might have led them to think that that supported the identification evidence. In our judgment, **because of this danger**, the trial judge ought to have directed the jury in terms of Lord Widgery CJ's observation in *Turnbull*; see *R v Pemberton* (1993) 99 Cr App Rep 228." (Emphasis supplied)

[81] In **Oniel Roberts**, this court, again, discussed the guidelines as laid down in **Turnbull** and discussed the circumstances where it would be contraindicative to give a direction as to false alibi. At pages 20 to 21, Smith JA (Ag) stated:

> "The first observation we wish to make is that the warning concerning the rejection of alibi by the jury is applicable in the following circumstances:
>
> (i) Where the fact of rejection of the alibi is identified by the judge as capable of supporting the evidence of identification.
>
> (ii) Where because of discrepancies inconsistencies [sic] and contradictions in the evidence adduced by the defence the alibi evidence is in such a state that there is a risk that the jury may conclude that a rejection of the alibi necessarily supports the identification evidence. See for example, **R v Gavaska Brown et al** where the discrepancies between the defendant's unsworn statement and the alibi witness' evidence were pointed out to the jury. In the circumstances of that case this Court felt that the judge ought to have given the jury the **Turnbull** – false alibi – warning. However it should be observed that a full **Turnbull** direction may not be in the interest of the accused. It is open to the judge, to say that while an innocent person may put forward a false alibi out of stupidity or fear, the deliberate fabrication of an alibi, if it can be established beyond doubt, might properly be counted

against the accused – **Coley v R** (supra) at p. 316 (d-e).

(iii) Where the alibi evidence had collapsed as in **James Pemberton v R** and there was a risk that the jury might regard the collapsed alibi as confirming a disputed identification. See also **R v Drake** (1996) Crim. L.R. 109.

Another observation is that where the alibi witnesses have been unshaken and there is no apparent weakness in the alibi evidence to suggest that the alibi might be false then as a matter of logic and common sense the jury should be directed that they can only reject the alibi if they are sure that the identification evidence is correct.

In such a case a false alibi warning would make no sense. To put it another way – where the only rational basis for the rejection of the alibi is the fact that the jury is otherwise convinced of the correctness of the identification evidence, a warning about false alibi would be, in our view, at the least confusing. Of course the judge would have told the jury that there is no burden on the defendant to prove the alibi, that it was for the prosecution to disprove the alibi and the prosecution would have succeeded in doing so if the jury were sure on the evidence, of the correctness of the identification by the prosecution witnesses.

This is in contradistinction to (ii) above where a jury may reject an alibi because of inherent weaknesses in the evidence of the alibi witnesses. Normally in such a case the jury should be warned that a false alibi does not by itself prove that the accused was where the identifying witnesses say he was."

[82] **Goodway**, a decision of the criminal division of the English Court of Appeal, does not contradict the above principle as expounded in **Oniel Roberts**. In the case at bar, it would not be strictly necessary for the false alibi warning to be given. No alibi witness was called by the applicant that contradicted his evidence. Further, the issue was not whether a proper identification had been made. What was relevant was the credibility of the complainant and this is further borne out by the absence of any suggestion to her

that she was mistaken. What was put to her was that she was lying and, in fact, had a motive for implicating the applicant. The applicant's evidence that he was at home was not shown or proven to be false by any other evidence. The jury had to determine whether they believed that the applicant came to the complainant's room that day and raped her or whether they harboured doubts or believed the evidence of the applicant that he was not there. The issue was one of credibility. The directions given by the learned judge along with the directions as to burden and standard of proof would therefore have been sufficient. Ground eight has no merit.

[83] Concerning ground 11 on whether there was a requirement that the learned judge give a Lucas direction, Lord Taylor CJ in **Goodway**, expressed at page 900 d to f:

> "In three subsequent passages, the learned judge referred to those assertions in the interviews which the prosecution relied upon as lies. Nowhere, however, did he give any direction as to how the jury should approach lies told by an accused.
>
> It is well established that where lies told by the defendant are relied on by the Crown, or may be relied upon by the jury as corroboration, where that is required, or as support for identification evidence, the judge should give a direction along the lines indicated in *R v Lucas* [1981] 2 All ER 1008 at 1011, [1981] QB 720 at 724. That is to the effect that the lie must be deliberate and must relate to a material issue. The jury must be satisfied that there is no innocent motive for the lie and should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour. In regard to corroboration, the lie must be established by evidence other than that of the witness who is to be corroborated."

[84] In relation to the physical disability, the applicant stated that he had received the injury to his right hand as a result of a chopping incident in 1995 and that, as a result, he could not use that hand properly. The hand was shown to the jury. While prosecuting counsel cross-examined him rigorously and asked if he had a medical certificate, she did

not and could not have suggested to him that he was lying. She posed the following to him at page 106 lines six to nine of the transcript:

> "Q. … So you are asking the jury to believe **and it is for the jury**, that you received your injury in April 1995?
>
> A. Holy Thursday night, m'Lady." (Emphasis supplied)

[85] The learned judge indicated to the jury that they had to assess the evidence and decide whether they believed him (see page 30, lines four to 11 of the summation). In these circumstances, a Lucas direction was not required as the prosecution did not rely on any lie told by the applicant to establish that his alibi ought to be rejected or could corroborate any identification evidence. Ground 11 has no merit.

[86] In relation to ground 13 regarding the outline by the learned judge of the applicant's defence, and the other aspects of Mr Williams' complaints, it is my view that the learned judge outlined the case for the applicant with sufficient clarity and fairness. The applicant gave evidence that he had no previous convictions; that he had a disability to his right hand which occurred in 1995; and that the complainant is known to him as he and Miss Simmonds operated a shop on premises owned by the complainant's aunt. He denied the incident of rape on 21 September 2012 and stated that he had no sexual contact with the complainant; he was not at the shop but at home at the time of the incident; and that, on 26 September 2012, he went to the aunt's house with his girlfriend and the mother of the complainant, and the complainant and her aunt were there. He stated that the mother demanded $100,000.00 from him because he had raped her daughter. He denied it and refused this demand.

[87] The learned judge reminded the jury of the applicant's evidence, his denial and the defence of alibi. She told the jury that he did not have to prove anything but that the Crown bore that responsibility. She referred specifically to the evidence of his disability, that he could not use the hand "full-blown" (see pages 20 to 21 of the summation). It is within that context and, at that juncture, that the learned judge referred to his evidence that he had agreed with prosecuting counsel that "he didn't produce a medical certificate

with respect to him, [sic] the use of his hand and what, and what he can do with the hand. So again, it is his evidence that you will have to determine based on your assessment of the witness when [sic] you accept it or not". The learned judge picked up this theme again when she reminded the jury that he said as a result of the injury, he cannot "apply any pressure with the hand" (see page 28, lines 20 to 25 and page 29 of the summation).

[88] It is expedient to set out the learned judge's statements relevant to the comment of the prosecutor on the lack of a medical certificate. At page 29, lines six to 25 to page 30, lines one to 25 and page 31, line one, she stated:

> "Now, the [C]rown had raised in their defence [sic] the fact that he had not produced any medical report to support this fact that he has this injury. However [,] as part of the evidence, you need to take into consideration, because you need to consider whether based on what [the complainant] said that Mr. Wittock did, which is taking his hand putting over her mouth, holding her and pulling down her underwear and inserting his penis in her vagina, whether, with the injury that he says he has to his hand and the limitation that he says that the hand gives him, whether he would have done what she said he did. All that she said that he did, putting the hand over the mouth, holding her down on the bed, pulling down her clothes, inserting his penis in her vagina. You need to consider his evidence about the injury, whether in fact he could have done all those things and then it comes down to credibility, who you believe, having assessed all the evidence, whether you believe him or whether you believe her. You also need to, in assessing his evidence, decide for yourself as well, since as counsel had said to you in her address he didn't produce any medical report, whether that injury in fact, whether you believe him, that it is an injury that he suffered from as far back as 1995 and therefore this incident that he is alleged [sic] in 2012. I am going to remind you as well, that just as I have made commentary on the evidence, I have commented on certain things in the evidence, [defence counsel] commented on certain things when he was addressing you and Ms – madam for the [C]rown also commented on certain things in relation to the evidence. Although, they have commented on these things and you are to take their

> comments as well as any comments that I have made into consideration, you are to remember, at the end of the day, that you are the supreme judge in relation to the facts. You take the comments into consideration, at the end of the day you have the final decision in terms of what you decide on dealing with the facts. Understood?"

[89] The learned judge addressed the comment of prosecuting counsel concerning the lack of the medical certificate, but reminded the jury that they needed to take into consideration whether they believed that he suffered the injury in 1995 with the consequential limitations to the use of his hand. It would have been prudent, as Ms Llewellyn conceded, to remind them at that juncture that there was no burden on the applicant to prove anything. However, in the context of her address to the jury, as shown above, it is my view that it did not detract from what had been said previously about the burden of proof. The learned judge made it clear that it was an issue of credibility as to who they believed. Ultimately, the issue of his disability and any limitations were left to the jury for their consideration.

[90] Concerning the learned judge's treatment of the mental element for the offence of rape, the proper direction in law for the offence of rape is set out at section 3(1) of the Sexual Offences Act ('SOA'):

> "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."

[91] The learned judge spoke to the indictment and the particulars of the offence at page nine, lines 16 to 25 to page 10, lines one to five of the summation:

> "Now as I indicated, Mr. Wittock has been charged on an indictment which says that on the 21st September 2012, he did have sexual intercourse with [the complainant] **without her consent and knowing she did not consent or**

> **recklessly not caring whether she consented or not so he has been charged for the offence of rape**. So what is rape, the law says that a man commits rape when he has sexual intercourse with a woman that is, he inserts his penis in her vagina and he does so without her consent **and knowing that she does not consent to what he is doing and really not caring whether or not she has consented to what he is doing.**" (Emphasis supplied)

[92] As demonstrated in the above excerpt, in summarizing the offence of rape, the learned judge is recorded as having used the conjunctive "and" instead of the disjunctive "or" (the ultimate direction in the paragraph highlighted). She had properly directed the jury at the commencement of her directions to them concerning the definition of the offence.

[93] Immediately afterwards, the learned judge directed the jury that the prosecution must prove beyond a reasonable doubt that the applicant had sexual intercourse with the complainant and did so without her consent (see page 10, lines six to 10). At pages 26 and 27 of the summation, she reiterated what the offence of rape is, but this time the proper use of the disjunctive "or" is seen, as follows:

> "Members of the Jury, as we resume this morning, when we broke yesterday afternoon, I had indicated that I would go further into the evidence that was given by the defendant Mr. Wittock but before I go any further there, I am going to revisit one area that I had addressed you on previously just to re-enforce [sic] some of the information I gave you and to ensure that you understand what I had indicated to you yesterday. The accused Mr. Wittock, is charged on a document which is called an indictment and that indictment would have set out that he was charged for the offence of rape, and it also indicates that particulars, what we call the particulars of the offence which I had outlined to you on the 21st of September 2012 in the parish of Clarendon, **he did have sexual intercourse with [the complainant] without her consent and knowing she did not consent or recklessly not caring whether she consented or not.** What I am going to revisit is the definition and the explanation of rape and what is involved in terms of rape. So the law says, that one; there has to be both an intention on the part of the

> accused to do the act that he has been accused of, so in his mind he must have intended to commit the rape and then he must also have committed the offence of rape. So, he would have, one; had sexual intercourse with the complainant …, **he would have done so, without her consent or acting recklessly, meaning he didn't really care whether or not she consented.** And as I also indicated, there must be penetration, that is, the penis entering the vagina and even the slightest penetration the law says is considered rape." (Emphasis supplied)

[94] At this ultimate direction, it appears that she inadvertently left off that aspect of the definition that speaks to "knowing she did not consent" which she had done in two prior directions. In spite of these "mishaps", I agreed with the assessment of Ms Llewellyn that it would not have had a prejudicial impact on the defence. The issue was not whether the applicant may have thought she was consenting or alleged that she consented. The defence was that he had no sexual intercourse with her. The jury accepted that he did and that it was without her consent. In the round, it cannot be said that the episodes of misdirection would have caused confusion in the mind of the jury and impacted the soundness of the jury's determination.

[95] As to the complaint regarding the comment concerning the lack of defence witness, there is no demonstration on the record of what Mr Williams has asserted. At page six of the summation, the learned judge referred to the fact that several witnesses gave evidence. This was done in the context of her direction on discrepancies. She pointed out discrepancies in the evidence of two prosecution witnesses and then spoke to the issue of demeanour. Her comment about there being no defence witness was solely in the context of her discussion on demeanour and discrepancies (see page nine, lines seven to 16 of the summation).

[96] In **Yousefi**, the Court of Appeal of England and Wales identified grave deficiencies and errors made by the trial judge. In several passages in his directions to the jury, it was found that they "appear to suggest that the jury could draw inferences

from the failure by the appellant to call witnesses …" (per Fulford LJ at para. 25). Further, Fulford LJ stated at para. 26:

> "In this summing-up the judge fatally undermined his direction that the jury should not speculate on the absence of witnesses by dwelling on how their evidence might have been introduced and by directing the jury that it was a matter for them to determine the significance of the fact that a witness had not been called. This was an issue on which the judge should have given the jury short, clear and accurate directions in just a few sentences. He entirely failed to do so."

[97] I identified no such grave deficiencies or errors in the summation of the learned judge. In light of all the above, I concluded that no miscarriage of justice occurred. Ground of appeal 13 fails.

Ground of appeal 10 - The applicant was denied a fair trial by the court's refusal of an application by his trial counsel to cross-examine the complainant concerning some issues. In the alternative, the learned judge was wrong to curtail trial counsel from advancing his instructions to the sole witness or calling the available witness.

Submissions

[98] Mr Williams cited section 27 of the SOA in positing that the applicant was denied a fair trial by the court's refusal of an application by defence counsel to cross-examine the complainant during the trial on some issues relevant to her sexual history. The proposed line of questioning revolved around the complainant having a motive to name the applicant as the one who sexually assaulted her. The applicant had sought to argue that he was a scapegoat for another man who, at the material time, was engaged in a sexual relationship with the complainant. He stated that she had become pregnant and gave birth sometime in the following year, 2013 and because she was a minor, she wished to shield this other man from criminal prosecution. He argued that the applicant was not seeking to demonstrate that the complainant was of "loose virtue" but that there were factual circumstances that could provide her with a motive to falsely accuse the applicant. Mr Williams agreed that the SOA's purpose was to prohibit sexual history evidence unless it fell into one of the categories as permitted in the section. However, he contended that

the legislation appreciated that there were circumstances where the complainant's sexual history might be relevant. He commended the cases of **R v F** [2008] EWCA Crim 2859 and **R v Seaboyer; R v Gayme** [1991] 2 SCR 577 ('**Seaboyer and Gayme**') for the court's consideration.

[99] Ms Ferguson, on the other hand, argued that pursuant to section 27(4) of the SOA, in order for the learned judge to grant leave to permit inquiry into a complainant's sexual history, she must be satisfied that the probative value of the evidence is significant and likely to outweigh any risk of prejudice to the proper administration of justice if it is admitted. The questions posed by the applicant's attorney must fall within some regulatory framework and cannot be mere generalisations of the complainant. Best practice dictates that the proposed questions be served on the court for its consideration. In all the circumstances, the applicant, through his counsel, had not engaged the correct process at trial and, upon enquiry by the learned judge, at his own instance, abandoned the application. Moreover, nothing of substance was placed before the judge for her consideration as to the likely probative value of the evidence to the issues before the court. It tended towards prejudicing the proper administration of justice, eliciting material through the back door to impugn the credibility of the complainant by shaming and embarrassing her and dragging her sexual history into the proceedings.

Analysis

[100] Section 27 of the SOA provides as follows:

> "27.-(1) In any proceedings in respect of rape or other sexual offence under this Act, no evidence shall be adduced and no question shall be asked in cross examination relating to the sexual behaviour of the complainant with a person other than the accused, unless leave of the Judge is obtained on application made by or on behalf of the accused.
>
> (2) An application for leave under subsection (1) shall be made in the absence of the jury and a copy thereof shall be served upon the complainant.

(3) Subject to subsection (4), the Judge shall not grant leave under subsection (1) –

(a) unless the evidence or question in respect of which leave is sought, is or relates to, evidence –

(i) of specific instances of the complainant's sexual behaviour which tend to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge;

(ii) of other sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge and relates to the consent which the accused alleges that the accused believed was given by the complainant; or

(iii) which rebuts evidence of the complainant's sexual behaviour or absence thereof that was previously adduced by the prosecution; or

(b) unless the Judge is satisfied that the exclusion of the evidence or question in respect of which leave is sought, would be unfair to the accused because of the extent to which that evidence-

(i) relates to behaviour on the part of the complainant which was similar to the alleged behaviour on the occasion of, or in relation to, events immediately preceding or following the alleged offence; and

(ii) is relevant to issues arising in the proceedings.

(4) In determining for the purposes of subsection (3) whether evidence is admissible or questioning should be allowed, the Judge shall be satisfied that the probative value of the evidence sought to be admitted or allowed is –

(a) significant; and

(b) likely to outweigh any risk of prejudice to the proper administration of justice if it is admitted."

[101] The relevant portions of the transcript encapsulating defence counsel's application under section 27 are set out below (see pages 37 to 40 of the transcript):

> "[DEFENCE COUNSEL]: M'Lady, it is a part of the defence, that in fact, this witness has an interest to serve and to tell lies on my client because she was involved in an intimate relationship with somebody else. Said relationship resulted in her having a child and said persons [sic], as far as we are aware, was not prosecuted, even though she was fifteen at the relevant time and so, I am aware that the now Sexual Offences Act, requires that the defence demonstrates that the questions in relation to previous sexual conduct, is relevant to the defence before same can be asked and that permission must first be sought from the presiding judge before any such questions can be put to the witness. M'Lady, may I request m'Lady, that the defence be permitted to ask those questions in order for the jurors to fully appreciate the suggestion, that this is a witness with an interest to serve and this is a witness whose credibility will be challenged to the response to those questions. So again, I say m'Lady, I am aware that [sic] the Sexual Offences Act, those questions should not be asked unless it is that the defence can satisfy the Court, that those questions are necessary in furtherance of the defendant's defence and that permission must first be sought from the Court to ask those questions. Might it so please you.
>
> MISS P. HICKSON: Of course m'Lady, the Crown objects to those questions based on the basis of such allegation. Even in the face of the explanation the defence has given, I fail to see any relevance of the complainants [sic] previous, past or current sexual history on the charges before the court. I agree that the case is really a case about credibility but counsel has already asked her several questions about certain sums of money being demanded and she has already said she is not aware of it. I don't see the question of her sexual history in relation to the, [sic] and her credibility can be decided on the evidence that has come before the court and that would be a breach of the Sexual Offences Act. Counsel has not given sufficient, cogent reasons for such questions to be asked.
>
> [DEFENCE COUNSEL]: M'Lady, if your Ladyship wishes to look at the section, Sexual Offences Act, it is not saying that questions cannot be asked, it is not saying it can't be asked at all. It is saying that the defence, so the question is whether

your Ladyship finds what I said is sufficient reason, if your Ladyship says no, I will leave it and move on. It is not saying the questions can't be asked.

HER LADYSHIP: Well, counsel, you really haven't given me any reason.

[DEFENCE COUNSEL]: M'Lady, perhaps I wasn't elegant enough.

HER LADYSHIP: Save and that you …

[DEFENCE COUNSEL]: M'Lady, I wasn't saying that. That the reason is that she has something to hide, someone to protect, with whom she was having an intimate relationship at the time. M'Lady, remember at the time she would have been fifteen years, m'Lady it is a matter for you, I won't belabour the point any further.

HER LADYSHIP: Counsel, I really do not find that the reasons you outlined …

[DEFENCE COUNSEL]: Very well, m'Lady. M'Lady, might I say then, will it be permitted for me to say that she is telling lies on him to be protecting the boyfriend she had at the time?

HER LADYSHIP: No, counsel. That will be it, certainly nothing about anything else.

[DEFENCE COUNSEL]: That is it, m'Lady, thank you.

(Jurors return at 2:25 p.m.)

(Witness returns at 2:26 p.m.)

…

[THE COMPLAINANT]: CROSS-EXAMINATION BY [DEFENCE COUNSEL]CONT'D (2:25 P.M.)

Q. [Complainant], you are still on the oath.

A. Okay.

Q. You are also called Mary?

A. Yes.

Q. And your aunty's name, that you say is Monica?

A. Yes.

Q. And your mother's name is Veronica Lindsay?

A. Yes.

Q. And your mother is also called Joy?

A. Yes.

Q. Let me suggest to you, you see, that you are also telling lies on the accused man, Dale, because you want to protect the identity of your boyfriend that you had at the time?

A. That's a lie.

Q. What's a lie?

A. I didn't have a boyfriend, and I didn't tell a lie."

[102] The inference to be drawn from section 27(2) of the SOA is that an application is to be made in writing to cross-examine the complainant on matters pertaining to her sexual history, and a copy is to be served on the complainant. This was not done. Nevertheless, the learned judge entertained the application.

[103] An examination of the section reveals that there are discrete circumstances in which permission should be given, as set out at sections 27(3)(a)(i), (ii), and (iii). Section 27(3)(a)(i) describes circumstances relevant to specific instances of the sexual behaviour of the complainant, which would go toward establishing the identity of a person having sexual contact with her on the date set out in the indictment. The evidence that defence counsel sought to obtain did not fall within this section. Similarly, it did not fall within either subsections (ii) or (iii) as those sections speak to (i) evidence that would relate to the consent of the complainant and (ii) rebuttal evidence. The applicant's defence was a denial, so these sections would be irrelevant to the trial proceedings.

[104] Section 27(3)(b)(i) and (ii) allows a trial judge a further filter to determine if the application should be allowed. Would the exclusion of the evidence be unfair to the defendant because it relates to similar behaviour of the complainant on the actual date of the offence or, immediately before or after the actual date of the offence, and is it relevant to the proceedings? Once the judge is considering whether the evidence is permissible or questioning is to be allowed, then section 27(4)(a) and (b) must be applied to her assessment under section 27(3)(b). The pertinent question to be considered is whether the probative value of the evidence is significant and does it outweigh the risk of prejudice to the proper administration of justice.

[105] The particular circumstances of each case must, therefore, undergo these filters. The authorities relied on by Mr Williams were, therefore, unhelpful. **R v F** is easily distinguishable. In that case, the appellant was convicted of several counts of indecent assault, and as the jury was unable to arrive at a verdict on three counts of rape, it was being considered whether a retrial should be ordered. During the course of the trial, defence counsel sought leave to cross-examine the complainant on the basis of medical records disclosed by the Crown about a "pregnancy scare" and also about whether or not she had made assertions of sexual activity with other people. The trial judge allowed a "small degree" of cross-examination about the medical records and the timing of the consultation regarding the pregnancy scare. However, questions regarding what the complainant had told her doctor as to the reasons for the pregnancy scare were excluded. The medical records noted that the complainant had attributed her pregnancy to a "condom accident" with her boyfriend and nothing to do with being raped by the appellant. It was argued on appeal that the judge was wrong, as a matter of law, to exclude cross-examination on that issue and to exclude that information from the jury. Lord Judge CJ stated at para. 22:

> "22. Without setting out all the matters of fact in detail, the consequences of the judge's decision can be readily explained. The evidence that LB had become pregnant or had a pregnancy scare will undoubtedly have confirmed beyond question that she had indeed had sexual intercourse with

> someone (or that someone had had sexual intercourse with her). If her assertion had been recorded when she visited the doctor that it was the Appellant who had been responsible for her pregnancy, we suspect that that assertion would have been admissible. Yet when she asserted that somebody else was, on the basis of the judge's ruling it was not admissible. The reality, however, is that the basis of her statement and on her evidence there was no other candidate for her pregnancy. The prosecution case was therefore reinforced. On her account to her doctor, the position was plainly different. In the context of this case the difference mattered very greatly."

[106] The court found that had the appellant been convicted of rape in the circumstances, the conviction would have been unsafe. Further, it was uncertain of the likely impact on the jury's deliberations if the full evidence relating to the complainant's pregnancy had been deployed and properly explored in evidence. The convictions on indecent assault were, therefore, quashed, and a retrial was ordered.

[107] **Seaboyer and Gayme** involved challenges in the Canadian Supreme Court to the constitutionality of "rape shield" legislation comparable to section 27 of the SOA. The issue of the constitutionality of the Jamaican legislation was not pursued before this court. Nevertheless, certain observations of the Canadian court are helpful in an assessment of our "rape shield" legislation. The Canadian Supreme Court, in considering the issue as to whether the Criminal Code's "rape shield" provisions (sections 276 and 277) infringed the principles of fundamental justice or the right to a fair trial found in sections 7 and 11(d) of the Canadian Charter made the following statements at page 580 d to h:

> *"Per* Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Stevenson and Iacobucci JJ.: It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. Nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is thus probative should be received absent some other ground for its exclusion. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law

> justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial. The trial judge must balance the value of the evidence against its potential prejudice. Virtually all common law jurisdictions recognize a power in the trial judge to exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it. The prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law."

And further at page 590 b to i:

> "Sections 7 and 11(d) of the Charter protect not only the accused but other interests as well. The exact nature of the other interests involved depends upon the nature and aspect of the right considered. **The complainant, and indeed the community at large, have an interest in the reporting and prosecution of sexual offences. They also have a legitimate interest in ensuring that trials of such matters are conducted in a fashion that does not subordinate the fact-finding process to myth and stereotype.** However, a discussion of the community or group interests involved is not strictly necessary as the competing interest in this case, that of ensuring that trials and thus verdicts are based on fact and not on stereotype and myth, is not one belonging solely to any group or community but rather is an interest which adheres to the system itself; it maintains the integrity and legitimacy of the trial process. This interest is so closely intertwined with the interests of complainants and of the community that the distinction may be unimportant in reality.
>
> The recognition of the accused's unfettered right to adduce all relevant evidence seriously misconstrues the phrase 'principles of fundamental justice'. Clearly, these principles have developed with an eye to values and interests beyond those of the accused, and thus such values and interests are pertinent in constitutional inquiries. The argument that an accused is prevented from adducing all relevant evidence going to innocence has little weight in this inquiry and must give way to other considerations. **Sexual history evidence excluded by the provision is either irrelevant or so prejudicial that its minimal probative value is**

> **overwhelmed by its distorting effect on the trial process. It operates as a catalyst for the invocation of stereotype about women and about rape.**" (Emphasis supplied)

[108] Section 27 of the SOA, similarly, has these two competing rights in focus. The learned judge found that the rationale given by defence counsel did not satisfy any test pursuant to that section. Mr Williams has not persuaded me that the learned judge erred in this regard. The question to be determined is whether the learned judge was justified in refusing the application based on the provisions of the SOA. There was no evidence in the case at bar of any admission made by the complainant that would be relevant to the identity of someone other than the applicant having sexual intercourse with her at the date of the offence. Even if the complainant had given birth in 2013, the rationale to adduce the evidence appeared speculative, at the least. The applicant did not contend that the complainant named him as the father of a child born in 2013 and that this (complaint against him) was done to hide the identity of the true father. It does appear to be no more than a red herring, which would have had a distorting effect on the trial process without any probative value.

[109] Mr Williams' complaint that the learned judge gave no reasons for her decision to refuse the oral application does not carry much weight. A review of the transcript (as set out at para. [101] above) reveals that defence counsel interrupted the learned judge before she was able to complete her ruling. He asked permission instead to suggest to the complainant that she was lying about the applicant's involvement in order to protect her boyfriend. As seen from the transcript above, this was permitted. The complainant emphatically denied those allegations.

[110] This ground of appeal fails.

Grounds of appeal 14 and 4c - Alternatively, if this court is prepared to affirm the conviction and only reduce the sentence for 'time spent on remand' the court should also reduce the sentence for the constitutional breaches, including breach of guarantee for a fair trial in a reasonable time. The State infringed the applicant's constitutional rights to …(c) trial in a reasonable time (s. 16(2)), and as these breaches have significantly disadvantaged the applicant's prosecution of his appeal, the conviction ought to be quashed as an abuse of process.

Submissions

[111] Concerning ground 14, Mr Williams posited that the applicant's sentence should be reduced for the breaches of his constitutional rights that occurred during the adjudication of the matter. He cited that there was a six-year pre-conviction delay, as the alleged incident took place in September 2012, whilst the conviction was in October 2018. He argued that there was also a delay of five years and one month between the applicant's conviction on 25 October 2018 and the hearing of this appeal. These delays he contended, were entirely attributable to the State.

[112] Counsel contended that even though the applicant was given a mandatory minimum sentence, given the supremacy of the Constitution, Parliament could not restrict the court's powers in providing a proper remedy. He commended the following cases for our consideration with respect to a reduction in the sentence: **Curtis Grey v R** [2019] JMCA Crim 6, **Evon Jack v R** [2021] JMCA Crim 31 and, **Jahvid Absolam and Others v R** [2022] JMCA Crim 50. Counsel requested that the sentence be reduced by two years and nine months as a remedy for the breach of the applicant's constitutional rights.

[113] The Crown, by way of oral submissions, contended that the pre-trial delay was not solely attributable to the prosecution as there were instances when the prosecution was ready to proceed. However, the applicant's legal representation had still not been settled. The Crown admitted, however, that the delay between conviction and the production of the full transcript affected the applicant's appeal. This notwithstanding, it was posited that the delay was not extreme and that a public acknowledgment of the breach would be a sufficient remedy for the applicant. The cases of **Alfred Flowers v R** (2000) 57

WIR 310 and **Melanie Tapper and Another v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 28/2007, judgment delivered 27 February 2009, were referred to the court for consideration.

Analysis

[114] I will not be considering ground 14 (whether the applicant is entitled to a reduction in sentence) in light of my decision relevant to ground one. However, I have decided to examine the issues relevant to delay (ground 4c), as the question of delay will impact my consideration of whether, ultimately, a retrial should be ordered.

[115] Section 16(1) of the Constitution of Jamaica under the Charter of Fundamental Rights and Freedoms ('the Charter') provides:

> "16.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[116] Mr Williams' complaints concerned both pre-trial and post-trial delay. There have been numerous cases determined by this court addressing these issues (see **Julian Brown v R** [2020] JMCA Crim 42, **Jerome Dixon v R** [2022] JMCA Crim 2, **Tussan Whyne v R** [2022] JMCA Crim 42, and **Lloyd Forrester v R** [2023] JMCA Crim 20, among others).

[117] Based on these cases, it is now well established that it is not enough for an applicant or an appellant to simply assert that there was delay. There must be evidence not only in proof of delay, but also to demonstrate that the delay was properly attributable to the State. The reasons for the delay as well as the length of the delay are, therefore, critically important to any assessment of an alleged breach of the section 16(1) Charter right. In his affidavit filed on 17 November 2022, the applicant has asserted that none of the delay is attributable to him.

[118] Further, in the case of an appellate court, the court considers whether an assertion was made in the court below, of the alleged breach of the constitutional right. Failure to assert a breach previously, may weigh negatively against an appellant or applicant (see **Julian Brown v R** at paras. [81] to [83]). Based on the facts before us, the applicant could have only raised the issue of pre-trial delay in the court below. There is no indication that this was done.

[119] A further consideration in determining whether this constitutional right has been breached is the issue of prejudice, that is, whether and, to what extent an applicant or appellant has suffered prejudice arising from the delay. No assertion was made by the applicant, in any of his affidavits of any specific harm or prejudice suffered, as a result of the alleged delay. Notwithstanding this, it is noted that lengthy delay, without more, may be considered prejudicial (see **Lloyd Forrester v R** at para. [71]).

[120] If the court determines that there has been inordinate delay that is not attributable to an applicant or appellant, it may be found that there was a breach of the constitutional right to a fair trial within a reasonable time. The remedy to be provided depends on the court's assessment of the particular circumstances of each case.

[121] The chronology of events supplied by the Crown reflected the dates of 9 January 2017 (when the matter first came before the Clarendon Circuit Court for mention) to 22 October 2018 (the date when the trial commenced). That period revealed nine court appearances, inclusive of the date the matter was first set for trial and the date the trial commenced. On five of those appearances, the matter was adjourned for reasons concerning the applicant, namely, settlement of his legal representation, absence of defence counsel or an application for an adjournment by the defence. On the first trial date, it appears the Crown witnesses were absent, and on another trial date, the matter could not be reached, as a part-heard trial was in progress. It cannot be seriously argued, therefore, that the State was responsible for delay during this period.

[122] The court has not been provided with a history of the proceedings between 23 July 2013 (the date the applicant was arrested and charged for the offence) and 9 January 2017 (the date the matter was transferred to the Circuit Court). This was a period of approximately three and a half years. In the normal routine of court procedure, including assigned periods for the Clarendon Circuit Court, a two-year period before commencement of trial would not be considered unreasonable. However, there remains a period of delay of a year and a half for which no account has been given. The State must accept responsibility for this delay.

[123] The applicant was sentenced by the learned judge on 7 December 2018. He was sentenced to the mandatory minimum sentence of 15 years' imprisonment with the stipulation that he should serve 10 years before eligibility for parole. Applications for permission to appeal and for an extension of time within which to appeal were filed on 8 January 2019. By notice dispatched on 16 April 2019, a request was made by this court for copies of the notes of proceedings. The summation of the learned judge was received on 20 January 2021. The application for leave to appeal was then considered and refused by a single judge on 15 April 2021.

[124] The notes of evidence portion of the transcript was submitted to the court electronically on 7 May 2021. However, it does not appear that the applicant was notified of this by the court. The applicant renewed his application for leave to appeal on 13 May 2021. In September 2021, a legal aid certificate was issued on his behalf and the application for leave was set to be heard in the week commencing 16 May 2022. Notice of this hearing was issued to the applicant on 27 October 2021. A letter was also sent to Mr John Clarke, to ascertain whether the applicant had retained his services, and advising him of the hearing date. No response having been received from Mr Clarke, the deputy registrar made further attempts to contact him and, on 5 May 2022, Mr Clarke advised that he was not retained and that he was only approached to assist in procuring the notes of evidence. Further, he advised that Mr Wittock's family intended to retain Mr Terrence Williams for the appeal but had not done so due to the absence of the notes of evidence.

The notes of evidence were accordingly emailed to Mr Clarke, and the matter was rescheduled to the week commencing 12 December 2022.

[125] The time period between the request by this court for the notes of proceeding and the production of the summation was approximately 21 months, with the notes of evidence arriving less than five months later. This time frame in and of itself, although lengthy may not necessarily be viewed as unusually lengthy within the context of Jamaica's court system. However, it does appear that the failure of the court to notify the applicant that the notes of evidence were available, may have hampered the applicant in settling his legal representation ahead of the hearing in May 2022. The State would, therefore, bear some responsibility for delay during this time frame, which I would assess as one year.

[126] Between 14 November 2022 and 5 December 2022, two notices of application for court orders, affidavits and other documents were filed on behalf of the applicant. By the notice of application filed on 5 December 2022, the applicant asked the court to receive his affidavit evidence and that of Miss Simmonds, in effect making an application for fresh evidence and also raising the issue of incompetence of counsel. This would have necessitated a response from defence counsel, to enable the court to determine the issue of incompetence of counsel.

[127] Leading up to the hearing scheduled during the week of 12 December 2022, the court also observed that the arraignment portion of the transcript was missing and that the indictment that was submitted with the notes of evidence was incorrect. Consequent on enquiries by the court, a corrected transcript of the notes of evidence was filed electronically on 12 December 2022, with the arraignment portion included. However, the correct indictment was not provided to the court in the week of 12 December 2022, and no affidavit in response had been filed by defence counsel until Friday, 16 December 2022. In all those circumstances, the hearing could not proceed and was adjourned to the week of 20 November 2023.

[128] Prior to the hearing in November 2023, further affidavits were filed by defence counsel, the applicant and Miss Simmonds. When the matter came on for hearing on 22 and 23 November 2023, it was apparent that a case management conference ('CMC') was necessary to allow for further responses by defence counsel and to make a further attempt to procure the correct indictment. A CMC was set for 11 December 2023, on which occasion, the hearing was set for the week commencing 15 January 2024. Once again, the State was not responsible for the delay between November 2023 and January 2024, which was, in any event, a short time frame.

[129] By and large, the adjournments in the hearing of the application for leave to appeal were given to allow the applicant to put his entire evidence before the court regarding the issue of incompetence of counsel and to ensure that the court was seized of all the material for full ventilation of that issue. Therefore, I did not attribute any fault relevant to this ultimate period of delay to the State.

[130] Based on the above assessment, the entirety of the delay for which the State should bear responsibility in respect of both pre-trial and post-trial delay is two and a half years. A delay of such length, in my view, is not inordinate and does not constitute a breach of the applicant's right to a fair trial within a reasonable time.

[131] As previously indicated however, having determined that the applicant was not afforded a fair trial based on the conduct of the case by his counsel, the conviction must be quashed. However, a further assessment of factors, including the impact of delay, must now be undertaken in determining whether a retrial should be ordered.

Whether there should be a retrial

Submissions

[132] In written submissions, Mr Williams stated that the prosecution's case against the applicant was not strong and that a retrial would allow the prosecution to strengthen its evidence. Further, that the lapse of time since the commission of the offence and the likely commencement of a new trial militate against the ordering of a new trial and would

also compound the breach of the applicant's right to a fair trial within a reasonable time. Mr Williams also asserted that the applicant is now unable to procure medical evidence of his injury and that his sole prospective witness, Miss Simmonds, would be unavailable. In making these submissions, reliance was placed upon the cases of **Reid v R** (1978) 27 WIR 254, **Mark Russell v R** [2021] JMCA Crim 34 and **Vibert Adams v The Queen** (unreported), Court of Appeal, Saint Vincent and the Grenadines, Criminal Appeal No 1 of 1992, judgment delivered 7 April 1992.

[133] The Crown, in written submissions also commended the cases of **Reid v R** and **Mark Russell v R** for our consideration. It was submitted that the offence of rape is serious and that the complainant's evidence was credible, noting that the jury returned a unanimous verdict. The Crown noted further that the main issue for consideration would be the lapse of time and submitted that it is ultimately for this court, in its discretion, based on our knowledge of local conditions, to determine whether a retrial should be ordered.

Analysis

[134] Section 14(2) of the JAJA confers the power to order a new trial:

> "(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[135] In **Reid v R**, the Privy Council stated that "a consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against …. The weight to be given to these various factors may differ from case to case and depends … on local conditions in Jamaica with which the Court of Appeal is much more familiar …". Factors to be considered include (a) seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the

new trial; (e) whether evidence that tended to support the defence is available for the new trial; and (f) the strength of the prosecution's case. The issue of delay and the constitutional right to a fair trial within a reasonable time must also be considered (see **Mark Russell v R** at para. [61]). A balancing act is therefore required, taking into account the factors referred to above. Each case will turn on its own peculiar facts.

[136] The applicant was found guilty for the offence of rape. This is a serious offence which attracts a mandatory minimum sentence of 15 years' imprisonment without eligibility for parole before 10 years. While there are no statistics before us as to the prevalence of the reported cases, sexual offences are numerous in the courts of Jamaica. The interests of the public would be best served where persons who are guilty of serious crimes are brought to justice and do not escape merely because of some failure, in this particular case, by defence counsel. It is noteworthy that the prosecution cannot be held responsible for the question of whether a retrial should be ordered.

[137] The major issue in the case at bar concerned the credibility of the complainant. Her credibility remained unshaken after cross-examination. Therefore, no serious contention arises as to the prosecution being given another chance to cure evidential deficiencies.

[138] The Crown relied on three witnesses, including the complainant and her mother. The applicant relied on two character witnesses, including Miss Simmonds. Mr Williams contends that Miss Simmonds is no longer available. However, that is not an accurate representation of what had been indicated to this court. Miss Simmonds gave affidavit evidence for the purposes of the appeal and had made herself available on a particular day during these proceedings. She did not turn up on a subsequent date when she was actually required to give sworn evidence. The court was told that she was in a new job and did not wish to be absent from her employment again. As the Crown has submitted, she could be served a subpoena to attend court on a subsequent trial date. It is notable, however, that there is no indication from the Crown as to the availability of their witnesses, for the purpose of a retrial.

[139] The offence was committed in 2012, and the trial conducted over four days in 2018. A new trial could be mounted and concluded within the span of a week. There is nothing to indicate that the matter could not be set for retrial within a period of 12 months, based on the capacity of the Supreme Court to hear and determine the trial of sexual offences in a reasonable time period. The failure of the Crown, however, to account for the availability of the witnesses would be an important indicator against ordering a retrial.

[140] Further, the impact of future delay and any resulting prejudice to the applicant looms large in my final determination (see **Mark Russell v R** at paras. [71] and [72]). At the time of the writing of this judgment, it has been more than 12 years since the offence was committed. The applicant has been incarcerated since 7 December 2018, just under six years ago (five years and 10 months). He would have completed more than half of the pre-parole period imposed. Added to this, I have determined that the State is already responsible for a two-and-a-half-year delay for the pre-trial and post-conviction periods (relevant to the trial that has been determined). If convicted upon a retrial, the applicant would also be subject to another mandatory minimum period of 15 years and a minimum parole period of 10 years. In **Mark Russell v R**, Brooks P, at para. [73] considered the case of **Mikal Tomlinson v R** [2020] JMCA Crim 54, in which this court declined to order a retrial because the appellant had already served six years and seven months of his mandatory minimum sentence of 15 years and would be subject to the same mandatory minimum sentence if convicted after a retrial.

[141] Considering all the above, I do not think that it is in the interests of justice, even with a potential retrial period of one year, that a retrial be ordered. In keeping with section 14(2) of the JAJA (as set out above at para. [134]), I must direct that a judgment and verdict of acquittal be entered.

Conclusion

[142] There were several grounds relied on by the applicant, however, I have determined that ground one has merit. Defence counsel's failure to obtain proper

instructions from the applicant in light of the circumstances that existed, has resulted in a lack of due process. The conviction and sentence should therefore be quashed. Although the offence is serious, I have had to weigh this against the lack of information regarding the availability of the witnesses, the lapse of time since the commission of the offence, the length of time that the applicant has been in custody and the potential for further delay that may precede a retrial. In light of the above, no retrial is ordered.

FOSTER-PUSEY JA (DISSENTING)

[143] I regret that, respectfully, I do not agree with my sister's position on the issue of incompetence of counsel. I would, therefore, dismiss the appeal and affirm the conviction.

[144] My sister has indicated that, although defence counsel had a note indicating that the applicant agreed that Miss Simmonds need not be called, this was not credible since the applicant did not sign the note, and no explanation was given for this. My sister also opined that in light of the time reflected in the transcript when the cross-examination of the applicant ended, which was followed by defence counsel's indication that the defence case was closed, while an opportunity for consultation in the dock may have been possible, it could not have amounted to more than "whispered advice". I am of a different view.

[145] I, nevertheless, believe that, even if we proceed on the basis of my sister's assessment of the evidence, the legal standard for incompetence of counsel has not been met in this case.

[146] My sister Straw JA, with whom V Harris JA agrees on this issue, referred to a number of the cases that address the issue. I will highlight some of my thoughts as I examine the cases. Firstly, a comment on **Ebanks v R**. A part of the focus in **Ebanks v R** concerned **a defendant's decision** as to whether to give evidence. In my view, this cannot be automatically equated with a decision as to whether to call a witness. The

implications for a defendant relate to whether to give sworn testimony, whether to give an unsworn statement, and whether to say nothing at all.

[147] Their Lordships stated that this decision was of such fundamental importance that it should always be recorded in writing along with a brief summary of the reasons for that decision and, "**wherever possible**", the defendant's endorsement (emphasis supplied, see para. [17] of the judgment). The court noted, however, that in the absence of such a written record, an appeal court is not bound to give the appellant the benefit of the doubt, and should consider the respective accounts of the appellant and his former counsel in light of other relevant circumstances (see paras. [17] and [18] of the judgment).

[148] In **Ebanks v R**, the appellant argued that counsel's failure to call him to testify on the *voir dire* proceedings in defiance of or without proper instructions "was a failure of judgment so fundamental in nature that [he] was deprived of due process of law and did not receive a fair trial". The appellant complained that although he wanted to give evidence, counsel prevented him from doing so (the court described this as a critical matter, see para. [21] of the judgment), and counsel did not cross-examine the two police witnesses to the effect that they were lying and that the appellant did not make the statement to which they spoke in evidence.

[149] The Crown did not dispute that if the appellant's attorneys had defied his instructions in either way, they would have been guilty of professional misconduct, which would, in effect, have led to a denial of due process with the result that the verdict would have to be quashed. One can understand why the Crown made that concession in light of the nature of the appellant's complaints.

[150] It was found that counsel culpably failed to have his instructions on the issue that arose recorded at the time, but the Board accepted the evidence of the appellant's counsel and attorney that they were following the appellant's instructions in not calling him to give evidence. The court was also satisfied that counsel had followed the

appellant's instructions in limiting the scope of the attack on the police's evidence (see para. [33] of the judgment). I consider it crucial to note their Lordships' ruling that unless the court has been persuaded that the verdict of the jury is unsafe, the verdict must stand. The court also indicated that, in pursuing the complaint of incompetence of counsel, the appellant has to discharge a burden of persuasion, and persuade the court that the conviction is unsafe (see para. [14] of the judgment).

[151] I also reviewed **Kenyatha Brown v R**. In that case, the appellant complained that counsel at trial had been less than helpful in advancing his defence of consensual intercourse and that the complainant asked for money and did not get it, leading to the report of rape.

[152] In **Kenyatha Brown v R**, defence counsel had brief written instructions, but the specific instructions were not put to the complainant. The case was never adequately put to the complainant, which was a clear dereliction of duty. The appellant's case was explicitly placed before the jury for the first time when he gave evidence. This allowed the Crown to attack his credibility and suggest to the jury that it was a recent concoction. There was no suggestion to the complainant when she was giving evidence that she requested money. Phillips JA wrote at para. [35]:

> "[35] … So, the question must be, 'could the above exchange [regarding the complainant's request for money] have affected the outcome of the trial?' Was the failure of counsel to specifically treat with this particular and important aspect of the appellant's case by not putting the same to the complainant, such an extreme error as to result in a denial of due process? In our view, it was."

Phillips JA went on to comment that the court's position was underscored by comments that the trial judge made in the summation, that the conversation about money was never put to the complainant.

[153] In continuing to comment on the impact of defence counsel's failure to properly put the appellant's case to the complainant, Phillips JA wrote at para. [36]:

> "[36] ... It is difficult therefore to see, how, in those circumstances, the appellant would have received a fair trial, when a large part of the case turned on who the jury believed, the appellant or the complainant. We cannot say that the result of the case would have been the same, if the appellant's case as instructed had been put to the complainant. In our view, this process was unfair to him, as, instead of his case being put to the complainant, adverse comments were being made with regard to him, due to counsel's omission. The case was not just one, as counsel for the appellant submitted, about a denial of rape. Whether counsel was pursuing a particular strategy, or management of the appellant's defence as he saw fit, it was wrong, and the ineptitude in the handling of the appellant's defence resulted in a negative consideration of his case. On this basis alone the conviction would not be safe."

[154] Importantly, at para. [39] of the judgment, Phillips JA wrote:

> "[39] … As indicated, one is not really concerned as to the degree of ineptitude of the conduct of counsel, **the court is really concerned with the impact of that ineptitude on the appellant's defence, and as a consequence on the fairness of the trial process**." (Emphasis supplied)

[155] I note that in **Kenyatha Brown v R**, no effort was made to put forward specifically the essence or substance of the appellant's defence – consensual intercourse with a promise to pay certain sums, which promise was unfulfilled, resulting in the charge of rape. The court quashed the appellant's conviction and ordered a new trial.

[156] I find this court's judgment in **Leslie McLeod** very instructive. This court noted that cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional, but if counsel acted either in defiance of or without proper instructions, or when all the promptings of reason and good sense point the other way, that may lead an appellate court to set aside a conviction on the ground that it was unsafe and unsatisfactory.

[157] In **Michael Ewen v R** [2016] JMCA Crim 19, the appellant contended that counsel did not advance his instructions in respect of the issue of malice. This court noted that

the applicant, in his evidence, denied knowing the police, and so closed the door to any evidence of malice attributable to them. Further, that the evidence could have been harmful to the applicant's case.

[158] In **Daryeon Blake and another v R** [2017] JMCA Crim 15, the appellants complained that counsel did not adequately put their case to the jury. This court found the cross-examination adequately foreshadowed and was consistent with the appellants' case, so there was no substantial failure of the attorney to put their case to the jury.

[159] I also considered **Andrew McKie v R** [2021] JMCA Crim 17. In that matter, this court refused an application to adduce fresh evidence relating to the applicant's alibi, good character, and physical description. The Director of Public Prosecutions conceded that defence counsel was incompetent, as he failed to explore inconsistencies in the complainant's statement and adduce evidence of an alibi. This rendered the verdict unsatisfactory and unsafe, occasioning a miscarriage of justice.

[160] This court emphasised that in cases of this nature, the court will consider what any reasonably competent counsel would have done (see para. [60] of the judgment). At para. [62], the court noted that defence counsel's failure to heed the instructions given to him by his client resulted in a denial of due process, leading to an unfair trial. Among other things, the applicant said that defence counsel had not prepared him to speak at the trial. His unsworn statement did not refer to his whereabouts or to people who could attest to where he was and defence counsel did not call witnesses as to alibi or good character, although they were available. The court found that defence counsel did not adequately represent the applicant, and this led to a miscarriage of justice.

[161] There is a summary of principles helpfully outlined by Brown-Beckford JA (Ag) in **Troy Barrett v R** at para. [40] of the judgment, which has been referred to at para. [23] above by my learned sisters. I now set out the specific extract for convenience, as follows:

> "(i) [T]he misconduct of counsel will not be a basis to interfere with the decision unless there is a denial of due process to the accused;

(ii) defence counsel is given a discretion to conduct the case in the way they believe is in the best interest of their client;

(iii) New counsel should be generally wary of criticizing the steps taken by the former counsel in advancing the case; and

(iv) in examining this issue, the court ought not to focus on the alleged incompetence of counsel but rather the impact which it may have had on the case of the accused."

[162] At para. [41] of the judgment, this court approved a statement made in **R v Doherty & McGregor** [1997] 2 Cr App R 218, that unless it can be shown that no reasonably competent counsel would have adopted that course, these grounds of appeal, that is, incompetence of counsel, should not be advanced.

[163] In considering the particular facts, this court, in **Troy Barrett v R** at para. [43] of the judgment, stated that counsel's advice to the applicant not to include the alibi defence in his unsworn statement could not be faulted. The applicant also complained that defence counsel did not call witnesses to support his good character. However, at para. [44] of the judgment, the court noted that the applicant benefited from the judge's directions to the jury on both the credibility and propensity limbs although he was only entitled to a direction on the propensity limb, as he gave unsworn evidence.

[164] At para. [46] of the judgment, the court considered whether the conduct of the attorney in the presentation of the applicant's case fell below the acceptable standard of competence and concluded that, on an objective analysis, it did not.

[165] In **Paul Lashley**, it was held by a majority at paras. [11] - [13] that in resolving the issue of incompetence of counsel:

"[11] … the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather this Court is guided by the principles of

> fairness and due process ... This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial. In arriving at that assessment, the court would consider the impact of any errors of counsel on the outcome of the trial. Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court might yet consider … that the ineptitude or misconduct so extreme as to result in a denial of due process … the conviction would be quashed regardless of the guilt or innocence of the accused …
>
> [12] Thus all counsel, … are entitled to the utmost latitude in matters such as strategy … Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the witness-box and to rely on their unsworn evidence.
>
> [13] A conviction could only be set aside on appeal if, in assessing counsel's handling of the case, the court concluded that there had not been a fair trial or the appearance of a fair trial …"

[166] Therefore, in the words of the majority at paras. [24] and [25]:

> "[24] …**the allegation of incompetence on the part of the defence counsel is in fact premised on the failure of counsel's strategy rather than any denial of due process.** …
>
> [25] It cannot be said that on the evidence competent counsel would have succeeded in achieving a different outcome. … nothing in the trial suggested that the Appellants were denied their fair trial rights or due process." (Emphasis supplied)

[167] Recently, in **Craig Dubidath v R** [2024] JMCA Crim 20, my sister Dunbar Green JA, examined the relevant legal principles concerning claims of incompetence of counsel (see paras. [78] – [107]). In that case, Mr Dubidath complained that defence counsel failed to put aspects of his case to the complainant to establish her prior sexual relationship with him. Counsel for Mr Dubidath argued that these matters "went to the crux of the issues of consent and credibility". Further, Mr Dubidath's instructions were

not carried out "on a material issue" (see para. [67] of the judgment). At para. [108] of the judgment, Dunbar Green JA indicated that the important question was whether the jury would have "inevitably entertained reasonable doubt about [Mr Dubidath's] guilt had defence counsel suggested to the complainant that she had sexual intercourse with the appellant on a prior visit to his home …". After analyzing the defence case and what in fact occurred at the trial, at para. [119] of the judgment, this court concluded that "defence counsel's conduct of the defence was not so extreme as to have resulted in a denial of due process, or left the process completely bereft of the essential requirements of the appellant's defence as to render the conviction unfair …".

[168] Now to the case at bar. I agree with paras. [22] - [28] of the analysis in the draft judgment of this matter and the outline of the legal principles.

[169] I have a challenge, however, with how the issue is outlined in para. [29] *viz* that "in the round, the impact of defence counsel's conduct must be weighed in the context of what transpired during the cross-examination of the applicant and before the closing of the case for the defence". My sister went on to find that defence counsel acted without any or proper instructions in deciding not to call Miss Simmonds.

[170] Further, at para. [38] of the draft, my sister concludes that "the response of the applicant under cross-examination could be said to have created an expectancy in the jury that Miss Simmonds would have given evidence. The failure to call Miss Simmonds could have negatively impacted the applicant's overall credibility". My sister also indicates that the applicant was "robbed of an opportunity to present a positive defence and meet the jury's expectation that the witness he spoke about as coming to give evidence on his behalf would have been called to support his case". It must be noted that, as indicated in the draft judgment, the issue as to whether Miss Simmonds would be called, came up in the context of what the applicant could do in the shop. It had nothing to do with alibi or good character.

[171] In my respectful view, the ultimate issue is not whether defence counsel acted without the applicant's instructions in making the decision not to call Miss Simmonds. In line with the legal principles established in the case law, the ultimate issue is whether, as a result of counsel's failure to call Miss Simmonds, the applicant was denied due process.

[172] In order to make this assessment, we must look at the applicant's response to the charge of rape. The main elements of the applicant's defence were:

a. He did not have sex with the complainant;
b. Due to his physical incapacity, he could not have held down the complainant in the manner that she claimed;
c. The complainant's family members demanded money from him, but he refused to pay as he did not have sex with the complainant;
d. He was not at the shop at the time when the complainant claimed that he had sex with her, but was, instead, at his home, and Miss Simmonds was there with him (alibi); and
e. He was of good character and so was credible and did not have the propensity to commit rape.

[173] Every single element of the applicant's defence was placed before the jury in a positive way, and the learned judge directed the jury on them in her summation. As noted above, the context in which the question came as to whether Miss Simmonds would be coming to give evidence for the applicant, related to what the applicant could handle in the shop and whether he could lift things. The learned judge gave detailed directions to the jury on the applicant's handicap, so that aspect of his defence was adequately explored in the case. The applicant also received a full good character direction.

[174] The applicant gave sworn evidence, and his evidence was there for the jury to assess in the same manner as they assessed the complainant's evidence. It should not be overlooked that defence counsel also expressed the view that Miss Simmonds' evidence could have harmed the applicant's case.

[175] In light of all of the above, it cannot be fairly said that due to defence counsel's handling or mishandling of the case, in this case, his failure to call Miss Simmonds, the applicant was denied due process and did not receive a fair trial or the appearance of a fair trial. It cannot be stated that there was a substantial failure to put the applicant's case to the jury, or an extreme error in defence counsel's handling of the applicant's case. It would more appear to be an issue of defence strategy. There is also no basis on which it can be concluded that the conviction is unsafe.

[176] With respect, I do not agree that the applicant would, therefore, have had an unfair trial because Miss Simmonds was not called to give evidence.

[177] A further word. It is also important to consider how Mr Williams, counsel for the applicant, argued the issue of the calling of evidence. In oral submissions, and in response to a question from the bench, counsel stated that the failure to call a witness to testify is treated in the same manner as a failure to call the defendant. Respectfully, my reading of the cases does not lead me to that view. The question as to how the defendant is to treat with his own defence, whether to speak at all, to give sworn evidence, or to give an unsworn statement from the dock is said to be of fundamental importance. I refer to **Ebanks v R** above. In my view, Mr Williams was not on solid ground in equating the two things. One can see, however, why he did so, as this was a way to argue that a denial of due process had taken place. However, the circumstances in this case have not established any such denial of due process or an unfair trial, even if defence counsel acted without any or proper instructions when he did not call Miss Simmonds to testify. It is for the above reasons that I would dismiss the appeal and affirm the conviction.

V HARRIS JA

[178] I have read, in draft, the judgment of my learned sister, Straw JA. I agree with her reasoning and conclusion.

STRAW JA

ORDER

By majority (Foster-Pusey JA dissenting)

1. The application for leave to appeal is granted.
2. The hearing of the application is treated as the hearing of the appeal.
3. The appeal is allowed.
4. The conviction is quashed and the sentence is set aside.
5. A judgment and verdict of acquittal is entered.