**[2017] JMCA Crim 31**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 127/2010**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**

**EVERTON CLARKE v R**

**Oswest Senior-Smith for the applicant**

**Mrs Denise Samuels-Dingwall for the Crown**

**20, 21 September 2016 and 31 July 2017**

**MCDONALD-BISHOP JA**

[1] The applicant was tried in the Portland Circuit Court, before F Williams J (as he then was), sitting with a jury, between 23 and 25 November 2010 on an indictment that charged him with three counts of rape. The particulars were that on three separate occasions, between June 2007 and January 2009, the applicant raped the complainant. On 2 December 2010, he was sentenced to 15 years' imprisonment at hard labour on each count and the sentences were ordered to run concurrently.

[2] The applicant subsequently applied for leave to appeal against his conviction and sentences. He relied on three grounds of appeal under three broad headings:

unfair trial; lack of evidence; and miscarriage of justice. His application was considered by a single judge of this court who, in refusing the application, opined that the applicant was "convicted on a pure credibility issue, on what appeared to be strong evidence for the prosecution, after proper directions from the learned trial judge". The learned single judge further opined that in the circumstances, "the sentence cannot be said to be manifestly excessive".

[3] The applicant renewed his application before this court. Leave was granted to Mr Senior-Smith, counsel appearing on his behalf, to abandon the original grounds of appeal and to argue four supplemental grounds. The supplemental grounds of appeal have embodied the applicant's complaints concerning the learned trial judge's treatment in his directions to the jury of the following matters: (i) the standard of proof (ii) the deliberation on the separate counts on the indictment; (iii) the jury's approach to the evaluation of the evidence of the applicant and his witnesses; (iv) the evidence of the purported recent complaint; and (v) the credibility of the prosecution's case. The applicant also complains that the jury may have succumbed to "inadvertent pressure" to arrive at their verdict.

**The case at trial**

**The prosecution's case**

[4] In summary, the case presented by the prosecution at trial was as follows: In June 2007, the complainant was living with her mother and the applicant, who was her stepfather, in the parish of Portland. On a day in June 2007, which the complainant

could not recall, she was alone at their home during the course of the evening when the applicant came home, pulled her to a bed and proceeded to have sexual intercourse with her, despite her expressed objection to him doing so. Again, in June 2007, on a day, which she also could not recall, the complainant went to a nearby river to bathe when the applicant went there, held her down on a stone and proceeded to have sexual intercourse with her, without her consent. The third incident allegedly occurred in January 2009, on a day the complainant also could not recall. On this occasion, she had gone to the house of the applicant to get something to eat. While there, the applicant held her and took her to a bed where he had sexual intercourse with her, against her will. On 12 February 2009, the complainant spoke to her father and on 17 February 2009, a report was made to the police at the Port Antonio Police Station. The applicant was charged with three counts of rape on 22 July 2009.

[5] The father of the complainant gave evidence. His evidence was ultimately not of any material evidential worth to the prosecution's case as the jury was directed to disregard the part of his evidence that the prosecution had sought to rely on as being a recent complaint. Essentially, in so far as was relevant to the prosecution's case, he spoke to having received a report from the complainant that led to the arrest and charge of the applicant.

[6] The investigating officer, Detective Corporal Karlene McKen, also gave evidence, which also did not put the prosecution’s case any higher in so far as the allegations of the commission of the offence are concerned. Her evidence was to the effect that the

report against the applicant was made to her at the Port Antonio Police Station that led her to conduct investigations into the allegations. She was not able to locate the applicant for some time but on 14 July 2009, after receiving certain information, she visited the Port Antonio Police Station, where the applicant was pointed out to her. She subsequently arrested and charged him for the three counts of rape. He made no statement upon being cautioned.

**The applicant's case**

[7] The applicant's defence was a complete denial of the allegations made against him. In his sworn testimony, he stated that the complainant was living with his aunt in June 2007, which was nearby his home. He had taken the complainant to his aunt's home because the accommodation he shared with her mother was not adequate. She was therefore not living with him when she claimed the incidents occurred but she would visit his house. He has had to scold the complainant "very diligently" on a number of occasions about her behaviour and on 5 February 2009, he scolded and slapped her for her bad behaviour. After he did so, the complainant told him that she would be going to the police station to report that he was having sexual intercourse with her and "make the police lock [him] up".

[8] He called two witnesses, his aunt and the mother of the complainant who was his common law spouse at the material time. His aunt's testimony was that the complainant lived with her for about a year and six months. She overheard the complainant telling her (the aunt's) daughter that the applicant had boxed her in her

face and that she was going to lock him up. The complainant's mother testified that the complainant was an "out of order child" and that she lived at the applicant's aunt's home at some time during the relevant period. On 5 February 2009, she was present when the applicant boxed the complainant. She heard the complainant say that she was going to tell her father that the applicant had boxed her and the complainant left. She did not hear the complainant say anything else. She denied (in her examination-in-chief) that the complainant had reported to her that the applicant had sexual intercourse with her.

[9] In the end, these witnesses called by the applicant (like the father and the investigating officer called by the prosecution) were not able to add anything of any materiality that could aid in the resolution of the critical issue, that is, whether the applicant had sexual intercourse with the complainant without her consent on the three occasions as alleged. So, the resolution of the material issue in the case clearly revolved around the credibility of only two witnesses, that being, the complainant and the applicant.

**Grounds of Appeal**

[10] The grounds of appeal argued by counsel on the applicant's behalf were as follows:

**Ground 1**

> "The Applicant respectfully lost the protection of the law arising from the gloss that the Learned Trial Judge placed on the standard of proof the jury were obliged to apply."

**Ground 1A**

"There was an insufficiency of directions, respectfully, in regard to the issue of:

1. The jury's deliberation on the separate counts of rape and the evidence adduced thereon; and

2. The jury's approach in evaluating the evidence of the [applicant] and his witnesses."

**Ground 2**

"The Applicant was irretrievably prejudiced by the inadmissible references to and evidence of purported 'recent complaint'."

**Ground 3**

"The Applicant's prospects of acquittal were denuded by the absence of a more careful set of directions on the credibility of the Prosecution's Case."

**Ground 4**

"The jury having elected to receive the Learned Trial Judge's directions during the usual luncheon adjournment may have succumbed to inadvertent pressure to arrive at their verdict."

**Ground 1**

**"The Applicant respectfully lost the protection of the law arising from the gloss that the Learned Trial Judge placed on the standard of proof the jury were obliged to apply"**

[11] Mr Senior-Smith argued on ground one that "the Learned Trial Judge beneficially sought to simplify or explain the meaning and application of the term 'reasonable doubt' [and] unwittingly... fell into fatal error as the eventual directions on

the requisite proof, required too low a standard thereby resulting in the Applicant suffering the convictions". He argued that the learned trial judge, in explaining to the jury what is meant by reasonable doubt, had "watered down" the directions as to the extent to which they should be satisfied.

[12] The aspects of the learned trial judge's directions that have generated this disquiet on the part of the applicant are as follows:

> "I will point out to you as well that in this case it is not the accused man, Mr. Everton Clarke, who has brought himself here. It is the crown or the prosecution that has brought himself here. It is the Crown or the prosecution that has brought him here and it is for the prosecution to prove their case against him to satisfy you as to his guilt, and in doing so you should bear in mind that he is not required to prove his innocence and the standard to which the prosecution has to satisfy you is what we refer to as beyond reasonable doubt.
>
> It doesn't mean that there cannot be any doubt at all, but if you have a doubt it has to be what we call a reasonable doubt. That is a doubt based on a reason, not a fanciful doubt, not a gut feeling as we call it, but it has to be a doubt based on a reason, having regard to the evidence."

[13] Learned counsel also pointed to several other aspects of the learned trial judge's direction in advancing his argument that he had failed to properly direct the jury on the standard of proof. In fact, Mr Senior-Smith pointed to approximately nine instances when the learned trial judge used the word "satisfied" or "satisfying" without any reference to the extent to which the jury must be satisfied. Some aspects of the portions of the summing-up that have led to the complaint of the applicant would

suffice to illustrate clearly the argument of counsel on his behalf. They are extracted as follows:

a. After the general directions on the standard of proof were given within the context of the directions on the burden of proof (paragraph [11] above), the learned trial judge further directed the jury, among other things, that proof beyond a reasonable doubt "really means that if on a careful assessment of the material before them, [they were] satisfied of the guilt of the [applicant], it [was] open [to them] to return a verdict of guilty".

b. After giving the corroboration warning, the learned trial judge pointed out to the jury that, even in cases where there is no corroboration, if, having heeded the corroboration warning and reviewed the evidence carefully, they "feel satisfied as to the guilt of the [applicant]", it was open to them to convict in the absence of corroboration.

c. Again, in reviewing the evidence for the jury's benefit, the learned trial judge made reference to the complainant's evidence that she was resisting the applicant on all three occasions. He directed the jury that the complainant's

> evidence in that regard was led by the prosecution "with a view to satisfying them" that the complainant was resisting the applicant's sexual advances every time sexual intercourse took place.

[14] Mr Senior-Smith argued that on every occasion that the jury were told that they must be satisfied of certain things or that evidence was put before them to satisfy certain elements of the offence, the learned trial judge should have directed them as to the extent to which they should be satisfied. According to Mr Senior-Smith, the learned trial judge, by merely stating at those points in the summing-up that the jury must be satisfied, without saying to what extent, had simplified the directions and so the directions fell short of what was required. He argued that the need for the jury to have felt sure was not sufficiently reiterated in the summing-up. There was, he said, "a glaring need" for the summation to refer to the standard of proof. He relied on cases such as **Regina v Yap Chuan Ching** (1976) EWCA Crim J0205-7; **Regina v Allan** (1969) 1 All ER 91; **Henry Walters v The Queen** (1969) 2 AC 26; and **Regina v Hepworth and Fearnley** (1955) 2 QB 600.

[15] We find ourselves unable to accept the submissions of Mr Senior-Smith that the learned trial judge failed to do what was required of him in law in directing the jury on the standard of proof. The learned trial judge adequately dealt with the issue of standard of proof in his directions to the jury, even though he did not repeatedly state

on every occasion that he used the words "satisfy" or "satisfying" that they must be satisfied to the extent that they are sure. We say so for the following reasons.

[16] There is no prescribed formula by which the learned trial judge should have directed the jury as is made clear on well settled authorities. What was required of him was to ensure that at the end of it all, the jury clearly understood that the onus of proving the case was on the prosecution throughout and that they must not return a verdict against the applicant, unless they were satisfied beyond a reasonable doubt, or, in other words, to the extent that they were sure, of his guilt.

[17] In **Regina v Hepworth and Fearnley**, the principle was enunciated thus:

> "Although no particular formula of words is required when directing a jury in a criminal case, the jury should be directed that the onus is always on the prosecution and that, before they convict, they must feel sure of the accused's guilt."

[18] In **Walters v The Queen**, their Lordships of the Privy Council found, as unobjectionable, an explanation by the trial judge (Small J) of the term "reasonable doubt", which was far more extensive in detail than the explanation in the instant case. Small J had properly instructed the jury that they could only convict if they were satisfied beyond a reasonable doubt or to the extent that they were sure of the accused guilt. He, however, gave a lengthy explanation as to what is meant by reasonable doubt during the course of which he stated, essentially, that reasonable doubt is that quality and kind of doubt, which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other".

[19] Their Lordships, in approving the directions of Small J, made it quite clear that by the time a trial judge sums up a case, he would have had an opportunity to observe the jurors and that it is best left to his discretion to choose the most appropriate set of words in which to make that jury understand that they must not return a verdict against a defendant unless they are sure of his guilt. The Board endorsed the dictum of Lord Goddard CJ in **R v Kritz** [1950] 1 KB 82 at page 89 that:

> "It is not the particular formula that matters: it is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the judge uses one form of language or another is neither here nor there."

[20] However, Lord Diplock went on to explain when more may be needed to be said by a trial judge about the standard of proof. He stated, in part, at page 30:

> "...if the judge feels that any of them, through unfamiliarity with court procedure, are in danger of thinking that they are engaged in some task more esoteric than applying to the evidence adduced at the trial the common sense with which they approach matters of importance to them in their ordinary lives, then the use of such analogies as that used by Small J. in the present case, whether in the words in which he expressed it or in those used in any of the other cases to which reference has been made, may be helpful and is in their Lordships' view unexceptionable. Their Lordships would deprecate any attempt to lay down some precise formula or to draw fine distinctions between one set of words and another. It is the effect of the summing-up as a whole that matters."

[21] In **Regina v Allan** Fenton Atkinson LJ stated:

> "If on a summing-up it is sufficiently brought home to the minds of the jury that they must be sure about any charge

> before they convict, there are no grounds for appeal on the inadequacy of the direction to the jury."

[22] In the instant case, the learned trial judge, after giving the directions set out at paragraph [11] above, also went on to direct the jury in these terms:

> "And the issue for you to determine at the end of the case when it comes time for you to make, I mean deliver your verdict, is whether or not you can accept the evidence of the virtual complainant, ... that on a day unknown, or two days unknown in June 2007, the accused man Everton Clarke, had sexual intercourse with her without her consent, and also whether you can accept her evidence and **whether you believe her to the extent that you feel sure** that on a day in January of last year as well he also had sexual intercourse with her without her consent." (Emphasis added)

Then again at page 37, he told them:

> "You have heard the evidence of the accused man and his witnesses. If having heard that evidence **you have a reasonable doubt about his guilt,** then you should return a verdict of not guilty in relation to any of the Counts about which you have reasonable doubt, or **if you have a reasonable doubt about all of them**, then you need to return a verdict of not guilty in respect of all of them.
>
> If you believe him completely, then, of course, **that would be more a situation of clear reasonable doubt** and that would also be for you to return a verdict of not guilty." (Emphasis added)

[23] It is clear from the summing-up that the jury was directed that the onus was on the prosecution to prove the case against the applicant that he had raped the complainant and that they must be satisfied beyond reasonable doubt of his guilt on each count on the indictment before they could convict him.

[24] Also, as can be seen from the portions of the summing-up extracted above, although the learned trial judge had consistently referred to proof beyond a reasonable doubt, he did, in fact, direct the jury at one point in the summing-up that before they could convict the applicant, they must be satisfied to the extent they were sure on the complainant's evidence. Given that it was the complainant who was the sole witness to establish the charges against the applicant, the jury would have been directed, in effect, that they could not convict the accused unless they felt sure of his guilt or were satisfied beyond reasonable doubt. The learned trial judge was, in effect, saying the same thing. In **Regina v Yap Chuan Ching**, the Court of Appeal of England and Wales approved directions of the trial judge, in terms, that proof beyond reasonable doubt and proof to the extent that they are sure are "two different ways of saying what is really the same thing".

[25] We find that on the totality of the summing-up, the need for the jury to have felt sure or to be satisfied beyond reasonable doubt was adequately brought home to them, even though the direction as to the extent to which they must be satisfied was not repeated the nine times or more highlighted by learned counsel. In our view, there was no simplification of the directions on standard of proof as a result of the learned judge's failure to constantly repeat the directions as to the extent to which they should be satisfied.

[26] Equally unacceptable is the argument of learned counsel that the learned trial judge, by explaining what is meant by reasonable doubt, had put a gloss on the directions, which lowered the standard of proof. It is indeed correct, that when the authorities are considered, especially those from the United Kingdom ('the UK'), it is observed that trial judges have been strongly advised not to proffer an explanation of what is meant by "reasonable doubt " or "sure" in explaining the standard of proof, unless it is necessary to do so. It was stated, for instance, in the case of **Yap Chuan Ching**, relied on by Mr Senior-Smith, that outside of the exceptional case, where the jury ask for the meaning of the standard of proof, "...in most cases... judges would be well advised not to attempt any gloss upon what is meant by 'sure' or what is meant by 'reasonable doubt'. Some of the comments by trial judges on the standard of proof, the court explained, create difficulties and are more likely to confuse than help. The court went on to state further, in relatively strong terms, that "if judges stopped trying to define that which is almost impossible to define there would be fewer appeals". This is, indeed, a valid observation and a legitimate admonition.

[27] Despite the approval by the Privy Council in **Walters v The Queen**, of the extensive directions of Small J explaining to the jury the concept of reasonable doubt, the weight of the authorities seems now to have moved away from the use of the reasonable doubt formula because of the difficulties encountered with it (see Adrian Keane and Paul McKeown, The Modern Law of Evidence, 9th edition, pp 105-108 and the cases discussed therein). As the learned authors noted at page 107:

> "In the wake of difficulties encountered with the formula of proof beyond reasonable doubt, *Majid* [[2009] EWCA Crim 2563] makes it clear that the direction on the criminal standard must adhere to the formula of being sure, in accordance with the longstanding advice given to judges by the Judicial Studies Board [that the jury must be directed that before they can return a verdict of guilty, they must be sure that the accused is guilty]. That advice, currently contained in the Crown Court Bench Book, is simply that the prosecution prove their case if the jury, having considered all the relevant evidence, are sure that the accused is guilty. Further explanation is described as 'unwise'. If the jury are not sure then they must find the accused not guilty."

[28] The longstanding advice of the Judicial Studies Board has now gained formal expression in the Supreme Court of Judicature of Jamaica Criminal Bench Book at page 48, chapter 5, directions 9(1) to (3). There, it is indicated that the trial judge should direct the jury that it is for the prosecution to prove that the accused is guilty and that to do this, the prosecution must make the jury sure that the accused is guilty. Nothing less than that will do, it states. In an effort to avoid the legal pitfalls that could emanate from an attempt to explain the concepts involved in the standard of proof, it does seem wise, indeed, for trial judges to adhere to this direction, unless further explanation is required by the jury. If an explanation is required, then the guidance given by the Privy Council in **Walters v The Queen** concerning the explanation to be given should be considered.

[29] In the instant case, however, the explanation of the learned judge was not such as was likely to confuse the jury, even if it may have been unnecessary for him to seek to predominantly use and explain the meaning of the concept, reasonable doubt. The

jury would have been mindful, on the totality of the summing-up, that they could not properly convict the applicant if they entertained reasonable doubt about his guilt, which would mean if they were not satisfied to the extent that they were sure that the complainant spoke the truth that he raped her.

[30] In all the circumstances, we find that the learned judge's directions to the jury on the standard of proof were not such as to render the verdict unsafe. Accordingly, ground one cannot succeed.

**Ground 1A**

**"There was an insufficiency of directions, respectfully, in regard to the issue of:**

1. **The jury's deliberation on the separate counts of rape and the evidence adduced thereon; and**
2. **The jury's approach in evaluating the evidence of the [applicant] and his witnesses."**

[31] Counsel for the applicant submitted that the learned trial judge failed to provide the jury with directions that: (i) they ought to have considered the three counts of rape separately; (ii) they were to approach the evidence in relation to each count in a discrete manner; (iii) the prosecution was obliged to prove each count of the indictment distinctly and beyond a reasonable doubt; and (iv) they were to treat the testimonies of the applicant and his witnesses in terms equal to the approach taken by them in treating with the prosecution's witnesses. According to Mr Senior-Smith, these non-directions amount to a "fatal misdirection" and so the convictions are unsustainable.

[32] The Crown does not share this view, as ably articulated by Mrs Samuels-Dingwall on its behalf. She maintained, in short, that there was no misdirection that would justify an interference with the conviction.

***(i) The treatment of the separate counts***

[33] It is accepted that the learned trial judge did not give the directions in the conventional "bench book" manner or in the terms articulated by the applicant in arguing this ground of appeal. We accept that the learned trial judge had a duty to convey to the jury, in whatever words he chose, that the prosecution bore the burden of proving each count on the indictment and so the evidence in relation to each count must be considered separately and distinctly from the evidence in relation to another in considering whether they were satisfied to the requisite standard in respect of each count. Furthermore, it was incumbent on the learned trial judge to have conveyed to the jury that the fact that they may have found the applicant guilty or not guilty on one count did not mean that the same verdict should be returned in relation to the other counts or any other count. The jury must have been made to clearly understand from the summing-up that they were required to reach a verdict on each count separately. Once all this was conveyed to the jury by the learned trial judge, then there would be no scope for impugning the conviction on this ground.

[34] Mrs Samuels-Dingwall, in her response, accepted that the learned trial judge did not expressly give the directions in the terms stipulated by Mr Senior-Smith or in the

conventional terms. She, however, argued that the summing-up, in its entirety, adequately covered what was required to be conveyed to the jury. She, however submitted, in the alternative, that should the court find that there was a non-direction, then it would be appropriate to apply the proviso to section 14(1) of The Judicature (Appellate Jurisdiction) Act because there has been no miscarriage of justice, given the weight of the evidence against the applicant on each count.

[35] Counsel for the Crown also made an effort to substantiate her submissions by pointing to different areas of the summing-up in which she said the learned trial judge had discharged his duty in assisting the jury on their approach in considering the separate counts. She pointed to the directions given by the learned trial judge, from the outset, that the applicant was charged for three counts of rape and that he had pleaded not guilty to all three counts. She also pointed to the fact that further in the summing-up, the learned trial judge had reviewed the evidence by focusing the jury's attention on three separate incidents to match the separate counts on the indictment and he directed them as to what the applicant's defence was in relation to the charges (which was a blanket defence in relation to all). All these have been noted.

[36] We have also observed that in distilling for the jury the central issue in the case for their resolution, the learned trial judge told them that the central question they had to decide was whether or not they could accept the evidence of the complainant that on two days unknown, in June 2007 and on an unknown day in January 2009, the applicant had sexual intercourse with her. This, in effect, was pointing out to the jury

that the issue for consideration was in relation to three different incidents. He then went on to later state:

> "You have heard the evidence of the accused man and his witnesses. If having heard that evidence you have a reasonable doubt about his guilt, then you should return a verdict of not guilty in relation to **any of the Counts** about which you have that reasonable doubt**,** or if you have a reasonable doubt **about all of them, then you need to return a verdict of not guilty in respect of all of them.**
> ...
>
> If, on the other hand, you have considered all the evidence in this case and you are of the view that you have been convinced by the evidence led by the prosecution of the guilt of the accused man, Mr. Everton Clarke, then it would be open for you to return a verdict of guilty **in respect of any Count** that you believe he is guilty of, **or all the Counts,** if you believe that he is guilty of all the Counts of Rape.
>
> So it would be a matter for you at the end of the day when you are asked to return your verdict, **to say on each of the three Counts** whether or not Mr. Everton Clarke is guilty or not guilty of those Counts." (Emphasis added)

[37] Although we would have much preferred for the learned trial judge to have adhered, as close as possible, to the usual form of the direction as prescribed in the relevant bench book in order to avoid any doubt, we accept the position advanced by the Crown that implicit in the overall directions he gave, was a direction to the jury that they would have to look at the evidence in respect of each of the counts separately in order to return a separate verdict on each of them. The learned trial judge had already directed the jury that it was the prosecution who had brought the applicant there and that it was the prosecution that must prove their case against him beyond a reasonable doubt. The prosecution's case constituted the three counts on the

indictment, which the jury were told they must consider in arriving at a verdict. They would have been mindful from that direction that they could only return a verdict of guilty on each count, if they were satisfied beyond reasonable doubt on all the evidence in relation to the particular count. It would have been brought home clearly to them that they need not return the same verdict on all the counts. This would mean, in essence, that they could not use the finding on one to influence the finding on the other.

[38] We find, therefore, that although the learned trial judge did not give the directions as to the separate treatment of the evidence in relation to each count in a direct and more specific manner as he should have done, it was not an omission that amounts to a misdirection, and in any event, one of such gravity, as to lead to miscarriage of justice. The cumulative content of the directions was adequate for the jury to appreciate that they had to consider the evidence in relation to each count and that they were required to arrive at a separate verdict in relation to each count. We think it safe to say that even if the "textbook" directions were given, it is not likely to have had any impact on the verdicts that would have been favourable to the applicant, given the weight of the evidence against him. So, even if there was lack of direction in the terms posited by counsel for the applicant, it cannot be said that the verdicts of the jury are rendered unsafe by virtue of this. Therefore, this ground of appeal does not provide a compellable basis on which the finding of the jury could be impugned and the convictions quashed.

### *(ii) The approach to the treatment of the applicant's case*

[39] Mr Senior-Smith also contended, on the applicant's behalf, that the learned trial judge did not direct the jury to treat the applicant and his witnesses in the same way as they would treat the prosecution's witnesses. It is accepted that the standard direction when a defendant gives sworn evidence and/or calls witnesses is to direct the jury that his evidence and that of his witnesses is to be treated with the same standard of fairness and in the same way as the evidence of the witnesses for the prosecution. In other words, it must be brought home to them quite clearly that the evidence of the accused and his witnesses must not be regarded any less merely on the basis that he is the accused. The learned trial judge did not directly instruct the jury in these specific terms.

[40] He stated:

> "**Now, you will need to consider all the evidence in the case and there were several witnesses who gave evidence**. You had the complainant, you had her father, and you also had the investigating officer on the side of the Prosecution. **For the side of the Defence, you had Mr. Clarke himself giving his evidence and you also had [the complainant's mother] and [the applicant's aunt]. You need to consider all the evidence in this case and hopefully as well, you would have been not just listening to what the witnesses said but also looking at them as they gave their evidence because that should assist you in coming to a view as to whose evidence you should accept and whose evidence you should reject**." (Emphasis added)

[41] The learned trial judge also made it clear to the jury that it was for them to decide whether on the one hand, they accepted the complainant's evidence or they

were in doubt about it, or whether, on the other hand, the evidence of the applicant and his witnesses had raised "enough doubt" or "enough reasonable doubt" in their minds, for them to return a verdict of not guilty.

[42] The jury were also directed, in detail, about the approach they should take in assessing the evidence of the witnesses, which the jury would have known included the evidence of the applicant and his witnesses. Within that context, the learned trial judge instructed the jury on such matters as errors, inconsistencies and discrepancies in the evidence of witnesses and their implication for the credibility of the witnesses, especially the complainant, whose credibility was in issue.

[43] The learned trial judge also put before the jury, in a fair and balanced way, the applicant's defence, which was a simple one. The jury would have also heard, for themselves, the evidence of the applicant himself and his case that was put to them through his witnesses and through the cross-examination of the prosecution's witnesses. In the end, the learned trial judge would have told the jury, in effect, that they should evaluate the witnesses for the prosecution and defence in the same way in coming to a determination as to whom to believe, which was a matter for them.

[44] It cannot be accepted as a reasonable complaint that the applicant's case was not given a fair treatment by the learned trial judge, even though he did not expressly tell the jury that the case for the prosecution and the defence should be treated equally. We can discern no prejudice or any injustice to the applicant arising from the failure of the learned trial judge to give the directions in a more direct and specific

way. This aspect of the applicant's complaint cannot avail him as a basis on which this court could justifiably disturb the conviction.

**Ground 2**

**"The Applicant was irretrievably prejudiced by the inadmissible references to and evidence of purported "recent complaint"**

[45] Crown counsel, at the trial, led evidence from the complainant as to whether she had spoken to anyone about what had happened after the last incident in January 2009. She said she told a cousin. She was stopped by Crown counsel on that response and was immediately asked if she had spoken to anyone else. She then said her father. Upon an attempt by Crown counsel to elicit from her the terms of the complaint to her father, counsel for the defence immediately objected to the evidence on the ground that it did not fulfill the requirements of the law to be admissible as a recent complaint because it was not established on the evidence led up to that point that the complainant did not have a reasonable opportunity to make the complaint to her father and also that a considerable time would have passed before any report was made to him. The learned trial judge upheld the objection and allowed the prosecution to adduce further evidence in an effort to lay the necessary foundation to establish that the report to the father was admissible.

[46] The complainant then testified, among other things, that she would see her father after the last incident but that she was afraid to tell him what had happened because the applicant had threatened her. Crown counsel again asked for permission

to admit the evidence of recent complaint, which was once again objected to by defence counsel. The learned trial judge, in allowing the evidence to be led, ruled in these terms:

> "In relation to the evidence thus far one incident is alleged to have occurred in January of 2009, and it may not be that unreasonable to admit the evidence of the recent complaint made sometime in February of 2009... [T]he law as I understand it, coming from the case of the Queen against Ballentyne, is that its admissibility depends on whether it is made at the first reasonable opportunity and that has to be looked at in light of the, [sic] a number of concerns, the age of the complainant, the relationship she has with the person to whom she is making the complaint at this time and so so [sic].
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> ...
>
> For what it is worth the Court would allow the evidence of it and if needs be address the Jury on it later on when it's time for summation."

[47] Following this ruling, Crown counsel proceeded to ask the complainant if she had told her father about what had happened to her. When she was asked about what she had told her father, she said that she told her father "[t]hat Crapsy have sex with me, Crapsy have sex wid mi, miss" and "I told him that he boxed me, miss".

[48] Later, upon being cross-examined, the following exchange took place between counsel for the defence and the complainant:

> "Q. So, the people who you told was [sic] your father and your cousin?
>
> A. Sir, mi tell mi mother, mi friend.
>
> ...

A. Sir, the first time him have sex with me sir, mi tell mi mother the next day."

[49] The complainant was then asked the name of the friend to whom she had spoken and she gave a name. So, during cross-examination, it was revealed that apart from her father and cousin, she had spoken to her mother and a friend.

[50] When the father was called to give his evidence for the prosecution, he testified that the complainant told him that the applicant had sex with her and that he (the applicant) had boxed her. This was similar to what the complainant had said that she reported to her father. There were no details in the complaint as to how any of the incidents was alleged to have happened as reported by the complainant to the court.

[51] These were the directions of the learned trial judge concerning the evidence that was led by the prosecution as evidence of a recent complaint:

> "Next we heard from [the father of the complainant], and he gave evidence as to speaking with her, the complainant, on the 12 of February, 2009, and certain things that were said. A certain report was made to him, but, of course, this report would have come some time after the [sic], what the complainant tells us is the last incident, and it is not what would normally be regarded as a recent complaint. I will speak to you about that a little later on."

[52] Later, he continued:

> "In this matter earlier in the trial you might have heard something mentioned, some argument going to and fro as to a recent complaint. There is something in the law known as a recent complaint and where it exists you could have regard to it and say that it would support, it would go not to prove or help to prove the case against the accused man, it would go towards showing some consistency in what the

> complainant is saying. That she said something on a previous occasion and it is the same thing she is saying in the witness box.
>
> In this case there is no recent complaint. There is no recent complaint in this case. A report was made yes, but in terms of what the law requires there are certain requirements in law to establish a recent complaint, and I direct you in this case that there is no recent complaint and you [sic] put that out of your minds, very well."

This was the last direction given to the jury before they were asked to retire to the jury room.

[53] Mr Senior-Smith contended on behalf of the applicant that it was only at the "literal end" of the summing-up that the learned trial judge directed the jury that the evidence of the father of the complainant's report was not evidence of a recent complaint. He argued that "[a]lthough the learned trial judge told the jury to 'put that out of [their] minds' there was an excruciating need for a more comprehensive set of directions to address the father's evidence and to attenuate and/or limit the effect or cogency of this material on the jury's contemplation".

[54] Learned counsel further submitted that the learned trial judge, having decided belatedly that the father's evidence was not, after all, evidence of recent complaint, should have given directions to the jury to "delete from their minds altogether any material given by the complainant" about having told her father, her mother, her cousin and her friend of the instances of alleged sexual intercourse. He said the directions should have gone further to focus on having the jury "expunged from their deliberations" all the evidence substantively given by the complainant's father. He argued that the witness and his evidence should have been dispelled completely as "it

is difficult to see how the jury could have disentangled" the purported recent complaint from the rest of his evidence. In advancing the applicant's position counsel relied on the opinion of the Privy Council in **White v the Queen** [1998] UKPC 38.

[55] Mrs Samuels-Dingwall submitted, in response, that the report made by the complainant to her father was a recent complaint of the last incident and should have been left to the jury to determine whether a complaint was made and whether it is consistent with the complainant's evidence. The fact that the jury was told to put it out of their minds was a benefit to the applicant, she said. She submitted, in the alternative, however, that even if the court were to find found favour with the argument advanced on behalf of the applicant and find that the learned trial judge had admitted inadmissible and possible prejudicial material in evidence, adequate directions were given by the learned trial judge to remedy the situation and there was no repetition in the summing-up of what the complainant had said to her father.

[56] We find ourselves unable to accept the submissions of Crown counsel that there was, in fact and in law, evidence of a recent complaint arising on the complainant's father's testimony that could have been properly left to the jury for their consideration. Quite apart from the question of whether the complaint was recent, in terms of time, there is the added issue as to whether, in substance, there was a complaint satisfying the requirements of the law. The evidence shows that all that the complainant had told her father was that the applicant had sexual intercourse with her and had boxed her. No detail was given as to the circumstances in which the sexual intercourse took

place and when it took place. The evidence does not disclose that the complainant gave an account to the father of any incident in which the applicant had sexual intercourse with her, which was substantially in the same terms as the account she gave the court. This is a prerequisite for a complaint to be admitted as a recent complaint. For present purposes, we consider it sufficient to say, without the need for any deeper analysis, that the learned trial judge was correct in his belated recognition that the father's evidence did not meet the requirements, in law, to be left to the jury as a recent complaint and that there was no such evidence in the case.

[57] We have recognised, however, that the learned trial judge, having allowed the evidence to be adduced before the jury, then had a change of view and so retrospectively ruled the evidence as being inadmissible. The crucial question, therefore, is whether the late ruling of inadmissibility of the evidence has prejudiced the applicant so as to render the verdicts unsafe as he contends.

[58] It is noted that the learned trial judge attempted to give rehabilitative directions by advising the jury on the evidential value of a recent complaint. Having said that, he made it clear to the jury that there was no such evidence in the case that could be treated as a recent complaint because the legal requirements were not fulfilled for the evidence to be treated as such. He specifically referred to the evidence led of the report to the father, which the jury would have known was led as a recent complaint given the discussions that unfortunately ensued in their presence. He told them to disabuse their minds of the evidence that was led. This would have been in addition to

the direction that there was no evidence of corroboration in the case that could go in support of the complainant's case.

[59] It does seem at the end, that the jury would be directed that there was no evidence from the father that was supportive of the complainant's evidence in a material particular, implicating the applicant, and none which could go to support her credibility or to show consistency in her account that she was raped by the applicant. The directions would have ultimately made it clear that what was admitted as a recent complaint from the father was of no evidential value and so should be disregarded.

[60] The same would have applied to the evidence of the complainant that she had spoken to other persons. In relation to her mother, she said she told her mother after the first incident but no evidence was led as to what she told her mother and the mother had denied that anything was told to her. The learned trial judge directed the jury that it was a matter for them whether they believed she spoke to the mother or not. He did not present this evidence, on which there was a discrepancy, as evidence of a recent complaint or of any materiality in supporting the credibility or consistency of the complainant's account that the applicant had raped her. His direction that there was no recent complaint in the case would have also been applicable to this evidence of the complainant that she had told her mother.

[61] Similarly, the directions would also have extended to the evidence of the complainant that she spoke to her cousin and her friend. No details were elicited from the complainant as to what she had told those persons and those persons were not

called as witnesses to repeat the terms of any report that was made to them. When one views the directions on recent complaint, with what the learned trial judge directed about speculation, it is difficult to see any likely risk of the jury taking the evidence that the complainant spoke to these other persons any higher than the mere fact that she had spoken to them and nothing else. The learned trial judge had directed the jury in these terms about these persons who were not called as witnesses:

> "You heard mention of a District Constable. You heard mention of a [cousin], and you heard mention of other persons, and you might be wondering to yourselves what evidence those witnesses might have come to Court to give, but really you cannot speculate. You cannot make up theories or imagine what those witnesses might have said and bring that to bear on your decision, because at the end of the day you have to take your case as you find it, and you just have to make your decision or arrive at your verdict based solely on the evidence that you have heard in this case."

[62] Mr Senior- Smith has relied on **White v the Queen** in an effort to advance his submissions that the applicant was prejudiced by the late ruling of admissibility of the father's evidence and the treatment by the learned trial judge of the evidence of the reports to other persons. In **White v the Queen**, the appellant was charged for two sexual offences committed against a female complainant. At the trial, Crown counsel led evidence from the complainant that she had spoken to several persons about "what had happened". None of those persons were called to give details of the complaint that was reportedly made to them. The trial judge directed the jury that the complainant's own evidence that she had "made several reports to certain persons", though not corroboration, could be used to show consistency and negative consent.

The point was raised before the Court of Appeal and later at the Privy Council that the evidence of the five complaints was inadmissible and so the trial judge erred in his directions to the jury. The Privy Council agreed that the learned trial judge misdirected the jury.

[63] In treating with the trial judge's summing-up, their Lordships observed, in so far as is immediately relevant:

> "**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 [sic] case depended**…
>
> **The jury must therefore have considered that, having formed an opinion on these matters, they were entitled to put it to some use. … 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.**" (Emphasis added)

[64] The dicta from the Privy Council in **White v the Queen** cannot assist the applicant. The learned trial judge in the instant case had made it clear to the jury what use is generally made of a recent complaint, where it exists. He went on to indicate in clear terms that there was no such evidence in the case, which means, in effect, that

there was no evidence to be used in the manner permitted by law in treating with a recent complaint. This would mean that whatever evidence was adduced in the case concerning the report to the father, the mother (or anyone else) could not be taken as being supportive of the consistency of the complainant's account, as negativing consent, as corroboration or, in general, as confirming her credibility. Furthermore, and even more importantly, the learned trial judge in the instant case had told the jury, in no uncertain terms, to disregard what was adduced as evidence of a recent complaint. He told them to put it out of their minds. The direction could not have been any stronger. The learned trial judge, therefore, did not leave it to the jury to form the view that the evidence of the father or any evidence in the case could be treated as a recent complaint or as any other evidence supportive of the credibility of the complainant.

[65] There was nothing more that the learned trial judge could have done in bringing home to the jury that there was no recent complaint in the case and that the evidence adduced as evidence of a recent complaint was of no evidential value. In the light of the judge's overall directions, it is difficult to see how the jury could have concluded that the evidence from the complainant that she had spoken to others would have qualified as evidence of some value in the case, particularly on the issue of the credibility of the complainant. This is unlike what had obtained in **White v the Queen**, in which the Privy Council opined that there was "a significant risk" that the jury could have formed the view that they were entitled to use the evidence of the several complaints made by the complainant in that manner. The circumstances of the

two cases are therefore distinguishable thereby rendering **White v the Queen** of no value to the applicant's cause.

[66] While the learned trial judge may have wrongly ruled the evidence as being admissible, he gave rehabilitative directions and did so at a point where it would have been fresh in the minds of the jury when they retired to consider the case, it being the last direction given to them. We conclude that any prejudice to the applicant from the wrongful admission of the evidence of the purported recent complaint would have been eradicated by those directions. In the absence of any indication to the contrary, the jury must be taken to have accepted that they were duty bound to take directions on the law from the judge and so disregard the tainted evidence as they were instructed by him to do.

[67] In the end, the whole summing-up was such as to clearly focus the jury's attention on the critical fact that what was important in deciding whether the case was proved against the applicant was only the unsupported evidence of the complainant. The error of the learned trial judge, in initially ruling the evidence of the father as being admissible, cannot be said to have irretrievably prejudiced the applicant.

[68] We also cannot accept the contention made on behalf of the applicant that the entire evidence of the father should have been "expunged" from the jury's deliberation. The father was integrally involved in the making of the report to the police and his evidence was relevant in showing the chronology of events leading up to the charges laid against the applicant. Therefore, his evidence in other respects, even

if not of assistance in going in proof of the critical issue in the case, was, nevertheless, relevant and not prejudicial. As such, there would have been no basis for the learned trial judge to have directed the jury to ignore his evidence in its totality. In our view, ground two has no merit.

**Ground 3**

**"The Applicant's prospects of acquittal were denuded by the absence of a more careful set of directions on the credibility of the Prosecution's Case"**

[69] The applicant contends in ground three that the learned trial judge failed to carefully direct the jury on the credibility of the prosecution's case, thereby denying him of the prospect of an acquittal. According to Mr Senior-Smith, the learned trial judge endeavored to and did accurately conduct a review of the prosecution's case but, given the prosecution's dependence on credibility, "...the evidence and circumstances attending the allegations, respectfully, demanded a more involved evaluation and assessment", which the learned trial judge failed to do.

[70] Mr Senior-Smith pointed to several matters in respect of which he said the jury could have been better assisted by the learned trial judge by a more involved analysis of the evidence. These include, for instance, the absence of hue and cry at the time of the reported incidents; the connection between the complainant's report to the police and the incident of 5 February 2009, in which she was scolded and boxed by the applicant; the impact on the credibility of the complainant of the delay in reporting the alleged incidents; and whether the complainant's report of threats by the applicant was

credible. The summing-up was, in his words, "devoid of this analytical assistance" and as a result, the applicant "was exposed to an undue and heightened risk of conviction".

[71] We are unable to accept the contention of the applicant that the learned trial judge would have erred by failing to properly analyze or assess the evidence for the prosecution. The main issue was credibility and, as Mrs Samuels-Dingwall pointed out, there was no technical evidence to be analyzed. It was a simple case and the jury heard it all. It was for the jury, having heard and seen the witnesses (in particular the complainant and the applicant), and after applying their common sense and the directions in law to the evidence, to determine whom they believed and what evidence they would accept or reject. The learned trial judge had made that absolutely clear to them.

[72] Furthermore, the learned trial judge gave the jury all the necessary directions relative to the assessment of the credibility of the critical witnesses. He pointed out to them, for instance, the relevance to the issue of the witnesses' credibility, especially the complainant's, such matters as discrepancies, inconsistencies, and errors. He gave the jury the necessary warnings and the reasons for the warning in treating with the evidence of the complainant who he pointed out to them as being a child of tender years. The jury would have known that the prosecution's case rested on a child witness who could have made up a story against the applicant, which was the thrust of the case for the defence. They were warned that they must exercise caution before convicting the applicant because the evidence was not corroborated.

[73] The jury also heard from the applicant and his witnesses that the complainant was a child who was not well behaved and that on 5 February 2009, just before she reported the matter to her father, he had scolded her. The jury would have known that it was the scolding of the complainant that led to the report being made to the police about the applicant having sexual intercourse with her. Indeed, this was consistently put to the complainant as the motive for her making up a story against the applicant. The jury also heard the evidence that the complainant did not make a hue and cry and the reasons she gave for not doing so; that aspect of her evidence was thoroughly explored by defence counsel during cross-examination. All these matters were before the jury for their consideration in evaluating the credibility and reliability of the complainant. The jury heard it all and they were mindful of their functions as judges of the fact. They needed no greater assistance from the learned trial judge on how to a carry out their assessment of the salient aspects of the prosecution's case, which were highlighted by the learned trial judge. Therefore, he cannot be faulted in the approach that he took in reviewing the prosecution's case. We find ground three to be devoid of merit.

**Ground 4**

**"The jury having elected to receive the Learned Trial Judge's directions during the usual luncheon adjournment may have succumbed to inadvertent pressure to arrive at their verdict"**

[74] The complaint of the applicant in ground four is that the jury's deliberations lasted a "mere forty-three (43) minutes" and as Mr Senior-Smith contended, this cannot be "divorced from the fact that the jury preferred to have not taken their

accustomed lunch hour". He maintained that it is "immediately arguable" that the jury may have been "unsuspectingly but unintentionally accidentally, coerced into arriving at an early verdict; thereby compensating for the loss of their customary lunch break and sustenance". He placed reliance on the decision of this court in **Regina v Tommy Walker** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 105/2000, judgment delivered 20 December 2001.

[75] We agree with the submissions of learned counsel for the Crown that there is no evidence to support the view that the jury may have succumbed to unintentional, accidental or inadvertent pressure to arrive at a verdict. It was their decision to forego the luncheon adjournment and to proceed with their deliberations. Nowhere is there evidence or the slightest indication that this election had affected or influenced their verdicts. The issues in the case were quite uncomplicated. It was a simple question of whether they believed the complainant or the applicant in the light of the directions in law. The time the jury deliberated is not reflective of them being pressured by anything in their circumstances as contended or by anything said or done by the learned trial judge.

[76] In **Regina v Tommy Walker**, the jury were sent out to deliberate at 4:55 pm on a Thursday and were advised by the trial judge that they were required to return a verdict on that same evening. The jury did not themselves elect to retire at that time and they were not given the option to continue on another occasion. The trial judge also made comments to the jury, which this court, through Panton JA (as he then was)

found to have "amounted to nothing short of the administering of pressure on the jury to arrive at a verdict". There was no comment from the learned trial judge in the instant case to the jury that there was any time constraint and there is nothing from which it can be inferred that the jury would have been led to believe that there was a time constraint that required them to move with some dispatch to arrive at a verdict. Deliberating for 43 minutes is not, at all, out of the ordinary for an uncomplicated case of this nature so as to lead to an inescapable conclusion that there must have been pressure placed on the jury to arrive at a verdict. Ground of appeal four has no prospect of success.

**Conclusion**

[77] We would conclude by stating that although the learned trial judge may have unnecessarily explained what is meant by reasonable doubt; had failed to give the conventional directions on the separate treatment of counts and the equal treatment of the case for the prosecution and the defence; and had retrospectively ruled the evidence of recent complaint as being inadmissible, his summing-up was, nevertheless, adequate, and fair. The evidence against the applicant on each count of the indictment was compelling. It is difficult to see the jury returning any other verdict, even if they were given the perfect "text book" directions in respect of the matters complained of by the applicant and in respect of which we found that there were deficiencies in the summing-up. There was no grave omission or any misdirection in the summing-up that is so weighty as to render the verdicts unsafe or such as to lead to a miscarriage, or substantial miscarriage, of justice.

[78] For all the foregoing reasons, we would refuse leave to the applicant to appeal his conviction.

**Application for leave to appeal sentence**

[79] Although the applicant had applied for leave to appeal sentence, no ground was filed or argued in relation to that. In any event, we agree with the learned single judge that the sentences are not manifestly excessive and so there is no proper basis on which to disturb them.

**Disposal**

[81] The application for leave to appeal conviction and sentence is refused. The sentences are to be reckoned as having commenced on 2 December 2010.