**[2018] JMCA Crim 24**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 23/2014**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**

**KENYATHA BROWN v R**

**Dwight Reece for the appellant**

**Adley Duncan for the Crown**

**9, 23 March, 20 April and 28 May 2018**

**PHILLIPS JA**

[1] This is an appeal against the appellant's conviction for rape, and the sentence of 12 years imprisonment imposed on him, in the Westmoreland Circuit Court on 13 February 2014, after a trial before E Brown J and a jury. The appellant filed an application for leave to appeal against his conviction and sentence on 24 April 2014. The grounds stated were: (a) unfair trial; (b) incompetence of counsel; (c) insufficient evidence to warrant a conviction; and (d) miscarriage of justice. The notice of application indicated that further grounds would be filed by counsel.

[2] The virtual complainant alleged that on 30 May 2011, the appellant, who was at the time her elder sister's boyfriend, held her down with a ratchet knife pressed to her

throat, stripped her below the waist, and proceeded to have sexual intercourse with her without her consent in his car. It was also alleged that the virtual complainant sent a text message to a friend and to Miss Denise Lewin, a peer counsellor, in relation to the alleged rape. Under cross-examination, the complainant admitted that she had visited the appellant's home alone on one occasion, when she had "loose out [sic] his hair" and "picked a bump from his face". Additionally, she stated in cross-examination, there had been a previous incident in which she alleged that the appellant had assaulted her in his home, but she had not previously reported that assault to the police. The complainant and her mother reported the alleged rape to the Lucea Police Station two days later, and the complainant was directed to the Noel Holmes Hospital, where she was examined by a medical doctor in the presence of a police officer.

[3] Miss Denise Lewin testified about a text message that she had received from the complainant regarding the alleged rape. That was on the evening of the day of the alleged rape. Miss Karen Hudson, the complainant's mother, testified that the appellant had apologised to her for raping the complainant and asked for consideration of his children. Dr Aung Naing, a medical officer practising at the Lucea Hospital who examined the complainant, had testified that, on examination, there was evidence which was consistent with signs of vaginal penetration, having occurred within the timeframe stated by the complainant, which was within 48 hours before the examination.

[4] The appellant gave evidence that he had consensual sexual intercourse with the complainant and that, in fact, he had been gentle with her, and had made her

comfortable. He also denied placing a knife to her throat. He testified that the complainant had lied about what had occurred, because he had promised to give her $6,000.00 but he had not been able to keep that promise. He said that the following day she asked him "what happen [sic] to the money" , and he had promised to give it to her the day after that. Her response was that he should "make sure", at which point she "hiss her teeth and walk off". He denied telling the complainant's mother that he had raped her daughter and apologising to her, but said that he had told her to ask her daughter to tell her exactly what had happened.

[5] Miss Gardner, the complainant's sister, gave evidence in support of the appellant. She stated that she had not sent the complainant to the appellant's home to "pull out his hair". She stated that she had received a text message from her sister stating that the appellant had raped her. She was very upset about that information and confronted the appellant over the phone. He did not admit to her that he had raped her sister.

[6] The single judge of appeal who reviewed the appellant's application for leave to appeal against conviction and sentence, refused it and the application was therefore renewed before the court. The application came on for hearing on 6 and 9 June 2016, when it was adjourned for the full transcript of the notes of evidence of the trial to be produced. Subsequent to receipt of the transcript, counsel for the appellant, Mr Dwight Reece, filed the affidavit of Henry Charles Johnson, the attorney who had represented the appellant at trial, attempting to address the ground of appeal namely, "(b) Incompetence of Counsel".

[7] Mr Johnson's evidence was that he was a senior attorney and trial lawyer of the firm of H Charles Johnson & Co. He stated that he had been retained by the appellant and had duly conducted his trial on 12 and 13 February 2014. He said the matter of the appellant's defence had been discussed thoroughly with him prior to the trial. He stated further that, consistent with the strategy arranged for the trial, the appellant gave sworn testimony setting out his case, which was that he had had consensual sex with the virtual complainant, with whom he had developed a social friendship over the period that they knew each other. Mr Johnson referred to the notes of evidence and the cross-examination of the complainant and the appellant. He insisted that the appellant's case "was clearly put before the court at trial".

[8] Mr Johnson stated further that the trial judge had "failed or erred on most of the occasions to accept the evidence in favour of the appellant and interfered or interrupted unnecessarily during the trial". This approach he said can result in a miscarriage of justice and, in his view, had done so in the instant case. He stated further, that apart from the error of interference in the trial, "the [j]udge's tone was always unfavourable to the [a]ppellant when he had to accept as truthful areas in the evidence that came [over] as favourable to the [a]ppellant".

[9] The matter came up again before the court (Morrison P, Phillips and P Williams JJA) on 17 January 2018. On that date, Mr Reece filed an affidavit sworn to by him on 16 January 2018, wherein he referred to the fact that, subsequent to the hearing date on 9 June 2016, as the attorney-at-law representing the appellant, he had contacted Mr

Johnson, and requested a copy of any statement of the appellant which contained his instructions at trial.

[10] In response to this request, Mr Reece obtained a copy of the following undated statement "purportedly signed by a Kenyatta Brown", from Mr Johnson's office:

"STATEMENT

**Tel: 865-5794**

Kenyatta Brown States

I am 32 years old residing at Cousin Cove, Hanover. Father of 3 children reside with son eleven years. [sic]

Taxi operator owner of vehicle. [sic] Father lives in the parish of Hanover, mother lives in England.

The sister of my girlfriend claimed that I raped her and that is not true.

I did not assault her I had sex with her and she asked for four thousand dollars which I promised to give her. I did not give her the money same time and she kept calling me for the money

I was putting the money together and she could not wait, so she claimed that I rape her.

Signed

Kenyatta Brown"

[11] On 17 January 2018, having drawn the court's attention to the letter of instructions of "Kenyatta Brown", Mr Reece indicated to the court that he intended to rely on one ground only, namely that of incompetence of counsel. The court granted

the appellant leave to appeal and fixed the matter for hearing in the week commencing 26 February 2018.

**The submissions**

[12] Counsel for the appellant submitted that the appellant had not received a fair trial as counsel appearing for him in the court below, had been less than helpful in advancing his defence, which was one of consensual intercourse. At the conclusion of the Crown's case, counsel submitted the sole challenge to the evidence of rape, was a mere denial of rape. It was never put to the virtual complainant that she had consented to having sex with the appellant. Counsel had also not put the appellant's defence to the complainant, pursuant to his instructions, that he had sex with the complainant and that she had asked for money, which not having been delivered, resulted in the report of rape. The matter, counsel submitted, was one of credibility, that of the complainant against that of the appellant. Counsel not having properly put the appellant's defence of to the complainant, deprived the jury of the complainant's reaction to those suggestions being made to her.

[13] Additionally, the detailed nature of the appellant's account would have been heard from him for the first time in his examination-in-chief and in his cross-examination, and the jurors would have wondered why they had not heard any of this being put to the complainant previously, and whether that was so because it was a recent fabrication and lacked sincerity. So, instead of these details, the jury was only left with the mere denial of the offence of rape, as against a case of consensual sex being engaged in; that moneys were promised; and that the claim of rape was as a

result of non-payment or non-compliance with the promise of payment; and that this was so although these were the appellant's only instructions to counsel.

[14] In addition to that, Mr Reece submitted that Mr Johnson had introduced prejudicial material into evidence, namely the complaint of a previous assault by the appellant on the complainant. The complainant agreed that there had been an allegation of assault, but no other evidence was adduced, so that at the end of her testimony, one did not know what the assault was, or any details pertaining to it. Counsel submitted that on page 42 of the transcript of the evidence, the learned trial judge had attempted to stop Mr Johnson from pursuing that line of cross-examination, but he would not be deterred from proceeding as he thought it could benefit the appellant, as in spite of the assault, the complainant had still attended an event with him. But, counsel contended, that notwithstanding Mr Johnson's motive, the evidence of a previous assault without more, could not have assisted the appellant, and the evidence adduced only had the residual effect of hurting the appellant's credibility. Counsel submitted further, that even though the trial judge tried to neutralise this evidence in his summation, the damage had already been done in respect of the jurors.

[15] Counsel therefore submitted, that Mr Johnson, having received the statement of instructions, setting out that the appellant had had sex with the complainant; that she had asked for money; and that having not received the funds she had claimed that she had been raped by the appellant; and not having advanced the appellant's case, was a serious departure from the proper standards of advocacy. He argued further that no

reasonable counsel would have proceeded in that manner, and the appellant had been severely prejudiced as a result, and the conviction was therefore unsafe.

[16] In reply, counsel for the Crown, Mr Adley Duncan, submitted that an allegation of incompetence, however well founded, was not sufficient to establish that the safety of the conviction was in jeopardy. It was for the appellant, he argued, if he were to succeed on appeal, to demonstrate that the acts of incompetence, as alleged, operated with undue prejudice to the fairness of the trial. He relied on **Muirhead v R** [2008] UKPC 40 for this legal proposition.

[17] Mr Duncan submitted that the appellant's defence had been fully ventilated on oath by him at the trial. It was detailed, thorough, and tested by cross-examination. The jury, he said, would not have been in any doubt as to the nature of his defence. Counsel accepted that the court ought to inquire into the likely effect of the failure of counsel to put the appellant's case to the complainant, but submitted that the complainant was likely to have responded in the same way that she had done to all the previous suggestions put to her, which was an overall denial. He referred to several of those suggestions in the notes of evidence. He also reminded the court that suggestions to witnesses were not evidence, and argued that had the suggestion referred to by counsel, with regard to the promise of payment after having had consensual intercourse, been put to the complainant, it would not have advanced the defence to cause the safety of the conviction to have been called into question.

[18] Counsel argued that it was essentially a credibility contest between the complainant and the appellant and it is clear that the jury had preferred the complainant's evidence. Counsel submitted that the jury had before it all the elements of the prosecution's case, namely:-

> "1. the complainant's own detailed account of the rape;
>
> 2. the evidence of recent complaint made to a peer counsellor the same day of the incident;
>
> 3. the evidence of recent complaint made to her sister, who had been overseas, two days after the incident;
>
> 4. the evidence that the accused called and apologized to the young complainant's mother for raping the complainant two days after the incident;
>
> 5. the medical evidence of bruises of recent infliction to the lower section of the vagina (in contrast to the Appellant's account of taking care to be tender with the complainant."

[19] Counsel reiterated and underscored that the case was not therefore a bare credibility case, as there was other information, particularly the evidence of a recent complaint, which the jury would have heard and considered. Counsel submitted, that whereas the complainant may have fabricated the reports to her counsellor, her sister and her mother, she could not have fabricated the call from the appellant to the mother apologising for raping the complainant. Counsel also submitted further, that the appellant's evidence was that the lovemaking had been tender and gentle, but the medical evidence was that there had been bruises in the vagina. Although counsel accepted that the bruises could still have occurred in tender lovemaking, the jury was

entitled to find that bruises, although possible in that tender area, particularly with regard to a virgin, was nonetheless more consistent with the complainant's evidence as to the rape, than with the appellant's case of tender lovemaking.

[20] Counsel submitted further that the prejudicial evidence in relation to the assault which had allegedly occurred prior to the incident of rape, which had gone unreported until the report of the rape, had been blunted by the evidence that the complainant had, after the claimed assault, gone to Dover Raceway with the appellant and others. This evidence, he said, would tend to put doubt on the credibility of the complainant with regard to her interactions with the appellant, in that, she would have failed to report an assault in a timely way, and was yet accompanying the appellant thereafter on a family outing. Counsel submitted that pursuing this line of cross-examination could only benefit the appellant, and would not therefore have been incompetent of counsel to have done so.

[21] Counsel did posit a concern, however, for the court's consideration, which was that, at page 60 of the transcript, Mr Johnson had suggested to the complainant that the only reason why the police had heard about the alleged rape was that she was trying to "cover [her] tracks" as she did not want her sister to know that she was "seeing" the appellant. This, counsel submitted, seemed to be a suggestion made without instructions, and therefore posed a serious concern for him.

[22] Counsel submitted therefore that even in the light of the fact that Mr Johnson did not acquit himself well in the conduct of the case, any review of his incompetence,

based on the totality of the evidence, would not ultimately have affected the safety of the conviction. The lack of the suggestion of the promise of money was made nugatory in the light of all the suggestions which had been readily denied. The evidence of the assault also did not affect the appellant's credibility, and so any possible prejudice was mitigated by that. The appeal, he submitted, ought to be dismissed.

**Discussion and analysis**

[23] There have been several cases where the court has made statements on the approach to be taken in the face of counsel failing in his duty to his client in the conduct of the trial. In many instances, the issue relates to the failure of counsel to comply with instructions or to obtain complete instructions or directing the strategy of the case without proper consultation with the client. The principles derived from the various authorities are instructive and helpful. I will refer to a few of them.

[24] In **Bethel (Christopher) v The State** (1998) 55 WIR 394, a case from the Judicial Committee of the Privy Council, there were serious allegations against counsel, which were vigorously denied, that the client had not seen him to discuss his case prior to trial. He had, therefore, it was claimed, not put the client’s case properly to the jury. In particular, he had not advanced the client’s claim that he had been beaten by the police, which had resulted in his confession of the offence of murder. There was also a complaint that counsel had instructed the client to remain silent, when he wished to give sworn testimony. Lord Hoffmann, on behalf of the Board, made the point that counsel should always ensure as a matter of course that there is a written record of the instruction that they have received. Counsel were reminded of the absolute necessity of

protecting themselves from allegations of incompetence, as it has become prevalent for such allegations to be made in some cases without any merit whatsoever. However, as in the instant case, where counsel had received such a statement of instructions, it is incumbent on counsel to endeavour to comply with them.

[25] In **Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ) from the Caribbean Court of Justice, Nelson, Saunders and Hayton JJA (Wit and Anderson JJA dissenting), commented on the issue of the incompetence of counsel. The court said that in resolving this issue, the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather the court was guided by the principles of fairness and due process. There was no need, the court said, for any sliding scale of pejoratives to describe counsel's errors. The court made these comments at paragraphs [11], [12] and [13] of the judgment of the majority:

> "[11] ... 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 this assessment, the Court will consider as one of the factors to be taken into account 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 may yet consider, in the words of de la Bastide CJ in *Bethel* that the ineptitude or misconduct may have become so extreme as to result in a denial of due process. As this Court said in *Cadogan v The Queen* [[2006] CCJ 4 (AJ) at [14]] the Court will evaluate counsel's management of the case 'with a reasonable degree of objectivity.' If counsel's management of the case results in a denial of due process, the conviction will be quashed regardless of the guilt or innocence of the accused. See also

*Teeluck and John v The State* [[2005] 4 LRC 259, 273-4; (2005) 66 WIR 319 at [39]].

[12] An appellate court, in adjudicating on an allegation of the incompetence of counsel which resulted in an unfair trial, has to bear in mind that the trial process is an adversarial one. Thus all counsel, including in this case the police prosecutor and retained counsel for the Appellants, are entitled to the utmost latitude in matters such as strategy, which issue he or she would contest, the evidence to be called, and the questions to be put in chief or in cross-examination subject to the rules of evidence. The judge is an umpire, who takes no part in that forensic contest. 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 can only be set aside on appeal if in assessing counsel's handling of the case, the court concludes that there has not been a fair trial or the appearance of a fair trial: see *Boodram v The State* [[2002] 1 Cr. App. R 12, 19]..."

[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."

[27] In this jurisdiction, Morrison JA (as he then was) in **Leslie McLeod v R** [2012] JMCA Crim 59, on behalf of this court, endorsed the above principles generally, and noted the observations of Rougier J in the English Court of Appeal **R v Clinton** [1993]

1 WLR 1181, 1187, where he stated that the cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional. However, Morrison JA noted that Rougier J recognised that 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".

[28] **Michael Ewen v R** [2016] JMCA Crim 19 is a case in which the applicant advanced as one of his grounds of appeal, the contention that defence counsel failed to advance his instructions in respect of the issue of malice. The failure, he asserted, deprived him of the benefit and consideration of vital material which went to the issues of credit and motive on the part of the police witnesses. He also claimed that counsel failed, thereafter, to put details of the malice and the confrontation. For those reasons, he asserted, that the applicant had been deprived of a fair trial. Edwards JA (Ag), speaking on behalf of the court, referred to the cases cited above, and accepted the principles stated therein. She however indicated that the learned trial judge had been correct to find that there had not been any proof of malice and that the police had not acted from any motive. The applicant had actually in his evidence denied knowing the particular police officers and that had therefore closed the door to any evidence of malice and motive directly attributable to them. It was, the learned acting judge of appeal stated, therefore difficult to see how counsel could have managed to elicit evidence of this "transferred malice", and to do so would have encouraged speculative evidence which had the risk of being more harmful that helpful to the applicant's case.

The court warned that each case must be examined within the context of its own peculiar circumstances. It is also clear that that examination must always be done against the background and within the framework of the principles enunciated in the authorities cited.

[29] Finally, in this important list of cases, I must mention **Daryeon Blake and Vaughn Blake v R** [2017] JMCA Crim 15 where Morrison P, on behalf of this court, once again canvassed the authorities dealing with what he referred to in that case as "the inadequate representation issue". One of the complaints in that case was that counsel had failed to adequately put the appellants' case to the jury, in that, counsel had failed to suggest the appellants' full case to the prosecution's witnesses, along the lines of his detailed evidence of the deceased's attack on him. The submission was, as it was in the instant case, that that failure made it possible for the prosecution to justifiably invite the jury to conclude that his evidence was recently fabricated, thereby affecting his credibility and depriving him of the possibility of an acquittal.

[30] After a detailed review of the transcript the court came to the conclusion at paragraph [62] that:

> "In our view, while the actual content of the cross-examination was perhaps, as Mr McFarlane accepted in retrospect, less detailed than it could have been in the light of his instructions, it nevertheless adequately foreshadowed, and was entirely consistent with, the case which the first applicant would subsequently advance in his evidence. That evidence was, it will be recalled,... that it was the deceased who first attacked both applicants and that it was the first, and not the second applicant who inflicted the stab wounds on the deceased..."

[31] Having set out the questions asked by counsel of the witnesses, the court stated at paragraph [64] that:

> "Again, these suggestions were entirely in keeping with the evidence which the first applicant would subsequently give. Therefore, in the light of the parts of Mr McFarlane's cross-examination of Mr Levy and Hughroy to which we have referred, we are clearly of the view that it cannot fairly be said that there was any substantial failure on Mr McFarlane's part to put the first applicant's case to these witnesses."

[32] The instant case is not one in which counsel did not have a statement of his instructions from the appellant. Although, admittedly, it was a brief statement. The instructions were that the appellant had had consensual sexual intercourse with the complainant. He had not raped her. He had not assaulted her. She had asked for money ($4,000.00) which he had promised to give her, which she kept calling for, and which he endeavoured to obtain, but as she could not wait for these funds, she claimed that he had raped her. The defence was therefore very clear. The specific instructions in relation to the appellant's defence were not put to the complainant. Counsel instead focused on:

1. the amount of times that the complainant had visited the appellant's home, before and after her sister had left Jamaica;
2. whether her sister had asked the complainant to go to the appellant's home to "loose his hair", or to "pick

bumps from his face" and whether that was on more than one occasion;

3. the amount of times she had been to Negril with the appellant; and

4. whether the complainant's failure to tell her mother about the incident immediately after it had occurred and whether by telling her mother two days later and thereafter making a report to the police, meant that the complainant did not go to the police station of her own free will.

[33] Although questions were posed challenging the complainant's narrative on the incident of the rape, namely the removal of her clothes, the use of the condom, and the ratchet knife, there were few suggestions made by counsel, which related to the case of the appellant in relation to his specific instructions. The suggestions which were put to the complainant were: whether the complainant had requested that the appellant pick her up at Green Island to go to Westmoreland; whether she had asked him to permit her to accompany him to several places; that the appellant had not pulled a knife on her; that he had not raped her; and that she had asked him for money on occasions including the day of the incident. The specific instructions set out in his statement to counsel were not put to the complainant.

[34] So, as indicated, his case was never adequately put to the complainant pursuant to his instructions. This was in our view a clear dereliction of duty. The appellant's case

was therefore being explicitly placed before the jury for the first time when he gave evidence. It allowed Crown Counsel in cross-examination to attack his credibility, and to permit the jury to consider whether his case was a concoction, a recent fabrication and lacking sincerity. On page 114 of the transcript, the appellant was cross-examined in this way-

> "Q. Now, you are saying that [the complainant] asked you for $6,000?
>
> A. Yes ma'am
>
> Q. Did you hear your lawyer put to [the complainant] that she had asked you for $6,000 in relation to the sexual - -
>
> A. He did not put that to her because he asked her if she never asked Mr. Brown for anything and she said, no.
>
> Q. You would think that is pretty important?
>
> A. Yes, it is important.
>
> Q. Did you hear your lawyer put to [the complainant] that both of you were talking about sex in the car when you were eating the bun and cheese?
>
> A. Yes ma'am.
>
> Q. And that is very important, isn't it?
>
> A. Yes ma'am."

[35] The impact of this evidence was that something as important as the request for payment of $6,000.00 in relation to the sexual encounter, ought to have been suggested to the complainant when she was giving evidence, and that having not been done, it was either not important, or simply not true. The appellant's case was about a

relationship, consensual sexual intercourse, the promise of the payment of sums which was not fulfilled, and the consequences thereof. So, the question must be, "could the above exchange 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. This position is underscored by the comments of the learned trial judge in his summation in relation thereto, which in the light of the evidence, were in our view correct. In these circumstances, as the impartial umpire, he would have felt obliged to do so. He stated at pages 28-30 of the transcript:

> "And he gave you, Mr. Foreman, in his words, the reason she is saying that. And the reason he said is because he promised to give her six thousand dollars and that did not materialize and he told you why it didn't materialize. He said he saw her the Tuesday after the incident which, as I understand the evidence, would have been the day before the report was made and she asked him what happened to the money and he told her that she will get it in the morning, the Wednesday and she told him to make sure. She hissed her teeth and walked off.
>
> Now, he never told you, Mr. Foreman and your members, about any conversation about the money. But, suffice it to say, the report was made on the Wednesday, the very day he should have given her the money. Nothing else was said about the money. And the learned Crown Counsel said to you, none of this was put to the complainant.
>
> Well, the complainant was asked if she never begged him money and she said no. But the figure of six thousand dollars was never put to her and all of this surrounding the matter that she saw him the Tuesday and asked what happened to the money and he told her that she would get it the following morning and she hissed her teeth and walked off, none of that was ever put [to] her so you never

> got a chance to see how she would have reacted if that suggestion had been made to her. And neither, Mr. Foreman and your members, were you given the opportunity to assess the complainant, how she would have answered if it had ever been suggested to her that she helped him to put on the condom using her left hand, and raised him up and said, make sure it is on properly because she didn't want it to burst. First time you were hearing that when he went up there.
>
> So you were denied, Mr. Foreman and your members, the opportunity to assess how the complainant would have reacted to that suggestion. It was never put to her."

[36] This final comment on this important aspect of the appellant's case, namely, the promise to pay money and her reaction to having not been paid, by the learned judge to the jury, was likely, in our view, to have had a strong adverse effect on the credibility of the appellant. Credibility looms large in this case, as even the issue of whether the recent complaints took place, and the content thereof is a matter of credibility in respect of the complainant. 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.

[37] However, in addition to the above, counsel for the appellant in the court below pursued another line of questioning and adduced evidence from the complainant that there had allegedly been a previous assault on her by the appellant. This was a suggestion put to the complainant by counsel for the appellant. The complainant agreed with counsel that there had been an allegation of such an assault. But there were no further details in relation to it. No circumstances were suggested or provided. The jury would therefore have been bound to consider, and at the very least, initially would have had a concern that the appellant would have committed an earlier assault of some kind on the complainant, and then subsequently have possibly committed another assault on her, namely the offence of rape, with the use of a ratchet knife. The introduction of this evidence of a previous assault was inadmissible, irrelevant, inappropriate, improper, unlawful and prejudicial to the appellant.

[38] It is true that the learned trial judge attempted to prevent this evidence from being adduced but that was to no avail, as Mr Johnson was insistent on pursuing that line of questioning. It is also true that the learned trial judge made it clear in his summation that the evidence ought to be disregarded. This is what he said at page 26 of the transcript of the summation:

> "Now, Mr. Foreman and your members, there are two bits of evidence I ought to have directed your attention to, before I commence this short review and these are they. During the cross-examination of the complainant, she was

> asked if she had given a statement to the police about Mr. Kenyatha Brown assaulting her at his house. And further, in cross-examination she told you of the reason he gave her for going to Hopewell.
>
> Now, these bits of evidence, really ought not to have been placed before you, Mr. Foreman and your members, because these have nothing to do with the charge laid in the indictment. And so, Mr. Foreman and your members, I am instructing you to put these bits of evidence, outside of your minds. You cannot include them in your considering the evidence, when you come to consider it, as to whether or not the prosecution has made out it's [sic] case"

[39] In our opinion, the learned judge is to be commended for what was a generally very thorough and detailed summation, correct in its analysis and directions to the jury, as it was on this issue of the previous assault. However, we consider that, in the circumstances of the case, that may not have been able to negative the adverse impact the evidence could already have had on the trial process to make it no longer fair, or even to make it appear to be fair. 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.

[40] In our view, this is not a case concerning facts like **Daryeon Blake** where the suggestions lacked detail, but were sufficient to foreshadow the evidence that would ultimately be adduced. There was in the instant case simply no effort whatsoever to put forward specifically the essence or substance of the appellant's defence, which, as indicated, was consensual intercourse with a promise to pay certain sums, which

promise was unfulfilled resulting in the charge of rape. The process was therefore unfair. A miscarriage of justice would have occurred. The conviction would be unsafe and must be quashed.

**Should there be a new trial?**

[41] After hearing the substantive appeal, we invited both counsel to make submissions on the question as to whether a new trial ought to be ordered in the interests of justice. Counsel for the appellant contended that the appellant was sentenced to 12 years imprisonment and had already served four years of that term and so ought not to be subjected to a new trial. Crown Counsel, after much effort, contacted the complainant who he submitted had indicated that she would be available to testify should the court decide to order a retrial. Crown Counsel further contended that in all the circumstances, a new trial ought to be ordered in the interests of justice.

[42] The principles enunciated in the oft cited case of **Dennis Reid v R** [1980] AC 343, are well known. Rape is a prevalent and serious offence and the evidence was that a ratchet knife was used in the assault of rape, although this was denied by the appellant. It has become the scourge of the society, and is particularly concerning when persons who are in positions of trust, and who should care and protect young girls, act contrary to what is expected, and instead abuse them. In this case, the complainant has indicated that she would be available to testify. It is also of note that the offence took place on 30 May 2011, the appellant was convicted in 24 April 2014 and so has spent approximately four years in custody since having been sentenced. This court is therefore cognisant of the fact the appellant may have to face the ordeal and undergo a

trial for a second time after a considerable lapse of time, and the fact that even more time must elapse before a new trial would take place, with the possibility of the appellant serving further time in custody, all over again commencing on a new date.

[43] As stated above, the complainant has indicated that she is willing to testify, and having regard to the seriousness of the offence and the relative strength of the prosecution's case, we consider that, in the interests of justice, a new trial is ordered to take place at the next sitting of the Westmoreland Circuit Court.

[44] We therefore order that the appeal is allowed, the conviction is quashed and sentence set aside; and in the interests of justice, a new trial is ordered to take place at the next sitting of the Westmoreland Circuit Court.